Central Region District Court **TA 40762-10-10**

Presiding: The Honorable Judge Professor Grosskopf

Matter:

1. Alpha Capital Anstalt, FL -002.024.411-4
2. Ness Energy of Israel, Inc, registered company no. 560021628

Both represented by Adv. Tzvi Bar Natan and / or Yoav Fruchtman and / or Sagi Fredi of Goldfarb, Zligman & Co.
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The Plaintiff

-Versus-

1. Noya Oil & Gas Explorations Ltd, registered company no. 512763335
2. Do-Tsach Ltd., registered company no. 513229104
3. IDB Holding Corporation Ltd registered company no. 520028283

All three are represented by Adv. Giora Erdinast and / or Adv. Ran Sprinzak and / or Adv. Tomer Weissman
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4. Viceroy, LLC (Oklahoma Reg. No. 3512236717)

Represented by Adv. Yehuda Raveh and / or Calev Myers and / or Adv. Nir Kimhi and / or Adv. Michael Decker and / or Aviram Goldstein and / or Yom-Tov Kalfon
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The Defendants

Summary statements in the Name of Defendant 4

In accordance with the decision of the Court on 16/10/2012, Defendant 4 hereby submits its summaries regarding the claim in the heading above.

Emphases added, unless otherwise stated.

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A. Introduction

1. The claim in question fundamentally surrounds the conflict between Plaintiff 2, Ness Energy of Israel, Inc. (hereinafter: "**Ness Israel**") and Defendant 1, Noya Oil and Gas (hereinafter: "**Noya**"), Defendant 2, Do-Tsach Ltd (hereinafter: "**Do-Tsach**") and Defendant 3, IDB Holding Corporation Ltd. (hereinafter: "**IDB**"), regarding the dilution of Ness Israel's holdings of Noya from 100% to 5% by means of the share Allocation which took place on 29/09/09 (hereinafter: the "**Allocation**" and / or "**Improper Allocation**").

2. Ness Israel claims that the Allocation was executed illegally without the chance to properly and legally exercise its preemptive rights and should therefore be voided.

3. A dispute erupted between Plaintiff 1, Alpha Capital Anstal, (hereinafter: "**Alpha**") and Defendant 4, Viceroy LLC, (hereinafter: "**Viceroy**") around the ownership of Ness Israel which is not relevant to the claim in question since there is no significant conflict between Alpha and Viceroy regarding the validity of Ness Israel's claim against those who have illegally diluted its holdings in Noya.

4. On the dates relevant to the claim, i.e. the period surrounding the Improper Allocation, Viceroy truly believed that it was the sole owner of Ness Israel - although, it had heard Alpha's claims, and managed to reveal them to Noya - Viceroy acted as sole owner of Ness Israel towards Noya, for all intents and purposes.

5. As detailed above, during the legal proceeding that took place recently in the USA between Alpha and Viceroy, Viceroy's claims of ownership of Ness Israel shares were rejected and Alpha's claims were accepted. However, the possibility that Viceroy will indirectly receive rights to Ness Israel was not rejected. This is the reason Viceroy is still a party to this proceeding even

after the American judgment in the matter.

6. The main purpose for joining Viceroy to this suit – as a defendant with procedural rights of a plaintiff - was and remains to prove that the Allocation was executed illegally, and this statement has no connection to the conflict surrounding the ownership of Ness Israel. Because, and as will be proved below, even if the relevant representatives of Noya and Do-Tsach who initiated and carried out the Allocation thought that Viceroy was the owner of Ness Israel, the matter has no bearing on Ness Israel's claims of illegal dilution.

7. Accordingly, after we have clarified why the issue of Ness Israel's ownership has no relevance to this proceeding, we will detail how the combination of objective and subjective circumstances which led to the Allocation process, the only logical conclusion to be reached is that the Allocation was executed illegally and, therefore, it should be cancelled.

8. We will also address the question of the remedy, especially in light of Defendants' 1-3 allegations that cancellation and restitution cannot be implemented because of the increase in Noya's worth, and we will prove that these allegations – that are self-contradictory - are illogical and that Noya should be returned to its owner, Ness Israel.

B. Factual Background

9. Viceroy is a private company registered in Oklahoma, USA, and engages in exploration and oil drilling across the U.S. Mr. David Boyce (hereinafter: "**Boyce**") holds a 50% of Viceroy's shares and Mr. Taylor V. Dillard holds the remaining 50%.

10. Mr. Boyce acquired ownership of Ness Energy International, Inc. (hereinafter: "**Ness International**") from the hands of Mr. Shannon Stephens (hereinafter "**Mr. Stephens**"), who established and founded Ness Israel. On 13/11/2008 Boyce acquired ownership of Ness Israel, and on 30/06/2009, all

the rights to Ness Israel were transferred to Viceroy.

11. The purpose of Boyce's purchase of Ness International and Ness Israel was mainly to put these companies in order after the unsuccessful management of Mr. Stephens (he and his family are close to Mr. Boyce) and make them profitable companies. Mr. Boyce wanted to contribute his experience in oil exploration not only to Ness Israel but to the State of Israel in general, because beyond the economic investment, he is a believer and strong Zionistic man that saw it as a religious mission.

12. Ness Israel was the only owner that held 100% of Noya's shares, and was even registered in the Register of Companies as the sole owner of Noya, until Do-Tsach's wrongful dilution and takeover.

13. Shortly after acquiring ownership of Ness Israel and Ness International, Boyce worked for OKT and Viceroy to investigate the assets of Ness Israel, including Noya, and the assets in its possession.

14. Shortly after acquiring ownership, at the beginning of 2009, Boyce began receiving phone calls from Mr. Ben Bleiberg, Director and CEO of Noya (hereinafter: "**Bleiberg**"), who asked him to transfer all his rights in Ness Israel to Noya.

15. During these phone calls, Mr. Bleiberg gave Mr. Boyce only general information about the state of Ness Israel but never provided written documentation to support his words.

16. During these phone calls Boyce made it clear that he is demanding to receive all the documents related to the holdings, rights, obligations and status of Ness Israel to and in Noya and in the other companies in which it owns shares – Modi'in Management, Modi'in Trusts, and Modi'in Energy Limited Partnership (hereinafter: "**Modi'in**").

17. Boyce told him that without written documentation verifying the assets

and obligations of Ness Israel and OKT/Viceroy they are not willing to relinquish and/or transfer any rights in Ness Israel to Noya and/or any other party.

18. Over a period of six to eight weeks Boyce received four or five phone calls from Mr. Bleiberg, but Noya never returned and/or responded to his requests for precise information.

19. In addition to the phone calls, between March - September 2009 there was also an frequent exchange of letters/emails between Boyce and Bleiberg, which were mostly written by Noya's Attorney, Adv. Itay Brafman (hereafter "**Brafman**"), on behalf of Bleiberg.

20. As detailed below, Boyce was misled by these correspondences by the presentation of incorrect and incomplete information about Noya and its holdings. In addition, his innocence and his hesitation to act were taken advantage of to carry out the Improper Allocation behind his back, without his consent and without his knowledge.

21. Even after the Improper Allocation, Boyce tried - again out of his innocence and good will – to conduct a dialogue with relevant representatives of Defendants 1-3 in order to resolve the issue.

22. When he understood that his attempted dialogue with Defendants 1-3 would not lead anywhere, Boyce looked into filing suit and then negotiated to join the lawsuit filed by Alpha in cooperation with Alpha. Oddly Alpha decided to file suit on behalf of Ness Israel alone while simultaneously initiating proceedings against Viceroy in America regarding the ownership of Ness Israel.

23. Viceroy hurried to request to join the proceedings. Eventually, and in light of their need for Viceroy in order to clarify the procedure, they allowed Viceroy to join as a Defendant whose claims are primarily directed against Defendants 1-3.

C. The Question of Ownership of Ness Israel is not Relevant to the Proceeding

24. Around the same time of the commencement of this proceeding, Alpha filed a lawsuit in Oklahoma, USA, against Viceroy, Ness International and others regarding the question of ownership of Ness Israel, in: CIV-10-1218-D Alpha Capital Ansalt v. Ness Energy International, Inc.

25. On 28.3.2012 the court in Oklahoma decided[1] among other things, that Viceroy has no legal right to ownership of shares of Ness Israel.

26. In light of the court's decision in Oklahoma, on 08/05/2012 Viceroy submitted a request to this Honorable Court, to be removed from this claim, the main reason being that even if Viceroys' claims (and the Plaintiff's) are accepted and proven that the Defendants stole the ownership of Ness Israel, Viceroy may not be entitled to any remedy in this case because it has been decided that it has no legal right to ownership of shares of Ness Israel.

27. In its decision from 9/05/12, the Honorable Court clarified that Viceroy does not have the option to be removed from the claim without announcing that it has no claim to any rights to the asset, subject to this claim. The Court further clarified in its decision that if Viceroy wishes to be removed from the procedure in order to preserve its right to claim ownership of the asset in the U.S. proceedings against the Plaintiffs, it must make it clear that it accepts everything that is decided during the proceedings regarding the rights of Defendants 1-3, including decisions made with the consent of the parties that remain parties to the case.

28. Although Viceroy has no direct interest in being present at the proceedings in Israel, and its presence at the proceeding will only cause it unnecessary

[1] Appendix 1 to Boyce's affidavit.

expenses, it didn’t have an option to announce that it was waiving any right regarding the asset, subject to this the claim. Since, in its' decision dated 28/03/12, the Oklahoma Court apart from determining that Viceroy has no legal right to Ness Israel, also decided that the "equity" procedure will determine what share each party owned in Ness International and Ness Israel. Given that Viceroy has rights to Ness International, there is a chance that as a result of the procedure in Oklahoma, it will receive rights to Ness Israel.

29. Therefore, Viceroy did not have the option to be removed from this proceeding.

30. <u>Nonetheless, it is important to emphasize that there is no connection between the proceedings being conducted in Oklahoma regarding the question of ownership of Ness Israel and the question of the improper dilution of and the proprietary theft from Ness Israel by Defendants 1-3, which is under the jurisdiction of the Israeli court.</u>

31. It should also be emphasized that there is no substantial dispute between Viceroy and Alpha, regarding Ness Israel's claim following the Improper Allocation and dilution of shares which was perpetrated by Defendants 1-3 and/or any of the parties involved in the matter.

32. It should be added that, as described below, Viceroy never hid the existing dispute that it had with Alpha regarding the ownership of Ness Israel. In fact Mr. Boyce told Noya at the outset that there is, in his words, a "cloud" surrounding the ownership of Ness Israel, and even reiterated this on several occasions.[2]

33. Therefore, the dispute regarding ownership of Ness Israel existed from the beginning, to the knowledge of Defendants 1-3.

34. It is important to emphasize once and for all that the claim before us is being conducted between a company called Ness Israel - Plaintiff 2 - and

[2] Boyce affidavit sections 27–29.

Defendants 1-3, and the main question being asked in this proceeding is whether the Allocation that transpired on 29.9.09, as a result of which Ness Israel, which held 100% of the shares of Defendant 1, Noya, was left with only 5%, was lawful or not. The question of who was the owner of Ness Israel, whether it was Viceroy, Alpha or any other party is irrelevant because there is no lawsuit regarding the ownership of Ness Israel but rather regarding the dilution of Ness Israel's holdings in Noya.

35. Also, the chaos surrounding the ownership of Ness Israel cannot be used as a defense by Defendants 1-3, for several reasons: 1. They knew about it, as Mr. Boyce reported it in several letters, consequently Defendants 1-3 should have acted extremely carefully when carrying out the Allocation of shares; 2. Even if we assume, for the sake of the matter, that they did not know about the cloud surrounding the ownership, it makes no difference as even if they thought that Viceroy was the owner of Ness Israel, Defendants 1-3 did not act properly both towards Viceroy, including its representative Mr. Boyce, as described below.

36. The aggregate of the above indicates that the question of ownership of Ness Israel is not relevant to this proceeding and does not constitute any defense for Defendants 1-3 for their illegal actions in executing the Wrongful Allocation.

D. Circumstances Test of the Allocation Leads to One Conclusion: The Allocation Was Executed Illegally

37. The main question around which this proceeding is being conducted is whether the Allocation which was carried out by Noya on 29.9.09, through which Do-Tsach received 95% of Noya's holdings for $ 50,000 and as a result Ness Israel holdings in Noya were diluted from 100% to 5%, was legally executed.

38. The Plaintiff and Defendant 4's claim is that the Allocation was illegal, the Allocation was improper and led to the wrongful dilution of Ness Israel, and

the theft of Ness Israel's ownership of Noya.

39. In order to reach the above conclusion the entirety of circumstances must be examined, the objective circumstances and the subjective circumstances, which led to the execution of the Allocation.

40. And in fact, when combining both the objective circumstances, such as Noya's evasion of Boyce's request for accurate information about Noya and subjective circumstances such as Brafman and Bleiberg's personal interests to allow Do-Tsach to take control of Noya, the only possible conclusion is that the people at Noya and Do-Tsach collaborated to dilute Ness Israel's holdings in Noya, without allowing Ness Israel to prevent it by exercising its preemptive right, and presenting incomplete and/or misleading and/or false information.

41. Note: Following are the circumstances in detail which lead to the only possible conclusion- that the Allocation was unlawful:

1. **Noya's evasion of Boyce's request for documents.**
2. **Lack of warning and no notification to Boyce at the time of the Allocation.**
3. **Noya's disregard of the letters regarding the "cloud" surrounding its ownership.**
4. **Noya conducted talks with the Do-Tsach before appealing to Ness Israel.**
5. **Noya presented false and incomplete information to mislead Ness Israel.**
6. **Bleiberg and Brafman had personal interests to allow Do-Tsach to take control of Noya.**
7. **Sultan did not conduct proper due diligence before the transaction.**

42. We will detail below, each of the aforementioned circumstances, to illustrate and prove that the Allocation was executed illegally.

1. Noya's evasion of Boyce's request for documents

43. Starting at the beginning of 2009, there were telephone conversations between Bleiberg and Boyce. At this point, Boyce already made it clear to Bleiberg during these conversations that he requires any and all documents related to Ness Israel's holdings, rights, obligations and its status in connection to Noya and the companies with shares owned by Noya – Modi'in Management, Modi'in Trusts and Modi'in Energy Limited Partnership and the like.

44. Boyce made it clear to Bleiberg that without written documentation verifying the assets and obligations of Ness Israel, Viceroy will not agree to relinquish any of rights in Ness Israel to Noya and/or any other party.

45. Over a period of six to eight weeks Boyce received four or five phone calls from Mr. Bleiberg, however his requests for accurate information were never answered.

46. In addition to the phone calls, mainly between March - September 2009 frequent letters/emails were exchanged between Boyce and Bleiberg, which were mostly written by Brafman on behalf of Bleiberg.

47. **In response to a letter sent by Mr. Brafman on behalf of Mr. Bleiberg dated 03/08/09 Mr. Boyce sent a letter[3] on 11/08/09 to Noya reiterating his request for documents and detailed information about the status of Modi'in and Noya in order to properly plan his next steps. And here is a quote:**

> **"At this time we have no documentation as to what Ness Energy of Israel, Inc owns in Modi'in. Mr Bliberg has requested we agree to sign all rights owned by Ness Energy of Israel, Inc. but we require documentation as to what percentage is owned and what debts are**

[3] Appendix 2 to Boyce's affidavit.

outstanding. We must have this information so the new board of directors of Ness Energy International, Inc. has sufficient information to make an informed decision on the matter".

48. In the same letter dated 11.8.09, which Defendants 1-3 attempted to use to illustrate a negative response to the investment request, Boyce notes that Ness International, **at the time**, did not have the necessary funds to pay Modi'in's debts. In addition, and in response to Noya's letter from 03/08/09, he confirms that he is aware that funds invested by another investor will result in the dilution of Ness Israel's share of Noya.

49. **However, it is not possible to see this letter as a negative response to an investment request**. **In fact, the opposite is true. The essence of the letter was a request for documents and information about the status of Modi'in and Noya in order to plan an investment and the next steps**. If it had been Boyce's intention to respond negatively and to agree to a dilution, he would not have bothered to persistently request accurate information and documents.

50. And note: Immediately after his aside regarding his understanding about the possibility of dilution, Boyce writes again that he wants to obtain all the information and documents **in order to make a decision** on the basis of relevant and current information, as follows:

"We at Ness want to make sure all decisions made are done so with accurate and current documentation as to the facts that concern Modi'in. Ness' intent is to do everything necessary to cooperate in retiring the debts of Modi'in."

51. Boyce is unrelenting and concludes his letter by **thanking them in advance for sending the documents** and writes that he expects to work towards a mutually beneficial arrangement.

"Thank you in advance for forwarding the documentation concerning Modi'in. We look forward to working toward a mutually beneficial arrangement".

52. Therefore, it can be understood clearly from Boyce's letter dated 11/08/2009 that he did not consent to any dilution and that he demands information/documents in order to decide whether and how to invest funds in Noya.

53. After sending this letter dated 11/08/09, Boyce and Brafman continued to correspond via email. During this correspondence, Boyce persisted in his demand to receive documents and information about the status of Modi'in and Noya, so, in his mind, he would be able to assess his holdings and rights in Noya and Modi'in, in order to respond to the request to invest.

54. And note: In his email from 14/08/09[4], just three days after sending the letter dated 11/08/09, Boyce wrote to Brafman:

"Itay,
Would please forward documentation of Ness Energy of Israel, Inc.'s ownership in Modi'in."

55. On 16/08/09, Brafman responded to Boyce that he would "try" to deliver the requested documents to him, but may be unable to do so because these documents are written in Hebrew[5].

56. **One cannot help but marvel at Mr. Brafman's reply. After all, Ness Israel is the controlling shareholder of Noya, and its sole owner. The representative of the sole shareholder demands essential documents to assess an investment in the company, why not provide them? Was it so difficult to translate these documents from Hebrew to English? <u>Did they</u>**

[4] Appendix 3 to Boyce's affidavit.
[5] Appendix 4 to Boyce's affidavit.

not have an interest and even a duty to provide to the entity holding 100% of Noya's shares all the necessary information?

57. Either way, it is unclear whether Mr. Brafman even tried to translate any documents seeing that in actuality he did not translate any documents, and sent the only document he claimed[6] was in English, which is a diagram of the structure of holdings in Modi'in Energy[7].

58. When Mr. Brafman was asked about the matter, he confirmed that he did not translate anything or send documents other than the only document he had in English[8].

59. Suddenly, while Boyce was still waiting to get accurate information and documents in order to make an informed decision whether to invest or not in the company, he received a letter sent by Brafman on behalf of Mr. Bleiberg, on 3/09/09[9] with the heading: "Notice to the Shareholders of The Company".

60. In the letter Bleiberg reports on behalf of Noya that the company's Board of Directors – which is actually just him as sole director – has decided to make contact with other investors, due to the fact that the Ness Israel has "notified" the company that is has no funds to invest in Noya. Mr. Bleiberg also reports in the letter that the company has received an offer letter from a potential investor who will invest $50,000 USD and in return will hold 95% of Noya.

61. **Therefore, without the consent and/or approval of Ness Israel Mr. Bleiberg, who is Director of the Board and also**

[6] Brafman's testimony, p. 1099 of the resolution, lines 25-27.
[7] Appendix 53 to Mr. Brafman's affidavit.
[8] Ibid.
[9] Appendix 5 to Boyce's affidavit.

the CEO, decided to make contact with an outside investor and grant him 95% of Noya for a "bowl full of lentils" - $50,000 USD. Not only this, Mr. Bleiberg also writes on behalf of Ness Israel that it has announced that it doesn't have funds in its possession to invest in Noya, even though at the date of this letter Mr. Bleiberg knew very well, and all the correspondence proves this, that on behalf of Ness Israel, Boyce demanded documents and information in order to assess investing in Noya.

62. On 08/09/09, Boyce sent an email reply to Mr. Bleiberg's letter of 03/09/09 and **again made it clear that without the documents and information he cannot make any decision regarding the capital investment in Noya,** and these are his words:

"We cannot make any decisions concerning this matter of Modi'in without proper documentation"

63. Mr. Boyce emphasized again on this occasion that he wants to get not only information but "**documentation**" i.e. documents.

64. Mr. Boyce also mentioned the only "document" that was sent to him, the chart in English and writes that the chart does not meet the definition of "document" to him, as follows:

> **"We did receive a one page chart showing names of companies and what they own, but that is not documentation."**

65. In his affidavit[10] and in his testimony[11] Mr. Brafman hints that when Boyce thanked him for sending the document, supposedly Boyce was satisfied with the chart in his request for documents.

[10] Sec. 27 of Brafman's affidavit.
[11] Brafman's testimony, p. 1099 of the resolution, line 27.

Boyce's email proves exactly the opposite. Mr. Boyce, a refined and very polite man did indeed thank Mr. Brafman for sending the document but never wrote that the chart was adequate in order for him to make a decision. On the contrary, he makes it clear that's not what he meant when he asked for documents.

66. **And so, Noya never sent the requested documents, despite Ness Israel's many requests.**

67. Mr. Brafman himself confirmed in his testimony that Boyce asked for documents "many times"[12] and that other than the chart in English, he did not send him any other documents, and did not translate any documents[13].

68. In light of the Mr. Boyce's insistence to receive documents, in the aforementioned email from 08/08/09, Mr. Brafman managed to send an email[14] on 09/09/09 (on behalf of Mr. Bleiberg) with information regarding Noya and Modi'in's holdings and information about contact with a new investor without specifying his name, which we now know was Mr. Sultan. At the same time recommending that Boyce agree to dilution.

69. Clearly, this email dated 09/09/09 does not meet the definition of "document", even if it had been written after reviewing the documents.

70. Again, Mr. Boyce as any polite man would, sent an email[15] that same day, thanking Brafman for the information sent by email and writes that he will be in touch.

71. Mr. Brafman's testimony confirms that the documents required

[12] Brafman's testimony, p/ 1098
[13] See note 6 above.
[14] Appendix 7 to Boyce's affidavit.
[15] Appendix 63 to Brafman's affidavit

by Boyce are not confidential and that "he is the owner and can see them."[16] If so, there is no dispute that when Mr. Boyce demands - not just once – to receive the documents, it creates one might even call it- an obligation to send them to him, even if it requires translation and the like.

72. This is true, a fortiori, when we know why Mr. Boyce demanded to receive the documents. As he wrote on a number of occasions, he is demanding to receive the documents **in order to make an informed decision whether to invest in the company or not, and clearly explained, as described above, that without these documents he cannot make an informed decision**.

73. **Since Ness Israel, which held 100% of Noya's shares, never received the necessary documents, it could not have made an informed decision whether to invest in the company and exercise its preemptive right.**

74. From the aggregate above, it is evident that it was not unintentional that Bleiberg and Brafman avoided Boyce's many appeals for documents. They tried to "sedate" him by sending a simple chart in English and email with information. They thought, apparently, that if Boyce received accurate documents he would have made a decision other than the one they wanted him to make, i.e. to invest first in the company in accordance with its preemptive right and consequently avoid a takeover by Do-Tsach.

2. **No warning or notification to Boyce at the time of execution of the Allocation**

75. As stated above, on 09.9.09, Mr. Boyce wrote to Mr. Brafman that he "would get back to him."

[16] Brafman's testimony, p. 1099 of the resolution, lines 22-23.

76. It should be emphasized that at the time, Ness Israel was still the owner of Noya, and Mr. Boyce is the only person that Noya was in contact with.

77. Nevertheless, without checking why he hadn't been back in touch, and without informing him in advance at the very least giving him a short warning, Noya executed the Improper Allocation subject to this claim, on 29.9.09, i.e. only 20 days after Boyce's last email.

78. When asked, Adv. Brafman confirmed that he was in **constant contact** with Mr. Boyce during the summer, as follows:

> "**Q: So in terms of frequency of contact, it was fairly continuous, right? Throughout these months.**
> **A: No, absolutely not. I had no contact with him during the period from that fax to him in May until the summer, until August.**
> **Q: But in the summer, during the summer.**
> **A: During the summer, yes**."[17]

And:

> "**Q. At that time you corresponded with Mr. Boyce almost every day by email. Almost every day you corresponded by e-mail. If I look at the e-mails from 13/8 until 9/9 that you wrote, you are really in constant contact. This is really constant contact, right?**
>
> **A: Yes, okay.**"[18]

79. And note: the period between early August and 09/09/09 Mr.

[17] Brafman's testimony, p. 1098 of the resolution, lines 11-16
[18] Ibid, p. 1105 lines 22-26.

Boyce and Mr. Brafman were in touch almost daily.

80. Mr. Boyce sent an email on 08/09/09, Mr. Brafman responded the next day on 09/09/09, and Mr. Boyce responded the same day, 09/09/09. He not only answers him but also informs him that he will stay in touch with him.

81. Despite this, Brafman and Bleiberg chose to keep their eyes shut. The owner of the company who was in contact with them on a daily basis writes that he will continue to be in contact with them, but they in turn take advantage of his delay in giving them a final answer to dilute him!

82. We can't help but wonder, why they didn't send him, even for the sake of being cautious, a brief email a few days before the Allocation, in which they remind him that he promised to be in touch. Or alternatively, why not send a short warning that on so and so day the Allocation will be executed?

83. When asked about this, Mr. Brafman answered as follows:

"Q: So he doesn't get back to you, and you are about to execute the Allocation, a pretty important event in the life of the company. He is also the only owner of the company in your eyes during that period, and he tells you - I'll get back to you. Until then he had written back to you within a few days. You don't get in touch with him, perhaps with a reminder email - Dear Mr. Boyce, I have not heard from you lately, we are about to execute the Allocation?

A: No. I stopped chasing after people when I was a kid. Listen, I sent him, he knew exactly. There was no doubt what was happening. He knew exactly. He got what he wanted, he said - thank you very much. He had seven days to answer it

was written in what was sent to him. We waited well over seven days, I remind you.

...

Q: But for the sake of being cautious, it may have been prudent to send a reminder email, a confirmation email.

A: No. <u>Why do I need to remind him?</u> Maybe you want more time to consider it? I do not know. So no, the answer is no."[19]

84. Indeed Mr. Brafman's excuse is that he "stopped chasing after people when he was a kid," he claims that they appealed to Boyce, he said he would get back to them, he doesn't...so they shut their eyes.

85. And so, we wonder why shut your eyes? Why leave things so ambiguous and not take caution? What were they afraid of?

86. After all, they already dragged their feet about the documents Boyce demanded and didn't give him what he wanted. Now he says that he will be in touch, and he is the owner. Why not get back to him? Why evade him again here?

87. **Therefore, the only conclusion is that Defendants 1-3 did not want Ness Israel to exercise its preemptive right and be the first to invest in the company, and their purpose was to prevent an investment by Ness Israel in Noya in any way possible. After doing everything to avoid sending the documents required for a decision, they also made sure not to "wake the dead" and did not get back to Boyce before the Allocation.**

[19] Brafman's testimony, p. 1106 of the resolution, lines 2-13, and 18-21.

3. Noya's disregard of the letters regarding the "cloud" surrounding its ownership

88. After acquisition of Ness Israel, Boyce was informed of Alpha's claims, a creditor of Ness International, according to which Mr. Allen Striklin had no authority to sell ownership of Ness Israel to OKT / Boyce.

89. Thus, in the letter Mr. Boyce sent to Mr. Brafman and Mr. Bleiberg on 04/05/09[20], Boyce noted as follows:

"As it concerns ownership of Ness Energy of Israel, Inc. there is concern on our part that there is a cloud on the transfer of title due to the Judgment filed by Alpha Capital, el at prior to the transaction between Ness Energy International, Inc. and OKT. Before we can sell any portion of Ness Energy of Israel, Inc. we must have confirmation that we have good and marketable title."

90. Therefore, Mr. Brafman and Mr. Bleiberg already knew in May 2009 that there is a "**cloud**" surrounding the ownership of Ness Israel and as long as a final order has not been obtained confirming the OKT's ownership of Ness Israel, **sales of shares cannot be executed**.

91. In a letter dated 11/08/2009 Boyce reiterated what he wrote in his letter dated 04/05/09, as follows:

"Ness Energy of Israel, Inc. was purchased by OKT Resources, LLC, but there are matters that put a cloud on the former Ness officer's legal authority to do so."

92. Certainly each of Defendants 1-3, and at least Mr. Bleiberg and Mr. Brafman knew that shortly before the Allocation, ownership of Ness Israel changed and was transferred to OKT /Viceroy and

[20] Appendix 8 to Boyce's affidavit.

that there is a cloud surrounding the transfer of ownership.

93. Boyce stressed more than once, that in these special circumstances Ness Israel could not have assessed its holdings and / or its rights and / or obligations in Noya and / or Modi'in.

94. **Despite all this, Defendants 1-3 continued to proceed and execute the takeover, with concrete and clear knowledge, which could not have been understood any other way, that there is a dispute surrounding the ownership of Ness Israel.**

4. Noya conducted negotiations with the Do-Tsach before approaching Ness Israel

95. Noya first appealed to Ness Israel with an official request for investment on 03/0809.[21]

96. The problem is, at that time, Noya was already in what some would call advanced negotiations, with Do-Tsach.

97. Mr. Bleiberg and Mr. Brafman admitted that they were already in touch with Mr. Do-Tsach in "late June or early July 2009".[22]

98. The problem is when they appeal to Ness Israel - the sole owner of Noya - on 03/08/09 they hide the fact that they have already been negotiating with a specific potential investor - Do-Tsach – but rather inform him that if they don't invest $ 380,000 they will approach outside investors, in the following words:

> **"Please note that if you shall not inform so, in writing, you shall be deemed as you reject the said opportunity and the Company shall approach external investors"**

[21] Appendix 47 to Brafman's affidavit.
[22] Sec. 86 of Bleiberg's affidavit, sec. 118 of Brafman's affidavit.

99. Therefore, they made false pretenses to Ness Israel that only in the event that it does not invest this amount then the company will have to start looking for outside investors, even though at this date they are already in advanced negotiations with Do-Tsach.

100. Sultan himself confirmed in his affidavit[23] that the Boards' decision from 03/08/09 and its request to Ness Israel the same day were perfunctory, namely to make pretenses that they are supposedly going by the book, approaching the shareholder so that it can exercise its preemptive right:

> 29. **During these talks Adv Brafman said to me that Noya's shareholder has a preemptive right, which is a first right to partake in any allocation of Noya's shares, which could dilute the holdings of existing shareholders. Therefore Mr. Brafman explained to me, that <u>before Noya could enter into a deal with Do-Tsach for an allocation of shares, Noya has to approach Ness Israel and offer it the option to make the proposed investment</u>**."

101. Therefore, the exact schedule is as follows: Noya conducted talks with the Do-Tsach beginning in June 2009, even though at that time there was no official request made to Ness Israel for an investment. At the end of July, beginning of August 2009, when negotiations with Do-Tsach were, apparently, coming to the point of closure, Noya announced to Sultan that it first needed to go through the motions and give Ness Israel the option to partake in the Allocation, "in accordance with the law". Therefore, Brafman and Bleiberg contacted Boyce and depicted

[23] Sec. 29 of Sultan's affidavit.

the situation as if the company was in trouble and if he didn't invest the required amount ($380,000) they would be forced to look for other investors, even though at the time they were already in advanced negotiations (final?) with Do-Tsach.

102. Defendants 1-3 tried to paint a picture that they supposedly had appealed to Do-Tsach only after Boyce had notified them that Ness Israel did not have the needed funds for investment, which is reflected, among others things, by sending Sultan's formal proposal on 25/08/09, i.e. two weeks after Boyce's response dated 11/08/09, and as argued in section 40 to Defendants 1-3's Statement of Defense:

> 40. **In light of Mr. Boyce's response and as part of efforts to find other investors, contact was made between Noya and Do-Tsach, a company controlled by Mr. Tsachi Sultan. Noya gave Do-Tsach details about the investment required and on 25/08/09 Do-Tsach conveyed that it wants to invest in Noya and sent Noya's Board an offer to invest.**"

103. This attempt failed when it was discovered, as described above, that these negotiations were going on long before the request to Ness Israel, and long before the receipt of Boyce's response to an investment. **Therefore, contact with Do-Tsach was not made "in light of Mr. Boyce's reply," but on the contrary, the appeal to Boyce was made ensuing the relationship that had long been established with Do-Tsach**.

5. Noya presented false and incomplete information to mislead Ness Israel.

104. On 03/08/09 Noya's Board made a decision that since it needed to raise funds "for the company and Modi'in

Management" immediately, otherwise they will be forced to stop operating, they would contact the shareholders with a request to immediately invest $380,000. It was also noted that if the shareholders do not invest the amount, the Company would approach external investors and the shareholders' holdings would be diluted to the point of elimination.

105. Based on this decision, Mr. Brafman prepared a letter[24] to the shareholder, Ness Israel, in English. The letter to Mr. Boyce, was sent the same day.

106. It's noted that strangely the text of the letter to Ness Israel is slightly different than decision to the Board. Note: There is no reference in the letter to dilution to the point of elimination of Ness Israel's holdings in the company, as specified in the decision.

107. Also, there is no explanation in this decision of how they got to the amount of $ 80,000. Brafman, in his affidavit, claimed that, "to the best of my recollection," this amount was determined following CPA Sabo's calculation of the cost of restoring Modi'in Energy to activity[25].

108. **The problem is that Defendants 1-3 never presented this calculation**. Not only this, when CPA Sabo was asked, he himself did not know where this calculation is[26]. Moreover, CPA Sabo could not even explain how exactly he had calculated this amount[27].

109. However, in the only document that Brafman sent to Boyce, an organizational chart diagram of Modi'in Energy, it also

[24] Appendix 47 to Brafman's affidavit.
[25] Sec. 120 of Bradman's affidavit.
[26] CPA Sabo's testimony, p. 1289 of the protocol, lines 11-25.
[27] CPA Sabo's testimony, p. 1294 of the protocol, lines 1-7

explicitly states that, **as of 31/07/09, Modi'in Energy's debts amounted to $380,000**.

110. The problem is that CPA Sabo didn't know about Modi'in Energy's debts in the amount above, but that this amount consisted of debts in the amount of $280,000 and $100,000 in expenses required for issuance[28].

111. **Therefore, when Noya appealed to Ness Israel with its request for investment it presented false information, that supposedly Modi'in Energy had debts of $380,000.**

112. **Also, Noya presented incomplete information, when it was unable to specify how it calculated this amount and / or give minimal details of what it was comprised.**

113. Today, since we know that in the end Do-Tsach did not invest $380,000, but rather just $50,000, an amount that to this day we still don't know how it was calculated or where it originated[29] from, we understand that Noya was working to mislead Ness Israel by presenting them with an unbased, unexplained excessive amount, with a clear goal: to allow the Allocation of shares to Do-Tsach in any way possible, while preventing the possibility for Ness Israel to prevent this Allocation, although it held 100% of the company's shares.

114. **It has been extensively detailed above, how Mr. Boyce demanded accurate information and documents, as well as how Noya evaded from producing these documents and information, and even the little information that Noya agreed to present to Boyce turned out to be false and incomplete**.

115. Therefore, even if Boyce was satisfied with this information

[28] Sec. 30 of CPA Sabo's affidavit, Sabo's testimony, p. 1294 of the protocol, lines 4-12.
[29] See Sultan's testimony, p. 854 to the protocol, line 1-4.

- and he wasn't, as stated above - to make an informed decision for investment in Noya, his decision would have been made based on false and incomplete information.

116. **Given that Noya misled Ness Israel in its presentation of incomplete and false information in its request for an investment, it's impossible to understand Ness Israel's negative response, if there even was one, and/or its lack of a response as a waiver of its preemptive right.**

6. Bleiberg and Brafman had personal interests to allow Do-Tsach to take control of Noya.

117. As detailed above, Bleiberg and Brafman worked tirelessly to allow Do-Tsach's takeover of Noya. They saw Mr. Sultan as a kind of savior, who would save the company and did not hide that fact from Boyce. Note: Boyce's email dated 09/09/2009[30], twenty days prior to the Improper Allocation, Mr. Brafman writes on behalf of Noya, about Sultan, as follows:

> **"...I know this investor who is very familiar with the capital market in Israel, for many years, and believe he can raise such amount. I believe the his joining to the group will contribute a lot to it.**
>
> **...I believe, that the best thing will be to have your bless to the Investment as, to our believe, this is the only and the last chance of Modi'in Energy – Limited Partnership, taking into account the short period before its delisting."**

118. When these factors are combined, along with the incredible time pressure Ness Israel was put under to give an answer (seven days), along with the fact that Ness Israel as the sole

[30] Appendix 7 to Boyce's affidavit.

shareholder was not given the fundamental right granted to controlling shareholders to appoint the board of directors on behalf of Noya, along with the overall conduct surrounding the Allocation (evasion of the information requested by Boyce, negotiating in parallel with the Sultan, etc.), one cannot avoid the conclusion that Bleiberg and Brafman wanted to prevent, in any way possible, Ness Israel's continued control of Noya.

119. The question that arises is why were Brafman and Bleiberg so desperate to let Do-Tsach take control of Noya? Could it be that they had personal interests to promote this takeover?

120. The answer appears to be affirmative.

121. Ben Bleiberg had interests in channeling funds to Modi'in Management because his son, Jacob, owns 10% of the shares. Bleiberg also received repayment of a debt that was owed to him by Modi'in in the amount of $24,000, as a result of the Improper Allocation.[31]

122. As for Brafman, he also had personal interests, as fees of hundreds of thousands of shekels that were owed to him / his office by Modi'in, were returned to him by Modi'in.[32]

123. For this reason, it was proven that Bleiberg and Brafman did anything they could to allow Do-Tsach's takeover of Noya, severely breaching the fiduciary duty they owed to Ness Israel. Not only this, it has also been proven that they didn't work to promote the interests of Noya but rather their own interests, in a blatant show of conflict of interest.

7. Sultan did not conduct proper due diligence before the

[31] Bleiberg's testimony, p. 1113 to the protocol, lines 1-8.
[32] Brafman's testimony, p. 935 to the protocol, lines 15-27 and p. 936 lines 1-10.

transaction

124. We have focused so far, mainly on the actions of Noya's representatives- Bleiberg and Brafman - which as proven did everything possible to allow the takeover by Do-Tsach, in an attempt to obscure the facts that indicated that the Allocation was made illegally.

125. However, what about Do-Tsach? Did it act in good faith?

126. The answer is no. The collaboration between Bleiberg, Brafman and Tsachi Sultan in the plot to execute the Improper Allocation was strong.

127. Indeed, Sultan pretended that he did not know and did not want to know. Note: He himself admitted during his testimony that he didn't conduct the proper due diligence as required, as follows:

> "**Q: Do you know if there were General Assemblies?**
> **A: As I told you, I relied on a report from August 18th.**
> **Q: You did not ask.**
> **A: I did not do.**
> **Q: You did not ask.**
> **A: I have already said several times that I did not research or conduct a thorough due diligence.**"[33]

128. He did not try to find out who Ness Israel is, who Boyce is, and if there was an agreement regarding the Allocation of shares etc.

129. Sultan tried to paint himself as innocent seeing as he relied

[33] Sultan's testimony, p. 783 to the protocol, lines 15-22.

on the words of Mr. Brafman[34] with regards to Ness Israel but ignored the fact that he had a duty to check the information for himself before entering the transaction. Of course, it is so easy to close your eyes and act like you didn't not know or hear.

130. Therefore, Do-Tsach acted in bad faith when it entered into the transaction, because it knew of Ness Israel's existence but didn't bother to check if the procedure was carried out correctly.

E. Interim Summary

131. Boyce who acted on behalf of Ness Israel and who is recognized by Defendants 1-3 as the only representative of Ness Israel demanded accurate information and documents in order to assess an investment and make an informed decision whether to exercise Ness Israel's preemptive right, and invest first in the company.

132. The trouble is, the requested documents were never sent to him, and accurate information was never presented to him.

133. Not only that but the little information which appeared in the only document sent to him - which was not acknowledged by him as a sufficient document - turned out to be false and incomplete made under false pretenses that they have to invest $380,000 to cover Modi'in's debts.

134. All of Noya's dealings with Ness Israel proved to be artificial, Noya marked the bull's-eye: Do-Tsach's takeover and dilution of Ness Israel's holdings of Noya and then made a circle around the bull's-eye.

135. In order to do so, they took care to avoid any mines that were

[34] Sections 29-24 of Sultan's affidavit.

likely to prevent the Improper Allocation. They supposedly approached Ness Israel with a request to invest but presented it with misinformation after already having negotiated with the Do-Tsach. They evaded Boyce's request for documents and accurate information. They evaded the "cloud" surrounding the ownership of Ness Israel, and pretended that they had supposedly never heard about Alpha's claims. Finally, when the Allocation date approached, they took advantage of Boyce's hesitation in replying and executed the Allocation without even notifying him.

136. Even if it transpires that all of Brafman's and Bleiberg's actions on behalf of Noya were for Noya's benefit, it would not be sufficient to validate their improper actions. However, not even that is true. It transpires that they did not act in Noya's best favor at all but rather out of a conflict of interest as they had clear personal interests in promoting the Improper Allocation and Do-Tsach's takeover of Noya.

137. Do-Tsach admitted that did not perform a proper due diligence before the transaction and indeed acted in blatant bad faith when it pretended not to know what was happening between Noya and Ness Israel. Thus, the only conclusion is that Do-Tsach collaborated from beginning to end with Noya in the plot to takeover.

138. From the legal perspective, there is no need to waste words on Noya's duty and its officers' duty to its sole shareholder, Ness Israel, to permit it to exercise its preemptive right as required. Also, there is no need to waste words on Noya's and its officers' duty to present Ness Israel with transparent, accurate information, which includes accurate and clear documents even if that had necessitated a reasonable investment of resources for things such as translation from Hebrew to English, etc., in order

to allow Ness Israel to make an informed decision whether to invest in Noya.

139. Therefore, we will make do with the well written and relevant words of Justice Procaccia CA 741/01 Cote v. Estate of Isaiah Eitan et al, PD 57(4) 171, (2003) (hereinafter: the "**Cote Judgment** "), pp. 187-188:

> "The obligation to disclose is recognized in the law as part of the duty of good faith. It applies as a basic norm of contract law in the framework of the parties' obligations in negotiating a contractual agreement, in executing the contract and in even in terminating the contract. It is recognized as part of the duty of care in different contexts in tort law. It is recognized in corporate law as part of the fiduciary duties owed by the directors towards the Company.
>
> In Section 96 (a) (4) of the Companies Ordinance, within the definition of the fiduciary duty of an officer towards the company, the obligation to disclose to the company any knowledge and any documents relating to the affairs of the company that came to the officer during his time in office at the company is explicitly mentioned. The obligation of disclosure as part of the fiduciary duty owed by an officer to a company has many different aspects. **The inherent assumption in the duty of disclosure is that the exposure of all the facts relating to the company is necessary to ensure the due process of decision making in the company**. Disclosure also ensures that important information relating to the company will not be misused for the personal benefit of the officer. "... The duty of disclosure draws its inspiration from the aspiration to reveal conflicts of interest between the representative and the company, from the comprehensive doctrine of "full disclosure" and being the best police flashlight" (the words of Y. Karniel in his book, *Breach of Trust in a Corporation – in Civil and Criminal Law* [10], p. 87). Along with the general principle of the duty of disclosure to a company, which is derived from the duty of good faith which is inherent to the officers' fiduciary duty, there are

various statutory arrangements that include explicit provisions that give shareholders the right to receive information about the company as part of their right to take part in the management of the company. **The right to information is reflected in the information that the company must provide through routine annual reports (Sections 128-121 of the Companies Ordinance), and every member has the right to examine the records of the General Assembly minutes (Article 120 of the Ordinance). In the Companies Law- 1999 the shareholder's right to information has been defined at length (Sections 187-184 of the Law). The scope of information that the shareholder is entitled to by his right to vote in the General Assembly is derived from the purpose for which it granted the right to vote on that issue (J. Danziger *The Right to Information About a Company* [11], pp. 259-261). Shareholders' rights to information about the company's affairs is one aspect of the managers' duty to provide it as required for the smooth running of the company's business. This duty is part of the managers' fiduciary duties toward their company.**

Beyond the general obligation imposed on officers to provide information to shareholders regarding the company's affairs and activities, there are special situations which create a special disclosure obligation of the director towards the shareholder as part of a special fiduciary duty he owes him in those special situations where such obligation is created. When managers turns to shareholders with a proposal to take a specific action on behalf of the company, and this proposal requires due consideration - a special fiduciary duty is formed under which a duty to act fairly, in good faith and full disclosure of relevant information for making an informed decision is imposed upon the members of the Board, The burden to provide complete information rests on the Board. Information is an essential tool to realize the right of a shareholder to use its shares and property rights in a company in a way that will allow it to get the most out of its property. Denial of the shareholder's right to full information in these circumstances or limiting its access to information may significantly

limit the ability to assess business evaluation including the issue that he must make a decision about and make it difficult to make a decision based on rational foundations."

140. **From the aggregate above, it transpires that when considering the totality of the circumstances that led to the Allocation and their combination, one cannot avoid reaching the conclusion that there was a desire to execute a snatch and prevent Ness Israel from making an informed assessment of investing in Noya and exercising its preemptive right. Noya and its officers violated the duty of disclosure that it owed to Ness Israel and acted in conflict of interest and breach of fiduciary duty to the company. Therefore, the Allocation that was executed, was executed illegally without allowing use of the preemptive right in a blatant display of conflict of interest. The Allocation, therefore, should be cancelled.**

F. Question of Remedy: Law of a thief who improves his spoils

141. The additional legal question that arose during this procedure is what the remedy will be after it has been decided that the Allocation was illegal.

142. Seemingly the answer is simple, return the situation to its former state, cancel the Allocation and return the ownership of Noya to Ness Israel, cancellation and restitution in kind.

143. The problem is that one of the complaints brought by Defendants 1-3 is that the value of Noya/Modi'in has greatly increased since the Allocation, among other things, they claim, because of the activity / reputation etc. of Mr. Sultan.[35]

144. It should be clarified that firstly it has not been proven at all that the value of Noya/Modi'in has really increased because it is only speculative value with

[35] See Chapter XI and section 161 of Sultan's affidavit.

extreme fluctuations[36]. To this day, the drilling has been unsuccessful, which illustrates that these claims are based on estimates and hopes, and no more.

145. Therefore, the claims of Defendants' 1-3 of improving Noya have been refuted outright.

146. However, and for the sake of being cautious, we will approach the question of whether there is a basis for the claim of Defendants 1-3 that the situation cannot be returned to its original state because the value of Noya today is not a result of the " stolen" ownership of Noya but the actions taken after that.

147. The question really is what happens if the thief improves his spoils?

148. If we try to visualize things and assume that A is the owner of an empty lot in the center of Tel Aviv. Without A noticing, B takes over the lot and recruits investors to build three skyscrapers and a huge shopping mall called "Azrieli Center" on the lot. From the time of B's announcement of his intentions to build a grandiose project on the lot, the value of the area greatly increases, but there is no dispute that if the lot had not been in the heart of the business center of Tel Aviv, B could not have planned for the construction of an office building and a huge shopping mall. In fact, if the lot was not located in the heart of Tel Aviv but rather in an uninhabited area in the desert, B would not have been successful in recruiting investors and would have had no reason to take over the lot.

149. Returning to our case, if Noya/Modi'in had not been a shell of an oil exploration company, would Do-Tsach have wanted to invest in them and take control of it? Of course not. Therefore, even if at the relevant times, Noya was not worth much - like the neglected area in the heart of Tel Aviv – it has always had great potential! And yes, just as B in our example above was able

[36] The following is a quite from "The Marker" (http://www.themarker.com/markets/1.1938968) from 27/2/2013, that Illustrates the extreme volatility of the stock: "Modi'in, controlled by Tsachi Sultan, jumped today (Wednesday) by 18%, with high turnover 35 million shekels - six times the daily average, after earlier today it jumped by 60%. During the last year, the stock has lost 97%, and plunged to a low of three years and a half - only 9.2 agarot per share."

to recruit investors to build a major project in that location and improve the lot, it is just as likely that a third entrepreneur, that would get hold of a lot in the heart of Tel Aviv would also be able to recruit investors. And therefore, Mr. Sultan is not the only person who is able to recruit investors and is not the only person who would have been able to increase the value of Noya - again, we will mention that it has not actually been proven that the value has really increased, but rather only a speculative / potential value.

150. Therefore, even if its proven that the thief did indeed improve the spoils, that does not meant that noone else, including the owner, would not have been able to improve the property equally or even to a greater degree, at the time that the property was stolen.

151. It is not out of place to mention that Jewish law deals with this specific question, and the Rambam (Mishneh Torah, Laws of Robbery and Loss Chapter 2, Law 4) states unequivocally that the person who was robbed receives the stolen property and any improvement to it - of course in a case where the owners did not despair and give up. He says the following:

> **"When a person obtains an article by robbery, causes it to increase in value, and then sells it or bequeaths it to another person, he bequeaths or sells the increase in value, and the purchaser or the heir acquires the right to this increase. Therefore, at the time of judgment, he should be reimbursed by the original owner for the increase in value, and then return to him the article obtained by robbery. The original owner may then collect the worth of the increase in value from the robber, for he did not despair of its return."**

152. The law states that indeed if B stole property from A and sold it to C, C must return the property to A, but he is entitled to receive compensation in the amount of the value of the improvement from A. However, A can then go to B and demand the compensation amount from A. Ultimately the property and the improvement fees are returned to A.

153. Sefer HaChinuch (Paragraph 130) also specifically refers to this question and explains that it is relevant if the property was not changed, and only

improved upon, meaning its value increased but it is the same property.

> "**Nevertheless in Torah law (Baba Kama p. 111 side 2) an improvement should be returned to the person it was stolen from as is. Even if the thief is the one that improved the stolen goods, as it is written in the Bible, and he shall return that which he took by robbery. Meaning if it is still the same as when it was stolen, meaning it was not changed, it should be returned as it is, even if it has been improved upon.**"

(See also on this matter: Shulchan Aruch Choshen Mishpat para. 254, sec. 4)

154. **In our case, there is no doubt that Noya is the same Noya, and has not changed. Its potential has always been there and is inherent to it and if it turns out that there has been a speculative realization of part of its potential, that is not sufficient to determine that it has changed and that it cannot be returned to its rightful owner.**

G. <u>Summary</u>

155. The question at the heart of the dispute in this procedure is whether the Allocation that was executed on 29/09/09 was executed lawfully or not.

156. In order to answer this question we needed to consider under what circumstances the Allocation was executed, i.e. whether the preemptive right that is secured by Noya's by-laws was implemented properly, was the fiduciary duty of Noya's officer towards the company and Ness Israel breached, and finally whether the company that executed the takeover, Do-Tsach acted in good faith.

157. We have proven throughout this summary that examination of all the above circumstances leads to the only unequivocal conclusion that the Allocation was executed unlawfully.

158. Noya, including those acting on its behalf, prevented Ness Israel from exercising its preemptive right properly, as well as evading Ness Israel's requests for accurate information and documents and even provided incomplete and false information in order to adversely affect the decision making process of the shareholder, Ness Israel. Noya, including those acting on its behalf, violated its amplified duty of disclosure which it owed to Ness Israel. It conducted negotiations with Do-Tsach before it approached Ness Israel and even hid it from Ness Israel. Noya's representatives, Ben Bleiberg, Noya's CEO and Director and its legal advisor, Attorney Itay Brafman, who executed the Allocation, acted in blatant conflict of interest as they had personal and financial interests in Do-Tsach's takeover. In turn, Do-Tsach acted in absolute bad faith, when it avoided carrying out proper due diligence and closed its eyes to all the signs that indicated an Improper Allocation.

159. In this summary we have referred to another question that arose during the procedure and that is the question of ownership of Ness Israel. We proved that this question has no relevance to this proceeding in light of the fact that it is being deliberated in the U.S. in a separate proceeding, in view of the fact that there is no substantial dispute between Alpha and Viceroy regarding the appropriateness of Ness Israel's demand to be considered an separate plaintiff regardless of the identity of the owner.

160. Finally, we found it necessary to contend with an additional question which is of greater importance in this process and that is how the remedy will be granted if proven that the Allocation was made illegally.

161. We have proven that even if Defendant's 1-3 claim is accepted, which has been refuted, that the value of Noya has increased dramatically since the Allocation, this does not prevent such cancellation of the Allocation and return of the shares to Ness Israel, because there is no logic and justice in it, and we mentioned for that matter the interesting position of Jewish law on this matter.

162. Therefore, we request that the Honorable Court order the cancellation of

the Allocation which took place on 29/09/09 and the return of Noya shares to Ness Israel.

163. Also, we request that the Honorable Court obligate the plaintiffs and Defendants 1-3 to bear Defendant 4's expenses, including attorney's fees plus VAT.

Adv. Michael Decker **Adv. Yom-Tov Kalfon**

Yehuda Raveh & Co.

Defendant 4's Legal Counsel