[Emblem]

In the Supreme Court as a Court of Criminal Appeals

CrimA 99/14
CrimA 1829/14
CrimA 1899/14

Before: The Honorable Justice E. Rubinstein
The Honorable Justice U. Vogelman
The Honorable Justice D. Barak-Erez

The Appellant in CrimA 99/14, and Respondent in CrimA 1829/14 and CrimA 1899/14:	The State of Israel
The Appellant in CrimA 1829/14	Golan Madar
The Appellants in CrimA 1899/14:	1. Ofer Investments Ltd. 2. Ofer Development and Investments Ltd.

v.

The Respondent in CrimA 99/14	Melisron, Ltd.

Appeals on the verdict and sentencing handed down by the Tel-Aviv District Court on November 19, 2013 in CrimC 23842-11-11 by Judge K. Kabub

Date of session: 1st Av, 5774 (July 28, 2014)

On behalf of the Appellant in CrimA 99/14, and Respondent in CrimA 1829/14 and CrimA 1899/14:	Adv. A Bachar, Adv. A Tabenkin
On behalf of the Appellant in CrimA 1829/14:	Adv. G. Adereth, Adv. O. Adereth, Adv. J. Chen, Adv. M. Rosen-Ozer, Adv. E. Ben-Moshe, Adv. Y.

Shefek, Adv. R. Hotam

On behalf of the Appellants in CrimA 1899/14 and the Respondent in CrimA 99/14:	Adv. P. Rubin, Adv. E. Harel, Adv. H. Shimon

Judgment

Justice E. Rubinstein

1. Before us are three appeals on the judgment of the Tel Aviv District Court (Judge K. Kabub) in CrimC 23842-11-11 (verdict dated November 19, 2013; sentence dated January 26, 2014). The case revolves around offenses in securities, and there are two primary issues before us: first, whether one should be convicted of the offense of manipulation under section 54(a)(2) of the Securities Law, 5728-1968 (hereinafter: "the Law" or "the Securities Law"), where it was found that the motivation for committing the offenses was mixed – a fraudulent intent alongside a legitimate financial intent; and second, under what circumstances should a corporation be held criminally responsible for criminal offenses committed by an officer who is considered to be an organ of the corporation.

The Indictment

2. On November 3, 2010, the indictment in our matter was filed with the Tel Aviv District Court against the following defendants:

   The First Defendant, Avraham Levi (hereinafter: "Levi"), who served in the time period relevant to the indictment as the CEO of Ofer Investments, Ltd. (hereinafter: "Ofer Investments"), acting CEO of Ofer Development and Investments Ltd. (hereinafter: "Ofer Investments"; both companies together will be hereinafter referred to as "Ofer"), interim CEO of Melisron Ltd. (hereinafter: "Melisron") and director of Melisron. Additionally, Levi held approx. 3% of Melisron's shares. As part of his position, Levi was an authorized signatory in all three corporations' accounts and managed their financial affairs alongside the Second Defendant.

   The Second Defendant – the Appellant in CrimA 1829/14 – Golan Madar (hereinafter: "Madar"), served in the relevant time period as the financial manager of Ofer Investments, as well as managed the financial affairs of Ofer Development and Melisron together with Levi. Like Levi, Madar was also an authorized signatory for Ofer Investments, Ofer Development and Melisron, and he was present in Melisron's Board of Directors' meetings as part of his position as a financial manager for the Ofer Group.

The Third Defendant, Eliyahu Haelyon (Hereinafter: "Haelyon"), was a financial consultant who traded in bonds and securities in the trading room of Poalim Sahar Ltd. at the relevant time period.

The Fourth Defendant – Appellant 1 in CrimA 1899/14 – Ofer Investments, is a private company in the fields of real estate, banking, hotels and others. In the relevant time period, Ofer Investments was positioned at the top of the Ofer Group pyramid, which included, among others, Ofer Industry Properties (Nazareth) Ltd., Ofer Properties and Shipping 1980 Ltd. and Ofer Development.

The Fifth Defendant – Appellant 2 in CrimA 1899/14 – Ofer Development, is a private holding company that, during the relevant time period, was entirely but indirectly owned by Ofer Investments: 81.9% of its shares were owned by Ofer Sahaf Ltd., which was fully owned by Ofer Investments. The rest of its shares were owned by Ofer Industry Properties Nazareth Ltd., which was also entirely owned by Ofer Investments.

The Sixth Defendant – The Respondent in CrimA 99/14 – Melisron, is a public company which in the relevant period operated commercial spaces and offices for rent. At the time, 71% of Melisron's shares were owned by Ofer Investments.

It should be noted here, that at the end of the day, Levi and Melisron were acquitted from the offenses alleged in the indictment, whereas Madar, Haelyon, Ofer Investments and Ofer Development were convicted of all the offenses for which they were charged, as will be detailed below. It should be further noted that Levi and Haelyon are not parties to the appeals before us, and I will therefore elaborate about them only when it is necessary to address the disputes in the matter before us.

3. According to the indictment, in February 2008, Melisron issued bonds at a nominal value of approx. NIS 200 million in a private offering (hereinafter: "Series D Bonds"). Melisron raised approx NIS 200 million for these bonds. In May 2009, Melisron issued a shelf proposal in which the public was offered series D bonds as part of a series expansion. As a result, buy orders were received for bonds at a nominal value of NIS 140 million, in the total amount of NIS 145 million (hereinafter: "the First Expansion"). On November 4, 2009, at a board of directors' meeting, Levi recommended to the board, on behalf of Melisron's management, to raise funds by issuing additional bonds. At the end of the meeting, the board decided to issue additional bonds by way of issuing a new series or expanding an existing series.

4. Later in November 2009, Levi and Madar worked together to advance the issuance that was decided upon at the November 9 board meeting. For this purpose, the two selected Clal Finance Underwriting Ltd. as the arranger of the offering (hereinafter: "the Arranger") and decided to further expand series

D bonds. Together with the Arranger, Levi and Madar decided on the date for the issuing, the minimum price and the number of bonds to be issued. Afterwards, Levi and Madar coordinated the issuance with Ofer Group's institutional investors and legal counsels, who drafted Melisron's shelf proposal.

5. On November 25, 2009 Melisron notified the public about the option of a second expansion of series D bonds in December 2009. This occurred through a uniform offering of a tender regarding the price of a unit, which generally takes place in two phases: in the first phase, a preliminary tender is held for confidential investors, as defined in regulation 1 of the Securities Regulations (Offer of Securities to the Public) - 2007 (hereinafter: "the institutional investors tender".) In the second phase, the securities are offered to the public (hereinafter: "the public tender"). In this method, the price of the security that is set in the institutional investors tender is used as the minimum price in the public tender phase, and the final price is set in the public tender phase. The offers by the investors in the institutional investors tender are influenced by the price of the security in the stock market – the higher the price of the security in the market, the higher the price set by the institutional investors at the tender, and the more funds that can be raised for the company's securities.

6. According to the indictment, Levi and Madar agreed amongst themselves to use Ofer Group accounts to purchase series D bonds in the period leading up to the institutional investors tender. This was designed to raise the price of series D bonds or to prevent its decline (hereinafter: "the Influence Plan"). As a result, the offers at the institutional investors tender, and in turn the minimum price of series D bonds in the public tender, were expected to be higher.

7. In order to execute the influence plan, Levi and Madar used Ofer Investment's securities account in Poalim Sahar (hereinafter: "the securities account"). The securities account was managed by Levi and Madar, and they were the ones who gave the buy and sell orders.

8. On November 25, 2009, as part of the execution of the influence plan, Levi and Madar ordered the transfer of NIS 20 million from Ofer Investments' account in HaPoalim Bank to the securities account. Afterwards, in the days prior to the institutional investors tender, and specifically between November 26, 2009 and December 1, 2009, Madar gave instructions to Haelyon, with Levi's consent, to make trade transactions that would raise the price of series D bonds before the institutional investors tender or would prevent its decline, through purchases of the bonds. On the last day of trade, Madar even specified a target and asked Haelyon to bring series D bonds to a price of 117 Agorot each. This was, allegedly, with Levi's knowledge and consent (who as mentioned above, was ultimately acquitted). Additionally, Madar set the time frame in which Haelyon was asked to make transactions in series D bonds, and limited this period to the days prior to the institutional investors tender.

This too – as alleged – was with Levi's knowledge and consent. Additionally, it was alleged, with Levi's knowledge and consent, Madar made it clear to Haelyon that he was authorized to use the entire sum in the securities account – about NIS 20 million – and that should there be a need for an additional amount, Madar would provide it. Accordingly, in consultation with Haelyon, on December 1, 2009, and before the institutional investors tender, Madar and Levi transferred an additional sum of NIS 10 million into the securities account, and instructed Haelyon to also use that in order to raise series D bonds' price or prevent its decline.

9. It was also alleged that following Levi and Madar's instructions, Haelyon made transactions using Ofer Investments' securities account in Poalim Sahar in order to raise the series D bonds' price or prevent its decline. Allegedly, Levi, Madar and Haelyon all acted while exploiting the continuous trading, whereby every buy or sell order in the trade influences the fluctuations in the security's price. As the issuance date approached, Levi and Madar increased the pressure on Haelyon so that their fraudulent activity in the series D bonds became, as alleged, more intense.

10. Among others, it was alleged that the following methods were employed:

Cancelling Layers: giving a sell order in a higher price than the highest sell order and for an amount greater than the overall amount offered at the three best layers of the sell orders. Such a buy order means a safe transaction where the three best sells are "cancelled" as to expose the highest sell prices. At times, the cancellation leaves a "trail" of buy orders at a high price that enters the first level of buy orders and raises it. Such a purchase signals to the stock market that there is a buyer who is willing to buy large amounts at high prices, and that the buyer does not "haggle" over the price.

The trail method: giving a buy order for an amount greater than the nominal value of NIS 1 (or a similar minimal amount) of the amount of the first sell order and for the price of the second level of the sell orders. This way, the price is set according to the second level – that of the higher price – though most of the transaction was made at the lower price. This raises the price to the price of the second level through a "cheaper" purchase, which is made mostly at the price of the first level.

11. As a result of the described activity, between November 26, 2009 and December 1, 2009 (hereinafter: "the Manipulation Period"), the price of series D bonds climbed from 115.72 Agorot on the first trade date, to a price of 116.9 Agorot on the fourth trade day. During this period, Ofer Development, funded by Ofer Investments, purchased series D bonds in a total amount of approx. NIS 23.9 million. Ofer Development constituted between 62-97% of the purchase volume of series D bonds during those four days of trading.

As will be clarified below, both in the District Court and in the appeal, there has been no real dispute between the parties as to use of the above methods and their outcomes. The dispute relates to the purpose that motivated these methods, and on this – further below.

12. On December 1, 2009 the institutional investors tender took place, and it closed at a price of 116 Agorot. Accordingly, the minimum price in the public tender was also 116 Agorot. The following day, Melisron published a shelf proposal, and on the next day, the results of the shelf proposal were published, and it was reported in the immediate report that buy orders for series D bonds were received at a nominal value of NIS 146 million for a total amount of NIS 170 million. Allegedly, Melisron hid the influence plan from the public, even though it constituted an event or matter that is outside of the regular course of business, and avoided publishing it within the shelf proposal or the immediate report published the day afterwards.

13. For the reasons mentioned above, it was alleged that Levi, Madar and Haelyon operated as joint perpetrators and fraudulently influenced the price of series D bonds, an offense under section 54(a)(2) of the Law (hereinafter: "the Manipulation Offense"). In addition, it was alleged that Levi and Madar acted together and induced or attempted to induce a person to buy or sell securities (an offense under section 54(a)(1) of the Law; hereinafter "the Inducement Offense"). Additionally, it was alleged that Levi and Madar caused Melisron's immediate report to include misleading items designed to mislead a reasonable investor (failing to follow section 36 of the Law and an offense under section 54(a)(1) of the Law; hereinafter: "the First Reporting Offense"). By doing so, they caused the shelf proposal, which is equivalent to a prospectus, to include misleading items (failing to follow section 16(b) of the Law and an offense under section 53(a)(2) of the Law; hereinafter: "the Second Reporting Offense").

    In regard to the companies, it was alleged that Ofer Investments, Ofer Development and Melisron, through their representatives – Madar and Levi – fraudulently influenced the series D bonds' prices, as well as induced or attempted to induce persons to buy or sell securities. Melisron was also accused of causing, through its representatives Madar and Levi, Melisron's immediate report to include misleading items with the intent to mislead a reasonable investor, and thus caused the prospectus to include misleading items.

The Judgment Outline

14. The appeals before us challenge both the District Court's verdict and its sentence. I will first detail the main points in the District Court's verdict. Then, I will discuss Madar's appeal of the verdict, after which I will elaborate on the sentence and the appeal challenging it. I will then discuss Ofer Investments and Ofer Development's appeal against the conviction and the

sentence, and finally the State's appeal against Melisron's acquittal. It is appropriate here to acknowledge with appreciation the quality of the arguments of the parties' attorneys.

The District Court's Verdict

15. In a detailed verdict, the District Court contemplated the various factual and legal issues that arise in our matter, and ultimately decided, as mentioned, to convict Madar, Haelyon, Ofer Investments and Ofer Development in all the charges against them, to acquit Levi due to reasonable doubt, and to acquit Melisron. Levi was acquitted because the State failed to prove, to the level of the burden required in criminal cases, that he participated in Madar's sell orders to Haelyon, for which Madar was convicted (para. 317 of the verdict). We will address Melisron's acquittal, which the State appeals, further below.

16. The court noted that most of the factual details of the affair – dates, bond prices, investment details, etc. – are not in dispute among the parties (para. 65 of the verdict), so that the gist of the dispute revolves around the legal meaning that should be given to the events detailed in the indictment. As noted, the State maintains that this is an influence plan with fraudulent characteristics, while the defendants see the very same activities as legitimate and acceptable actions in the stock market, which were conducted with no awareness and with no criminal intent. Concretely, the heart of the dispute is the interpretation of the manipulation offense set in section 54(a)(2) of the Law, which addresses influencing the prices by fraudulent means, and in our case – influencing buy acts of series D bonds by the Ofer Group prior to the institutional investors tender, in an attempt to influence the value of Melisron's bonds.

17. Section 54 of the Securities Law, titled "Fraud in connection with Securities", stipulates as follows:

> (a) A person who [is convicted of doing] one of the following shall be punishable by imprisonment for a term of five years or to a fine in an amount five times the fine prescribed in section 61(a)(4) of the Penal Law, and if a corporation is so convicted – it will be subject to a fine which is twenty-five times the size of the said fine:
>
> (1) Induced or attempted to induce a person to purchase or sell securities by way of a statement, promise or projection - written, oral or otherwise - which the person knew or ought to have known to be false or misleading, or by concealing material facts;
>
> (2) Fraudulently influenced the fluctuation of the price of securities. For the purpose of this paragraph, it will be

> presumed that anyone acting in accordance with the provisions of section 56(a) regarding the stabilization of the price of securities has not engaged in an act of fraudulent influencing as stated above.

The court considered the purpose of the section, and noted that its purpose is to protect the investing public from an artificial intervention in the capital market. It was noted that an efficient capital market is characterized by the fact that the price of securities is set according to the forces of supply and demand, and therefore any artificial intervention compromises its efficiency. The court distinguished the offense established by section 54(a)(1) – the inducement offense – and the offense established by section 54(a)(2) – the manipulation offense, which is the offense relevant for our purposes. The court found, after reviewing the existing case law, that the manipulation offense is a **result** offense. That is, in order to prove the elements of the offense, the prosecution must show that the defendant's actions did indeed influence the price. However, as the court noted, a slight influence is sufficient (para. 97 of the verdict). The court additionally found that it is an offense with an **intent** element. That is, the prosecution must show that the defendant had the intent to change the price of the share. The court also noted, the action itself is often a legitimate action in the stock market, but it is the intent that makes it a criminal offense (para. 101 of the verdict). The court further held that in order for the elements of the offense to be fulfilled, it is not enough to couple the theoretical fraudulent intent to the seemingly legitimate action, but rather the State must point to "indications that have some behavioral basis" in practice in addition to the intent itself, because, of course, "one cannot be punished for what is in their heart" (para. 104 of the verdict). It was also noted that there is no need to point to the existence of a motive, though a motive can be used, where appropriate, as circumstantial evidence of intent.

18. The main issue the court considered, in terms of the manipulation offense, was the issue of mixed purposes – that is, whether one should be convicted of the offense when the prohibited fraudulent intent of influencing the price of the security was accompanied by an additional, legitimate, intent, which was based on a sincere desire to purchase securities. The court reviewed the existing case law and scholarship in the field and ultimately held:

> "We must examine whether the influence on the price was a **byproduct** of the trading action alone, or whether the defendant acted in a manner that **intended** to influence the price. In other words, even where the defendant had a legitimate economic intent, if he acted (alongside or for this legitimate purpose) in order to influence the price – he should be convicted" (Para. 118 of the verdict) (Emphasis in original).

19. The court reviewed the relevant evidence and ultimately found that Madar and Haelyon should be convicted of manipulation, and that Levi should be acquitted of this offense. The court based its decision on the following evidence: recorded conversations between Madar and Haelyon between November 26, 2009 and December 1, 2009 (the day of the institutional investors tender), in which Madar explicitly instructed Haelyon to reach a price of 117; financial expert opinions submitted by the parties – Mr. Yossi Bahir on behalf of the State, Professor Avner Kalai on behalf of Madar and Professor Aharon Ofer on behalf of Haelyon; as well as the statements Madar, Haelyon and Levi gave to the police and their testimonies in court. We will return to these in more depth below.

20. Relying on the above, the court found that there is a reasonable doubt as to Levi's involvement in the affair detailed in the indictment, and thus Levi was acquitted due to reasonable doubt (para. 317 of the verdict). As for Madar, it was held that while Levi was acquitted of the charges against him, it was impossible to convict Madar for the influence plan as is. In other words, it could not be said that it has been proven beyond a reasonable doubt that Madar intended to influence the price of the bonds "in the days, weeks or months" prior to the offering (para. 319 of the verdict), but only for several days. However, it was held, on the basis of the evidence, that Madar had dual intent from the beginning of the trade – to purchase bonds as a legitimate investment for Ofer, as well as to support the price in preparation for the offering. The court emphasized that it was not a secondary intent, but "two purposes living symbiotically side by side" (para. 320 of the verdict), and therefore convicted him of committing the offense (para. 324 of the verdict). As for Haelyon, it was held that though he was not equally culpable as Madar, it was proven beyond a reasonable doubt that he executed the instructions he received from Madar in a sophisticated manner and with "commitment to the task," in order to support the securities price in preparation for the expansion of the series. Haelyon was therefore convicted of this offense (para. 327 of the verdict).

21. The court considered Madar's argument that he consulted, along with Levi, with Melisron's attorneys before expanding series D, which would demonstrate that he acted in good faith when making the purchases. In this regard, the court held that the consultation held with the attorneys in regard to the events described in the indictment was lacking and that material details were absent from it. It was also found that it is likely that had the lawyers known that the extent of the purchase was "unlimited" and that the order Haelyon received was to make the purchases only until the date of the offering, and especially had they known that the purchase was designed, among others, to increase or stabilize the price, the attorneys' advice would have changed accordingly. It was therefore held that the consultation with the attorneys cannot be seen as indicative of Madar's good faith and lack of intent to influence the price of the bonds (para. 307 of the verdict).

22. Regarding the inducement offense, it was held that the elements of the offense were met in Madar's case, as his actions caused a material misrepresentation amounting to fraudulent motivation. This is because shortly before the expansion of the series Madar purchased bonds at a scope of 60-97% of the trade, in a manipulative way, and thus could have influenced the investing public's decision whether to purchase Melisron's securities (we will not address the question of overlap between the inducement and manipulation offenses, as it is not part of the appeal). As for the first reporting offense, the court found that Madar caused the report published by Melisron on November 24, 2009 to exclude a material detail as to the influence plan, while Madar was also the one who approved the draft to Melisron's attorneys, and thus the court convicted him of this offense. As for the second reporting offense, the court found that in Melisron's shelf proposal report dated December 2, 2009, Madar again failed to report the influence plan, and he therefore was convicted of this offense as well.

23. As for the criminal liability of the companies for the offenses, it was held, as mentioned, that Melisron should be acquitted of the charges against it. This was because the activity for which Madar was convicted was not carried out in the course of his duties in Melisron but in the course of his duties in Ofer Group's private companies. Therefore, on the basis of organ theory, it could not be found that Melisron – and Madar as an organ of Melisron, as argued – played a part in committing this offense (para. 335 of the verdict). However, the court found that Ofer Investments and Ofer Development should be convicted of the offenses of manipulation and inducement. In this matter, it was found that the companies could not be separated with regard to the commission of the offense because "under the unique circumstances of this case, the conduct of both companies was one and the same." Therefore, the actions taken by Madar as an organ of both companies – "Number 2 in the organization" as Levi called him (record of hearing dated December 27, 2012, p. 641, l. 31) – form the criminal liability of the two companies, even though the investment was formally made by Ofer Development only (para. 341 of the verdict).

24. Now that we have presented an overview of the main points in the verdict, we can address the appeals before us. At this stage I will only discuss the arguments challenging the verdict, and further below – following the discussion of the verdict – I will address the arguments challenging the sentences imposed on Madar, Ofer Development and Ofer Investments.

CrimA 1829/14 – Madar's Appeal – the Verdict

The Appellant's Arguments – Madar's Verdict

25. At the center of Madar's appeal against his conviction stands mainly the legal questions of mixed purposes, as discussed above – should a person be convicted of the offense of manipulation when the legitimate intent he had in

purchasing securities was coupled with an additional, fraudulent, goal in the form of a desire to influence the price of the security. It was argued that this is the first and only case where a person has been convicted of manipulation in such a case of mixed purposes, and Madar maintains that the interpretation the lower court gave to the manipulation offense is inconsistent with the legislative intent and the case law on similar matters. In his arguments, Madar also presented American law, which supports, it was claimed, his argument that the interpretation given to the manipulation offense in our matter was wrong.

26. In addition, both written and oral arguments emphasized that the appropriate test in the context of mixed motivations is the "fundamental goal test" or the "but for test" – if, but for the legitimate goal, the defendant would not have made the investment, the defendant should be acquitted. Therefore, when the court found that both goals – the legitimate and the fraudulent – "lived side by side in symbiosis" (para. 320 of the verdict), meaning that the fraudulent goal was not fundamental, it should not have convicted Madar. It was also argued that the verdict reveals that the fraudulent goal was "secondary, if not incidental," which should, of course, also lead to an acquittal (para. 26 of the notice of appeal).

27. It was also argued that the court erred by not considering Madar's consultation with Melisron's attorneys as indicative of his good faith and lack of intent to influence the securities. In this context, it was argued that the court's finding contradicts a different finding - as the court held that during the consultation with the lawyers on November 25, 2009 Madar should have disclosed his intentions to "support" the price, but it also held that Madar's intention to support the price only materialized on November 26, 2009. It was additionally maintained that Madar and Levi presented to the attorneys the information they had as to the purchase possibility, and that the attorneys were expected to present the legal aspects and potential problems of purchasing bonds, because Madar and Levi are not lawyers and they could not have known that this activity could be problematic. Thus, the court erred by not seeing Madar's reaching out to the lawyers as an indication of good faith. Madar also emphasized that reliance on a lawyer's advice would provide sufficient defense in criminal proceedings but was never argued, and thus, there was no reason to examine such claim by the court using the case law's guidance on a reliance argument.

28. As for the financial expert opinions, Madar argued that the District Court erred in not attributing the appropriate weight to the fact that both Bahir and Professor Kalai's opinions suggest that the trade activity itself does not reveal a fraudulent intent, but rather that such an intent can allegedly be inferred from the recorded conversations, which are insufficient because they are "intentions of the heart" for which one cannot be convicted in criminal proceedings. It was noted that this is also inconsistent with the court's own finding that even if there was an intent to influence the security in the

defendant's heart, but in reality he acted as if he would have acted had he not had that intent, he should not be convicted of manipulation (para 104 of the verdict). As for the recorded conversations, it was argued that they reveal that Madar saw the purchase of Melisron bonds as a good investment that fitted the needs of Ofer Development, regardless of the series D expansion. The timing of the purchase was set for four days before the beginning of the trade, because – as was argued –a good opportunity for a significant purchase was created at that time, and not in order to influence the price.

29. At the end of his appeal, Madar also challenges his conviction of the offenses of inducement and causing a misleading item in a report. I will expand on his arguments on this further below. As mentioned, the issue of the sentence will be discussed separately.

The Respondent's Response – Madar's Verdict

30. It was argued that although Madar presented his appeal primarily as legal, the notice of appeal weaves in factual assumptions that contradict the District Court's various findings. First and foremost, Madar's argument that the primary purpose at the base of the series D bonds' purchase was a legitimate financial investment is inconsistent – as said – with the District Court's finding that the legitimate purpose stood alongside the fraudulent purpose, without determining a greater relative weight to one over the other, and while emphasizing that the fraudulent intent was neither secondary nor incidental (para. 3 of the main arguments).

31. As for the legal aspect, it was held that the District Court's interpretation of the manipulation offense is consistent with the legislative objective and the Supreme Court's case law on the issue, and as it was proven that Madar acted with a prohibited purpose to influence the price, it is immaterial that this goal was accompanied by a legitimate financial goal. This is because the legitimate goal cannot mitigate the adverse influence his activity had on the stock market's proper trade. Additionally, the Respondent maintains that Madar's failure to disclose the activities detailed in the indictment to the public in the prospectus or in the report is sufficient to unequivocally meet the "fraudulent means" element of the manipulation offense. Regarding the case law Madar presented from American law, it was argued that it did not provide a comprehensive picture of the applicable law there, and thus the conclusion Madar seeks to reach on its basis is incorrect.

32. The Respondent claims that the numerous conversations between Madar and Haelyon during the four days of trade clearly point to Madar's intention to influence the price of the bonds, and that this is detailed in the District Court's verdict. This is coupled with Madar's notices to the Israel Securities Authority dated April 27, 2010 and April 28, 2010, in which he admitted that his actions was designed to influence the outcome of the series D bonds offering.

33. With regard to the financial expert opinions it was argued that at this point there is no dispute that Madar's actions did indeed influence the price, and thus the opinions are used primarily as evidence to prove Madar's intention to influence the price. It was argued in this context that Mr. Bahir's opinion is the only one that includes a discussion of the financial aspects, in addition to the recorded conversations, whereas in his opinion, Professor Kalai intentionally avoided discussing these conversations. Therefore, the District Court rightly preferred Bahir's opinion, as it provides a broader picture of the events, and it reveals that Madar acted with intent to influence the price.

34. As for Mardar's appeal as to the inducement and reporting offense, it was argued that his claim that he should not be convicted because he was not an officer of Melisron and was not responsible for its reports should be rejected. This is because in order to meet the elements of the offense it is sufficient that the offender caused the misleading reporting in his actions, as Madar indeed did, and whether he was an officer or was responsible for the reports is irrelevant (even if the Respondent disputes the claim that Madar was not an officer in Melisron at the relevant time, and on this in Melisron's appeal, below).

CrimA 1899/14 – Ofer Investments and Ofer Development Appeal – The Verdict

The Appellants' Arguments – Ofer Investments and Ofer Development – The Verdict

35. This appeal was filed by Ofer Investments and Ofer Development against their conviction by the District Court for the charges detailed in the indictment. It was claimed that the District Court erred by viewing the two companies as one and convicting both of the charges in the indictment, while, at most, there was room to only convict Ofer Development, which in reality made the purchase of the series D bonds. In this context, it was argued that the fact that Ofer Development made the purchase, and not Ofer Investments, was based on Ofer Development's legitimate tax considerations, rather than an artificial transaction in a manner that warrants "joining" the two companies for the purpose of a conviction. In effect, the court performed a sort of "lifting of the veil" between the two companies where there was no need to do so. It was also maintained that insufficient weight was given to the fact that Levi, CEO of Ofer Investments, was acquitted from the charges, which, too, should support Ofer Investments' acquittal.

36. It was also argued that even had the decision to invest in Melisron – a decision which is not disputed to have had legitimate financial purposes – had been made by Ofer Investments, then in the four relevant trade days, in which Madar decided – according to the District Court's finding – to influence the price with prohibited intentions, the trade took place with Ofer Development rather than Ofer Investments. At this point, Ofer Investments no longer served as a relevant party to the decision to invest in Melisron. It was also argued in this context that policy considerations lead to a conclusion that Ofer

Investments should not be convicted for the offenses committed, at most, by Ofer Development because this would constitute a conviction of a company because a "finance officer in a grandchild company got spontaneously carried away" (para 58 of the appeal).

37. As for the conviction of Ofer Development, it was argued that Madar's investment in Melisron only caused Ofer Development damages, which result from purchasing bonds of large amounts and high price, when in contrast to the District Court's finding, Ofer Development did not even enjoy Melisorn's success as it is no more than a sister company to Ofer Development. Hence, the court should have applied the exception to the organ theory that when the organ acted against the best interest of the company, the company should not be found criminally liable for the organ's actions. It was also argued that Ofer Development did not significantly profit from Madar's investment and should be acquitted for this reason as well. Finally, it was claimed that there was no place for the lower court's finding that Ofer Investments and Ofer Development were in a position to supervise Madar's activity and prevent what had transpired, because this is a single failing that was hard to detect and was centered in the telephone conversations between Madar and Haelyon, and it could not be expected of other officers in the corporation to have to participate in such conversations and prevent what happened.

38. In the hearing before us, Ofer's attorney also challenged Madar's conviction and the District Court's holding that the two purposes at the basis of the manipulation offense were of equal status. In this context, it was argued that as it is impossible to find that the fraudulent goal was the dominant of the two, the situation of a "tie" between the purposes does not allow for Madar's criminal conviction, and thus neither does it allow for the companies' convictions.

The Respondents' Arguments – Ofer Investments and Ofer Development – The Verdict

39. The State argued that there is no basis for the appellants' argument that the District Court "lifted the veil" between Ofer Investments and Ofer Development and relied on this to convict Ofer Investments. It is obvious from the verdict that the court examined the direct responsibility of each of the companies and convicted them on that basis. It was argued in this regard, that in contrast to the appellant's argument, the activity described in the indictment was carried out by Madar in the course of his duties as an organ of the two companies, and not only of Ofer Development. Therefore, the District Court's finding that the appellants operated as one was required in order to show that Madar acted as an organ of both companies when committing the offenses and not for "lifting of the veil," as was argued. This finding by the District Court was built – so it was argued – upon solid foundations: Levi's testimony that from an organizational perspective, the management of the Ofer Group views the group as a whole "as if there are no companies" (record of hearing dated December 27, 2012, p. 589, l. 13-22); the testimony of Ms.

Yochi Yaakovi, Ofer Group's treasurer, that Ofer Development had no independent investment policy, but that it relied on the group's policy (record of hearing dated September 11, 2012, p. 121, l. 23-33), and more.

40. As for the argument regarding the exception for an activity that harms the company, it was argued that it must be rejected. At the basis of the offense of manipulation is a short term loss, which the manipulator is willing to absorb for future gains. As mentioned, this happened in our case as well. This occured when Ofer Development and Ofer Investments – which, according to the State and the findings of the District Court, should not be separated in this context – absorbed the short term loss caused to them by the purchase of the bonds at a high price, in order to produce profits for the Ofer Group in the long term when the value of Melisron's bonds would rise, as eventually did in fact happen.

CrimA 99/14 – The State's Appeal against Melisron's Acquittal

The Appellant's Claims – The Appeal against Melisron's Acquittal

41. This appeal was filed by the State against Melisron's acquittal of the charges against it. The State claimed that Madar was an organ of Melisron. It seems this is also reflected in the District Court's sentence regarding Madar, where it was found that the latter ran Melisron's financial matters and was an authorized signatory of it. As for the manipulation offense, it was argued that the District Court erred in finding that Madar did not commit the offense attributed to him within the course of this duties as an organ of Melisron, but in the course of his duties with Ofer Development and Ofer Investments only. This is from both an objective and a subjective examination of the circumstances. From the objective perspective, raising the value of the bonds by Madar served primarily Melisorn's interests as it raised its financial worth. From the subjective perspective, Madar said in his statements and testimony that he acted to benefit Melisron, and he therefore committed the offenses within the course of his duty (record of hearing dated January 16, 2013, p. 732, where it was said: "I also had the goals of Melisron in mind").

42. As for the reporting offense, it was argued that the Court erred in acquitting Melisron of these offenses. The court noted, as mentioned, that it was acquitting Melisron because Madar did not have powers that merit attributing his intent to Melisron, and because the appellant did not prove that any of Melisron's employees knew of his intent. It was argued in this regard that Madar held a senior position in Melisron, and was even considered to be Levi's – the CEO – right hand, and that additionally, he played an active role in issuing the bonds. Therefore, he must be seen as an organ for the purposes of the reporting offense. It was also noted that Mader indeed took an active part in Melisron's reports and particularly those concerning the purchase activity at the heart of the indictment, which also supports his consideration as an organ in this respect. This is true also for the offense of including a

misleading item in a prospectus – even according to the findings of the District Court, Madar knew that the shelf proposal report was incomplete, as it did not include the manipulation that he himself executed, and thus the court convicted him for this offense. Yet, as argued, for these very reasons Melisron should also be convicted, and the court's finding that these offenses were not committed in the course of Madar's duties as organ in the company is incorrect. It was also maintained that the fact that none of Melisorn's employees knew of Madar's activities is immaterial here because this is not a relevant requirement for a conviction under the organ theory. The District Court itself noted this when finding that Ofer Development and Ofer Investments should be convicted of the offenses for which they were indicted, even if it has not been proven that any of their employees were aware of Madar's activities (para. 342 of the verdict).

The Respondent's Arguments – Appeal against Melisron's Acquittal

43. It was argued that Madar's actions should not be viewed as actions taken as an organ of Melisron's, but instead as actions taken in the course of his duties in Ofer Development and Ofer Investments. Thus, the District Court was correct in acquitting the Respondent. It was also argued that Madar was merely an external services provider, as part of this position at Ofer Investments, rather than an organ of Melisron, and that he was not named as a high officer in the prospectus at the relevant time (para. 13 of the main arguments). Additionally, even though the District Court found Madar was an authorized signatory, the Respondent emphasizes that he was an authorized signatory in Melisron's accounts, but he never signed its financial reports, prospectuses or the shelf proposal report nor the immediate report mentioned in the indictment. Therefore, Madar should not have been viewed by the court as an organ of Melisron.

44. Alternatively, it was argued that even if Madar could have been seen as an organ of Melisron, in effect, the specific actions for which he was convicted were not executed in the course of his duties as an organ of Melisron, but – as the District Court noted – as an organ of Ofer Investments and Ofer Development. Thus, Melisron's conviction will contradict the legal rationale at the basis of convictions under the organ theory – a conviction where the corporation could have supervised in advance and could have prevented the offense committed by the organ, yet, in this case, Melisron had no possibility of doing so.

Judgment: The Statutory Framework

The Manipulation Offense

45. The main issue at the core of the appeals is Madar's conviction (and in turn Ofer Development and Ofer Investments' convictions, but Meliseron's

acquittal) for the manipulation offense found in section 54(a)(2) of the Securities Law, which establishes as follows:

> "(a) A person who [is convicted of doing] one of the following shall be punishable by imprisonment for a term of five years or to a fine in an amount five times the fine prescribed in section 61(a)(4) of the Penal Law… (2) Fraudulently influenced the fluctuation of the price of securities ….".

The Legislature therefore found it appropriate to prohibit, in the form of a non exhaustive list, with a broad definition, artificial intervention in the stock market that has the potential to influence the price of the security. Professor Goshen discussed the rationale behind this criminal prohibition:

> "Manipulation that takes place through prohibited intervention in the stock market's pricing mechanism causes a distortion of the information produced in the trade itself (trade cycles, price fluctuations, etc.)… The sophisticated investor is particularly vulnerable to fraud and manipulation due to his reliance on information in making investment decisions… However, in effect, protecting the sophisticated investors, who ensure the efficiency of the stock market, indirectly protects unsophisticated investors as well. In an efficient market, each security is traded at its correct value, which allows the unsophisticated investor to trade in securities without fear as to whether their price is distorted." (Zohar Goshen, *Fraud and Manipulation in Securities: Non Identical Twins*, MISHAPATIM 30, 591, 599-600 (2000) (hereinafter: Goshen).

To this we can add a moral tone, beyond the efficacy component – the voice of decency that should be expected to exist, not just in terms of "person to person – a person" (as coined by President Barak in LAC 6339/97, *Rocker v. Salomon*, IsrSC 55(1) 199, 279 (1999)), but also in light of the inherent sophistication involved with securities and working with them.

The Offense of Manipulation – The Result Element

46. The elements of the offense, as mentioned, are that the person committing it (1) influenced the fluctuation of the price, and (2) did so fraudulently. The question is whether this is a result based offense, meaning that in order to convict the defendant for having committed the offense, it is necessary to show that the security's price was actually changed, or whether this is only a conduct based offense. Although the issue does not have to be determined here, because as noted above, the District Court found that the security was indeed influenced as a result of Madar's actions and this point is no longer in

dispute between the parties, I find it fitting to briefly address this issue. The first precedent in this regard, as set by this Court in CrimA 8573/96, *Mercado v. The State of Israel*, IsrSC 51(5) 481, 517 (1999) (hereinafter: "the *Mercado* Case"), is that the offense is a result offense. This, primarily on the basis of the language of section 54(a)(2), which requires, as one of the elements of the offense – "influenced." That is, an actual influence on the price is required and a mere attempt is insufficient (p. 517 of the opinion). In CrimA 1027/94, *Zilberman v. The State of Israel*, IsrSC 53(4) 502 (1999) (hereinafter: "the *Zilberman* Case"), President Barak left this issue for future consideration, yet still noted that in order to prove the result element, to the extent it is necessary, "the existence of influence is sufficient, even if it is not extreme but as long as it is not negligible."

47. Various positions can be found in the professional literature. For example, Professor Z. Goshen believes that "searching for actual influence of the price's fluctuation is pointless" because even if actual influence has not been proven, the mere attempt to influence the price still causes the harm which is reflected in the investors' need to guard themselves against manipulative trade orders. This self protection itself carries costs – costs that may harm, in and of themselves, the stock market's efficiency, and therefore an awareness requirement should suffice for a conviction of this offense (Goshen, p. 634.) Scholar Assaf Ekstein expresses a similar position (Assaf Ekstein, *Mixed Goals in the Offense of Securities Manipulation*, MISHPAT V'ASAKIM 16 277, 292 (2004) (hereinafter "Ekstein")). Ekstein also refers to the Yadin Commission and the Gabai Commission, which were formed in order to examine different issues in the Israeli stock market and respectively found, in terms of the manipulation offense, that "it is immaterial whether the action caused damage or not" and that "it is immaterial whether the outcome that the person conducting the transaction intended to achieve was reached or was not reached." (Report of The Commission for Issuing and Trading Securities, para. 208 (1963) (the Yadin Commission); Report of The Commission for Proposal of Legislation in the Field of the Stock Market, para. 52 (1985) (the Gabai Commission); Ekstein, p. 292).

48. Professor O. Yadlin holds a different position. In his opinion, section 54(a)(2) of the Law requires actual influence on the price of the security, because in the absence of influence, no damage was caused – neither to the market as a whole nor to those trading in it. This is contrary to section 54(a)(1), which, as mentioned, establishes the inducement offense and does not require existence of actual influence, because even in its absence damage might still be caused to a concrete trader who purchased a security based on misleading information and thereby entered into a transaction at a loss (O. Yadlin, *Fraud in the Market – The Limits of Professional Responsibility for Misrepresentations in the Secondary Market*, MISHAPTIM 27, 249, 270 (1997) (hereinafter: "Yadlin"). Judge (now Deputy President) Dr. O. Mudrik holds a similar position (O. Mudrik "'Ramping' Securities as an Offense – "Shall I Win… and in the Pocket the Rocks of Deceit"" TRENDS IN CRIMINAL LAW –

THOUGHTS ON CRIMINAL RESPONSIBILITY THEORY 509, 536-539 (2001, Eli Lederman ed.) (hereinafter: "Mudrik"). It should be noted that Dr. Mudrik believes that the *mens rea* element of the offense, which we will get to below, is not of intent but merely of awareness. This may influence, it seems, his desire to restrict the scope of the offense through raising a stricter *actus reus* requirement, as well as a requirement for actual influence rather than conduct alone (Mudrik 540-45).

49. As for me, I believe, and noted, that this need not be decided now, and even had the requirement for an outcome been significantly diminished in the *Zilberman* case, it is highly doubtful whether it is appropriate from a policy perspective. The purpose of the Securities Law, from its inception, is to provide protection to investors – whether they are sophisticated investors who invest out of knowledge or unsophisticated investors who do not utilize external information (Goshen, 594). Both need to know that when they come to invest, the price of the security reflects, to the greatest extent possible, its value, and that artificial efforts to change it have not been made. When this certainty does not exist, serious investors must invest time and money to acquire relevant information to ensure that the estimate of the security is "clean", as much as possible, of any considerations that are external to the market. The words of President Barak in CrimA 5052/95, *Vaknin v. The State of Israel*, IsrSC 50(2) 642, 655 (hereinafter: "the *Vaknin* Case") are fitting here as well:

> "The price of a security reflects a balance between the actual supply and the actual demand, which stems from the investor's forecast regarding the future profit from that investment. This ensures the public's trust in the stock market and the economic information it represents. To be sure, there is no guarantee of success. These forecasts may fail. But a market mechanism, based on economic estimations, was established in order to determine the price of the security. Against this utilitarian approach we must examine the different situations which, arguably, constitute fraudulent influence on fluctuations of the securities' price."

See also the *Mercado* case, p. 519; *Zilberman*, 515; LCrimA 2184/96, *Haruvi v. The State of Israel*, IsrSC 54(2) 114, 121-122 (1998) (hereinafter: "the *Haruvi* Case"); *Gurary v. Winehouse*, 190 F.3d 37, 45 (2d Cir. 1999).

50. Therefore, even in the absence of direct influence on the fluctuations of the securities' price, it is impossible, in my view, to say that no harm was caused to the stock market and to the investing public, by the very fraudulent activity designed to influence the price of the security, in a manner that does not justify a conviction for the offense. Indeed, even Professor Yadlin himself, who, as mentioned, believes that the offense should be regarded as requiring actual influence, noted that the "**mere potential** of the existence of misleading

information causes investors to waste resources on verifying the information" (Yadlin, p. 269, emphasis added). As for the concern brought up by Dr. Mudrik regarding the overreach of the offense over seemingly legitimate activity, I believe that this concern must be relieved within the *mens rea* element rather than the *actus reus* element, and I will discuss this further below. I will once more add the moral component and decency, which in my eyes are a necessary foundation of the stock market that the investor can put trust and faith in. This factor, in my humble opinion, cannot be overstated.

51. Nonetheless, I am afraid that the language of section 54(a)(2) of the Law does not permit leaving out the result element completely. As noted in the *Mercado* case, the use of the verb "influenced" requires the existence of influence, and this is evident particularly when comparing the language of this section to section 54(a)(1) which uses the term "induced or **attempted to induce**" (emphasis added.). This demonstrates that the Legislature was aware, with regard to the fraud offense (including inducement and manipulation,), of the possibility to include attempt in the elements of the offense. As for the inducement offense the Legislature elected to include the attempt as an element of the offense as well, whereas in the offense of manipulation – it opted not to do so. Therefore, without the proper legislative amendment, I believe that section 54(a)(2) encompasses a requirement for actual influence, despite the fact that in the *Zilberman* case, as discussed, "the existence of influence is sufficient, even if it is not extreme, as long as it is not negligible." I believe influence must be interpreted broadly, to include indirect influence, which could fall under the definition of "pulling strings."

52. Recall that today, after the enactment of section 34D of the Penal Law, 5737 - 1977 (hereinafter: the Penal Law), which mandates that "any statue enactment that applies to the primary commission of a completed offense also applies to an attempt". The significance of the result element of this offense is not as great as it once was (even if this may have some implication, for example, for the difference in social stigma on those convicted of an attempt to commit an offense and those convicted of committing the complete offense, see Mudrik, p. 539-40). Therefore, should one be convicted, under the current version of the Law, of attempting to commit a manipulation, the court may consider, in the sentencing phase, the importance of guarding the value protected by this offense, whether it was an attempt to influence or actual influence, and then decide on the sentence accordingly.

The Manipulation Offense – The Intent Element

53. Another question is what is the required *mens rea* for the manipulation offense. As opposed to the result element, which is explicitly included in the Law, section 54(a)(2) does not explicitly state the *mens rea* required. This is different from section 54(a)(1) which explicitly establishes a *mens rea* of negligence ("knew or should have known"). In the *Vaknin* case, President Barak held that "in order to convict the defendant, the court must find that the

defendant committed the offense '**with the intention** to achieve price fluctuation.' The intent is the thing indicating whether the defendant's action was done in 'fraudulent ways', as the language of the section states, or whether it was merely a legitimate activity with real economic meaning" (Id., p. 656; emphasis added). Later, in the *Mercado* case, Justice Goldberg expanded on this matter and mentioned that because section 54(a)(2) is silent on the issue, a criminal mindset of recklessness is seemingly sufficient. However, as for the offense of manipulation by means of participation in trade, as in our case, Justice Goldberg noted, "the intent to artificially influence the price is the thing that constitutes the offense. In such cases, the intent creates the distinction between permitted activity and prohibited activity" (*Mercado*, 524-25).

54. Accordingly, it seems that the approach that the manipulation offense requires a *mens rea* of intent to achieve fluctuations in the price has since settled in the case law of different levels of the courts. See for example *Haruvi* case, p. 123-124; CrimC (Mag. Tel Aviv) 7019/00, *The State of Israel v. Mualem*, para. 99, 102 (2002); CrimC (Mag. Tel Aviv) 4131/05 *The State of Israel v. Opmath Investments*, para. 24 (April 15, 2008) and the appeal on the matter: CrimA (Dist. Tel Aviv) 70384/08 *The State of Israel v. Opmath Investments*, para. 24 (November 23, 2009); CrimC (Mag. Tel Aviv) 2617/04, *The State of Israel v. Greenfield*, under the heading "The Second Charge", para. A (February 25, 2008) (hereinafter: "*Greenfield* – Mag. Case") and the appeal in that same matter: CrimA (Dist. Tel Aviv) 70226/08, *The State of Israel v. Greenfield*, para. 44 (December 21, 2008) (hereinafter: "*Greenfield* – Dist. Case").

55. It seems that even the scholarship is almost unanimous in its position that the *mens rea* required for the manipulation offense is a *mens rea* of intent, both in terms of interpreting the current law and in terms of the desirable legal policy. Thus, for instance, Goshen notes that "manipulation, in contrast (to the inducement offense – Rubinstein,) is based entirely on the *mens rea* of the trader – the intent to commit fraud. On the factual level alone, the trader's conduct is identical to any other legitimate commercial activity" (Goshen, 602). Professor Yadlin voices a similar opinion (Omri Yadlin, *Prohibited Manipulation – What Is It?*, TRENDS IN CRIMINAL LAW – THOUGHTS ON CRIMINAL RESPONSIBILITY THEORY, 465, 466-67 (2001, Eli Lederman, ed.), as well as the scholars Fischel and Ross:

> "[T]here is no objective definition of manipulation. The only definition that makes any sense is subjective – it focuses entirely on **the intent** of the trader. Manipulative trades could be defined as profitable trades made with 'bad' intent…" (Daniel R. Fischel & David J. Ross, "Should the Law Prohibit 'Manipulation' in Financial Markets?" 105 HARV. L. REV. 503, 510 (1991) (Emphasis added – Rubinstein).

Even Mudrik, who believes that the existing Law requires only a criminal mindset, noted that his conclusion causes "'discomfort' due to the attribution of criminal responsibility to those who influence the security's price with 'real activity', without having 'intent' regarding this outcome" (Mudrik, p. 545).

56. Reviewing American law leads to a generally similar conclusion. Section 10(b) of the Securities Exchange Act of 1934 authorizes the United States Securities and Exchange Commission (The US SEC) to set regulations as to the use of financial tools that may cause manipulation, deception, or contrivance in securities. Accordingly, the Commission drafted Rule 10b-5 (17 CFR 240.10b-5) entitled "Employment of Manipulations and Deceptive Devices", which reads as follows:

> "It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
>
> (a) To employ any device, scheme, or artifice to defraud,
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person in connection with the purchase or sale of any security" (17 CFR 240.10b-5).

In the matter of *Ernst & Ernst v. Hochfeder*, 42 U.S. 185 (1976) the United States Supreme Court held that the very use of the term "manipulation" reflects the existence of an intent requirement:

> "Use of the word 'manipulation' is especially significant. It is and was virtually a term of art when used in connection with securities markets. It connotes intentional or willful conduct designed to deceive or defraud investors by controlling or artificially affecting the price of securities" (*Id.*, p. 199).

In addition, in the matter of *Santa Fe Indus. v. Green*, 430 U.S. 462 (1977), the United States Supreme Court reiterated this rule and held that:

> "The term [manipulation – Rubinstein] refers generally [494] to practices, such as sales, matched orders, or rigged prices, that are intended to mislead investors by artificially affecting market activity" (*Id.*, p. 476.).

See also: Maxwell k. Multer "Open-Market Manipulation under SEC Rule 10b-5 and its Analogous: Inappropriate Distinctions, Judicial Disagreement and Case Student: Ferc's Anti-Manipulation Rule" *Securities Regulation Law Journal*, 97, 97-98 (2011).

And indeed, it is clear to all that the term "manipulation" is generally, and certainly in the financial and government world, a negative term (in the world of medicine and natural sciences there may be an act of manipulation where the purpose is beneficial, but of course that is not what we are discussing). Influence by fraudulent means is a negative act of course; see the distinction between manipulation as "treating something with one's hands" and that which means "using fraud or contrivance to achieve some advantage" (EVEN SHUSHAN DICTIONARY FOR THE 2000'S) (2007), under the entry "Manipulation").

57. It seems that there is unanimity in the case law and scholarship regarding the requirement for intent in the manipulation offense. In effect, intent is inherent to the element "by fraudulent means" of section 54(a)(2), and in the words of Justice Goldberg: "**The intent to artificially influence the price is what constitutes the offense**" (*Mercado*, 523-24. Emphasis added). As discussed, it is possible that one's investment influences the price, but this would be a side effect of a legitimate economic activity, and without that person intending to do so. In such a case, though one's activity influenced the price, it is doubtful whether an injury warranting protection was caused to the stock market or the investing public, and so such a case does not fall under the offense of manipulation. However, when one's activity was based on a fraudulent intent, and the activity did in fact influence the price, an actual harm has been caused to the market, and that harm is what the Law was designed to prevent. Indeed, this must be an actual intent, and the intent cannot be simply inferred from one's awareness to do the act. In other words, the expectation doctrine cannot be applied to the offense of manipulation. We learn this, in my view, from the very import of the intent among the elements of the offense, because, as discussed below, but for the intent, it is highly doubtful whether any activity could be found to have been done "by fraudulent means" as the provision requires. I will simply add: there is no fraud without intent. Whoever presents something to another without any intent to harm, but in the regular course of business and in good faith, will not be trapped in the net of this offense.

58. In this spirit, as a rule, the existence of an intent to commit a particular act also indicates an additional, abstract, harm to the **protected value** at the basis of the offense, which, in the long term, could also erode the status of that value (see Yitzhak Kogler, INTENT AND THE EXPECTATION DOCTRINE IN CRIMINAL LAW 294-95 (1997)). It seems that these things are especially true with regard to the manipulation offense – when one acts in order to influence the price. Then, aside from the actual harm caused as a result of the influence to the price of the specific security, there is conceptual harm caused to the value at the basis of the manipulation offense, that is, protecting the stock

market as a whole and ensuring that the prices of securities reflect, as much as possible, their true economic worth. As I explain below, in my opinion, these things apply even when the fraudulent intent does not stand alone.

59. As for the existence of a motive – as the District Court noted, in order to convict the defendant for the offense of manipulation it is not necessary to show that the defendant had a motive to commit the offense, but insofar as such a motive existed, it is possible that the motive would serve as circumstantial evidence in proving the offense, with emphasis on the intent element (*Greenfield* – Dist. Case, para. 46; see also *Bryant v. Avado Brands Inc.* 187 F.3d 1271, 1286 (1999); *Carley Capital Group v. Deloitte & Touche*, 27 F. Supp.2d 1324, 1339 (1998)).

60. We learn from the above, on the one hand, about the importance of the intent requirement to meet the elements of the offense and, on the other hand, about the importance of a conviction for manipulation in those cases where there was indeed intent. Still, a separate question is whether, for the purposes of a conviction of manipulation, the prosecution must prove that the defendant's **entire** intent was to influence the price, or whether the mere existence of the fraudulent intent is sufficient, even if it was coupled with a sincere intent to make a legitimate financial investment. On this in the next part.

The Manipulation Offense – Mixed Purposes

61. We discussed the importance of the intent requirement to the offense of manipulation. There can be no dispute then that when "the appellants' **entire** intent was to cause the increase in the stock's price" (*Haruvi* case, President Barak, para. 7. Emphasis added); or when "their **entire** intent was but to fraudulently cause the price to increase" (*Vaknin* case, President Barak, p. 646. Emphasis added); or when our case falls within "the deliberate intervention in the trade of the stock, whose **entire** purpose is to influence the price" (CrimA 5383/97, *Tempo Beer Industries Inc. v. The State of Israel*, IsrSC 54(1) 557, 569, President Barak (2000) (hereinafter: "the *Tempo* Case") Emphasis added); and in other words – when the defendant's **entire** intent in the manipulation was to influence the fluctuations of securities' prices by fraudulent means, then the intent requirement has clearly been met.

Yet what is the law when we are concerned with mixed intents or mixed purposes – that is, when the defendant's fraudulent purpose, to influence the price by fraudulent means, was coupled with the sincere intent of a legitimate financial investment. First, is it at all possible to convict such a defendant of the manipulation offense where mixed purposes motivated his actions? And if the answer for this is in the affirmative, we must ask – what is the necessary proportion required between the defendant's different intents in order to convict him of the offense? In other words, is **any** fraudulent intent that is added to the legitimate financial intent sufficient, or is it necessary to show that it is a **primary** or **fundamental** intent, and the stronger the evidence is,

that but for the legitimate purpose the defendant would not have committed the offense, then the defendant must be acquitted?

62. This is what the District Court held in this case regarding this issue (para. 118):

> "I believe that in the instance of a 'true transaction' (an action that is seemingly permitted but the purpose behind that action makes it prohibited), in order to achieve the purpose underlying the prohibition in section 54(a)(2) of the Securities Law, we must examine whether the influence on the price was merely a **byproduct** of the trade activity, or whether the defendant acted in a manner **intended** to influence the price. In other words, even if the defendant had a legitimate financial purpose, as long as he acted (in addition or for the proposes of this legitimate purpose) in order to influence the price – he should be convicted" (Emphasis in the original – Rubinstein).

As I will show below, my position is as that of the lower court, and even more strongly so. To me, the existence of the intent to influence the price is, on the criminal level, the dominant factor in the decision.

63. Indeed, it seems that this issue of mixed purposes has yet to warrant this Court's attention. At the very least, not explicitly. Madar argues that this Court's various decisions on the issue of manipulation – including the decisions in the *Vaknin*, *Haruvi*, and *Tempo* cases – indicate that a conviction of this offense is appropriate **only** when the defendant's entire intent was to influence the price. In other words, that the positive indicates the negative, and where mixed purposes are at issue, and it is impossible to find that the defendant's intent was entirely fraudulent, the defendant should not be convicted (para. 58 of the Notice of Appeal).

64. I am afraid that I cannot accept this reading of the case law. The fact that it was found in the *Vaknin*, *Haruvi* and *Tempo* cases that the appellants only intent was to influence the price, and they were thus convicted, does not mean that under different circumstances where the fraudulent intent was coupled with a legitimate intent, the court should not convict the defendant of manipulation. Naturally, the court does not engage theoretical issues and does not determine legal issues that are unnecessary in a concrete matter. It is therefore clear that in the circumstances of the above cases the court was not called upon to consider this situation of mixed purposes, but rather to only consider what was before it – that is, the sole purpose of influencing the price. But, this does not at all indicate that according to these cases when there are mixed purposes the defendant should be completely acquitted of the manipulation offense.

65. The District and Magistrates Courts adjudicated several cases where a defendant was found to have acted with mixed purposes. A Review of the different opinions reveal that the dominant approach is that in the case of mixed purposes, the defendant should be convicted of manipulation when the **primary** purpose was to influence the price, while the legitimate financial purpose was only secondary. Thus, for instance, in CrimC (Mag. Tel Aviv) 1349/98, *The State of Israel v. Orasis* (October 31, 2004), the court adjudicated the case of a person indicted for manipulation and it was found he acted with mixed purposes, and the purpose of "supporting the price was the determinative one" (para. 145 to Judge Dr. Binyamini). In that case, the court convicted the defendant of manipulation, noting the following:

> "There certainly may be a case where an investor believes in a stock and is interested in purchasing additional stock, but decides to do this on a certain trade day in a manner that would raise the price of the stock, or would prevent its fall, while creating a misrepresentation to the reasonable investor. It is similarly possible that a person conducting activity in the stock exchange honestly wishes to sell his stock, but does so in a fraudulent manner that is designed to influence the price in order to make the sale at a price desirable to him, rather than at the market price. Such a case also falls within section 54(a)(2) of the Law" (para. 343).

66. Similarly, in CrimC (Mag. Tel Aviv) 8044/99, *The State of Israel v. Tzafrir Engineers* (January 3, 2005), the court convicted the defendant of manipulation under circumstances of mixed purposes where the fraudulent purpose was a **primary purpose** (para. 159-161 to Judge Dr. Binyamini's verdict). In the *Greenfiled* – Mag. case, the court held that "in order to convict of the offense it must be shown that the dominant **primary** intent was impermissible" (para. 9 of then Deputy President Hadasi-Herman's opinion, emphasis added – Rubinstein). Hence, when it was found that the fraudulent intent was secondary and the defendant's primary intent was a legitimate financial purpose, the court acquitted the defendant. The appellate judges embraced this approach and held that "we are faced with a clear case of 'mixed purposes,' and it is extremely difficult to determine which was the defendants' primary purpose and which was their secondary purpose" (*Greenfield* – Dist. Case, para. 76 of the opinion of President Goren and Judges Dr. Binyamini and Ronen).

67. Examples of certain exceptions for the main purpose test can be seen in the next two cases. In CrimC (Mag. Tel Aviv) 2587/06, *The State of Israel v. Kabiri* (March 15, 2008) the court held that "it should be examined whether participation in trade, as mentioned there – was merely an artificial activity… whose **one and only purpose** is to influence the price" (para. 26 of Judge Mor's verdict, emphasis in original – Rubinstein). Since under the circumstances of the specific case it was found that "there is no activity before

us whose purpose – as mentioned there – was **exclusively** to cause the price to fluctuate" (emphasis added – Rubinstein), the defendant was acquitted of manipulation. On the other hand, in CrimA (Dist. Tel Aviv) 70384/08, *The State of Israel v. Opmath* (November 23, 2009) (hereinafter: "the *Opmath* Case") the court noted in *obiter dictum* that in order to be convicted of the manipulation offense, it must be shown that the defendant's fraudulent intent was an **actual** intent, in addition to the legitimate financial purpose, and not necessarily the primary intent to which the financial purpose is merely secondary.

68. In his article, scholar Ekstein proposes the "fundamentality test" or the "but for test". According to this test, "if but for the permissible/financial/business purpose one would not have conducted the security transaction under the given circumstances, then the offense of manipulation does not form" (Ekstein, p. 333). Ekstein adds that this is a one directional test: "where the defense can show that but for the permissible purpose the defendant would not have acted, he should be acquitted. However, where the prosecution can show that but for the fraudulent purpose the defendant would not have acted, it is not necessary for the defendant to be convicted" (there, p. 334).

69. Both parties before us refer to the American law to support their arguments, however, it seems that established jurisprudence regarding mixed purposes has yet to be developed there, and to the extent the issue was discussed it appears to have been raised mainly in *obiter dicta*. In *US v. Mulheren*, 938 F.2d 364, Court of Appeals, 2nd Circuit (1991) (hereinafter: "*Mulheren* Case") the court did in fact find that in order to convict a person of manipulation it must be shown that his single intent was fraudulent, however, as we will elaborate below, this was said beyond the necessary scope of the circumstances of the case at hand there (Id., 396). In *SEC v. Masri*, 523 F. Supp. 2d 361 (2007) (hereinafter: "*Masri* Case"), the court established (in a civil- administrative matter) a variation of the "but for" test (id. 372-73). Yet there, too, reviewing the circumstances of the matter reveals that there were no direct evidence to show a primary fraudulent intent (id. at footnote 19). However in *SEC v. Kwak*, F. Sec. L. Rep. 579 (2009) (hereinafter: "*Kwak* Case"), the court rejected (again, in a civil administrative manner) the defendants' attempt to rely on the "but for" test established in the *Masri* case, and held that as long as the defendant's fraudulent intent impacted the way he ultimately made the investment, the "but for" test loses its value (*id.*, footnote 10). Thus, in my view, we cannot infer from American law any clear theory on this issue. I will add, analogously, that in Jewish law we find the idiom "this and this causes," and according to the definition in the Talmudic Encyclopedia under this term (vol. 11, 70 1936/7) it means "a thing that has two causes to its being, or raising, one of permission and one of prohibition," with the review of the different relevant laws on the matter.

70. In my opinion, neither the main purpose test nor the "but for" test reviewed above fit the manipulation offense. In my eyes, and clearly so, there is no real

significance to the question of whether the activity also had a legitimate purpose. The tainting of the act by the fraudulent purpose fulfills the dominant element of influence by fraudulent means. When one fraudulently influences the price, and does so **in order** to influence the price by fraudulent means, he compromises the proper operation of the stock market; he distorts the information it represents, in order to produce an artificial profit, while harming the protection of various types of investors. "When there is 'intent to harm' there is an additional injury that does not exist in a situation of 'recklessness'" (Kogler, 292); and in the manipulation offense, when a defendant acts with the purpose of influencing the price, he causes both an actual harm, as a result of obstructing the pricing of the concrete security, and a harm to the protected value at the basis of the manipulation offense, which is protecting the proper operation of the stock market. These harms are caused even when there is a legitimate financial purpose that accompanies the fraudulent intent, and even where, but for the legitimate financial purpose the defendant would not have made the investment.

71. As a result, I believe that where the defendant had intent to influence the price by fraudulent means, even if such intent was coupled with a legitimate financial purpose, we must find that the intent requirement had been met for purposes of the manipulation offense. This, as discussed, without necessarily finding that the fraudulent intent was primary whereas the legitimate financial intent was secondary to it. And note, so that no doubt remains, that where no intent to influence the price has been shown, but ultimately, as a result of legitimate financial activity the defendant influenced the price of the security, this will be insufficient for a conviction of the manipulation offense. In other words, I will again add the moral dimension – the fraudulent intent pollutes the activity, and this pollution is highly significant when examining whether the activity was proper.

The Manipulation Offense – From the General to the Particular

72. With regard to the result element: as discussed, the District Court was presented with three financial opinions which addressed this question – one by Mr. Yossi Bahir, on behalf of the State; a second by Professor Avner Kalai, on behalf of Madar; and a third by Professor Roni Ofer, on behalf of Haelyon. Even as early as when the District Court's verdict was handed down, it seemed that there was no real dispute between the parties that as a result of the purchases Ofer Development made, the price of series D bonds increased (paras. 211 and 318 of the verdict); and we will recall that at the beginning of the first purchasing day, November 26, 2009, the price of series D bonds stood at 115.72 Agorot, while at the end of the last purchasing day, December 1, 2009, the price was 116.99 Agorot (see para. 143.2 of Bahir's opinion). Madar does not challenge these facts before us, either. Thus, there is no dispute that the result element is met in our case.

73. As mentioned, Madar's appeal challenges, primarily, the intent element. The District Court held that as Levi was acquitted from the charges against him, Madar could not be convicted of the influence plans as is. In other words, it could not be said that it was proven beyond a reasonable doubt that Madar intended to influence the price of the bonds "in the days, weeks or months" prior to the offering (para. 319 of the verdict). However, the District Court found that from the beginning of the trade days, Madar had a dual intent – a legitimate financial intent and a fraudulent intent to support the price of the bonds (para. 320 of the verdict). It seems that the State does not dispute, at least not at this stage, that at the basis of Madar's activity was also a legitimate financial purpose. The dispute revolves, then, around the question whether, in addition to the legitimate financial purpose, Madar also had, as found by the District Court, a fraudulent intent, and if so – does the fact that there were mixed purposes mean that he should not be convicted of the offense of manipulation.

74. Madar maintains that the evidence relied upon by the District Court in the verdict demonstrates that his desire to influence the price was incidental to his legitimate decision to invest in Melisron's bonds, and that the evidence – including the financial opinions – cannot lead to a conclusion that any of his actions were taken in a way that is inconsistent with the intent to make a legitimate investment. In addition, he claims that the court convicted him based on "things of the heart", that is, on Madar's alleged manipulative intent as inferred from his conversations with Haelyon prior to the offering of the series D bonds, but without the manipulative intent having any actual manifestation in his actions. In other words, the element of "by fraudulent means" required for a conviction of manipulation was not proven.

75. I believe that the evidence paints a different picture. The primary evidence used to prove Madar's guilt in the District Court was a series of conversations between Madar and Haelyon, beginning on November 26, 2009 and ending on December 1, 2009. These conversations were recorded by the managers of the offering (recall that the series D bonds were offered on December 2, 2009). For example, in a conversation held between Madar and Haelyon on November 26, 2009 (Prosecution exhibit 8-1) the following was said (emphasis added – Rubinstein):

> "Madar: Ok, listen, we can actually start… uh… to make purchases of Melisron's series D bonds…
> …
> Ok, you know… like what's called "market making"?
> Haelyon: Yes, yes.
> Madar: Collect exactly… start collecting.
> Haelyon: Without going wild.
> Madar: What?
> Haelyon: Without going wild. Slowly.
> Madar: Exactly. So we'll have… **the right gains as they say**

Haelyon: I understand. For how much money?
Madar: Look, you have 20 million there. **I need four trade days**.
Haelyon: Alright.
Madar: You have no limit. And even if…even if there won't be enough, so we're talking, it's not like…
Haelyon: Sure, sure.
…
Madar: But **don't go through it all today. You know I need till next week**.
Haelyon: Everything slowly.
Madar: Exactly.
Haelyon: I understand."

And later that day (Prosecution exhibit 8-3):

"Haelyon: Right now there's not much need… no need to fire a lot of the ammunition.
Madar: Yes. Exactly, exactly.
Haelyon: That's what I'm doing. You see, not running, not…
Madar: That's excellent for me. Excellent for me.
Haelyon: You see that I'm standing, if they throw I stand further below, they throw… no, not taking risks, not trying to… **the market is going down but there's a buyer here**… that's what… there are buyers.
Madar: That's not good because it calls attention, you see? They go in, see the turnovers, see this… this, this is perfectly all right."

And a conversation dated November 30, 2009 (Prosecution exhibit 8-10) reveals the following:

"Haelyon: We bought 5.3 million.
Madar: What a crazy turnover.
Haelyon: Yeah, so I don't know what that is (chuckles).
Madar: Crazy turnover!
Haelyon: Yeah, yeah. **There are buyers and soon there will be some more buyers, God willing**.
Madar: **Yeah, I see everything increasing or going our way**.
…
All right. **Give it a nice push toward the end**.
Haelyon: Definitely."

76. Things become crystal clear in conversations between Madar and Haelyon on November 1, 2009, the day before the offering, where Madar sets for Haelyon a target price for the bonds. First, the following (Prosecution exhibit 8-12):

"Haelyon: … Wait a minute, I'll tell you how much we bought. Ok. Let's say from the 20th there wasn't… we bought, we bought 2.2 million, 2.2 million and 8.6 let's say.
Madar: 13 total.
Haelyon: 13.
Madar: Ok, good, so… uh… keep going. Try to get to even a price of 117.
Haelyon: All right. So I have about 13… About 6 million more. Right?
Madar: If you see you're falling apart and that, tell me and I'll get more money.
Haelyon: Good."

And later that day (Prosecution exhibit 8-14):

"Madar: You got another 10 million.
Haelyon: All right.
Madar: All right?! Ohh… Try to get to 117 with it.
Haelyon: I'll do everything."

And more from that day (Prosecution exhibit 8-16):

Madar: I'm starting a new job with you, and new job, and we will continue it tomorrow too, tomorrow you'll get more money.
Haelyon: No, not all right. So today I'm giving it my all… (laughing)
Madar: **You're giving it all you've got on series D to complete the mission – you need to get to 117**.
Haelyon: I'll try my best.
Madar: Try your best, exactly. Now beyond this you won't use all the ammunition."

77. During his interrogations at the Israeli Securities Authority, Madar confirmed that he instructed Haelyon to achieve a price of 117 (see his interrogation dated April 27, 2010, p. 18, l. 30-31, p. 19, l. 28-29 (Prosecution exhibit 2-1); his interrogation dated April 28, 2010, p. 2, l. 28-30 (Prosecution exhibit 2-2)). In his testimony in court he changed his version and said this was a maximum price (a "limit" order). In other words, he intended for Haelyon to make the purchases of the bonds as long as their price does not go over 117, rather than in order to achieve a price of 117 (p. 732 of the record hearing, l. 16-25.) In my opinion, the courts was correct in preferring Madar's version in his interrogation rather than the one he offered on the witness stand – his version on the stand is a testimony that is inconsistent with the content of the conversations themselves and the manner in which Madar gave the buy orders, and it is in fact contradictory to what he said at the Securities Authority: when Madar was asked, explicitly, whether this was a "limit"

order, because Levi had claimed in his interrogation that what they meant was "buy up to the 117 limit," he replied – "I don't remember such a thing" and later – "beyond 117 was never discussed, so it's irrelevant to try to get beyond 117…" (his interrogation dated April 28, 2010, p. 3, l. 16-30 (Prosecution exhibit 2-2.) Additionally, even on the stand, Madar noted that on the last day of trade he "had Melisron's goals also in mind" (Record of hearing, p. 732, l. 31-32.)

78. Haelyon's testimony sheds additional light on the above. Haelyon noted that on December 1, 2009 there was an explicit order to buy at a price of 117, and from the moment that order was given he did not try to purchase for less, as this was a "client's order" (Record of hearing, p. 1174, l. 32 through p. 1175, l. 10.) When he was asked if it was unusual for a client to explicitly specify a price, he replied in the affirmative (Record of hearing, p. 1175, l. 30 through p. 1176, l. 1).

79. Madar disputes the way the District Court interpreted the financial opinions in this regard. He argues that both Bahir's opinion and Kalai's opinion reveal that the trade data in and of itself do not conclusively indicate fraudulent intent on Madar's part. Additionally, he argues that the "further step" that Bahir took towards concluding that Madar had intended to act by fraudulent means, relies on the transcripts of the above conversations, which he received from the State. In this regard, it is argued that Bahir, as a financial expert, should have reached his conclusion solely on the basis of relevant financial information, and therefore no weight should be attributed to his opinion as to the conversations' transcripts which point, primarily and at most, to "intentions of the heart" and are an insufficient basis for Madar's conviction.

80. I cannot accept this argument. The role of an expert witness is to paint the court a fuller picture of the issue at hand within his expertise (Goren, ISSUES OF CIVIL PROCEDURE 484 (11th edition, 2013). For such purposes, the court may, when appropriate, consider the expert's **professional conclusion** on the issue at hand in reliance on the relevant evidence (CA 1639/01, *Ma'ayan Tzvi Kibbutz v. Krishov*, para. 25 of (then) Justice Naor (2001)). Of course, this may not substitute the discretion of the presiding judge, who alone, is responsible to reach a **judicial conclusion** based on all the evidence and testimonies presented, including relevant opinions and expert testimonies (CrimA 1839/92, *Ashkar v. The State of Israel*, para. 4 (1994); HCJ 5227/97, *David v. The Great Rabinical Court in Jerusalem*, IsrSC 55(1) 453, Justice Kedmi's opinion (1998)). The specific relevant evidence is part of the context that the witness must consider, in addition to general professional knowledge. After all – "for this it was created."

81. In our case, from the outset, the financial opinions were brought in order to examine, *inter alia*, the purpose that motivated the purchase of series D bonds. Kalai found, based on the trade data alone, that "Ofer Development's choice to purchase in the market and the characteristics of the purchases fit,

financially speaking, the conduct of an investor aimed at an investment opportunity" (Defendant's exhibit 45, para. 199.) In his initial opinion from March 2011 (Defendant's exhibit 23,) before receiving the transcripts of the conversations between Madar and Haelyon, which were presented above, Bahir noted the following:

> "It is possible to interpret the trading activities in two ways: **One:** this was a deliberate activity designed to raise the price to 117. **The second**: the broker was instructed to purchase bonds in a high quantity up to a price of 117… In light of this it is difficult to conclusively determine, based on the trade information alone, that the broker conducted deliberate activity in order to raise the price on this day…" (id. para. 2.4.4.4.; emphasis in the original – Rubinstein).

And later, in his opinion from March 2012 (Prosecution exhibit 9), after he received the transcripts of conversations from the four days prior to the issuing, Bahir found as follows:

> "On December 1, 2009 an employee of Poalim Sahar (HeAlion – Rubinstein) was instructed by a representative of Ofer Development (Madar – Rubnistein) to bring the series D bonds to a target price of 117 Agorot at the stock exchange. Analysis of the methods of executing the trade orders for Ofer Development on December 1, 2009 reveals that indeed it exhibited signs of a (successful) attempt to raise the price of the bond to 117 Agorot" (Id., para. 163).

82. In my opinion, the distinction that Madar wishes to create between the way Bahir examined the pattern of investment and the way he examined the conversations' transcripts, claiming that the latter was outside of Bahir's expertise, is an artificial distinction. It is clear that both are important in order to understand the financial objective behind the investment, and it is not out of the scope of either party's experts' discretion. Therefore, the fact that Kalai did not address the transaction results in his opinion leads it to be considered – with all due respect – as lacking. Additionally, as the District Court noted, Bahir's conclusion in relying on the transcripts, though it contributes to clarifying the matter, is not necessary – as Bahir mentioned, in his first opinion, that it is possible that Ofer's activity was meant to influence the price and bring it to 117. This is joined by the conversations' transcripts which show that Madar in fact instructed Haelyon to bring the price to 117. Given these, the court can also "put two and two together" and come to a similar conclusion that Madar intended to influence the price.

83. As for applying American law, first I will note that indeed in financial matters, and unlike obvious "local" issues, additional room exists to consider comparative law, since other countries also face similar problems and Israel

did not "invent the wheel" (see LCrimA 779/06, *Kital International Holdings and Development Inc. v. Shaul Maman*, para 11 (2012)). And yet, as always, we must consider it carefully and mindfully. As noted at the time by President Barak:

> "Comparative law is not about merely comparing the provisions of the law. Such comparison is of no importance. Comparative law is fruitful if a broad area is explored, on the basis of common premises. In the matter before us, comparison with other countries as to the arrangement of managing investment portfolios is not conclusive. Indeed, the complexity of the arrangements in each and every state, the difficulties and the flaws which it comes to address, and the differences in the stock market and financial systems in each of the states – all of these impede the intelligent and informed use of comparative law" (HCJ 1715/97, *Office of Investment Managers in Israel v. The Minister of Finance*, IsrSC 51(4) 367, 403 (1997)).

And in our case, American law sets different regulations (termed Regulation M) with regard to the intervention in the offering of a new security, in order to prevent potential future manipulation, in instances which have inherent potential for dangerous intervention in the market. In such cases, the state is not required to prove the existence of fraudulent intent, and thus the question of mixed purposes does not arise. The preamble reads as follows:

> Rather than addressing manipulation after the fact, Regulation M seeds to prevent it by generally precluding certain persons from engaging in specified market activities. Also, unlike the more general anti-manipulation provisions, Regulation M does not require the Commission to prove in an enforcement action that distribution participants have a manipulative intent or purpose" (Amendments to Regulation M: Anti-Manipulation Rules Concerning Securities offerings, *available at:* http://www.sec.gov/rules/proposed/33-8511.htm#P42_7646)

Accordingly, Regulation 17 CFR 242.101 establishes:

> "*Unlawful Activity*. In connection with a distribution of securities, it shall be unlawful for a distribution participant or an affiliated purchaser of such a person, directly or indirectly, to bid for, purchase, or attempt to induce any person to bid for a purchase, a covered security during the applicable restricted period."

Thus, it is possible, and of course without setting anything in stone, that according to the above rules, the incident before us, in which Madar decided, as he was serving as an officer of Ofer, to purchase Melisron's series D bonds, while he himself took an active role in offering such bonds, should have been prohibited in advanced *per se*. As such, we would not even be called upon to consider the application of the manipulation offense in general, and the element of intent in particular. As discussed, we must take this into consideration when comparing the manipulation offense in American law to our case.

84. As for applying the American case law on mixed purposes – as mentioned, these do not reveal a coherent and consistent jurisprudence. In contrast to Madar's position, I believe it is insufficient to support his argument that the fact that he had a legitimate financial purpose for purchasing the series D bonds lessens his fraudulent intent and he therefore must not be convicted of the offense of manipulation. Madar refers to the *Mulheren* case where it was held:

> "[W]e will assume, without deciding on this appeal, that an investor may lawfully be convicted under Rule 10b-5 where the purpose of his transaction is *solely* to affect the price of a security." (Id. p. 369, emphasis added – Rubinstein).

Accordingly, once it was not found there that the appellant's **sole** purpose was to influence the price, it was decided to acquit him. However, reviewing the opinions show that ultimately, the court found that it was not at all proven that he acted by fraudulent means to influence the price (id., 370-72). Thus, the court's holding with regard to the sole intent requirement was merely theoretical, and should be weighed accordingly. Additionally, it is interesting to note that the opinion also includes the following:

> "Clearly, this case would be much less troubling had Boesky (the investor – Rubinstein) said 'I'd like to bring it up to 45' or, perhaps, even 'I'd like to see it trading at 45.' But to hand a conviction on the threadbare phrase 'it would be great if it traded at 45,' particularly when the government does not suggest that the words were some sort of sinister code, defies reason and a sense of fair play. Any doubt about this is dispelled by the remaining evidence at trial" (id., 370)".

And recall that in our case, Madar explicitly told Haelyon "try to bring it to 117" (Prosecution exhibit 8-14) and "you should bring it to 117" (Prosecution exhibit 8-16) and not – as in the American example – "it would be great if it traded at 117." Therefore, I believe that if anything is to be inferred from that case to ours, it is the opposite conclusion that Madar wishes us to make.

85. In the *Masri* case, the court developed a certain variation of the "but for" test discussed above, and held that in order to prove the intent element, the state must show that but for the fraudulent intent, the defendant would not have taken the relevant actions (id., 372-73). Yet, in that same case, it was held that, under the circumstances, there was no direct evidence pointing to the defendants' intent to artificially influence the price, and therefore it is unclear how the court applied the test under the circumstances relevant there (id., fn 19). As discussed, this significantly differs from our matter, where Madar's intent to influence the price is learned directly from what he said to Haelyon before the offering. Hence, I believe, that this decision too can lead to no conclusive conclusions in our matter.

86. On the other hand, in the *Kwak* case, the court rejected the defendants' attempt to rely on the "but for" test established in the *Masri* case. It was held, *inter alia*, that the "but for" test loses its importance if it has been factually found that the defendant's fraudulent intent altered the **way** he intended to make the investment, even if it was motivated by legitimate financial purposes (there, fn. 10). In any event, it was held that while the state proved that the defendants had fraudulent intent, it was sufficient to find them culpable for manipulation. It seems that the circumstances of this case fit ours more than the previous cases, because – as opposed to the other cases presented – it was explicitly found that the defendants intended to execute a manipulation, even if such intent was coupled with a legitimate financial intent. Additionally, as in our case, the fraudulent intent influenced the means in which the legitimate financial purpose was executed – even if Madar had intended to make a legitimate financial investment, his conversations with Haelyon reveal that his fraudulent intent influenced the means by which the investment would take place – in four days alone, without "using all the ammunition" too early. Thus, in our case, and similar to the American law, the legitimate financial intent cannot mitigate the fact that Madar operated by fraudulent means to an extent, that he must not be convicted of the offense of manipulation.

87. Madar also challenges the court's conclusions regarding his consultation with Ofer's attorneys. Madar argues that this consultation indicates that he had no intention of influencing the price, as had he wished to do so, he would not have consulted the attorneys to make sure that his actions were lawful (para. 75 of the notice of appeal). Yet Madar emphasizes that he is not making a claim of reliance on attorney's counsel, which may, in extreme cases, absolve the consulting party from criminal responsibility (para 34(19) of the Penal Law), but claims that this can indicate both his good faith and that he did not act with intent to influence. As for the District Court's finding that Madar did not share relevant information with the attorneys, which indicates he lacked good faith, it was argued that the court erred in this finding since the attorneys – as experts on the matters – were the ones who should have raised the potential problems in circumstances such as ours, and to request information accordingly. Madar's good faith is seen, as argued, by the mere fact that he brought the issue to them.

88. In my opinion, Madar's consultation with the attorneys does not indicate his good faith, as argued. In an email sent by Ofer's attorney to Levi and Madar on November 25, 2009, it was written: "The purpose of the report is to prepare the purchase of series D bonds (without concern for use of inside information) one trading day after publishing the information to the public (Prosecution exhibit 18). Another email from the same day sent to Levi, Madar and Yaacovi reveals that the consultation revolved around the way the offering report must be prepared (Prosecution exhibit 20). Madar did not argue, and certainly did not present any evidence to this effect, that he presented the attorneys with information that could have raised their suspicions that he intended to influence the price, and therefore, I do not think that this can indicate he acted in good faith. This is true even if we went as far as to say that he tried to "launder" his activity by acquiring the attorneys' approval while they had only partial information.

89. Nevertheless, and with the warranted caution because we do not have full information regarding this matter and the Ofer attorneys are not a party in the proceedings before us, I will note that in my view, it should be internalized that these cases necessitate careful legal advice from the lawyers consulted. When the senior officers in each of the companies relevant to the transaction are the same people, and these companies are connected by ownership, there is a concern that they will take unlawful action, whether knowingly or not. This is despite the law's requirement that each company act as a separate legal entity working toward its own profit, and thus there is supervision accordingly. And so, when it comes to the senior officers in each of the companies, there is a concern – and this is said, or course, without "generally" tainting anyone – that with the intention to benefit the conglomerate as a whole, they will act in ways that may harm one of the corporations or the investing public, and that in some cases, as in ours, this may amount to a criminal offense. The business sense motivates those heading financial corporations and their desire to achieve profits as expected, and they may from time to time fail and fall in traps that lawyers could have prevented, as "you shall not place an obstacle before the blind". Therefore, the legal advice in these matters must be "active" and clarify the legal boundaries and the different nuances, by virtue of the corporate structure and the identities of the officers, even if the client did not explicitly reveal to the lawyers any wishes to execute acts that may amount to criminal offenses. I highly doubt that the client would come to the attorney and ask, for example: "I wish to manipulate the stock market, what is your legal opinion on the matter?" And still, the lawyer should convey to the client the legal complexity of the matter and the different nuances beforehand, so that the lawyer can be seen to properly serve the client.

90. Before concluding this part, and beyond the necessary scope, I will note that Madar's motive in taking the fraudulent action was clear – to benefit Melisron, to which he provided financial services, as well as ultimately benefited Ofer Group, where Madar served as financial manager. Though

Madar did not enjoy personal financial gains, benefiting the companies' financial state would clearly have favorable consequences for Madar as the one responsible for their financial management, and contribute to solidifying his status. In any event, this is said beyond the scope, as the evidence clearly points to Madar's fraudulent intent, after being carried away and being overly eager in fulfilling his duties, that led him, regrettably, into the boundaries of criminal behavior and therefore there is no need to address the motive at the basis of his activity.

91. To conclude this part: the evidence reveals that when he came to purchase series D bonds, Madar acted out of mixed purposes. One purpose was a legitimate financial purpose to invest in the bonds to benefit Ofer Development. His second purpose – a clear fraudulent intent to influence the price and bring the price of the bond to 117 Agorot, as he did successfully. Therefore, Madar acted in order to influence the price, by fraudulent means, and the District Court properly convicted him for the offense of manipulation under section 54(a)(2) of the Law.

Offenses of Reporting and Inducement

92. First, I will comment that from the outset, Madar's challenge to his conviction of the offenses of reporting and of inducement were presented at the end of his notice of appeal (paras. 94-95) and were not included in the main arguments. Substantively, it was claimed that should Madar's appeal of the offense of manipulation be granted, his conviction of the other offenses would be voided. But, even if Madar's appeal of the manipulation offense be rejected, his appeal of the offenses of inducement and reporting should be granted because the purchase of the bonds was done spontaneously, rather than in the course of Madar's duties in Melisron, and in any event Madar was not responsible for Melisron's reports, and thus must not be convicted of these offenses. At the hearing held before us, it was argued that the District Court erred with regard to the first reporting offense, as the court found Madar to have omitted a material detail from the report dated November 25, 2009, for which he was convicted of the first reporting offense. However, the court also found that Madar's fraudulent intent materialized only the day after, on November 26. Therefore, there was no place to find that he omitted a material detail from the prospectus and for this reason too, there was no place to convict him for this offense.

93. I believe that these arguments by Madar should be rejected. As for the first reporting offense – the report with the intention to mislead according to section 53(a)(4) of the Law. Even if Madar's argument that he was not an officer of Melisron during the relevant period should be accepted – **and as I will detail below in discussing the State's appeal against Melisron, in my opinion this argument should be rejected** – this could not mitigate Madar's responsibility in this regard. As this Court has held before:

> "The provision of section 53(a)(4), according to its language, does not limit the type of people who may be considered as 'a person who… caused" the reporting duty to be breached. The provision does not restrict the duty to report to a corporation or its officers… Therefore, even one who is not an officer of the corporation, who caused the corporation to mislead in its reports, may be criminally responsible under the section, and the case before us is one such case". (CrimA 5307/09, *Davis v. The State of Israel*, para. 92 of Deputy President Rivlin (2010) (hereinafter: "the *Davis* Case").

And in our case, Madar – who was charged with Melisron's financial matters – chose not to include in Melisron's report from November 25, 2009 the massive purchases of series D bonds by Ofer Development, which were made, as mentioned and among others, with the goal of influencing the price of Melisron's bonds. This failure amounts to a report with the intention to mislead, in violation of the provision is section 53(a)(4) as mentioned. And in any event, the evidence shows that on November 25, 2009 Madar emailed Melisron's attorney about his report regarding the purchase of the bonds, and wrote: "Alright with me, if Avi does not have any comments we can issue the report" (Prosecution exhibit 19). Hence it is difficult to accept Madar's argument that he was not responsible for Melisrons' report (even though Levi, as CEO of the company, was also required to approve it).

94. As for Madar's argument in regard to the date of the fraudulent intent's materialization – the court reached a factual finding that Madar's conduct during the purchase of the bonds, including his choice not to consult his attorneys on this matter, shows that as early as the date of the report's publication, the day prior to purchasing the bonds, he intended to conceal the influence plan from the investing public (para. 356 of the verdict). Therefore, his argument, as raised in the hearing, that it was impossible to conceal his fraudulent intent from the report on November 25, 2009 when it only materialized, according to the District Court, on November 26, 2009 must be rejected. Further, even if it had been found that his fraudulent intent only materialized the day after the report was published, I am hard pressed to accept the argument that this could mitigate his criminal responsibility. As the State pointed out, Madar could have corrected the report after its publication, and once he had chosen not to do so, **knowing** that the report may mislead investors, it must be found that the elements of the offense were met in this regard.

95. As for the second reporting offense – including a misleading item in a prospectus under section 53(a)(2) of the Law: the District Court discussed the difference between this section and section 54(a)(4) of the Law, particularly before Amendment 45 of the Law (and as discussed, the relevant offense was committed prior to the amendment). Madar does not challenge this interpretation and so I will repeat it briefly. Section 53(a)(2) concerns the

prohibition of breaching the duty to report in the initial market (in a prospectus, including a shelf proposal report, as in our case), whereas section 53(a)(4) concerns the prohibition of breaching the duty to report in the secondary market (the ongoing duty to report). Prior to Amendment 45 of the Law, there seemed to be some difference between the two sections' *actus reus*. Section 53(a)(4) established (and still does) that it must also be applied to "**A person who…** caused a report, notice, registration document or purchase offer specification, pursuant to this Law or regulations enacted hereunder and submitted to the ISA or the stock exchange to contain a misleading item - all with the intention of misleading a reasonable investor". Section 53(a)(2), prior to its amendment, did not include this possibility explicitly, and seemingly only allowed the convictions of those who were responsible for ongoing reporting, and not of those who were not responsible for the report, but through their actions (or failures, as in our case), caused it to be published with a misleading item. As the District Court noted, relying on the relevant discussions in the Knesset, it is doubtful whether the legislature wished to create this distinction between the *actus reus* of the two offenses – the rationale behind the expansion of the responsibility for reporting in the initial market to those who caused the inclusion of a misleading detail in the report, rather than those who were responsible for the report, is no less and no more important than that which exists for the secondary market. Therefore, even if Madar had not been responsible, as he argues, for the publication of the shelf proposal report in our matter, this is insufficient to establish in advance that he must not be convicted of committing the offense.

96. As a result, I believe that even if Madar had not been the one to sign the shelf report dated December 2, 2009, this would not have mitigated his criminal responsibility in this matter. First, the rationale for the court's finding in the *Davis* case, which we discussed above with regard to the offense under section 53(a)(4) of the Law, also applies here (see and compare CrimA 2103/07, *Horovitz v. The State of Israel*, paras. 55-60 (2008) (hereinafter: "the *Horovitz* Case")). Any other interpretation is inconsistent with the purpose of the provision, which is aimed at preventing the misleading of stock market investors. In our case, Madar, who was responsible for managing Melisron's finances at the time, and was present at the board of directors meeting on December 2, 2009 (as indicated by the meeting's minutes, Prosecution exhibit 33), failed to report in the shelf report from December 2, 2009 about the purchase of the bonds, which were bought several days prior in order to influence the price. Even if he was not the person directly responsible for the shelf report's publication and did not sign the report, it is enough that he was responsible for managing Melisron's financial matters and played a dominant role in the actual offering, to establish that he should be convicted of the offense of including a misleading item in a prospectus by way of failure to act – by not including a material detail in the report, that is, the purchase of the bonds – which was done to influence the price.

97. As for Madar's conviction of the offense of inducement: the court held (para. 392 of the verdict), that the way in which Madar acted amounts to making a material false representation. The court held that this had real potential to influence the discretion and consideration of investors when deciding whether to purchase Melisron's bonds, and that this false representation fell within the scope of the offense of inducement under section 54(a)(1) of the Law. In the appeal, Madar does not raise a substantive argument against the well founded holdings of the District Court on this matter, and I therefore find no need to address it. However, it should be noted, and we will return to this point in the sentencing phase as well, that the mere conviction of this offense has no real weight in setting the appropriate sentence, because both the offense of manipulation and the offense of inducement stem from the same events, and the activities at their root are similar.

Madar's Sentence And The Appeal Against His Sentence

98. The District Court set the range of Madar's sentence between 9 and 24 months' imprisonment, with additional imprisonment time suspended. In doing so, the court considered, on the one hand, the nature of the offenses which Madar was convicted of, and the harm caused to the stock market as a whole as a result, and on the other hand, the fact that Madar did not commit the crimes for his own immediate personal financial gain, and that it had not been proven that long term planning preceded the commission of the offenses. The court additionally mentioned that the range of the sentence was set in light of the offenses for which Madar was convicted as a whole, because it was one ongoing event – instructing the purchase of series D bonds in order to influence the price without reporting to the investing public.

99. As for Madar's sentence within the range of sentencing, the District Court sentenced Madar for a year of imprisonment, 9 months of suspended imprisonment, and a fine of NIS 100,000. The court considered the character witnesses presented: Adv. Doron who has professional ties with Madar and wished to testify as to his character as an honest financial manager; Mr. Gutterman, Madar's father in law who testified about Madar's positive performance as a family man and about Madar's difficult state of mind since the events occurred and the investigation began; and to Madar's personal appeal, in which he described how the events and the criminal proceedings that followed caused him years of shame and insomnia. The court also considered different persons and entities who wrote the court and testified to his good character, both personally and professionally. Further, according to section 40.11 of the Penal Law, the court noted the relevant circumstances around Madar's sentencing: his positive background and the impact of the sentence on his family – his wife and three children, including a baby born about a month prior to the sentencing; his good behavior and contribution to society, his lack of any criminal history; as well as the fact that he did not commit the offenses out of greed or personal financial gain but in order to benefit the companies.

100. In conclusion, the court noted that his sentence was part of a recent trend to increase sentencing for financial and economic offenses, which are usually committed, by their very nature and substance, by normal, positive people who may even invest some of their time and money to contribute to society. The past years' amendments to the Penal Law and the Securities Law, so it was held, require significantly heavier sentences for such offenses in order to deter actors in the stock market from committing unlawful activity, as well as to provide a sense of security to the investing public, whoever they may be.

101. With regard to his sentence, Madar argued that in setting a range for the sentence the court failed to sufficiently account for Madar's belief that his actions were indeed lawful, and that in any event – he did not act out of personal greed. He also argued that not enough weight had been given to the fact that this was the first instance where a court convicted a person in a case of mixed purposes, and that this should lower the bar for the proper sentence. In addition, it was argued that in previous cases, which were much more egregious than ours, when the defendants acted with full awareness of the unlawfulness, and out of personal greed, the sentences were lighter. It was claimed that the court did not consider that had Madar's activity taken place now, then under Amendment 45 of the Law the appropriate proceeding likely would have been administrative rather than criminal, and thus the sentencing range appropriate for our case is lower than that set by the District Court.

102. Madar further maintains that the District Court erred by holding that there is no room to stray from the sentencing range it established. It was noted in this regard that in a different cases adjudicated by the District Court, it was decided that there was room to lower the sentence as the defendant was a positive person with no criminal history, whereas in our case the court did not find this to be a significant mitigating factor, which constitutes a departure from the principle of uniformity in sentencing. It was also argued in this regard that precisely because Madar was a positive person with no criminal history, his chances of rehabilitation are greater, which the court should also have considered. It was thus argued that his sentence should be lighter and he should not be sentenced to incarceration. It was finally claimed, in the alternative, that the court erred in setting the sentence within the sentencing range established because under the circumstances of this matter, the sentence should have been set, at most, at the lowest point of the sentencing range – that is, nine months incarceration.

103. The State argues, in contrast, that Madar's argument that in a case of mixed purposes, such as this case, the sentence should be lighter must be rejected. This is because the social value protected by the offense of fraud – protecting the stock market and the investing public – is similarly harmed even when the offender had a legitimate financial purpose along with the fraudulent one. It was argued that although in the cases on which Madar relies the offenders were given lighter sentences, this was at a time when the sentencing standard for securities offenses was lower than the standard common in recent years.

Currently, courts repeatedly emphasize that the appropriate sentence for these offenses is incarceration.

104. As for Madar's claim that had the offense been committed today the proper sentence would have been administrative rather than criminal, it was maintained that this claim is incorrect. Administrative enforcement is designed to target offenses where no intent was proven, and this is unlike the relevant offense here, where the intent is one of the elements of the offense of manipulation and the court did in fact hold in no uncertain terms that Madar had such intent. Therefore, even had this case been adjudicated today, it likely would have reached the criminal enforcement track. In conclusion, it was noted that to the extent that mitigating factors exist in our matter – and primarily, that Madar did not operate out of personal greed – these were considered by the District Court, which sentenced the appellant to a light sentence in considering the severity of the offense.

105. After reviewing and hearing the parties' arguments in this regard, should my opinion be heard, we would not intervene in the sentence to which the District Court sentenced Madar. This is because it does not stray from the recent years' trend of heavier penalties for white collar crimes, which stems from the unique nature of such offenses:

> "Let us not mischaracterize financial offenses as 'white and pure'. These are sophisticated offenses, which are difficult to detect, usually committed by offenders with status and education who use others' finances while exploiting their power and status and breaching their fiduciary duties. Often these offenses remain hidden for many years, and when they are discovered, the serious harms they caused are also revealed. Such harms are generally much more severe than the harms caused by 'regular' property offenses. It was with good reason that this Court has found over the past several years that it is time to raise the standard of penalties for financial offenses, including incarceration when appropriate." (CrimA 4430/13, *Sharon v. The State of Israel*, para. 22 of Justice Danziger's opinion (2014); see also CrimA 9788/03, *Topaz v. The State of Israel*, IsrSC 58(3) 245, 250 (2000); the *Horovitz* case, para. 339; CrimA 677/14, *Dankner v. The State of Israel*, para 37 (July 7, 2014) (hereinafter: "the *Dankner* Case")).

I am aware that we are concerned with private companies, aside from Melisron, but particularly in light of the proposed outcome in terms of Melisron, recall that the sentence for offenses in the field of securities in an "area" other than inside information was discussed in CrimA 6020/12, *The State of Israel v. Eden*, (2013) (hereinafter: "the *Eden* Case"), where my colleague Justice Barak-Erez discussed (para. 29) the "justified weight of the clear public interest in enforcing the law in the field of financial offenses in

the stock market… as a counter balance of this temptation (for 'normative' officers wishing to exploit an opportunity – Rubinstein) the legislature opted to establish a difficult sanction, which must come to life as part of the battle against crime that harms investors' private interests, and even more seriously – the public interest of the entire Israeli market in an efficient and reliable stock market." Recall that we were concerned there with the offense under section 52C of the Securities Law, the sentence for which is identical to that for the offense in section 54(a), that is, up to five years imprisonment, a fine five times – and according to the new version of the Law, for a corporation up to twenty five times – the fine set in section 61(a)(4) of the Penal Law. And in the *Eden* case the Deputy President discussed the "tipping point" in terms of the sentence there, and I myself noted:

> "Let us remember that the legislature set a sentencing tag of five years, among others, to the offense under section 52C as discussed in this case. I myself believe that there is no escaping raising the sentencing bar in such cases. The nature of these offenses is of clear harm to the public's trust and there are no clichés, in the common 'laundered' termination. But let us put ourselves in investors' shoes, for example, who learn that the heads of a company in which they invested their funds are profiting at the expense of the investing public. Indeed, a criminal conviction is a blemish, community service that substitutes incarceration is unpleasant – but they cannot at all be compared to incarceration behind bars, doubtfully a pleasure even in the best of prisons. It means the denial of freedom, removal from family, being constantly subjected to the control of others, generally unpleasant company, and the like. We cannot therefore analogize such incarceration to other forms of punishment, certainly not for a person who had been considered normative and for his entire life only read about prisons or watched them in films. Perhaps incarceration behind bars would deter, assuming deterrence has true efficacy, and should it be expressed – as it should – that this is the expected fate of an inside information offender."

It would seem this applies to our matter as well.

106. As discussed, the actions for which Madar was convicted were harmful. As mentioned in a similar context "their outcome is not manifested only in harm to one investor or another, but in the loss of public trust in the stock market" (the *Tempo* case, para. 33 of President Barak's opinion). We will also mention that our matter concerns significant amounts of funds, since the expansion of series D bonds by Melisron and the purchase of the bonds by Ofer were at sums of tens on millions of Shekels.

107. The sentence handed down by the District Court certainly is not light. Especially in light of the fact that Madar did not act for personal gain, and that in addition to his fraudulent intent, his investment had a legitimate financial purpose. On the one hand, I agree with Madar that there was room to give the latter consideration more weight in the sentencing phase, as the fate of those who acted out of fraudulent intent should be harsher than those who also acted out of legitimate financial purposes. This is especially true when, as in our case, the legitimate purpose motivated the investment for a long time, while the fraudulent intent materialized, as the evidence reveals, only several days before it was carried out.

108. On the other hand, I believe the District Court did not give sufficient weight to the deterrence considerations in cases such as this, as it did not address considerations of general deterrence (para. 22 of the verdict). The court addressed general deterrence in terms of the trend of heavier sentencing beyond the range, but section 40G of the Penal Law addresses heavier sentencing **within** the established ranged. As I have noted in a similar context:

> "In my opinion, even those who do not believe that general deterrence, perhaps as opposed to specific deterrence, usually works within the context of 'classic' crime such as murder, robbery, rape, assault and the like (see CrimA 7534/11, *Mizrahi v. The State of Israel*, (2013), para. 3 of my opinion), could think that it has a chance with regard to financial offenses, or 'white collar'. The planner of offenses – or should we say 'schemer' – who learns that his fate may be incarceration, might perhaps think twice. As noted, it seems in our case that a deterring sentence is designed to deter not just the appellant himself going forward, but just as much the public, and primarily – as noted by the District Court – those serving in high offices within corporations, lest they betray the trust given to them. Perhaps precisely for essentially regular, good people who plan their conduct, the 'planning' would also include the risk of criminal prosecution" (the *Dankner* case, paras 35-36).

In my view, these things are particularly apt for our case, once we are concerned with a conglomerate, and when the senior officers are the same people for each of the companies, there is real concern that while the officer works under one hat, he would consider factors that are relevant to his other hat. As Madar noted in his testimony:

> "There was no conflict of interests whatsoever between Ofer and Melisron, it was exactly the same. Both had the same interests, but **somehow I must have become confused, I had Melisron's goals in mind, too**." (Record of hearing, p. 732, l. 29-32; emphasis added – Rubinstein).

I believe that the concern for such "confusion" is almost inherent to the situation described. Though the legislature did not find it fit to prevent the possibility of wearing several hats, the courts must send forth a clear message of deterrence: while one serves as a senior officer in several companies related by ownership, one must take extra precautions when operating in the intersection between them, particularly when one company is a **public company**, with all that it entails, and particularly when it comes to the decision by one of the companies to purchase securities of another. For if one does not, one risks the significant sentence of incarceration.

109. As for the claim that administrative enforcement is appropriate for our purposes and therefore the range of sentencing should be lighter, I fear I cannot accept it. The legislative memorandum of the bill regarding the mechanism of financial sanctions in the Securities Law explicitly states that "the administrative enforcement mechanism proposed is designed to target the violations where the required *mens rea* needed to prove they have been committed is at most negligence" (Bill for Increased Efficiency in Securities Enforcement (Legislative Amendments) 2010, **Bills** 489, 440.) Our matter, as mentioned, is concerned with an offense requiring intent, and it seems here that the proper means of enforcement was not administrative enforcement, even if this had been available at the time the offense was committed. This must therefore be rejected as a basis for reducing the sentence.

110. I must note that I am sorry for Madar – a young man, and as I understand, talented, who held a senior position in important companies in our economy and who mis-stepped by being overly eager to reach his goals, to the extent that he reached the boundaries of crime. I do not make light of the difficult implications of his incarceration, and I regret he came to this. But in light of everything discussed, there is no escape from incarceration behind bars. In conclusion, as said, I did not find it fit to intervene in the District Court's decision in terms of Madar's sentence.

The Appeals Regarding The Companies

111. The charges against Ofer Investments, Ofer Development and Melisron were submitted under organ theory. Ofer Investments and Ofer Development were indicted – and convicted – for committing the offense of manipulation and offense of inducement through Madar, as an organ of the companies (the indictment also touched on the offenses having been committed through Levi, and another organ, but as mentioned he was acquitted), whereas Melisron was indicted – and acquitted – of committing the offense of manipulation, offense of inducement and offenses of reporting, through Levi and Madar. We will now address the relevant legal framework and then the two appeals – by Ofer Development and Ofer Investments against the State (CrimA 1899/14) and by the State against Melisron (99/14). I will say at the outset that I have reached a conclusion that the appeals by Ofer Development and Ofer Investments

should be rejected, whereas the State's appeal against Melisron should be accepted.

The Legal Framework – Organ Theory

112. A corporation does not operate by itself in the "physical" sense. It – the corporation, an abstract legal entity created by the law – does not decide on investments, does not actually sign reports, does not hire or fire employees and does not take any action reserved to humans, even if these are legally associated with it. For this reason, it has employees and people who operate on its behalf, whether they are senior or not, who on a daily basis execute a variety of actions which are primarily meant, ordinarily, to increase the corporation's profits (section 11 of the Companies Law, 1999). Additionally, in the words of then Justice Barak: "A corporation has no natural existence. A person has a natural existence. There is no corporation without law, but there is no law without people. People are a prerequisite for the law, and the law is a prerequisite for the corporation". (CrimA 3027/90, *Modi'im Company Construction and Development Inc. v. The State of Israel*, IsrSC 45(4) 364, 381 (1991) (hereinafter: "the *Modi'im* Case"); see also CrimA 4670/03, *I.M.S. Investments Inc. v. Klal (Israel) Inc.*, para. 11 of President Barak's opinion (2006); O. Haviv-Segal CORPORATIONS LAW, chapter 3(b) (2007) (hereinafter: Haviv-Segal)).

113. When an individual takes a particular action in the course of their role in a corporation, there is a range of situations where the commission of the action by him justifies imposing personal liability, as opposed to vicarious liability, on the corporation itself (Y. Gross, THE NEW COMPANIES LAW,121 (4th edition, 2007)). This is the source of the organ theory (which sadly also has no Hebrew name) which "presents the organ as the 'human face' of the corporation and sees them both as one 'combined entity' meant to provide the corporation with human character that enables imposing on it – as a corporation – personal criminal liability" (CrimA 7399/95, *Nehoshtan Elevator Industries Inc. v. The State of Israel*, IsrSC 52(2) 105, 124 (Justice Kedmi) (1998) (Hereinafter: "the *Nehoshtan* Case"); see also CC 230/80, *Pneidar, Investments Development and Construction Company Inc. v. David Kastro*, IsrSC 35(2) 713, 726 (1981)). A primary goal in imposing liability under the organ theory is deterring the corporation and corporations like it, so that going forward they would prevent further offenses by creating supervision mechanisms that would be able to prevent, in advance, situations which lead to criminal behavior:

> "When shareholders opt to incorporate as a company, and when they act to increase the scope of the company's activity, then they create an organizational structure vulnerable to certain legal violations, when the organizational structure challenges law enforcement authorities and prevents them from being able to properly enforce legal norms. Therefore, there is

> a normative consideration as well that guides those shareholders who start the corporation and enjoy its existence. They are required to ensure that they each follow the law's provisions. They must create internal supervision mechanism that may ensure the prevention of corporate crime and ensure that the law is obeyed by the organs who operate within the corporation" (Haviv-Segal, chapter 2, section 4.c; see also Hamdani, *Transactions between Interest Holders and Corporate Liability for Securities Fraud*, MEHKAREI MIHSPAT 23 769, 772-74 (2007)).

As for the status of a corporation – a modern legal creation – in Jewish law, see Rabbi Sinai Levi, *An Incorporated Company's Liability to a Third Party*, TCHUMIN 26 (2006), 362 and the sources therein. The author points to (p. 364) the difficulty in applying Jewish agency law, among others because of the rule that "there is no agent in a crime" (Bavli Kidushin 42, 2; and see MISHNA Bava Kama 6, 4), it is therefore preferable to see this as "the law of the kingdom shall be the prevailing law," see also Dr. M. Vigoda (with H.Y. Tzafri) AGENCY (1984) 384 (note 295). The rationale for "there is no agent in a crime" (Bavli Kidushin, Id.) is that "the words of the Rabbi (G-d – Rubinstein) and the words of the student are the words of those who hear" and thus the agent cannot take upon himself the commitment of a crime. Though our case is different, as a corporation did not instruct the agents to commit the crime, but rather their actions are seen as its long arm.

114. This is true both for civil law and for criminal law (the *Modi'im* case, p. 379-80; CrimA 7130/01; *Solel Boneh Construction and Infrastructure Inc. v. Yigal Tanami*, para 19 of Justice Tirkle's opinion (2003); Haviv-Segal, chapter 3(b)). As for the criminal aspect, which is relevant to our case, though it is essentially a creature of the case law, it has been anchored in Amendment 39 of the Penal Law from 1994, in section 23(a)(2), which states as follows:

> "(a) a corporation will be held criminally liable –
> (b) for an offense that requires proving a criminal intent or negligence, if, under the circumstances and in light of one's position, authority and responsibility for managing the corporation's affairs, the act that constitutes the offense and the criminal intent or negligence must be seen as the act, intent or negligence of the corporation."

As it was held in the case law, this section does not narrow the application of the organ theory as it was developed in the case law, but anchors it in primary legislation (CrimA 2560/08, *The State of Israel – The Antitrust Authority v. Yaron Vohl*, para 78 (2009) (hereinafter: "the *Vohl* Case").

115. At the center of the organ theory stands, of course, the organ – that high ranking long arm of the corporation. In the case law and the scholarship, two

alternative tests are common for inquiring whether a certain person is to be considered an organ in a particular corporation. The first test, **the organizational test**, examines whether the individual is an organ according to their formal role and position in the corporation. Thus, the case law recognized "the general assembly of shareholders, members of the board of directors, the CEO and the COO" as clear organs of the corporation (the *Modi'im* case, p. 383; see also Groos, p. 123-24; M. Kremnitzer and H Ganaim, *A Corporation's Criminal Responsibility*, SHAMGAR BOOK – ARTICLES – PART 2, 87 (2003) (hereinafter: Kremnitzer and Ganaim)).

The second test, **the functional test**, asks whether the function committed by the particular officer warrants seeing their acts as the acts of the corporation "whatever the hierarchical status of the corporate actor may be" (Gross, p. 124; see also the *Modi'im* case p. 383; CC 8133/03, *Yitzhak v. Lotem Marketing Inc.*, IsrSc 59(3) 66, 84 (2004); CrimA 3891/04, *Arad Investments and Industry Development Inc. v. The State of Israel*, IsrSC 60(1) 294, 349 (hereinafter: "the *Arad* Case"); Kremnitzer and Ganaim, p. 87-88.

116. Both tests, which are rooted in common sense, do not exhaust the list of officers who may be considered as organs, and for a good reason:

> "Indeed, out of the necessity of reality, the terms organs and other senior officers of a corporation are somewhat amorphous and do not form an accurate and unified framework for discussion. But their logic is clear. They are designed to encompass all the decision-making persons and high institutions of a legal body, who are responsible for shaping its policy and executing most of its actions internally and externally, regardless of their position titles or jobs. The list of offices and positions is not identical in every corporation and may somewhat change according to the organization's structure, the nature of its activity and the division of powers and authorities of the examined body. Considerations of legal policy may often take part in establishing the framework, and naturally may prevail in borderline cases" (A. Lederman, *Criminal Responsibility of Organs and Other High Officers of a Corporation*, PLILIM – VOL 5 101,107 (1996); see also Kremnitzer and Ganaim, p. 89).

117. Melisron argues that the organizational test and the functional test must be combined as cumulative tests. In other words, a corporation could be found responsible under the organ theory only when one committed the offense as a senior officer of a corporation **and** in line with the function they fill (para. 11 of the main arguments). This argument must be rejected. **First**, the case law clearly points out that these are alternative tests:

> "A body or a senior officer of the corporation (the general assembly of shareholders, members of the board of directors, the CEO and the CFO) will **certainly** be an organ of the corporation. But an officer who is not a senior officer may **also** be considered an organ of the corporation, and this when, according to the articles of incorporation or under another legal source, we may see their actions and mindsets as those of the corporation itself" (the *Modi'im* case, p. 383, then Justice Barak; emphasis added – Rubinstein; see also Gross, p. 123-124).

Second, with all due respect, I am hard pressed to find the logic in this argument – would it make any sense, for example, for the corporation's CEO, who acts in the course of their position in the company and in the best interest of the company, not to represent the company in his actions? In such a situation it is hard to meet the requirement to prove that the function the CEO fills justifies seeing his activity as that of the corporation – something that is the outcome of their very role in the corporation. At most, it may be said that when the corporation wishes to distance itself from the actions of a person who served as a senior officer, who has acted in the course of his role in the corporation and did not act with the intent of harming the corporation – it would carry the burden of showing they did not represent it in their actions, as "there is no agent in a crime", and this is a heavy burden. Still, I will emphasize that a CEO, for example, is not similarly situated to a "professional manager" or a "regional manager" and the like whose title does not necessarily point to their being senior officers (see CrimA 16/08, *The State of Israel v. Best Buy*, para. 15 (2009)). In such cases, there is room to examine the function filled by the specific officer on a case by case basis. In other words, there are organs who, for purposes of the matter, are one and the same with the corporation, and there are officers whose actions must be specifically examined.

The fact that these are alternative tests is emphasized particularly in terms of the functional test. As noted, this test attaches the individual's actions to the corporation in light of the function they hold within the corporation, "**whatever the hierarchical status of the corporate actor may be**" (Gross, p. 124, emphasis added – Rubinstein). Therefore, absolving a corporation from criminal responsibility solely because the individual, who committed the act on behalf of the corporation and for its benefit, did so without being formally placed in the corporate hierarchy is illogical and contradicts the purposes at the basis of the organ theory.

118. All this as for the identity of the organ, but it is all insufficient. In order to find a corporation responsible under the organ theory for actions taken by the corporation's organ, courts should find that it is **appropriate** to impose responsibility on the corporation for the concrete actions of the organ (the *Modi'im* case, p. 383-84). This is a question of legal policy, and over the years

the case law has developed the following tests: **first**, did the legislation not intend to exclude the corporation's responsibility from its scope (*Modi'im*, p. 385); **second**, was the organ's action taken in the course of fulfilling his duties (Kremnitzer and Ganaim, p. 97-98); and **third**, was the action to the benefit of the corporation, or at the very least not aimed against it (*Arad*, para. 66; CrimA 5734/91, *The State of Israel v. Leumi and Partners Investment Bank Inc.*, IsrSC 49(2) 4, 28-29 (1995) (hereinafter: "the *Leumi* Case")).

119. As for the first test, as we know, section 4 of the Interpretation Law, 1981 stipulates that as a rule, anywhere Israeli law refers to a "person", the law or regulations also apply to a corporation. There is no dispute that this is also true for imposing criminal responsibility, and that this is long enshrined in our legal system in these strong words by our predecessors: "in offenses as those before us, not only does this seem strange and undesirable, but should we consider the legislative intent, if we were to allow incorporated bodies qua incorporated bodies to say: 'the law applies only to that whose hand took part in the act, and we escaped.'" (HCJ 125/50, *Beit HaShita Circles Group v. The Chairman and Members of the Court for Prevention of Stealing Goals and Scalping in Haifa*, IsrSC 5 113, 139 (President Zmorah) (1950); and see also the *Modi'im* case, p. 384-85; CrimA 4855/02, *The State of Israel v. Borovitz*, IsrSC 59(6) 776, 862 (2005)).

However, when it comes to offenses of a "human" nature, such as bigamy, rape and the like, it has been noted that there is no place to apply the organ theory and attribute the conduct and criminal intent of the organ to the corporation (the *Modi'in* case, p. 385; *Lederman*, p. 103), and common sense supports these examples. But there may be different cases. A review of the jurisprudence of this Court reveals that so far no use has been made of this test as a means to entirely negate the application of organ theory, and the discussion – insofar that there has been any discussion – has been merely theoretical (the *Modi'im* case, p. 385). Thus, for example, even in the context of the offense of negligent manslaughter, which arguably has a "human" nature, it was found that the corporation should be held criminally responsible for violating the Workplace Safety Ordinance (New Version), 1970 and the regulations under it (LCrimA 8174/05, *Doron v. The State of Israel* (2005); and for in depth discussion of that same case see CrimC (Jer) 1267/03, *The State of Israel v. John Doe*, para. 4(a) (2004)). I will add that, as pointed out by Kremnitzer and Ganaim, it is highly doubtful whether it is appropriate to set blanket rules, and any case must be considered on its merits (Kremnitzer and Ganaim, p. 94-95).

120. As for the second test, the question whether the organ acted in the course of their position is not necessarily a simple one. On one extreme, it is obvious that an activity of a clear personal nature, which the organ conducted out of work hours and out of the workplace, is unlikely to fall under the course of their position. On the other extreme, it is likely that activities that the organ conducted and are inherently related to their position and were executed under

instructions from his managers would come under activity within the course of the position.

In the range between the two ends of the spectrum there might be many cases. However, it seems that the approach taken by the case law, and in my view rightly so, is that the range of situations that may come under "in the course of the position" should be broadly interpreted. For example, it was held that when the organ commits the criminal activity on behalf of the corporation but in a manner that was seemingly beyond the scope of the authorization he received, this may not serve as a defense for the corporation against applying the organ theory and imposing responsibility on the organization for the organ's actions (the *Nehoshtan* case, p. 122-123; the *Leumi* case, p. 26-27). Even when the board of directors of the corporation opposed a move made by the organ, the corporation was found criminally responsible for his actions (the *Vohl* case, para. 78). Simply put, the test is whether the organ generally acted as a "corporation person" rather than a private individual, and should the answer be in the affirmative, this test has been met (*Nehoshtan*, p. 122-123). Analogously, in administrative law, at times an estoppel is created when one relies in good faith on an administrative authority even when the latter has acted outside its authority (Daphne Barak-Erez, ADMINISTRATIVE LAW A 153 (2010), AA 7275/10, *The Special Committee Under The Disengagement Plan Execution Law v. Amiram Shaked*, para. 24 and the sources there (2011).

121. The third test is essentially a subset of the second test. The case law held in this context that the activity that the organ committed intentionally against the interests of the corporation would not trigger the corporation's responsibility, since in such a case the organ did not act as an organ but as a private individual. Thus, his conduct should not be attributed to the corporation. As noted by Kremnitzer and Ganaim, a primary justification for imposing responsibility on the corporation for the individual's actions is that the individual acted to benefit the corporation and therefore, in acting against the corporation it would not be justified to impose responsibility on the corporation for those actions. Thus, for instance, when it was found that the manager of the company made a false statement in the corporate documents in order to produce profits to someone **other** than the company, it was held that the corporation should not be held criminally responsible (CrimA 24/77, *"Pan-Lon", Engineering and Construction Company Inc. v. The State of Israel*, IsrSC 33(1) 477, 493-494 (1979)). Furthermore, in a (civil) case where the directors embezzled funds from the bank where they served as directors, it was held that the bank could not be attributed the directors' awareness of the embezzlement (CC 7276/07, *The Official Receiver Acting as Dissolver of North America Bank Inc. v. Assurance General De France*, para. 31 of Justice Melcer's opinion (2012)). In contrast, when it was found that the organ operated both for the benefit of the corporation and for his own personal benefit **and that of the conglomerate of which he was a part**, it was held that this could not mitigate the corporation's criminal responsibility for his actions (the *Leumi* case, p. 28.) And now to our matter.

122. As noted, Ofer Development and Ofer Investments challenge the District Court's holding that they should be convicted, under the organ theory, for Madar's actions. Ofer Investments argues, as mentioned, that since it is a sister company of Melisron it did not at all benefit from Madar's activity. Their argument is because to the extent that Ofer Investments profited from the increase in the price as a result of the manipulation and their holdings in Melisron – this profit was to begin with lower than the loss it took because the bonds were purchased at an inflated price. Additionally, Ofer Development did not hold any share of Melisron and thus was actually harmed as a result of such activity. On the other hand, Ofer Investments argues that Ofer Developments was the one to make the transaction and thus Ofer Investments should not be found responsible in the matter. Additionally, it was argued that the District Court effectively lifted the corporate veil between the two companies and attributed the wrongdoings of one to the other, without having presented any rationale for doing so.

123. The many testimonies reveal that the decision to purchase series D bonds was made by Ofer Investments, however due to tax planning it was decided to conduct the transaction through Ofer Development (p. 644, l. 28-32 (Levi's testimony); p. 744, l. 26-30 (Madar's testimony); p. 146, l. 4-16 (Yaacovi's testimony)). Madar testified that though the investment was actually made by Ofer Development, Ofer Investments was at the center of the decision to invest:

> "The purpose of Ofer Investments' investment was to invest in series D bonds… The opportunity presented itself, it was a good investment, and we took advantage of it." (Record of hearing dated January 16, 2013, p. 731, l. 16-17).

And in addition:

> "… at that point where I had Melisron's interest in mind, and this god forbid, god forbid it did not conflict with Ofer Investments' interests. It fit Ofer Investments, the activity of Ofer Investments." (Record of hearing dated January 16, 2013, p. 757, l. 28-30).

124. Therefore, it is not necessary to address the appellants' claims regarding the lifting of the corporate veil in the criminal law. This is because, in effect, the offenses were committed as a joint commitment of sorts; each of the companies played a separate and independent role in the offenses – as said, Ofer Investments was the one to decide upon the investment, and Ofer Development was the one to actually make the investment (and as we will see below, it seems Melisron was the one to benefit from it). Therefore, each of the companies was effectively separately and independently responsible for

the offenses committed by Madar, and there is no need to discuss their conviction together as a conglomerate. Similar things were said in this context by President Barak in *Tempo*, addressing the District Court's opinion in that matter:

> "In finding the appellants 1-2 responsible, the court did not find it fitting to separate them, although the purchase of 'Tempo Beer' bonds was made by 'Tempo Plastic' and although the prospectus – and its lack of disclosure – was published by 'Tempo Beer' rather than 'Tempo Plastic.' The court held so because the two companies designed together – through their organs – the entire plan of purchasing 'Tempo Beer' bonds, and executed it jointly." (The *Tempo* case, p. 564).

Similar things were held by the United States Supreme Court in *United States v. Bestfoods*, 524 U.S. 51, 71 (1998) (hereinafter: "the *Bestfoods* Case"). There, it was held that a mother and daughter companies may be convicted as directly responsible for the offense when the companies operated together as a joint project of sorts. In regard to a conglomerate in the civil law context, see Lahovski CORPORATIONS LAW: A SINGLE COMPANY AND A CONGLOMERATE, 65 (2014); see also Stern PURPOSE OF THE BUSINESS CORPORATION, 164 (2009).

125. Furthermore, there is no prospective prohibition against one's service as a senior officer of two companies connected by ownership, and this is even common in the reality of the economy, and it is generally not controversial:

> "[It is a] well established principle that directors and officers holding positions with a parent and its subsidiary can and do 'change hats' to represent the two corporations separately, despite their common ownership" (*Lusk v. Foxmeyer Health Corp*., 192 F. 3d 773, 779 (CA 5 1997).

Still, I believe that in many cases where the officer operates, while serving as an officer in one company, to promote the interests of the other company and factors those into his actions, this may lead to a conclusion that each of the companies is directly responsible for such actions, even if those were seemingly made only by one of them (if, of course, it is found that he is in fact an organ of each of the companies and the matter fulfills the organ theory tests, as discussed above). Having one's cake and eating it too, and enjoying both worlds cannot be allowed. In other words, taking action for both companies – yes, the responsibility of both – no. This cannot be acceptable here. Things to this effect were said in *Bestfoods*, for example:

> "[A] dual officer or director might depart so far from the norms of parental influence exercised through dual office holding as

> to serve the parent, even when ostensibly acting on behalf of the subsidiary…" (Id. at p. 71.)

And as said, in our case, this does not constitute lifting the corporate veil between the companies, as the appellants argue, but to indicate that each of them is directly responsible for Madar's activity, should it be decided to apply the organ theory in our case. Now, we turn to the application of the organ theory itself with regard to Ofer Investments and Ofer Development.

126. As discussed, the first question is whether Madar should be considered an organ of the companies. Levi's testimony sheds light on Madar's high position in Ofer Group, including Ofer Investments and Ofer Development:

> "Ofer's management consists of a team, the senior team included Golan Madar, who is the Group's financial manager, Golan joined the group immediately after I was appointed as CEO in 2003, and serves with us – serves us and with us – to this day. Golan Madar is the Group's financial manager, is responsible for all the Group's financial activity." (Record of hearing dated December 27, 2012, p. 641, l. 31).

And later:

> "Golan is the company's financial manager, and he is number 2 in the organization." (Record of hearing dated December 27, 2012, p. 641, l. 31).

As noted, according to the organizational structure, the mere senior status of the officer leads to him being considered an organ in the corporation. In our case, it is seemingly undisputed that Madar was the Group's financial manager, "number 2" in Levi's words, and this is sufficient to find that he served as an organ in the companies. The companies themselves conceded, at the end of their main arguments, that Madar operated as an organ of both, even if they maintain he was not a senior organ (para. 60.4 of the main arguments).

127. In this regard, the companies argue, among other things, that since Levi was CEO and he was acquitted, there is no place to convict the companies for Madar's activity as he served at a less senior position. I am afraid this argument should be rejected. It was held in a similar matter:

> "There is no dispute that Avraham served as a senior officer in the company. The defense even argues that though he served as a senior officer, Aharon held a higher office than him. This, in my opinion, is immaterial. Organ theory does not mean that a company has a single alter ego, whose actions alone and no one else's may lead to its responsibility. Even under a narrow approach that recognizes only a few senior people as organs,

> we accept that there is more than one organ…" (the *Leumi* case, Justice Strasberg-Cohen, p. 24).

This is suitable for our case. Therefore, even if Levi, who served in a position senior to Madar was acquitted (for reasonable doubt) from the charges against him, this does not mitigate the companies' responsibility for Madar's actions, himself an organ in the companies.

128. However, as noted, this is not enough. A criminal conviction of a company under organ theory is first and foremost a question of legal policy – is it appropriate to convict the company, or in our case the companies, for the actions of the organ. Three tests may assist us:

First, did the law not intend to exclude the possibility of convicting the company for the organ's actions? In our matter, we are concerned with the Securities Law. It seems almost redundant to note that the Securities Law does not exclude the conviction of corporations. As held in *Arad*, the contrary is true:

> "The offense for which Arad was convicted – of including misleading items in the reports and the prospectus published – are offenses under the Securities Law. This Law was designed to direct the financial activity of public corporations while placing direct conduct duties on them. When the Securities Law is violated, using organ theory is thus natural and obvious" (Id., para. 66 of then Justice Rivlin's opinion).

Second, did Madar act in the course of his duties? Here, too, it seems the answer is simple – clearly, when Madar decided on the purchase of series D bonds, and the manner in which the bonds would be purchased, he did so in his corporate hat, not his personal one. Madar made the investment in Melisron with the knowledge, if not on the initiative, of the CEO of Ofer Investments and Ofer Development (Record of hearing dated December 27, 2012, p. 623, l. 6). The fact that it was not proven that the companies' CEO or their board instructed Madar to make the investment in manipulative ways, does not mitigate the finding that Madar committed the offenses of which he was accused in the course of his position (the *Leumi* case, p. 26-27; the *Nehushtan* case, p. 122-123; the *Vohl* case, para 78). In addition, it is very difficult to accept the companies' argument that Madar operated at the time at most as an organ of Ofer Development rather than of Ofer Investments, and therefore Ofer Investments must not be found criminally responsible (para. 55 of the notice of appeal). As mentioned, each of the companies played a role in committing the offense – as an organ in Ofer Investment, Madar took part in the decision to invest; as an organ in Ofer Development, Madar took an active role in the actual investment. Therefore, there is no basis to the claim that Madar did not commit the offenses as an organ in each of the corporations.

Third, was Madar's activity directed against the companies' interests? As mentioned, Ofer Investments and Ofer Development argue that Madar's activities did not benefit them. Ofer Investments argued that although it controls Melisron, the harm it was caused as a result of the bonds' overpriced purchases outweighs the benefit of the raised prices. Ofer Development argued that since it is merely a sister company of Melisron's, it only suffered loss as a result of purchasing series D bonds at a higher price than what it would have needed to pay but for the manipulation. I believe that these arguments should be rejected, to the extent that they concern the relationship between Madar and the companies. As the District Court held – and seemingly this is undisputed – Madar did not wish to make personal gains (p. 130 of the verdict) aside from possibly promoting himself as a good financial manager. As for the companies' argument that Madar's activity benefited, at most, Melisron, but harmed them – throughout his testimony, Madar insisted that the purpose of the investment was, among others, to benefit Ofer Group, including Ofer Investment and Ofer Developments:

> "The purpose of the investments by Ofer Investments was to invest in series D bonds… The opportunity presented itself, it was a good investment, and we took advantage of it." (Record of hearing dated January 16, 2013, p. 731, l. 16-17).

And later:

> "Madar: the goal was to make these investments. The goal was to invest in cash.
> Adv. Chen: Whose?
> Madar: All along the way. Ofer's. All along the way that was the basis for all these activities." (Record of hearing dated January 26, 2013, p. 733, l. 9-6).

Even when Madar admitted he also acted with the intent to benefit Melisron, he emphasized that the investment was consistent with Ofer's business interests:

> "… at that point where I had Melisron's interest in mind, and this god forbid, god forbid did not conflict with Ofer Investments' interests. It fit Ofer Investments, the activity of Ofer Investments." (Record of hearing dated January 16, 2013, p. 757, l. 28-30).

I believe these things should be taken at face value.

129. I will emphasize that in order to find that Madar's activity was not designed to harm Ofer, if this need be addressed at all, it is unnecessary to discuss the actions' final outcome, that is – it is unnecessary to find that this activity actually did in effect benefit either of the companies:

> "Intention to benefit the corporation is sufficient and the action need not actually benefit it, and even had the outcome been to the contrary, the corporation's responsibility still exists." (*Leumi*, p. 28 of Justice Strasberg-Cohen's opinion).

I therefore do not see it necessary to discuss the companies' "score keeping" in terms of the precise profit the Ofer Group enjoyed as a result of Madar's activity in comparison to the harm caused as a result of purchasing overpriced securities. It is sufficient, as mentioned, that it was proven that Madar acted to benefit Ofer Group, including Ofer Investments and Ofer Development, in order to fulfill the requirements of this test.

130. Indeed, the fact that Madar intended to benefit both Ofer and Melisron with his actions, does not mitigate Ofer's responsibility. As it was noted in a similar matter:

> "Avraham **also** operated for the benefit of the companies. This is true even if he wished to simultaneously promote his own interests **and those of his group**." (*Leumi case*, p. 29, emphasis added – Rubinstein).

Therefore, Madar's intention to benefit Melisron is immaterial with regard to the finding that he acted to benefit Ofer Investments and Ofer Development. However, and I will address this further below, I believe this is relevant to the issue of Melisron's responsibility for Madar's actions.

131. All of the sub-tests regarding the imposition of responsibility under the organ theory are then met in our case. Additionally, recall that the question whether we should impose criminal responsibility on a corporation for an act committed by its organ is primarily a question of legal policy. In our matter, as the District Court noted, the policy considerations clearly lean toward imposing responsibility on the corporations:

> "We are concerned with managing a portfolio of about NIS 150 million. Despite the defendants' argument that the relevant amounts are negligible for Ofer, it is obvious that when an organ of a company is given 'free reign' in managing NIS 150 million (and restricted only by general limits – 20% shares and 80% bonds – which the Board of Directors defined in advance), then this is an activity of the corporation that carries responsibility alongside it. This is not negligible or insignificant activity, which cannot tie the company to any criminal act it involved, but rather a meaningful action, both for Ofer, and certainly from an objective perspective. Even when taking a closer look, we are dealing with the significant amount of about NIS 24 million which was invested in Melisron's bonds within the expansion of the series in

> December 2009. From this perspective, too, Madar was authorized, with the knowledge of Levi – the company's dominant CEO – to invest tens of millions of shekels in bonds of the daughter company Melisron, when nearing the expansion of the series. In other words, in filling the function of the investment activity in Ofer investments, and particularly with regard to the investments in the bonds during the series expansion, it is clear that Madar was the party authorized by the company, who expressed its voice and will" (p. 127 of the verdict).

I do not see it necessary to add to this. Therefore, should my opinion be heard, we will not accept the companies' appeal against their convictions.

Obiter Dictum – Conviction in a Conglomerate

132. Once it was found that each of the companies was independently responsible for Madar's actions, under the organ theory, it is unnecessary to decide whether to convict the Ofer Group as a whole. I will note, however, that it is possible that even if it was not found that each of the companies was directly criminally responsible, our matter would have warranted examining both companies as if they were one company, and establishing their responsibility accordingly. Indeed, as known, "ordinarily, a corporation which chose to facilitate the operation of its business by employment of another corporation as a subsidiary will not be penalized by the judicial determination of liability for the legal obligations of the subsidiary" (*Anderson v. Abbot*, 321 U.S. 349, 362 (1944)). However, there are situations where it would be appropriate to convict the conglomerate as a group, because the law must trace the nature of the activity rather than the formal structure of incorporation, so that one cannot hide wrongdoings behind the corporate veil as an artificial shield:

> "The inherent power of the Commonwealth to prosecute those who violate the law, whether they be individuals or corporations, dictates that such offenders should not be permitted to insulate themselves from criminal prosecution by shielding themselves behind instrumentalities which they promulgate to conceal their criminal acts. This is especially true of large endocratic corporations, which are structured to enable themselves to create a flow of authority from the upper echelons of directors and officers to lower ranks of corporate executives. Such a structure makes the responsibility for a criminal act more easily susceptible to concealment. Even greater clouding of responsibility by a corporate principle takes place where a corporation principal creates subsidiaries and business trusts to carry out its everyday administration and business operations. We find it appalling that such a corporate structure would be allowed to shield those corporate entities

> which directly or indirectly receive the monetary benefit of criminal activity and at the same time avoid the sanctions which may be imposed upon those corporate employees who commit the actual criminal act" (*Commonwealth v Beneficial Finance Co.*, 275 N.E.2d 33, 94 (Mass 1971) *cert. denied* 407 U.S. 914 (1972) (Hereinafter: "the *Beneficial* case").

And so, for example, it has been established in American law that conglomerates should be criminally convicted as one when one of the companies completely or almost completely controls the daughter company; when the senior officers of the companies are the same people; when the companies consider themselves to be one; and when the daughter company was essentially run as a department in the parent company (the *Beneficial* case; *Garett v. Southern Railway Company*, 173 F. Supp. 915 (1959); Richard S. Gruner CORPORATE CRIMINAL LIABILITY AND PREVENTION, s. 5.02 (2004)). It is clear that the existence of each of these indications cannot lead to a finding that the companies operated, at least insofar as the concrete offense is concerned, as if they were one, but it should be examined whether the totality of circumstances indicates so. Here, too, it is ultimately a question of normative legal policy:

> "Because society recognizes the benefits of allowing persons and organizations to limit their business risks... sound public policy dictates that imposition of alter ego liability be approached with caution... Nevertheless, it would be unjust to permit those who control companies to treat them as a single or a unitary enterprise and then assert their... separateness in order to commit frauds and other misdeeds with impunity" (*Las Palmas Associates v. Las Palmas Center Associates* 235 Cal.App.3d 1220, 1249 (1991) see also *Beneficial*, p. 289).

As we have said – one cannot hold the stick at both ends and enjoy both worlds according to changing considerations of convenience.

133. And in our case – from the way the companies' arguments were made, one could think that we are dealing with two stranger companies – as if Ofer Investments' CEO is not Ofer Development's CEO; as if Ofer Investments' financial manager is not the same as Ofer Development's; and as if Ofer Investments does not fully own Ofer Development. In addition to these initial given circumstances, the different testimonies heard by the court reveal that, on its face, the companies operated – at least to the extent that our matter is concerned – as one. As Levi noted in his testimony:

> "In reality, when we look at how this whole mechanism is managed, all the daughter companies are fully transparent as if there are no companies, we view them with full transparency directly toward the assets, there is no significance but for the

> aspects of accounting – that they must have different balances – or for the aspects of taxation – that they have separate reports. But from a perspective, from a business perspective, we consider this as full transparency as if it is one company… from a management perspective, too, Ofer Investments' leadership manages all the companies under it". (Record of hearing dated December 27, 2012, p. 589, l. 13-22).

And additionally:

> "As far as we are concerned, Ofer Investments and Ofer Development does not mean anything. It doesn't matter who the buyer is, because to us if Ofer Development made the purchase, it is as if Ofer Investments made it". (Record of hearing, dated December 27, 2012, p. 638, l. 25-26).

Additionally, throughout Madar's entire testimony, and we already discussed parts of it above, Madar addressed the interests of Ofer Group, without distinguishing between Ofer Investments and Ofer Development (see for instance the record of hearing dated January 26, 2013, p. 731, l. 16-17; p. 733, l. 6-9; p. 757, l. 28-30).

Ms. Yochi Yaacovi, who served as an accountant and Vice President of finances in Ofer Investments, said similar things, too:

> "Ofer Investments and Ofer Development operate together because all the private companies are managed by the leadership together. There is no difference." (Record of hearing dated September 11, 2012, p. 121, l. 1-2).

And later, when she was asked about the investment policy of Ofer Development, she replied:

> "Ofer Development itself didn't have a policy, there was a policy in the private company within Ofer Investments…" (Record of hearing dated September 11, 2012, p. 121, l. 24).

Mr. Mordechai Meir, who served as a director of Ofer Investments, similarly noted:

> "Adv. Negev: …when we're talking about Ofer Investments, it is a private company, right?
> Mr. Meir: Yes.
> Adv. Negev: And it has a pretty large number of daughter companies, and when we talk about Ofer Investments, about its investments, its activity and so on, is it true that you, as a board of directors, viewed it as one entity, not as each of the daughter companies on its own?

Mr. Meir: Certainly.
Adv. Negev: So it does not matter if it operates through Ofer Development or another Ofer, you saw it as one entity?
Mr. Meir: Correct."
(Record of hearing dated September 13, 2012, p. 166, l. 3-11).

In other words, we are concerned with two companies who are closely tied by ownership, and are almost identical with regard to their officers. Ofer Investments served as a "headquarters" and decided upon the investment, while the investment was in fact made with Ofer Development's funds. It is doubtful whether Ofer Development had any independent decision making mechanism that did not rely on Ofer Investments. As reflected in the testimonies of the two companies' senior officers, even they did not distinguish between the two companies and regarded them as one. Therefore, on its face, at least with regard to the investment at hand here, the two companies acted as one entity, and thus even if we had not found that each of them should be held specifically responsible for Madar's actions as an organ in each of the companies, it is doubtful that we should have accepted the companies' request that "this honorable Court view each of them separately as related to the acquittal of the first defendant, the rejection of the theory about the influence plan, the timing of the offense and the exception to the organ theory" (para. 44 of the notice of appeal). However, as noted, these things are said beyond the necessary scope, as it was found that each of the companies is in itself responsible for the actions of its organ.

Ofer Investments and Ofer Development's Sentence and the Appeal against It

134. The court considered the State's arguments that the fine imposed on the companies should be heavy in light of their substantial trading volume and the need for a severe sentence that would deter them in the future. On the other hand, the court considered the companies' argument that, until today, the fine for such offenses was set at only NIS 140,000-150,000, and when fines exceeded these sums, it was under much more serious circumstances. The companies also argued that they took upon themselves a restrictive corporate regime beyond what is required of them because they are not traded in the stock exchange, and that their conviction relied on the organ theory, and the organ committing the offense was not the most senior, and it was not proven who of the senior officers instructed him to do so. Finally, it was noted that Ofer Investments must be distinguished from Ofer Development for these purposes, as Ofer Development is the one who made the actual investment.

135. The court held that the companies' argument that they should be distinguished from each other is to be rejected, as noted in the verdict, because such distinction is artificial. As to the amount of the fine, it was noted that under section 54 of the Law, following Amendment 45 dated January 27, 2011, had the offenses been committed today it would have been possible to impose a fine of NIS 22,600,000 on the two companies for the two offenses. Therefore,

even if at the time the offenses were committed section 54 permitted imposing a fine of only up to NIS 1,100,000 on each company for each offense, Amendment 45 reflects the Legislature's desire to increase the level of sentencing for these offenses, and this should be taken into account when deciding the fine in our case. The court therefore noted that the proper fine in our case is the maximum fine of NIS 1,100,000 for each company, however, separate fines should not be imposed for the manipulation offense and the inducement offense as both were a result of the same action. It was also noted that had the court been authorized to rule under the Amendment to the Law, it would have set the amount of the fine between NIS 2-4 million for each company, given their significant trading volume and the fact that they did not adequately supervise Madar. Rather, they allowed him to do as he wished with millions of shekels, and did not instruct him against making transactions that belonged entirely to the same conglomerate.

136. In their appeal, the companies argue that the court erred by imposing the maximum fine on Ofer Investments and Ofer Development without examining the appropriate sentencing range. It was additionally argued that the mere fact that the Securities Law was amended to allow imposing a higher fine is not in itself a reason to impose the maximum fine on the appellants. It was then argued that examining the fines previously imposed in similar cases, including more serious ones, points to the fine here being extremely unusual in its severity.

137. On the other hand, the Respondent argues that although the District Court did not explicitly mention the sentence range appropriate in this case, it did substantively consider the factors detailed in the amendment to the Penal Law that influence this range. Thus, for instance, the court correctly attributed a significant weight to the companies' financial strength, and the fact that a fine lower than that imposed would not meaningfully deter the companies from committing similar offenses in the future. This consideration is consistent with section 40H of the Penal Law, which stipulates that when imposing the appropriate sentence, the court must consider the defendant's financial circumstances. Therefore, there is no room to intervene in the fines imposed on the companies.

138. I believe there is no room to intervene in the amounts of the fines that were imposed on the companies. As opposed to Ofer's arguments, I believe there is great significance to the fact that the Legislature considered the issue, and that today – as the District Court mentioned – it is possible to impose in a case such as this a much higher fine (though, of course, the new legislation should not be applied retroactively). Section 40H of the Penal Law states that while imposing a fine on a criminal defendant, the court must consider the defendant's "financial situation, in order to establish the appropriate range of fine." I believe this is even more apt insofar as the conviction of corporations is concerned, and this was explicitly taken into account in the creation of the financial sanctions mechanisms in the provisions of financial legislation (see

section 52.17(b) of the Securities Law; section 50D of the Antitrust Law 1988, and section B(8) of GILUY DA'AT 2/12 – The Considerations of the Antitrust Authority in Setting the Amount of a Financial Sanction, dated July 24, 2012). And recall that a conviction under the organ theory was designed first and foremost to deter, whether the specific corporation or a corporation like it, from committing similar acts in the future, and therefore deterrence considerations must be given substantial weight in setting the fine amount. This is also consistent with section 40F and section 40G of the Penal Law, which address considerations of specific and general deterrence, respectively, when imposing a sentence.

139. In our case, as Ofer Group presents itself, it is "one of the leading business groups in the Israeli economy" (see the company's website: http://www.oferinvest.com/ofer-investments/group/). Ofer's financial strength can also be inferred from Levi's testimony, which noted that at the time relevant to the commission of the offenses, the insurance system of the Group included NIS 6 billion in assets, and at the time of the testimony reached NIS 15 Billion. The Group's investment portfolio stood at the time at NIS 150 million (Record of hearing dated December 27, 2012, p. 594, l. 3-7). Therefore, in our case, imposing a fine lower than the maximum fine would not sufficiently deter the companies, or companies like it, from committing similar offenses in the future, and it would be inconsistent with the trend, which we pointed to above, of increasing the level of sentencing in these offenses. Additionally, as the District Court noted and I must agree, had the new amendment to the Law applied here, it would have been appropriate to impose a much higher fine upon each of the companies.

CrimA 99/10 – The State v. Melisron

140. In this appeal, the State challenges Melisron's acquittal. It was agued that the court's finding that Madar committed the offenses of manipulation and inducement, as well as the reporting offenses, outside of his role at Melisron was incorrect. This, because Madar was an organ of Melisron while conducting this activity, because the activity was designed to benefit the company and did in fact benefit it. Therefore, according to the principles on which organ theory is based, as we discussed above, it is both desirable and necessary to convict Melisron for Madar's actions.

141. According to the legal framework of the organ theory, we will now examine whether the main aspects of the doctrine apply to Melisron. The preliminary question is of course whether Madar can be seen as an organ of Melisron for our purposes. The District Court refrained from making such explicit findings. However, according to the State, Madar's sentence reveals that his role in Melisron was significant – as its financial manager, signatory and participant in board meetings (p. 6 of the sentence). The appellant maintains these claims are unfounded because Madar did not serve as an organ of Melisron, rather as merely an external service provider (para. 13 of the main arguments).

Alternatively, even if the Court was to find that Madar did in fact serve as an organ, he did not commit the offenses attributed to Melisron in the course of his duties there, but rather – as noted by the District Court – in the course of his role in Ofer Investments and Ofer Development.

142. I will first note, that in my opinion, Melisron's argument that Mader should not be considered an organ of the company merely because he did not serve as a financial manager in the company, but externally as a "financial services provider" should be rejected. This is because the law is not satisfied by how things look on their face, but instead examines them substantively. This is necessary in order to realize the law's most basic purpose – justice (on the tension between form and substance, see A Barak, INTERPRETATION IN LAW, VOL. 1 – GENERAL THEORY OF INTERPRETATION 196-197 (1992)). This was established in this Court in different areas of the law (see e.g. HCJ 107/59, *Itzhak Mey-Dan v. The Local Committee for Construction and Planning of the City of Tel Aviv Yaffo*, IsrSC 14, 800, 808 (1960) (construction and planning laws); CA 6926/93, *Mispanot Israel Inc. v. The Electric Company Inc.*, IsrSC 48(3) 749, 771-72 (1994) (administrative law); CA 455/89, *Colombo, Food and Drink Inc. v. Trade Bank Inc.*, IsrSC 45(5) 490, 495 (1991) (property law); CA 345/87, *Hughes Aircraft Company v. The State of Israel*, IsrSC 44(4) 45, 106 (1990) (patent law); CFH 3962/93, *Shlomo Minz v. Tax Assessor of Large Factories*, IsrSC 50(4) 817, 831 (1996) (tax law); CrimFH 188/94, *The State of Israel v. Abutbul*, IsrSC 51(1) 1, 10 (1996) (evidence law); and LCrimA 7946/09, *New Makefet Pension and Benefits Management v. Yael Anuch*, para. 14 (2012) (insurance law). Corporate law, which is the relevant area of law to our case, is no different, and as Gross notes: "the common approach in corporate law emphasizes the nature of the organ's activity rather than the formal appointment" (Id., p. 124).

143. Indeed, Melisron does not argue that its financial matters were not managed by Madar, and even refers to the District Court's finding that Madar managed the finances with Levi (para. 19 of the main arguments). Mardar himself testified that he did actually manage Melisron's finances:

> "When I need to operate for Melisron, I wear the hat of Melisron's financial manager, and work towards Melisron's goals." (Record of hearing dated January 16, 2013, p. 731, l. 25-27).

And this is also supported by Levi's testimony:

> "I said, and I am saying, I was also the strong person in Melisron, and in Ofer too, I said Golan managed Ofer's finances and Melisron's finances." (Record of hearing dated December 27, 2012, p. 647, l. 20-21).

Melisron's claims, then, relies on the technical aspect of how Madar provided his services to the company. This is particularly puzzling because this is not an "external service provider" who is foreign to Melisorn, but rather Ofer Group, who, as noted, controls Melisron. Therefore, even if only for this reason, Melisron's argument that Madar must not be considered an organ of the company should be rejected.

144. In addition, I believe that the function Madar filled in Melisron indicates that he should be considered an organ of the company in all regards concerning the offenses at hand. As mentioned, and as the District Court ruled, and as undisputed by Melisron, Madar managed Melisron's financial affairs along with Levi. Additionally, Madar participated in the specific Board of Directors meeting where the offering of the relevant bonds was decided (Prosecution exhibit 15: minutes of meeting dated November 4, 2009), as well as played an active role in promoting the offering, including reporting to the stock exchange (see Prosecution exhibits 19 and 21, email messages in which Madar approves the report to Melisron's attorney, and his testimony dated January 16, 2013, p. 740-41, where he detailed his part in the offering). As a result, examining the nature of Madar's role in Melisron, to the extent this case is concerned, demonstrates that he should be seen as an organ of the company.

145. Recall that under organ theory, in order to impose criminal liability upon Melisron, it is insufficient that Madar operated as an organ. In our case, the core of the issue is whether it can be shown that Madar committed the offenses, particularly the offenses of manipulation and inducement, within the course of his duties in Melisron and not just in the course of his duties in Ofer. The District Court found that "the criminal activity at the center of the inducement was committed in the course of bond purchases that Ofer made and in which Melisron had no part (and as a result neither did Madar, as an employee or organ of Melisron (para. 335 of the verdict). Indeed, there is no dispute that the funds relevant to the offense were Ofer Development's funds. However, I believe – with all due respect – that this finding by the District Court does not take into account the circumstances of this particular case: Madar operated as the financial Manager of both Melisron and Ofer. As noted, he did not see a conflict of interests in his work for both companies, and he mentioned that while committing the offense "he had Melisron's goals in mind" (Record of hearing, p. 732, l. 29-32). As we discussed above in regard to Ofer, when one holds office in two companies that are related by ownership, and operates within one company in order to benefit the other, this can tip the scales in favor of imposing criminal responsibility on both companies, directly, as a result of that person's activity as an officer in both companies. In addition, the case law tends to interpret this requirement – which is designed to distinguish one's activities in their private hat from their activities in their corporate hat – broadly, and it is undisputed that Madar's activity was committed in the latter.

146. Further, it is certainly impossible to say that Madar did not operate in Melisoron's interest. Quite the contrary, as mentioned above, Madar noted that in his activities he meant to benefit Melisron, and indeed he did. While his activities could benefit Ofer indirectly (as a result of Ofer's ownership of Melisron, and the rise in the value of its bonds), Melisron was the primary beneficiary of his actions, since the result of Madar's support of the price meant the rise of Melisron's bonds price. See Bahir's opinion, according to which, any rise of a single Agora of the series D bonds would have resulted in revenue of NIS 1.46 million to Melisron (section 169 of the opinion). As discussed above, the fact that one operated to benefit the company where they serve as an organ is a subset of the test as to whether they operated within the course of their duties. Thus, once it was found that Madar acted to benefit Melisron it was sufficient to support the finding that he executed the influence plan in the course of his role in Melisron – and therefore convict Melisron under the organ theory.

147. We will mention that a conviction based on the organ theory is a matter of desirable legal policy. We are concerned with a conglomerate, in which one company in the conglomerate (Ofer Investments) decides upon a certain investment, another company (Ofer Development) is the one to actually make the investment, and a third company (Melisron) enjoys the investment. The person who made the investment, in a manner that amounts to a criminal offense, served as an organ in each of the companies and took an active role in the relevant decisions in each of the companies. The other senior officers (Levi and Yaacovi) served in parallel positions in the companies where the relevant decisions were made, and were therefore in a position to supervise the organ's activities. When putting all of this together, a proper legal policy leads to a conclusion that each of the companies must be convicted for the action of the person who served as an organ in each of them.

148. I will emphasize that this finding applies to both the offenses of manipulation and inducement and the reporting offense. In terms of the manipulation and inducement offenses – the points above speak for themselves, where Madar took part both in Melisron's decision to expand the series and in Ofer's decision to purchase series D bonds. With regard to the reporting offenses, I myself do not believe the District Court's finding that Madar's position in Melisron does not warrant attributing his actions to the company can stand (paras. 348 and 367 of the verdict). As mentioned, Madar effectively served as Melisron's financial manager and was an authorized signatory; At the April 5, 2009 Board of Directors meeting he was appointed to set the terms of the prospectus based on which the expansion was executed (Defense exhibit 11), and on November 25, 2009 he emailed Melisron's lawyer about the report regarding the bonds purchase, where he wrote "Alright with me, if Avi does not have any comments we can issue the report" (Prosecution exhibit 19). As for the shelf report, at the December 2, 2009 Melisron Board of Directors meeting, which – as found – was held after Madar's fraudulent intent had materialized and where Madar was present, the shelf proposal report was

discussed and approved (Prosecution exhibit 33). Therefore, I am afraid that the District Court's finding that Madar's position does not justify attributing his conduct to Melisron in this matter should be reversed, and Melisron should be convicted of the reporting offenses.

149. As a side note, as I mentioned with regard to Ofer Investments and Ofer Development, it is possible that here, too, Melisron should have been found criminally responsible by virtue of Ofer's criminal responsibility (even if we had not found that Madar served as an organ of Melisorn or thought that he did not commit the offense in the course of his duties). At the relevant time, Ofer Investments owned 71% of Melisron's shares. As mentioned, Levi, who at the time served both as CEO of Ofer Investments and as acting CEO of Melisron, played a role both in the decision to expand the series, as an officer of Melisron, and in the decision to purchase the bonds, as an officer of Ofer Investments. The same is true for Madar, who was charged with both companies' financial management, and for Yaacovi, who served as financial vice president in Ofer Investments and took care of Melisron's financial reports (Record of hearing dated September 11, 2012, p. 120, l. 10-11, p. 122, l. 20-21). As mentioned, they all attended the Board of Directors meeting in which Melisron decided to expand the series (see record of hearing dated November 4, 2009, Prosecution exhibit 16). In addition, Levi testified that Melisron was in effect managed by Ofer:

> "Ofer Investments also controlled Melisron, and in Melisorn, Melisron did not have its own management. In other words, all the financial management, all the accounting, and essentially managing of the transactions were done through the management of Ofer Investments, which I headed. So from a business perspective, I effectively also managed Melisron." (Record of hearing dated December 27, 2012, p. 588, l. 21-25).

However, as opposed to Ofer's matter, I believe that we were not presented with sufficient evidence and testimonies to suggest that the companies operated as one. As said, convicting a conglomerate as a group is the exception rather than the rule. With regard to Ofer, many testimonies were presented to show that the companies were managed, to a great extent, as one, and were treated as such by the senior officers. Similar evidence was not presented with regard to Melisron, and I therefore believe that there was no room to impose criminal responsibility on it as part of Ofer Group's responsibility as a group. As mentioned, this is said beyond the necessary scope, as Melisron has been found to be **directly** responsible for Madar's actions, both with regard to the offenses of manipulation and inducement and to the reporting offenses.

150. To summarize, I believe the State's appeal should be granted, and that Melisron should be convicted of the offenses for which it was indicted: fraud in regard to securities by means of influencing the fluctuation of the

securities' price – an offense under section 54(a)(2) of the Securities Law; fraud in regard to securities by means of inducement or attempt to induce to purchase securities – an offense under section 54(a)(1) of the Securities Law; violating section 36 of the Securities Law and the Periodic and Immediate Reporting Regulations – an offense under section 53(a)(4) of the Securities Law, and violating section 16(b) of the Securities Law – an offense under section 53(a)(2) of the Securities Law.

151. As for the sentence: in the time relevant to the commission of the offenses, section 53(a) and section 54(a) of the Law stated that the maximum sentence for each of the offenses for which Melisron was convicted is a fine five times the fine set in section 61(a)(4) of the Penal Law, which, as we noted with regard to Ofer, was set at NIS 1,100,000 (5x220,000). As discussed, following Amendment 45 the fine allowed is much higher. As a result, in our case, the maximum sentence that may be imposed on Melisorn is NIS 4,400,000 for the four offenses for which it was convicted. However, as the District Court noted with regard to Ofer and Madar, the offenses were born out of the same activity, and thus, it is inappropriate to impose upon the company more than the maximum fine for committing a single offense.

152. On one hand, it could be said that Melisron's responsibility is lower compared to Ofer's, because the purchase activity at the basis of the offense was committed from within Ofer – the funds were Ofer's funds, and the decision was made by Ofer's directors. On the other hand, as opposed to Ofer, at the end of the day Melisron was convicted for committing fraud and manipulation and for the reporting offenses that were committed within this company. This should be taken into account in establishing the severity of the sentence. Melisron is a public company, and according to its financial reports, its income for 2009 – at the time the offense was committed – was NIS 382.2 million (and for 2008 – NIS 283.1 million). Given all the above, and for reasons similar to those discussed regarding Ofer, I believe that the fine to be imposed on Melisron should be identical to that imposed on Ofer Development and Ofer Investments. That is, the maximum fine permitted by the Law at the time relevant to the offenses – NIS 1,100,000. As we mentioned regarding Ofer, any amount lower than this would not deter the company, or others like it, from committing similar offenses in the future.

Conclusion

153. Should my opinion be heard, with regard to Madar, Ofer Invetsments and Ofer Development, we would reject the appeals before us – CrimA 1829/14 and CrimA 1899/14 – and uphold the judgment of the District Court, both for the conviction and for the sentence. On the other hand, we would grant the appeal by the State in CrimA 99/14, and hold that Melisron should be convicted of the offenses of manipulation, inducement and reporting, and impose upon it a fine of NIS 1,100,000.

Madar will report to serve his sentence on December 1, 2015 at the Y.M.R. Nitzan Prison by 10am.

Justice

Justice U. Vogelman:

I join the comprehensive opinion by my colleague Justice E. Rubinstein.

The question whether the manipulation offense is a result offense does not require determination in our matter (as noted by my colleague) and I leave it, as I do the side note regarding conviction within a conglomerate, for future determination.

As for the *mens rea* of the manipulation offense – I accept my colleague's conclusion that an intent to artificially influence the price must be proven. Where the defendant's intent to influence the price by fraudulent means was proven, that is a sufficient infrastructure for a conviction, even if this intent was coupled with a legitimate financial purpose. It is not necessary to prove that the fraudulent intent was the primary purpose, and that the other purpose was secondary.

I also join my colleague's concrete findings regarding each of the defendants, both in terms of the convictions (including accepting the State's appeal in regard to Melisron) based on the relevant legal framework, and in terms of the sentences. In its sentence, the District Court attributed proper weight to public interest in combating financial offenses in the stock market and to the jurisprudence of this Court, which my colleague also detailed at length. This consideration was balanced with mitigating factors resulting from the particular nature of the case and the people at hand, particularly that of Madar's, whose lapse is indeed unfortunate. I also believe that there is no reason to intervene in the outcome of this balance between the factors considered in this case.

Justice

Justice D. Barak-Erez:

1. I join my colleague's Justice E. Rubinstein's comprehensive opinion, and wish to not decide the issues discussed here beyond the necessary scope, and acknowledge that the current scope is too narrow to fully and exhaustively address them. For instance, insofar that the issue of conviction within a conglomerate is concerned, although I believe that there is good reason for the trend my colleague pointed out, I wish not to take a stand as to the conditions and circumstances under which it would be appropriate to do so.

2. I wish to add that in my opinion, the finding that the offense established by section 54(a)(2) of the Securities Law (the "manipulation" offense) is also committed under the circumstances of "mixed purposes" – committing an act in securities in order to influence their price with the additional purpose of

making a "good investment" – is understandable, and even obvious. Let us imagine a case where a person who trades in securities is faced with a choice between two avenues of action – influencing the price of a security, an investment which will also yield "legitimate" financial benefits, versus influencing a price of a security, an investment which will not yield any financial benefits, and he opts for the former. Did he not commit an offense? The manipulation offense is designed to prohibit acts in securities in order to influence their value in the market. What is it to us if the person committing the prohibited act thinks that the activity will also financially benefit him or the corporation in which he is employed? The harm to the value protected by this offense – protecting the investing public from artificial changes in the securities price in a manner that distorts their trading – is caused either way. It is easy to understand that there are additional possibilities of completely lawful investments in securities, which may also have financial benefits. These were not made by the person committing the offense because the decision on the investment was joined all along by the intention to **also** impermissibly influence the prices of the securities. This is, essentially, the distortion caused to the market when securities are traded out of "mixed proposes." An ordinary decision by an actor in the stock market is based on factoring the financial utility that may result from the investment. This is how the market maintains its efficiency – each security is traded according to "pure" financial considerations. However, in a case of "mixed purposes" there is an illegitimate consideration, which is unlawful, of influencing the value of securities. Of course, this manipulation, which is not visible to other investors, inherently distorts the market (because it introduces "foreign" considerations to the trade) and may mislead investors. These investors may believe that the security achieved a certain price as a result of "pure" financial considerations, whereas in reality, its trade resulted from irrelevant considerations in order to influence its price.

3. By way of analogy, it could be noted that even in other contexts, in and outside criminal law, an activity that is motivated by two purposes (one legitimate and one prohibited), and even a double motive (legitimate and prohibited), may be considered unlawful and prohibited, all according to the purpose at the base of the relevant statute. For instance, let us imagine a situation where a public official appoints people to whom he has close political ties in order to advance the official's own self interest. The wrongdoing here is not "wiped" only because the official chose good and qualified people in the official's mind who also happen to be closely tied politically to him. The mere fact that selecting good and qualified people was limited to the relevant political circle seemingly lays the foundation for the conclusion that this is prohibited and wrong conduct. The argument that the appointee is qualified is immaterial. Discrimination law is similar: an employer's decision to hire a male candidate over a female candidate because he prefers working with men is wrong and prohibited, even if an additional consideration supporting the decision was that the man's compensation requirements were lower than the woman's – the mere consideration of the

woman's sex as a "disadvantage" is prohibited (see and compare HCJ 706/94, *Ronen v. The Minister of Education and Culture*, IsrSC 53(5) 389, 421 (1999)). This is the law applicable here, too, with the necessary changes. The mere fact that the activity in the securities intended to manipulatively influence their price also had, arguably, a legitimate financial reason, does not cure the harm to the protected societal value. As a result, an activity in securities with the intent to influence the market is always wrong. The fact that this intent was coupled with other purposes, and even if these purposes were substantial in the eyes of the perpetrator, they cannot serve as a defense against a criminal conviction. This unequivocal message ought to be internalized by all those acting in the stock market.

Justice

Decided according to the opinion of Justice E. Rubinstein.

Given today, December 25, 2014.

Justice Justice Justice