Legal Update **April 2018**

Litigation Department

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Significant decision of the United States District Court to dismiss Israeli Securities Law claims brought against a dual-listed company in a securities class action in the United States

On March 28, 2018 the United States District Court for the Southern District of New York (the Honorable J. Paul Oetken) dismissed the Israeli securities laws claim in a securities class action brought against the drug manufacturer Mylan N.V. ("**Mylan**") and several of its officers (IN RE MYLAN N.V. SECURITIES LITIGATION 16-CV-7926 (JPO)).

The complaint, which was brought against Mylan by investors who purchased its shares on the NASDAQ as well as by investors who purchased its shares on the Tel-Aviv Stock Exchange ("**TASE**"), alleged that, after committing illegal acts in relation to its products, Mylan made materially misleading statements about its conduct to investors, in violation of U.S. and Israeli securities laws.

Mylan moved to dismiss the complaint. The Court denied Mylan's motion with regard to U.S. securities laws claims, but granted it with respect to the Israeli securities laws claim, refusing to assert supplemental jurisdiction over the claim brought by investors who purchased their shares on the TASE (pursuant to Sections 1367(c)(1) and (4) of the Federal Supplemental Jurisdiction Statue (28 U.S.C. § 1367(c))).

As to Section 1367(c)(1), the Court stated that the Israeli law claim raised "complex issues of foreign law", since Plaintiffs' claim calls on the Court "to decide whether Israeli courts would apply U.S. securities law to a 'dual listed' company such as Mylan". While the Court acknowledged recent decisions by

Israeli District Courts that applied U.S. securities laws to claims brought by TASE purchasers of shares of dual-listed companies (citing the *Damti v. Mankind Corporation et al.*, C.A. 28811-02-16 decision), the Court stated that these decisions did not have precedential effect. For this reason, the Court opted to allow the Israeli Supreme Court to decide definitively what law applies to the question of liability for the reporting of dual-listed companies in Israel, instead of asserting jurisdiction over the matter.

As to Section 1367(c)(4), the Court concluded that the case presented "'exceptional circumstances' offering 'compelling reasons for declining jurisdiction,'" since two class actions against Mylan were currently pending in Israeli courts, both brought by purchasers of Mylan shares on the TASE, and raising similar claims against Mylan. While the Court noted that Plaintiffs' counsel in Israel intends to stay these class actions, the Court concluded that Israeli courts are better equipped than a U.S. court "to offer Israeli plaintiffs an appropriate forum to litigate their claims under Israeli law"; and that the Court "hesitates to impinge on Israeli courts' ability to adjudicate the claims of their own citizens under their own securities laws - even if Israel has chosen, as a matter of *Israeli law*, to apply U.S. securities laws".

Furthermore, drawing, *inter alia*, on the Supreme Court decision in *Morrison v. Nat'l Bank Ltd.*, 561 U.S. 247, 269 (2010), the Court stated that the U.S. has a "minimal interest, if any, in providing a forum to litigate the claims of foreign stockholders under foreign securities laws".

Finally, the Court stated that declining to assert jurisdiction over the Israeli plaintiffs "avoids the risk of exposing Defendants to inconsistent or double liability".

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If the *Mylan* decision is upheld, it will have a dramatic effect on class actions brought against dual-listed companies in the United States: individuals who purchased shares of a dual-listed company on the TASE will be excluded from bringing securities claims against such companies in U.S. courts, even if the Israeli "choice-of-law" is that U.S. securities laws apply to Israeli securities laws claims against dual-listed companies. It should be

noted that shortly after the *Morrison* decision was handed down, the Israel Securities Authority raised this very concern in a letter to the SEC.

The scope of the effects of the *Mylan* decision on securities class actions brought in Israel against dual-listed companies is unknown for now. On the one hand, Israeli courts may be less inclined to grant a stay of proceedings in cases where class actions were brought in both jurisdictions, since the TASE purchasers may be excluded from the U.S. class. On the other hand, since Israeli courts have opined that U.S. securities laws should apply in these cases, they may still be more inclined to allow U.S. courts to adjudicate claims made under U.S. securities laws, before ruling on similar on identical questions themselves.

It should be noted that the *Mylan* decision does not preclude the possibility of including an Israeli class in a U.S. settlement agreements, and in fact this has occurred in previous situations.

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FBC represents foreign and Israeli issuers in connection with dual-listing in Israel and regularly advises dual-listed companies in connection with ongoing reporting obligations and securities offerings in Israel. For further information in this regard generally, or more specifically in regard to the *Mylan* and *Mankind* decisions (and the similar decision in *Cohen v. Tower Semiconductor Ltd.* et al., C.A. 44775-02-16, on which we issued a previous legal update), please feel free to be in touch with your regular FBC contact or any of the following attorneys below.

Sincerely,

Litigation Department

Fischer Behar Chen Well Orion & Co.

Dr. Gil Orion	gorion@fbclawyers.com	+972-3-6944142
Ron Lehmann	rlehmann@fbclawyers.com	+972-3-6944145
Michal Minsky	mminsky@fbclawyers.com	+972-3-6944142