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Breeders' Rights in the Cannabis Industry and Employees' Rights for Royalties in Israel

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The massive expansion of the Cannabis industry in recent years has led to increased interest in a relatively marginal intellectual property right – plant breeders' right. A significant aspect of this type of IP right – employees' possible entitlement to additional compensation for strains protected by breeders' rights – is not addressed in most companies' template employment agreements. This deficiency may have significant impact (financial, strategic and otherwise) on stakeholders in the Cannabis industry.

Cannabis has become one of the hottest trends in the Israeli market, and as an increasing number of countries now allow the usage of Cannabis, be it for medical or other purposes, more and more companies are entering this field. As a result, we are currently witnessing an influx of new technological developments in the Cannabis ecosystem, including the development of new Cannabis plant strains. Each of these new strains may possess unique qualities, for instance with respect to the rate of its active pharmaceutical ingredients (for instance, CBD and THC), longer shelf life and so on.

The protection of intellectual property rights derived from the development of new plant strains, including the Cannabis plant, is done, *inter alia*, by registering an intellectual property right known as a “breeders' right”.

A breeders' right is an independent intellectual property right that in Israel is registered with the Ministry of Agriculture and Rural Development, entitling the holder of such right exclusive usage of the new strain for 20-25 years. In Israel, breeders' rights are governed by the Plant Breeders' Rights Law, 5733-1973 (the "**Plant Breeders' Rights Law**"). The new strain may be subsequently registered in other countries that are members of the Union for the Protection of New Plant Varieties. Currently, 75 states (including Israel) are members.

The Plant Breeders' Rights Law includes several provisions outlining breeders' rights – many of which are similar to the provisions outlining rights in "service inventions" under the Israeli Patents Law, 5727-1967 (the "**Patents Law**"). Among other things and similarly to the Patents Law, the Plant Breeders' Rights Law provides that the intellectual property rights relating to a new strain that was developed by an employee as a result of his/her employment shall vest with the employer. In the absence of an agreement between the employer and the employee with respect to the employee's right to compensation for breeders' rights, the employee's entitlement to compensation may be determined by the Committee for Breeders' Rights (the "**Committee**"). This arrangement is substantially similar to the arrangement regarding rights in service inventions under the Patents' Law.

The protection of the employer's rights in the intellectual property created by its employees is extremely important in almost any technology-based company. This may include, in some cases, new plant strains. Contractual provisions regarding intellectual property rights can be found in most Israeli employment agreements. Typically, they will articulate that any intellectual property created by the employee within the context of his/her employment with the relevant employer, shall be the employer's exclusive property. A fairly broad definition of "intellectual property" will ordinarily be included. In recent years, following several decisions rendered by the Compensation and Royalties Committee, a body constituted under the Patents Law, it has become common practice to include an express waiver by the employee of any rights to receive royalties or any other consideration (in excess of what is granted under the employee's employment agreement) for service inventions to which the employee contributed. As mentioned, the relevant statutory provisions in the Plant Breeders' Rights Law are generally similar to those provided under the Patents Law. Most employment agreements in Israel do not explicitly refer to breeders' rights. Equally, they almost never include an express waiver by the employee of any rights to receive compensation for contributing to the development of new plant strains. In light of these weaknesses, and in the event that the employer registered a breeders' right with

respect to a new strain, the employee may be able to bring a claim for compensation in front of the Committee.

Plant breeders' rights may be a strategic asset, with significant value (from a legal as well as a business perspective), to companies whose line of business includes developing new strains of plants – including Cannabis companies. Employees' rights in plant breeders' rights may be especially crucial, and potentially detrimental, to companies that are at a critical strategic phase (e.g. facing an investment round, an IPO or an M&A deal). In addition, managing a proceeding in front of the Committee may lead to unexpected and significant costs (due to the possibly-lengthy proceedings in front of the Committee for Breeders' Rights as well as to the future payment of royalties), damage to the employer's business and reputation, and so on.

A possible solution should include amending your template employment agreement such that it will include an express waiver by your employees of the right to receive royalties for new plant strains. Furthermore, the definition of "intellectual property" should explicitly include plant breeders' rights. Amendments in the foregoing manner will provide better intellectual property protection to the employer, greater certainty and will prevent (extreme) cases where employers may be held hostage by current or past employees.

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