

C A N A D A

**PROVINCE OF QUÉBEC
REGISTRY OF MONTRÉAL**

No: 500-09-022220-115
(S.C. N° 500-11-041322-112)

COURT OF APPEAL

**JOSEPH FAHS
STEVEN CHAPNICK
ELIZABETH TAGLE**

APPELLANTS/Petitioners
-and-

PRICEWATERHOUSECOOPERS INC.
APPELLANT/Receiver/Interim Receiver

-and-

DAVID GOTTLIEB
APPELLANT/Foreign Representative

v.

GEORGES MARCIANO

RESPONDENT/Debtor
-and-

**MICHEL BENSMIHEN
9204-7570 QUÉBEC INC.
9211-9882 QUÉBEC INC.
9213-4568 QUÉBEC INC.**

RESPONDENTS/Mis-en-cause

DE BENE ESSE APPLICATION FOR LEAVE TO APPEAL

*(Bankruptcy and Insolvency Act, s. 193; Bankruptcy and
Insolvency Rules, s. 31)*

**TO ONE OF THE JUDGES OF THE COURT OF APPEAL, THE APPELLANT
PRICEWATERHOUSECOOPERS INC. RESPECTFULLY SUBMITS AS FOLLOWS:**

INTRODUCTION

1. Following the filing of the Notice of Substitution of Attorneys of Appellant/Receiver/Interim Receiver PricewaterhouseCoopers Inc. ("PWC") on December 16, 2011, PWC wishes to amend the Notice of Appeal filed by PWC,

Appellants/Petitioners Joseph Fahs, Steven Chapnick and Elizabeth Tagle (the “**Creditors**”) and the Appellant/Foreign Representative David Gottlieb, in his capacity as US Trustee to the bankruptcy of Marciano (the “**U.S. Trustee**”) dated December 8, 2011 in Court of Appeal file number 500-09-022220-115 for the purpose of initiating a distinct appeal from that of the Creditors and the U.S. Trustee.

2. As such, PWC seeks leave to appeal, if this Honourable Court finds that leave is required, in respect of a judgment of the Superior Court of Quebec dated December 8, 2011 rendered by the Honourable Mark Schrager, J.S.C. sitting in the Commercial Division of the Superior Court of Québec for the judicial district of Montreal, following a hearing which took place on October 17, 19 and 20, 2011 (the “**Judgment**”), a copy of which is filed herewith as Exhibit **R-1**.
3. PWC seeks leave to appeal the Judgment for the fundamental reason that, as a consequence thereof, PWC, an officer of the Court, is improperly being punished for actions taken and fees and disbursements incurred in the furtherance of a mandate conferred by an executory order of the Superior Court. Justice Schrager committed errors of law, palpable and overriding errors of fact and, fundamentally, exceeded his jurisdiction, rendering a Judgment which significantly undermines the effectiveness of Canada’s bankruptcy and insolvency regime and directly affects the rights and patrimony of PWC.
4. The Judgment from which appeal is sought granted two (2) motions by the Respondents, namely:
 - a) A Motion to quash the issuance of a search warrant and authorization to seize the property of the debtor, to rescind and dismiss orders and for the issuance of safeguard orders brought by Respondents Michel Bensmihen, 9204-7570 Quebec Inc., 9211-9882 Quebec Inc. and 9213-4568 Quebec Inc. (the “**Motion to quash**”); and,
 - b) A Motion to review, rescind and vary various orders rendered pursuant to the Bankruptcy and Insolvency Act filed by Respondent Georges Marciano (the “**Motion to review**”).
5. As appears from its conclusions, the Judgment was rendered executory notwithstanding appeal, the whole despite the presence of complex and novel issues at stake and the fact that PWC, as court-appointed Interim Receiver and Receiver, had taken physical possession of Marciano’s assets and confided most of them to third-party guardians to protect the interests of Marciano’s creditors.
6. For that reason, concurrent to the Notice of Appeal filed on December 8, 2011, the Appellants, including PWC, filed a *Motion to suspend the provisional execution notwithstanding appeal of a judgment* which was heard by the Honourable Jacques Fournier, J.C.A. on December 9 and 12, 2011 but for which judgment has not yet been rendered.
7. Terms not defined in the present Application for Leave to Appeal shall have the meaning ascribed in the Judgment.

PROCEDURAL BACKGROUND IN RELATION TO THE JUDGMENT

8. On September 14, 2011, the U.S. Trustee filed a Motion to obtain the recognition of a foreign main proceeding (the “**Recognition Motion**”) before the Superior Court of Quebec and sought, *inter alia*, the appointment of PWC as Receiver pursuant to subsection 272(1) d) of the *Bankruptcy and Insolvency Act* (“**BIA**”), the whole as more fully appears from a copy of the Recognition Motion filed herewith as Exhibit **R-2**.
9. On or about September 14, 2011, the Creditors filed in the Superior Court of Quebec a Petition for a receiving order against Marciano in order to have him declared bankrupt in Canada.
10. Concurrently with the Petition for a receiving order, the Creditors filed a Motion to appoint an interim receiver (the “**Interim Receiver Motion**”) over the assets of Marciano and those of various related entities including, *inter alia*, Respondents the CKSM Family Trust, as well as 9204-7570 Quebec Inc., 9211-9882 Quebec Inc. and 9213-4568 Quebec Inc. (collectively, the “**Numbered Companies**”) by which they sought to appoint PWC as interim receiver, the whole pursuant to Section 46 BIA, the whole as more fully appears from a copy of the Interim Receiver Motion, filed herewith as Exhibit **R-3**.
11. Both the Interim Receiver Motion and the Recognition Motion were heard *ex parte* by the Honourable Chantal Corriveau, J.S.C. during two (2) consecutive days of hearing on September 14 and 15, 2011.
12. On September 15, 2011, Justice Corriveau granted both the Recognition Motion and the Interim Receiver Motion (the “**Corriveau Orders**”). As a consequence thereof, PWC was appointed as Interim Receiver and Receiver over the assets of Marciano, the CKSM Family Trust and the Numbered Companies, the whole as more fully appears from copies of the Corriveau Orders, filed herewith as Exhibit **R-4**.
13. Further to this dual appointment, PWC filed a Motion to obtain the issuance of a search warrant and the authorization to seize the property of the debtor (the “**Search Warrant Motion**”), the whole as more fully appears from a copy of the Search Warrant Motion, filed herewith as Exhibit **R-5**.
14. This motion was granted by Justice Corriveau on September 15, 2011, and a second similar motion was granted by Justice Corriveau on September 16, 2011 (the “**Search Warrant Orders**”), the whole as more fully appears from copies of the Search Warrant Orders, filed herewith *en liasse* as Exhibit **R-6**.
15. On or about September 26, 2011, Marciano filed Notices of Appeal against the Corriveau Orders and the Search Warrant Orders (the “**Appeals**”).
16. As of the present date, none of the Appeals have been heard.
17. Notwithstanding the Appeals, on or about September 28, 2011, the CKSM Family Trust and the Numbered Companies also filed the Motion to quash and Marciano filed the Motion to review, the whole as more fully appears from copies of the Motion to quash and of the Motion to review, filed herewith *en liasse* as Exhibit **R-7**.

18. The Motion to quash and the Motion to review were heard during three (3) days of arguments before Justice Schrager on October 17, 19 and 20, 2011, following which, Justice Schrager took the Motion to quash and the Motion to review under advisement.
19. On October 24, 2011 Justice Schrager permitted PWC to file an affidavit rebutting certain testimony of Ms. Sascha Romer, and detailing the seizures performed and the persons retained in relation thereto, the whole as appears from a copy of said affidavit, filed herewith as Exhibit R-8.
20. All parties filed their written submissions on the Motion to quash and the Motion to review on or about October 25, 2011.
21. Following additional legal developments in the US proceedings concerning Marciano's bankruptcy, on October 31, 2011, PWC filed a Motion to obtain the reopening of the hearing held on October 17, 19 and 20 2011 (the "**Motion to reopen the hearing**") for the purpose of filing into the Court record copy of legal proceedings and orders rendered in the US proceedings subsequent to the hearings on the Motion to quash and the Motion to review, the whole as more fully appears from a copy of the Motion to reopen the hearing, filed herewith as **Exhibit R-9**.
22. The Motion to reopen the hearing was heard on November 25, 2011 and granted by Justice Schrager.
23. Further to the judgment granted by Justice Schrager on November 25, 2011, Marciano, the CKSM Family Trust and the Numbered Companies were also permitted to file additional exhibits to reply to the additional exhibits filed by PWC.

PWC HAS A DE PLANO RIGHT OF APPEAL

24. PWC respectfully submits that it has a right of appeal, without any requirement of seeking leave to appeal, by virtue of subsections 193 a) and c) of the BIA:
 - 193.** Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:
 - (a) if the point at issue involves future rights;
 - (b) if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings;
 - (c) if the property involved in the appeal exceeds in value ten thousand dollars;
 - (d) from the grant of or refusal to grant a discharge if the aggregate unpaid claims of creditors exceed five hundred dollars; and
 - (e) in any other case by leave of a judge of the Court of Appeal.

[Emphasis added]

25. The points at issue in the present appeal involve the future rights of PWC in that, as a result of the Judgment:
 - a) expenditures and liabilities properly made or incurred by PWC in its capacity as court appointed officer, including its fees and disbursements and the fees and disbursements of its legal counsel can no longer form a first charge on Marciano's assets, including the assets owned or controlled by Marciano indirectly, and including those assets in the name of the CKSM family trust and its affiliates as is contemplated in the Corriveau Orders;
 - b) PWC will no longer be at liberty to apply reasonable amounts, out of the monies in its possession, against its fees and disbursements, including legal fees and disbursements, incurred at the normal rates, and charges of PWC or its counsel;
 - c) PWC has been stripped of its protection against the institution of proceedings against it in its capacity of Interim Receiver;
 - d) PWC has been stripped of its court conferred immunity against liabilities or obligations resulting from its appointment or the fulfillment of its duties as Interim Receiver;
 - e) PWC is exposed to significant expenses for the return of property seized in conformity with the Corriveau Orders; and,
 - f) PWC faces liability in light of the solidary condemnation for costs contained in the Judgment.
26. In sum, all while causing PWC to suffer significant losses related to the execution of its mandate conferred by the Corriveau Orders and executed by PWC in conformity therewith, the Judgment further exposes PWC to future liability such that it is clear that the points raised in the herein appeal as against the conclusions of the Judgement imposing such further liability can properly be said to involve future rights.
27. It is equally clear that the property involved in the appeal exceeds in value \$10,000 in that, as a result of the Judgment:
 - a) PWC was deprived of its court conferred control over the assets of Marciano, the CKSM Family Trust and the Numbered Companies, the value of which is well in excess of \$10,000 (indeed, as appears from the consolidated balance sheet dated August 20, 2009, filed in support of the Interim Receiver Motion as Exhibit R-14 and referred to at paragraph 18 thereof, these assets included \$83,255,000 in real estate, an art collection valued at \$36,205,953, \$30,736,824 in jewellery and watches, a wine collection evaluated at \$6,855,430, automobiles worth \$3,225,000 and over \$1,500,000 in silver, coins and currency, crystal and fire arms);
 - b) PWC has to assume all the fees and disbursements related to the execution of its mandate, plus all the costs incurred for returning the assets seized by PWC under its mandate as court appointed Interim Receiver and Receiver, as well as costs

pursuant to the Judgment, the whole totalizing an amount well in excess of \$10,000;

- c) PWC is deprived of passing its accounts for fees and disbursements as provided in the Corriveau Orders, which fees and disbursements are well in excess of \$10,000; and,
- d) PWC was ordered to return all sums received on account of fees or disbursements, which fees and disbursements are well in excess of \$10,000.

SUBSIDIARILY, SHOULD LEAVE TO APPEAL BE REQUIRED, IT SHOULD BE GRANTED

28. Should leave to appeal be required in this instance, which is denied, such leave should be granted in light of the fact that the present appeal is of significance to the practice, of significance to the action, is *prima facie* meritorious and will not unduly hinder the progress of the action.

The points on appeal are of significance to the practice

29. The present appeal is of great importance to the practice of bankruptcy and insolvency law in Canada given that the Judgment significantly undermines and throws into doubt the ability of interim receivers and receivers to carry out duties conferred upon them by Court orders and has the very certain potential to undermine the effectiveness of the institutions of interim receivership and receivership, and other analogous functions carried out by trustees and monitors, by seriously undermining the confidence that such actors appointed as officers of the Court can ascribe to the orders defining the scope of their powers, duties, immunities and methods of remuneration.

30. If the Judgment is left to stand as is, it can reasonably be expected that such actors will be significantly more reticent to accept Court appointments to act in such capacities as officers of the Court and that even if such appointments are accepted, such actors will undoubtedly carry out their duties with much less vigour so as to minimize any potential risk, which in turn would be significantly detrimental to creditors generally under Canada's bankruptcy and insolvency regime, thus undermining the effectiveness of the regime itself.

31. In addition, this appeal raises a number of significant questions with respect to search warrants issued pursuant to section 189 BIA, including the proper interpretation to be given of the term "bankrupt" within the meaning of that section, the question of whether such search warrants can affect the property of third parties and the question of whether documents can be seized pursuant to such search warrants.

32. Finally, this appeal raises the very significant question of the powers of the Court pursuant to sub-section 187(5) BIA as well as the interplay between these powers and appeal rights in a context where the decision which was subjected to review was in fact executory notwithstanding appeal and that appeals had also filed in addition to the Motion to quash and the Motion to review.

This appeal is significant to the action

33. The appeal is of great significance to the action given that, as a result of the Judgment, the Creditors and the U.S. Trustee will be unable to have their rights recognized in Canada and, in stripping PWC of its powers, compromises their access to the assets of Marciano, the CKSM Family Trust and the Numbered Companies in furtherance thereof.
34. Further, the appeal is of significance to the action in light of the fact that the rights of PWC under the Corriveau Orders were entirely annihilated as a result of the Judgment and that significant further sources of monetary liability were imposed upon PWC.
35. In light of the fact that appeals of the Corriveau Orders were also filed and that these appeals remain pending, it is of significance to the action that this Honourable Court more clearly define the outlines of the jurisdiction of a Superior Court judge sitting in Bankruptcy pursuant to sub-section 187(5) BIA as well as the interplay between these powers and appeal rights.

This appeal is *prima facie* meritorious

Justice Schrager erred in exceeding his jurisdiction

36. Justice Schrager exceeded his jurisdiction pursuant to sub-section 187(5) BIA by conducting an exercise which is tantamount to sitting in appeal of the Corriveau Orders and rendering a judgment rescinding the Corriveau Orders based largely on questions of law which had been considered by Justice Corriveau in rendering the Corriveau Orders.
37. Justice Schrager erred in:
 - a) failing to sparingly exercise the jurisdiction conferred by sub-section 187(5) BIA;
 - b) rescinding the Corriveau Orders in the absence of a fundamental change in circumstances and where no new evidence justifying a different result had been adduced before him; and,
 - c) conducting a rehearing on the merits of the Corriveau Orders in circumstances where such orders were executory notwithstanding appeal, that suspension of the provisional execution of the Corriveau Orders had not been sought while Notices of Appeal had been filed and appeals were thus pending against the Corriveau Orders.
38. Justice Schrager does not, in his reasons in support of the Judgment, criticise the conduct of PWC. Rather, the only point directly concerning PWC on which Justice Schrager comments, at paragraphs 143 to 180 of the Judgment, is the fact that PWC obtained search warrants pursuant to section 189 BIA.
39. It is clear from the Search Warrant Orders that Justice Corriveau, when granting said orders, considered section 189 BIA. Despite this, Justice Schrager quashed these search warrants, solely on the basis of legal issues.

40. It appears from the Judgment that the search warrants were quashed not because it had been alleged or proven that Justice Corriveau was misled by PWC, but because Justice Schrager disagreed with Justice Corriveau as to whether or not section 189 BIA authorized her to render the Search Warrant Orders.
41. In doing so, Justice Schrager was clearly usurping the powers of this Honourable Court to review errors of law made by inferior courts.
42. Irrespective of the question of whether or not Justice Schrager was justified in quashing the Corriveau Orders, PWC submits that he erred in stripping PWC of all of the protections afforded to it by the Superior Court for the execution of the mandate conferred to it, in its capacity as officer of the Court, by the Corriveau Orders, namely:
 - a) by annulling PWC's Receiver's Charge;
 - b) by preventing PWC from passing its accounts;
 - c) by stripping PWC of its protection from proceedings being instituted against it in its capacity of Interim Receiver;
 - d) by stripping PWC of its protection from liability or obligations resulting from its appointment or the fulfillment of its duties as Interim Receiver;
 - e) by ordering that the return of the seized assets be at PWC's expense;
 - f) by ordering that PWC return to the Respondents all sums received on account of fees or disbursements; and,
 - g) by condemning PWC to costs.
43. The mandate conferred to PWC by the Superior Court by virtue of the Corriveau Orders and the rights and protection contained therein, which were necessary to allow PWC to properly carry out its court appointed duties, were conferred upon PWC as a result of motions in which PWC was not a petitioner.
44. PWC relied on the Corriveau Orders, including the protections granted therein, to accept its appointment as receiver and interim receiver, and then to carry out its duties in such capacity.
45. PWC, based on reasonable expectation and relying on the Corriveau Orders, fulfilled its mandate by taking reasonable measures in furtherance thereof on the basis of the Corriveau Orders, thus incurring substantial fees and disbursements.
46. Furthermore, Justice Schrager erred in considering PWC as a petitioner under the Recognition Motion and the Interim Receiver Motion (paragraphs 16(i) and 89 of the Judgment) and in concluding that it is PWC that has to bear consequences stemming from any purported impropriety committed by the Creditors and the U.S. Trustee in the obtention of the Corriveau Orders.

47. PWC is not an interested party in the dispute between the Creditors and Marciano and did not seek the issuance of the Corriveau Orders. It is not the Creditors who appointed PWC – it is the Superior Court and it constitutes a reviewable error for a Superior Court judge to rescind an order of the Superior Court in such a way that punishes officers of the Superior Court for actions taken and fees and disbursements incurred in the furtherance of a mandate conferred by that same court.
48. What is more, Justice Schrager erred in going beyond the conclusions sought in the motions filed by the Respondents. In fact, in the Motion to quash, the only conclusion sought with respect to the repayment of the fees and disbursements paid to PWC from the Respondent/mis-en-cause's property is in the form of a conclusion that the Creditors be ordered “to provide an undertaking to be responsible and abide by any order that the Court may make as to damages sustained by the Petitioners by reason of the appointment of the Interim Receiver or in the event the Petition for a receiving order is dismissed”, PWC obviously not being included in this conclusion as it is not an “alleged creditor”.
49. In the Motion to review, the only conclusion sought against PWC concerns the return of the seized assets. Marciano did not seek from the Court that such return be at PWC's expense.
50. Further, there are no allegations in the Motion to review or the Motion to quash as concerns any wrongful conduct by PWC aside from vague and imprecise allegations contained in the Motion to quash to the effect that the seizures were “unlawfully and abusively performed by PriceWaterhouseCoopers Inc.” Such allegations were not dealt with in the Judgment.
51. The Respondents take issue with the legality and the appropriateness of the Corriveau Orders but do not take issue specifically with PWC's conduct or allege that it is not in conformity with the Corriveau Orders. In light of this, Justice Schrager erred in condemning PWC to pay and to incur significant amounts as a result of the performance of its duties stemming from the Corriveau Orders.
52. Finally, Justice Schrager committed a reviewable error in condemning PWC in such a fashion without providing any reasons justifying his conclusions. Indeed, the only comments in Justice Schrager's reasons as concerns PWC specifically are limited to the legal question as to whether or not PWC was entitled to obtain the search warrants pursuant to section 189 BIA.
53. Nowhere does Justice Schrager discuss or come to the conclusion that the fact that PWC had sought the search warrants amounted to an abuse of proceedings justifying any sort of monetary condemnation as against PWC.
54. As such, for Justice Schrager to have then proceeded to render a judgment, the conclusions of which cause PWC to sustain significant financial losses, past, present and future, constitutes a reviewable error.

Justice Schrager erred in determining that PWC could not obtain the search warrants

55. As concerns Justice Schrager's conclusions concerning the Search Warrant Orders, aside from the question that it was not within his jurisdiction to determine this issue, PWC submits that Justice Schrager also erred in finding that Justice Corriveau had misapplied section 189 BIA.
56. Justice Schrager's comments with respect to the search warrants can be summarized as relating to the following issues:
 - a) the status of Marciano as a bankrupt;
 - b) the ability to seize documents pursuant to a search warrant issued under section 189 BIA; and,
 - c) the ability to seize third party assets pursuant to a search warrant issued under section 189 BIA.
57. Irrespective of the merits of Justice Schrager's analysis with respect to the issuance of the search warrants, this analysis did not take into account the wide powers given to PWC by Justice Corriveau under the Corriveau Orders, which powers included, *inter alia*:
 - a) that the administration or realization of all of Marciano's property located in Canada shall be carried out by PWC acting as Receiver (section 11 of the order issued pursuant to the Recognition Motion);
 - b) the supervision and monitoring of all activities with regard to the preservation, protection, removal, consolidation, possession and/or control of the debtor's assets, including the assets owned or controlled by the debtor indirectly, including, *inter alia*, the CKSM Family Trust and the Numbered Companies (the "**Property**") and the power to relocate any of the Property in order to safeguard it (section 13(a));
 - c) taking possession of all or part of the Property if needed (section 13(b));
 - d) the searching of premises (section 13(d)); and,
 - e) taking steps for the preservation and protection of the Property (section 13(i)).
58. It is submitted that the process of analyzing the validity of the powers given pursuant to the search warrant in a vacuum, independently from the powers given to PWC in the Corriveau Orders, as if such powers did not exist, constitutes an error of law.
59. As regards the question of whether or not Marciano can be considered as a bankrupt within the meaning of section 189 BIA, PWC submits that Justice Schrager erred in:
 - a) narrowly construing the term "bankrupt" as excluding Marciano who, PWC submits, is clearly bankrupt in light of the executory order of Mrs. Justice Kaufman of the California Bankruptcy Court rendered on December 28, 2010,

which order was recognized by the Superior Court of Québec on September 15, 2011, prior to PWC seeking the issuance of the search warrants; and,

- b) interpreting section 189 BIA as excluding the possibility that an interim receiver appointed under section 46 BIA be able to seek the issuance of a search warrant, in view of the fact that its appointment expires upon the taking of possession by a trustee, and limiting the use of search warrants by interim receivers appointed under section 47 and 47.1 to exceptional and limited circumstances, rendering search warrants useless for interim receivers for all intents and purposes.
- 60. This error as to the proper interpretation of the term “bankrupt” in section 189 BIA led Justice Schrager to commit a second reviewable error as concerns the ability of an interim receiver to seize the property of third parties pursuant to a section 189 BIA search warrant.
- 61. Indeed, at paragraphs 145 and 146 of the Judgment, Justice Schrager dismissed two decisions, one of which being a very recent decision of this Honourable Court, standing for the proposition that an interim receiver can indeed seize the property of third parties pursuant to a section 189 BIA search warrant.
- 62. Justice Schrager erroneously distinguished those two cases from the case at hand by concluding that they do not apply in light of his earlier erroneous conclusion that Marciano could not be considered a “bankrupt” for the purposes of section 189 BIA.
- 63. As to the seizure of documents, books and records (collectively, the “**Documents**”), Justice Schrager erred in considering that section 189 BIA does not apply to Documents. In his analysis of the issue, Justice Schrager says at paragraph 176 of the Judgment that a trustee has the duty to take possession of the Documents of the bankrupt and held that “[h]owever, a trustee cannot rely on section 189 BIA to perform a seizure of the bankrupt’s documents”.
- 64. It is to be noted, however, that sub-section 16(3.1) BIA specifically refers to the obligation for the trustee to obtain a search warrant issued under section 189 BIA in order to enter premises occupied by a third party to gain access to Documents of the bankrupt.
- 65. Sub-section 16(5) BIA also refers to the obligation of third parties to remit to the trustee Documents relating to the accounts of or to any trade dealings of the bankrupt.
- 66. To summarize, specific reference is made in the BIA to the section 189 search warrant in relation to Documents of a bankrupt, as well as Documents of the bankrupt or relating to accounts or trade dealings of the bankrupt in the hands of third parties.
- 67. It is submitted that restricting the powers of the Court to issue a search warrant relating to Documents constitutes an error of law.

The present appeal will not unduly hinder the progress of the action

- 68. At the present time, there is simply no action whose progress will be unduly hindered by the appeal, as the action is already on appeal further to the Judgment. It is submitted that

this factor is irrelevant in the case at hand as there is no “action” and no “progress” relating thereto.

Other considerations justifying the granting of leave to appeal

69. It is respectfully submitted that, in addition to the factors described above, leave to appeal should be granted in the present instance because, failing which, PWC will suffer the serious injustice of incurring losses in excess of one million dollars when all it did was to properly, faithfully and comprehensively fulfill the duties, powers and obligations conferred upon it by orders of the Superior Court, while relying on the protections granted by that same Court to enable PWC to fulfill its duty as an officer of the court.
70. This would be the result of a situation where a Superior Court judge disapproved of the conduct of persons unrelated to PWC and because that same judge was of the opinion that his colleague committed errors of law.
71. This serious injustice is caused by the exercise, in the Judgment, of a discretionary power conferred by sub-section 187(5) BIA which was not exercised judicially in that it was exercised principally based on a wrong principle and a palpable and overriding error of fact, namely that the Creditors failed to satisfy their burden of providing full and frank disclosure to Justice Corriveau.
72. Moreover, the Judgment does not contain any reasons supporting the conclusions against PWC, which also supports the conclusion that Justice Schrager did not exercise his discretion judicially.
73. In conclusion, the Court is faced here with the judgment that is contrary to law in that it:
 - a) exceeds the powers of the Superior Court under sub-section 187(5) BIA
 - b) involves obvious errors of fact and law;
 - c) contains conclusions rendered in an *ultra petita* fashion, and without reasons;
 - d) causes serious and unjustified prejudice to an officer of the court; and,
 - e) amounts to an abuse of judicial power for which leave to appeal is justified and by reason of which the present appeal should be granted.

FOR THESE REASONS, MAY IT PLEASE THIS HONOURABLE COURT TO:

GRANT the present Motion;

DECLARE that the Appellant PricewaterhouseCoopers Inc. has a *de plano* right of appeal of the judgment rendered on December 8, 2011 in the present instance by the Honourable Mark Schrager, J.S.C.;

PRAY ACT of the Appellant PricewaterhouseCoopers Inc.'s Amended Notice of Appeal enclosed with the present Motion;

THE WHOLE without costs, save in the event of contestation;

IN THE ALTERNATIVE:

GRANT the Appellant PricewaterhouseCoopers Inc.'s Application for Leave to Appeal;

AUTHORIZE the Appellant PricewaterhouseCoopers Inc. to appeal the judgment rendered on December 8, 2011 in the present instance by the Honourable Mark Schrager, J.S.C.;

PRAY ACT of the Appellant PricewaterhouseCoopers Inc.'s Amended Notice of Appeal enclosed with the present Motion;

THE WHOLE without costs, save in the event of contestation.

Montréal, December 19, 2011

OSLER, HOSKIN & HARcourt LLP

OSLER, HOSKIN & HARcourt LLP

(*Mtre Martin Desrosiers*)

(*Mtre Éric Préfontaine*)

(*Mtre Alexandre Fallon*)

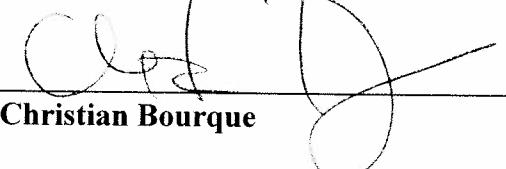
Attorneys for Appellant/Receiver/Interim Receiver,
PricewaterhouseCoopers Inc.

AFFIDAVIT

I, the undersigned, CHRISTIAN BOURQUE, senior vice-president at PricewaterhouseCoopers Inc., having a place of business at 1250 René-Lévesque Blvd. West, City of Montréal, Province of Québec, do solemnly declare as follows:

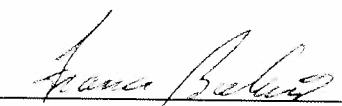
1. I am a duly authorized representative of the APPELLANT/Receiver/Interim Receiver, PricewaterhouseCoopers Inc., in the present case;
2. All the facts contained in the present *de bene esse* Application for Leave to Appeal are true.

AND I HAVE SIGNED



Christian Bourque

SOLEMNLY DECLARED BEFORE ME, at
Montréal, Québec, this 19th day of December 2011.


France Boulais
Commissioner for Oaths for the Province of Québec



NOTICE OF PRESENTATION

TO : Blake, Cassels & Graydon LLP
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Attorneys for Appellants/Petitioners and Appellants/Foreign Representative

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Attorneys for Respondent/Debtor

TO : Stikeman Elliott LLP
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c/o M^e C. Jean Fontaine
c/o M^e Pierre-Paul Daunais
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Suite 4000
Montréal, Québec H3B 3V2

Attorneys for Respondents/Mis-en-cause

TAKE NOTICE that the present *de bene esse Application for Leave to Appeal* will be presented for decision before the Court of Appeal on December 22, 2011 at 9:30 am, at 100 Notre-Dame Street East, Montréal, H2Y 4B6, in room RC-18.

DO GOVERN YOURSELVES ACCORDINGLY.

Montréal, December 19, 2011

OSLER, HOSKIN & HARcourt LLP
OSLER, HOSKIN & HARcourt LLP
Attorneys for Appellant/Receiver/Interim Receiver,
PricewaterhouseCoopers Inc.

CANADA

**PROVINCE OF QUÉBEC
REGISTRY OF MONTRÉAL**

No: 500-09-022220-115
(S.C. N° 500-11-041322-112)

COURT OF APPEAL

**JOSEPH FAHS
STEVEN CHAPNICK
ELIZABETH TAGLE**

APPELLANTS/Petitioners
-and-

PRICEWATERHOUSECOOPERS INC.
APPELLANT/Receiver/Interim Receiver

-and-

DAVID GOTTLIEB
APPELLANT/Foreign Representative

v.

GEORGES MARCIANO

RESPONDENT/Debtor
-and-

MICHEL BENSMIHEN
9204-7570 QUÉBEC INC.
9211-9882 QUÉBEC INC.
9213-4568 QUÉBEC INC.

RESPONDENTS/Mis-en-cause

AMENDED NOTICE OF APPEAL

*(Bankruptcy and Insolvency Act, s. 193; Bankruptcy and
Insolvency Rules, s. 31; Art. 199 C.C.P.)*

**THE APPELLANT PRICEWATERHOUSECOOPERS INC. HEREBY APPEALS FROM
THE JUDGMENT OF THE SUPERIOR COURT RENDERED ON DECEMBER 8, 2011
IN FILE NO. 500-11-041322-112:**

INTRODUCTION

1. Following the filing of the Notice of Substitution of Attorneys of Appellant/Receiver/Interim Receiver PricewaterhouseCoopers Inc. ("PWC") on

December 16, 2011, PWC wishes to amend the Notice of Appeal filed by PWC, Appellants/Petitioners Joseph Fahs, Steven Chapnick and Elizabeth Tagle (the “**Creditors**”) and the Appellant/Foreign Representative David Gottlieb, in his capacity as US Trustee to the bankruptcy of Marciano (the “**U.S. Trustee**”) dated December 8, 2011 in Court of Appeal file number 500-09-022220-115 for the purpose of initiating a distinct appeal from that of the Creditors and the U.S. Trustee.

2. As such, PWC amends the Notice of Appeal dated December 8, 2011 by giving the herein distinct Amended Notice of Appeal before the Court of Appeal sitting in and for the judicial district of Montreal in respect of a judgment of the Superior Court of Quebec dated December 8, 2011 rendered by the Honourable Mark Schrager, J.S.C. sitting in the Commercial Division of the Superior Court of Québec for the judicial district of Montreal, following a hearing which took place on October 17, 19 and 20, 2011 (the “**Judgment**”), a copy of which is attached to the present notice as Schedule 1.
3. PWC seeks leave to appeal the Judgment for the fundamental reason that, as a consequence thereof, PWC, an officer of the Court, is improperly being punished for actions taken and fees and disbursements incurred in the furtherance of a mandate conferred by an executory order of the Superior Court.
4. The Judgment from which appeal is sought granted two (2) motions by the Respondents, namely:
 - a) A Motion to quash the issuance of a search warrant and authorization to seize the property of the debtor, to rescind and dismiss orders and for the issuance of safeguard orders brought by Respondents Michel Bensmihen, 9204-7570 Quebec Inc., 9211-9882 Quebec Inc. and 9213-4568 Quebec Inc. (the “**Motion to quash**”); and,
 - b) A Motion to review, rescind and vary various orders rendered pursuant to the Bankruptcy and Insolvency Act filed by Respondent Georges Marciano (the “**Motion to review**”).
5. As appears from its conclusions, the Judgment was rendered executory notwithstanding appeal, the whole despite the presence of complex and novel issues at stake and the fact that PWC, as court-appointed Interim Receiver and Receiver, had taken physical possession of Marciano’s assets and confided most of them to third-party guardians to protect the interests of Marciano’s creditors.
6. For that reason, concurrent to the Notice of Appeal filed on December 8, 2011, the Appellants, including PWC, filed a *Motion to suspend the provisional execution notwithstanding appeal of a judgment* which was heard by the Honourable Jacques Fournier, J.C.A. on December 9 and 12, 2011 but for which judgment has not yet been rendered.
7. Terms not defined in the present Notice of Appeal shall have the meaning ascribed in the Judgment.

PROCEDURAL BACKGROUND IN RELATION TO THE JUDGMENT

8. On September 14, 2011, the U.S. Trustee filed a Motion to obtain the recognition of a foreign main proceeding (the “**Recognition Motion**”) before the Superior Court of Quebec and sought, *inter alia*, the appointment of PWC as Receiver pursuant to subsection 272(1) d) of the *Bankruptcy and Insolvency Act* (“**BIA**”).
9. On or about September 14, 2011, the Creditors filed in the Superior Court of Quebec a Petition for a receiving order against Marciano in order to have him declared bankrupt in Canada.
10. Concurrently with the Petition for a receiving order, the Creditors filed a Motion to appoint an interim receiver (the “**Interim Receiver Motion**”) over the assets of Marciano and those of various related entities including, *inter alia*, Respondents the CKSM Family Trust, as well as 9204-7570 Quebec Inc., 9211-9882 Quebec Inc. and 9213-4568 Quebec Inc. (collectively, the “**Numbered Companies**”) by which they sought to appoint PWC as interim receiver, the whole pursuant to Section 46 BIA.
11. Both the Interim Receiver Motion and the Recognition Motion were heard *ex parte* by the Honourable Chantal Corriveau, J.S.C. during two (2) consecutive days of hearing on September 14 and 15, 2011.
12. On September 15, 2011, Justice Corriveau granted both the Recognition Motion and the Interim Receiver Motion (the “**Corriveau Orders**”). As a consequence thereof, PWC was appointed as Interim Receiver and Receiver over the assets of Marciano, the CKSM Family Trust and the Numbered Companies.
13. Further to this dual appointment, PWC filed a Motion to obtain the issuance of a search warrant and the authorization to seize the property of the debtor (the “**Search Warrant Motion**”).
14. This motion was granted by Justice Corriveau on September 15, 2011, and a second similar motion was granted by Justice Corriveau on September 16, 2011 (the “**Search Warrant Orders**”).
15. On or about September 26, 2011, Marciano filed Notices of Appeal against the Corriveau Orders and the Search Warrant Orders (the “**Appeals**”).
16. As of the present date, none of the Appeals have been heard.
17. Notwithstanding the Appeals, on or about September 28, 2011, the CKSM Family Trust and the Numbered Companies also filed the Motion to quash and Marciano filed the Motion to review.
18. The Motion to quash and the Motion to review were heard during three (3) days of arguments before Justice Schrager on October 17, 19 and 20, 2011, following which, Justice Schrager took the Motion to quash and the Motion to review under advisement.

19. On October 24, 2011 Justice Schrager permitted PWC to file an affidavit rebutting certain testimony of Ms. Sascha Romer, and detailing the seizures performed and the persons retained in relation thereto.
20. All parties filed their written submissions on the Motion to quash and the Motion to review on or about October 25, 2011.
21. Following additional legal developments in the US proceedings concerning Marciano's bankruptcy, on October 31, 2011, PWC filed a Motion to obtain the reopening of the hearing held on October 17, 19 and 20 2011 (the "**Motion to reopen the hearing**") for the purpose of filing into the Court record copy of legal proceedings and orders rendered in the US proceedings subsequent to the hearings on the Motion to quash and the Motion to review.
22. The Motion to reopen the hearing was heard on November 25, 2011 and granted by Justice Schrager.
23. Further to the judgment granted by Justice Schrager on November 25, 2011, Marciano, the CKSM Family Trust and the Numbered Companies were also permitted to file additional exhibits to reply to the additional exhibits filed by PWC.

GROUNDS OF APPEAL

Justice Schrager erred in exceeding his jurisdiction

24. Justice Schrager exceeded his jurisdiction pursuant to sub-section 187(5) BIA by conducting an exercise which is tantamount to sitting in appeal of the Corriveau Orders and rendering a judgment rescinding the Corriveau Orders based largely on questions of law which had been considered by Justice Corriveau in rendering the Corriveau Orders.
25. Justice Schrager erred in:
 - a) failing to sparingly exercise the jurisdiction conferred by sub-section 187(5) BIA;
 - b) rescinding the Corriveau Orders in the absence of a fundamental change in circumstances and where no new evidence justifying a different result had been adduced before him; and,
 - c) conducting a rehearing on the merits of the Corriveau Orders in circumstances where such orders were executory notwithstanding appeal, that suspension of the provisional execution of the Corriveau Orders had not been sought while Notices of Appeal had been filed and appeals were thus pending against the Corriveau Orders.
26. Justice Schrager does not, in his reasons in support of the Judgment, criticise the conduct of PWC. Rather, the only point directly concerning PWC on which Justice Schrager comments, at paragraphs 143 to 180 of the Judgment, is the fact that PWC obtained search warrants pursuant to section 189 BIA.

27. It is clear from the Search Warrant Orders that Justice Corriveau, when granting said orders, considered section 189 BIA. Despite this, Justice Schrager quashed these search warrants, solely on the basis of legal issues.
28. It appears from the Judgment that the search warrants were quashed not because it had been alleged or proven that Justice Corriveau was misled by PWC, but because Justice Schrager disagreed with Justice Corriveau as to whether or not section 189 BIA authorized her to render the Search Warrant Orders.
29. In doing so, Justice Schrager was clearly usurping the powers of this Honourable Court to review errors of law made by inferior courts.
30. Irrespective of the question of whether or not Justice Schrager was justified in quashing the Corriveau Orders, PWC submits that he erred in stripping PWC of all of the protections afforded to it by the Superior Court for the execution of the mandate conferred to it, in its capacity as officer of the Court, by the Corriveau Orders, namely:
 - a) by annulling PWC's Receiver's Charge;
 - b) by preventing PWC from passing its accounts;
 - c) by stripping PWC of its protection from proceedings being instituted against it in its capacity of Interim Receiver;
 - d) by stripping PWC of its protection from liability or obligations resulting from its appointment or the fulfillment of its duties as Interim Receiver;
 - e) by ordering that the return of the seized assets be at PWC's expense;
 - f) by ordering that PWC return to the Respondents all sums received on account of fees or disbursements; and,
 - g) by condemning PWC to costs.
31. The mandate conferred to PWC by the Superior Court by virtue of the Corriveau Orders and the rights and protection contained therein, which were necessary to allow PWC to properly carry out its court appointed duties, were conferred upon PWC as a result of motions in which PWC was not a petitioner.
32. PWC relied on the Corriveau Orders, including the protections granted therein, to accept its appointment as receiver and interim receiver, and then to carry out its duties in such capacity.
33. PWC, based on reasonable expectation and relying on the Corriveau Orders, fulfilled its mandate by taking reasonable measures in furtherance thereof on the basis of the Corriveau Orders, thus incurring substantial fees and disbursements.
34. Furthermore, Justice Schrager erred in considering PWC as a petitioner under the Recognition Motion and the Interim Receiver Motion (paragraphs 16(i) and 89 of the Judgment) and in concluding that it is PWC that has to bear consequences stemming from

any purported impropriety committed by the Creditors and the U.S. Trustee in the obtention of the Corriveau Orders.

35. PWC is not an interested party in the dispute between the Creditors and Marciano and did not seek the issuance of the Corriveau Orders. It is not the Creditors who appointed PWC – it is the Superior Court and it constitutes a reviewable error for a Superior Court judge to rescind an order of the Superior Court in such a way that punishes officers of the Superior Court for actions taken and fees and disbursements incurred in the furtherance of a mandate conferred by that same court.
36. What is more, Justice Schrager erred in going beyond the conclusions sought in the motions filed by the Respondents. In fact, in the Motion to quash, the only conclusion sought with respect to the repayment of the fees and disbursements paid to PWC from the Respondent/mis-en-cause's property is in the form of a conclusion that the Creditors be ordered “to provide an undertaking to be responsible and abide by any order that the Court may make as to damages sustained by the Petitioners by reason of the appointment of the Interim Receiver or in the event the Petition for a receiving order is dismissed”, PWC obviously not being included in this conclusion as it is not an “alleged creditor”.
37. In the Motion to review, the only conclusion sought against PWC concerns the return of the seized assets. Marciano did not seek from the Court that such return be at PWC's expense.
38. Further, there are no allegations in the Motion to review or the Motion to quash as concerns any wrongful conduct by PWC aside from vague and imprecise allegations contained in the Motion to quash to the effect that the seizures were “unlawfully and abusively performed by PriceWaterhouseCoopers Inc.” Such allegations were not dealt with in the Judgment.
39. The Respondents take issue with the legality and the appropriateness of the Corriveau Orders but do not take issue specifically with PWC's conduct or allege that it is not in conformity with the Corriveau Orders. In light of this, Justice Schrager erred in condemning PWC to pay and to incur significant amounts as a result of the performance of its duties stemming from the Corriveau Orders.
40. Finally, Justice Schrager committed a reviewable error in condemning PWC in such a fashion without providing any reasons justifying his conclusions. Indeed, the only comments in Justice Schrager's reasons as concerns PWC specifically are limited to the legal question as to whether or not PWC was entitled to obtain the search warrants pursuant to section 189 BIA.
41. Nowhere does Justice Schrager discuss or come to the conclusion that the fact that PWC had sought the search warrants amounted to an abuse of proceedings justifying any sort of monetary condemnation as against PWC.
42. As such, for Justice Schrager to have then proceeded to render a judgment, the conclusions of which cause PWC to sustain significant financial losses, past, present and future, constitutes a reviewable error.

Justice Schrager erred in determining that PWC could not obtain the search warrants

43. As concerns Justice Schrager's conclusions concerning the Search Warrant Orders, aside from the question that it was not within his jurisdiction to determine this issue, PWC submits that Justice Schrager also erred in finding that Justice Corriveau had misapplied section 189 BIA.
44. Justice Schrager's comments with respect to the search warrants can be summarized as relating to the following issues:
 - a) the status of Marciano as a bankrupt;
 - b) the ability to seize documents pursuant to a search warrant issued under section 189 BIA; and,
 - c) the ability to seize third party assets pursuant to a search warrant issued under section 189 BIA.
45. Irrespective of the merits of Justice Schrager's analysis with respect to the issuance of the search warrants, this analysis did not take into account the wide powers given to PWC by Justice Corriveau under the Corriveau Orders, which powers included, *inter alia*:
 - a) that the administration or realization of all of Marciano's property located in Canada shall be carried out by PWC acting as Receiver (section 11 of the order issued pursuant to the Recognition Motion);
 - b) the supervision and monitoring of all activities with regard to the preservation, protection, removal, consolidation, possession and/or control of the debtor's assets, including the assets owned or controlled by the debtor indirectly, including, *inter alia*, the CKSM Family Trust and the Numbered Companies (the "**Property**") and the power to relocate any of the Property in order to safeguard it (section 13(a));
 - c) taking possession of all or part of the Property if needed (section 13(b));
 - d) the searching of premises (section 13(d)); and,
 - e) taking steps for the preservation and protection of the Property (section 13(i)).
46. It is submitted that the process of analyzing the validity of the powers given pursuant to the search warrant in a vacuum, independently from the powers given to PWC in the Corriveau Orders, as if such powers did not exist, constitutes an error of law.
47. As regards the question of whether or not Marciano can be considered as a bankrupt within the meaning of section 189 BIA, PWC submits that Justice Schrager erred in:
 - a) narrowly construing the term "bankrupt" as excluding Marciano who, PWC submits, is clearly bankrupt in light of the executory order of Mrs. Justice Kaufman of the California Bankruptcy Court rendered on December 28, 2010,

which order was recognized by the Superior Court of Québec on September 15, 2011, prior to PWC seeking the issuance of the search warrants; and,

- b) interpreting section 189 BIA as excluding the possibility that an interim receiver appointed under section 46 BIA be able to seek the issuance of a search warrant, in view of the fact that its appointment expires upon the taking of possession by a trustee, and limiting the use of search warrants by interim receivers appointed under section 47 and 47.1 to exceptional and limited circumstances, rendering search warrants useless for interim receivers for all intents and purposes.

48. This error as to the proper interpretation of the term “bankrupt” in section 189 BIA led Justice Schrager to commit a second reviewable error as concerns the ability of an interim receiver to seize the property of third parties pursuant to a section 189 BIA search warrant.

49. Indeed, at paragraphs 145 and 146 of the Judgment, Justice Schrager dismissed two decisions, one of which being a very recent decision of this Honourable Court, standing for the proposition that an interim receiver can indeed seize the property of third parties pursuant to a section 189 BIA search warrant.

50. Justice Schrager erroneously distinguished those two cases from the case at hand by concluding that they do not apply in light of his earlier erroneous conclusion that Marciano could not be considered a “bankrupt” for the purposes of section 189 BIA.

51. As to the seizure of documents, books and records (collectively, the “**Documents**”), Justice Schrager erred in considering that section 189 BIA does not apply to Documents. In his analysis of the issue, Justice Schrager says at paragraph 176 of the Judgment that a trustee has the duty to take possession of the Documents of the bankrupt and held that “[h]owever, a trustee cannot rely on section 189 BIA to perform a seizure of the bankrupt’s documents”.

52. It is to be noted, however, that sub-section 16(3.1) BIA specifically refers to the obligation for the trustee to obtain a search warrant issued under section 189 BIA in order to enter premises occupied by a third party to gain access to Documents of the bankrupt.

53. Sub-section 16(5) BIA also refers to the obligation of third parties to remit to the trustee Documents relating to the accounts of or to any trade dealings of the bankrupt.

54. To summarize, specific reference is made in the BIA to the section 189 search warrant in relation to Documents of a bankrupt, as well as Documents of the bankrupt or relating to accounts or trade dealings of the bankrupt in the hands of third parties.

55. It is submitted that restricting the powers of the Court to issue a search warrant relating to Documents constitutes an error of law.

WHEREFORE, THE APPELLANT SHALL PRAY THIS HONOURABLE COURT TO:

GRANT this appeal;

OVERTURN the judgment rendered by the Honourable Mark Schrager, J.S.C. on December 8, 2011;

DISMISS the *Motion to review, rescind and vary various orders rendered pursuant to the Bankruptcy and Insolvency Act;*

DISMISS the *Motion to quash the issuance of a search warrant and authorization to seize the property of the Debtor, to rescind and dismiss orders and for the issuance of safeguard orders;*

RESTORE all the judgments rendered by the Honourable Chantal Corriveau, J.S.C. on September 15 and 16, 2011;

THE WHOLE with costs, both in first instance and on appeal;

IN THE ALTERNATIVE:

DECLARE that the judgment rendered by the Honourable Mark Schrager, J.S.C. on December 8, 2011 did not affect the conclusions of the judgments rendered by the Honourable Chantal Corriveau, J.S.C. on September 15, 2011 as concerns the prohibition of proceedings against the Interim Receiver, the limitation on the Interim Receiver's liability, the Interim Receiver's accounts (conclusions 12, 13, 14 and 15 of the Order (Interim Receiver)) and the Receiver's accounts (conclusions 14, 15 and 16 of the Order (Recognition of a Main Foreign Proceeding)), including the fact that these conclusion are executory notwithstanding appeal;

ORDER that no proceeding shall be commenced against the Appellant PricewaterhouseCoopers Inc., in its capacity of Interim Receiver, except with the written consent of PricewaterhouseCoopers Inc. or with leave of the Superior Court;

ORDER that the Appellant PricewaterhouseCoopers Inc., in its capacity of Interim Receiver, shall incur no liability or obligation as a result of its appointment or the fulfillement of its duties as Interim Receiver in carrying out the provisions of the Order (Interim Receiver) rendered on September 15, 2011 by the Honourable Chantal Corriveau, J.S.C., save and except for any gross negligence or wilful misconduct on its part;

ORDER that any expenditure or liability which was properly made or incurred by PricewaterhouseCoopers Inc., in its capacity of Interim Receiver, and the fees and disbursements of its legal counsel, incurred at the current rates and charges of PricewaterhouseCoopers Inc., in its capacity of Interim Receiver, and its counsel, shall be allowed to it in passing of its accounts and shall form a first charge on the assets owned or controlled by Georges Marciano, including the assets owned or controlled by Georges Marciano indirectly, and without limiting the generality of the foregoing, the assets in the name of Chloe M ULC, 1305066 Alberta ULC, 9204-7570 Québec Inc., 9211-9882 Québec Inc., 9213-4568 Québec Inc. and the CKSM Family Trust in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any person;

ORDER that PricewaterhouseCoopers Inc., in its capacity of Interim Receiver, and its legal counsel shall pass their accounts from time to time, and for this purpose the accounts of PricewaterhouseCoopers Inc., in its capacity of Interim Receiver, and its legal counsel are hereby referred to the registrar or a judge of the Commercial Division of the Superior Court;

ORDER that any expenditure or liability which was properly made or incurred by PricewaterhouseCoopers Inc., in its capacity of Receiver, and the fees and disbursements of its legal counsel, incurred at the current rates and charges of PricewaterhouseCoopers Inc., in its capacity of Receiver, and its counsel, shall be allowed to it in passing of its accounts and shall form a first charge on the assets owned or controlled by Georges Marciano, including the assets owned or controlled by Georges Marciano indirectly, and without limiting the generality of the foregoing, the assets in the name of the CKSM Family Trust and its affiliates in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any person;

ORDER that PricewaterhouseCoopers Inc., in its capacity of Receiver, and its legal counsel shall pass their accounts, and for this purpose the accounts of PricewaterhouseCoopers Inc., in its capacity of Receiver, and its legal counsel are hereby referred to the registrar or a judge of the Commercial Division of the Superior Court;

ORDER that prior to the passing of its accounts, PricewaterhouseCoopers Inc., in its capacity of Receiver, shall be at liberty to apply reasonable amounts, out of the monies in its possession, against its fees and disbursements, including legal fees and disbursements, incurred at the normal rates and charges of PricewaterhouseCoopers Inc., in its capacity of Receiver, or its counsel, and such amounts shall constitute advances against its remuneration and disbursements when and as approved by the Superior Court;

THE WHOLE with costs, both in first instance and on appeal;

The Appellant advises Mtre Bernard Boucher, Mtre Sébastien Guy and Mtre Patrick Kergin of Blake, Cassels & Graydon LLP, attorneys for the Petitioners and the Foreign Representative, Mtre Jean-Yves Fortin and Mtre Melanie Martel of Davis LLP, attorneys for the Debtor, Mtre Mortimer Freiheit, Mtre C. Jean Fontaine, Mtre Pierre-Paul Daunais and Mtre Caroline Plante of Stikeman Elliott LLP, attorneys for the mise-en-cause and the Registrar of Bankruptcy for the Superior Court of Québec, district of Montréal of the present amended notice.

Montréal, December 19, 2011

OSLER, HOSKIN & HARCOURT LLP
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(*MTRE MARTIN DESROSIERS*)
(*MTRE ÉRIC PRÉFONTAINE*)
(*MTRE ALEXANDRE FALLON*)
Attorneys for Appellant/Receiver/Interim Receiver,
PricewaterhouseCoopers Inc.

C A N A D A

**PROVINCE OF QUÉBEC
REGISTRY OF MONTRÉAL**

No: 500-09-022220-115
(S.C. N° 500-11-041322-112)

COURT OF APPEAL

**JOSEPH FAHS
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PRICEWATERHOUSECOOPERS INC.

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RESPONDENTS/Mis-en-cause

LIST OF EXHIBITS

(DE BENE ESSE APPLICATION FOR LEAVE TO APPEAL)

Exhibit R-1: Judgment of the Superior Court of Quebec dated December 8, 2011 rendered by the Honourable Mark Schrager, J.S.C.;

Exhibit R-2: Motion to obtain the recognition of a foreign main proceeding before the Superior Court of Quebec dated September 13, 2011;

Exhibit R-3: Motion to appoint an interim receiver dated September 13, 2011;

Exhibit R-4: Order (Recognition of a Main Foreign Proceeding) and Order (Interim Receiver) dated September 15, 2011 rendered by the Honourable Chantal Corriveau, J.S.C. (*en liasse*);

Exhibit R-5: Motion to obtain the issuance of a search warrant and the authorization to seize the property of the debtor dated September 13, 2011;

Exhibit R-6 Order (Issuance of a search warrant and the authorization to seize property of the Debtor), Warrant for the Search and Seizure of Property of the Debtor, Amended Order (Issuance of a search warrant and the authorization to seize property of the Debtor) and Amended Second Warrant for the Search and Seizure of Property of the Debtor (*en liasse*);

Exhibit R-7 Motion to quash the issuance of a search warrant and authorization to seize the property of the Debtor, to rescind and dismiss Orders and for the issuance of safeguard orders and Motion to review, rescind and vary various orders rendered pursuant to the *Bankruptcy and Insolvency Act* (*en liasse*);

Exhibit R-8 Copy of Affidavit of Christian Bourque dated October 24, 2011;

Exhibit R-9: Motion to obtain the reopening of the hearing held on October 17, 19 and 20, 2011 dated October 31, 2011.

Montréal, December 19, 2011

OSLER, HOSKIN & HARCOURT LLP
OSLER, HOSKIN & HARCOURT LLP
Attorneys for Appellant/Receiver/Interim Receiver,
PricewaterhouseCoopers Inc.

No. : 500-09-022220-115
(S.C. N° 500-11-041322-112)

COURT OF APPEAL
PROVINCE OF QUÉBEC
REGISTRY OF MONTRÉAL

JOSEPH FAHS ET AL.

APPELLANTS/Petitioners

-and-

PRICEWATERHOUSECOOPERS INC.

APPELLANT/Receiver/Interim Receiver

-and-

DAVID GOTTLIEB

APPELLANT/Foreign Representative

v.

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-and-

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RESPONDENTS/Mis-en-cause

**DE BENE ESSE APPLICATION FOR LEAVE
TO APPEAL**
(*Bankruptcy and Insolvency Act, s. 193; Bankruptcy
and Insolvency Rules, s. 31*)
AND LIST OF EXHIBITS

ORIGINAL

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