

C A N A D A

PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

N°: 500-06-000453-080

S U P E R I O R C O U R T
(C l a s s A c t i o n)

ANDRÉE MÉNARD

Class Plaintiff

v.

LINO P. MATTEO

-and-

PAUL D'ANDRÉA

-and-

B2B TRUST

-and-

DELOITTE LLP

-and-

BDO DUNWOODY S.R.L.

-and-

SCHWARTZ LEVITSKY FELDMAN S.R.L.

Defendants

-and-

ERNST & YOUNG INC., IN THE CAPACITY OF
LIQUIDATOR OF SERVICES FINANCIERS
PENSON CANADA INC.

Defendant in continuance of suit

-and-

JOSEPH PETTINICCHIO

-and-

LAURENCE HENRY

-and-

ANDRIS SPURA

-and-

LOWELL HOLDEN

Mis en cause

DEFENCE OF DELOITTE LLP

IN RESPONSE TO PLAINTIFF'S PARTICULARIZED MOTION TO INSTITUTE PROCEEDINGS, DEFENDANT DELOITTE LLP (DELOITTE) RESPECTFULLY SUBMITS THE FOLLOWING:

1. With respect to the allegations contained in paragraphs 1 and 2 of the Particularized Motion to Institute Proceedings (February 24, 2014) (**Motion**), it refers to Exhibit P-1 and denies anything inconsistent therewith;
2. With respect to the allegations contained in paragraph 3 of the Motion, it takes act of the admission that the losses suffered by the members of the group were caused by unscrupulous criminals as well as by B2B Trust (**B2B**) and Services Financiers Penson Canada inc. (**Penson**), denies the remainder of the allegations contained therein and adds that rendering fraud possible, without any involvement in the perpetration of the fraud, is not a cause of action against auditors in Québec;
3. It denies the allegations contained in paragraph 4 of the Motion and adds that Gestion MRACS Ltée (**MRACS**), Investissements REAL VEST Ltée (**Real Vest**) and Corporation Real Assurance Acceptation (**RAAC**) were no longer subsidiaries of Corporation Mount Real (**MRC**) as of December 31, 2002, as will be explained hereinbelow;
4. It ignores the allegations contained in paragraph 5 of the Motion;
5. It denies the allegations contained in paragraph 6 of the Motion. More particularly, it denies the allegation that MRC did not have any actual business activities during the period up to December 31, 2002. Furthermore, it adds that Plaintiff's theory that the notes in litigation were sold based on MRC's credibility is inconsistent with Plaintiff's cause of action, which is not predicated on reliance upon MRC's financial statements. In fact, the evidence demonstrates that the investors relied, *inter alia*, upon the representations of the investment representatives and MRC's representatives to purchase the notes;
6. With respect to the allegations contained in paragraph 7 of the Motion, it takes act of the fact that the notes in litigation were issued illegally;
7. With respect to the allegations contained in paragraph 8 of the Motion, it admits that the Finance Minister appointed Jean Robillard from Raymond Chabot Grant Thornton as provisional administrator;
8. With respect to the allegations contained in paragraphs 9 and 10 of the Motion, it takes act of the fact that Defendant Lino P. Matteo (**Matteo**) was a member of the Order of Certified Management Accountants (**CMA**) until he was struck off the roll of the Order, noting that he was highly skilful and held senior level positions within MRC, and all else is ignored;

9. It ignores the allegations contained in paragraphs 11,12 and 13 of the Motion;
10. With respect to the allegations contained in paragraph 14 of the Motion, it notes that the Defendant Paul D'Andrea (**D'Andrea**) was controller of MRC in 2000 and continued to act in that capacity during the relevant time period for Deloitte. It ignores the remainder of the allegations;
11. With respect to the allegations contained in paragraph 15 of the Motion, it takes act of the fact that D'Andrea was the right-hand man of Matteo thereby demonstrating the high level of collusion that existed within MRC;
12. With respect to the allegations contained in paragraph 16 of the Motion, it takes act of the fact that D'Andrea was a member of the Order of CMA until he was struck off the roll of the Order and that he colluded with Matteo, and all else is ignored;
13. It ignores the allegations contained in paragraph 17 of the Motion;
14. With respect to the allegations contained in paragraph 18 of the Motion, it refers to Exhibit P-4 and denies anything inconsistent therewith;
15. It admits the allegations contained in paragraphs 19 and 20 of the Motion;
16. With respect to the allegations contained in paragraph 21 of the Motion, it takes act of the fact that the notes in litigation were issued illegally and adds that, as of December 31, 2002, MRACS, Real Vest and RAAC were no longer subsidiaries of MRC;
17. It ignores the allegations contained in paragraph 22 of the Motion and notes that the allegations are based on a chart which fails to explain the relationships between the entities and individuals mentioned therein. Furthermore, this chart was prepared in 2005 and is therefore not relevant to the time period during which Deloitte acted as auditor for MRC;
18. It ignores the allegations contained in paragraph 23 of the Motion and notes that these allegations are based on the reports prepared by the provisional administrator, Exhibits P-6 and P-7. It adds that it is unaware of the criteria used by the provisional administrator for the purposes of his opinion that Matteo in fact controlled numerous entities referred to in the above-mentioned reports. Furthermore, this opinion is based on reports dated December 9, 2005 and February 23, 2006, which consider facts as they existed at each of those dates respectively, and which do not apply to the time period during which Deloitte acted as auditor for MRC;
19. With respect to the allegations contained in paragraph 24 of the Motion, it admits that Justice Jean-Yves Lalonde rendered the judgment, Exhibit P-8, but states that the judgment must be examined in light of the issues submitted to the Court. More particularly, the Court was seized with an appeal, made by companies which are not involved in the issues as set forth by Plaintiff, of the trustee's decision to disallow a proof of claim following the bankruptcy of MRC on February 26, 2006, which is

therefore not relevant to the time period during which Deloitte acted as auditor for MRC;

20. With respect to the allegations contained in paragraph 25 of the Motion, it refers to Exhibit P-9 and denies anything inconsistent therewith;
21. It admits the allegations contained in paragraphs 26 to 29 of the Motion;
22. It ignores the allegations contained in paragraph 30 of the Motion;
23. With respect to the allegations contained in paragraph 31 of the Motion, it takes act of the fact that Defendants B2B and Penson were custodians and/or trustees of the notes sold by the investment representatives;
24. With respect to the allegations contained in paragraph 32 of the Motion, it refers to Exhibit P-12 and denies anything inconsistent therewith;
25. With respect to the allegations contained in paragraph 33 of the Motion, it refers to Exhibit P-13 and denies anything inconsistent therewith;
26. It ignores the allegations contained in paragraphs 34 to 36 of the Motion;
27. With respect to the allegations contained in paragraph 37 of the Motion, it refers to Exhibit P-14 and denies anything inconsistent therewith;
28. It admits the allegations contained in paragraph 37.1 of the Motion;
29. It denies the allegations contained in paragraph 37.2 of the Motion and states that it received representations from the highest levels of MRC's management that Investsafe Ltd., a U.K. company (**Investsafe**), was not a related party, which representations were also made publicly by MRC, as will be explained hereinbelow. Moreover, contrary to Plaintiff's allegations, the minutes of the meeting of the Board of Directors dated March 15, 2002, communicated as part of Exhibit P-16, do not demonstrate that Investsafe was a company created and controlled by Matteo. Furthermore, as regards the 3 emails exchanged between Matteo and Stephen Hancock (**Hancock**) communicated as part of Exhibit P-16, these communications were not provided to Deloitte nor are they the type of communications that an auditor would normally seek during the course of its audit;
30. It ignores the allegations contained in paragraph 37.3 of the Motion;
31. With respect to the allegations contained in paragraph 37.4 of the Motion, it takes act of the fact that the false representations made by MRACS were communicated to the members of the group;
32. The allegations contained in paragraph 37.5 of the Motion are questions of law;
33. With respect to the allegations contained in paragraph 38 of the Motion, it refers to Exhibit P-19 and denies anything inconsistent therewith;

34. With respect to the allegations contained in paragraph 38.1 of the Motion, it takes act of the fact that Real Vest was a wholly-owned subsidiary of MRC up until September 30, 2000 and denies that Real Vest did not have any business activity as alleged by the Plaintiff. It also ignores Exhibit P-20;
35. With respect to the allegations contained in paragraph 38.2 of the Motion, it admits that Real Vest issued new shares to Investsafe on September 30, 2000, ignores the remainder of the allegations contained therein;
36. With respect to the allegations contained in paragraph 38.3 of the Motion, it admits that shares of Real Vest were issued in favour of Investsafe in exchange for an amount receivable of 5 million dollars and denies the remainder of the allegations contained therein, which constitute opinions based on financial statements of Investsafe, Exhibit P-22, which it ignores. Moreover, Deloitte adds that the financial statements P-22 cannot constitute a valid basis for these opinions, as note 8 contained therein provides that Investsafe acquired a 32.5% interest in Real Vest while, as admitted by Plaintiff, Investsafe acquired 65% of the share capital of Real Vest;
37. It admits the allegations contained in paragraphs 38.4 and 38.5 of the Motion;
38. With respect to the allegations contained in paragraph 38.6 of the Motion, it notes that the value of Real Vest is a matter of opinion. Furthermore, Deloitte ignores the current characterization of the Real Vest transaction as fictitious and adds that at the time of the subject audit, it received representations from the highest levels of MRC's management that Investsafe was not a related party, which representations were also made publicly by MRC, as will be explained hereinbelow;
39. It denies the allegations contained in paragraphs 38.7 of the Motion, as regards the time period relevant for the audits performed by Deloitte, as Plaintiff has failed to produce any notes issued by Real Vest guaranteed by MRC for the period from October 2000 to March 2003, as appears from Plaintiff's answer to undertakings DLT-7 and DLT-8 communicated in support of the Defence as **Exhibit DD-1**. Moreover, in paragraph 109.31 of the Motion, Plaintiff acknowledges that MRC did not guarantee the notes issued by Real Vest;
40. With respect to the allegations contained in paragraph 38.8 of the Motion, it takes act of the fact that false representations made by Real Vest were communicated to the members of the group;
41. The allegations contained in paragraph 38.9 of the Motion are questions of law;
42. With respect to the allegations contained in paragraph 39 of the Motion, it refers to Exhibit P-25 and denies anything inconsistent therewith;
43. It denies the allegations contained in paragraph 39.1 of the Motion, as Plaintiff has failed to produce any notes issued by RAAC guaranteed by MRC;
44. It ignores the allegations contained in paragraph 40 of the Motion;

45. It denies the allegations contained in paragraph 41 of the Motion, states that the provisional administrator erroneously included approximately \$58 million of fictitious interest in his estimate of amounts supposedly owed to investors and adds that it performed its last audit of the consolidated financial statements of MRC for the year ended December 31, 2002;
46. With respect to the allegations contained in paragraphs 42 to 44 of the Motion, it refers to Exhibits P-26, P-27 and P-28 and denies anything inconsistent therewith;
47. It ignores the allegations contained in paragraph 45 of the Motion and notes that these allegations are based on the reports prepared by the provisional administrator, Exhibits P-6 and P-7. It adds that it is unaware of the criteria used by the provisional administrator for the purposes of his opinion that Matteo in fact controlled numerous entities referred to in the above-mentioned reports. Furthermore, this opinion is based on reports dated December 9, 2005 and February 23, 2006, which consider facts as they existed at each of those dates respectively, and which do not apply to the time period during which Deloitte acted as auditor for MRC;
48. It ignores the allegations contained in paragraph 46 of the Motion and adds that such allegations constitute opinions expressed by Plaintiff as to the definition of a "Ponzi scheme";
49. It denies the allegations contained in paragraph 47 of the Motion and adds that Exhibit P-7, identified by Plaintiff, recognizes that significant amounts were collected pursuant to magazine instalment contracts thereby demonstrating valid business activities;
50. It ignores the allegations contained in paragraph 48 of the Motion and adds that such allegations constitute opinions expressed by Plaintiff as to the definition of a "Ponzi scheme";
51. With respect to the allegations contained in paragraph 49 of the Motion, it takes act of the fact that the perpetrators of the fraud caused the losses claimed by the members of the group;
52. It denies the relevance of the allegations contained in paragraph 50 of the Motion, as Plaintiff's cause of action is not based on reliance on MRC's audited consolidated financial statements, and adds that, contrary to Plaintiff's allegation, having a public company is not a prerequisite for setting up a Ponzi scheme;
53. It denies the allegations contained in paragraph 51 of the Motion and adds that MRC's credibility is not relevant to Plaintiff's cause of action as Plaintiff admits that the members of the group did not rely on the audited consolidated financial statements of MRC;
54. With respect to the allegations contained in paragraph 52 of the Motion, it refers to Exhibit P-29 A to F and denies anything inconsistent therewith;

55. It denies the allegations contained in paragraph 53 of the Motion and adds that MRC's financial results are not relevant to Plaintiff's cause of action, as Plaintiff admits that the members of the group did not rely on the audited consolidated financial statements of MRC;
56. It denies the allegations contained in paragraph 54 of the Motion;
57. With respect to the allegations contained in paragraph 55 of the Motion, it refers to Exhibits P-18 and P-31, which speak for themselves, without admission of the contents thereof;
58. It denies the relevance of the allegations contained in paragraph 56 of the Motion, as Plaintiff's cause of action is not based on reliance on MRC's audited consolidated financial statements, and adds that the characterization of MRC's financial situation is a matter of opinion;
59. With respect to the allegations contained in paragraphs 57 to 57.11 of the Motion, it states that the analyses performed by the liquidator in 2005 and 2006 contained therein are not relevant for the audit work performed by Deloitte during the relevant time period for the years ended on December 31, 2002 and, as will be explained hereinbelow, such analyses are incomplete, possibly inaccurate and cannot be relied upon;
60. It ignores the allegations contained in paragraph 58 of the Motion;
61. With respect to the allegations contained in paragraphs 59 of the Motion, it takes act of the admission that the notes in litigation were issued illegally in contravention of the provisions of the *Securities Act*;
62. With respect to the allegations contained in paragraph 60 of the Motion, it admits that Deloitte was never retained to audit the stand-alone financial statements of MRACS, Real Vest and RAAC. It notes that MRACS was a wholly-owned subsidiary of MRC until September 30, 2002, that Real Vest was a wholly owned subsidiary of MRC from May 4, 2000 to September 30, 2000 and RAAC was a subsidiary of MRC up to September 2000. While MRACS, Real Vest and RAAC were subsidiaries of MRC, their accounts were included in the consolidated financial statements of MRC which Deloitte was engaged to audit. Deloitte's responsibility as auditor, was to express an opinion on MRC's consolidated financial statements taken as a whole rather than an opinion on the alleged guarantees;
63. With respect to the allegations contained in paragraph 61 of the Motion, for the relevant time period during which Deloitte acted as auditor of MRC, it admits that the accounting of MRACS, Real Vest and RAAC was performed by MRC;
64. With respect to the allegations contained in paragraph 62 of the Motion, it states that the opinions arrived at by the liquidator in 2005 and 2006 contained therein are not relevant for the audit work performed by Deloitte during the relevant time period for the years ended on December 31, 2002;

65. With respect to the allegations contained in paragraph 63 of the Motion, it admits that Justice Jean-Yves Lalonde rendered the judgment, Exhibit P-8, but states that the conclusions reached by Justice Lalonde must be examined in light of the issues that were submitted to the Court. More particularly, the Court was seized with an appeal, made by companies which are not involved in the issues as set forth by Plaintiff, of the trustee's decision to disallow a proof of claim following the bankruptcy of MRC on February 26, 2006;
66. It ignores the allegations contained in paragraph 64 of the Motion and adds that the opinions of the liquidator in 2005 are not relevant for the audit work performed by Deloitte during the relevant time period for the years ended on December 31, 2002;
67. With respect to the allegations contained in paragraph 65 of the Motion, it takes act of the fact that Matteo and D'Andrea caused the losses claimed by the members of the group and adds that they were assisted by skilful accomplices who held senior level positions within MRC, as will be explained below. Moreover, it denies that the losses suffered by the members of the group were close to \$130 million;
68. It denies the allegations contained in paragraph 66 of the Motion;
69. With respect to the allegations contained in paragraphs 67 and 68 of the Motion, it takes act of the admissions contained therein;
70. With respect to paragraph 69 of the Motion, it admits that the complaint of the Order of CMA that led to the striking of Matteo off the roll of the Order alleged the facts mentioned therein;
71. It ignores the allegations contained in paragraph 70 of the Motion;
72. With respect to the allegations contained in paragraph 71 of the Motion, it takes act of the fact that Matteo was found guilty of all charges, and all else is ignored;
73. With respect to the allegations contained in paragraph 72 of the Motion, it takes act of the fact that D'Andrea was struck off the roll of the Order of CMA and that he colluded with Matteo, and all else is ignored;
74. With respect to the allegations contained in paragraph 73 of the Motion, it takes act of the admissions contained therein;
75. With respect to the allegations contained in paragraphs 74 to 74.4 of the Motion, it ignores the statements made by D'Andrea to the Order of CMA;
76. It denies the allegations contained in paragraphs 75 and 75.1 of the Motion and adds that Plaintiff has failed to establish the relevance of all the audited consolidated financial statements mentioned therein;
77. With respect to paragraph 75.2 of the Motion, as regards the relevant time period for Deloitte, it notes that Plaintiff fails to identify which specific transactions are the subject matter of the paragraph. It denies the relevance of the relationship between the

generation of profits by the investees and the gains from dilution or sales of investments, as suggested by Plaintiff. It ignores the reasons underlying Plaintiff's opinions that some unidentified transactions did not have any economic substance;

78. As regards the relevant time period for Deloitte, it denies the allegations contained in paragraph 75.3 of the Motion and adds that Plaintiff fails again to identify which specific transactions are the subject matter of the paragraph. It also denies Plaintiff's opinions that the repetitive nature of the transactions is indicative of fraud, as such transactions, i.e. investing and divesting of investments in companies, were in fact in the normal course of business for MRC as disclosed in its annual reports and as appears from the "Business acquisitions and divestitures" note and the notes relating to Investments, to the audited consolidated financial statements of each relevant year in Exhibits P-29 A to F. Moreover, as will be explained hereinbelow, auditors do not have the duty to discover fraud;
79. As regards the relevant time period for Deloitte, it denies the conclusions contained in paragraph 75.4 of the Motion in which Plaintiff suggests that the transactions mentioned in table 75.4 were fraudulent as they did not generate cash from operations. Moreover, it adds that the non-cash nature of certain transactions was questioned by the Commission des valeurs mobilières du Québec (**CVMQ**) in the course of the Continuous Disclosure Review Program and the CVMQ was apparently satisfied with the answers provided by MRC, as appears from paragraphs 1.8.1, 1.9.1 and 3.1 of the CVMQ's letter dated April 23, 2003 and from MRC's response dated May 28, 2003, communicated in support of the Defence as **Exhibit DD-2** and **Exhibit DD-3**. Furthermore, it adds that Plaintiff fails to identify which specific transactions are the subject matter of this paragraph and it ignores the reasons underlying Plaintiff's conclusion that such transactions did not have any economic substance;
80. As regards the relevant time period for Deloitte, it denies the allegations contained in paragraph 75.5 of the Motion and adds that, as will be explained hereinbelow, auditors do not have the duty to discover fraud;
81. As regards the relevant time period for Deloitte, it denies the allegations contained in paragraph 76 of the Motion and notes that said allegations refer to reports (Exhibits P-6 and P-7) prepared by the provisional administrator in 2005-2006 which are based on information, facts and circumstances as they existed at the time of the preparation of the reports. Furthermore, Deloitte adds that the provisional administrator's mandate was not an audit mandate, as appears from the notice to reader contained in Exhibits P-6 and P-7, which reads as follows:

"Notre analyse a consisté essentiellement en prise de renseignements, procédés analytiques et discussions portant sur les renseignements qui nous ont été fournis. Ce travail ne constitue pas une vérification et, conséquemment, nous n'exprimons pas d'opinion sur les informations financières recueillies et analysées";

(our emphasis)

82. With respect to the allegations contained in paragraph 76.1 of the Motion as regards the relevant time period for Deloitte, it denies Plaintiff's characterization of the table contained in paragraph 57.4 of the Motion;
83. As regards the relevant time period for Deloitte, it denies the allegations contained in paragraph 76.2 i) of the Motion and adds that Plaintiff fails to provide the underlying reasons supporting her opinion that the private companies referred to were under the influence of MRC and its officers;
84. It ignores the allegations contained in paragraph 76.2 ii) of the Motion;
85. With respect to the allegations contained in paragraph 76.2 iii) of the Motion as regards the relevant time period for Deloitte, it admits the allegations contained therein that investments and loans were made to entities established in Minnesota, Bermuda and the Bahamas and adds that Plaintiff fails to provide the underlying reasons supporting her opinion that such companies were under the influence or under the direct or indirect control of MRC's directors and officers;
86. It admits the allegations contained in paragraph 76.2 iv) of the Motion and adds that the liquidation of certain Norshield entities occurred several years subsequent to Deloitte's involvement as auditor of MRC;
87. As regards the relevant time period for Deloitte, it denies the allegations contained in paragraph 76.2 v) of the Motion and adds that Plaintiff fails to provide the underlying reasons supporting her opinion that the value of such advances, loans and investments was significantly below book value;
88. It ignores the allegations contained in paragraph 76.3 of the Motion and adds that the analysis performed in the provisional administrator's report (Exhibit P-7) is not relevant to the audit work performed by Deloitte during the relevant time period for the years ended on December 31, 2002;
89. It denies the allegations contained in paragraph 76.4 of the Motion and adds that the provisional administrator's opinion contained in his report (Exhibit P-7) is not relevant to the audit work performed by Deloitte during the relevant time period for the years ended on December 31, 2002;
90. It denies the allegations contained in paragraph 76.5 of the Motion as regards the relevant time period during which Deloitte acted as auditor for MRC;
91. With respect to the allegations contained in paragraphs 76.6 to 76.11 of the Motion, it denies the relevance of same as they do not pertain to Deloitte's involvement as auditor of MRC;
92. With respect to the allegations contained in paragraphs 77 and 78 of the Motion, it refers to Exhibit P-35 and denies anything inconsistent therewith;
93. With respect to the allegations contained in paragraphs 79 and 80 of the Motion, it refers to Exhibit P-36 and denies anything inconsistent therewith;

94. With respect to the allegations contained in paragraph 81 of the Motion, it refers to Exhibit P-37 and denies anything inconsistent therewith;
95. With respect to the allegations contained in paragraph 82 of the Motion, it refers to Exhibit P-38 and denies anything inconsistent therewith;
96. With respect to the allegations contained in paragraph 83 of the Motion, it refers to Exhibit P-29 A to F and denies anything inconsistent therewith and adds that MRC's financial results are not relevant to Plaintiff's cause of action, as Plaintiff admits that the members of the group did not rely on the audited consolidated financial statements of MRC;
97. It denies the allegations contained in paragraph 84 of the Motion and adds that the exceptional nature of the fraud which involved the highest levels of management and certain members of the Board of Directors (including Defendants Matteo, D'Andrea, Joseph Pettinicchio (**Pettinicchio**), Laurence Henry (**Henry**) and Andris Spura (**Spura**)), and the extensive collusion, including with third-party perpetrators, impeded Deloitte's ability to discover the fraud in the course of its audits of the consolidated financial statements of MRC, as will be explained hereinbelow. Furthermore, it adds that the five criteria listed in paragraph 84 were considered during the audits, to the extent applicable;
98. It denies the allegations contained in paragraph 85 of the Motion and notes that the provisional administrator's opinions are based on incomplete and possibly inaccurate information and therefore cannot be relied upon. As expressly acknowledged at page 13 of the provisional administrator's report (Exhibit P-7):
- "Le portrait sommaire de la situation financière des sociétés a été effectué à partir des états financiers partiels internes, des documents saisis par l'AMF et d'interrogatoires menés par l'administrateur provisoire. Ces informations sont incomplètes et possiblement inexactes et comportent donc un degré d'incertitude important";
- (our emphasis)
99. With respect to the allegations contained in paragraphs 85.1 and 85.1.1 of the Motion, it admits that MRACS and Real Vest were subsidiaries of MRC at the time of their incorporation. However, it denies the remainder of the allegations, which constitute opinions;
100. It denies the allegations contained in paragraph 85.2 of the Motion and adds, as will be explained hereinbelow, that Investsafe, which was not a related party, acquired control of MRACS and Real Vest. It also states that note 17 to the audited consolidated financial statements is not relevant to Plaintiff's cause of action as Plaintiff admits that the members of the group did not rely on the audited consolidated financial statements of MRC. Finally, Deloitte refers to Generally Accepted Auditing Standards (GAAS) and denies anything inconsistent therewith;

101. It denies the allegations contained in paragraph 85.3 of the Motion;
102. It denies as drafted the allegations contained in paragraph 85.4 of the Motion, ignores the current characterization of the Real Vest and MRACS transactions as fictitious and adds that at the time of the subject audits, it received representations from MRC that such transactions had been entered into with a UK company, Investsafe, which was not a related party, as will be explained hereinbelow;
103. It denies the allegations contained in paragraph 85.5 of the Motion, which constitute opinions;
104. It denies the allegations contained in paragraph 86 of the Motion and adds that the responsibility for the preparation of the financial statements, including the notes thereto, rests with management. Furthermore, such allegations are contradicted by the allegations contained in paragraph 90;
105. It ignores the allegations contained in paragraph 87 of the Motion;
106. With respect to the allegations contained in paragraph 88 of the Motion, as regards the time period relevant to the audits performed by Deloitte, it refers to Exhibit P-29 A to F and denies anything inconsistent therewith;
107. It denies the allegations contained in paragraph 89 of the Motion as regards the time period relevant to the audits performed by Deloitte;
108. With respect to the allegations contained in paragraph 90 of the Motion, as regards the time period relevant to the audits performed by Deloitte, it denies Plaintiff's characterization of what is contained in the consolidated financial statements of MRC in respect of amounts due to MRC. Furthermore, it adds that Plaintiff's position contained in paragraph 86 is contradicted by the provisional administrator's opinion as reflected by the allegations in paragraph 90;
109. It denies the allegations contained in paragraph 91 of the Motion, which constitute opinions, and adds that MRC's financial results are not relevant to Plaintiff's cause of action, as Plaintiff admits that the members of the group did not rely on the audited consolidated financial statements of MRC;
110. It denies the allegations contained in paragraph 91.1 of the Motion and adds that auditors do not have the duty to discover fraud, as will be more fully explained hereinbelow;
111. With respect to the allegations contained in paragraph 92 of the Motion, it ignores the statements made by D'Andrea to the Order of CMA;
112. It denies the allegations contained in paragraph 93 of the Motion and refers to its responses set out in the previous paragraphs of its Defence;

113. It denies the allegations contained in paragraphs 94 and 95 of the Motion and adds that Plaintiff's novel causality theory is based on ill-founded assumptions, conjectures and speculations;
114. It denies the allegations contained in paragraph 96 of the Motion;
115. With respect to the allegations contained in paragraph 97 of the Motion, it takes act of the fact that B2B and Penson are responsible for the damages claimed by the members of the group and denies being responsible for any such damages;
116. It ignores the allegations contained in paragraphs 98 and 99 of the Motion;
117. With respect to the allegations contained in paragraphs 100 to 102 of the Motion, it does not contest the fact that letters of the nature mentioned in said paragraphs were sent to members of the group;
118. With respect to the allegations contained in paragraph 103 of the Motion, it takes act of the fact that B2B and Penson held the notes in litigation on behalf of the investors and attested to the value of the notes;
119. With respect to the allegations contained in paragraphs 104 to 109 of the Motion, it takes act of Plaintiff's admission that the losses suffered by the members of the group are attributable to B2B and Penson;
120. With respect to the allegations contained in paragraphs 109.1 to 109.32 of the Motion, it takes act of Plaintiff's admission that all the losses suffered by the members of the group as of 2000 are attributable to B2B;
121. It ignores the allegations contained in paragraph 110 of the Motion;
122. With respect to the allegations contained in paragraph 111 of the Motion, it denies having participated in or rendered the fraud possible (which is not a recognized cause of action against auditors in Québec) and adds that the Defendants Matteo, D'Andrea, Pettinicchio, Henry, Spura and Lowell Holden (**Holden**) are responsible for the perpetration of the fraud. Furthermore, B2B, Penson and the investment representatives who sold the notes in litigation to the investors are, together with the above-mentioned Defendants, responsible for the damages claimed by the members of the group;
123. It ignores the allegations contained in paragraphs 112 and 113 of the Motion;
124. With respect to the allegations contained in paragraph 114 of the Motion, it acknowledges that the words "Senior Promissory Securitized Note" (Billet à Ordre Garanti de Premier Rang) appear on certain of the notes issued by MRACS (Exhibit P-32) but does not admit that this indication constitutes a legal guarantee. Furthermore, Plaintiff's investments were renewed yearly further to Plaintiff's explicit instructions in this regard;

125. It ignores the allegations contained in paragraphs 115 and 116 of the Motion and notes that Plaintiff's examination on discovery demonstrated that one of her investments was not made in a RRSP;
126. It denies the allegations contained in paragraph 117 of the Motion, as the amount of \$132,026.35 includes capital and illegal capitalized interest;
127. With respect to the allegations contained in paragraph 118 of the Motion, it takes act of the fact that Plaintiff was appointed inspector to the estate of MRC, Real Vest, MRACS and RAAC;
128. With respect to the allegations contained in paragraph 119 of the Motion, it denies being responsible for any damages suffered by Plaintiff or by the members of the group;

AND FOR FURTHER DEFENCE, DELOITTE RESPECTFULLY SUBMITS AS FOLLOWS:

(I) Consideration of fraud in the context of an audit

1. Objectives of an audit

129. Plaintiff alleges that Deloitte should have discovered the highly complex and carefully orchestrated fraud which was perpetrated by the highest levels of management, certain members of the Board of Directors of MRC and third parties, in the context of the audits of MRC's consolidated financial statements;
130. The Canadian Institute of Chartered Accountants Handbook (**CICA Handbook**) contains the provisions applicable to the conduct of an audit of financial statements in Canada;
131. More particularly, CICA Handbook Section 5135 (December 2002) *The auditor's responsibility to consider fraud and error in an audit of financial statements* in paragraph 13 specifically recognizes that an auditor is not and cannot be held responsible for the prevention of fraud and error:

5135.13 As described in AUDIT OF FINANCIAL STATEMENTS — AN INTRODUCTION, Section 5090, the objective of an audit of financial statements is to express an opinion whether the financial statements present fairly, in all material respects, the financial position, results of operations and cash flows in accordance with generally accepted accounting principles, or in special circumstances another appropriate basis of accounting. An audit conducted in accordance with generally accepted auditing standards is designed to provide reasonable assurance that the financial statements taken as a whole are free from material misstatement, whether caused by fraud or error. For the reasons set out in paragraphs 5135.15-.17, the assurance an auditor provides concerning misstatements arising from fraud is of necessity lower than the assurance provided concerning those

arising from error. The fact that an audit is carried out may act as a deterrent, but the auditor is not and cannot be held responsible for the prevention of fraud and error. The nature and the scope of a public sector audit may be affected by legislation, regulation, ordinances and ministerial directives relating to the detection of fraud and error.

(our emphasis)

2. Management responsibility for prevention and detection of fraud

132. The responsibility for the preparation of the financial statements, including the responsibility for the prevention and detection of fraud and error, lies with management as clearly expressed by paragraph 5090.02 of the CICA Handbook (December 2002) :

5090.02 The operations of an entity are controlled by management under the direction of those charged with governance, including those with oversight responsibility for the financial reporting process. Management has the primary responsibility for the accurate recording of transactions and the preparation of financial statements in accordance with generally accepted accounting principles. These responsibilities include those related to internal control such as designing and maintaining accounting records, selecting and applying accounting policies, safeguarding assets and preventing and detecting error and fraud. An audit of the financial statements does not relieve management of its responsibilities. The auditor may make suggestions as to the form or content of the financial statements or the auditor may draft them in whole or in part, based on management's accounting records. However, financial statements remain the representations of management and of those charged with governance, particularly the audit committee or equivalent.

(our emphasis)

133. As also described in paragraph 5135.10 of the CICA Handbook (December 2002), it is clearly incumbent upon management and the Board of Directors to prevent and detect fraud within the company:

5135.10 The primary responsibility for the prevention and detection of fraud and error rests with both those charged with the governance and the management of an entity. The respective responsibilities of those charged with governance and management may vary by entity, by jurisdiction, and according to the relevant statute and regulation. Management, with the oversight of those charged with governance, needs to set the proper tone, create and maintain a culture of honesty and high

ethics, and establish appropriate controls to prevent and detect fraud and error within the entity.

(our emphasis)

134. As will be established hereinbelow, it is precisely those individuals, among others, who were responsible for the prevention and detection of fraud who committed the fraud under consideration;

3. Assumption of management's good faith

135. The assumption of management's good faith was fundamental to the conduct of the subject audits, as recognized by the following paragraphs of the CICA Handbook (December 2002):

5090.05 In planning and performing an audit, the auditor neither assumes that management is dishonest nor assumes unquestioned honesty. The auditor normally designs auditing procedures on the assumption of management's good faith, and exercises professional judgment in determining the nature, extent and timing of those procedures, in evaluating their results and assessing determinations made by management. However, the auditor performs the audit with an attitude of professional scepticism, without which the auditor may not be alert to circumstances which should lead him or her to be suspicious and he or she may then draw inappropriate conclusions from evidence gathered.

5090.06 The assumption of management's good faith means the auditor, in the absence of evidence to the contrary, can accept accounting records and documentation as genuine and representations as complete and truthful. This assumption is normally necessary for an audit to be economically and operationally feasible. However, representations from management are not a substitute for obtaining sufficient appropriate evidence to draw reasonable conclusions on which to base the audit opinion.

5090.07 An attitude of professional scepticism recognizes that circumstances may exist that cause the financial statements to be materially misstated. It means the auditor makes a critical assessment, with a questioning mind, of the sufficiency and appropriateness of audit evidence obtained and is alert for evidence that contradicts or brings into question the reliability of documents or management representations. It does not mean the auditor is obsessively sceptical or suspicious. The attitude of professional scepticism is necessary throughout the audit process to reduce the risk of overlooking suspicious circumstances, of

overgeneralizing when drawing conclusions from audit observations, and of using faulty assumptions in determining the nature, timing and extent of the audit procedures and evaluating the results thereof.

(our emphasis)

- 136. In the case under consideration, Deloitte rightfully relied upon management's good faith while performing the audits with an appropriate attitude of professional scepticism;
- 137. As will be explained hereinbelow, numerous factors impeded the discovery of the fraud;

4. Factors impeding the auditor's ability to discover fraud

- 138. The CICA Handbook (December 2002) addresses factors impeding the auditor's ability to discover fraud in the course of an audit in paragraphs 5135.15 to 5135.17;
- 139. As will be explained hereinbelow, many of the factors referred to in paragraph 5135.15 which impede the auditor's ability to detect fraud are present in the case under consideration:

5135.15 The likelihood of not detecting a material misstatement resulting from fraud is higher than the likelihood of not detecting a material misstatement resulting from error because fraud may involve sophisticated and carefully organized schemes designed to conceal it, such as forgery, deliberate failure to record transactions, or intentional misrepresentations being made to the auditor. Such attempts at concealment may be even more difficult to detect when accompanied by collusion. Collusion may cause the auditor to believe that evidence is persuasive when it is, in fact, false. The auditor's ability to detect a fraud depends on factors such as the skilfulness of the perpetrator, the frequency and extent of manipulation, the degree of collusion involved, the relative size of individual amounts manipulated, and the seniority of those involved. Audit procedures that are effective for detecting an error may be ineffective for detecting fraud;

(our emphasis)

- 140. Furthermore, as appears from paragraph 5135.16 of the CICA Handbook, the perpetration of fraud by management further impedes the auditor's ability to detect the fraud, which was the case in this matter:

5135.16 Furthermore, the likelihood of the auditor not detecting a material misstatement resulting from management fraud is greater than for employee fraud, because those charged with governance and management are often in a position that

assumes their integrity and enables them to override the formally established control procedures. Certain levels of management may be in a position to override internal controls designed to prevent similar frauds by other employees (for example, by directing subordinates to record transactions incorrectly or to conceal them). Given its position of authority within an entity, management has the ability to either direct employees to do something or solicit their help to assist management in carrying out a fraud, with or without the employees' knowledge.

(our emphasis)

141. Moreover, paragraph 5135.17 of the CICA Handbook, emphasizes the significance of collusion in respect of the auditor's ability to detect fraud. It also recognizes that an audit does not guarantee the discovery of fraud:

5135.17 The auditor's opinion on the financial statements is based on the concept of obtaining reasonable assurance; hence, in an audit, the auditor does not guarantee that material misstatements, whether from fraud or error, will be detected. Therefore, the subsequent discovery of a material misstatement of the financial statements resulting from fraud or error does not, in and of itself, indicate:

- (a) a failure to obtain reasonable assurance;
- (b) inadequate planning, performance or judgment;
- (c) the absence of professional competence and due care; or
- (d) a failure to comply with generally accepted auditing standards.

This is particularly the case for certain kinds of intentional misstatements, since auditing procedures may be ineffective for detecting an intentional misstatement that is concealed through collusion between or among one or more individuals among those charged with governance, management, other employees, or third parties, or involves falsified documentation. Whether the auditor has performed an audit in accordance with generally accepted auditing standards is determined by the adequacy of the audit procedures performed in the circumstances and the suitability of the auditor's report based on the result of these procedures;

(our emphasis)

(II) Application of relevant factors to the fraud under consideration

1. Skilfulness and seniority of the individuals involved in the fraud under consideration

(a) Within MRC

142. As recognized by the aforementioned standards, either the skilfulness of the perpetrator or the seniority of those individuals within management involved in the fraud impedes the auditor's ability to detect fraud;
143. In the case under consideration, there were numerous perpetrators, including Matteo, Spura, Pettinicchio, Henry and D'Andrea, who were all both highly skilful and held senior positions within MRC;
144. In this regard, Matteo, the CEO, and Spura were on the Board of Directors of MRC in addition to being members of the audit committee and therefore necessarily misled certain members of the audit committee and the Board of Directors;
145. Matteo graduated from Concordia University and obtained a Bachelor of Commerce degree with a major in Accounting in 1984. He also obtained his CMA professional designation in 1988. He had the skilfulness and seniority, in his capacity as CEO of MRC, to plan, orchestrate and execute the elaborate fraudulent scheme in litigation and to mislead Deloitte;
146. As regards Spura, he held a Bachelor of Science degree in Business Administration and a Masters of Business Administration (**MBA**). Prior to joining MRC, his career included multiple management positions in the financial services industry such as Vice-President and General Manager of Canagex Limited (a mutual fund manager), Vice-President of National Bank Mortgage Corporation, Manager of Specialized Deposit Services at National Bank of Canada, Chairman of the Board of Directors of La Gestion Européenne La Laurentienne S.A. and Vice-President of Laurentian International Investments. He had the skilfulness and seniority to participate in the perpetration of the elaborate fraud in litigation and to mislead Deloitte;
147. Pettinicchio, in his capacity as Vice-President Finance and subsequently as President and COO of MRC (1999-2005), was at the highest levels of management and, in addition, was a member of the Board of Directors of MRC;
148. Pettinicchio was also a CGA (Certified General Accountant) with impressive business experience, including senior positions with various financial institutions including AGF Management, Royal Bank, Royal Trust, Royal Mutual Funds, Placement Geoffrion Leclerc and Scotia Factors. He also worked at an a public accounting firm, Raymond, Chabot, Martin, Paré. He had the skilfulness and seniority to participate in the perpetration of the elaborate fraud in litigation and to mislead Deloitte;
149. As regards Henry, in his capacity as Vice-President Corporate Development at MRC from 1999 until 2001, he was at the highest levels of management. He had 35 years of experience in management, during which time he had served in various senior

executive positions in industries such as leasing, factoring, natural wellness products, franchising and management consulting. He had the skilfulness and seniority to participate in the perpetration of the elaborate fraud in litigation;

150. D'Andrea held senior management positions within MRC, as controller (2000-2003) and CFO (2004-2005). He held a Bachelor of Commerce degree with a major in Management and Accounting from McGill University. He also was a CMA and had the skilfulness and seniority to participate in the perpetration of the elaborate fraud in litigation and to mislead Deloitte;

(b) Third-party perpetrators

151. In the case under consideration, the participants in the fraud also included third-party perpetrators, such as Holden and Hancock, who were also highly skilful;
152. As regards Holden, he became a director and President of MRACS and a director of Real Vest and RAAC in 2005. He held a Bachelor of Science degree, and during his career, he worked at Dayton Hudson Corporation (now known as Target Corporation) as part of the corporate internal audit team;
153. Hancock was the President of Investsafe, the UK company involved in the Real Vest and MRACS transactions characterized as fictitious by Plaintiff. He was a Chartered Accountant and a fellow of the Institute of Chartered Accountants in England and Wales. Prior to the relevant time period, he had been deputy managing director of a subsidiary of ABN AMRO Bank of the Netherlands;

2. Collusion in the case under consideration

154. As recognized by the applicable standards discussed hereinabove, collusion may cause the auditor to believe that evidence is persuasive when it is, in fact, false;
155. Therefore, the ability of an auditor to discover the fictitious nature of fraudulent transactions is seriously impeded in the case of collusion;
156. In the case under consideration, the complex and sophisticated fraud necessarily involved collusion not only between the members of MRC's senior management and certain members of the Board of Directors but also with third-party perpetrators;
157. Given the highly complex nature of the fraud as recognized by Jean St-Gelais in the AMF Press Release dated September 22, 2008, communicated in support of the Defence as **Exhibit DD-4**, Deloitte submits that it would have been impossible for Matteo to carry out such a fraud without the participation of numerous accomplices, not limited to those mentioned hereinbelow;

(a) Lino Matteo and Paul D'Andrea

158. Plaintiff recognized that Matteo provided false and misleading information to the auditors, as appears from her answer to undertaking SLF-19, communicated in support of the Defence as **Exhibit DD-5**;

159. As for D'Andrea, he admitted that he participated in the fraud orchestrated by Matteo by pleading guilty to the 131 penal charges laid against him by the AMF;

(b) Joseph Pettinicchio

160. During the period relevant to the class action, Pettinicchio, was Vice-President Finance, President and COO of MRC, as well as a member of the Board of Directors;

161. The AMF's investigation demonstrated that Pettinicchio was involved in MRACS and Real Vest, more particularly in that he signed cheques issued by these companies, as did Matteo and D'Andrea, as appears from paragraphs 78 and 80 of the BDRVM Decision identified as Exhibit P-10;

162. During the relevant period, Pettinicchio held senior positions in the companies involved in the sale of the promissory notes in litigation. In this regard, he was a director, President, CEO and member of the audit committee of iForum Financial Network, the parent company of iForum Financial Services and iForum Securities, which sold promissory notes to members of the group, as well as a director and Vice-President of iForum Financial Services;

163. He was also a shareholder and President of 3251497 Canada Inc., the principal shareholder of iForum Financial Network;

164. According to the BDRVM, Pettinicchio, as a director and Vice-President of iForum Financial Services, was responsible for ensuring that only qualified representatives of iForum Financial Services could sell promissory notes in accordance with the *Securities Act*, as appears from paragraph 65 of the BDRVM Decision identified as Exhibit P-10;

165. It is clear that Pettinicchio was an accomplice of Matteo and that he was involved in the sale of promissory notes to members of the group in contravention of various securities laws;

166. Furthermore, in the context of the MRACS transaction characterized as fictitious by Plaintiff, Pettinicchio made representations to the CVMQ for the purposes of the Continuous Disclosure Review Program that Investsafe was an arms' length party, as appears from paragraph 1.5.2 of MRC's letter to the CVMQ dated May 28, 2003, already communicated as Exhibit DD-3;

167. Pettinicchio's involvement in the MRACS transaction will be more fully explained herein below;

(c) Laurence Henry

168. During the period relevant to the class action, Henry acted as Vice-President Corporate Development of MRC, and President and a director of RAAC, MRACS and Real Vest;

169. He was directly involved in the management and administration of MRC, RAAC, MRACS and Real Vest and in the issuance of promissory notes to the members of the group;
170. The AMF's investigation demonstrated that several promissory notes issued illegally by one or other of MRC, MRACS, Real Vest and RAAC were signed by Matteo, D'Andrea and Henry, as appears from paragraph 79 of the BDRVM Decision identified as Exhibit P-10;
171. In fact, Henry signed promissory notes issued by MRACS to Plaintiff, as appears from copies of the notes included in Exhibit P-32;
172. The AMF's investigation also demonstrated that Henry, as well as Matteo, Pettinicchio and D'Andrea, were signatories of MRACS cheques drawn on accounts held with Royal Bank of Canada, Bank of Montreal and TD Canada Trust and signatories of Real Vest cheques drawn on accounts with Royal Bank of Canada, as appears from paragraphs 78(a) and 78(b) of the BDRVM Decision identified as Exhibit P-10;
173. In light of the facts related hereinabove, it is clear that Henry is an accomplice of Matteo and that he participated in the sale of the promissory notes to the members of the group;
174. Moreover, Henry was involved in the scheme aimed at changing MRACS' ownership from UK ownership (Investsafe) to Canadian ownership (Mapleridge Financial Management Corporation (**Mapleridge**)), as will be more fully explained hereinbelow;
175. In this regard, Henry was President, director and sole shareholder of Mapleridge, a company incorporated in Alberta, which became the majority shareholder of MRACS pursuant to a scheme aimed at changing MRACS' UK ownership, as appears from the Resolution of the Directors of MRACS of May 16, 2003 and the Notice of Subscription by Mapleridge, communicated *en liasse* in support of the Defence as **Exhibit DD-6**;
176. Henry was also President, director and shareholder of 1082095 Alberta Limited, which was created on December 31, 2003 to acquire the shares of MRACS and Real Vest owned by Investsafe, as appears from two agreements dated February 19, 2004 between Investsafe and 1082095 Alberta Limited, communicated in support of the Defence as **Exhibit DD-7**. Investsafe was the UK company involved in the MRACS and Real Vest transactions, which transactions are characterized as fictitious by the Plaintiff, as will be more fully explained hereinbelow. Contemporaneously with the acquisition, 1082095 Alberta Limited changed its name for Investsafe Ltd (same name as the UK Company);

(d) *Andris Spura*

177. During the period relevant to the class action, Spura was a member of the Board of Directors of MRC and a member of the audit committee;

178. Furthermore, he held senior positions within the companies which issued the notes in litigation. In this regard, he was a director and Secretary of MRACS, a director and Secretary of RAAC and a director and Secretary-Treasurer of Real Vest;
179. He was also involved in the scheme aimed at changing MRACS' ownership from UK ownership (Investsafe) to Canadian ownership (Mapleridge), as appears from the Resolution of the Directors of MRACS of May 16, 2003, already communicated as Exhibit DD-6;
180. Moreover, it was Spura who represented Real Vest for purposes of the Real Vest transaction characterized as fictitious by Plaintiff, as will be explained hereinbelow;
181. In light of the facts related hereinabove, it is clear that Spura was an accomplice of Matteo and that he participated in setting up a transaction characterized as fictitious by Plaintiff;

(e) Lowell Holden

182. Holden was an accomplice of Matteo and was aware of the fraudulent activities orchestrated by Matteo, since he agreed, at Matteo's request, to become a director of MRACS, Real Vest and RAAC in the summer of 2005, when these companies were being investigated by the AMF further to their refusal to reimburse the noteholders;

(f) Stephen Hancock

183. Hancock, as will be explained hereinbelow, was involved in the MRACS and Real Vest transactions that are characterized as fictitious by Plaintiff;

3. Perpetrators of the fraud also misled independent members of MRC's Board of Directors

184. The independent members of the Board of Directors of MRC were also misled by the perpetrators of the fraud despite the knowledge and experience of said Board members;
185. Furthermore, they were necessarily misled on a continuous basis since they not only approved MRC's annual consolidated financial statements but also approved MRC's quarterly unaudited consolidated financial statements;
186. Gwyer Moore, a Board member of MRC from 2000 to 2002 and a member of the audit committee, had impressive credentials. He was, *inter alia*, a former governor of the Toronto Stock Exchange and a Board member of the Investment Dealers Association. He was also chief executive of Deacon Capital Corporation and BZW Canada Limited, the investment banking division of Barclays Bank, and a senior executive of Burns Fry Limited (now BMO Nesbitt Burns);
187. Similarly, Robert Laflamme, a Board member of MRC until 2005 and a member of the audit committee, had extensive investment dealer and business experience and was well known in the business community. He was a registered representative,

institutional representative, Vice-President and sales manager in the Canadian finance and investment industry. He was the co-founder of Investpro Securities Inc., a duly registered member of the Investment Dealers Association (now known as IIROC);

- 188. Mtre Guy A. Gagnon, a Board member of MRC until 2003, was a tax specialist and recognized lawyer as well as a partner at a leading Montreal law firm;
- 189. Paul K. Marchand, a Board member of MRC until 2004, was an insurance broker and managing partner of Marchand, Fairchild, Blais Financial Services Inc.;
- 190. Elyse Claire Rowen, a Board member of MRC from 2002 to 2005, held an MBA and had worked for several public companies including Canadian Pacific, Sun Life, Schering-Plough, Pfizer and Kraft;

(III) Real Vest and MRACS Transactions

- 191. Plaintiff has characterized the Real Vest and MRACS transactions as fictitious and accuses Deloitte of failing to discover the fictitious nature of these transactions;

1. Real Vest Transaction

- 192. In September 2000, Real Vest issued shares to Investsafe, a UK company, resulting in the dilution of the MRC ownership in Real Vest to 35%, with Investsafe holding the remaining 65%, thereby providing Investsafe with control of Real Vest, as appears from the Share Subscription Agreement identified as Exhibit P-23;
- 193. The Share Subscription Agreement was signed by Spura for Real Vest and by Hancock on behalf of Investsafe, as appears from the Share Subscription Agreement identified as Exhibit P-23;
- 194. For the purposes of the audit for the period ended December 31, 2000, Deloitte received representations from the highest levels of management, including from Matteo and D'Andrea, that Investsafe was not a related party;
- 195. These representations were also publicly confirmed by MRC's press release of October 3, 2000, communicated in support of the Defence as **Exhibit DD-8**, in which Pettinicchio was quoted, as well as by the Management Discussion and Analysis contained in the 2000 Annual Report signed by Matteo and Pettinicchio, identified as Exhibit P-29D;
- 196. This transaction was approved by the Board of Directors of MRC, as appears from the Minutes of a meeting of the Board held on September 25, 2000, communicated in support of the Defence as **Exhibit DD-9**;
- 197. If Plaintiff's characterization of the Real Vest transaction as fictitious is accurate, it is the result of high level collusion within MRC by Matteo, Spura, D'Andrea and Pettinicchio and by Hancock, a third-party perpetrator, who signed the Share Subscription Agreement identified as Exhibit P-23 on behalf of Investsafe;

2. MRACS Transaction

198. On September 30, 2002, MRACS, a wholly-owned subsidiary of MRC, was sold to Investsafe, a UK company, pursuant to the terms of a Share Purchase Agreement identified as Exhibit P-15;
199. The Share Purchase Agreement was signed by Matteo for MRC and by Hancock on behalf of Investsafe, as appears from the Share Purchase Agreement identified as Exhibit P-15;
200. This sale was reflected in the third quarter unaudited consolidated financial statements of MRC, which were approved by the Board of Directors, as appears from the unaudited consolidated financial statements for the 9-month period ended September 30, 2002 and the minutes of a meeting of the Board of Directors of MRC held on November 21, 2002 approving said financial statements, communicated *en liasse* in support of the Defence as **Exhibit DD-10**;
201. For the purposes of the audit for the period ended December 31, 2002, Deloitte received representations from the highest levels of management, including from Matteo, Pettinicchio and D'Andrea, that Investsafe was not a related party;
202. These representations were also publicly confirmed by MRC's press release of October 2, 2002, communicated in support of the Defence as **Exhibit DD-11**, as well as in the subsequent press release of November 22, 2002, communicated in support of the Defence as **Exhibit DD-12**;
203. Furthermore, identical representations were made by Pettinicchio in the Message of the President to the shareholders contained in the 2002 Annual Report, identified as Exhibit P-29F;
204. Furthermore, Pettinicchio reiterated such representations in a letter to the CVMQ in the context of the Continuous Disclosure Review Program, as appears from section 1.5.2 of MRC's letter to the CVMQ dated May 28, 2003, already communicated as Exhibit DD-3;
205. The MRACS transaction was discussed by the Board of Directors of MRC, as appears from the Minutes of a meeting of the Board held on August 21, 2002, communicated in support of the Defence as **Exhibit DD-13**, was later approved by the Board, as appears from the Minutes of the meeting of the Board of Directors held on October 1, 2002, communicated in support of the Defence as **Exhibit DD-14**, and was further discussed at a meeting of the Board of Directors held on November 21, 2002, as appears from the Minutes of the said meeting already communicated as Exhibit DD-10;
206. If Plaintiff's characterization of the MRACS transaction as fictitious is accurate, it is the result of high level collusion within MRC by Matteo, Pettinicchio, D'Andrea and Spura as well as by Hancock, a third-party perpetrator, who signed the Share Purchase Agreement identified as Exhibit P-23 on behalf of Investsafe;

207. Such collusion in respect of the Real Vest and MRACS transactions was exceptional due, *inter alia*, to the involvement of a significant number of highly skilful perpetrators, including: i) members of senior management of MRC (Matteo, D'Andrea, Pettinicchio), ii) certain members of the Board of Directors of MRC who approved the transactions (Matteo, Spura, Pettinicchio) and iii) a third-party perpetrator (Hancock);
208. As explained hereinabove, the CICA Handbook recognizes that the existence of just one of the factors mentioned in paragraphs 5135.15 to 5135.17 seriously impedes the ability of the auditor to discover fraud, whereas in the case under consideration, several of these factors exist, thereby further significantly increasing the likelihood of not discovering the fraud;
209. The fact that three well known, highly reputable audit firms were all defrauded attests to the exceptional skill and knowledge of the perpetrators of the fraud and the collusion of third parties;
210. In summary, the senior management positions of the perpetrators of the fraud, their specific knowledge and experience, and the role of third-party accomplices, all combined to defraud not only Plaintiff, the members of the group and the independent directors described above but also the Professional Defendants;

(IV) Absence of causation

1. Plaintiff's cause of action is not based on reliance on MRC's audited consolidated financial statements

211. Plaintiff's cause of action against the professional defendants Deloitte, BDO Dunwoody and Schwartz Levitsky Feldman (**Professional Defendants**) is admittedly not predicated on reliance by the members of the group on MRC's audited consolidated financial statements for the purposes of purchasing and renewing the notes in litigation;
212. As noted by the Court in the judgment authorizing the class action, Plaintiff did not rely or even take cognizance of MRC's audited consolidated financial statements, as appears from paragraph 51 of the Rectified Judgment :

[51] Or, il se trouve que Mme Ménard ne s'est pas fiée aux états financiers endossés⁵ par les sociétés comptables intimées. En effet, elle reconnaît sans ambages qu'elle n'en a pas pris connaissance.

⁵ Les sociétés comptables intimées signalent que, strictement parlant, les états financiers ne sont pas préparés par les vérificateurs externes mais plutôt par la direction de l'entreprise et adoptés par son conseil d'administration alors que les vérificateurs externes ne font que livrer leur opinion quant aux états financiers que l'entreprise leur soumet. Sans s'attarder sur cette question, le présent jugement utilise dans ce contexte le terme endosser pour indiquer que les vérificateurs externes ont livré une opinion professionnelle favorable et sans réserve quant aux états financiers en cause.

213. In the context of an action against auditors in Québec based on losses suffered by investors, the burden of establishing a certain, direct and immediate causal link has always required the demonstration of reliance on audited financial statements by investors for the purposes of making their investment decisions;
214. The foregoing was again recently and unequivocally confirmed by the Québec Court of Appeal in the well-known Castor matter (*Wightman c. Widdrington (Succession de)*, 2013 QCCA 1187, motion for leave to appeal before the Supreme Court of Canada dismissed);
215. Plaintiff cannot unilaterally eliminate the necessity of proving reliance on audited consolidated financial statements of MRC by the members of the group by inventing a cause of action that is inconsistent with the legal requirement of establishing a direct, certain and immediate causal link;
216. The inherent flaws of Plaintiff's cause of action are illustrated, *inter alia*, by the fact that despite her position that her claim is not based on reliance by the members of the group on MRC's audited consolidated financial statements, many allegations contained in the Motion clearly recognize that reliance thereon is indeed required, as appears from paragraphs 52 and 53 of Plaintiff's Motion;

2. Plaintiff's novel cause of action

217. Plaintiff's novel causation theory assumes a series of highly speculative and hypothetical events, thereby rendering the causal link between the alleged negligence of Professional Defendants and the losses of the members of the group indirect and exceedingly remote;
218. In this regard, Plaintiff's "Spotlight" theory assumes that the Professional Defendants should, at the time of their respective audits, have discovered the fraud and refused to report upon MRC's consolidated financial statements, which would necessarily have led to MRC's failure to file its audited consolidated financial statements with the regulator, thereby triggering a highly speculative cascade of events that would eventually have led to the intervention of the AMF, which in turn would have prevented the continuation of the fraud;
219. Plaintiff further attempts to unilaterally circumvent the requirement to prove a direct, immediate and certain causal link by inventing a second cause of action based on the credibility that the Professional Defendants would have allegedly lent to MRC, which in turn would have rendered the fraud possible;
220. In this regard, Plaintiff alleges that the mere involvement of Professional Defendants as auditors of MRC would have lent credibility to MRC although the evidence demonstrates that the members of the group were unaware of the identity of the Professional Defendants and that their investment decisions were not based on such credibility;

- 221. In fact, the evidence contradicts the existence of a direct, immediate and certain causal link, as Plaintiff was unaware of the fact that Deloitte had audited MRC's consolidated financial statements;
- 222. Moreover, before purchasing the notes in litigation, Plaintiff never received any documents pertaining to MRC and did not even know the nature of MRC's activities, thereby rendering her allegation in paragraph 51 of the Motion that MRC benefited from an "aura of credibility" ill-founded;
- 223. In fact, Plaintiff decided to invest in the notes in litigation as she was operating under the erroneous assumption that such investments were guaranteed by the Canadian and Québec governments on the basis that they were RRSP eligible;
- 224. Furthermore, the notes held by the members of the group on November 9, 2005, in accordance with the description of the group, were purchased or renewed subsequent to Deloitte's involvement as auditor of MRC and therefore there is no direct and immediate causal link between the alleged negligence of Deloitte and the losses of the members of the group;

(V) The losses sustained by the members of the group were caused by third parties and not by Professional Defendants

- 225. There is no direct, immediate and certain causal link between the losses of the members of the group and the alleged negligence of the Professional Defendants;
- 226. The losses sustained by the members of the group were caused by the perpetrators of the fraud, including the highest levels of management, certain members of the Board of Directors of MRC and third parties mentioned hereinabove as well as by B2B, Penson and the investment representatives who sold the notes in litigation and made false representations to the members of the group;

1. Investment representatives

- 227. From 1996 to 2005, Plaintiff renewed her investments in MRACS notes yearly, by completing a one-page document entitled "Formulaire de rachat / souscription pour un nouveau terme" which gave her the option of renewing her investments for another term or requesting redemption thereof, the whole as appears from renewal forms completed by Plaintiff, already identified as Exhibit P-32;
- 228. Plaintiff invested in the notes issued by MRACS due to the wrongful and fraudulent representations made to her by her investment representative, Yves Mechaka (**Mechaka**), whom she sought to hold solely liable for her losses in the context of a motion in appeal of a disallowance of a proof of claim in the bankruptcy of IForum Securities, in support of which she personally signed an affidavit attesting to the truth of the facts alleged in the motion, as appears from said motion, the exhibits thereto and Plaintiff's affidavit in support thereof, communicated *en liasse* in support of the Defence as **Exhibit DD-15**;

229. The members of the group purchased and renewed the notes in litigation on the basis of false representations by their investment representatives;

230. In this regard, the representative Yves Tardif pleaded guilty to penal charges laid by the AMF which involved 21 members of the group to whom Tardif had made false representations, as appears from paragraph 33 of the decision in *R. c. Tardif*, 2010 QCCQ 11090, communicated in support of the Defence as **Exhibit DD-16**:

[33] Tant et aussi longtemps que c'était payant, que l'accusé recevait ses commissions, il ne se pose pas de questions allant même jusqu'à donner des informations fausses, trompeuses à propos de placements soi-disant garantis, qui sont aux yeux du Tribunal, de graves infractions.

231. Similarly, the representative Paul Messier (**Messier**) pleaded guilty to numerous penal charges laid by the AMF involving seven members of the group who were misled by false representations made by Messier, as appears from the decision in *Thibault c. Messier*, 2008 CanLII 13824 (QC CDCSF), communicated in support of the Defence as **Exhibit DD-17**;

232. In the same vein, the representative René Proteau made false representations to his clients, including the fact that their investments in the notes in litigation were guaranteed by an insurance policy, as appears from the judgment in the case *Roberge c. Planification Copepco inc.*, 2010 QCCS 114 and *Roberge c. Smith*, 2011 QCCA 2118 (appeal dismissed), communicated *en liasse* in support of the Defence as **Exhibit DD-18**;

233. Furthermore, in its decision already identified as Exhibit P-10, the BDRVM recognized that the investors had been misled over the course of a very long period by their investment representatives:

« Nous sommes en présence d'une situation inacceptable où des professionnels du marché auraient abusé de leur situation pour tromper les investisseurs, sur une longue période, et cela perdurerait encore. Alors que ces personnes devraient constituer un rempart destiné à assumer la protection des investisseurs qui leur avaient confié leurs avoirs, ils auraient plutôt profité de cette situation pour mieux bafouer les intérêts de ces mêmes épargnants »

2. B2B

234. The negligence of B2B, which was holding notes in litigation and dealing directly with the perpetrators of the fraud, including with the investment representatives, in respect of, *inter alia*, the purchase, renewal and redemption of the notes, was also the direct and immediate cause of the losses sustained by the members of the group;

235. Deloitte incorporates herein the allegations of gross negligence made by Plaintiff against B2B in paragraphs 97 to 101, 103, 104, 106 to 109.32 of the Motion;
236. In light of such serious allegations, Deloitte submits that the losses suffered by the members of the group, at least as of 2000, are attributable to B2B;

3. Penson

237. The negligence of Penson, which was holding notes in litigation and dealing directly with the perpetrators of the fraud, including with the investment representatives, in respect of, *inter alia*, the purchase, renewal and redemption of the notes, was also the direct and immediate cause of the losses sustained by the members of the group;
238. Deloitte incorporates herein the allegations of negligence made by Plaintiff against Penson in paragraphs 97 to 100, 102 to 106 and 109 of the Motion;

(VI) Absence of solidarity between the Professional Defendants

239. Subsidiarily and without prejudice to the foregoing, no finding of solidary liability as between the Professional Defendants could ever be lawfully permitted;
240. Plaintiff necessarily recognizes that the Professional Defendants conducted successive yet separate audits of MRC's consolidated financial statements;
241. They allegedly committed distinct faults and caused different losses at different times;
242. Even if Plaintiff's allegations of negligence are presumed to be true, Deloitte cannot be held liable for the losses suffered by the members of the group subsequent to its resignation as auditor of MRC's consolidated financial statements;
243. The Professional Defendants, by their alleged faults, did not cause one unitary loss or solidary claim of \$130 million. On the contrary, Plaintiff alleges that approximately 1,600 investors suffered distinct individual losses, at different times and as a result of various alleged faults;
244. While the task of segregating and apportioning any supposed liability towards the 1,600 investors between the Professional Defendants would be time consuming, it would certainly not be impossible;
245. The segregation and apportionment of the losses caused to the members of the group as a result of each Professional Defendant's supposed failure to discover the fraud would first be anchored to the distinct time slots for each Professional Defendant's audit period(s);
246. The regrouping of the member claims is merely procedural and cannot alter the individual nature of these investor losses;
247. None of Plaintiff's factual allegations could give rise to any solidary findings as between the Professional Defendants. Their alleged faults, even if presumed to be

true, are distinct and successive. Moreover, they gave rise to distinct losses caused to different members of the group at various times;

(VII) Composition of the group

248. Deloitte submits that the perpetrators of the fraud, including the investment representatives and any person who is or was in any way related to such perpetrators, as well as companies with more than 50 employees, should be excluded from the group;

(VIII) Damages

249. Subsidiarily and without prejudice to the foregoing, Plaintiff is attempting to recover illicit and exaggerated amounts from the Defendants;
250. Plaintiff's theory is predicated on the assumption that had the Defendants fulfilled their respective obligations, the notes in litigation would not have been sold to the members of the group and therefore they would not have suffered any losses;
251. Indeed, neither Plaintiff nor any other member of the group is entitled to claim the excessive interest generated by the fraudulent notes. In short, a fraudulent note cannot give rise to legitimate interest;
252. Hence, only the actual capital invested by the members of the group could form the basis of their individual claims;
253. Yet, Plaintiff is relying on estimates prepared by the provisional administrator, which include approximately \$58 million of such fictitious interest, as appears from the provisional administrator's report already identified as P-7;
254. Numerous members of the group also received purported interest payments following their investment in the notes in litigation;
255. These fictitious interest payments must be accounted for in such manner as to reduce the claim in capital of the members of the group in order to reflect the actual loss;
256. Finally, Deloitte submits that collective recovery is not possible in the circumstances.

FOR THE FOREGOING REASONS, MAY IT PLEASE THIS HONORABLE COURT TO:

DISMISS the Motion of Plaintiff Andrée Ménard;

MAINTAIN the Defence of Deloitte LLP;

THE WHOLE, with costs, including those of experts;

Montréal, March 24, 2014

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