

COURT FILE NUMBER 2501-06120

COURT COURT OF KING'S BENCH OF ALBERTA

JUDICIAL CENTRE CALGARY

APPLICANT(S): IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, as amended

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF SUNTERRA FOOD CORPORATION, TROCHU MEAT PROCESSORS LTD., SUNTERRA QUALITY FOOD MARKETS INC., SUNTERRA FARMS LTD., SUNWOLD FARMS LIMITED, SUNTERRA BEEF LTD., LARIAGRA FARMS LTD., SUNTERRA FARM ENTERPRISES LTD., SUNTERRA ENTERPRISES INC

CLAIMANT: **NATIONAL BANK OF CANADA**

RESPONDENTS TO THE CLAIM **SUNTERRA FOOD CORPORATION, TROCHU MEAT PROCESSORS LTD., SUNTERRA QUALITY FOOD MARKETS INC., SUNTERRA FARMS LTD., SUNWOLD FARMS LIMITED, SUNTERRA BEEF LTD., LARIAGRA FARMS LTD., SUNTERRA FARM ENTERPRISES LTD., SUNTERRA ENTERPRISES INC., RAY PRICE, DEBBIE UFFELMAN and CRAIG THOMPSON**

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**BRIEF OF THE RESPONDENTS TO NATIONAL BANK OF CANADA CLAIM
HEARING BEFORE THE HONOURABLE JUSTICE MICHAEL I. LEMU
DECEMBER 4 AND 5, 2025**

Counsel to Applicants / Defendants to National Bank of Canada v Sunterra Claim

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I. INTRODUCTION

A. National Bank of Canada claim to be determined

1. This Brief is provided in support of the Defence by Sunterra Food Corporation, Trochu Meat Processors Ltd. ("**Trochu**"), Sunterra Quality Food Markets Inc. ("**Sunterra Markets**"), Sunterra Farms Ltd. ("**Sunterra Canada**"), Sunwold Farms Limited ("**Sunwold Canada**"), Sunterra Beef Ltd. ("**Sunterra Beef**"), Lariagra Farms Ltd. ("**Lariagra Canada**"), Sunterra Farm Enterprises Ltd. ("**Sunterra Farm Enterprises**") and Sunterra Enterprises Inc. ("**Sunterra Enterprises**") (together, the "**Corporate Respondents**"), and Ray Price, Debbie Uffelman and Craig Thompson (together, the "**Individual Respondents**") to the claim brought by National Bank of Canada ("**NBC**") in this *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("**CCAA**") proceeding ("**NBC v. Sunterra Claim**"), as provided for by the orders of His Honour Justice Lema on July 24, 2025 ("**NBC Scheduling Order**").
2. The NBC v Sunterra Claim is to be heard summarily, per the following:
 - (a) Court Order (Scheduling) made by consent on July 24, 2025, by the Honourable Justice M.J. Lema in this CCAA proceeding, Schedule A, paragraph 2: "*The NBC v Sunterra Claim shall be determined concurrently with the Compeer v. Sunterra Claim summarily pursuant to an application on the Commercial List...*"; and
 - (b) section 20(1)(a)(iii) of the CCAA.
3. The NBC Scheduling Orders define the claim to be determined as follows:

"NBC v. Sunterra Claim" means every claim NBC has against the Sunterra Parties, or any of them, for:

(i) contribution and indemnity arising out of or in any way connected to the Compeer v. NBC Claim; and

(ii) damages,

which claim shall exclude a claim for the NBC Indebtedness as set out in paragraph 2 of this Order;
4. Related definitions in the NBC Scheduling Order are as follows, and will be used as such in these submissions:

"Compeer v. NBC Claim" means every claim Compeer has or may have against National Bank of Canada (as amalgamation successor to Canadian Western Bank) that is related to, arises from or is in anyway connected to Canadian Western Bank dishonoring cheques issued by Sunterra Farms Inc.[sic – Limited] or Sunwold Farms Limited in favour of the Sunterra US Entities;

"Sunterra US Entities" means, collectively, Sunterra Farms Iowa, Inc. and Sunwold Farms, Inc;
5. Paragraph 2 of the NBC Scheduling Order identifies the "**NBC Indebtedness**" as follows:

As at July 24, 2025, the outstanding balance for all amounts advanced by NBC under the Amended and Restated Commitment Letter, dated November 15, 2022, between NBC, as lender, and Sunterra Food Corporation, Trochu Meats Processors Ltd., Sunterra Quality Food Markets Inc., Sunterra Farms Ltd., and Sunwold Farms Limited, as borrowers, exclusive of all accruing interest, fees, costs and expenses (all of which are recoverable by NBC), which outstanding balance, for clarity, also excludes the amounts claimed or to be claimed by NBC in respect of the NBC v. Sunterra Claim (as such term is defined in the attached Schedule "A"), is \$9,932,732.20.

B. Preamble

6. NBC was, and is, fully secured and has no losses. As such it attempts to assert a claim for indemnity, without any indemnity agreement, arising from a non-existent hypothetical action against it by Compeer – while also maintaining that NBC has done nothing wrong.
7. To be clear – as confirmed by Alexandre LeBlanc, Vice President of the Special Asset Management Unit – “no claim has been made from Compeer as against NBC”.¹
8. It is not a proper use of a CCAA proceeding to determine disputes between parties other than the debtor company. Here there is no claim by Compeer against NBC nor any facts underlying such a claim. Put plainly, there are no underlying facts as to how a claim by Compeer against NBC might exist. As such it is impossible to evaluate a possible contribution to or an indemnity regarding a claim that isn’t formulated and has no factual underpinnings.
9. To allow NBC’s claim to continue in such circumstances would have serious deleterious implications for CCAA proceedings. It would mean that critical resources of a debtor company would need to be allocated to pay for a potential claim that does not yet even exist. Further, it would cause irreparable delays to the CCAA process if such process was contingent on the resolution of non-CCAA third party claims that had not even been filed let alone articulated. In such a circumstance how could debtor companies ever realistically file an emergence plan in a timely and efficient manner if that plan had to account for unproven and highly speculative claims for an unknown duration as between third parties?
10. NBC made a voluntary decision to advance conditional credit to Sunterra². In fact, NBC actually reviewed and made the voluntary decision to increase the amount of conditional credit that was available to Sunterra.³ Prior to February 2025 NBC had all of the information available to it to know about all of Sunterra’s activities which led to the cheque freeze in February 2025⁴ and in fact NBC had a “comprehensive system to monitor Sunterra’s transactions and their exchanges

¹ Cross Examination of Alexandre LeBlanc on October 23, 2025 [Joint Book of Evidence TAB 63] [LeBlanc Cross] at page 67, lines 3-7

² Cross-Examination of Raymond Pai on October 16, 2025 [Pai Cross] [Joint Book of Evidence at TAB 58] 76 lines 3-8

³ *Ibid* at page 77 lines 14-17

⁴ *Ibid* at page 85 lines 7-10 and 86 lines 5-8 and 107 lines 14-19

with clearing parties".⁵ Finally, NBC had known about large sequential intercompany cheques with actual examples as early as July 2023⁶

11. The bank profits from conditional credit – it “receives” the deposit before the cash transfers. Deposits are a fundamental part of NBC’s business and NBC profits off of the interest on them⁷. The decision to advance conditional credit was unilateral – no specific formal contract was entered between the parties with respect to the conditional credit.
12. Conditional credit, by its nature, is temporary. The credit extends during the time period between when a deposit is “transferred” to the time when the cash clears. This is typically 3 days. Therefore, at any one time the exposure for the granting of conditional credit is no more than approximately 3 days. The aggregate amount of credit over time does not matter for the purpose of calculating credit risk. The only relevance of the aggregate amount is that it gives the bank, in this case NBC, information with respect to how its customer, in this case Sunterra, has been using the conditional credit over time.
13. In other words, the aggregate amounts are proof that the NBC knew the extent to which Sunterra was using the conditional credit historically over time but is not evidence of any actual loss or exposure as that exposure at any one time would always be limited to the 3-day clearing period.
14. There is no evidence that either NBC, nor Compeer, imposed any use restrictions on the conditional credit that they extended. In other words, Sunterra was permitted to use the conditional credit allotted prior to the cash actually transferring.
15. In the event that conditional credit was ever withdrawn Sunterra’s belief was that NBC had an ongoing duty of commercial reasonableness such that Sunterra would be able to repay any conditional credit outstanding at that time.
16. NBC knew that Sunterra was using its conditional credit for large value intercompany transfers and had known that fact for many years. Sunterra did not hide or obscure that fact from NBC – it met with them, answered questions and discussed it. After receiving those answers NBC elected to exercise its discretion to continue the practise of advancing conditional credit to Sunterra. NBC had full transparency.⁸
17. Further, the only NBC witness to have any dealings with Sunterra or any personal knowledge prior to February 2025 readily admits that Sunterra, and specifically Ray Price, was always open and honest in their communication with NBC⁹:

Q. [Mr. Chimuk] I'm going to suggest to you that Mr. Price's communications were open and transparent during that meeting, correct?

⁵ Pai Cross, *supra* note 2 104 lines 2-10

⁶ *Ibid* at page 108-lines 1-9 and 109 lines 22-25 and page 110 line 1

⁷ Cross-Examination of Laurent Ferreira on November 5, 2025 [Joint Book of Evidence TAB 64] [Ferreira Cross] page 5 lines 11-21

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A [Erin Depoe]. As to what we were discussing, yes.

(...)

Q: I'm going to suggest to you that it's always been Mr. Price's practice to address, in a timely way, any concerns of CWB when you would have raised them with him and to work openly with you to find a solution to any issues; is that fair?

*A. Yes.*¹⁰

18. As will be set out herein there is no evidence before the Court on the following points;
- (a) No expert evidence has been called and therefore all evidence is fact evidence – there is no opinion evidence;
 - (b) No opinion evidence was called to explain what is cheque-kiting;
 - (c) No evidence was led to demonstrate that Sunterra had committed cheque-kiting;
 - (d) No opinion evidence was led to actually examine the transactions in question leading to the account freeze to opine on whether those transactions constituted cheque kiting;
 - (e) There is no evidence that NBC suffered any loss¹¹ with respect to its issuance of conditional credit;
 - (f) There is no evidence of any claim being advanced by Compeer against NBC but further there is no evidence that NBC even knows underlying facts with respect to a potential claim Compeer¹²;
 - (g) There is no evidence of any misrepresentation by Sunterra; and
 - (h) There is no evidence that NBC relied upon any misrepresentation by Sunterra.
19. There was no deception. There was no fraud. There was no loss. There is no claim to even be indemnified from and even if one existed NBC doesn't know what it is.
20. NBC had an obligation to put its best foot forward -this being it – and therefore the claim must fail.

C. Preliminary issues for determination

21. The NBC submissions refer to and rely upon the evidence of Compeer Financial, PCA (“Compeer”) filed and served for the purpose of the Compeer v Sunterra Claim, in particular in paragraphs 85 to 89 of the submissions under the heading Compeer Inquiries – 2022 to 2024. Evidence in the Compeer v Sunterra Claim is not evidence admissible in the NBC v Sunterra claim and both the evidence from Compeer and the submissions by NBC concerning them must be disregarded by the Court for the purpose of adjudicating the NBC v Sunterra Claim.

¹⁰ *Ibid.*

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¹⁰ *Ibid.*

¹¹ Pai Cross, *supra* note 2 page 50 lines 19-20

¹² *Ibid* pages 46-49

D. Summary

22. NBC's claims are all based upon their allegation that Sunwold Canada and Sunterra Canada ("**Canadian Hog Farm Entities**") together with Sunwold US and Sunterra US (US Hog Farm Entities) engaged in a cheque kiting scheme, which is inherently fraudulent, by their admitted conduct. They claim that the respondents' only defence to that claim is that both NBC and Compeer Financial, PCA ("**Compeer**") (together, the "**Banks**") should have discovered the so called kiting scheme earlier.¹³ The respondents dispute both of these characterisations of the facts, the law and the case put by the respondents.
23. The approach of NBC in its pleadings, evidence and submissions is to describe the transactions that took place and assert, without pleading or substantiating the elements of civil fraud, that those transactions in and of themselves prove that a civil fraud was committed by the respondents as against NBC. Even the choice of language in NBC's documents, defining the Canadian Hog Farm Entities as the "Canadian Kiting Entities" and US Hog Farm Entities as the "US Kiting Entities", exemplifies their approach of pleading, asserting and submitting a conclusion of fraud without establishing it.
24. NBC's written argument, in a somewhat startling but telling approach, with respect, relies upon an extract from McDonnell, Monroe, Kerr on the *Law of Fraud and Mistake*, 7th ed.¹⁴ to try and tell the Court that civil fraud is not, in effect, bound to any particular cause of action, in respect of which the elements must be proved, but rather is a general concept of which the torts of civil fraud and fraudulent misrepresentation, here in Canada, is just one example.¹⁵
25. NBC then fail to adequately take the Court through the required elements of civil fraud, well established on the authorities, to come to their conclusion that it has in fact been committed in this case.
26. NBC has failed to establish that there was an intention to deceive on the respondents' part, or any of them, nor any actual deception suffered by NBC, for them to be able to substantiate their claim.
27. The respondents openly describe in their evidence an "**Account Coverage Practice**" by which the Canadian Hog Farm Entities and the US Hog Farm Entities, transparently and with the knowledge and tacit approval of the Banks, managed funds between them on a daily basis, which transfers utilized the conditional credit granted by each of the Banks.
28. The respondents say, and the evidence supports, that each of the Banks knew about, carefully scrutinised and monitored these practices, which were self-evident from each of the Banks' own records and further from the additional books and records of the Sunterra Group with which they were provided and which they also scrutinised, and in respect of which the Banks had a higher level of understanding, experience and expertise than any of the respondents. In this context, it is the respondents' position that there was no intent to deceive the Banks, that the Banks were

¹³ Brief of the National Bank of Canada filed in these proceedings on November 19, 2025 [NBC Submissions] at para 1

¹⁴ London: Sweet & Maxwell Limited, 1952

¹⁵ *NBC submissions*, *supra* note 10 at para. 156 and 157

not deceived and that the Banks did not therefore act in reliance upon or by inducement from any allegedly false representations made by the respondents, or any of them.

29. On cross examination NBC admitted that it had full transparency:

Chimuk: now, so, you'd agree with me that the National Bank had full transparency with respect to information that was in the national bank's bank accounts, correct? Money was coming and going from those bank accounts, and they're National Bank bank accounts. National Bank has full transparency with respect to the comings and goings of that money within those accounts, is that fair?

*Pai: Yes*¹⁶

30. In other words, NBC provided and continued to provide credit to the Canadian Hog Farm Entities in the form of the "float", knowing that it was providing credit to those entities as per the daily transactions between the entities, in addition to what was provided for under the respective loan agreements, and they cannot therefore now claim that they were deceived by the respondents' actions, or any of them, and induced thereby to act in a manner that caused them the damages that they claim. There is no doubt that NBC has known about and indeed asked Sunterra about the practise of certain large sequential cheques as far back as 2023¹⁷.

31. To be clear NBC knew that

- (a) Sunterra issued over \$20 billion in physical cheques that NBC would have processed between 2023 and 2025¹⁸
- (b) they had to physically review and process all of these cheques on both an incoming and outgoing basis.¹⁹
- (c) they had the capability to conduct a thorough analysis that would tell them the number of cheques as well as the quantum of cheques²⁰; and
- (d) that Chan was authorized to put a hold on Sunterra's cheque writing ability at any time and did not even need the input or authorization of Mr. Leblanc to do so.²¹

32. In other words, NBC had complete knowledge and control of the situation at all times.

¹⁶ Cross-Examination of Raymond Pai on October 16, 2025 [Pai Cross] [Joint Book of Evidence at TAB 58] at pages 93-94 lines 20-25 and 1-3

¹⁷ LeBlanc Cross, *supra* note 1 page 37 lines 12-25

¹⁸ *Ibid* at page 49 lines 3-21

¹⁹ *Ibid* at page 50 lines 4-7

²⁰ LeBlanc Cross, *supra* note 1 at pages 51-52 lines 11-22 and 14-20

²¹ *Ibid* at page 54 lines 8-15

33. It is trite law that civil fraud requires the claimant to establish that it was actually induced to act upon the alleged false representation, and that the claimant must prove inducement.²² NBC have failed to adduce evidence to prove that NBC was actually induced to act upon the alleged false representations, including by not providing evidence from critical NBC witness, Richard Dean Chan and Rodney Randell, over the relevant period of time. They have given no explanation, reasonable or otherwise, for that failure, which means that the court cannot have confidence in the factual record before it.
34. Further, central to NBC's allegations is the credibility of Sunterra witnesses, and allegations of fraudulent actions, omissions and intent on the part of Individual Respondents and the Canadian Hog Farm Entities.²³ This makes the failure of NBC to adequately identify their cause of action and the elements thereof on the evidence, on a summary application for fraud, even more glaring. On well established principles of fairness in summary disposition applications and the right of the defendant *not* to have a trial on an unmeritorious claim,²⁴ together with principles requiring that the judge to be truly confident in the result based on only documentary evidence in front of him, in particular for controversial findings such as wilful blindness and/or reckless intent²⁵ where credibility of their witnesses is at issue, and for the purpose of allegations of fraud, it is the respondents' position that the NBC claim ought to be dismissed.²⁶
35. Further, and fatally, NBC has provided no evidence of suffering any loss or damage. Nor has NBC provided any evidence of an actual indemnity agreement.²⁷ There is not even any evidence of any claim being advanced by Compeer as against NBC. Compeer has not even threatened, let alone committed to, any such claim as against NBC. Accordingly, not only is there no loss, but there lacks any evidence of a claim or even evidence of a potential claim that could even hypothetically give rise to an action for contribution or indemnity.
36. In this context, without limitation, no civil fraud was committed.
37. As will be seen, all other claims and actions by NBC against the respondents in this proceeding fall away and are defeated in light of the above.
38. Further, NBC has by its conduct, breached its common law duty of good faith to perform its contractual obligations "...to act honestly and reasonably and not capriciously or arbitrarily",²⁸ in particular by failing "...to give reasonable notice of a change to the prevailing course of lending conduct between the parties".²⁹

²² *Bruno Appliance and Furniture, Inc. v. Hryniak*, [2014] 1 SCR 126 [*Bruno Appliance*]... at para. 19 [BOA TAB 1], citing *Parna v. G. & S. Properties Ltd.*, [1971] S.C.R. 306 [*Parna*] at 316, quoting *Anson on Contract* [BOA TAB 2]

²³ *Pollock v. Tonca*, 2021 BCSC 1446) at para [1], [BOA TAB 3]

²⁴ *Weir-Jones Technical Services Incorporated v. Purolator Courier Ltd.*, 2019 ABCA 49, [2019] [*Weir-Jones*] [BOA TAB 4], at para. 42 and 43, citing *Hryniak v. Mauldin*, 2014 SCC 7 [*Hryniak*] [BOA TAB 5]

²⁵ *Weir-Jones* at ft 163

²⁶ *Weir-Jones* at para. 42 and 43, Alberta Court Rules Alta Reg 124/2010, R. 3.68, R. 7.3

²⁷ *Pai Cross*, *supra* note 2 page 50 lines 19-20

²⁸ *Bhasin v. Hrynew*, 2014 SCC 71 [*Bhasin*], at para. 33 and 63 [BOA TAB 6]

²⁹ *Thermo King Corp. v. Provincial Bank of Canada* (1981), 34 O.R. (2d) 369 (C.A.) [*Thermo,King*] [BOA TAB 7] and *Murano v. Bank of Montreal* [1995] O.J. No. 883, at para 71 – 87 [BOA TAB 8] [*Murano*]

39. In respect of the claims by NBC against the individual respondents, in particular, NBC say that they are not seeking to establish that the corporate veil was breached, but rather that the individual respondents are liable directly to NBC for tortious activities and are thereby jointly and separately liable to NBC with the Corporate Respondents for NBC's claimed damages.
40. It is the position of the individual respondents that they committed no such torts as alleged against NBC and therefore have no such liability.
41. In addition, some of the causes of action alleged as against the respondents in the NBC written argument were not pleaded in their Claim and therefore cannot now be pursued before the Court. These will be identified.
42. Finally, these submissions identify and corrects misrepresentations in the NBC written argument, in respect of written and oral testimony given by the Sunterra witnesses.

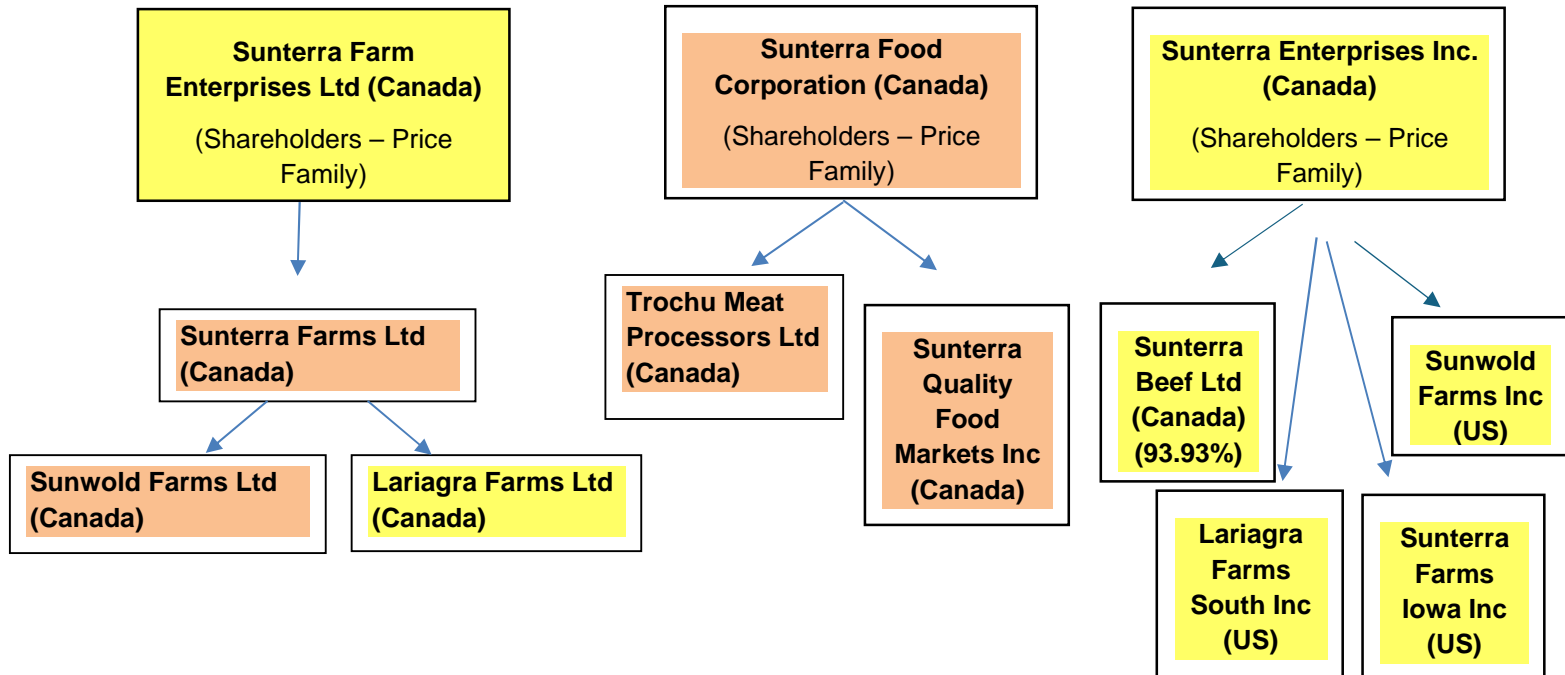
II. FACTS

43. The facts on which this submission and the defence is based are more fully set out in the affidavits filed by and on behalf of the Respondents for the purposes of the NBC claim.

A. Sunterra Group and the Respondents

44. The Corporate Respondents are members of a larger diversified group of affiliated companies carrying on separate businesses, which are ultimately owned and operated by various members of the Price family, with a long and respected history in Canada ("**Sunterra Group**", "**Group**" and /or "**Sunterra**"). The Group operates a fully multifaceted farm to market enterprise encompassing a wide range of operations, assets and intercompany arrangements. Its operations extend across multiple sectors of the agricultural and food distribution industries, and its businesses benefit from longstanding relationships with third-party vendors, service providers, and a dedicated workforce.
45. The Group's business model allows production and processing operations to provide specialty meat and produce to international markets and also directly to its retail outlets. Such integration requires stringent quality control, enhanced operational efficiencies, and the consistent maintenance of premium product standards. In addition, Sunterra Markets benefits from its longstanding relationships with a network of third-party vendors who supply supplementary food products, beverages, and ancillary services, and the farming businesses benefit from long term supplier relationships such as for livestock feed. This strategic integration together with valuable supplier relationships, reinforces the Group's prominent market position within the high-end retail food sector and hog production businesses.
46. The Group's sustained operations for over 50 years exemplifies its resilience and robust market presence. Over time, the Price family has built and maintained significant goodwill with suppliers, employees, and customers alike, cultivating a brand that is synonymous with high quality and reliability. This reputable standing has enabled the Group to negotiate favourable credit terms and secure significant equity across its operations, contributing to its ability to weather challenging economic periods
47. The following diagrams show the corporate structure in which the Corporate Respondents sit, along with the other members of the Sunterra Group which are currently subject to protection

under the CCAA, plus the three US Hog Farm Entities which are subject to receivership proceedings in the US.



48. Contrary to paragraphs 11 and 12 of the NBC submissions, Sunterra Beef Ltd. Is a subsidiary of Sunterra Enterprises Inc. as to 93.93%, not Sunterra Farm Enterprises Ltd.
49. The Canadian Hog Farm Entities run pig farming businesses in Alberta. Sunwold own sows that give birth to piglets in Canada, which are then sold as piglets to the US Hog Farm Entities. The piglets are produced to NAE standards, which stands for “no antibiotics ever” such that they have special health status for the purpose of sale at a premium price, primarily to the US Hog Farm Entities and ultimately by US Hog Farm Entities to market, also at a premium price. Sunterra Canada manages its own business and provides pig management services to Sunwold Canada.
50. An important part of the financial position of the Sunterra Group since mid-2024, is the property owned by Trochu Meat in Trochu, Alberta. The plant and equipment on that property was subject to a fire incident on June 17, 2024. It previously carried on a meat processing business but has not done so since the fire incident. The liability of the insurer of the Property was engaged and was not disputed. The insurance proceeds were determined to be approximately \$16,000,000 for the building plus approximately \$300,000 with respect to inventory. NBC was aware of both the Trochu plant and the fire. In an email exchange from Veronica Casavant at NBC to Dean Chan

on June 27, 2024³⁰, with the subject line “CBC News : Trochu, Alta., loses more than 140 jobs in a community of only 1,100 after plant fire”, Veronica wrote:

Good Morning...

*Sunterra's meat processing plant in Trochu went up in flames, this is Bank security.
Not sure if we were advised.*

51. Dean Chan replied to this email on the same day:

Yes we are aware and are following with client for insurance

B. Loan Agreement with National Bank of Canada

52. Sunterra Food Corporation, Sunterra Farms, Sunwold Farms, Trochu and Sunterra Markets, are parties to a loan agreement as borrowers (“**Borrowers**”) with the National Bank of Canada as lender (“**NBC**” or “**Bank**”), which is secured, *inter alia*, under various security agreements which provide that the respective Borrowers each grant, assign, convey, mortgage, pledge and charge all of their present and after acquired property (“**All PAAP**”), including real property, to and in favor of the Bank, and a mortgage for land owned by Trochu in the principal amount at \$13,000,000 (“**Trochu Mortgage**”) (“**Loan Agreement**”).³¹
53. The Loan Agreement, granted in the name of Canadian Western Bank (“**CWB**”) as lender³², provides for the following loans to the Borrowers:
- (a) an operating loan, in the amount of \$12,000,000 (“**Loan Segment (1)**”);
 - (b) a non-revolving loan, in the amount of \$982,272 (“**Loan Segment (2)**”); and
 - (c) a collateral mortgage, in the amount of \$7,000,000 (“**Loan Segment (3)**”),
- (collectively, the “**Loan**”).*
54. NBC has alleged that each of the Borrowers have cross-guaranteed the liabilities of the other Borrowers under the Loan Agreement (“**Alleged Cross-Guarantees**”).³³
55. NBC has claimed that the indebtedness of the Borrowers to the Bank is guaranteed by Sunterra Beef Inc (a subsidiary of Sunterra Enterprises Inc, not Sunterra Farm Enterprises³⁴), Lariagra Farms, Sunterra Farm Enterprises, Sunterra Enterprises Inc, Sunwold Farms US and Sunterra Farms Iowa (together, the “**Alleged Guarantors**”), and that those Alleged Guarantors have provided security for the indebtedness of the Borrowers including, *inter alia*, under a general

³⁰ Undertaking responses of Dean Chan at NBC (Chan) UT-03 [Bates No. NBC (Chan) UT 2-02.0001] [Chan Undertakings]

³¹ Affidavit of Ray Price, sworn September 22, 2025 [Price Affidavit] at para. 20-27 (Bates No. RP0006-0007) and Exhibits D, 2022 Commitment Letter Bates No. RP0084-0092, Exhibit E [Bates No. RP0084-0092], Certificate of Title Trochu Property, Exhibit F PPSR searches [Bates No. RP0093-94] [Joint Book of Evidence at TAB 45]

³² *Ibid*

³³ Ray Price Affidavit, *supra* note 27 at para. 24(e), and First NBC Application (see paragraph 24 hereof), at para 15

³⁴ NBC submissions, *supra* note 10 at paras 11-12

security agreements for All PAAP granted by Sunterra Beef and a \$2,000,000 promissory note granted by Sunterra Food Corporation.³⁵

56. Security registered under the *Personal Property and Securities Act*, R.S.O. 1990, c. P. 10, as amended (“**PPSA**”) (the PPSA register, “**PPSR**”) and a mortgage registered by NBC against the Trochu Property, are as set out in paragraph 27 of the Price Affidavit, and in Exhibit F.
57. NBC claims first priority as security-holder over real property owned by Trochu, plus inventory, receivables and accounts (as defined in the Loan Agreement and priority agreements) belonging to the Borrowers, and claims security over certain property belonging to the Alleged Guarantors.³⁶

C. USD accounts and Business Account Agreements alleged by NBC

58. It is acknowledged by Ray Price that USD accounts were set up for Sunterra Canada and Sunwold Canada in or around August 2010 and May 2020 respectively, however he does not recall whether he was presented with of the Business Account Agreement from NBC in respect of those accounts.³⁷ NBC’s evidence is simply to provide a conclusion rather than evidence to the effect that those accounts were governed by “...the Account Application Agreements together with a standard form Business Account Agreement that was then in force and was updated from time to time.” Pai exhibits copies of the terms of the Business Account Agreement that appear to be dated around the time that the accounts were opened, but does not assert nor provide any documentary evidence to prove that the Business Account Agreement terms were ever actually provided to Sunterra.³⁸
59. Contrary to the NBC submissions, therefore, there is no evidence that the Business Account Agreement terms were ever provided to any of the respondents or their representatives, and further no evidence that any of the respondents had knowledge of the terms of the Business Account Agreements, and in particular any of the Individual Respondents.³⁹ These questions were not put to the individual Respondents on cross-examination.

D. Loan Agreement with Farm Credit Canada

60. Farm Credit Canada (“**FCC**”) is a lender to Sunwold Farms and Sunterra Farms as borrowers (“**FCC Borrowers**” and “**Canadian Hog Farms**”), pursuant to an amended and restated loan agreement dated June 14, 2024. Sunterra Beef, Sunterra Farm Enterprises, Sunterra Food Corporation, Sunterra Markets, Sunterra Enterprises, Trochu, Sunterra Farms Iowa, Sunwold Farms US and Lariagra Farms are recorded as guarantors in respect of the loan (“**FCC Guarantors**”).⁴⁰ On or around December 31, 2024, the balance of the FCC loans were **\$17,830,522**.⁴¹

³⁵ Ray Price Affidavit, *supra* note 27 at para. 11, and First NBC Application.

³⁶ Ray Price Affidavit *Supra* note 27 para. 35-36

³⁷ *Ibid* at para. 36;

³⁸ Affidavit #2 of Raymond Pai, sworn September 21, 2025 [Pai #2], at para. 35 [Joint Book of Evidence at TAB 31]

³⁹ NBC submissions *supra* note 10 at para. 17 and 18

⁴⁰ Ray Price Affidavit, *supra* note 27 at para. 26-36

⁴¹ *Ibid*, at para. 48, Exhibit Q [Bates No. RP 0343-384]

61. FCC has second priority security over the assets secured by NBC as above, first priority security over fittings and other assets not covered by the NBC priority, plus first priority mortgage over certain real property owned by Sunterra Farms, Sunwold Farms and Lariagra Farms (“**FCC Security**”).⁴²

E. Other Secured Creditors

62. The Applicants have other secured creditors as identified in the PPSA registers for each of them.⁴³

F. Trade Creditors

63. As around the dated of the Initial Order, the Borrowers has approximately 280 trade creditors that were largely paid in the ordinary course until the occurrence of recent events. As of the date the BIA Applicants filed for protection under the BIA, unpaid trade creditors stood at approximately \$3.2 million.⁴⁴

G. Secured Assets

64. The assets of the Borrowers subject to the first priority security claimed by NBC were as follows:

- (a) \$79,172,808 in personal and real property, excluding cash, as at 31 December 2024; plus
- (b) cash held in the accounts of the Borrowers as at March 11, 2025, of \$4,348,447.03;⁴⁵

65. The total value of the assets of the Borrowers over which NBC had security (including in second priority to FCC) as at December 31, 2024, was \$137,995,796.⁴⁶

H. NBC Knowledge of Sunterra Group Business and Financial Information

66. NBC had comprehensive and detailed knowledge and understanding of the business of the Borrowers and the Sunterra Group as a whole over the long period of its banking relationship with Sunterra, commencing in at least 2010.⁴⁷ In particular, it had a thorough understanding of the interrelationship of the Canadian and US hog farming businesses, including:
- (a) that the Canadian Hog Farm Entities were the sole supplier of piglets to the US Hog Farm Entities, and that the US Hog Farm Entities purchased the vast majority of the pigs from the Canadian Hog Farm Entities;
 - (b) that Sunterra Canada shared its expertise and other operational requirements with Sunterra US for the pig farm management businesses; and

⁴² *supra* note 10

⁴³ Ray Price Affidavit, *supra* note 27 para. 37 - 43

⁴⁴ Price Affidavit, *supra* note 27, para. 30

⁴⁵ Price Affidavit *supra* note at 27 , Exhibit A – “Demand and Notice” at pg 3-4 (excluding cash of any Alleged Guarantors) [Bates No. RP 0023-40],

⁴⁶ Ray Price Affidavit, *supra* note 27 at para 47, exhibit N, page 5– “Sunterra Group’s Monthly Financial Statements”

⁴⁷ Ray Price Affidavit , *supra* note 27 at para. 35 and 36, and Pai #2, *supra* note at Exhibit “R” [Bates no. . 2008

- (c) the nature of the hog farms in the US and Canada as going concern and specialised businesses in the NAE market and the significant going concern value of them.⁴⁸
67. NBC also understood the nature and substantial value of Sunterra Markets going concern business.⁴⁹
68. NBC further knew that the Sunterra entities held USD bank accounts for the US Sunterra entities at Compeer, and have been aware of such information since at least 2023. In an email from Erin Depoe to Ray Price on July 24, 2023, Erin Depoe wrote the following:
- Also, we had an inquiry come across which I reached out to Debbie on this morning. I see she's on (well deserved) holiday, perhaps you can assist, or would Craig be the better resource? CWB's US clearing bank have noticed that Sunterra Farms has been depositing sequential large value USD cheques drawn from Sunterra Farms **Iowa which are immediately being used towards outgoing USD cheques to Compeer in sequential large value cheques.** Could you help me understand why separate cheques are issued simultaneously to/from the same entities, what dictates the amount of each cheque and the purpose, please? [emphasis added]*⁵⁰
69. Sunterra also provided monthly financial reporting to NBC in the form requested by NBC under both the 2022 Loan Agreement and the 2020 Loan Agreement in respect of the NBC Borrowers, including the Canadian Hog Farms ("**Monthly Reporting**"). That Monthly Reporting disclosed important financial information about the NBC Borrowers, including the following:
- (a) total revenue
 - (b) total expenses
 - (c) current assets
 - (d) livestock inventory
 - (e) commodity crops inventory
 - (f) Sunterra Markets inventory (largely perishable goods) payables and receivables
 - (g) Trochu inventory, payables and receivables.⁵¹
70. Depoe's bald statements in her affidavit that the reporting was often late or inadequate ought not be accepted in the absence of documentary evidence, particularly given the considerable doubt regarding the credibility of her evidence, as addressed further below. In fact, upon cross examination, Ms. Depoe admitted that "required information was provided" by Sunterra, and Sunterra provided NBC with "satisfactory information" concerning "financial performance, the

⁴⁸ Ray Price Affidavit, *supra* note 27 at para.44

⁴⁹ *Ibid* at para. 44

⁵⁰ Ray Price Affidavit, *supra* note 27 at Exhibit "U", Bates no. RP0471

⁵¹ Ray Price Affidavit, *supra* note 27 at para. 49

need to use funds, and near term outlook” that was sufficiently fulsome to allow NBC to conduct due diligence on the Sunterra entities as of at least 2022.⁵²

71. NBC was also provided with financial statements requested pursuant to the NBC Loan Agreements, including for the 2022 and 2023 financial years. While statements for Sunterra Enterprises, holding company for the US Sunterra entities, and for the Sunterra Group as a whole, inadvertently⁵³ were not provided among the financial statements for 2023 as sent to Rodney Randall, [NBC customer contact point] NBC never followed up or disputed the sufficiency of the financial statements we provided and proceeded with their annual review of the Sunterra entities, business and financials without requiring further information, including those statements from Sunterra.⁵⁴ The 2023 financial statements that they had received included all of the Borrowers as well as a consolidated report for those Borrowers and their holding companies.⁵⁵
72. NBC’s Special Asset Management Unit (“**SAMU**”), which on NBC’s evidence is “...*the division within NBC that is responsible for managing borrowers who have breached covenants in their lending and other agreements with NBC*”, took over the management of the Sunterra customers in September 2023.⁵⁶ Upon receiving the 2023 financial statements that were provided, SAMU examined and considered the same for their annual review, and made certain inquiries with Sunterra regarding the records following receipt, including for the purpose of their annual review.⁵⁷ No evidence has been put forward that the missing financial statements would not have been provided by Sunterra if they had been requested, and it is disingenuous in the context to imply otherwise. Per an email from Rod Randall to Ray Price of November 28, 2024:

Good Day Ray,

(...)

We are finishing up your annual review and have some questions that we need clarity on.

*1. Based on combined financials, total sales decreased by approx. \$10 Million from F22. Please provide commentary on the reasons for this?*⁵⁸

73. When questioned on cross-examination, Ray Price stated the following on this exchange:

Q [Mr. Smyth] Could you turn to Exhibit X, please. Is that the email that you're referencing at the bottom from 6 Mr. Randall, November 28?

⁵² Cross-examination of Erin Depoe on October 21, 2025, pages 16-7 [Depoe Cross] [Joint Book of Evidence at TAB 60]

⁵³ *Ibid*, Cross-examination of Dean Chan on October 17, 2025 [Chan Cross] [Joint Book of Evidence TAB 59]

⁵⁴ Ray Price Affidavit, *supra* note 27 at para 50, Exhibit “X” [Bates NO. RP0467-468]

⁵⁵ See Pai Affidavit #2, *supra* note 34 paragraphs 107-109;

⁵⁶ Affidavit Richard Dean Chan #1 sworn September 21, 2025, at para 1 and 2 [Chan Affidavit #1] [Joint Book of Evidence at TAB 30], Chan Cross, *supra* note 52 at paras 1-2,

⁵⁷ Ray price Affidavit, *supra* note 27 paragraph 51; Dean Chan Undertaking Responses at Bates No NBC (Chan) UT2 2-04.0001

⁵⁸ Ray Price Affidavit, *supra* note 27 at Exhibit “N” [Bates No. 0467]

A[Ray Price]. Yes.

Q. Are you suggesting that that's not a follow-up to what you provided to him?

A. What I read here is based on the combined financials. Sales decreased, so obviously he had the financial statements.

(...)

Q. NBC certainly followed up, including by Exhibit X to your own affidavit. Don't you agree?

A. Never followed up or disputed the sufficiency of the financial statements provided. So I think if you reread the sentence, then I would believe that they never followed up on whether the financial statements were provided or not. In fact, they did not. They followed up on the question of the financial statements, they followed up on other information around the financial statements, but they didn't follow up on whether the sufficiency of the financial statements were provided or not.⁵⁹

74. In written argument, counsel for NBC say that “NBC had assumed that KPMG had been instructed not to prepare the missing financial statements, particularly in light of the events that transpired a few months later in February 2025”⁶⁰, however NBC gave no evidence to this effect, and the submission should be disregarded accordingly. Further this assertion was not supported in the cross examination of KPMG by NBC.
75. The written arguments for NBC say that the 2023 financial statements which were provided to NBC for its annual review in October 2024, identified the following:
- (a) Sunterra Farm Enterprises Ltd., KPMG drew attention to the fact that it had “generated a net loss of \$13.8 million during the year” and “had a working capital deficiency before callable debt of \$13.7 million”;
 - (b) Sunterra Food Corporation, KPMG drew attention to the fact that it had “generated a net loss of \$9.8 million during the year”, “had a working capital deficiency of \$83.5 million and negative equity of \$40.9 million”; and
 - (c) that, in respect of both entities, there was “material uncertainty that may cast significant doubt about the Entity’s ability to continue as a going concern”.
76. As also identified in the written argument for NBC, the two missing financial statements for 2023, for Sunterra Enterprises (holding company of the US Hog Farm Entities, not the Canadian ones) and the Sunterra Group as a whole, identified consistent but smaller figures of loss for Sunterra Enterprises than for Sunterra Farm Enterprises and Sunterra Food Corporation as referred to above, and overall a smaller loss for the Sunterra Group and negative equity figure, than would

⁵⁹ Cross examination of Ray Price by NBC on October 7, 2025 [Ray Price Cross] at page 49 [Joint Book of Evidence at TAB 55], line 8-19

⁶⁰ NBC Submissions, *supra* note 10 at para 110

be expected from looking at Sunterra Farm Enterprises and Sunterra Food Corporation alone, as follows⁶¹:

- (a) concerning Sunterra Enterprises, KPMG drew attention to the fact that it had “generated a net loss of \$3.6 million during the year”, “had a working capital deficiency of \$13.4 million and negative equity of \$11.4 million”;
- (b) concerning the Sunterra Group of Companies as a whole, KPMG drew attention to the fact that it had “generated a net loss of \$27.2 million during the year”, “had negative equity of \$20.2 million and a working capital deficiency of \$103.3 million”; and
- (c) stated that, in respect of both entities, there was “material uncertainty that may cast significant doubt about the Entity’s ability to continue as a going concern”.

77. The above were further confirmed upon the cross-examination of KPMG, who confirmed that such facts were known, were included within the financial statements provided to NBC, and were not considered as serious concerns to KPMG.

78. This is further demonstrated by an email exchange between Rod Randall and Dean Chan from November 18, 2024. On November 17, 2024, Chan writes the following email to Randall with the subject line “Sunterra”⁶²:

I just looked at their accounts and they have huge deposits with us.

Can this be sent back to the banking centre?

79. Rod Randall replied to this email on November 18, 2024:

*We are just doing the AR and that is my hope ... should have it done by end of month*⁶³

80. There is therefore no evidence of any reasons for Sunterra to have withheld the missing financial statements, as suggested in NBC’s written argument,⁶⁴ nor any basis nor evidence for concluding that NBC would have acted differently if they had been provided.

81. Counsel for NBC also state that the missing financial statements also disclosed that:

- (a) as detailed in the 2023 audited financial statements for the Sunterra Group, there was a liability included on the balance sheet item for “Accounts payable and accrued liabilities” of \$51,679,000 for “Cheques issued in excess of funds on deposit”; and
- (b) as detailed in the review engagement statements for Sunterra Enterprises for 2023, 207 there was a liability included on the balance sheet item for “Accounts payable and accrued liabilities” of \$20,486,000, for “Cheques issued in excess of funds on deposit”. This information is described in note 4 to the review engagement statements for Sunterra

⁶¹ NBC Submissions, *supra* note 10 at para 108

⁶² Chan Undertakings, *supra* note 26 at NBC(Chan) UT 2-04

⁶⁴ NBC submissions, *supra* note 10 para. 107 - 112

Enterprises for 2023, and, as set out in note 15, represents a year-over-year change of \$22,430,000.

82. However, the NBC written submissions fail to inform the Court that the consolidated 2023 Financial Statement for Sunterra Farm Enterprises, being the holding company for the Canadian Hog Farm Entities, also disclosed liability included on the balance sheet item for “*Accounts payable and accrued liabilities*” of \$29,866,000 for “*Cheques issued in excess of funds on deposit*”, roughly a \$11.5 million increase from the 2022 financial year, and that of Sunterra Food Corporation of \$1,327,000.
83. Contrary to the submissions by NBC, there was no financial information intentionally withheld from NBC, NBC were not mislead as to the financial status of the Canadian Hog Farm Entities or the Group as a whole by the missing statements, NBC had every opportunity to request those missing statements but instead chose to continue providing services to the Sunterra companies after their 2024 Annual Review⁶⁵, including the extension of credit pursuant to the float, on the basis of the information with which they had been provided, which included identification of “*Accounts payable and accrued liabilities*” of \$29,866,000 for “*Cheques issued in excess of funds on deposit*”, roughly a \$11.5 million increase from the 2022 financial year, for the holding company of the Canadian Hog Farm Entities.

I. Account Coverage Practice

84. Sunterra accounts at NBC for the most part have not and do not operate in a way that provides for the automatic transfer of funds between accounts to allow for positive balances and/or credit available in some accounts to cover shortfalls and avoid overdrafts in other accounts. This is despite the fact that there have generally been account netting agreements or terms in place for the managements of some of the Sunterra Group accounts. Ray Price’s evidence is Sunterra have therefore always had a practice in place internally of moving funds between accounts within the relevant entities in the Group to cover shortfalls and avoid overdrafts arising (“**Account Coverage Practice**”).⁶⁶

85.

Q [Mr. Smyth]. And that's your definition of what we've been calling "account coverage practice" throughout these questions; am I correct?

A [Ray Price]. Yes.

Q. It's the practice of covering overdrafts to avoid shortfalls and avoid overdrafts. That's what the account coverage practice is?

A. It's moving funds between the accounts where necessary to avoid having overdraft.

Q. What do you mean by "always" in that sentence?

⁶⁵ Ray Price Affidavit, *supra* note 27 at 51; Ray Price Affidavit at Exhibit “X” [Bates No, RP0467-8] *supra* note 58

⁶⁶ Ray Price Affidavit, *supra* note 27 at para. 52, Ray Price NBC Cross, *supra* note 58 at page 10, line 14

A. So as an example would be if we have a deposit in Sunterra markets and we have cheques going out of Trochu Meat Processors, and we know that the TrochuMeat Processors needs money, then we would move it from¹ Sunterra markets to Trochu or we would move it from Sunterra markets to Sunterra Food Corporation, where the line of credit was held by CWB. And then we would assume that it would actually move out automatically from Sunterra Food Corporation to the company that needs it. So that's the process that we've used since we started, where money would flow to wherever company needed it, either automatically or by manual transfer.

86. Additionally, the Account Coverage Practice was used not only for the coverage of accounts between CWB and Compeer, but also between the accounts of the individual Sunterra entities:

Q[Mr. Smyth]here's an element of the account coverage practice, as we've talked about now for the last day and a half, that involves the Compeer bank accounts and transferring money back and forth to those accounts. Isn't that when the account coverage practice started?

A {Ray Price}. No.

(...)

: We had -- we balanced the Canadian ones on their own, and then we worked with the account coverage practice when we had the US entities established as well.

(...)

My thought at the time and now is that we used the account coverage practice for the Canadian accounts because we had to manually move money between the Canadian accounts to make sure they weren't overdrawn.⁶⁷

87. Per admissions in the cross-examination of Erin Depoe, NBC was aware of this practice of moving funds between the entities in order to cover shortfall was know to NBC as early as 2020.⁶⁸

Q; [Mr. Chimuk]Specifically page 4, it reads: (as read) They've noticed that Sunterra Farms has been depositing sequential large-value USD cheques drawn from Sunterra Farms Iowa. Do you see that?

A [Erin Depoe]. Yes.

¹ Q. So you agree with me that you were made aware of that fact at that time, correct?

A. Yes.

Q. Then it goes on: (as read) Upon review, it looks like the funds are immediately being used towards outgoing USD cheques to Compeer in the same pattern, sequential large-value cheques. You also agree that you were made aware of that fact at that time, correct?

⁶⁷ Ray Price Cross, *supra* note 58 at pages 13-14, lines 2-8, 4-13

⁶⁸ Depoe Cross, *supra* note 51 page 18, lines 3-15

A: Yes

88. The Account Coverage Practice was also used for operational purposes. There has always been a substantial amount of activity across the border between the Canadian companies and the US companies, such as, for example, isoweans and feeder hogs management support and swine expertise from Canada to the US, as well as the purchase and sale of the isowean and feeder pigs, between the companies in the Sunterra Group.⁶⁹
89. The Sunterra Group involves a complex array of commercial arrangements and transactions between the related companies in the Group. These arrangements give rise to the constant flow of revenue between entities. From a bird's eye view, these would include:
- (a) the flow of funds in payment for the flow of piglets between the two breeding entities in Canada, Sunwold Canada and Sunterra Canada, and the two "wean to finish" entities in the US, Sunwold US and Lariagra US;
 - (b) the flow of funds between those entities and the two pig management entities, Sunterra Canada and Sunterra US for all aspect of pig management, including for example, rent, feed, medications, plant and equipment, employees, third party suppliers of goods and services of various kinds, and between the pig management entities themselves; and
 - (c) accounting, insurance and other business requirements have often been managed across and between Group members, also requiring the flow of funds between them.⁷⁰
90. In addition, as a part of the Account Coverage Practice, Sunterra have managed the cash flow needs between the Canadian Hog Farm Entities and the US Hog Farms Entities, arising from the difference between cash accounting used in respect of taxation of the Canadian Hog Farm Entities, and accrual accounting which is required to be used in the US for the US Hog Farm Entities.⁷¹ Sunterra did this by deferring the payment for piglets and other expenses supplied by the Sunwold Canada and Sunterra Canada to Sunwold US, Sunterra US and Lariagra US for up to two years. This in turn necessitated a flow of funds between the companies in the US and Canada to help ensure adequate cash flow for the Canadian Hog Farm Entities.⁷²
91. Ray Price instructed Uffelman to manage the Account Coverage Practice on a daily basis to ensure that none of the Sunterra accounts were overdrawn⁷³:

Q [Mr. Smyth] What you've told me is that you operated on

4 instructions from Mr. Price. That is Ray Price; right?

⁶⁹ *Ibid*, at para 53,

⁷⁰ *Ibid* at para. 54

⁷¹ Ray Price Cross, *supra* note 58 at pages 13-14, lines 2-8, 4-13

⁷² *Ibid* at para. 55

⁷³ *Ibid*, at para. 52, Cross-examination of Debbie Uffelman by NBC [Uffelman Cross] [Joint Book of Evidence at TAB 53] at page 31, line 1-3

5 A.[Ms. Uffelman] Correct.

Q. So what I'm asking you is: Was the genesis or origin of the account coverage practice the instructions you received from Mr. Ray Price on whatever occasion or date those instructions may have been given to you?

A. Again, I don't recall the exact conversation, but I do take my instructions from Ray Price.

Q. Regardless of when the date or the particular conversation is that you're now referencing, is it your evidence that the account coverage practice arose from instructions from Mr. Ray Price?

A. Yes.

Q. Thank you. In fact, Ms. Uffelman, you were specifically instructed to manage Sunterra's account coverage practice on a daily basis. Is that not so?

A. We were instructed to ensure that the various accounts were not overdrawn.⁷⁴

92. Uffelman worked together with Thompson, to carry out this practice, as set out in their respective affidavit evidence as well as their respective cross-examinations.⁷⁵:

Q. [Mr. Smyth] Having been specifically instructed by Ray Price to manage Sunterra's account coverage practice on a daily basis, did you give Mr. Thompson instructions that each amount that was to be transferred under his direction and with your approval were to be for less than \$1 million?

A.[Ms. Uffelman] Again, the process had been going on a long time. That's how we had been doing it for a very long time. So I do not recall giving him any specific instructions like that.

93. This work was collaborative and not, as NBC suggests, of a nature whereby Uffelman controlled Thompson in carrying out the practice. The instructions provided by Mr. Price did not contain specific instructions regarding the mechanics by which either Thompson or Uffelman were to ensure that the accounts were not overdrawn.
94. Ms. Uffelman and Mr. Thompson were only instructed, as a part of their day-to-day activities to ensure the accounts were not overdrawn.⁷⁶: Per Ray Price's cross-examination:

Q [Mr. Smyth] Would you agree with me that Uffelman also had day-to-day responsibilities for the management of the US Sunterra company accounts with Compeer?

⁷⁴ Uffelman Cross, *supra* note 73 at page 25, lines 3-23

⁷⁵ Uffelman Cross, *supra* note 73, Cross-Examination of Craig Thompson by NBC on October 6, 2025 [Thomson Cross] [Joint Book of Evidence at TAB 51] at page 40, line 22

⁷⁶ Uffelman Cross, *supra* note 73 at para 31

A.[Ray Price] I would define the day-to-day responsibilities is she would make sure that the Canadian entity accounts had the money movement between and through the letter of credit -- or the line of credit, sorry, that we had available to us from NBC. And so that would be what her -- what her job would be. And then in the US one, with Compeer accounts would have been -- she would have been looking at what was needed to happen, and Craig would have been the one to do the calculations.

Q. You agree with me, do you, that Ms. Uffelman had responsibility day-to-day for the management of the US Sunterra entities, their bank accounts with Compeer?

A. The day-to-day bank accounts where the US entities would have been managed in terms of cash movement by Craig doing the calculation and Debbie affirming.⁷⁷

95. Neither Thompson nor Uffelman have qualifications or training in accounting or corporate finance.⁷⁸
96. Uffelman started working for the Sunterra group over 45 years ago as a young accounts clerk.⁷⁹ She has held numerous and varied positions with the Sunterra Group over the years.⁸⁰ Her formal title for the last few years has been "Vice President, Corporate Finance", however the extent of her understanding and role in the Group is defined not by that title, *per se*, but by her experience and responsibilities, and is limited by her lack of education and training (as referred to above). Contrary to the assertions of NBC, she did not hold the position of Chief Financial Officer.⁸¹ Uffelman's current job responsibilities are divided into three parts:
- (a) management and oversight of teams in the Accounting Departments, Payroll Department as well as some IT and HR supervision;
 - (b) aiding in various operational management, most often where accounting and production overlap;
 - (c) providing financial reports to management and owners, oversight of the NBC bank account balances, and generation of some borrowing base information for the lenders to various entities in the Group, including monthly borrowing base calculations for Sunwold US, which is reviewed and signed off on by Ray Price.⁸²
97. Uffelman has and had day to day responsibilities for the management of the Canadian Sunterra companies accounts with NBC and reported to Ray Price. She did not have responsibility for the management of finances, nor for the accounts and credit facilities, as a whole other than under direction from Ray Price.⁸³ Uffelman was not and is not involved in any strategic decision making

⁷⁷ Ray Price Cross, *supra* note, *supra* note at page 16, lines 7-22

⁷⁸ Uffelman Cross at page 7, line 10

⁷⁹ Affidavit of Debbie Uffelman, sworn September 19 2025 [Uffelman Affidavit] [Joint Book of Evidence at TAB 43] at para. 3

⁸⁰ *Ibid* at para. 4

⁸¹ Ray Price Affidavit *supra* note 27 at para. 47

⁸² Uffelman Affidavit *supra* note 79 at para. 5

⁸³ Ray Price Affidavit, *supra* note 27 at para. 47, Uffelman Cross, *supra* note 73 at page 7, line 10

of the business and affairs of the companies in the Sunterra Group.⁸⁴ She did not have direct contact with NBC except as to answer the occasional question when Ray Price was not available.

98. The mechanics of what Uffelman did on a day-to-day basis in respect of the Account Coverage Practice, are set out in her affidavit evidence.⁸⁵
99. Thompson's education and qualifications comprise a City & Guilds certificate in swine management from Bishop Burton College, Bishop Burton, Beverley, East Yorkshire, UK, obtained in 1988.⁸⁶ He has been employed by Sunterra for 27 years. Thompson was initially hired as Breeding/Gestation Sow Department Head in their swine operations. Over the years, he has held numerous roles within Sunterra Farms Canada and is currently working within the day-to-day accounting team for the farming companies, in respect of which he reports to Uffelman.⁸⁷
100. Thompson's formal job title is "Accounting" and/or "Controller" of Sunterra Canada, Sunwold Canada and Lariagra Canada.⁸⁸ The title of "Controller" was given to him when it was decided that Thompson be a signatory for the Canadian and US farming entities and NBC required that he have that title for that purpose.⁸⁹ Like Uffelman, the extent of Thompson's understanding and role in the Group is defined not by his formal titles,⁹⁰ but by his experience and responsibilities, and is limited by his lack of education and training in either accounting or corporate finance (as referred to above). Thompson reports to Uffelman⁹¹ and his recent job responsibilities included:
- (a) approving invoices for payment;
 - (b) reviewing the farms' monthly income statements against budget;
 - (c) reviewing daily cash requirements; and
 - (d) renew the insurance policies in all Sunterra Group companies and assist with most company insurance claims.⁹²
101. Other than as authorised cheque signatory for day-to-day transactions, Thompson was not otherwise authorized to carry out any activities on behalf of the companies, nor was he authorized in any other way to bind them.⁹³ Thomson did not deal directly with NBC.
102. It is Thompson's uncontested evidence that he was instructed to take steps to ensure that:
- (a) Sunterra US and Sunwold US Compeer bank accounts remained within their credit line limit daily;

⁸⁴ *Ibid* at para. 5 and 6, 21, 28 to 30 (with exhibits) and 33.

⁸⁵ Uffelman Affidavit *supra* note 79 at para. 8 - 15

⁸⁶ Affidavit of Craig Thompson, sworn September 19, 2025 [Joint Book of Evidence at TAB 44] [at para. 4

⁸⁷ Thompson Affidavit *supra* note 86 at para. 3 and Uffelman Affidavit, *supra* note 79 at para. 7

⁸⁸ Thompson Affidavit *supra* note 86 at para. 5

⁸⁹ Ray Price Affidavit *supra* note 27 at para. 47, Uffelman Cross at page 26, line 3

⁹⁰ *Ibid*

⁹¹ *Ibid*

⁹² Thompson Affidavit, *supra* note 86 at para 6 and 8

⁹³ *Ibid* at para. 7; Ray Price Affidavit *supra* note at para. 47.

- (b) Sunwold Canada and Sunterra Canada USD Canadian Western Bank accounts were not to go overdrawn.⁹⁴
103. The mechanics of what Thompson did on a day-to-day basis in respect if the Account Coverage Practice, are set out in his affidavit evidence.⁹⁵
104. Thompson understood that the need for the Account Coverage Practice arose from the large volume of transactions between the US and Canadian farm entities in relation to their commercial transactions, and also for some taxation purposes, but he had no specific knowledge of how that worked. Further, Thompson understood that this was done with the knowledge and consent of the Banks.⁹⁶
105. Sunterra experienced continuing problems with the NBC systems in relation to the systems' inability to adequately manage account netting and revolving account functions, which contributed to the need for the daily cash management transactions.⁹⁷ As deposed to by Ray Price:
- 37. NBC was required under the 2022 Loan documents to carry out an account netting exercise each day for some of the debit and credit accounts of the Sunterra Group. I was told by NBC that they would pool accounts together so that overdrafts certain accounts would be netted as against deposit or credit available in other accounts at the end of each day.*
- 38. It was also supposed to be the practice of NBC to revolve monies between Sunterra accounts from at least 2020, so that deposit credits would balance off as against borrowing debts to reduce the principal amounts on which interest was payable.*
- 39. NBC system failed to carry out the account netting and revolve entry obligation and therefore Sunterra undertook the task of working out the balances and transferring funds to cover overdrafts as part of the Account Coverage practice carried out each day...*
- 40. This task was made more difficult by NBC's online banking, because we could also never be confident in the actual account balances at the end of each day ("**Account Balancing Issues**").*
106. Uffelman worked with NBC to try and utilise these functions, but repeatedly encountered issues with account netting and revolve entries, lack of clarity, and mis-matches, on what the account balances were at any point in time.⁹⁸ Sunterra also experienced problems with transfer restrictions which prevented Sunterra from covering overdrafts in certain accounts with deposits in other accounts, which was required because of the failure of NBC's systems to adequately

⁹⁴ Thompson Cross, *supra* note 75 at page 15, line 16-20

⁹⁵ Thompson Affidavit *supra* note 86 at para. 12 - 22

⁹⁶ Thompson Affidavit *supra* note 86 at para 10 and 26, Thompson NBC Cross, *supra* note 75 at page 44, lines 3-7

⁹⁷ Uffelman Affidavit *supra* note 79 at para. 23 and 24, and Exhibit "G" [Bates No. DU0036-; see also Exhibit "T" to Ray Price Affidavit, *supra* note [Bates No, RP0456-9]

⁹⁸ *Ibid* and para. 16-18, and 25, with Exhibit "H" [Bates No. DU0044-6]; see also Ray Price Affidavit para. 40 and Uffelman Affidavit, *supra* note 79 at Exhibit "H" [Bates No. DU0037-46]

provide account netting and revolve functionality.⁹⁹ Contrary to NBC's submissions, Uffelman's manual account management was not a deliberate choice by Uffelman, but rather was, per Uffelman's testimony, a functionality that NBC wished to be a function. Uffelman's manual transactions were a result of the fact that Uffelman "gave up" on the account netting arrangement at NBC, as it would never work.¹⁰⁰ :

Q [Mr. Smyth] And Ms. Depoe describes that this cash netting arrangement was terminated at your direction. Is that correct?

A [Ms. Uffelman]. I do not agree with that statement.

Q. Pardon me?

A. I would not agree with that statement, no.

Q. What would you replace that statement with and what would your evidence be on the subject of the termination of the cash netting agreement?

A. Basically I just gave up and started doing the transactions myself. And periodically someone, maybe once a month, would indicate that certain accounts were overdrawn, and then we would go through the whole discussion again of why it wasn't working.

107. In response to these problems, Depoe wrote back to Uffelman and informed her that the problems were arising due to some hold limits and that therefore Depoe had requested an increase to Sunterra's limits and would revert once she heard back.¹⁰¹ Therefore, contrary to the statements by Pai in his affidavit evidence,¹⁰² Uffelman did not request the increase in the holds associated with the Sunterra Entities NBC accounts,¹⁰³ rather, as admitted to by Ms. Depoe on cross-examination, the increase in the hold limits were initiated by NBC in response to the problems that Uffelman reported experiencing in trying transfer funds to manage the account balances.¹⁰⁴ :

Q[Mr. Chimuk'] And I understand that you brought in Jennifer Zazuliak from Cash Management to assist with respect to the request that you received from Ms. Uffelman, correct?

A[Ms. Depoe]. Yes.

Q. And my understanding is that Ms. Zazuliak recommended that the best solution to this problem was to increase Sunterra's hold limits, correct?

A. Yes.

⁹⁹ *Ibid* at para. 25 to 27

¹⁰⁰ Uffelman Cross, *supra* note 73 at page 41, line 12-25

¹⁰¹ Uffelman Affidavit, Exhibit "G", at DU0045; see also Exhibit "T" to Ray Price Affidavit {Bates No, 0456-9}

¹⁰² Pai #2, *supra* note at para. 36

¹⁰³ See also Ray Price Affidavit *supra* note 27 at para. 48 and Exhibit "W"[Bates No. RP 0464-6]

¹⁰⁴ Depoe Cross, *supra* note 51 at page 13, lines 2-18

Q. And my understanding is that that recommendation from Mr. Zazuliak -- Ms. Zazuliak was approved from the manager of the CWB branch at which the Canadian Sunterra entities were held, correct?

A. Yes.

Q. And my understanding is that that resulted in an increase in their hold limit to \$1 million, correct?

A. Yes.

Q. And my understanding is that that was approved, correct?

A. Yes.

Q. And you'd agree with me that the decision to increase the hold limit was a discretionary decision of CWB, correct?

A. Yes.¹⁰⁵

108. Further, per an email exchange between Depoe, Ray Price and Uffelman in July 2023, Ray Price sent the following email to Depoe on June 9, 2020¹⁰⁶:

Hi Erin,

It would be helpful to know more about the revolving situation. It doesn't look like anything is being resolved and

Debbie is not able to do anything with the new account. We have assumed that the new margin amount is in place.

Good afternoon Ray and Debbie,

I apologize as I am having some major IT and connectivity issues this morning.

Correct, the limit has been updated back to \$8MM.

Hi Erin,

I would really like to transfer from the TMP General account yet today. As you see from the first attachment, the balance

is \$74K. However, when I go to the transfer screen shown on attachment 2, the balance is only \$2K.

Hi Erin,

¹⁰⁵ Depoe Cross, *supra* note 51 at page 13, lines 2-18

¹⁰⁶ Uffelman Affidavit, *supra* note 79 at Exhibit "H" [Bates No. DU0037-46]

First thing this morning I was still getting the message "insufficient funds" when I tried to transfer from the new account.

109. Depoe responded on June 16, 2020:

Hi Debbie,

It would appear that the restriction is due to some hold limits. I have requested an increase to your limits from our branch manager and will revert back once I have heard.

Thanks

Erin

110. Uffelman replied again on June 17, 2020

Looks like the revolve entries were not made again this afternoon. Were you able to confirm what time of day they are

going to make the entries going forward? We talked about early afternoon as that was the previous timing but that

doesn't seem to be the case

111. In response to these problems, Depoe wrote back to Uffelman and informed her that the problems were arising due to some hold limits and that therefore Depoe had requested an increase to Sunterra's limits and would revert once she heard back.¹⁰⁷ Therefore, contrary to the statements by Pai in his affidavit evidence,¹⁰⁸ Uffelman did not request the increase in the holds associated with the Sunterra Entities NBC accounts,¹⁰⁹ rather, as admitted to by Ms. Depoe on cross-examination, the increase in the hold limits were initiated by NBC in response to the problems that Uffelman reported experiencing in trying transfer funds to manage the account balances.¹¹⁰

112. It is further noted that the 2020 issues with the account netting and revolve account functions at NBC, as per Ray Price and Uffelman's evidence, arose in June 2020. NBC analysis of what they say were the alleged "cheque kiting" activities only go back to January 1, 2023.¹¹¹

113. Depoe disingenuously purports, in the body of her affidavit, to give evidence to the effect that Uffelman quickly and without cause terminated new account netting arrangements pursuant to the 2022 loan agreement as soon as they were put in place. In explaining this, Depoe deposes to

¹⁰⁷ Uffelman Affidavit, *supra* note 79 at Exhibit "G", at DU0045; see also Exhibit "T" to Ray Price Affidavit {Bates No, 0456-9]

¹⁰⁸ Pai #2, *supra* note 34 at para. 36

¹⁰⁹ See also Ray Price Affidavit *supra* note 27 at para. 48 and Exhibit "W" {Bates No. RP 0464-6]

¹¹⁰ Depoe Cross, *supra* note 54 at page 13, lines 2-18

¹¹¹ Pai #2, *supra* note 34 at para. 11.

the effect that previous communications from Price and Uffelman raised the need to move money in a timely manner to cover overdrafts in from credit available in the loan accounts,¹¹² which Depoe says:

“32. ...precipitated discussions with Uffelman and Price commencing around the time of the 2022 loan refinancing about whether CWB could arrange a formal “mirror netting” of the balances in all of the Canadian Sunterra Entities. This would allow for global monitoring of balances without physically merging the Canadian Sunterra Entities' CWB accounts into one and without physically or electronically moving cash from one CWB account to another CWB account.

33. Ultimately, this resulted in approval of a cash netting arrangement in 2022 which was supposed to operate in the fashion described in the previous paragraph. The cash netting arrangement only applied to accounts held at CWB and not any other financial institutions.

34. Almost as soon as the cash netting arrangement was put into place, Uffelman expressed dissatisfaction with the system. Uffelman explained to me that the system was too restrictive as it limited her ability to self-manage the draws on the borrowing base loan. Under Uffelman's direction, the arrangement was terminated. Attached hereto and marked Exhibit 1 is the email exchange between Uffelman and me ending with her request to terminate the arrangement.

35. On the termination of the cash netting arrangement, the Canadian Sunterra Entities reverted to their former process of physically or electronically moving cash from one CWB account to another CWB account to cover shortfalls.”

114. Contrary to these statements made by Depoe in her affidavit evidence, Exhibit 1 to her affidavit clearly disclose that the reason for the reversion to the old manual method of balancing accounts by Sunterra themselves was because of the inability of the NBC systems to enable the account netting with the loan accounts, and that the reversion to the old account set up was at the instigation of NBC¹¹³. Also, contrary to paragraph 35 of Depoe affidavit, the emails exchange does not end with a request from Uffelman to terminate the arrangement. For completeness, the entire email exchange in Exhibit 1 reads as follows:

Depoe to Uffelman, April 2, 2023 at 10:38am:

Hi Debbie,

Thanks for the quick chat this morning. To confirm, the mirror netting arrangement actually is not going to be a fit for Sunterra as you won't have access to pull funds from the LOC. We will therefore be reverting the account types back to how they were previously set up. Our front line has been on the watch for O/D charges as well so we will make sure they're cleaned up.

¹¹² Affidavit of Erin Depoe, affirmed September 29, 2025 [Depoe Affidavit] [Joint Book of Evidence at TAB 34] at para. 31

¹¹³ Uffelman Cross, *supra* note 79 at page 41 lines 5-25

With respect to the EFT timing, typically it has occurred late at night but this past week it occurred in the afternoon - not sure if this is the new normal going forward but we will try to find out for you.

Thanks and kind regards,

Erin

Uffelman to Depoe, April 4, 2023 at 10:42am:

Thanks, Erin!

Debbie

115. However, for the purpose of this evidence she relies upon Exhibit 1 to her affidavit which shows by Depoe's own email to Uffelman that the NBC would be "...*reverting the account types back to how they were previously set up*", because "...*the mirror netting arrangement actually is not going to be a fit for Sunterra as you wont have access to pull funds from the LOC [i.e. the line of credit accounts].*" In other words, Depoe acknowledges in her email to Uffelman on April 4, 2023 that the account netting system provided by NBC will not do what it is supposed to do and that is the reason that it wouldn't work for Sunterra needs.

J. Transparency of the Account Coverage Practice and the knowledge and acquiescence thereof by NBC

116. NBC has always had full visibility of the transactions between the accounts of the US Hog Farm Entities and the Canadian Hog Farm Entities, including the transactions which they now identify as "Cheque Kiting". They have also always had full visibility of the revenue and expenditures of the Borrowers, including the Canadian Hog Farm Entities, from the monthly margin reports, and of the Borrowers from the Financial Statements provided. Per the cross-examination of Dean Chan ¹¹⁴ :

Q [Mr. Chimuk] at all material times, NBC knew that separate checks were being issued simultaneously to and from the same entities at Sunterra, correct?

A [Mr. Chan]. Again, my answer would be the same.

Q. Well, your answer, sir, is that you had the information but that you didn't identify it as an issue, correct?

A. I would say to that the information would have been available, but it was not identified as an issue.

117. Further, per the Cross-examination of Raymond Pai:

Q [Mr. Chimuk] Was that information -- the information that formed the basis of that calculation, was that information available to NBC prior to February 14, 2025?

¹¹⁴ Chan Cross, *supra* note 53 at page 112, lines 2-6

A. That information is the basis of the calculation.

Q. And was that information available to NBC prior to February 14, 2025?

A. The information being the account statements, yes.

Q. The fact that the overwhelming majority of those cheques were in favour of the US impugned entities, was that information available to NBC prior to February 14, 2025?

A. Yes.

(...)

And why was that information not available prior to February 14, 2025? A. It's not readily available. I don't know the reason why.

Q. Well, the fact is, the information was available, sir. You just hadn't bothered to calculate it prior to February 14, 2025, correct?

A. Yes.¹¹⁵

118. It is these two pieces of information alone, that NBC has used to now declare in their affidavit evidence demonstrates clear and unequivocal evidence of “cheque kiting” by the Canadian Hog Farm Entities with the US Hog Farm Entities.
119. Within NBC’s written submissions, NBC identifies three “commonalities indicative of fraud”:
- (a) the vast majority of issued cheques were in an amount ranging from \$800,000 to \$999,000 and all were less than the \$1 million threshold (including after conversion of any USD cheques to CAD), over which threshold such cheques would undergo additional scrutiny by applicable clearing banks and would be subject to a further hold, with respect to transactions taking place in the NBC Accounts;
 - (b) the transactions were all undertaken by way of physical cheques, rather than by EFT or wire transfer, which is far more convenient and common, especially in cross-border related entity transactions;
 - (c) each of the cheques, were deposited individually, as multiple individual deposits, rather than one deposit, at the specific request and direction of the applicable Canadian Sunterra Entity, to circumvent the holds and availability limits.
120. However, in direct contradiction to NBC’s written submissions, when Raymond Pai was asked, on cross-examination, about whether any of the above were unusual business practices, he testified that *none* of the three above so-called “commonalities indicative of fraud” were unusual on face value, and may in fact be expected or even typical, depending upon the banking practices of a particular client:

¹¹⁵ Pai Cross, *supra* note 1 pages 85-86, lines 2-10, 1-8

Q. Is it usual for a vast majority of issued cheques to be in the range of \$800,000 to \$999,000 but being less than a \$1 million threshold?

A. It depends on the context.

Q. How so?

A. Examples would be, Does it align with the business? Does it align with their finances? Does it align with -- those are the only two things I can think of right now.

Q. So your evidence, sir, is that there's nothing inherently unusual about that?

A. Not at face value, sir.

Q. What about transactions that were all undertaken by way of physical cheques? Is there anything unusual about that?

A. If you mean the issuance and depositing of cheques, there is nothing unusual about that.

Q. What about cheques having no "memo" line or reference to any existing invoice or ledger? Isn't that highly unusual?

A. From my experience, businesses, from time to time, would utilize the "memo" line to keep records of the purpose for the cheque that is being issued.

Q. So it would be unusual if that wasn't done?

A. It depends on the practice of the business.

Q. So you're telling me that if it was a practice of a business not to do that, that that wouldn't be unusual?

A. At face value, that would not be unusual.¹¹⁶

121. Further, despite his assertions that NBC should have used wire transfers as opposed to physical cheques, Mr. Chan admitted in his cross examination that he did not even know if wire transfers were possible as between NBC and Compeer.¹¹⁷ Sunterra's evidence is that such transfers were not possible.
122. Further, in July 2023, it appears that the US clearing bank used by CWB for the transactions in question wrote to NBC to ask about the transactions which NBC now says constitute "Cheque Kiting". It is NBC's evidence that the inquiry came through NBC's anti-money laundering ("AML") group regarding a particular series of cheques. Further to that inquiry, Erin Depoe wrote to Debbie Uffelman on July 24, 2023 as follows:

¹¹⁶ Pai Cross, *supra* note 16 at pages 38-39

¹¹⁷ Chan Cross, *supra* note 53 at page 87

Hope you had a great weekend. I am hoping for your assistance with this time sensitive request.

CWB's US clearing bank have noticed that Sunterra Farms has been depositing sequential large value USD cheques drawn from Sunterra Farms Iowa which are immediately being used towards outgoing USD cheques to Compeer in sequential large value cheques. Could you help me understand why separate cheques are issued simultaneously to/from the same entities, what dictates the amount of each cheque and the purpose, please?

I have some samples of deposit/ outgoing cheques which raised the questions if that helps with the context.

Thank you in advance for your help!

123. Uffelman was on leave at the time, and Depoe followed up on the same day with the same inquiry with Ray Price, copied to Al Cavanagh at NBC. Ray Price responded the next day, July 25, 2023, by email with some preliminary information and offered to discuss further when they were planning to meet in any event.¹¹⁸ Specifically, Ray Price responded as follows:

I checked on the cheques. With no U.S. operating line in Canada and no Canadian operating line in the U.S. we are trying to manage both as best we can without doing CDN to USD and USD to CDN dollar exchanges. We can discuss further when we are together if that works?¹¹⁹

124. The chain of emails also included discussions regarding the financial performance of the Sunterra entities and the provisions of financial statements as required by NBC, contained open and honest disclosures about the financial difficulties that Sunterra had been having. In particular, on July 24, 2023, Ray Price explained:

Sorry for the delay in providing the financial statements this year. I have attached all of the statements for all of the Sunterra Companies, Consolidated statements for each of the Sunterra Enterprises Inc, Sunterra Food Corporation and Sunterra Farm Enterprises companies, as well as the Group combined statement. I have also attached a revised 2023 forecast using current futures pricing for pigs and feed,

It was a disappointing year for the Sunterra Food Group companies coming out of Covid and while the pig operations did okay during the first 7 or 8 months, the end of the year and the first 4 months of 2023 had low pig prices and high feed grain costs. As compared to others in the industry, the pig division did well to generate positive cash flow while others were losing money. I have included the financial statement for Sunterra Farms Greenhouse because it is included in the Group statement. As you know it was in it's first year of operation and sustained some losses.

¹¹⁸ Ray Price Affidavit *supra* note 27 at para. 58 and 59 and Exhibit "Z" [Bates No. RP0471-2]

¹¹⁹ *Ibid*

It would be good to connect to go through the statements and forecasts whenever it works best for you.

125. Depoe responded further on July 25, 2023 as follows:

Unfortunately, we are looking for a bit more context, our US clearing bank (Fifth Third) is inquiring further. With respect to the additional information required, can you assist please: Could you help me understand why separate cheques are issued simultaneously to/from the same entities: i.e. what dictates the amount of each cheque and the purpose, please?

126. While Depoe then asserts in her affidavit evidence that she does not recall receiving a further reply on this issue from Price,¹²⁰ and the NBC submissions assert that this was a deliberate obfuscation of the purpose of the transaction practice by Ray Price, this is again disingenuous in light of Ray Price's invitation on July 25, 2023 to discuss further and their meeting together two days later on July 27, 2023. Per Depoe's cross-examination, however, this topic was not discussed at their meeting not because of an obfuscation on the part of Ray Price, but because she did not feel it was an important issue and therefore failed to raise it.

127. Ray Price met with Erin Depoe, and Al Cavanagh, on July 27, 2023, at the NBC offices, where the queries from the clearing bank was discussed, as well as the financial status and records of the companies. It is clear from Depoe's affidavit and notes of the meeting which are exhibited thereto,¹²¹ together with the evidence as above that NBC had been provided with the required financial statements for 2022 before the meeting, as well as revised 2023 forecasts, that very detailed discussions were had of the financial performance and difficulties of the Sunterra Borrowers in the year 2022 and 2023, including discussion of the expenses and revenue (actual and forecast), and the assets and liabilities (balance sheet information) of the Canadian Hog Farming Entities. While Ms. Depoe does not specifically recall discussions of the cheques, on his cross-examination Ray Price testified that, while not the main focus of the meeting, the discussion of cheques formed "part" of their discussion:

A[Ray Price]: Yes, so I remember meeting with her on July 27.

Q.[Mr. Smyth Yes, but the meeting on July 27, 2023 wasn't primarily to do with that inquiry about cheques; was it?

A. [Ray Price] I believe that was part of what we covered in the meeting.

Q. The meeting, sir, on July 27, 2023, I propose to you, was about the fact that the borrowers under the commitment letter were offside of their financial covenants under the commitment letter. Do you agree with me?

A. We would have had a wide-ranging discussion about many things in that meeting.¹²²

¹²⁰ Depoe Affidavit *supra* note 112 at para. 40

¹²¹ Depoe Affidavit *supra* note 112 at para. 49, and Exhibit 4

¹²² Ray Price Cross, *supra* note 58 at page 26, lines 3-13

(...)

Q: What I'm suggesting to you and proposing to you that the meeting on July 27, 2023 was primarily about the fact that the borrowers, those are the companies listed in Ms. Depoe's email, were in default of their financial covenants under the commitment letter that those borrowers and others had entered into the year prior. Do you recall that?

A. No, I don't think that was the case. I think that there was concerns around -- as described there, she was wondering about the cheques. She was wondering when -- about additional information and the consolidated statements for the group of borrowers, which I think I explained is not -- it's not possible to be consolidated because the way that the companies are structured, it wasn't possible to be consolidated. So that wasn't something that they would be able to receive.

So I don't think that there was any -- there was discussion about how to fill in the information they were looking for, but I don't remember it being anything more than a discussion about what information they need and what format would work¹²³

(...)

Q: Ms. Depoe is stating, and I'm required to put such evidence to you because it contradicts your own, that little to no time was spent discussing the issues about the cheques that she had raised in those same emails.

A. I don't think it's contradictory because she says "little," and it wouldn't have been a lot of time if she didn't want to talk about it.¹²⁴

128. Further, per Ms. Depoe's evidence, she testified that she believed that had she raised the issue, Mr. Price would have been transparent¹²⁵:

Q. [Mr. Chimuk] I'm going to suggest to you that Mr. Price's communications were open and transparent during that meeting, correct?

A [Erin Depoe]. As to what we were discussing, yes.

(...)

Q: I'm going to suggest to you that it's always been Mr. Price's practice to address, in a timely way, any concerns of CWB when you would have raised them with him and to work openly with you to find a solution to any issues; is that fair?

A. Yes.

129. In this context, Ray Price understood that NBC were aware of and content for Sunterra to continue with the Account Coverage Practice and the use of cheque transfers as identified by the

¹²³ Ray Price Cross, *supra* note 58 at pages 27-28, lines 6-25, 1-2

¹²⁴ Ray Price Cross, *supra* note 58 at page 30, lines 16-22

¹²⁵ Depoe Cross, *supra* note 51 at page 25, lines 2-5, page 26 lines 1-4.

US clearing bank, effectively allowing the hog farm entities to utilise conditional credit created by the transactions, but he relied upon NBC's knowledge and attention to the practices in believing that that NBC were happy for Sunterra to continue with the practices.¹²⁶:

Q: I'm going to suggest to you that Ray was completely transparent in answering any specific questions that you had; is that fair?

A. The questions that I would have had? Yes.

Q. I'm going to suggest that there were no follow-up inquiries from yourself regarding the July 2023 inquiries relating to questions from Ms. Sy; is that fair?

A. In the meeting?

Q. Following the meeting. You discussed it in the meeting, but that following -- following the July 27, 2023, meeting, there was no other follow-up with respect to those issues that were raised by Ms. Sy?

(...)

A. Not that I recall.

130. This was also affirmed in the cross-examination of Erin Depoe, who explained that she inquired to Sunterra concerning the "large-value sequential cheques", was provided an answer, and therefore "did not raise alarm."¹²⁷:

Q[Mr. Chimuk] And you would agree with me that that's because at that time, you didn't deem there to be anything inherently serious about Sunterra depositing sequential large-value USD cheques drawn from Sunterra Funds [verbatim] Iowa, correct?

A [Ms. Depoe]. My role would not have been to understand the seriousness of that or what it implied.

Q. I'm not asking you what your role entailed. I'm suggesting to you that you did not consider that to be

serious at that time, correct?

A. I treated it as a question to be answered.

Q. You did not consider it serious at the time, that it looked like funds were immediately being used towards outgoing USD cheques to Compeer in the same pattern, sequential large-value cheques, correct?

A. I asked the question of Ray Price, and he gave me an answer, which I trusted, and it did not raise alarm.

¹²⁶ Ray Price Affidavit *supra* note 27 at para. 62, Depoe Cross, *supra* note at page 26, lines 1-9

¹²⁷ Depoe Cross *supra* note 51 at page 37, lines 5-9

131. Further, in September 2023, NBC's SAMU division took over the management, including day to day management of the Sunterra customers. On NBC's evidence, the reason for this was as follows:

More particularly, when the Canadian Sunterra Entities were referred to SAMU, they had breached certain financial covenants in their loan agreement which, in turn, caused NBC concern with respect to their ability to perform their obligations to NBC. The matter of the 2023 financial covenant breach was resolved by NBC waiving such breach, but the overall concerns remained such that the Canadian Sunterra Entities remained managed by SAMU.

132. While a waiver letter was provided by NBC in relation to some non-compliance by Sunterra as revealed in the 2022 Financial Statements¹²⁸, the Sunterra customers remained under the supervision and scrutiny of the SAMU division of NBC from that time.¹²⁹

133. The annual review of the Sunterra customers appears to have then occurred under the SAMU division at NBC, which is put forward by the NBC evidence and submissions as being more specialised and therefore presumably having more expertise and experience than the previous customer relationship management team¹³⁰, and who were appointed to manage the Sunterra customers particularly because of the higher risks that NBC in NBC's view were posed by the Sunterra customers¹³¹. The higher credit risk of Sunterra was a fact that was at all times known to the SAMU team upon the transfer of the Sunterra account to their oversight in September 2023¹³²:

Q[Mr. Chimuk] In the WAVE system, would there be information pertaining to whether an individual client that was subject of -- of the file was a credit risk, that type of information.

(...)

A.[Mr. Chan] The answer to your question is yes, it would contain the information that the bank is aware of that details credit risk on the client.

134. In light of the above, it is the Defendant's submission that it is simply implausible to suggest that NBC in July to December 2023, when it completed its annual review of the Sunterra customers, did not turn its mind to the transactions which it now calls "cheque kiting", being the daily "deposit by the Canadian Hog Farm Entities of sequential large value USD cheques drawn from the US Hog Farm Entities, which were being immediately used towards outgoing USD cheques to Compeer in sequential large value cheques", and also at the same time to the revenues and expenses of the Canadian Hog Farm Entities, which together NBC now says is certain and obvious proof in itself of "Cheque Kiting" by the use of conditional credit granted in the "float", and with that knowledge NBC decided to allow the practice to continue.

¹²⁸ Ray Price Affidavit *supra* note 27 at para. 63 and Exhibit "AA" [Bates No. RP0473-4]

¹²⁹ Chan Cross *supra* note 53 at page 30-31

¹³⁰ Chan Cross *supra* note 53 at page 12, lines 11-21, Depoe Cross, *supra* note 52 at page 38, lines 16-19

¹³¹ Chan Cross *supra* note 53 at page 9 lines 11-15

¹³² *Ibid* at page 20, lines 4-10

135. The hearing of NBC's claim is a summary proceeding. Alberta law requires that all parties to a proceeding put their "best foot forward" in summary judgment proceedings, meaning they must present all evidence they intend to rely upon, as the court will decide the application based on the existing record.¹³³ Further, the Alberta Court of Appeal has set out the principles of fairness in summary disposition matters, as follows:

IV. Principles of Fairness

41 The final principle is a need to ensure an appropriate level of fairness in the procedures used to resolve disputes. Considerations of "fairness" are built into the Hryniak v. Mauldin test, which specifies that summary disposition must be a suitable "means to achieve a just result".

42 Restrictions on summary disposition are sometimes justified on the basis that summary disposition deprives the plaintiff of "the right to go to trial", or "full access to the civil procedure spectrum". This is essentially a procedural argument about fairness. There is, however, no right to take an unmeritorious claim to trial, a process described in Hryniak v. Mauldin at para 28 as "the most painstaking procedure". All claims are subject to screening at various stages. Claims must disclose a cause of action, or they will be struck: R. 3.68. Plaintiffs must be able to demonstrate sufficient "merit" to avoid summary disposition: R. 7.3. There is no "right" to use the most expensive modality of dispute resolution (i.e., the trial) if these hurdles cannot be overcome: Trial Lawyers Association of British Columbia v. British Columbia (Attorney General), 2017 BCCA 324 (B.C. C.A.) at paras. 21, 56, (2017), [2018] 2 W.W.R. 480 (B.C. C.A.), leave to appeal refused SCC #37843 (July 26, 2018) [2018 CarswellBC 2029 (S.C.C.)].

43 In any event, any "right of the plaintiff to have a trial" is equally offset by the "right of the defendant not to have a trial on an unmeritorious claim". Fairness is a two-way street. Litigation is expensive and distracting, and the costs awarded to the successful party seldom amount to full indemnity. Cost, delay and inequality of arms may mean that the right to adjudicative fairness, justice, and reliability can actually be hindered by a full trial. A defendant who can show that a claim has "no merit" on a summary disposition application should not have to suffer a trial. As noted, supra para. 32, the resisting party does not have to prove its own case at this stage, but only demonstrate that the moving party has failed to show there is no genuine issue requiring a trial.

(emphasis added)

136. It is the respondents' position that NBC have not satisfied their obligations in particular by their failure to disclose a cause of action in fraudulent misrepresentation, as referred to above and below, but also by their failure to give any evidence to established the required fact for an allegation of fraudulent misrepresentation, that NBC was induced to, or actually relied upon, the alleged false representations to their detriment

¹³³ Hryniak, *supra* note 24, Weir-Jones, *supra* note 24 at para. 37

137. In this regard, Dean Chan has deposed to being head of SAMU and to assigning the day-to-day conduct of the Sunterra customers to Rodney Randall, one of his direct reports, in September 2023.¹³⁴ However, Dean Chan simply fails to depose to anything further regarding the conduct of Sunterra and the customer relationship with NBC from September 2023 until he becomes “*directly involved*” in February 2025.¹³⁵ :

Q[Mr. Chimuk]: The SAMU team. To the SAMU team where Rodney Randall becomes the new relationship manager. Is that, again, accurate?

A. Sorry. I didn't hear the last word. Is that again --

Q. Where Rodney Randall becomes the new relationship manager?

A. Yes.

Q. And Rodney Randall is your direct report, correct?

A. Yes.

Q. And was your direct report at all material times?

A. Correct.

Q. Okay. So Rodney reports to you, correct?

A. Yes.

Q. Does that mean that you, upon transfer of the file to -- of the Sunterra file to the SAMU team, that you were ultimately responsible for the Sunterra file but that Rodney Randall, as the relationship manager, would be responsible for all day-to-day matters that arose? Is that a fair synopsis?

A. Yes.

Q. So any major decisions that were made with respect to 4 the Sunterra file after it was transferred to the SAMU Unit, you would need to sign off on those decisions; is that fair?

A. Yes.

Q. And the way that you would keep yourself informed with respect to that would be that Mr. Randall would report directly to you, correct?

A. Yes.

¹³⁴ Chan Cross, *supra* note 53 at pages 15-16

¹³⁵ Affidavit #1 of Richard Dean Chan, sworn August 29, 2025 [Chan Affidavit #1] [Joint Book of Evidence at TAB 30] at para. 2-4

138. In addition, NBC have not put forward Rodney Randell as a witness, despite Dean Chan's testimony as to the centrality of his role. Dean Chan, further, claimed in cross-examination to have no knowledge of and no ability to speak to the matters dealt with by Rod Randall prior to February 2025.¹³⁶
139. The evidentiary burden is upon NBC to prove their case and disclose a cause of action. They have not put forward critical evidence, nor any evidence at all, to prove that NBC were induced to act or acted in reliance upon the alleged misrepresentations. There was no relevant evidence to challenge of on cross-examination. As will be addressed further below, the Court ought to dismiss the NBC Claims, all of which are based on the allegations of fraudulent misrepresentation, in accordance with rule 7.3(3) of the Alberta Court Rules, and the principles of fairness in summary applications. The consequences of this failure will be addressed further below.

K. Reliance on NBC regarding regulatory requirements and monitoring

140. The Sunterra Group does not have expertise in clearing house rules and other regulatory obligations on banks with respect to daily transactions, which are the responsibility of NBC. The Sunterra Group, including the Canadian Hog Farm Entities, reasonably relied upon NBC in its due diligence for the purposes of the 2022 loan renewal, and the ongoing bank monitoring to ensuring that their financial activities through the NBC were in compliance with the regulatory requirements.¹³⁷ NBC further admitted in cross-examinations that such regulatory requirements exist, and in fact result in daily monitoring of NBC's Accounts¹³⁸:

Q[Mr. Chimuk] Are you aware of what mechanisms would have been in place to monitor this sort of activity at that time?

A [Mr. LeBlanc] In general terms, monitoring activities is an active situation in the sense that my team -- I'm talking generally speaking here, not specific to the Sunterra file, but my team will manage a credit relationship. We'll -- where there are bank accounts and there are operations, my team will not go and dig into the details of every operation unless it has reasons to do so. So there is no such thing as an enhanced monitoring of account operations unless we actually decide to conduct it.

- 141.
142. The Account Coverage Practice, including the use of conditional credit, was always visible to NBC from a historical perspective and in real time, through both bank transaction records and reporting of total revenue and total expenses of the Borrowers on a monthly and annual basis.¹³⁹ Additionally, those pieces of information which NBC cites as having allowed for the "discovery" of this practice were available and accessible to NBC within its own systems, even prior to the 2024

¹³⁶ Chan Cross, *supra* note 53 at page 31, lines 16-20

¹³⁷ Ray Price Affidavit, *supra* note 27 para. 64

¹³⁸ LeBlanc Cross, *supra* note 1 at page 51, lines 13-22

¹³⁹ Ray Price Affidavit, *supra* note 27 at para. 65

renewals. As admitted to by Dean Chan, the material records of NBC, including banking records, were at all material times accessible to NBC.¹⁴⁰

143. Ray Price understood that NBC undertook regular monitoring of the business practices and financial transactions of the Canadian Hog Farm Entities and further that the Account Coverage Practices had been investigated by NBC and its clearing bank, and there was no reason for concern. As confirmed by Dean Chan:¹⁴¹ :

Q: At all material times, NBC knew that Sunterra was

9 writing large sequential cheques, correct?

10 A.(...). I mean, certainly NBC would -- we have access to our systems. We could have -- we would have access to the banking records.

We have access to the banking systems,

144. This is confirmed by the fact that such a sentiment was echoed repeatedly by the bank itself, who determined that such practices were not of concern, even when questions were raised.

L. Compeer knowledge of the Sunterra businesses and the Account Coverage Practice

145. NBC has alleged in its pleadings that the “cheque kiting” activity, and the fraud perpetrated thereby, was carried out by the Canadian Hog Farm Entities together with the US Hog Farm Entities.¹⁴² Somewhat obscurely, and without explanation, they say in their written argument that the “cheque kiting scheme” was carried out by the “Sunterra Group”.¹⁴³
146. In light of this position, the respondents’ evidence also goes to the relationship between the Sunterra US Hog Farm Entities and Compeer.
147. Similar to NBC, Compeer had a long-standing relationship with the US Hog Farm Entities, a through understanding of the business between them and the Canadian Hog Farm Entities and of the importance of the NAE status.¹⁴⁴
148. Compeer also had direct knowledge of the Account Coverage Practice undertaken on behalf of the Canadian and US Hog Farm Entities. From 2022, Compeer addressed their attention to the Account Coverage Practice and in particular the manner in which the transfers between the Canadian and US Hog Farm Entities accounts were taking place. Their concerns were not with

¹⁴⁰ Chan Cross, *supra* note 51 at page 112, lines 10-17

¹⁴¹ *Ibid.*

¹⁴² Statement of Claim of National Bank of Canada [Joint Book of Evidence at TAB 17] [*Statement of Claim*] at para. 55

¹⁴³ NBC submissions, *supra* note 10 at para 52

¹⁴⁴ Affidavit of Arthur Price, sworn September 18, 2025 [Art price Affidavit] [Joint Book of Evidence at TAB 42] para. 23-26; Ray Price Affidavit *supra* note 27 at para.68 – 78;

the transactions *per se*, but with the administrative burden for the bank which arose because of the use of cheques as opposed to some other method such as electronic transfers.¹⁴⁵

149. Ray Price had explained to Compeer that NBC were unable to conduct electronic transfers,¹⁴⁶ which is further attested to by the evidence of Uffelman in her affidavit.¹⁴⁷ NBC have put up some evidence in reply in an apparent effort to retort those statements, but there is no documentary evidence provided to support their statements, nor any explanation of when or how that capability became available.¹⁴⁸ Given the contradictions between statements about the ability of NBC (CWB's) system to carry out entries and accounting netting, and the inability of those systems to do what is promised in practice, bald statements after the fact that CWB's systems had the electronic and wire transfer capabilities at an unspecified earlier date ought not be relied upon as proof of what the systems could do nor of what Sunterra believed the systems could do. The most concrete evidence provided, upon the cross-examination of Dean Chan, amounts simply to the fact that he personally believes that it would be unusual for a bank to not have the ability for electronic transfer, but that he had no knowledge of the existence (or lack therefor) of such systems at NBC¹⁴⁹:

Q[Mr. Chimuk]: Prior to your personal involvement in this matter in February 14, 2025, had you had any personal involvement dealing with Compeer?

A. Prior to February 14, 2025, is what you said?

Q. '25, correct.

A. No.

Q. Are you personally aware of what Compeer's ability is to receive electronic international wire transfers?

A. No.

Q. At paragraph 12 of your affidavit, you preface it by saying, "Based on my review of the Uffelman affidavit and the Thompson affidavit," and then you go on to explain your understanding of the Sunterra practice with respect to the physical delivery of cheques. Is that fair?

A. Yes.

Q. My question is simple, and I think your evidence is clear, but that understanding that you have – that understanding is based upon your review of the Uffelman and Thompson affidavits, correct?

¹⁴⁵ Ray Price Affidavit, *supra* note 27 para. 69 -100

¹⁴⁶ Ray Price Affidavit, *supra* note 27 at para. 84

¹⁴⁷ Uffelman Affidavit, *supra* note 79 at para. 32.

¹⁴⁸ Affidavit #2 of Richard Dean Chan, sworn September 29, 2025 [Chan Affidavit #2] at para. 7 to 12

¹⁴⁹ Chan Cross, *supra* note 53 at page 87 lines 1-10

A. Correct.

Q. It's not based on anything else, correct?

A Correct.

Q. And you personally do not know if wire transfers could utilized with respect to a cross-border transaction as between a Canadian Sunterra account with NBC to an American Sunterra account with Compeer, correct?

A. I would suggest that wire transfers are a pretty common occurrence in the North American banking system, and I know of no reason why the Compeer accounts would not be able to receive wire transfers.

Q; And you personally do not know if wire transfers could be utilized with respect to a cross-border transaction as between a Canadian Sunterra account with NBC to an American Sunterra account with Compeer, correct?"

A. No.

150. However, he, nor none of the NBC deponents, have presented any actual knowledge as to whether such capabilities existed at NBC. There was no evidence that this issue was ever discussed with Sunterra at the time as the NBC witnesses themselves did not even know about NBC capabilities in this regard – even after the fact and in the middle of litigation.
151. Ray Price also explained to Compeer that the intercompany transfers were in amounts less than USD \$1M, because of the time delay that he understood would arise in clearing cheques above that amount.¹⁵⁰ This was in the context of the issues already occurring in terms of delays in transfers and accurate balances recorded on the accounts on a day to day basis¹⁵¹. In addition, as Ray Price explained to Compeer, because of the location of Sunterra offices in the US and Canada, they did not have to send physical cheques between the countries when they were being issued, but could print them out in the local offices in locations where they were to be deposited.¹⁵²
152. Ray Price's discussion with Compeer about steps being anticipated to reduce or remove the need for the multiple daily cash flow transfers busing cheques, included references to the use of funds from the insurance proceeds arising for a fire on the Trochu property in 2024, which were expected to come through from mid-2024 in the range of \$15 - \$20 million, and potential sale of cropping land and equipment in Canda, and how that would create working capital and assist with cash flow.¹⁵³
153. As for NBC, therefore, Compeer had full visibility of the daily transactions between the account of the US Hog Farm Entities and the Canadian Hog Farm Entities and actually directed their attention to those transactions on a regular basis. They also had regular updates to the financial

¹⁵⁰ Ray Price Affidavit, *supra* note 27 at para. 84.

¹⁵¹ Ray Price Affidavit, *supra* note 27 at para. 99; Uffelman Affidavit, *supra* note 79 at para. 19

¹⁵² Ray Price Affidavit *supra* note 27 at para. 91, 92 and 94

¹⁵³ Ray Price Affidavit *supra* note 27 at para. 91, 92 and 94

information of the US Hog Farm Entities, which they examined each year for the purpose of the annual renewal and replacement of the previous year's loan agreements, from which they would have considered the gross revenue and expenditure figures for each of the companies.¹⁵⁴ Finally they understood that one of the proposed solutions to getting rid of the daily cheque transfer practice was to inject working capital funds from the Trochu fire proceeds and/or the sale of land and equipment.¹⁵⁵

154. Ray Price understood that the Account Coverage Practice effectively created some conditional credit, but given that Compeer was aware of the Account Coverage Practice from their close oversight of the US Hog Farm Entities' businesses and accounts and from regular discussions, particularly in 2024 and into early 2025,¹⁵⁶ including with regard to their clearing bank, he understood them to be content for those entities to utilise the conditional credit while they worked out a way to change the practice. This awareness of the Account Coverage Practice is also clear from the testimony of Nicholas Rue, who was aware both of the extension of conditional credit extended to the Sunterra accounts, and was aware of (and was in fact managing complaints within Compeer associated with) the number of large-value sequential cheques being moved at Compeer every day, on a go-forward basis beginning in March 2023.

III. EVENTS PRECEDING THE CCAA APPLICATION

A. Transient Default and Account Freeze

155. On or around 11 February 2025, Compeer made inquiries with Sunterra again about the multiple high-value USD cheques going between the US Hog Farm Entities and the Canadian Hog Farm Entities on a daily basis ("**Compeer Inquiries**")¹⁵⁷. However, this time, rather than re-engaging in dialogue with Sunterra about the practice and checking on the timing of any anticipated working capital injections to help alleviate the need for the practice, Compeer acted to immediately freeze all cheques issuing from the US Hog Farm Entities to the Canadian Hog Farm Entities ("**Compeer Account Freezing**").¹⁵⁸ As a result, the accounts of the Canadian Hog Farms in respect of Loan Segment 1 went temporarily above the approved borrowing limit, creating a transient event of default under the 2022 Loan Agreement (the "**Transient Default**").¹⁵⁹
156. NBC started freezing cheques issued by the Canadian Hog Farms to the US Hog Farms on or around February 14, 2025 ("**NBC Freezing Action**").¹⁶⁰ Notwithstanding that no thorough investigation had taken place it was the initial view of NBC on February 14th, 2025 that the Suntera had engaged in a kiting scheme¹⁶¹

¹⁵⁴ Ray Price Affidavit *supra* note 27 at para. 31 - 33, 81 and Exhibit "FF" [Bates No. RP0533-7]

¹⁵⁵ Chan Underakings, *supra* note 30 [Bates No. NBC (Chan) UT 2-02.0001]

¹⁵⁶ Ray Price Affidavit *supra* note 27 para. 82-100,

¹⁵⁷ Art Price Affidavit *supra* note 114 at para. 27, Ray Price Affidavit, *supra* note at para. 101.

¹⁵⁸ Art Price Affidavit, *supra* note 114 at para. 27

¹⁵⁹ Art Price Affidavit, *supra* note 114 at para. 27, and Exhibit "G", CWB account statements for Sunterra Canda and Sunwold Canada [Bates No. AAF AP 000094-102]

¹⁶⁰ Art Price Affidavit *supra* note 114 at para. 28 and 34. Cross of Dean Chan at page 68 at lines 13-17

¹⁶¹ LeBlanc Cross, *supra* note 1 at page 20, lines 14-21 and page 28 lines 18-21

B. Sunterra cooperation with and assistance to NBC – including with FTI as NBC’s agent

157. Sunterra stopped writing cheques between the Canadian Hog Farm Entities and the US Hog Farm Entities in response to and immediately following Compeer’s Inquiries and the Compeer Account Freeze, except as was absolutely necessary for operational purposes only, and thereafter made substantial deposits into the accounts of the Canadian Hog Farm Entities with NBC to bring the balance back within the borrowing limit.¹⁶² As a result, the Transient Default with NBC was cured within five business days.¹⁶³
158. On Monday, February 17, 2024, NBC told Sunterra that they had retained FTI Consulting Canada (“**FTI**”) to investigate and monitor Sunterra’s financial practices, and asked Sunterra to agree to allow FTI to enter Sunterra’s premises and access their business records, including financial information for the purpose of investigating the business and affairs of Sunterra. NBC told Sunterra that a formal agreement in respect of FTI’s appointment as interim monitor would be provided shortly and requested that FTI be allowed to commence in the meantime. Sunterra consented to that request. From the morning of Tuesday, February 18, 2025, Sunterra fully cooperated with FTI, including allowing FTI access to its premises and records on an ongoing basis, and assisting FTI with its investigations. A formal written agreement in respect of the engagement of FTI as Monitor was executed by all parties on or around February 20, 2025.¹⁶⁴

C. Court Actions commenced

NBC Demand for Repayment and Notices of Intention to Enforce/ Realize Security

159. Around a month after the Transient Default was cured, on March 14, 2025, NBC issued a Demand for Repayment within 15 business days and Notices of Intention to enforce and to realize security pursuant to section 244 of the BIA and section 21 of the *Farm Debt Mediation Act*, S.C. 1997, c. 21 (“**Demand and Notice**”), against the NBC Borrowers and also against the Alleged Guarantors.¹⁶⁵
160. The amount demanded by NBC in the notice was **\$17,532,351.57**, which NBC said was the total debt then owing under the NBC Loan as at March 11, 2025, increasing at an approximate *per diem* rate of \$1,015.43.¹⁶⁶

NBC – Interim and Investigative Receiver Application

161. On March 14, 2025, the same day as the notices under the BIA and the FDMA, and in breach of the notice period, the NBC served on the Applicants to this proceeding, plus the US Farm Entities, Soleterra and Precision Diagnostics (as defined below), an application for the appointment of an interim receiver, as filed in the Court of King’s Bench Alberta (“**Court**”), no. 2501-04252, seeking orders for the appointment of a interim receiver and manager, with

¹⁶² Art Price Affidavit *supra* note 114 at para. 33, *Ibid*, at para. 52;

¹⁶³ Art Price Affidavit *supra* note 114 at para. 27, and Exhibit “G”, CWB account statements for Sunterra Canda and Sunwold Canada [Bates No. AFFAP000094]; Pai Cross *supra* note at page 50, lines 19-20

¹⁶⁴ Art Price affidavit *supra* note 114 para. 56 and Exhibit “K” [Bates No.,. AFF AP 000142-146][

¹⁶⁵ *Ibid*, para. 11, Exhibit A [Bates NO. AFF AP 000019-57]

¹⁶⁶ *Ibid*

investigative powers, pursuant to s 47 of the BIA, s 13(2) of the *Judicature Act*, R.S.A. 2000 (the “**Judicature Act**”), section 65 of the PPSA and section 99 of the *Business Corporations Act*, R.S.A. 2000, c B-9 (the “**BCA**”) (“**Interim Receiver Application**”).

Interim Receiver Application Dismissed

162. The Interim Receiver Application was dismissed by this Honourable Court by endorsement on March 24, 2025, which included findings that NBC had not established that the appointment of an interim receiver was necessary to protect the assets of the respondents from dissipation and/or that there was any risk to NBC’s right of recovery that required the appointment of an interim receiver in lieu of notice.¹⁶⁷ Further, his Honour found that the notice period required by the Farm Debt Mediation Act had been breached.
163. The endorsement contemplated “the possibility of the respondents attracting replacement financing during the current hold period (at least concerning the Farmers [meaning Sunwold Farms and Sunterra Farms]) and any stay period that might be triggered [by] the FDMA or by other proceedings taken by the Group or some members under the BIA or other restructuring statute.”¹⁶⁸
164. His Honour Justice Lema also found, in effect, that:
- (a) the Transient Defaults, the “Unauthorised Overdrafts” identified by the Bank, had been cured and could not be repeated; and
 - (b) the alleged “Overdraft Indebtedness” had been reduced to zero.¹⁶⁹
165. In making the findings, his Honour Justice Lema noted that the predominant purpose of the Interim Receiver NBC Application appeared to be for information gathering about possible cheque kiting by some of the defendant companies.¹⁷⁰
166. The Notice of Intention to make a Proposal under the BIA (Nol’s as above at para. 1(a) above), were filed on March 24, 2025, pursuant to which the automatic stay under section 69(1) of the BIA was effected in respect of the NBC Borrowers (the “**BIA Stay**”).

Actions Commenced Between NBC and Sunterra Companies

167. On March 18, 2025, NBC filed and served a second court proceeding against Sunterra in the Court of King’s Bench Alberta, no. 2501 04252, again seeking the appointment of an interim receiver over the assets, undertakings and property of the NBC Borrowers and Alleged Guarantors, based on substantially the same facts as in the First NBC Application, with additional orders as a part of enforcement against NBC’s security under the 2022 Loan Agreement (the “**Second NBC Application**”).

¹⁶⁷ Endorsement of Lemu J, *National Bank of Canada v Precision Livestock Diagnostics Ltd.*, 2025 ABKB 175 (CanLII)

¹⁶⁸ *Ibid* at para. 107

¹⁶⁹ *Ibid* at para. 8, 16, 18 and 43

¹⁷⁰ *Ibid* at para. 1, 29 and 47

168. On March 24, 2025, the Corporate Respondents to the NBC claim, plus related entities Soleterra D'Italia Ltd. and Precision Livestock Diagnostics Ltd.,¹⁷¹ filed a Statement of Claim in the Court of King's Bench Alberta, no. 2501 04640, claiming loss and damages arising out of NBC alleged breaches of the 2022 Loan Agreement and its duties of good faith, honesty and fair dealing, and other claims in negligence, misrepresentation, unjust enrichment for loss and damages as a result of the NBC Freezing Action. Those proceedings claim that the Second NBC Application is an abuse of process, a position which is maintained in this proceeding. ("**Sunterra Claim against NBC**").

D. NBC bad faith conduct: harm to Sunterra, including loan collateral

169. From the commencement of the Account Freeze until the protection afforded by the orders under these CCAA Proceedings on April 22, 2025, NBC obstructed and significantly damaged the going concerns businesses of the Sunterra Group in Canada, and in particular Sunterra Markets, and in doing so also undermined the value of assets by which debts owing to by the Sunterra companies to NBC were secured.¹⁷²
170. By email on February 14, 2025,¹⁷³ Sunterra requested that NBC inform Sunterra of which accounts it intended to freeze. NBC provided a list of accounts that it was freezing, which included payroll accounts, a health care savings account, and a trust account in which employee contributions are held for the benefit of employees under a disability payment plan (i.e. a fund which does not belong to Sunterra, but is held on trust for the benefit of employees).
171. That same day, NBC started freezing transactions in all Sunterra Group accounts with NBC, returning cheques written not only from the Canadian Hog Farm Entities' USD accounts to the US Hog Farm Entities' accounts, but also returning all cheques written by Sunterra entities, including in particular Sunterra Markets, Sunwold Canada and Sunterra Canada as "no sufficient funds" ("**NSF**") and also freezing the accounts of Soleterra D'Italia and Precision Livestock Diagnostics ("**NBC Freezing Actions**").¹⁷⁴
172. By freezing the Sunterra accounts, NBC blocked the payment of cheques to:
- (a) employees in respect of their wages and other benefits, health care payments to employees, and disability payments to affected employees.
 - (b) supplies of feed and other essential supplies to the Canadian Hog Farms; and
 - (c) essential supplies required in large volumes from multiple suppliers on a daily basis to Sunterra Markets for perishable and non-perishable food and beverage supplies.¹⁷⁵

¹⁷¹ See Art Price Affidavit, *supra* note 114 para. 10

¹⁷² Art Price Affidavit *supra* note 114 at para. 51

¹⁷³ Art Price Affidavit, *supra* note 114 para. 34 and Exhibit "H" [Bates No., AFF AP 000103-7], and para. 52.

¹⁷⁴ *Ibid* at Exhibit "J" [Bates NO AFF AP 000135-141]

¹⁷⁵ Art Price Affidavit *supra* note 114 at para. 54

173. Sunterra communicated its strong objections to the NBC Freezing Actions, particularly regarding impacts to entities outside the Sunterra Group (including Soleterra D'Italia), and impacts to wages, healthcare, and disability payments to employees.¹⁷⁶
174. Sunterra also communicated its objections to NBC's Freezing Actions on the basis of the significant impact on the business of Sunterra Markets as a going concern, which depends on daily high-volume transactions with suppliers to sustain its operations. NBC's freezing of the accounts on Sunterra Markets has caused many suppliers to cut supply and/or demand payment on or prior to deliver, rather than on favourable credit terms previously provided by those suppliers.¹⁷⁷
175. From February 14, 2025, Sunterra provided, and continued to provide, lists of cheques that had been issued by the Sunterra Group entities and which are essential to the sustainability of the businesses affected by NBC's Freezing Actions, including to make payments to employees, suppliers and other services providers, and rent to landlords. Sunterra requested that the listed cheques be released for payment in order to mitigate the disruption and harm experienced by the businesses of the Group and of Soleterra D'Italia and Precision Livestock Diagnostics.¹⁷⁸
176. NBC routinely informed Sunterra that it will approve, and release requested cheques. Despite these assurances, NBC acted with unreasonable delay and committed errors resulting on many occasions in cheques being returned NSF.¹⁷⁹ Sunterra again identified and stressed the extent of the damage that been caused to Sunterra's businesses as a result of the NBC Freezing Actions in detail¹⁸⁰ and demanded that the situation be remedied immediately.¹⁸¹
177. NBC's freezing actions continued despite there being sufficient funds in the Sunterra Accounts to cover the cheques issued.¹⁸²
178. These actions damaged not only the interest of Sunterra, but also of suppliers and FCC as lender and holder of security over Sunterra Canada, Sunwold Canada and Lariagra Canada (whose value is maintained by their continued use for hog farming). The NBC freezing actions also endangered the health and safety of the sows and piglets on the Canadian Hog Farm Entities in relation to blocked supplies to those farms.
179. NBC's Freezing Actions also directly jeopardized employee livelihoods, unjustifiably interfered with the businesses of third-party entities like Soleterra D'Italia and Precision Livestock Diagnostics, and threatened the viability of Sunterra Markets as a going concern and caused harm to Sunterra's reputation in the marketplace.

¹⁷⁶ Art Price Affidavit at para. 57 *supra* note 114 and Exhibit "L" [Bates No. AFF AP 000153-172]

¹⁷⁷ Art Price Affidavit *supra* note 114 at para. 58, and Exhibit "L" [Bates No. AFF AP 000153-172]

¹⁷⁸ *Ibid* at para. 59 and Exhibit "M" [Bates No. AFF AP000173-6]

¹⁷⁹ *Ibid* at para. 58, and Exhibit "L" [Bates No. AFF AP 000153-172]

¹⁸⁰ *Ibid*

¹⁸¹ *Ibid* at para. 61 and Exhibit "L" [Bates No. AFF AP 000153-172]

¹⁸² *Ibid* at para. 64, and Exhibit "N" [Bates No. AFF AP000183-241]

180. In summary, the actions disrupted critical transactions, impaired business operations, and inflicted significant financial and reputational damage on all Sunterra Group entities, including the NBC Borrowers.

E. NBC bad faith conduct – other

181. NBC also caused delays and obstruction to the efforts of Sunterra in obtaining advice and assistance for professional advisors as follows:
- (a) rejecting on three occasions, the counsel nominated by the Applicants to represent them in respect of all related matters with NBC, when those counsel had advised Sunterra that they had no conflict (as referred to above); and
 - (b) rejecting on two occasions, the licensed insolvency practitioners nominated by the NBC Borrowers to represent them in respect of the proposed BIA proceedings (see paragraph 95 below).¹⁸³
182. NBC acted unilaterally, without consent or court order, and in breach of the stay protection afforded pursuant to the NOI's under the BIA, to remove funds from the Trochu account with NBC, presumably taking the funds by way of payment to the Bank in response to its Demand and Notice of Intention to Enforce Security.¹⁸⁴
183. On March 12, 2025, NBC consented to requests from Compeer to release piglets for delivery to Sunterra US and Sunwold US to an agreed payment formula for which no payment has been received or demanded by NBC. The total value of the pigs which had been authorised by Compeer for payment, being 37,374 isoweans and 14,402 feeders, at the normal pricing between the Canada Hog Farm Entities and the US Hog Farm entities, was USD \$4.2 million. No money was ever received by way of payment for the pigs placed with the US Hog Farm Entities in this period. While NBC did not release security over the piglets absent payment, it has taken no steps to demand or otherwise realise the payment from Compeer and took no actions to oppose the fire sale, nor to trace the proceeds of sale.¹⁸⁵

F. Sunterra cooperation after the account freeze – despite NBC continuing conduct in bad faith

184. Sunterra did everything they could to cooperate with both NBC and Compeer and address their concerns. In addition to paying out the NBC overdraft within 5 days, co-operating fully with FTI as NBC's agent, Sunterra representatives also attended multiple meetings with NBC and at those meeting sought to move forward in good faith and a commercially reasonable manner.¹⁸⁶
185. On February 22, 2025, NBC proposed a form of Forbearance Agreement in which various Sunterra parties were required to admit to serious allegations corporate wrongdoing against Sunterra entities and individuals, plus give indemnities for any and all liabilities that may arise for NBC, additional security and unlimited personal guarantees to be granted by Art Price, Ray Price

¹⁸³ Art Price Affidavit *supra* note 114 at para. 68

¹⁸⁴ *Ibid* at para. 69

¹⁸⁵ *Ibid* at para. 70

¹⁸⁶ *Ibid* at para. 36 and 39

and Glen Price, in consideration of only one month's forbearance by NBC of enforcement actions.¹⁸⁷

186. Art Price told NBC at a meeting attended by Art Price, Glen Price, Dean Chan and Pai from NBC and Dustin Oliver from FTI on February 24, 2025 ("**February 24, 2025 Meeting**"),¹⁸⁸ that the First Forbearance Agreement would not be accepted because it was draconian and commercially unreasonable.¹⁸⁹ In response, Dean Chan for NBC asked to withdraw the First Forbearance Agreement.¹⁹⁰
187. During the course of the February 24, 2025 meeting, Dean Chan and Pai agreed the following two matters:
- (a) that NBC were fully secured in respect of any and all outstanding amounts; and
 - (b) that NBC's only concern is with any claims from Compeer against NBC.¹⁹¹

Q[Mr. Chimuk] Mr. Price said that they would work cooperatively with

A[Mr. Chan] FTI. He did not make any mention about a commercially reasonable manner, is my recollection.

Q. He said that the first forbearance agreement from NBC was draconian, commercially unreasonable, and that he had therefore chosen not to take it to the boards of the Sunterra companies until it was discussed with NBC. He said that in any event, it could not proceed because two of the proposed guarantors, namely himself and Glen Price, had decided that they would not be signing it.

A. I don't recall him using the word "draconian," but the rest of that statement, I recall.

188. A second version of the forbearance agreement ("**Second Forbearance Agreement**") was proposed by NBC to the Sunterra parties by email on February 25, 2025. Most of the terms of the First Forbearance Agreement were retained and the Sunterra parties accordingly rejected Second Forbearance Agreement and proposed their own.¹⁹²
189. There are significant disputes on the evidence regarding the facts of the February 24, Meeting which go to the conduct of NBC and allegations regarding admissions and representations by the Sunterra parties, which the respondents deny.¹⁹³

¹⁸⁷ Art Price Affidavit *supra* note 114 at para. 37

¹⁸⁸ *Ibid* at para. 39 to 46, and 48

¹⁸⁹ *Ibid* at para. 41

¹⁹⁰ *Ibid* at para. At 41(g)

¹⁹¹ *Ibid* at para. 46, Chan Cross *supra* note at page 59 at lines 9-17

¹⁹² *Ibid* at para. 49 and 50, Exhibit "I"; [Bates No. AGFF AP 000108-134]; Cross of Dean Chan at page 59 at lines 9-17

¹⁹³ *Ibid* at para. 39-48; cf Pai Affidavit #2, *supra* note at para. 67 and 68, Dean Chan Affidavit #1, *supra* note at para 18, Affidavit #2 of Richard Dean Chan, sworn September 29, 2025 [Chan Affidavit #2] [Joint Book of Evidence at TAB 32] at para. 55;

G. Alleged admissions

190. The NBC submissions have mischaracterised the representations made by Ray Price in the course of communications with NBC after the account freeze.
191. In communications with Compeer between February 12 and 14, 2025, Ray Price explained that:
- (a) cheques were written each day to ensure that the various accounts between the farming entities were balanced and not overdrawn;
 - (b) the Account Coverage Practice had arisen “because of differences between the cash accounting for the Canadian entities and the accrual accounting for the US entities”, which later “grew beyond what it was meant to be as we continued to make sure that both entities had the money that they needed. I apologize for what ended up happening”.
192. It is disingenuous to suggest that Ray Price’s explanation changed from one regarding the tax implications to one regarding the management of cash flow, as if to suggest some sort of misrepresentation,¹⁹⁴ when both were clearly and at the same time a part of the Account Practice and equally a part of his explanations to Compeer.
193. It is further disingenuous to suggest that Ray Price was aware of the overdraft or additional conditional credit being created, as per his own cross-examination that the extent of his understanding was that NBC had communicated to him that there was an issue and it was large. His knowledge of the overdrafts, and subsequent issues identified such as the payment of interest of the compeer accounts, was not known by Mr. Price until such information was specifically communicated to him in February 2025
194. It is clear on the facts and evidence as outlined above, that none of the respondents had any idea that the Account Coverage Practice was creating an overdraft or effective additional provision of credit from the Banks, or either of them, that could not be repaid from available deposits or other realisable assets in the short term, and in particular of the magnitude that arose. Further, it is clear that all of the respondents understood that the Banks had full knowledge and had consented to the transfers comprising the Account Coverage Practice. Finally, it is clear that the Banks both turned their minds to the transfers which they now say constituted the alleged “check kiting” and must have understood the impact of those in the context of the financial information they had available to them and in fact scrutinised and in the context also for NBC of enquiries precisely regarding the transactions from their own clearing bank.

IV. INADMISSIBLE AND/OR PREJUDICIAL EVIDENCE

A. Inadmissible evidence to be disregard

195. The affidavit evidence filed and served of behalf of NBC in support of the NBC Claim is replete with hearsay, opinions and conclusions which are thereby inadmissible, or in the alternative highly prejudicial and should be given very little weight. The credibility of their evidence is also undermined and accordingly should be given little weight, as outlined below.

¹⁹⁴ NBC submissions, *supra* note 10 at para. 52

196. Specifically, NBC has failed to put its best foot forward in terms of its affiants. Dean Chan was only involved after the fact and had no direct knowledge of anything that happened prior to his involvement in February 2025. Notwithstanding same he offers opinions and speculation over issues like alleged cheque kiting even though he had no first-hand knowledge and did not even play a role in compiling or analyzing that material.
197. With respect to Raymond Pai, Mr. Pai also had no personal knowledge¹⁹⁵ and was reliant on others to perform analysis on important evidence such as the alleged cheque kiting scheme. Consequently, we have both Pai and Chan, NBC's main affiants, neither of whom had any personal knowledge whatsoever.
198. Worse, with respect to Pai, he was incredibly confrontational in his evidence and refused to accept answers that he had given under oath in March 2025 – some 7 months prior to the October cross examination. On more than 4 different occasions he refused to accept evidence that he had given under oath months earlier on material points ¹⁹⁶.
199. This presents very serious credibility concerns over NBC's key witness. Credibility issues on a summary application without *viva voce* evidence are not only problematic – they are fatal to the applicant who has the burden of proof.
200. The executives also lacked any personal knowledge and indeed did not even file affidavits. As such NBC is left with only one witness with any personal knowledge – Ms. Depoe.
201. Depoe's evidence, both in her affidavit and under oath, lacks credibility and should be given little weight because of the following:
- (a) Her evidence is frequently incorrect of contradictory.
 - (b) Contrary to representation in paragraph 48 and 50 of her affidavit, not only were the 2022 financial statements sent to her by Sunterra, she even sent a reply email acknowledging receipt in October 2023 thanking him ¹⁹⁷
 - (c) Upon cross examination, Ms. Depoe admitted that “required information was provided” by Sunterra, and Sunterra provided NBC with “satisfactory information” concerning “financial performance, the need to use funds, and near-term outlook” that was sufficiently fulsome to allow NBC to conduct due diligence on the Sunterra entities as of at least 2022.¹⁹⁸
 - (d) She purports to have had no dealings with Sunterra after the transfer to SAMNU in September 2023, but was clearly involved in communications with Sunterra on behalf of NBC in 2024;

¹⁹⁵ Pai cross, *supra* note 16 at page 19 lines 2 -6

¹⁹⁶ *Ibid* at pages 26,30,31,100 and 105 lines 1-25

¹⁹⁷ Arthur Price Affidavit, *supra* note 114 at Exhibit “G” [Bates No AFFAP000093]

¹⁹⁸ Depoe Cross, *supra* note 52 at pages 16-7

202. Despite representations that she was not involved in the Sunterra customers since September 2023, and giving no indication of what documentary records she reviewed for the purpose of her affidavit evidence, Depoe makes the statements regarding the alleged inadequacy of reporting and late reporting by the Sunterra entities, and failure to satisfy financial covenants and other obligations, but provides no details and no records to establish or verify these statements. On cross examination she admitted that in fact NBC had received the requisite information.

V. ISSUES

203. The issues to be considered on this Application are follows, save to the extent that they relate to a claim for the NBC Indebtedness:

(a) Summary Judgment:

- (i) What are the principles of summary judgement and how to they affect the court's determination of the NBC claim for the purposes of this summary trial?

(b) Fraudulent Misrepresentation:

- (i) did the Respondents make false representations to NBC, which it knew to be false, with the intention of deceiving NBC?
- (ii) if so, did those representations induce NBC to act, because they were deceived, in a manner which resulted in the loss that NBC claims?

(c) Conspiracy:

- (i) did more than one of the Respondents engage together in conduct, acting in concert, by agreement or with a common design:
- (A) for the predominant purpose of causing injury to NBC, and which resulted in actual damage to NBC, or
- (B) which was itself unlawful and where the Respondents knew or ought to have known that conduct was likely to result in injury to NBC, and injury to NBC did result from their conduct, and
- (ii) if so, what loss resulted to NBC was caused by that injury?

(d) Indemnity and contribution:

- (i) Is NBC entitled to indemnity from the Respondents, or any of them, arising out of or in any way connected to the Compeer v. NBC Claim, by reason of:
- (A) An express indemnity, arising from contract;
- (B) An implied indemnity under common law; or
- (C) An indemnity applied by principles of equity ?

- (ii) Is NBC entitled to contribution from the Respondents, or any of them, arising out of or in any way connected to the Compeer v. NBC Claim and if so, what does it cover?
 - (iii) Is NBC entitled to indemnity or contribution from the Respondents, or any of them, by virtue of the *Tort-feasors Act* (Alberta) or the *Contributory Negligence Act* (Alberta)?
- (e) Bills of Exchange Act:
 - (i) Did Sunterra Canada and/or Sunwold Canada make any implicit representations under the Bills of Exchange Act pursuant to sections 125 and 165 and to sections 132 and 165 as alleged?
 - (ii) If so, did Sunterra Canada and/or Sunwold Canada breach any such Implicit Representations?
 - (iii) If so, did any such breaches, if established cause any damage to NBC as claimed?
 - (iv) Further, or in the alternative, do Sunterra Canada and/or Sunwold Canada have any obligations arising from the alleged implicit representations, if established, such that they are bound to compensate NBC, and if so for what losses?
- (f) Breach of Business Account Agreements:
 - (i) What, if any, terms of the Business Account Agreements as alleged were binding upon Sunterra Canada and/or Sunwold Canada?
 - (ii) Did Sunterra Canada and/or Sunwold Canada breach any such terms, and if so, which ones?
 - (iii) Did any such breach result in damages to NBC for which Sunterra Canada and/or Sunwold Canada are liable?
- (g) Oppression – Business Corporations Act:
 - (i) Did the respondents perpetrate the “Kiting Scheme”, as alleged, and if so, does any such conduct amount to oppressive conduct that unfairly disregarded or prejudiced the interests of NBC for the purposes of section 242 of the Alberta *Business Corporations Act*?
 - (ii) Is NBC entitled to relief as a “complainant” within the meaning of section 239 of the Act?
 - (iii) Did Ray Price, Uffelman and/or Thompson induce Sunterra Canada, Sunwold Canada and the US Sunterra Entities to commit the acts alleged above, plus misrepresentations of Commitment Letter Reporting Requirements and Commitment Letter Operational Requirements (each as defined to the SOC)?
 - (iv) Are any of the respondents liable in respect thereof?

- (h) Knowing assistance in alleged fraud in breach of fiduciary or statutory duty
 - (i) Were the alleged duties owed by Ray Price, Uffelman and/or Thompson personally to Sunterra Canada, Sunwold Canada and the US Sunterra Entities as alleged, were any of those personal duties breach and if so did such breach cause loss and damages to NBC in the manner pleaded in the SOC?
- (i) Duty of Good Faith
 - (i) Did NBC breach its duty of good faith in respect of its contractual obligations to the Corporate Respondents or any of them? If so, how does this effect its entitlement, if any, to the remedies sought?
 - (ii) Did NBC breach its duty to act in good faith in CCAA proceedings? If so, how does this effect its entitlement, if any, to the remedies sought?
- (j) Guarantees:
 - (i) Are the Corporate Respondents guarantors in respect of any of the damages claimed by NBC against the Borrowers, jointly and severally?
 - (ii) if so, did NBC breach its duties to the Corporate Respondents as guarantors, specifically its duty of honest performance, such that NBC has no claim under the guarantees or alternatively that the liability of the Corporate Respondents is reduced?
- (k) Defences:
 - (i) Is NBC estopped from claiming loss and damages for fraudulent representation or civil conspiracy because of their knowledge of and acquiescence to the alleged practice?
 - (ii) Did NBC waive it's alleged rights, by their practice of allowing conditional credit, and their knowledge of the extent of conditional credit given, in particular in light of their close scrutiny of the accounts and of practices of the Sunterra entities.
- (l) NBC Liability under a Compeer v NBC Claim:
 - (i) Is any liability by NBC to Compeer in a Compeer v. NBC Claim too uncertain, speculative and indeterminate such that it ought not be considered as part of NBC's claim for adjudication in the proceeding under the CCAA?
 - (ii) Is it the case that, *ipso facto*, any liability by NBC to Compeer in a Compeer v. NBC Claim will arise by wrongful conduct of NBC in respect of Compeer, such that the respondents are not the cause nor liable for that loss.

VI. LAW

A. The Test for Summary Judgement

204. This Court has ordered the adjudication of the NBC v. Sunterra Claim in the context of the CCAA proceedings, by way of summary trial, pursuant to:

- (a) the orders of the Court made on July 24, 2025 and as amended on November 13, 2025 and
- (b) in compliance with section 20(1)(a)(iii) of the CCAA, to the extent that they are unsecured claims, and under section 20(1)(b), to the extent that they are secured claims, as follows:

Determination of amount of claims

20 (1) For the purposes of this Act, the amount represented by a claim of any secured or unsecured creditor is to be determined as follows:

(a) the amount of an unsecured claim is the amount

...

(iii) in the case of any other company, proof of which might be made under the Bankruptcy and Insolvency Act, but if the amount so provable is not admitted by the company, the amount is to be determined by the court on summary application by the company or by the creditor; and

(b) the amount of a secured claim is the amount, proof of which might be made under the Bankruptcy and Insolvency Act if the claim were unsecured, but the amount if not admitted by the company is, ..., in the case of any other company, the amount is to be determined by the court on summary application by the company or the creditor..

205. The Alberta Court of Appeal in *Weir-Jones Technical Services Incorporated v Purolator Courier Ltd*, 2019 ABCA 49 ("**Weir-Jones**")¹⁹⁹ has affirmed that the procedures underlying summary judgement as established by the Supreme Court of Canada in *Hryniak v. Mauldin*:

... consistent with the overriding goal of "proportionality" in civil procedure recognized by R. 1.2 of the Alberta Rules of Court...²⁰⁰ All procedures for resolving civil disputes, including summary dispositions, should be timely, cost-effective, and proportionate to the importance and complexity of the issues.

206. The Court of Appeal in *Weir-Jones* summarised the application of the principals for summary judgement as follows:

47 The proper approach to summary dispositions, based on the Hryniak v. Mauldin test, should follow the core principles relating to summary dispositions, the standard of proof, the record, and fairness. The test must be predictable, consistent, and fair to both parties. The procedure and the outcome must be just, appropriate, and reasonable. The key considerations are:

¹⁹⁹ *Supra* note 24 At para 26

²⁰⁰ *Burns Bog Conservation Society v. Canada (Attorney General)*, 2014 FCA 170 para. 42 [BOA TAB 9]

a) *Having regard to the state of the record and the issues, is it possible to fairly resolve the dispute on a summary basis, or do uncertainties in the facts, the record or the law reveal a genuine issue requiring a trial?*

b) *Has the moving party met the burden on it to show that there is either “no merit” or “no defence” and that there is no genuine issue requiring a trial? At a threshold level the facts of the case must be proven on a balance of probabilities or the application will fail, but mere establishment of the facts to that standard is not a proxy for summary adjudication.*

c) *If the moving party has met its burden, the resisting party must put its best foot forward and demonstrate from the record that there is a genuine issue requiring a trial. This can occur by challenging the moving party’s case, by identifying a positive defence, by showing that a fair and just summary disposition is not realistic, or by otherwise demonstrating that there is a genuine issue requiring a trial. If there is a genuine issue requiring a trial, summary disposition is not available.*

d) *In any event, the presiding judge must be left with sufficient confidence in the state of the record such that he or she is prepared to exercise the judicial discretion to summarily resolve the dispute.*

To repeat, the analysis does not have to proceed sequentially, or in any particular order. The presiding judge may determine, during any stage of the analysis, that summary adjudication is inappropriate or potentially unfair because the record is unsuitable, the issues are not amenable to summary disposition, a summary disposition may not lead to a “just result”, or there is a genuine issue requiring a trial. (emphasis added)

207. In addressing “*Principle of Proof*”, the Court of Appeal confirmed that the standard of proof is the balance of probabilities, but that is not decisive of the matter. As the Court explained in more detail:

34 ... as a part of the overall assessment of whether summary disposition is a suitable “means to achieve a just result”, the presiding judge can consider whether the quality of the evidence is such that it is fair to conclusively adjudicate the action summarily. Proof of the factual basis of the claim or defence by the moving party at the stage of the Hryniak v. Mauldin test during which the “judge makes the necessary findings of fact”, does not displace issues of fairness. The chambers judge’s ultimate determination on whether summary resolution is appropriate, or whether there is a genuine issue requiring a trial, must still have regard to the summary nature of the proceedings.

35 Related to the issue of the “standard of proof”, is the “burden of proof” in summary dispositions, the test for which was confirmed in *Murphy Oil Co. v. Predator Corp.*, 2006 ABCA 69 (Alta. C.A.) at para. 25, (2006), 55 Alta. L.R. (4th) 1, 384 A.R. 251 (Alta. C.A.). The moving party has the burden of establishing that, considering the facts, the record, and the law, it is entitled to summary judgment on the merits of the case, and that there is no genuine issue for trial. The resisting party then has an evidentiary burden of persuading the court that there is a genuine issue requiring a trial, or in other words that the moving party has not met that aspect of its

burden. The ultimate burden remains on the moving party to establish that there is no genuine issue requiring a trial, and that a fair and just adjudication is possible on a summary basis. The resisting party can meet its evidentiary burden by challenging the moving party's entitlement to summary judgment (based on gaps or uncertainties in the facts, the record, or the law, etc.), or by raising a positive defence (such as a limitations defence). A dispute on material facts, or one depending on issues of credibility, can leave genuine issues requiring a trial. As noted, infra para. 37, the resistance to summary judgment must be grounded in the record, not mere speculation. Sometimes the resisting party can succeed by demonstrating that the complexity of the issues makes the case unsuitable for summary disposition, or in other words that there are genuine issues requiring a trial. (emphasis added)

208. The court in *Weir-Jones* addresses “*Principles Relating to the Record in Summary Dispositions*” and cites the Supreme Court in *Hyrniak v. Mauldin* as follows:

*On a summary judgment motion, the evidence need not be equivalent to that at trial, but must be such that the judge is confident that she can fairly resolve the dispute (emphasis added). The sufficiency of the record will depend on the issues, the source and continuity of the evidence, and other relevant considerations.*²⁰¹

209. The Court of Appeal goes on to explain what is required for these principles relating to the record, including the following:

*(a) ... the parties to a summary disposition application must “put their best foot forward”... One could not resist summary disposition, or create a “genuine issue requiring a trial” by speculation about what might turn up in the future.*²⁰²

*(b) The chambers judge can make findings of fact if, viewed overall, the record permits that to be done;*²⁰³

*(c) There are some issues of fact (such as issues of credibility, or conflicts in the evidence on material issues) that are not amenable to summary adjudication, and that are markers of genuine issues requiring a trial;*²⁰⁴

*(d) In those cases where there is a “genuine issue requiring a trial”, it will be because there is a realistic prospect that a trial will create a better record, but that conclusion must be reached based on the evidence before the summary disposition judge, not speculation.*²⁰⁵

210. If NBC has failed to make out their causes of action by insufficient pleading of the law and the facts, and/or sufficiency of the record for the purposes thereof there can be no fair disposition. To

²⁰¹ At para 36, quoting *Hyrniak v. Mauldin* supra note 24 at para. 57

²⁰² Para 37, citing *Canada (Attorney General) v. Lameman*, 2008 SCC 14 at para. 11, [2008] [BOA TAB 10]

²⁰³ At para 38, citing *Shefsky v. California Gold Mining Inc.*, 2016 ABCA at para. 113[BOA TAB 11]; *Arndt v. Banerji*, 2018 ABCA 176 at para. 42 [BOA TAB 12]

²⁰⁴ supra note 24 Para 38

²⁰⁵ *Hyrniak*, supra note 24 at para 39

cite the Court of appeal in these circumstances, "...the moving party has failed to establish there is no genuine issue requiring a trial".²⁰⁶

211. Further, the following observations of the Court of Appeal apply in the case at bar: "[d]isputes on material facts, or one depending on issues of credibility, can leave genuine issues requiring trial", and "[s]ometimes the resisting party can succeed by demonstrating that the complexity of the issues makes the case unsuitable for summary disposition, or in other words that there are genuine issues requiring a trial."²⁰⁷
212. The Court of Appeal in *Weir-Jones* also addresses "*Principle of Fairness*" in summary trials in greater detail. In particular, and relevant to the NBC Claim, the Court observed the following:

42 Restrictions on summary disposition are sometimes justified on the basis that summary disposition deprives the plaintiff of "the right to go to trial", or "full access to the civil procedure spectrum". This is essentially a procedural argument about fairness. There is, however, no right to take an unmeritorious claim to trial, a process described in Hryniak v. Mauldin at para 28 as "the most painstaking procedure". All claims are subject to screening at various stages. Claims must disclose a cause of action, or they will be struck: R. 3.68. Plaintiffs must be able to demonstrate sufficient "merit" to avoid summary disposition: R. 7.3. There is no "right" to use the most expensive modality of dispute resolution (i.e., the trial) if these hurdles cannot be overcome.²⁰⁸....

*43 In any event, any "right of the plaintiff to have a trial" is equally offset by the "right of the defendant not to have a trial on an unmeritorious claim". Fairness is a two-way street. Litigation is expensive and distracting, and the costs awarded to the successful party seldom amount to full indemnity. Cost, delay and inequality of arms may mean that the right to adjudicative fairness, justice, and reliability can actually be hindered by a full trial. A defendant who can show that a claim has "no merit" on a summary disposition application should not have to suffer a trial. As noted, *supra* para. 32, the resisting party does not have to prove its own case at this stage, but only demonstrate that the moving party has failed to show there is no genuine issue requiring a trial.*

213. It needs further to be observed that the NBC Claim is a claim under the CCAA for the purpose of the CCAA proceeding, and section 20(1)(a)(iii) of the CCAA relevantly requires that the claim be determined by the Court on summary application. Therefore, if there is doubt as to the ability of the Court to achieve a fair and just adjudication on a summary basis,²⁰⁹ whether it be because of principles of proof, principles of fairness or principles relating to the record, the claim cannot be referred to trial but must be dismissed. It is the submission of the respondents that all of these

²⁰⁶ *Ibid* at para 32

²⁰⁷ *Ibid* at para 35

²⁰⁸ *Citing Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2017 BCCA 324 (B.C. C.A.) at paras. 21, 56, (2017), [2018] 2 W.W.R. 480 (B.C. C.A.), leave to appeal refused SCC #37843 (July 26, 2018) [2018 CarswellBC 2029 (S.C.C.)][BOA TAB 13]

²⁰⁹ For example, *Weir-Jones*, *supra* note 24 at para. 29

factors apply in the case at bar and NBC's application for summary judgement must be dismissed.

B. Fraudulent Misrepresentation/Civil Fraud

214. NBC's pleadings, evidence and submissions fail to definitively identify the cause of action in civil fraud and in particular the required elements for that cause of action, fail to adequately address the facts that must be proven for their claim and fail to provide a sufficient record of evidence such that the judge can be confident that he can fairly resolve the dispute.²¹⁰
215. As referred to above, NBC's written argument, in a somewhat startling but telling approach, relies upon an extract from McDonnell, Monroe, Kerr on the *Law of Fraud and Mistake*, 7th ed. (London: Sweet & Maxwell Limited, 1952) to try and tell the Court that civil fraud is not, in effect, bound to any particular cause of action, in respect of which the elements must be proved, but rather is a general concept of which the torts of civil fraud and fraudulent misrepresentation, here in Canada, is just one example.²¹¹
216. The elements of civil fraud, often referred to as fraudulent misrepresentation and/or the tort of deceit, have been helpfully identified by the Manitoba Court of Appeal *Ultracuts v Magicuts*, 2023 MBCA 71, as follows:
- (i) a representation or statement of fact made by the representor that was false;*
 - (ii) the representor knew that the representation was false or was reckless as to its truth or falsity;*
 - (iii) the false representation was made with the intention that the representee would act upon it;*
 - (iv) the representee relied on the false representation, sometimes stated as the misrepresentation caused (i.e., induced) the representee to act; and*
 - (v) the representee's reliance on the representation caused/resulted in a loss.*²¹²
217. NBC relies upon a small extract from the judgement of Karakatsanis J in the decision of the Supreme Court of Canada *Bruno Appliances* (including text of submissions, and quote from Bruno Appliance):as follows:
157. "Fraud" also sometimes refers to the torts of civil fraud and fraudulent misrepresentation, the elements of which are as follows:
- (1) a false representation made by the defendant; (2) some level of knowledge of the falsehood of the representation on the part of the defendant (whether through

²¹⁰ *Ibid*

²¹¹ NBC submissions, *supra* note 10 at para. 156 and 157,

²¹² *Ultracuts v Magicuts*, 2023 MBCA 71 [*Ultracuts*] at para. 49 [BOA TAB 14]

*knowledge or recklessness); (3) the false representation caused the plaintiff to act; and (4) the plaintiff's actions resulted in a loss.*²¹³

(emphasis added)

218. As explained by the Manitoba Court of Appeal in *Ultracuts v Magicuts* 2023 MBCA 71:

[67] *In my view, the weight of the jurisprudence and the academic commentary supports a finding that the elements of civil fraud include the requirement that the representor must have made the false representation with the intention that the representee would act/rely on it, and I would so find.*"

219. This explanation is consistent with the extract from *Kerr* relied upon by NBC and the observation in Halsbury's that:

[a]n intention to deceive, by knowingly or recklessly making a false representation, provides the essential element of "fraud" in fraudulent misrepresentation.

220. The brevity of the Supreme Court's consideration in *Bruno Appliance* of the elements of civil fraud and the authorities provides support for these analyses.

221. The Ontario Court of Appeal in *Midland Resources Holding Ltd v Shtaif*, 2017 ONCA 320 at para 162, affirmed the five-part test for fraudulent misrepresentation as follows:

[162] *Fraudulent misrepresentation is established where there are the following five elements: (i) a false representation of fact by the defendant to the plaintiff; (ii) knowledge the representation was false, absence of belief in its truth, or recklessness as to its truth; (iii) an intention the plaintiff act in reliance on the representation; (iv) the plaintiff acts on the representation; and (v) the plaintiff suffers a loss in doing so: Amertek Inc. v. Canadian Commercial Corp. (2005), 2005 CanLII 23220 (ON CA), 76 O.R. (3d) 241, [2005] O.J. No. 2789 (C.A.), at para. 63, leave to appeal to S.C.C. refused [2005] S.C.C.A. No. 439.*

222. Leave to appeal to SCC was refused in that case²¹⁴, as it was in the *Amertek* case on which *Midlands* relied.

223. In light of the above, the respondents submit that it is well established on the authorities that an intention on the part of the representor that the representee act in reliance on the false representation, is an essential element of the action in fraudulent misrepresentation in Canadian law, and we will address it accordingly below.

1. Burden of Proof

224. Each of the elements for fraudulent misrepresentation must be proven on a balance of probabilities. Per the Supreme Court of Canada in *Poonian*,²¹⁵ the court cannot take judicial notice of fraudulent misrepresentation, nor can such a claim be simply inferred. Additionally, "a

²¹³ NBC submissions, *supra* note 10 at para. 157, quoting Karatkatsanis J in *Bruno Appliance supra* note at para. 21

²¹⁴ Michael Shtaif, et al. v. Midland Resources Holding Limited, 2019 SCC 37485 [BOA TAB 15]

²¹⁵ *Poonian v. British Columbia (Securities Commission)*, 2024 SCC 28 at para 66 [*Poonian*] [BOA TAB 16]

party cannot simply presume or assume that a claim resulted from a deceitful statement without proving the required elements.”²¹⁶ For example, the Supreme Court of Canada in *Deloitte Restructuring*²¹⁷, the court held that the City of Montreal’s claim for civil fraud failed as:

*“the City considered it sufficient for that purpose to mention that the claim existed, and did not try to prove or even allege any of these elements, presuming or assuming that the VRP claim resulted from fraudulent representations.”*²¹⁸

225. Evidence of each of the elements must be established on a balance of probabilities by the plaintiff in order for such a claim to be found.

2. False Representation or Statement of Fact

226. In respect of the first element of the cause of action for fraudulent misrepresentation, that there was a false representation or statement of fact,²¹⁹ *Ultracuts* considers promises, predictions and opinions as follows:

[53] Generally speaking, “[o]pinions, predictions as to future events and promises are all statements that, as far as their explicit content is concerned, are neither true nor false” (Burns at section 7.18).

[54] Second, an opinion, estimate, prediction or promise that “may convey factual information by implication, which [could open] up the possibility of liability in civil fraud” (Burns at section 7.18). That is, such a statement may constitute a representation if it implies that facts exist that are consistent with it, in which case, it would be treated as a representation of implied fact. (See, for example, *KRM Construction Ltd v British Columbia Railway*, 1982 CarswellBC 257 (CA); and Burns at section 7.19.)

[55] That said, an “opinion about facts that both parties know equally well will not usually be a statement of fact” (MacDougall at section 2.148). That is, if two parties are privy to the same facts underlying the opinion, that opinion will not be based on implied facts known only to the party giving the opinion, so there will be no representation of implied facts. (See also *Williams v Saanich School District No 63*, 1986 CarswellBC 699 (SC), *aff’d* on other grounds, 1987 CarswellBC 146 (CA).) (emphasis added)

227. Also for the purpose of the first element, *Ultracuts* helpfully observes the following factors for consideration and their authorities:

[56] Third, the existence and meaning of a representation should be construed objectively from the perspective of a reasonable recipient of that communication in all of the circumstances of the actual representee. (See *Primus*

²¹⁶ *Ibid*

²¹⁷ *Montréal (City) v. Deloitte Restructuring Inc.*, 2021 SCC 53 [*Deloitte*] [BOA TAB 16]

²¹⁸ *Ibid* at para 26

²¹⁹ Bruno Appliance, *supra* note 22 at [21] and at [18]

Telecommunications Plc v MCI Worldcom International Inc, [2004] EWCA Civ 957 at para 30; and *MacDougall* at section 2.32.)

[57] Fourth, as previously noted, the representation must be false. The onus to prove that falsity is on the plaintiff; there is no onus on the representor to prove that the representation is true. (See *MacDougall* at section 2.65, relying on *Melbourne Banking Corporation v Brougham* (1882), [1881-82] 7 AC 307 (HL (Eng)), as implied in *Queen v Cognos Inc*, [1993] 1 SCR 87 at 109-10.)

[58] Further, the test when determining whether a representation is false is an objective one, by considering the effect of the words on a reasonable person in the circumstances of the representee. (See 2249659 *Ontario Ltd v Sparkasse Siegen*, 2018 ONCA 371 at para 35; see also *Toronto-Dominion Bank v Leigh Instruments Ltd (Trustee of)* (1999), 178 DLR (4th) 634 at para 9 (ON CA), leave to appeal to SCC refused (2000), 188 DLR (4th) vi (note) (SCC); and *Burns* at section 7.32.) (emphasis added)

228. In the case before this court, NBC appears to identify the alleged false representation or representations by the Canadian Hog Farm Entities, Ray Price, Uffelman and Thompson (the “**Sunterra Parties**”) as writing cheques and thereby representing that “*sufficient funds exist to satisfy the cheque despite the representor knowing that this is not the case*”.²²⁰ NBC has failed to establish this component of the test. Specifically, NBC has to show that the specific cheques in issue that led to the account freeze were false. NBC did not put this question to any of the named parties during their cross examination and did not lead any evidence to show that this there were in fact false representations that related to an alleged loss by Compeer that NBC is seeking an indemnity with respect to.
229. NBC allege that the Sunterra Parties attempted to “*cover and conceal*” the “*transactions*” which they call “*fraudulent*”, as referred to in paragraph 94 of the Amended Statement of Claim, but is unclear whether anything there is intended to be pleaded as a false representation for the purpose of the first element, or not. Nor is it explained how any representations that may be referred to in paragraph 94 have a causal connection to injury to the plaintiff which is sought to be alleged.
230. It is the Respondents submission that this first element has not been made out as against any of the Respondents for the following reasons:
- (a) At the time that the cheques were written conditional credit was made available by both NBC and Compeer. Further, there were funds coming into the accounts through regular sources. There is no evidence that the specific cheques which allegedly caused losses to Compeer had insufficient funds in them at the times that the cheques were written. Therefore, there is no evidence that of any actual misrepresentation.

NBC has failed to adduce any expert evidence on this issue. Further, NBC did not even present evidence from the individuals at NBC who had conducted their internal fraud analysis. As confirmed by M. LeBlanc:

²²⁰ Statement of Claim, *supra* note 142 at 90 and 92; NBC submissions, *supra* note 10 at 162

A; LeBlanc - So Mr. Chan's role as well as Mr. Pai's role in situations like this is to pull the appropriate internal experts to help them. A person like Mr. Pai will not do himself the reconciliation of all cheques. That is not part of his task, and that is not his – his main speciality, let's say

Q [Chimuk] – Gotcha. So Pai and Chan are getting others to do the actual reconciliations, and then they're using the data that's compiled from those reconciliations as the basis for their own analysis, correct?

A – That appears correct to me.²²¹

- (b) The only clear misrepresentation pleaded by NBC for the purpose of this cause of action as against each of the Sunterra Parties is that by writing the cheques there were thereby representing that there were sufficient funds available to satisfy the cheques written. Absent the claim for conspiracy, the alleged "Kiting Scheme" cannot be pleaded as a fraudulent misrepresentation because the alleged scheme necessarily involved the participation of at least each of the Canadian Hog Farm Entities and each of the US Hog Farm entities, which explains why NBC have not pleaded the "Kiting Scheme" itself as a fraudulent misrepresentation, other than for the purposes of the unlawful conduct conspiracy allegations, which are dealt with below;
- (c) At all relevant times before on or around February 11, 2025, there were sufficient funds in the accounts of the Canadian Hog Farm Entities and the US Hog Farm Entities, in the form of conditional credit, to cover the amounts written in the cheques, as is evidenced by the fact that none of the cheques written were not rejected for NSF (no sufficient funds) until after that conditional credit was withdrawn by both Compeer and NBC after February 11, 2025. ;
- (d) The fact that sufficient funds existed to satisfy the cheques is not limited to the issue of conditional credit. As confirmed by NBC there is no issue that NBC is fully secured and has not suffered any loss or shortfall. The cumulative assets of Sunterra, even without the conditional credit, were more than enough to ensure that any representations made to NBC vis a vis cheques were accurate as there was indeed sufficient funds;
- (e) To the extent that there were any misrepresentation of fact, which is denied, then these misrepresentations were not with respect to cheques that NBC was depositing as is evidenced by the fact that NBC suffered no losses arising from Sunterra's use of the cheques. As such no fraudulent misrepresentation existed by Sunterra as against NBC;.
- (f) Finally, the existence and meaning of the alleged representations should be construed objectively from the perspective of a reasonable recipient of that communication in all of the circumstances of the actual representee. In the present case, it is clear that the existence and meaning of any representations made by the writing of the cheques in issue to a reasonable person in the shoes of NBC, was that they were to be covered by conditional credit arising from the parallel incoming cheques from the US Hog Farm

²²¹ LeBlanc Cross, *supra* note 1 page 34 lines 17-25 and page 35 lines 1-2

Entities, thereby making use of conditional credit knowingly granted by NBC. In this regard, the circumstances of NBC included the following:

- (i) NBC had actual knowledge of, and had turned its mind to, the practice of the writing of the cheques each day between the Canadian and US Hog Farm Entities;
- (ii) NBC had knowledge of the number of cheques and the value of cheques so written each day, in sums under USD \$1M;
- (iii) NBC had knowledge of the actual revenue and expenditure of the Canadian Hog Farms Entities on an ongoing and monthly basis;
- (iv) having applied their minds to the practice referred to above in 2023, NBC soon after chose to give greater scrutiny to the practices of the Canadian Hog Farm Entities on a continuing basis, through the transfer to SAMU in September 2023; and
- (v) NBC had greater experience, expertise and understanding about the granting of conditional credit through the “floats”, the number of days that cheques took to clear, the operations of its clearing house bank and of the clearing house banks generally, including that of Compeer, from its business in facilitating international cross-border transactions, and therefore of how much conditional credit might be created by the practice referred to above.

231. There is one other “representation”, or “representations”, alleged to have been made by the Canadian Hog Farm Entities. NBC says that these were representations made by virtue of the *Bills of Exchange Act*. NBC characterises the alleged representations as “implicit representations”. NBC has given no authority for saying that a representation can arise for the purposes of fraudulent misrepresentation from the provision of a statute. In our respective submission, this is a bizarre and anomalous representation to allege for the tort of fraudulent misrepresentation. For instance, questions of honest belief as to the meaning and truth of a statement can have no relevance when alleging a statement arising by virtue of the provisions of a statute, particularly in circumstances where it has not been alleged that the representors had any knowledge or awareness of the particular provisions of the statute from the which the alleged representations are supposed to arise. The fact of these representations for the purpose of civil fraud have not been proved by NBC. Nor was the statute put to any of the witnesses upon cross-examination and therefore NBC are precluded from making this submission pursuant to *Brown vs. Dunn*.

3. Representor Knew That the Representation Was False or Was Reckless as to Its Truth or Falsity

232. For the second element, that the representor knew that the representation was false or was reckless as to its truth or falsity,²²² the authorities as outlined in *Ultracuts* establish the following relevant considerations:

(a) if the representor had an honest belief in the truthfulness of the statement, then it would not be fraudulent, even if the statement was, in fact, false;²²³

(b) the representor's honest belief in the truthfulness of the statement should not be judged objectively, on the basis of whether it was reasonable, but subjectively, from the representor's point of view;²²⁴

(c) a belief is a state of mind and direct evidence of a person's beliefs is not often available, which raises the question of how to determine whether a belief was honestly held. A person's belief, like knowledge or intention, can be determined by inference from the surrounding circumstances. A court should consider the context and surrounding circumstances in which the representation was made. The more unreasonable the belief, when considered in the context and circumstances, the less likely it may be for a court to find that it was honestly held. (See *Derry* at pp 369, 375-76; *Burns* at section 7.24.) However, the absence of reasonable grounds for a belief does not establish that there was, at law, no honest belief.²²⁵

(d) if a representation is capable of different meanings, a court must determine whether the representor honestly believed that the representation was true in the sense in which he or she understood it when making it, even if that understanding was objectively wrong;²²⁶

(e) while the representor has to know that the representation is false, the motive for making the false statement is irrelevant. As stated in *Derry*, "if fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the [representee]" (at p 374).²²⁷

(emphasis added)

233. It is clear from the above analysis, that the alleged misrepresentation is capable of different meanings: i.e. NBC say in effect that it includes funds on deposit, and the Sunterra Parties say that it includes credit and conditional credit which they believed that NBC were aware of and agreed to give. In these circumstances, the court must determine whether the representor honestly believed that the representation was true in the sense in which he or she understood it

²²² *Bruno Appliance* *supra* note 22 at para 18 and 21 *Derry and others v Peek* (1889), [1886-90] All ER Rep 1; [1889] UKHL 1 at 374 (HL (Eng)). [*Derry*]at p. 374

²²³ *Ultracuts* *supra* note 212 at para. 59 citing *Derry*, *ibid* at p. 370

²²⁴ *Ibid* at para. 60 citing *Derry* at p. 358, 363, 370

²²⁵ *Ibid* at para 62

²²⁶ *Ibid* at 63 citing *Burns*, *supra* note 200 at section 7.24; and *Hoyano* at p 481

²²⁷ *Ultracuts*, *supra* note 212, *ibid* at para. 63

when making it, even if that understanding was objectively wrong. On the facts established by the evidence, it is clear, or in the alternative NBC has failed to prove, that the Sunterra Parties did not honestly believe the truth of any representations made by the writing of the cheques in the sense in which they understood it, even if NBC can establish that that meaning was objectively wrong.

234. Specifically, the evidence of Sunterra was that at all times the various entities had the requisite funds to pay. Indeed, these representations were not reckless – they were true as NBC has suffered no losses.
235. Once again – there were no specific examples ever put to any of the witnesses wherein it was suggested that that knowingly false representations were made on a given transaction.
236. Further, the Court must consider the position of each of the Sunterra Parties which NBC include within their allegation of fraudulent misrepresentation.
237. In addressing its position with respect to the position of the Individual Respondents, NBC say that: “[i]n seeking to attach liability to the personal Respondents, NBC does not rely upon the doctrine of “piercing the corporate veil”.”²²⁸ They say that they instead rely upon concurrent liability. We refer to the passage from *Swanby v Tru-Square Homes Ltd*, , quoted in the NBC written argument.²²⁹ In particular, we note that following passage:

When an individual is found to be concurrently liable for a tort committed in the name of a corporation, this is not truly an instance of “lifting the corporate veil”. The liability of the individual is based on his or her breach of an individual duty owed in tort, not by lifting the corporate veil to impose the corporation’s duty or liability on the individual.

(emphasis added)

238. The specific torts alleged as having been committed by the Individual Respondents will be dealt within further detail below, but for present purposes we say the following:
- (a) The first individual tort alleged is for inducing the Canadian Hog Farm Entities to commit breaches of the Business Account Agreements.²³⁰ This is not an allegation of fraudulent misrepresentation..
 - (b) The second tort alleged is a breach of fiduciary or statutory duty, however the duties alleged are duties owed to the Canadian Hog Farm Entities and not to NBC.²³¹
 - (c) The third tort alleged is knowing assistance by each of the Individual Respondents in breaches of statutory or fiduciary duties owed by each of them to the Canadian Hog Farm Entities.²³² Again, this does not relate to duties owed to NBC..

²²⁸ NBC submissions, *supra* note 10

²²⁹ *Ibid* at para 228, quoting *Swanby v Tru-Square Homes Ltd*, 2023 ABCA 224 [BOA TAB 18] at para 36.

²³⁰ NBC submissions *supra* note 10 at para 230 - 235

²³¹ NBC submissions *supra* note 10 at para 236 to 242

²³² *Ibid* at para 243 to 250

239. To otherwise pursue the allegations of fraudulent representations and/or wrongful conduct conspiracy as against the Individual Respondents, NBC would have to establish grounds for piercing of the corporate veil. The Individual Respondent's conduct as alleged and on the evidence was all in relation to the affairs of the Canadian Hog Farm Entities and US Hog Farm Entities. Per the extract quoted in the NBC submissions from *Swanby*, as referred to above:

[48] Liability in tort is primarily personal; a tort arises when the tortfeasor breaches a duty imposed on him or her by the law of tort. Corporations are considered to be separate legal persons, with their own rights and obligations; their shareholders and directors are not personally liable for the corporation's obligations. Corporations, however, can only act through human agents, and any corporate tort generally involves concurrent human actions. There is thus a conflict between these two basic principles: personal liability in tort, and the separate legal personality of corporations.

[49] This engages two separate but overlapping concepts. There are some occasions where the law will "lift the corporate veil", and find the directing minds behind the corporation responsible for the liabilities and obligations of the corporation. These situations are, however, an exception to the general rule that there is no personal liability for corporate obligations.

240. NBC has not pressed its reference in its prayer for relief to seeking a declaration that NBC is entitled to pierce the corporate veil of the Canadian Hog Farm Entities to enforce their claims and seek damages against the Individual Respondents, nor has it actually pleaded that claim. Further, NBC has expressly said in its written argument that it is not pursuing a claim to piece or lift the corporate veil. We nevertheless answer it briefly here and reserve the rights of the Individual Respondents to respond further should NBC change their position and the Court accede to their request. The Individual Respondents position is that the corporate veil of the Canadian Hog Farm Entities has not been breached in relations to any of their conduct as alleged for the following reasons:

- (a) any such actions and conduct were not tortious and identified no separate identity of interest from that of the corporations so as to make the allegedly impugned actions or conduct their own;²³³
- (b) neither the Canadian Hog Farm Entities nor the US Hog Farm Entities were dominated and controlled and being used by Ray Price, Uffelman and Thompson or any of them as a shield for fraudulent or improper conduct²³⁴; and
- (c) there is no factual underpinning pleaded by NBC to support allegations that any of Ray Price, Uffelman and Thompson acted outside of their capacity as officers, directors or employees of the relevant entities, there was no separate identity of interest and the none of the actions or conduct alleged were carried out for the benefit of any of the Individual Respondents²³⁵.

²³³ *Peoples Department Stores Inc. (Trustee of) v. Wise*, 2004 SCC 6 [BOA TAB 36]

²³⁴ *Swanby*, *supra* note 229

²³⁵ *Peoples*, *supra* note 233 at para 46

4. False Representation Was Made with the Intention That the Representee Would Act Upon It

241. *Ultracuts* cites multiple authorities for this element at paragraphs 64 and 65, and then addresses the authority of *Bruno Appliance*. In elucidating of the requirements of this element, *Ultracuts* sets out the following:

[68] *Proving intention, like proving knowledge or belief, can be difficult because it is a state of mind, and, unless the representor admits to having a particular state of mind, it can only be proven by inference from the surrounding circumstances. This starts with the basic legal premise that the law infers that a person intends the natural consequences of his actions, often called a common sense inference (the common sense inference). (See Burns at section 7.34; Hoyano at p 485; Jago v Virden Credit Union Ltd, 1990 CarswellMan 392 (QB) at para 30, aff'd 1993 CarswellMan 411 at para 13 (CA).)*

[69] *Once it is proven that a representor knowingly made a false representation to the representee about a material fact, it would be open to the court to infer that the representor intended the natural consequences of making that statement, that is, to draw the common sense inference. Here, the common sense inference would be that the representor intended that the representee would rely on the representation.*

[70] *However, as with any inference, before drawing the common sense inference, it is important to consider the specific circumstances in which the representation was made and the relationship between the parties. Considered in context, a judge may conclude that reliance on the representation, although a common sense inference, was not, in fact, intended.” (emphasis added)*

242. For example, in *Apotex Inc. v. Sanofi-Aventis*,²³⁶ the court found that in the case of an adversarial contractual negotiation, “*parties engaged in an adversarial situation cannot be expected to know or foresee that their representations will be relied upon blindly by their opponent, especially on matters of law or construction of contract.*”
243. For the present matter, as for the case in *Apotex*, it was not believed by the Respondents or any of them that NBC would blindly act upon the representations made in the writing of the cheques. The Respondents understood NBC to have the requisite knowledge of the cheques being written, the fact that conditional credit was being created thereby and also that NBC had in depth knowledge of their business, including the value of the commercial activities of the companies, and of the system and mechanics for the settling of cheques and the interactions of the clearing banks between each other, if applicable, and the Banks. The Respondents therefore did not foresee that the writing of the cheques in issue would be relied upon blindly by NBC on such matters which were entirely within NBC actual knowledge and expertise.

²³⁶ 2010 FC 182 [BOA TAB 20]

5. Representee Relied on the False Representation, Sometimes Stated as the False Representation Caused (i.e. Induced) the Representee to Act²³⁷

244. Reliance by the representee on a false representation, that is, that the representation caused or induced the representee to act, is the fourth element, and “requires proof that the representee, in fact, relied on the false representation”.²³⁸ “Whether the representee relied on the representation is “a question of fact to be inferred from all the circumstances of the case and [the] evidence at the trial””.²³⁹
245. The question of reliance is to be determined on a subjective test,²⁴⁰ and the Court must ask whether the defendant’s misrepresentation was material to the plaintiff and thereby induced them to act.²⁴¹ The Alberta Court of Appeal in *L.K. Oil* references multiple authorities in establishing that proof that the representation actually caused the plaintiff to act is essential.²⁴² It is not sufficient to draw an inference of inducement or reliance on the basis that there was a material representation made with the intention to induce a person to act.²⁴³ Per *L.K. Oil*:²⁴⁴

... the approach taken by Canadian courts is to consider all of the relevant facts of a case in order to decide whether a statement was relied upon. Where nothing else but the representation could have induced the contract, then a logical inference is that the representation did in fact induce the contract. Where other factors could be operative, the evidence must be considered to determine which factors were relied upon. Lord Blackburn noted in *Smith v. Chadwick*, the weight of the inference as evidence must “greatly depend upon the degree to which the action of the plaintiff was likely, and on the absence of all other grounds on which the plaintiff might act.

246. Similarly, the Manitoba Court of Appeal in *Ultracuts*, concludes the following:

[36] In summary, the case law does not support the Appellant's argument that if the Trial Judge had found the statements to be material, he would necessarily have found them to have been relied on. The question of reliance is a question of fact to be inferred from all of the circumstances of the case and all of the evidence adduced at trial.

²³⁷ *Ultracuts supra* note 212 at para. 73 – 83

²³⁸ *Ultracuts supra* note 212 at para. 73, citing *Parna supra* note at pp 316-17; *Kelemen v El-Homeira*, 1999 ABCA 315 at paras 9-10 [*Kelemen*], leave to appeal to SCC refused [BOA at TAB .; *Bruno Appliance* at para 19; *York University v. Markicevic*, 2018 ONCA 893 at para 21 [BOA TAB 21]; and *Chamberlain v. Meierhans*, 2003 ONSC 5515, at pp 851, 874-75 [BOA TAB 22]

²³⁹ *Ultracuts supra* note 212 at para. 75, citing *XY, LLC v Zhu*, 2013 BCCA 352 at paras 24-27 [BOA TAB 24] , leave to appeal to SCC refused,

²⁴⁰ *Kelemen supra* note 238 para. 9 and 10, per Halsbury’s at HMF-28 Requisite elements of the tort of fraudulent misrepresentation

²⁴¹ *Kelemen supra* note 238 citing Clerk & Lindsell on Torts, 17th ed. (London: Sweet & Maxwell, 1995) at 732, per Halsbury’s Laws of Canada - Misrepresentation and Fraud (2023 Reissue) “ Fraudulent Misrepresentation Founded in Tort: The Tort of Fraudulent Misrepresentation, : Requisite Elements of the Tort” (IV.1(2)), HMF-28 “Requisite elements of the tort of fraudulent misrepresentation” [HMF-28] [BOA TAB 60]

²⁴² *L.K. Oil & Gas Ltd. v. Canaland Energy Corporation* 60 DLR (4th) 490 at para. 25 [*LK Oil*] [BOA TAB 25]

²⁴³ *Ibid* at para 27 ff

²⁴⁴ *Ibid* at para 31

247. The question whether a representation was relied upon is also evaluated by considering the knowledge, experience, and expertise of the representee. In *Parna*, the Supreme Court of Canada held that an individual could not have been said to have been induced into an agreement by another party's low estimate of value on a property, as the purchaser was "a *shrewd and experienced apartment house operator*" and was aware of the state of the building upon purchase, and therefor "could not have been deceived" by the low estimate offered by the seller.

248. The Court of Appeal in *Ultracuts* noted that:

[t]here are a number of circumstances that may indicate that it is unlikely that the representee acted on the false representation, such as:

- where the representee made his own investigations or inquiries into the matter (see Amertek Inc et al v Canadian Commercial Corp et al (2005), 256 DLR (4th) 287 (ON CA), leave to appeal to SCC refused, 31141 (16 February 2006); Abdossamadi v TD Insurance Direct Agency Inc, 2016 ONSC 1363; and 1348623 Alberta Ltd v Choubal, 2016 SKQB 129);

...

- where it can be shown that the representee knew that the misrepresentation was false, or it did not believe the truth of the representation (see Parna; and Brent v Slegg Construction Materials Ltd, 2007 BCSC 661);

...

(emphasis added)

249. Having regard to the above authorities it is clear that NBC has not satisfied the burden of proof upon it to establish that NBC relied on the alleged representations said to have been made by the writing of the cheques as alleged. It is a question of fact to be inferred from all the circumstances of the case and evidence, on a subjective test. Common sense inference can be drawn by reference to the circumstances by where other factors could be operative, the evidence must be considered to determine which factors were relied upon. knowledge, experience, and expertise of the representee is relevant, as are the representee's own investigations or inquiries into the matter.

250. NBC has failed to adduce a record of evidence in respect to this element, without limitation, of its claim for fraudulent misrepresentation. Dean Chan's evidence is that SAMU took over looking after the Sunterra customers when they were deemed to be a higher risk client. On his evidence:

"SAMU is the division within NBC that is responsible for managing borrowers who have breached covenants in their lending and other agreements with NBC. ...

More particularly, when the Canadian Sunterra Entities were referred to SAMU, they had breached certain financial covenants in their loan agreement which, in turn, caused NBC concern with respect to their ability to perform their obligations to NBC. The matter of the 2023 financial covenant breach was resolved by NBC waiving such breach, but the overall concerns remained such that the Canadian Sunterra Entities remained managed by SAMU.

251. It is also Dean Chan's evidence that:

At the time the Canadian Sunterra Entities (as defined below) first became involved with SAMU in September 2023, I was the head of SAMU with CWB. I assigned day to day conduct of the file to one of my direct reports, Mr. Rodney Randal, who reported to me with respect to the credit from time to time.

252. However, in respect of the period from September 2023 to February 14, 2025, Dean Chan gives no evidence as to the management of the file and in particular as to whether NBC actually relied upon or were induced by the alleged false representation to act. In addition, NBC has failed to produce Rodney Roandell as witness at all and specifically in relation to any evidence that NBC relied of the alleged false representation. All of this must be considered in the context of NBC's attention being drawn to the cheque writing practice of which they now complain by NBC's own clearing bank and through NBC personnel, the heightened risk that the Canadian Hog Farm Entities were deemed to pose, the regular scrutiny of the finances, including revenues and expenses of the entities, annual reviews of the customers and the credit and loan arrangements, as well as assets and liabilities.
253. The facts on the evidentiary record also show a long-standing relationship between NBC (CWB) and the Sunterra Group and on a commonsense inference, a desire on their part to keep the business of the client.
254. NBC tried to assert in the affidavit of Raymond Pai #2, that the "*Kiting Scheme*" as alleged, "*included the following commonalities of fraud*":
- (a) the vast majority of issued cheques were in an amount ranging from \$800,000 to \$999,000 and all were less than the \$1 million threshold (including after conversion of any USD cheques to CAD), over which threshold such cheques would undergo additional scrutiny by applicable clearing banks and would be subject to a further hold, with respect to transactions taking place in the NBC Accounts;*
- (b) the transactions were all undertaken by way of physical cheques, rather than by EFT or wire transfer, which is far more convenient and common, especially in cross-border related entity transactions; and*
- (c) the cheques had no memo line or reference to any existing invoice or ledger.*²⁴⁵
255. Aside from the fact that Pai was not set up as an expert witness and this testimony is in the nature of opinion evidence, Pai admitted under cross examination that none of these factors would be considered indications of fraud.²⁴⁶
256. NBC did not rely upon the alleged false representations and no evidence was put forward to show that they did.
257. Fo all of these reasons, it is clear that NBC have failed to prove reliance by NBC and that there is no genuine issue for trial.

²⁴⁵ Affidavit of Raymond Pai #2 *supra* note 38 at para 59.

²⁴⁶ *Supra* note 116

6. The Representee's Actions [per Fourth Element] Resulted in a Loss

258. The Supreme Court of Canada has made it clear that in cases of civil fraud, proof of loss is required:

"[a]s Taschereau C.J. held in Angers v. Mutual Reserve Fund Life Assn. (1904), 35 S.C.R. 330 "fraud without damage gives ... no cause of action" (p. 340)".²⁴⁷

7. In the case at bar no actual loss or damages have been suffered by NBC. They merely seek a declaration in relation to loss and damages that may arise from a speculative and contingent claim from Compeer as against NBC. The clear authority on the case law is loss must be established to establish a cause of action in civil fraud. There can be no test of causation of the alleged loss in the circumstances and NBC's allegation of civil fraud as against all of the Sunterra Parties must fail.Burden of Proof

259. Each of the elements for fraudulent misrepresentation must be proven on a balance of probabilities. Per the Supreme Court of Canada in *Poonian*,²⁴⁸ the court cannot take judicial notice of fraudulent misrepresentation, nor can such a claim be simply inferred. Additionally, "a party cannot simply presume or assume that a claim resulted from a deceitful statement without proving the required elements."²⁴⁹ For example, the Supreme Court of Canada in *Deloitte Restructuring*²⁵⁰, the court held that the City of Montreal's claim for civil fraud failed as:

"the City considered it sufficient for that purpose to mention that the claim existed, and did not try to prove or even allege any of these elements, presuming or assuming that the VRP claim resulted from fraudulent representations."²⁵¹

Evidence of each of the elements must be established on a balance of probabilities by the plaintiff in order for such a claim to be found. [Add authority ref/citation for this statement?].

8. NBC's submission on the law of civil fraud

260. NBC asserts that the record provides sufficient grounds to establish civil fraud, but seems to suggest that fraud is a somewhat amorphous creature that is not defined by the tort of civil fraud, nor indeed to any other tort or action. In the three short paragraphs that NBC takes to address the law of civil fraud, it takes an extract from an Alberta Court of Kings Bench case, itself referencing *Kerr in the Law of Fraud and Mistake*, and describing some general notions of infinite variety of the actions of "man's invention" that can constitute fraud. NBC then goes on to suggest that, "[f]raud .. sometimes refers to the torts of civil fraud and fraudulent misrepresentation", before identifying the elements as set out in *Bruno Appliance*.

²⁴⁷ Bruno Appliance *supra* note 22 at para 20.

²⁴⁸ *Poonian*, *supra* note 215 at para 66

²⁴⁹ *Ibid*

²⁵⁰ *Deloitte*, *supra* note 217

²⁵¹ *Ibid* at para 26

261. The courts do not make finding of “fraud” per se, without tying those findings to particular causes of action. In *Bruno Appliance*, allegations of fraud were addressed in the context of a cause of action for civil conspiracy. The court found that the predominant purpose of the actions of the alleged conspirators was to injure Stampeder by “*interfering with its ability to raise capital on the public market, and thereby force Stampeder to make a deal with Colborne [another party]*”.²⁵² The question of whether or not the conduct of the conspirators was lawful or unlawful did not arise because of the predominant purpose being to injure Stampeder.
262. This is not the case in the present matter, where it is not alleged that the predominant purpose of any of the respondents was to injure NBC. Accordingly, unlawful conduct for must here be proven as one of the elements of conspiracy if that allegation is to stand. It is in this regard., that NBC must prove that its allegations hang upon, and satisfy the test for civil fraud, otherwise know as fraudulent misrepresentation.
263. NBC then goes on to state that: “*Courts have consistently held that cheque kiting, wherein an individual knowingly writes a cheque with insufficient funds to cover the funds withdrawn, is an inherently fraudulent activity*”, and in this regard relies upon *Royal Bank of Canada v. Hejna*²⁵³, and *Location Bristar Idea lease Inc. (Syndic de)*²⁵⁴. Those cases and the paragraphs thereof which are relied upon by NBC, simply do not support this statement.
264. The court in *Hejna* carried out a detailed analysis of the facts and evidence to establish the elements of fraudulent misrepresentation. We address some of these below, together with the distinguishing factors from the present case, and then include the concluding text of the judgment of which NBC rely.
265. In *Hejna*, it was established in the evidence that daily reports only came to the attention of the bank’s representative, “*...if there was no money in the account on which a cheque or cheques had been written, and all that she would see is a net result showing a shortfall in any given account. Her evidence is clear that she did not have the means to examine the daily cheque-writing activity carried on by each of the Hejna Group entities within their account and the defendant’s personal account*”²⁵⁵. That is quite different to the facts in this case where NBC not only regularly considered the transactions in the accounts of the Canadian Hog Farm Entities, but also their monthly reporting of expenditure and revenue and their financial statements and other relevant information for the purpose of annual review of the accounts of those entities, and further actually turned their minds to “... the sequential high value intercompany cheques ...” at the request of their clearing house bank, and soon after transferred the Sunterra customers to their SAMU branch as a high risk customer, to be more closely tracked and scrutinised.
266. *Hejna* must also be distinguished on the basis of the personal benefit to the individual actor, which was obtained by the cheque writing activities in that case: “*...once the restrictions had been placed on the accounts, effectively breaking the cycle of irregular transactions, the RBC*

²⁵² *Bruno Appliance*, supra note 22

²⁵³ *Hejna* 2013 ONSC 1719 (CanLII) at paras. 86-92 [BOA TAB 26]

²⁵⁴ 2012 QCCS 211 (CanLII) at paras. 3, 5, 7-9 [BOA TAB 44] [*Location Bristar*] [BOA TAB 27]

²⁵⁵ *Ibid* at para. 21

accounts were all significantly overdrawn. The defendant's personal account was overdrawn in the amount of \$989,323.64 as of November 22, 2006."²⁵⁶

267. The Court in *Hejna* also identified "*gross weaknesses in the defendant's evidence*" and the wording of forbearance agreements in which "*contained contain clear admissions that the overdrafts were unpermitted excesses over agreed credit limits. This wording is in direct contradiction to the position taken by the defendant in this action*"²⁵⁷ (emphasis added). Further, the Court found that it was proven, "...that at no time prior to November 2006 was it [the bank] aware of or prepared to permit the defendant to access additional funds beyond his approved credit facilities".²⁵⁸ Again, this is in stark contrast to the present case. The weaknesses in the defendant's evidence in *Hejna* was tied to the particular circumstances of that case and NBC has neither identified nor proven such weaknesses in the respondents' evidence in this case, but to the country relies upon the testimony given by the respondents. Further, what NBC seeks to rely upon in the present case are admissions as to the daily practice of the writing of cheques between the Canadian and US Hog Farms Entities, with the understanding that some conditional credit was being used, but with the belief that it was being used with the oversight and consent of both of the Banks.
268. There are other distinguishing factors that can be identified between *Hejna* and the NBC claim²⁵⁹, but one in particular is NBC's own evidence which purports to tell the court that the creation of large sums of conditional credit by the daily cheque writing activities is obvious from a simple comparison of daily transactions in and out of the Canadian Hog Farm Entity accounts (as scrutinised by NBC from at least July 2023) to reported revenue and expenses (as reported and considered monthly, and as part of annual reviews). There is no mention of the need for an expert or a forensic accounting department to identify the alleged activity, save perhaps for SAMU who were in fact scrutinising the activities of the Canadian Hog Farm Entities from soon after the clearing bank's enquiries in July 2023. By comparison, in *Hejna* the court found that "...it took the forensic accounting department significant work to trace and document the account activity".²⁶⁰
269. The court concludes its assessment of the allegations of fraud, in the context of considering requested declarations under section 178 of the BIA, as follows:

90 RBC seeks to have the judgment declared to be a judgment in fraud in order that it will survive any discharge from bankruptcy. In this case the allegations of fraud by way of cheque kiting have been pled with particularity and have been strictly proved. As set out in *McKee, Re* (1997), 47 C.B.R. (3d) 70 (Alta. Q.B.) at paras. 34-39, the test under s. 178(1)(e) is whether the bankrupt has been deceitful. Quoting from *Peek v. Derry* (1889), 14 A.C. 337 (U.K. H.L.), Master Funduk summarized the law by stating that to make out deceit, there must be proof of fraud, which is proved when it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it to be true or false. To

²⁵⁶ *Hejna*, *supra* note 253 at para 22(viii), 50 and 201

²⁵⁷ *Ibid* at para 55

²⁵⁸ *Ibid* at para 58

²⁵⁹ *Ibid* at para 60-61

²⁶⁰ *Ibid* at para 63

prevent a false statement from being fraudulent, there must always be an honest belief in its truth.

91 *As set out under the Analysis section of these Reasons, this court has found that the defendant could not have held an honest belief that he was acting without intent to defraud. Any explanation given by him by way of justification for obtaining over \$6 million in unauthorized credit does not stand up under any scrutiny. I find that the defendant was deceitful in advising RBC that he was undertaking transactions through the ATM machines for legitimate business activities, in transferring funds to his personal account, and in undertaking transactions in a way that created an artificial float that allowed his conduct to go undetected by RBC, and that by doing so he obtained property in the form of currency to which he was not entitled. It is telling that although he admits to owing the money to RBC, he has provided no evidence of repayment of any portion of it, or even of attempts to do so.*

270. In summary, *Hejna* was decided on its own facts and evidence.

271. To conclude on the law of civil fraud, Canadian authorities, including those cited above, are abundantly clear that the burden of proof is on the plaintiff in any allegations of civil fraud to establish each of the elements of the cause of action. To suggest otherwise is to suggest that the courts have developed a separate legal test for allegations of “cheque kiting”. If inferences are to be drawn from certain facts to establish elements such as honesty of belief, representor’s intention and representee’s reliance, in particular, such an approach must be conducted carefully with regard to all of the circumstances and context, facts and evidence, including the knowledge, understanding and scrutiny by NBC, as outlined above, and in accordance with the subjective tests as established by the courts.

C. Conspiracy

272. NBC plead an unlawful means conspiracy as between Sunterra Canada, Sunwold Canada, the US Sunterra Entities, Ray Price, Uffelman, and Thompson (the “**Sunterra Parties**”). Specifically, they plead that the Sunterra Parties acted in concert with a common design in pursuing the “Kiting Scheme” with the intention of inducing NBC to provide conditional credit and advance funds, based on false and misleading representations, while knowing that there was not sufficient cash to honour the face value of the cheques drawn in furtherance of the unlawful conspiracy.

273. The Claim in conspiracy is denied by the respondents.

274. The seminal case of unlawful conduct conspiracy is the decision of the Supreme Court of Canada in *Canada Cement Lafarge Ltd. v. B.C. Lightweight Aggregate Ltd.*²⁶¹ The claim for unlawful means conspiracy requires NBC to prove that:

- (a) two or more of the Sunterra Parties engaged together in conduct, acting in concert, by agreement or with a common design²⁶²;

²⁶¹ *Canada Cement Lafarge Ltd. v. B.C. Lightweight Aggregate Ltd.*, [1983] S.C.J. No. 33, 145 D.L.R. (3d) 385 (S.C.C.), at pg 471 to 472, 475 (causal connection) [Canada Cement] [BOA TAB 28]

²⁶² *Agribrands Purina Canada Inc. v. Kasamekas*, 2011 ONCA 460 [Agribrands] [BOA TAB 29] at para 26

- (b) the conduct was unlawful;
- (c) the conduct was directed towards NBC;
- (d) the Sunterra Parties knew that, in the circumstances, injury to NBC was likely to result from the conduct;
- (e) the Conduct by the Sunterra Parties causes injury to NBC, resulting in the loss which is claimed.²⁶³

275. It requires concerted action taken pursuant to an actual agreement between each of the alleged co-conspirators.²⁶⁴ Further, however, to maintain an action for damages, actual pecuniary loss caused by the conspiracy must be established.²⁶⁵

276. It is a defence if the loss suffered by the claimant was occasioned by its voluntary participation in the unlawful conduct of which the claimant now makes complaint.²⁶⁶ In other words, if the loss arises from NBC's voluntary conduct NBC has no claim. Because NBC's claim is framed in indemnity that means that in order for there to be a claim as against Sunterra there would first have to be a valid claim as against NBC. Such a claim as against NBC would have to be based on NBC's voluntary conduct and as such a claim over for indemnity would be precluded.

277. Halsbury's summarises the case law respect of the agreement between the parties as follows:

Knowledge of a conspiracy will not result in liability, nor will a common intention between two or more persons,⁴²⁶⁷ nor will a deemed or constructive agreement.⁵²⁶⁸ There must be an actual agreement between the parties, though it does not necessarily have to take the form of a contract.⁶²⁶⁹ There may be such an agreement between corporations, or between a corporation and its directors.⁷

278. In *Polimeni v. Danzinger*,²⁷⁰ The Manitoba court addressed the need to establish that the parties had come to an agreement, as follows:

66 While there may be some differences in the factual situations giving rise to the tort of conspiracy between the law of England and that of Canada, both authors [see below] are in agreement that an essential element for liability is that there be an agreement between the alleged conspirators.

²⁶³ *Canada Cement*, supra note 261 per Agribands supra note 262 at para 24, 25 and 26

²⁶⁴ *Mraiche Investment Corp. v. McLennan Ross LLP*, [2012] A.J. No. 285, citing *Canada Cement*, adopting the statement in *Lonrho Ltd. v. Shell Petroleum Co. Ltd.*, [1982] AC 173, [1981] 2 AER 456 [BOA TAB 30]

²⁶⁵ *Canada Cement*, supra note 261 at pg 472; *Brideau v. Boucher*, [1994] N.B.J. No. 544, [BOA TAB 5]; *HSBC Bank Canada v. Fuss*, 2013 ABCA 235 at para 35 [BOA TAB 34], citing Agribands, supra note at para 26

²⁶⁶ *Canada Cement*, supra note 262 at pg 475 - 479

²⁶⁷ Citing *Posluns v. Toronto Stock Exchange & Gardiner*, [1964] O.J. No. 792, 46 C. (BOA TAB 31); *Maguire v. Calgary*, [1983] A.J. No. 859 [BOA TAB 33],

²⁶⁸ Citing *Mraiche* supra note 264

²⁶⁹ Citing *Polimeni v. Danzinger*, [1995] M.J. No. 445, [BOA TAB 32]

²⁷⁰ *Ibid*

67 *Fridman states this requirement as follows (at p. 267):*

An actionable conspiracy will not arise unless and until there is an agreement between two or more persons to act unlawfully or to injure another. Participation is the essence of conspiracy. Mere knowledge that a conspiracy exists, or acquiescence in the agreement, will not suffice. Hence, a common intention among several persons does not constitute an agreement that amounts to a conspiracy. (any more than correspondence between two people that indicates they both wish to contract about the same subject-matter, without such correspondence taking the form of an offer and acceptance, will constitute a contract). ...

68 *Clerk and Lindsell state this requirement as follows (at p. 873):*

The tort requires an agreement, combination, understanding, or concert to injure, involving two or more persons. ...

And at p. 874:

... there must be a combination; lack of overt acts or an uncommunicated intention to join a conspiracy may show there has not been an effective combination.

And at p. 875:

... The question is whether a particular defendant, having regard to his knowledge, utterances and actions, was sufficiently a party to the combination and the common design. In the normal case the issue of combination will involve only a question of fact. ...

279. The Alberta court in *Mraiche* states that: "[t]he artificial imposition of a deemed agreement arising from a purely constructively determined 'ought to know' state of mind would make this tort so elastic as to make it mere negligence without proximity, privity, or fiduciary duty." It goes on to quote the reasons of the Court of Appeal in *Maguire v Calgary (City)* which it states:

*11 The wording "concerted action taken pursuant to agreement" was used by Lord Diplock in *Lonrho et al. v. Shell Petroleum Co. et al.*, [1981] 2 All E.R. 456, at 463.*

*12 In order to be found to be a party to a conspiracy one must know the facts of the alleged agreement or combination and intend to be a party to the "combining". This principle was adopted by the English Court of Appeal in *Belmont Finance Corp. v. Williams Furniture et al.* (No. 2), [1980] 1 All E.R. 393, wherein both Buckley, L.J., and Waller, L.J., referred to *Churchill v. Walton*, [1967] 2 A.C. 224, approving the words of Viscount Dilhorne at p. 237:*

... I would say that mens rea is only an essential ingredient in conspiracy in so far as there must be an intention to be a party to an agreement to do an unlawful act; that knowledge of the law on the part of the accused is immaterial and that knowledge of the facts is only material in so far as such knowledge throws a light on what was agreed.

280. NBC in its submissions rely upon *HSBC Bank Canada v Fuss* and *Agribrands*. The Alberta Court of Appeal in *HSBC Bank Canada* held that for the tort of unlawful conduct conspiracy:

[27] The defendants must act in combination, that is, in concert, by agreement or with a common design: Agribrands at para 26. They must know the facts of the alleged agreement and intend to be a party to the combining:²⁷¹... Often, direct evidence of the agreement is not available and resort must be had to circumstantial. The requirement of unlawful conduct unlawful conduct and conspiracy, the Court in Agribrands explained the following:

[27] ...Civil conspiracy cannot be established if only one conspirator acts unlawfully.

*[28] What, then, are the requirements for unlawful conduct for the purposes of this tort? Most obviously, it must be unlawful conduct by each conspirator: see *Bank of Montreal v. Tortora*, 2010 BCCA 139 (CanLII), [2010] B.C.J. No. 466, 3 B.C.L.R. (5th) 39 (C.A.). There is no basis for finding an individual liable for unlawful conduct conspiracy if his or her conduct is lawful or, alternatively, if he or she is the only one of those acting in concert to act unlawfully. The tort is designed to catch unlawful conduct done in concert, not to turn lawful conduct into tortious conduct. The trial judge applied this requirement and found that each of the appellants had committed an unlawful act.*

281. There are no facts before the court, and no attempt by NBC to put forward facts and evidence of an actual agreement by any of the Respondents to work together to carry out the alleged “Kiting Scheme, which is of course denied. There is at best mere knowledge of the facts being undertaken, for Uffelman and Thomson’s part on the direction of Ray Price. There is no evidence that the Individual Respondents, and through them the Canadian Hog Farm Entities agreed to a course of conduct to work together to intentionally deceive NBC by there actions and thereby caused injury to NBC.
282. In considering what is unlawful conduct for the purpose of unlawful conduct conspiracy, the court in *Agribrands* explained that the conduct in questions must be actionable by the third party, in that case for the tort of interference with economic relations.²⁷²
283. The Court of Appeal in *HSBC v Fuss* affirmed the findings of the trial judge below who found that the appellants, together with another were the directing minds of the corporation and carried out the agreed conduct, knowing that the corporation was in trouble, with intent to deprive the bank of its security for the outstanding loan in questions, and to transfer assets of the corporation by conversion to other corporations of which they were respectively directors, with knowledge of the effect of their conduct.²⁷³
284. In the case at bar, the facts and evidence paint a very different story. There is no evidence that the Individual Respondents, and therefore the Canadian Hog Farm Entities, knew the effect of their conduct beyond that some conditional credit was being created with the knowledge and

²⁷¹ Citing Maguire, *supra* note 267; Mraiche, *supra* note 264 at para 43.

²⁷² *Agribrands*, *supra* note 262 at para 32 and 33

²⁷³ *HSBC v Fuss*, *supra* note 265 para 28 - 33

consent of NBC to the extent that it is asserted otherwise, there are real issue of credibility which create a genuine issue requiring trial.

285. Further, the unlawful conduct relied upon is the alleged civil fraud. Unless the court is able to find that the allegations of civil fraud are made out, then there can be no finding of unlawful conduct conspiracy.
286. In addition, NBC has not adduced evidence to prove that the Sunterra Parties knew that, in the circumstances, injury to NBC was likely to result from the conduct. Given the experience, expertise and knowledge of NBC, the evidence better supports an inference that NBC had more knowledge of an injury likely to result from the conduct complained of.
287. Finally, and conclusively, no injury to date has been suffered by NBC and any injury remains speculative and contingent. This in itself is an essential requirement to establish the tort of unlawful conduct conspiracy, no doubt also because of the need to prove causation of injury actually suffered. Even more than that however, how can it be argued that the Sunterra Parties knew that injury was likely to result to NBC from the conduct complained of, when all parties now have so much more knowledge of the consequences of the conduct than before, but still, injury remains speculative, contingent and not of Sunterra's doing?

D. Indemnity and Contribution

288. As cited by NBC in their written argument, Alberta Court of Appeal described common law and equitable contribution and indemnity rights in *Addison & Leyen Ltd v Fraser Milner Casgrain LLP* ("**Addison & Leyen ABCA**") as follows:²⁷⁴

*[22] The leading authority on the common law of contribution and indemnity is Birmingham and District Land Co v London and Northwestern Railway Co (1886), 34 Ch D 261 (CA). In that early decision, the English Court of Appeal broadly defined the right to indemnity under the common law as a **direct right to reimbursement which may arise: (1) by express contract, if provided in the terms of a contract between the parties; (2) by implied contract, if the parties intended such indemnity; or (3) by implication, if the circumstances demand a legal or equitable duty to indemnify, by which the law recognizes an assumed promise by a person to do what, under the circumstances, he ought to do (at 274). The court identified certain circumstances where the law may imply a contract to indemnify, such as relationships of principal and agent and of co- trustees***

2. Express indemnity, by contract

289. NBC pleads that it is entitled to an indemnity from the express contractual terms in the Business Account Agreements.²⁷⁵ They allude in their submissions to other contractual terms, but none are pleaded (nor directly identified for this purpose in the submissions), and therefore cannot be pressed. NBC, in our respectful submission, conflates the nature of a contractual indemnity with

²⁷⁴ *Addison & Leyen Ltd v Fraser Milner Casgrain LLP*, 2014 ABCA 230 [Addison] [BOA TAB 35]

²⁷⁵ Statement of Claim, *supra* note at 142 para 120 – 122, NBC submissions, *supra* note 10 at para 135

rights to damages for breach of contract and a right to damages for tortious liability in seeking to assert an express contractual indemnity.

290. A contract of indemnity is one in which the promisor undertakes to indemnify the promisee against a liability or loss, independent of whether there is default by some other person.²⁷⁶ Per Halsbury's Laws of Canada:

"A right to recover the damages occasioned by a breach of contract is the converse of a contractual right to an indemnity. Where a contractual right of indemnity exists, the right to an indemnity constitutes a term of the contract and forms part of the contract between the parties.... A right to recover damages for breach of contract is not part of a contract; it is an incident that the law attaches to a breach of the contract, rather than a provision of the contract itself.

*... A similar distinction exists in the case of a right of damages for tortious injury. Every person has a right at common law to recover the amount of the damages occasioned to them as a result of the tortious conduct of another person."*²⁷⁷

291. The manner in which an express indemnity may arise under contract, requires that the contractual term be interpreted in light of the factual matrix and the intentions of the parties at the time of the agreement.²⁷⁸

292. In order for an indemnity clause to include being indemnified for claims of negligence against the indemnified party, the indemnity clause in question must state so, and such a statement must be explicitly clear.²⁷⁹ This was affirmed by the Supreme Court of Canada in *Consumers' Gas v. Peterborough* ("**Peterborough**"), affirming the decision of the Court of Appeal for Ontario below:²⁸⁰

If one is to be protected against and indemnified for one's own negligence there would have to be an indemnity clause spelling out this obligation on the other party in the clearest terms.

293. These principles are set out in the Canadian Encyclopedic Digest as follows:²⁸¹

²⁷⁶ Halsbury's Laws of Canada - Guarantee and Indemnity (2022 Reissue) Assessing the Liability of the Surety, Non-Guarantee Indemnities: Contractual Indemnities Distinguished by Similar Objections" (III.3(1)) at HGI-113 "Meaning and Scope of Contractual Indemnities" [HGI-113] [BOA TAB 61]

²⁷⁷ Halsbury's Laws of Canada - Guarantee and Indemnity (2022 Reissue) , "Assessing the Liability of the Surety, Non-Guarantee Indemnities: Contractual Indemnities Distinguished by Similar Objections" (III.3(1)) at HGI-114 "Circumstances under which the right to indemnity may exist." [HGI-114] [BOA TAB 62]

²⁷⁸ *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 [BOA TAB 38]

²⁷⁹ *Canada Steamship Lines Limited v. R.* [1952] AC 192 [BOA TAB 39]

²⁸⁰ *Consumers' Gas v. Peterborough* [1981] 2 SCR 613 at page 615 [*Peterborough*], quoting the Court of Appeal in (1979)[BOA TAB 40], *Fenn v. City of Peterborough* 1979 104 D.L.R. (3d) 174 [BOA TAB 4]

²⁸¹ CED 4TH (online) *Guarantees, Indemnity and Standby Letters of Credit*, "Indemnities: Miscellaneous" (XIII.D) at § 134[[BOA TAB 59] , including footnotes:

1. *Walters v. Whessoe Ltd.* (1968), 6 Build. L.R. 23 (C.A.); *E.E. Caledonia Ltd. v. Orbit Valve Co. Europe*, [1993] 4 All E.R. 165 (Eng. Q.B.).

3. *E.E. Caledonia Ltd. v. Orbit Valve Co. Europe*, [1993] 4 All E.R. 165 (Eng. Q.B.).

The law presumes that any indemnity given to a person is not intended to extend to loss or cost arising by reason of that person's own negligence or the negligence of his or her employees or agents.¹ ... in construing contractual indemnities other than insurance contracts, there is a strong bias in the courts against interpreting the indemnity as affording protection against the indemnified person's own negligence.³

Absent an express provision dealing with negligence,⁵ a right to indemnity will be inferred only where it arises by necessary implication, that is, where no interpretation of the indemnity agreement is possible other than that it must extend to negligence in order for the provision to be given meaning. Specifically, if the words used in the agreement are wide enough to encompass negligence, the court will consider whether there is some non-negligent base of liability that is neither remote nor fanciful which the parties might have had in mind when drafting the contract. If such an alternative liability exists, then the court will construe the indemnity not to apply to the indemnified person's own negligence.⁶

294. While the pleadings are not clear upon which alleged contractual provisions they say provide the indemnity alleged, it is clear that there is no express contractual indemnity owed by any of the Respondents to NBC as sought:
- (a) the Respondents deny that the terms of the Business Account Agreement are binding upon them on the basis that they were not given a copy of those terms to be able to agree to them. There is no evidence the terms were provided by the NBC to any of the Respondents at the opening of the accounts for otherwise. The burden of proof lies upon NBC and they have failed to adduce evidence to establish that the terms were so provided;
 - (b) in the alternative, if the Business Account Agreements are binding as a matter of contract, only the Canadian Hog Farm Entities are parties to those contracts and therefore the other Respondents can have no liability in respect thereof;
 - (c) in any event, the Business Account Agreements contain no contractual provisions for indemnity. The nature of the provisions in the Business Account Agreements which are referred to in NBC written argument²⁸² are in the nature of exclusion clauses relating to indebtedness or liability of the “Business” of the customers, for which NBC will not be liable. (In this regard, it is important to look at the contractual context for each of the provisions quoted in NBC’s written argument.²⁸³) That is separate and distinct from an

5. *Hancock Shipping Co. v. Deacon & Trysail (Private) Ltd.*, [1991] 2 Lloyd’s Rep. 550 (Q.B.).

6. *Alderslade v. Hendon Laundry Ltd.*, [1945] 1 All E.R. 244 (Eng. C.A.); *Canada Steamship Lines Ltd. v. R.*, [1952] A.C. 192 (Canada P.C.); *E.E. Caledonia Ltd. v. Orbit Valve Co. Europe*, [1993] 4 All E.R. 165 (Eng. Q.B.); *Kocherkewych v. Greyhound Canada Transportation Corp.* (2006), 2006 CarswellBC 808 (B.C. S.C.) (indemnity clause not containing express language exempting corporation from negligence of its own employees; words not wide enough in their ordinary meaning to cover such consequence; such liability being remarkable obligation and requiring very clear words; corporation’s interpretation contradicted by other clause in agreement; clause directed to other non-fanciful heads of damage)

²⁸² NBC submissions, *supra* note 10 at para 19

²⁸³ See for example, wording from the Business Account Agreements as quoted in para 19(e) and (i) which are written in the context of provisions regarding debits to the accounts of the Canadian Hog Farm Entities, and Account Statements and verifications in respect of NBC (CWB) cheques written.

indemnity for any liability that NBC may have to Compeer arising from a Compeer v. NBC claim. Further the reference to “*unauthorized transactions*” in respect of which NBC says the Canadian Hog Farm Entities would be responsible, is inappropriately used²⁸⁴:

“*unauthorized*” in the context referred to relates to whether the signing officers were in fact authorised by the Canadian Hog Farm Entities respectively to write the cheques. Neither NBC nor the respondents allege at any point that the signing officers for the respective Canadian Hog farm Entities were not authorised to sign the cheques.

- (d) further, even if there were any so called express provisions for indemnity in the Business Account Agreements, the case authorities make it very clear that without express wording to make very clear that they apply to cover liability of NBC to a third party arising from its own wrongful conduct, in negligence or otherwise, the so called indemnity will not extend to such cover such liability. In the present matter, the Compeer v NBC Claim is purely speculative, but in the absence of any contractual relations between Compeer and NBC, cannot arise other than on the basis of some wrongful conduct by NBC and therefore could not be covered by any alleged express contractual indemnity. This is important because NBC does not have any contractual relationship with Compeer. Therefore the only potential source of liability from NBC to Compeer would be some form of common-law liability – none of which is expressly pled. Therefore, even if there were to be indemnity with respect to a liability of NBC to Compeer, it would necessarily be because of some underlying fault of NBC – which in turn would exclude that indemnity from being applicable.

3. Implied indemnity, by contract

295. NBC plead that: “*it is an implied term of the Business Account Agreements that Sunterra Canada and Sunwold Canada would hold NBC harmless from, and indemnify NBC for, any and all losses suffered by NBC as a result of the Sunterra Parties’ fraud or any fraudulent instructions given by the Sunterra Parties to NBC*”.
296. The only further assistance we get from NBC of the articulation of this claim for an implied term of indemnity in the contracts between NBC and the Canadian Hog Farm Entities, is in paragraphs 208 and 209 of their written argument. There, they rely upon *Addison & Leyer* to say simply that: “*It is well established that, even where no express term of a contract applies, an indemnification obligation may arise by implied terms if “the parties intended such indemnity”*”.²⁸⁵
297. NBC goes on to allege “common law duties”,²⁸⁶ but does not explain what the duties are nor how or on what basis they arise. In any event, for the reasons set out herein, the respondents deny any breach of any duties as alleged.
298. The Respondents therefore cannot and do not know the how and why and by what circumstances NBC say that the alleged implied indemnity arises, i.e. how is it shown that “*the parties intended*

²⁸⁴ NBC submissions, *supra* note 10 19(h) and (m)

²⁸⁵ *Addison*, *supra* note 274

²⁸⁶ Statement of Claim, *supra* note 142 at para 210

such an indemnity”, other than by oblique reference to the Business Account Agreement or to undefined ‘duties’.

299. In regard to the terms of the Business Account Agreements, as referred to above, NBC can only say by those terms that it is not liable to the Canadian Hog Farm Entities for losses suffered by those entities by the bank honouring or dishonouring cheques written by them, but not that those terms imply that NBC would be indemnified in respect of its own losses to Compeer as a result of its own wrongs committed.
300. Further, NBC is a large, sophisticated, well funded and experienced parties with sophisticated and experienced legal counsel who draft terms and conditions such as the Business Account Agreements as standard form agreements in respect of which the customers have no chance to negotiate. If they intended for there to be indemnities in their agreement with customers, they would have included them.
301. Further, if a failure to expressly cover a claim for indemnity in respect of the negligence (or other wrongdoing) of the party claiming the indemnity, excludes the operation of an express indemnity, it must all the more so exclude the operation of an implied indemnity.
302. With regards to any Compeer v NBC Claim, and as referred to above, in the absence of any contractual relations between Compeer and NBC, such a claim cannot arise other than on the basis of some wrongful conduct by NBC and therefore could not be covered by any alleged implied contractual indemnity.
303. It is well established law that in order to claim an implied indemnity in contract, the party claiming must be innocent of wrongdoing. Per *Canadian Encyclopedic Digest*:

CED Contracts § 172, Specific Types of Implied Terms – Indemnification - An implied contract of indemnity arises in favour of a person who, without fault on his or her part, 1 is exposed to liability and compelled to pay damages on account of the negligence or tortious act of another, provided the parties were not joint tortfeasors in such a sense as to prevent recovery.2

“The right to indemnification has traditionally been available to a person who, with-out active fault on his or her own part, has been required to pay damages that are rightly the primary responsibility of another party. The right is based on the principle that everyone is responsible for his or her own wrongdoing: McFee v. JossInLine KeyCite Flag (1925), 56 O.L.R. 578 (Ont. C.A.).”

“...a party cannot claim indemnification in respect of a loss which he or she has brought about by his or her own fault” .²⁸⁷

4. *Non-contractual indemnity, implied at common law and in equity*

304. NBC claim that the Canadian Hog Farm Entities “...are at law and in equity, to indemnify NBC for any losses suffered by NBC as a result of the Kiting Scheme, including under the Compeer v.

²⁸⁷ CED 134, *supra* note 282

NBC Claims".²⁸⁸ They say that these non-contractual indemnification obligations flow from the alleged fraud conducted pursuant to the alleged "Kiting Scheme", and that "*any claims in favour of Compeer would result from the occurrence of the Kiting Scheme, and but for the Kiting Scheme, no such claims would exist.*"²⁸⁹

305. We note that their pleadings claim liability for non-contractual indemnity at common law or in equity against the Respondents generally,²⁹⁰ but this appears to have been dropped in the written argument,²⁹¹ and accordingly it must be presumed that this claim as against the remaining respondents is not pressed.
306. The respondents deny that they committed any alleged fraud and also deny the "Kiting Scheme" as alleged, which terms as defined are used by NBC in their submission to refer not simply to the mechanics of the cheque writing, but to an actual finding of civil fraud. As addressed in detail in these submissions, the Respondents deny the allegations of civil fraud and rely on that position with respect to any non-contractual indemnity as alleged.
307. In the alternative, which is vehemently denied, that there is a finding of civil fraud as against the Canadian Hog Farm Entities, then they nevertheless say that they are not liable to NBC for any loss NBC may suffer as a result of the Compeer v NBC Claim, as such loss, while speculative, could only arise by virtue of a wrong committed by NBC as against Compeer.
308. The Court of Appeal *Addison v. Leyen* identifies the principles in implying a right of indemnity at common law, as follows:

27 Both parties highlight *McFee v. Joss*, a decision of the Court of Appeal for Ontario, as an early statement of the law in Canada (at para 24):

...[A]n implied contract of indemnity arises in favour of a person who, without fault on his part, is exposed to liability and compelled to pay damages on account of the negligence or tortious act of another, provided the parties were not joint tortfeasors in such a sense as to prevent recover; that is where the act is not clearly illegal itself. This right of indemnity is based upon the principle that everyone is responsible for his own negligence, and if another is by a judgment of a Court, compelled to pay damages which ought to have been paid by the wrongdoer, such damages may be recovered from the wrongdoer.

28 ... in, *Ryan v Dew Enterprises Ltd*, the Newfoundland Court of Appeal summarized the applicable legal principles in implying a right of indemnity in common law quotes explains the basis for a claim in indemnity arising from implication of law (at para 54):

"... An example of a claim to indemnity arising from implication of law is where an act is done at the request of another, the act turns out to be injurious to a third party and in consequence of doing the act the doer incurs liability to the third

²⁸⁸ NBC submissions *supra* note 10 at para 138

²⁸⁹ *Ibid* at para 139

²⁹⁰ Statement of Claim, *supra* note 142 at para 124 and 125

²⁹¹ NBC submissions, *supra* note 10 para 133 - 143

party (*Birmingham and District Land Co. v. London and North Western Railway Co.* (1886), 34 Ch. D. 261 (C.A.)). Other diverse examples include: (i) where an agent incurs loss while lawfully carrying out the mandate of his or her principal; (ii) where a principal suffers loss by incurring liability to a third party as a result of the wrongful actions of his or her agent or employee; (iii) where a trustee causes a co-trustee to incur costs through the trustee's negligent management of the trust; and (iv) where an obligation arises in equity from the relationship between the parties, such as between trustee and beneficiary."²⁹²

29 While these cases provide diverse factual examples giving rise to a right of implied indemnity, courts have cautioned against the unprincipled expansion of these claims. In *R. v. Imperial Tobacco Canada Ltd*, the Supreme Court of Canada stated (at para 147):

Equitable indemnity is a narrow doctrine, confined to situations of an express or implied understanding that a principal will indemnify its agent for acting on the directions given. As stated in *Parmley v. Parmley*, [1945] S.C.R. 635, claims of equitable indemnity "proceed upon the notion of a request which one person makes under circumstances from which the law implies that both parties understand that the person who acts upon the request is to be indemnified if he does so" (p. 648, quoting Bowen L.J. in *Birmingham and District Land Co. v. London and North Western Railway Co.* (1886), 34 Ch. D. 261, at p. 275.)

30 A narrow approach was also encouraged in *Ryan v. Dew Enterprises Ltd.*, where the court noted (at para 54):

While the circumstances where an obligation to indemnify arises by implication of law are diverse, they are not open-ended. The obligation cannot be imposed simply by the exercise of ad hoc discretion." (emphasis added)

...

34 ...the common law of implied indemnity is rooted in the principles of restitution and unjust enrichment. An indemnity permits the reimbursement of damages paid by an innocent party to a third party on behalf of the true wrongdoer, where that wrongdoer should otherwise have been liable to pay. A right to reimbursement through an implied indemnity does not arise in every situation in which A becomes liable to C in connection with the negligence of B. That connection must be supported by a theory of legal or equitable liability between the third party and the party against whom the indemnity is."²⁹³

309. With respect to any Compeer v NBC Claim, it is the respondents' submission that no indemnity would be implied at common law and equity as passing from any of the respondents to NBC in

²⁹² Addison Supra note 274 at para 28, citing *Ryan v Dew Enterprises Ltd*, 2014 NLCA 11[Ryan] [BOA TAB 57]

²⁹³ Addison at para 27 ff; CED 134, supra note 282

respect of any such claim, because NBC's liability in respect of any such claim must, *ipso facto*, arise from its own wrongdoing.²⁹⁴

310. In addition, no claim for indemnity can arise unless Compeer is successful in establishing a claim against the Respondents.²⁹⁵

5. Claim for contribution

311. A claim for contribution has a different basis to a claim for indemnity. The court in *Paramount Resources Ltd v Grey Owl Engineering Ltd*, after citing the same paragraphs from *Ryan v Dew Enterprises* as in *Addison* above, also quotes the following from *Ryan v Dew Enterprises*:

*"A claim for contribution, on the other hand, is in one sense a claim to a partial indemnity. However, the basis of the right is different. As noted by Goodridge J. in Collavino at paragraph 18, the right to contribution is based on general principles of justice involving the equitable sharing of responsibility among persons who are jointly responsible for a claimed loss. It usually arises as between joint debtors, contractors, trustees, sureties or tortfeasors. [Emphasis added]"*²⁹⁶

312. The court goes on to say that:

"... contribution finds its foundations and justification in equitable principles related to fairness and the prevention of unjust enrichment. Those principles similarly require that "the claimant and the defendant were both liable to the third party" for a claim in contribution to arise: Petersen Pontiac at para 54. See also, Swift at para 63; Architecture 2000 Inc et al v Moncton, a municipal body corporate et al 2023 NBCA 50 at paras 30-31; Toronto Hydro v Gonte and City of Toronto 2018 ONSC 4315 at para 85; RBC Life Insurance Company v Heritage Insurance & Consulting Ltd 2014 ABQB 130 at para 11, aff'd, 2014 ABQB 595."

313. In *Isfeld v. Petersen Pontiac Buick GMC (Alta.) Inc* ²⁹⁷, as referred to in the Alberta Court of Appeal, the Court explained the enactment of legislations around contribution between wrongdoers as follows:

[38] As to the first, Alberta (as well as other provinces) has enacted legislation with the primary purpose of repealing the common law rule that there can be no contribution between wrongdoers, see generally Klar at 492. In some provinces, one statute accomplishes this. In others, such as Alberta, there are two, the Contributory Negligence Act and the Tort-Feasors Act, RSA 2000, c T-5. The latter contains language such as "tort" and "tort-feasor", while the former uses "fault". For example, section 2 of the Contributory Negligence Act provides (emphasis added):

²⁹⁴ *Addison*, at para 27 and 28

²⁹⁵ *Supra* note 292

²⁹⁶ *Paramount Resources Ltd v Grey Owl Engineering Ltd*, 2022 ABQB 333 at para 32 [BOA TAB 43]

²⁹⁷ *Isfeld v. Petersen Pontiac Buick GMC (Alta.) Inc.* (2013), 2013 ABCA 251, [BOA TAB 44]

2(1) When damage or loss has been caused by the fault of 2 or more persons, the court shall determine the degree in which each person was at fault.

(2) When 2 or more persons are found at fault, they are jointly and severally liable to the person suffering the damage or loss, but as between themselves, in the absence of a contract express or implied, they are liable to make contribution to and indemnify each other in the degree in which they are respectively found to have been at fault.

314. After a lengthy analysis of the case law around apportioning liability between parties found liable in contract and/or tort, the Court of Appeal addressed the findings below and confirmed the apportionment of liability accordingly as follows:

[53] The trial judge clearly thought both parties contributed to the plaintiffs' damages. Nothing in his reasons suggests that one was more or less to blame than the other. Accordingly, equal apportionment of the liability should be made.

[54] I consider that this result can also be justified on the basis of equitable principles. According to Charles Mitchell, Paul Mitchell & Stephen Watterson, eds, Goff & Jones *The Law of Unjust Enrichment*, 8th ed (Common Law Library, Sweet & Maxwell, 2011) at para 20-1, a claimant for contribution must show:

- (1) the claimant and the defendant were both liable to the third party,
- (2) who was forbidden to accumulate full recoveries from both of them, but
- (3) who could choose to recover in full from either of them, and that
- (4) some or all of the burden of paying him should ultimately be borne by the defendant.

315. The Alberta Court of Appeal in *Swift*²⁹⁸ ... addressed the question of apportionment of liability by way of contribution as follows:

[63] Regardless of whether or not the respondent's liability arises out of tort or breach of contract, the parties ought to be required to contribute their fair share of the judgment commensurate with their share of fault. In this case, the trial judge found that the fault which gave rise to the loss lay squarely with the Engineers, notwithstanding that the Architects were also liable to the Swifts on a contractual basis. That finding is amply supported by the record. This Court in the past has used restitutionary principles to resolve issues of contribution: see *Petersen Pontiac Buick GMC (Alta) Ltd v Campbell*, 2013 ABCA 251. In that case Hunt JA for this court said at para 54: [see above]

(emphasis added).

²⁹⁸ *Swift v Tomecek Roney Little & Associates Ltd.*, 2014 ABCA 49 [BOA TAB 46]

316. In *RBC Life Insurance Company v Heritage Insurance & Consulting Ltd*, the Alberta Court of Kings Bench observed:²⁹⁹

[10] *The Tort-Feasors Act, RSA 2000, c T-5, gives a statutory right of contribution between two persons whose torts caused the same damage to the Plaintiff. It allows one tort-feasor to settle with the injured person and then to seek contribution for the value of the settlement from the other. Arcelormittal Tubular Products Roman SA v Fluor Canada Ltd, 2013 ABCA 279 (leave denied SCC No. 35568, Feb. 6, 2014). There is apparently also a common law right of contribution between parties whose underlying liability would have been in separate contracts or mixed. Peterson Pontiac Buick GMC (Alta) Ltd v Campbell, 2013 ABCA 251;*

[11] *The ‘common law right of contribution’ is something of a misnomer. It really comes from equity’s desire to prevent an unjust enrichment; as would be the case if one at fault party came clean and settled, and the other got off scot-free. The Tort-feasor’s Act came about to cure the deficiency in the common law that allowed contribution if one tort-feasor owed the other a duty, but not where two tort-feasors owed duties to the Plaintiff but not to each other.*

(emphasis added).

317. In answer to NBC’s claim for contribution, the respondents say:

- (a) None of the respondents are liable to Compeer, and therefore they cannot be liable to contribute to any liability NBC may have to Compeer;
- (b) In the alternative that the Respondents or some of them are found to be liable to Compeer, there is currently no claim by Compeer as against NBC. Compeer has not given NBC any basis for which it says a claim might be brought. No cause of action, facts or evidence on which to base such a claim has been raised, and the claim is therefore not only contingent but also purely and utterly speculative, and so accordingly must be any claim for contribution; and
- (c) a claim for contribution between two or more parties who are both found to be liable to a third party, in relation to the amount of that liability, can only be considered and determined on the basis of an “*equitable sharing of responsibility among persons who are jointly responsible for a claimed loss*”, which involves a determination by the court of contribution commensurate with their share of fault. It is simply impossible to determine an equitable sharing of contribution based upon fault when the Compeer v NBC claim is currently non-existent and highly speculative.

E. Speculative and contingent claims under the CCAA

318. As recognized by the authority cited in NBC’s written argument, the validity of uncertain and contingent claims under the CCAA is circumscribed by substantive legal requirements established in CCAA and bankruptcy jurisprudence.

²⁹⁹ 2014 ABQB 130 at para 11, aff’d, 2014 ABQB 595 [BOA TAB 45]

319. For the purposes of a compromise or arrangement under the CCAA, the only claims that can be dealt with are those falling within section 19 of the CCAA, which provides as follows:

19 (1) Subject to subsection (2), the only claims that may be dealt with by a compromise or arrangement in respect of a debtor company are

(a) claims that relate to debts or liabilities, present or future, to which the company is subject on the earlier of

(i) the day on which proceedings commenced under this Act, and

(ii) if the company filed a notice of intention under section 50.4 of the Bankruptcy and Insolvency Act or commenced proceedings under this Act with the consent of inspectors referred to in section 116 of the Bankruptcy and Insolvency Act, the date of the initial bankruptcy event within the meaning of section 2 of that Act; and

(b) claims that relate to debts or liabilities, present or future, to which the company may become subject before the compromise or arrangement is sanctioned by reason of any obligation incurred by the company before the earlier of the days referred to in subparagraphs (a)(i) and (ii).

320. As determined by the Alberta Court of Appeal in *Repsol Canada Energy Partnership v Delphi Energy Corp*, 2020 ABCA 364 (CanLII), section 19 “...provides that any claim that relates to a debt or liability to which a company may become subject by reason of an obligation incurred by the company prior to the CCAA filing date is a pre-filing claim, regardless of when the damage was suffered or the claim itself arose”.³⁰⁰ In the case at bar, the relevant date under section 19 would be March 24, 2025, the date on which the Canadian Hog Farm Entities filed a notice of intention under section 50.4 of the *Bankruptcy and Insolvency Act*.

321. The court in *Repsol* goes on to explain the purposive interpretation of section 19, and the definition of a “claim” as follows:³⁰¹

[16] ...The specific provisions of s 19 were designed to capture claims that are broader than crystallized causes of action. Those claims include present and future liabilities to ensure that all stakeholders understand the contingent or unliquidated claims that might arise so they can determine their position on the plan and, in particular, whether the plan is fair and reasonable having regard to all the circumstances. Not the least of those circumstances is the viability of the company post-arrangement.

...

[18] As was noted by Romaine J at para 25 of SemCanada³⁰², a “claim” for the purpose of the CCAA includes any “indebtedness, liability or obligation that would be

³⁰⁰ *Repsol Canada Energy Partnership v Delphi Energy Corp*, 2020 ABCA 364 at para 15 [BOA TAB 37]

³⁰¹ *Ibid* para 16 and 17

³⁰² *Re: SemCanada Crude Company* (Celtic Exploration Ltd. #2), 2012 ABQB 489, leave to appeal denied 2012 ABCA 313 [BOA TAB 47]

provable under the Bankruptcy and Insolvency Act, RSC 1985, c B-3". Section 121(1) of the BIA defines "provable claims" as "all debts and liabilities, present and future, to which the bankrupt is subject... , or to which the bankrupt may become subject... by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt..."; s 121(2) of the BIA makes clear that this includes contingent or unliquidated claims: SemCanada at paras 25-26

322. A claim that is "too remote or speculative or remote in nature that they cannot be considered contingent claims" will not properly be considered a contingent claim and thus not a provable claim.³⁰³
323. In *Merit Energy*, as relied upon by NBC in their written argument, the Alberta Court of Queen's Bench upheld a claim against the underwriters, directors and officers which were based on written indemnities. The Underwriters, directors and officers had been named as defendants in several actions commenced throughout Canada by PriceWaterhouseCoopers, on the basis of allegations of misrepresentation made in a prospectus.³⁰⁴ In respect of the claim under the indemnity agreement, the Court assessed the circumstances of the claim and the state of the law, as follows:

[77] Section 121 does not specify the degree of certainty required to make a claim provable, other than to include as provable all debts or liabilities to which the bankrupt may become subject. As stated, the Ontario Court of Appeal addressed this in *Re Confederation Treasury Services Ltd.* and held that the test of probable liability set out in *Claude Resources (Trustee of) v. Dutton* and *Re Wiebe* (also relied on by the Trustee) imposed too high of a threshold to establish a valid contingent claim. Rather, the Ontario Court of Appeal expressed that contingent claims must simply be not too "remote or speculative in nature". I agree with the Ontario Court of Appeal's view of the test.

[78] On a plain reading of the Underwriting Agreement, the indemnity appears to be engaged by the Flow-Through Shareholders' actions. The actions are under case management and are proceeding through discoveries at this time. Further, there are several authorities that suggest an indemnity becomes enforceable as soon as a claim of the type indemnified is alleged.[20] Finally, at least one part of the Underwriters' claim is not contingent - they have incurred costs and disbursements in defence of the Flow-Through Shareholders' claims and according to the terms of the indemnity are currently entitled to reimbursement for those costs, regardless of the outcome of the litigation.

I. ³⁰³ *Newfoundland and Labrador v. AbitibiBowater Inc.*, 2012 SCC 67 (CanLII), [2012] 3 SCR 443 at para 36 and 84; *Re Confederation Treasury Services Ltd.* 1997 CarswellOnt 31 43 CBR (3d) 4, (sub nom. Confederation Treasury Services Ltd. (Bankrupt), Re) 1997 CanLII 3091 (ON CA), 96 OAC 75 at para. 4; *Re: SemCanada Crude Company (Celtic Exploration Ltd. #2)*, 2012 ABQB 489 (CanLII) at para 30 [BOA TAB 48]

³⁰⁴ *National Bank of Canada v. Merit Energy Ltd.*, 2001 ABQB 583 at para 19 [BOA TAB 49]

324. It is the respectful submission of the Canadian Hog Farm Entities that the circumstances and nature of the NBC Claim do not fall within the test set out in *Merit Energy* and other authorities, as:
- (a) the successful claimant in *Merit Energy* was basing their claim on a written and express indemnity in place in favour of the claimant. In the case at bar, there is no indemnity agreement, nor any express provisions for an indemnity in the contractual documents between the parties;³⁰⁵
 - (b) any implied indemnity or non-contractual indemnity, both of which would have to be based in equity, is denied by the respondents on the basis that any claim by Compeer against NBC would have to arise out of a wrongdoing on NBC's part;
 - (c) even if an indemnity could be implied in contract or otherwise found in equity, then unlike the written indemnities in *Merit Energy*, at this stage any such indemnity is itself contingent and speculative depending on the nature of any claim brought by Compeer against NBC;
 - (d) given that Compeer has not brought a claim against NBC nor has given any indication as to what that claim might be, any alleged indemnity is not yet enforceable, i.e. there is no way of knowing whether the alleged indemnity would even answer the claim;
 - (e) The claim in *Merit* had advanced to discoveries and was under case management. Additionally, losses had actually occurred. In the present case Compeer has not even said if it will make a claim and the CEO of Compeer declined to provide the underlying facts of any such potential claim; and
 - (f) NBC's alternative claim for contribution cannot be evaluated absent an understanding of the basis of any claim by Compeer as against NBC, because the necessary consideration of respective wrongdoing is impossible to assess in those circumstances.

F. Alleged breach of Business Accounts Agreements

325. As referred to above, the Respondents deny that they are bound by the terms of the Business Account Agreements as alleged because they have no recollection of been provided with these standard form documents by NBC, and NBC has not provided a sufficient record of evidence to prove that they have nor did NBC raise it in cross-examination of the Respondents' witnesses.
326. In any event, the terms relied upon by NBC, and the terms of the Business Account Agreements as a whole, are to the effect that NBC would have no responsibility for losses *caused* to the Canadian Hog Farm Entities by any *misuse* of the Canadian Hog Farm Entity accounts for the writing or deposit of dishonoured cheques,³⁰⁶ including in respect of the provisions in paragraph 21 thereof, which read as follows:

The Business will maintain procedures and controls to detect and prevent thefts of instruments or losses due to fraud or forgery involving Instruments . The Business

³⁰⁵ See paragraphs 300-320 above

³⁰⁶ NBC submissions, *supra* note 10 at para 19 and 201, 203, 204, 207

will diligently supervise and monitor the conduct and work of all Authorised Signing Officers and all agents and employees having a role in the preparation of Instruments and the Business's bank statement, reconciliation or other banking functions. CWB shall have no responsibility or liability whatsoever for any loss due to forged or unauthorised signature unless:...

327. It is clear from these provisions and the broader context of the terms of the Business Account Agreements put in evidence by NBC, that the “*fraud and forgery*” referred to in paragraph 21 pertains to the “*Instruments*” themselves. For example, clause 6 which has provisions in relation to “*Account Statements and Verifications*”, concludes with the following provisions:

...CWB shall not be liable for any loss or claim arising from any breach by the Business or any third party of any duty or trust in respect of the sums or dealings noted in the statements. Notwithstanding the foregoing, the Business shall notify CWB immediately if at any time prior to the expiry of the Review Period, the Business becomes aware that an instrument has been altered, is a duplicate or is otherwise fraudulent, or at any time the business becomes aware of any unauthorised or forged endorsement on any instrument.

328. For further context, clause 19 makes provision for the “*Authorized Signing Officers*” and includes the following:

The Business is responsible for determining the suitability of individuals appointed as Authorised Signing Officers. CWB shall not in anyway be liable or help responsible for any loss suffered by the Business caused by any act or omission, or wrongful conduct, of any Authorised Signing Officer appointed by the Business .

329. In addition, as for all of the NBC Claims, the nature of any loss and damages it may claim arising out of the Compeer v NBC claim are obviously highly speculative. There is no way of knowing at this time, absent any indication of what if any basis such claims may be brought, if brought at all, it is impossible to determine whether any loss or damages arising therefrom would be properly attributable, in the sense of being cause by, any alleged breaches of the Business Account Agreement terms by the Canadian Hog Farm Entities.

G. Negligence and Negligent Misrepresentation

330. NBC did not raise a cause of action in negligence or negligent misstatement in their Claim or Application, other than to briefly mention in the context of claim for indemnity.³⁰⁷ It is nowhere pleaded or particularised. NBC are therefore precluded from now seeking to pursue such a claim as they are seeking to do in their written argument.³⁰⁸

H. Oppression - section 239(b)(iii) of the Alberta Business Corporations Act (the “ABCA”)

331. NBC's pleadings contain one short paragraph with respect to its oppression claim, simply stating that the perpetration of the alleged “Kiting Scheme” by the two Canadian Hog Farm Entities, Ray

³⁰⁷ Statement of Claim, *supra* note 142 at para 125

³⁰⁸ NBC submissions, *supra* note 10 at para 214 - 219

Price, Uffelman and Thompson amount to oppressive conduct that unfairly prejudiced or disregarded the interest of NBC, and as a result NBC is entitled to compensation and relief under section 242 as a complainant. It fails to adequately plead and particularise its claim and ought to be struck out or given little countenance.

332. NBC's submissions provide little more assistance in identifying the basis of their claim for oppression, or even which parties they seek to bring the claim against and for what remedy.
333. NBC is a creditor of the Canadian Hog Farm Entities. A creditor does not have automatic standing to bring an application under section 242 of the ABCA, but pursuant to section 239(b)(iii)(B), a creditor will only have standing if the court exercises its discretion under subclause (iv) by determining that NBC is a proper person to make an application under Part 19 of the ABCA.
334. NBC has given no particulars and made no submissions as to why and on what basis the court should exercise its discretion to decide that NBC is a proper person to bring the application. It is not for the respondents to make NBC's case before responding to it. The Respondents say that NBC has not established a basis on which the court should exercise its discretion to give NBC standing as a proper person.
335. The respondents take no issue with NBC's reliance on the authority of *JBRO Holdings Inc v Dynasty Power Inc*, 2022 ABCA 140 (CanLII), ("**JBRO Holdings**") but do draw the Courts attention to the whole of the relevant considerations set out in paragraphs 54 to 61 of the judgement. In particular, the Respondents note the following extracts:

[54] *Oppression is an equitable corporate remedy that seeks to ensure fairness, justice, and equity in the context at hand and in regard to the relationships at play: BCE v 1976 Debentureholders, 2008 SCC 69, paras 58, 59, 71, [2008] 3 SCR 560. It is inherently fact-specific: BCE, paras 59, 62, 71.*

...

[57] *The Court's powers are delineated in s 242(3), and allow the Court to make any interim or final order it thinks fit to rectify the matters subject to complaint: Toor v 1176520 Alberta Ltd, 2019 ABCA 334, para 30; Connelly v Connelly-McKinley Ltd, 2010 ABQB 515, para 12.*

[58] *The test for determining whether conduct is oppressive, unfairly prejudicial or unfairly disregards security holders' interests has two elements:*

- (a) *does the evidence support a reasonable expectation asserted by the claimant?*
- (b) *does the evidence establish that the reasonable expectation was violated by conduct falling within the terms "oppression," "unfair prejudice" or "unfair disregard" of a relevant interest?*

The claimant bears the burden of establishing the asserted expectation, the reasonableness of the expectation, and the violation of the expectation by conduct that was oppressive, unfairly prejudicial or that unfairly disregarded a relevant interest: BCE, paras 56, 68, 119, 137; 1216808 Alberta Ltd, para 39.

[59] *To determine whether a stakeholder's expectation is reasonable, the Court may consider "general commercial practice; the nature of the corporation; the relationship between the parties; past practice; steps the claimant could have taken to protect itself; representations and agreements; and the fair resolution of conflicting interests between corporate stakeholders": BCE, para 72.*

[60] *The Supreme Court has provided guidance on remedies. The court's broad discretion is not limitless; it must be exercised within legal bounds, and as a starting point, within the bounds expressly delineated by the statute. The purpose of the oppression remedy is corrective, and an order should go no further than necessary to correct the injustice or unfairness between the parties: Wilson v Alharayeri, 2017 SCC 39, [2017] 1 SCR 1037, paras 26-27 (referring to CBCA equivalent sections).*

[61] *As such, where oppressive conduct is made out, the court must intervene in as minimal a way as possible in the circumstances to address the imbalance or the conduct which is the subject of complaint. The ultimate test requires an assessment of the best interests of the corporation, its shareholders, directors and officers. It involves a balancing of competing interests: Toor, para 32; Caron v Canadian Energy Inc, 2017 ABQB 767, para 51; Melin v Melin, 2018 ABQB 1056, para 69.*

336. As established above, the relationship between NBC and the Canadian Hog Farm Entities and the past practice was that the practice complained of, being the numerous high value cheques circulating each day between the Canadian and US Hog Farm Entities by which conditional credit was created was known to NBC, as was the financial context of the Canadian Hog Farm Entities, in particular their actual gross revenue and expenses, such that NBC knew that the conditional credit was being created by the practice and allowed it to continue. They could have taken steps to protect themselves by disallowing the continued use of cheques in this manner from the time it came to their attention in July 2023 or at least by December 2023, but they chose not to do so.
337. In any event, the Canadian Sunterra Entities abandoned the conduct complained of³⁰⁹ on or around on or around February 2025, immediately following the concerns raised by NBC. The corrective purpose of the oppression remedy has been met. The oppression claim is not an appropriate remedy for the determination of NBC's claim. Applying the "ultimate test" per *JBRO Holdings*, it is not in the best interests of the Canadian Hog Farm Entities, its shareholders, directors and officers, nor of the other stakeholders in the corporation for the purposes of the CCAA, including employees and other creditors, for the oppression provisions to be utilised as sought by NBC.
338. In particular, NBC appears to be seeking permission to bring a derivative action. No argument or basis is set forth for this application, it is motivated by self interest and with all due respect, it appears to be a frivolous and vexatious claim in respect of this remedy. Per *Chen v Sumwa Trading Co Ltd*, 2018 ABQB 269 (CanLII):

³⁰⁹ *V.F. Erickson Consultants Ltd. v. Ventures West Minerals Ltd.*, [1990] B.C.J. No. 1111 (B.C.C.A.) [BOA TAB 50], as cited in Halsbury's Laws of Canada - *Business Corporations (2022 Reissue)* Shareholder Remedies, The Oppression Remedy, Procedural Considerations, Bars to Action, at HBC 306 Specific exclusions [BOA TAB 62]

[14] *There is a subjective and an objective element to the requirement of good faith on an application for leave to bring a derivative action. The subjective element is whether the Applicant believes that the proposed derivative action has merit; that it is not motivated by self-interest or private vendetta. Even if the subjective element is established, the Court must also consider whether, objectively viewed, the action is not frivolous or vexatious: Valgardson v Valgardson, 2012 ABCA 124 at para 20.*

I. Duty of good faith

339. Further, NBC has by its conduct, breached its common law duty of good faith to perform its contractual obligations “...to act honestly and reasonably and not capriciously or arbitrarily”,³¹⁰ in particular by failing “...to give reasonable notice of a change to the prevailing course of lending conduct between the parties”.³¹¹
340. In *Bhasin v. Hrynew*, 2014 SCC 71, the Supreme Court of Canada created new common law duty under the broad umbrella of good faith performance of contracts. Canadian courts have “...expanded of the range of “special” relationships giving rise to a duty of good faith, including in “the termination of long-standing contractual relationships”³¹²
341. In *Murano v. Bank of Montreal*,³¹³ the court recognised the duty to give reasonable notice before calling for repayment of a demand loan as a question of fact to be determined on the circumstances of each case. In this regard, the court noted the factors to be considered as follows:³¹⁴

Matters to be assessed in making this determination include (1) the amount of the loan in question; (2) the risk to the creditor of losing money or security; (3) the length of the relationship between the debtor and the creditor; (4) the character and reputation of the debtor; (5) the potential ability of the debtor to raise the money required in a relatively short period; (6) the circumstances surrounding the demand for payment; and (7) any other relevant factor that may exist.

342. Elaborating further on this legal principle and the factors to be considered, the court said:

[75] *The failure to give reasonable notice constitutes a breach of an implied contract between bank and customer and the related seizure of assets by a receiver constitutes both trespass and a conversion. See McLachlan v. Canadian Imperial Bank of Commerce (1989), 35 B.C.L.R. (2d) 100 (C.A.), at p. 105. Very short notice, particularly notice of less than one day, is prima facie unreasonable and, in such*

³¹⁰ *Bhasin*, supra note 28

³¹¹ *Thermo King*, supra note 29; *Murano*, supra note 29 at para 71 – 87

³¹² Canadian Encyclopedic Digest, § 189. Duty of Good Faith in Performing Contracts, CED Contracts, citing Valley Equipment Ltd. v. John Deere Ltd. (2000), 2000 CarswellNB 13 (N.B. Q.B.) (dealer awarded damages against manufacturer for breach of duty of good faith; “reasonableness” read into cancellation clause in dealer agreement; termination of long-term relationship based on resignation of dishonest and disloyal general manager not reasonable) [BOA TAB 66]

³¹³ *Murano*, supra note 29

³¹⁴ *Ibid* at para 72

circumstances, justification lies with the creditor. See Kavcar Investments Ltd., supra, at p. 238. In this respect, Madam Justice McKinlay stated:

However, any very short notice period – certainly one of less than a day – is prima facie unreasonable, and in such a case it would be up to the creditor to show why, in the particular circumstances, the period allowed was reasonable. It is important for creditors to keep in mind that while the creditor of a dishonest debtor may well have evidence of that dishonesty available to him, to obtain evidence of a debtor's inability to raise funds is a much more difficult matter. Even a technically insolvent debtor may have funds available through related individuals or corporations. If a creditor demands payment and gives his debtor no time or a very short time to pay, relying on the debtor's inability to raise funds, he takes the risk that he will be unable later to prove that inability.

[76] Finally, there is judicial recognition that Canada's banks occupy a privileged position in the economy and shoulder correlative duties in respect of their customers. The policy underlying this perspective was captured by McDonald J. in *Royal Bank v. W. Got & Associates Electric Ltd.*, [1994] 5 W.W.R. 337 (Alta. Q.B.), at p. 396, para. 148 in writing:

Canada's major chartered banks occupy a privileged position. It is not easy for a new bank to obtain a charter and to attain an established position in the marketplace. The major chartered banks are a vital source of financing for Canada's businesses. The small group of major chartered banks enjoy prestige, respect and respect in the commercial community and among depositors (whose deposits form the source of the banks' lending capacity). This respect is engendered not only by their large and firm capital base which gives reassurance of stability, but also by their integrity and good faith in their dealings with borrowers and depositors alike. The major chartered banks are not a collectivity of retailers responsible only to their shareholders for the maximization of profits. They are looked to by the citizenry as honest, trustworthy, law-abiding leaders of the business community. The citizenry expects the ethics of the chartered banks to be above reproach and above what might be the dictates of "the bottom line". Any shocking failure on the part of any of these banks to meet those expectations may be expected not only to harm those directly affected by such conduct, but to cause cynicism and distrust on the part of present or potential borrowers, depositors and shareholders. Bad faith and law-breaking by a major chartered bank cannot but damage the fabric of Canada's banking system and hence the country's potential for prosperity and economic well-being.

343. In *Thermo King Corp. v. Provincial Bank of Canada*³¹⁵, the court held that bank has a duty to give reasonable notice of a change to the prevailing course of lending conduct between the parties. The court considered the case of *Cumming v. Shand* (1860)³¹⁶ as follows:

³¹⁵ *Supra* note 29

³¹⁶ 5 H.&N. 95, 157 E.R. 1114, cited in *Thermo King* (1981) CanLII 1731 (ON CA) at pg 5

The plaintiff's action against the bank was tried before a jury and the trial judge left it to the jury to determine what the course of dealing between the bank and its customer was. He instructed them, however, that if they came to the conclusion that the course of dealing between them was that the plaintiff was allowed to draw cheques without reference to the sums placed to his debit under the arrangement, then the bank was obliged to give the plaintiff reasonable notice that it was no longer prepared to follow that course. The jury found for the plaintiff and the bank moved for a new trial on the basis of misdirection by the trial judge. The bank argued that it was not bound to honour the plaintiff's cheque because the plaintiff was in a debit position and, even if the bank in the past had been permitting the plaintiff to overdraw his account, that was an indulgence which the bank could discontinue at any time.

Pollock C.B. stated at pp. 97-98 H. & N., p. 1116 E.R.:

I am of opinion that the case was properly left to the jury. No doubt, if a person has been accustomed to accept bills for the accommodation of another, he may refuse to do so any longer; for there is no tenancy of a man's credit which requires any time to put an end to it. But that is not the case where a course of dealing has prevailed, and value has been given for the accommodation. It makes no difference whether the one party is a factor or a banker, if the circumstances are such as to justify the other in drawing though he has not a cash credit, he is entitled to do so until he has notice that the accommodation is discontinued. The question then is, whether there was, between the plaintiff and the Bank, a course of business which could not be put an end to without a reasonable notice. It seems to me that there is no objection to the mode in which the case was left to the jury, and that they have arrived at a proper conclusion.

(Emphasis added.) The other judges agreed with Pollock C.B.

- 344. NBC owed to the Canadian Hog Farm Entities a duty of good faith and honest dealing in relation to the banking and credit relationship between them. The course of conduct between them was such that NBC allowed the Canadian Hog Farm Entities to draw cheques without reference to the actual deposits available.
- 345. NBC breached its duties of good faith and honest performance in the performance of its obligations to the Canadian Hog Farm Entities by changing its course of conduct from allowing the continuation of the conditional credit knowingly granted to the Canadian Hog Farm Entities for a period of approximately 18 months, to suddenly and without notice changing course and disallowing the extension of that conditional credit.
- 346. The Canadian Hog Farm Entities operate a profitable business. Therefore, NBC was at no risk during any reasonable notice period.

J. Guarantees

- 347. NBC had and has a duty of honest performance in respect of its relationship with the alleged guarantors. It breached that duty by changing its course of conduct from allowing the continuation of the conditional credit knowingly granted to the Canadian Hog Farm Entities for a period of

approximately 18 months, to suddenly and without notice changing course and disallowing the extension of that conditional credit.

348. This change in practice by NBC also amounted to a fundamental change in the nature of the debtor and creditor relationship and accordingly must be found to have resulted in the termination of the alleged contracts of guarantee.

K. Knowing assistance in inducing breach of contract

349. We refer to and repeat the above submissions with respect to denial of any breach of contract, and say further, without limitation, that the Individual Respondents:

- (a) did not know the terms of the Business Account Agreements;
- (b) owed no personal, separate and distinct duties to NBC;
- (c) pursued and obtained no personal interest from their conduct;

350. In addition, the expectations of the parties was that that the Individual Respondents understood and honestly believed that NBC were aware of the practice complaining of, being the circulation of cheques each day between the US and Canadian Hog Farm Entities, and in the absence of and direction to the contrary, were happy for the practice to continue

L. Defences

1. Estoppel

351. As was held by the Supreme Court of Canada in *Ryan*³¹⁷, the doctrine of estoppel is “one of the most flexible and useful in the armoury of law”:

When the parties to a transaction proceed on the basis of an underlying assumption - either of fact or law, and whether due to misrepresentation or mistake makes no difference - on which they have conducted the dealings between them - neither of them will be allowed to go back on that assumption when it would be unfair or unjust to do so. If one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands.”

352. This was expanded further in *Stankovic v 1536679 Alberta Ltd*³¹⁸:

[52] The effect or outcome of promissory estoppel, if found, is that a party seeking to enforce its rights is prevented from enjoying the full benefit of a particular right.

[53] The facts underpinning an estoppel defence are crucial: what were the actions or words of the parties? Here, despite the volume of evidence relating to the assumptions underlying the parties’ overall agreement, the chambers judge did not

³¹⁷ *Ryan v Moore*, 2005 SCC 38 at para 51 [BOA TAB 57]

³¹⁸ *Stankovic v 1536679 Alberta Ltd*, 2019 ABCA 187 [BOA TAB 56]

consider that 153 did not need to prove estoppel, rather it needed only to persuade the court that Stankovic could not meet his burden of proving no triable issue

353. As in *Stankovic*, NBC proceeded in renewing their agreements with Sunterra, and therefore in continuing to extend conditional credit to Sunterra, on the basis of an underlying assumption with respect to the extension of conditional credit. The close scrutiny of Sunterra's accounts by NBC, as detailed herein, in conjunction with Sunterra's openness as willing disclosure of its financial information whenever requested, makes it evident that NBC and Sunterra had proceeded in the continuation of these agreements on the understanding that conditional credit had been, and would continue to be, used by Sunterra in the manner that it had been used by Sunterra for over ten years.

2. Waiver

354. As cited in *Agrium v Orbis Engineering Field Services*³¹⁹, one party cannot, without notice, suddenly insist upon strict performance of a contract, when the behaviour of that party let the other party to believe that the contract would not be enforced.
355. In the current action, the behaviour of NBC, in the extension of conditional credit for over ten years, and their continuation of this practice despite having full visibility into Sunterra's accounts and knowledge of the credit risk associated with those accounts (as detailed herein) clearly classifies as a waiver of NBC's ability to now, after nearly a decade, strictly enforce the terms of an agreement which, by their own conduct, Sunterra understood not to be strictly enforced.

VII. RELIEF REQUESTED

356. NBC was, and is, fully secured and has no losses. As such it attempts to assert a claim for indemnity, without any indemnity agreement, arising from a non-existent hypothetical action against it by Compeer – while also maintaining that NBC has done nothing wrong.
357. No claim has been made by Compeer against NBC. NBC does not even know the underlying facts of a potential claim. As such this is well beyond the contemplation of "future claims" as set out in the CCAA.
358. It is not a proper use of a CCAA proceeding to determine disputes between parties other than the debtor company. Here there is no claim by Compeer against NBC nor any facts underlying such a claim. Put plainly, there are no underlying facts as to how a claim by Compeer against NBC might exist. As such it is impossible to evaluate a possible contribution to or an indemnity regarding a claim that isn't formulated and has no factual underpinnings.
359. To allow NBC's claim to continue in such circumstances would have serious deleterious implications for CCAA proceedings. It would mean that critical resources of a debtor company would need to be allocated to pay for a potential claim that does not yet even exist. Further, it would cause irreparable delays to the CCAA process if such process was contingent on the resolution of non-CCAA third party claims. In such a circumstance how could debtor companies

³¹⁹ 2022 ABCA 266 [BOA TAB 58]

ever realistically file an emergence plan in a timely and efficient manner if that plan had to account for unproven and highly speculative claims for an unknown duration as between third parties?

360. NBC knew that Sunterra was using its conditional credit for large value intercompany transfers and had known that fact for many years. Sunterra did not hide or obscure that fact from NBC – it met with them, answered questions and discussed it. After receiving those answers NBC elected to exercise its discretion to continue the practise of advancing conditional credit to Sunterra.
361. There is no evidence before the Court on the following critical points;
- (a) No expert evidence has been called and therefore all evidence is fact evidence – there is no opinion evidence;
 - (b) No opinion evidence was called to explain what is cheque-kiting;
 - (c) No evidence was led to demonstrate that Sunterra had committed cheque-kiting;
 - (d) No opinion evidence was led to actually examine the transactions in question leading to the account freeze to opine on whether those transactions constituted cheque kiting;
 - (e) There is no evidence that NBC suffered any loss with respect to its issuance of conditional credit;
 - (f) There is no evidence of any claim being advanced by Compeer against NBC;
 - (g) There is no evidence of any misrepresentation by Sunterra; and
 - (h) There is no evidence that NBC relied upon any misrepresentation by Sunterra.
362. There was no deception. There was no fraud. There was no loss.
363. NBC had an obligation to put its best foot forward -this being it – and therefore the claim must fail.
364. Sunterra asks that the NBC application be denied with costs against it.

RESPECTFULLY SUBMITTED THIS 3 day of December 2025.

BLUE ROCK LAW LLP



David W. Mann KC / Scott Chimuk
Counsel to the Respondents

VIII. AUTHORITIES

Caselaw

<u>Tab</u>	<u>Authority</u>
1.	<i>Bruno Appliance and Furniture, Inc. v. Hryniak</i> , [2014] 1 SCR 126
2.	<i>Parna v. G. & S. Properties Ltd.</i> , [1971] S.C.R. 306
3.	<i>Pollock v. Tonca</i> 2016 BCCA 260
4.	<i>Hryniak v. Mauldin</i> , 2014 SCC 7
5.	<i>Brideau v. Boucher</i> , [1994] N.B.J. No. 544
6.	<i>Weir-Jones Technical Services Incorporated v. Purolator Courier Ltd.</i> , 2019 ABCA 49
7.	<i>Bhasin v. Hrynew</i> , 2014 SCC 71
8.	<i>Thermo King Corp. v. Provincial Bank of Canada</i> (1981), 34 O.R. (2d) 369 (C.A.)
9.	<i>Murano v. Bank of Montreal</i> [1995] O.J. No. 883,
10.	<i>Burns Bog Conservation Society v. Canada (Attorney General)</i> , 2014 FCA 170
11.	<i>Canada (Attorney General) v. Lameman</i> , 2008 SCC 14
12.	<i>Shefsky v. California Gold Mining Inc.</i> , 2016 ABCA
13.	<i>Arndt v. Banerji</i> , 2018 ABCA 176
14.	<i>Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)</i> , 2017 BCCA 324 (B.C. C.A.) at paras. 21, 56, (2017), [2018] 2 W.W.R. 480 (B.C. C.A.), leave to appeal refused SCC #37843 (July 26, 2018)
15.	<i>Ultracuts v Magicuts</i> , 2023 MBCA 71
16.	<i>Michael Shtaif, et al. v. Midland Resources Holding Limited</i> , 2019 CanLII 37485 (SCC)
17.	<i>Poonian v. British Columbia (Securities Commission)</i> , 2024 SCC 28

18.	<i>Montréal (City) v. Deloitte Restructuring Inc.</i> , 2021 SCC 53
19.	<i>Apotex Inc. v. Sanofi-Aventis</i> 2010 FC 182
20.	<i>Kelemen v El-Homeira</i> , 1999 ABCA 315
21.	<i>York University v. Markicevic</i> , 2018 ONCA 893
22.	<i>Chamberlain v. Meierhans</i> , 2003 CanLII 5515 (ON SC),
23.	<i>National Bank of Canada v Precision Livestock Diagnostics Ltd.</i> , 2025 ABKB 175
24.	<i>XY, LLC v Zhu</i> , 2013 BCCA
25.	<i>LK. Oil & Gas Ltd. v. Canaland Energy Corporation</i> 60 DLR (4th) 490
26.	<i>Hejna</i> 2013 ONSC 1719
27.	<i>Location Bristar Idealease Inc. (Syndic de)</i> 2012 QCCS 211
28.	<i>Agribrands Purina Canada Inc. v. Kasamekas</i> , 2011 ONCA 460
29.	<i>Canada Cement Lafarge Ltd. v. B.C. Lightweight Aggregate Ltd.</i> , [1983] S.C.J. No. 33
30.	<i>Mraiche Investment Corp.v. McLennan Ross LLP</i> , [2012] A.J. No. 285
31.	<i>Posluns v. Toronto Stock Exchange & Gardiner</i> , [1964] O.J. No. 792
32.	<i>Polimeni v. Danzinger</i> , [1995] M.J. No. 44
33.	<i>Maguire v Calgary (City)</i> 146 DLR (3d) 350
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