Clerk's stamp:

COURT FILE NUMBER	2501-19283
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
CLAIMANT:	**COMPEER FINANCIAL, PCA**
DEFENDANTSDEFENDANTSDEFENDANTS 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 DEFENDANTS **DEFENDANTSTO THE APPLICATION OF COMPEER**
HEARING BEFORE THE HONOURABLE JUSTICE MICHAEL I. LEMA
DECEMBER 4 AND 5, 2025

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I. APPLICATION AND ORDERS SOUGHT

1. This Brief is provided in support of the Defence by Sunterra Farms Ltd. ("**Sunterra Canada**"), Sunwold Farms Limited ("**Sunwold Canada**"), Sunterra Enterprises Inc. ("**SEI**"), (collectively the "**Corporate Defendants**"), Ray Price, Debbie Uffelman and Craig Thompson ("**Individual Defendants**"), Arthur Price, David Price and Glen Price ("**Additional Individual Defendants**") to the claim brought by Compeer Financial PCA ("**Compeer**") as against those parties in this proceeding ("**Compeer v. Sunterra Claim**" or "**Compeer Claim**")[1], as provided for by the orders of His Honour Justice Lema on July 24, 2025 ("**Compeer Scheduling Order**")[2].

A. Preliminary issues for determination

2. We draw to the Court's attention to the following housekeeping matter. Compeer commenced a claim against the Defendants in a separate proceeding, Court File No. 2503 10998 ("**Compeer Proceeding**") after the commencement of the stay orders in this proceeding under the *Companies' Creditors Arrangement Act*¸ R.S.C. 1985, c. C-36 (the "**CCAA**") and before the Compeer Scheduling Order. Thereafter, the Defence and Counterclaim filed on behalf of the Defendants, the Affidavits filed on behalf of Compeer and those filed on behalf of the Defendants, and the subsequent amended pleadings, were incorrectly filed in the Compeer Proceeding. The Defendants seek orders to correct the Court file numbers of those documents such that the Compeer Claim is properly proceeding within this CCAA proceeding, Court File No. 2501-06120, as per paragraph 3 of the Compeer Scheduling Order, which reads as follows:

> *Compeer's application for declaratory relief and summary judgment of its claims in Court of King's Bench Action No. 2501-06120 against the Defendants is adjourned to December 4 and 5, 2024 and shall proceed in accordance with Schedule "A" hereto.*

3. On July 24, 2025, his Honour Justice Lema also made orders for the adjudication of a claims brought by National Bank of Canada ("**NBC**") in the within CCAA proceeding ("**NBC Scheduling Orders**")[3]. Those claims were defined by the Court in those orders as follows:

4. 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;*

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[1] Amended Claim of Compeer Financial, PCA, served on October 27, 2025 [Joint Book of Evidence at TAB 10]

[2] Order of Justice Lema, filed July 24, 2025 (amended November 13, 2025) [Joint Book of Evidence at TAB 6] [*Compeer Consent Order*]

[3] NBC Schedule, filed July 24, 2025 (amended November 13, 2025) [*NBC Order*] [Joint Book of Evidence at TAB 4]

5. No orders were made to allow evidence in one of the claims to be evidence in the other, and accordingly Cross-examination were not conducted in that respect.

6. The Compeer submissions[4] refer to and rely upon the evidence filed and served by NBC for the purpose of the NBC v Sunterra Claim,. Evidence in the NBC v Sunterra Claim is not evidence admissible in the Compeer v Sunterra Claim and both the evidence from NBC and the submissions by Compeer concerning them must be disregarded by the Court for the purpose of adjudicating the Compeer v Sunterra Claim.

B. <u>Summary</u>

7. Compeer made a voluntary decision to advance conditional credit to Sunterra. According to Mr. Wagner, Compeer's CEO, the decision to do so was voluntary[5]. The decision to advance conditional credit was unilateral – no specific formal contract was entered between the parties with respect to the conditional credit.

8. 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 actually 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 Compeer, information with respect to how its customer, in this case Sunterra, has been using the conditional credit over time. In other words, the aggregate amounts are proof that Compeer 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.

9. There is no evidence that 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.

10. In the event that conditional credit was ever withdrawn Sunterra's belief was that Compeer had an ongoing duty of commercial reasonableness such that Sunterra would be able to repay any conditional credit outstanding.

11. Compeer knew that

    (a) Sunterra was using intercompany cheques in an "uncommon" manner;[6]

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[4] Brief of Compeer financial, PCA, submitted in these proceedings, filed on November 19, 2025 [ICompeer Submissions] see e.g. at para 27

[5] Cross examination of Jase Wagner of November 13, 2025 at page 17, lines 6-22 [Wagner Cross] [Joint Book of Evidence TAB 67] page 17 lines 5-8 and 20-22

[6] Cross Examination of Nicholas Rue on October 21, 2025 [Rue Cross] [Joint Book of Evidence TAB 61] cross, page 49 lines 1-12

(b) That there were regularly occurring overdrafts[7] and that he had reached out to Ray Price with respect to those overdrafts[8];

(c) Sunterra was using “lots” of cheques for its transactions;[9]

(d) That these cheques were intercompany cheques between the Canadian and US Sunterra entities[10] and that the daily value of these cheques was approximately $15 million[11] and that the number and volume of cheques was unusual[12] ;

(e) That the cheques were physical cheques that were manually scanned in by CSR personal at Compeer[13];

(f) That the use of cheques for intercompany fund transfers had become a red flag;[14]

(g) That they knew the quantum of the chequers the date of the cheques and that these cheques were to and from CWB;[15]

(h) That all appropriate financial informaiton was provided by Sunterra to allow for lending;[16] and

(i) That Compeer had all the primary informaiton it needed to come to the conclusion that Sunterra was using conditional credit for intercompany transfers. As put by Mr. Grosland

(j) That is the primary evidence., When you’ve got a company that grosses probably 32 million a year and they are writing out cheques of multiple billions of dollars, I struggle to understand why a company would need to move that much money back and forth when their gross income is 50 multiples less

12. In summary, Compeer had all of the base information at its disposal with respect to knowing that Sunterra was using conditional credit in accordance with the Account Management Practise. However, Compeer did not put forward any evidence from witnesses with any first hand knowledge and has objected to and refused to answer undertakings from witnesses that would have first-hand knowledge.

13. Even then, putting its best foot forward, Compeer does not deny that it knew about the Account Management Practise. When asked Mr. Grosland stated “I don’t know if we knew because I don’t

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[7] Rue Cross, supra note 6 page 56 lines 17-24

[8] Ibid page 55 lines 16-17

[9] Ibid page 62 lines 14-18

[10] Ibid page 68 lines 13-15

[11] Cross Examination of Steve Grosland on October 22, 2025 [Grosland Cross] [Joint Book of Evidence at TAB 62] page 44 lines 10-12

[12] Ibid at page 49 lines 1-25

[13] Rue Cross, supra note 6 page 71 lines 8-9 and 18-20

[14] Ibid page 77 lines 23-25

[15] Grosland Cross, supra note 12 page 54 lines 1-8

[16] Rue Cross, supra note 6 page 105 lines 2-24

know if anybody took the time to review it"[17]. In other words, Compeer can neither confirm nor deny that it knew. Compeer elected not to call any witnesses with actual knowledge and as such an adverse inference applies.

14. Additionally, Compeer has failed to call any evidence with respect to cheque-kiting. Of Compeer's two witnesses only Mr. Rue had any actual first hand knowledge of events prior to February 2025. However, Mr. Rue

    (a) was simply the "primary contact point"[18] and was not in charge of back office calculations;

    (b) did not perform any due diligence regarding the loans or underwriting, that was done by Ms. Zeigler who was not produced and whose undertakings were refused[19]; and

    (c) it was "not his job" to look at frauds and indeed he didn't even know "who that person is"[20]

15. The second witness, Mr. Grosland had no personal knowledge and was called in after the fact however the primary purpose of his job was to protect "collateral" as opposed to investigating fraud. Mr Grosland confirmed that;

    (a) He was not an accountant[21];

    (b) He did not conduct a forensic audit[22];

    (c) It was never the primary purpose of his job to make a determination with respect o whether there was cheque kiting[23]; and

    (d) That the decision with respect to whether cheque kiting had occurred had been made prior to his involvement.[24]

16. In short – Compeer has adduced no evidence that cheque kiting has occurred, that Compeer relied on representations by Sunterra or that cheque-kiting caused a loss.

17. Finally, the evidence has established that Compeer's loss was actually occasioned by its own bad faith conduct. Compeer has admitted knowledge of the US Sunterra entities business – namely to raise special NAE status piglets that it purchased from the Canadian Sunterra entities. To operate as a going concern this required the continual purchasing of special NAE piglets from the Canadian entities[25].

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[17] Grossland Cross, supra note 11 at page 55 line 25 and page 56 line 1

[18] Rue, cross supra note 6 page 14 lines 7-10

[19] Ibid page 19 lines 21-24 and page 41 lines 8-12

[20] Ibid page 41 lines 13-19 and page 42 lines 6-10

[21] Grosland Cross, supra note 11 page 60 lines 11-25

[22] Ibid.

[23] Ibid page 61 lines 1-6

[24] Ibid page 62 line 25 and 63 lines 1-6

[25] Grosland page 81 lines 19-22

18. Compeer knew that the Canadian Sunterra entities would not simply give the pigs away for free and that payment was required[26] Notwithstanding this knowledge, Compeer, promised payment to the Canadian Sunterra entities and nthen subsequently and for no reason refused to allow those payments to process – which in turn destroyed the US Sunterra entities as going concerns and destroyed their ability to pay back any money owed to Compeer. This is all set out in the examination of Grosland:

> *Q. You told Ray Price that if the Canadian entities continued to ship hogs to the US entities, that you -- you'd authorize the US entities to write cheques to pay for those pigs, correct?*
>
> *A. We agreed to a price in formula, which I'm sure you have access to, and that was -- our commitment was to transfer funds once we had gotten a certain set of information from CWB.*
>
> *Q. And you said that you were going to take that payment proposal to the credit committee at Compeer, correct?*
>
> *A. It's possible, yes.*
>
> *Q. And on March 12, 2025, you advised Ray Price by email that Compeer had received a confirmation letter from NBC acknowledging the amount of money to be paid and that it was acceptable to Compeer, correct?*
>
> *A. That is correct, yes.*
>
> *Q. And on March 13, 2025, you sent another email saying that those payments would be made, correct?*
>
> *A.*
>
> *Yes. That time frame, I remember it was that week. Whether it was the 13th or 14th, I'm not sure, but I do*

[26] Ibid page 71 lines 20-23.

remember sending an email to Ray confirming that we

were planning to make payments once certain information

was clarified with the bank, yes.

Q. But those payments were never made in the week of March

19th, 2025, correct?

A. The payments to the bank were not wired, no. They were

not made.[27]

19. In other words – any inability of Compeer US to repay Compeer was occasioned by Compeer's own misconduct in dishonouring commitments and refusing to pay for hogs.

20. Compeer had an obligation to put its best foot forward - this being it – and therefore the claim must fail.

II. FACTS

21. The facts on which this Defence is based are more fully set out in the following affidavits:

(a) Arthur Price, sworn September 5, 2025 ("Art Price Affidavit");

(b) Ray Price, sworn September 5 2025 ("Ray Price Affidavit")

(c) Debbie Uffelman, sworn September 4, 2025 ("Uffelman Affidavit")

(d) Craig Thompson, sworn September 5, 2025 ("Thompson Affidavit")

together, "Sunterra Evidence".

A. Sunterra Group

22. 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.[28]

23. 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

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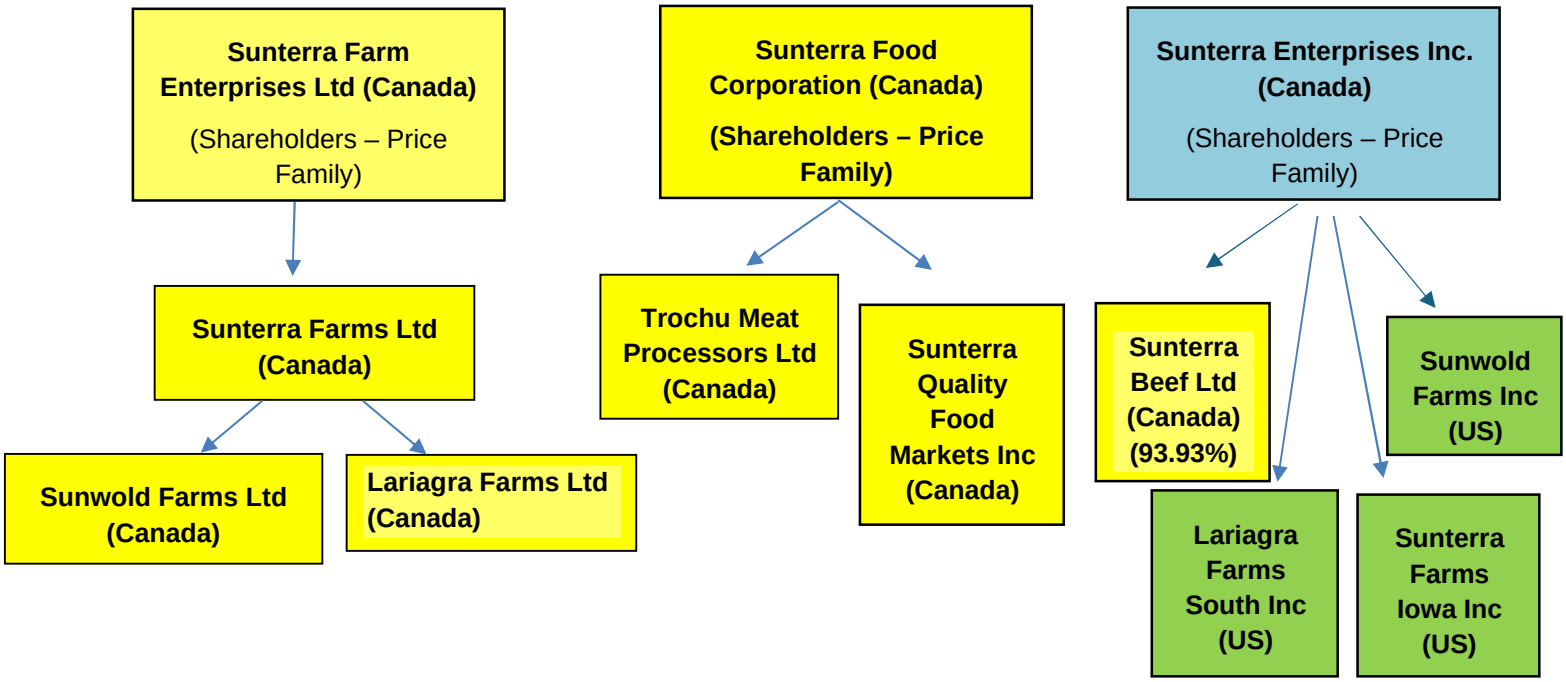
[27] Grosland Cross, supra note 11 page 69 lines 18-25 and page 70 lines 1-18

[28] Affidavit of Arthur Price, sworn September 5, 2025 [*Art Price* Affidavit] [Joint Book of Evidence TAB 38] at para 5

requires stringent quality control, enhanced operational efficiencies, and the consistent maintenance of premium product standards. In addition, Sunterra Quality Food Markets Inc. ("**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.[29]

24. 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.[30]

25. 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.[31]



26. The directors of each of the companies are as follows:

[29] Ibid at para 6

[30] Art Price Affidavit, supra note 28 at para 7

[31] Ibid at para 10

(a) for Sunterra Food Corporation, Sunterra Farm Enterprises Ltd ("**Sunterra Farm Enterprises**"), Sunterra Enterprises Inc ("**Sunterra Enterprises**"): Arthur Price, Glen Price, Ray Price, David Price, Allan Price and Joyce Lord;

(b) for Sunterra Canada, Sunwold Canada and Lariagra Farms Ltd ("**Lariagra Canada**"): Arthur Price and Ray Price;

(c) for Trochu Meat Processors Ltd ("**Trochu Meat**") and Sunterra Beef Ltd ("**Sunterra Beef**"): Glen Price and Ray Price;

(d) for Sunterra Quality Food Markets Ltd ("**Sunterra Markets**"): Ray Price, Glen Price and Art Price;

(e) for Lariagra Farms South Inc ("**Lariagra US**") and Sunwold Farms Inc ("**Sunwold US**"), Ben Keeble is registered as the principal officer; and

(f) for Sunterra Farms Iowa Inc ("**Sunterra US**"), the registered officers are Ben Keeble as director and Ray Price as President.

B. The Business of the Canadian and US Hog Farms

27. Sunterra Canada and Sunwold Canada ("**Canadian Sunterra Entities**") run pig farming businesses in Alberta (the "**Canadian Hog Farms**"). Sunwold Canada own sow who 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 to the US Hog Farms Entities and ultimately by US Hog Farms Entities to market also at a premium price. Sunterra Canada provide pig management services for Sunwold Canada and Lariagra Canada, which in turn also breeds piglets for sale to the US Hog Farm Entities.[32]

28. Sunwold US and Lariagra US are both companies incorporated pursuant to the laws of the State of South Dakota, which prior to the US Receivership (see below) carried out "wean to finish" swine operations, in respect of which it purchased high quality piglets from Sunwold Canada and Lariagra Canada, raised those piglets to market weight, and then sold the hogs as raised at a premium price because of their NAE status, as follows:

(a) Sunwold US purchased approximately 5500 to 6000 piglets per week;

(b) the pigs would take between 20 and 26 weeks to reach market weight; and

(c) inventory on hand at any one time was approximately 130,000.[33]

29. Sunterra demonstrated for years its reliable ability to generate an incremental EBITDA of $4 USD million per year in excess of what would be achieved with regular commodity prices.[34]

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[32] Art Price Affidavit, *supra* note 28 at para 11

[33] *Ibid* at para 12

[34] *Ibid* at para 13

30. Sunterra US is incorporated pursuant to the laws of the State of Iowa which, prior to the commencement of the US Receivership, carried out a business operating as a pig management company, including for Sunwold US and Lariagra US.[35]

31. Sunterra US managed the farms which were rented by Sunwold US and Lariagra US, and the care and raising of the pigs in a "wean to finish" operation for sale on the market.[36]

32. Since 2018, Sunwold US and Lariagra US have had agreements in place with Tyson Fresh Meats ("**Tyson**"), whereby Tyson is bound to the purchase of a minimum number of hogs from those companies with a price formula that includes an NAE premium on top of the market price.[37]

33. 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 $16 million.[38]

C. US Hog Farm entities banking relationship with Compeer

34. As referred to above, Sunwold US and Lariagra US purchased piglets from the Canadian Hog Farms, and using Sunterrra US for pig management services, raised the piglets into hogs for sale to the market. The vast majority of the hogs were sold in the US market at a premium price because of the NAE eligibility .

35. Compeer Financial, PCA ("**Compeer**") is primary lender to the US Hog Farm Entities (together, the "**Compeer Borrowers**"), under loan agreements which expired on an annual basis and therefore required review for renewal and continuation of the lines of credit as granted ("**Compeer Loans**"). They were last reviewed and renewed in or around October 2024.

36. Compeer Financial is a member-owned, Farm Credit cooperative. It puts itself forward as serving and supporting agriculture and rural communities, providing loans, leases, risk management and other financial services throughout 144 counties in Illinois, Minnesota and Wisconsin. Compeer purports to offer specialized expertise and personalized service specific to the various industries aCross its lending portfolio, including dairy, swine, grain and renewable energy[39].

37. Compeer has always held itself out to the Sunterra Group as having expert knowledge in the swine industry in the US.

38. Pursuant to the contracts and prior to 2024, Tyson purchased approximately 5,500 to 6,000 hogs from Sunwold US and Lariagra US together each year, with 4,500 to 5,000 of them NAE eligible.

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[35] *Ibid* at para 14

[36] *Ibid* at para 15

[37] *Ibid* at para 16

[38] *Ibid* at para 17

[39] Affidavit of Ray Price, Sworn September 5, 2025 [Joint Book of Evidence TAB 37] at Exhibit "A"" [Bates No. RPAff000010] [Ray Price Affidavit]

39. The contract between Tyson and Lariagra US expired in or around March of 2024 and was not renewed. The contract between Tyson and Sunwold US, on the other hand, was ongoing. Tyson was required under contract to give Sunwold US 18 months notice should it wish to terminate the agreement. In or around March 2024, Tyson gave notice that it wished to terminate the contract with SunwoldUS . Sunwold US opted to hold Tyson to the contract notice period and the notice was effective for termination of the contract September 2025.

40. Sunterra began discussions with another potential buyer, Sioux Preme, in or around early 2024, with respect to an arrangement for the purchase of NAE hogs at a premium. In January 2025, Sunwold US, Lariagra US and Perdue Premium Meat Co., the owner of Sioux Preme, ("**Perdue**") agreed on commercial terms an agreement by which Perdue committed to the purchase of a minimum of 1,400 hogs per week (72,800 hogs per annum) commencing February 1, 2025, on a graduated premium increasing to approximately USD $20 per head by the end of 2025

41. After the expiry of the Lariagra Tyson contract in early 2024, Tyson continued to buy approximately 2,000 hogs per week from Lariagra US pursuant to its contract. It also bought 3,000 hogs per week from Sunwold US.

42. Sunterra US had a commercial relationship with The Pig Group ("**TPG**"), which is owned by Tyson. TPG owns pigs that are sourced from other suppliers (i.e. not from the Sunterra Group). For several years, Sunterra US has been working with TPG to care for and manage their pigs in Iowa and South Dakota. In the last two years, the majority of the TPG pigs under its management have transitioned to South Dakota. Many of the TPG pigs were destined for the Tyson NAE market. The expertise of Sunterra US in managing those pigs was therefore valuable to TPG and TPG paid a premium management fee to Sunterra for the management of those NAE pigs. Benchmarking information provided by TPG has indicated that Sunterra is the top management performance for both regular and NAE pigs.

43. The details of these contracts with Tyson, Perdue and TPG, and the fact that they were profitable for the US Hog Farm Entities, was well-known to Compeer throughout their banking relationship with Sunterra[40]:

> *11 Q.[Mr. Chimuk] Sir, you knew that since 2018, Sunwold US and Lariagra*
>
> *12 US had agreements in place with Tyson Fresh Meats*
>
> *13 whereby Tyson was bound to purchase a minimum number of*
>
> *14 hogs from those companies with a price formula that*
>
> *15 included an NAE premium on top of the market price,*
>
> *16 correct?*
>
> *17 A[Nicholas Rue]. I knew they had two contracts with Tyson on NAE, yes.*

[40] Rue Cross, *supra* note 6 pages 122-12, lines 19-4

18 I don't know -- I don't remember -- or recall the date

19 those contracts would have been entered into.

20 Q. The date precedes your involvement in the file, to be

21 fair to you, sir, 2018, and you didn't get involved

22 until 2022, but I was just wondering if you were aware

23 of those contracts. Your evidence is that you were

24 aware of them, but you're not aware specifically of the

25 date; is that fair?

Dates or even necessarily specifics within the contract

2 other than there was an NAE premium, correct.

3 Q. Sir, you knew that Tyson was contractually obligated to

4 purchase any eligible pigs until September 2025 when

5 their contract was to be terminated, correct?

6 A. I apologize. Can you restate that?

7 Q. Yeah. You knew that the contract with Tyson would

8 terminate September 2025?

9 A. I knew they had received notice on both their

10 contracts, yes.

11 Q. And you knew that they began discussions with another

12 potential buyer, Sioux-Preme?

13 A. yes

And that ultimately a contract was

20 entered into on commercial terms with Sioux-Preme where

21 there was a commitment to purchase 1,400 hogs per week

22 commencing February 1, 2025, on a graduated premium

23 increasing to $20 US per head by the end of 2025,

24 correct?

25 A. I remember they were working on it. I don't remember

123

1 the specific details or if those finalized were

2 executed. From my memory, I remember them sending hogs

3 there but were still working out the details of the

4 contract.

44. In particular, Compeer has always had detailed knowledge with respect to the Sunterra business model and in particular:

(a) the interoperation and interdependence of the different members of the farming entities in Canada and the US., with the Canadian Hog Farms as sole suppliers of NAE piglets to the US Hog Farms as sole purchasers of those piglets;

(b) that the Canadian Hog Farm Entities and the holding companies use cash accounting for taxation purposes, whereas the US Hog Farms Entities are required to use accrual accounting because of their Canadian ownership, that the payment for piglets supplied is deferred for 2 years and that this necessitated a flow of funds between the companies in the US and Canada to help ensure adequate cash flow for the US Hog Farm Entities;

(c) the premiums paid by Sunwold US and Lariagra US to the Canadian US Hog Farm Entities because of the NAE status of the piglets, and in turn the premium paid to Sunwold US and Lariagra US on the market when the reared hogs are sold in the US market;

(d) that Sunterra Canada performs a similar function to Sunterra US, but provides hog management services solely for Sunwold Canada and Lariagra Canada (not to third parties);

(e) the flow of funds between the piglet and hog owning entities in Canda and the US respectively, 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;

(f) that Sunwold US Lariagra US had an ongoing contract with Tyson for the purchase of hogs with the NAE premium;

(g) that there was a broader commercial relationship with Tyson through TPG and the pig management services provided through Sunterra US, including farm rental; and

(h) that Sunterra US managed approximately 350,000 swine barn spaces in total, approximately 60% of which were for TPG, with approximately 40% for Sunwold US and Lariagra US. [41]

45. Compeer is familiar with, and in fact specializes in, the US Hog Farm business. This includes their familiarity with the Sunterra file. While Sunterra has held accounts with Compeer for over ten years, the most recent relationship manager was Mr. Nicholas Rue. Mr. Rue is a specialist in the agricultural space and, specifically, was familiar with Sunterra's business model and, in particular the business relationship between the Canadian and US Sunterra Entities[42]:

> *Q[Mr. Chimuk]So if I understand the business model correctly with*
>
> *17 respect to both the US or the Sunterra customers and*
>
> *18 their interplay with the Sunterra Group, it's that the*
>
> *19 Sunterra Group up in Canada would -- would have NAE*
>
> *20 hogs that it would then sell to the US customers. The*
>
> *21 US customers would then raise those weaned pigs to*
>
> *22 market weight and sell them at that NAE premium. Is*
>
> *23 that a fair view from a 50,000-foot assessment of what*
>
> *24 was happening?*
>
> *25 A [Mr. Rue]. That would be a fair 50,000-foot view from my understanding*

46. In addition to his familiarity with the Sunterra business operations, Mr. Rue was also readily informed by Ray Price that the Canadian and US Sunterra Entities relied on each other from a business standpoint not only in terms of supply, but that the Sunterra business model necessitated the flow of funds between the entities in order to cover various operational costs. This was told to Mr Rue at the outset of his relationship with Sunterra. and further that the entities used accrual accounting because of this:

> *Just as the US Sunterra entities relied on the Canadian*
>
> *7 entities for the supply of the NAE-eligible hogs,*
>
> *8 right?*
>
> *9 A. Correct.*
>
> *10 Q. And during that meeting, Ray explained that the*

---

[41] Ray Price Affidavit, *supra* note 39 at para 26

[42] Rue Cross, *supra* note 11 at page 13, lines 16-25

11 Canadian hog farm entities and the holding companies

12 used cash accounting for taxation purposes, whereas the

13 US hog entities were required to use accrual accounting

14 because of their Canadian ownership, correct?

15 A. Put a different way, they needed to use accrual

16 accounting in Canada because the US entities -- they

17 were US entities.

18 Q. That's what he explained to you?

19 A. That's my understanding, yes.

20 Q. And he explained that this necessitated a flow of funds

21 between the companies in the US and Canada to ensure

22 adequate cash flow for the US entities, right?

23 A. There were a number of business obligations of --

24 operational items of the US entities that needed cash,

25 yes.[43]

47. The above information was also outlined in the transfer forms for the three US Sunterra entities, upon their transfer to the Risk Asset Unit on February 12, 2025.

48. In addition to familiarity with the business operations of Sunterra, Compeer has, and always has had, full visibility into the Sunterra accounts at Compeer and as had some, though limited, visibility into the Sunterra Accounts at NBC from which funds would be arriving.[44] What Compeer was clearly able to see on a daily basis from its online banking systems and records, is the transactions in and out between the Canadian Hog Farm Entities and the US Hog Farm Entities

D. <u>Compeer loans to US Hog Farms</u>

49. The Compeer Loans to the US Hog Farms Entities arise under loan agreements which are reviewed and renewed on an annual basis, documented as follows.

50. Promissory Note/Loan Agreement Security agreement dated October 7, 2024, between Sunwold Farms US as borrower and Compeer as lender ("**Sunwold RLC**"), including the following terms and related documentation:

---

[43] Rue Cross, *supra* note 11 at page 125, lines 6-25

[44]Grosland Cross, sup

(a) extension of loan comprising a $7,000,000 USD revolving line of credit, to cover the period October 24, 2024 to May 1, 2025;

(b) certain property granted by Sunterra Farms US and Lariagra Farms US as collateral for the Sunwold RLC;

(c) written guarantee from Sunterra Enterprises, which is denied, capped at $3 million USD, without security;

(d) debt subordination agreement between Compeer and Sunwold Canada, pursuant by which:

(i) payment of Sunwold Farms US indebtedness to Sunwold CA, is to be subordinated to payment in full of Compeer indebtedness;

(ii) any security interests held by Sunwold CA in respect of assets of Sunwold US, subordinated to security interests given by Sunwold Farms US to Compeer

(e) debt subordination agreement between Compeer and Sunwold Canada, pursuant by which:

(i) payment of Sunwold Farms US indebtedness to Sunterra Enterprises, is to be subordinated to payment in full of Sunwold Farms US indebtedness to Compeer;

(ii) any security interests held by Sunterra Enterprises in respect of assets of Sunwold US, subordinated to security interests given by Sunwold Farms US to Compeer.

51. Promissory Note/Loan Agreement Security agreement dated October 7, 2024, between Sunterra Farms US as borrower and Compeer as lender ("**Sunterra RLC**"), including the following terms and related documentation:

(a) extension of loan comprising a $500,000 USD revolving line of credit, to cover the period October 7, 2024 to May 1, 2025;

(b) certain property granted by Sunwold Farms US and Lariagra Farms US as collateral for the Sunterra RLC;

(c) written guarantee from Sunterra Enterprises, which is denied, without security;

(d) debt subordination agreement between Compeer and Sunterra Enterprises, pursuant which:

(i) payment of Sunwold Farms US indebtedness to Sunterra Enterprises, is to be subordinated to payment in full of Compeer indebtedness;

(ii) any security interests held by Sunterra Enterprises in respect of assets of Sunterra US, subordinated to security interests given by Sunterra US to Compeer.

52. Promissory Note/Loan Agreement Security agreement dated October 7, 2024, between Lariagra Farms US as borrower and Compeer as lender ("**Lariagra RLC**"), including the following terms and related documentation:

    (a) extension of loan comprising a $4,000,000 USD revolving line of credit, to cover the period October 7, 2024 to May 1, 2025;

    (b) certain property granted by Sunwold Farms US and Sunterra Farms US as collateral for the Lariagra RLC;

    (c) written guarantee from Sunterra Enterprises, which is denied, without security;

    (d) debt subordination agreement between Compeer and Sunterra Enterprises, pursuant which:

        (i) payment of Lariagra Farms US indebtedness to Sunterra Enterprises, is to be subordinated to payment in full of Lariagra Farms US indebtedness Compeer;

        (ii) any security interests held by Sunterra Enterprises in respect of assets of Lariagra Farms US, subordinated to security interests given by Lariagra Farms US to Compeer

53. The prior year loan documentation included:

    (a) a Promissory Note/Loan Agreement dated August 28, 2023 for the period from that date to July 1, 2024, between Sunwold US as borrower, Compeer as lender;

    (b) a Promissory Note/Loan Agreement dated September 26, 2023 for the period from that date to October 1, 2024, between Sunterra US as borrower, Compeer as lender;

    (c) a Promissory Note/Loan Agreement dated August 28, 2023 for the period from that date to July 1, 2024, between Lariagra US as borrower, Compeer and lender.

54. It has always been the intention of the US Hog Farms to service its loans with Compeer, and they have worked collaboratively with Compeer over the years to takes steps within its control to pay any debts owing to Compeer.

E. <u>Canadian Sunterra entities banking relationship with National Bank of Canada</u>

55. Since 2010, the Canadian entities in the Sunterra Group have banked with CWB, and now NBC, whereby NBC has provided bank account services, credit facilities (as described in more detail below), and related cash management services.[45]

56. Sunterra Food Corporation, Sunterra Canada, Sunwold Canada, Trochu and Sunterra Markets, are parties to a loan agreement as borrowers ("**NBC 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

[45] Art Price Affidavit *supra* note at para 19

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**").[46]

57. The Loan Agreement, granted by Canadian Western Bank ("**CWB**") as lender[47], prior to its amalgamation with NBC on or around March 1, 2025, 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 "**NBC Loan**").

58. NBC has alleged that each of the Borrowers have Cross-guaranteed the liabilities of the other Borrowers under the Loan Agreement ("**Alleged Cross-Guarantees**").[48]

59. NBC has claimed that the indebtedness of the Borrowers to the Bank is guaranteed by Sunterra Beef Inc (a subsidiary of Sunterra Enterprises Inc), 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 security agreements for All PAAP granted by Sunterra Beef and a $2,000,000 promissory note granted by Sunterra Food Corporation.[49]

60. 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.

61. 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.[50]

F. <u>USD accounts with NBC</u>

62. The Canadian Hog Farm Entities each had USD deposit accounts with NBC, from which cheques were drawn in favour of the Compeer Accounts for the US Hog Farm Entities.

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[46] Art Price Affidavit *supra* note at para. 20-27, Exhibit D, 2022 Commitment Letter [Bates No. APAff000093], Exhibit E, Certificate of Title Trochu Property [Bates No. APAff000095, Exhibit F PPSR searches [Bates no. APAff000180]

[47] *Ibid*

[48] Art Price Affidavit at para. 24(e), and First NBC Application (see paragraph 24 hereof), at para 15

[51]Ary Price Affidavit *supra* note at para. 26-36

[51]Ary Price Affidavit *supra* note at para. 26-36

G. Loan Agreement with Farm Credit Canada

63. 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**").[51] On or around December 31, 2024, the balance of the FCC loans were **$17,830,522**.[52]

64. 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, and Sunterra Enterprises Inc. ("**FCC Security**").[53]

H. Other Secured Creditors

65. The Applicants have other secured creditors as identified in the PPSA registers for each of them.[54]

I. Trade Creditors

66. 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.[55]

J. Secured Assets

67. The assets of the Borrowers subject to the first priority security claimed by NBC are 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;

68. The total value of the assets of the Borrowers over which NBC it has security (including in second priority to FCC) as at December 31, 2024, was $137,995,796.[56]

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[51] Ary Price Affidavit *supra* note at para. 26-36

[52] *Ibid*, at para. 48, Exhibit Q

[53] Op cit, footnote 10

[54] Art Price Affidavit, para. 37 - 43

[55] *Ibid*, para. 49

[56]"; Affidavit of Debbie Uffelman, sworn September 5 2025 [Uffelman Affidavit] [Joint Book of Evidence TAB 39] at para 17

K. Access to Sunterra Information

69. At all material times Compeer had access to all of the requisite information that it needed to properly understand the movement of monies between the Sunterra entities.

70. Specifically, Compeer had access to

(a) Hard physical copies of all cheques that were deposited as well as all cheques that were written on Compeer bank accounts. These cheques would have shown the amount of money, the date, the source as well as the receiving party with respect to each and every cheque;

(b) Access to Ray Price to discuss any issue at any time;

(c) All internal Compeer banking information; and

(d) Information provided by Sunterra's in the course of the loan agreements.

L. Account Coverage Practice

71. Sunterra accounts at NBC and Compeer for the most part did 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 the Sunterra Group accounts, or some of them, with each bank.

72. 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 and otherwise between the companies in the Sunterra Group[57].

73. The Sunterra Group involves a complex array of commercial arrangements and transactions between the interrelated 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[58]:

(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.

---

[57] Ray Price Affidavit, *supra* note at paras 5-7

[58] *Ibid*

74. In addition, as a part of the Account Coverage practice, Ray Price explained that Sunterra have worked to manage the cash flow needs between the Canadian Hog Farm Entities and the US Hog Farm 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. This is done by deferring the payment for piglets supplied by the Canadian farm companies to the US farm companies for up to two years. This in turn necessitates a flow of funds between the companies in the US and Canada to help ensure adequate cash flow for the Canadian Hog Farm Entities. [59]

75. Sunterra, therefore, like many entities at Compeer, relied primarily on the use of cheques in order to facilitate the above-explained flow of funds between the entities. Contrary to the written submissions of Compeer, this is not unusual for companies operating within the farming space, as illustrated by the fact that Compeer had established processes in place, which it deemed to be "practically necessary" as banking practices, in order to remain competitive within the marketplace.[60]

76. Because Sunterra, like many Compeer customers, used cheques as a primary method of fund transfer, as a part of the relationship with Compeer, Sunterra was extended credit for cheques prior to clearing of such cheques. This "conditional credit" (a term which is erroneously attributed to Ray Price[61], but with which the Compeer deponents were familiar, is also referred to as "float". This is not, as Compeer attempts to imply, a "state" which occurs accidentally, over which Compeer has no choice or control. It is a deliberate choice by Compeer to add additional funds to an account before such funds have been actually transferred, which Compeer maintained in order to remain competitive in their market. This is, per Compeer's own admissions, a mechanism that Compeer uses in order to remain competitive within the agricultural space and is not unusual or atypical. However, it is not, as Compeer implies, automatic. It is a practice which Compeer makes the decision to participate in and use for its customers, including the intentional increasing of limits for the holds on those cheques:

> *s Compeer obligated to provide float?*
>
> *16 A. Practically speaking, yes.*
>
> *17 Q. What do you mean "practically speaking"?*
>
> *18 A. The structure of the financial system, the competitive*
>
> *19 nature of lending requires the ability to use cheques*
>
> *20 in today's environment, and if you're going to accept*
>
> *21 cheques, then the structure in the financial system*
>
> *22 would create a scenario where float is possible or*

---

[59] *Ibid*

[60] Cross examination of Jase Wagner of November 13, 2025 at page 17, lines 6-22 [Wagner Cross]

[61] Brief of Compeer Financial, PCA, submitted in these proceedings, [Compeer Submissions] at para 35

23 likely.

(…)You'd agree with me that there's nothing in the

6 structure of the financial system itself that mandates

7 that float be provided, correct?

8 A. Correct.

9 Q. And when you refer to the competitive nature of

10 lending, what you're referring to is the fact that

11 Compeer's customers may have other financial

12 institutions that they could go to, correct?

13 A. Correct.

14 Q. And you're referencing the fact that those other

15 financial institutions, to your knowledge, offer -- or

16 at least some of them offer float, correct?

17 A. Again, float is a function of an outcome, not something

18 that they specifically offer. They would transact

19 business in a way that would allow float to happen.

20 Q. But that's a choice that the lending institution makes,

21 correct?

22 A. Correct.[62]

77. Ray Price instructed Uffelman to manage the Account Coverage Practice on a daily basis to ensure that none of the Sunterra accounts were overdrawn. 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.

78. It was the understanding of Ray Price and Uffelman that CWB did not allow for Cross-border electronic funds transfers with the US and, as a result, Sunterra was required to use cheques in order to facilitate this.[63] This inability to use electronic transfer was something which was explained by Ray Price to Compeer.

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[62] Wagner Cross, *supra* note at page 17, lines 6-22 [Wagner Cross]

[63] Ray Price Affidavit, *supra* note at a para 26; Uffelman Affidavit, *supra* note at para 24

79. Neither Thompson nor Uffelman have qualifications or training in accounting or corporate finance[64].

80. Uffelman started working for the Sunterra group over 45 years ago as a young accounts clerk. She has held numerous and varied positions with the Sunterra Group over the years. 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 Compeer, she did not hold the position of Chief Financial Officer. Uffelman's current job responsibilities are divided into three parts:

    (a) management and oversite 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, oversite 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.

81. 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. Uffelman was not and is not involved in any strategic decision making of the business and affairs of the companies in the Sunterra Group.

82. The mechanics of what Uffelman did on a day-to-day basis in respect if the Account Coverage Practice, are set out in her Affidavit evidence.[65]

83. She does not participate in the strategic decision-making, or participate in the business affairs of the Sunterra Group. She primarily administratively management their accounting practice.

84. Despite Compeer's insistence, at no time has Uffelman made statements or identified herself as the CFO of Sunterra:

> *Understood. Paragraph 9, you say that Debbie Uffelman*
>
> *21 was the chief financial officer?*
>
> *22 A. Yes.*
>
> *23 Q. I'm going to suggest that she was the VP, Corporate*
>
> *24 Finance. Do you agree with me?*

---

[64] Uffelman Affidavit, *supra* note at paras 3-5

[65] Uffelman Affidavit at paras 8-19

25 A. No, it was my understanding she was chief financial

99

1 officer.

2 Q. What was the basis for your understanding?

3 A. That's the way it was portrayed in our meetings.

4 Q. Did she say those words?

5 A. I don't recall specific words, no.

6 Q. Did Ray Price say those words?

7 A. I don't recall the specific words, no.

8 Q. So it's fair to say that it was just your impression

9 that she was the CFO; is that fair to you?

10 A. She was -- it was my impression she was the CFO along

11 with essentially Ray Price's right-hand person, if you

12 will.

13 Q. But that wasn't based on anything that she explicitly

14 or Ray Price explicitly told you, correct?

15 A. No.[66]

85. Ray Price's instructions to Uffelman were to ensure that all payments to outside customers were made on time and that the accounts held by Sunterra were not over drafted. It was this instruction alone which was the extent of Ray Price's instructions to Ms. Uffelman.[67] He at no time instructed her to participate in kiting or fraud, nor did he provide specific instructions as to the mechanics of the Account Coverage Practice. Compeer's assertions to the contrary are completely unsupported and without any evidence and, as will be supported below, "fraud" is a legal test and one which none of the individual Defendants, including Ms. Uffelman, satisfy as they had no intent.

86. Per the Cross examination of Uffelman:

And I take it that in your -- in terms of your

---

[66] Rue Cross, *supra* note at page 93 lines 20-25 and page 94 lines 1-7

[67] Cross-examination of Debbie Uffelman on October 6, 2025 [Uffelman Cross] [Joint Book of Evidence at TAB 52] at page 49, lines 20-25

19 responsibilities for cash management, one of the things

20 that fell under the scope of your responsibilities was

21 overseeing Mr. Thompson's carrying out of the process

22 he described as the account coverage practice?

23 A. My portion of the cash management was primarily with

24 the CWB Canadian accounts and the small US accounts.

25 So to say -- to say I oversaw Craig wouldn't be quite

11

1 accurate. We worked together.[68] *(page 11)*

2 Q. Okay, did --

3 A. He providing some information and me providing other

4 information.

So having signed them, you're aware of them. And I

9 think you've already told me, your understanding was

10 that those deposits would have to be made to avoid a

11 shortfall in the Sunwold USD account -- or the Sunwold

12 US account; right? That was the purpose for carrying

13 this process out?

14 A. The process was to make sure none of the accounts were

15 in overdraft[69]*. (page 42, lines 8-15)*

And you understood that the purpose of the process was

19 just to cover the shortfalls between the accounts;

20 right?

21 A. I understood the process was to make sure the various

---

[68] Uffelman Cross, *supra* note at page 11 line 1

[69] *Ibid* at page 42, lines 8-15

22 accounts were not overdrawn. Not just the US accounts.[70]

87. Further, per the Cross of Ray Price:

Q. Part of Ms. Uffelman's testimony that you would have

21 heard is that although she doesn't recall, she says, a

22 specific discussion, she says that the original

23 direction that she received to start undertaking the

24 account coverage practice came from you.

25 I gather you agree with her in that regard?

33

1 A. I would have told Ms. Uffelman to make sure that the

2 account would not go into overdraft.

(…)

It says -- I would agree that accounts within the

16 relevant entities in the group have shortfalls and

17 overdrafts. So, yes, I would have said: Let's make

18 sure we cover shortfalls and avoid overdrafts.[71]

88. In addition to cheques being the manner in which Sunterra transferred funds between accounts, cheques were also a manner by which Sunterra would receive payments from third party vendors. That is, the use of cheques was present aCross Sunterra's business and was not, as Compeer suggests, unique to intercompany transfers whereby conditional credit would be extended. In other words, Sunterra chose cheques as the manner of payment and deposit, even when no conditional credit would be extended.[72]

89. 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. 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.

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[70] *Ibid* at page 48, lines 18-22

[71] Cross-Examination of Ray Price by Compeer on October 6, 2025 [*Ray Price Cross*] [Joint Book of Evidence at TAB 54] at pages 32-33, lines 20-21, 15-18

[72] Uffelman Cross, *supra* note 52

90. Thompson's formal job title is "Accounting". Like Uffelman, the extent of Thompson's understanding and role in the Group is defined not by his formal titles, 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 Uffelman 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.

91. 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.

92. 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;

    (b) Sunwold Canada and Sunterra Canada USD Canadian Western Bank accounts were not to go overdrawn.

93. 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.[73]

94. 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.[74] Further, Thompson understood that this was done with the knowledge and consent of the Banks.[75]

95. The instructions provided to Thomspon were, not, as Compeer implies, specific with respect to mechanics. Rather, Mr. Thompson was imply instructed, as Ms. Uffelman was "*to ensure the accounts were not overdrawn*".

96. Compeer spend a great deal of their written submission attempting to analyse a spreadsheet used by Mr. Thompson in his carrying out of these every day tasks. Mr. Thompson used an excel spreadsheet, which was shared between himself and others, and which tracked the account

---

[73] Affidavit of Craig Thompson, sworn September 5, 2025 [Thompson Affidavit] [Joint Book of Evidence at TAB 50] at para *s*. 12 - 22

[74] *Ibid* at para. 10

[75] *Ibid* at para 10 and 24,

balances within the Sunterra accounts and which was updated on a daily basis. In addition to those metrics mentioned in the Compeer written submissions, it additionally tracked the net amount of available funds within the account without the loan or available credit, and deposits (also by cheque) from third party vendors.[76] In effect this document was used as a general purpose manner by which Sunterra maintained a documentation of its overall banking activities aCross various entities. This spreadsheet is not, and was never, a "way of documenting that all cheques were NSF". Further, this conclusion was never put to or suggested to Mr. Thompson in Cross examination nor put forward in any evidence by Compeer.

97. Within the spreadsheeted, upon updating the balances, Mr. Thompson would look at the comparative balance within a given account, relative to upcoming expenses. If the account in question had upcoming expenses such that there would be an overdraw on that account, he would calculate the difference and move the funds from another available account. To suggest that this was always the practice which occurred, regardless of circumstance, is inaccurate and a misstatement of Mr. Thompson's evidence:

> *you'd do a calculation, and then you'd determine*
>
> *22 if a deposit was going to be required to ensure that*
>
> *23 those accounts were not overdrawn; right?*
>
> *24 A. Correct.*
>
> *25 Q. All right, and so I'm right then in understanding tha if you identified that there was going to be a*
>
> *2 shortfall and the account was going to be overdrawn,*
>
> *3 you needed to do something as part of the account*
>
> *4 coverage practice, as you've described it, to bring the*
>
> *5 account to a positive balance before the end of the*
>
> *6 day; is that right?*
>
> *7 A. Yes (page 28)*
>
> *So the total amount of the cheques that you would be*
>
> *15 calculating for deposit in, for example, Sunwold Canada*
>
> *16 to issue to Sunwold US, I take it that the total value*
>
> *17 was just based on the calculation that you did to*
>
> *18 determine what the shortfall in the Sunwold US account*

[76] Undertaking Response of Craig Thompson [Joint Book of Evidence at TAB 68]

19 was going to be; is that right?

20 A. Once I calculated the shortfall, I would then confer

21 with Debbie to let me know if there was any additional

22 revenue that I may not have known about, which would

23 then change the balance that I would be writing. So

24 that's why it was very much a fluid calculation.

25 Q. All right, but I take it that the fluidity of the page 31[77]

98. In their submissions, Compeer identify two "red flags" within Sunterra's behaviour. Firstly, the cheques being of a nonsequential nature and secondly, the valuation being under one million dollars. For both of these characteristics, which Compeer attempts to paint as indicative of intent, the Sunterra Defendants provided reasonable explanations under Cross examination, as below.

99. With respect to the valuation of Cheques, Ray Price explained that the valuation of cheques in less than USD $1M dollars was the result of desires to avoid delays at CWB:

When the cheques would be issued and taken to the bank,

6 if they were person to courier, the person would take

7 it to the branch and deposit it. And if the deposit or

8 the cheque was over $1 million, it would be an

9 extensive delay while the courier waited there until

10 they cleared the cheque.

11 So from our perspective, it was much easier for

12 the courier not to wait a period of time before they

13 were able to leave again. So we kept the cheques under

14 $1 million.

15 Q. I want to be clear about this, Mr. Price. Your

16 evidence is that the $1 million threshold related to a

17 courier person delivering cheques to the banks; is that

[77] Cross Examination of Craig Thompson by Compeer on October 4, 2025 [*Thompson Cross*] [Joint Book of Evidence at TAB 50] at page 31 LINES 14-24

18 right?

19 A. That's my recollection, yes, to the -- to the CWB.

100. Compeer assert that "*Mr. Thomspon could not offer a cogent explanation*" for the amounts transferred between entities in the Account Coverage Practice. This is inaccurate. Per Mr. Thompson evidence under Cross-examination, the total amount to be transferred was *not* random. It were calculated as the difference between the amount currently held in a given account, and the upcoming expenses for that account. However, as explained in the Cross-examination of Ms. Uffelman, because submission of multiple cheques in the same amount would often lead to errors in the online banking portal, the cheques would be written in various smaller amounts, in order to ensure that the funds would be transferred without the banking system experiencing an error[78]:

And you understood that the purpose of the process was

19 just to cover the shortfalls between the accounts;

20 right?

21 A. I understood the process was to make sure the various

22 accounts were not overdrawn. Not just the US accounts.

23 Q. Okay, so you have to help me understand then why would

24 it be necessary to issue multiple cheques to accomplish

25 that?

49

1 A. Just part of the process. I would say that the reason

2 that all the cheques weren't the same amount is if

3 you've ever done a bank reconciliation, it's very hard

4 if you have a whole bunch of cheques with the same

5 amount. More prone to errors. That's really all I can

6 add to that.

7 Q. And you would agree with me, you wouldn't have that

8 problem if you issued just one cheque; right?

[78]Uffelman Cross, *supra* note at page 49, lines 1-10

9 A. That may have been an easier way, but that was just the

10 process that we followed.

101. In addition to the above, Compeer attempt to assert that, as a result of his access to the living excel document, and his transfer of funds, Mr. Thompson "*must have known*" that there were "*no funds in the Compeer accounts*". Mr. Thompson at no time, as explained below, believed that there "*were no funds in the accounts*", and at all times reasonably believed that Compeer had awareness of this practice. Compeer has offered no evidence in contradiction of this[79].

Q: But they don't say anything about the financial status

21 of the source of those cheques; right?

22 A. Yes.

23 Q. So then am I right in understanding that as part of

24 your involvement in the account coverage practice, you

25 didn't personally take any steps to ascertain whether p37

or not there were any funds available in the source

2 accounts of the cheques that were being issued. Is

3 that fair?

4 A. Yes. That was not part of my role in the cash coverage

5 process. P. 38[80]

102. Uffelman and Thomspon, were instructed to carry out the Account Coverage Practice as described by Ray Price. They did not, however, as Compeer suggests, receive any specific instructions with respect to the activities they undertook, nor were they ever instructed by Ray Price to induce or otherwise deceive any party. Instead, the instructions provided by Ray Price were, and never extended beyond, an instruction to ensure that the Sunterra Accounts were not overdrawn. To suggest that such an instruction is equivalent to an instruction to "*carry out cheque kiting fraud*" is completely unsupported by evidence[81]:

You understood this concept of conditional credit not

23 just sitting here today, Mr. Price, but also back at

24 the time that the account coverage practice was being

---

[79] Thomspon Cross, *supra* note

[80] Uffelman Cross, *supra* note at page 37 lines 2-25

[81]

25 undertaken?

always knew that there was always a bit of time that

2 it takes for cheques to clear.

3 Q. So the answer to my question is yes, you did understand

4 that back at the time; right?

5 A. I don't know whether I would have looked at it from

6 that perspective at that time[82]

103. In addition to Ray Price's evidence that he did not "think of" the conditional credit in the manner suggested by Compeer, Compeer attempt to assert, by way of misstating Ray Price's evidence, that he had an understanding that there was simultaneous credit being extended by both Compeer and NBC. In fact, Mr. Price made repeated assertions to the contrary:

So if the cheques are going daily, the way you've just

6 told me they were, you'd agree with me that the

7 conditional credit was being extended by Compeer and

8 CWB at the same time; right?

9 A. We knew we had access to conditional credit. I didn't

10 really think about whether it was CWB or Compeer or

11 both.

12 Q. Well, you know, though, as a matter of fact it was

13 both; right?

14 A. I don't know whether I know that as a fact, no. I

15 would look at the analysis to see which bank accounts

16 had what cheques going through at what time.(p46 lines 4-16)

(…)

and certainly to the extent then that both banks are in

24 the process of clearing cheques simultaneously, then a

---

[82] Ray Price Cross, *supra* note at pages 39-40, ines 5-25, 1-2

25 conditional credit was extended on both sides; right?

Again, I don't know when the cheques were cleared, so

2 if, for example, one bank cleared them the same day,

3 then there would be no conditional credit on one side,

4 but there would be on the other.

5 Q. And that might be the case on any particular day, I

6 gather you're saying, but overall when we stand back

7 and look at what was happening here over the course of

8 many years, Mr. Price, you knew, didn't you, that there

9 was conditional credit being extended simultaneously by

10 both Compeer and CWB?

11 A. I don't know whether it was simultaneously. I just

12 don't know.(page 48, lines1-12)[83]

104. Notwithstanding the above, the Account Coverage Practice, which was carried on by Sunterra for many years, and was a practice which was intended to cover overdrafts in credit accounts and shortfalls in deposit accounts, in the context of the many and varied transactions with which the respective companies were involved. There is no evidence which has been advanced by Compeer to support an assertion that the practice was intended to do any more than that particular goal, and speculation of what could have happened, as is presented by Compeer in their written submissions, ought be disregarded.

M. Transparency of the Account Coverage Practice and Compeer knowledge and acquiescence

105. Throughout Sunterra's relationship with Compeer, Compeer had full visibility and knowledge of the account coverage practice. Sunterra were in communication with Compeer about their business and accounts for the US Farm entities on a regular basis.

106. Nicholas Rue ("**Rue**") was Sunterra's relationship manager with Compeer from around 2022, and the primary point of contact for Sunterra. Rue was the Vice President of Compeer for Swine Lending. Ray Price would talk on a regular basis about the business and the management of the US HOlg Farm Entities' accounts.

107. The three lines of credit held by the two US Hog Farm Entities respectively with Compeer, came up for renewal each year and Sunterra would primarily communicate through Rue about the business and provide required documentary records, including borrowing base information, for

[83] Ray Price Cross, *supra* note at page 47, lines 1-14

that purpose, including quarterly financial statements.[84] Among other documents, Ray Price sent 2023 year end financial statements for the US Sunterra Entities to Compeer between September 29 and October 1, 2024.[85]

108. On or around August 28, 2022, Rue came to Alberta with Jessica Zeigler ("**Zeigler**") and Steve Malakowsky ("**Malakowsky**") from Compeer. Ray Price understood Malakowsky to be Rue's boss at Compeer. He met with them and introduced Uffelman. Ray Price explained that he was president of the Sunterra farming entities in Canada and the US, being the US Hog Farm Entities and the Canadian Hog Farm Entities, plus Sunterra Enterprises, Sunterra Food Corporation and Sunterra Farm Enterprises.

109. Ray Price understood that the nature of the meeting was to discuss the overall needs of the US Hog Farm Entities and how Compeer could best support them. Ray Price explained in detail the business of the US Hog Farm Entities and the Canadian Hog Farms Entities, including:

(a) the interoperation and interdependence of the different members of the farming entities in Canada and the US., with the Canadian Hog Farms as sole suppliers of NAE piglets to the US Hog Farms as sole purchasers of those piglets;

(b) that the Canadian Hog Farm Entities and the holding companies use cash accounting for taxation purposes, whereas the US Hog Farms Entities are required to use accrual accounting because of their Canadian ownership, and that Sunterra therefore work to minimise income in the US entities by deferring the payment for piglets supplied for up to two years; that this necessitated a flow of funds between the companies in the US and Canada to help ensure adequate cash flow for the US Hog Farm Entities;

(c) the premiums paid by Sunwold US and Lariagra US to the Canadian entities because of the NAE status of the piglets, and in turn the premium paid to Sunwold US and Lariagra US on the market when the reared hogs are sold in the US market;

(d) that Sunterra Canada performs a similar function to Sunterra US, but provides hog management services solely for Sunwold Canda and Lariagra Canada (not to third parties);

(e) that Sunwold US and Lariagra US had an ongoing contract with Tyson for the purchase of hogs with the NAE premium;

(f) that there was a broader commercial relationship with Tyson through TPG and the pig management services provided through Sunterra US, including farm rental; and

(g) that Sunterra US managed approximately 350,000 swine barn spaces in total, approximately 60% of which were for TPG, with approximately 40% for Sunwold US and Lariagra US.

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[84] Ray Price Affidavit at paragraph 23, and Exhibit "E" [Bates No. RPAff000087]; Affidavit of Nicholas Rue, sworn June 19, 2025] [Rue Affidavit] [Joint book of Evidence at TAB 24] at para 18

[85] *Ibid* para 53

110. The Compeer representatives asked Ray Price about the use of cheques for the intercompany transfers taking place between the US and Canadian companies. They raised the administrative burden that this puts on the bank where the international cheques all need to be manually received, inputted and processed. The fact that this was such an administrative burden on Compeer is indicative of the fact that there was a very large and substantial volume of cheques that they were keenly aware of.

111. Ray Price explained to Rue, Zeigler and Malakowski the following:

(a) CWB were not able to conduct electronic funds transfers to the US;

(b) intercompany transfers were in amounts less than $1M, because of the time delay that Ray Price understood would arise in clearing cheques above that amount[86];

(c) further, because of the location of Sunterra offices in the US and Canada, Sunterra 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.

112. In or around September 7, 2022, Compeer raised concerns with Ray Price regarding what they referred to as potentially fraudulent cheques issued from the Sunterra US account with Compeer. It became apparent from communications that an alert had been raised on the Compeer system because of cheques being issued with numbers out of sequence. After further investigation, it was realized that some older used cheques had been used and that the cheques issued together were out of sequence.[87] Sunterra then put controls in place going forward to ensure that that did not happen again.[88]

113. Jessica Ziegler, an "underwriter" at Compeer of the Sunterra loans at Compeer, was also primarily responsible for the due diligence performed on the Sunterra accounts prior to the

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[86] Ray Price Affidavit at para 26; Ray price Cross at page 42

3 …And when you say in that sentence that you understood
4 there was time delays, what are you referring to there?
5 A. When the cheques would be issued and taken to the bank,
6 if they were person to courier, the person would take
7 it to the branch and deposit it. And if the deposit or
8 the cheque was over $1 million, it would be an
9 extensive delay while the courier waited there until
10 they cleared the cheque.
11 So from our perspective, it was much easier for
12 the courier not to wait a period of time before they
13 were able to leave again. So we kept the cheques under
14 $1 million.

[87] Answer to Undertakings of Rue, chain of emails between Compeer and Craig Thompson dated September 7 – 9, 2022, at page 7-21;

[88] Ray Price Affidavit, *supra* note at para 27

renewal of the Sunterra loans at Compeer in 2024.[89] Ziegler was involved as early as 2022, when the original "fraud scare" occurred, as referred to above. It is clear from email exchanges, as identified below, from this time that the accounting and underwriting department (and Ziegler and Rue specifically) had direct knowledge and visibility of the activity in the Sunterra accounts, and in particular the large value cheques going back and forth between the US and Canadian Hog Farm Entity Accounts.[90]

114. The chain of emails referred to above regarding the "fraud scare", includes the following emails involving Zeigler and Rue:

(a) Emails dated September 7, 2022 from Barbara Johnson to Ziegler, Rue and Jayson Koopmans, and a response form Zeigler (i.e "Jessica"):

> *FYI, Accounting had sent us a couple of drafts that they were suspicious of and below is Craig's response. I have forwarded this to accounting and to Nic Hunter, and will keep you posted if you want.*
>
> *Thanks,*
>
> *Barb*
>
> ---
>
> *Wow, the two fraud ones are for big dollars. Yes please keep this group in the loop*
>
> *Jessica*[91]

(b) Email from Thompson to Barbara Johnson, dated September 8, 2022, forwarded to others at Compeer, including Zeigler and Rue, which reads as follows:

> *Hi Barb,*
>
> *In the draft listed today, there's one that looks odd on pg 41, payable to Security state bank for $6,000.00. This*
> *draft was issued by us back in Feb and cleared the bank.*
> *If this draft is not trying to clear the bank again, then it's not a forged draft. All the rest sent for review today*
> *are good.*
>
> *…*
>
> *Going back to yesterday's drafts, the top one for $943,000.00 is correct; it's not forged.*

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[89] Rue Cross, *supra* note on page 19, line 23-24

[90] Rue Cross page 47 at line 16 - 21

[91] Undertaking Responses of Nicholas Rue [Rue Undertakings] [Joint Book of Evidence at TAB 70] at page 19

> *The last one for $870,000.00 on April 14 was issued by us and has cleared the bank. If this draft is not trying to clear the bank again, then it's not a forged draft.*
>
> *Thanks,*
> *Craig*

115. It is additionally clear, from the responses of Thompson, however, that he had no knowledge that such deposits may be suspicious, as he was open with Compeer in disclosing the amounts of the cheques in question and provided (and in fact requested) additional detail from Compeer with respect to the issue.

116. In March 2023, it is clear from Rue's evidence under Cross-examination that Compeer had again turned its mind to the frequent use of a large number of high value inter-company cheques being written between the US and Canadian Hog Farm Entities.[92]

117. Conversations continued between Ray Price and with Rue into 2023 with regard to different ways Sunterra could work to move away from the use of cheques for intercompany transfers. Compeer always communicated their concerns to be with regards to the use of cheques themselves, and not the actual transfers which comprised the Account Coverage Practice. Ray Price understood by these conversations that Compeer were aware of the transfers taking place each day between the accounts of the US and Canadian companies, because they were directing their attention to them and discussing them with Sunterra from time to time. The Compeer representatives continued to express no concerns other than with regard to the administrative burden for them in handling and processing the cheques and occasionally with overdrafts that appeared in or between some of the accounts.

118. Ray Price understood that Compeer's preference was that Sunterra not use cheques for transfers between the US and Canada because of the administrative burden. However, with the Canadian companies banking with CWB and our US companies banking with Compeer, the Account Coverage Practice would be difficult to eliminate altogether.

119. The Account Coverage Practice had become a regular part of Sunterra's business over time and some changes in the business would be required to remove the need for them. One approach, which we shared with Compeer, possibly from around the beginning of 2023, was to consider an amalgamation of some of the Sunterra entities within countries. In particular, Ray Price advised Compeer that Sunterra were considering the prospect of amalgamating the Canadian Hog Farm Entities as one and the US Hog Farm Entities as one. Most of the cheques and activity was happening through the Sunterra Canada and Sunterra US companies, logically because their business in providing the pig management services required large volumes of smaller cheques for payments to suppliers and service providers, as well as to farm landlords. However, most of the assets were held by the owners of the swine, being Sunwold Canada, Sunwold US and Lariagra Canada and Lariagra US. As discussed by Ray Price with Compeer, with entities amalgamated, there would be less accounts to reconcile on a daily basis and we could leverage more credit to reduce the need for Account Coverage practice.

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[92] Rue Cross, *supra* note at page 77, line 1 - 8

120. Ray Price had started working with KPMG in 2023 towards a plan to amalgamate the farming entities in each country. As that progressed over time, challenges that Sunterra were trying to work through with KPMG included the different year ends for tax purposes between the Canadian Hog Farm Entities, but Sunterra still hoped to progress the proposal and intended to carry out the amalgamations.

121. These plans were all put on hold when Ray Price had to go into hospital following a heart attack at the end October 2023. He underwent triple by-pass heart surgery and was significantly out of action for the rest of 2023.

122. Ray Price started communicating more regularly again with Mr. Rue in early 2024. The potential to move away from the use of cheques for the intercompany transfers continued to be a subject for discussion. At that point in time, Sunterra still planned on working on an amalgamation plan. Ray Price explained to Compeer that as a result of legal advice, Sunterra had decided not to amalgamate Sunterra US with the other US entities, but still planned to amalgamate Sunwold US and Lariagra US.

123. In addition, Ray Price talked with Mr. Rue about the possibility of selling some crop land and equipment in Canada which would also simplify the banking between the US Hog Farm Entities and the Canadian Hog Farm Entities by increasing working capital. This would involve coming to an agreement with FCC which held security over the land in respect of loans to Canadian entities in the Sunterra Group.

124. By second half of 2024, Ray Price was also communicating with Compeer about the proceeds that Sunterra was expecting to come through from the Trochu fire insurance claim. Ray Price put to Compeer that this would assist with cash flow.

125. Ray Price met with Rue, Zeigler and Malakowski again in or around August 23, 2024. They discussed the prospect of an amalgamation of Sunwold US and Lariagra US. However, as explained by Ray Price, with the remaining Tyson NAE Contract being tied to Sunwold US, Sunterra were not able to make any firm statements about if and when the amalgamation could take place. [93]

126. Mr. Rue emphasised again, in that meeting, that Compeer wanted Sunterra to move away from using cheques for the intercompany transfers because of the administrative expenses and logistics involved for Compeer in processing them. Ray Price assured Rue that Sunterra would find another solution as soon as possible, but gave no assurance of a fixed date by which it could be done. The insurance proceeds from the Trochu fire, which were expected to settle in the range of $15 – 20 million and how that would create working capital, was also discussed. Finally, Ray Price explained that the amalgamation could not happen until after the expiry of the last Tyson NAE contract in September, 2025.

127. There were further email communications between Sunterra and Compeer, following the August 2024 meeting, about the timeline to move away from the use of cheques for transfers between the US and Canada, but they were never the main issue of discussions and Ray Price was not

[93] Ray Price Affidavit, *supra* note at paras 24-25

lead to believe that Rue nor his boss, Malakowsky, saw it as a critical issue in the banking relationship that Sunterra had with Compeer.

128. The extent of meetings between Ray Price and Compeer as set out above is evidence of Ray Price's intent to ensure that Compeer was paid.

Compeer – visibility of accounts and transactions

129. Compeer has always had full visibility of its accounts, and had the ability to access those accounts at all times. Compeer at all times had access to records of the volume of cheques and number of cheques exchanged between CWB and Compeer. While Steve Grosland, specifically, had no specific actual knowledge of such information during the period prior to February 2025, he admitted that the "visibility" into the accounts was known by individuals within Compeer and extended beyond simple access to such information, simply by virtue of the processing of cheques at Compeer[94]:

> *Q. [Mr. Chimuk]: During the relevant time frame, so I'm talking 2022 to February 2025, Compeer had information as to the volume, like the number, of cheques that went from Compeer accounts to Canadian Western Bank accounts, correct?*
>
> *A.[Mr. Grosland]: Well, certainly if we reviewed the statements, we would find that that is true. We would see all those cheques that were written as well as the date that they were written and deposited to or withdrawn from the Compeer loan.*
>
> *(…)*
>
> *Q. (…) So what cheques, they would see the physical cheque coming in?*
>
> *A. That seems to make sense, yes. Somebody has to process that cheque.*
>
> *Q. Right. So CSR [Customer Service Representatives] would have the information with respect to the volume of incoming cheques from CWB, correct?*
>
> *A. If they all came to one office, yes*
>
> *(…)*
>
> *Q. And Compeer would have had the information that these were all physical cheques, correct?*
>
> *A. If they were physical cheques, certainly somebody would have had to process them, yes*

[94] Cross-Examination of Steve Grosland on October 22, 2025 [Grosland Cross] [Joint Book of Evidence at 62] at page 57

130. 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 basis[95].

131. 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,[96] he understood them to be content for those entities to utilise the conditional credit while they worked out a way to change the practice.

III. EVENTS PRECEDING THE CCAA APPLICATION

A. Transient Default and Account Freeze

132. On or around 10 February 2025, Compeer made inquiries with Sunterra about a number high-value USD cheques going between the US Hog Farm Entities and the Canadian Hog Farm entities on a daily basis and ("**Compeer's Inquiries**"). On the same day, Compeer acted to freeze all cheques issuing from the US Hog Farm Entities (whose accounts were held with Compeer) to the Canadian Hog Farm Entities (whose accounts were held with NBC) ("**Compeer Account Freezing**"). As a result, the accounts of the Canadian Hog Farm Entities 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 "**NBC Transient Default**").

133. NBC responded by freezing cheques issued by the Canadian Hog Farms to the US Hog Farms on or around February 12, 2025 ("**NBC Freezing Action**").[97] Sunterra stopped the transfers in response to Compeer's Inquiries.[98]

B. Compeer bad faith – failure to mitigate

134. On February 11, 2025, Ray Price was informed by Mr. Rue that Compeer were concerned about the large volume of cheques that were being issued between the US Hog Farm Entity accounts with Compeer and the Canadian Hog Farms Entity accounts with CWB in Canada.[99]

135. Despite what Compeer attempt to assert in their written submissions, Ray Price had no knowledge prior to February 12, 2025, either of the overdraft that had been created or that the intercompany cheque practice had resulted in Compeer paying interest when in fact the companies were in overdraft:

> *Q [Mr. Shaheen]: I gather then, based on those words, you knew that the positive balances that the account coverage practice*
>
> *ensured were in the US entities' Compeer accounts*

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[95] Ray Price Affidavit, *supra* note at para. 99; Uffelman Affidavit, *supra* note at para. 19

[96] Ray Price Affidavit, *supra* note para. 82-100, Cross-examination of Steve Grosland, *supra* note at page 58

[97] Art Price Affidavit, *supra* note at para 44, Exhibit Q [Bates No. APAff000463]

[98] Art Price Affidavit *supra* note at para 50

[99] Ray Price Affidavit, *supra* note at para43

> *resulted in Compeer paying interest to those entities?*
>
> *A [Ray Price]. As part of the discussion on the phone that day – I think it was February 12, might have been the 11th or 12th - people from Compeer indicated that they had been paying interest on positive cash balances. I didn't realize that had happened until he said that on that day.*[100]

136. In response to Compeer's information, and in reaction to the alarm communicated on the phone by Mr. Rue, Ray Price stated that Sunterra would pay back any interest and that it was wrong that Sunterra ended up in this position where they appeared to have an overdraft well above the approved RLOCs. Ray Price explained that we had kept writing cheques each day to ensure that the various accounts between the farming entities were balanced and not overdrawn. [101]

137. Ray Price continued participating in discussions with Compeer on February 13 and 14, 2025, in which he offered several solutions which he saw as viable as he believed the Sunterra entities to have cash available currently (and not exclusively in the future).

138. On February 13, 2025, Ray Price participated in another call with Rue and others at Compeer. He thought that there was a balance of around USD $20million on deposit in the Compeer accounts and so he asked Rue if Compeer would reconsider their position and permit further cheques to be issued to the Canadian Hog Farms Entities. They discussed the business of the US Hog Farms in some detail in the context of looking at ways and timing to pay out the Compeer overdraft. Rue asked Ray Price to provide a summary of the US Hog Farm Entities LRP coverage and other financial information. Ray followed up the call with an email to Rue with various attachments including a summary of the LRP coverage, option positions on the CME and the budget for 2025.[102]

139. Unbeknownst to Ray Price (or Sunterra in general), however, prior to Compeer's contacting him on February 12, 2025, and informing him of what had occurred (information which he was completely unaware of) prior to such phone call, Compeer had already decided that the behaviour in question was cheque kiting and that the accounts would be frozen. This was without the input or involvement of Sunterra. Essentially, the "information gathering" of Compeer at that point was a façade- the determination to freeze the accounts had been made:

> *Q [Mr. Chimuk]: By the time you went into the office on February 12, 2025, Compeer had already made the determination that cheque -- kite chequing had occurred, correct?*
>
> *[Mr. Grosland] They were pushing back on Ray to explain or provide*
>
> *another explanation, yes.*

---

[100] Ray Price Cross, *supra* note at page 53, lines 1-10

[101] *Ibid* at para 45

[102] Ray Price Affidavit at para 46 and 47 and Exhibit "G" [Bates No. RPAff000092]

> *Q: internally, on February 12, 2025,you were aware that Compeer had internally already*
>
> *arrived at the conclusion that there had been cheque*
>
> *kiting, correct?*
>
> *A. That is what was explained to me in my Wednesday meeting, is that cheque kiting was going on, yes*[103]

140. Subsequently to this meeting, however, Sunterra was assured by Compeer that they would be capable of continuing to operate their business as a going concern. This was, additionally, with Compeer's ongoing awareness of Sunterra's existing contracts with two outside entities for the sale of Sunterra's hogs, and other contracts and operations of which Compeer had been aware for years.[104]

Lack of good faith in relation to piglets purchase payments

141. From the time that Compeer froze the accounts of the US Hog Farm Entities and Sunterra [105]stopped being able to write cheques from those entities, Sunterra still continued to send pigs to the Sunterra hog farms in the US relying on discussions that they had with Grosland to the effect that the payments for the pigs would be made.

142. On March 3, 2025, Sunterra agreed with Compeer, through Grosland, to a formula proposal to be used for the payment of pigs for a two week period of time. Grosland said that he was going to take the proposal to the credit committee at Compeer.

143. On March 12, 2025, Grosland informed Sunterra by email that Compeer had received a confirmation letter from NBC acknowledging the amount of money to be paid and that it was acceptable to them.

144. On March 13, 2025, Sunterra received another email from Steve Grosland saying that the payments would be made

145. On March 17, 2025, Sara Compart from Compeer said that they were going to be sending CWB the wire for the pig payment that day.

146. On March 19, 2025, Ray Price wrote to Sara to say that Sunterra had not seen the wire transfer and could she please send through details so that he could check at Sunterra's end. He received no response to that email.

147. Shortly thereafter, Sunterra received the application by Compeer for the appointment of a receiver to the US Hog Farm Entities.

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[103] Grosland Cross, *supra* note at page 63 lines 1-7

[104] Rue Cross, *supra* note at page 121, lines 11-25

[105] Ray Price Affidavit, *supra* note at paras 49-59

148. Sunterra continued to place pigs from the Canadian farms with the US farms for another week because they could not continue to hold them from an operational point of view and they understood that the pigs placed and unpaid for were still the property of the Canadian Hog Farm Entities. Sunterra then stopped placing pigs with the US farms because no payments were coming through.

149. 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 Farms in this period. Compeer's behaviour was both deceptive and fraudulent.

Failure to realise the value of the US Hog Farm Entities' Business: Fire Sale

150. On February 18, 2025, Art Price and Ray Price attended a video meeting with representatives of Compeer, including Steve Grosland and others. During that meeting, Art Price advised the Compeer representatives that the business of the US Hog Farm Entities was in a very positive financial position, much stronger than it had been for many years. In particular, Art Price referred to the recent agreement with Sioux Preme for the purchase of NAE hogs at a premium, and the continuing obligation of Tyson to also purchase NAE hogs at a premium until September 2025, at which point Sunterra anticipated that the Sioux Preme demand would grow to fill the gap, and the strength of the hog market in the US. Art Price also referred to the insurance proceeds that were expected to come in from the Trochu fire insurance claim. He explained to Grosland that he therefore believed that Compeer would be repaid in full from the continuing business activities of the US Hog Farm Entities. With regard to NBC, Art Price made no representatives about whether or not NBC would dishonour any further cheques written to the Compeer accounts.

151. The Sunterra hog operations in the USA had been established by the Canadian hog business to take advantage of the specialty NAE hog market in the USA that does not exist in Canada. The NAE hog premium was typically $20 per head more than commodity hogs, and was dependant on high health status isoweans or growers that are available from the Sunterra's Canadian operations. The Sunwold US and Lariagra US barns were located and managed so that they could sustain the high health status though to market weights.[106]

152. The incremental EBITDA generated by the premium was approximately $4 million USD per year. Using a modest range of multiples of 4 to 6, the Sunterra combined hog operations would be valued at $16 to $24 million USD more than if they received regular commodity prices.

153. Art Price explained to Compeer that if they could realize this incremental value it would more than cover the amount of the overdraft that is in excess of the inventory value of the animals pledged as security for the loan. This would depend on both the USA hog operations and the Canadian hog operations continuing as going concerns or being sold together as a going concern.

154. Art Price organized a Framework for Compeer Loan Repayment and with the support of the Management, Board and Shareholders of Sunterra. Dave Price and Art Price met with Compeer on March 10 and 11, 2025 at the Compeer offices in Mankato to present the offer in the

[106] Ray Price Affidavit, *supra* note at paras 51-55

Framework document ("**Framework Offer**"). At the meeting, Art Price handed Compeer a copy of the Framework document, plus a table of the 2025 Hog Division Forecast for Sunwold US and Lariagra US (the table is headed Sunwold, but covered both entities). Sunterra offered to pay Compeer over time through a transparent ring-fenced, auditable share of 75% of EBITDA effectively committing the superior cash flow to Compeer until the overdraft was paid off. 75% of the combined EBITDA effectively provided to Compeer all the free cash flow of the combined hog group. This would have reliably paid off the overdraft. [107]

155. Compeer did not offer of a forbearance agreement period to allow the parties to find a going concern solution for Compeer's benefit as compared to the net proceeds of a receiver liquidating the existing inventory.

156. As openly disclosed with Compeer, the hog business in Canada and the USA were both profitable and materially cash flow positive. In Art Price's meetings with Compeer, Grosland acknowledged that Sunterra was its most profitable client and was interested in understanding why.

157. Compeer were approaching the overdraft as if the Companies were cash flow negative and had to be liquidated in order to reduce losses when in actuality, they would be generating cash for the benefit of Compeer through any period that the businesses continued.[108]

158. Compeer sought and was awarded accelerated receivership. In doing so, it alleged that the livestock was in danger, but the only way it would be in danger is if Compeer scooped the USA cash flow for its own purpose and refused to allow Sunterra USA to purchase feed for the hogs out of its cash flow. Up until that time, Sunterra were lead to believe that Compeer and the US Receiver were considering the proposal that had been put to them as above, and were given no notice of their application.[109]

159. The Receiver never invited Sunterra Canada to make it an offer.

160. The Receiver never offered to negotiate a purchase agreement for hogs that would be made available to purchasers of the USA business or assets.

161. In any open competitive process involving farm industry players, one would expect that some farmers would explore the availability of hogs from Sunterra, but no one in the market approached Sunterra for a supply of the isoweans and growers.

162. The Receiver arranged with Tyson to sell the inventory below market value and did not achieve any of the material going concern value. Payments were delayed over time. The Receiver did not remotely deliver its obligation to maximize proceeds for the estate.

163. If Sunterra had the opportunity to pay off the loans as a going concern using its Framework Offer or another mutually agreeable going concern approach, Compeer would have realized a very high probability of no loan losses.

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[107] *Ibid*

[108] Art Price Affidavit at para 60

[109] Art Price Affidavit at para 60 and 69

164. If the business was operated under the Framework Offer, today Compeer would have security on an estimated $20 million USD of inventory and the overdraft would have been reduced by $4 million USD. That would have reduced the Overdraft in excess of inventory value to $11 million USD. In addition, Compeer's 75% of EBITDA annual payments, would average $7 - $11 million USD at normal hog and feed price ranges.

165. Compeer chose its course of action, and it appears from Compeer's claim that its net proceeds to date are less than $10 million, that its outstanding overdraft is approximately $25 million and it has sold its inventories and has no more secured assets.[110]

Compeer obstruction and damages to the US Hog Farms

166. Compeer also obstructed and damaged the US Hog Farm Entities' business in other ways.

167. Compeer blocked the payment of rent monies owing to barn owners. Payments of around $500,000 for the February 2025 monthly rent for barns and in some cases management fees to third party farmers had come in from Tyson to Sunterra US and were to be paid out to those farmers. This was Tyson money held by Sunterra US on their behalf. Sunterra US in turn had written cheques for payment of the rent as management fees, as applicable, to the third party farmers on Tyson's behalf, but Compeer had rejected those cheques as NSF. The farmer owners were complaining and some were threatening not to accept the new pigs that were coming through into their barns.[111]

168. Sunterra explained to Compeer the nature of the monies, and their importance not only to Tyson but to the business of Sunterra US and the overall relationship with Tyson and TPG. Compeer agreed to allow the payments to be made and new cheques were drawn up. In breach of their agreement to clear the cheques for those payments, Compeer again bounced them as NSF.

169. In spite of Compeer's awareness of Sunterra's ongoing contracts, which would have allowed Sunterra to recover any costs that were allegedly owed by Compeer, that Compeer chose to participate in a fire sale of Sunterra's assets.

170. Therefore, while Compeer's written submissions attempt to assert that no recovery has occurred for Compeer, that is simply untrue. Not only has Compeer recovered, they further have still not paid Sunterra for the amounts owed in the sale of Sunterra's assets, as had been promised and was Ray Price's understanding.

171. In their written submissions, Compeer assert further that "no solution was possible because the funds didn't exist". No evidence has been provided in support of this statement in any capacity and therefore it ought be disregarded in its entirety.

IV. ISSUES

172. The issues to be considered on this Application are as follows:

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[110] *Ibid* at para 67

[111] Art Price Affidavit, *supra* note at para 68

(a) Strike out inconsistent pleadings/ contradictory claims in Statement of Claim

(i) Are the pleadings contradictory with respect to the parties to the alleged "Cheque Kiting", the parties to the alleged fraudulent misrepresentation and the parties to the alleged conspiracy?

(ii) If so, should the inconsistent pleadings be struck out as frivolous and vexatious and/or an abuse of process?

(b) Summary Judgment

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

(c) Adverse inferences

(i) What adverse inference should be drawn from the failure of Compeer to produce material witnesses?

(d) Fraudulent Misrepresentation and the corporate veil

(i) did the Defendants make false representations to Compeer, which it knew to be false, with the intention of deceiving Compeer?

(ii) if so, did those representations induce Compeer to act, because they were deceived, in a manner which resulted in the loss that Compeer claims?

(iii) did any of the alleged actions by the individual Defendants, Ray Price, Debbie Uffelman and/or Craig Thompson, pierce the corporate veil such that they might be individually liable to Compeer in relation to any conduct as alleged?

(e) Conspiracy

(i) This claim is not pressed by Compeer, but Defendants make observations pertinent to fraudulent misrepresentation claim

(f) *Oppression – Alberta Business Corporations Act*

(i) This claim is not pressed by Compeer.

(g) What was the cause of Compeer's loss?

(h) Declarations

(i) Should the declarations sought for exemption of the Canadian Hog Farm Entities from release any plan of comprise or arrangement under section 19(2) of the CCAA be granted?

(ii) Should the declarations sought for exemption of the Ray Price, Uffelman and Thompson from release under any plan of comprise or arrangement under section 19(2) be granted

(iii) Are the declaration sought in relation to Art Price, Glen Price and David Price ("**Price Directors**") an abuse of process?

(i) Guarantees

(i) has Compeer breached its duties to Sunterra Enterprises as guarantor, specifically its duty if good faith and specifically its duty of honest performance?

(ii) If so, is Sunterra enterprises released of any liability to Compeer under the alleged guarantee or alternatively is that liability reduced as result a Compeer's breach and if so by how much?

(j) Failure to mitigate

(i) Did Compeer fail to mitigate their losses such that they cannot now recoup damages for harms resulting from their own negligence?

(k) Defences

(i) Estoppel: Is Compeer estopped from claiming loss and damages for fraudulent misrepresentation because of their knowledge of and consent to the alleged practice?

(ii) Waiver: Did Compeer waive it's alleged rights, by their practice of allowing conditional credit, in particular in light of their close scrutiny of the accounts and of practices of the Sunterra entities

V. LAW

A. Strike out inconsistent pleadings/ contradictory claims in Statement of Claim..

173. Compeer has failed to adequately identify who it says are the parties to the civil fraud as alleged in the Statement of Claim. At paragraph 68, it alleges a "Cheque Kiting Scheme" perpetuated by the US Sunterra Entities and the Canadian Sunterra entities, which action it says was "caused" by Ray Price, Uffelman and Thomson, and which is said to be a fraudulent scheme. Compeer's allegations of the perpetuation of the alleged scheme by the Canadian Sunterra Entities together with the US Sunterra Entities, and the requirement of action by both for the scheme to take place, is further pleaded in paragraphs 70, 72 and 75. However, in paragraph 91, in apparent contradiction of paragraphs 68 to 75 as above, Compeer alleges that the '*Check Kiting Scheme'* was perpetrated by the Canadian Sunterra Entities, Ray Price, Uffelman and Thompson, with no mention of the US Sunterra Entities. Also in contradiction of paragraphs 68 to 75, Compeer claim a civil conspiracy to conduct the alleged fraud by Ray Price, Uffelman, Thompson and the Canadian Sunterra Entities, but not the US Sunterra Entities.

174. The allegations of civil fraud also bewilderingly, and without clarifying context, refer Compeer's reliance on false representations that resulted from the "*Sunterra Group's*" use of cheques to further the '*Cheque Kiting Scheme'*. The "*Sunterra Group*" is defined at the commencement of the pleadings to broadly to refer the members of the Alberta-based group that is ultimately owned by the Price family.

175. For the reasons outlined below, the activities alleged to constitute the '*Cheque Kiting Scheme'*, which is the basis of its civil fraud claims, were, on the facts pleaded by Compeer, carried out by and between the US Sunterra Entities and the Canadian Sunterra Entities. However, Compeer has failed to join the US Sunterra Entities as Defendants to its claims and presumably would face challenges in doing so given that the US Sunterra Entities have not submitted to this jurisdiction. In the absence of the US Sunterra Entities as Defendants, any finding by the court in favour of the allegations would render the subject matter of the claims *res judicata* and the US Sunterra entities would thereby be bound by those finding without having an opportunity to defend as against the claims.

176. In an attempt to get around the conundrum that Compeer faces in not joining the US Sunterra Entities as Defendants, it has instead abused the processes of this Court to inappropriately bring this claim in an effort to recover from the Canadian Sunterra entities, Ray Price, Uffelman and Thompson in circumstances where it has not joined the US Sunterra Entities as Defendants, being companies which are on Compeer's own pleadings, essential and required parties to the alleged 'Check Kiting Scheme'. It has attempted to do so by contradictory pleadings as identified above.

177. It is the Defendants' submission that Compeer has therefore knowingly taken inconsistent positions as to the parties to the alleged fraud. They have included the US Sunterra entities in the facts alleged because, *ipso facto*, there can be no '*Check Kiting Scheme'* as alleged without the involvement, for one half of the ledger, so to speak, of the US Sunterra Entities. On the other hand, Compeer wishes to avoid the *res judicata* argument above, by later alleging that the fraud has been perpetuated by the individual Defendants together with the Canadian Sunterra Entities, without any mention of US Sunterra Entities.

178. Compeer has knowingly and egregiously taken inconsistent positions as to the parties to the alleged fraud comprising what it calls the '*Check Kiting Scheme'*, which are not articulated as alternative claims, and which accordingly amount to an abuse of process. Compeer is a sophisticated party, represented by sophisticated and experienced counsel. The contradictory claims are deliberate and egregious, and advanced with full knowledge of the facts, and in the Defendants' submissions, on the premises, they undermine the integrity of the justice system. They amount to a clear abuse of process.

179. The pleadings of civil fraud and civil conspiracy, as alleged in paragraphs 92 to 95 and 96 to 99 of the Statement of Claim, should accordingly be struck out pursuant to the Alberta *Rules of Court*, Alta. Reg. 124/2010, s. 3.68 and at general law.

B. <u>The Test for Summary Judgement</u>

180. Compeer has brought an application for summary judgment and it is to be heard as such pursuant also to the Compeer Scheduling Order and 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..*

181. The Alberta Court of Appeal in *Weir-Jones Technical Services Incorporated v Purolator Courier Ltd,* 2019 ABCA 49 ("***Weir-Jones***")[112] has affirmed that the procedures underlying summary judgement as established by the Supreme Court of Canada in *Hryniak v. Mauldin*:[113]

> *… consistent with the overriding goal of "proportionality" in civil procedure recognized by R. 1.2 of the Alberta Rules of Court:…[114] All procedures for resolving civil disputes, including summary dispositions, should be timely, cost-effective, and proportionate to the importance and complexity of the issues.*

182. 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:*
>
> *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.*

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[112] At para 26

[113] *Weir-Jones Technical Services Incorporated v. Purolator Courier Ltd.* , 2019 ABCA 49, [2019] [*Weir-Jones*] [BOA TAB 4], at para. 42 and 43

[114] citing *Burns Bog Conservation Society v. Canada (Attorney General)*, 2014 FCA 170 at para. 42,

> *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)*

183. 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 of Appeal 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)*

184. 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.*[115]

185. 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.*[116]
>
> *(b) The chambers judge can make findings of fact if, viewed overall, the record permits that to be done;*[117]
>
> *(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;*[118]
>
> *(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.*[119]

186. If Compeer 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 cite the Court of Appeal in these circumstances, "…*the moving party has failed to establish there is no genuine issue requiring a trial*".[120]

187. 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",*

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[115] At para 36, quoting *Hryniak v. Mauldin* , 2014 SCC 7 [*Hryniak*] [BOA TAB 5] at para. 57

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

[117] 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]

[118] *Supra* note 101 Para 38

[119] *Ibid* at Para. 39

[120] *Ibid* Para. 32

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*."[121]

188. The Court of Appeal in *Weir-Jones* also addresses "*Principle of Fairness*" in summary trials in greater detail. In particular, and relevant to the Compeer 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:[122]….*
>
> *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.*

189. It needs further to be observed that the Compeer 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,[123] 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 Defendants that all of these factors apply in the case at bar and Compeer's application for summary judgement must be dismissed.

C. Adverse inferences

190. Compeer has an evidentiary burden to prove each of the elements of fraudulent misrepresentation in respect of the false misrepresentations alleged, as below. The Defendants

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[121] *Ibid* Para. 35

[122] 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]

[123] Weir-Jones, for example at para. 29

rely upon the law of adverse inference and say that Compeer has failed to call material witnesses to satisfy its evidentiary burden in respect, in particular, of the element of reliance in respect of the fraudulent misrepresentation claim, as detailed further below.[124]

191. The law on adverse inference is well established. The Alberta Court of King's Bench in *Paterson v. Hamilton*,[125] relied upon the law as stated in Sopinka and Lederman, *Evidence in Civil Cases* at p:535, as follows:

> *… the failure of a party or a witness to give evidence, which it was in the power of the party or witness to give and by which the facts might have been elucidated, justifies the court in drawing the inference that the evidence of the party or witness would have been unfavourable to the party to whom the failure was attributed.[126]*

192. In the case at bar, Compeer failed to call any witnesses who were involved in assessing the accounts and banking practices of the US Sunterra Entities from at least the time when Compeer became aware of the large number of high value cheques being used on a daily basis for the purpose of intercompany transfers between the Canadian Sunterra Entities and the US Sunterra Entities in September 2022. The only witness called by Compeer who was involved with the US Sunterra Entities from September 202 to February 2025 was Rue. Rue was only a customer relationship manager and it is apparent from his testimony under Cross-examination that he had no role in the management of the Sunterra account, in particular in relation to accounts and banking practices of the US Sunterra Entities. The Defendants only became aware of the limitations of Rue's role and the materiality of the role of the "underwriter", Jessica Zeigler, and others from Cross-examination of Rue.

193. In accordance with the authorities, Compeer's failure give evidence by failing to call material witnesses which it had the power to call and by which the facts might have been elucidated, in particular in relation to the question of reliance by Compeer on the alleged fraudulent misrepresentation[127], justifies the court in drawing the inference that the evidence of Compeer through those witnesses would have been unfavourable to its claim.

D. <u>Fraudulent Misrepresentation/Civil Fraud</u>

194. Compeer'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.[128] Further, adverse inferences must be drawn form the failure of Compeer to produce material witnesses for testimony

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[124] See also para 227 herein

[125] 1996 CanLII 10453 (AB KB), <https://canlii.ca/t/28q7g; see also Opron Constr. Co. v. Alta. (1994), 1994 CanLII 18362 (ABKB), https://canlii.ca/t/gq97n at para 768 and Klewchuk v. Switzer, 2001 ABQB 316 (CanLII), at par 128

[126] *Ibid* at para 205

[127] See paragraphs … herein

[128] For example, *Weir-Jones*, *supra* note 24 at para. 29

195. 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[129], 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 mis-representation caused (i.e., induced) the representee to act; and

(v) the representee's reliance on the representation caused/resulted in a loss.[130]

196. The judgement of Karakatsanis J in the decision of the Supreme Court of Canda *Bruno Appliances* states:

> *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 knowledge or recklessness); (3) the false representation caused the plaintiff to act; and (4) the plaintiff's actions resulted in a loss.[131]*
>
> (emphasis added)

197. 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."*

198. Per Halsbury's Laws of Canada:

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

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

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[129] *Ibid*

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

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

200. The Ontario Court of Appeal in *Midland Resources Holding Ltd v Shtaif*, 2017 ONCA 320[132] 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.*

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

202. In light of the above, the DefendantsDefendants 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.

2. Burden of Proof

203. Each of the elements for fraudulent misrepresentation must be proven on a balance of probabilities. Per the Supreme Court of Canada in *Poonian*,[133] 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*."[134] For example, the Supreme Court of Canada in *Deloitte Restructuring*[135], 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."*[136]

204. 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. False Representation or Statement of Fact

205. In respect of the first element of the cause of action for fraudulent misrepresentation, that there was a false representation or statement of fact,[137] *Ultracuts* considers promises, predictions and opinions as follows:

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

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

[134] *Ibid*

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

[136] *Ibid* at para 26

[137] Bruno Applicance, *supra* note 22 at [21] and at [18

> *[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)*

206. 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 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)*

First element – what is the alleged false representation

207. In the case before this court, Compeer 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 it had capacity to honour

the cheque being issued, or that funds existed to satisfy those cheques.[138]Compeer has failed to establish this component of the test. Specifically, Compeer has to show that the specific cheques in issue that led to the account freeze were false. Compeer did not put this question to any of the named parties during their Cross examination and did not lead any evidence to show that they there were in fact false representations that are related to an alleged loss by Compeer.

208. It is the Defendants submission that this first element has not been made out as against any of the Defendants for the following reasons:

(a) At the time that the cheques were written conditional credit was made available by 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.

Compeer has failed to adduce any expert evidence on this issue. Further, Compeer did not even present evidence from the individuals at Compeer who had conducted their internal analysis.

(b) The only clear misrepresentation pleaded by Compeer 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, which will be considered further below, 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. This explains why Compeer have not pleaded the “Kiting Scheme” itself as a fraudulent misrepresentation, other than for the purposes of the unlawful conduct conspiracy allegations.

(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 rejected for NSF (no sufficient funds) until after that conditional credit was withdrawn by both Compeer and NBC after February 11, 2025.

209. 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 by the Canadian Hog Farm Entities in issue to a reasonable person in the shoes of Compeer, was that they were to be covered by conditional credit arising from the parallel outgoing cheques from the US Hog Farm Entities, thereby making

[138] Amended Statement of Claim of Compeer [Statement of Clai] [Joint Book of Evidence at TAB 10] at para at 76 and Compeer submissions at, *supra* note at paras 5, 59

use of conditional credit knowingly granted by Compeer. In this regard, the circumstances of Compeer included the following:[139]

(a) Compeer 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;

(b) Compeer had knowledge of the number of cheques and the value of cheques so written each day, in sums under USD $1M;

(c) Compeer had knowledge of the actual revenue and expenditure of the US Hog Farms Entities on an ongoing and monthly basis;

(d) having applied their minds to the practice referred to above from as early as 2022, Compeer soon after chose to give greater scrutiny to the practices of the US Hog Farm Entities on a continuing basis, through the investigations and "fraud scares" in 2022 and 2023, and the due diligence performed on a monthly basis and prior to the renewal of Sunterra's loans in 2024;

(e) Compeer 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 NBC, 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.

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

210. For the second element, that the representor knew that the representation was false or was reckless as to its truth or falsity,[140] 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;*[141]
>
> *(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;*[142]
>
> *(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*

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[139] See above herein at para 99 to 122, and in particular 106 to 122

[140] 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

[141] *Ultracuts supra* note212 at para. 59 citing *Derry* , *ibid* at p. 370

[142] *Ibid* at para. 60 citing *Derry* at p. 358, 363, 370

> *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."*[143]
>
> *(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;*[144]*.*
>
> *(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).*[145]
>
> *(emphasis added)*

211. It is clear from the above analysis, that the alleged misrepresentation is capable of different meanings: i.e. Compeer 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 Compeer 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 when making it, even if that understanding was objectively wrong. On the facts established by the evidence, it is clear, or in the alternative Compeer 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 Compeer can established that that meaning was objectively wrong.

212. 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.

213. Civil fraud requires a demonstration of subjective knowledge of the party with respect to a fact. Further, the Court must consider the position of each of the Sunterra Parties which Compeer include within their allegation of fraudulent misrepresentation.

214. In respect of the submissions of Compeer in paragraph 61 - 64, the Sunterra Parties say the following:

    (a) no explanation is given, nor any reference to the evidence provided, as to how Ray Price misrepresented the financial situation; and

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[143] *Ultracuts, supra* note 212*, ibid* at para. 63

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

[145] *Ibid* at para. 63

(b) it has been established on the evidence that:

(i) business transactions, intercompany transfers for taxation purposes, failure of account netting systems, were among the reasons for the cheques used in the Account Coverage Practice;

(ii) that the Account Coverage Practice was carried out over a long period of time to maintain positive account balances and prevent overdrafts in the context of the lack of real time visibility of the balances of the accounts and the complexity and multiplicity of business and interactions between companies in the group; and

(iii) that the Account Practice was carried out honestly, understanding that some conditional credit was being utilised with the knowledge and agreement of Compeer and NBC.

(c) Compeer have misrepresented the nature, purpose and content of the live spreadsheet maintained by Craig Thompson. [146]

4. <u>False Representation Was Made with the Intention That the Representee Would Act Upon It</u>

215. *Ultracuts* cites multiple authorities for this element at paragraphs 64 and 65, and then addresses the authority of *Bruno Appliance* as per paragraph .. above. 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)*

[146] Dee above herein at para 90-91

216. For example, in *Apotex Inc. v. Sanofi-Aventis*,[147] 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."

217. For the present matter, as for the case in *Apotex*, it was not believed by the Sunterra Parties or any of them that Compeer would blindly act upon the representations made in the writing of the cheques. The Defendants understood Compeer to have the in depth knowledge of:

(a) the cheques being written, including the large number of high value cheques being written each day between the Canadian and US Sunterra Entities,

(b) the fact that conditional credit was being created thereby;

(c) the Canadian and US Sunterra Entities businesses, including the value of the commercial activities of the US Sunterra Entities in particular; and

(d) the system and mechanics for the settling of cheques and the interactions of the clearing banks between each other, if applicable, and the Banks.

(e) The Defendants therefore did not foresee that the writing of the cheques in issue would be relied upon blindly by Compeer on such matters which were entirely within Compeer's actual knowledge and expertise.

218. This is, in particular, the case where Compeer would conduct regular internal investigations with Sunterra and, despite identifying certain activity on the Sunterra Accounts as suspicious as early as September 2022, failing to communicate as much to the Sunterra parties.

219. Finally, in order for the Court to making a finding of fraudulent misrepresentation in a summary judgement application, the Court must be satisfied that there are not real issues of credibility such that there is a genuine issue requiring trial. The burden is upon Compeer to prove that there is no genuine issue requiring trial, and it has failed to discharge that burden in respect of challenging the testimony of the testimony of the Sunterra witnesses in respect of their honest beliefs and intentions on behalf of the Canadian Sunterra Entities (and themselves personally).[148]

5. Representee Relied on the False Representation, Sometimes Stated as the False Representation Caused (i.e. Induced) the Representee to Act[149]

220. 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*".[150] "*Whether the representee relied on the representation*

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[147] 2010 FC 182 [BOA TAB 20]

[148] See e.g. Uffelman Cross, *supra* note at page 47

[149] *Ultracuts supra* note 212 at para. 73 – 83

[150] *Ultracuts supra* note212 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]

is "*a question of fact to be inferred from all the circumstances of the case and [the] evidence at the trial*"".[151]

221. The question of reliance is to be determined on a subjective test, and the Court must ask whether the defendant's misrepresentation was material to the plaintiff and thereby induced them to act.[152] 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.[153] 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.[154] Per *L.K. Oil*:[155]

> *… 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.*

222. 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.*

223. 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.

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

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[151] *Ultracuts supra* note a212 t para. at 75, citing *XY, LLC v Zhu*, 2013 BCCA 352 at paras 24-27 [BOA TAB 24] , leave to appeal to SCC refused,

[152] *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]

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

[154] *Ibid* at para 27 ff

[155] *Ibid* at para 31

> *[t]here are a number of circumstances that may indicate that it is unlikely that the representee acted on the false representation, such as:*
>
> *- <u>where the representee made his own investigations or inquiries into the matter</u> (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)*

225. Having regard to the above authorities it is clear that Compeer has not satisfied the burden of proof upon it to establish that Compeer 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.

226. Compeer has <u>failed to adduce a sufficient record of evidence</u> for summary judgment in respect to this element of its claim for fraudulent misrepresentation. Jessica Ziegler was the Compeer "underwriter" responsible for the approval of Sunterra's loans in 2024. She was also a senior representative Compeer at the time of the "fraud scare" in 2022 when it came to the attention of Compeer, including by Zeigler and Rue, that a large number of high value cheques were going back and forth between the Canadian and US companies on a frequent basis and an investigation took place into those cheques. Compeer, including through Zeigler, continued to monitor the financials of the US Sunterra Entities on a monthly and annual basis, while also being aware of the intercompany cheques continuing as above. Further, Compeer, through personnel such as Zeigler and Rue, had far greater knowledge, experience and expertise than any of the Sunterra Parties in how conditional credit, or the "float" works upon the issuing of cheques, taking into account the delays in the clearing of cheques of which Compeer also had far great knowledge and understanding.

227. In the context of the failure of Compeer to produce a material witness, namely Jessica Zeigler, to prove the element of reliance in respect of its claim for fraudulent misrepresentation, justifies the court in drawing the adverse inference that the evidence of Zeigler, or of another material witness

who was relevantly involved in assessing the banking practices and financial status of the US Sunterra Entities, would have been unfavourable to Compeer.[156]

228. All of these factors, without limitation, also displace what Compeer in its submissions appears to rely upon as a "common sense" inference, giving no explanation of evidence for reliance other than: the companies wrote the cheques and "*Compeer believed that Sunterra had the funds to back the cheques they were depositing*".[157]

229. The facts on the evidentiary record also show a long standing relationship between Compeer and the Sunterra Group and on a common sense inference, a desire on their part to keep the business of the client[158].

230. In these circumstances, there is considerable reason to doubt that Compeer actually and subjectively relied upon the alleged false representations, no evidence put forward to show that they did, plenty of evidence to show that they knew about the conditional credit created by the circulation of the cheques, a common sense inference on the evidence that there is another explanation for their continued provision of conditional credit (maintaining the customer), and an inadequate record of evidence produced which shows a failure on Compeer's part to put their "best foot forward".

231. For all of these reasons, it is clear that Compeer have failed to prove reliance by Compeer and that there is no genuine issue for trial.

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

232. 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)".*

233. As for reliance, Compeer have not explained to the Court how loss resulted from Compeer's reliance on the cheques issued by the Canadian Sunterra Entities, by which they say that the false representations were made.

234. No expert analysis has been put forward to identify whether, for example, Compeer's loss was directly attributable to NBC denying cheques written the Canadian Sunterra Entities as NSF, or by the US Sunterra Entities writing cheques relying on conditional credit granted knowingly Compeer. This question is particularly *apropos* given that it is Compeer that in fact started freezing cheques written from the accounts held by the US Sunterra Entities with Compeer before NBC started freezing cheques written from the accounts held by the US Sunterra Entities with NBC. On simple logical, one would expect the balance of conditional credit granted to land with the NBC accounts because it was later to stop denying checks. Clearly an expert analysis would be required to truly identify the cause.

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[156] See para 190 – 193 herein

[157] Compeer submissions, *supra* note at para 65

[158] Rue Cross, *supra* note at pages 13-24

235. Further, it appears that the actual cause was likely to be Compeer own decisions on an ongoing basis form at least 2022, to continue to allow the US Sunterra Entities to use conditional credit in the context of the intercompany transfers back and forth each day between the Canadian and US entities well in excess of their business revenues and expenses.

236. Compeer have failed once again to satisfy their burden of proof with respect to this element of fraudulent misrepresentation.

7. Burden of Proof

237. Each of the elements for fraudulent misrepresentation must be proven by the plaintiff on a balance of probabilities. Per the Supreme Court of Canada in *Poonian*,[159] 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*."[160] For example, the Supreme Court of Canada in *Deloitte Restructuring*[161], 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."*[162]

238. 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.

239. Compeer has presented the above conclusions, such as the engagement in a "Cheque Kiting Scheme" as being proven simply by way of assertion. They have in no way satisfied the burden of proof required with regard especially to the intent and reliance elements of this tort. As was held by the Supreme Court of Canada in *Deloitte*, Compeer has not discharged its burden and therefore the claims must fail.

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

240. There is nothing inherently fraudulent about the Account Coverage Practice undertaken by Sunterra, and on the evidence, and for the reason as given above, Compeer has not been able to establish the conduct as civil fraud. The expression "check kiting" is used by the courts when they have come to the conclusion that the cheque writing activities in question have satisfied the elements of fraudulent misrepresentation. It is useful to examine the facts and analysis in *Royal Bank of Canada v. Hejna*[163] as an example, and to distinguish it from the facts and considerations in the case at bar.

241. 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

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[159] *Poonian*, *supra* note 215 at para 66

[160] *Ibid*

[161] *Deloitte, supra* note 217

[162] *Ibid* at para 26

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

distinguishing factors from the present case, and then include the concluding text of the judgment of which Compeer rely.

242. 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*"[164] . That is quite different to the facts in this case where Compeer not only regularly considered the transactions in the accounts of the US Sunterra 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 large number of high value intercompany cheques from at least 2022.

243. *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 accounts were all significantly overdrawn. The defendant's personal account was overdrawn in the amount of $989,323.64 as of November 22, 2006.*"[165]

244. 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*"[166] (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*".[167] 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 Compeer has neither identified nor proven such weaknesses in the DefendantsDefendants' evidence in this case, but to the contrary relies upon the testimony given by the DefendantsDefendants. Further, what Compeer 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 Sunterra Entities, with the understanding that some conditional credit was being used, but with the belief that is was being used with the oversight and consent of both of the Banks.

245. There are other distinguishing factors that can be identified between *Hejna* and the Compeer Claim[168], but one in particular is Compeer's own evidence which implies 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 actually known to Compeer from at least 2022) to reported revenue and expenses (as reported

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[164] *Ibid* t para. 21

[165] Hejna, *supra* note at para 22(viii), 50 and 201

[166] *Ibid* at para 55

[167] *Ibid* at para 58

[168] *Ibid* at para 60-61

and considered monthly, and as part of annual reviews)[169]. Compeer makes no mention of the need for an expert or a forensic accounting department to identify the alleged activity. By comparison, in *Hejna* the court found that "…*it took the forensic accounting department significant work to trace and document the account activity*".[170]

246. The court in *Hejna* 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 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.*

247. In comparison to *Hejna*, in the case at bar Compeer has failed to satisfy the burden of proof upon it for each of the elements, including honest belief, and at the very least there are genuine issues requiring trial, including with respect to credibility.

248. On a final note, Compeer has mischaracterised the position of the Sunterra Parties with respect to the allegations of civil fraud as a defence, being to "*blame the victim*" of the fraud.[171] That is not the Defendants positions. Their position is that there was no fraud because Compeer knew what

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[169] Affidavit of Steve Grosland, sworn June 20 2025 [Joint Book of Evidence at TAB 25] [Grosland Affidavit] at para 25

[170] Hejna *supra* note at para 63

[171] Compeer submissions, *supra* note at para 70 -

was happening and were not deceived. In this regard, we let the above submission speak for themselves.

9. Piercing the corporate veil

249. To pursue the allegations of fraudulent representations and/or wrongful conduct conspiracy as against the Individual Defendants, Compeer would have to establish a 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. In *Swanby v Tru-Square Homes Ltd*, 2023 ABCA 224, the Alberta Court of Appeal explained the lifting of the corporate veil as follows:

> *[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.*
>
> (Emphasis added)

250. The Individual Defendants 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;[172]

(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 conduct[173]; and

(c) there is no factual underpinning pleaded by Compeer 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

[172] *Peoples Department Stores Inc. (Trustee of) v. Wise,* 2004 SCC 6 [BOA TAB 64]

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

none of the actions or conduct alleged were carried out for the benefit of any of the Individual Defendants[174].

E. Conspiracy – not pressed

251. Compeer plead a wrongful means conspiracy as between Sunterra Canada, Sunwold Canada, the US Sunterra Entities, Ray Price, Uffelman, and Thompson (the "**US and Canadian Sunterra Parties**"). Specifically, they plead that the **US and Canadian** Sunterra Parties acted in concert with a common design in pursuing the "Kiting Scheme" with the intention of inducing Compeer 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.

252. Compeer have chosen in a footnote to their submissions to say that:

> *In addition to fraudulent misrepresentation, carrying out the cheque kiting fraud engages other causes of action, including civil conspiracy. 89 This cause of action was pled as an alternative basis for relief. For the purposes of this application it is unnecessary to address these causes of action as the ultimate remedy arising from these causes of action would be the same and summary judgment can be granted on the basis of fraudulent misrepresentation alone.*[175]

253. As Compeer have not pressed this cause of action, the court is precluded from findings in respect thereof. If it were, it would be denied by the Defendants and the Defendants reserve their rights in respect thereof.

254. It is useful, however to brief consider the cause of action plead in for wrongful means conspiracy, because it highlights a key weakness in the case brought by Compeer for fraudulent misrepresentation in respect of the alleged kiting scheme. That is, again, the absence of the US Sunterra Entities as parties to their claim.

255. The seminal case of unlawful conduct conspiracy is the decision of the Supreme Court of Canda in *Canada Cement Lafarge Ltd. v. B.C. Lightweight Aggregate Ltd*.[176] The claim for unlawful means conspiracy requires the plaintiff to prove that:

(a) two or more of the Sunterra Parties engaged together in conduct, acting in concert, by agreement or with a common design[177];

(b) the conduct was unlawful;

(c) the conduct was directed towards NBC;

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[174] Peoples, *supra* note at para 46

[175] Compeer Submissions, *supra* note at para 89

[176] *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]

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

(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. [178]

256. It requires concerted action taken pursuant to an actual agreement between each of the alleged co-conspirators.[179] Further, however, to maintain an action for damages, actual pecuniary loss caused by the conspiracy must be established.[180]

257. 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.[181]

258. 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,4[182] nor will a deemed or constructive agreement.5[183] There must be an actual agreement between the parties, though it does not necessarily have to take the form of a contract.6[184] There may be such an agreement between corporations, or between a corporation and its directors.7*

259. In *Polimeni v. Danzinger*,[185] The Manitoba court addressed the need to establish that the parties had come to an agreement, as follows:

> *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, ...*

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[178] *Canada Cement , supra* note 261 per *Agribrands supra* note 262 at para 24, 25 and 26

[179] *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]

[180] *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 235at para 35[BOA TAB 34], citing Agribands, *supra* note at para 26

[181] Canada Cement at pg 475 - 479

[182] 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],

[183] Citing *Mraiche supra* note 264

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

[185] *Ibid*

260. 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 its states:

> *... 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;*

261. Alberta Court of Appeal in *HSBC Bank Canada* held that for the tort of unlawful conduct conspiracy:

> *[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.*

262. Compeer did not include the US Sunterra Entities in their pleadings as parties to the conspiracy. Without the US Sunterra Entities however, there is no basis to make any allegation of "Cheque Kiting" because the US Sunterra Entities were the other side of the intercompany transfers by which Compeer say that the alleged "check kiting". Therefore, there could be no agreement or action in concert to effect of "check kiting". In other words, even if the submission of "cheque kiting" were accepted, which is denied by the defendant, there could be no agreement to "cheque kite" absent the US Sunterra Entities from that agreement.

F. Oppression – not pressed

263. Compeer's claim in oppression pursuant to the Alberta *Business Corporations Act*, as pleaded in its Amended Statement of Claim, is also not pressed in its submissions, presumably by the same footnote that refers to the Conspiracy claim. The Defendants reserve their rights to give submissions on this claim.

G. Compeer's Losses

264. Compeer claims that it has suffered losses of at least USD $436,500,103.19 due to the "Cheque Kiting Scheme", and not due to the fraudulent misrepresentations alleged as against the defendant.[186] This is telling and speaks to the Defendants' submissions above in relation to the

[186] Statement of Claim, *supra* note at 103-105

fifth element of the test for fraudulent misrepresentation: that the representee's loss must be caused by the alleged false representation.

265. Again, the "Cheque Kiting Scheme" as pleaded and claimed in the Affidavit evidence for Compeer and its submissions, by definition and identification, requires the participation of the US Sunterra Entities. Those entities are not alleged to be a defendant to the claim brought by Compeer for fraudulent misrepresentation in this adjudicated claim.

266. Likewise, the expenses claimed by Compeer are said to arise out of the investigation of the "Check Kiting Scheme" and its funding of the appointment of the US Receiver. Again these losses are in no way tied the allegations of fraudulent misrepresentation brought in Compeer's Claim.

267. Finally, Compeer makes no attempt to justify its claim for punitive and exemplary damages, which appear to sit in the context of the allegations of the "Check Kiting Scheme", in respect of which we refer to and repeat our comments above[187]. It is not pressed in the Compeer submissions. Compeer has not made out its case for punitive and exemplary damages and it should be dismissed accordingly.

H. Declarations sought for exemption under the CCAA are not appropriate

268. Section 19(2) of the CCAA provides as follows:

> *Exception*
>
> *(2) A compromise or arrangement in respect of a debtor company may not deal with any claim that relates to any of the following debts or liabilities unless the compromise or arrangement explicitly provides for the claim's compromise and the creditor in relation to that debt has voted for the acceptance of the compromise or arrangement:*
>
> *…*
>
> > *(d) any debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation, other than a debt or liability of the company that arises from an equity claim;*

269. In respect of the declaration sought in paragraph 1(c) of Compeer's Notice of Application provided to the Court on October 27, 2025, section 19(2) of the CCAA does not operate in all cases to exempt any such claims from a plan of compromise or arrangement, but rather such exemption depends upon whether the compromise or arrangement explicitly provides for the claim's compromise and the creditor in question in relation to that debt votes for the acceptance of the compromise or arrangement. To make a declaration to the effect sought by Compeer in paragraph 1(c) of its Amended Notice of Application now, would be peremptory in circumstances where the assets and liabilities of the Corporate Defendants have not yet been determined and a plan has not yet been prepared or proposed, and would undermine the purposes of the CCAA.

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[187] Statement of Claim , *supra* note at para 105

270. Section 5.1(1) of the CCAA provides as follows:

> *Claims against directors — compromise*
>
> *5.1 (1) A compromise or arrangement made in respect of a debtor company may include in its terms provision for the compromise of claims against directors of the company that arose before the commencement of proceedings under this Act and that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations.*
>
> *Exception*
>
> *(2) A provision for the compromise of claims against directors may not include claims that*
>
> > *…*
> >
> > *(b) are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.*

271. In respect of the declaration sought in paragraph 1(d) of the Amended Notice of Application, the exemption sought therein cannot extend to Uffelman nor Thompson on any basis because Section 5.1(2)(b) of the CCAA applies only in respect of directors and neither Uffelman nor Thompson were directors of any of the Corporate Defendants at any time. In respect of Ray Price, the Defendants deny that he made any misrepresentations to creditors of any of the Defendants, Compeer not being a creditor of any of the Corporate Defendants, nor to Compeer, and deny that he undertook wrongful or oppressive conduct as a director of one of more of the Corporate Defendants such that the exception in section 5.1(2) could apply in respect of any release in connection with a compromise or arrangement of one or more of the Corporate Defendants pursuant to that section.

I. Declarations sought in respect of Art Price, Glenn Price and David Price are an abuse of process

272. Compeer again have not pressed their claims as against Art Price, Glen Price and David Price for oppression as per paragraphs 101 to 102 of the Amended Statement of Claim. In any event, these paragraphs ought to be struck out with respect to David Price, Art Price and Glen Price, because no conduct has been pleaded on their behalf and the Defendants therefore cannot know the case they have to answer. Further, David Price and Glen Price were not and are not directors of the Canadian Hog Farm Entities, or either of them, and it has not been alleged by the Plaintiff that Sunterra Enterprises took part in the alleged Cheque Kiting Scheme on which the oppression claims as pleaded by the Plaintiff is based.

273. In addition, Art Price's unchallenged testimony is that he had no knowledge of the alleged conduct comprising the alleged "Cheque Kiting Scheme" prior to on or around February 11, 2025 after Compeer contacted Ray Price and after which no new cheques were written by or on behalf of the Canadian Hog Farm Entities or the US Hog Farm Entities as part of the Account Coverage Practice, and did not and was not required to review the transaction records and account statements for the Canadian Hog Farm Entities and the US Hog Farm Entities before that date for the purposes of his duties and obligations as director of those companies such that he ought to

have become aware of the alleged conduct comprising the alleged "Cheque Kiting Scheme", which is denied, before that date.

274. Finally, there is absolutely no justification for delay in the bringing of any and all actions against the Defendants within this Compeer Claim and in particular as against David Price, Art Price, Glen Price and Ray Price in relation to the subject matter of the Compeer Claim. The derivative action anticipated by the Plaintiff in paragraph 102 of the Statement of Claim is, *ipso facto*, related to the same subject matter as the Compeer Claim and the same parties who are now Defendants of the within claim, and cannot and/or ought not be allowed to proceed after the hearing of the Compeer Claim pursuant to the doctrines of *res judicata*, issue estoppel and/or abuse of process.

J. Guarantee claim

275. A guarantee is not a primary liability, but is "*is a collateral contract to answer for the default of another person*".[188]

276. The guarantee claimed by Compeer is as against Sunterra Enterprises in respect of debts owing by the US Sunterra Entities to Compeer.

277. The guarantees given by Sunterra Enterprises to Compeer are unsecured. In respect of the indebtedness of Lariagra US, the guarantee given is limited to USD $3 Million.

2. Compeer – breached its common law duty of good faith

278. Compeer has by its conduct, breached its common law duty of good faith to perform its obligations to Sunterra Enterprises under the contract for guarantee and debt subordination agreement. The duty of good faith is a duty "…*to act honestly and reasonably and not capriciously or arbitrarily"*,[189] in particular by failing "…*to give reasonable notice of a change to the prevailing course of lending conduct between the parties*".[190]

279. 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*"[191]

280. In *Murano v. Bank of Montreal*,[192] 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

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[188] *Color Your World Inc. v. Robert F. Avery Holdings Ltd*. (ABQB) at 228, citing *Halsbury's Laws of England*, 4th Edition vol. 20, p. 54, para 108

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

[190] *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]*

[191] 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)

[192] Murano, *supra* note 71 – 87

circumstances of each case. In this regard, the court noted the factors to be considered as follows:[193]

> *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.*

281. 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 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*

[193] *Ibid* at para 72

> *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.*

282. In *Thermo King Corp. v. Provincial Bank of Canada*[194], 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)[195] as follows:

> *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.*

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[194] (1981) CanLII 1731 (ON CA); (1981), 34 O.R. (2d) 369 (C.A.), [1981] O.J. No. 3136

[195] 5 H.&.N. 95, 157 E.R. 1114, cited in Thermo King, *supra* note at pg 5

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

283. Compeer breached its duty of good faith to the US Sunterra Entities, and to Sunterra Enterprises as guarantor having secondary liability to the US Sunterra Entities, by[196]:

(a) its actions in suddenly and without notice changing the course of conduct between the US Sunterra Entities and Compeer, a course of conduct which Compeer had knowingly let transpire since 2022;

(b) by its conduct causing harm to the business of the US Sunterra Entites following the account freeze;

(c) by its conduct in proceeding to a receivership application without notice and while leading the US Sunterra Entities to believe that they were negotiating in good faith for an outcome that would maximise the interests of all stakeholders and yield a much higher dollar value result for Compeer, when they had no such intention; and

(d) in refusing to engage and accept a course of conduct that would enable outcome that would maximise the interests of all stakeholders and yield a much higher dollar value result for Compeer.

284. As a result of Compeer breaching its duty of good faith as above, the outstanding debts of the US Sunterra Entities to Compeer, being the primary liabilities, are estimated to be at least USD $15million higher than they would have been and any liability of Sunterra Enterprises to Compeer under the guarantee must be reduced accordingly.

K. Tracing

285. For completeness, it is noted that the ap[plication for tracing funds as a result of the alleged "Cheque Kiting Scheme" and a declaration that such funds be held in trust or on a constructive trust for Compeer has not been pressed in Compeer's submissions. Further no case for a constructive trust was pled and no evidence put forward in respect thereof. The Defendants say Compeer is not entitled to any such declaration and otherwise reserve their rights.

L. Failure to mitigate

286. The law of the failure to mitigate for one's own losses was set out by the Alberta Court of Appeal in *Calgary (City) v. Costello*[197]**: "***a claimant generally is denied recovery with respect to losses that she reasonably could have avoided***"**

287. Mitigation in principle is intended to ensure that the wrongdoer is not "*not abused when compensating the victim for their loss*"[198]. In other words, while a Plaintiff is not required to make

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[196] See above para 1340171

[197] **, 1997 ABCA 281 at para 37**

[198] ***La Trace v Warkentin Building Movers*, 2025 ABKB 412 at para 308**

great steps towards mitigation of their losses, they cannot seek to recoup damages from the wrongdoer for harms resulting from their own negligence[199].

288. The key principles of the failure to mitigate were additionally outlined by the Alberta Court of King's Bench in *Pettigrew v Llewellyn*[200], as follows:

(a) The question as to whether or not the plaintiff acted reasonably in the circumstances is one of fact.

(b) The onus of proof lies on the defendant to establish on a balance of probabilities that the plaintiff failed to take reasonable steps to avoid losses. However, the courts will not allow the defendant, in discharge of that onus, to be overly critical of the plaintiff. Having committed a wrong, the defendant should not quickly be heard to point out his victim's shortcomings in avoiding resulting losses. The benefit of doubt, therefore, generally will be given to the plaintiff.

(c) The duty to mitigate does not invariably require action to be taken immediately upon breach. As the plaintiff need merely act reasonably in the circumstances, considerable delay may be permitted in some cases.

(d) The plaintiff need not incur great expense or inconvenience in an attempt to stem the flow of losses resulting from the defendant's breach. Thus, Lord Goddard observed that a prospective purchaser is not "bound to hunting around the globe" to find a suitable substitute for the goods that he expected to receive under a contract.

(e) Nor need the plaintiff incur an unreasonable risk, or embark upon a speculative venture, in an attempt to mitigate her losses.

289. Compeer failed to mitigate its losses as follows:

(a) By appointing a receiver with no experience who was in fact a veterinary management business[201]

(b) by its conduct in causing harm to the business of the US Sunterra Entities following the account freeze, in particular in respect to the going concern business of the US Sunterra Entities;

(c) by its conduct in proceeding to a receivership application without notice and while leading the US Sunterra Entities to believe that they were negotiating in good faith for an outcome that would maximise the interests of all stakeholders and yield a much higher dollar value result for Compeer, when they had no such intention;[202] and

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[199] *Ibid*

[200] **2025 ABKB 291**

[201] Grosland Cross, *supra* note 11 page 67 lines 16-24

[202] See above para 160-165

(d) in refusing to engage and accept a course of conduct that would enable an outcome that would maximise the interests of all stakeholders and yield a much higher dollar value result for Compeer; and

(e) in proceeding to a fire sale of the assets of the US Hog Farm Entities, as described herein, effectively throwing away an estimated USD $15 million in the value of those assets.

290. The possible solutions available to Compeer, as presented to it by Sunterra, would not have required Compeer to engage in conduct which would place it at great risk, and presented a reasonable solution to allow Compeer to recoup its losses without unreasonable delay and to avoid the extraordinary expenses of continuing litigation in the USA and Canada.

291. While in their submissions, Compeer assert that no solution was possible" [203]for the alleged damage claimed, this is simply not the case. Sunterra at multiple points approached Compeer, in good faith with attempts to provide solutions which would have, based on the information available to the parties at the time, allowed for an equal if not greater recovery of losses for Compeer. The sale of the US Sunterra assets, despite the admissions of Steve Grosland, did not accurately reflect the premium value of the pigs at the time of sale, per Sunterra's calculations and their contract and growing relationship with Siouxpreme and their continuing contract with Tyson.

292. Compeer seeks to rely on the receivership orders made with respect to the US Sunterra Entities in answer to the allegations made by the defendant that they have failed to mitigate. The defenders say that this is no answer for the following reasons:

(a) Compeer has not sought to have the respective US court decisions recognised here under the very procedure put in place for that to occur in Canadian insolvency regimes;[204]

(b) In any event, no submissions have been made as to the nature of the issues and onus before the US courts when the orders were made for receivership and approval of the fire sale, respectively, and therefore there can be no relevant issues of *res judicata* arising.

M. <u>Estoppel</u>

293. As was held by the Supreme Court of Canada in *Ryan*[205], the doctrine of estoppel is "one of the most flexible and useful in the armoury of law":

> *<u>When the parties to a transaction proceed on the basis of an underlying assumption</u> - either of fact or law, and whether due to misrepresentation or mistake makes no difference - on which they have conducted the dealings between them - <u>neither of them will be allowed to go back on that assumption</u>*

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[203] Compeer submissions

[204] CCAA, Part IV; see for example, *In the Matter of 23andMe Holding Co. and 23andMe, Inc* 2025 BCSA 1067

[205] *Ryan v Moore*, 2005 SCC 38 at para 51

> *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."*

294. This was expanded further in *Stankovic v 1536679 Alberta Ltd*[206]:

> *[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 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*

295. As in *Stankovic,* Compeer proceeded in renewing their agreements with Sunterra, and 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 Compeer, as detailed herein, including monthly reporting on the Sunterra accounts, in conjunction with Sunterra's openness as willing disclosure of its financial information whenever requested, makes it evident that Compeer 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.

296. Compeer ought therefore to be estopped from now seeking to enforce its rights in relation to the conduct complained of the by the Defendants.

N. Waiver

297. As cited in *Agrium v Orbis Engineering Field Services*[207], 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.

298. In the current action, the behaviour of Compeer, in the knowing extension of conditional credit since at least September 2022, 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 Compeer's ability to now to strictly enforce the terms of an agreement which, by their own conduct, Sunterra understood not to be strictly enforced.

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[206] *Stankovic v 1536679 Alberta Ltd*, 2019 ABCA 187 [BOA TAB 56]

[207] 2022 ABCA 266 [BOA TAB 58]

VI. RELIEF REQUESTED

299. Compeer made a voluntary decision to advance conditional credit to Sunterra. According to Mr. Wagner, Compeer's CEO, the decision to do so was voluntary[208]. The decision to advance conditional credit was unilateral – no specific formal contract was entered between the parties with respect to the conditional credit.

300. Compeer had all of the base information at its disposal with respect to knowing that Sunterra was using conditional credit in accordance with the Account Management Practise. However, Compeer did not put forward any evidence from witnesses with any first hand knowledge and has objected to and refused to answer undertakings from witnesses that would have first-hand knowledge.

301. Even then, putting its best foot forward, Compeer does not deny that it knew about the Account Management Practise. When asked Mr. Grosland stated "I don't know if we knew because I don't know if anybody took the time to review it"[209]. In other words, Compeer can neither confirm nor deny that it knew. Compeer elected not to call any witnesses with actual knowledge and as such an adverse inference applies.

302. In short – Compeer has adduced no evidence that cheque kiting has occurred, that Compeer relied on representations by Sunterra or that cheque-kiting caused a loss.

303. Finally, the evidence has established that Compeer's loss was actually occasioned by its own bad faith conduct. Compeer has admitted knowledge of the US Sunterra entities business – namely to raise special NAE status piglets that it purchased from the Canadian Sunterra entities. To operate as a going concern this required the continual purchasing of special NAE piglets from the Canadian entities[210].

304. Compeer had an obligation to put its best foot forward - this being it – and therefore the claim

305. The Applicants respectfully request:

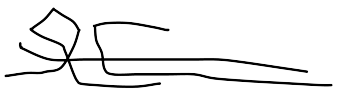
(a) That the application of Compeer be denied,

(b) Costs against Compeer; and

(c) Any other relief that this Honourable Court deems just.

RESPECTFULLY SUBMITTED THIS 3rd day of December, 2025.

BLUE ROCK LAW LLP



David W. Mann KC / Scott Chimuk
Counsel to the Defendants

[208] Wagner Cross, page 17 lines 5-8 and 20-22

[209] Grossland Cross page 55 line 25 and page 56 line 1

[210] Grosland page 81 lines 19-22

VII. AUTHORITIES

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10.	*Burns Bog Conservation Society v. Canada (Attorney General)*, 2014 FCA 170
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