Court of Queen's Bench of Alberta

Citation: Kowal v Sun Star Energy Inc, 2020 ABQB 244

Date: 20200408
Docket: 1301 05604
Registry: Calgary

Between:

Raymond David Kowal, Janet Irene Kowal, Eagle Tree Investments Corporation, Otto David Cutts, Lois M. Cutts, Neil Gordon Devitt, Donald S. Devitt, Kevin Orriss, Marc Clement, Terry Lynn Clement, Lerry Hubbs, Robert Knoll and Mei Choon Knoll

Plaintiffs

- and -

Sun Star Energy Inc., Robert McCormick, Sandy Rizopoulos and Lester Hartland

Defendants

Reasons for Decision
of
Honourable Madam Justice A. Woolley

Introduction

[1] In 2011 Lester Hartland, Robert McCormick and Sandy Rizopoulos marketed and sold shares in a company they had created, Sun Star Energy Inc. ("Sun Star").

[2] The Plaintiffs claim that the marketing and sale of those shares was based on false information. They say that Mr. Hartland, Mr. McCormick and Mr. Rizopoulos knew that the information was false. They say that they relied on it, and that as a result they suffered a loss. They say, in short, that this is a case of fraudulent misrepresentation and the Defendants should give them their money back.

[3] With the exception of Mr. Kevin Orriss, who has terminal cancer and was unable to testify, I accept the Plaintiffs' claims.

[4] The evidence before me shows that Mr. Hartland, Mr. McCormick and Mr. Rizopoulos came up with a scheme to market the shares in Sun Star without concern for the truth of the

claims that they made; indeed, the evidence shows that they marketed the shares based on false information about their own financial investment, the shares they held and, by providing false information about an important analogue well, the quality of the assets Sun Star had acquired.

[5] Sun Star itself was not a scam. Mr. Hartland, Mr. McCormick and Mr. Rizopoulos legitimately hoped that the company would be profitable, and that they and all of their investors would be enriched by its ventures. They had acquired assets to develop, and they took steps to develop those assets.

[6] But the assets Sun Star owned, and the opportunity it offered, were modest, and required patience and time to attract investors and achieve success. Mr. Hartland, Mr. McCormick and Mr. Rizopoulos were unwilling or unable to exercise patience and take the necessary time, and instead sought investors quickly, presenting Sun Star as a much better opportunity than the true information showed it to be. And in doing so they committed a civil fraud on the Plaintiffs.

[7] The Plaintiffs also make claims against the Defendants based in oppression, breach of fiduciary duty and piercing the corporate veil. Given my findings on the Plaintiffs' action in civil fraud, I do not consider these other claims.

Issues

[8] The issues in this trial are as follows:

1. Are the Defendants liable to the Plaintiffs for fraudulent misrepresentation? In particular:
    a) Did the Defendants knowingly or recklessly make false representations to the Plaintiffs on which those Plaintiffs relied and as a result of which they suffered a loss?
    b) How, if at all, is this Court's assessment of the Defendants' liability constrained by limits in the allegations contained in the Plaintiffs' Amended Amended Amended Statement of Claim?
    c) Can the Defendants avoid liability based on the Plaintiffs' lack of due diligence or because the falsity of the Defendants' representations was easily discoverable?
    d) Can a Defendant avoid liability to a Plaintiff if a false representation was made only by another Defendant or Defendants?
    e) Do the Subscription Agreements signed by the Plaintiffs affect the Defendants' liability?

Background Facts

Founding Sun Star Energy – May 2009 to June 2011

[9] In 2009 Mr. Jim Gotmy introduced Mr. Hartland and Mr. McCormick to Mr. Rizopoulos. They began working together to pursue opportunities in the oil and gas sector. Mr. Hartland and Mr. McCormick had experience in bringing in financing to start and develop projects, but only in the real estate sector. Mr. Rizopoulos, a petroleum engineer with many years of oil and gas experience, brought the oil and gas expertise.

[10] On May 8, 2009 Mr. Hartland, Mr. McCormick and Mr. Rizopoulos incorporated the numbered company that later became Sun Star. The business plan was for Sun Star to pursue a low risk good reward development projects, and then to use the income from those projects as a springboard from which to pursue higher risk but potentially much higher reward exploration projects. The low risk projects they pursued were ones in developed areas, with land and pipeline access and with known reserves, so that the capital costs would be low and the likelihood of a commercially viable well relatively high.

[11] From 2009 until the first issuing of common shares to outside investors in July 2011, none of Mr. Hartland, Mr. McCormick or Mr. Rizopoulos received any payment for the work they did to establish Sun Star, although they all testified that they worked hard and put in many hours to establish the company and create opportunities for it to pursue. Mr. Hartland and Mr. McCormick's real estate development company, Condo-Condo Holdings Inc. ("Condo-Condo"), lent money to Sun Star in order for it to acquire oil and gas interests, as discussed below.

[12] In return for these contributions, and in reflection of their efforts, Mr. Hartland, Mr. McCormick and Mr. Rizopoulos named themselves officers and directors of Sun Star. Mr. Hartland was the President, Mr. McCormick was the Secretary, Treasurer and Chief Financial Officer, and Mr. Rizopoulos was the Chief Operating Officer.

[13] Mr. Hartland, Mr. McCormick and Mr. Rizopoulos also issued themselves shares in the company. They issued themselves a few hundred shares from 2009 to 2011, along with some other initial investors. In early 2011 they bought out the other initial investors and restructured their own investment in Sun Star. Specifically, as of March 31, 2011 Condo-Condo was issued 4,866,700 shares. Mr. Rizopoulos's consulting company, Hyperion Oil and Gas Inc. ("Hyperion"), was issued 2,433,300 shares. Mr. Hartland, Mr. McCormick and Mr. Rizopoulos were each issued an additional 900,000 shares. As a result, the total shares issued in the company were just over 10,000,000, of which each founder controlled about 1/3.

[14] Mr. McCormick said that the 10,000,000 shares issued as of March 31, 2011 were based on a "stock split" and an estimate that at that time Sun Star had assets worth $10,000,000, such that it was legitimate to split their initial 1000 shares on a 10,000 to 1 basis.

[15] The estimate of Sun Star's worth was not based on a third-party independent appraisal of the assets. Nor was it supported by any documentation provided to me. Mr. McCormick described it as a valuation based on information from Mr. Rizopoulos, Mr. Roger Hume (who advised Sun Star on its oil and gas activities) and Sun Star's legal counsel Mr. Scott Reeves. In cross-examination Mr. McCormick clarified that they had not in fact put a value on the assets prior to doing the stock split – they had had discussions about the assets but had not valued them *per se*. Nonetheless, it was the worth of the company in the eyes of the Defendants which, they say, justified their decision to issue themselves 10,000,000 shares at no cost.

[16] Specifically, the stock split appears to have been based on the Defendants' hope that the properties they had acquired within the last two years for a total financial output of $190,000, including what they paid for seismic, would prove to be so oil rich, easily developed and highly profitable that – even prior to any of that having been proven to be the case – they could be estimated to be worth $10,000,000. Moreover, the Defendants thought this estimate of Sun Star's assets sufficiently legitimate to justify issuing themselves 10,000,000 Sun Star shares prior to selling shares to third parties.

[17] The financial statements of Sun Star as of September 30, 2011 do not match this estimate of asset value. They list the capital assets of Sun Star as worth $531,755. As of September 30, 2012, the financial statements list the capital assets as worth $2,911,079.

[18] While the record before me suggests that the Defendants' stated view of their assets in March 31, 2011 was not justified by what they knew at that time, I do note that they were represented by Mr. Reeves who, according to Mr. Hartland and Mr. McCormick, accepted the issuance of the shares on this basis and prepared the necessary legal documentation to do so. I also acknowledge that effective December 31, 2011 they obtained a report from Sproule and Associates that assessed the proved plus probable reserves of the company at a 10% discount rate at $10,682,000.

Oil and Gas Interests Acquired: May 2009 - June 2011

[19] To pursue its corporate objectives, Sun Star sought out projects with a mix of risk profiles. Prior to July 2011 it managed to obtain a small number of oil and gas development and exploration interests to pursue, some of which it identified as low risk, and some as high risk.

[20] The most immediately significant of these was an interest obtained from Tiger Moth Energy Inc. ("Tiger Moth") in the Charlie Lakes pool in eastern Alberta. Sun Star farmed-in to a five-year petroleum and natural gas lease owned by Tiger Moth, which gave Sun Star the right to drill at the 13-29-68-6 location (the "13-29" or "Elmworth" opportunity and well). To obtain the 13-29 opportunity from Tiger Moth, Sun Star paid Tiger Moth $40,000 and granted to it a 7 ½ percent gross overriding royalty. They also granted a 1.5% gross overriding royalty to Mr. Roger Hume, an oil and gas expert who had consulted with the Defendants.

[21] To support drilling at the 13-29 location, Tiger Moth provided data about two analogue wells in particular. One, the 10-30 well, had produced at a modest rate but over time had produced a high amount of total oil reserves, about 750,000 barrels. The 10-30 well was one of several wells west of the 13-29 opportunity that had been on production for a number of years. The other analogue well, the 4-32 well, had produced only for a short period of time but, in its first few days of production, had produced at a high rate of 433 barrels of oil per day ("bbls/d").

[22] Mr. McCormick testified that the more significant information in deciding to acquire the 13-29 opportunity related to the 10-30 and other wells to the west, and the total reserves that had been produced from those wells. It was those wells, Mr. McCormick said, which supported the decision to acquire the 13-29 well, not the 4-32 well – he said that in discussions with Tiger Moth the 4-32 well was not the main topic of discussion, and that it was not the focal point. He questioned whether the 13-29 well was even in the same pool as the 4-32 well.

[23] In his testimony Mr. Rizopoulos agreed that the wells to the west were important but emphasized the importance of the 4-32 well as an analogue that could be used to assess the 13-29 well. He said that it was the initial production from the 4-32 well that Tiger Moth was excited about and that Sun Star was excited about. The 4-32 well was very close to the 13-29 location, approximately 200 metres away, and the 13-29 well was intended to be a "twin" of the 4-32 well. Mr. Rizopoulos emphasized the 4-32 well's geological features – and in particular a 30% porosity streak – that suggested the 13-29 well would be productive.

[24] Mr. Hartland also noted in his evidence the significance of the 4-32 well. He said that the only production graph he had any familiarity with was the one related to the 4-32 well. He also said that they thought that the 4-32 well might be connected to the same pool as the wells to the

west. He noted that he thought the 4-32 well might have been shut in in order to prevent draining of the wells to the west.

[25] On this point I prefer the evidence of Mr. Rizopoulos and Mr. Hartland to Mr. McCormick. I note that the information presented to investors highlighted the 4-32 well, featuring it on 3 of the slides about the 13-29 opportunity, and putting a bold and highlighted banner about the production from that well on two of those slides. The Defendants provided more information about the 4-32 well to investors than they did about the 10-30 well or the other wells to the west of the 13-29.

[26] In addition, Mr. Rizopoulos was the oil and gas expert at Sun Star, and the person with the primary role in identifying and evaluating oil and gas opportunities. He is the person best positioned to accurately identify what Sun Star used and relied on to evaluate the 13-29 opportunity. Other evidence presented in the trial showed that all of the parties, including Mr. McCormick, had a consistent interest in the 4-32 well. As Mr. Hartland's evidence suggested, they did not see the 4-32 well as necessarily separate and distinct from the wells to the west.

[27] Mr. McCormick himself later testified that once the 13-29 well came close to production the parties expected the 4-32 well to be opened again and watched it with interest because of the close relationship between it and the 13-29 well. This casts doubt on the accuracy of Mr. McCormick's earlier testimony that the 4-32 well was not the focus or important in the decision to pursue the 13-29 opportunity.

[28] This is not to say that the wells to the west of the 13-29 were irrelevant or unimportant, but simply to emphasize the importance of the 4-32 well to the Defendants' decision to acquire the 13-29 opportunity.

[29] Mr. Rizopoulos received specific information about the 4-32 well from Mr. Duncan McCowan of Tiger Moth on May 2, 2011, which he forwarded to Mr. Hartland and Mr. McCormick. Specifically, he was given production data that said:

1. In December 2008 the 4-32 well produced daily of 433.2 bbls/d and had cumulative production of 974.8 barrels.
2. In January 2009 the 4-32 well produced 112 bbls/d and had cumulative production of 2318.3 barrels.
3. In February 2009 the 4-32 well produced 59.6 bbls/d and had cumulative production of 3620.3 barrels.
4. The "Life Summary" of the 4-32 well was 100.3 bbls/d with cumulative production of 3620.3 barrels.

[30] What that production data told Mr. Hartland, Mr. McCormick and Mr. Rizopoulos was that the 4-32 well came on production in December 2008. In December 2008 it produced oil for just over two days at an average rate of 433.2 bbls/day to generate a total amount of 974.8 barrels of oil in that month. It produced oil until February 2009. Over that three-month period the 4-32 well produced an average of 100.3 bbls/d at a declining rate, with the last days of production being about one seventh of the production in the first two and a half days. As of May 2011, the 4-32 well had not produced any oil since February 2009, when it was shut in.

[31] Mr. Rizopoulos also testified that Tiger Moth advised him that they had a scout who witnessed trucks shipping oil from the 4-32 well to market. He confirmed in his testimony that this was something he was told prior to July 2011.

[32] One question relevant to this litigation is: what was the "initial production" of the 4-32 well? Mr. Hartland, Mr. McCormick and Mr. Rizopoulos agreed that initial production means the initial production of a well over a defined initial production period. They disagreed, however, about how to define an "initial production period".

[33] Mr. Rizopoulos said that, in his experience, the industry defines an initial production period as anywhere from 30 to 90 days. Mr. McCormick maintained that he understood the initial production period to be 24 hours. Mr. Hartland agreed with Mr. McCormick.

[34] I am not assessing here the Defendants' evidence that their statements to the Plaintiffs only related to the "initial production" of the 4-32 well. Nor am I assessing the truthfulness and accuracy of their explanations about why they described the 4-32 well as they say that they did. I am considering only their evidence about how many days of a well's production they would have included had they been trying to accurately communicate the well's "initial production".

[35] On that question I again prefer the evidence of Mr. Rizopoulos. Mr. Rizopoulos is an engineer with extensive oil and gas experience. Mr. Hartland and Mr. McCormick are not. Mr. McCormick said, in fact, that his knowledge of oil and gas came largely from Mr. Rizopoulos, as well as from meetings he had with Tiger Moth. Mr. Hartland said that he did not have any technical oil and gas knowledge. Amongst Sun Star's Officers and Directors, Mr. Rizopoulos was the engineer and responsible for identifying appropriate oil and gas opportunities and evaluating their merits. In 2011, had the Defendants wanted to describe the initial production of the 4-32 well, they would have taken direction from Mr. Rizopoulos and identified the 4-32 well's initial production from its production over its first 30-90 days.

[36] Given that, what was the "initial production" from the 4-32 well?

[37] The data available to Mr. Hartland, Mr. McCormick and Mr. Rizopoulos on May 4, 2011 showed that the 4-32 well produced 433 bbls/d for approximately 2 ½ days, 112 bbls/d for approximately 12 days and 59 bbls/d for just under 22 days. The number of days can be calculated by dividing the total cumulative oil produced in the month by the number of barrels of oil produced by per day. Using a weighted average of the May 4, 2011 production data, and a 30-day initial production period, the initial production of the 4-32 well was in the range of 110 bbls/day.

[38] The Defendants' confidence that the 13-29 opportunity was low risk grew after Sun Star reached a farm-out agreement with Western Canadian Oil and Gas Inc ("Western"). Under that agreement, Western would drill the well and, after it had recovered its costs, would share the profits with Sun Star on a 50/50 basis. That meant that Sun Star could profit from the 13-29 well if it proved successful but would take none of the risks arising from drilling it.

[39] In addition to the 13-29 opportunity, Sun Star also acquired an opportunity to drill between one and four wells in a pool in southern Alberta, called Nisku. Mr. Rizopoulos had prior experience in that area on which Mr. Hartland, Mr. McCormick and Mr. Rizopoulos hoped to capitalize. In addition, Sun Star entered into a farm-out agreement with Galleon Energy ("Galleon") on Section 21, allowing Galleon to farm-in and granting Sun Star a royalty. The Defendants viewed the Nisku and Section 21 opportunities as low risk.

[40] Finally, Sun Star acquired a large parcel of land, just over 12 sections, from the Crown for $113,000, called Montney. The Montney land was the main higher risk opportunity acquired by Sun Star, which the Defendants hoped would generate high rewards.

[41] All of the Defendants emphasized the importance of the Montney opportunity to Sun Star's long-term success and viability. Mr. McCormick testified that, after they acquired the Montney opportunity, Shell Oil acquired interests in the land all around theirs, and at a much higher price. This both increased the immediate market value of the Montney interest and gave the Defendants confidence that the oil they hoped to find would be there.

[42] I accept that Montney was important to Sun Star. As Mr. Rizopoulos explained, however (and on this he was not contradicted), the overall business plan of Sun Star depended on first achieving cash flow through the lower risk 13-29, Nisku and Section 21 opportunities; unless those opportunities were viable Sun Star had no realistic chance of developing the Montney play.

[43] To acquire these various opportunities, and to obtain and interpret seismic data, Sun Star spent about $190,000 prior to June 2011. It financed that expenditure through a loan from Condo-Condo.

Sale of Shares and Alleged Misrepresentations

[44] The Plaintiffs allege that Mr. Hartland, Mr. McCormick and Mr. Rizopoulos, individually and collectively, made fraudulent misrepresentations when they sold the Plaintiffs shares in Sun Star. The Plaintiffs allege that they relied on those misrepresentations in deciding to purchase the shares, and as a result suffered a loss.

[45] This section sets out the facts related to the sale of common shares in Sun Star in July and August 2011, and to the sale of flow-through shares in November and December 2011.

Credibility Assessment

[46] Setting out the facts related to the share sales requires me to make findings of fact with respect to the documents provided by the Defendants to the Plaintiffs, and about what the Defendants said to the Plaintiffs when soliciting the Plaintiffs to purchase the common shares and flow-through shares of Sun Star. That further requires me to choose whether to accept the evidence of the Plaintiffs or that of the Defendants. Their accounts directly contradict each other and, on the most significant points, cannot be reconciled.

[47] I accept the evidence of the Plaintiffs and, where it conflicts with the Defendants, prefer the evidence of the Plaintiffs to that of the Defendants. This is largely because of my assessment of the evidence in relation to specific areas of dispute, which I discuss below. In each area, as my discussion will make clear, I find the testimony of the Plaintiffs to be more plausible and better substantiated than that of the Defendants.

[48] In addition, however, I offer some general observations in support of my preference for the Plaintiffs' evidence.

[49] First, what the Plaintiffs say the Defendants told them accords with the Defendants' own documents. The Defendants could conceivably have corrected the inaccurate or false information their documents contain, and they say that they did so, but it seems more plausible to accept what the Plaintiffs say occurred: that the Defendants relied on and in some cases reinforced the inaccurate or false information contained in the Defendants' own documents.

[50] Further, both Mr. Kowal and Mr. Cutts made and retained notes of their meetings with the Defendants, with Mr. Kowal's notes being quite specific and detailed. Those notes are significant because they document the careful attention Mr. Kowal and Mr. Cutts paid to the

information they were given, they helped Mr. Kowal and Mr. Cutts retain that information, they allowed Mr. Kowal and Mr. Cutts to refresh their memories about events prior to testifying and, finally, they corroborate the testimony that Mr. Kowal and Mr. Cutts gave before me.

[51] I note that the Defendants accept the accuracy of Mr. Kowal and Mr. Cutts' notes except where the notes suggest that the Defendants gave false or misleading information. It seems unlikely that the notes are accurate in every respect except those unhelpful to the Defendants.

[52] I also think it significant that the record shows that, in April 2012, when Mr. Rizopoulos finally provided them with an accurate account of the events from 2009 to July 2011, Mr. Kowal and Mr. Cutts immediately identified that they had been given untrue information about the 4-32 well and the founders' investment. This shows that Mr. Kowal and Mr. Cutts did not construct their allegations with the commencement of litigation, or after hunting through the documents for something to complain about. Rather, they identified the false information as soon as they were told the truth.

[53] Similarly, also in April 2012, when Mr. Hubbs discovered the issues that had arisen with Sun Star, he wrote to the Defendants identifying some of the things he had been told prior to investing which now form part of his fraudulent misrepresentation claim.

[54] It is true that none of the Plaintiffs other than Mr. Kowal, Mr. Cutts and Mr. Hubbs have contemporaneous or near-contemporaneous records to support their testimony. However, I think it probable that the Defendants gave similar information to all prospective investors, and thus view the documentation prepared by Mr. Kowal, Mr. Cutts and Mr. Hubbs as tending to corroborate the testimony of the other Plaintiffs.

[55] I acknowledge that the testimony of all of Plaintiffs came across as an oft-recounted tale, reflecting their experience and response to the events, not just their recollection of the events themselves. I also acknowledge that Mr. Kowal and Mr. Cutts have consulted with each other since the time they made the decision to first invest in the common shares and have worked closely together throughout. Mr. Kowal and Mr. Cutts have also spoken with their spouses and with the other Plaintiffs in deciding to pursue and in pursuing this litigation. The Plaintiffs shared their stories with each other prior to coming to Court. Although they did not attend each other's testimony, and I believe respected the Court's direction not to speak with each other about what occurred when they were on the stand, their testimony cannot be said to be uninfluenced or untainted by each other's memories and experiences.

[56] I have considered whether this creates doubt in my mind about the accuracy or truthfulness of the Plaintiffs' testimony. It does not. I do not believe that the Plaintiffs have scripted or concocted their testimony. Indeed, I accept it as their truthful account of what took place. Their testimony is corroborated by the contemporaneous documentary record, and to a great extent uncontradicted by the Defendants. That the Plaintiffs have had time to dwell and reflect on the events of 2011 and 2012, and have talked about them with each other, is the natural and predictable outcome of what they experienced and their decision to seek a legal remedy for that experience. Their conversations may have reinforced their memory of certain events, but viewed in light of the broader evidentiary record, I do not believe that it has rendered their memories false or unreliable.

[57] I also find the evidence of the Defendants to be implausible or false on the key areas of dispute between the parties, as I discuss below. More generally I was troubled by the inability of

any of the Defendants to critically examine their own behaviour and by their ability to vigorously defend almost everything they had done. The account the Defendants gave of their own conduct was of good hearted and hard-working businessmen, trying honestly and appropriately to create an oil and gas opportunity. Mr. Hartland and Mr. McCormick defended themselves vigorously and, on occasion, with anger; they were willing to criticize Mr. Rizopoulos, but admitted no meaningful fault in their own conduct. Mr. Rizopoulos presented his testimony with a sense of grievance and victimization rather than anger but was similarly unwilling to accept any suggestion that he had acted improperly.

[58] Yet from 2011 through to the collapse of Sun Star the Defendants individually and collectively made decisions of dubious propriety – issuing themselves 10,000,000 in shares at no cost prior to selling shares to the public for $1 per share; saying assets recently acquired for less than $190,000 had become worth $10,000,000 so as to justify the shares they issued themselves; providing written materials to investors that were – at best – likely to cause confusion; paying themselves a salary, including retroactive payments for eight months, as soon as they had received the common shares investment but prior to Sun Star earning any meaningful revenues; continuing to pay themselves those salaries long after Sun Star had run into serious economic difficulties; and, engaging in related party transactions (paying rent and salaries to Condo-Condo). The Defendants' failure to appreciate any of the ways in which their conduct was objectively concerning causes me to doubt the overall accuracy and credibility of their testimony. It suggests they do not view matters accurately, or cannot account for them honestly, either of which makes their testimony unreliable.

Sale of Common Shares: June 2011 – August 2011

[59] Between June and August 2011 common shares in Sun Star were purchased by the Plaintiffs Ms. Terri-Lynn Clement, Mr. Marc Clement, Mr. David Kowal, Ms. Janet Kowal, Eagle Tree Investments Ltd. ("Eagle Tree"), Mr. Otto Cutts and Ms. Lois Cutts (the "Common Share Plaintiffs").

[60] Eagle Tree is a company owned by Mr. and Ms. Kowal; Mr. Kowal is the President of Eagle Tree and makes decisions on its behalf.

[61] Common shares were also purchased by Mr. Kevin Orriss. Mr. Orriss has terminal cancer and did not testify at the trial of this matter. I deal with the facts related to Mr. Orriss later in this decision, and do not include him in the category of Common Share Plaintiffs.

Documents Provided by Sun Star

Preparation and Distribution

[62] Mr. Hartland, Mr. McCormick and Mr. Rizopoulos sought investors in the common shares between June and August, 2011.

[63] The Defendants created three documents in relation to the Sun Star investment. Those three documents were, first, an e-mail providing some general information about the properties acquired by Sun Star and the proposed development of those properties ("Introductory E-mail"); second, a three year business plan providing information about the assets, potential revenue and financing of Sun Star, and the expected return on investment ("Business Plan"); and, third, an investor presentation providing more detailed information about the properties and opportunities available to Sun Star ("Investor Presentation").

[64] All of these documents were drafted in the first instance by Mr. Rizopoulos. Mr. Rizopoulos sent numerous versions of the documents to Mr. Hartland and Mr. McCormick and solicited their feedback. The record does not show what feedback was given by Mr. Hartland and Mr. McCormick on the documents (the e-mails produced were largely from Mr. Rizopoulos to Mr. Hartland and Mr. McCormick), and to a significant extent both Mr. Hartland and Mr. McCormick tried to distance themselves from the creation of the documents. There is no doubt, however, that Mr. Hartland and Mr. McCormick had numerous opportunities to review and comment on Mr. Rizopoulos's work, were well aware of what it contained and not only knew that the documents were going to investors, but also sent the documents to investors themselves. In addition, Mr. Rizopoulos testified that he received feedback from Mr. Hartland and Mr. McCormick on the documents, and that Mr. McCormick had a hand in creating them.

[65] Based on this evidence, I find that all of Mr. Hartland, Mr. McCormick and Mr. Rizopoulos had involvement in, and responsibility for, creating the documents provided to the investors.

[66] Mr. Kowal and Mr. Cutts received all these documents and relied on them in making their decision to invest, in advising their spouses to participate in the investment and, in the case of Mr. Cutts, in advising his family members and friends about the investment.

[67] Mr. Clement testified to receiving the Business Plan and the Investor Presentation. Ms. Clement did not have an accurate recollection with respect to receiving the Investor Presentation (she recalled it being much shorter), and was somewhat inconsistent between questioning and trial about whether she had received the Business Plan (at questioning she only remembered the Investor Presentation; at trial she said she had received both); however, I find that she and Mr. Clement did receive the Investor Presentation and Business Plan in the same form as they were received by Mr. Kowal and Mr. Cutts. Mr. Clement testified that he received that information, and Ms. Clement at trial did recall receiving the Business Plan and seeing parts of the Investor Presentation. She noted she had been very nervous at the questioning. I am satisfied that the Clements received the Business Plan and the Investor Presentation based on Mr. and Ms. Clements' evidence, and because Sun Star's investor strategy involved providing these documents to potential investors in the common shares. There is no reason to believe they would not have provided them to the Clements, and indeed none of the Defendants denied that they had done so, with Mr. McCormick confirming that he had provided them with the Investor Presentation.

[68] The Defendants maintained that the Business Plan had not been created to be provided to investors; rather, it had been created for the purpose of financing the company. I do not accept the Defendants' evidence on this point. The Business Plan was provided to investors. In addition, information contained in the Business Plan, for example with respect to the net asset value per share, was also set out in the Investor Presentation. The two documents seem to have been prepared together and for the same purpose.

[69] Further, there is no evidence of the Business Plan ever having been provided to or used for the purposes of obtaining financing – no documents show it having been used in that way. Mr. McCormick could not recall any specific meeting for that purpose. Mr. Hartland noted some meetings with banks, but he put those meetings in the time frame of April 2011, prior to the creation of the Business Plan. In the one documented meeting to obtain financing, with Mr.

Dingwall of National Bank in April 2011, the Defendants provided a budget, not the Business Plan.

[70] E-mails sent by the Defendants suggest that the Business Plan was prepared for investors. A June 5, 2011 e-mail sent by Mr. Rizopoulos to Mr. Reeves, counsel to Sun Star, and copied to Mr. Hartland and Mr. McCormick, said,

> The model illustrates how an investors [sic] investment will grow over a 3 year period, from $2.8/sh to north of $10/sh. The purpose of the model is to show how we have invested 2 years of time and money to acquire land, purchase seismic, provide consulting for interpretation and completed a budget that will growth [sic] to potential 750,000 bbls in the first year before this year's end as an approximation.

In a June 12, 2011 e-mail from Mr. Rizopoulos to Mr. Hartland and Mr. McCormick, the subject line said, "Business model to send to investors".

[71] Finally, Mr. McCormick acknowledged in his testimony that it was the Introductory E-mail, the Investor Presentation and the Business Plan that explained to the investors the investment they were making, and Mr. Hartland described the Investor Presentation and the Business Plan as working "hand in hand".

[72] I thus find that the Business Plan was created for the purpose for which it was used – namely, to provide information to investors about the future business potential of Sun Star.

Content

[73] The three documents provided information about Sun Star's status and structure, and about the oil and gas interests it planned to explore and develop.

[74] The Introductory E-mail identified the opportunity to invest in Sun Star as short-term ("a 3 year investment horizon with clearly defined exit strategy") and oil and gas based. It described the risks as involving both "low" and "higher" aspects, or as "calculated risks with the potential to yield significant results".

[75] The main low risk opportunity the Introductory E-Mail identified was the 13-29 opportunity. The e-mail described the 13-29 opportunity as follows:

> This drill consist[s] of a Low Risk development opportunity that involves the drilling of a twin of an existing well positioned in the south 200m south of a discovery well to the north location at the 4-28 location that is 200m to the north. The 4-28 well has accessed a 5.5 meters of Charlie lakes oil pay containing a 30% porosity streak that is connected to the same Charlie Lakes interval we will be drilling on our lands. The Bottom Hole Location is 30m up dip of the main producing Charlie Lakes pool that had an Initial production at 450 bbls/d and close to the 10-30 well that has accumulated oil reserves of 750,000 bbls of oil. There is an opportunity to drill one more vertical and or a horizontal well oriented south to north on the same land base accessing the same 5.5 meters of Charlie Lakes light oil zone (40 Degrees API) that will commence on September 1, 2011 on stream.

[76] The "4-28" location is the well otherwise described as the 4-32 well (the reference to 4-28 was confirmed by Mr. McCormick to be a typographical error which has no significance to

this litigation). The reference to an initial production of 450 bbls/d is ambiguous. It could refer to the producing wells west of the 13-29 well one of which, according to a map provided by Tiger Moth, produced 408 bbls/day in its first year on production. However, the Defendants acknowledged in their evidence that it referred to the 4-32 well, and that is certainly a possible interpretation of the Introductory E-mail. I note that at least one of the Common Share Plaintiffs, Mr. Cutts, read it in that way. I accept that the Introductory E-mail described the 4-32 well as producing 450 bbls/d.

[77] The Introductory E-mail also attached the Business Plan, described as the "Sun Star Energy Inc. 3 Year Business Model". For 2011 the Business Plan listed as an asset value "Founders invested $2,500,000". The other asset values listed were an "O& G asset valuation per 2P reserve at $40.00" of $30,000,000 and financing of $5,500,000. That made the asset value set out in the Business Plan $38,000,000, from which it deducted $3,000,000 of "Cash invested to date, land, sesmic [sic], Consulting Equity".

[78] The Business Plan also listed as shares issued "Founders Shares" of 2,593,361; other shares of 1,000,000; and "Founders Financing/Share Pool, CH. L. + Projects Budgets" at 5,500,000 shares, for a total of 9,093,361 "basic" shares. To that sub-total it added "options" of 909,336 shares, making the final total 10,002,697 shares.

[79] The Business Plan listed the net asset value per share for 2011 as $3.85, which was the asset value of 35,000,000 divided by the basic shares of 9,093,361.

[80] Finally, the Introductory E-mail attached a copy of the third document, the Investor Presentation, which was also given to Mr. Kowal, Mr. Cutts and the Clements at their meetings with Mr. Rizopoulos, Mr. McCormick and Mr. Cutts.

[81] The Investor Presentation was 62 pages. It described Sun Star and its management team and directors, along with its key opportunities.

[82] It described the three oil plays (Montney, 13-29 and Nisku) generally as "Low to high risk COS", with "Robust well economics" and a "6 month payout potential". It then moved on to outlining the specific opportunities, beginning with Montney. It described Montney as "Mid to HIGH risk drilling". In the discussion of Montney the Investor Presentation discussed various analogue wells. With respect to the analogues the Investor Presentation provided production graphs and data, none of which are easily readable. It did not include any headings or added descriptions or claims with respect to the Montney analogues.

[83] After Montney the Investor Presentation moved on to the 13-29 opportunity. It described the 13-29 opportunity at the outset of the Presentation as providing "low risk opportunities, Aug 1 drill". On the slide introducing the information specifically related to the 13-29 opportunity the Investor Presentation reiterated that these were "low risk drilling opportunities". It described the "analogue selection criteria".

[84] The Investor Presentation then provided details of the 4-32 analogue well. With respect to this well, Mr. Rizopoulos had added text and information. Specifically, the two slides containing the production graph and the production report for the 4-32 well had a large bolded heading added on the top which read:

4-32 Analogue well. 400 bbls/d.

[85] On those two slides, the large added heading was the only clearly readable part of the document. The report reproduced on the slide giving the actual production for the 4-32 well cannot be read with any ease. I looked at the originals of the Investor Presentations as produced from the records of Mr. Kowal and Mr. Cutts. On those documents I cannot read the production number for December 2008 or January 2009, although I can see that it is in triple digits. For February 2009 the production was in double digits, not triple, but also cannot be read. I can read the dates on the left-hand side, and I can see that those dates end as of February 2009. Further, I can see that there was only production in three of the months listed – the rest of the months say "0.00" for the production.

[86] I can read the first handwritten note at the bottom of the production report, which says that the "well flowed for 3 months". I cannot read the other handwritten notes.

[87] The production graph is also difficult to read but it is possible to see that it has an abbreviated line across the horizontal time axis, indicating that the 4-32 was on production only for a short period of time.

[88] In his evidence, Mr. Hartland maintained that he could read the copy in evidence, and said it was "fairly good" and that he could see what was on there. Later in his testimony he became angry at it being suggested that the slide was hard to read, saying that they did not hide the information and that the real data was there.

[89] I am troubled by Mr. Hartland's evidence. While, as just described, careful scrutiny reveals a little information with respect to the actual production of the 4-32 well from these slides, much of it cannot be read, and none of it can be read with ease. None of the documents provided to me – or reviewed by Mr. Hartland – could be honestly described as "fairly good". The specific production numbers for each month in particular cannot be identified on any of the copies I reviewed, including the originals from Mr. Kowal and Mr. Cutts' production.

[90] Mr. Hartland also suggested that there might be a better-quality copy that was circulated; however, no such copy was in the evidence before me. Instead, the evidence suggests that the legibility issues arose as soon as Mr. Rizopoulos added the banner "4-32 Analogue well. 400 bbls/d." and those legibility issues, while they would have been obvious to Mr. Rizopoulos when he created the slides and to Mr. Hartland and Mr. McCormick when they reviewed them, were never corrected or addressed by the Defendants.

[91] The Investor Presentation then goes on to describe another analogue well, the 10-30 well. It also provides a production graph for the 10-30 well which is somewhat more legible. It added a heading, "10-30 Analogue well. 30 bbls/d".

[92] After providing some more information about the nature of the Charlie lakes reservoir, the Investor Presentation lists the cost of drilling the 13-29 well and anticipated average first year production for a vertical drill as "150 boepd" with potential production of "400 boepd", and a horizontal drill average first year production of "350 boepd" with potential production of "500 boepd".

[93] The Presentation then moved on to the Nisku opportunity which it also described as low risk. On the discussion of the analogues for Nisku the analogue well had a heading listing "20 bbls/d" but included a legible production graph. In that case the production graph showed 20 bbls/d to be the current production, not the initial production. The initial production for that

analogue was considerably higher than 20 bbls/d. On that slide the added banner thus referred to the current production, not the initial production.

[94] The Investor Presentation set out the "Prospective Capital Structure" of Sun Star. It listed "Basic" Shares, of which "Mgmt/Board owns 100%", at "10M". It listed Options at "1M". It listed Equity, Working Capital, Bank Line and secured term loan at "0". It said the "NAV – Basic" was $3.85. NAV refers to net asset value per share, and was the same number as set out in the Business Plan. As noted, that number in the Business Plan was derived from dividing the total asset value ($35,000,000) by the shares issued (9,093,361) as set out in the Business Plan, rather than based on the asset and share value reflected in the Investor Presentation.

[95] The next page of the Investor Presentation, "Prospective Company NAV" listed the total net value of the assets, including proved plus probable reserves, undeveloped land and seismic and working capital as $31,750,000 and said the basic shares outstanding post financing were 10,000,000. The math of the slide is incorrect on its face, since the assets it lists add up to $41,750,000. The slide then listed the net asset value per share again as $3.85, although given the numbers on that page the net asset value per share should – based on the stated total assets – have been $3.18 or, given the total assets added correctly, $4.18.

[96] The final page of the Investor Presentation included a disclaimer with respect to forward looking statements. It emphasized the risks associated with forward information, which it defined as "All information, other than information of historical fact, included herein". It said with respect to forward information, "No assurance is given such that information will prove to be accurate and actual results and future events could differ materially from those anticipated in such information".

False Statements

[97] The Introductory E-mail, Business Plan and Investor Presentation contained three false statements of fact.

[98] First, the Business Plan stated that the founders had invested $2,500,000 in the company. The founders had not invested any money in the company at all.

[99] The Defendants say that the document does not say that they invested cash, and that the statement is true because they invested the equivalent to $2,500,000 in "sweat equity". I do not accept this submission. Absent some qualifying or clarifying words, "Founders invested" coupled with a dollar sign and numbers, communicates that the founders have invested cash or its near equivalent. It does not communicate that they have done work that they believe to be really valuable.

[100] I note as well that the document says "invested" not "invest". Thus, while the Business Plan provides information for year-end 2011, the implication of the past tense is that the investment had already been made.

[101] Mr. Hartland testified in defence of the Defendants' position that this number referred to sweat equity and would be so understood by a reader of the document, saying that a dollar figure does not mean cash but just means there is value. Mr. McCormick similarly asserted that an ordinary reader might not read the Business Plan to mean that the founders had invested $2,500,000 in cash.

[102] The testimony of both witnesses in this respect strained credulity. There is nothing on the face of the Business Plan to indicate that the document did not mean what it seemed to mean, and what the Common Share Plaintiffs who read it understood it to mean. Mr. Hartland and Mr. McCormick did not elaborate how an ordinary reader could have interpreted "founders invested" followed by a dollar sign and number, to refer to sweat equity.

[103] Further, I am not satisfied that the Defendants added the $2,500,000 because they believed it to be a fair representation of their "sweat equity". I note that the Defendants struggled to maintain consistent explanations as to what the $2,500,000 represented. Sometimes they said it was sweat equity, but sometimes they described it differently. In a phone call with the Clements in 2013, discussed below, Mr. McCormick called it "a guestimate of value of the assets that we had in the company at that point in time". He said in his testimony that his description in that phone call was unclear and that he should then have said to the Clements that the amount represented sweat equity. I think, however, that Mr. McCormick's prior inconsistent account properly calls into question the credibility of his current explanation.

[104] Similarly, in his evidence at trial, Mr. Rizopoulos said this amount reflected the acquisition of the land and seismic and the value of the oil bearing lands; he said it included things "on top of" the founders having skin in the game.

[105] These inconsistent explanations undermine the Defendants' claim that they intended to communicate sweat equity when they added the $2,500,000 to the Business Plan.

[106] Moreover, at no point did the Defendants provide any evidence or documentation to substantiate how this asset – whether sweat equity, an asset guestimate, things on top of skin in the game – was valued at $2,500,000. Mr. Rizopoulos had prepared invoices that he sent to Mr. Hartland and Mr. McCormick, but it was not clear that these related to the $2,500,000 (as opposed to the $3,000,000 negative asset entry) or to the Business Plan at all.

[107] In earlier drafts of the Business Plan it said "Founders invested 2MM@$1" in the descriptor of the $2,500,000 entry and, alternatively, "Founders invested 2MM@$1" with an entry of $2,000,000. Mr. Rizopoulos said that these versions were discussed with Mr. Hartland and Mr. McCormick, along with Mr. Michael Megale, the Chief Financial Officer of Condo-Condo. The Defendants might argue that they eliminated that descriptor to avoid any misperception; in my view, however, the more plausible inference is that the prior inclusion of that descriptor clarifies that the Defendants wanted to give the impression that they had made a cash investment. They eliminated the more explicit form of the misrepresentation, but the misrepresentation, and the reason for it, remained.

[108] Mr. McCormick tried to suggest that the Business Plan was not misleading on this point because below the reference to the $2,500,000 founders' investment in the list of assets, there was a negative entry for $3,000,000 which said "Cash invested to date, land, sesmic [sic], Consulting Equity". Mr. McCormick said that this amount "offset" the $2,500,000 and, he suggested, made it clear that that $2,500,000 referred to sweat equity.

[109] This explanation does not make sense. It suggests that the sweat equity was included as an investment in the company/asset of the company and also as a loan to the company/debt owed by the company. But it cannot be both: it is either an asset of the company – an investment – or a loan to the company – a debt. It is not plausible to suggest that a person would read the Business Plan and understand that the asset included in one line was the same item described as debt two

lines below (with a different number). It is also not plausible to suggest that the reader would apply the description of the debt to the earlier listed asset (which has its own and different description) so as to understand that "founders' invested" described with a dollar value was not in fact a cash investment. If anything, the use of the word "consulting equity" in the entry two lines below clarifies that the $2,500,000 did not refer to consulting or sweat equity, but rather to a cash investment.

[110] Finally, even if the $2,500,000 did represent "sweat equity," it was highly misleading to include this as an "asset" of the company. The assets of the company are things of value, that it can use to generate revenue, by selling them or exploiting them. A cash investment is a thing of value, that can be used to generate revenue. But what could Sun Star do with "sweat equity"? It cannot sell it; it cannot use it to create revenue. It was a resource of the principals that, in their own explanation, they had already expended on Sun Star's behalf. The benefit received by Sun Star from the principals' sweat equity was reflected in the assets and opportunities it had acquired at that time, but the sweat equity itself is not an asset of Sun Star's and could not accurately be represented as such.

[111] The second misrepresentation in the documents provided to investors is that the Business Plan said that the founders held 2,593,361 in shares. This was not true. Mr. Hartland and Mr. McCormick acknowledged that this was not true, and said it was simply an error that they failed to catch. I do not accept this explanation. I find it to be implausible that a one-page document that was provided to Mr. Hartland and Mr. McCormick in multiple iterations over several weeks could contain an error of this magnitude and that neither of them would catch or correct it. This is not an error like a typo – as if, for example, they had written 11 instead of 10. It is also not an error like putting in a number that had once been accurate but was no longer, or that reflected a part of the shares but not all of them. "2,593,361" bears no relationship to any number in the evidence before me.

[112] Rather, I find that this number was put in the Business Plan by Mr. Rizopoulos, and not removed or corrected by either Mr. McCormick or Mr. Hartland, to falsely represent to prospective investors that the founders had received shares for a price similar to that being offered to investors, that is, for $1.00 per share. This was how the Common Share Plaintiffs who read the Business Plan interpreted it.

[113] Both Mr. Hartland and Mr. McCormick suggested that the information in the Investor Presentation setting out the "Prospective Capital Structure" and the "Prospective Company NAV" were sufficient to clarify and correct the information in the Business Plan. They point out that it says on those slides that the basic shares are 10,000,000 and that "Mgmt/Board owns 100%". They also emphasize that the slide says that the equity and working capital of the company are "$0.0 M".

[114] There are difficulties with this suggestion. The slides refer to "Prospective" information and so do not alert the reader to the possibility that they represent the current circumstances of the company. In addition, the slides do not make a great deal of sense. The net asset value the slides report per share does not match the asset and share numbers the slides set out. Further, the slides say on one page that all of the share are owned by management and the board, but then on the next page that, "post financing", the number of shares will remain the same. The slides contain some information that seems to flow from the Business Plan – the list of the assets, and

the net asset value per share – but other information that seems to contradict the Business Plan – the list of shares, equity and working capital.

[115] I accept that these pages of the Investor Presentation should have caused an investor to ask some probing questions about the accuracy of the information with which they were being provided. When read carefully, and compared to the Business Plan, they raise the question whether the materials are a bunch of malarkey. I consider below the legal significance of the clues in the Defendants' own materials with respect to their liability for fraudulent misrepresentation. Here, however, I note only that the confusing and inconsistent slides in the Investor Presentation do not correct or clarify the contents of the Business Plan, even though they in some ways contradict them.

[116] The third misrepresentation in the documents was that the Investor Presentation said "4-32 Analogue well. 400 bbls/d." which could reasonably be understood to mean – and the Common Share Plaintiffs did understand to mean – that the 4-32 well was producing 400 bbls/d on an ongoing or average basis. This was also not true. I note here that the Investor Presentation does not qualify the statement with the words "initial production". Further, the production data and production graph ranged from difficult to read to illegible.

[117] The Defendants knew that it was untrue that the 4-32 well had ongoing production of 400 bbls/d. The Defendants were given this information, and they acknowledged in their testimony that they knew it when they created and presented the Investor Presentation.

[118] They also knew that 400 bbls/d did not represent its initial production of the 4-32 well on any definition. The information available to them prior to the creation of the Investor Presentation showed that the 4-32 well did not record 400 bbls/d of production at any point – its first two days of production were higher, at 433 bbls/d – and its production fell off sharply from there, so that over the first thirty days it had 110 bbls/d of production. It was shut in and had no ongoing production and had not had any production for over two years.

[119] The Defendants suggest that the information below the banner was sufficient to contextualize the statement, and to provide the complete and accurate information to the Common Share Plaintiffs with respect to the production from the 4-32 well. As discussed, however, that information was at best hard to read and, in large part, impossible to read. It did not alert the Common Share Plaintiffs to the fact that the large and bold claim, "4-32 analogue well. 400 bbls/d" was untrue.

[120] Mr. McCormick, in response to the question of whether there was anything in the Investor Presentation that was wrong or inaccurate, said that there was "nothing" in the presentation that was "wrong, inaccurate, false or misleading". Mr. McCormick went so far as to say that he never considered the possibility that the investors might wrongly believe that the 4-32 well had produced 400 bbls/d for a significant period of time as a result of the Investor Presentation. He refused to accept that a highlighted banner saying "400 bbls/d" with respect to a well that had been shut in after its production quickly declined to 59 bbls/d might be misleading.

[121] Yet I do not understand how Mr. McCormick could not at least see the possibility that the statement "400 bbls/d" would be misunderstood or misleading given that nowhere does the Investor Presentation say "initial production", the illegibility of most of the information on the slides, and that 400 bbls/d did not represent the well's production at any point. Mr. McCormick's

failure to even admit the possibility that the information could be confusing or misleading as presented, calls his broader credibility into question.

[122] This is also the case with Mr. Hartland, who reacted with indignation at the suggestion that their behaviour in respect of the Investor Presentation had been anything less than transparent.

[123] With respect to the illegibility of the information in the Investor Presentation, Mr. Hartland, Mr. McCormick and Mr. Rizopoulos denied deliberately making a shoddy copy so as to mislead the investors and emphasized that the Plaintiffs never asked them for legible copies. But they also provided no explanation as to why the production reports and graph, which would have made it clear that the 4-32 never produced 400 bbls/d, were reproduced so shoddily. They simply emphasized their claim that they had provided accurate information at the presentation, and that no one asked them for a legible copy.

[124] With respect to the Defendants' knowledge and intention about the content of the Business Plan and Investor Presentation, the Plaintiffs point to an e-mail sent by Mr. Rizopoulos to Mr. Hartland and Mr. McCormick on June 12, 2011. In response to their request that he enter into a unanimous shareholder agreement, Mr. Rizopoulos said, in part:

> To be clear, I will not lie to investors and supply invoices to show a genuine investor that we have skin in the game as illustrated in the Business model, nor will I misrepresent the risks associated with our drills in being straight forward and very transparent in all matters. We all agree to share equally any profit as an example, as you had illustrated Les, and I do understand that we need a viable business to share prospective revenues and together. To be clear if there is an opportunity for me to receive my share as consulting dollars it is easier for me to avoid reporting situations, with my divorce ect [sic].

[125] The Plaintiffs suggest that this e-mail shows that Mr. Rizopoulos had lied, and that Mr. Hartland and Mr. McCormick were on notice as to his dishonesty.

[126] This e-mail does not tell me whether the Defendants were or were not being honest. If the Business Plan and Investor Presentation contained no misrepresentations, then the e-mail would suggest honesty – an expression of Mr. Rizopoulos's commitment to being truthful. If they contained misrepresentations – as I have found that they did – then this e-mail could be interpreted to suggest that they knew there was an issue about the truthfulness of the statements in the documents. Even then, though, I am not sure how a statement that a person will *not* lie shows that they *did* lie. I accept that the e-mail does not prove that the documents were in fact truthful; I just do not see this e-mail as significant one way or another in assessing the truthfulness of the documents created by the Defendants and provided to the Common Share Plaintiffs.

[127] More troubling for the Defendants is an e-mail sent by Mr. Rizopoulos to Mr. Hartland and Mr. McCormick on December 1, 2011. In that e-mail Mr. Rizopoulos says:

> We all agreed that we would give the investors a liquidity event and so to unlock there [sic] investment and so they can reap the reward of their investment (I point you to the IP and Business plan I had created, economics, reserve analysis, economic analysis ect [sic]) and countless number of deliverable draw [sic] from my 30 Plus years of experience as delivered. **This is the reason why we showed**

> **the significant equity input to illustrate to investors that the business model will yield results from the seed equity and as we passed this to all investors to help them see SSE skin in the game.**
>
> Within the business model it place [sic] this helped our invests [sic] move form [sic] thinking about investing to actually investing into a calculated plan of equity growth given reserves, revenues ect [sic].
>
> Guys, I am not saying anything different than before, I think you misunderstand salary for Hyperion sweat equity, I do not collect a salary and can not record it due to my personal situation, that is why I would bring it via Hyperion, and as part of the business model I expect to take as much as I can via my invoices as we had discussed in the past. I can demo straight [sic] with great clarity that I have been pulling the ship forward and I am a good representative and have done a very very good job, showing my 30 years plus oil and gas experience leading to the decisions being made in the organization [emphasis added].

[128] While Mr. Rizopoulos's prose is hard to follow, this e-mail suggests to me that he and Mr. Hartland and Mr. McCormick were trying to show through the Business Plan that the investors had made a "significant equity input", put in "seed equity" and created Sun Star's "skin in the game". The Defendants might suggest that Mr. Rizopoulos meant sweat equity; however, for the reasons given earlier regarding the way the Business Plan was written, I do not see it this way. I see this e-mail as corroborating my inference that the Business Plan was drafted to create the impression in investors that the founders had contributed equity.

[129] Mr. Hartland's explanation of this e-mail was unpersuasive. He seemed to suggest that the Defendants had skin in the game because their efforts would create liquidity for the investors. This does not accord with the ordinary meaning of skin in the game, which refers to the risk you are taking of loss, not to the possibility that you might create gain for others at no risk to yourself. Mr. Hartland's evidence does not avoid the inference supported by this e-mail: Mr. Rizopoulos wrote the Business Plan to create the impression that an investment had been made in the company by the Defendants, and that Mr. Hartland and Mr. McCormick knew and went along with it.

Information Provided by Sun Star

Position of the Parties

[130] Mr. Hartland, Mr. McCormick and Mr. Rizopoulos met with the Common Share Plaintiffs other than Ms. Kowal and Ms. Cutts on several occasions over June through August 2011. The Defendants and the Common Share Plaintiffs disagree about what happened during those meetings in several key respects.

[131] First, the Common Share Plaintiffs say that in their meetings the Defendants confirmed that the 4-32 well produced 400 bbls/d on average, and they believed that it was producing that amount on an ongoing basis. They say that they were not told the true facts about the 4-32 well, and were not told that it was shut in.

[132] The Defendants assert that they told the Common Share Plaintiffs that "400 bbls/d" meant initial production. They say that they were very clear on this point, and never said that the 400 bbls/d referred to average or ongoing production. They say that they told the Common Share

Plaintiffs that the 4-32 well was shut in and gave the Common Share Plaintiffs accurate and complete information about its production history.

[133] Second, the Common Share Plaintiffs say that the Defendants bolstered their claim about the production from the 4-32 well by talking about counting trucks coming from the 4-32 well to verify the production data. Mr. and Ms. Clement, Mr. Kowal and Mr. Cutts all recalled this representation being made. Ms. Cutts recalled being told it by Mr. Cutts.

[134] Mr. Rizopoulos acknowledged that he had information about scouts counting trucks from Tiger Moth and acknowledged that he had said as much to Ms. Clements. However, he and the other Defendants deny that they said anything to imply that the 4-32 well was producing 400 bbls/d on average or on an ongoing basis. Mr. Hartland and Mr. McCormick suggested that the statements about trucks verifying production were made to the flow-through share investors, not the common share investors.

[135] Third, Mr. Kowal said that he was explicitly told that the founders had invested $2,500,000 in cash, as implied by the Business Plan. The Clements say the same. Further, all of the Common Share Plaintiffs say that they were never told that the $2,500,000 founders investment represented sweat equity, and that the founders had been issued 10,000,000 shares.

[136] The Defendants deny saying that the founders had invested $2,500,000 in cash and say that they told the Common Share Plaintiffs that the founders' investment was sweat equity, and that the founders had been issued 10,000,000 shares.

[137] Fourth, Mr. Kowal and Mr. Cutts say they were told that Mr. Hartland, Mr. McCormick and Mr. Rizopoulos would be paid through dividends not salary.

[138] The Defendants deny making that representation and say that they always planned to take a salary once the company had cash flow sufficient to support it. The Defendants also note that the Plaintiffs' pleadings do not identify this as one of the misrepresentations allegedly made to the Plaintiffs.

The 4-32 Well Production

[139] Mr. Kowal and Mr. Cutts met with the Defendants on July 13, 2011; Mr. Hartland and Mr. McCormick attended in person, and Mr. Rizopoulos attended by phone. Both Mr. Kowal and Mr. Cutts say they were told that the 4-32 well produced 400 bbls/d, which is what they also understood to be the case from the banner written across the slides in the Investor Presentation dealing with the 4-32 well. They say that they understood from the Introductory E-mail and from what they were told that the 4-32 well had started higher than 400 bbls/d – at 450 or 475 bbls/d – but had come down to produce 400 bbls/d on an ongoing basis. Mr. Kowal and Mr. Cutts testified that the information about the 4-32 well was important. It suggested that the company had a low-risk and high opportunity play.

[140] Mr. Kowal's notes of the July 13 meeting say that the Defendants said the initial production of the 4-32 well (the "well to north") was 475 bbls/d. The notes say that the estimated production from the Elmworth well, which would be a twin of the 4-32 well, was 200 bbls/d; Mr. Kowal said this number was based on Sun Star only being entitled to part of the total given its drilling arrangement with Western – that is, to a portion of the predicted 400 plus bbls/d of production in the new well. Mr. Kowal's full notes with respect to the "Elmworth Play" said:

Oil prod'n 200 metres away.
2 proposed shallow well sites (Funded)
Arc & Progress prod'n in area
*They may want to take SSE out.
30% porosity (High)
SSE – ½ Section – Prod'n zone runs through ½ sec.
5m pay zone w 30% porosity.
Est. 200 bbls/d
Well to North @475 bbl/D (initial prod'n)
SSE pays 9% for rights to this land.
½ Farmed out to raise 1.6 M$ Drill Cost
[Therefore] SSE share 50% at 91% = 45.5%
Partner ROFR on 2nd well.
Partners Tech People like area
Value 100K$/flowing bbl
15-25 m$
* Arc & Progress likely don't want us to pull oil from the area
$40/bbl oil value in the ground.

[141] Mr. Cutts' notes of the July 13, 2011 meeting say "Well just to north producing 400 b/d"

[142] These notes of Mr. Kowal and Mr. Cutts, along with the content of the Investor Presentation and the Introductory E-mail, support the Plaintiffs' testimony that at the July 13, 2011 meeting the Defendants told Mr. Kowal and Mr. Cutts that the 4-32 well began producing at 450-475 bbls/d and that that amount had come down to an ongoing production level of 400 bbls/d.

[143] Mr. Cutts had further notes dated simply "August", and referring to a meeting with all of Mr. Hartland, Mr. McCormick and Mr. Rizopoulos. Mr. Cutts purchased common shares on July 27, 2011 but also on August 16, 2011, and he testified that these notes are from a meeting prior to the second purchase. The notes say, "Sandy very excited about Elmworth well, his scouts on site counted 5 or 6 trucks per day over 3 days (proving the 400 b/d on well just north of ours)".

[144] This note also supports Mr. Kowal and Mr. Cutts' evidence that the Defendants told them that the 4-32 well produced 400 bbls/d and that the Defendants bolstered that account with the story of the scouts counting trucks coming from the well. This is also consistent with Ms. Clements' evidence, discussed below, that Mr. Rizopoulos told her the story of the scout counting the trucks – evidence which Mr. Rizopoulos confirmed.

[145] The Defendants suggest that Mr. Cutts' notes are not actually from August but are rather from November 2011, such that the scouts Mr. Cutts was told about were the scouts that Mr. Hartland and Mr. McCormick acknowledged that Sun Star used in the fall of 2011, when the 4-32 well came back on production. The Defendants suggest that the Common Share Plaintiffs have simply misremembered when these conversations occurred. They note that, in questioning prior to trial, when asked if these notes were with respect to the flow-through shares, Mr. Cutts said "yes".

[146] Given, however, Mr. Rizopoulos's acknowledgement that he had been told by Tiger Moth about scouts counting trucks, that he had told at least Ms. Clements about the trucks, and that Mr. Cutts' notes say "August" on them, I do not accept the Defendants' suggestion on this

point. I also note that Mr. Cutts' notes refer to "investing another $60,000", and he purchased $60,000 of common shares in August 2011 which also suggests that these notes relate to the second common share purchase, not the flow-through shares. Mr. Cutts purchased $80,000 in flow-through shares. Finally, I emphasize that on being given the opportunity to clarify this point in pre-trial questioning, Mr. Cutts corrected his answer and said that the notes related to the common shares purchase.

[147] Mr. Kowal and Mr. Cutts said they told Ms. Kowal and Ms. Cutts about the production of the 4-32 well in explaining why the investment in Sun Star was wise, and Ms. Kowal and Ms. Cutts confirmed that they had been given this information. Ms. Kowal also recalled being told about the production being confirmed by counting trucks, although she was not sure if it was prior to the common share investment or the flow-through investment. Ms. Cutts recalled being told about the scouts and recalled that she was told that in the summertime. She noted that she has a very visual memory, and she remembered that she visualized trucks driving on a dirt road and green grass around.

[148] Mr. Clement and Ms. Clement testified that they were told about the 4-32 well producing 400 bbls/d at a meeting with Mr. McCormick and Mr. Rizopoulos, with that information being bolstered by Mr. Rizopoulos's account of scouts counting the trucks. Ms. Clement recalls expressing surprise that they would hire someone to sit on the road outside the well to watch and count the trucks. Mr. Rizopoulos confirmed that he had told Ms. Clement about the scouts. I note that Mr. and Ms. Clement did not buy flow-through shares or meet with the Defendants about buying flow-through shares, so that this testimony could only relate to the common share purchase.

[149] Based on Mr. Cutts' notes, Ms. Clement's detailed recollection, Ms. Cutts' visual memory, and Mr. Rizopoulos's confirmation that he talked about the scouts to the Clements, I accept that Mr. Rizopoulos told the Common Share Plaintiffs that they had confirmed the production from the 4-32 well through scouts. This was not a statement made by either Mr. Hartland or Mr. McCormick, although Mr. McCormick was there when it was made to Mr. and Ms. Clement, and both Mr. Hartland and Mr. McCormick were there when it was said to Mr. Cutts.

[150] The Defendants say that they told Mr. Kowal, Mr. Cutts and the Clements the truth about the 4-32 well, that it initially produced over 400 bbls/d but that the production had declined, and that it had been shut in since February 2009. Mr. McCormick said, it was all explained each and every time they did the presentation. He said that the information about the 4-32 well was a fact and they would not tell anyone anything that was not a fact. Mr. Hartland said the same. The Defendants vigorously deny saying this was ongoing or average production. They say that they ensured that the Common Share Plaintiffs were given complete and accurate information about the 4-32 well, including that it had only been online for 3 months and was shut in.

[151] The contemporaneous notes of Mr. Kowal and Mr. Cutts contradict the evidence of Mr. Hartland, Mr. McCormick and Mr. Rizopoulos, and provide more reliable information about what was said to Mr. Kowal and Mr. Cutts. They, along with the current testimony of the Common Share Plaintiffs, cast significant doubt on the reliability of Mr. Hartland, Mr. McCormick and Mr. Rizopoulos's claim that they provided accurate information about the 4-32 well.

[152] Further, the Defendants ask me to accept, in essence, two premises. One, that the Investor Presentation was not false – because 400 bbls/d can be understood as referring to Initial Production. And, two, that in any event they told the Common Share Plaintiffs that the well only produced for 3 months and that it had significantly decreased after its initial production. I find neither of these premises plausible, in part because they seem in such obvious tension with each other.

[153] If the Defendants recognized the need to provide accurate and complete information, I see no reason for the Investor Presentation to have been presented as it was. It should have said "initial production" if initial production was what was meant, or provided the actual ongoing production as they did with the Nisku analogue. If it was going to present the initial production than it should have done so accurately – as 110 bbls/d over the first 30 days (or, accepting for the moment Mr. McCormick and Mr. Hartland's position, 433-475 bbls/d over the first 24 hours). It should not have included a number – 400 bbls/d – which related to nothing. It should not have included illegible production data and graphs. I am not saying this to reiterate the issues with the Investor Presentation that I have already discussed; rather, my point is that the failure to provide accurate and complete information in the Investor Presentation, when I am unable to identify – and the Defendants were unable to provide – any plausible reason for that failure, raises doubt in my mind about the Defendants' claim that they were committed to providing accurate and complete information and in fact did so in their meetings with the Common Share Plaintiffs.

[154] Mr. Hartland maintained in his evidence that while he only attended two presentations to investors, he had a clear and strong memory of accurate information about the 4-32 well being provided to investors. He noted that the 400 bbls/day heading raised questions and that they had to clarify that it referred to initial production and that the well was shut in after 3 months, as the graphs below the banner illustrated. Mr. Hartland's testimony is inconsistent. As previously discussed, Mr. Hartland firmly maintained that the materials in the Investor Presentation were clear and could be read. But he also says he remembers what was said because the heading on the document needed to be clarified. This inconsistency raises further doubts about the veracity of his testimony.

[155] In addition, Mr. Rizopoulos admitted that he told Ms. Clement about the scouts, and the evidence in general supports the conclusion that he did so. The information about the scouts would have had no relevance to the prospective investors except to show that Sun Star had verified current or ongoing production; if he had told them simply about the initial production, that information was set out in data and logs available to the Defendants that they could show to the Common Share Plaintiffs. There would be no reason to bolster the claim with a story about scouts. The fact that Mr. Rizopoulos told the Common Share Plaintiffs about the scouts supports my conclusion that the Common Share Plaintiffs are telling the truth, and that the Defendants not only did not provide them with accurate information about the 4-32 well, they in fact confirmed the false information suggested by the Investor Presentation, that the 4-32 well was producing 400 bbls/d on an ongoing basis.

[156] Based on the Plaintiffs' testimony, this assessment of the Defendants' evidence, and the contemporaneous documentation, I accept that all of the Common Share Plaintiffs were told, either directly or indirectly, that the 4-32 well produced 400 bbls/d on an ongoing basis without that information being qualified or placed in the context of the actual performance of the 4-32 well. I do not believe that the Common Share Plaintiffs were told that it was the initial production of the 4-32 well that was 400 bbls/d. I find that those of them who were told about

initial production (Mr. Kowal and Mr. Cutts) were told a number that was considerably higher – in the range of 450-475 bbls/d.

[157] As noted with respect to the Investor Presentation, the Defendants knew that the information they provided to the Common Share Plaintiffs about the 4-32 well was untrue. They had accurate information about the production from the 4-32 well and knew that it did not produce 400 bbls/d on an ongoing basis.

The Founders Investment and Sun Star Share Structure

[158] As outlined earlier, the Business Plan said that the founders had invested $2,500,000 and that the founders had 2,593,361 in shares.

[159] Mr. Kowal and the Clements said that during their meetings the Defendants confirmed that the founders had invested $2,500,000 in cash. Mr. Cutts said that his understanding that the founders had invested $2,500,000 came from the Business Plan. He did not recall being explicitly told that by the Defendants,

[160] All of the Common Share Plaintiffs who spoke with the Defendants said that the Defendants did not modify or clarify the content of the Business Plan regarding the founders' investment or shares issued.

[161] Ms. Kowal and Ms. Cutts said that Mr. Kowal and Mr. Cutts told them that the founders had invested $2,500,000 in the company, and Mr. Kowal and Mr. Cutts confirmed that they had passed on this information to their wives.

[162] The notes taken by Mr. Kowal support the Common Share Plaintiffs' account that the Defendants never contradicted or clarified the Business Plan. Mr. Kowal's notes of July 13, 2011 say that the Plaintiffs were being given shares "Same as Bob, Les & Sandy". This suggests that Mr. Kowal and Mr. Cutts were led to believe verbally, as well as through the Business Plan, that the Defendants had acquired their shares on the same basis as was being proposed to the Common Share Plaintiffs, at $1 per share. This would tend to have reinforced in the Plaintiffs' mind the accuracy of their interpretation of the Business Plan, since the $2,500,000 founders' investment approximates 2,593,361 shares having been issued to the founders at $1 per share.

[163] Mr. Kowal's July 13, 2011 notes further indicate that Sun Star would issue "1-1.5 million shares @$1 = 10-15% of the company". The Business Plan said that Sun Star was going to issue about 10,000,000 shares on a fully diluted basis; in that case, the "1-1.5 million shares" would be 10-15% of the company. By contrast, if the common shares were being sold to the investors in addition to the 10,000,000 shares already issued to the founders, the shares acquired by the Common Share Plaintiffs would be 9-13% (1,000,000/11,000,000 or 1,500,000/11,500,000). This is not a huge difference; however, it suggests that the information provided at the July 13, 2011 meeting did not contradict the information contained in the Business Plan.

[164] Mr. Cutts did not recall being given information about the shares at the July 13th meeting; however, I accept that Mr. Kowal's notes would reflect what both of them were told.

[165] Mr. Kowal and Mr. Cutts did not claim that Mr. Hartland, Mr. McCormick or Mr. Rizopoulos verbally represented on July 13, 2011 that they had made a $2,500,000 cash investment or that the Business Plan accurately recorded the shares that they owned. They testified only that the information they were given that day did not correct or change the information on the Business Plan. Mr. Kowal's notes confirm that testimony, suggesting that

what they were told on July 13, 2011 was consistent with the Business Plan, not contradictory with it.

[166] Mr. Hartland and Mr. McCormick said that they interpreted "Same as Bob, Les & Sandy" in Mr. Kowal's July 13, 2011 notes to refer to the fact that all the shares issued were common shares. I do not agree with their interpretation. I think it unlikely that Mr. Kowal would have made a note of the fact that the shares held by the founders were also common shares. If he was noting that the shares he was purchasing were common shares, then he would have said "common shares" directly. I do not think he would have tried to communicate they were common shares by saying they were "Same as Bob, Les and Sandy".

[167] Mr. Kowal further testified that, at a meeting on July 20, 2011, Mr. Rizopoulos explicitly told him that the founders had invested $2,500,000 and Mr. Rizopoulos explained the share structure in accordance with what the Business Plan suggests – namely, that the founders had paid about $1 per share to obtain their shares. Mr. Kowal's notes of the July 20, 2011 meeting do not refer to the founders' investment, but Mr. Kowal suggested that the comment in the notes "Founders (we would be founders)" reflected the discussion of this point. He said that he would not have made any more detailed notes on this point given that the information was set out in the Business Plan.

[168] In cross-examination Mr. Kowal acknowledged that in questioning prior to trial he did not say that he had been given this information by Mr. Rizopoulos. In questioning he was asked whether he confirmed that the founders invested $2,500,000 and he said no. He had the following exchange with counsel:

> Q: …I thought your answer yesterday was that you assumed that he [Mr. McCormick] had invested the $2.5 million in their money?
>
> A: It was clear in the business plan.
>
> Q: Right. But he did not tell you that; you assumed?
>
> A. The way an accountant looks at it, it shows that $2.5 million –…
>
> Q. Whether he used the term, I have put $2.5 million cash into this company. That was the assumption that you made, not something he specifically told you?
>
> A. It wasn't an assumption, and he didn't tell me. It was in the three-year business model.
>
> Q. All right.
>
> A. It was clear.

[169] In a further exchange, Mr. Kowal was asked about whether at the July 20th meeting Mr. Rizopoulos told him that he had invested $2,500,000. Mr. Kowal answered, "I don't recall".

[170] Mr. Rizopoulos did not deny making this statement to Mr. Kowal at the July 20th, 2011 meeting, although he did in general refute the proposition that the $2,500,000 in the Business Plan was a misrepresentation.

[171] I accept Mr. Kowal's evidence that his understanding of the Business Plan was confirmed by Mr. Rizopoulos during the July 20, 2011 meeting. I put only limited weight on Mr. Rizopoulos's failure to contradict Mr. Kowal's evidence because Mr. Rizopoulos was self-

represented and consequently had some difficulties in organizing and presenting his own evidence. He may have simply not appreciated the need to deny the point.

[172] More significant, in my view, is that Mr. Kowal's evidence on this point is directionally consistent with his notes and with the content of the Business Plan. I accept Mr. Kowal's statement that he was less likely to include information in his notes which was contained in the documents provided. For example, unlike Mr. Cutts' notes, Mr. Kowal's notes on the Investor Presentation did not include the "400 bbls/d" information, but rather noted that the well to the north had 475 bbls/d initial production – that is, his notes on that point reflected information not already set out in the document provided. His notes on July 13, 2011 did include some information from the Investor Presentation but did not do so consistently; they were detailed, but not so as to capture everything said.

[173] I also do not see Mr. Kowal's failure to recall this point during questioning as sufficient for me to reject the evidence now. The questions he was asked are not necessarily inconsistent – he has not changed his evidence with respect to Mr. McCormick not telling him verbally about the $2,500,000 investment. It is understandable that, in responding to a question about whether he had confirmed the $2,500,000 investment that he might not think to mention that Mr. Rizopoulos had told him about it – since the focus was on the sufficiency of his own diligence, not on what Mr. Rizopoulos had said. Finally, his answer to the question most directly on point (about what Mr. Rizopoulos told him on July 20, 2011) was not a denial, but was merely that, at that time and in response to that question, he did not recall.

[174] In the circumstances, given the documentary record, my overall assessment of Mr. Kowal's testimony, and Mr. Rizopoulos's evidence, the difference between the answers in questioning and the answers given at trial is not sufficient for me to reject the evidence given by Mr. Kowal at trial.

[175] Mr. Cutts did not recall Mr. Kowal telling him about the July 20th meeting. He noted that he would have expected Mr. Kowal's notes of the July 20th meeting to reflect that point. The notes do not do so clearly; Mr. Cutts' comment about what he would expect the notes to have contained does not affect my assessment of the evidence.

[176] During questioning prior to trial, Mr. Cutts said that he knew the founders had 10,000,000 shares prior to investing. At trial, however, he said that he misspoke in giving that answer. He had meant to refer to the fact that the Business Plan sets out 10,000,000 shares as the total shares to be issued for Sun Star, not to say that he knew that the founders had 10,000,000 shares. He did not get counsel to correct the evidence he had given in questioning, but he said he did not appreciate that he should have done so.

[177] I accept Mr. Cutts' trial evidence on this point. His explanation for his confusion seems plausible – that 10,000,000 is both around the number of total shares in the Business Plan and the shares in fact issued to the founders makes confusion between the two concepts understandable. His evidence at trial, that he did not know that the founders had 10,000,000 shares accords with the rest of the documentary evidence, including the Business Plan and Mr. Kowal's notes. In his testimony Mr. Cutts emphasized this point, saying that he does not know why he would have thought the founders had 10,000,000 shares given the documents do not show that and no one had told him that.

[178] I note that during pre-trial questioning, when asked if it was "fair and accurate" to say that he understood "that there existed issued 10 million shares, and that $2.5 million worth of those shares had been paid for in cash" Mr. Cutts agreed that that was his understanding. As such, his answers in questioning were also not entirely consistent with each other – and this other questioning answer was generally consistent with what he said at trial.

[179] I also observe that in another point where there was an inconsistency with that he had said in questioning (with respect to whether the Defendants had reviewed the "forward looking statements' page in the Investor Presentation) Mr. Cutts said that the statement in the questioning was correct. This shows that Mr. Cutts was not simply taking new positions at trial and disavowing his evidence in questioning but was rather trying to give his best recollection to the Court.

[180] Mr. Clement and Ms. Clement also testified that they had been told by Mr. McCormick when they met with him that the founders had invested $2,500,000 in cash.

[181] Mr. McCormick denied making this statement. And, in general, he, Mr. Hartland and Mr. Rizopoulos firmly maintained that they did not lie to or mislead the Defendants about their investment or the shares they held. They say that they corrected the error in the Business Plan with respect to the number of shares and made it clear that the founders had not made a cash investment in the company. Mr. McCormick made this point particularly strongly, emphasizing that the Common Share Plaintiffs had been provided the accurate information. As noted, he and Mr. Hartland also denied that the Business Plan was misleading – they did not think a reader would understand "$2,500,000" to necessarily refer to cash.

[182] I do not accept the evidence of the Defendants on this point and prefer the evidence of the Common Share Plaintiffs. As noted, Mr. Kowal's notes of July 13, 2011 suggest that the information given to the Defendants was generally consistent with the Business Plan. His notes of July 20, 2011 can be interpreted to support his current testimony.

[183] The inconsistencies with answers given in questioning do not make me disbelieve either Mr. Kowal or Mr. Cutts.

[184] Further, the existence of the Business Plan, and the representations it includes, bolsters the credibility of the evidence given by the Plaintiffs; it seems more plausible that the information given by the Defendants was the same as that contained in the Business Plan than that it contradicted or changed it.

[185] I note also that the Common Share Plaintiffs provide evidence which is directionally consistent – they all noted the information contained in the Business Plan about the founders investment and the shares – but also not identical or duplicative: Mr. Kowal and the Clements said they were explicitly told about the $2,500,000 investment, but Mr. Cutts did not.

[186] Conversely, as was the case with the 4-32 well, I struggle with the proposition on which the Defendants' evidence rests. They say that they circulated a Business Plan that contained an acknowledged error about the number of shares issued, and that described sweat equity as "founders invested", with a number and dollar sign attached. They also say that in person they provided clear and accurate information that "founders invested" meant sweat equity and they had been issued 10,000,000 shares. It seems implausible to me, however, that they carelessly circulated written documents with errors and inaccuracies, but carefully ensured in their verbal

remarks that the correct information was given. The Common Share Plaintiffs' evidence on this point is more plausible and believable.

[187] Mr. McCormick also pointed out the information contained in the Investor Presentation about the Prospective Capital Structure. As discussed earlier, in my view that information was confusing, and not sufficient on its own to correct or clarify the Business Plan. I also do not view it as supporting the Defendants' claim that in their presentations they told the investors that they had not invested $2,500,000 in cash, and that they had 10,000,000 shares. If anything, the existence of confusing and contradictory information in a second document confirms that the Defendants did not take seriously the need to provide accurate factual information to their prospective investors.

[188] In sum, I find that the Defendants never provided the accurate information about their investment and shares to the investors and that, in fact, Mr. Rizopoulos confirmed the false information to Mr. Kowal, and Mr. McCormick confirmed some of the false information to the Clements.

[189] The Defendants did this despite knowing that they had not invested any cash in Sun Star, and that they had in fact been issued 10,000,000 shares, not 2,593,361.

Director and Officer Pay Structure

[190] Both Mr. Kowal and Mr. Cutts testified that they were led to believe by Mr. McCormick that the officers and directors would be paid based on company performance through the issuance of dividends. Mr. Cutts said he asked about that because the Business Plan indicated $600,000 of general and administrative expenses which Mr. Cutts viewed as high.

[191] Mr. Cutts' notes of the July 13, 2011 meeting say that the dividends are to be shared equally, and also say "that's how Les and Bob to take their income, no drawing from profit or cash flow".

[192] Mr. Kowal's notes from his July 19, 2011 meeting with Mr. McCormick say executive compensation was "To be determined ⇒ Expect to be performance based".

[193] Mr. Kowal testified that executive compensation was important to him, that it was a deal breaker. He testified that Mr. McCormick's information about pay, even though stated "to be determined", led him to understand that this meant that Sun Star would be paid out of dividends because of their shareholdings.

[194] Based on the testimony of Mr. Kowal and Mr. Cutts, and also on Mr. Cutts' notes from July 13, 2011, I accept that Mr. Kowal and Mr. Cutts were told that the payment of the officers and directors would be performance based and would take the form of dividends. I also accept, based on Mr. Kowal's notes, that Mr. McCormick told Mr. Kowal that this matter had not been finally determined.

[195] In his testimony before me, Mr. McCormick said that the plan of the Defendants was to take a salary once the company had significant farm-out or drilling success and it looked like they were in a position to afford to take a salary. He said that it was never the plan of the Defendants to take their pay only through dividends, although as significant shareholders it would have been to their benefit were dividends to be paid. He suggested that this is the point that he had been making to Mr. Kowal and Mr. Cutts.

[196] Mr. Hartland and Mr. Rizopoulos similarly testified that they decided to pay themselves because they had raised money from investors and received the deposit from Western. They thought they deserved pay for the work they put in.

[197] At the time the statements to Mr. Kowal and Mr. Cutts about pay were made they were not specifically false; the Defendants had not yet taken any salary, and the information given to Mr. Kowal on July 19, 2011 was explicit in saying that this issue was "to be determined".

[198] I also, though, find what the Defendants said on this point, particularly in the July 13, 2011 meeting, was misleading. Mr. McCormick may have later qualified the representation that they would be paid through dividends by saying that no final decision had been made; however, even then Mr. McCormick suggested that their pay would be performance based which, in the context of their earlier remarks, Mr. Kowal understood to mean that they would be paid through dividends. The point the Defendants had made at the beginning, as reflected in Mr. Cutts' notes, was that they said that there would be no draw from profit or cash flow; saying it was "to be determined" qualified that message but did not change its substance.

[199] Yet not taking a draw from profit or cash flow was never what the Defendants intended. I accept Mr. McCormick's evidence that the Defendants always planned to pay themselves a salary once they had the revenue to do so; that they paid themselves a salary so quickly after the common share sale confirms that that was their intention even prior to the common share sale. Their statements to Mr. Kowal and Mr. Cutts suggesting that the pay would be through dividends and not taken from profit or cash flow created a misleading impression, and one that the Defendants knew would be misleading.

Due diligence

[200] The Common Share Plaintiffs did little independent research or due diligence in relation to the Sun Star investment. Mr. Kowal and Mr. Cutts together or on their own talked to one or more of Mr. Hartland, Mr. McCormick and Mr. Rizopoulos a number of times prior to purchasing their shares. They reviewed the materials they were given. Mr. and Ms. Clement met with Mr. McCormick and Mr. Rizopoulos.

[201] They did not, however, ask for legible copies of the slides on the Investor Presentation in relation to the 4-32 well. They did not seek out production data with respect to the 4-32 well from other sources.

[202] They did not confirm that the founders had invested $2,500,000 or ask what the founders had paid for their shares. They did not ask for clarification of the pages in the Investor Presentation labelled "Prospective Capital Structure" or "Prospective Company NAV", or for an explanation of how those slides could be reconciled with the information in the Business Plan.

[203] They did not ask Sun Star for banking information, the share register or financial statements. They did not ask to speak to Sun Star's legal counsel. They did not verify the truth of any of the claims made by Sun Star. They say that they did not ask for any additional information because they were satisfied with the information they were given.

[204] Mr. Kowal and Mr. Cutts did do some due diligence on Mr. Rizopoulos personally; they asked him for references and contacted them. Nothing in that process raised any cause for concern. Mr. Cutts indicated that everyone they contacted was positive about Mr. Rizopoulos.

[205] Mr. Kowal also shared the information with a business acquaintance, who described it as aggressive but doable with new technology.

[206] Fundamentally, however, all of the Common Share Plaintiffs simply accepted the accuracy of the information they were given. In particular, they believed that the proposed 13-29 well was low risk. They believed the 4-32 analogue well was producing 400 bbls/day. They believed that the founders had invested $2,500,000 of their own money and had received 2,593,361 shares. Mr. Kowal and Mr. Cutts believed that the Defendants would not be taking a salary. The Common Share Plaintiffs believed what they were told and did not make much effort to confirm its veracity.

Information Relied on by Common Share Plaintiffs

[207] Mr. Kowal and Mr. Cutts say they relied on the incorrect or false information given by the Defendants in deciding to purchase the common shares. In particular, they relied on the 13-29 well being low risk. They relied on the analogue 4-32 well having ongoing production of 400 bbls/d, which indicated that the 13-29 well was likely to be productive as well as low risk. They relied on the Defendants having invested $2,500,000 in cash and having been issued 2,593,361 shares. They relied on the Defendants being paid through dividends, not cash.

[208] Similarly, the Clements say they relied on the 4-32 analogue well having production of 400 bbls/d. They relied on the Defendants having invested $2,500,000 of their own money.

[209] Ms. Kowal and Ms. Cutts say they relied on their husbands' advice and direction in making the decision.

[210] The Defendants submit that the Common Share Plaintiffs have not accurately described the reasons for their decision to invest. They emphasize in particular that Mr. Kowal and Mr. Clement had had successful investments with Condo-Condo and Mr. Hartland and Mr. McCormick in the past. They say that the decision to invest was based on trust and confidence in the Defendants, and in particular in Mr. Hartland and Mr. McCormick. They say that who Mr. Hartland and Mr. McCormick were was important, not what they said.

[211] The Defendants also suggest that the Common Share Plaintiffs were more influenced by the longer-term higher risk/higher reward plays and in particular the Montney property in making their investment.

[212] I accept the Common Share Plaintiffs' evidence on this point. The contemporaneous record supports their evidence, particularly with respect to the 4-32 well; Mr. Kowal and Mr. Cutts' notes include detailed information about that well, and it was highlighted in the Investor Presentation.

[213] Further, it makes sense that the Common Share Plaintiffs would have been induced by the 4-32 well and the founders' investment to make their investment in the common shares. An analogue well 200 metres away producing 400 bbls/d provides considerable reassurance that drilling the 13-29 well was low risk and had a meaningful probability of producing good rewards. The founders having invested $2,500,000 not only shows the founders had put their own resources at stake; it also suggests that the company had either paid out significant funds to acquire their assets or had a good financial cushion to allow them to develop those assets.

[214] In addition, the difference between purchasing shares in a company where founders already have 10,000,000 shares for which they paid nothing, and a company where the founders

have 2,593,361 shares which they acquired on a similar basis to what the investors were being offered, is highly material, and would logically influence an investors' decision to invest. Mr. Cutts described himself as "flabbergasted" when he discovered the truth and emphasized the difference between the nature of the investment in a company where the founders have 2,593,361 shares and one where they have 10,000,000. He said that he could not believe that anyone could make a presentation to investors and not disclose this information. His surprise on this point is reasonable and reflects the reliance he placed on the share information set out in the Business Plan.

[215] I am less confident that the Common Share Plaintiffs relied on the information about how the Defendants would be paid. Mr. Kowal was told that this issue was to be determined, which means he did not have concrete information on which it would be reasonable to rely. The documents that they were provided do not show the Defendants being paid entirely through dividends, and in fact list a relatively large number for general and administrative expenses. It also is not reasonable to expect that people working as officers of a company will do so without financial compensation except through their shareholdings, especially since the Common Share Plaintiffs believed those shareholdings to be much smaller than they actually were. I know Mr. Cutts and Mr. Kowal said this information was very important to them, and I accept that it was important, but I do not think it induced their decision to invest in the way that the other information did. It does not speak as directly or centrally to the financial viability and opportunity available to Sun Star as does the 4-32 well or the founders' investment.

[216] I agree that the Common Share Plaintiffs were influenced by their trust and confidence in Mr. Hartland and Mr. McCormick. That trust and confidence led them to believe what they were told, and not to feel they needed to check or verify that information. I do not, however, think that that trust and confidence means they ignored the facts with which they were provided. This was not an abstract investment – 'here's some money, go do something good with it' – it was a specific investment in a specific opportunity explained to them by Mr. Hartland, Mr. McCormick and Mr. Rizopoulos. The Plaintiffs said they relied on that explanation, and on the information they were given about the 4-32 well and the founders' investment, in deciding to purchase the common shares. It makes sense that they would have done so, and I believe their evidence in this respect.

[217] I also note, as they did in their testimony, that the Common Share Plaintiffs knew that there were risks associated with this investment. They did not view it as a sure thing. They could not reasonably have done so. The question was as to the nature and extent of the risk they thought they were taking, and in assessing that – and in deciding to invest – they relied on what they were told by the Defendants and saw in the documents about the 4-32 well, the founders' $2,500,000 investment and the founders' shares.

Purchase of the Common Shares

[218] On July 7, 2011 Marc and Teri-Lynn Clement purchased 50,000 shares at $1 per share for a total cost of $50,000.

[219] On July 25, 2011 Mr. and Ms. Kowal and Eagle Tree each agreed to purchase 100,000 common shares in Sun Star for a total cost of $300,000.

[220] In late July and mid-August, in two transactions, Mr. and Ms. Cutts each purchased 60,000 common shares in Sun Star for a total cost of $120,000.

[221] In addition, in July or August 2011, Mr. Kevin Orriss purchased 10,000 shares for $10,000.

Subscription Agreement

[222] Each of the Common Share Plaintiffs entered into a Subscription Agreement with Sun Star.

[223] The Subscription Agreement included an acknowledgement of risk, and a representation as to the subscriber's sophistication, knowledge and risk capacity. It also included representations by the subscriber that they understood that no regulatory body, including a securities commission, had given an opinion with respect to the merits of investing the common shares, and that no prospectus had been filed. It made the subscriber responsible for obtaining "such legal advice as it considers appropriate".

[224] The Agreement provided that the subscriber accepted that no representations had been made about the future value of the shares, and that they had relied only on publicly available information and not on "verbal or written representation as to fact or otherwise made on behalf of the Corporation". It further provided that the subscribers agreed to indemnify the corporation for losses arising from Sun Star's reliance on their representations.

[225] The Subscription Agreement contained an entire agreement clause, which stated that "there are no representations, covenants or other agreements relating to the subject matter hereof except as stated or referred to herein".

[226] All of the Common Share Plaintiffs acknowledged that this was a binding legal agreement; some had paid more attention to the terms than others. Mr. Kowal and Mr. Cutts had reviewed the Agreement and had some understanding of its terms, whereas Ms. Kowal and Ms. Cutts relied on their husbands and did not themselves review it. The Clements had a lawyer provide them with an opinion on the Agreement prior to signing it.

Kevin Orriss

[227] As noted, Mr. Orriss purchased 10,000 common shares. Mr. Orriss is suffering from terminal cancer and was unable to testify before me.

[228] Evidence presented at trial provided some information about his participation in the common share purchase, which largely occurred through Mr. Cutts.

[229] On July 13, 2011 Mr. Cutts sent an e-mail to Mr. McCormick saying that he was "Looking forward to investing" and that he had passed on information to his wife's cousin, Mr. Orriss, "who has been a land man for a number of start up's and operating companies over the last 30 years in Alberta".

[230] On that same day, Mr. Cutts sent Mr. Orriss an e-mail attaching the Investor Presentation and the Business Plan. The e-mail said:

> The attached looks and sounds pretty good, (I was at a presentation this am) my friend who introduced me to these folks has invested in a real estate deal with the Pres and Sec and says they are good honest people. The key of course is the oil and gas guys and the three leases they have acquired. Yu will no doubt know the area's [sic] they are involved in.

> They are raising 1.5 million and have commitments for 500K to date and want to close the other million in 10 days – I'm interested and will more than likely get Neil Devitt and my son Daniel to take a look as well. However, would not move forward if you put up any red flags.
>
> Daniel, can you have your Calgary office look at this – would they have insight on this size an investment opportunity? I will call you later today.
>
> The folks are talking a 10 times return in three years – "from their lips to gods ear"!!!!!
>
> They are set to start drilling on the Elmworth Charlie Lakes property by August 1st and have a major that will start drilling on their one section sight in the Montney Oil Play Zone within the next 10 to 15 days – so the window to invest is fairly small because they will not be offering this investment at a $1.00 pre [sic] share if either of these wells show positive results.

[231] Mr. Cutts further testified that he told Mr. Orriss about the 400 bbls/ day production from the 4-32 well, about the founders having invested $2,500,000, and the total shares being 10,000,000.

[232] Mr. Cutts said that Mr. Orriss was very busy, and it was not clear to Mr. Cutts how much time Mr. Orriss spent on the investment decision.

[233] Based on this evidence I am satisfied that Mr. Orriss received the Business Plan and Investor Presentation. I do not, however, have evidence about whether he reviewed those materials, or relied upon them.

[234] I have less confidence in Mr. Cutts' evidence about what he told Mr. Orriss than in the remainder of his evidence. This is not because I think Mr. Cutts was not honest. However, the evidence here is not supported by contemporaneous documentation. I also think it less likely that Mr. Cutts recalls clearly what he said to someone else, as opposed to Mr. Orriss remembering what was said to him about the investment he was going to make. That is, I think Mr. Orriss would provide more reliable evidence about what Mr. Cutts said to him, than would Mr. Cutts about what he said, simply because of the nature of the evidence in question. I assess below whether, in the absence of confirmatory testimony by Mr. Orriss, Mr. Cutts' evidence (along with the e-mail) is sufficient to discharge Mr. Orriss's burden of proof with respect to his fraudulent misrepresentation claim.

Sale of the Flow-Through Shares: November-December 2011

Background

[235] As noted, Sun Star had an agreement for the 13-29 Well to be drilled by Western. Unfortunately, Western backed out of the agreement. It forfeited its deposit, and Sun Star decided to drill the 13-29 well itself.

[236] Sun Star spud the 13-29 well on October 16, 2011. By November 2011 Sun Star had started to receive some preliminary information on the 13-29 well; the drill was completed on November 19, 2011.

[237] The Defendants decided to finance the drill of the 13-29 well through selling flow-through shares. They solicited purchasers of flow-through shares in November and December, 2011.

[238] All of the Plaintiffs, except the Clements and Eagle Tree, purchased flow-through shares, specifically, Mr. Kowal and Ms. Kowal, Mr. Cutts and Ms. Cutts, Mr. Neil Devitt, Mr. Don Devitt, Mr. Lerry Hubbs, Mr. Robert Knoll and Ms. Mei Choon Knoll (collectively, the "Flow-Through Plaintiffs").

[239] While I discuss the evidence related to the other Flow-Through Plaintiffs in the sections that follow, I note here that Ms. Knoll invested based on the advice and direction of Mr. Knoll; she did not testify at the trial, but Mr. Knoll confirmed that she simply relied on his judgment to make the investment, and did not participate in the process of deciding whether to buy the shares. He did not explain the investment to his wife to any great extent.

[240] Mr. Orriss also purchased flow-through shares; again, evidence related to his purchase will be discussed in a separate section, and I do not include him in the category Flow-Through Plaintiffs.

Documents Provided by Sun Star

[241] Sun Star did not prepare any new documents to provide to prospective investors in the flow-through shares.

[242] Mr. Kowal and Mr. Cutts still had the Investor Presentation, Business Plan and Introductory E-mail they had been given prior to purchasing the common shares.

[243] Mr. Cutts shared the Investor Presentation and Business Plan with Mr. Don Devitt, although Mr. Don Devitt did not review them.

[244] Mr. Neil Devitt could not recall whether he received the Investor Presentation and the Business Plan.

[245] Mr. Hubbs and Mr. Knoll were shown the Investor Presentation by Mr. McCormick, including the slides related to the 4-32 well. Mr. McCormick and Mr. Knoll testified that Mr. McCormick reviewed the Investor Presentation; both Mr. McCormick and Mr. Knoll said that Mr. Hubbs was there. Mr. Hubbs did not mention Mr. McCormick's review of the Investor Presentation, but I am satisfied that it happened and that he was there.

[246] Mr. Hubbs may have been given a copy of the Business Plan, but he was not certain and, in any event, did not review it.

[247] Mr. Knoll could not recall seeing the Business Plan.

Information Provided by Sun Star

Position of the Parties

[248] The Flow-Through Plaintiffs who spoke with the Defendants – namely Mr. Kowal, Mr. Cutts, Mr. Hubbs and Mr. Knoll – all testified to having been given information in relation to five key points: first, the Defendants' personal investment in Sun Star; second, the positive initial results from drilling the 13-29 well; third, the production from the 4-32 well; fourth, how the Defendants would be paid; and, fifth, the availability of tax deductions for the flow-through shares.

[249] Ms. Kowal could not recall what additional information, if any, Mr. Kowal gave to her prior to purchasing the flow-through shares. Ms. Kowal testified that she did not recall why Mr. Kowal thought it was a good idea to purchase the flow-through shares. She simply relied on her husband's advice and direction in deciding to do so.

[250] Similarly, Ms. Cutts did not have any recollection about what information, if any, Mr. Cutts provided to her prior to purchasing the flow-through shares.

[251] Mr. Don Devitt testified that Mr. Cutts told him that the well adjacent to the 13-29 well was producing 400 bbls/d, and that this had been verified by scouts. He also said that Mr. Cutts told him that the founders had invested $2,500,000 in the company. Finally, Mr. Don Devitt said Mr. Cutts told him that the 13-29 well was doing very well, looking very positive and should definitely produce oil. Mr. Don Devitt did not mention in his testimony being given information about how the Defendants were to be paid.

[252] Mr. Neil Devitt also testified that he knew from what Mr. Cutts told him that the well adjacent to the 13-29 well was producing 400 bbls/d, and that the founders had invested $2,500,000 in the company. He was told by Mr. Cutts that the Defendants were not going to be paid until others were receiving their dividends. Finally, he was also told by Mr. Cutts that the 13-29 well was doing very well, and that they expected it would produce at 400 bbls/d or higher. He said though that at the time he purchased his flow-through shares he did not yet know whether it had produced oil or not.

[253] Mr. McCormick and Mr. Rizopoulos testified that they only provided accurate information about the production from the 4-32 and 13-29 wells. Mr. McCormick denied telling any of the Flow-Through Plaintiffs that they had invested $2,500,000 in the company or that they would only be paid in dividends.

[254] Mr. Hartland testified that he never met with the Flow-Through Plaintiffs and did not give them any information. The Flow-Through Plaintiffs acknowledged that they did not meet with Mr. Hartland.

The Founders Investment and Sun Star Share Structure

[255] As described previously, Mr. Kowal and Mr. Cutts were given information about the founders' investment of $2,500,000 during the common share investment process. They were given this information through the Business Plan and, in the case of Mr. Kowal, in a meeting with Mr. Rizopoulos. This information was not clarified or corrected by the Defendants during the flow-through share meetings. Mr. Kowal and Mr. Cutts continued to believe that the founders had invested $2,500,000 in Sun Star at the time of the flow-through share purchase, and still did not know that the founders had 10,000,000 shares.

[256] I note in support of Mr. Kowal and Mr. Cutts' testimony on this issue that, on November 30, 2011, Mr. Kowal met with Mr. Hartland and Mr. McCormick. Mr. Kowal's notes of the meeting say

- Shares
  9 m
  + 1 @ $1
  + 1 Flow Thru @ $1

Mr. Kowal testified that he understood these notes to be consistent with the share information provided in the Business Plan. This evidence is plausible. The decision to issue these flow-through shares would have been made after the Business Plan was created; Western did not withdraw from participating in drilling the 13-29 well until after the common share purchases, and it was not until Western withdrew that issuing the flow-through shares became necessary. The notes thus plausibly identify the 10,000,000 diluted shares in the Business Plan with the addition of a proposed 1,000,000 in flow-through shares.

[257] By contrast, these notes do not support the evidence of the Defendants that they explicitly told the Plaintiffs that they had been issued 10,000,000 shares at no cost. They are *prima facie* inconsistent with that claim.

[258] The meeting described in these notes occurred after Mr. Kowal had purchased the flow-through shares and, as such, cannot be used directly to show that the Defendants provided false information relied on by Mr. Kowal to purchase those shares. However, the notes generally support the credibility of the Plaintiffs' testimony that the Defendants did not tell them about the shares they actually had.

[259] Mr. McCormick suggested in his testimony that Mr. Kowal's notes were incorrect. I do not see why Mr. Kowal's notes would not have accurately recorded what he was told, particularly given the rest of the evidence on this issue. I do not accept Mr. McCormick's suggestion.

[260] Mr. Cutts said he gave the information about the founders' investment to Mr. Don Devitt and Mr. Neil Devitt. Mr. Neil Devitt and Mr. Don Devitt said that Mr. Cutts told them about the founders' investment.

[261] I accept that Mr. Cutts told Mr. Don Devitt and Mr. Neil Devitt about the founders' investment. As I explained above with respect to the information relied upon by the Common Share Plaintiffs, the $2,500,000 founders' investment suggested that Sun Star had a financial stability that mitigated the risks associated with its well development, and also that the founders had a significant personal stake in their company. It was important and reassuring information. I find it plausible that Mr. Cutts would have told Mr. Neil Devitt and Mr. Don Devitt about it in describing the nature of the Sun Star opportunity and the associated risk.

[262] Mr. Hubbs recalled specifically being told by Mr. McCormick that Mr. Hartland and Mr. McCormick had each invested $1,250,000 in cash in Sun Star, and that Mr. Rizopoulos had contributed $1,400,000 in land. Mr. McCormick was staying at Mr. Hubbs' home in Phoenix in November 2011. Mr. Hubbs testified that he felt grateful because he was being given the opportunity to buy shares for $1 per share, the same price as the other investors, even though the well had actually been drilled. Mr. Hubbs said that Mr. McCormick told him that this opportunity was to make-up for some bad advice Mr. McCormick had given him years ago. Mr. Hubbs said that he knew that normally Mr. McCormick did not put his own funds in projects in which he was involved, and that Mr. Hubbs did not want to invest where Mr. McCormick was simply using other people's money in his business ventures. That the founders had themselves invested made Sun Star different.

[263] Mr. Knoll said that he asked Mr. McCormick about whether they had "skin in the game". He asked Mr. McCormick this at the presentation Mr. McCormick gave to Mr. Knoll and Mr. Hubbs. Mr. Knoll said that Mr. McCormick told him that they had skin in the game. Mr. Knoll

said further that Mr. McCormick told him then, or later in Calgary, that the founders had invested $2,500,000 in the company. Mr. Knoll did not recall Mr. McCormick saying how much each of the Defendants had contributed to the $2,500,000. Mr. Knoll also said that this was important to him – that the Defendants were risking their assets, and not just the investors'.

[264] In his final day of questioning prior to the trial, Mr. Knoll said that he did not recall Mr. McCormick saying that the founders had invested money. Mr. Knoll explained this difference form his trial evidence as arising from his illness on the last day of questioning.

[265] Having reviewed the transcript excerpts from the final day of questioning, comparing it to the excerpts from other days of questioning with which I was provided, and listening to Mr. Knoll's testimony at trial, I observe that his testimony on that final day of questioning is atypical of the evidence he otherwise provided. Further, I note that during questioning on that final day his answers were variable – as well as saying that he did not recall being told about the founders' investment, he also said that the Defendants had "lied about drilling a well next to a producing well and about putting money into the company".

[266] Mr. McCormick denied saying to Mr. Hubbs and Mr. Knoll that the Defendants had made a cash investment in Sun Star.

[267] In resolving this conflict in the evidence, I do not have the benefit of contemporaneous documentation about what Mr. Hubbs and Mr. Knoll were told. The correspondence Mr. Hubbs sent to the Defendants in April 2012 expressing his frustration with how events had turned out did not mention the founders' investment. That gap does not especially favour the Defendants, however, since Mr. Hubbs would not have known in April, 2012 that the founders had not invested any money; however, it does mean that there is no contemporaneous or near contemporaneous evidence to corroborate his and Mr. Knoll's account. I also note that Mr. Hubbs did not mention this issue in his correspondence to the Defendants in 2013, at which point he was more likely to have known that the founders had not invested cash.

[268] Despite the lack of corroborating contemporaneous evidence, and the deviation from Mr. Knoll's answers in his final day of questioning, I prefer the evidence of Mr. Hubbs and Mr. Knoll to that of Mr. McCormick.

[269] Mr. Hubbs had a specific recollection of Mr. McCormick telling him about the founders' investment, and he also told his story with emotion that lent it authenticity. The clear impression I had from Mr. Hubbs' testimony was that he felt hurt and betrayed that an old friend – someone staying in his house! – had told him a lie. That personal betrayal seemed to be as much of a concern to Mr. Hubbs as was the loss of his investment. That emotion, along with the specificity of his recollection, made me think that Mr. Hubbs was telling the truth. I also think it significant that Mr. Hubbs had declined to invest with Mr. McCormick in other ventures because Mr. McCormick did not have a personal stake in the venture. I believe Mr. Hubbs on that point (and note that the Defendants do not challenge his evidence that he had not made such an investment) and thus also accept that Mr. McCormick saying he had a significant stake in Sun Star would have been both important to Mr. Hubbs and the kind of thing Mr. Hubbs would remember. Nothing in what he said, or in the way he said it, gave me reason to think Mr. Hubbs untruthful.

[270] Similarly, while Mr. Knoll had no contemporaneous records in relation to what he was told, I find it plausible that the founders' investment would have been important to him, and the kind of thing that he would remember having been told. I also do not think the difference from

questioning is significant. I accept that Mr. Knoll was not well on the final day of questioning and that his answers that day are atypical and less reliable than his evidence given at trial. I also note that even on that day Mr. Knoll said that the Defendants had lied to him about their investment, which was consistent with his trial evidence.

[271] Further, even if it was not relied on with Mr. Knoll and Mr. Hubbs to the same extent as it was with the Common Share Plaintiffs, the fact that the Business Plan said what it did shows that the Defendants pitched the investment by claiming to have made a significant personal investment, and I see no reason to think that they would have changed their approach when promoting the flow-through shares.

[272] In addition, my significant doubts about the plausibility of Mr. McCormick's evidence in other respects, as previously discussed, undermines his credibility generally, and supports my preference for the evidence of Mr. Hubbs and Mr. Knoll on this point of conflict.

[273] As earlier discussed, Mr. McCormick (and the other Defendants) knew that they had not invested $2,500,000

The 13-29 Well

[274] With respect to the 13-29 well, Mr. Kowal and Mr. Cutts were given numerous updates and predictions through meetings and e-mails in November 2011. For the most part this information was positive, suggesting variously that Sun Star had found oil, that there did not appear to be significant amounts of gas or water, and forecasting production of anywhere from 100-1000 bbls/day, depending on the type of drilling used over the longer term.

[275] On November 8, 2011 Mr. Kowal sent an e-mail to Mr. Cutts summarizing a meeting he had with Mr. McCormick. Mr. McCormick, on being provided with a copy of this e-mail at the time, replied to Mr. Kowal and Mr. Cutts saying that it captured the conversation "well". Mr. Kowal's e-mail said that Mr. McCormick described the 13-29 well as "the best play in the package" and that drilling was underway. The e-mail said that Mr. McCormick described the 13-29 well as a "development" not "exploration" play.

[276] On November 13, 2011 Mr. McCormick forwarded an e-mail to Mr. Kowal and Mr. Cutts which said that they had "oil on the shaker". That same day he forwarded another e-mail which identified that they had had to withdraw from the hole to avoid getting tools stuck. Another e-mail in the same thread said "Great news …. significant porosity!!!!" It described the overall situation as "Very positive news". Mr. McCormick also forwarded an e-mail from Mr. Rizopoulos saying "We have officially hit the Zone, Roger and I collectively made a decision to case the well since we have had strong oil shows and gas, this is great news guys". The thread also included an e-mail saying "there were excellent oil shows over the shaker and bubbling gas in the mud".

[277] In notes dated November 14, 2011, of a meeting with Mr. Rizopoulos and Mr. McCormick, Mr. Kowal reports being told that they had achieved the "Best possible result" and that the pool might result in 20,000,000 barrels of oil. The notes say that the well will produce "Conservative 200-300 bpd" and "Optimistic 500+".

[278] Notes made by Mr. Cutts of a meeting, which are not dated but which Mr. Cutts said were from a meeting with Mr. Rizopoulos from the time when they made the flow-through share investment, say projected production is "800 to 1000 bpd. Fracking within days". The notes

indicate the availability of 1,000,000 flow-through shares, and that they had sold 125,000; this supports Mr. Cutts testimony that the notes predate the flow-through share purchase.

[279] Mr. Kowal's November 18, 2011 notes of a conversation with Mr. Rizopoulos say, "Elmworth 150 bbl/day w/o frac w/o horizontal drill". Mr. Kowal's earlier notes, dated November 15, 2011, of a conversation with Mr. Rizopoulos say (punctuation added) "Elmworth: Oil only; Gas w liquids not in numbers – No Gas; No NGL - * Very conservative numbers * » 2011 YE numbers as a minimum".

[280] Mr. Kowal also spoke about the 13-29 well to Mr. Roger Hume, who was working with the Defendants on the drill. Mr. Kowal's notes say that Mr. Hume told Mr. Kowal that the well was cased-off, that it was in the "Most favourable position", that the long-term potential of the well was 100 bbls/d, and that it had 200,000 plus barrel potential over the life of the well.

[281] Notes dated November 21, 2011 of a discussion between Mr. Rizopoulos and Mr. Kowal, say that the production estimate was in the range of "150-250 bbl/d with no stimulation. Conservative". The notes suggest that fracking would increase production two and a half to three times. They say that it is estimated that there were 20,000,000 to 25,000,000 barrels in the pool.

[282] In an e-mail dated November 26, 2011, Mr. Rizopoulos told Mr. Kowal with respect to the 13-29 well that all "looks very good" and said, "Stay tuned".

[283] In notes dated November 29, 2011 of a phone call with Mr. McCormick, Mr. Kowal recorded being told that the 13-29 well had "IP 250 BPD" and that with acid wash the initial production might increase by "50 BPD". The notes are contained in Mr. Kowal's "Action" list for that date, noting "Msge 8:50 am Bob McCormick re Funds for Manyberries". Then underneath it lists the information about Elmworth 1. Mr. Kowal confirmed in his testimony that this recorded a conversation with Mr. McCormick. This phone call occurred after Mr. Kowal purchased the flow-through shares.

[284] Mr. McCormick testified that he did not recall saying this to Mr. Kowal.

[285] On December 4, 2011, following his purchase of the flow-through shares, Mr. Kowal sent a congratulatory e-mail to Mr. Hartland, Mr. McCormick and Mr. Rizopoulos saying:

> Hi Bob, Les and Sandy
>
> I wanted to send a brief note with a few comments about Sun Star Energy.
>
> As we look back on the past few weeks, November has been a month to remember.
>
> …the excitement of the drill at Elmworth 1 and the confirmation last week of 250 BPD before an acid wash and without fracing
>
> ….Positive feedback from Galleon regarding potential additional wells on Section 21
>
> ….The potential of an Elmworth 2 well, and looking forward to Manyberries, as well as the 9,000 acre "wildcard" lease (My terminology)
>
> ….The successful issue of a million flow through shares.
>
> Lots to feel good about!
>
> My congratulations and thanks to the Sun Star Management Team.

> We appreciate the knowledge and experience that you bring to the business, as well as your transparency and open communication as we move forward.
>
> We look forward to many more Sun Star Energy success stories.
>
> Thanks again,
>
> Dave

[286] Mr. Kowal testified that this e-mail reflected his knowledge in December 2011 regarding the Defendants' projections for the 13-29 well based on their professional opinions. He said that by sending the e-mail he was confirming their open communications and transparency, along with his understanding that the 13-29 well had been confirmed to produce 250 bbls/d.

[287] Mr. Kowal and Mr. Cutts were sent some information indicating challenges that had been encountered in terms of the drilling performance and speed, including some daily drilling reports. The overall message, however, based on their notes and e-mails from the time, as well as their testimony, suggest that Mr. Kowal and Mr. Cutts were told by the Defendants that the initial drilling of the 13-29 well showed very positive signs, was likely to produce a significant amount of oil per day and, to use the words of Mr. McCormick, could be considered a development well not an exploration well. Mr. Kowal was specifically told its initial production was 250 bbls/d, although not until after he had purchased the flow-through shares.

[288] Mr. Neil Devitt recalls being told by Mr. Cutts that the 13-29 well was in the process of being drilled, that they'd had very positive results, and were expecting production of about 400 bbls/day. He was given especially positive information about the 13-29 well prior to making his second investment in the flow-through shares; he understood that Sun Star had had positive results from its initial drilling. Mr. Cutts confirmed that he had provided this information to Mr. Neil Devitt.

[289] Mr. Donald Devitt said that he too had been told by Mr. Cutts that the 13-29 well was doing very well and was about to be finished. He did not remember if he received actual numbers but does remember being told that it was very positive, that everything looked good and that they should definitely get oil from it. Mr. Cutts confirmed that he had provided this information to Mr. Don Devitt.

[290] Mr. Hubbs testified that Mr. McCormick told him that Sun Star had successfully drilled the 13-29 well and that there were shows of oil. Mr. McCormick was staying with Mr. Hubbs in Phoenix at the time the 13-29 well was being drilled, and was receiving regular updates on the drilling, which he showed to Mr. Hubbs. At some point Mr. McCormick told Mr. Hubbs that the tip had touched oil, and there was a great deal of pressure showing that it would be a winner.

[291] Mr. Knoll was somewhat inconsistent with respect to his recollection on the 13-29 well, saying at first that he thought that it had not yet been drilled but then acknowledging under cross-examination that he was aware prior to his investment that the 13-29 well had been cased, drilled and that there was oil with good pressure.

[292] Mr. McCormick and Mr. Rizopoulos did not dispute that they had provided this information about the 13-29 well to the Flow-Through Plaintiffs. They maintained that what they said to the Flow-Through Plaintiffs reflected their own knowledge at that time. They emphasized that the Flow-Through Plaintiffs knew that the 13-29 well was not complete and on-production at

that time, and that the information the Defendants provided was only a forecast based on the preliminary results Sun Star was obtaining.

[293] The documents do show, however, that as of November 30, 2011 Mr. Rizopoulos advised Mr. Hartland and Mr. McCormick by e-mail that the well was producing 149 bbls/d. On December 1, 2011 the Defendants were given information in an e-mail from Mr. Soares showing that the 13-29 well had produced 65 bbls/day over a 24-hour period. Further, in an e-mail dated December 5, 2011 Mr. Rizopoulos advised Mr. Hartland and Mr. McCormick, along with representatives of Tiger Moth, that the 13-29 well "may see a stabilized rate of somewhere between 35 and 50 bbls/d." On December 6, 2011, after receiving the updated 4-32 well results, Mr. Rizopoulos said to Mr. Hartland "We just spent 2.2 million for a 30 to 40 bbl/d oil well". In an e-mail dated December 10, 2011 Mr. Soares advised a number of persons, including the Defendants, that "the 13-29 flowed 24mc/d (150 bbls/d) to less than 10 m3/d (63 bbls/d)".

[294] This information was available to the Defendants prior to Mr. Knoll and Mr. Hubbs investing in the flow-through shares, but the Defendants did not provide that information to Mr. Knoll and Mr. Hubbs.

[295] The evidence before me does not show that either Mr. Knoll or Mr. Hubbs were provided specifically false information with respect to the 13-29 well's initial performance or projections. It does, however, suggest that the Defendants did not tell Mr. Knoll or Mr. Hubbs the actual information they had with respect to the 13-29 well by early December 2011, and the extent to which it suggested that the production from the 13-29 well was not at the high levels the Defendants had initially hoped, or consistent with the claims they made about production from the 4-32 well, as discussed below.

[296] The evidence shows that Mr. Kowal and Mr. Cutts were provided with projections of the 13-29 well that could not reasonably be supported by the information known to the Defendants in November 2011. Those projections gave Mr. Kowal and Mr. Cutts a misplaced sense of security with respect to their investment and the risk associated with the flow-through share investment. Mr. Cutts shared this unduly optimistic information with Mr. Neil Devitt and Mr. Don Devitt.

[297] The evidence also shows, however, that Mr. Kowal and Mr. Cutts knew and were told that many of these numbers were projections; it also shows that they were given some accurate information about the progress of the 13-29 well. Further, by the time the Defendants knew that the 13-29 well was performing below expectations, the Kowals, the Cutts and Mr. Neil Devitt and Mr. Don Devitt had already purchased their flow-through shares. It is not clear based on the evidence before me that the Defendants themselves appreciated prior to December 1, 2011 that the 13-29 well was going to produce oil only to a mediocre extent.

[298] Having said that, the evidence does not show any foundation for the projections given by Mr. Rizopoulos and Mr. McCormick for the future production of the well. My inference from the evidence is that in providing this information Mr. Rizopoulos and Mr. McCormick wanted to reinforce the desirability of the flow-through investment to Mr. Kowal and Mr. Cutts and were unconcerned with whether the information was true or not.

The 4-32 Well

[299] With respect to the 4-32 well, Mr. Kowal testified, and his notes confirm, that in the meeting on November 14, 2011 Mr. McCormick and Mr. Rizopoulos told Mr. Kowal that the

next door well (that is, the 4-32) was currently producing 250-350 bbls/day, and that that had been verified by scouts counting three trucks a day leaving the well site.

[300] Mr. Cutts did not recall being told anything about the 4-32 well during the meetings regarding the flow-through shares. His only information was what he had earlier been told about the 4-32 well, namely, that it had produced on average 400 bbls/day and that this had been confirmed by scouts. Mr. Neil Devitt said that he was given this information by Mr. Cutts, as did Mr. Donald Devitt. Mr. Cutts confirmed that he provided them with this information.

[301] Mr. Hubbs was told that the 4-32 was producing 285 bbls/day, and that this had been confirmed by a scout – someone with an ATV who camped out and counted the trucks being carried from the adjacent well. He testified to being given this information by Mr. McCormick. In addition, in his April 2012 e-mail to Mr. McCormick and Mr. Hartland, Mr. Hubbs said that this is what Mr. McCormick had told him prior to his investment in the flow-through shares:

> You and I spent 10 days in Phoenix in November and all I heard from you was "great news", "outstanding investment opportunity" "great Engineer with 30 years' experience working in the Oilfield" "a report from some dude who 'camped-out' at your well-site for several days reporting that an adjacent well was reporting 285 BOED and that your well should come in at around the same flow rate".

[302] Mr. McCormick testified that Mr. Hubbs' e-mail of April 2012 was incorrect; however, I prefer the documentary evidence of Mr. Hubbs' near contemporaneous e-mail to Mr. McCormick's current denial. I see no basis in the evidence for concluding that Mr. Hubbs' e-mail from that time would be inaccurate.

[303] Mr. Knoll said that he was told that the 4-32 well had averaged 400 bbls/d in its initial production over its first three months. This was also what he had derived from looking at the Investor Presentation. He observed that 400 bbls/d of production over three months is a "hell of a good well", and that these results were significant because it was only one well-spacing unit above the proposed location for the 13-29 well. He understood that Sun Star was going to use scouts to verify this information, although he did not follow-up on whether they did so.

[304] Mr. Knoll said that the initial production of 3 months at 400 bbls/d was important to him because if you have a well that has that production capability and you are drilling a well only 300-400 metres south of it, you have a low geologic risk. Even if the well only came in at a quarter of that amount, it would still be a very effective well. To Mr. Knoll this was a development well, not an exploration well.

[305] Mr. Knoll acknowledged that in his last day of questioning he answered that he did not recall to questions about the 4-32 well; I have previously noted the health issues Mr. Knoll had on that day, and its atypical quality. In this case, however, I also observe that Mr. Knoll dealt with the issue of the initial production on a previous day of questioning and at that time gave an answer consistent with his testimony at trial – "it's three months of IP production, 400 barrels a day".

[306] The Defendants denied providing the Flow-Through Plaintiffs with inaccurate information about the 4-32 well. Mr. Hartland suggested that the reference in Mr. Kowal's notes to the next door well could mean a well other than the 4-32 well. Mr. McCormick said that Mr. Rizopoulos was merely speculating on the production from the 4-32 well, but that at that point

they had no solid information; counting the trucks gave only nebulous information about what was going on.

[307] In an e-mail dated November 19, 2011, Mr. Rizopoulos advised Mr. Hartland and Mr. McCormick and others that "Based on the current 4-32 trucked report the 4-32 is flowing at 200-300 bbls/d based on the pump stroke speed and trucking off the lease, after they stimulated the well".

[308] I prefer the evidence of the Flow-Through Plaintiffs to that of the Defendants about what they were told regarding the 4-32 well. Mr. Kowal's evidence is confirmed by his notes of the time. Mr. Hubbs' testimony is corroborated by the near-contemporaneous e-mail he sent in April 2012. The e-mails exchanged between the Defendants suggests that they exchanged information between themselves consistent with what the Flow-Through Plaintiffs say they were told. The documentation prepared by the Defendants, and in particular the Investor Presentation, is consistent with Mr. Knoll's testimony, and Mr. Knoll was largely consistent on this point between questioning and trial.

[309] I also remain concerned about the credibility of the Defendants' evidence on this point, as discussed previously. Further to that point, I note Mr. Hartland's implausible claim – which did not match the evidence of Mr. McCormick – that the reference to the "next door" well could mean something other than the 4-32 well.

[310] In light of the documentary evidence, and the more credible testimony given by the Flow-Through Plaintiffs, I accept that the Flow-Through Plaintiffs were given false information about the production of the 4-32 well. Mr. Kowal and Mr. Hubbs were both given new information that the 4-32 well was now producing 250-300 bbls/d in the fall of 2011. Mr. Cutts still believed what he had been told earlier, that the 4-32 well produced 400 bbls/d on an ongoing basis. He passed that information on to Mr. Neil Devitt and Mr. Don Devitt. Mr. Knoll believed that the 4-32 well had produced 400 bbls/d in its first three months of production.

[311] None of this information was correct. The 4-32 well had come back on production in the fall of 2011 but produced only 12 bbls/d in November 2011. It did not produce 250-350 bbls/d when it came back on stream, it did not produce 400 bbls/d on an ongoing basis, and it did not produce 400 bbls/d in its first three months on production.

[312] The Defendants knew throughout that the 4-32 well did not produce 400 bbls/d on an ongoing basis or over its first three months of production. They also knew that they had no reliable information about the production of the 4-32 well in the fall of November 2011. Mr. McCormick himself said in his testimony that any information about the 4-32 well based on scouts was "nebulous". Mr. McCormick told Mr. Kowal and Mr. Hubbs that the 4-32 well was producing 250-300 bbls/d without any thought to the truth or falsity of that statement. He could perhaps have made the statement relying on the e-mail from Mr. Rizopoulos, although Mr. McCormick did not suggest this was the case; he simply denied saying it.

Director and Officer Pay Structure

[313] Mr. Kowal and Mr. Cutts did not receive any new information about the Defendants' pay through the flow-through share process and continued to believe that the pay would be performance-based through dividends. They did not know that the Defendants had started to receive a monthly salary.

[314] Mr. Cutts says he told Mr. Don Devitt and Mr. Neil Devitt that the founders were not being paid. Mr. Neil Devitt testified that he was told about the pay issue, but Mr. Don Devitt did not.

[315] Mr. Hubbs testified that he was told by Mr. McCormick that the founders would not "take a nickel" in salary, but would instead be paid in dividends, as would the investors.

[316] Mr. Knoll also testified that he was told by Mr. McCormick that they were not going to take salary, but only dividends.

[317] Mr. McCormick denied making these representations.

[318] I accept that the Flow-Through Plaintiffs did not know that the Defendants were taking a salary. I also accept that they were told, either directly or indirectly, that the Defendants would be paid based only on dividends.

[319] I hesitated over this conclusion because of the lack of contemporaneous documentation from the time of the flow-through share sale, and because the Defendants' documents, and in particular the Business Plan, shows general and administrative expenses being paid, and at a high dollar amount. Further, saying that they were not taking a salary would have been an outright lie at the time of the flow-through share sale, whereas the time of the common share sale it was only misleading, and the record suggests that at that time the representation was somewhat qualified – "to be determined".

[320] I ultimately reach my conclusion that Mr. Kowal, Mr. Cutts, Mr. Hubbs and Mr. Knoll did not know about the salary, and that Mr. Hubbs and Mr. Knoll were specifically told that the Defendants would be paid through dividends, on the following grounds. First, the contemporaneous record shows this representation was made to Mr. Kowal and Mr. Cutts on July 13, 2011. While it was only prospective at that time, given how quickly the Defendants paid themselves a salary after the common share sale, and given the evidence at trial of Mr. McCormick that it was always their intention to pay themselves a salary as soon as they could, it was also misleading. It makes sense to me to think that the Defendants would not materially have changed their approach of marketing the investment through representing that they were not taking a salary, and would not have disclosed to Mr. Cutts and Mr. Kowal that the earlier information they had provided was incorrect.

[321] I believe that Mr. Cutts saw this information as sufficiently important to share with Mr. Neil Devitt and Mr. Don Devitt. I also note that he and Mr. Neil Devitt were consistent on this point.

[322] In addition, I note the specificity of Mr. Hubbs' recollection; I believe that Mr. McCormick would say to someone that he would not take a nickel of salary. Based on his testimony before me, it seems like the type of thing Mr. McCormick would say.

[323] In my view the claim that they would be paid through dividends was part of Mr. McCormick's sales pitch to the Flow-Through Plaintiffs as well as to Mr. Kowal and Mr. Cutts when they bought the common shares: he claimed to be highly invested in the company, both through a front-end cash investment and through a back-end willingness to be paid through dividends. It was part of his pitch to make Sun Star attractive to investors, even though it was not true, and he knew that it was not true.

Tax Deductibility

[324] The Flow-Through Plaintiffs were all advised by the Defendants that the cost of purchasing the flow-through shares would be tax deductible. They submitted their tax returns on this basis and were initially successful in obtaining those deductions. Ultimately, however, the Canada Revenue Agency reviewed and disallowed the Flow-Through Plaintiffs' deductions associated with the purchase of the flow-through shares.

[325] I do not know why or on what basis the tax deduction was denied, and I make no finding about whether the information provided by the Defendants with respect to the tax treatment of the flow-through shares was false, or whether the Defendants bear any responsibility for the rejection of the tax deduction.

Due Diligence

[326] As was the case with the Common Share Plaintiffs, none of the Flow-Through Plaintiffs undertook any meaningful due diligence in relation to the information provided by the Defendants. They did not seek out independent information about the production from the 4-32 or 13-29 wells, or request additional documentation or records about Sun Star from the Defendants or their legal counsel.

Information Relied on by Flow-Through Share Plaintiffs

[327] I find that the Flow-Through Plaintiffs made their investment based on the positive information they were given about the initial results from drilling the 13-29 well and its predicted performance, and what they were told about the 4-32 analogue well and the founders' investment of $2,500,000.

[328] I also find that Mr. Hubbs was influenced by the claim of Mr. McCormick that he would not be taking his pay in the form of a salary; given Mr. Hubbs' particular concerns about Mr. McCormick's approach to business, and the nature of the representation made to him by Mr. McCormick, I find that this representation had more significant to Mr. Hubbs than to the other Plaintiffs.

[329] For Mr. Knoll, by contrast, it was the information about the 3 months of production from the adjacent 4-32 well that most significantly influenced his decision to purchase the flow-through shares.

[330] The Defendants submitted that the primary motivation of the Flow-Through Plaintiffs was the tax deductibility of the share purchase, their trust in Mr. Hartland and Mr. McCormick and, particularly in the case of Mr. Knoll, the significant potential upside of the Montney asset.

[331] I accept that the Flow-Through Plaintiffs were in part motivated to purchase the flow-through shares as a result of the factors identified by the Defendants. Had the flow-through shares not been tax deductible, had they not trusted Mr. McCormick in particular, had the Montney asset not existed, the Sun Star flow-through shares would have been a less attractive investment.

[332] Ultimately, however, the facts that showed that Sun Star was a company worth investing in were the facts related to the immediate prospects of that company and its overall financial viability. A tax deduction does not make shares free of cost, and the ability to develop the Montney play depended on the financial return generated from the 13-29 well in the first instance. That the Flow-Through Plaintiffs, and most especially Mr. Kowal, Mr. Cutts, Mr.

Hubbs and Mr. Knoll, trusted Mr. McCormick made them believe that he told them; it did not make what he told them irrelevant to their decision to invest.

Purchase of the Flow-Through Shares

[333] On or about November 22, 2011, Mr. and Ms. Cutts subscribed for 80,000 flow-through shares (30,000 for Mr. Cutts and 50,000 for Ms. Cutts) at $1 per share for a total cost of $80,000, to bring their total investment in Sun Star to $200,000.

[334] On about November 28, 2011, Mr. and Ms. Kowal each subscribed for 100,000 flow-through shares at $1 per share for a total cost of $200,000, bringing their investment in Sun Star up to $500,000. They later changed their proportionate flow-through share holdings to 135,000 (Mr. Kowal) and 65,000 (Ms. Kowal). Ms. Kowal's subscription agreement is not dated and does not list the number of shares acquired.

[335] On or about November 3 and November 30, 2011, Mr. Neil Devitt subscribed for 70,000 flow-through shares at $1 per share for a total cost of $70,000.

[336] On or about November 25, 2011, Mr. Donald Devitt subscribed for 30,000 flow-through shares at $1 per share for a total cost of $30,000.

[337] On or about December 20, 2011, Mr. Knoll subscribed for 50,000 flow-through shares at $1 per share for a total cost of $50,000, and his wife Ms. Knoll also subscribed for 50,000 flow-through shares at $1 per share for a total cost of $50,000.

[338] On or about December 29, 2011, Mr. Hubbs subscribed for 200,000 flow-through shares at $1 per share for a total cost of $200,000.

Subscription Agreement

[339] Each of the Flow-Through Plaintiffs executed a subscription agreement. The subscription agreement contained numerous acknowledgements and representations, including that the investor was responsible for obtaining such advice as they needed, that the investment was risky, that no prospectus has been filed and that no regulatory body had made any finding or determination with respect to the merits of investing in the shares.

Kevin Orriss

[340] On or about November 30, 2011, Mr. Orriss purchased 30,000 flow-through shares for $30,000.

[341] Mr. Orriss had previously received the Investor Presentation and Business Plan regarding Sun Star, and thus had available the information about the investment contained in those documents. Again, however, I do not have any evidence about what he did with those documents, and whether he reviewed or relied upon them.

[342] With respect to the flow-through purchase in particular, Mr. Cutts testified that he gave the same information to Mr. Orriss that he had given to Ms. Cutts, Mr. Neil Devitt and to Mr. Don Devitt with respect to the 13-29 well results, the tax benefits of the flow-through shares and the ability to invest after oil had already been discovered. They also discussed the information that had been relied on earlier with respect to the founders' investment and the 4-32 well.

[343] On being asked if he had reviewed each of these points with Ms. Cutts, Mr. Neil Devitt, Mr. Don Devitt and Mr. Orriss, Mr. Cutts said that he was sure they had because they talked on a regular basis and this investment was part of their discussions.

[344] As was the case with the common share investment, the issue with respect to Mr. Orriss is whether, in the absence of confirmatory testimony from him, Mr. Cutts' evidence about what he told Mr. Orriss regarding the investment is sufficient to discharge Mr. Orriss's burden of proof to show fraudulent misrepresentation.

Sun Star Management and Operations: August 2011-April 2012

[345] Between August 2011 and April 2012, Sun Star went from the hopeful beginnings of an oil and gas venture to failure.

[346] In August 2011, based on the successful common share issuance, the deposit cheque given to them by Western for drilling the 13-29 well, and the initial cash flow from Galleon, the Defendants decided to pay themselves. They paid themselves $10,000 each backdated to January 2011 and continued to pay themselves $10,000 per month each going forward.

[347] In November and December 2011, they also repaid the $190,110.11 loan that had been made by Condo-Condo.

[348] In addition, through this time Sun Star paid amounts to Condo-Condo in rent and also for salaries of Condo-Condo employees who, the Defendants say, provided services to Sun Star.

[349] In January 2012, Sun Star received a reserve evaluation from Sproule Associates Limited. The reserve evaluation was positive about Sun Star's asset value, identifying the proved plus probable reserves at a 10% discount rate as having a value of $10,682,000.

[350] By April 2012, the 13-29 well had come fully on to production but was producing far below expectations – it produced 38 bbls/day in February 2012 and 28 bbls/day in March 2012 – while incurring nearly double its estimated drilling costs.

[351] It also turned out that when the 4-32 well came back on production in 2011, it produced very little – on average in 2011 it produced 21.56 bbls/day and in 2012 only 16.34 bbls/day.

[352] By April 2012, Sun Star had significant debt, considerable expenditures for salaries and office costs, and minimal cash flow.

[353] Relationships between the Defendants broke down. In April 2012, Mr. Rizopoulos left the company and threatened a lawsuit for the nearly $4 million he felt he was owed as a result of his efforts to build the company. Mr. Rizopoulos ultimately abandoned his lawsuit.

[354] Mr. Hartland and Mr. McCormick reduced their pay in April 2012 from $10,000 a month to $6,000 a month and brought in Jim Gotmy to assist them following Mr. Rizopoulos's departure.

[355] On or about May 30, 2012, Sun Star obtained financing from Tallin Capital Mezzanine Limited Partnership for just under $1,000,000 (after the deduction of a commitment fee). Mr. Hartland and Mr. McCormick gave personal guarantees of $250,000 each to secure that financing.

[356] At around that time and up to July 2012, Sun Star offered debentures to vendors to whom they had accounts payable to reduce their indebtedness to those vendors.

[357] Things continued to go badly for Sun Star. On average in 2012, the 13-29 well produced 17.34 bbls/day. In 2013, it produced 19.85 bbls/d in the one month it was on production.

[358] Ultimately Sun Star sold Montney for $630,000 to Shell – an amount significantly higher than the $113,000 they paid for it. This was a positive outcome given that, when Shell drilled it, they hit water not oil.

[359] The September 2012 unaudited financial statements for Sun Star, which include 2011 comparables, show that in September 2011 the company had no revenues, and its operating expenses were $310,012. By September 2012 it had earned $566,904 in petroleum and natural gas sales and from royalties and had $1,151,739 in expenses, $783,941 of which was general and administrative expenses.

[360] In the end, Mr. Rizopoulos was paid $183,000 from Sun Star through management fees paid to his company Hyperion. Mr. Hartland and Mr. McCormick were each paid $234,400 from 2011 through 2013 ($220,800 from 2011 through 2012). Mr. Hartland, Mr. McCormick and Mr. Rizopoulos thus collectively took $651,800 from the company in salary despite Sun Star's total revenues from oil and gas sales and royalties being only $1,084,770.

Breakdown of Plaintiffs-Defendants Relations

[361] It took some time for the Plaintiffs to become aware of the extent of the issues with Sun Star. Through January, February and March 2012 Mr. Kowal and Mr. Cutts were told that the 13-29 well was producing at a higher level than it was. In February and March, for example, Mr. Rizopoulos told Mr. Kowal and Mr. Cutts that the production was 100 and 75 bbls/day, when the actual production was 38 and 29 bbls/day in those months.

[362] It was only in April 2012, when Mr. Rizopoulos left Sun Star and met with Mr. Kowal and Mr. Cutts, that they obtained a fuller picture, learning not only about the poor production from the 13-29 well but also about the pay to the Defendants, that the Defendants had not put any cash into the company but only 'sweat equity', that the Defendants held 10,000,000 shares and that the 4-32 well had a significant decline from its production in the first month.

[363] Mr. McCormick claims that the shareholders were told of the financial issues the company was having as soon as they arose, but the documentary evidence does not substantiate this claim; it suggests, rather, that the Plaintiffs either were not kept informed or were told things were going better than they were.

[364] Relations between the Defendants and the Plaintiffs deteriorated. On or about March 7, 2013, Mr. Kowal and Mr. Cutts sent letters to the minority shareholders saying that they had a cause of action for negligent or fraudulent misrepresentation and breach of fiduciary duty, as well as a claim for oppression. They invited other investors to join the action.

[365] On or about March 25, 2013, Mr. Hartland wrote to the shareholders, saying that the letter from Mr. Cutts and Mr. Kowal was "misleading, incorrect and defamatory". They acknowledged that there were issues with the 13-29 well, but that this was not "as a result of management's derogation from its announced plans or through any negligence on the part of directors of Sun Star". Mr. Hartland said that they had managed the company appropriately despite difficult circumstances.

[366] In February 2013, Mr. Hubbs sent an e-mail to Mr. Hartland and Mr. McCormick accusing them of fraud, and of not providing him with proper information. In May 2013, counsel

for Mr. Hartland and Mr. McCormick accused Mr. Hubbs of defamation. Mr. Hubbs responded that he had retracted his statements, but also advised counsel for Mr. Hartland and Mr. McCormick that he had filed suit against them.

[367] In 2013, the Clements phoned Mr. McCormick and recorded the phone call. Ms. Clement said she recorded it because they were in the middle of a home build, and she wanted to ensure an accurate record of the call. She acknowledged in cross-examination that she had not recorded other conversations related to the investment in Sun Star.

[368] In the call Mr. McCormick described Mr. Kowal and Mr. Cutts as "disgruntled". He said that the cost overruns on the 13-29 well were because of Mr. Rizopoulos's negligence, emphasized that they had believed the company was going to be successful, and saying that they were doing what they could to manage things. Mr. McCormick said that the Clements might be approached by Mr. Kowal and Mr. Cutts who are "trying to get some of [the investors] to band with them".

[369] Mr. McCormick said in the call that the 4-32 well had "IP at a very high rate", but that there was no public knowledge as to what it was actually producing. He emphasized that Sproule had given them a positive analysis of the 13-29 well. He suggested that the problems were because of how Mr. Rizopoulos had fracked the well, although he also said that the 4-32 well was now back on production and not doing very well.

[370] Mr. McCormick suggested there was a $2,000,000 offer to purchase the 13-29 well, and that he was trying to negotiate a gross overriding royalty for Sun Star as part of that transaction. He said, though, that it would still not be enough to pay the shareholders. He said that third parties had invested $2,000,000.

[371] At that point Ms. Clement said "so, 2 million and then you had 2,5000,000 invested originally between the two of you?". Mr. McCormick responded:

> Between – well Les and I had originally some money that was lent to Sun Star, Les and I, should say, our holding company lent some money – lent a loan to Sun Star Energy for some original land investments. And ah –
>
> [Mr. Clement interjects saying "Bob, we're just looking at the 3 year business model which you gave us and when I read initially into this that…the founders had $2.5 million into it…"]
>
> **That was a guestimate of value of the assets that we had in the company at that point in time. Not hard cash investment**…
>
> [The Clements ask, what assets?]
>
> Well, primarily the ah, ah, the 8,000 acres that we sold to Shell. So when we had that cost overrun, when we got, when we went to Shell to essentially farm into their land and we turned the table around and asked them if they'd purchase our land, and ah, we managed to sell 8,000 acres to them or sell the lease opportunity to them.
>
> [Ms. Clement: "did you sell that land for $2 ½ million?"]
>
> No, we sold it for $550,000…

> But we were forced to sell at the time because we had a million and a half dollars in payables that we didn't have the money to pay.
>
> [Mr. Clement points out that he is talking about the period prior to investing]
>
> Well there was the land and the plays that we had tied up and then the cash that we raised through flow through and common shares. That's what… [emphasis added]

[372] In short, Mr. McCormick's answers here were evasive, trying to shift the conversation away from the question the Clements asked him, and in his answer never mentioned the sweat equity that the Defendants now claim was what made up the $2,500,000; rather, he said it was a "guestimate of the assets", mentioning the land sold to Shell, and the plays that had been tied up.

[373] The Plaintiffs filed their Statement of Claim on May 7, 2013.

Analysis

Summary of the Law

Test for Civil Fraud

[374] The Supreme Court set out the current test for civil fraud in its 2014 decision in ***Bruno Appliance and Furniture, Inc v Hyrniak***, 2014 SCC 8. The Court held that to establish liability for civil fraud the Plaintiff must show:

> (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: ***Hyrniak*** at para 21.

[375] Prior case law also required that the defendant intend to deceive the plaintiff: ***Stack v Hildebrand,*** 2010 ABCA 108 at para 13; ***TWT Enterprises Ltd v Westgreen Developments (North) Ltd***, 1992 ABCA 211 at para 14.

[376] The Supreme Court in ***Hyrniak*** did not include the intention to deceive in its four-part test, although it also did not expressly reject the intention requirement. Subsequent appellate decisions suggest that the ongoing relevance of the intention requirement is uncertain: ***Precision Drilling Canada Limited Partnership v Yangarra Resources Ltd.,*** 2017 ABCA 378 at para 29-30; ***Singh v Trump,*** 2016 ONCA 747 at para 141.

[377] The Alberta Court of Appeal has emphasized, however, that to the extent an intention to deceive does need to be established, it can be inferred on the evidence as a whole, including "a lack of evidence of a credible explanation of the concealment or false representation of the actor": ***Precision Drilling*** at para 32.

[378] To constitute civil fraud the misrepresentations must be ones of fact, not future intention; the misrepresentations cannot be "mere puffery": ***Motkoski Holdings Ltd v Yellowhead (County),*** 2010 ABCA 72 at para 45, citing ***Derry v Peek*** (1889) 14 AC 337 at 374. The representations must be made by the defendant or its representatives: ***Motkoski*** at para 41.

[379] The requirement that the defendant know that the representation is false can be established by showing that the defendant had actual knowledge of falsity, but also by showing that the defendant did not believe the statement to be true, or did not care whether it was true or

false: ***Hyrniak*** at para 18, citing ***Derry v Peek*** at 374; ***Precision Drilling*** at para 29. As the Court of Appeal said in ***Motkoski*** at para 58, recklessness requires more than negligence. Recklessness is not established by saying that the defendant "'should have known' the truth, or should have been more careful and made further inquiries"; it requires the defendant to have been indifferent to the truth of the statement at the time when they made it. At the same time, however, a defendant who shuts their eyes to the facts, or purposely abstaining from inquiring into them, cannot claim to have had an honest belief in those facts: ***Precision Drilling*** at para 35, citing ***Derry v Peek***.

Proof and Pleadings

[380] The burden of proof for establishing civil fraud lies on a plaintiff, who must establish the elements of the test for civil fraud on the balance of probabilities.

[381] Older Alberta case law, relied upon by the Defendants, said that, given the serious and stigmatizing nature of civil fraud, the standard of proof "must be met by cogent and convincing evidence": ***TWT*** at para 39 (Belzil JA, dissenting on other grounds).

[382] The proposition that proof of civil fraud requires a particular type of evidence is cast into doubt by the Supreme Court's decision in ***F.H. v McDougall,*** 2008 SCC 53. In that case the Supreme Court emphasized that the burden of proof in all civil cases requires the plaintiff to establish on the evidence that "it is more likely than not that the event occurred": ***McDougall*** at para 44. All cases require serious scrutiny of the evidence, and all require that the evidence be "sufficiently clear convincing and cogent to satisfy the balance of probabilities test"; "it is inappropriate to say that there are legally recognized different levels of scrutiny of the evidence depending upon the seriousness of the case": ***McDougall*** at para 46, 45.

[383] The plaintiff must plead fraud specifically; Rule 13.6(3) of the Rules of Court requires that the allegations contain sufficient particulars to allow the defendant to know the case they have to meet. This includes a description of the misrepresentation, who made it, to whom and when: ***Elliott v Rainbow Homes Ltd***, 2018 ABQB 328 at para 4.

Defences

[384] Generally speaking, a person is only liable for misrepresentations made by them or their representatives: ***Hyrniak*** at para 26; ***Motkoski*** at para 41.

[385] An exception to this principle arises where the parties are joint tortfeasors because of the nature of the relationship between them. This includes where "two persons who agree on common action, in the course of, and to further which, one of them commits a tort. These seem clearly joint tortfeasors; there is one tort committed by one of them on behalf of, or in concert with another": ***The Koursk***, [1924] P. 140 at 155 per Scrutton LJ.

[386] In a 2000 decision of the British Columbia Court of Appeal, Justice Southin applied this rule to fraudulent misrepresentation: "the facts of this case bring the appellants within the third of Scrutton L.J.'s categories. They agreed on the common action of selling together both the real property and the business and in the course of negotiating that sale, and to further that sale, the female appellant committed the tort of deceit….Thus, the appellants are joint tortfeasors": ***Osborne v Pavlick,*** 2000 BCCA 120 at para 23-24; ***Cruise Connections Canada v Szeto,*** 2015 BCCA 363 at para 49; ***Harrison v Biggs*** (1992) 74 BCLR (2d) 164 at para 53-56.

[387] ***Koursk*** was cited with approval although distinguished in ***MacLachlan & Mitchell Homes Ltd. v Frank's Rentals and Sales Ltd.***, 1979 ABCA 258 at para 27.

[388] ***Osborne*** has not been relied upon in Alberta (although it was noted in ***Ellmar Developments Ltd v Bearspaw Development Inc***, 2016 ABQB 221 at para 70). Relatedly, however, in a 2005 decision, Watson J. (as he then was) explained the concept of joint tortfeasors and reviewed the law in detail. He held that "persons are considered joint tortfeasors if (1) they engage in concerted action towards a common goal or (2) if they agree on a common course of action and one person commits a tort in furtherance of that agreement, provided the course of action was tortious in itself": ***Raywalt Construction Co. Ltd v J.R.B.,*** 2005 ABQB 989 at para 334. The concerted action does not need to be tantamount to a conspiracy; it can be characterized as a "common enterprise voluntarily entered into to a significant degree": ***Raywalt*** at para 349; 361.

[389] In addition, a corporation may be held liable for fraudulent acts taken by its directing minds on its behalf and in furtherance of its interests:

> Once the dishonest employees are found to have been the directing minds of the company and once it is found that they were at the time of the commission of the dishonest acts acting in the course of their employment, in the sense that they were carrying out the enterprise and policies of the corporate employer, then their dishonest actions are attributed to the company whose liability in criminal law follows: ***Canadian Dredge and Dock Co v The Queen*** [1985] 1 SCR 662 at para 58.

[390] In deciding whether to hold a corporation liable in the civil context, a court may also consider whether imposing liability on the corporation is in the public interest: ***Deloitte & Touche v Livent Inc. (Receiver of)***, 2017 SCC 63 at para 104.

[391] A defendant cannot rely on an exclusionary clause in a contract where the defendant's fraudulent misrepresentation induced the plaintiff to enter into the contract: ***Condominium Plan No. 822 2960 (Owners) v 75252 Manitoba Ltd.,*** 1999 ABQB 111 at para 48; ***TWT*** at para 18; ***1018429 Ontario Inc v Fea Investments Ltd,*** (1999) 125 OAC 88 at para 50-54.

[392] A defendant also cannot rely on the plaintiff's lack of due diligence, or that the dishonesty was easily discovered, as a defence to fraudulent misrepresentation: ***Performance Industries Ltd. v Sylvan Lake Golf & Tennis Club Ltd.,*** 2002 SCC 19 at para 67: "It should not, I think, lie in his mouth to say that he should not be responsible for what followed because his fraud was so obvious that it ought to have been detected".

[393] The Supreme Court cited with approval the decision of Southin J. (as she then was) in ***United Services Funds (Trustees of) v Richardson Greenshields of Canada Ltd,*** (1988) 22 BCLR (2d) 322 at para 63-64 where she explained that a victim's gullibility offers the fraudster no defence:

> Once the plaintiff knows of the fraud, he must mitigate his loss but, until he knows of it, in my view, no issue of reasonable care or anything resembling it arises at law.
>
> And, in my opinion, a good thing, too. There may be greater dangers to civilized society than endemic dishonesty. But I can think of nothing which will contribute to dishonesty more than a rule of law which requires us all to be on perpetual

guard against rogues lest we be faced with a defence of "Ha, ha, your own fault, I fool you". Such a defence should not be countenanced from a rogue.

Damages

[394] A plaintiff who shows that they entered into a contract as a result of fraudulent misrepresentation is entitled to an award of damages to compensate it for the losses it experienced as a result of the misrepresentation: ***Doyle v Olby (Ironmongers) Ltd,*** [1969] 2 All ER 119 at 122; ***Royal Bank of Canada v Benchmark Real Estate Appraisals Ltd***, 2015 ABQB 288 at para 40.

Did the Defendants Commit Civil Fraud?

[395] With the exception of Mr. Orriss, each of the Plaintiffs in this case has discharged their onus and has established the liability of the Defendants for civil fraud. Because the particulars of the fraud vary between Plaintiffs, and some Plaintiffs raise legal issues that others do not, this section considers each Plaintiff's case individually. Some issues with respect to the liability of the Defendants arise for multiple Plaintiffs; the issues are discussed most comprehensively in the analysis of the claims of Mr. Kowal and Ms. Kowal, with which I begin.

Raymond David Kowal

[396] Mr. Kowal has discharged his burden of showing that the Defendants are liable for the losses he incurred as a result of purchasing the common shares and flow-through shares in Sun Star.

[397] First, the evidence shows that Mr. Hartland, Mr. McCormick and Rizopoulos made false representations to Mr. Kowal.

[398] In the Investor Presentation and Business Plan they made false representations to Mr. Kowal about the 4-32 well, the founders' investment and the shares held by the founders. Mr. Rizopoulos wrote those documents, but Mr. Hartland and Mr. McCormick were provided with many drafts of them, had the opportunity to comment upon and revise them, and provided them to Mr. Kowal knowing the information they contained.

[399] Further, at meetings attended by all three individual defendants prior to his purchase of the common shares, Mr. Kowal was given false information about the 4-32 well and information that tended to confirm the false information in the Business Plan about the share structure of Sun Star. He was also told falsely that the investors would not take a draw or be paid from cash flow, although Mr. McCormick later qualified that information by telling Mr. Kowal that while pay was to be performance based, the issue was to be determined.

[400] In addition, Mr. Rizopoulos repeated to Mr. Kowal the false information that the founders had invested $2,500,000. Mr. Hartland and Mr. McCormick were not present at the meeting when that additional false statement was made.

[401] During the flow-through share process, the false representations to Mr. Kowal came from Mr. McCormick and Mr. Rizopoulos; Mr. Hartland did not meet with Mr. Kowal at that time. Mr. Kowal was falsely told at a meeting with Mr. McCormick and Mr. Rizopoulos that the 4-32 well had come back on production and was producing 250-300 bbls/d and that amount had been confirmed by scouts. Mr. McCormick and Mr. Rizopoulos also gave Mr. Kowal projections about the 13-29 well that had no basis in the facts available at that time.

[402] Second, the evidence shows that Mr. Hartland, Mr. McCormick and Mr. Rizopoulos made these representations to Mr. Kowal with the requisite level of knowledge of their falsity. They all knew that the information they provided to Mr. Kowal about the 4-32 well, the founders' investment and the shares they held in Sun Star was false. They knew that it was not true to say that they would not take a draw or be paid from cash-flow. In addition, Mr. McCormick and Mr. Rizopoulos provided Mr. Kowal with projections about the 13-29 well's future performance without any thought to the truth or accuracy of those projections, and without regard to the actual information available to them about the 13-29 well.

[403] Third, the evidence shows that Mr. Kowal relied upon the false representations made by Mr. Hartland, Mr. McCormick and Mr. Rizopoulos in deciding to purchase the common shares and flow-through shares.

[404] Finally, the evidence shows that Mr. Kowal suffered a loss as a result of his reliance. He paid $100,000 for common shares and another $100,000 for flow-through shares and lost the entirety of that investment due to the collapse of Sun Star.

[405] I also find the Defendants to be jointly liable for the misrepresentations on which Mr. Kowal relied. It does not matter that Mr. Rizopoulos prepared the documents, who spoke at the meetings attended by all of them, or that on some occasions Mr. Hartland was not present. This case falls within the principles set out in ***The Koursk*** and discussed in ***Raywalt***. Mr. Hartland, Mr. McCormick and Mr. Rizopoulos acted in concert on a common enterprise. They all knew the information that investors were being given, and they knew that in material respects that information was false. I can infer from the evidence and the facts as discussed above, that they together created a scheme to attract investors despite the fact that, when described honestly and accurately, the investment they were marketing was not especially attractive. They wanted to sell Sun Star shares, and none of them were concerned with ensuring that they did so honestly and truthfully. That from time to time one took a more active role does not change the collective nature of their conduct and responsibility. They are jointly liable for fraudulent misrepresentations made in pursuit of the common fraudulent enterprise in which they engaged.

[406] The evidence also establishes the Defendant Sun Star's liability for the misrepresentations made by Mr. Hartland, Mr. McCormick and Mr. Rizopoulos to Mr. Kowal. Mr. Hartland, Mr. McCormick and Mr. Rizopoulos were the directing minds of Sun Star and acting in furtherance of its enterprise and objectives when seeking investors in its common shares and flow-through shares, such that the principle of corporate identity applies. The public interest favours the application of the corporate identity doctrine; it favours holding Sun Star accountable for the frauds perpetrated by its directing minds to generate the equity and cash it needed to further its corporate endeavours.

[407] The evidence before me shows that Mr. Kowal could have avoided being duped had he reviewed the materials he was given with a more skeptical eye. The Defendants' fraud was not executed with much sophistication, and their own materials hinted at the falsity of the representations they were making. The documents themselves should have alerted Mr. Kowal to the need to ask critical questions about the information he was being given, to at minimum ask for legible copies of the production data and graphs for the 4-32 well and to ask for an explanation of the differences between the Investor Presentation and the Business Plan.

[408] But the law quite properly prevents the Defendants from escaping liability simply because Mr. Kowal was too trusting. That Mr. Kowal took them at their word, and did not pick

up on the clues suggesting that what they said ought not to be believed, does not allow them to avoid their legal and moral responsibility for the fraud they committed.

[409] I note in this respect that having seen Mr. Hartland, Mr. McCormick and Mr. Rizopoulos testify I understand why Mr. Kowal believed and trusted them. They tell their story with an apparent sincerity that gives it a veneer of truth even when, based on the totality of the evidence, I can see that it was not.

[410] The Defendants submitted in argument that the things that could have alerted Mr. Kowal to the fact that the information he received was false show that they did not intend to deceive Mr. Kowal. They also pointed out that Sun Star was a legitimate business as evidence of their claim that they did not intend to deceive the Plaintiffs. It may not have succeeded, but it acquired assets and the Defendants worked hard to make those assets a success.

[411] Assuming without deciding that the test for fraudulent misrepresentation includes an intention to deceive, I do not accept the Defendants' submission on this point. It does not account for the fact that the Defendants made false representations on numerous occasions and on several facts important to Mr. Kowal's decision to invest. Mr. Hartland, Mr. McCormick and Mr. Rizopoulos's consistent disregard for the truth, and willingness on numerous occasions to state facts they knew to be untrue, show an intention to deceive that a certain clumsiness in execution does not negate.

[412] It is true that Sun Star was not itself a fraud, and money invested by Mr. Kowal and the other Plaintiffs was in fact used to pursue its oil and gas ventures. What was a fraud, however, was the manner in which the Defendants persuaded Mr. Kowal to invest in Sun Star. Had the Defendants told Mr. Kowal the truth – that they had acquired the assets for less than $190,000, that the adjacent 4-32 well had been shut in after three months when its production dropped to 59 bbls/d, that they had put none of their own money at risk, and that they already held 10,000,000 shares for which they paid nothing, it is most unlikely that he would have invested $500,000 in their venture (when adding in the investment of Eagle Tree and Ms. Kowal). Instead of telling Mr. Kowal those true facts the Defendants constructed a false narrative to make Sun Star seem like a desirable low-risk high-reward venture; they intended to deceive him, and they did so.

[413] I accept the Defendants' position that Mr. Kowal's claim against the Defendants is constrained by the pleadings; the law clearly provides that pleadings must identify and sufficiently particularize a claim of fraudulent misrepresentation for it to be properly before the Court.

[414] The Amended Amended Amended Statement of Claim filed December 22, 2015 sufficiently particularizes Mr. Kowal's claim of fraudulent misrepresentation in relation to the 4-32 well, the founders' investment and the shares that had been issued to the founders. It does not specifically refer to the shares in the Business Plan but it does identify the stated net asset value per share of $3.85 as one of the "deceitful and fraudulent statements and representations" made by the Defendants; this gave the Defendants sufficient notice that the honesty of their reported shares was at issue.

[415] The Amended Amended Amended Statement of Claim does not, however, allege that the statements made by Mr. Hartland, Mr. McCormick and Mr. Rizopoulos about how the directors and officers would be paid were a deceitful and fraudulent statement and representation. It

identifies the amount they took in salary as an issue in relation to breach of fiduciary duty and oppression, but not as a fraudulent and deceitful statement.

[416] It is difficult to determine whether the pleadings in this case should constrain this Court's consideration of the false statements made by Mr. Hartland, Mr. McCormick and Mr. Rizopoulos about their pay. It may be that the Defendants had sufficient notice of the case they had to meet given the pleadings as a whole: ***40 Sunpark Plaza Inc. v 850453 Alberta Inc.***, 2007 ABQB 54 at para 43. On the other hand, the pleadings impugn the salaries taken by Mr. Hartland, Mr. McCormick and Mr. Rizopoulos based on their unreasonableness, not based on what was said about them or on the Plaintiffs having been misled. At trial, counsel for Mr. Hartland and Mr. McCormick objected to consideration of the pay issue. He said that the Plaintiffs had sought a further amendment to their pleadings to include this claim, and that further amendment was denied.

[417] Without endorsing a technical approach to pleadings, I am satisfied that I ought not to include any false statements made about salaries in my assessment of whether the Defendants committed fraudulent misrepresentation.

[418] Based on the other false statements made to Mr. Kowal, however, and the analysis previously set out, the Defendants are nonetheless jointly liable to him for the $200,000 loss he suffered as a result of purchasing the common and flow-through shares in Sun Star.

Janet Irene Kowal

[419] Ms. Kowal has discharged her burden of showing that the Defendants are liable for the losses she incurred as a result of purchasing the common shares and flow through shares in Sun Star.

[420] While Ms. Kowal testified that Mr. Kowal repeated false representations made by the Defendants, and I accepted her testimony on this point, her central claim was that she made the decision to invest in Sun Star based on Mr. Kowal's advice and information. She did not speak to Mr. Hartland, Mr. McCormick or Mr. Rizopoulos, and she did not review the Investor Presentation or Business Plan. Mr. Kowal did so, however, and he relied on the fraudulent misrepresentations made to him not only in deciding to buy the common shares and flow-through shares, but also in advising Ms. Kowal to do so.

[421] The issue with Ms. Kowal's claim is, therefore, whether the fraudulent misrepresentations to her husband, on which he relied in advising her to buy common shares and flow through shares in Sun Star, are sufficient to discharge her onus of showing that the Defendants are liable to her for fraudulent misrepresentation. Does the fact that the fraudulent misrepresentations were not made directly to her shield the Defendants from liability?

[422] It does not. I accept that in some circumstances fraudulent misrepresentations not having been made directly to a plaintiff may support an argument against liability for those misrepresentations. I can imagine a scenario where X makes a false statement to Y knowing that Y has no reason to rely on the statement, and will not do so; Y believes the false statement but does not rely on it; Y then repeats the statement to Z, who also believes the statement and does rely on it, to their loss. I think X might have an argument that they cannot be held responsible for the false statement having been repeated to Z when they did not intend for it to be, did not benefit from it being repeated and, perhaps, did not anticipate that it would be.

[423] Whether or not X would succeed in that argument, the case before me is entirely different from that hypothetical. Mr. Hartland, Mr. McCormick and Mr. Rizopoulos knew that Ms. Kowal was making an investment based on the advice and information provided by her husband. They must have done, since she had no other basis on which she could have decided to make the investment; they had not spoken with her or provided her with any information. It would have been obvious and apparent to Mr. Hartland, Mr. McCormick and Mr. Rizopoulos that Ms. Kowal was going to rely on the advice and information of Mr. Kowal, since he was directly connected to her and the person to whom they had given the information about the Sun Star investment. In addition, all of the Defendants knew of – and indeed directly profited from – Ms. Kowal's decision to invest in Sun Star based on her husband's advice. There is no meaningful separation between the Defendants' fraudulent misrepresentations, Ms. Kowal's decision to invest in Sun Star, and the consequent loss she suffered.

[424] The law seems to accept it as obvious that a fraudster who relies on intermediaries to execute the fraud, including innocent intermediaries, can be held accountable as if they had executed the fraudulent act themselves. In ***R v Stoltz***, (1993) 84 CCC (3d) 422, the British Columbia Court of Appeal found *prima facie* evidence that Mr. Stoltz had committed a fraud on the Court when he lied to his lawyer, and that lawyer repeated the lie to the Court: "Mr. Stoltz through the intermediary of the duped solicitor, has perpetrated a fraud on the court": ***Stoltz*** at 426. In ***R v Steinhubl***, 2010 ABQB 602 Bielby J (as she then was) found at para 98 that the Crown had proven "the essential element of the use of deceit, falsehood or other fraudulent means" where the Crown had proven that the accused arranged to have misrepresentations made "through a chain of intermediaries". She found at para 101 that the "accused directly or indirectly but knowingly induced the straw buyers to make these misrepresentations".

[425] Here, Mr. Hartland, Mr. McCormick and Mr. Rizopoulos duped Mr. Kowal; Mr. Kowal then advised Ms. Kowal based on the false information with which they had provided him. Ms. Kowal relied on that advice and suffered a loss for which the Defendants are as liable as if they had made the false representations directly to Ms. Kowal.

[426] For the reasons set out with respect to Mr. Kowal, that liability extends to Sun Star, and I reject the other arguments made by the Defendants to avoid liability.

[427] The Defendants are jointly liable to Ms. Kowal for the $200,000 she lost as a result of her purchase of the common shares and flow-through shares in Sun Star.

Eagle Tree Investments

[428] As noted, Mr. and Ms. Kowal own Eagle Tree and Mr. Kowal is the President of Eagle Tree, making decisions on its behalf.

[429] Eagle Tree has discharged its burden of showing that the Defendants are liable for the losses it incurred as a result of purchasing the common shares in Sun Star. Because Mr. Kowal was the directing mind and made decisions for Eagle Tree, the Defendants' liability to Eagle Tree rests on the same foundations as their liability to Mr. Kowal. The fraudulent misrepresentations they made to Mr. Kowal were misrepresentations to him both personally and in his capacity as the President of Eagle Tree. The reasons provided above with respect to Mr. Kowal are adopted here with respect to Eagle Tree.

[430] The Defendants are jointly liable to Eagle Tree for the $100,000 it lost as a result of its purchase of common shares in Sun Star.

Otto David Cutts

[431] Mr. Cutts has discharged his burden of showing that the Defendants are liable for the losses he incurred as a result of purchasing the common shares and flow through shares in Sun Star.

[432] First, the evidence shows that Mr. Hartland, Mr. McCormick and Rizopoulos, made false representations to Mr. Cutts.

[433] As was the case with Mr. Kowal, through the Investor Presentation and Business Plan Mr. Hartland, Mr. McCormick and Mr. Rizopoulos made false representations about the 4-32 well, the founders' investment and the shares held by the founders. In addition, and again like Mr. Kowal, at meetings attended by all three individual defendants prior to his purchase of the common shares, Mr. Cutts was given false information about the 4-32 well and information that tended to confirm the false information in the Business Plan about the share structure of Sun Star.

[434] In addition, at a meeting with Mr. Hartland, Mr. McCormick and Mr. Rizopoulos in August 2011, Mr. Cutts was falsely told that the production from the 4-32 well had been verified by reports from scouts.

[435] During the flow-through share process, Mr. Cutts largely relied on information with which he had previously been provided. The only new information he was given were the projections by Mr. McCormick and Mr. Rizopoulos about the 13-29 well that had no basis in the facts available to Mr. McCormick and Mr. Rizopoulos at that time.

[436] Second, for the reasons set out in the analysis of Mr. Kowal's claim, the evidence shows that Mr. Hartland, Mr. McCormick and Mr. Rizopoulos made these representations to Mr. Cutts with the requisite level of knowledge of their falsity.

[437] Third, the evidence shows that Mr. Cutts relied upon the false representations made by Mr. Hartland, Mr. McCormick and Mr. Rizopoulos in deciding to purchase the common shares and flow-through shares.

[438] Finally, the evidence shows that Mr. Cutts suffered a loss as a result of his reliance. He paid $60,000 for common shares, and another $30,000 for flow-through shares, and lost the entirety of that investment due to the collapse of Sun Star.

[439] For the reasons set out with respect to Mr. Kowal, the Defendants are jointly liable to Mr. Cutts, and I reject the other arguments made by the Defendants to avoid liability.

[440] Thus, I find the Defendants jointly liable for the $90,000 in losses suffered by Mr. Cutts by virtue of his purchase of the common shares and flow through shares in Sun Star.

Lois M. Cutts

[441] Ms. Cutts has discharged her burden of showing that the Defendants are liable for the losses she incurred as a result of purchasing the common shares and flow through shares in Sun Star.

[442] Like Ms. Kowal, Ms. Cutts testified that Mr. Cutts repeated to her some of the fraudulent misrepresentations made by the Defendants, including in her case the misrepresentation that scouts had verified the production from the 4-32 well as 400 bbls/d. Also like Ms. Kowal,

however, Ms. Cutts' evidence was primarily that she relied on the advice of Mr. Cutts in deciding to purchase the common shares and flow-through shares of Sun Star.

[443] For the reasons set out in my analysis of Ms. Kowal's claim, I find the Defendants jointly liable to Ms. Cutts for the fraudulent misrepresentations made to Mr. Cutts that informed his advice to Ms. Cutts to purchase the common shares and flow through shares in Sun Star. Specifically, they are jointly liable to her for the $110,000 in losses she suffered as a result of the $60,000 she spent on common shares and the $50,000 she spent on the flow through shares.

Marc and Terry Lynn Clement

[444] Mr. and Ms. Clement have discharged their burden of showing that the Defendants are liable for the losses they incurred as a result of purchasing the common shares in Sun Star. I discuss their claims together because they both attended the meeting where the misrepresentations were made, and they both received the Investor Presentation and the Business Plan.

[445] First, Mr. and Ms. Clement were provided with false information in the Investor Presentation about the 4-32 well, the founders' investment and the shares issued to the founders. At their meeting in June 2011 with Mr. McCormick and Mr. Rizopoulos, Mr. and Ms. Clement were told that the production from the 4-32 well was 400 bbls/d and also that the founders had invested $2,500,000. All of that information was false.

[446] Second, for the reasons set out earlier in the analysis of Mr. Kowal's claim, the Defendants provided that false information to Mr. and Ms. Clement with the requisite knowledge of its falsity.

[447] Third, the evidence shows that Mr. and Ms. Clement relied on that false information and suffered a loss. In particular, they lost the $50,000 they spent acquiring common shares in Sun Star.

[448] For the reasons set out in my analysis of Mr. Kowal's claim, the Defendants are jointly liable for that loss, and I reject all of the arguments made by the Defendants to avoid liability.

Neil Gordon Devitt

[449] Mr. Neil Devitt has discharged his burden of showing that the Defendants are liable for the losses he incurred as a result of purchasing the flow through shares in Sun Star.

[450] Unlike Ms. Kowal and Ms. Cutts, Mr. Neil Devitt did not rely on the advice of Mr. Cutts in deciding to purchase his shares. He did, however, rely on the fraudulent misrepresentations made to Mr. Cutts that Mr. Cutts then repeated to him. For the reasons set out in my analysis of Ms. Kowal's claim, I find the Defendants liable to Mr. Devitt for the fraudulent misrepresentations made to Mr. Cutts and repeated to Mr. Devitt. The evidence shows that Mr. Devitt relied on those misrepresentations and suffered a loss. They were misrepresentations made through an innocent intermediary for which the Defendants are responsible. Further, the misrepresentations were made with the intention to deceive people to whom they were repeated as well as to the people to whom they were made.

[451] For the reasons set out with respect to Mr. Kowal, that liability extends to all of the Defendants, and I reject the arguments made by them to avoid liability.

[452] The Defendants are jointly liable to Mr. Neil Devitt for the $70,000 he lost as a result of spending $70,000 to purchase flow through shares in Sun Star.

Donald S. Devitt

[453] Mr. Donald Devitt has discharged his burden of showing that the Defendants are liable for the losses he incurred as a result of purchasing the flow through shares in Sun Star. The basis for the Defendants' liability to Mr. Donald Devitt is the same as for their liability to Mr. Neil Devitt.

[454] The Defendants are jointly liable to Mr. Donald Devitt for the $30,000 he lost as a result of spending $30,000 to purchase flow through shares in Sun Star.

Lerry Hubbs

[455] Mr. Hubbs has discharged his burden of showing that the Defendants are liable for the losses he incurred as a result of purchasing the flow through shares in Sun Star.

[456] Mr. McCormick told Mr. Hubbs that he and Mr. Hartland had each invested $1,250,000 in Sun Star, and that Mr. Rizopoulos had provided $1,400,000 in property. That was not true. In addition, Mr. McCormick told Mr. Hubbs that the 4-32 well had a 285 bbls/d flow rate. That was also not true. Mr. McCormick made these statements knowing them to be untrue. The evidence shows that Mr. Hubbs relied on these statements in deciding to spend $200,000 in flow through shares.

[457] For the reasons given in the analysis of Mr. Kowal's claim, the Defendants are jointly liable for the false statements made by Mr. McCormick to Mr. Hubbs, and I reject the various arguments made by the Defendants to avoid liability.

[458] As a result, I find the Defendants jointly liable to Mr. Hubbs for the $200,000 loss he suffered as a result of purchasing the flow through shares in Sun Star.

Robert Knoll

[459] Mr. Knoll has discharged his burden of showing that the Defendants are liable for the losses he incurred as a result of purchasing the flow through shares.

[460] Mr. McCormick showed the Investor Presentation to Mr. Knoll and represented to Mr. Knoll that the 4-32 well had produced 400 bbls/d, which Mr. Knoll understood to be the case over the well's first three months of production. Mr. McCormick told Mr. Knoll that the founders had invested $2,500,000 in Sun Star. Neither of these facts were true. Mr. McCormick provided this information to Mr. Knoll knowing it to be false. The evidence shows that Mr. Knoll relied on these statements in deciding to spend $50,000 to purchase flow-through shares, and to advise his wife Ms. Knoll to spend $50,000 to purchase flow-through shares.

[461] For the reasons given in the analysis of Mr. Kowal's claim, the Defendants are jointly liable for the false statements made by Mr. McCormick to Mr. Knoll, and I reject the various arguments made by the Defendants to avoid liability.

[462] As a result, I find the Defendants jointly liable to Mr. Knoll for the $50,000 loss he suffered as a result of purchasing the flow through shares in Sun Star.

Mei Choon Knoll

[463] Although she did not testify, Ms. Knoll has discharged her burden of showing that the Defendants are liable for the losses she incurred as a result of purchasing the flow through shares. I accept Mr. Knoll's evidence that Ms. Knoll relied entirely on his advice in purchasing the shares. For the reasons given above with respect to Ms. Kowal and Ms. Cutts, I find the Defendants liable for the loss suffered by Ms. Knoll in relying on advice informed by the false representations made by Mr. McCormick to Mr. Knoll.

[464] For the reasons given in the analysis of Mr. Kowal's claim, the Defendants are jointly liable for the advice given to Ms. Knoll based on Mr. McCormick's false representations to Mr. Knoll, and I reject the arguments made by the Defendants to avoid liability.

[465] The Defendants are jointly liable to Ms. Knoll for the $50,000 loss she suffered as a result of purchasing the flow through shares in Sun Star.

Kevin Orriss

[466] Mr. Orriss has not discharged his burden of showing that the Defendants are liable for the losses he incurred as a result of purchasing the common shares and flow through shares in Sun Star.

[467] Unlike Ms. Knoll, Ms. Cutts and Ms. Kowal, Mr. Orriss did not make his investments based on the advice and direction of a third party. His situation is equivalent to that of Mr. Neil Devitt or Mr. Donald Devitt; he must present sufficient evidence of false representations having been passed on to him through Mr. Cutts, and that he relied on those false representations and suffered a loss.

[468] The evidence here is not sufficient. Mr. Orriss did not meet with the Defendants. I know that Mr. Orriss received the Investor Presentation and Business Plan. I do not, however, know what he did with those documents – whether he read them and relied on them. Mr. Donald Devitt did not read and rely on those documents even though he received them; I cannot thus assume that because Mr. Orriss received the documents, he necessarily read them. I have Mr. Cutts' evidence that he repeated to Mr. Orriss the false information he was given by the Defendants; I am not, however, satisfied based only on that evidence that that occurred. As noted earlier, I think it much more likely that someone will remember what was said to them and what information they thought was important, than that they will remember what they relayed to a third party. We do not have confirmatory testimony from Mr. Orriss. The only contemporaneous documentation about what Mr. Cutts told Mr. Orriss is the e-mail sending on the documents, and that e-mail does not repeat any of the false information given by the Defendants.

[469] I am not happy with this conclusion. Given the false information in the Investor Presentation and the Business Plan, and the importance of the information about the 4-32 well and the founders' investment to Mr. Cutts, I think it is quite possible that Mr. Orriss was given false information, that he relied upon it and that it caused his loss. But Mr. Orriss has to prove that this happened on the balance of probabilities and, in the absence of his evidence, I am not satisfied that he has done so.

Conclusion

[470] The Defendants are jointly liable to the Plaintiffs for a total amount of $1,150,000 apportioned between the Plaintiffs as set out above.

[471] The Defendants are also liable to pay pre-judgment interest on those amounts under the ***Judgment Interest Act*** RSA 2000 c J-1.

[472] If the parties cannot reach an agreement as to costs, they may arrange to appear before me to speak to that issue.

Heard on the 13-17th and 20-24th days of January, and 3-6th days of March, 2020
Dated at the City of Calgary, Alberta this 8th day of April, 2020.

A. Woolley
J.C.Q.B.A.

Appearances:

Shaun MacIsaac, Q.C.
for the Plaintiffs

Bradley Minuk
for the Defendants Sun Star Energy Inc., Lester Hartland and Robert McCormick.

Sandy Rizopoulos, Self-Represented