

**THE KING'S BENCH
Winnipeg Centre**

BETWEEN:

BANK OF MONTREAL,

applicant,

- and -

GENESUS INC., CAN-AM GENETICS INC. and GENESUS GENETICS, INC.

respondents.

IN THE MATTER OF: THE APPOINTMENT OF A RECEIVER PURSUANT TO SECTION
242 OF THE BANKRUPTCY AND INSOLVENCY ACTION, R.S.C.
1985 c. B-3, AS AMENDED AND SECTION 55 OF THE COURT
OF KING'S BENCH ACT, C.C.S.M. c. C280

**AFFIDAVIT OF ALLAN HERMAN
AFFIRMED: MAY 29, 2024**

MARR FINLAYSON POLLOCK LLP as agents for:

Barristers and Solicitors
240 River Avenue
Winnipeg, Manitoba
R3L 0B4

PETER HALAMANDARIS
Telephone: (204) 992-7092
Facsimile: (204) 992-7099
Email: peterh@mfplawco.com

File No. 2300187

WALDIN BARRISTERS

77 King Street West,
Suite 3000, P.O. Box 95
TD Centre North Tower
Toronto, Ontario
M5K 1G8

ALLAN HERMAN
(LSO #227551)
Telephone: (416) 364-7116
Email: allan.herman@waldin.ca
Lawyers for the plaintiff

**THE KING'S BENCH
Winnipeg Centre**

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AFFIDAVIT

I, ALLAN HERMAN, of the City of Toronto, in the Province of Ontario,

HEREBY AFFIRM AS FOLLOWS:

1. I am an Ontario lawyer practising in Toronto, Ontario. I have at all material times been the lawyer of record in an action brought by Sea Air International Forwarders Limited ("Sea Air") against Genesis Inc. ("Genesis"), and I thereby have knowledge of the matters deposed to herein.
2. Attached hereto as Exhibit "A" is a true copy of the statement of claim in Sea Air's action against Genesis, issued September 1, 2023.

3. The statement of claim was duly served, by personal service. As well, copies of the statement of claim were emailed to Trevor Klippenstein, Jodi Nigh and Mike Van Schepdael on September 11, 2023. A true copy of my email is attached hereto as Exhibit "B".

4. In the absence of a defence, Sea Air obtained default judgment on October 3, 2023. Attached hereto as Exhibit "C" is a true copy of Sea Air's judgment against Genesis.

5. After Sea Air obtained the judgment, we engaged Marr Finlayson Pollock LLP, in Manitoba, to register the judgment against three properties which, we determined, were owned by the judgment debtor. These registrations were effected on December 15, 2023.

6. Between the time we commenced Sea Air's action and the date on which its certificate of judgment was registered against title to the Genesis properties, the applicant herein, Bank of Montreal ("BMO"), registered collateral charges against each of these properties. Particulars of the registrations against the three properties, including Sea Air's certificates of judgment and BMO's mortgage, are set out in paragraph 30 of the affidavit of Ed Barrington, filed on behalf of BMO in support of its application.

7. It is Sea Air's position that the mortgage granted by Genesis to BMO was a fraudulent conveyance and a preference. The facts underlying this position are as follows¹:

- (a) According to the Barrington affidavit and the agreements between BMO and Genesis attached thereto as exhibits:
 - (i) the BMO financing was initiated in 2011 and was amended from time to time;
 - (ii) the financing agreements provided for security, including a GSA and guarantees, but not real property;
- (b) Included in Exhibit "II" of the Barrington affidavit (page 319) is a demand letter from BMO's lawyers attaching a notice of intention to enforce security addressed to "Genesis Inc., an insolvent person". The demand letter and notice are dated June 16, 2023.
- (c) Included in Exhibit "JJ" of the Barrington affidavit (page 388) is a demand letter from the lawyers for another secured creditor, Farm Credit Canada, also enclosing a notice of intention to enforce security under the *Bankruptcy and Insolvency Act*, addressed to "Genesis Inc., insolvent person". The demand letter and notice are dated June 21, 2023.

¹ Where I reference the Barrington affidavit, I am informed by that affidavit and believe the particular reference to be true. Otherwise, the facts are within my personal knowledge.

- (d) Sea Air's unpaid invoices, that were the subject matter of its judgment, were dated May 23, 30, June 6 and 26, 2023;
- (e) The stated consideration for the BMO mortgages was a 3.5 month forbearance set out in a forbearance agreement attached to Mr. Barrington's affidavit as Exhibit "KK". There is no indication that any further funds being advanced, or any other consideration besides this 3.5 month forbearance.
- (f) Section 95(1)(a) of the *Bankruptcy and Insolvency Act* provides that a charge on property made in favour of an arm's length creditor by an insolvent person with a view of giving that creditor a preference is void if made within three months before the "date of the initial bankruptcy event".
- (g) The "date of the initial bankruptcy event" is a defined term under the *BIA*. It is Sea Air's position that the definition would include the commencement of a receivership application in which a bankruptcy order is eventually made.

8. In the circumstances, I believe that when Genesis and BMO entered into the "forbearance agreement" and Genesis granted mortgages to BMO,

- (a) Genesis was insolvent;

- (b) BMO knew Genesis was insolvent;
- (c) Both Genesis and BMO knew that the mortgages would delay, disadvantage or defeat the interests of other creditors who could otherwise have looked to the real property assets which are the subject of the BMO mortgages;
- (d) The consideration for the BMO mortgages and the *bona fides* of BMO are in issue.

9. Attached hereto as Exhibit "D" is a true copy of a letter to Catherine Howden, of BMO's lawyers, dated March 11, 2024.

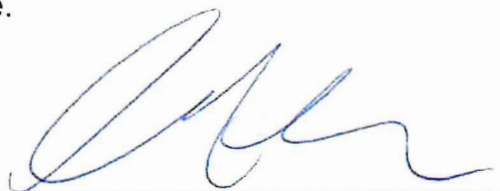
10. This affidavit is made in good faith in respect of a receivership application brought by BMO, and for no improper purpose.

AFFIRMED before me, at the City of)
Winnipeg, in the Province of Manitoba, this)
29th day of May, 2024)

Notary Public & Barrister-at-Law Entitled to)
Practice in and for the Province of Manitoba)

This is the original copy of the affidavit of)
ALLAN HERMAN affirmed the 29th day of May,)
2024, before me at which time I virtually saw)
and heard the deponent affirm this document)
and sign it.)

Allan Herman's identity was previously verified)
and known to me. I have an electronic copy of)
the affidavit virtually affirmed in my possession)
and I have verified the signature on this affidavit)
and confirmed that the signature herein)
matches the signature virtually observed.)



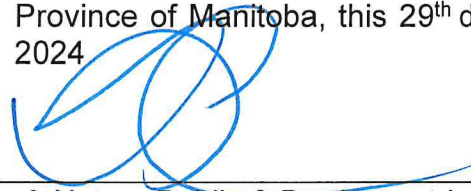
ALLAN HERMAN

On this ___ day of May 2024, having received)
the originally executed document, I have)
signed it.)

LAUREN L. GERGELY

A Barrister-at-Law Entitled to Practice in and)
for the Province of Manitoba)

This is Exhibit "A" referred to in the Affidavit of ALLAN HERMAN, virtually affirmed before me at the City of Winnipeg, in the Province of Manitoba, this 29th day of May, 2024

A handwritten signature in blue ink, consisting of several overlapping loops and a long horizontal stroke extending to the right.

A Notary Public & Barrister-at-Law Entitled
to Practice in and for
the Province of Manitoba

Court File No.



**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N :

SEA AIR INTERNATIONAL FORWARDERS LIMITED

Plaintiff

-and-

GENESUS INC.

Defendant

STATEMENT OF CLAIM

TO THE DEFENDANT(S)

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff(s). The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the plaintiff(s) lawyer(s) or, where the plaintiff(s) do(es) not have a lawyer, serve it on the plaintiff(s), and file it, with proof of service, in this court office, WITHIN TWENTY DAYS after this statement of claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

IF YOU PAY THE PLAINTIFF'S CLAIM, and \$1,000.00 for costs, within the time for serving and filing your statement of defence, you may move to have this proceeding dismissed by the court. If you believe the amount claimed for costs is excessive, you may pay the plaintiff's claim and \$400.00 for costs and have the costs assessed by the court.

TAKE NOTICE: THIS ACTION WILL AUTOMATICALLY BE DISMISSED if it has not been set down for trial or terminated by any means within five years after the action was commenced unless otherwise ordered by the court.

Date: September 1, 2023

Issued by

Local Registrar

Address of Court Office:

330 University Ave., 8th floor

Toronto, Ontario M5G 1R7

TO: **GENESUS INC.**
101 2nd Street, P.O. Box 278
Oakville MB R0H 0Y0

CLAIM

1. The plaintiff claims:
 - (a) The sum of \$315,686.35;
 - (b) interest thereon at pursuant to the provisions of the *Courts of Justice Act*;
 - (c) punitive damages of \$100,000.00;
 - (d) its costs of this action on a full indemnity basis;
 - (e) such further and other relief as this Honourable Court deems just.
2. The plaintiff ("SeaAir") is an Ontario Corporation having its registered office in Mississauga, Ontario and carrying on business throughout Canada and internationally as an international freight forwarder.
3. The defendant is a company incorporated pursuant to the laws of Manitoba carrying on the business of breeding and selling swine.
4. The plaintiff has provided freight forwarding services to the defendant, or the defendant's predecessor corporations, for over 15 years.
5. The services provided by the plaintiff to the defendant include:
 - (a) contracting for carriage, on the defendant's behalf, with the airline;
 - (b) coordinating with support services, veterinarians, the Canadian Food Inspection Agency ("CFIA") and other authorities with jurisdiction over the shipment of live animals;
 - (c) construction of specialized pens for safe and efficient transport of the animals, which pens are loaded onto the aircraft;
 - (d) arranging as needed, for the animal feed, water and rest on arrival in Toronto.
6. In the spring and summer of 2023, the parties negotiated arrangements for three swine shipments to South Korea.
7. The service provided by the plaintiff to the defendant involves significant time and effort and advance planning and arrangements weeks in advance of a flight.

8. In each instance:

- (a) the defendant requested a quote, the plaintiff provided a quote and the defendant agreed to the quote;
- (b) the plaintiff arranged carriage with the airline, prepared a load plan, built specialized pens for the animals, and coordinated with the various authorities, professionals and service providers to obtain the permits, goods and services required for the shipment;
- (c) the defendant trucked the animals to Toronto Pearson International Airport, via the plaintiff's premises, where the plaintiff enabled the defendant's employee to feed, water and rest the animals, with feed purchased from the plaintiff and water supplied by the plaintiff;
- (d) the plaintiff's project coordinator attended at the airport to plan and organize loading the animals into the pens and the pens onto the aircraft, to address any issues that arose and make final arrangements with the various authorities and services required to complete the shipment and its duties under its contract with the plaintiff;
- (e) the parties agreed that the plaintiff's services are provided subject to the CIFFA standard trading conditions.

9. The plaintiff duly invoiced the defendant in accordance with the terms that the parties had agreed to as well as for feed at \$25 per bag as required by the defendant.

10. The plaintiff provided the agreed services and rendered the following invoices:

| <u>DATE</u> | <u>INVOICE</u> | <u>AMOUNT</u> |
|----------------------|----------------|---------------------|
| 05/23/23 | 555104 | \$101,884.20 |
| 05/30/23 | 555179 | 500.00 |
| 06/06/23 | 555283 | 102,805.86 |
| 06/26/23 | 555519 | 32,971.90 |
| 06/26/23 | 555520 | <u>77,524.39</u> |
| TOTAL BALANCE OWING: | | <u>\$315,686.35</u> |

11. These invoices were due when rendered as – the defendant well knew – the plaintiff had been obliged to pay the airline for carriage and for the various other goods and services it had obtained from third parties on the defendant's behalf.

12. The defendant has failed to pay any of the foregoing amounts despite demand.
13. Rather than pay anything to the plaintiff, the defendant engaged another forwarder for its next shipment, but still attempted to use the plaintiff's facilities to water and rest its animals for the shipment it arranged through the other forwarder.
14. The plaintiff says that the defendant never intended to pay these amounts when due, or at all, and intentionally exploited the plaintiff's good faith to appropriate over \$300,000 in credit.
15. The defendant has flouted its contractual obligations in a high-handed and outrageous fashion.
16. The defendant corporation has an Ontario extraprovincial registration and carries on business in Ontario, as well as in Manitoba and elsewhere. In the event the plaintiff is obliged to serve the claim in Manitoba, it relies on rule 17.02(f) of the *Rules of Civil Procedure* to serve the Statement of Claim outside of Ontario without leave of the court, on the following grounds:
 - (a) the agreement between the parties was made in Ontario,
 - (b) the contract provides that it is to be governed by or interpreted in accordance with the law of Ontario and that the courts of Ontario are to have jurisdiction over legal proceedings in respect of the contract,
 - (c) the breach was committed in Ontario.

The plaintiff proposes that this action be tried in the City of Toronto.

Dated: September 1, 2023

WALDIN BARRISTERS

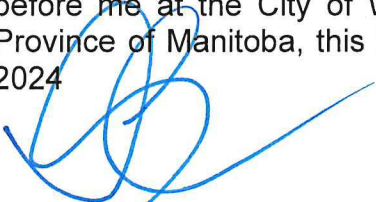
77 King Street West
Suite 3000, Box 95
TD Centre North Tower
Toronto ON M5K 1G8

Allan Herman (LSO #227551)
(416) 364-7116
allan.herman@waldin.ca

Lawyers for the plaintiff

| | | | | |
|---|--|-----------|--|--|
| SEA AIR INTERNATIONAL FORWARDERS LIMITED | | v. | GENESUS INC. | |
| Plaintiff | | | Defendant | |
| Court File No.: | | | | |
| | | | ONTARIO SUPERIOR COURT OF JUSTICE (PROCEEDING COMMENCED AT TORONTO) | |
| | | | STATEMENT OF CLAIM | |
| | | | WALDIN BARRISTERS 77 King Street West, Suite 3000, P.O. Box 95 TD Centre North Tower Toronto ON M5K 1G8 Allan Herman (LSO #227551) Telephone: (416) 364-7116 <i>allan.herman@waldin.ca</i> Lawyers for the plaintiff | |

This is Exhibit "B" referred to in the Affidavit of ALLAN HERMAN, virtually affirmed before me at the City of Winnipeg, in the Province of Manitoba, this 29th day of May, 2024



A Notary Public & Barrister-at-Law Entitled
to Practice in and for
the Province of Manitoba

From: allan.herman allan.herman@waldin.ca

Subject: Sea Air v. Genesis

Date: September 11, 2023 at 1:56 PM

To: Trevor Klippenstein tklippenstein@genesus.com, Jodi Nigh jnigh@genesus.com, Mike Van Schepdael mike@genesus.com

Cc: Mary Overington maryoverington@waldin.ca



We are the lawyers for Sea Air International Forwarders Limited, and have been retained to collect various defaulted payments from Genesis Inc.

Attached please find for your reference a copy of Sea Air's statement of claim that was personally served on James Long, a director of Genesis, last Friday evening. It was served in Ontario, at his home address.

We are writing to ensure that there is no confusion over Genesis' time limits to defend this action. Because Genesis was served in Ontario, the period for serving and filing your statement of defence is **twenty** days.

Genesis' last day to defend is therefore Friday, September 29, 2023. If it fails to do so, we will note Genesis in default and file for default judgment on Monday, October 2, 2023.

Please also note, that:

- there will be no extension of Genesis' deadlines **unless confirmed by me in writing**;
- our instructions at this time are **not to** extend Genesis' deadlines.

We would be pleased to discuss payment terms with you at an early opportunity, so that the parties may avoid unnecessary legal costs.



Statement of
Claim-...23.pdf

Allan Herman
WALDIN BARRISTERS
77 King Street West
Suite 3000, Box 95,
TD Centre North Tower,
Toronto, Ontario M5K 1G8

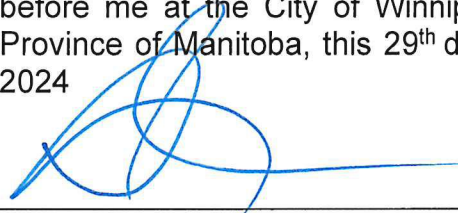
Telephone: 416-364-6761
Direct Line: 416-364-7116
Fax: 416-364-3866

MAILROOM LOCATED ON 27TH FLOOR FOR DELIVERIES

PRIVILEGED AND CONFIDENTIAL

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This is Exhibit "C" referred to in the Affidavit of ALLAN HERMAN, virtually affirmed before me at the City of Winnipeg, in the Province of Manitoba, this 29th day of May, 2024



A Notary Public & Barrister-at-Law Entitled
to Practice in and for
the Province of Manitoba



Court File No. CV-23-00705416-0000

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN :

SEA AIR INTERNATIONAL FORWARDERS LIMITED

Plaintiff

-and-

GENESUS INC.

Defendant

JUDGMENT

ON READING the statement of claim in this action and the proof of service of the statement of claim on the defendant, filed, and the defendant, having been noted in default,

1. IT IS ORDERED AND ADJUDGED that the defendant, pay to the plaintiff the sum of \$319,796.33 and the sum of \$ 1270.00 for costs of this action.

2. THIS JUDGMENT BEARS INTEREST at a rate of 7 per cent per annum from its date and costs shall bear interest at the rate of 7 per cent per annum from its date.

Date: October 3, 2023

Digitally signed
by Marko
Stambolic
Date: 2023.10.03
15:12:44 -04'00'
Signed by Marko Stambolic
Local Registrar

Superior Court of Justice - Ontario
330 University Avenue, 8th floor
Toronto, Ontario M5G 1R7

| | | |
|---|-----------|--|
| SEA AIR INTERNATIONAL FORWARDERS LIMITED | v. | GENESUS INC. |
| Plaintiff | | Defendant |
| Court File No.: CV-23-00705416-0000 | | |
| | | ONTARIO SUPERIOR COURT OF JUSTICE (PROCEEDING COMMENCED AT TORONTO) |
| | | JUDGMENT |
| | | WALDIN BARRISTERS 77 King Street West, Suite 3000, P.O. Box 95 TD Centre North Tower Toronto ON M5K 1G8 Allan Herman (LSO #227551) Telephone: (416) 364-7116 <i>allan.herman@waldin.ca</i> Lawyers for the plaintiff |

This is Exhibit "D" referred to in the Affidavit of ALLAN HERMAN, virtually affirmed before me at the City of Winnipeg, in the Province of Manitoba, this 29th day of May, 2024

A handwritten signature in blue ink, consisting of a series of loops and a long horizontal stroke extending to the right.

A Notary Public & Barrister-at-Law Entitled
to Practice in and for
the Province of Manitoba

W A L D I N B A R R I S T E R S

77 King Street West, Suite 3000, Box 95, TD Centre North Tower, Toronto, Ontario, Canada M5K 1G8
Telephone: (416) 364-6761

March 11, 2024

Sent by email: howden@pitblado.com

Ms. Catherine Howden
Pitblado Law
2500-360 Main Street
Winnipeg MB R3C 4H6

Dear Ms. Howden:

Re: Sea Air International Forwarders Limited v. Genesis Inc.

This is further to our previous correspondence in this matter.

Kindly advise if it is the Bank's intention to proceed with its receivership after the farm debt mediation stay expires.

As well, having had the opportunity to review the Bank's evidence on its application, as well as related information, it is our view that the Bank's registration of mortgages against Genesis' real estate on October 12, 2023, are of questionable validity. The following are the primary facts that are germane to this view:

- We do not know whether the Bank was aware that our client had sued Genesis for over \$300,000 at the time Genesis granted the mortgage, but Genesis was certainly so aware.
- In any event, to the Bank's knowledge, Genesis was insolvent at the time. Indeed, Genesis' financial difficulties were clearly the Bank's motivation in obtaining the mortgages.
- The Bank had advanced 100% of the debt owed by Genesis on the strength of other security it obtained several years ago – apparently on all of Genesis' assets other than real property.
- No further funds were advanced in consideration of the mortgages.
- Genesis was motivated to treat the Bank favourably by transferring its only unsecured asset to the Bank. If the Bank is made whole, principals of Genesis who were personally at risk would benefit from that risk being alleviated.
- These transactions, however, would defeat, injure, delay or defraud creditors such as my client. This consequence would be obvious to the Bank at the time these mortgages were granted.

In our view, the safe harbour provision of the *Fraudulent Conveyances Act* does not protect the Bank in these circumstances. As noted above, there was no financial consideration for the mortgages. We appreciate that a forbearance agreement can constitute consideration but, in this case, it appears not to be *bona fide*. Aside from a three-month forbearance being trivial consideration in the circumstances, the forbearance is in the Bank's own interest and self-serving. This short forbearance is substantially identical to the look-back period under the *BIA*. Had the Bank obtained the mortgages and brought its receivership proceedings less than three months after the mortgages were granted, the date of appointment would have been treated as the "initial bankruptcy event" in the event a trustee in bankruptcy were subsequently appointed, and the mortgages would be presumed void as against the trustee.

Given the foregoing, we urge the Bank not to look to these mortgages in seeking its recourse against Genesis. Should it do so, and my client is disadvantaged as a consequence, we will recommend an action against the Bank and Genesis under the *Fraudulent Conveyances Act*.

Thank you for attention to the foregoing.

Yours truly,

WALDIN BARRISTERS

A handwritten signature in black ink, appearing to be 'Allan Herman', written in a cursive style.

Allan Herman
AH/mo