

COURT FILE NUMBER B301-163430

COURT COURT OF KING'S BENCH OF ALBERTA

JUDICIAL CENTRE CALGARY

MATTER IN THE MATTER OF THE *BANKRUPTCY AND
INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS
AMENDED,

AND IN THE MATTER OF THE NOTICE OF
INTENTION TO MAKE A PROPOSAL OF CLEO
ENERGY CORP.

Clerk's stamp

APPLICANT TRAFIGURA CANADA LIMITED

RESPONDENT CLEO ENERGY CORP.

DOCUMENT **APPLICATION**

ADDRESS FOR SERVICE **STIKEMAN ELLIOTT LLP**
AND CONTACT Barristers & Solicitors
INFORMATION OF 4200 Bankers Hall West
PARTY FILING THIS 888-3rd Street SW
DOCUMENT Calgary, AB T2P 5C5

Karen Fellowes, K.C. / Archer Bell
 Tel: (403) 724-9469 / (403) 724-9485
 Fax: (403) 266-9034
 Email: kfellowes@stikeman.com / abell@stikeman.com

Lawyers for the Applicant,
Trafigura Canada Limited

File No.: 137093.1030

NOTICE TO THE RESPONDENT

This application is made against you. You are a respondent.

You have the right to state your side of this matter before the Court.

To do so, you must be in Court when the application is heard as shown below:

Date: December 26, 2024

Time: 10:00 am

Where: Calgary, Alberta

Before Whom: The Honourable Justice M. Hollins

Go to the end of this document to see what you can do and when you must do it.

Purpose of Application:

1. The Applicant, Trafigura Canada Limited ("**Trafigura**"), in connection with Cleo Energy Corp.'s ("**Cleo**") proceedings under Division I of Part III of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, as amended (the "**BIA**", and such proceedings, the "**Proposal Proceedings**"), commenced by notice of intention to make a proposal filed on December 8, 2024 (the "**Filing Date**", and such notice, the "**NOI**"), seeks an Order for the following relief:
 - (a) abridging the time for service of notice of this Application, deeming service of notice of this Application to be good and sufficient, and declaring that there is no other person who ought to have been served with notice of this Application;
 - (b) granting a declaration that Cleo committed Termination Events (as that term is defined in a prepayment agreement dated July 9, 2024 (the "**Prepayment Agreement**")) prior to the Filing Date and, therefore, the outstanding balance of \$750,000 owing to Trafigura by Cleo (the "**Owed Amount**") pursuant to the Prepayment Agreement, which was always due and owing, matured prior to the Filing Date;
 - (c) authorizing Trafigura to exercise its right of set-off under the Prepayment Agreement with respect to the Owed Amount that arose prior to the Filing Date as, pursuant to section 97(3) of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, as amended (the "**BIA**"), despite the filing of the Notice of Intention to Make a Proposal (the "**NOI**") by Cleo;
 - (d) in the alternative, granting a declaration pursuant to section 69.4 of the BIA that the Stay of Proceedings should be lifted in order to allow Trafigura to exercise its right of set-off with respect to the Owed Amount;
 - (e) in the further alternative:
 - (i) a Court-ordered charge of \$750,000 in favour of Trafigura attaching to all of the assets and property of Cleo that shall rank in priority to all other charges, mortgages, liens, security interests and other encumbrances (the "**Trafigura Charge**"), except for any administrative charge in favour of the Proposal Trustee, its legal counsel, and Cleo's legal counsel in respect of their fees and disbursements (the "**Administrative Charge**"), and any charge in favour of a potential DIP lender (the "**DIP Lender Charge**"), both of which shall rank in priority to the Trafigura Charge; and

- (ii) granting a declaration that payment to Cleo of the November Oil Revenues (as defined herein) shall in no way prejudice Trafigura's right to claim set-off against the Owed Amount at a future date;
- (f) awarding costs of this Application to Trafigura; and
- (g) such further and other relief as counsel for Trafigura may advise.

Grounds for making this application:

Background

2. Trafigura has had a long-standing relationship with Cleo and has been marketing Cleo's crude oil for many years. In the spring of 2024, Cleo approached Trafigura for financing and, as a result, the parties signed two agreements:
 - (a) a commercial agreement dated July 12, 2024 (the "**Commercial Agreement**"); and
 - (b) the Prepayment Agreement whereby Trafigura agreed to advance Cleo \$1 million and Cleo agreed, *inter alia*, to grant Trafigura set-off rights
3. Trafigura had no knowledge of Cleo's pre-filing financial difficulties or issues with the Alberta Energy Regulator, which events gave rise to Termination Events (as that term is defined in the Prepayment Agreement), as such events were concealed from Trafigura by Cleo until after the Filing Date.
4. At no point prior to the Filing Date was Trafigura given notice of the impending insolvency or the events constituting Termination Events and willful breach of the Prepayment Agreement. Had Trafigura been given such notice, it could have then worked with Cleo to find a solution (as it had been working with Cleo over the past number of months to assist in managing its cash flows). However, given Cleo's actions, Trafigura was not given the opportunity to exercise its rights in the Prepayment Agreement (including set-off) until now.

Trafigura's Right of Set-Off

5. Pursuant to section 11.1 of the Prepayment Agreement, the occurrence of certain enumerated events constitute a Termination Event.
6. Pursuant to section 11.2 of the Prepayment Agreement, upon the occurrence of a Termination Event, Trafigura becomes entitled to take a number of different actions, including canceling all advances made pursuant to the Prepayment Agreement, declaring any advances to be

immediately due and payable by Cleo to Trafigura in cash and exercising any or all of its other rights, remedies, powers or discretions under the Transaction Documents (as defined in the Prepayment Agreement).

7. Prior to the Filing Date, had Cleo not concealed its financial difficulties and difficulties with the AER (as detailed in the Affidavit of Chris Lewis, sworn December 22, 2024 and the Affidavit of Chris Lewis, sworn December 23, 2024) which constitute Termination Events under the Prepayment Agreement, Trafigura would have been in a position to demand repayment and set-off the \$754,644.77 in funds owing to Cleo for November 2024 oil sales (the “**November Oil Revenues**”) against the Owed Amount.
8. Regardless, the Termination Events occurred before the Filing Date and the Owed Amount therefore became due and owing before the Filing Date and constitutes a pre-filing debt. As a pre-filing debt owed by Cleo, Trafigura is entitled to set-off against pre-filing debts owed to Cleo pursuant to section 97(3) of the BIA. The November Oil Revenues is revenue on oil sales accrued during the month of November 2024, prior to the Filing Date, and therefore constitute a pre-filing debt.
9. Furthermore, the entire premise of the Prepayment Agreement was to allow for fulsome set-off rights. The Owed Amount was due and owing, regardless of whether it had matured, as, for the purpose of set-off, a debt is payable regardless of whether it is payable now or at a future time.

Prejudice to Trafigura

10. If Trafigura is forced to pay the Owed Amount to Cleo at this time, it will suffer irreparable prejudice as it will lose the ability to claim its contractually bargained for set-off rights at a later date as the Cleo will have spent the Owed Amount on various pending expenses within the next three weeks and any further oil revenues collected by Trafigura will be post-filing and therefore will not be eligible for set-off against pre-filing debts.
11. This prejudice could be partially mitigated by preserving Trafigura’s right to assert and argue its set-off rights at a later date and protecting such right with the Trafigura Charge, though some prejudice will still remain as such a charge will only preserve Trafigura’s right to the extent that any funds in the estate ultimately exceed the Administrative Charge and any DIP Lender Charge.
12. Such further and other grounds as counsel may advise and this Honourable Court may permit.

Material or evidence to be relied on:

13. All pleadings and proceedings filed in the within Action;
14. The Affidavit of Ethan Post, sworn on December 23, 2024;
15. The proposed form of Order; and
16. Such further and other material as counsel for Trafigura may advise and this Honourable Court may permit.

Applicable rules:

17. The *Alberta Rules of Court*, AR 124/2010, as amended; and
18. Such further and other Acts and regulations as counsel may advise and this Honourable Court may permit.

Applicable Acts and regulations:

19. The BIA; and
20. Such further and other acts and regulations as counsel for the Lenders may advise or this Honourable Court may permit.

Any Irregularity Complained of or Objection Relied on:

21. There are no irregularities complained of or objections relied on.

How the Application is Proposed to be Heard or Considered

22. Before the Honourable Justice M. Hollins on December 26, 2024 at 10:00 a.m.

WARNING

If you do not come to Court either in person or by your lawyer, the Court may give the applicant what they want in your absence. You will be bound by any order that the Court makes. If you want to take part in this application, you or your lawyer must attend in Court on the date and at the time shown at the beginning of this form. If you intend to rely on an affidavit or other evidence when the application is heard or considered, you must reply by giving reasonable notice of the material to the applicant.

