

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
AND CONTACT
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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: January 6, 2025

Time: 2:00 pm

Where: Calgary, Alberta

Before Whom: The Honourable Justice M. Lema

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 certain obligations whereby Trafigura must pay Cleo the purchase price for crude oil delivered by Cleo to Trafigura in a given month under the Commercial Agreement ("**Purchase Price**") which are calculated and become due after the Filing Date according to the schedule agreed to therein are post-filing obligations ("**Trafigura Post-Filing Obligations**");
 - (c) granting a declaration that certain obligations whereby Cleo must pay Trafigura amounts arising from the Prepayment Agreement which become due after the Filing Date according to the schedule agreed to therein are post-filing obligations ("**Cleo Post-Filing Obligations**");
 - (d) granting a declaration that the outstanding balance of \$750,000 paid by Trafigura to Cleo pursuant to the Prepayment Agreement as a prepayment of the purchase price for crude oil delivered under the Commercial Agreement (the "**Purchase Price Advance**") is a Cleo Post-Filing Obligation, as it becomes due on a monthly basis subsequent to the Filing Date; and
 - (e) authorizing Trafigura to exercise its right of set-off under the Prepayment Agreement (as defined herein) pursuant to section 97(3) of the *BIA*, by allowing it to deduct Cleo Post-Filing Obligations (including the Purchase Price Advance) against Trafigura Post-Filing Obligations as they become due on a monthly basis;
 - (f) 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 Purchase Price Advance and deduct it from Trafigura Post-Filing Obligations as they become due on a monthly basis;

- (g) in the further alternative, granting a charge in favour of Trafigura in the amount of the Purchase Price Advance, attaching to all of the assets and property of Cleo that shall rank in priority to all other charges, liens, mortgages, security interests and other encumbrances, 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 and any charge in favour of a potential DIP lender, both of which shall rank in priority to the Trafigura Charge;
- (h) awarding costs of this Application to Trafigura; and
- (i) 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 purchasing and marketing Cleo's crude oil for many years.
- 3. In the spring of 2024, Cleo approached Trafigura to discuss, amongst other things, the entering by the parties into sale and purchase arrangements whereby Trafigura would pay in advance for the purchase price of crude oil to be delivered by Cleo under such arrangements.
- 4. As a result of these discussions, the parties signed two agreements:
 - i. a prepayment agreement dated July 9, 2024 (the "**Prepayment Agreement**"), whereby Trafigura agreed to advance Cleo \$1 million as a prepayment of the purchase price for crude oil under the Commercial Agreement (as defined below); and
 - ii. a commercial agreement dated July 12, 2024 (the "**Commercial Agreement**"), whereby Trafigura agreed to purchase 100% of available marketable crude from Cleo's existing assets for the duration of the term of the Commercial Agreement.

The Prepayment Agreement and Commercial Agreement contain set-off mechanisms allowing for the Purchase Price Advance to be deducted from the Purchase Price in tranches of \$83,000, as they become due on a monthly basis.

- 5. The advance made under the Prepayment Agreement, and therefore the Purchase Price Advance, is not a loan. Trafigura made an agreement to pre-pay for goods it purchased from Cleo under the Commercial Agreement. The Commercial Agreement and the Prepayment Agreement work together to govern the relationship between the parties, which is not a creditor-

debtor relationship based on a loan, but a commercial agreement which gives rise to ongoing mutual obligations.

6. Cleo brought an emergency application on December 23, 2024 requesting that the Court order Trafigura to pay the Purchase Price for the November 2024 deliveries to Cleo, as opposed to setting off the full outstanding Purchase Price Advance against the same. The application was considered and an endorsement delivered by Justice Hollins without oral argument on December 26, 2024 (the “**Endorsement**”).
7. In her Endorsement, Justice Hollins granted Cleo’s application declaring that the stay of proceedings under section 69 of the *BIA* prevented Trafigura from enforcing its set-off rights, and ordered that \$757,644.77, representing the estimated Purchase Price for the November 2024 deliveries, be paid by Trafigura to Cleo immediately. Trafigura complied with the Justice Hollins’ Endorsement by payment directly to Cleo on December 27, 2024 of the Purchase Price calculated for the November 2024 deliveries, adjusted for a previous GST payment.
8. Justice Hollins explicitly did not decide the issue of the ongoing monthly set-off of the Cleo Post-Filing Obligations against Trafigura Post-Filing Obligations and adjourned determination of this issue to a future hearing.

Trafigura’s Right of Set-Off

9. Pursuant to section 13.2 of the Prepayment Agreement, Trafigura may set off any matured obligation due from Cleo against any matured obligations owed by Trafigura to Cleo. As such, Trafigura is entitled to set-off Cleo Post-Filing Obligations against Trafigura Post-Filing Obligations as they mature on a monthly basis.
10. In addition, the entire premise of the Prepayment Agreement and Commercial Agreement as expressed several times in the Pre-Payment Agreement, is to allow Trafigura to deduct from the Purchase Price the Purchase Price Advance in tranches agreed by the parties, so that Trafigura is not required to pay twice for crude delivered under the Commercial Agreement.
11. Further, the Purchase Price Advance becomes due in tranches of \$83,000 per month, and each amount which matures subsequent to the Filing Date is a Cleo Post-Filing Obligation and can therefore be set off against the Trafigura Post-Filing Obligation.

Prejudice to Trafigura

12. If Trafigura is denied its right to set-off the Cleo Post-Filing Obligations (including the Purchase Price Advance) against the Trafigura Post-Filing Obligations, it will suffer irreparable prejudice and defeat the purpose of these agreements, namely:
- i. Trafigura will be required to pay Cleo for the same product twice.
 - ii. Trafigura will be deprived of rights which have been explicitly agreed to and contemplated under the Prepayment Agreement and Commercial Agreement in consideration of Trafigura making the Purchase Price Advance, to protect Trafigura's rights in case of Cleo filing an NOI or declaring bankruptcy, amongst other things.
13. Such further and other grounds as counsel may advise and this Honourable Court may permit.

Material or evidence to be relied on:

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

Applicable rules:

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

Applicable Acts and regulations:

20. The *BIA*; and
21. Such further and other acts and regulations as counsel may advise or this Honourable Court may permit.

Any Irregularity Complained of or Objection Relied on:

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

How the Application is Proposed to be Heard or Considered

23. Before the Honourable Justice M. Lema on January 6, 2025 at 2:00 p.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.