

COURT FILE NUMBER B301-163430

COURT COURT OF KING'S BENCH OF ALBERTA

JUDICIAL CENTRE CALGARY



IN THE MATTER OF THE *BANKRUPTCY AND
INSOLVENCY ACT*, RSC 1985, C B-3, AS AMENDED

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

DOCUMENT BENCH BRIEF OF CLEO ENERGY CORP.

ADDRESS FOR SERVICE
AND CONTACT
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**APPLICATION BEFORE THE HONOURABLE JUSTICE LEMA
JANUARY 6, 2025 AT 2:00 PM ON THE CALGARY COMMERCIAL LIST**

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I. INTRODUCTION¹

1. On December 8, 2024, the Applicant, Cleo Energy Corp. (“**Cleo**”) filed a Notice of Intention to Make a Proposal (“**NOI**”) pursuant to subsection 50.4(1) of the *Bankruptcy and Insolvency Act* RSC 1985, c. B-3 (“**BIA**”) with the assistance of its legal counsel, Gowling WLG (Canada) LLP (“**Gowling**”) and appointed Alvarez & Marsal Canada Inc. (“**A&M**”) as Proposal Trustee (the “**Proposal Trustee**”). The NOI was necessary to provide stability to Cleo’s business and allow Cleo the chance to restructure.

(a) Trafigura Set-off Claims

2. As a result of the filing of the NOI, all proceedings against Cleo and its property were automatically stayed for an initial period of thirty (30) days (the “**Stay Period**”), including the exercise of any rights of setoff any of Cleo’s creditors has against Cleo.
3. On Friday, December 20, 2024 at 3:30 PM, thirty minutes prior to the Court closing before the two week holiday closure, Trafigura advised Cleo that it was accelerating all of Cleo’s unsecured debt owing to Trafigura under the Prepayment Agreement and would unilaterally setoff Cleo’s unsecured indebtedness owing to Trafigura as against almost all of Cleo’s production revenues for the month of November, 2024. The set-off would have jeopardized Cleo’s continuing operations.
4. On December 23, 2024, Cleo filed an emergency application (the “**Emergency Application**”) seeking urgent relief to prevent Trafigura from setting-off all amounts owing by it to Cleo under the Commercial Agreement against the obligations owing by Cleo under the Prepayment Agreement².
5. On December 26, 2024, the Emergency Application and written materials therefrom, including a subsequent cross-application of Trafigura, was reviewed by Justice Hollins. Justice Hollins ordered that Trafigura was not allowed to accelerate Cleo’s unsecured debt under the Prepayment Agreement and was further not allowed to set-off the entire Advance

¹ Capitalized terms not defined herein have the meaning given to them in the Affidavit of Chris Lewis, sworn January 5, 2025 (the “**January 5 Affidavit**”).

² January 5 Affidavit at para 18.

balance against its December Payment and that the entire December Payment was due immediately. The issue of ongoing monthly set-off of scheduled monthly loan payments under the Prepayment Agreement of approximately \$91,000 (the “**Scheduled Monthly Payments**”) was adjourned to the scheduled court appearance on January 6, 2025.³

6. Cleo’s primary cash receipts anticipated during the NOI proceedings are the amounts to be paid by Trafigura to Cleo pursuant to the Commercial Agreement. A reduction of Cleo’s oil production revenues during the Stay Period in the amount of the Scheduled Monthly Payments will prejudice Cleo’s ability to pay the obligations incurred by it during these NOI Proceedings that are contemplated by its 13-Week Cash Flow Forecast⁴. It will further cause Cleo’s unsecured pre-filing debt owing to Trafigura under the Prepayment Agreement to be repaid in priority to other creditors. Trafigura will not be prejudiced if there is a continued stay of the Scheduled Monthly Payments.

(b) Interim Financing and Stay Extension

7. The Stay Period expires on January 7, 2025. Cleo is required to file a proposal within the Stay Period unless Cleo obtains from this Honourable Court an Order extending the time period for filing a proposal prior to the said expiration.
8. Cleo is seeking an extension of the time to file a proposal in these Proposal Proceedings to February 21, 2025 (the “**Stay Extension**”).
9. The 13-week Cash Flow Forecast indicates that Cleo requires an Interim Financing Facility from January 6, 2025 and onwards to ensure that it has the liquidity required to continue with these Proposal Proceedings.⁵
10. Cleo has now entered into an Interim Financing Agreement which will provide the working capital required in order to pay a significant portion of the obligations contemplated in the 13-week Cash Flow Forecast.⁶

³ January 5 Affidavit at para 21.

⁴ January 5 Affidavit at para 24.

⁵ January 5 Affidavit at para 26.

⁶ January 5 Affidavit at para 27.

11. Cleo previously made written submissions regarding the Stay Extension in its brief dated December 23, 2024. Cleo provides these supplemental submissions in light of it recently entering into an Interim Financing Agreement with uCapital - uLoan Solutions Inc (the “**Interim Lender**”).

(c) Stay of Proceedings for Chris Lewis

12. Battle River Energy Limited (“**Battle River**”) has filed a claim against Cleo and its officers, for breach of trust while acting as officers of Cleo⁷.
13. Battle River is taking the position that the automatic Stay does not apply to the Directors and Officers of Cleo.⁸
14. As a result of section 69.31(1) of the *BIA*, the Battle River’s Action is stayed as against the Directors and Officers of Cleo. An application must be brought by Battle River to lift the stay pursuant to section 69.4 of the *BIA* if its wishes to continue with the Action against the Directors and Officers of Cleo during the stay period.

Relief sought

15. This Bench Brief is submitted on behalf of Cleo in support of an Application seeking from this Honourable Court an Order, among other things:
 - (a) declaring that Trafigura’s right to effect set-off of post December 8, 2024 scheduled monthly payments under the Prepayment Agreement that will become owing by Cleo to Trafigura as against ongoing amounts that will become owing by Trafigura to Cleo under the Commercial Agreement for Cleo’s continuing production sales to Trafigura under the Commercial Agreement is stayed pursuant to section 69(1) of the *BIA*;
 - (b) extending the 30 day period, ending January 7, 2025, within which Cleo is required under section 50.4(8) of the *BIA* to file a proposal by an additional 45 days to

⁷January 5 Affidavit at para 34.

⁸January 5 Affidavit at para 35.

February 21, 2025 (such period, as extended from time to time under section 50.4(9) of the *BIA*, being the “**Stay Period**”, and the date on which the Stay Period expires being the “**Expiry Date**”);

- (c) a stay of proceedings during the Stay Period and any claims against Chris Lewis in his capacity as a director of Cleo; and
 - (d) such further and other relief as Cleo may request and this Honourable Court may grant.
16. This application is supported by Affidavits sworn by Chris Lewis (“**Mr. Lewis**”), the sole Director, Executive Chairman, and Chief Executive Officer of Cleo dated December 22, 2024, December 23, 2024, December 24, 2024 and January 5, 2025 (the “**Lewis Affidavits**”).

II. ISSUES

17. This Brief addresses whether this Honourable Court should:
- (a) declare that Trafigura’s right to effect set-off of post December 8, 2024 scheduled monthly payments under the Prepayment Agreement that will become owing by Cleo to Trafigura as against ongoing amounts that will become owing by Trafigura to Cleo under the Commercial Agreement for Cleo’s continuing production sales to Trafigura under the Commercial Agreement is stayed pursuant to section 69(1) of the *BIA*;
 - (b) grant a stay of proceedings during the Stay Period and any claims against Chris Lewis in his capacity as a director of Cleo; and
 - (b) extend the time within which Cleo is required to file a proposal.

III. LAW AND ARGUMENT

A. Stay of Trafigura Canada Limited Set-off Claims

18. Pursuant to section 97(3) of the *BIA*, the law of set-off applies to all claims made against a bankrupt's estate as well as to all actions instituted by the trustee for the recovery of any debts owed to the bankrupt:

Law of set-off or compensation

97(3) The law of set-off or compensation applies to all claims made against the estate of the bankrupt and also to all actions instituted by the trustee for the recovery of debts due to the bankrupt in the same manner and to the same extent as if the bankrupt were plaintiff or defendant, as the case may be, except in so far as any claim for set-off or compensation is affected by the provisions of this Act respecting frauds or fraudulent preferences.⁹

19. Pursuant to Section 66(1) of the *BIA*, section 97(3) is applicable to a proposal proceeding.¹⁰
20. A similar set-off provision is explicitly provided for in section 21 of the *Companies Creditor Arrangement Act* ("CCAA"):

Law of set-off or compensation to apply

The law of set-off or compensation applies to all claims made against a debtor company and to all actions instituted by it for the recovery of debts due to the company in the same manner and to the same extent as if the company were plaintiff or defendant, as the case may be.¹¹

21. While the *BIA* does not expressly restrict or abrogate the right to set-off debts of an insolvent debtor during reorganization, a restriction on the exercise of set-off rights is implied in section 69(1) of the *BIA*, which extends the stay of proceedings with respect to the ability of creditors to, among other things, seek remedies for the recovery of property of the debtor:

⁹ *BIA* section 97(3) [TAB 1].

¹⁰ *BIA* section 66(1) [TAB 1].

¹¹ *Companies' Creditor Arrangement Act*, RSC 1985, c C-36 section 21 [TAB 2].

Stay of proceedings — notice of intention

69 (1) Subject to subsections (2) and (3) and sections 69.4, 69.5 and 69.6, on the filing of a notice of intention under section 50.4 by an insolvent person,

(a) no creditor has any remedy against the insolvent person or the insolvent person's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy,

(b) no provision of a security agreement between the insolvent person and a secured creditor that provides, in substance, that on

(i) the insolvent person's insolvency,

(ii) the default by the insolvent person of an obligation under the security agreement, or

(iii) the filing by the insolvent person of a notice of intention under section 50.4,

the insolvent person ceases to have such rights to use or deal with assets secured under the agreement as he would otherwise have, has any force or effect,¹²

22. In the case of *North American Tungsten Corporation Ltd. (Re)*, North American Tungsten Corporation (“NATC”) produced tungsten from a mine and sells it to Global Tungsten and Powders Corp. (“GTP”) under a supply agreement, which included an annual supply of tungsten concentrate. A loan agreement was also established, secured by property related to the mine, with a debt exceeding \$4 million. After filing of the initial order, GTP offset loan amounts against payments for tungsten deliveries, prompting NATC to seek a court declaration that GTP breached the stay provisions and to request an injunction to prevent GTP from setting off payments. The British Columbia Supreme Court, affirmed later by the Court of Appeal, noted that section 21 of the CCAA does not exempt set-off claims from stays, even when it is acknowledged that those rights exist¹³.

¹² BIA section 69(1) [TAB 1].

¹³ *North American Tungsten Corporation Ltd. (Re)*, 2015 BCSC 1382 at para 28 [TAB 3].

23. In *Re Just Energy Corp.*, Just Energy Group Inc. applied to prevent financial institutions from exercising "sweep rights" under their agreements. The Ontario Superior Court of Justice concluded that section 21 of the *CCAA* does not exempt set-off rights from a stay of proceedings¹⁴. The court granted this application, noting that while section 21 preserves set-off rights, their exercise can be deferred. The court reasoned that allowing banks to claim set-off could deplete Just Energy's accounts, giving banks a preferred position over other creditors and depriving Just Energy of working capital.
24. In the case of *Montréal (Ville) c. Restructuration Deloitte Inc.*, a consulting engineering firm ("CEF") contracted with the City of Montréal (the "City"). After discovering collusion by two former officers, the firm became insolvent. In August 2018, the Québec Superior Court issued an initial order under the *CCAA*, staying the exercise of rights and remedies against CEF. Despite CEF continuing to work for the City, the City refused payment, attempting to offset its debt to CEF against two pre-order claims related to alleged fraud by CEF. The first claim arose from a settlement between CEF and the Minister of Justice, representing the City, under a voluntary reimbursement program. The second claim involved the allegedly fraudulent installation of water meters in the city. The Supreme Court of Canada held that section 21 of the *CCAA* does not grant creditors a right to pre-post compensation that would be shielded from a supervising judge's power to order a stay, and concluded that the broad discretion conferred on a court allows it to stay creditors' rights to effect pre-post compensation if the exercise of those rights could jeopardize the restructuring process.¹⁵
25. While the above cases were decided under the *CCAA*, the *CCAA* and *BIA* should be read harmoniously,¹⁶ and Cleo respectfully submits that the same analysis applies to the stay of proceedings and set-off provisions under the *BIA*.
26. The exercise of Trafigura's set-off of the Scheduled Monthly Payments would jeopardize Cleo's restructuring process. Cleo's primary cash receipts during the NOI proceedings will

¹⁴ *Re Just Energy Corp.*, 2021 ONSC 1793 (Ont. S.C.J. [Commercial List]) at para 102-103 [TAB 4].

¹⁵ *Montréal (Ville) c. Restructuration Deloitte Inc.* 2021 SCC 53 at paras 54 and 62-63 [TAB 5].

¹⁶ 9354-9186 *Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10 at para 74 [TAB 6]; *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60 at para 24 [TAB 7].

be the amounts to be paid by Trafigura to Cleo pursuant to the Commercial Agreement. A reduction of approximately \$91,000 per month will significantly impact Cleo's ability to meet its cash flow obligations during the NOI proceedings.¹⁷ Cleo's 13-week cash flow does not contemplate setoff of the Scheduled Monthly Payments and its cash flow cannot support such a setoff.¹⁸

27. If Trafigura is permitted to exercise set-off of the Scheduled Monthly Payments in light of the Stay, according to the 13-Week Cash Flow Forecast, Cleo will not have the required cash flow to maintain its operations during the NOI proceedings which will cause prejudice to Cleo and Cleo's other stakeholders. If the NOI Proceedings fail because Cleo doesn't have sufficient cash flow to meet its post NOI obligations, Cleo would automatically become bankrupt. This would cause irreparable harm, loss and damage to Cleo and its stakeholders.¹⁹
28. Furthermore, allowing Trafigura to set-off the Scheduled Monthly Payments will allow Trafigura to reduce its pre-filing unsecured debt in priority to other creditors and stakeholders, which it would otherwise not have priority over.
29. In ordering that Trafigura was not allowed to set-off the entire Advanced balance against its December payment and that the entire December Payment was due immediately, Justice Hollins stated:

[19] I appreciate the perception of unfairness to Trafigura in having extended a loan to Cleo, substituting a right of set-off in place of actual security (likely not an option at that point) and now being foreclosed from that contractual right. However, that is akin to the perceived unfairness visited on all unsecured creditors whose rights are suspended for the statutory objectives of BIA-sponsored reorganization.

[20] Those objectives, as concerns Cleo, must in my view take precedence over the rights of one unsecured creditor, particularly where granting the relief sought by Trafigura would not only mean the end of the company but would prejudice the other creditors of Cleo, both in extinguishing the possibility of a proposal to all but also in paying one creditor in preference to the others. [Emphasis added]²⁰

¹⁷ January 5 Affidavit at para 24.

¹⁸ January 5 Affidavit at para 24.

¹⁹ January 5 Affidavit at para 25.

²⁰ Cleo Energy Corp (Re), 2024 ABKB 773 at paras 19 and 20 [Tab 11].

30. Trafigura will not be prejudiced in the circumstances. Trafigura continues to benefit from the Commercial Agreement through a fee deduction of US\$0.95/bbl fee (the “**Marketing Fee**”) from the base price of the oil it purchases from Cleo before paying revenue out to Cleo.²¹
31. Trafigura further benefits from Cleo’s continued operations during the Proposal Proceedings as it continues to purchase oil from Cleo and can realize profits from the resale of Cleo’s oil products at higher rates than Trafigura paid to Cleo for the purchase of the products.²²

B. Extension of the Stay Period is Appropriate and Interim Financing

32. The Stay Period expires on January 7, 2025. Cleo is required to file a proposal within the Stay Period unless Cleo obtains from this Honourable Court an Order extending the time period for filing a proposal prior to the said expiration.
33. Cleo is seeking an extension to February 21, 2025, in these Proposal Proceedings (the “**Stay Extension**”).
34. Cleo previously made written submissions regarding the Stay Extension in its brief dated December 23, 2024. Cleo provides these supplemental submissions in light of it recently entering into an Interim Financing Agreement with the Interim Lender.
35. Pursuant to section 50.4(9) of the *BIA*, a debtor in a proposal proceeding may apply to the Court for an order extending the time to file a proposal by a maximum of 45 days and up to the aggregate of five (5) months after the expiry of the 30-day period, provided that the Court is satisfied that:
 - (a) The insolvent person has acted, and is acting, in good faith and with due diligence;
 - (b) The insolvent person would likely be able to make a viable proposal if the extension being applied for were granted and

²¹ January 5 Affidavit at para 15(a).

²² January 5 Affidavit at para 15(a).

(c) No creditor would be materially prejudiced if the extension be applied for were granted.²³

36. The court may extend the time to make a proposal and during that time the court may approve interim financing pursuant to s. 50.6 (1) of the *BIA*²⁴. In making that decision and in exercising its discretion, the court is mandated to consider all relevant factors including the debtor's cash-flow statement and those factors set out in subsection (5).
37. The 13-week Cash Flow Forecast indicates that Cleo requires interim financing from January 6, 2025 and onwards to ensure that it has the liquidity required to meet its monetary obligations within these Proposal Proceedings²⁵. As illustrated in the Cash Flow Forecast, Cleo will require additional funds to funds operations during the proposed proposal extension date of February 21, 2025²⁶.
38. Cleo has entered into an Interim Financing Agreement²⁷. The Interim Financing Agreement includes the following terms²⁸:

Amount of Loan: \$750,000.00

Maturity Date: The earliest of :

- a) May 8th, 2025, or such other date as agreed to between the parties;
- b) the termination of the *BIA* proceedings; or
- c) the occurrence of an Event of Default (as defined in the Term Sheet).

Security: A Court authorized first-ranking, valid, enforceable financing charge with priority over all creditors of Cleo, in an amount to match the anticipated draws required by Cleo from the Lender from time to time as prescribed by the 13-week Cash Flow Forecast, which shall not exceed \$900,000.00 (the “**DIP Charge**”) charging all the property, assets and undertakings of Cleo granted

²³ *BIA* section 50.4(9) [Tab 1].

²⁴ *BIA* section 50.6 (1) [Tab 1].

²⁵ January 5 Affidavit at para 26.

²⁶ January 5 Affidavit at para 25.

²⁷ January 5 Affidavit at para 27.

²⁸ January 5 Affidavit at para 28.

pursuant to the DIP Order (as defined in the Term Sheet) that includes standard debtor-in-possession terms and conditions satisfactory to the Interim Lender acting reasonably, pursuant to section 50.6(1) of the *BIA*, as the case may be, subject only to an administration charge not to exceed \$700,000 (the “**Administration Charge**”)

**Conditions
Precedent:**

Prior to any disbursement, Cleo is required to have obtained an order made by the Court (the “**DIP Order**”) in form and content satisfactory to the Interim Lender, which shall include, among other things: (a) the approval of the Interim Financing Agreement and all the terms and conditions thereof; (b) authorizing Cleo to borrow on the terms and conditions outlined in the Term Sheet and approving same; and (c) creating various court-ordered priority charges including the granting of the DIP Charge.

Interest Rate:

Interest is payable monthly, at a rate of 3% per annum.

Fees:

On payment in full of the DIP Loan, an additional \$50,000 fee will be earned and payable, in full.

**Administration
Charge:**

Not to exceed \$700,000.

39. The 13-week Cash Flow Forecast indicate that Cleo will have drawn fully on the interim financing by the week of February 7, 2025.
40. In *Pacific Shores Resort & Spa Ltd., Re*, a stay extension was granted in the *CCAA* proceedings notwithstanding that the interim financing was less than what the cash flow projections indicated was required for the debtor to meet the next stay extension.²⁹
41. As the amount of the Interim Financing Agreement is insufficient to cover all obligations until February 21, 2025, as anticipated by the 13-week Cash Flow Forecast, Cleo has entered into negotiations with a potential purchaser regarding the sale of all of the Sedgewick Fields in order to obtain additional funds to meet its obligations during the Stay

²⁹ *Pacific Shores Resort & Spa Ltd., Re* 2011 BCSC 1775 at para 45, 60 [TAB 8].

Period (the “**Sedgwick Sale**”).³⁰ The Sedgwick Sale is anticipated to provide Cleo enough operating capital to meet its obligations within the 13 week cash flow period.

42. Cleo anticipates that the Sedgwick Sale will close prior to February 21, 2025, in which case Cleo will seek Court approval of the Sedgwick Sale prior to that date and approval that the proceeds of sale may fund Cleo’s ongoing operations during the Proposal Proceedings, including during the sales and investment solicitation process Cleo intends to immediately commence following January 6, 2025.³¹
43. Cleo respectfully submits that the Stay Extension ought to be approved for, *inter alia*, the following reasons:
 - (a) Cleo has acted and continues to act in good faith and with due diligence;
 - (b) No creditor will be materially prejudice by the requested extension of the stay period; and
 - (c) The extension of the Stay Period is necessary to allow Cleo sufficient time and opportunity to continue the restructuring of its business and pursue strategic alternatives.

C. Battle River Claim against Chris Lewis

44. Battle River Energy Limited (“**Battle River**”) has filed a claim against Cleo and its officers for breach of trust while acting as officers of Cleo. Battle River has served a brief dated January 3, 2025 taking the position that the automatic Stay does not apply to the Directors and Officers of Cleo (the “**Battle River Brief**”).
45. The following are additional submissions on the Stay of Guarantees and Personal Claim, supplementing those in the brief dated December 23, 2024.
46. Reproduced below are paragraphs 35-39 from Battle River’s statement of claim:

³⁰ January 5 Affidavit at para 30.

³¹ January 5 Affidavit at para 30 and 33.

35. Battle River states that, at all material times, Cleo served as the trustee of a trust of which Battle River was a beneficiary by operation of the Mont Lake COO.

36. Battle River reiterates paragraph 27 above and states that, in the event that Cleo engaged in the Trust Misappropriations, the commission of such acts constituted fraudulent or dishonest breaches of trust on behalf of Cleo.

37. Battle River states that, during the period in which they were officers of Cleo, each of the Cleo Officers had actual knowledge, derived through subjective knowledge, recklessness, or wilful blindness, of Cleo's breaches of trust by way of the Trust Misappropriations.

38. Battle River further states that each of the Cleo Officers were responsible for managing Cleo's financial affairs during their respective periods of officership. Accordingly, the Cleo Officers each participated in or otherwise assisted Cleo in its commission of breaches of trust obligations owed to Battle River.

39. Battle River, therefore, states that each of the Cleo Officers are personally liable to Battle River for the tort of knowing assistance in breach of trust. Battle River states that it is entitled to recover damages arising from the tort of knowing assistance in breach of trust from each of the Cleo Officers, on a joint and several basis with each other and with Cleo, in an amount to be determined at trial corresponding to the aggregate value of the Trust Misappropriations occurring during the period in which each of the Cleo Officers served as officers of Cleo.

47. Subsections 69.31(1) and (2) of the *BIA* state:

69.31 (1) Where a notice of intention under subsection 50.4(1) has been filed or a proposal has been made by an insolvent corporation, no person may commence or continue any action against a director of the corporation on any claim against directors that arose before the commencement of proceedings under this Act and that relates to obligations of the corporation where directors are under any law liable in their capacity as directors for the payment of such obligations, until the proposal, if one has been filed, is approved by the court or the corporation becomes bankrupt.

(2) Subsection (1) does not apply in respect of an action against a director on a guarantee given by the director relating to the corporation's obligations or an action seeking injunctive relief against a director in relation to the corporation.³²

48. Subsection 69.31(1) of the *BIA* must be interpreted broadly to fulfill its purpose of providing a comprehensive protection during *BIA* proposal proceedings for directors from legal claims and actions related to corporate obligations. The specific exceptions outlined in subsection 69.31(2), namely claims on guarantees and injunctive relief, illustrate the legislature's specific intent for subsection (1) to apply widely to all other claims. This broad application is essential to ensure directors can focus their time and efforts on effectively managing the restructuring process, except in narrowly defined circumstances.
49. During the Proposal Proceedings, Chris Lewis, as Cleo's sole director, will have to perform the following tasks, among other tasks, for the benefit of Cleo's stakeholders, which will consume the majority of his time:
 - (a) work with Cleo's employees and consultants, and maintain Cleo's day-to-day operations;
 - (b) work with Cleo's vendors and service providers;
 - (c) work with and correspond with stakeholders regarding the Proposal Proceedings;
 - (d) work towards the sale and closing of the Sedgwick Field;
 - (e) work with the AER regarding the sale of the Sedgwick Field;
 - (f) work with the Proposal Trustee regarding ongoing cash flows and payments in accordance with the 13-week Cash Flow Forecast; and
 - (g) work with his counsel, the Proposal Trustee and stakeholders with respect to a sales and investment solicitation process.³³

³² *BIA*, s. 69.31(1) (2) [TAB 1].

³³ January 5 Affidavit at para 48.

50. The Battle River litigation would divert significant resources and attention from Mr. Lewi's focus on this Proposal Proceeding. The Battle River litigation is complex and would require substantial focus and attention from Chris Lewis in order to file a proper defence. It would require, *inter alia*, additional review from an accounting perspective which will take sufficient time and effort to perform.³⁴
51. Section 69.31(1) of the *BIA* provides precisely the relief intended by the legislature in these circumstances, which is to allow Chris Lewis and Cleo to concentrate all of its efforts on this Proposal Proceeding, which is crucial for the benefit of all Cleo's stakeholders.
52. Section 69.4 of the *BIA* further states that a creditor wishing to proceeding against a director the subject of a stay under Section 69.31(1) of the *BIA*, must seek leave to lift the stay of proceedings as against that director:
- 69.4** A creditor who is affected by the operation of sections 69 to 69.31 or any other person affected by the operation of section 69.31 may apply to the court for a declaration that those sections no longer operate in respect of that creditor or person, and the court may make such a declaration, subject to any qualifications that the court considers proper, if it is satisfied
- (a) that the creditor or person is likely to be materially prejudiced by the continued operation of those sections; or
- (b) that it is equitable on other grounds to make such a declaration.³⁵
53. In paragraphs 12-13 of the Battle River Brief, Battle River cites *Bear Creek Contracting Ltd. v. Pretium Exploration Inc.* ("***Bear Creek Contracting***") a case from the British Columbia Supreme Court. In *Bear Creek Contracting*, an application was brought to amend a claim including following the expiry of a governing limitation period to include additional defendants, including past or current directors and officers, based on an alleged requirement for the company to retain a holdback in favor of subcontractors under section 4 of the *Builders Lien Act*.
54. The Court's statements in *Bear Creek Contracting* at paragraph 127, indicating that the proposed new claims against the directors are not stayed, should be interpreted narrowly

³⁴ January 5 Affidavit at para 46.

³⁵ *BIA*, s. 69.4 [TAB 1].

within the context of the specific CCAA orders in that case and the specific factual context in *Bear Creek Contracting*.

55. First, Battle River's statement of claim states at paragraph 38 that "each of the Cleo Officers were responsible for managing Cleo's financial affairs during their respective period of officership. Accordingly, the Cleo Officers each participated in or otherwise assisted Cleo in its commission of breaches of trust obligations owed to Battle River." Even if these allegations were true, which Mr. Lewis denies, it is clear from the statement of claim, that the allegations against Chris Lewis relate at all times to periods when he was acting in his capacity as director and officer of Cleo and not in his personal capacity, unlike the decision in *Bear Creek Contracting*.
56. Battle River further wishes to force Mr. Lewis to continue to actually move forward in the litigation notwithstanding the stay of proceedings in his favour under section 69.31(1) of the *BIA*, and does not seek to amend its own pleading to add Mr. Lewis as a defendant to prevent prejudice. In this case, Battle River will not be prejudiced by allowing Mr. Lewis to continue to focus his energy on the Proposal Proceedings. Once the Proposal Proceedings ends and the Stay Period expires, Battle River will be entitled to move forward with its claim as against Mr. Lewis.
57. Cleo relies on two authorities which do not follow reasoning in *Bear Creek Contracting*.
58. Firstly, the case of *Nortel Networks Corp., Re* involved two motions. The company brought a motion for an order extending the stay contained in the initial order to the directors and officers in an action centered on alleged breaches of fiduciary duties under the *Employee Retirement Income Security Act* (the "**Action**"). Certain employees brought a motion to lift the stay to pursue the Action, arguing that the directors and officers were being sued as fiduciaries, and not as the company's officers or directors. Justice Morawetz granted the company's motion, maintaining the stay, and dismissed the employees' motion. It emphasized that the litigation would divert significant resources and attention from the restructuring. Justice Morawetz found that the claims under the Action were intertwined

with the company's obligations, thus falling under the directors and officers stay.³⁶ Further, the Court specifically found no distinction between the directors as “fiduciaries” and as directors of the company.

59. Secondly, in the case of *Coopérative forestière Laterrière, Re*, an employee of *Coopérative forestière Laterrière* (“CFL”) served a motion to commence proceedings against CFL’s directors for damages. At paragraph 22, the court stated that at the outset, pursuant to subsection 69.31(1) of the *BIA*, the employee was stayed from bringing and continuing such an action against the directors after the debtor company filed its the notice of intention to make a proposal contemplated by subsection 50.4(1) of the *BIA*.³⁷
60. Based on the foregoing, Cleo respectfully submits that pursuant to section 69.31(1) of the *BIA*, Battle River’s action is stayed as against Chris Lewis as the sole director of Cleo. An application must be brought by Battle River to lift the stay pursuant to section 69.4 of the *BIA* if its wishes to continue with the Action against Chris Lewis as sole director of Cleo during the stay period.
61. In the alternative, if the court finds that section 69.31(1) is not operative for the Directors and Officers of Cleo, then Cleo submits that the Court should exercise its jurisdiction pursuant to section 183(1) of the *BIA* and declare that the stay applies with respect to Chris Lewis as the sole director of Cleo.³⁸

³⁶ *Nortel Networks Corp., Re* 2009 CarswellOnt 4806 [TAB 9].

³⁷ *Coopérative forestière Laterrière (Faillite), Re*, 2004 CanLII 23702 (QC CS) [TAB 10].

³⁸ *BIA*, s. 183(1) [TAB 1].

IV. CONCLUSION AND RELIEF SOUGHT

62. For the reasons above, Cleo requests the Orders sought be granted as they are fair, necessary, and reasonable in the circumstances and necessary for the benefit of its estate and its stakeholders.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 5th day of January, 2025.

GOWLING WLG (CANADA) LLP

Per: 

Sam Gabor/Tom Cumming
Counsel for Cleo Energy Corp.

TABLE OF AUTHORITIES

Tab	Authority
1.	<u>Bankruptcy and Insolvency Act, RSC 1985, c B-3</u>
2.	<u>Companies' Creditor Arrangement Act, RSC 1985, c C-36</u>
3.	<u>North American Tungsten Corporation Ltd. (Re), 2015 BCSC 1382</u>
4.	<u>Re Just Energy Corp., 2021 ONSC 1793</u>
5.	<u>Montréal (Ville) c. Restructuration Deloitte Inc. 2021 SCC 53</u>
6.	<u>9354-9186 Québec inc. v. Callidus Capital Corp., 2020 SCC 10</u>
7.	<u>Century Services Inc. v. Canada (Attorney General), 2010 SCC 60</u>
8.	<u>Pacific Shores Resort & Spa Ltd., Re 2011 BCSC 1775</u>
9.	<u>Nortel Networks Corp., Re 2009 CarswellOnt 4806</u>
10.	<u>Coopérative forestière Laterrière (Faillite), Re, 2004 CanLII 23702 (QC CS)</u>
11.	<u>Cleo Energy Corp (Re), 2024 ABKB 773</u>