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| 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. |
| APPLICANT | CLEO ENERGY CORP. |

**BENCH BRIEF OF THE RESPONDENT,
TRAFIGURA CANADA LIMITED**

**FOR THE HEARING SCHEDULED IN JUDGE'S CHAMBERS
ON DECEMBER 26, 2024, AT 10:00 AM**

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PART I – INTRODUCTION AND RELIEF SOUGHT

1. Trafigura Canada Limited (“**Trafigura**”) submits this Brief in response to Cleo Energy Corp.’s (“**Cleo**”) Application and in support of Trafigura’s Application, both scheduled to be heard concurrently on December 26, 2024. In its Application, Trafigura 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*, 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 the Lenders may advise.

PART II – FACTS

2. A statement of the facts can be found in the Affidavit of Ethan Post, sworn December 23, 2024.

PART IV – LAW AND ARGUMENT

3. On July 12, 2024, Trafigura and Cleo entered into a commercial agreement (the “**Commercial Agreement**” and together with the Prepayment Agreement, the “**Agreements**”) whereby Trafigura agreed to market and sell Cleo’s oil product. Concurrently, Trafigura and Cleo entered into the Prepayment Agreement wherein Trafigura agreed to make certain advances to Cleo which were to be repaid by Cleo either by repayment with cash or by way of set-off against deliveries of oil product by Trafigura to Cleo under the Commercial Agreement. In accordance therewith, Trafigura advanced \$1,000,000 to Cleo on August 1, 2024 (the “**Advance**”)
4. On December 8, 2024 (the “**Filing Date**”), and without any prior notice to Trafigura, Cleo filed a notice of intention to file a proposal (the “**NOI**”) under the BIA. Prior to the Filing Date, Cleo failed to comply with its obligations under the Prepayment Agreement and multiple Termination Events (as that term is defined in section 11.1 of the Prepayment Agreement) occurred, including sections 11.1(d), (e) and (g), which state that the following constitute Termination Events:
 - (a) [Cleo] breaches any representation, warranty or undertaking in any Transaction Document;
 - (b) any expropriation, compulsory acquisition, nationalisation, attachment, sequestration, distress or execution or any analogous process in any jurisdiction affects any asset or assets of [Cleo] or any step is taken by any person or agency with a view to the same; and
 - (c) a Material Adverse Change occurs, which is defined in subsection 3.1(l) of the Prepayment Agreement as “[an] event or circumstance (either individually or when taken as a whole) which in [Trafigura’s] opinion is materially adverse to: (i) the ability of any party (other than [Trafigura]) to perform its obligations under the Transaction Documents to which it is party thereto; (ii) the rights or remedies of [Trafigura] under the Transaction Documents; or (iii) the business, operations, assets, revenues or prospects of the Borrower or any of its Affiliates or which results, or is reasonably likely to result, in any Transaction Document not being legal, valid and binding on, and enforceable substantially in accordance with its terms against, any party thereto.”
5. Cleo’s extensive financial difficulties and issues with the Alberta Energy Regulator, as described in the Affidavit of Chris Lewis, sworn on December 22, 2024 (the “**First Lewis Affidavit**”) and the

Affidavit of Chris Lewis, sworn on December 23, 2024 (the “**Second Lewis Affidavit**”), constitute Termination Events under the above-noted subsections. Such events include, *inter alia*:

- (a) the three judgments against Cleo rendered between July 16, 2024 and October 18, 2024 and associated garnishments;¹ and
 - (b) the various shut ins of Cleo’s oil producing assets, including by directive of the Alberta Energy Regulator (the “**AER**”).²
6. As a result of these Termination Events, Trafigura is entitled to exercise the remedies outlined in section 11.2 of the Prepayment Agreement, including, *inter alia*, to cancel all advances and declare that such advances, together with all unpaid amounts, be immediately due and payable by Cleo to Trafigura.
7. As such, when the Termination Events occurred prior to the Filing Date, Trafigura became entitled to set-off the Owed Amounts against deliveries of oil product. The fact that the Termination Events were concealed from Trafigura by Cleo, thus preventing Trafigura from exercising its set-off rights under the Prepayment Agreement until now, does not change the fact that the Termination Events and the remedies arising therefrom arose before the Filing Date; as such, the Owed Amount matured and became due and owing before the Filing Date.
8. Furthermore, multiple provisions in the Prepayment Agreement explicitly contemplate repayment by way of set-off, from time to time, in particular Recital B, section 2.1 and section 5.3(b), all of which are reproduced below.³

(B) Subject to the terms of this Agreement, [Trafigura] has agreed to make Advances to [Cleo] in the manner set out in Section 5 (*Advances*), and the Advances shall be repaid by [Cleo] to [Trafigura] either by repayment with cash or by way of set-off against deliveries of Products by [Cleo] to [Trafigura] under the Commercial Contract.

(...)

2.1 The Prepayment Facility

Subject to the terms of this Agreement, [Trafigura] agrees to make Advances to [Cleo] in an aggregate amount not to exceed the Maximum Amount as a prepayment of the purchase price for the Products under the Commercial Contract. The Obligations may be repaid in whole or in part, and from time to time, either by cash repayment by [Cleo] or by setting off amounts due to [Cleo]

¹ Affidavit of Chris Lewis, sworn December 23, 2024 [Second Lewis Affidavit] at para 88-89.

² *Ibid* at paras 16-29.

³ Affidavit of Ethan Post, sworn on December 23, 2024 [Post Affidavit], Exhibit B at Preamble and ss 2.1, 5.3(b).

from [Trafigura] as payment for deliveries by [Trafigura] of Products under the Commercial Contract (or by a combination thereof, all as set forth in Section 5.3.

(...)

5.3 Scheduled Payments

(...)

- (b) [Trafigura] shall be entitled to deduct on the last day of each Delivery Period the Relevant Amount for each Advance for that Delivery Period plus any accrued interest and any other Unpaid Amounts from the purchase price for the Products delivered by the Borrower pursuant to the Commercial Contract. [Trafigura's] obligation to pay for the Products under the Commercial Contract shall be satisfied and extinguished to the extent of such deductions.

9. Reading the Prepayment Agreement as a whole, including the provisions set out above in paragraph 8, and in conjunction with the Commercial Agreement (which is an ancillary agreement to the Prepayment Agreement), it is clear that set-off rights underpin the entire repayment process. This is not a traditional loan where there is an extension of credit with defined repayment terms upon default. This was a facility which was designed by its very nature to be repaid by way of set-off at any time, from time to time.
10. The Owed Amount was and is 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.⁴
11. Trafigura currently holds \$754,644.77 (the "**November Oil Revenues**") in funds owing to Cleo for November 2024 oil sales (i.e. sales that were effected pre-filing). Trafigura submits that, pursuant to section 97(3) of the BIA, it is entitled to set-off the Owed Amount against the November Oil Revenues, as they are both pre-filing debts; application of section 97(3) of the BIA is not ousted by the stay of proceedings imposed under section 69.1.⁵ A bankrupt's estate includes only the net amount of a debt owing to the bankrupt after proper allowances for the recognized common law right of set-off.⁶
12. In the alternative, Trafigura submits that, pursuant to section 69.4 of the BIA, this Honourable Court should grant a declaration pursuant to section 69.4 of the BIA that the stay of proceedings in favour of Cleo (the "**Stay**") does not operate to bar Trafigura from exercising its right of set-off under the

⁴ See e.g., *Re North American Tungsten Corp*, 2015 BCSC 1382 at paras 10-11, aff'd 2015 BCCA 390.

⁵ See e.g., *Re 728835 Ontario Ltd.* (1998), 111 OAC 155 (Gen Div).

⁶ *Husky Oil Operations Ltd v Minister of National Revenue* (1993), 22 CBR (3d) 153, [1994] 1 WWR 629; affirmed [1995] 10 WWR 161, 128 DLR (4th) 1 (SCC).

Prepayment Agreement. Trafigura will be materially prejudiced if the Stay is not lifted, as it can only assert its set-off rights against mutual pre-filing obligations.⁷ Since the November Oil Revenues were earned before the Filing Date, the only chance Trafigura has to assert set off of its pre-filing debt is in December. December Oil Revenues will be largely post-filing. It is apparent from Cleo's materials, including their 5-week cash flow forecast, that the November Oil Revenues will be completely dissipated (including paying \$150,000 for professional fees) within the course of two weeks. In effect, Trafigura will have completely lost its right of set-off, as Cleo intends to dissipate all the revenue and will be bankrupt shortly thereafter, unless it can find a DIP lender in the next two weeks.

13. In the further alternative, Trafigura submits that, if it is required to pay the November Oil Revenues to Cleo at this time, then this Honourable Court should grant a declaration that payment of the November Oil Revenues shall not prejudice Trafigura's right to claim set-off against the Owed Amount at a later date. Furthermore, to ensure that Trafigura's right to claim set-off at a later date is not prejudiced, Trafigura submits that it should be granted the Trafigura Charge. The Trafigura Charge should rank in priority to all other charges, mortgages, liens, security interests and other encumbrances, except for any Administrative Charge or DIP Lender Charge, both of which shall rank in priority to the Trafigura Charge. Without the Trafigura Charge, Trafigura's right to argue set-off at a later date could essentially be rendered moot if Cleo becomes bankrupt and its assets (which are oil and gas assets encumbered by significant ARO) are sold for less than Cleo's roughly \$24 million in debt, especially if the assets are sold for less than the secured debt, in which case Cleo would see no recovery and its ability to claim set-off would be entirely extinguished.

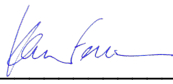
PART V – CONCLUSION

14. Without the sought relief, Trafigura will be irreparably prejudiced and its contractually bargained for set-off rights will be rendered moot. Meanwhile, Cleo will receive all of the benefits under the Agreements, without having to answer to the extensive set-off rights it promised to Trafigura in return. This is especially unfair and prejudicial given Cleo's various events of default that were concealed from Trafigura until after the Filing Date. As a result, the relief sought by Trafigura is reasonable and appropriate in the circumstances.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 24th day of December, 2024.

STIKEMAN ELLIOTT LLP

⁷ See e.g., *Montreal (Ville) c Restructuration Deloitte Inc.*, 2021 SCC 53 at paras 63-82 where the Supreme Court of Canada holds that pre-post set-off is prohibited (unless otherwise ordered by the Court) and that section 21 of the *Companies Creditors' Arrangement Act*, RSC 1985, c C-36 (which is largely identical to section 97(3) of the BIA) authorizes pre-pre set-off.

Per:  _____

Karen Fellowes, K.C.

Counsel for the Respondent/Applicant,
Trafigura Canada Limited

TABLE OF AUTHORITIES

| Tab No. | Description |
|---------|---|
| 1) | <i>Re North American Tungsten Corp</i> , 2015 BCSC 1382 at paras 10-11, aff'd 2015 BCCA 390 |
| 2) | <i>Re 728835 Ontario Ltd.</i> (1998), 111 OAC 155 (Gen Div) |
| 3) | <i>Husky Oil Operations Ltd v Minister of National Revenue</i> (1993), 22 CBR (3d) 153, [1994] 1 WWR 629; affirmed [1995] 10 WWR 161, 128 DLR (4th) 1 (SCC) |
| 4) | <i>Montreal (Ville) c Restructuration Deloitte Inc</i> , 2021 SCC 53 |