IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 15
Canadian Overseas Petroleum Limited, *et al.*,[1]	Case No. 24-10376 (JTD)
Debtors in a foreign proceeding.	(Jointly Administered)
	Re: Docket Nos. 44 & 51

FOREIGN REPRESENTATIVE'S REPLY TO BP ENERGY COMPANY'S OBJECTION TO THE MOTION OF THE FOREIGN REPRESENTATIVE FOR ENTRY OF AN ORDER (I) RECOGNIZING AND ENFORCING THE CCAA VESTING ORDER, (II) APPROVING THE SALE OF SUBSTANTIALLY ALL OF THE DEBTORS' INTERESTS FREE AND CLEAR OF LIENS, CLAIMS, AND ENCUMBRANCES, (III) CONDITIONALLY APPROVING DISMISSAL PROCEDURES FOR DEBTOR SOUTHWESTERN PRODUCTION CORPORATION; AND (IV) GRANTING RELATED RELIEF

Canadian Overseas Petroleum Limited ("COPL"), in its capacity as the duly-appointed foreign representative (the "Foreign Representative") for the above-captioned debtors (collectively, the "Debtors"), in the proceedings (the "Canadian Proceedings")[2] currently pending before the Court of King's Bench of Alberta in Calgary (the "Canadian Court"), initiated under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (as amended, the "CCAA"), by and through its undersigned counsel, respectfully submits this reply (the "Reply") to the objection [Docket No. 51] (the "Objection") of BP Energy Company ("BP") to the *Motion of the Foreign*

[1] The Debtors in these chapter 15 proceedings, together with the last four digits of their business identification numbers are: Canadian Overseas Petroleum Limited (8749); COPL Technical Services Limited (1656); Canadian Overseas Petroleum (Ontario) Limited (8319); Canadian Overseas Petroleum (UK) Limited (7063); Canadian Overseas Petroleum (Bermuda Holdings) Limited (N/A); Canadian Overseas Petroleum (Bermuda) Limited (N/A); COPL America Holding Inc. (1334); COPL America Inc. (9018); Atomic Oil and Gas LLC (8233); Southwestern Production Corporation (8694); and Pipeco LLC (0925). The location of the Debtors' headquarters and the Debtors' duly appointed foreign representative is 715 5 Avenue SW, Suite 3200, Calgary, Alberta T2P 2X6, Canada.

[2] Information on the Canadian Proceedings and documents filed in connection therewith, including reports from the Monitor (as defined herein) and motion materials, can be found at the website of the Monitor at https://www.ksvadvisory.com/experience/case/canadian-overseas-petroleum.

Representative for Entry of an Order (I) Recognizing and Enforcing the CCAA Vesting Order, (II) Approving the Sale of Substantially All of the Debtors' Interests Free and Clear of Liens, Claims, and Encumbrances, (III) Conditionally Approving Dismissal Procedures for Debtor Southwestern Production Corporation; and (IV) Granting Related Relief [Docket No. 44] (the "Motion").[3] In support of this Reply and in further support of the Motion, the Foreign Representative respectfully states the following:

Preliminary Statement

1. The Transaction that the Foreign Representative seeks recognition and approval of is consistent with precedent in both Canada and the United States. A lender is seeking to credit bid senior debt and assume other prepetition debt and obligations of debtors. Notwithstanding BP's protests in its Objection, the proposed sale is not unusual, unprecedented, or inconsistent with the Bankruptcy Code or principals of comity.

2. The Objection ultimately fails and should be overruled because (a) BP is not entitled to adequate protection as a holder of a fully undersecured loan; (b) the Transaction satisfies section 363(f) because parties have either consented to the Transaction or, in the case of BP, (i) the Purchase Price is greater than the aggregate value of all liens on the Purchased Assets and (ii) there are various legal and equitable proceedings that could be compel BP to accept less than full payment of its debt; and (c) the releases provided for in the CCAA Vesting Order and sought to be recognized by this Court (the "Releases") cannot be contrary to public policy when there is well established precedent approving non-consensual third-party releases in the Third Circuit and in this Court.

[3] Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the Motion and Objection, as applicable.

Relevant Background[4]

I. The SISP Process.

3. As described in further detail in the Kravitz SISP Declaration and the SISP Recognition Motion, the Debtors determined that the SISP was the only viable going-concern exit strategy available to the Debtors. *See* Kravitz SISP Decl. ¶ 29. On March 19, 2024, after the appropriate application process, the Canadian Court granted the SISP Order. On March 21, 2024, the Foreign Representative filed the SISP Recognition Motion. There were no formal or informal objections filed or received from BP, in either the Canadian Court or this Court in connection with the approval and recognition of the SISP.[5] The Court entered the SISP Recognition Order on April 8, 2024.

4. The SISP Recognition Order contains findings of fact that, among other things, finds that (a) the SISP was necessary and appropriate in these Chapter 15 Cases; (b) the notice regarding the SISP Recognition Motion was appropriate; and (c) the Sale Procedures and Stalking Horse Purchase Agreement were negotiated and entered into in good faith. The SISP Recognition Order also approved all terms of the SISP Order and the Sales Procedures contained therein.

5. Pursuant to the SISP Orders, the Debtors with the assistance of Province and the CRO, implemented a robust and wholesome marketing process pursuant to the terms of the SISP

[4] A detailed description of the Debtors and their businesses and the facts and circumstances surrounding these chapter 15 cases is set forth in (a) the *Verified Petition for (I) Recognition of Foreign Main Proceedings, or, in the Alternative, Foreign Non-Main Proceedings, (II) Recognition of Foreign Representative, and (III) Related Relief Under Chapter 15 of the Bankruptcy Code* [D.I. 3] (the "Verified Petition" and, together with the official form petitions filed concurrently therewith, the "Chapter 15 Petitions"), (b) the *Declaration of Peter Kravitz in Support of the Debtors' Verified Petition for (I) Recognition of Foreign Main Proceedings, or, in the Alternative, Foreign Non-Main Proceedings, (II) Recognition of Foreign Representative, and (III) Related Relief Under Chapter 15 of the Bankruptcy Code* [Docket No. 11] (the "Initial Kravitz Declaration"), and (c) the *Declaration of David Rosenblat as Canadian Counsel to the Debtors in Support of the Debtors' Chapter 15 Petitions and Requests for Certain Related Relief Pursuant to Chapter 15 of the Bankruptcy Code* [D.I. 10]. Additional information regarding the Motion and the Transaction can be found in the Motion and the Kravitz Declaration.

[5] The Debtors received emails from a shareholder and Anvaio in the Canadian Proceedings expressing concern with the proposed timeline in the SISP. Such concerns were either resolved or overruled.

Order under the supervision of the Monitor. This process included (a) reaching out to 137 different parties; (b) issuance of a press release; (c) engagement with four parties that executed NDAs; (d) responding to diligence requests from three parties; (e) arranging site visits for two parties during the week of April 8, 2024; and (f) engagement with the CAG Representative. Kravitz Decl. ¶¶ 25-28.

6. Despite the robust marketing process and the Debtors' considerable efforts, the Debtors did not receive any LOIs or bids as of the applicable deadlines pursuant to the SISP—including any bid or LOI from BP. *See id.* ¶ 30. Accordingly, the Debtors declared the Stalking Horse Bid as the Successful Bid. *Id.*

II. The CCAA Vesting Order, the BP Objection, and the Canadian Appeal.

7. After determining that the Stalking Horse Bid was the Successful Bid, the Debtors applied for, and were subsequently granted the CCAA Vesting Order on April 24, 2024 by the Canadian Court over an objection filed by BP in the Canadian Proceedings (the "BP Canadian Objection").

8. On May 13, 2024, BP filed its application for permission to appeal the CCAA Vesting Order in Canada (the "BP Canadian Appeal").

9. On May 29, 2024, the BP Canadian Appeal was heard by the Canadian Court, which took the matter under advisement and stated that it would try to issue its ruling within a week.

Reply

I. BP is Not Entitled to Adequate Protection as a Fully Undersecured Lender.

10. A debtor seeking to use, sell, or lease a secured creditor's collateral is required to provide the secured creditor with adequate protection of its interest in such collateral. *See* 11 U.S.C. § 363(e) ("[O]n request of an entity that has an interest in property used, sold, or leased,

or proposed to be used, sold, or leased, by the trustee, the court, with or without a hearing, shall prohibit or condition such use, sale, or lease as is necessary to provide adequate protection of such interest."). A claim is only secured "to the extent of the value of such creditor's interest in the estate's interest in such property. . . and is an unsecured claim to the extent that the value of such creditor's interest. . . is less than the amount of such allowed claim." 11 U.S.C. § 506(a); *see also In re Phila. Newspapers, LLC*, 599 F.3d 298, 315 (3d Cir. 2010) (describing the 506(a) treatment of an undersecured creditor as "divided into: (1) a secured claim equal to the court-determined value of collateral securing the claim, and (2) an unsecured claim for the deficiency"). "An undersecured claim is thus treated as a secured claim only up to the value of the collateral; the excess debt becomes an unsecured claim." *McDonald v. Master Fin., Inc.*, 205 F.3d 606, 609 (3d Cir. 2000).

11. It is well established in the context of a sale that "an auction allows the marketplace to determine the value of the collateral, which, in turn, determines the value of the secured portion of claim[s]." *In re Aerogroup Int'l Inc.*, No. 17-11962 (KJC), 2018 Bankr. LEXIS 1930, *9 (Bankr. D. Del. June 25, 2018). "The fair market value of a business or asset *is the highest amount that a reasonably well[-]informed purchaser would pay in arm's length negotiations in an open and unrestricted market*." *In re Nortel Networks, Inc.*, 532 B.R. 494, 521 n. 165 (Bankr. D. Del. 2015) (emphasis added) (quoting and citing *United States v. Cartwright*, 411 U.S. 546, 551 (1973)).

12. Despite the robust marketing efforts described above, and as described more fully in the Kravitz Declaration, no parties, including BP, submitted any higher or better offers than the Stalking Horse Bid. As discussed above, BP never objected to the propriety of the SISP in either

the Canadian Court or in this Court.[6] The robust SISP, marketing, and sale process have determined that is a BP wholly undersecured creditor. BP acknowledges this in the Objection, stating that "[t]here is no dispute that the price for the Purchased Assets does not provide any recovery on account of the liens securing BP's claims." Obj. ¶ 28 (internal quotation marks omitted). Thus, BP is not entitled to adequate protection under section 363(e) as a fully unsecured creditor under section 506(a)—a possibility BP was well aware of at the outset of this restructuring process. *See Initial Kravitz Declaration* at ¶¶ 131-132.[7]

II. Approval of the Transaction is Appropriate Pursuant to Section 363(f)(3) of the Bankruptcy Code.

13. Section 363(f)(3) of the Bankruptcy Code allows a trustee to sell property free and clear of any liens on such property if "the price at which such property is to be sold is greater than the aggregate value of all liens on such property." 11 U.S.C. § 363(f)(3). The Bankruptcy Code does not define how the "aggregate value of all liens" should be calculated when applying section 363(f)(3), but the most prevalent practice is to determine the aggregate value of liens under section 506(a) and its prescribed process for determining security status in bankruptcy. 3 Collier on Bankruptcy ¶ 363.06, n. 49 (16th ed. 2022) (gathering cases including *In re Beker Indus., Inc.*, 63 B.R. 474, 477 (Bankr. S.D.N.Y. 1986)); *but see id.* at n. 52 (gathering cases holding that a sale price must exceed the face amount of all liens in order to satisfy the "aggregate value of all liens"

[6] Aside from the legal arguments regarding the recognition of the CCAA Vesting Order, the Objection also contains language calling the propriety and fairness of the SISP, and as a result its recognition by this Court, into question. *See* Obj. ¶ 13. To the extent that BP is attempting to challenge the findings of fact or conclusions of in the SISP Recognition Order, BP must meet the high and exacting standards required for this Court to take the "extraordinary step of reconsidering its order," including, but not limited to, a showing that the Court "misapprehended the facts and, thus, made a manifest error of fact and law." *See generally In re Energy Future Holdings Corp.*, 575 B.R. 616 (Bankr. D. Del. 2017) (describing and applying the onerous standards required to reconsider orders).

[7] Further, "a creditor's right to receive adequate protection payments is calculated at the time adequate protection is sought." *In re Aerogroup Int'l, Inc.*, 601 B.R. 571, 596 (Bankr. D. Del. 2019), *aff'd*, 620 B.R. 517 (D. Del. 2020). Prior to BP requesting adequate protection, the SISP conclusively demonstrated that BP is fully unsecured. BP is, therefore, not entitled to adequate protection.

requirement of section 363(f)(3)). This is especially true in circumstances such as chapter 11 cases "where a sale free and clear of liens, even undersecured liens is [] required as a practical matter to permit the sale of a business as a going concern." *Id.*

14. As discussed at length above, BP is a fully undersecured creditor with a valueless lien. Based on the majority view and the prevalent practice, the Transaction satisfies the requirement of section 363(f)(3) of the Bankruptcy Code and recognition of the Transaction as a "free and clear" sale is appropriate.

15. Moreover, the Stalking Horse Purchaser is only seeking to credit bid the senior DIP obligations as part of the Transaction. That the Transaction also contemplates assumption of the Lender's prepetition debt under the Credit Agreement does not change the analysis under section 363(f). Assumption of liabilities under an asset purchase agreement is legally different than a credit bid of secured debt under section 363(k). *See, e.g.*, *In re Never Slip Hold'gs, Inc.*, No. 24-10663 (LSS) (Bankr. D. Del. May 24, 2024) (approving sale with purchase price consisting of, among other things, DIP credit bid and assumption of liabilities); *In re Near Intelligence, Inc.*, No. 23-11926 (TMH) (Bankr. D. Del. Feb. 22, 2024) (same); *In re Humanigen, Inc.*, No. 24-10003 (BLS) (Bankr. D. Del. Feb. 17, 2024) (same); *In re Timber Pharmaceuticals, Inc.*, No. 23-11878 (JKS) (Bankr. D. Del. Jan. 22, 2024) (same); *In re AN Global LLC*, No. 23-11294 (JKS) (Bankr. D. Del. Dec. 28, 2023) (same).

III. Approval of the Transaction is Also Appropriate Pursuant to Section 363(f)(5) of the Bankruptcy Code.

16. Alternatively, under section 363(f)(5), the trustee may sell property of the estate free of liens or other interests if the holder "could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest." 11 U.S.C. § 363(f)(5). Numerous legal and equitable procedures exist by which a junior lender may be forced to accept less than full payment

of its debt. *In re Bos. Generating, LLC*, 440 B.R. 302, 333 (Bankr. S.D.N.Y. 2010). To the extent a junior lender "could be compelled under state law to accept general unsecured claims to the extent the sale proceeds are not sufficient to pay their claims in full, section 363(f)(5) is satisfied." *Id.*

17. Under the law of Wyoming, where the Purchased Assets are located, "[w]hen collateral is disposed of by a secured party after default, the disposition transfers to a purchaser for value all of the debtor's rights therein, discharges the security interest under which it is made and any security interest or lien subordinate thereto." *C. Bud Racicky Agency, Inc. v. Wood Gundy, Inc.*, 767 P.2d 601, 605 (Wyo. 1989). This is the case upon the disposition both under the state's Uniform Commercial Code and real property laws.[8] The bankruptcy court in *Bos. Generating, LLC* held that under a substantially identical New York law,[9] a junior lender could be compelled to accept a general unsecured claim where the sale proceeds were insufficient to pay its debt and, therefore, that section 363(f)(5) permitted the transfer of collateral free and clear of such junior lender's security interests. *In re Bos. Generating, LLC*, 440 B.R. 302, 333 (Bankr. S.D.N.Y. 2010).

IV. The Court Should Recognize the Transaction Approved by the Canadian Court in the Interest of Comity and in Furtherance of the Goals and Objectives of Chapter 15.

18. "Chapter 15 embraces the universalism approach . . . emphasiz[ing] the United States policy. . . that our courts 'act. . . in aid of the main proceedings, in preference to a system of full bankruptcies . . . .'" *In re ABC Learning Ctrs. Ltd.*, 728 F.3d 301, 306 (3d Cir. 2013) (citing H.R. Rep. No. 109-31(l), at 109). A court overseeing a chapter 15 proceeding "acts as an adjunct"

[8] Regarding personal property, s*ee* WY ST § 34.1-9-617. Regarding real property, *see* WY ST § 34-4-113; *Michael's Const., Inc. v. Am. Nat. Bank*, 278 P.3d 701, 710 (Wyo. 2012) (citing several sources in of junior lienholder's liens on real property being terminated by foreclosure).

[9] Regarding personal property, *see* NY § 9-617. Regarding real property, *see* N.Y. Real Prop. Acts Art. 13; *In re Bos. Generating, LLC*, 440 B.R. 302, 333 (Bankr. S.D.N.Y. 2010) ("Under New York law, a junior lienholder (either in a foreclosure of real property or of collateral under the Uniform Commercial Code) is entitled to nothing more.").

to the foreign main proceeding. *Id.* Subject to the public policy exception, "[o]nce a case is recognized as a foreign main proceeding, chapter 15 specifically contemplates that the court will exercise its discretion consistent with principles of comity." *In re Sino-Forest Corp.*, 501 B.R. 655, 664 (Bankr. S.D.N.Y. 2013) (citing *In re Atlas Shipping A/S*, 404 B.R. 726, 733 (Bankr. S.D.N.Y. 2009)).

19. Section 1506 of the Bankruptcy Code contains the "public policy" exception stating that "[n]othing in [chapter 15] prevents the court from refusing to take an action governed by this chapter if the action would be manifestly contrary to the public policy of the United States." 11 U.S.C. § 1506. The public policy exception is narrowly construed because the use of the word "'manifestly' in international usage restricts the public policy exception to the most fundamental policies of the United States." *ABC*, 728 F.3d at 308 (citing H.R. Rep. No. 109-31(l)). The public policy exception applies where the procedural fairness of the foreign proceeding is in doubt or cannot be cured by the adoption of additional protections or where recognition would impinge severely on a U.S. constitutional or statutory right." *Id.* at 309 (internal quotations and citations omitted). "[W]hen the foreign proceeding is in a sister common law jurisdiction with procedures akin to our own, comity should be extended with less hesitation, there being fewer concerns over the procedural safeguards employed in those foreign proceedings. *In re Metcalfe & Mansfield Alternative Investments*, 421 B.R. 685, 698 (Bankr. S.D.N.Y. 2010) (internal quotations and citations omitted). "Canadian courts afford creditors a full and fair opportunity to be heard in a manner consistent with standards of U.S. due process[, and] U.S. federal courts [repeatedly] grant[] comity to Canadian proceedings." *Id.* In the context of non-consensual third-party releases, "the relief granted in the foreign proceedings and the relief available in a U.S. proceeding need not be identical. . . [and] a U.S. bankruptcy court is not required to make an independent determination

about the propriety of individual acts of a foreign court." *Id.* at 697 (internal citation omitted). As a result, "where third-party releases are not categorically prohibited, it cannot be argued that the issuance of such releases is manifestly contrary to public policy." *Sino-Forest*, 501 B.R. at 665 (distinguishing the Fifth Circuit's decision in *In re Vitro S.A.B. de C.V.*, 701 F.3d 1031 (5th Cir. 2012) because it merely failed to find an abuse of discretion in a refusal to extend comity in the case of a non-consensual third-party release without implicating or relying on the public policy exception of section 1506). In fact, multiple courts have held that under rules of comity U.S. courts should recognize third-party releases granted through foreign main proceedings, including Canadian bankruptcy proceedings, even if such releases may not have been granted under U.S. bankruptcy law. *In re Metcalfe & Mansfield Alternative Invs.*, 421 B.R. at 700 ("[P]rinciples of enforcement of foreign judgments and comity in chapter 15 cases strongly counsel approval of enforcement in the United States of the third-party non-debtor release and injunction provisions included in the Canadian Orders, even if those provisions could not be entered in a plenary chapter 11 case."); *see also In re Avanti Commc'ns Grp. PLC*, 582 B.R. 603, 617 (Bankr. S.D.N.Y. 2018) (collecting chapter 15 cases in which bankruptcy courts have recognized third-party releases granted in foreign proceedings).

20. The Third Circuit precedent is clear that non-consensual third-party releases are permissible, and this Court has approved non-consensual third-party releases. *E.g.*, *In re Continental Airlines*, 203 F.3d 203 (3d Cir. 2000); *In re Millennium Lab Holdings II, LLC*, 945 F.3d 126, 139 (3d Cir. 2019) (affirming the approval of non-consensual third-party releases); *In re BSA*, 642 B.R. 504 (Bankr. D. Del. 2022); *In re Mallinckrodt PLC*, 639 B.R. 837 (Bankr. D. Del. 2022). The Releases were approved by the Canadian Court—a court in a sister common law jurisdiction with procedures akin to our own that offers creditors a full and fair opportunity to be

heard in a manner consistent with standards of U.S. due process. BP had the opportunity to, and did in fact, object to the application for the CCAA Vesting Order, without so much as mentioning the Releases. Importantly, the Releases do not have to mirror the procedures of standards that would be applied in this Court when analyzing non-consensual third-party releases in order to be recognized in the chapter 15 context. Therefore, recognition of the CCAA Vesting Order, the Transaction, and the Releases contained therein, is appropriate in the interest of comity and in furtherance of the goals of chapter 15—such recognition not meeting the onerous standard of being "manifestly contrary to the public policy of the United States."

Conclusion

WHEREFORE, the Foreign Representative respectfully requests that the Court overrule the Objection and enter the Proposed Order granting the relief requested in the Motion and such other and further relief as may be just and proper.

Dated: May 31, 2024
Wilmington, Delaware

Respectfully submitted,

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