Court File No. CV-23-00707394-00CL

***ONTARIO***
**SUPERIOR COURT OF JUSTICE**
**(COMMERCIAL LIST)**

**BETWEEN:**

**IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED**

**AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TACORA RESOURCES INC.**

**Applicant**

# AIDE MEMOIRE OF THE CONSORTIUM NOTEHOLDER GROUP
**(Case Conference – February 6, 2024)**

February 5, 2024

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1. This Aide Memoire is filed on behalf of a consortium (the "**Consortium**") comprised of Snowcat Capital Management LP, Brigade Capital Management, LP, Millstreet Capital Management LLC, MSD Partners, LP, O'Brien-Staley Partners, Resource Capital Fund VII L.P., and Javelin Global Commodities (SG) Pte Ltd. as holders of US$207,930,000 (92.4%) in principal of 8.250% Senior Secured Notes due 2026 and/or US$14,955,000 (55.4%) in principal of 9.00% Cash / 4.00% PIK Senior Secured Priority Notes due 2023 issued by Tacora Resources Inc. ("**Tacora**").

2. The Consortium represents the largest economic stakeholder in this CCAA proceeding. The outstanding principal amount owed to members of the Consortium totals approximately $223 million on a fully-secured basis.

3. On October 30, 2023, this Court granted the Solicitation Order, which, among other things, approved the process to solicit offers or proposals for a sale, restructuring, or recapitalization transaction in respect of Tacora's assets and business operations (the "**SISP**"). The SISP also specifically solicited interest in replacing the "**Offtake Agreement**", a contract that requires Tacora to sell 100% of the iron ore concentrate production at the Scully Mine to Cargill International Trading Pte Ltd. ("**Cargill**").

4. The Consortium participated in the SISP in good faith and put forward a bid that provides for the complete repayment or satisfaction of all secured debt, assumption of all pre- and post-filing trade amounts (excluding the Cargill Agreements), continued employment for Tacora's 460 employees, significant new capital to fund Tacora's contemplated capital expenditure plan to ramp up production at the Scully Mine, and a new marketing arrangement on favourable terms for the sale of iron ore to replace the Offtake Agreement. After consultation with its financial advisor and the Monitor, the board of Tacora determined, in its reasonable business judgment, that the

Consortium's bid was the best and only actionable bid in the circumstances and was superior to the other Phase 2 Bids received (the "**Winning Bid**"), which were not Phase 2 Qualified Bids under the SISP.

5. The Consortium executed a support agreement to work together on a restructuring of Tacora dated November 30, 2023 and entered into a subscription agreement with Tacora on January 29, 2024. The target closing date of the transaction set out in the Winning Bid is March 22, 2024, with an outside date of April 26, 2024. The SISP originally provided for an outside date for the closing of a transaction of February 24, 2024 (which timeline was acceptable to Cargill as DIP Lender), reflecting the need for Tacora to emerge as a going concern entity from these CCAA proceedings as soon as possible.

6. Cargill participated in the SISP and was an unsuccessful bidder because, among other things, its bid was incapable of execution. It now proposes a litigation schedule that would materially delay and potentially jeopardize the closing of the only qualified transaction under the SISP in the guise of an alleged need to litigate a plethora of undisclosed issues, including potentially whether the Winning Bid chosen by Tacora, with the support of its financial advisor and the Monitor, should be approved.

7. The Consortium supports the litigation schedule proposed by Tacora. Tacora's schedule provides more than sufficient time to fairly address whatever objections Cargill may have, and would result in the sale approval hearing proceeding the week of March 25th. The litigation schedule proposed by Cargill is unacceptable and unworkable in the context of these CCAA proceedings. It appears to be tactical in its design to extend this process and jeopardize the transaction. Cargill's schedule contemplates two weeks to address the "Preliminary Motion", delays the service of notices of examination until February 21st (even though witnesses have

already been identified), provides more than a month for Cargill to produce its responding motion materials, and includes a week of cross examinations and examinations of at least eight witnesses plus two days of reattendance following answers to undertakings. The sale approval motion, as proposed by Cargill, would only commence on May 1st – five and a half weeks after the time proposed by the Company, over three months after the Winning Bid was chosen, and after the outside date for the Consortium's transaction.

8. This is a real-time CCAA proceeding, not ordinary course litigation. Timely completion of the proposed transaction is critical to Tacora's future. All parties are represented by experienced and sophisticated counsel, all of whom are experienced in conducting real-time litigation both fairly and expeditiously, within the limitations imposed by an insolvency. The evidence is clear that Tacora does not have the luxury of time to conduct protracted litigation. This Court has previously recognized the urgency of concluding these proceedings, noting that delay and instability "could be prejudicial to the company's restructuring efforts."[1]

9. Moreover, Cargill has been aware at least since the SISP was approved, and likely prior to that date, that a competing bid would very likely require that the Offtake Agreement would not be assumed and would need to be replaced by the restructured company. Previous attempts to sell Tacora were unsuccessful in part because the Offtake Agreement limited the interested party's ability to use Tacora's iron ore in its own operations, thus preventing realization of potential synergies. Only one of the Phase 1 LOIs, received from Cargill, contemplated an assumption of the Offtake Agreement. Furthermore, this Court noted when it approved the DIP Facility on October 24, 2023:

[1] *Tacora Resources Inc. (Re)*, 2023 ONSC 6126, at para 101.

> [T]he question of whether the Offtake Agreement can be disclaimed or replaced remains an issue for another day. But at the very least, it is acknowledged that there is the possibility for this to happen in the context of a transaction or restructuring arising out of the Solicitation Process (including a credit bid from the AHG submitted in that process)…[2]

10. The dispute regarding the Offtake Agreement does not come as a surprise to anyone, especially Cargill. During the Comeback Hearing in October, Cargill told the Court that it would litigate any attempt to replace the Offtake Agreement. As a sophisticated litigant deeply involved in these CCAA proceedings, Cargill must have anticipated that this issue would need to be litigated swiftly if the SISP resulted in a successful bid that required the replacement of the Offtake Agreement. It should have planned for this contingency, especially given its failure to submit a compliant Phase 2 Qualified Bid, despite being informed on January 22nd, and several times thereafter, that its bid was non-compliant and having failed to improve that bid.

11. In these circumstances, it is inappropriate to delay the Company's exit from these insolvency proceedings to allow for an extended litigation schedule, proposed by an unsuccessful bidder and contractual counterparty who knew or ought to have known of the need to litigate disputed issues expeditiously, and that will take as long or longer to complete than the SISP itself.

12. Prompt implementation of the Winning Bid, as determined by the Court-approved SISP overseen by a Court-officer, is the only way to ensure stability and certainty for the Company and all of its stakeholders. Any disputes raised by Cargill must therefore be litigated on the more than reasonable timetable proposed by the Company to respect the deadlines within this proceeding and the urgency for the restructured Company to emerge from these CCAA proceedings.

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[2] *Tacora Resources Inc. (Re)*, 2023 ONSC 6126, at para 103. See also para 115-116, where the Court noted that the solicitation process agreed to in the Cargill DIP Facility expressly contemplates that the company shall solicit "Alternative Offtake or Services Agreements" as part of the Solicitation Process.

13. Cargill's suggestion that it will increase the DIP Facility to allow for an extended litigation schedule is counterproductive. Increasing the indebtedness of Tacora will only make it very difficult if not impossible for the Company to emerge from these proceedings with sufficient working capital to successfully ramp up its operations and become profitable. Increasing the DIP Facility will come at the expense of Tacora's employees, suppliers, and other stakeholders, who are interested in building a strong and sustainable business on the emergence from CCAA.

14. Cargill should not be permitted to leverage its position as a contractual counterparty to significantly delay the implementation of the Winning Bid. Doing so would amount to a collateral attack on the Court-approved SISP – a process that was specifically designed to identify and implement a value maximizing transaction in an expeditious and efficient manner. The Consortium played by the rules and submitted its bid within the SISP. Its bid was determined, within those rules and in the exercise of the good faith business judgment of Tacora's board, to be successful. If Cargill's delay efforts are successful in frustrating the Consortium's Winning Bid, Cargill will have improperly engineered a second opportunity to submit a bid. The delay undermines the integrity of the SISP, which required all bidders to put their best foot forward. As this Court has recognized, "[t]he Court does need to be vigilant to ensure that a creditor [such as Cargill] wearing more than one hat does not take advantage of its position."[3]

15. It is incumbent on Cargill to put forward its position and arguments, whatever they may be, so the parties can deal with them in a timely way and within the confines of the CCAA

[3] *Tacora Resources Inc. (Re)*, 2023 ONSC 6126, at para 139.

Proceedings and the reality that only a single actionable bid was obtained for Tacora – the Winning Bid.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 5th day of February, 2024.