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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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.

FACTUM OF CARGILL, INCORPORATED AND CARGILL INTERNATIONAL TRADING PTE LTD.

(Comeback Motion of Tacora Resources Inc. for an Amended and Restated Initial Order, and Cross-Motion of the Ad Hoc Group of Noteholders, returnable October 24, 2023)

October 22, 2023

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PART I – OVERVIEW

1. Cargill, Incorporated and Cargill International Trading Pte Ltd. (together, "**Cargill**") support the relief sought by the Applicant, Tacora Resources Inc. ("**Tacora**"), at this comeback hearing, including the approval of an Amended and Restated Initial Order (the "**ARIO**"). Tacora's ARIO would allow it to obtain a debtor-in-possession ("**DIP**") credit facility under a DIP Facility Term Sheet dated October 9, 2023 with Cargill, Incorporated (the "**Cargill DIP Agreement**"). This will permit Tacora to borrow up to a maximum principal amount of US$75 million in new loans, as well as continue Tacora's existing arrangements with Cargill, which will provide Tacora with liquidity necessary to continue operations and advance its restructuring alternatives during these CCAA proceedings. Tacora, following a DIP solicitation process conducted by its advisors under the supervision of FTI Consulting Canada Inc. in its capacity as the proposed court-appointed Monitor (the "**Monitor**"), and based on advice and recommendations from its advisors, exercised its business judgment to select the Cargill DIP Agreement. The Monitor supported the Cargill DIP Agreement at the initial CCAA hearing on October 10, 2023, and continues to support it now at this comeback hearing.

> DIP Facility Term Sheet, being Exhibit K to the Affidavit of J. Broking sworn October 9, 2023, Application Record, Tab 2.K, p. 453 [CL p. A1309;A637]

2. Cargill opposes the cross-motion by an ad-hoc group of noteholders (the "**AHG**") who seek, among other things, to impose on Tacora their alternative DIP proposal, which has been neither selected by Tacora, nor recommended by Tacora's advisors or the Monitor.

3. The AHG's notice of cross-motion baldly expresses "significant concerns" with Tacora's governance, the process followed in approving the Cargill DIP Agreement, and its terms. Having filed no evidence from any of the AHG members, the AHG sought to find evidence to support its

unfounded allegations against Tacora and Cargill by: (i) serving summonses purporting to require discovery-like production within a day or two of overly broad categories of irrelevant and privileged documents; (ii) cross-examining four witnesses including two Cargill employees (one of whom is also a Tacora director); (iii) serving Tacora with a request to inspect documents; and (iv) serving the Monitor with written interrogatories on its Pre-Filing Report. Yet the AHG's fishing expedition uncovered no evidence to substantiate AHG's unfounded "concerns" or that would support the granting of its cross-motion.

4. Also troubling in the AHG's approach on its cross-motion is the fact that it has not disclosed on the record the identity of its members or their individual economic interests in Tacora.

Companies Creditors Arrangement Act, RSC, 1985, c C-36, s. 11.9

5. The evidence filed both on the initial application and on this comeback hearing strongly supports the granting of the ARIO sought by Tacora. It shows that the parties engaged in a fair DIP solicitation and selection process that allowed Tacora to review and assess DIP proposals with the advice of its advisors and the then-proposed Monitor, and to enter into the DIP financing agreement that is best for all stakeholders—namely, the Cargill DIP Agreement.

6. Indeed, the Monitor has reported in both its Pre-Filing Report and in its First Report (which was delivered after all examinations on the AHG's cross-motion had been completed) that "the terms of the [Cargill] DIP Financing Agreement are reasonable and within market parameters, it is the best interim financing facility currently available, and no creditor will be materially prejudiced by the approval of the [Cargill] DIP Financing Agreement or the granting of the DIP Charge." The Monitor also recommends that the AHG's cross-motion be dismissed.

Pre-Filing Report of the Proposed Monitor dated October 9, 2023 ("**Pre-Filing Report**") at paras. 4(e)(i) and 10(b) [CL p E67;E35

and E70;E38]

First Report of the Monitor dated October 20, 2023 ("**First Report**") at paras. 9(a), 13-14 and 76 [CL p. E37;E5, E38;E6, and E55;E23]

7. Cargill provides this factum to assist the Court in understanding the facts as they pertain to Cargill for the purposes of this comeback hearing.

PART II – SUMMARY OF THE FACTS

A. Cargill's Relationship with Tacora

8. Cargill operates in approximately 70 countries and has over 150 years of experience working with customers.

Cross-Examination of Leon Davies held October 18, 2023 ("**Davies Cross**"), p. 61, lines 7-8 and p. 118, lines 5-7, Transcript Brief, Tab 1 p. 66 and p. 123

9. Cargill has been a significant stakeholder in Tacora's business since 2017. Aside from the Cargill DIP Agreement, Cargill is party to the following materials agreements with Tacora:

(a) An offtake agreement between Tacora, as seller, and Cargill, as buyer of 100% of the iron ore concentrate production at the Scully Mine owned by Tacora, dated April 5, 2017 and restated on November 9, 2018, and as further amended from time to time (the "**Offtake Agreement**"). The Offtake Agreement was amended in 2020 to last for the life of the Scully Mine. It was in place well before the AHG invested in Tacora in May 2021 and February 2022.

Affidavit of Joe Broking sworn October 9, 2023 ("**First Broking Affidavit**") at paras. 34 and 69-70, Application Record, Tab 1, p. 33 [CL p A889;A217 and A898;A226]

(b) A stockpile agreement dated December 17, 2019, as amended from time to time, which works in conjunction with the Offtake Agreement (the "**Stockpile Agreement**"). It provides for payment of a provisional purchase price by Cargill to Tacora when iron ore concentrate is unloaded to a stockpile at the port, as opposed to later after a vessel is loaded in port—effectively providing working capital financing. As described in the First Broking Affidavit:

> The Stockpile Agreement provides Tacora with significant working capital while it remains in effect. As result of the Stockpile Agreement, Tacora receives weekly cash receipts, rather than payments only when vessels are loaded, which occurs approximately every 3-4 weeks.
>
> First Broking Affidavit at paras. 34 and 38, Application Record, Tab 1, p. 33 [CL A889;A217 and A890;A218]

(c) An advanced payments facility agreement, initially dated January 3, 2023, as amended and restated on May 29, 2023 and further amended on June 23, 2023 (the "**APF**"), whereby Cargill initially made advanced payments to Tacora against future deliveries under the Offtake Agreement. As part of the amendment and restatement of the APF on May 29, 2023, Cargill agreed to provide a US$25 million margining facility, to fund Tacora's margin amounts under the Offtake Agreement by way of deemed advances instead of cash payments, thus providing additional liquidity to Tacora. Cargill most recently agreed to extend the term of the APF (as well as the Stockpile Agreement) to October 10, 2023 (*i.e.*, the date on which Tacora filed for protection under the CCAA).

> First Broking Affidavit at paras. 81 and 86, Application Record, Tab 1, p. 45 [CL p. A901;A229 and A903;A231]
>
> First Report at paras. 76-78 and 88 [CL p. E55;E23 –

E56;E24 and E59;E27]

Amended and Restated Advance Payments Facility Agreement dated May 29, 2023, being Exhibit I to the First Broking Affidavit, Application Record, Tab 2.I, p. 409 [CL p A1255;A583]

(d) A wetcon purchase and sale agreement dated July 10, 2023 (the "**Wetcon Agreement**") whereby Cargill agreed to purchase 172,000 tonnes of wet concentrate from Tacora for an initial upfront payment of $5 million for 117,000 tonnes of wet concentrate, and additional payments when additional wet concentrate (up to a limit of 225,000 tonnes) was added to the stockpile, along with deferred further payments if and when Cargill took delivery of the wet concentrate based on the actual price of such wet concentrate. On September 12, 2023 (a potential date on which Tacora contemplated filing for protection under the CCAA), Cargill agreed to amend the Wetcon Agreement and to provide to Tacora $3,954,171.43 in full satisfaction of all amounts (including deferred amounts) owing under the Wetcon Agreement.

First Broking Affidavit at paras. 125-126, Application Record, Tab 1, pp. 56-57 [CL p A894;A222-A895;A223]

10. Cargill, International also holds preferred shares in Tacora issued in November 2022, which provided Tacora with additional funding. The issuance of these preferred shares coincided with the November 15 semi-annual interest payment due on the AHG's notes.

Cross-Examination of Paul Carrelo held October 19, 2023 ("**Carrelo Cross**"), p. 81, lines 2-17, Transcript Brief, Tab 3, p. 444

First Broking Affidavit at para. 71, Application Record, Tab 2, p. 43 [CL p A899;A227]

11. Over the past years, Cargill has been a stable and reliable partner to Tacora. Leon Davies, a Cargill employee and Tacora board member, testified about Cargill's marketing efforts and technical research that has assisted in making Tacora's iron ore concentrate highly desirable, and steps Cargill has taken to provide ongoing working capital and liquidity to Tacora, as well as increasing such liquidity at key times. Paul Carrelo, one member of a broad team of Cargill employees involved with Tacora, testified that, despite Cargill having withheld certain payments to Tacora for trains in September and October 2023 in order to protect Cargill's interests (*i.e.*, set-off rights) in the face of Tacora advising Cargill it had booked court dates and potentially intended to commence CCAA proceedings, Cargill tried very hard to keep Tacora out of CCAA.

> Davies Cross, p. 117, line 17 – p.119, line 19, Transcript Brief, Tab 1, p. 122 – p. 124
>
> Carrelo Cross, p. 43, line 22-23, p. 59, line 7 – p. 61, line 7, and p. 72, lines 1-13, Transcript Brief, Tab 3, p. 406, p. 422 – 424, p. 435
>
> See also, Cross-Examination of Joe Broking held October 19, 2023 ("**Broking Cross**"), p. 45, line 13 – p. 46, line 17, Transcript Brief, Tab 4, p. 531 – p. 532

12. The view that Cargill has been a good partner to Tacora is shared by Tacora's Chief Executive Officer, Joe Broking. During cross-examination by AHG's counsel, Mr. Broking's evidence was that "Cargill has been a good partner to Tacora going all the way back to 2017 and 2018."

> iMessages between J. Broking and L. Davies, being Exhibit 5 to the Davies Cross, Transcript Brief, Tab 1(E), p. 156
>
> Broking Cross, p. 75, lines 14-22, Transcript Brief, Tab 4, p. 561

B. Events Relevant to the DIP Selection Process

(i) The August/September 2023 DIP Solicitation Process

13. On August 14, 2023, Tacora's financial advisor, Greenhill & Co. Canada Ltd. ("**Greenhill**"), as part of contingency planning efforts, commenced a solicitation process to obtain DIP financing on behalf of Tacora. At such time, Cargill and the AHG had been advancing the terms of a consensual transaction to be implemented outside of an insolvency proceeding.

> First Broking Affidavit at paras. 129 134, Application Record, Tab 2, pp. 57 and 59 [CL p A895;A223]

14. Led by its counsel, Cargill participated in this initial DIP solicitation process in August and September and submitted a non-binding DIP facility term sheet to Tacora. However, Cargill did not ultimately submit a binding DIP proposal to Tacora in September 2023 as Cargill was focused on reaching a consensual restructuring transaction and helping Tacora to avoid a CCAA application altogether.

> Response of Tacora on October 17, 2023 to AHG Request to Inspect dated October 15, 2023, item (d)
>
> Carrelo Cross, p. 55, line 14 – p. 56, line 20, Transcript Brief, Tab 3, p. 418 – 419

15. Tacora's board (comprised of: Tacora's Chief Executive Office, Mr. Broking; a Cargill employee, Mr. Davies; and the representative put in place by the AHG, Trey Jackson) initially approved a DIP proposal that was submitted by the AHG in mid-September 2023 when it was the ***only*** DIP option available to Tacora. Mr. Davies testified that "[t]he Board was satisfied that a DIP was better than no DIP." Mr. Broking testified that "we had one option and, therefore, because that was our only option, we did execute the DIP term loan agreement [with the AHG] in September."

Davies Cross, p. 78, lines 2-3, Transcript Brief, Tab 1, p. 83

Broking Cross, p. 35, line 4 – p. 36, line 3, Transcript Brief, Tab 4, p. 521 – p. 522

Tacora Corporate Profile Report, being Exhibit A to the First Broking Affidavit, Application Record, Tab 2.B, p. 73 [CL p A928;A256]

(ii) Tacora's Stakeholders Advance a Consensual Deal

16. Tacora did not file for CCAA protection in September, as Cargill and the AHG, as well as another confidential third-party potential investor, were advancing discussions and had reached an agreement in principle on a consensual transaction that was intended to obviate any need for Tacora to file for CCAA protection (the "**Consensual Deal**"). In addition, Cargill made various payments to Tacora during this September period to ensure Tacora had sufficient liquidity to avoid a CCAA filing, including in respect of amending the Wetcon Agreement and providing certain payments thereunder as described above on September 12, 2023, and paying for certain trains.

First Broking Affidavit at paras. 125-126 and 129, Application Record, Tab 2, p. 55 [CL p A912;A240 – A913;A241 and A913;A241]

Broking Cross, p. 35, line 4 – p. 36, line 3, Transcript Brief, Tab 4, p. 521 – p. 522

Carrelo Cross, p. 55, line 22 – p. 56, line 20, Transcript Brief, Tab 3, p. 418 – 419

Davies Cross, p. 112, lines 1-8 and Exhibit C (For Identification), Transcript Brief, Tab 1, p. 117 and p. 209

17. Following September 12, Cargill and the AHG (as well as the third-party investor) continued to work to advance the Consensual Deal. In this regard, meetings in New York were scheduled for October 3 and 4, between Cargill, the AHG and the third party investor.

First Broking Affidavit at para. 129, Application Record, Tab 2, p. 55 [CL p A913;A241]

18. Unbeknownst to Cargill at the time, on September 28, 2023, counsel for the AHG provided a new DIP agreement to Tacora's counsel. Tacora's Chief Financial Officer, Mr. Vuong, recalls being surprised it was sent because he believed everyone was focused at that time on the Consensual Deal done and he was uneasy that the AHG were seeking to re-engage on a DIP at that time. Mr. Vuong believes the new DIP agreement sent by the AHG to Tacora on September 28 was an update of the AHG's DIP from September 11 as that earlier agreement was no longer actionable.

Undertaking Chart from Broking Cross re No. 4, Q. 234, p. 84, Transcript Brief, Tab 4, p. 570

19. Chetan Bhandari from Greenhill testified that, towards the end of September, given Tacora's cash flows, Tacora faced the prospect of having to file for CCAA if the Consensual Deal did not proceed. Mr. Bhandari said Tacora's advisors felt that Tacora needed the best DIP possible, so wanted an alternative to the AHG DIP signed September 11, including because that DIP from September "was not workable given some of the milestones that it had in it which wouldn't have been able to – which we couldn't achieve." So on September 29, 2023, Greenhill contacted Mr. Carrelo of Cargill and encouraged Cargill to consider making a DIP proposal to Tacora. However, Mr. Carrelo's view was that Cargill and other parties were focused on the Consensual Deal and there was no need to work on a DIP proposal. So Cargill took no steps to advance a DIP proposal at that time. Unknown to Cargill, starting in late September, counsel to Tacora was having discussions with counsel to the AHG about updating the AHG's DIP from September.

Carrelo Cross at p. 64, line 8 to p. 66, line 23, Transcript Brief, Tab 3, p. 427 – p. 429

Cross-Examination of Chetan Bhandari held October 18, 2023

("**Bhandari Cross**") at p. 66, line 2 – p. 68, line 3, p. 71, lines 3-13, p. 91, line 16 – p. 92, line 4, p. 97, lines 9-16, Transcript Brief, Tab 2, p. 277 – p. 279, p. 282, p. 302 – p. 303, p. 308

(iii) The October 3-4 New York Meetings

20. On October 3 and 4, 2023, Mr. Carrelo of Cargill attended in-person meetings in New York with representatives of the AHG and the third-party investor. Mr. Carrelo understood that the purpose of the New York meetings was to move forward the Consensual Deal.

Cross-Examination of Paulo Carrelo held October 19, 2023 ("**Carrelo Cross**"), p. 87, line 6 – p. 88, line 9, Transcript Brief, Tab 3, p. 450 – p. 451

21. The New York meetings ended on the morning of October 4, 2023. It was only after that point that Cargill made the determination that a CCAA filing was likely unavoidable and it was only on October 4 that Mr. Carrelo spoke to others within Cargill about Cargill considering preparing a DIP proposal, which process was led by Cargill's counsel. Cargill had not worked on a DIP proposal between the time it stopped work on the initial DIP solicitation process in mid-September 2023, and October 4, 2023 when the New York meetings ended.

Carrelo Cross, p. 66, line 18 – p. 67, line 11 and p. 90, line 10 – p. 92, line 10, Transcript Brief, Tab 3, p. 429 – p. 430, p. 453 – p. 455

(iv) The Second DIP Solicitation Process

22. Tacora had been, as part of contingency planning, preparing for a CCAA filing for an extended period of time, with such a filing having always been possible.

23. There is no credible argument that the AHG was unfairly unprepared or provided with insufficient time to respond to Tacora's request on October 5 that final DIP proposals be submitted by 5:00 pm on Saturday, October 7. Mr. Bhandari testified that in the run-up to October 5, the

AHG was working on its DIP proposal, and the AHG's advisors were communicating with Tacora and were advised of Tacora's concerns with the September 11 DIP.

> Bhandari Cross at p. 72, line 14 – p. 73, line 1, p. 75, line 14 – p. 77, line 2, Transcript Brief, Tab 2, p. 283 – 284, p. 286 – 288.

24. On October 5, 2023, Mr. Broking learned that Cargill wanted to submit a DIP proposal, which Cargill DIP proposal was sent to Tacora and its advisors on October 5, 2023.

> Broking Cross, p. 45, lines 18-23, Transcript Brief, Tab 4, p. 531.

25. Mr. Broking emailed Cargill on October 5, 2023, asking Cargill to pay for ten trains of iron ore that had been delivered to port. Cargill ultimately agreed to pay for seven trains, and to extend the maturity of the Advanced Payment Facility and the Stockpile Agreement "on the basis that Tacora will not file for CCAA prior to the 10th of October 2023."

> Emails between J. Broking and L. Kirk dated October 5, 2023, being Exhibit 5 to the Cross-Examination of Chetan Bhandari, Transcript Brief, Tab 2.F, p. 360

26. According to Mr. Broking, he sent the October 5 email to Cargill requesting payment for trains because he was:

> … trying to improve the liquidity of the company before we file for CCAA because, at this time, it was apparent or at least likely that we were going to be filing for CCAA. But with that being said, we -- we received a DIP term sheet that we were working through with our advisors from Cargill and, at the same time, we were using this as an opportunity to meaningfully improve the cash position of the company by collecting revenue for train shipments.
>
> At the time, we were expecting to file on October 6th with approximately 5.5 million in cash and, again, we saw this as an opportunity to improve the cash position for the benefit of all stakeholders of the company by collecting trains while we evaluated and the advisors evaluated the DIP term sheet as well as the board of directors.

…

> To be clear, and for the record, the invoice that was due and payable on this date was for seven trains because we were trying to improve the cash flow position of the company for the benefit of all stakeholders. We initially asked for Cargill to pay for ten trains which would have been the estimated shipments through the point that this conversation was happening.
>
> We felt like this was an opportunity for Tacora to -- to take advantage of some leverage that Tacora had to try and maximize the liquidity and increase this liquidity before we filed for CCAA. So this was the result of a negotiation and, again, that materially improved the cash balance of the company on a pro forma basis [on] October 10th, 2023.
>
> Broking Cross, p. 45, line 24 to p. 46, line 17, and p. 51, lines 5-21, Transcript Brief, Tab 4, p. 531 – p. 532 and p. 537

27. Mr. Carrelo similarly gave evidence that Cargill "made the train payments to create more liquidity in the business."

> Carrelo Cross, p. 72, lines 7-9, Transcript Brief, Tab 3, p. 435

28. Cargill submitted a binding DIP proposal on October 7, 2023. Tacora asked for a higher amount of the Cargill DIP, which Cargill agreed to on October 8. Tacora, together with its advisors and with the participation of the Monitor, determined that the Cargill DIP Agreement (with the higher, US$75 million loan amount and the additional liquidity provided by way of extension of the existing arrangements between Tacora and Cargill) was Tacora's best option. As stated by a representative of Greenhill, Chetan Bhandari:

> Throughout the Second DIP Process, Stikeman and Greenhill, in consultation with FTI, as Proposed Monitor, communicated key issues in each party's DIP proposal and negotiated with both parties to secure the best possible terms for the Company. Following these negotiations, the final DIP proposals from each of Cargill and the Ad Hoc Group were provided to the Company's board of directors (the "**Board**") and management. Following receipt of the advice and recommendations from Greenhill, Stikeman and FTI, the Board

> exercised their good faith business judgment and determined that the Cargill DIP proposal received during the Second DIP Process was the superior DIP facility available for the Company.
>
> Affidavit of Chetan Bhandari sworn October 9, 2023 ("**First Bhandari Affidavit**") at para. 19, Application Record, Tab 3, p. 514 [CL p A1370;A698]

29. Tacora and its advisors, with the involvement of the Monitor, ran a fair DIP solicitation process. Tacora and its advisors considered the terms available and selected what was best.

30. On October 9, 2023, Tacora and Cargill entered into the Cargill DIP Agreement.

> Cargill DIP Agreement, Exhibit K to the First Broking Affidavit, Application Record, Tab 2.K, p. 453 [CL p A1309;A637]

C. No Improper Information Sharing

31. Any suggestion that Mr. Davies, a Tacora director who is also an employee of Cargill, had improperly been involved in Cargill's DIP proposal, is wholly without merit. To the contrary, Mr. Davies' evidence, which was uncontroverted, was that: (i) he took his fiduciary duties as a Tacora director seriously; (ii) he had no involvement in Cargill's DIP proposal or its negotiation other than to encourage Cargill on behalf of Tacora to consider putting forward a DIP proposal; (iii) he shared no confidential Tacora information with Cargill; and (iv) he did not learn of the substance of Cargill's DIP proposal or the AHG's until they were presented to Tacora's board on October 8, 2023.

> Davies Cross, p. 50, line 23 – p. 51, line 12, p. 82, line 20 – p. 83, line 10, p. 116, line 12 – p. 117, line 16, Transcript Brief, Tab 1, p. 55 – p. 56, p. 87 – p. 88, p. 121 – p. 122

32. Mr. Davies testified that Cargill had "absolutely not" received any advantage in respect of advancing or securing the Cargill DIP Agreement as a result of Mr. Davies having been on the

Tacora board. Mr. Davies did not vote on the Tacora board's approval of the Cargill DIP Agreement.

> Davies Cross, p. 88, lines 20-22 and p. 114, lines 5-10, Transcript Brief, Tab 1, p. 93 – p. 119

33. Mr. Bhandari testified that although Tacora and its advisors were in discussions with the AHG after September 11 about DIP matters, he provided no details of those discussions to Cargill, and he is not aware of Tacora or any of its advisors doing so either.

> Bhandari Cross, p. 109, lines 9-19, Transcript Brief, Tab 2, p. 320

34. Mr. Broking's evidence on this point also directly refutes the suggestion by the AHG about concerns regarding Tacora's process to approve the Cargill DIP Agreement. Mr. Broking was not involved in negotiations of the DIP proposals, and did not see the DIP term sheets until they were provided to Tacora's board on October 8.

> Second Affidavit of Joe Broking sworn October 15, 2023 at para. 33, Supplementary Application Record dated October 15, 2023, Tab 1, p. 12 [CL p A684;A12]
>
> Broking Cross, p. 60, lines 9-23, p. 62, lines 13-21, Transcript Brief, Tab 4, p. 546, p. 548

D. The Cargill DIP Agreement and Offtake Agreement Do Not Impede Tacora's CCAA

35. Mr. Bhandari gave evidence that the Cargill DIP Agreement permits Tacora to engage in a strategic sales and solicitation process during these CCAA proceedings that could involve assumption of Cargill's Offtake Agreement, a new offtake agreement, or no Offtake Agreement—subject to a reservation of Cargill's rights.

> First Bhandari Affidavit at para. 21, Application Record, Tab 3, p. 515 [CL p A1371;A699]

36. The evidence does not show that the Offtake Agreement is an impediment to Tacora's restructuring.

> Broking Cross, p. 87, line 6 to p. 89, line 9 including Confidential Exhibit 3, Transcript Brief, Tab 4, p. 573 – p. 575 and Tab 4.C, p. 609

37. Cargill supports the sale, investment and services solicitation process proposed by Tacora.

> Revised Proposed Solicitation Order, Supplementary Application Record dated October 15, 2023, Tab 4, p. 136 [CL p A1378;A706]

E. The Monitor Supports the Cargill DIP Agreement

38. The Monitor has been involved in this CCAA proceeding, has received the evidence filed, has observed the cross-examinations conducted by the AHG, and has provided answers to interrogatories requested by the AHG. After all the examinations were completed, the Monitor filed its First Report on October 20, 2023, in which it recommended that this Court approve the Cargill DIP Agreement with no changes to the form of agreement previously approved by this Court on October 10. In other words, after the AHG had a full opportunity to show the alleged superiority of the DIP sought to be approved by the AHG (which required that Tacora, the Monitor and Cargill expend significant effort and legal fees in response), there has been ***no change*** to the Monitor's recommendation provided to this Court in the Monitor's Pre-Filing Report.

> First Report of the Monitor dated October 20, 2023 at paras. 9(a) and 18 -20 [CL p. E37;E5 and E39;E7 – E40;E8]

39. The strong recommendations in both reports from the Monitor—who was materially involved in the DIP process in conjunction with Tacora's financial advisor and counsel—is a strong indicator of the fairness of both the process by which DIP financing was solicited, analyzed and selected, and the terms of the Cargill DIP Agreement itself.

Companies Creditors Arrangement Act, RSC, 1985, c C-36, s. 11.2(4)(g)

F. Cargill Complied with its Obligations under Rule 39.03

40. In support of its cross-motion, the AHG summonsed two Cargill employees, Mr. Davies and Mr. Carrelo, pursuant to Rule 39.03 of the *Rules of Civil Procedure*. Each discharged their duties and obligations in accordance with the notices of examinations they received and the jurisprudential obligations of Rule 39.03 witnesses.

41. The proper scope of a Rule 39.03 examination is clear:

(a) Is such scope limited solely to the personal knowledge of the witness? Yes.

(b) Is such witness required to take reasonable steps to inform himself or herself prior to being examined? No.

(c) Is such witness obliged to undertake to make enquiries of others if he or she cannot answer otherwise proper questions by reason of lack of knowledge or recollection? No.

Magnotta Winery Corp. v. Ontario (Alcohol and Gaming Commission), 2016 ONSC 3174 (CanLII) at para. 21 (S.C.J.—Master)

42. Each of Mr. Davies and Mr. Carrelo produced the relevant and non-privileged records requested of them by the AHG in advance of their cross-examinations. However, they did not—nor were they obligated to—produce all records responsive to the overly broad, discovery-like document requests set out in the notices of examination only delivered late in the evening on Monday, October 16 in advance of examinations scheduled for October 18 and 19. The notices of examination sought production of Cargill documents since early 2023 about irrelevant topics; for

example, Mr. Carrelo was asked to produce "[a]ny and all Documents in your possession power or control discussing Cargill's strategy for its negotiations in respect of Tacora's restructuring".

> Notice of Examination to Leon Davies dated October 16, 2023 , being Exhibit 8 to the Davies Cross, Transcript Brief, Tab 1.H, p. 171
>
> Notice of Examination to Paulo Carrelo dated October 16, 2023 , being Exhibit 1 to the Carrelo Cross, Transcript Brief, Tab 2.A, p. 458

43. The document requests in the notices of examination were improper. A document request for a hearing may compel production of documents for the purpose of proving the relevant facts at issue, but cannot allow for discovery of documents.

> *Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co.*, 1990 CanLII 5609 (AB KB) at para. 6

44. Thus, where the defendants in an action summonsed non-party witnesses and requested enormous numbers of documents spanning lengthy time periods, had not pointed to any specific documents in the possession of the non-parties, and had served the same or very similar lists on each of the non-parties, the Court quashed the summons, having concluded that:

> … it is inspection and discovery that is sought and not proof. The subpoenas [to produce documents] here are properly characterized as a disguised form of discovery against non-parties.
>
> *Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co.*, 1990 CanLII 5609 (AB KB) at paras. 16 and 21

45. The very same principles apply here. The Rule 39.03 witnesses produced relevant documents, made themselves available for several hours of examination, and answered relevant questions to the best of their abilities.

46. The AHG's broad document requests and questions asked that were wholly unrelated to the AHG's cross-motion raise questions as to the AHG's motivations in bringing this cross-motion at all.

47. During the hearing by this Court of Tacora's initial application on October 10, 2023, the AHG made broad, sweeping and unfounded accusations against Tacora, Tacora's management and board, the Monitor, and Cargill. At the time, Cargill advised the Court that such factually inaccurate and misleading statements were not supported by the facts or the evidence in the record on the initial application. The evidence filed in respect of this comeback hearing, and the AHG's cross-motion, which includes transcripts of cross-examinations conducted by the AHG of four witnesses, does not support any of the misleading and inaccurate statements made to this Court by the AHG during the initial application hearing. Rather, the evidence filed both on the initial application and on this comeback hearing strongly supports the actual facts: Tacora and its advisors, as well as Cargill, worked in good faith to seek to avoid the need for a CCAA filing, and Tacora and its advisors engaged in a fair DIP solicitation and selection process that allowed Tacora and its advisors, including the proposed Monitor, to negotiate and evaluate, and for Tacora to enter into, the DIP financing agreement that is best for all stakeholders. The AHG's approach to this CCAA proceeding so far should not be countenanced by this Court.

PART III – ISSUES AND THE LAW

48. The question to be determined on this comeback motion is whether the ARIO sought by Tacora, including its terms relating to the Cargill DIP Agreement, ought to be approved by this Court, and whether the AHG's cross-motion should be dismissed.

49. Cargill supports the legal argument contained in the factums of Tacora dated October 22, 2023.

PART IV – ORDER REQUESTED

50. Cargill respectfully requests that the ARIO sought by Tacora be granted, and that the AHG's cross-motion be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

October 22, 2023

/s/ Goodmans LLP

Goodmans LLP

SCHEDULE A

LIST OF AUTHORITIES

1. *Magnotta Winery Corp. v. Ontario (Alcohol and Gaming Commission)*, 2016 ONSC 3174 (CanLII)

2. *Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co.*, 1990 CanLII 5609 (AB KB)

SCHEDULE B

EXCERPTS OF STATUTES AND REGULATIONS

Companies' Creditors Arrangement Act, R.S.C., 1985, c. C-36

Interim financing

11.2 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

Priority — secured creditors

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

Priority — other orders

(3) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.

Factors to be considered

(4) In deciding whether to make an order, the court is to consider, among other things,

(a) the period during which the company is expected to be subject to proceedings under this Act;

(b) how the company's business and financial affairs are to be managed during the proceedings;

(c) whether the company's management has the confidence of its major creditors;

(d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;

(e) the nature and value of the company's property;

(f) whether any creditor would be materially prejudiced as a result of the security or charge; and

(g) the monitor's report referred to in paragraph 23(1)(b), if any.

Additional factor — initial application

(5) When an application is made under subsection (1) at the same time as an initial application referred to in subsection 11.02(1) or during the period referred to in an order made under that subsection, no order shall be made under subsection (1) unless

the court is also satisfied that the terms of the loan are limited to what is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

Disclosure of financial information

11.9 (1) A court may, on any application under this Act in respect of a debtor company, by any person interested in the matter and on notice to any interested person who is likely to be affected by an order made under this section, make an order requiring that person to disclose any aspect of their economic interest in respect of a debtor company, on any terms that the court considers appropriate.

Factors to be considered

(2) In deciding whether to make an order, the court is to consider, among other things,

(a) whether the monitor approved the proposed disclosure;

(b) whether the disclosed information would enhance the prospects of a viable compromise or arrangement being made in respect of the debtor company; and

(c) whether any interested person would be materially prejudiced as a result of the disclosure.

Meaning of *economic interest*

(3) In this section, ***economic interest*** includes

(a) a claim, an eligible financial contract, an option or a mortgage, hypothec, pledge, charge, lien or any other security interest;

(b) the consideration paid for any right or interest, including those referred to in paragraph (a); or

(c) any other prescribed right or interest.

***Rules of Civil Procedure,* R.R.O. 1990, Reg. 194**

Evidence by Examination of a Witness
Before the Hearing

39.03 (1) Subject to subrule 39.02 (2), a person may be examined as a witness before the hearing of a pending motion or application for the purpose of having a transcript of his or her evidence available for use at the hearing.

(2) A witness examined under subrule (1) may be cross-examined by the examining party and any other party and may then be re-examined by the examining party on matters raised by other parties, and the re-examination may take the form of cross-examination.

(2.1) Subrules (1) and (2) do not apply to an application made under subsection 140 (3) of the *Courts of Justice Act*. O. Reg. 43/14, s. 12.

To be Exercised with Reasonable Diligence

(3) The right to examine shall be exercised with reasonable diligence, and the court may refuse an adjournment of a motion or application for the purpose of an examination where the party seeking the adjournment has failed to act with reasonable diligence.

At the Hearing

(4) With leave of the presiding judge or officer, a person may be examined at the hearing of a motion or application in the same manner as at a trial.

Summons to Witness

(5) The attendance of a person to be examined under subrule (4) may be compelled in the same manner as provided in Rule 53 for a witness at a trial.

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.

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at Toronto

Factum of Cargill, Incorporated and Cargill International Trading Pte Ltd.

(Comeback Motion of Tacora Resources Inc. for an Amended and Restated Initial Order, and Cross-Motion of the Ad Hoc Group of Noteholders, returnable October 24, 2023)

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