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.

APPLICANTS

FACTUM OF THE CONSORTIUM NOTEHOLDER GROUP

March 27, 2024

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PART I - OVERVIEW

1. This factum is filed on behalf of the Consortium Noteholder Group (the "**Consortium**")[1] in support of the motion brought by Tacora Resources Inc. ("**Tacora**" or the "**Company**") for an Approval and Reverse Vesting Order (the "**Sale Approval Order**"). The Consortium also supports the Company in opposing the motions and cross-motions by Cargill Incorporated and Cargill International Pte Ltd. ("**Cargill**") challenging the Sale Approval Order and seeking to compel Tacora, over its objections, to implement Cargill's own restructuring plan for the Company.

2. The Consortium represents approximately 94% of the holders of secured notes issued by Tacora (the "**Noteholders**"). The Noteholders are Tacora's largest economic stakeholder in this proceeding under the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36 ("**CCAA**"). The outstanding principal amount owed to the Noteholders totals approximately US $223 million on a fully-secured basis. The Consortium's proposed transaction for restructuring Tacora's business (the "**Consortium Transaction**") was the only Phase 2 Qualified Bid submitted under and in compliance with the court-approved Solicitation Process ("**SISP**"). The Consortium Transaction was unanimously adopted as the Successful Bid by the Tacora board of directors (the "**Board**"), in the exercise of its informed business judgment, in consultation with the Company's legal and financial advisors and with the support of the court-appointed Monitor.

3. The Consortium participated in good faith in the SISP. The SISP was conducted in accordance with the Solicitation Order dated October 30, 2023 ("**SISP Order**"), which was

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[1] The Consortium consists of 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 LP, 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.

granted by this Court on the basis that the process was reasonable and appropriate. Importantly, the SISP Order and the SISP, including its timelines and bid deadlines, were consented to in all respects by Cargill; indeed, the SISP was *required* under the terms of Cargill's DIP financing. The SISP is typical of many similar sales process orders approved by this Court in CCAA proceedings. The Consortium submitted its fully compliant bid by the court-approved bid deadline.

4. The implementation of the Consortium Transaction, as the Successful Bid, would be in the form of a reverse vesting order ("**RVO**"), a transaction structure expressly contemplated under the SISP. Additionally, as also contemplated under the SISP, the Consortium Transaction proposes to replace the highly uneconomic Cargill Offtake Agreement with a new marketing arrangement for iron ore produced from the Scully Mine on favourable terms that will allow the Company to move forward on a viable economic footing.

5. In addition to new favourable iron ore marketing arrangements, the Consortium Transaction offers substantial benefits to Tacora and its stakeholders, including: (a) complete payment or satisfaction of all secured debt, including the secured indebtedness owed to the Noteholders and to Cargill (the latter is being paid in full in cash); (b) assumption of all pre- and post-filing trade amounts (excluding certain agreements between Tacora and Cargill); (c) continued employment for all of Tacora's 460 employees; and (d) significant new capital to fund Tacora's contemplated capital expenditure plan to ramp up production at the Scully Mine.

6. The Consortium Transaction satisfies all of the requirements accepted by this Court as supporting the approval of a sale transaction under the CCAA, in the absence of a plan, including the factors set out in section 36 of the CCAA. Such sale transactions outside a plan have been approved on countless occasions at the conclusion of a fair process in which the market for the debtor's assets or other restructuring alternatives has been fully canvassed.

7. No other compliant bid was submitted in the SISP. Two other bids were received, including a bid from Cargill. Despite its extensive knowledge of the Company's operations, its very substantial financial wherewithal, and despite having been provided several opportunities to improve its bid, Cargill's bid was not a Phase 2 Qualified Bid, as defined in the SISP, and was not executable. Cargill's bid fell short of the specified qualifying criteria under the SISP in multiple ways and was unanimously rejected by the Board. The evidence demonstrates that Cargill knew that its bid was not a qualifying bid under the SISP and it made the deliberate choice not to improve its terms to meet the SISP criteria.

8. Notably, Cargill's senior management decided not to backstop the Cargill bid, even though Cargill has the financial ability to do so, and knew that a failure to backstop the bid would render it non-compliant in the absence of other committed financing. Even now, two months later, despite its attempts to "slow play" the transaction approval process and despite its continued efforts to find financing, Cargill still does not have *any* committed financing necessary to support its non-qualified bid, even though it is well past the time to submit a qualifying bid.

9. Cargill is indisputably a "bitter bidder". A bitter bidder has limited, if any, rights to challenge a purchase transaction. Many of Cargill's objections to the process – for example, that the Company did not negotiate with it for longer, including after the timelines under the SISP had expired; that the Company did not give it more time to find equity partners; that the Company should have waived the requirements of the SISP as they applied to Cargill – are inherently the submissions of a bitter bidder seeking to convince this Court that the outcome of the SISP should have favoured Cargill, despite its deliberate choice not to submit a qualifying bid.

10. There is a very high threshold for this Court to disregard the outcome of its own court-approved sales process and to second-guess the Tacora Board's business judgment, as supported

by the Monitor, that the Consortium Transaction represents the best option for the restructuring of Tacora's business. Cargill does not even attempt to refute the determination by the Company, in consultation with its advisors and the Monitor, that Cargill's bid was not a Phase 2 Qualified Bid; nor could it. Cargill says only that Tacora should have continued to negotiate with Cargill after the Phase 2 bid deadline to create "deal tension", despite Cargill's deliberate failure to put a qualifying, executable deal on the table. Alternatively, Cargill says that the Company should have forced a negotiation between the only qualified bidder and Cargill, in its own self-interest.

11. Instead of accepting the consequence of its choices and the outcome of the SISP, Cargill has adopted a deliberate scorched earth strategy designed to subject every aspect of the SISP process to microscopic forensic examination, in its own words, as a "strategy to buy time" to gain leverage in this proceeding. The standard for fairness is one of reasonableness, not perfection. Despite its attempts to show otherwise, Cargill has not demonstrated that any unfairness occurred that would undermine the integrity of the process. In fact, the Monitor has expressed the unequivocal view that the SISP process was fairly designed and conducted.

12. Granting any of the relief sought by Cargill would undermine the court-approved SISP and play into Cargill's admitted strategy to use delay to its advantage in an attempt to maintain its economic stranglehold over Tacora and its other stakeholders for Cargill's own profit. This Court should refuse to let Cargill, as bitter bidder and in its capacity as an unsecured creditor in respect of the Offtake Agreement, hijack this restructuring in its own economic interest.

13. The focus of Cargill's objections is and has always been its desire to preserve its off-market Offtake Agreement at all costs, even though the uneconomic nature of this arrangement has been at the centre of this restructuring from even before the date of the filing, and before. [redacted]

[redacted]. The onerous terms of the Offtake Agreement have caused Tacora to suffer material losses over the years (in the order of hundreds of millions of dollars) and have repeatedly acted as a roadblock to any restructuring or refinancing for the Company. Of all the potential restructuring partners who have considered investing in the Company's business over many months and years, none has been willing to do so while the existing Offtake Agreement remains in place. Only Cargill seeks to maintain the Offtake Agreement in order to continue reaping its very substantial profits.

14. Instead of engaging in a restructuring that provides more favourable offtake terms or even providing relief from some of the more onerous terms of the Offtake Agreement during the CCAA proceeding, Cargill sought to control the replacement of the Offtake Agreement by inserting a condition in its DIP Facility providing that the disclaimer or termination of the Offtake Agreement would constitute an Event of Default under the DIP Facility, other than in connection with a Successful Bid arising from the SISP. The replacement of the Offtake Agreement is expressly contemplated under the SISP, an Order that was consented to by Cargill.

15. In these circumstances, giving effect to Cargill's current position seeking to block the replacement of the Offtake Agreement would be tantamount to concluding that, even though all stakeholders including Cargill have known that restructuring the Company's offtake arrangements is critical to the Company's future viability, and even though the replacement of the Offtake Agreement was expressly contemplated in the SISP such that the Consortium and other bidders invested time and resources in preparing bids on that basis, it cannot be done. The SISP – and this entire CCAA restructuring process – becomes a waste of the time and resources of the Consortium, the other parties who participated in the SISP, Tacora and the Court.

16. Cargill's objection to the use of an RVO transaction structure to give effect to the Consortium Transaction as the Successful Bid is unfounded. The RVO structure is necessary and appropriate to ensure a seamless transition of the business, including its permits and licenses, to the purchaser without interruption, as well as preserving the Company's tax attributes. This Court has both the jurisdiction and the discretion under section 11 of the CCAA to order that the Offtake Agreement be transferred to ResidualCo under the RVO on the basis that the purchaser is not assuming it. Section 11.3 of the CCAA does not apply. Nor is the Company required to disclaim the Offtake Agreement first. The transfer of contracts that are not being assumed by a purchaser to a ResidualCo in a reverse vesting structure is common in RVO transactions. The treatment of the Offtake Agreement under the proposed RVO is far from unprecedented, as Cargill suggests; rather, it is consistent with this Court's (and other Canadian commercial courts') treatment of RVOs in numerous other Canadian insolvencies.

17. As the Monitor has noted, Cargill is in exactly the same position whether the Consortium Transaction takes the form of the proposed RVO, or whether it is instead structured as a traditional asset sale transferring the assets to the purchaser by means of a vesting order ("**AVO**"). The Consortium Transaction pays out all of Cargill's priority claims as a secured creditor, even Cargill's claim that ranks *pari passu* with the claims of the Noteholders. Regardless of the transaction structure, the Consortium Transaction, as the Successful Bid, does not include the assumption of the Offtake Agreement. In relation to any alleged breach of the Offtake Agreement resulting from its replacement, whether through an RVO, AVO or disclaimer, Cargill's damages claim is unsecured. This unsecured damages claim must be balanced against the very significant benefits to stakeholders as a whole if the Consortium Transaction is approved and the Tacora business can move forward as a newly-viable going-concern enterprise with more favourable iron ore marketing arrangements.

18. Other than Cargill, all the key stakeholders, as well as the Company and its advisors, with the support of the Monitor, are of the view that the Consortium Transaction represents the best and, indeed, the only viable opportunity to put the Company back on a solid economic footing, in the best interests of stakeholders as a whole. There is no legal impediment to the approval by this Court of the Consortium Transaction. The Consortium Transaction should be promptly implemented to bring stability to the Company, particularly in the currently volatile iron ore market. The Consortium therefore submits that the Consortium Transaction and Sale Approval Order should be approved and Cargill's objections dismissed.

PART II -THE FACTS

19. Tacora has had significant liquidity problems for well over a year.[2] Well prior to the CCAA filing, Greenhill was retained in January 2023 to engage in a strategic process to explore and evaluate a broad range of alternatives for the Company. Cargill also worked in parallel to identify potential investors to provide capital to Tacora throughout most of 2023 (albeit with a view to preserving its Offtake).[3]

20. These efforts did not generate a successful restructuring solution, nor did it result in a consensual restructuring and recapitalization among the Company, the Noteholders and Cargill.[4] While Tacora has faced significant losses and struggled with its liquidity, Cargill has continued to enjoy significant profits from its Offtake Agreement, to which it ascribed tremendous value.[5] For

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2 Transcript of the Cross-Examination of Paul Daniel Carello, dated March 21, 2024 ("**Carrelo Cross**"), p. 11, q. 24-26.

3 Carrelo Cross, p. 11-14, 71-72, q. 27-31, 199-201.

4 Motion Record of the Applicant (Approval and Reverse Vesting Order) dated February 2, 2024 ("**Sale Approval MR**") [CL pp A2823;A1], Tab 2, Affidavit of Joe Broking sworn February 2, 2024 ("**Sale Approval Affidavit**"), paras. 16-17 [CL pp A2840;A18].

5 Transcript of the Cross-Examination of Jeremy Matican, dated March 22, 2024 ("**Matican Cross**"), p. 18-19, q. 55-58; Transcript of the Cross-Examination of Matthew Lehtinen, dated March 19, 2024 ("**Lehtinen Cross**"), p. 162-163, q. 431-434.

the duration of the Offtake Agreement, Tacora has operated in a deficit, and its losses since reopening the Scully Mine have been over $345 million.[6]

21. Before talks regarding a consensual resolution broke down, the only concession Cargill was prepared to make was to temporarily adjust the profit sharing under the Offtake Agreement.[7] Despite clear evidence that it has been profiting at the expense of Tacora, at no time was Cargill willing to consider permanent changes to the life of mine term or a permanent adjustment of profit sharing without being compensated.[8] In fact, the protection of its Offtake Agreement remained a key priority for Cargill throughout 2023 and into these CCAA proceedings.[9]

22. None of the parties who explored pre-filing restructuring solutions, other than Cargill, were prepared to go forward with the existing Offtake Arrangements in place.[10]

23. The Court granted the SISP Order on the consent of Cargill on October 30, 2023, coincident with the approval of DIP financing from Cargill.[11] The SISP expressly authorized interested parties to investigate and conduct due diligence regarding an opportunity to arrange an offtake, service or other agreement in respect of Tacora's business.[12] The SISP also contemplated the submission of a broad range of proposed restructuring transactions, including an asset sale, a share sale (including a reverse vesting structure) or a plan of arrangement.[13]

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6 Reply Record of the Applicant (Approval and Reverse Vesting Order) dated March 14, 2024, Tab 1, Reply Affidavit of Joe Broking sworn March 14, 2024, para. 17 ("**Reply Broking Affidavit**") [CL pp. A3439;A219].

7 Transcript of the Cross-Examination of Martin Valdes, dated March 21, 2024 ("**Valdes Cross**"), p. 39-44, q. 120-134 and p. 45, q. 141.

8 Valdes Cross, p. 47-48, q. 147, p. 50-51, q. 153.

9 Carrelo Cross p. 27-28, 34, 37, 139-141, qq. 57-60, 81, 88-89, 403-410; Lehtinen Cross, p. 64-66, qq. 198-199; Matican Cross, p. 24-26, 29, q. 84, 87-89, 97-98, Exhibits 1 and 2.

10 Sale Approval Motion Record, Tab 3, Affidavit of Michael Nessim sworn February 2, 2024 ("**Nessim Affidavit**"), paras. 5-7 [CL pp A3080;A258]; Reply Broking Affidavit, para. 11 [CL pp. A3438;A218]

11 Cargill was also provided a draft of the Order in advance and approved of its terms. See Lehtinen Cross, p. 46-48, q. 150-155.

12 Sale Approval Affidavit, paras. 18, 67 [CL pp A2841;A19 and A2861;A39]; SISP Order, Schedule "A," para 3 [CL pp. G37;G37].

13 Sale Approval Affidavit, para. 19 [CL pp A2841;A19]; SISP Order, Schedule "A," para. 23 [CL pp. G43;G43].

24. Of the three Phase 2 Bids, two of the bids (the Consortium Bid and the Bid from "Bidder #3") proposed a reverse vesting structure. Cargill's bid was a bid for all the assets of Tacora. It was not structured as a plan.[14]

25. On January 24, 2024, the Board determined, with input from Company counsel and Greenhill, and in consultation with the Monitor, that only the Consortium's bid met the requirements for a Phase 2 Qualified Bid.[15] At the same time the Board, also with input from Greenhill and Company counsel and in consultation with the Monitor, considered and determined in its business judgment not to waive compliance with the qualification criteria for Cargill or Bidder No. 3.[16] In making this determination, the Company considered detailed materials prepared by Company counsel and by Greenhill, including a detailed memorandum on the Board's fiduciary duties in the context of the SISP and a presentation summarizing and comparing the bids received. The Board took into account, among numerous other factors, the magnitude of the potential unsecured claim that could be triggered under the Consortium Transaction as a result of the replacement of the Offtake Agreement with a new marketing agreement for the sale of iron ore.[17]

26. A number of deficiencies with Cargill's bid were identified. Among others, the bid was structured as an asset sale (not a plan), but was subject to the condition that the purchaser be satisfied that the Company's tax attributes be preserved and available to be utilized by the purchaser, which is, quite simply, not possible in an asset sale. Although Cargill alluded to the

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14 Sale Approval Affidavit, para. 23 [CL pp. A2842;A20].

15 The requirements for a Phase 2 Qualified Bid are set out in detail in the Sale Approval Affidavit, para. 25 [CL pp. A2843;A21]. See also Fourth Report of FTI Consulting Canada Inc., in its Capacity as Court-Appointed Monitor dated March 14, 2024 ("**Monitor's Fourth Report**"), para. 34 [CL pp. E402;E10]; Confidential Exhibit 6 to Transcript of the Cross-Examination of Leon George (Trey) Jackson III, dated March 19, 2024 ("**Jackson Cross**"), Tacora Board Minutes for January 24, 2024 Meeting (and continued meetings).

16 The considerations that were taken into account in this determination are set out in detail in the Sale Approval Affidavit, paras. 26, 29 [CL pp. A2843;A21 and A2845;A23].

17 Sale Approval Affidavit, para. 29 [CL pp. A2845;A23]; Confidential Exhibit 6 to Jackson Cross, Tacora Board Minutes for January 24 Meeting (and continued meetings).

possibility that the bid could be structured differently, it provided no definitive documents for or information regarding such an alternative structure.[18]

27. Additionally, the Cargill Bid was contingent on raising new equity from unspecified third parties and therefore did not specify the new equity participants who would be the new majority owners of the Company. This adversely impacted the Company's ability to evaluate the necessary regulatory approvals, as well as the ability and willingness of those potential equity participants to provide further necessary financing for the business.[19]

28. Finally, the Cargill Bid contained no commitment from Cargill or any other equity participant to provide any new capital to the Company. All the new cash under Cargill's Bid was to be raised from third parties, none of whom had made a firm commitment;[20] Cargill itself refused to backstop the equity commitment despite having the financial resources to do so.[21] Cargill's senior management made this decision in the face of recommendations from its own advisors that the inclusion of the backstop would be critical.[22] Moreover, even if the contingent financing could be raised from third parties, the Cargill Bid did not provide sufficient financing to adequately capitalize the Company to fund required capital expenditures and operating costs necessary to ramp up production and allow the business to operate sustainably going forward.[23]

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18 Sale Approval Affidavit, para. 27(a) [CL pp. A2844;A22]. Note that the Cargill bid was not structured as a plan.
19 Sale Approval Affidavit, para. 27(b) [CL pp. A2844;A22].
20 Lehtinen Cross, p. 90-91, q. 251-253, p. 187-188, q. 506-511; Carrelo Cross, p. 112, q. 320-322; Matican Cross, p. 50-51, q. 147-151.
21 Sale Approval Affidavit, para. 34 [CL pp. A2847;A25]; Lehtinen Cross, p. 184-185, q. 496-498; Carrelo Cross, p. 100-101, q. 281-283.
22 Matican Cross, p. 65-69, 186-195; Exhibit 7 to Matican Cross, MAT*2386. The Steering Committee at Cargill with day-to-day responsibilities on the Tacora file also recommended to senior management that Cargill backstop the bid. See, Lehtinen Cross, 184-185, q. 496-501; Carrelo Cross, p. 147-149, q. 430-437; Confidential Exhibit 3 to Lehtinen Examination, January 2023 Project Caramel Deck, CAR*3614, Slide 2, p. 4.
23 Sale Approval Affidavit, para. 27(e) [CL pp. A2845;A23].

29. Despite its decision not to waive compliance with the qualifying criteria in the SISP, the Company did not immediately declare the Consortium Bid to be the successful bid. The Company conveyed the concerns with Cargill's Bid to Cargill, engaged in several discussions with Cargill, and Cargill had the opportunity to address the Company's concerns and to improve its bid.[24] It chose not to do so. As a result, on January 29, 2024, the Board selected the Consortium Transaction as the Successful Bid. The Board did not declare a "Back Up Bid", as neither Cargill's bid nor the other Phase 2 Bid met the necessary criteria to constitute a Phase 2 Qualified Bid.[25]

30. The Consortium Transaction represents a successful outcome for the Company and its stakeholders and provides a clear path to exit these CCAA proceedings in the near term as a viable restructured enterprise. Among other things, it represents the highest total bid value of the Phase 2 Bids; results in the lowest amount of funded debt remaining on the Company's balance sheet post-closing; reduces the Company's annualized debt service costs; repays in full all of the Company's secured debt in cash or through the credit bid mechanism; assumes pre-filing and post-filing trade amounts; includes a firm, irrevocable commitment to finance the Consortium Transaction; provides sufficient equity and new debt to fund emergence costs and the Company's ongoing operational costs; provides for significant new capital to fund the Company's capital expenditure plan; and provides for the ongoing employment of all the Company's employees.[26]

31. In addition to the numerous significant benefits listed above, the Consortium Transaction provides for the reduction of Tacora's pre-filing indebtedness by approximately $119.3 million, as

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[24] Sale Approval Affidavit, paras. 30-32 [CL pp. A2846;A24]. Exhibits J to N of Lehtinen Affidavit [CL pp. F2145;F405, F2215;F276, F2220;F281, F2227;F288, F2335;F396]. Confidential Exhibit 6 to Jackson Cross, Tacora Board Minutes for January 24, 2024 Meeting (and continued meetings); Transcript of the Cross-Examination of Michael Nessim, dated March 18, 2024 ("**Nessim Cross**"), p. 96-99, qq. 297-308.

[25] Sale Approval Affidavit, paras. 32-33 [CL pp. A2846;A24]. Confidential Exhibit 6 to Jackson Cross, Tacora Board Minutes for January 24 Meeting (and continued meetings).

[26] Sale Approval Affidavit, paras. 36, 38 [CL pp. A2848;A26 and A2849;A27].

well as a new marketing arrangement that replaces the crippling Offtake Agreement.[27] By contrast, neither of the other Phase 2 bidders proposed to pay out the other secured or priority claims.[28]

PART III -THE ISSUES AND THE LAW

A. The Consortium Transaction Should be Approved

(a) The Test for the Sale of the Company's Assets is Satisfied

32. The Consortium Transaction satisfies the well-established tests for approving a sale transaction within a CCAA, including a transaction that uses a reverse vesting structure.

33. Where a debtor company sells assets outside the ordinary course, section 36 of the CCAA applies.[29] Subsection 36(3) sets out factors that the Court is to consider, among others. These include: (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances; (b) whether the monitor approved the process leading to the proposed sale or disposition; (c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to creditors than a sale or disposition under a bankruptcy; (d) the extent to which the creditors were consulted; (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

34. Additionally, these criteria largely correspond to the criteria articulated in *Soundair* for the approval of the sale of assets in an insolvency. These are: (a) whether sufficient effort has been made to obtain the best price and that the debtor has not acted improvidently; (b) the interests of

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27 The benefits of the proposed new offtake arrangement to be entered into between Tacora and Javelin pursuant to the Consortium Transaction are set out in detail at para. 69 of the Sale Approval Affidavit [CL pp. A2861;A39].

28 Sale Approval Affidavit, paras. 42-43 [CL pp. A2853;A31].

29 CCAA, s. 36. Where an RVO structure is used, the jurisdiction to grant the order implementing the transaction as an RVO arises under section 11 of the CCAA. However, the Courts have indicated that the factors set out in section 36 must also inform the analysis. See, for example, *Just Energy Group Inc. et. al. v. Morgan Stanley Capital Group Inc. et. al.*, 2022 ONSC 6354 at paras. 29-31 [*Just Energy*].

all parties; (c) the efficacy and integrity of the process by which offers have been obtained; and (d) whether there has been unfairness in the working out of the process.[30]

35. As submitted below, all of the above criteria are satisfied here. Whether the RVO is the appropriate transaction structure to give effect to the Consortium Transaction – and whether there is any legal impediment to the use of this mechanism – is addressed separately below.

(b) The Process Was Reasonable

36. This Court approved the SISP on October 30, 2023, noting that the Solicitation Process had been developed by Greenhill, as financial advisor, in consultation with the Monitor and with input from the secured creditors. At the time, the Monitor expressed the view that the Court should approve the SISP on the basis that it: (a) provides for a broad, open, fair and transparent process; (b) provides for an appropriate level of independent oversight; (c) should encourage and facilitate bidding by interested parties; (d) is reasonable in the circumstances; and (e) should not discourage parties from submitting offers. With the consent of all parties, the SISP Order was granted.[31]

37. The SISP was also consistent with the Cargill DIP Agreement, which required a solicitation process in respect of a potential restructuring transaction and an offtake service or other agreement in respect of the business.[32] In fact, the SISP milestones correspond to the milestones in the Cargill DIP Facility, particularly the Phase 2 Bid Deadline (January 19, 2024 in both cases) and the outside closing date for a restructuring transaction (February 23, 2024, in the case of the SISP, and February 29, 2024 in the case of the Cargill DIP Facility).[33]

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30 *Just Energy* at para. 32, citing *Harte Gold Corp (Re),* 2022 ONSC 653 [*Harte Gold*] and *Royal Bank of Canada v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (C.A.) [*Soundair*].

31 *Tacora Resources Inc. (Re),* 2023 ONSC 6126 at paras. 168-170. See also Monitor's Fourth Report, para. 18 [CL pp. E399;E7].

32 Monitor's Fourth Report, para. 20 [CL pp. E399;E7].

33 SISP Order, Schedule "A" at para. 9 [CL pp. G39;G39]; Cargill DIP Facility, Affidavit of J. Broking sworn October 9, 2023, Exhibit K, at Section 29, Application Record, Tab 2K, p. 453 [CL pp. A515;A502].

38. No party, including Cargill, challenged this approval or appealed the SISP Order, including on the basis that it did not provide sufficient time to canvass potential purchasers and investors.[34] The process must therefore be presumed to be fair; any other conclusion would effectively constitute a collateral attack on this Court's prior order. Courts have soundly rejected challenges to the fairness of a process by parties who did not object when the sale process was approved.[35]

39. This principle should apply with even greater force to a party such as Cargill that was involved in the design of the process in its capacity as DIP lender. In any event, Cargill's own admission that it knew its bid was non-compliant and chose not to improve it or to backstop the economic gaps indicates that the true reason for its failure to submit a compliant bid has nothing to do with whether the timelines under the SISP were sufficient.[36] In fact, as early as December 12, 2023, Cargill's advisors expressed concerns that Cargill would be unlikely to find any equity investors for any bid that would pay 80-90% recovery to the bondholders.[37] Cargill's financial advisor retained in connection with the SISP, Jefferies LLC ("**Jefferies**") also discussed in December (and then recommended to Cargill's leadership) that it was important that Cargill be able to backstop its bid in the event that equity investors could not be signed up by the Phase 2 bid deadline.[38] Two months after the close of Phase 2 Bids, Cargill still has no committed financing, demonstrating that a considerably longer timeline would have made no difference to Cargill.

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34 Monitor's Fourth Report, paras. 21, 59(b) [CL pp. E399;E7 and E410;E18]. In fact, Cargill was provided a draft of the Order in advance, and approved of its terms. See Lehtinen Cross, p. 46-47, qq. 150-155.

35 *White Birch Paper Holding Company (Arrangement relatif à)*, 2010 QCCS 4915 at paras. 37-40 [*White Birch*], leave to appeal ref'd 2010 QCCA 1950; see also *Aveos Fleet Performance Inc./Aveos performance aéronautique inc. (arrangement relatif à)*, 2012 QCCS 4074 at paras. 18-20, 51-54.

36 Supplement to the Fourth Report of FTI Consulting Canada Inc., in its Capacity as Court-Appointed Monitor dated March 26, 2024 ("**Supplement to Fourth Report**"), para. 19 [CL pp. E487;E95]; Lehtinen Cross, p. 87-91, q. 244-253, p. 184-185, q. 496-498.

37 Matican Cross, p. 60-61, qq.174-175; Exhibit 6 to Matican Cross, MAT*3188.

38 Matican Cross, p. 65-69, 191-198; Exhibit 7 to Matican Cross, MAT*2386.

(c) No Unfairness in the Process

40. The Monitor has expressed the view that the process was conducted appropriately, in accordance with this Court's orders.[39] The Monitor was actively involved in and oversaw the SISP and was consulted by Tacora throughout. The market was fully canvassed both before the CCAA filing and during the SISP.[40] The Monitor's views on this point are prescribed by statute as an important consideration supporting sale approval.[41] It is well-established that, as an officer of the Court, the Monitor's views are deserving of significant deference.[42]

41. A sale process is required to be reasonable and to be conducted reasonably. This is not a standard of perfection. Minor issues do not undermine the fairness of the process, as long as the process was reasonable overall.[43]

42. Allegations of unfairness in the conduct of a sale process under the SISP have only been upheld where there is a fundamental flaw with the process that affects the manner in which the process was conducted or the result. Thus, for example, in *Bellatrix,* the Court considered a number of allegations of unfairness from a party whose bid had not been accepted, including that a successful bidder may have received confidential information that it ought not to have had. However, since the monitor's investigations determined that, even if this had occurred, it had not affected the process or provided any advantage to the successful bidder, the Court concluded that there was no evidence of impropriety that had affected the process or the result. The Court also rejected all of the other complaints.[44]

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39 Monitor's Fourth Report paras. 25-27 [CL pp. E400;E8].
40 Monitor's Fourth Report, paras. 35-36, 59(a) [CL pp. E402;E10 and E410;E18].
41 CCAA, s. 36(3).
42 *Bloom Lake, g.p.l. (Arrangement relatif à)*, 2015 QCCS 1920 at para. 28 [*Bloom Lake*], leave to appeal ref'd 2015 QCCA 754, citing *AbitibiBowater inc. (Arrangement relatif à)*, 2009 QCCS 6460 at para. 59 [*AbitibiBowater* 2009].
43 *Bloom Lake* at paras. 39, 57-59. See also *Sanjel Corp. (Re)*, 2016 ABQB 257 at para. 80.
44 *Bellatrix Exploration Ltd. (Re)*, 2020 ABQB 332 at paras. 42-46 [*Bellatrix*].

43. Similarly, in *Dundee Oil and Gas Limited (Re)*, the Court considered allegations of serious breaches of the confidentiality obligations of the purchaser. The purchaser set up unsanctioned data rooms to enable its potential investors and lenders to assess the debtor's assets. Nonetheless, a number of factors led the Court to conclude that the purchaser did not intend to undermine the process used to arrive at the successful bid. There was no evidence that the purchaser had been manipulating the process to its own advantage, including to provide a lower price.[45]

44. By contrast, in *MNP Ltd.*, the successful bidder used its status as creditor to obtain court-ordered disclosure of a bid, and then, knowing the terms of the bid, it sought to outbid the original bidder. The Court held that this was unfair and approved the sale to the original bidder.[46]

45. Cargill has not demonstrated at all that the SISP was conducted in a manner that was not fair and reasonable or that it did not generate a fair outcome in the circumstances (as indicated by the Monitor in its Fourth Report).[47] Despite cross-examination of multiple witnesses, Cargill has failed to turn up any evidence of unfairness that would undermine the integrity of the SISP, as conducted by the Company with the assistance of the Monitor and its advisors. The Company received three bids at the Phase 2 Bid Deadline and evaluated them on their own merits. Only one bid was compliant with the SISP and it was chosen as the Successful Bid.[48]

46. In its Supplement to the Fourth Report, the Monitor considered the evidence that emerged on cross-examination, noting that the parties did not always abide by the communication protocol under the SISP or their confidentiality agreements with Tacora. However, the Monitor concluded

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45 *Dundee Oil and Gas Limited (Re)*, 2018 ONSC 6376 at paras. 15, 41, 43-49.

46 *MNP Ltd. and the Bank of Nova Scotia v. Mustard Capital Inc.*, 2012 SKQB 325 at paras. 31-33 [*MNP Ltd.*].

47 Monitor's Fourth Report, para. 59 [CL pp. E410;E18]. If anything, Cargill had an informational advantage relative to other bidders. Cargill has a long-standing relationship with Tacora, and even received summaries of on the *in camera* portions of Board meetings that took place while it had a nominee on the Board. See e.g., Carrelo Cross, p. 60-63, qq. 166-178; Exhibit 7 to Carrelo Cross, Email from Mr. Mulvehill dated April 20, 2023, CAR*1553.

48 Sale Approval Affidavit, paras. 24-32 [CL pp. A2842;A20].

that "the few instances of non-compliance were minor and did not compromise the integrity of the Solicitation Process or Tacora's selection of the Investor Bid as the Successful Bid."[49]

47. With respect to Cargill's complaints that its requests to communicate with the Consortium were refused, it would not have been appropriate to encourage communication between two bidders in the process before the Successful Bid had been selected and as the Monitor notes, this would have been "antithetical to a properly run sale and investment solicitation process in a CCAA proceeding" in which "collusion between two bidders is to be discouraged" to ensure that the process is transparent, as well as effective in maximizing value for stakeholders.[50]

48. Following the selection of the Successful Bid, the Company and the Monitor have advised Cargill that they are free to request a discussion with counsel to the Noteholders, provided that the Monitor and its counsel are part of such discussions so as to maintain the integrity of the SISP. As of the date of the Monitor's Fourth Report, Cargill has not made such a request.[51]

(d) Other Section 36(3) Factors Are Satisfied

49. As noted above, the Monitor was involved in the SISP and approved the process leading to the Consortium Transaction. The Monitor has filed a report expressing the view that the Consortium Transaction, if approved and closed, will be more beneficial to the Company's creditors than a sale or disposition in a bankruptcy. A bankruptcy of Tacora would lead to significantly increased claims by, among others, employees, suppliers, regulators and contract counterparties. Moreover, the damages claim asserted by Cargill as arising from the proposed replacement of the Offtake Agreement would be equally applicable in a bankruptcy. The loss of

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49 Supplement to Fourth Report, para. 11 [CL pp. E485;E93].
50 Monitor's Fourth Report, para. 37 [CL pp. E402;E10].
51 Monitor's Fourth Report, para. 38 [CL pp. E402;E10].

value associated with a cessation of Tacora's business as a going concern would also result in significant reduction in recoveries for secured creditors.[52]

50. Finally, the consideration to be received under the Consortium Transaction is reasonable and fair, taking into account the market value of the assets.[53] This does not require the Court to engage in a valuation exercise. This requirement is satisfied by virtue of the fact that the market has been fully canvassed and no other qualifying bid, let alone a superior bid was received in the SISP. As noted by the Monitor, the Consortium Transaction was the best and highest bid received in the SISP. The Phase 2 bids submitted by Cargill and Bidder No. 3 did not comply with the SISP because, among other things, they were subject to significant financing conditions.[54]

(e) The Court-Approved Process Must Be Respected

51. It is a fundamental principle of CCAA jurisprudence that a court-approved sale process must be respected. Courts are scrupulous to protect such processes from machinations of bitter bidders seeking to engineer a different result.[55] Late-breaking bids should generally not be entertained, even if they may be considered to be superior to the bid accepted within the process (which is not the case here), at the risk of undermining the integrity of the particular process and of sale processes in general.[56] Courts have consistently rejected firm offers received after a sale process has concluded, even if the purchase price is higher.[57]

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52 Monitor's Fourth Report, para. 59(c) [CL pp. E410;E18].

53 *Acerus Pharmaceuticals Corporation (Re)*, 2023 ONSC 3314 at para. 10 [*Acerus*], citing CCAA, s. 36(3).

54 Monitor's Fourth Report, para. 59(f) [CL pp. E411;E19].

55 See, for example, *AbitibiBowater inc. (Arrangement relatif à)*, 2010 QCCS 1742 at paras. 82-88 [*AbitibiBowater* 2010], citing *Skyepharma PLC v. Hyal Pharmaceutical Corp.* (2000), 47 O.R. (3d) 234 (C.A.) at paras. 24-26, 30 [*Skyepharma*]; *White Birch* at para. 56.

56 *Soundair* at para. 22, per Galligan J.A., adopting *Cameron v. Bank of Nova Scotia* (1981), 45 N.S.R. (2d) 303 (C.A.) at 314 [*Cameron*]. See also *AbitibiBowater* 2010 at para. 72. See also *White Birch* at paras. 39-41, where the court said of an unsuccessful bidder: "to allow 'Sixth Avenue' to come before the Court and say: 'My bid is essentially better than the other bid and Court ratify my bid as the highest and best bid as opposed to the winning bid' is the equivalent to a complete eradication of all proceedings and judgments rendered to this date with respect to the Sale of Assets authorized in this file."

57 *Bloom Lake* at para. 70, citing *Boutiques San Francisco Inc. (Arrangement relative aux),* [2004] RJQ 965 (C.S.)

52. It is not appropriate for a bidder to lie in the weeds, wait for the outcome of the process and then seek to top the winning bid after the fact based on its knowledge of the outcome.[58] Cargill has known from the outset of this proceeding that the Offtake Agreement was an uneconomic contract that needed to be restructured. The Monitor has expressed its concurrence with the views of Tacora that the Offtake Agreement is significantly off-market, significantly inhibits Tacora's ability to raise capital to fund the necessary ramp-up and that Tacora cannot be restructured with the current Offtake Agreement in place.[59]

53. Since the SISP expressly contemplated the restructuring or replacement of the Company's offtake arrangements, Cargill knew that a successful bid within the SISP by another party would likely propose more favourable offtake arrangements.[60] Instead of refusing to consent to or appealing this aspect of the SISP, or participating in the SISP in good faith, Cargill deliberately chose not to engage with this issue, knowingly decided to put forward a non-qualifying bid that preserved the off-market Offtake Agreement, and determined instead to mount a rear-guard action against the outcome of the SISP with a view to playing for time and preserving its own economic interests at the expense of the Company and its stakeholders.

54. Cargill's strategy is effectively a collateral attack on the SISP. Any legal objections to the restructuring or replacement of the Offtake Agreement, as contemplated in the SISP, should have been raised and addressed long before bidders engaged in the time-consuming and costly exercise of participating in the SISP and developing a transaction that would see the Company go forward with restructured offtake arrangements. In fact, the Consortium requested on multiple occasions

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at paras. 11-25 and *AbitibiBowater* 2010 at paras. 72-73.

58 See, for example, *MNP Ltd.* at paras. 29-33.

59 Supplement to Fourth Report, para. 29 [CL pp. E489;E97]

60 Before the Phase 2 deadline (and December 24, 2023 at the latest), Cargill even knew more specifically that the Consortium's bid would include a proposal to replace Cargill as the offtaker for Tacora. See Matican Cross, p. 66-67, qq. 188-190; Exhibit 7 to Matican Cross, MAT*2386.

that the Company and this Court address this issue at a much earlier stage in this process, to no avail. Instead of expediting the resolution of these issues, Cargill advised the Monitor that any such motion, including the Monitor seeking the advice and direction of this Court, would be viewed as a default under the Cargill DIP Agreement.[61]

55. Cargill now comes to this Court objecting to the legality of any attempt to replace the Offtake Agreement and brings a cross-motion seeking a declaration that its Proposed Cargill Plan is superior principally because it does not restructure the Offtake Agreement. This is coupled with Cargill's attempts to comb through every aspect of the process to find any minute flaws or inconsistencies that it can rely upon to try to undermine the SISP. All of these actions are part of a strategy that it has openly admitted was intended to cause delay, with a view to derailing the only and the best executable transaction to emerge from the SISP and buying time to secure financing for its own transaction. This Court should decline to entertain this strategy any further.

56. Cargill's strategy of delay through litigation was highlighted during cross-examination. Cargill sent an email to a prospective investor: "By way of update, we have made progress on extending the litigation timeline into April, to give us more time to assemble an alternative transaction". Another Cargill employee characterized this as Cargill's "strategy to buy time".[62] Though Cargill witnesses (Messrs. Lehtinen and Carello) attempted to disavow this strategy of delay when questioned on the emails that spoke for themselves,[63] Cargill's lead financial advisor at Jefferies was more forthright and openly confirmed it. When asked whether he was aware that it was Cargill's strategy to extend the timeline to try to get a committed investor on board after the

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61 Supplement to Fourth Report, para 26 [CL pp. E489;E97].
62 See Exhibit 9 to Lehtinen Cross, MAT*1162 and Confidential Exhibit 8 to Lehtinen Cross, CAR*1316.
63 Lehtinen Cross, p. 115-121, q. 324-336; Carrelo p. 115-117, q. 328-334.

Phase 2 bid deadline, Mr. Matican responded candidly: "That was part of their [i.e., Cargill's] approach".[64]

57. This Court should refuse to countenance Cargill's blatant, tactical use of litigation timelines to get a second kick at the can in submitting its bid. The Monitor has stated that the SISP process was conducted fairly and nothing that emerged in the lengthy cross-examinations has undermined or caused the Monitor to change its views.[65] In its Supplement to the Fourth Report, the Monitor confirmed, based on the evidence that emerged in cross-examination, that Cargill was aware of the Phase 2 Bid Deadline, but did not view it as a firm date, and knew that Cargill's Phase 2 Bid did not satisfy the bid criteria under the SISP. The Monitor further expressed the view that Cargill was intentionally attempting to delay Tacora's decision in the SISP, including through its litigation timetable, in an attempt to get a committed investor on board.[66]

58. The Consortium participated in good faith in the SISP, in reliance on this Court's orders and on the assumption that all of the other bidders would play by the rules, including that all bidders were required to put their best foot forward. It invested a considerable amount of time, energy and other resources to prepare a bid that respects the priorities of the obligations owed by the Company, preserves jobs for the Company's over 400 employees, materially deleverages the Company's balance sheet, and provides the best chances for the Company to successfully exit from these proceedings with sufficient capital investment to be viable. The determination that its bid was the Successful Bid was made at the end of a fair process and it should be approved.

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64 Matican Cross, p. 84, q. 242-244, Confidential Exhibit 11, MAT*1162; See also; Exhibit 8 to Lehtinen Cross, CAR*1316, where Cargill writes in an internal email, "As you know, Tacora decided to move with the bonds deal, but, should our strategy to buy time work, we may need to be clear on next steps of feasibility of the deal structure in due time."

65 Monitor's Fourth Report, paras. 18 and 59(a) [CL pp. E399;E7 and E410;E18]. Supplement to Fourth Report, para. 11 [CL pp. E485;E93].

66 Supplement to Fourth Report, para. 19 [CL pp. E487;E95].

(f) Deference to the Board and the Monitor

59. The Board, after consultation with its advisors and following a review of the detailed materials prepared by Company counsel and Greenhill, and with the support of the Monitor, determined that the Consortium Transaction was the only viable and the best executable transaction emerging from the SISP that could result in the successful restructuring of the Company.[67] At the same time, after consultation with its advisors, and with the support of the Monitor, it determined that the proposed Cargill transaction was fatally flawed in a significant number of respects.[68]

60. It is not disputed that it was open to the Board to waive compliance with the qualifying criteria in the SISP, in the exercise of its business judgment.[69] The evidence demonstrates that the Board gave serious consideration as to whether to do so. In consultation with the Monitor and other advisors, the Board chose not to, taking into account multiple factors, including the potential unsecured damages claim that could be made by Cargill if the Offtake Agreement is disclaimed, otherwise replaced or dealt with pursuant to the RVO.[70]

61. The "business judgment rule" accords deference to a business decision made prudently and in good faith, where the Board's actions evidence its business judgment and the decision lies within a range of reasonable alternatives.[71] As noted above, the consultations engaged in by the Board, the materials reviewed, and the relevant factors it considered, demonstrate the Board's prudent business judgment conducted in good faith. The Board's outcome – the choice of the only viable and best executable transaction resulting from a court-approved SISP – is well within a reasonable

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67 Sale Approval Affidavit, para. 36 [CL pp. A2848;A26].
68 Sale Approval Affidavit, paras. 32-35 [CL pp. A2846;A24].
69 SISP Order, "Schedule A," paras. 26, 36 [CL pp. G46;G46 and G50;G50].
70 Sale Approval Affidavit, para. 43 [CL pp. A2853;A31].
71 *Ernst & Young Inc. v. Essar Global Fund Limited,* 2017 ONCA 1014 at paras 195-197.

range. It is well-established that the Board's business judgment, as well as the Monitor's support, are deserving of a very high degree of deference. [72]

62. There was no obligation to negotiate further with Cargill in the circumstances. The Company was presented with an executable transaction that the Board, with the support of the Monitor and its advisors, believed would present the best opportunity to restructure the Company and see it emerge from the CCAA as a viable going-concern. By contrast, the Cargill bid contemplated a transaction that was not actionable and was subject to significant uncertainty.[73] These determinations all involved the exercise of the business judgment of the Board, in consultation with the Monitor and other advisors, within the parameters of the SISP.

(g) Standing of Cargill as Bitter Bidder

63. Cargill is a bitter bidder. It is well-established that the participation of a bitter bidder in a sale approval hearing should be regarded by the Court with considerable caution. In ordinary circumstances, a bitter bidder has been held to have no standing to object to a sale approval.[74] There are strong policy reasons for this position. The duties on a sale approval are to ensure that the particular sale is in the best interests of the stakeholders. An unsuccessful purchaser has no interest in this issue.[75] "A losing bidder is not seeking to promote the best interests of the creditors but is looking to promote its own interest."[76]

64. A bitter bidder should only be entitled to make submissions at a sale approval hearing if it has an interest in the outcome of the sale approval apart from its status as bitter bidder.[77] The

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72 *Bloom Lake* at para. 28, citing *AbitibiBowater* 2010 at paras. 70-71, *AbitibiBowater* 2009 at para. 59.
73 Sale Approval Affidavit, paras. 33-36 [CL pp. A2847;A25].
74 See *Skyepharma* at paras. 24-26, 29-32; *AbitibiBowater* 2010 at paras. 78-88.
75 See *AbitibiBowater* 2010 at para. 83, citing *Skyepharma* at paras. 24-26.
76 *Bloom Lake* at para. 84.
77 *Skyepharma* at para. 29.

Consortium acknowledges that Cargill wears many hats in this proceeding. However, this Court should be scrupulous to ensure that it is only entertaining Cargill's submissions *other than* in its capacity as a disgruntled bidder in the SISP.

65. A number of the specific complaints asserted by Cargill are inherently those of a bitter bidder and should not be entertained on that basis – namely that: (a) the Company failed to consider the interests of Cargill as a major stakeholder and the impacts of the Consortium Transaction on Cargill (which is demonstrably false); (b) the Company failed to engage with Cargill and its advisors on the Cargill bid and seek solutions for the benefit of Tacora and its stakeholders (which is also false); and (c) the Company elected not to use the discretion within the SISP to extend timelines to allow Cargill to commit new third party equity partners in the "short SISP time" (to which Cargill had not previously objected).[78]

66. Many of Cargill's objections are directed towards the SISP timelines, as well as its reliance on the standard terms of the SISP that allowed, but did not require, the Company to waive compliance with requirements for phase 1 and phase 2 bids.[79] These complaints essentially constitute an admission that Cargill never had any intention of following the rules of the SISP. Cargill also appears to be attempting to establish that it required too much work for Cargill to prepare a compliant bid such that it should not have been required to abide by the SISP deadlines, despite the fact that all other parties were required to do so. These are also the submissions of a bitter bidder. The Consortium submitted its Phase 2 Qualified Bid within the SISP timelines; it would undermine the integrity of the process to entertain Cargill's complaints in this context.

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78 Responding Motion Record and Motion Record for the Responding Cross-Motion of Cargill, Incorporated and Cargill International Trading Pte Ltd. dated March 1, 2024, Tab 2, Affidavit of Matthew Lehtinen sworn March 1, 2024 ("**Lehtinen Affidavit**"), paras. 10, 13 [CL pp. F2767;F214 and F2768;F215].

79 Lehtinen Affidavit, paras. 65-79 [CL pp. F2785;F232].

67. Cargill also does not mention the fact that it had already been searching (unsuccessfully) for investors to provide capital to Tacora for over a year,[80] and that Cargill had the financial wherewithal to bridge the gap itself while it sought to secure equity investors, but chose not to.[81]

68. Since the replacement of the Offtake Agreement was contemplated under the SISP from the outset, Cargill cannot fully remove its "bitter bidder" hat even when it raises objections regarding the treatment of the Offtake Agreement under the Consortium Transaction. It chose not to object to the SISP order, nor submit a compliant bid under the SISP. It chose not to formally advance the position that the Company is legally incapable of replacing the Offtake Agreement until it was determined that Cargill was not the successful bidder. Instead, it supported a SISP that contemplated bids for new offtake agreements. By contrast, the new marketing arrangements for iron ore contemplated in the Consortium Transaction are one of the many benefits noted by the Company in favour of the Consortium Transaction as the Successful Bid.[82]

69. Even though Cargill indicates in its evidence that it was willing to renegotiate the Offtake Agreement,[83] nowhere does Cargill state that its non-compliant bid in the SISP involved a more favourable offtake arrangement, and its Proposed Cargill Plan, which is the subject of its cross-motion, proposes to retain the existing Offtake Agreement as the sole contractual marketing arrangement for the iron ore. In any event, none of these complaints has any merit in light of Cargill's own admission that it deliberately decided not to submit a compliant bid.

70. While Cargill has other interests in this proceeding – e.g. as DIP lender and as lender under the Advance Payment Facility – its secured indebtedness in both capacities will be fully paid in

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80 Carrelo Cross, p. 11-14, 71-72, qq. 24-31, 199-201.
81 Lehtinen Cross, p. 184-185, q. 496-498; Carrelo Cross, p. 100-101, qq. 281-282.
82 Sale Approval Affidavit, paras. 41, 68-69 [CL pp. A2852;A30 and A2861;A39] and ; Supplement to Forth Report, para 29 [CL pp. E489;E97].
83 Lehtinen Affidavit, para. 60 [CL pp. F2783;F230].

cash under the Consortium Transaction. Its only interest that will not be paid out is its potential unsecured claim as counterparty to the Offtake Agreement.[84] The submissions of Cargill are thinly disguised attempts to derail the Consortium Transaction in its capacity as bitter bidder and to hold this entire restructuring hostage to its own interests.

(h) The RVO Structure is Permissible and Appropriate

71. Many of Cargill's objections to the approval of the Consortium Transaction are focused on the RVO structure proposed for the transaction. However, the Consortium submits that there is no legal impediment to the use of this structure. Moreover, the benefits of this structure make it both necessary and appropriate in the circumstances.

72. An RVO is a transaction structuring mechanism that is used to give effect to particular types of restructurings. It generally involves a series of steps whereby: (a) the purchaser becomes the sole shareholder of the debtor company; (b) the debtor company retains its assets, including key contracts and permits; and (c) the liabilities not assumed by the purchaser are vested out and transferred, together with any excluded assets, to a newly incorporated entity. The assets and liabilities that are vested in the separate entity (referred to as "Residual Co") may then be addressed through a bankruptcy or similar process.[85]

73. CCAA courts have repeatedly confirmed their jurisdiction to approve an RVO by virtue of the authority given to them in section 11 of the CCAA, which gives CCAA courts the authority to make any order that the court considers appropriate in the circumstances.[86] This provision has been

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84 Sale Approval Affidavit, para. 43 [CL pp. A2853;A31].

85 *Just Energy* at para. 27, citing *Arrangement relatif à Blackrock Metals Inc.*, 2022 QCCS 2828 at para. 85 [*Blackrock Metals*], leave to appeal ref'd 2022 QCCA 1073, leave to appeal ref'd 2023 CanLII 36969 (S.C.C.).

86 *Acerus* at para. 9; *Harte Gold* at paras. 36-37; *Blackrock Metals* at paras. 92-94; *Just Energy* at para. 29.

interpreted by the courts as providing a broad jurisdiction to make orders that further the objectives of the CCAA.[87]

74. An RVO transaction structure can be contrasted with an AVO, which is the mechanism used to implement an asset sale in which the debtor company's assets are transferred to the purchaser. Asset sales, including going concern sales, have been granted on numerous occasions in CCAA proceedings in the absence of a plan.[88] In those circumstances, the purchase price stands in place of the assets and is used to satisfy the remaining liabilities not assumed by the purchaser, according to their priority.[89]

75. In an asset sale that is implemented by means of an AVO, there is no guarantee that there will be sufficient proceeds to satisfy all claims. The proceeds may only be sufficient to satisfy some or all secured claims and no unsecured claims.[90] This is common in a credit bid scenario because the consideration for the bid is, in large part, the application of the secured indebtedness owed by the credit-bidding creditor against the value of the secured assets, together with the repayment of any other priority claims that might encumber the assets to be acquired. There is no basis on which a successful purchaser can be required to provide sufficient value to satisfy unsecured claims. The Court's approval depends on the determination that process has been fair and reasonable and the market has been fully canvassed without generating a superior offer.

76. CCAA Courts have indicated that courts should consider carefully whether an RVO structure is warranted.[91] However, RVOs have been consistently approved on a number of

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87 *Harte Gold* at para. 37, citing *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10 [*Callidus*]. See also *Blackrock Metals* at para. 88.

88 *Callidus* at para. 43.

89 *Just Energy* at para. 27.

90 See, for example, *Bellatrix* at paras. 58-62; *White Birch* at paras. 51-52; *Nelson Education Limited (Re)*, 2015 ONSC 5557 at para. 38(e).

91 See, for example, *Harte Gold* at para. 38.

occasions as an appropriate way for a debtor to sell its business as a going-concern where the circumstances justify such a structure.[92]

(i) The Test for Granting an RVO is Satisfied

77. In evaluating an RVO, CCAA courts have considered the factors under section 36 of the CCAA that are relevant where a CCAA court is asked to approve a traditional asset sale.[93] These are addressed above and are satisfied in this case.

78. The Court also asks: (a) why the RVO structure is necessary; (b) whether it produces an economic result at least as favourable as any other viable alternative; (c) whether any stakeholder is worse off under the RVO structure than they would have been under any other viable alternative; and (d) whether the consideration being paid for the business reflects the importance and value of the licences and permits (or other intangible assets) being preserved under the RVO structure.[94]

(i) The RVO is Necessary

79. One of the principal circumstances in which an RVO structure has been held to be both necessary and appropriate (as opposed to a traditional vesting order) is where the debtor is engaged in a highly-regulated business such that it would be difficult, time-consuming, costly and/or impossible to transfer to the purchaser the licenses and permits required to operate the business.[95] A number of the cases approving an RVO structure involve mining companies, given the

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92 *Blackrock Metals* at para. 86; *Just Energy* at para. 33.
93 *Just Energy* at paras. 31-32.
94 *Acerus* at para. 12; *Rambler Metals and Mining Limited, Re CCAA*, 2023 NLSC 134 at para. 54 [*Rambler Metals*]; *Harte Gold* at para. 38; *Blackrock Metals* at para. 99.
95 *Just Energy* at paras. 36-45; *Harte Gold* at paras. 70-76; *Blackrock Metals* at paras. 114-116.

significant regulatory framework that applies to such companies and the potential difficulties in transferring necessary licenses, permits and agreements to a purchaser.[96]

80. Tacora operates in a highly regulated environment. It maintains eight material permits and licenses and six mining claims, leases and other property rights that are required to maintain its mining operations and to allow it to perform exploration work on various parts of the Scully Mine. It also holds certain forest resource licenses and fire permits. All of these permits and licenses would need to be in place for any purchaser to continue operations at the Scully Mine.[97]

81. The transfer of many of the required permits and licenses under a traditional asset sale structure would require the consent of the relevant government authority or lessor, and in some cases, advance discussions between a purchaser and relevant government authority or lessor. Several of the permits and licenses are issued by different government departments (both federal and provincial), some of which have no prescribed transfer process.[98] The process for transferring such licenses and permits is therefore uncertain, potentially time-consuming and costly, and presents risk for the ability of the business to continue as a going-concern.[99]

82. The RVO structure, because it does not involve a transfer of permits or licenses to a new entity, is therefore necessary to preserve the existing licenses and permits and to avoid the potentially significant risks to the continuous and uninterrupted operations of Tacora associated with attempting to transfer them. Additionally, the RVO structure has the added benefit of

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96 *Arrangement relatif à Nemaska Lithium inc.*, 2020 QCCS 3218, leave to appeal ref'd, 2020 QCCA 1488, leave to appeal ref'd, 2021 CanLII 35003, 2021 CanLII 34999 (S.C.C.); *Harte Gold*; *Rambler Metals*; *Blackrock Metals*; *PricewaterhouseCoopers Inc. v. Canada Fluorspar (NL) Inc.*, 2023 NLSC 88.

97 Sale Approval Affidavit, para. 46 [CL pp. A2854;A32].

98 Sale Approval Affidavit, para. 47 [CL pp. A2854;A32].

99 Sale Approval Affidavit, para. 48 [CL pp. A2855;A33].

preserving Tacora's tax attributes.[100] These advantages were an important consideration for the Consortium in pricing their Phase 2 Qualified Bid.[101]

(ii) Effect of the RVO Structure on Stakeholders

83. Cargill is the only stakeholder objecting to the Consortium Transaction. Cargill's objections are based, in part, on the alleged effects of the RVO structure on its interests as an unsecured creditor. Cargill takes the position that it is materially prejudiced by the reverse vesting structure and that it is being singled out in this respect. Neither of Cargill's objections impact the appropriateness of implementing the Consortium Transaction by means of an RVO; moreover, the prejudice to any one creditor is not a determinative factor in considering whether an RVO should be approved.

84. It is the nature of an offtake arrangement that it is a linchpin in a mining company's business. Tacora has only one offtake partner: Cargill buys all the iron ore under the Offtake Agreement and sells that ore to third parties. All of Tacora's revenues, not to mention Tacora's profit share on the sale of the only product it produces, are entirely dependent on the terms of the Offtake Agreement, which has a term lasting until the end of the life of the mine. The evidence is undisputed that this arrangement has resulted in very material losses to the insolvent Company, at the same time that Cargill has made significant profits – even much more than the Company originally believed.[102] As a result, Cargill has maintained since early 2023 that one of its key priorities in a transaction involving Tacora has been to preserve the Offtake Agreement.[103]

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100 Sale Approval Affidavit, paras. 49-51 [CL pp. A2855;A33].
101 Sale Approval Affidavit, para. 52 [CL pp. A2856;A34]
102 Reply Broking Affidavit, paras. 16-17 [CL pp. A3439;A219]; Lehtinen Cross, p. 162, qq. 431-434; Matican Cross, p. 18-19, qq. 55-58.
103 Carrelo Cross p. 27-28, 34, 37, 139-141, qq. 57-60, 81, 88-89, 403-410; Lehtinen Cross, p. 64-66, qq. 198-199. This goal was communicated to Jefferies, who received a fee if Cargill remained the offtaker for Tacora in a bid on terms consented to by Cargill (Matican Cross, p. 24-26, 29, q. 84, 87-89, 97-98, Exhibits 1 and 2).

85. Since Cargill is the only offtake partner, a restructuring of the Company's offtake arrangements necessarily involves effects on Cargill that may not be experienced by other stakeholders. Cargill had options to avoid its current circumstances. It could have offered a more economically favourable offtake arrangement, as part of a compliant bid under the SISP. It chose not to do so. It is noteworthy that, of all the parties who have sought to propose restructuring solutions for the Company, only Cargill has sought to preserve the existing offtake arrangements.[104] Moreover, well before submitting a Phase 2 bid, Cargill knew the Consortium's bid would look to replace the Offtake Agreement.[105] Cargill also knew that it would be prejudicial to this restructuring if it waited to raise its legal objections until after the conclusion of the SISP.

86. In relation to the Offtake Agreement and its replacement under the Consortium Transaction, which was the only Phase 2 Qualified Bid under the SISP, Cargill is no more prejudiced under the proposed reverse vesting structure than it would be in a traditional asset sale structure in circumstances where the purchaser did not choose to assume the Offtake Agreement or related liabilities. Whether the Consortium Transaction is structured as an RVO or an AVO, the replacement of the Offtake Agreement gives rise to the same proposed damages claim for Cargill. This position is supported by the Monitor.[106]

87. The fact that Cargill is left with an unsecured damages claim is not a function of the RVO transaction structure but rather the result of the SISP. As this Court recently observed in similar circumstances in granting an RVO in *Just Energy*:

> … [T]he Transaction does not provide any recovery for unsecured creditors or shareholders. I accept the submissions of the Just Energy Entities, however, that this is not a result of the RVO structure. Rather, this reflects the fact that the Just Energy Entities' value, as tested through the market through the SISP and through

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104 Nessim Affidavit, at para 20 [CL pp. A3085;A263]; Sale Approval Affidavit, para. 35 [CL pp. A2847;A25]; Confidential Exhibit 6 to Jackson Cross, Tacora Board Minutes for January 24 Meeting (and continued meetings).

105 See Matican Cross, p. 66-67, qq. 188-190; Exhibit 7 to Matican Cross, MAT*2386.

106 Monitor's Fourth Report, para. 52 [CL pp. E408;E16]

> previous marketing attempts over three years, is not high enough to generate value for the unsecured creditors and shareholders. This was also the situation in *Black Rock Metals Inc.* (see paras. 109, 120). I agree with the comments in *Black Rock Metals Inc.* wherein Chief Justice Paquette stated that the unsecured creditors and shareholders are therefore not in a worse position with the reverse vesting order than they would have been under a traditional asset sale…[107]

88. This is an insolvency. Potential prejudice experienced by one stakeholder must be balanced against the interests of stakeholders as a whole.[108] Any prejudice to Cargill under the Consortium Transaction is far outweighed by benefits for Tacora's stakeholders as a whole if the Consortium Transaction is approved. Moreover, such prejudice is not caused by the RVO structure, but rather, the circumstances of this insolvency.

89. Finally, it is a false comparison to evaluate whether the proposed RVO intended to give effect to the Consortium Transaction can be justified by comparison to the Proposed Cargill Plan as the alternative. The Proposed Cargill Plan is being presented outside the SISP, after the bid deadline and after the selection of the Consortium Transaction as the Successful Bid in the SISP. The proper comparators against which to evaluate the Consortium Transaction are the two other Phase 2 Bids submitted in the SISP, neither of which met the qualifying criteria under the SISP and which were rejected on this basis.

(j) There is No Legal Impediment to the Use of the RVO Structure

90. In its preliminary threshold motion,[109] Cargill has sought to preclude the Company from seeking approval of the Consortium Transaction and granting the proposed RVO without having issued a formal notice of disclaimer. Cargill's position is that: (a) the Offtake Agreement cannot be transferred to ResidualCo under the RVO because such "assignment" requires Cargill's consent and section 11.3 of the CCAA, which would allow this Court to override this requirement, is not

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107 *Just Energy* at para. 57.
108 *Grafton-Fraser v. Cadillac*, 2017 ONSC 2496 at para. 23.
109 Motion Record for Cargill's Preliminary Threshold Motion, dated February 5, 2024, Tab 1, Notice of Motion dated February 5, 2024 ("**Cargill Notice of Threshold Motion**") [CL pp. F2557:F4].

satisfied; and (b) if the damages liability arising from the replacement of the Offtake Agreement is to be transferred to ResidualCo, the Offtake Agreement must be subjected to the formal disclaimer process contemplated by section 32 of the CCAA.[110]

91. The Consortium submits that these objections are without merit. Among other things, none of the cases in which RVOs have been granted supports either of these propositions. Such a conclusion would undermine the benefits of using an RVO transaction structure and place limits on this Court's jurisdiction under section 11 that have no basis in the CCAA or the case law. The Consortium intends to fully brief these arguments in its factum responding to Cargill's preliminary threshold motion to be filed with this Court on April 6, 2024.

(k) Releases Under the Proposed RVO Are Appropriate

92. The proposed RVO contains typical releases in favour of the "Released Parties", which include (among others) the Notes Trustee and its respective present and former directors, officers, partners, employees and advisors, as well as the "Investors" (i.e. the Consortium) and their respective present and former directors, officers, employees, legal counsel and advisors.[111]

93. Roughly paraphrased, the proposed Releases contemplate that these parties are to be released from any and all present and future claims of any nature, based on any act or omission, transaction or dealing existing or taking place prior to delivery of the Monitor's Certificate in connection with (a) the proposed RVO; (b) the CCAA Proceeding; (c) the Subscription Agreement; and (d) the closing documents and/or the consummation of the Consortium

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110 Cargill Notice of Threshold Motion at 5-6 [CL pp. F2558;F5].
111 Monitor's Fourth Report, para. 54 [CL pp. E409;E17].

Transaction. The Released Claims do not include any claim that (a) is not permitted to be released under section 5.1(2) of the CCAA, or (b) results from fraud or wilful misconduct.[112]

94. Third party releases (i.e. releases in favour of parties other than the CCAA debtor company) have been granted in CCAA plans, in AVOs and in RVOs. As the Quebec Superior Court noted in *Blackrock Metals*, it "is now commonplace for third-party releases, in favor of parties to a restructuring, their professional advisors as well as their directors, officers and others, to be approved outside of a plan in the context of a transaction."[113] There are numerous examples where such releases have been granted in RVO transactions. These releases typically include the purchaser of the business and its directors, officers, employees and advisors.[114]

95. The same test for granting third party releases in a CCAA plan applies to a release in an RVO. The Court must ask: (a) whether the parties to be released were necessary to the restructuring of the debtor; (b) whether the claims to be released are rationally connected to the purpose of the restructuring and necessary for it; (c) whether the restructuring could succeed without the releases; (d) whether the parties being released contributed to the restructuring; and (e) whether the releases benefit the debtors as well as the creditors generally.[115] It is not necessary for each of these factors to apply in order for the proposed release to be granted.[116]

96. The Released Parties, including the Consortium, have made material contributions to this restructuring, including by generating the only Phase 2 Qualified Bid in the SISP. The Releases

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112 In respect of any release by the Consortium in favour of the Released Parties, such release is limited to matters directly relating to its investments in the Applicant: Monitor's Fourth Report, para. 55 [CL pp. E409;E17].

113 *Blackrock Metals* at para. 128, citing *Re Green Relief Inc.*, 2020 ONSC 6837 at paras. 23-25 [*Green Relief*].

114 See, for example, *Harte Gold* at paras. 78-86; *Just Energy* at para. 67; *Blackrock* at paras. 125-137; *Rambler Metals* at paras. 90-109.

115 *Blackrock Metals* at para. 130, citing *Harte Gold* at paras. 78-86, *Green Relief* at paras. 27-28, *Lydian International Limited (Re)*, 2020 ONSC 4006 at para. 54, and the test established in *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587, leave to appeal ref'd 2008 CanLII 46997 (S.C.C.).

116 *Green Relief* at para. 28.

that benefit the Consortium are rationally connected to the restructuring, as they are specifically limited to matters arising out of the CCAA proceeding and the Consortium Transaction. These Releases are also essential to the success of the restructuring.[117] They are an integral part of the proposed RVO. If the proposed RVO is granted, and the Consortium Transaction is consummated, Tacora's business will continue and its going-concern value will be preserved for the benefit of stakeholders.[118]

97. As the Monitor notes, the proposed Releases are essential to the Consortium Transaction and the Subscription Agreement. Moreover, the proposed Releases in favour of the Directors and Officers are necessary to allow for the release of the Directors' Charge, which in turn is necessary in order for the Consortium Transaction to close. The Monitor confirms that each of the Released Parties, including the Consortium, has contributed meaningfully and was necessary to Tacora's efforts to address its financial difficulties, the Pre-Filing Strategic Process, the Solicitation Process, the CCAA Proceeding and the Consortium Transaction, and each of the Released Parties was a necessary part of the restructuring.[119]

98. The Consortium submits that the Releases are reasonable in scope. The Monitor supports this view and confirms that the Releases are not overly broad.[120]

(l) Deemed Execution of the Shareholder Agreement is Appropriate

99. Subparagraph 7(j) of the RVO orders that the Unanimous Shareholder Agreement (as defined in the Subscription Agreement) shall be effective and any person receiving New Common Shares (as defined in the Subscription Agreement) on the Closing Date will be deemed a party

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117 Sale Approval Affidavit, paras. 77-78 [CL pp. A2684;A42].
118 Sale Approval Affidavit, para. 41 [CL pp. A2852;A30].
119 Monitor's Fourth Report, paras. 56-57 [CL pp. E409;E17].
120 Monitor's Fourth Report, para. 58 [CL pp. E410;E18].

thereto, in each case, at the time of and in the sequence set forth in subsections 7.2(j) and 7.2(k) of the Subscription Agreement, respectively. Similar orders have been granted in other cases.[121]

100. The Consortium asks this Court to dispense with any requirement that the shareholders of Tacora sign the Unanimous Shareholder Agreement. This is permitted pursuant to section 108(7) of the Ontario *Business Corporations Act*, which provides that:

> (7) If a unanimous shareholder agreement is in effect at the time a share is issued by a corporation to a person other than an existing shareholder,
>
> (a) that person shall be deemed to be a party to the agreement whether or not that person had actual knowledge of it when the share was issued;
>
> (b) the issue of the share does not operate to terminate the agreement; and
>
> (c) if that person is a purchaser for value without notice of the agreement, that person may rescind the contract under which the shares were acquired by giving notice to that effect to the corporation within 60 days after the person actually receives a complete copy of the agreement.[122]

101. The Consortium submits that this provision of the RVO is fair, reasonable and appropriate in the circumstances. The Consortium seeks the Court's approval to implement the Unanimous Shareholder Agreement as one of their constating documents and to deem any person receiving New Common Shares as a party thereto as it would be impracticable for Tacora to obtain signatures from all of the prospective holders of New Common Shares, including the Senior Secured Noteholders (which include the Consortium) as contemplated in subparagraph 7.2(k) of the Subscription Agreement. Similarly, it would be impracticable and unfair to require that all prospective holders of New Common Shares, including the Senior Secured Noteholders, actually

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[121] See, for example, the final orders granted in *In The Matter of a Proposed Arrangement in Respect of Tervita Corporation et al.* (6 December 2016), Calgary 1601-12176 (Alta. Q.B.), Book of Authorities of the Consortium Noteholder Group, Tab 1, at para. 19 and *In The Matter of a Proposed Arrangement in Respect of Trident Exploration Corp.* (26 August 2016), Calgary 1601-09578 (Alta. Q.B.), Book of Authorities of the Consortium Noteholder Group, Tab 2, at para. 9.

[122] *Business Corporations Act*, R.S.O. 1990, c. B.16, s. 108(7).

execute the Shareholder Agreement as a condition to receiving their New Common Shares on the Closing Date.

102. This proposed step is a corporate law mechanism designed to implement the RVO efficiently. It does not result in any prejudice to any party.

B. The Sale Approval Order Should be Granted

103. This restructuring needs to proceed to its conclusion as a matter of urgency. Tacora is in an extremely vulnerable position. Iron ore prices are volatile; the Consortium Transaction was negotiated in a context where prices were approximately $144/tonne. As recently attested in the context of the replacement DIP Facility motion, prices had dropped to $108.40/tonne by March 11, 2024.[123] The Monitor, in its Supplement to the Fourth Report, confirms the urgent need to complete this restructuring as soon as possible, noting that Tacora is in need of substantial capital investment to enable it to achieve consistent, profitable operations. The Consortium Transaction remains the only Phase 2 Qualified Bid and provides a path for Tacora to successfully restructure and exit these proceedings.[124]

104. All key stakeholders (except Cargill, for self-interested reasons) are of the view that the Consortium Transaction is in the best interests of stakeholders as a whole and provides the best chance for this Company to emerge as a viable business. Throwing out the only executable transaction in favour of the Proposed Cargill Plan or in favour of Cargill's "second auction" would create highly prejudicial uncertainty and delay, result in further litigation with no guaranteed

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123 Motion Record of the Applicant (Second Amended and Restated Initial Order and A&L Premium Finance Agreement Approval Order) dated March 11, 2024, Tab 2, Affidavit of Joe Broking sworn March 11, 2024 ("**DIP Replacement Affidavit**"), para. 7 [CL pp. A3233;A13]

124 Supplement to Fourth Report, paras. 19 and 20 [CL pp. E487;E95].

favourable outcome, and jeopardize the entire restructuring.[125] The only party that potentially benefits from such a course of action is Cargill, which is the object of its current litigation strategy.

PART IV -RELIEF REQUESTED

105. The Consortium therefore respectfully requests that the Court approve Tacora's proposed Sale Approval Order, and dismiss the motions and cross motions brought by Cargill, the whole with costs against Cargill and in favour of the Consortium on an appropriate scale.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 27 day of March, 2024:

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[125] DIP Replacement Affidavit, para. 9 [CL pp. A3235;A15].

SCHEDULE "A"
LIST OF AUTHORITIES

Case Law

1. *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10
2. *AbitibiBowater inc. (Arrangement relatif à)*, 2009 QCCS 6460
3. *AbitibiBowater inc. (Arrangement relatif à)*, 2010 QCCS 1742
4. *Acerus Pharmaceuticals Corporation (Re)*, 2023 ONSC 3314
5. *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587, leave to appeal ref'd 2008 CanLII 46997 (S.C.C.)
6. *Arrangement relatif à Blackrock Metals Inc.*, 2022 QCCS 2828, leave to appeal ref'd 2022 QCCA 1073, leave to appeal ref'd 2023 CanLII 36969 (S.C.C.)
7. *Arrangement relatif à Nemaska Lithium inc.*, 2020 QCCS 3218, leave to appeal ref'd, 2020 QCCA 1488, leave to appeal ref'd, 2021 CanLII 35003, 2021 CanLII 34999 (S.C.C.)
8. *Aveos Fleet Performance Inc./Aveos performance aéronautique inc. (arrangement relatif à)*, 2012 QCCS 4074
9. *Bellatrix Exploration Ltd. (Re)*, 2020 ABQB 332
10. *Bloom Lake, g.p.l. (Arrangement relatif à)*, 2015 QCCS 1920, leave to appeal ref'd 2015 QCCA 754
11. *Boutiques San Francisco Inc. (Arrangement relative aux),* [2004] RJQ 965 (C.S.)
12. *Cameron v. Bank of Nova Scotia* (1981), 45 N.S.R. (2d) 303 (C.A.)
13. *Dundee Oil and Gas Limited (Re)*, 2018 ONSC 6376
14. *Ernst & Young Inc. v. Essar Global Fund Limited,* 2017 ONCA 1014
15. *Grafton-Fraser v. Cadillac*, 2017 ONSC 2496
16. *Harte Gold Corp (Re),* 2022 ONSC 653
17. *In The Matter of a Proposed Arrangement in Respect of Tervita Corporation et al.* (6 December 2016), Calgary 1601-12176 (Alta. Q.B.)
18. *In The Matter of a Proposed Arrangement in Respect of Trident Exploration Corp.* (26 August 2016), Calgary 1601-09578 (Alta. Q.B.)
19. *Just Energy Group Inc. et. al. v. Morgan Stanley Capital Group Inc. et. al.*, 2022 ONSC 6354
20. *Lydian International Limited (Re)*, 2020 ONSC 4006

Case Law

21. *MNP Ltd. and the Bank of Nova Scotia v. Mustard Capital Inc.*, 2012 SKQB 325

22. *Nelson Education Limited (Re)*, 2015 ONSC 5557

23. *PricewaterhouseCoopers Inc. v. Canada Fluorspar (NL) Inc.*, 2023 NLSC 88

24. *Rambler Metals and Mining Limited, Re CCAA*, 2023 NLSC 134

25. *Re Green Relief Inc.*, 2020 ONSC 6837

26. *Royal Bank of Canada v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (C.A.)

27. *Sanjel Corp. (Re)*, 2016 ABQB 257

28. *Skyepharma PLC v. Hyal Pharmaceutical Corp.* (2000), 47 O.R. (3d) 234 (C.A.)

29. *Tacora Resources Inc. (Re),* 2023 ONSC 6126

30. *White Birch Paper Holding Company (Arrangement relatif à)*, 2010 QCCS 4915, leave to appeal ref'd 2010 QCCA 1950

SCHEDULE "B"
TEXT OF STATUTES, REGULATIONS & BY-LAWS

***Business Corporations Act*, R.S.O. 1990, c. B.16**

Issuance or shares subject to unanimous shareholder agreement

108 (7) If a unanimous shareholder agreement is in effect at the time a share is issued by a corporation to a person other than an existing shareholder,

> **(a)** that person shall be deemed to be a party to the agreement whether or not that person had actual knowledge of it when the share was issued;
>
> **(b)** the issue of the share does not operate to terminate the agreement; and
>
> **(c)** if that person is a purchaser for value without notice of the agreement, that person may rescind the contract under which the shares were acquired by giving notice to that effect to the corporation within 60 days after the person actually receives a complete copy of the agreement.

…

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

Claims against directors — compromise

5.1 (1) A compromise or arrangement made in respect of a debtor company may include in its terms provision for the compromise of claims against directors of the company that arose before the commencement of proceedings under this Act and that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations.

Exception

(2) A provision for the compromise of claims against directors may not include claims that

> **(a)** relate to contractual rights of one or more creditors; or
>
> **(b)** are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.

Powers of court

(3) The court may declare that a claim against directors shall not be compromised if it is satisfied that the compromise would not be fair and reasonable in the circumstances.

Resignation or removal of directors

(4) Where all of the directors have resigned or have been removed by the shareholders without replacement, any person who manages or supervises the management of the business and affairs of the debtor company shall be deemed to be a director for the purposes of this section.

General power of court

11 Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

Assignment of agreements

11.3 (1) On application by a debtor company and on notice to every party to an agreement and the monitor, the court may make an order assigning the rights and obligations of the company under the agreement to any person who is specified by the court and agrees to the assignment.

Exceptions

(2) Subsection (1) does not apply in respect of rights and obligations that are not assignable by reason of their nature or that arise under

(a) an agreement entered into on or after the day on which proceedings commence under this Act;

(b) an eligible financial contract; or

(c) a collective agreement.

Factors to be considered

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

(a) whether the monitor approved the proposed assignment;

(b) whether the person to whom the rights and obligations are to be assigned would be able to perform the obligations; and

(c) whether it would be appropriate to assign the rights and obligations to that person.

Restriction

(4) The court may not make the order unless it is satisfied that all monetary defaults in relation to the agreement — other than those arising by reason only of the company's insolvency, the

commencement of proceedings under this Act or the company's failure to perform a non-monetary obligation — will be remedied on or before the day fixed by the court.

Copy of order

(5) The applicant is to send a copy of the order to every party to the agreement.

Disclaimer or resiliation of agreements

32 (1) Subject to subsections (2) and (3), a debtor company may — on notice given in the prescribed form and manner to the other parties to the agreement and the monitor — disclaim or resiliate any agreement to which the company is a party on the day on which proceedings commence under this Act. The company may not give notice unless the monitor approves the proposed disclaimer or resiliation.

Court may prohibit disclaimer or resiliation

(2) Within 15 days after the day on which the company gives notice under subsection (1), a party to the agreement may, on notice to the other parties to the agreement and the monitor, apply to a court for an order that the agreement is not to be disclaimed or resiliated.

Court-ordered disclaimer or resiliation

(3) If the monitor does not approve the proposed disclaimer or resiliation, the company may, on notice to the other parties to the agreement and the monitor, apply to a court for an order that the agreement be disclaimed or resiliated.

Factors to be considered

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

(a) whether the monitor approved the proposed disclaimer or resiliation;

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

(c) whether the disclaimer or resiliation would likely cause significant financial hardship to a party to the agreement.

Date of disclaimer or resiliation

(5) An agreement is disclaimed or resiliated

(a) if no application is made under subsection (2), on the day that is 30 days after the day on which the company gives notice under subsection (1);

(b) if the court dismisses the application made under subsection (2), on the day that is 30 days after the day on which the company gives notice under subsection (1) or on any later day fixed by the court; or

(c) if the court orders that the agreement is disclaimed or resiliated under subsection (3), on the day that is 30 days after the day on which the company gives notice or on any later day fixed by the court.

Intellectual property

(6) If the company has granted a right to use intellectual property to a party to an agreement, the disclaimer or resiliation does not affect the party's right to use the intellectual property — including the party's right to enforce an exclusive use — during the term of the agreement, including any period for which the party extends the agreement as of right, as long as the party continues to perform its obligations under the agreement in relation to the use of the intellectual property.

Loss related to disclaimer or resiliation

(7) If an agreement is disclaimed or resiliated, a party to the agreement who suffers a loss in relation to the disclaimer or resiliation is considered to have a provable claim.

Reasons for disclaimer or resiliation

(8) A company shall, on request by a party to the agreement, provide in writing the reasons for the proposed disclaimer or resiliation within five days after the day on which the party requests them.

Exceptions

(9) This section does not apply in respect of

(a) an eligible financial contract;

(b) a collective agreement;

(c) a financing agreement if the company is the borrower; or

(d) a lease of real property or of an immovable if the company is the lessor.

Restriction on disposition of business assets

36 (1) A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

Notice to creditors

(2) A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

Factors to be considered

(3) In deciding whether to grant the authorization, the court is to consider, among other things,

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) whether the monitor approved the process leading to the proposed sale or disposition;

(c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

Additional factors — related persons

(4) If the proposed sale or disposition is to a person who is related to the company, the court may, after considering the factors referred to in subsection (3), grant the authorization only if it is satisfied that

(a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and

(b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

Related persons

(5) For the purpose of subsection (4), a person who is related to the company includes

(a) a director or officer of the company;

(b) a person who has or has had, directly or indirectly, control in fact of the company; and

(c) a person who is related to a person described in paragraph (a) or (b).

Assets may be disposed of free and clear

(6) The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the company or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

Restriction — employers

(7) The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(5)(a) and (6)(a) if the court had sanctioned the compromise or arrangement.

Restriction — intellectual property

(8) If, on the day on which an order is made under this Act in respect of the company, the company is a party to an agreement that grants to another party a right to use intellectual property that is included in a sale or disposition authorized under subsection (6), that sale or disposition does not affect that other party's right to use the intellectual property — including the other party's right to enforce an exclusive use — during the term of the agreement, including any period for which the other party extends the agreement as of right, as long as the other party continues to perform its obligations under the agreement in relation to the use of the intellectual property.

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: CV-23-00707394-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDING COMMENCED AT TORONTO

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