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.

REPLY FACTUM OF CARGILL, INCORPORATED AND CARGILL INTERNATIONAL TRADING PTE LTD. RE: DISCLAIMER AND GLOBAL PROCESS MOTIONS

(returnable June 26, 2024)

June 25, 2024

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PART I – REPLY ON MOTION TO SET ASIDE DISCLAIMER

A. Disclaiming the Stockpile Agreement is Not Permitted and Does Not Contribute to a Restructuring

1. Tacora seeks to disclaim both the Offtake Agreement and the Stockpile Agreement[1]. Yet its factum focuses almost exclusively on the former and says nothing about any purported enhancement of the viability of a restructuring based on disclaimer of the latter. Tacora's silence is telling. The Stockpile Agreement provides Tacora working capital (i.e. financing) in the range of $30 to $40 million[2], and disclaiming it is not only prohibited under the CCAA (for the reasons argued in Cargill's Disclaimer Factum), but it will also create a hole that must be filled by a bidder in the Second Sale Process or a new lender. As Tacora cannot show how this hole will be filled by a third party, this *diminishes* rather than enhances the prospect of a viable compromise or arrangement.

B. Cargill – and Contracting Counterparties – are Entitled to Certainty

2. Tacora accuses Cargill of "inventing" issues that will arise from a disclaimer. To the contrary, Cargill highlighted in its factum and affidavit evidence various operational and financial issues that will arise from terminating the Agreements, many of which relied on Tacora's own comments. Tacora's factum does not deny these. Instead, Tacora takes the fundamentally inconsistent position that the Agreements should be disclaimed to facilitate a potential restructuring, but that as noted by the Monitor, "it is imperative that Tacora's operations be funded", ie. by the Agreements, "through to the completion of a going concern transaction"[3].

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[1] Defined terms are as defined in Cargill's Disclaimer Factum and Global Process Factum dated June 20, 2024.
[2] Lehtinen June Affidavit, para. 32, Cargill MR, Tab 2, p. 26, CL F3864; Supplement to Monitor's Eighth Report, Appendix D, pp. 25-26; Monitor's Third Report, para. 28(a); Broking March Affidavit at para. 16(a), Cargill MR, Tab 11, p. 615, CL F4453; *Tacora Resources Inc. (Re)*, 2024 ONSC 2454, para. 28(a)
[3] Tacora Factum dated June 24, 2024, para. 34

3. Tacora seeks to remedy this inconsistency by asking the Court to re-draft the negotiated, arms-length Offtake Agreement. However, the Court cannot grant that remedy and impose on counterparties new commercial terms that have not been negotiated. Tacora cannot pick and choose only certain provisions of the Agreements it will honour without the agreement of its contractual counterparty Cargill.

4. The dispute on this point is not a matter of waiting or not waiting to adjudicate the disclaimer issue, as Tacora suggests at paragraph 91 of its factum. It is a matter of Tacora taking appropriate steps at appropriate times, and recognizing that its attempt to mould s. 32 to its convenience has broader ramifications. Absent this motion, Tacora's disclaimer would have taken effect on June 16, 2024, and the Agreements would no longer have any effect. This Court should thus be concerned for the precedential effect of sanctioning Tacora's amorphous disclaimer request if the fact of a dispute over it is used as an opportunity to amend the Agreements over Cargill's objection, thereby expanding s. 32 beyond its statutory intent and the Court's authority. This concern is validly considered in the exercise of the Court's discretion to assess "whether the disclaimer or resiliation is fair and reasonable".[4]

5. In addition to the *Doman Industries* case cited by Cargill in its Disclaimer Factum, the recent Quebec Superior Court decision in *Re Endoceutics Inc.* ("***Endoceutics***") is another illustration of Court scrutiny of disclaimers where it was not apparent that they would enhance the prospects of a viable restructuring. While there were some unique features, the factors that led Justice Dumais in *Endoceutics* to reject a disclaimer should equally influence the Court here, namely: (i) there was no evidence that future operations with a disclaimer would yield better results

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[4] *Re Laurentian University of Sudbury*, 2021 ONSC 3272, para. 44

than without (as it "could be the other way around"); and (ii) the debtor wanted to maintain the benefit of the agreement during the restructuring phase and only later wanted to be rid of it.[5] Notably, the Court rejected the disclaimer in *Endoceutics* in the face of evidence that creditor recovery would be higher if the disclaimer was effected and the Monitor's recommendation in support of the disclaimer.

C. Any Instability is of Tacora's Own Making

6. In paragraphs 5 and 32-36 of its factum, Tacora incorrectly blames Cargill for causing instability by seeking to take steps to protect itself in connection with scheduling of an upcoming vessel without the security of any contractual commitments in relation thereto (if the Disclaimer is allowed). As stated by Cargill in its letter dated June 19, 2024:

> The potential postponement of the vessel scheduling arose because Tacora is seeking to disclaim the [Agreements] and the massive uncertainty for Cargill and others created by Tacora's position in that regard. It is insufficient for Tacora to assert in its letter that it "will agree that notwithstanding the Disclaimer Tacora will honour its obligations related to the July 11–21 Vessel pursuant to the terms of the existing Offtake Agreement and Stockpile Agreement". The [Agreements] are binding agreements which Tacora is actively seeking to terminate, and Tacora cannot avoid the consequences of its position that it seeks to no longer be bound those agreements.[6]

7. Cargill is entitled to require contractual certainty to perform its obligations. Given the operational interdependencies between Cargill and Tacora created by the Agreements, including the many months during which iron ore is in shipment,[7] Tacora has itself caused any instability by seeking to disclaim the Agreements at a future unknown date of its own choosing despite Tacora needing to rely on the Agreements for financing, operational benefits, and stability.

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[5] *Arrangement relatif à Endoceutics inc.*, 2024 QCCS 1482, paras. 110, 112-117, 133 (translated).
[6] Letter from Cargill Counsel dated June 19, 2024, Appendix "H" to Monitor's Tenth Report, CL E757
[7] Lehtinen June Affidavit at paras. 36-40, Cargill MR, Tab 2, p. 27-28, CL F3865

8. Cargill strongly disagrees with Tacora's assertions that Cargill raised arguments relating to potential violation of the Cargill DIP Facility in "bad faith". Tacora highlights statements Cargill has made that it would not assert a disclaimer as a default under the Cargill DIP Facility. But this is beside the point. The Disclaimer is not itself a default under the Cargill DIP Facility, but if a disclaimer is effected without replacement cash flow for Tacora, then Tacora's cash flow budget would not be accurate under the Cargill DIP Facility.

9. Cargill wants stability with the Cargill DIP Facility and the CCAA proceedings. But the current Cargill DIP cash flows have only been approved by Cargill to the week of July 22, 2024. Tacora would need the consent of Cargill for any increased availability above the current DIP and approval for DIP cash flows beyond the week of July 22. Tacora has not put into evidence the ability to operate in the normal course without the consent of Cargill beyond that time. The relief Tacora seeks on the effective date of disclaimer is not supported on such facts alone.

10. As for the allegation about set-off, the parties have extensively discussed the issue, and Cargill disagrees with Tacora's position. Cargill is not in breach of its obligations.[8] Tacora raises this issue now to attempt to distract from its flawed decision to seek to disclaim the Agreements.

D. Tacora's Belief that Bidders May Not Want the Offtake Agreement is Untested

11. Tacora mischaracterizes the economics of the Offtake Agreement in paragraphs 12-14 of its factum, and its assertion about Cargill's alleged profit is false. The evidence concerned the cash Cargill received, and does not account for its expenses and other deductions.[9]

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[8] Letter from Cargill Counsel dated June 19, 2024, Appendix "H" to Monitor's Tenth Report, CL E757
[9] Lehtinen Cross-Examination dated March 19, 2024, Q. 197, Cargill MR, Tab 4, p. 233, CL F4071

12. Cargill has acknowledged (as selectively quoted by Tacora) that "some bidders may not wish to continue with the Offtake Agreement". Cargill also points out that other bidders may feel differently, and Tacora cannot reasonably say otherwise given that it does not have any other currently viable option. Cargill maintains that its profit share is commensurate with the various benefits it provides to Tacora, that the Agreements were negotiated at arm's length, and that many bidders – including those with whom Cargill is negotiating in connection with the Second Sale Process, and including itself – will want to continue with Cargill as offtaker.

13. The fact that the Offtake Agreement might be amended as part of an approved transaction also does not support a disclaimer, because it is unclear what would happen to the disclaimer Tacora seeks if Cargill remains the offtaker as a result of the Second Sale Process.

PART II – REPLY ON GLOBAL PROCESS MOTION

A. Tacora Has No Response to Meet the Legal Principles Set out in the Global Process Motion

14. Tacora presents no response to the legal principles set out in Cargill's global process motion. In response to Cargill's argument on the global process motion that no case has ever approved an RVO in the hypothetical fact scenario presented, Tacora points only to the *Quest* and *Just Energy* cases. Cargill's position on *Quest* is set out in its Global Process Factum. As described therein, *Quest* bears some key distinguishing facts from those before the Court here. However, to the extent parties perceive *Quest* as permitting RVOs to be approved in the hypothetical scenario presented by Cargill's motion, Cargill submits that this Court should clarify that *Quest* does not reflect the state of the law on RVOs in Ontario as it is inconsistent with *Plasco*, *Harte Gold*, and other leading Ontario cases.

15. Tacora speculates at paragraph 117 of its factum that the RVO granted in *Just Energy* followed a prior plan in which creditors' rights were restricted and creditors objected and thus "[w]hile not explicitly stated, given the magnitude of the claims, it is likely that the value of these litigants' claims could have swamped the unsecured class vote to prevent any approval [sic] the proposed CCAA plan." Tacora's speculation is both unfounded and beside the point.

16. The *Just Energy* plan did not proceed and the parties moved to a RVO transaction. At the approval hearing for the RVO transaction, the formerly objecting parties did not oppose, which allowed the RVO transaction to proceed unopposed (i.e. akin to a plan vote). *Just Energy* does not stand for the principle that the Court can cram-down an unsecured class that does not support an RVO transaction against their objection (as Cargill has outlined and described in detail in its Global Process Factum).

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

June 25, 2024

/s/ Goodmans LLP

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