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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

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

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

(Motion to Set Aside Disclaimer Returnable June 26, 2024)

June 20, 2024

Goodmans LLP
Barristers & Solicitors
Bay Adelaide Centre
333 Bay Street, Suite 3400
Toronto, ON M5H 2S7

Robert J. Chadwick (LSO No. 35165K)
rchadwick@goodmans.ca

Caroline Descours (LSO No. 58251A)
cdescours@goodmans.ca

Peter Kolla (LSO No. 54608K)
pkolla@goodmans.ca

Sarah Stothart (LSO No. 73068O)
sstothart@goodmans.ca

Tel: 416.979.2211

Lawyers for Cargill, Incorporated and Cargill International Trading Pte Ltd.

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PART I – OVERVIEW

1. Tacora asks this Court to order – but not order *now* – the disclaimer of two agreements with Cargill that not only cannot be disclaimed under s. 32 of the *Companies' Creditors Arrangement Act* ("**CCAA**"), but also are of fundamental importance to Tacora generally and in this CCAA specifically. Tacora wants the Court to allow it to delay the timing of the disclaimer until a future date of Tacora's sole choosing, in the hopes that it will be able to find, as part of its second sale process, more advantageous terms for selling its iron ore, receiving working capital (i.e. financing), and hedging. In effect, Tacora is asking this Court to modify the terms of its agreements with Cargill, to grant Tacora an unfettered option to terminate them at a time convenient to it. What Tacora seeks is not permitted under s. 32.

2. Cargill brings this motion in response to Tacora's Notice of Disclaimer dated May 16, 2024 in respect of the Offtake Agreement and Stockpile Agreement, as described and defined below. The agreements are eligible financial contracts and financing agreements where Tacora is the borrower, thus, s. 32(9) of the CCAA is an absolute bar to their disclaimer. Moreover, their disclaimer would be detrimental to the prospects of a viable compromise or arrangement in respect of Tacora, so it cannot meet the disclaimer requirement under s. 32(4) of the CCAA either.

3. The disclaimer sought by Tacora would leave it without the two agreements that provide it with (a) 100% of its revenue, (b) millions of dollars of working capital, (c) a margining facility that can provide financing and the ability to withstand variability in the price of iron ore, and (d) a hedging facility that provides further price movement protection. Disclaiming these agreements and the benefits they provide would be detrimental to Tacora and its stakeholders (including Cargill) and would imperil Tacora's ability to comply with its cash flow obligations under the

Cargill DIP Facility. The disclaimer would put Tacora in a highly vulnerable and precarious position at a time when Tacora is in the midst of seeking third party investment and needs stability.

4. Tacora is aware of these issues with its proposed disclaimer. Tacora's evidence clearly shows that a disclaimer is premature and would not enhance the prospect of a viable compromise or arrangement now. It readily admits a disclaimer would cause operational issues, confusion, and uncertainty. However, its proposed solution is not permissible under the CCAA – Tacora wants this Court to amend the terms of the agreements and keep the agreements alive (i.e. the opposite of a disclaimer), but grant Tacora the ability to terminate them in the future, so that Tacora can defer actually bearing the negative effects of its disclaimer until a time when it hopes a hypothetical future sale transaction and a hypothetical future offtake agreement will solve its problems. This is not a fair or appropriate use of the disclaimer provisions of the CCAA.

5. A disclaimer has been referred to as "one tool in the status quo toolbox" that can permit an insolvent debtor to "terminate unfavourable contracts" given the fundamental objective of the CCAA process to preserve the status quo while opportunities for an equitable restructuring may be pursued.[1] A disclaimer here would do the opposite, by upending the status quo for no actual enhancement to the prospect of a restructuring in a situation where Tacora wants to keep the agreements in place and benefit from them.

6. Cargill's motion should be granted and Tacora's disclaimer of the two agreements rejected.

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[1] *Bellatrix Exploration Ltd., Re*, [2020] A.J. No. 329 at para. 192 (Q.B.) ("***Bellatrix***"), Cargill Book of Authorities dated June 20, 2024 (**"Cargill BOA"**) at Tab 1

PART II – SUMMARY OF THE FACTS

A. Cargill's Relationship With and Support of Tacora

7. Cargill, Incorporated and Cargill International Trade PTE Ltd. (together, "**Cargill**"), whose metals business has 40 years of experience, has been a key partner and important source of financial support for Tacora Resources Inc. ("**Tacora**" or the "**Company**") since Tacora's 2017 acquisition of the Scully Mine.[2] Cargill has a long history of working with Tacora in a positive and constructive way to find balanced and reasonable solutions to liquidity issues it has faced.[3]

8. Until recently, Tacora and its financial advisors had consistently described the relationship with Cargill and the features of the Offtake Agreement as being a valuable asset of Tacora. Joe Broking, Tacora's then CEO, was clear when he was cross examined in October 2023 that "Cargill has been a good partner to Tacora going all the way back to 2017 and 2018."[4]

B. The Offtake Agreement and Stockpile Agreement

(i) Overview of the Agreements

9. Cargill purchases 100% of Tacora's iron ore and provides offtake and marketing services to Tacora under an offtake agreement from 2017, which was restated in 2018 in consideration for Cargill's equity investment of approximately $20 million (as further amended, the "**Offtake Agreement**"). The Offtake Agreement was amended in 2020 to last for the life of the Scully Mine.

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[2] Affidavit of Matt Lehtinen sworn March 1, 2024 at paras. 2-3, 7 ("**Lehtinen March Affidavit**"), Cargill Motion Record (Motion to Set Aside Disclaimer) dated June 11, 2024, Tab 3, p. 121-123 ("**Cargill MR**")

[3] Affidavit of Matt Lehtinen sworn June 11, 2024 at para. 9 ("**Lehtinen June Affidavit**"), Cargill MR, Tab 2, p. 20

[4] Lehtinen June Affidavit, para. 10, Cargill MR, Tab 2, p. 20-21; Cross Examination Transcript of Joe Broking dated October 19, 2023, Q. 217-220

10. Tacora's CFO, Heng Vuong, explained that when Tacora entered the Offtake Agreement in 2017, Tacora specifically desired and sought "an offtaking arrangement with an established offtaker who would be able to promote and sell a fledgling brand of iron ore concentrate."[5] Tacora found such an established offtake partner, with the capabilities it required, in Cargill. The Offtake Agreement was negotiated at arm's length.[6] Through substantial investment in branding and technical marketing, Cargill has enhanced the value of Tacora's iron ore.[7]

11. The Offtake Agreement works in conjunction with the Iron Ore Stockpile Purchase Agreement dated December 17, 2019 (the "**Stockpile Agreement**", and together with the Offtake Agreement, the "**Agreements**").[8] Around the time the Stockpile Agreement was entered, Tacora was at risk of default on its senior debt covenants and could not raise financing from any third parties.[9] Accordingly, Cargill provided the Stockpile Agreement as a financing solution for Tacora, by providing Tacora with earlier payment for the iron ore at no cost to Tacora.[10]

12. In addition to having significant value for Cargill,[11] the Agreements provide various benefits to Tacora as outlined in the Lehtinen Affidavit, including a guaranteed purchaser and no

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[5] Affidavit of Heng Vuong sworn June 14, 2024 at para. 16 ("**Vuong Affidavit**"), Tacora Responding Motion Record dated June 14, 2024, Tab 1 ("**Tacora MR**")

[6] *Tacora Resources Inc. (Re)*, 2024 ONSC 2612 at para. 74

[7] Lehtinen March Affidavit at paras. 7, 27, Cargill MR, Tab 3, p. 122, 129

[8] Affidavit of Joe Broking sworn October 9, 2023, para. 34, Cargill MR, Tab 9A, p. 471

[9] Lehtinen March Affidavit at para. 29, Cargill MR, Tab 3, p. 130

[10] Lehtinen March Affidavit at para. 38, Cargill MR, Tab 3, p. 132; Lehtinen June Affidavit at para. 8, Cargill MR, Tab 2, p. 20

[11] Lehtinen March Affidavit at paras. 17, 24-25, Cargill MR, Tab 3, p. 126, 128

credit risk, complete logistical and administrative coordination, a hedging program at below market fees, and a no-cost margining facility.[12]

(ii) Agreements Mechanics

13. The Agreements include a pricing and payment structure that takes place over time, such that Tacora is not settling for prices at a discount for the benefit of receiving such early payment. Rather, Tacora can fully realize the actual market settlements when such iron ore is delivered to, and payment for it is made by, the end customers.[13]

14. Payments proceed in three stages under the Agreements. First, by virtue of the Stockpile Agreement, Cargill pays a provisional purchase price at the time iron ore is shipped to a stockpile at the Port in Sept-Iles, Quebec, up to a capped amount of iron ore. Second, the Offtake Agreement provides for a true-up payment of a provisional purchase price by Cargill to Tacora once a vessel is loaded with iron ore. Third, once the iron ore is finally paid for (often several months after vessel load when it reaches a final destination), Tacora issues a final invoice to Cargill, which incorporates a profit share based on the final sale price and accounts for any prior provisional payments, interim hedging and margining that may have taken place.[14]

15. Cargill and Tacora share in the profits from the onward sales Cargill arranges. Cargill receives a portion of the profits as its commission, and for delivering the iron ore, Tacora receives the (larger) balance.

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[12] Lehtinen June Affidavit at para. 6, Cargill MR, Tab 2, p. 18-19; Transcript of Cross-Examination of Joe Broking on April 4, 2024, Qs. 277-280 ("**Broking April Cross**"), Cargill MR, Tab 12, p. 651

[13] Lehtinen June Affidavit at para. 8, Cargill MR, Tab 2, p. 19-20

[14] Vuong Affidavit at para. 20, Tacora MR, Tab 1; Lehtinen March Affidavit at paras. 38-46, Cargill MR, Tab 3, p. 132-135; Cross Examination Transcript of Joe Broking dated March 20, 2024, Q. 112-123 ("**Broking March Cross**"), Cargill MR, Tab 10, p. 522-524

(iii) Financing and Risk Management Through the Offtake Agreement

16. Through the Agreements and its features that are not typically provided by iron ore traders generally, Cargill provides Tacora with working capital, cash flow and financing.[15]

17. The Offtake Agreement provides for "marking to market" twice weekly, with price changes in the index price of iron ore to be settled in cash, subject to a margining facility that limits Tacora's cash settlement obligations under $7.5 million.[16] By virtue of the margining facility, Tacora is insulated from the effects of price swings between payment of the provisional purchase price and final invoice which would otherwise necessitate settlement in cash, as Tacora can effectively borrow from Cargill at 0% up to the margining limits. [17]

18. Another way Cargill provides financing to Tacora through the Agreements is through the accelerated payments for iron ore.[18] Tacora readily acknowledges that the lengthy shipping period before a final price can be determined means that Tacora requires, and receives through the Agreements, working capital in the interim.[19] Mr. Broking conceded that a replacement to the

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[15] Lehtinen March Affidavit at para. 44, Cargill MR, Tab 3, p. 134; Affidavit of Joe Broking sworn October 9, 2023 at paras. 38-29 ("**Broking October Affidavit**"), Cargill MR, Tab 9A, p. 472-473

[16] Lehtinen March Affidavit at paras. 7, 38-43, Cargill MR, Tab 3, p. 122, 132-134; Broking March Cross, Q. 116-118, Cargill MR, Tab 10, p. 523. Cargill's cash settlement obligations are limited to $5 million.

[17] While the Offtake Agreement provided for margin financing to Tacora of up to $7.5 million, Cargill subsequently agreed to increase the limit to $25 million in connection with the amendment and restatement of the Advanced Payments Facility dated May 29, 2023 (the "**APF**") and later the Cargill DIP Agreement, as amended (the "**Cargill DIP Facility**"). The increased margining facility was premised on, and amended, the existing facility under the Offtake Agreement, and upon termination of the APF, it was agreed that the parties' obligations would revert to those under the then-existing terms of the Offtake Agreement. *See* Lehtinen March Affidavit at para. 26, Cargill MR, Tab 3, p. 128-129; Lehtinen June Affidavit at paras. 25-29, Cargill MR, Tab 2, p. 24-25; Amendment No. 1 to Amended and Restated Advance Payments Facility Agreement made June 23, 2023, s. 2.2(d), Cargill MR, Tab 2(C), p. 67

[18] Lehtinen March Affidavit at paras. 29, 38-41, Cargill MR, Tab 3, p. 130-133; Broking March Cross, Q. 128-133, Cargill MR, Tab 10, p. 524

[19] *Tacora Resources Inc. (Re)*, 2024 ONSC 2612 at para. 20 (see also Affidavit of Joe Broking sworn March 21, 2024 re MFC dispute at paras. 16, 32)

Cargill DIP Facility would need to be $40 million higher to account for losing the working capital financing provided by Cargill under the Stockpile Agreement.[20]

19. In addition, the Offtake Agreement contemplates a hedging program offered by Cargill to Tacora to manage the risk of iron ore price fluctuations, which was implemented through amendments to the pricing formula in the Offtake Agreement.[21] In Mr. Broking's words, the hedges "mitigate risk associated with iron ore pricing."[22] Mr. Broking admitted that the Offtake Agreement hedges from Cargill remained available to Tacora after the CCAA, but Tacora chose not to enter into any in 2024 as their implementation would be suggestive of the Offtake Agreement being an eligible financial contract.[23]

20. In addition to the Tacora hedging, Cargill also has a trading desk that handles derivatives and other risk management and financial strategies for Cargill in respect of the Offtake Agreement. Cargill's trading desk uses hedges, which may extend over six months or more, to manage its own risk that pricing terms will vary as between Tacora and its third party customers. Cargill actively trades physical iron ore and iron ore derivatives (on a portfolio basis), including iron ore futures contracts, on the Singapore Exchange and Dalian Commodities Exchange.[24]

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[20] Affidavit of Joe Broking sworn March 11, 2024 at para. 16(a) ("**Broking March Affidavit**"), Cargill MR, Tab 11, p. 615; Broking April Cross, Q. 277-280, Cargill MR, Tab 12, p. 651

[21] Lehtinen March Affidavit at para. 40, Cargill MR, Tab 3, p. 132-133; Broking March Cross, Q. 126-127, Cargill MR, Tab 10, p. 524

[22] Broking March Cross, Q. 646, Cargill MR, Tab 10, p. 568

[23] Broking March Cross, Q. 646-651, Cargill MR, Tab 10, p. 568

[24] Lehtinen March Affidavit at paras. 45-46, Cargill MR, Tab 3, p. 134-135

C. Cargill is Open to an Amendment to the Offtake Agreement

21. Tacora has recently sought to characterize the Offtake Agreement as "off-market" and an impediment to its ability to solicit capital investments. However, Cargill was and remains open to the possibility of negotiating amendments to the Offtake Agreement, including its life-of-mine duration, in the context of a recapitalization or restructuring of Tacora. Cargill is also in discussions with a wide variety of parties that want Cargill to continue as the offtake provider as part of a go-forward solution for Tacora.[25]

D. Tacora's Restructuring Efforts to Date

22. Tacora sought and was granted protection under the CCAA in October 2023 and has been attempting to restructure ever since. When Tacora first sought CCAA protection, Mr. Broking noted that "Tacora relies on Cargill for 100% of its revenue" and that "[i]t is crucial for Tacora's business that the Company continue to have a source to sell its iron ore concentrate to during the CCAA Proceedings."[26]

23. The facts relating to subsequent events are well known. Tacora solicited offers for a sale, restructuring or recapitalization transaction through a Court-approved process, and accepted a proposal from an ad hoc group of noteholders and other participants (the "**AHG Reverse Vesting Transaction**"). The AHG Reverse Vesting Transaction required a reverse vesting order ("**RVO**") that proposed to assign the Agreements to a shell corporation that could not perform those contracts, and provide no payment to Cargill for the unsecured claim that would be created. Effectively, the AHG Reverse Vesting Transaction would have stranded the Agreements for no

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[25] Lehtinen June Affidavit at para. 33, Cargill MR, Tab 2, p. 27

[26] Broking October Affidavit at para. 39, Cargill MR, Tab 9A, p. 473

consideration. In order to protect its contractual and economic rights, Cargill contested the motion seeking approval of the AHG Reverse Vesting Transaction. On April 9, 2024, the evening before the scheduled Court hearing of the motion, Tacora advised Cargill that the AHG consortium had walked away from the transaction due to an unfulfilled debt condition.[27]

24. Tacora has now launched a new sale process that is soliciting bids to be submitted by July 12, 2024 (the "**Second Sale Process**"), and has sought to disclaim the Agreements (the "**Disclaimer**") by Notice of Disclaimer dated May 16, 2024 (the "**Notice**").[28]

PART III – ISSUES AND THE LAW

25. The Disclaimer is not available to Tacora as the Agreements are eligible financial contracts and financing agreements, both of which are exceptions to the disclaimer regime.[29] In any event, the Disclaimer should be set aside as it would not enhance the prospects of a viable compromise or arrangement, as readily conceded by Tacora itself.

A. The Offtake Agreement is an Eligible Financial Contract

26. Pursuant to s. 32(9)(a) of the CCAA, its disclaimer provisions do not apply in respect of an "eligible financial contract".[30] The Offtake Agreement falls within the meaning of "eligible financial contract" ("**EFC**") under s. 2 of the *Eligible Financial Contract Regulations* (the "***Regulations***"). The definition includes "(a) a derivatives agreement, whether settled by payment or delivery, that … (ii) is the subject of recurrent dealings in the … commodities markets". The

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[27] Lehtinen June Affidavit at paras. 15-19, Cargill MR, Tab 2, p. 21-23

[28] Notice of Disclaimer and Letter dated May 16, 2024, Cargill MR, Tab 2(B), p. 46

[29] CCAA, s. 32(9)(a) and (c)

[30] CCAA, s. 32(9)(a)

term "derivatives agreement" is defined as "a financial agreement whose obligations are derived from, referenced to, or based on, one or more underlying reference items such as … indices … commodities ... and includes (a) a contract for differences or a swap, including a total return swap".[31]

27. Through the pricing and sale mechanics under the Offtake Agreement, the price Cargill pays Tacora at each stage in shipment of the iron ore is fixed to an index price for a specific commodity, and Cargill and Tacora share in the profit from the final sale of iron ore to a customer.[32] As in *Bellatrix*, Tacora uses the Offtake Agreement to seek what it "considered to be a pricing arrangement more favourable to its financial risk management [and] cash flow … objectives."[33] The Offtake Agreement is subject to regular netting and margining of obligations owed to Cargill and Tacora until the final invoice, which may result in a payment by Tacora to Cargill if the global iron ore price has dropped in the time the iron ore is in transit.[34]

28. Jeremy Cusimano, an expert in financial markets and commodities and derivatives trading, opined that the pricing mechanism of the Offtake Agreement operates similarly to a total return swap ("**TRS**"), a form of swap, by replicating the cash flows of an investment in an asset and requiring parties to make payments to each other based on the performance of an underlying asset.[35] A TRS is a type of "derivative agreement" defined in s. 1 of the *Regulations*. Mr. Cusimano explained that, like the Offtake Agreement, a TRS allows both parties to share in benefit and risk:

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[31] *Eligible Financial Contract Regulations (Companies' Creditors Arrangement Act)*, SOR 2007-257

[32] Broking March Cross, Q. 120-122, Cargill MR, Tab 10, p. 523

[33] *Bellatrix* at para. 133, Cargill BOA at Tab 1

[34] Lehtinen March Affidavit at paras. 41-42, Cargill MR, Tab 3, p. 133-134

[35] Expert Report of Jeremy Cusimano dated March 1, 2024 at para. 60 ("**Cusimano Report**"), Cargill MR, Tab 5(A), p. 325

> Through the profit share agreements, Tacora is able to obtain value from the iron ore without actually owning it and Cargill, alternatively, is able to protect itself from a decline in the value of iron ore through its ability to reclaim some of the Provisional Purchase Price based on the Platts 62% index.[36]

29. Further, the Offtake Agreement provides a hedging program to Tacora to manage the risk of iron ore price fluctuations, which has been implemented through amendments to the pricing formula in the Offtake Agreement.[37] The purpose of these hedges was, in Mr. Broking's words, to "mitigate risk associated with iron ore pricing."[38] The hedges provide for set-off if a party defaults, which is a recognized indicia of an EFC.[39]

30. Mr. Cusimano pointed out that one of the hedges he reviewed expressly noted that it changes the pricing provisions of the Offtake Agreement from floating to fixed price, "providing to [Tacora] a degree of insulation from anticipated iron ore market price movements."[40] He concluded that the hedging and TRS-style profit share in the Offtake Agreement were characteristics "functionally similar to financial products", which allow Cargill and Tacora, as parties to the Offtake Agreement, to better manage price and timing risk in the open market.[41]

31. These hedging arrangements are part and parcel of one group of contractual arrangements with the Offtake Agreement at its core, akin to the agreements found to be an EFC in *Bellatrix*:

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[36] Cusimano Report at para. 60, Cargill MR, Tab 5(A), p. 325

[37] Lehtinen March Affidavit at para. 40, Cargill MR, Tab 3, p. 132-133; Broking March Cross, Q. 125-127, Cargill MR, Tab 10, p. 524

[38] Broking March Cross, Q. 646, Cargil MR, Tab 10, p. 568

[39] Hedging Amendment Agreement dated June 26, 2023, s. 26.2, Cargill MR, Tab 3(C), p. 197; *Bellatrix* at para. 52, Cargill BOA at Tab 1

[40] Cusimano Report at para. 57, Cargill MR, Tab 5(A), p. 324-325

[41] Cusimano Report at para. 65, Cargill MR, Tab 5(A), p. 326

> [135] There is no end to the number of definitions of a hedging contract. Having reviewed many of them, a common theme emerges. They seek to manage financial risk. …
>
> [139] I believe that the Contract is part of Bellatrix's hedging program…It is an important part of collection of agreements that play a role in Bellatrix's financial management undertakings.
>
> [140] That makes it a financial agreement for purposes of the Regulations. …
>
> [180] … If those derivative agreements are the subject of frequent transactions on derivatives markets and if it is proper, as I believe it is, to view the Contract and Bellatrix's hedging contracts as part of Bellatrix's overall risk management strategy, then the Contract may themselves be said to, at least indirectly, be "the subject of recurrent dealings in the derivatives markets".[42]

32. The Offtake Agreement contemplates further dealings in iron ore in the commodities markets, and Cargill executes hedging strategies in the market on a portfolio basis.[43] The requirement in the prescribed EFC definition that the derivatives agreement be "the subject of recurrent dealings in…commodities markets"[44] relates to the underlying commodity, not to the agreement itself, and whether the commodity is subject to recurrent dealings both as between the parties and in the derivatives market more generally.[45]

33. Ms. Brown-Hruska, Tacora's witness, purported to opine on whether the Offtake Agreement was an eligible financial contract as understood in the financial industry. However, where the statute contains its own lexicon, it is the legislated definition that governs.[46] In particular, an exhaustive definition introduced by the word "means", like the definition of "derivatives

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[42] *Bellatrix* at paras. 135, 139-140, 176, 180, Cargill BOA at Tab 1

[43] Lehtinen March Affidavit at paras. 45-46, Cargill MR, Tab 3, p. 134-135

[44] *Eligible Financial Contract Regulations (Companies' Creditors Arrangement Act),* SOR 2007-257 s. 2(a)(ii)

[45] *Bellatrix* at paras. 165-170, Cargill BOA at Tab 1

[46] "Interpretation according to the "object and spirit" of the legislation cannot, in my view, overcome a clear statutory definition. This is not a case in which the Court has a choice of the interpretations it may put upon the language used by the legislature. The legislature has specifically addressed the subject." *Mattabi Mines Ltd. v. Ontario (Minister of Revenue),* [1988] 2 S.C.R. 175 at para. 23

agreement" in the Regulation, "declare[s] the complete meaning of the defined term and completely displace[s] whatever meanings the defined term might otherwise bear in ordinary or technical usage."[47] Thus, expert evidence is only useful here to the extent that it considers the meaning of terms included in the definition of "derivatives agreement", such as "swap", "total return swap" or "forward", and not with respect to the definition itself.

34. Cargill submits that, viewed as a whole, the Offtake Agreement is a tool which assists in managing financial risk, which is "the essence of an EFC".[48] The Offtake Agreement is of the very nature underscoring the policy reasons for the EFC exception to the disclaimer regime: it is a key risk management tool for each of Tacora and Cargill in a broader series of transactions, the integrity of which must be preserved by not allowing a debtor to upend the entire series with one disclaimer.[49]

B. The Agreements are Financing Agreements

35. Further, the Agreements cannot be disclaimed because they are financing agreements where Tacora is the borrower, which is another exclusion under s. 32(9) of the CCAA.

36. Since Tacora does not have any working capital loan arrangements, Tacora has been very clear on the record that it has been utilizing the cash flow provided by Cargill through the Agreements to fund its operations on a day-to-day basis.[50] William Gula, an expert in corporate

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[47] *Briones v. National Money Mart Co.*, 2014 MBCA 57 at para. 26, quoting Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (Markham: LexisNexis Canada, 2008) at 62

[48] *Bellatrix* at para. 159, Cargill BOA at Tab 1

[49] *Enron Capital & Trade Resources Canada Corp. v. Blue Range Resource Corp.*, 2000 ABCA 239 at paras. 27, 53

[50] Broking March Cross, Q. 128-133, Cargil MR, Tab 10, p. 524; Broking March Affidavit at para. 16(a), Cargill MR, Tab 11, p. 615; Expert Report of William Gula dated March 1, 2024 at para. 71(a) ("**Gula Report**"), Cargill MR, Tab 7(A), p. 384; Lehtinen March Affidavit at para. 37, Cargill MR, Tab 3, p. 132

financing transactions, including in the mining industry, opined that the provisional payments upon delivery to the port and vessel load accelerate and advance cash flow to Tacora, which provides "enhanced liquidity to Tacora and eliminates or reduces risks associated with the shipment of iron ore to the end user", and that while these are "not a traditional financing arrangement like a bank loan, the Tacora Offtake Arrangements serve the same purpose in Tacora's operations."[51]

37. Cargill also provides financing to Tacora through the margining facility under the Offtake Agreement.[52] As described above, the sequence and mechanics of the Offtake Agreement's payment mechanics and the twice-weekly marking-to-market would leave Tacora vulnerable – absent the margining facility – to being forced to settle global price fluctuations in cash.[53] Mr. Broking described this margining within the Offtake Agreement as "establish[ing] thresholds for, really, credit exposure to each party"[54]. As long as the marking-to-market does not result in a change in Cargill's favour of more than $7.5 million (extended now to $25 million through the Cargill DIP Facility), Tacora is not obligated to pay that settlement in cash and Cargill finances it to be settled at a later date (and vice versa).[55]

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[51] Gula Report at para. 71(a)-(b), Cargill MR, Tab 7(A), p. 384-385

[52] Gula Report at para. 71(c), Cargill MR, Tab 7(A), p. 385

[53] Lehtinen March Affidavit at paras. 7, 42-43, Cargill MR, Tab 3, p. 122-123, 133-134

[54] Broking March Cross at Q. 116 (emphasis added), Cargill MR, Tab 10, p. 523

[55] Broking March Cross at Q. 116-118, Cargill MR, Tab 10, p. 523; Lehtinen March Affidavit at para. 43, Cargill MR, Tab 3, p. 134; Beyond the Offtake Agreement's $7.5 million limit, Tacora also benefits from a margin extension originally under the APF, now under the Cargill DIP Facility, up to $25 million: Lehtinen March Affidavit at para. 32, Cargill MR, Tab 3, p. 130-131

C. Disclaimer Would Not Enhance the Prospects of a Viable Compromise or Arrangement

38. Even if disclaimer of the Agreements were not prohibited by the exceptions under s. 32(9), it would be inappropriate in the present case to approve the Disclaimer as it would not enhance the prospects of a viable compromise or arrangement being made in respect of Tacora, and thus is offside s. 32(4)(b) of the CCAA.

(i) The Disclaimer is Far Worse than the Status Quo

39. In the words of Mr. Broking, Tacora's then CEO, in October 2023: "It is crucial for Tacora's business that the Company continue to have a source to sell its iron ore concentrate to during the CCAA Proceedings."[56] In the words of Tacora, reiterated in principle by the Monitor[57], in April 2024: "[T]he Company needs stability and certainty… to reassure suppliers, employees and other stakeholders that it is business as usual at Tacora," and would benefit from the continued existence of the Stockpile Agreement and the ability to hedge price volatility.[58]

40. In the words of the Court in April 2024:

> [46] Tacora has determined that it can best achieve the certainty and stability that it needs to continue its operations through the delivery of, and payment for, its iron ore product under established arrangements in place with Cargill that the AHG acknowledges provide a short term liquidity lift (through the margin and mark to market available under the Stockpile Agreement with enhanced flexibility being afforded under the Cargill Amended and Restated DIP Agreement) and with the added flexibility to manage the commodity price volatility to the greatest extent possible through hedging arrangements, also provided under the Cargill Amended and Restated DIP Agreement and reinforced in paragraphs 7 and 8 of the proposed form of order (the specific wording of which no party has opposed).

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[56] Broking October Affidavit at para. 39, Cargill MR, Tab 9(A), p. 473; see also *Tacora Resources Inc. (Re)*, 2023 ONSC 6126 at paras. 113, 118, 140

[57] Eighth Report of the Monitor dated April 21, 2024 at para. 30(c) and 31

[58] Reply Factum of Tacora (Re: Stay Extension and Amended DIP Agreement) dated April 24, 2024 at para. 3

> [47] Time is of the essence. Tacora has made it clear that the status quo is not sustainable in the longer term. However, the company has also made it clear that maintaining the status quo in the shorter term is important for its short term goals, to allow it to maintain stability and avoid the uncertainty of interim changes without a transaction or other path forward in place.[59]

41. The Agreements are Tacora's *sole source* of revenue. They also offer the ability for Tacora to hedge its position and take advantage of margining to protect itself from considerable price swings in the price of iron ore. It is therefore of fundamental importance, as Tacora has repeatedly and consistently stressed during these CCAA proceedings, that they remain in effect pending any restructuring of the Company, to ensure Tacora has stability and predictability while it seeks new investment. Tacora has repeatedly raised concerns to the Court about its precarious liquidity position – and the Disclaimer would severely exacerbate its liquidity issues.

42. The Disclaimer would result in the loss of Cargill as a source of guaranteed revenue and a provider of all of the benefits described above. Tacora would be suddenly in the position of having to market and sell its own iron ore where it has never done so before and has no operational infrastructure to do so, without any hedging or margining protection to protect itself through the lengthy shipment periods and without any working capital, or otherwise seeking to negotiate new agreements. This could cause related negative repercussions, including concerns to employees and suppliers about the Company's position, which could further impact stability and destroy value. It would also, by virtue of leaving Tacora without satisfactory cash flow, place Tacora offside the DIP Facility and leave it vulnerable to having no cash flow at all.[60]

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[59] *Tacora Resources Inc. (Re)*, 2024 ONSC 2454 at paras. 46-47 (emphasis added).

[60] Lehtinen June Affidavit at para. 31, Cargill MR, Tab 2, p. 26

43. The Disclaimer would also result in an unsecured claim in excess of US$500 million against the Company,[61] immediately resulting in Cargill having a blocking vote on a CCAA plan. This does not enhance the prospects of a viable compromise or arrangement.

44. None of these facts provide reassurance to a potential bidder in the Second Sale Process, in the context of valuing and bidding on the assets or shares.[62] The Disclaimer places Tacora in a far more precarious position – both in negotiations with potential replacement offtake providers, and with potential bidders in the Second Sale Process – than preservation of the status quo.

45. It is no secret that Tacora no longer views the Offtake Agreement as beneficial to it. But Mr. Broking was clear in his evidence early in these proceedings that Tacora's inability to operate its business at a profit was caused not by the Offtake Agreement, but by its difficulties reaching its target nameplate production capacity.[63] All parties acknowledge that replacing the Stockpile Agreement, a source of working capital provided at zero cost to Tacora in conjunction with the Offtake Agreement, would require new and additional working capital financing in the range of US$30-40 million, which would cause Tacora to incur significant interest expense and prime all existing creditors by a significant amount if the Agreements were disclaimed immediately.[64]

46. While it *may* be the case that certain bidders in the Second Sale Process may not want to assume the Offtake Agreement and instead prefer to substitute their own arrangements, it may not. Tacora's evidence on these points is speculative, unparticularized and cannot justify a disclaimer

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[61] Lehtinen June Affidavit at para. 30, Cargill MR, Tab 2, p. 26

[62] Lehtinen June Affidavit at para. 31, Cargill MR, Tab 2, p. 26

[63] Cross Examination Transcript of Joe Broking dated October 19, 2023, Q. 217-220; see also Vuong Affidavit at paras. 9-10, Tacora MR, Tab 1

[64] Lehtinen June Affidavit at para. 32, Cargill MR, Tab 2, p. 26; Broking March Affidavit at para. 16(a), Cargill MR, Tab 11, p. 615

of the Agreements at this time. Tacora does not currently have any alternative offtake agreement. Other bidders – including those with whom Cargill is currently in discussions – may see the benefit of continuing to work with an established offtake provider like Cargill.[65] Cargill provides considerable benefits to Tacora through the Agreements, which go above and beyond those of a typical offtake provider, and considers the profit share to be fair compensation for those benefits.[66] And in any circumstance in which Cargill would continue as offtaker, including if Cargill's bid is selected in the Second Sale Process, the Disclaimer would be unnecessary, as acknowledged by the Monitor, and only confuse and complicate the next steps between the parties.[67]

47. The same rationales articulated by Tacora, the Monitor and the Court for requiring ongoing stability continues to apply. Tacora's sudden desire to upend the status quo in favour of uncertainty is not needed at this time and does not add value or enhance the Second Sale Process, which is an ongoing process for an asset sale or share sale. Given all of the ways the Disclaimer would actively harm the Company, the status quo in the short term until completion of the Second Sale Process provides a clearer path to a viable restructuring.

(ii) The Disclaimer Would Create Operational Issues

48. The Disclaimer would also necessitate significant operational disentangling, as further described in the Lehtinen Affidavit. If the Agreements were disclaimed now, various shipments would be in the midst of their transit and payment journeys, and there would be lag time before Cargill and Tacora could settle amounts owing between them.[68] Further, Tacora (or another

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[65] Lehtinen June Affidavit at para. 33, Cargill MR, Tab 2, p. 27

[66] Lehtinen June Affidavit at para. 7, Cargill MR, Tab 2, p. 19

[67] Tenth Report of the Monitor dated June 19, 2024, para. 57. Note that if the successful transaction is an asset sale, the disclaimer is equally unnecessary.

[68] Lehtinen June Affidavit at paras. 36-40, Cargill MR, Tab 2, p. 27-28

hypothetical offtake provider) would need to be transferred or immediately itself implement all arrangements and infrastructure for marketing, stockpile storage, ocean transportation, onward sales, and hedging.[69]

(iii) Tacora's Request for a Delayed Disclaimer is Prejudicial and Unfair

49. Notwithstanding having served the Notice and seeking to disclaim the Agreements, Tacora appears to agree with all of the above points about the Agreements' present indispensability. Mr. Vuong stated the following in support of Tacora's position on this motion, which in large part restates Cargill's concerns and arguments above:

> . . . [T]ransitioning to a new offtake or marketing arrangement for an interim period prior to the bid deadline in the Sale Process would require significant operational changes to Tacora's shipping, logistics, and back-office administration, and risk causing undue disruptions. In addition, such an interim arrangement is likely to cause confusion in the marketplace amongst the ultimate customers of Tacora's iron ore concentrate. Transitioning from the Offtake Agreement once in connection with a long-term solution (i.e., following selection of the successful bid in the Sale Process) would provide practical advantages and greater stability to the Company in the near term.[70]

50. Thus, while asking for a disclaimer from one side of its mouth, Tacora stresses that it cannot have an *immediate* disclaimer from the other. It asks the Court to order the Disclaimer, but only with a delayed effective date. Tacora takes the extraordinary step of conceding that a disclaimer would not *now*, on today's date, enhance the prospect of a viable restructuring, but suggesting that it should nonetheless be granted the ability to disclaim at a date of Tacora's sole choosing when Tacora hopes it will have alternative offtaking and financing arrangements in place.

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[69] Lehtinen June Affidavit at paras. 38, 40, Cargill MR, Tab 2, p. 27-28

[70] Vuong Affidavit at para. 31, Tacora MR, Tab 1

51. Cargill is aware of no authority for such a request. The Court may, of course, apply s. 32 of the CCAA to authorize termination of contracts where consideration of the factors listed in that section (and any others) indicates it would be "fair, appropriate and reasonable in all the circumstances".[71] But s. 32 does not authorize the Court to *amend* contracts, and as stated by Justice Jones in *Bellatrix*, "the ability to disclaim is not unfettered."[72]

52. What Tacora seeks is an unfettered option to disclaim at its discretion through an amendment to the terms of the Agreements to give it unilateral termination rights. Tacora acknowledges the disclaimer is premature because it depends on the benefits of the Agreements. Tacora just wants, and is hoping, to hold onto them until it finds a better deal.

53. Seeking a better deal is insufficient grounds for a disclaimer. The Court said as much in *Re Doman Industries*, where the Court denied the debtor company's request to terminate certain contracts on the basis that the opportunity to achieve a more profitable deal was insufficient grounds to override the interests of the counterparties in maintaining the contracts.[73] Seeking a better deal where the better deal may never materialize, and asking for the counterparty to be kept waiting, is even less appropriate grounds for disclaimer.

54. Ordering otherwise is inconsistent with the baseline considerations of "appropriateness, good faith, and due diligence" that the Supreme Court has instructed the Court to always bear in mind when adjudicating disputes in CCAA proceedings.[74] The outcome Tacora seeks ignores that

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[71] *Re Laurentian University of Sudbury*, 2021 ONSC 3272 at para 44

[72] *Bellatrix* at para. 115, Cargill BOA at Tab 1

[73] *Doman Industries Ltd., Re*, 2004 BCSC 733 at paras. 35-38, leave to appeal ref'd 2004 BCCA 382

[74] *Century Services Inc. v Canada (Attorney General)*, 2010 SCC 60 at para 70, see also *9354-9186 Québec Inc. v Callidus Capital Corp.*, 2020 SCC 10 at para 49

a disclaimer will cause disruption detrimental to all stakeholders, and that Cargill as the contractual counterparty should not be forced to perform its own obligations without certainty as to how or when a disclaimer will take effect.

55. While the factual circumstances differed, the need to balance rights and obligations of the debtor and its contractual counterparties motivated the Court in *Groupe Dynamite inc. v. Deloitte Restructuring Inc*. to refuse the debtor's effort to maintain the benefit of certain leases while being excused from its obligation to pay rent.[75] Framed differently, the debtor wanted the benefit of a disclaimer (knowing it did not have to pay) without the consequence thereof (actually disclaiming and seeking to restructure without the agreement). The Court noted that the order sought by the debtor would enhance its prospects of a successful restructuring, but that it was not fair to the counterparty, and commented:

> [56] . . . [A]chieving the Act's remedial purpose is not a simple matter of analyzing the debtor's financial situation. As the Supreme Court of Canada affirmed in *Century Services*, "Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit."[76]

56. The Court ought not to countenance a clear opportunistic effort by Tacora to pave the way for a hypothetical future RVO transaction before the existence of such transaction – or its legal availability in this case, which is highly contingent – is even known.

57. The language of s. 32(5) sets out the timing for a disclaimer to take effect, and parties should be entitled to expect that when an agreement is disclaimed, performance will cease on the

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[75] *Groupe Dynamite inc. v. Deloitte Restructuring Inc.*, 2021 QCCS 3 ("***Groupe Dynamite***")

[76] *Groupe Dynamite* at para. 56

dates provided, subject to necessary delay to accommodate litigation scheduling if the disclaimer is contested. As the Alberta Court stated in *Bellatrix*, "flexibility must not unduly compromise certainty".[77] This Court should be concerned with ensuring parties can reasonably expect that a disclaimer will only be sought and obtained when the debtor truly believes it will – at the time sought – enhance the prospect of a viable restructuring.

PART IV - ORDER REQUESTED

58. For the foregoing reasons, Cargill respectfully requests that Tacora's Notice of Disclaimer be set aside.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

June 20, 2024

/s/ Goodmans LLP

Goodmans LLP

[77] *Bellatrix* at para. 117, Cargill BOA at Tab 1

SCHEDULE A

LIST OF AUTHORITIES

1. *9354-9186 Québec Inc. v Callidus Capital Corp.*, 2020 SCC 10
2. *Bellatrix Exploration Ltd., Re*, [2020] A.J. No. 329 (Q.B.)
3. *Briones v. National Money Mart Co.*, 2014 MBCA 57
4. *Century Services Inc. v Canada (Attorney General)*, 2010 SCC 60
5. *Doman Industries Ltd., Re*, 2004 BCSC 733, leave to appeal ref'd 2004 BCCA 382
6. *Enron Capital & Trade Resources Canada Corp. v. Blue Range Resource Corp.*, 2000 ABCA 239
7. *Groupe Dynamite inc. v. Deloitte Restructuring Inc.*, 2021 QCCS 3
8. *Re Laurentian University of Sudbury*, 2021 ONSC 3272
9. *Mattabi Mines Ltd. v. Ontario (Minister of Revenue)*, [1988] 2 S.C.R. 175
10. *Tacora Resources Inc. (Re)*, 2023 ONSC 6126
11. *Tacora Resources Inc. (Re)*, 2024 ONSC 2454
12. *Tacora Resources Inc. (Re)*, 2024 ONSC 2612

SCHEDULE B

EXCERPTS OF STATUTES AND REGULATIONS

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

Section 32

Agreements

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.

Eligible Financial Contract Regulations (Companies' Creditors Arrangement Act), SOR/2007-257

1 The following definitions apply in these Regulations.

derivatives agreement means a financial agreement whose obligations are derived from, referenced to, or based on, one or more underlying reference items such as interest rates, indices, currencies, commodities, securities or other ownership interests, credit or guarantee obligations,

debt securities, climatic variables, bandwidth, freight rates, emission rights, real property indices and inflation or other macroeconomic data and includes

(a) a contract for differences or a swap, including a total return swap, price return swap, default swap or basis swap;

(b) a futures agreement;

(c) a cap, collar, floor or spread;

(d) an option; and

(e) a spot or forward. (*contrat dérivé*)

financial intermediary means

(a) a clearing agency; or

(b) a person, including a broker, bank or trust company, that in the ordinary course of business maintains securities accounts or futures accounts for others. (*intermédiaire financier*)

2 The following kinds of financial agreements are prescribed for the purpose of the definition eligible financial contract in subsection 2(1) of the *Companies' Creditors Arrangement Act*:

(a) a derivatives agreement, whether settled by payment or delivery, that

(i) trades on a futures or options exchange or board, or other regulated market, or

(ii) is the subject of recurrent dealings in the derivatives markets or in the over-the-counter securities or commodities markets;

(b) an agreement to

(i) borrow or lend securities or commodities, including an agreement to transfer securities or commodities under which the borrower may repay the loan with other securities or commodities, cash or cash equivalents,

(ii) clear or settle securities, futures, options or derivatives transactions, or

(iii) act as a depository for securities;

(c) a repurchase, reverse repurchase or buy-sellback agreement with respect to securities or commodities;

(d) a margin loan in so far as it is in respect of a securities account or futures account maintained by a financial intermediary;

(e) any combination of agreements referred to in any of paragraphs (a) to (d);

(f) a master agreement in so far as it is in respect of an agreement referred to in any of paragraphs (a) to (e);

(g) a master agreement in so far as it is in respect of a master agreement referred to in paragraph (f);

(h) a guarantee of, or an indemnity or reimbursement obligation with respect to, the liabilities under an agreement referred to in any of paragraphs (a) to (g); and

(i) an agreement relating to financial collateral, including any form of security or security interest in collateral and a title transfer credit support agreement, with respect to an agreement referred to in any of paragraphs (a) to (h).

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

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

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at Toronto

FACTUM OF CARGILL, INCORPORATED AND CARGILL INTERNATIONAL TRADING PTE LTD. RE: MOTION TO SET ASIDE DISCLAIMER

Goodmans LLP
Barristers & Solicitors
Bay Adelaide Centre
333 Bay Street, Suite 3400
Toronto, Ontario M5H 2S7

Robert J. Chadwick (LSO No. 35165K)
rchadwick@goodmans.ca

Caroline Descours (LSO No. 58251A)
cdescours@goodmans.ca

Peter Kolla (LSO No. 54608K)
pkolla@goodmans.ca

Sarah Stothart (LSO No. 73068O)
sstothart@goodmans.ca

Tel: 416.979.2211

Lawyers for Cargill, Incorporated and Cargill International Trading Pte Ltd.