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.

(Responding to Tacora Motion for Extension of the Stay Period and Replacement of the DIP and Supporting Cargill Cross-Motion, returnable March 18, 2024)

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PART I – OVERVIEW[1]

1. Cargill, Incorporated and Cargill International Trade PTE Ltd. (together, "**Cargill**") are seeking an adjournment of the motion (the "**DIP Replacement Motion**") being brought by Tacora Resources Inc. ("**Tacora**" or the "**Company**") to replace the Company's existing DIP financing provided by Cargill (the "**Cargill DIP Financing**") and approval of an interim increase to the amount available under the Cargill DIP Financing, with certain other limited amendments to the Cargill DIP Financing in connection with such interim increased amount, pending the return of the Company's DIP Replacement Motion and Cargill's responding cross-motion in respect thereof (the "**Cargill DIP Cross-Motion**"). Cargill proposes that the DIP Replacement Motion and the Cargill DIP Cross-Motion be heard during the week of April 2, 2024, or alternatively after the hearing in respect of the Company's reverse vesting transaction approval motion (the "**RVO Motion**") and Cargill's responding cross-motion in respect thereof, which are scheduled for April 10-12, 2024 (the "**April Hearing**").

2. Alternatively, Cargill seeks the approval of the Cargill Amended DIP Financing on consent of Tacora, the Monitor, the Company's ad hoc group of noteholders (the "**AHG**") and Cargill on the terms set forth in the Cargill Amended DIP Agreement.

3. Such requested relief creates stability for Tacora, maintains the status quo, is beneficial to all stakeholders, is fair and reasonable and avoids the Court having to make assumptions or determinations on the DIP Replacement Motion on March 18, 2024, without a full and complete record and which decision could have ramifications to the outcome of the April Hearing.

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[1] Capitalized terms used herein and not otherwise defined herein have the meanings given to them in the Affidavit of Matthew Lehtinen sworn March 14, 2024 (the "**Lehtinen March 14 Affidavit**"). All dollar amounts referenced herein are in U.S. dollars unless otherwise stated.

4. The Cargill DIP Financing provided by Cargill to Tacora during these proceedings has provided Tacora with the liquidity it has needed to date, on reasonable terms and to the benefit of the Company and its stakeholders.

5. Tacora now requires additional DIP funding, which Cargill has agreed to provide, again on balanced and reasonable terms responsive to Tacora's requests. Instead, Tacora seeks approval of replacement DIP financing from the parties to the AHG Reverse Vesting Transaction (the "**AHG Replacement DIP Financing**"), on terms which are prejudicial to Cargill, a material stakeholder of Tacora, and, if approved by this Court, would result in a significantly greater amount of priming secured debt, higher interest expense, fees and professional costs, reduced flexibility, shorter term, and a "poison pill" feature designed to influence the Company's ultimate restructuring result. The AHG Replacement DIP Financing is structured to attempt to increase the AHG's leverage to secure the approval of their proposed reverse vesting transaction, which tactics are not appropriate and should not be permitted as part of the Company's DIP financing arrangements.

6. Cargill strongly believes that the AHG Replacement DIP Financing is inferior to the Cargill Amended DIP Financing, and is not in the best interests of the Company or its stakeholders.

7. There is no need for the AHG Replacement DIP Financing at this time, as Tacora would be provided with sufficient funding under its existing DIP financing arrangements with Cargill, with minimal amendments to the existing Court approved facility. The Cargill DIP Financing has been in place and in good standing for the last approximately five months of these proceedings.

8. The existing Cargill DIP Financing (with certain limited amendments in connection with the incremental additional funding required by the Company) would maintain the status quo for Tacora at a critical time in its CCAA proceedings and does not provide any advantages to Cargill or the AHG. The existing Cargill DIP Financing remains in the best interests of all stakeholders of Tacora and maintains a level playing field.

9. In the circumstances, where Cargill has agreed to provide additional interim DIP funding with no additional fees pending the proper review, consideration and hearing in respect of this important issue, there is no need for or urgency to Tacora's DIP Replacement Motion. Cargill believes that proceeding with Tacora's DIP Replacement Motion at this time, on the unnecessarily short timeline manufactured by Tacora, notwithstanding Cargill's repeated requests since January to set a fair and reasonable schedule for the parties to properly address DIP matters before the Court, is not fair, reasonable or appropriate in the circumstances. The determination of whether the AHG Replacement DIP Financing should be approved is a significant and material issue that should have due process and consideration by the Court, as in the circumstances, and based on its terms and conditions, acceptance of the AHG Replacement DIP Financing could impact the options available to the Company and the outcome of these proceedings, and would result in significant prejudice to Cargill.

10. The Court has set a litigation schedule for the Company's contested RVO Motion, which all parties have been working towards and which is scheduled to be heard in approximately three weeks. The relief being requested by Tacora at the April Hearing is an exceptional remedy and is subject to the determination of a preliminary threshold motion (the "**Preliminary Threshold Motion**"), opposition by Cargill to the proposed RVO transaction and a responding cross-motion of Cargill. Late in such scheduled process, Tacora is attempting to jam Cargill and its other stakeholders with a replacement DIP that could have ramifications on the outcome of the important pending April Hearing. Tacora is advancing a "poison pill" replacement DIP structured around only one potential outcome that it is seeking to advance at the April Hearing, and not balanced based on all potential outcomes coming out from such scheduled hearing.

11. The Company resisted having the Preliminary Threshold Motion heard which would have provided more guidance prior to its DIP Replacement Motion. The Company has argued that the

Preliminary Threshold Motion should not be heard in advance of the April Hearing, and has filed no affidavit materials in response to such Preliminary Threshold Motion. It now seeks to advance its DIP Replacement Motion where matters relating to the Preliminary Threshold Motion and the RVO Motion are relevant in the consideration of the AHG Replacement DIP Financing based on its terms and consequences.

12. The Court is being asked to evaluate the AHG Replacement DIP Financing, which is materially linked to the proposed AHG Reverse Vesting Transaction and the matters to be addressed at the April Hearing, resulting in the Court requiring to consider hypothetical matters, when the April Hearing is scheduled to be heard in approximately three weeks. This should not be permitted by the Court.

13. Cargill requests that the Company's DIP Replacement Motion be adjourned to provide sufficient time for proper consideration by the stakeholders and the Court, and that Cargill's cross-motion for approval of an interim increase in the financing available under the Cargill DIP Financing and an appropriate litigation timetable for a hearing of both the AHG's and Cargill's proposals to provide further DIP financing be granted.

PART II – SUMMARY OF THE FACTS

A. Background

14. Cargill has been a key partner and important source of financial support for Tacora since its inception. Cargill is Tacora's offtake and technical marketing provider under the Offtake Agreement that was negotiated in April of 2017. Cargill is or has also been party to other key related agreements and arrangements with Tacora including: (i) multiple working capital facilities to optimize Tacora's operations, working capital, cash flow and liquidity, (ii) as provider of a hedging program in a cost efficient and beneficial manner for Tacora, and (iii) as provider of

operational expertise and assistance at the Scully Mine. As part of the CCAA Proceedings, Cargill has also provided to Tacora the Cargill DIP Financing pursuant to the Cargill DIP Agreement.[2]

15. Cargill has, for an extended period of time, worked to assist Tacora and to provide stability and funding to Tacora for its operations, particularly when alternative sources of liquidity were not available. Cargill has a long history of working with Tacora in a positive and constructive way to find balanced and reasonable solutions, and it wishes to continue to do so now and going forward.[3]

B. Existing Cargill DIP Financing

16. This Court authorized Tacora to obtain the Cargill DIP Financing under the Cargill DIP Agreement pursuant to the ARIO granted on October 30, 2023. The Cargill DIP Financing has provided material liquidity needed by the Company during these CCAA proceedings. The Cargill DIP Financing was provided on reasonable terms, and benefited Tacora and its stakeholders.[4]

17. The full principal amount of $75 million available under the Cargill DIP Financing has been advanced by Cargill to Tacora, and the full amount of the Post-Filing Credit Extensions of $20 million has been utilized by Tacora. Tacora now requires additional DIP financing.[5]

18. Cargill has been the DIP Lender to Tacora since the commencement of the CCAA proceedings. No parties have filed any materials that evidence that the Cargill DIP Financing has not been serving Tacora and its stakeholders well.[6]

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[2] Lehtinen March 14 Affidavit at para 7 [CL p F1957;F18].

[3] Lehtinen March 14 Affidavit at para 8 [CL p F1958;F19].

[4] Lehtinen March 14 Affidavit at paras 9-10 [CL p F1958;F19].

[5] Lehtinen March 14 Affidavit at para 11 [CL p 1959;F20].

[6] Lehtinen March 14 Affidavit at para 65 [CL p F1976;F37].

C. Cargill's Amended DIP Proposal

19. On February 20 and 21, 2024, the Company initially requested from Cargill a proposal for an additional $32.5 million of DIP financing, and then subsequently increased that request by an additional $20 million for an aggregate request of $52.5 million. In connection with the increased amount of DIP financing, the Company also requested that Cargill increase the limit under the OPA by 100,000DMT, equivalent to approximately $10 million of additional liquidity (at no cost to and without creating any incremental debt for Tacora). Cargill agreed to provide such additional DIP financing and to increase the limit under the OPA for a period of time.[7]

20. On March 1, 2024, the Company advised Cargill that it thought the proposed exit fee on the incremental DIP financing of 3% (or $1.575 million) was too high. Cargill agreed to reduce the fee to 2% (or $1.05 million), which appeared to be acceptable to Tacora. The Company never raised any further issues or questions, or sought to further negotiate any other economic terms of the Cargill Amended DIP Proposal.[8]

21. In addition, to address Tacora's request for greater flexibility to disclaim or terminate the Cargill Offtake Agreement and OPA, Cargill agreed that under its DIP proposal, a disclaimer, termination, suspension, default or breach of the Offtake Agreement or OPA would **not** result in a breach of or an Event of Default under the Cargill DIP Agreement, to the extent such steps were taken pursuant to a Court approved disclaimer. This would provide the Company with full flexibility to seek to disclaim or terminate the Offtake Agreement at any time, with no impact on

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[7] Lehtinen March 14 Affidavit at paras 12-13, 15, 17, 18, 20 and 34 [CL pp F1959;F20, F1960;F21, F1961;F22, and F1966;F27].

[8] Lehtinen March 14 Affidavit at paras 18, 20 and 30, and Exhibits G, H and J [CL pp F1964;F25, F1961;F22, F2069;F130, F2075;F136, and F2145;F206].

the Cargill DIP Financing, and would ensure a fair process to address matters under the Offtake Agreement should Tacora seek to advance such steps.[9]

22. Tacora incorrectly continues to assert in its Court-filed materials that Cargill refused to make changes to this provision. This is categorically false, as evidenced by the exchanges of DIP term sheets on the record.[10]

23. The Cargill Amended DIP Proposal was responsive to Tacora's needs and requests in terms of funding, additional liquidity provided under the OPA, reduced fees, and flexibility with respect to Tacora's ability to seek to disclaim or terminate the Offtake Agreement.

D. Company's Flawed Process to Seek Increased DIP Financing

24. Tacora's advisors were express in their instructions that "*Proposals should not be linked in any manner related to the ongoing litigation related to the Successful Bid under the SISP*".[11]

25. Cargill complied with those instructions. In contrast, and as discussed in great detail in the Company's Court materials, the AHG Replacement DIP Financing is intrinsically linked to the AHG's proposed transaction under the SISP. In fact, the alignment of the Company and the AHG in connection with both the AHG Reverse Vesting Transaction and the AHG Replacement DIP Financing is stated as one of the key features and purposes of the AHG Group Replacement DIP.[12]

26. The Company engaged in limited exchanges of emails in connection with advancing the amended Cargill DIP Financing as part of its DIP process. Other than the one request to reduce

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[9] Lehtinen March 14 Affidavit at para 24 [CL p F1962;F23].

[10] Affidavit of Joe Broking sworn March 11, 2024 (the "**Broking March 11 Affidavit**") at paras 23-24 [CL p A3242;A22]; Lehtinen March 14 Affidavit at paras 24(b), 25 and 43, and Exhibit M [CL p F1963;F24 and F1968;F29]; Factum of Tacora dated March 15, 2024 ("**Tacora March 15 Factum**"), para 31 [CL p A3422;A202].

[11] Lehtinen March 14 Affidavit at para 13 and Exhibit D [CL p F1959;F20 and F2058;F119].

[12] Broking March 11 Affidavit at paras 19-20 [CL p A3240;A20 and A3241;A21]; Tacora March 15 Factum, para 36 [CL p A3424;A204].

the exit fee, which Cargill addressed, the Company at no time raised any concerns or issues, or sought to negotiate, discuss, or schedule any call or in-person exchange in any way regarding any of the other economic terms of the Cargill DIP Financing with Cargill or Cargill's advisors.[13]

E. The AHG Replacement DIP Financing is Inferior to the Cargill Amended DIP Proposal

27. Cargill strongly believes that the AHG Replacement DIP Financing is inferior to the Cargill Amended DIP Financing, is not in the best interests of the Company or its stakeholders, and results in prejudice to Cargill, a significant stakeholder of Tacora.[14] Cargill has a number of significant concerns with regards to the terms and impacts of the AHG Replacement DIP Financing on the Company and its stakeholders, which are described in further detail in the Lehtinen March 14 Affidavit, including, among other things:

(a) the significantly higher DIP amount under the AHG Replacement DIP Financing;

(b) the higher interest and fees under the AHG Replacement DIP Financing;

(c) the higher professional expenses under the AHG Replacement DIP Financing;

(d) the "poison pill" structure of the AHG Replacement DIP Financing; and

(e) the significantly shorter term of the AHG Replacement DIP Financing as compared to the Cargill DIP Financing and the resulting reduced flexibility and runway for the Company.[15]

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[13] Lehtinen March 14 Affidavit at para 30 [CL p F1964;F25].

[14] Lehtinen March 14 Affidavit at para 31 [CL p F1964;F25].

[15] Lehtinen March 14 Affidavit at paras 32-54 [CL pp F1965;F26 to F1971;F32].

28. A summary table comparing the interest expense and fees under the AHG Replacement DIP Financing and the Cargill Amended DIP Financing is set out below: [16]

($USD Millions)	05/19/24			06/02/24		
	Noteholder DIP	Cargill DIP	Variance	Noteholder DIP	Cargill DIP	Variance
Noteholder Proposed Transaction (RVO)						
Interest Expense[1]	2.4	1.6	(0.8)	3.1	2.1	(1.0)
Exit Fees / Extension Fee[2][3]	2.4	–	(2.4)	4.8	–	(4.8)
Subtotal - DIP Interest & Fees	**$4.8**	**$1.6**	**($3.2)**	**$8.0**	**$2.1**	**($5.8)**
Incremental Professional Fees[4]	4.1	–	(4.1)	4.1	–	(4.1)
Aggregate DIP Advances	188.0	127.5	(60.5)	188.0	127.5	(60.5)
Other Alternative Transactions (No RVO)						
Interest Expense[1]	2.4	1.6	(0.8)	3.1	2.1	(1.0)
Exit Fees / Extension Fee[2][3]	2.4	1.1	(1.4)	4.8	1.1	(3.8)
Subtotal - DIP Interest & Fees	**$4.8**	**$2.7**	**($2.1)**	**$8.0**	**$3.2**	**($4.8)**
Incremental Professional Fees[4]	4.1	–	(4.1)	4.1	–	(4.1)
Aggregate DIP Advances	188.0	127.5	(60.5)	188.0	127.5	(60.5)

(1) Interest expense calculated based on 10% per annum cash interest rate under both Proposals; assumes 3/24/2024 issuance date for illustrative purposes.

(2) Noteholder DIP Proposal includes a ~$2.42mm Exit Fee under a 5/19/2024 Repayment Date scenario and a ~$2.42mm Exit Fee plus a ~$2.42mm Extension Fee under a 6/2/2024 Repayment Date scenario; Exit Fee and Extension Fee to be equitized under a successful Noteholder Proposed Transaction scenario.

(3) Cargill DIP Proposal includes zero incremental exit fees under a successful Noteholder Proposed Transaction scenario and a $1.05mm incremental exit fee (the "Subsequent Exit Fee") under a scenario where the Noteholder Proposed Transaction is unsuccessful.

(4) Based on a comparison of the aggregate 'Restructuring Legal and Professional Costs' in the DIP Budget included in the Third Report of the Monitor vs. the DIP Budget provided to Cargill on 2/27/2024; includes the periods from week ended 3/10/2024 through week ended 5/19/2024.

F. Tacora's Refusal to Provide for a Fair and Proper Process in connection with the DIP Motion

29. As early as January, Cargill's counsel raised the need for Tacora and its advisors to consider proper notice and scheduling of a motion that would seek to extend the stay of proceedings and increase the size of DIP financing for Tacora. Such matters were raised by Cargill's counsel several times in connection with the scheduling of the Company's RVO Motion to seek approval

[16] Lehtinen March 14 Affidavit at para 64 [CL p F1976;F37].

of its proposed AHG Reverse Vesting Transaction. The Company refused at all times to set any schedule in connection with its stay extension and DIP motion.[17]

30. The Monitor stated in its Third Report that the Company expected opposition to its DIP Replacement Motion and included the additional litigation costs in its proposed cash flow forecast filed with the Court. Despite this, the Company has continued to resist to agree to set a schedule that would provide proper time for the parties to properly address this material issue before the Court. Instead, Tacora served its motion record in respect of its DIP Replacement Motion on Monday, March 11, 2024, for a hearing scheduled to be heard on Monday, March 18, 2024.[18]

PART III – ISSUES AND THE LAW

31. The issue on this motion is whether the AHG Replacement DIP Financing should be approved on one week's notice, for no apparent reason other than to align the interests of Tacora with the AHG's interest in securing approval of the AHG Reverse Vesting Transaction, when Cargill is willing to provide interim funding under the Cargill DIP Financing pending a hearing at which this Court can decide between the AHG Replacement DIP Financing and the Cargill Amended DIP Financing on full argument and evidence.

32. Cargill submits that the AHG Replacement DIP Financing should not be approved. Rather, Tacora's DIP Replacement Motion should be adjourned, an interim increase to the amount available under the Cargill DIP Financing pending the return of Tacora's DIP Replacement Motion and the Cargill DIP Cross-Motion should be approved, and a litigation schedule set.

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[17] Lehtinen March 14 Affidavit at para 55 [CL p F1972;F33]; Notice of Motion of Cargill filed February 5, 2024, page 2, being Exhibit O to Lehtinen March 14 Affidavit [CL p F2347;F408]; Aide Memoire of Cargill filed February 5, 2024, para 5, being Exhibit P of Lehtinen March 14 Affidavit [CL p F2358;F419].

[18] Lehtinen March 14 Affidavit at paras 56 and 58 [CL p F1972;F33].

33. This approach is in keeping with the CCAA objective of providing a structured environment for the negotiation of compromises and preventing manoeuvres for positioning among creditors during the period required to advance a plan or other transaction consistent with CCAA principles.[19] It strikes an appropriate balance by ensuring that the Company obtains the DIP financing immediately needed to fund their operations without unfairly tipping the scales in favour of one party and their pursuit of their proposed transaction with Tacora.

A. Approval of DIP Financing Requires Scrutiny and Should Not Be Rushed

34. The replacement of an existing DIP facility requires careful consideration owing to the "inevitable disruption" and consequent "increased uncertainty and instability" that is created when one DIP lender is substituted for another.[20] The Company points to no circumstances that warrant such disruption here. By the Company's own assessment, the two DIP proposals are "economically comparable" and provide substantially similar liquidity.[21] In addition, the Cargill Amended DIP Proposal provides all the flexibility the Company needs to pursue its restructuring efforts.

35. Moreover, courts must "scrutinize" any interim financing proposals to ensure that they are "reasonable and appropriate in the circumstances" and that they "do not inappropriately advantage one party over another to the detriment of that party and the stakeholders generally."[22] Such scrutiny is necessary because stakeholders may use their existing leverage to secure advantages

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[19] *Re Lehndorff General Partner Ltd.* (1993), 17 C.B.R. (3d) 24 at paras. 5-6, Cargill Book of Authorities ("**Cargill BOA**"), Tab 1.

[20] *Re Fire & Flower Holdings Corp.*, 2023 ONSC 4048 at para. 37 [*Fire & Flower*].

[21] Tacora March 15 Factum, section III.A.1.b.i [CL p A3421;A201]; Broking March 11 Affidavit, para 16(a) [CL p A3239;A19].

[22] *Fire & Flower* at para. 40 (emphasis added), citing *Re Great Basin Gold Ltd.*, 2012 BCSC 1459 [*Re Great Basin*]; see also *Quest University Canada (Re)*, 2020 BCSC 318 at paras. 97, 99-100.

for themselves at the expense of other stakeholders which, once approved by court order, cannot be revisited. The court "must be constantly vigilant against such strategies."[23]

36. For the court to properly perform its "gatekeeper" role in ensuring that any agreement proposed by stakeholders seeking to gain an advantage is reasonable and appropriate in the circumstances, it is critical that the court have evidence of the underlying reason for the transaction, the due diligence performed and negotiations undertaken, the consequences of not obtaining the relief, and the alternatives available.[24]

37. Consequently, a court considering interim financing must be wary of being rushed to make decisions in the face of "manufactured" urgency:

> … the court must be vigilant to ensure that it is not rushed to a decision based on an illusory sense of urgency which is not supported by the evidence. … The court must guard against deciding issues in the face of "manufactured" urgency, whether created by leverage from a stakeholder seeking certain relief or otherwise.[25]

38. As summarized in paragraphs 24 to 28 above, and discussed in further detail in the Lehtinen March 14 Affidavit, both the terms of the AHG Replacement DIP Financing and the process leading to its selection raise material issues and concerns. Tacora's accelerated timetable curtails the full review of the issues and evidence necessary to determine whether the AHG Replacement DIP Financing should be approved. Cargill is willing to advance the interim funds Tacora immediately requires under the Cargill DIP Financing. There is no need for new DIP financing to be approved on an exceedingly tight schedule over the objections of Tacora's current DIP Lender, major contractual counterparty and significant stakeholder.

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[23] *Re Great Basin* at para. 179.

[24] *Re Great Basin* at para. 181.

[25] *Re Great Basin* at para. 182.

B. The Company's Process was Flawed

39. Cargill has been a key partner and source of financial support for Tacora since its inception and throughout these proceedings.[26] In response to Tacora's need for further financing during these CCAA proceedings, Cargill submitted a proposal for a DIP amendment and increase that, as requested by Tacora was "not .. linked in any manner related to the ongoing litigation related to the Successful Bid under the SISP".[27]

40. Cargill responded to Tacora's request for a reduced exit fee and agreed to changes to allow Tacora to take any steps required to obtain court approval of a disclaimer of the Offtake Agreement and the OPA, and any steps pursuant to such court approved disclaimer, if obtained, without resulting in an event of default under the Cargill DIP Financing.[28]

41. Other than the one request to reduce the exit fee, which Cargill addressed, the Company at no time raised any concerns or issues, or sought to negotiate, discuss, or schedule any call or in-person exchange in any way regarding any of the other economic terms of the Cargill DIP Financing with Cargill or Cargill's advisors.[29]

42. Tacora ultimately accepted the AHG Replacement DIP Financing, which *is* "linked … to the ongoing litigation related to the Successful Bid under the SISP".[30]

43. Tacora's failure to respect its own parameters for the selection of further DIP financing can only be attributed to the tunnel vision that has caused it to accept the AHG Reverse Vesting Transaction as the only path forward rather than seeking to reach a consensual solution that

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[26] Lehtinen March 14 Affidavit, paras 7-11 [CL p F1957;F18 to F1959;F20].

[27] Lehtinen March 14 Affidavit, para. 13, Exhibit D and Exhibit M [CL p F1959;F20, F2058;F119 and F2227;F288].

[28] Lehtinen March 14 Affidavit, paras. 20 and 24 [CL p F1961;F22 and F1962;F23].

[29] Lehtinen March 14 Affidavit, para.30 [CL p F1964;F25].

[30] Lehtinen March 14 Affidavit, para. 28 [CL p F1963;F24].

maximizes value for all stakeholders. This approach is not consistent with the CCAA objective of providing a structured environment for the negotiation of compromises and preventing manoeuvres for positioning among creditors.[31]

44. Cargill submits that it is not appropriate for this Court to exercise its discretion to approve the AHG Replacement DIP Financing following such a flawed process, particularly in light of the Supreme Court of Canada's observation in *Century Services* that "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."[32]

45. Mr. Broking's assertion that the Board of Directors exercised their business judgment in selecting the AHG Replacement DIP Financing,[33] is not determinative or possibly even material.[34] The Court is required to reach its own "independent determination", having regard to the factors set out in s. 11.2 of the CCAA.[35]

C. The CCAA Factors Militate Against Approval of the AHG Replacement DIP Agreement

46. To the extent it is possible to assess the s. 11.2 factors at this stage, they weigh against the approval of the AHG Replacement DIP Financing. Rather than enhancing the prospects of a viable compromise or arrangement as required by s. 11.2(4)(d) of the CCAA, the AHG Replacement DIP Agreement is designed with a view to making the plan proposed by Cargill more difficult and expensive to implement, and seeking to increase the AHG's leverage in respect of the AHG

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[31] *Re Lehndorff General Partner Ltd.* (1993), 17 C.B.R. (3d) 24 at para. 6, Cargill BOA, Tab 1.

[32] *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60 at para. 70, as cited in *Re Crystallex*, 2012 ONCA 404 [*Crystallex*] at para. 63 and *Re Great Basin* at para. 12.

[33] Broking March 11 Affidavit, para 12 [CL p A3235;A15].

[34] *Crystallex* at para. 84.

[35] *Crystallex* at para. 85.

Reverse Vesting Transaction – a reverse vesting structure that Cargill believes is not a viable solution on these facts and in these circumstances.[36]

(i) The AHG Replacement DIP Agreement is Inferior to the Cargill Amended DIP Financing and is Prejudicial to Stakeholders, including Cargill

47. The economic terms of the AHG Replacement DIP Financing are, on the whole, less advantageous to Tacora than the Cargill Amended DIP Financing. The AHG Replacement DIP Financing is significantly larger, resulting in a higher amount of priming secured debt, and comes with higher overall interest, fees and costs than the Cargill Amended DIP Financing.[37]

48. The incremental interest expense and super-priority debt for which the AHG Replacement DIP Agreement provides cannot possibly be considered a "key enhancement" that "benefit[s] the Company", as Tacora's CEO Mr. Broking states at paragraph 16(a) of his affidavit. Indeed, Mr. Broking himself notes at paragraph 10 of his affidavit that "[a]dding additional debt on Tacora during the CCAA Proceedings will result in less capital being available for these [critical] capital investments [in the Scully Mine] upon emergence." The fees of close to $4 million, or 400% more, under the AHG Replacement DIP Financing than the Cargill Amended DIP Proposal are similarly unlikely an "enhancement".[38]

49. The only potential advantage under the AHG Replacement DIP Financing —the potential equitization of the fees and interest expense —is available only if the AHG Reverse Vesting Transaction is approved by this Court and is implemented. And in such circumstance, the advantage accrues to the benefit of the AHG and the other investors pursuant to the AHG Reverse

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[36] *Re Harte Gold Corp.*, 2022 ONSC 653 at para. 38;

[37] Lehtinen March 14 Affidavit, paras. 32-54 and 65 [CL pp F1965;F26 to F1971;F32 and F1976;F37].

[38] Broking March 11 Affidavit, paras 10 and 16(a)[CL p A3235;A15 and A3239;A19]; Lehtinen March 14 Affidavit at para 35 [CL p F1966;F27].

Vesting Transaction as the acquirors of Tacora, as by way of this tactic, they are effectively paying themselves. As noted herein, Cargill, a material stakeholder of the Company, is objecting to the AHG Reverse Vesting Transaction.[39]

50. To the extent the Court approves the AHG Replacement DIP Financing and does not approve the AHG Reverse Vesting Transaction, this would create a significantly negative result for Tacora and its stakeholders. Such a scenario would result in a significant additional amount of priming secured debt, a significantly shorter maturity under the DIP financing and thus reduced runway to address alternative solutions for the Company, and material incremental costs and fees. Neither the Company nor the Monitor address this important point in their materials filed with the Court.

(ii) The AHG Replacement DIP Agreement is based on an Improper "Poison Pill" Structure and Seeks to Increase Leverage in respect of the AHG Reverse Vesting Transaction

51. The purported benefits of the AHG Replacement DIP Financing are dependent on the realization of a hypothetical scenario in which the AHG Reverse Vesting Transaction—a transaction to which Cargill objects on the grounds that it is contrary to CCAA principles and unavailable in the circumstances—is approved by this Court. It appears that the main purpose of the AHG Reverse Vesting Transaction is to increase the AHG's leverage with respect to the approval of the AHG Reverse Vesting Transaction.[40]

52. The AHG Replacement DIP Financing effectively creates a poison pill that makes it more difficult to implement an alternative transaction that would be beneficial to the Company's

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[39] Lehtinen March 14 Affidavit, para. 39 [CL p F1967;F28].

[40] Lehtinen March 14 Affidavit, para. 3 [CL p F1956;F17].

stakeholders as a whole. The AHG's "loan to own" strategy, by which it seeks to extract value other than fees and interest, should be rejected.[41]

53. The situation raises concerns similar to those expressed by the Court in *Essar Steel Algoma Inc.*, including that "the DIP lenders are imposing terms to assist their position as Term Lenders who are party to the Restructuring Agreement" and "their interests are now too closely aligned with what has been proposed and … the provision of DIP lending is now being too negatively affected."[42] The Court allowed an extension of DIP financing only once the terms that allowed the DIP lenders to improve their position with respect to the proposed recapitalization transaction were removed and the DIP lenders no longer had the "added leverage" that had given rise to the earlier concerns.[43]

54. In contrast to the AHG Replacement DIP Financing, the Cargill Amended DIP Financing does not create "leverage" in favour of one party over another, or seek to prevent, restrict or impede any potential restructuring transactions or solutions that may be available to the Company for the benefit of its stakeholders.

55. Contrary to the suggestions at paragraphs 29 to 31 of the Company's factum, and then again at paragraph 39, this Court found at the Comeback Hearing that the Event of Default provision in the Cargill DIP Facility regarding the Offtake Agreement (which the Court called the "Offtake EOD") "does not limit the company's ability to explore all value-maximizing alternatives, including restructuring transactions that involve either a new offtake agreement or no offtake agreement." The only practical restriction created by the Offtake EOD was that the

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[41] See *Re Toys "R" Us (Canada) Ltd.*, 2017 ONSC 5571 at para. 11, observing that the DIP proposal before the court there did not contain such "unusual powers".

[42] *Re Essar Steel Algoma Inc.*, 2017 ONSC 3331 at para. 19 .

[43] *Re Essar Steel Algoma Inc.*, 2017 ONSC 4652 at para. 9(e).

Company would not be able to enter a stalking horse agreement as contemplated by the AHG—this was a "thorn in the AHG's side".[44]

56. The Court noted that the Offtake EOD expressly *excluded* any step or related action pursuant to a binding agreement entered into in respect of a Restructuring Transaction at or after the Bid Deadline, without prejudice to any rights that Cargill may have pursuant to section 32 of the CCAA or otherwise,[45] and contemplated that the Company would solicit "Alternative Offtake or Services Agreements" as part of the Solicitation Process.[46]

57. Similarly, the Cargill Amended DIP Proposal allowed (and the current Cargill Amended DIP Financing allows) for disclaimer of the Offtake Agreement in accordance with established CCAA procedure. Contrary to Tacora's assertion at paragraph 31 of its factum that Cargill might take the position that steps in contemplation of the termination of the Offtake Agreement required to ensure an orderly transition constitute an event of default under the Cargill DIP Agreement, Cargill has agreed that a disclaimer, termination, suspension, default or breach of the Offtake Agreement would *not* result in a breach of or event of default under the Cargill DIP Agreement, to the extent such disclaimer, termination, suspension, breach or default was completed pursuant to a Court approved disclaimer.[47]

58. The Court also found on the Comeback Hearing that, on an objective test, it was clear that the Cargill DIP Facility was far less prejudicial to creditors generally than the AHG's DIP,

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[44] *Re Tacora*, 2023 ONSC 6126 [*Tacora ARIO Endorsement*] at para. 37.

[45] Tacora ARIO Endorsement at para. 115.

[46] Tacora ARIO Endorsement at para. 117 (emphasis added).

[47] Lehtinen March 14 Affidavit, paras 24(b) and 43 [CL p F1963;F24 and F1968;F29].

including because the Company would require significantly less financing due to the operational agreements already in place with Cargill.[48] The same remains true today.

59. The Court concluded on the Comeback Hearing that

> The inclusion of the Offtake EOD does not lead to the conclusion that the Cargill DIP Facility is being used for an improper purpose just because it recognizes the commercial realities of the company's existing contractual arrangements with Cargill.[49]

60. In contrast, the Court noted that the AHG DIP Proposal would require the company to appoint two new directors from a slate of five put forward by the AHG, if requested, and cited the observation in *Quest University* that a creditor's attempt to seek control through board appointment in connection with DIP financing was "unreasonable and inappropriate in the circumstances and it may significantly disadvantage other interests in this proceeding". As the Court pointed out, in both *Quest University* and here, the creditor had indicated an interest in purchasing the debtor's property.[50]

61. The AHG Replacement DIP Financing similarly seeks to advantage the AHG and its interest in purchasing Tacora's property, to the detriment of other stakeholders' interests, including Cargill, a significant stakeholder of Tacora.

(iii) The AHG Replacement DIP Financing Appears to have an Improper Purpose

62. It appears that another purpose of the AHG Replacement DIP Financing is to facilitate Tacora potentially taking immediate unilateral steps to breach the Offtake Agreement, without following the CCAA disclaimer process. Tacora states in its factum that "*Under the DIP Replacement Agreement, the Company will have the flexibility to attempt to orchestrate a smooth*

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[48] Tacora ARIO Endorsement at paras. 108 and 111.

[49] Tacora ARIO Endorsement at para. 135.

[50] Tacora ARIO Endorsement at para. 135.

transition from the Offtake Agreement to a new offtake agreement." However, there is no need for the AHG Replacement DIP Financing to be approved in order to provide the Company with this flexibility, as the Cargill Amended DIP Proposal afforded the Company with the ability to seek to disclaim or terminate the Offtake Agreement pursuant to a Court-approved disclaimer, with no consequence under the Cargill DIP Financing. Thus, Cargill believes that the Company's statement around "orchestrating" a transition can only be interpreted as its intention to potentially take immediate unilateral steps, without any Court approval, to breach and cease performing its obligations under the Offtake Agreement, without following any proper process before the Court.[51]

PART IV – ORDER REQUESTED

63. Approving the AHG Replacement DIP Financing at this time would result in prejudice to the Company's stakeholders, including Cargill, and could impact the Company's restructuring options and alternatives and affect the results of these proceedings.

64. Cargill submits that the AHG Replacement DIP Agreement should not be approved at all, and certainly not on the short notice unnecessarily imposed by Tacora.

65. Cargill respectfully requests that the Court adjourn the Company's DIP Replacement Motion and approve the Cargill Interim Amended DIP Financing pending the return of such motion at a later date, or, in the alternative, approve the Cargill Amended DIP Financing on consent of the Company, the Monitor, the AHG and Cargill.

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[51] Tacora March 15 Factum, para 31 [CL p A3422;A202]; Lehtinen March 14 Affidavit, para 24(b) [CL p F1963;F24].

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

March 17, 2024

/s/ Goodmans LLP

Goodmans LLP

SCHEDULE A

LIST OF AUTHORITIES

1. *Re Lehndorff General Partner Ltd.* (1993), 17 CBR (3d) 24
2. *Re Fire & Flower Holdings Corp.*, 2023 ONSC 4048
3. *Re Great Basin Gold Ltd.*, 2012 BCSC 1459
4. *Quest University Canada (Re)*, 2020 BCSC 318
5. *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60
6. *Re Crystallex*, 2012 ONCA 404
7. *Re Harte Gold Corp.*, 2022 ONSC 653
8. *Re Toys "R" Us (Canada) Ltd.*, 2017 ONSC 5571
9. *Re Essar Steel Algoma Inc.*, 2017 ONSC 3331
10. *Re Essar Steel Algoma Inc.*, 2017 ONSC 4652
11. *Re Tacora*, 2023 ONSC 6126

SCHEDULE B

EXCERPTS OF STATUTES AND REGULATIONS

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

Interim financing

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

Priority — secured creditors

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

Priority — other orders

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

Factors to be considered

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

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

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

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

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

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

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

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

Additional factor — initial application

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

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

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.

(Returnable March 18, 2024)

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