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.

RESPONDING FACTUM OF CARGILL, INCORPORATED AND CARGILL INTERNATIONAL TRADING PTE LTD.
RE: RVO MOTION

(Returnable April 10-12, 2024)

April 6, 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

Alan Mark (LSO No. 21772U)
amark@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.

TABLE OF CONTENTS

PART I – OVERVIEW

1. Courts have been clear that a reverse vesting order ("**RVO**") in a CCAA proceeding is an exceptional remedy and only to be used sparingly. It is not to displace the CCAA's mechanisms for reorganization, primarily a consensual restructuring by means of a plan of arrangement, or an asset sale. An RVO is generally used where a share sale is required to preserve the value of intangible assets that would otherwise be lost and only where criteria – such as no prejudice to any stakeholder and clear evidence of necessity rather than convenience – have been satisfied.

2. The Courts and commentators in academia and the bar have expressed concern about possible creep in the use of RVOs, and particularly about their potential use as an ordinary course alternative to a plan or other restructuring avenues expressly provided for in the CCAA. Making an RVO available as a mainstream or default reorganization tool – allowing the debtor company to simply vest out unwanted liabilities rather than forge a consensual plan or work to find a superior alternative – is antithetical to the purposes of the CCAA that strive for compromises amongst the stakeholders of a distressed enterprise for their mutual benefit.

3. This precise issue is before the Court here – an attempt by Tacora to use an RVO as its first and only choice. Tacora cannot demonstrate that the RVO is necessary or that it used all the tools at its disposal but still failed to obtain a superior alternative. It is impossible to conclude that Tacora's chosen RVO transaction is the appropriate outcome when Tacora has made no effort to either propose a plan, negotiate an asset sale, or seek a consensual resolution among its creditors.

4. Tacora continues throughout this CCAA proceeding to rely on the Cargill Offtake Agreement as its sole source of revenue. Yet Tacora and its advisors, from an early date in the CCAA process, identified the Offtake Agreement not as an obligation to a significant stakeholder

requiring respect by Tacora, but as a burden to be jettisoned when convenient through an RVO for the benefit of Tacora's preferred suitor, the AHG Consortium. Tacora's strenuous submissions in its factum on this motion that the Offtake Agreement is "off market" and the reason that Tacora is insolvent are an after-the-fact attempt to unfairly paint Cargill in a bad light and distract from Tacora's flawed SISP. More importantly, Tacora's submissions entirely miss the mark, since Tacora had options other than an RVO to seek to shed the Offtake Agreement, such as selling its assets and leaving the Offtake Agreement behind.

5. The SISP gave Tacora all the tools it needed to maximize value and drive an optimal outcome for stakeholders, including, but not limited to, seeking a consensual transaction. It allowed Tacora to extend deadlines, waive strict compliance with bid criteria, negotiate with bidders after the receipt of irrevocable offers, and declare a winning and a back-up bid.

6. Tacora did none of this. Tacora now tries to characterize Cargill's Phase 2 bid, which contained a financing condition and sought limited additional time to firm up financing, as abusive and part of an improper delay strategy. That is not correct. Cargill believed (and believes) that its proposal was a superior transaction that would have made whole Tacora's secured and significant unsecured creditors. Cargill believed (and believes) it was justified in transparently seeking in its Phase 2 bid limited additional time to secure financing, since the SISP explicitly contemplated that Tacora could waive any non-compliance and continue negotiations, or accept a back-up bid.

7. Rather than use the tools provided under the CCAA and SISP order, Tacora simply accepted the bid from the AHG Consortium, which was conditional on, among other things, an RVO that Tacora and its advisors had been working toward with the AHG Consortium before final bids were submitted, which would flush away the Offtake Agreement. At no time in these CCAA proceedings did Tacora: propose a plan of arrangement (which would have afforded Cargill voting

rights as the largest unsecured creditor if the Offtake Agreement was abandoned); explore an asset transaction (which would have made its valuable tax attributes available to remaining creditors); negotiate a consensual deal between Cargill and the AHG (despite their previous openness to it); reject or push back on an RVO structure (so as to seek some compensation to Cargill for its $500 million loss in respect of the Offtake Agreement); undertake any recovery analysis for creditors under alternatives to an RVO (which would have shown Cargill's to be a superior bid); or consult with stakeholders about how an RVO would affect Cargill. Tacora cannot demonstrate the necessity of an RVO or that there are no available alternatives. Tacora so proceeded in the face of clear communication from Cargill that an RVO was extraordinary relief that could not be approved without its consent, and yet now complains that Cargill is litigating this very issue.

8. Tacora justified its disregard for Cargill's interests because of Cargill's position as a bidder in the SISP with the financial ability to fully backstop its own bid. Tacora reasoned that if Cargill didn't provide that backstop, then it was the author of its own misfortune if Tacora accepted the AHG Consortium's bid that used an RVO to give Cargill nothing for the Offtake Agreement claim. But Tacora's focus on Cargill as a bidder blinded Tacora to Cargill's interests as a creditor.

9. Any perceived disadvantages of the Offtake Agreement or Cargill's perceived failings as a bidder (which, as discussed below, were not fair perceptions) should have been divorced from Cargill's status as the largest and fulcrum unsecured creditor if the Offtake Agreement was not satisfied. Even if Tacora considered Cargill's bid not worthy of consideration, it does not follow that Cargill's interests as a stakeholder are therefore not worthy of consideration.

10. Tacora's single-minded pursuit of an RVO transaction with the AHG Consortium is especially troubling as the evidence makes clear that the process followed by Tacora was flawed. For example, Tacora's CEO and Board member had numerous meetings one-on-one with the AHG

Consortium, contrary to the explicit terms of the SISP, where he was told he could keep his job as CEO if Tacora accepted the AHG Consortium's bid. Tacora's CFO had similar meetings.

11. An RVO is not a starting point to consider along with other options; it is a last resort when all other alternative have failed, no one is prejudiced by its use, and the process which has been followed is beyond reproach. That is not the case here. If the proposed RVO is approved, the fears regarding its inappropriate use will be realized. The incentives on debtor companies to forge a consensual CCAA plan of arrangement will have been eliminated and the dynamics of CCAA proceedings will be changed forever contrary to the clear purpose of the statute.

12. The Court should not be persuaded by the claims of Tacora and the AHG Consortium that there is no alternative and calamity awaits if the RVO is not approved. To the contrary, Tacora and the AHG Consortium have said they will seek to negotiate an asset transaction if the RVO is not granted. More importantly, the two most interested parties – Cargill and the AHG – have substantial investments in Tacora already and are both highly motivated to find a solution. Tacora has DIP financing in place. No one will leave the table without a solution. Tacora should do now what it failed to do in the SISP – use the heat in the crucible to forge a better result.

13. Cargill submits that Tacora's approval motion should be dismissed, with the expectation that Tacora will seek and can achieve a solution for the benefit of all stakeholders.

PART II – SUMMARY OF THE FACTS

A. The Scully Mine

14. Tacora Resources Inc. ("**Tacora**" or the "**Company**") acquired the Scully Mine, located in Labrador, in July 2017 pursuant to a court-approved asset sale transaction in earlier CCAA

proceedings.[1] The closing conditions of that asset purchase included the granting of any consents or approvals necessary for the assignment or transfer of permits and licenses to Tacora, and the transaction was able to close six weeks after the execution of the asset purchase agreement.[2]

15. The Scully Mine produces iron ore concentrate, which is then shipped to a port in Quebec on the St. Lawrence River, and subsequently loaded on vessels for further shipment globally.[3]

B. Cargill's Relationship With and Support of Tacora

16. 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 since it acquired the Scully Mine in 2017, including through the Offtake Agreement (defined below).[4] Through a substantial investment in branding and technical marketing, Cargill has enhanced the value of Tacora's iron ore.[5] Various Cargill professionals have worked with Tacora on-site to support and enhance its operations, and Cargill has consistently sought to stabilize Tacora's operations and provided Tacora with additional funding and overall liquidity.[6] Cargill is a secured creditor to, holds shares in, and provides DIP financing to Tacora.[7]

---

[1] Affidavit of Joe Broking dated February 2, 2024 ("**Broking Feb. 2 Affidavit**"), Ex. A, para. 20, Motion Record of Tacora ("**RVO MR**"), Tab 2A, CL p. A2563. The CCAA debtor completed another asset sale for a similar iron ore mine to a different purchaser in the same CCAA proceedings: Broking Feb 2 Affidavit, para. 22, CL p. A2563.

[2] Affidavit of Matthew Lehtinen sworn March 1, 2024 ("**Lehtinen Affidavit**"), para. 20, Responding Motion Record and Cross-Motion Record of Cargill ("**RVO RMR**"), CL p. F218.

[3] Broking Feb. 2 Affidavit, Ex. A, para. 23, RVO MR, Tab 2A, CL p. A2564.

[4] Lehtinen Affidavit, paras. 2-3, 7, RVO RMR, Tab 2, CL p. F212-F213.

[5] Lehtinen Affidavit, paras. 7, 27, RVO RMR, Tab 2, CL p. F213, F220.

[6] Lehtinen Affidavit, paras. 49, 52, RVO RMR, Tab 2, CL p. F226-F227.

[7] Lehtinen Affidavit, para. 7, RVO RMR, Tab 2, CL p. F213.

17. Prior to Tacora's recent narrative pivot to blaming Cargill and the Offtake Agreement for the cash-flow issues forcing its CCAA filing, Tacora recognized the value Cargill brought as a partner. Joe Broking, Tacora's CEO, was clear when he was cross examined in October 2023 about his text "I love Cargill":

> Q. And why did you say that ["I love Cargill"], sir?
>
> A. The context of that comment is Cargill has been a good partner to Tacora going all the way back to 2017 and 2018.
>
> Q. And [Cargill] is the partner under whose agreement ultimately Tacora has run losses for the last several years.
>
> MR. KOLERS: That's not a fair question, Mr. Swan.
>
> MR. SWAN: Well, I think it is.
>
> MR. KOLERS: A highly -- a highly editorial one.
>
> Q. You have run losses for the last several years, have you not?
>
> A. Yes, that is correct. What I would say, though -- and this is disclosed within my affidavit -- the primary driver for these losses is operational issues and difficulties getting this mine, the Scully Mine ramped up to six million tonnes per year. It's critical that the operation ultimately achieve six million tonnes per year, which is its designed capacity, so that ultimately can achieve its estimated or anticipated cash costs per tonne which we believe makes this operational sustainable in any iron-ore market. And not only sustainable, allows it to generate significant cash in any iron-ore market.[8]

C. The Offtake Agreement and Related Agreements

(i) Offtake Agreement Mechanics

18. 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[9] (as further amended, the "**Offtake**

---

[8] Cross Examination Transcript of Joe Broking dated October 19, 2023, Q. 217-220, CL p. F889.

[9] Lehtinen Affidavit, para. 25, RVO RMR, Tab 2, CL p. F219.

Agreement"). The Offtake Agreement was amended in 2020 to last for the life of the Scully Mine.[10] The Offtake Agreement has significant value to Cargill,[11] and has also benefited Tacora as described below.

19. The Offtake Agreement provides for provisional payment by Cargill to Tacora when a vessel is loaded with iron ore.[12] Cargill is responsible for arranging sales of the iron ore, and the ultimate price paid by a customer is determined based on a global iron ore price index and the iron ore's chemical composition once it reaches a final destination (often several months after vessel load).[13] At that point, Tacora issues a final invoice to Cargill, which accounts for the final sale price and any prior provisional payments, interim hedging or margining as described below.[14]

20. Cargill and Tacora share in the profit from the final sale to a customer, and the final invoice will take into account the amount payable to Tacora for its portion of the profit.[15] In cases where the global iron ore price has dropped substantially in the time the iron ore is in transit, the calculation may result in a payment by Tacora to Cargill.[16]

---

[10] Lehtinen Affidavit, paras. 7, 24, RVO RMR, Tab 2, CL p. F213, F219.

[11] Lehtinen Affidavit, para. 17, RVO RMR, Tab 2, CL p. F217.

[12] Confidential Cross Examination Transcript of Joe Broking dated March 20, 2024 ("**Broking Cross"**), Q. 112-113, Joint Transcript Brief ("**TB**"), Tab 6, CL p. A1022-A1023; for a larger description of the mechanics of payments under the Offtake Agreement, see Lehtinen Affidavit, paras. 38-46, RVO RMR, Tab 2, CL p. F223-F226.

[13] Lehtinen Affidavit, para. 41, RVO RMR, Tab 2, CL p. F224; Broking Cross, Q. 114, 119, TB, Tab 6, CL p. A1023, A1025.

[14] Lehtinen Affidavit, para. 41, RVO RMR, Tab 2, CL p. F224; Broking Cross, Q. 119-123, TB, Tab 6, CL p. A1025-A1026.

[15] Broking Cross, Q. 119-122, TB, Tab 6, CL p. A1025-A1026.

[16] Broking Cross, Q. 119, TB, Tab 6, CL p. A1025.

(ii) Financing and Risk Management Through the Offtake Agreement

21. Cargill provides Tacora with working capital, cash flow and liquidity through a number of bespoke arrangements and services that are not typically provided by iron ore traders generally.[17]

22. First, Cargill and Tacora are parties to the Onshore Purchase Agreement ("**OPA**"), which modifies the Offtake Agreement such that Cargill pays an earlier provisional purchase price to Tacora ahead of when it otherwise would make its first payment under the Offtake Agreement (when ore is unloaded to a stockpile at the port rather than when a vessel is loaded in port).[18]

23. Second, Cargill provides financing to Tacora through a margining facility incorporated as part of the Offtake Agreement and the OPA.[19] There is a gap of many months between Cargill's provisional payment for iron ore delivered to the port and the final reconciliation that occurs after the iron ore has been sold to a third party, during which Tacora (and Cargill) are each vulnerable to fluctuations in the global market price of iron ore.[20] The Offtake Agreement therefore provides for marking to market twice weekly, with price changes to be settled in cash, subject to a margining facility that limits Tacora's cash settlement obligations under $7.5 million.[21]

---

[17] Lehtinen Affidavit, para. 44, RVO RMR, Tab 2, CL p. F225. In addition to the financing described in this section, the parties also have other contractual arrangements pursuant to which Cargill has provided additional liquidity to Tacora that it was otherwise unable to secure. See Lehtinen Affidavit, paras. 7, 29, 32, 35, RVO RMR, Tab 2, CL p. F213, F221, F222.

[18] Lehtinen Affidavit, para. 29, RVO RMR, Tab 2, CL p. F221.

[19] Lehtinen Affiavit, para. 26, RVO RMR, Tab 2, CL p. F219.

[20] Lehtinen Affidavit, para. 42, RVO RMR, Tab 2, CL p. F224.

[21] Lehtinen Affidavit, paras. 7, 38-43, RVO RMR, Tab 2, CL p. F213, F223-F225; Broking Cross, Q. 116-118, TB, Tab 6, CL p. A1024-A1025. Cargill's cash settlement obligations are limited to $5 million.

24. Finally, Cargill provided a hedging program to Tacora to manage the risk of iron ore price fluctuations, which was implemented through amendments to the pricing formula in the Offtake Agreement.[22] In Mr. Broking's words, the hedges "mitigate risk associated with iron ore pricing".[23]

25. The very risks the hedges are meant to mitigate have borne out in this case by virtue of the recent decline in iron ore pricing.[24] Mr. Broking admitted that 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 the Offtake Agreement is an eligible financial contract.[25] Cargill's trading desk can execute hedges in the market to further manage its own price risk. Cargill hedges in the market on a portfolio basis, such that these trades may not have a one-to-one relationship with a particular iron ore shipment.[26] Tacora seeks to cast this activity as improper, but Cargill pursues this business activity as a result of taking on the risk of trading Tacora's iron ore. Mr. Cusimano, an expert in financial markets and commodities and derivatives trading, noted it has trickle-down benefits for Tacora through better pricing Cargill can offer.[27]

26. While Tacora now seeks to claim its arrangements with Cargill are disadvantageous to it, this is clearly a revisionist position. The Offtake Agreement and OPA benefit Tacora and are a consistent source of liquidity and financial support. That Cargill has also benefited does not illegitimize Cargill's interest as a stakeholder in this case.

---

[22] Lehtinen Affidavit, para. 40, CL p. F223; Broking Cross, Q. 126-127, TB, Tab 6, CL p. A1027-A1028.

[23] Broking Cross, Q. 646, TB, Tab 6, CL p. A1205.

[24] Broking Cross, Q. 648, TB, Tab 6, CL p. A1205.

[25] Broking Cross, Q. 646-651, TB, Tab 6, CL p. A1205-A1206.

[26] Lehtinen Affidavit, paras. 45-46, RVO RMR, Tab 2, CL p. F225-F226.

[27] Cross Examination of Jeremy Cusimano dated March 18, 2024, Q. 176, TB, Tab 1, CL p. A60.

D. Cargill Engaged in Pre-CCAA Negotiations in Good Faith to Avoid CCAA

27. In the same spirit as its consistent efforts to assist Tacora operationally and financially, Cargill engaged in negotiations with an ad hoc group of noteholders (the "**AHG**") in the summer and fall of 2023 toward a potential recapitalization transaction. Cargill introduced an interested equity investor, Resource Capital Fund VII L.P. ("**RCF**"), to the potential Tacora investment, and entered into an NDA with RCF in May 2023 to facilitate its due diligence.[28]

28. Those negotiations culminated in a term sheet – which Cargill considered as essentially settled[29] – circulated in advance of meetings in New York on October 3-4, 2023 to avoid a CCAA filing. The discussions failed, with Michael Nessim of Greenhill & Co. ("**Greenhill**"), Tacora's financial advisor, confirming that it was the AHG that walked away in favour of the CCAA filing.[30]

29. The term sheet included proposed amendments to the Offtake Agreement for the economic benefit of the AHG.[31] 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.[32] Cargill also communicated to RCF that it remained open to modifying the Offtake Agreement after Tacora's CCAA filing.[33]

---

[28] Lehtinen Affidavit, para. 55, RVO RMR, Tab 2, CL p. F229.

[29] Lehtinen Affidavit, para. 56, RVO RMR, Tab 2, CL p. F229.

[30] Confidential Cross Examination Transcript of Michael Nessim dated March 18, 2024 ("**Nessim Cross**"), Q. 22-23, TB, Tab 2, CL p. A87-A88.

[31] Nessim Cross, Q. 23, TB, Tab 2, CL p. A88; Confidential Cross Examination Transcript of Martin Valdes dated March 22, 2024 ("**Valdes Cross**"), Q. 130-131, TB, Tab 10, CL p. A1821.

[32] Lehtinen Affidavit, para. 58 and Ex. F (RMR p. 145-149), RVO RMR, Tab 2 and 2F, CL p. F229, and F336-F340.

[33] Lehtinen Affidavit, paras. 60-61 and Ex. F (RMR p. 149), RVO RMR, Tab 2 and 2F, CL p. F230-F231 and F340.

E. The SISP was Launched to Obtain a Value Maximizing Transaction

30. On October 30, 2023, the Court granted a Solicitation Order in this CCAA process for Tacora's sale, investment and services solicitation process (the "**SISP**"). The SISP was, in Tacora's words, "broad and flexible" and provided Tacora with "latitude" to canvass a variety of transactions.[34] Mr. Nessim of Greenhill agreed that the SISP was intended to "create[] the necessary competitive tension and discipline to drive a successful outcome."[35]

31. Tacora's factum emphasizes Cargill's consent to the SISP as undermining Cargill's objection to this motion. But Tacora ignores the complete language of the SISP, which gave Tacora flexibility to adapt as needed in pursuit of a value maximizing transaction. Tacora had the discretion to do any of the following: (a) modify or amend the solicitation procedures; (b) extend any of the key milestones; (c) waive the criteria for acceptance as a Phase 2 Qualified Bid; (d) engage in further negotiation with any bidder; (e) create an auction between bidders after Phase 2 bids; (f) declare a winning bid and a back-up bid, both of which would remain binding on the bidders; and (g) take the time it required to consider the bids before determining a winner.[36]

32. Mr. Lehtinen confirmed that Cargill participated in the SISP in reliance on these discretionary options and its understanding that these enabled Tacora to achieve a transaction that would maximize value to all stakeholders.[37] Thus, Cargill does not criticize the SISP procedures, but how they were used – or not used – by Tacora.

---

[34] Tacora RVO Motion Factum, para. 33, CL p. A3116.

[35] Nessim Cross, Q. 30, TB, Tab 2, CL p. A90.

[36] SISP, paras. 5, 9, 36, 40, 41, being Ex. B to Broking Feb 2. Affidavit, RVO MR, Tab 2B, CL p. A2611, A2612, A2623, A2624; Nessim Cross, Qs. 31-53, TB, Tab 2, CL p. A90-A97. Facts relating to the SISP are also further set out in Cargill's Factum on its Responding Cross-Motion dated March 27, 2024.

[37] Lehtinen Affidavit, para. 65, RVO RMR, Tab 2, CL p. F232.

F. Cargill's Roles as Stakeholder and as Bidder

33. Cargill's approach to the SISP was to simultaneously pursue a potential bid on its own or with co-investors, to protect its economic interests, and it hired Jefferies Financial Group ("**Jefferies**") to assist it in doing so.[38] Cargill worked diligently to pursue third party financing and engaged with a variety of potential counterparties.[39]

34. The evidence details the issues Cargill and Jefferies encountered with their efforts in the SISP, including Greenhill rejecting Cargill's requests to engage with certain proposed investors, requirements and delays relating to NDAs and exclusivity, and delays with granting data room access, all of which delayed substantive consideration of an investment.[40] Paulo Carrelo of Cargill indicated that "there simply just was not enough time to complete due diligence"[41] and that RCF itself had indicated in early 2023 they would need two to four months for diligence on an expedited basis.[42] Matt Lehtinen of Cargill said it was "essentially impossible" for any third party that had not begun diligence pre-CCAA to have firmly committed financing by the Phase 2 bid deadline.[43]

35. The AHG, RCF, and Javelin Commodities Trading (SG) Pte Ltd. ("**Javelin**") (collectively, the "**AHG Consortium**") did not face these issues. The AHG had long been familiar with Tacora,

---

[38] Lehtinen Affidavit, paras. 62-63, RVO RMR, Tab 2, CL p. F231; Confidential Cross Examination Transcript of Jeremy Matican dated March 22, 2024 ("**Matican Cross**"), Q. 62-63, TB, Tab 12, CL p. A2137. The Offtake Agreement is undoubtedly valuable to Cargill, though Tacora misstated the evidence on this point in para. 15 of its factum – [redacted]. See Lehtinen Cross, Q. 197, TB, Tab 3, CL p. A400.

[39] Lehtinen Affidavit, para. 75, RVO RMR, Tab 2, CL p. F235.

[40] See Lehtinen Affidavit, paras. 64-77, RVO RMR, Tab 2, CL p. F231-F235; Confidential Cross Examination Transcript of Matthew Lehtinen dated March 19, 2024 ("**Lehtinen Cross**"), Q. 502, TB, Tab 3, CL p. A522.

[41] Confidential Cross Examination Transcript of Paul Carrelo dated March 21, 2024 ("**Carrelo Cross**"), Q. 302, TB, Tab 8, CL p. A1558.

[42] Carrelo Cross, Q. 125-129, TB, Tab 8, CL p. A1501-A1502.

[43] Lehtinen Affidavit, para. 93, RVO RMR, Tab 2, CL p. F240; Matican Cross, Q. 299-300, TB, Tab 12, CL p. A2226-A2227.

RCF began diligence into Tacora earlier in 2023 after being introduced to it by Cargill, and Javelin had been considering an investment, and had been working with the AHG since mid-2023.[44]

36. Cargill submitted a proposal as part of Phase 1 of the SISP. By the time of its Phase 2 proposal (the "**Cargill Proposal**"), Cargill's leadership had made a business decision that Cargill would want only a minority ownership interest in Tacora.[45] While Mr. Lehtinen acknowledged he was "disappointed" by this decision, recognizing that a fully backstopped bid might have had a higher probability of success in the SISP, Cargill continued to work diligently in pursuit of its other path of securing third party financing and presenting a value maximizing proposal in which the absence of a Cargill backstop would be one among many attributes to be compared among bids.[46]

37. Due to the impossible timelines, the Cargill Proposal therefore included a financing condition that Cargill would obtain equity commitments of *at least* $85 million within three weeks of the execution of the agreement contemplated by the Cargill Proposal. Cargill was in active dialogue (and was "making good progress"[47]) [redacted] and the Cargill Proposal would satisfy in full all secured debt, provide a complete or substantial recovery for unsecured creditors, and assume the Offtake Agreement in full on its existing terms along with other key contracts and obligations.[48] Given those terms, it deserved greater effort from Tacora to bring it to fruition. Notwithstanding Tacora's selection of the AHG RVO Transaction (defined

---

[44] Broking Cross, Q. 158-160, TB, Tab 6, CL p. A1039-A1040; Valdes Cross, Q. 83-84, TB, Tab 10, CL p. A1807; Confidential Cross Examination Transcript of Peter Bradley held March 21, 2024 ("**Bradley Cross**"), Q. 90-95, TB, Tab 9, CL p. A1681; Letter dated Sept. 20, 2023, being Ex. 1 to Bradley Cross, TB, Tab 9B, CL p. A1726.

[45] Lehtinen Affidavit, para. 78, RVO RMR, Tab 2, CL p. F235; Lehtinen Cross, Q. 499, TB, Tab 3, CL p. A522.

[46] Lehtinen Cross, Q. 299-300, 302, TB, Tab 3, CL p. A443-A445; Carrelo Cross, Q. 294-302, TB, Tab 8, CL p. A1555-A1558.

[47] Carrelo Cross, Q. 302, TB, Tab 8, CL p. A1558.

[48] Lehtinen Affidavit, para. 92 and Ex. G, RVO RMR, Tabs 2 and 2G, CL p. F239 and F343.

below) as the successful bid, Cargill has continued its efforts to secure financing, albeit impeded by a complete lack of support from Tacora, which has stated that the process is over.[49]

38. The Cargill Proposal would achieve the highest possible result for Tacora and its stakeholders. But, regardless, ***Cargill's role as bidder was distinct from its rights as a creditor and stakeholder of Tacora***. Tacora's criticisms of Cargill at paragraphs 59-65 and 98-99 of its factum – and evident during the SISP[50] – show it has forgotten that distinction. It asserts Cargill is a "bitter bidder" and the author of its own misfortune by not submitting a backstopped bid, and that Cargill adopted a strategy of delay to benefit itself. Setting aside that Cargill was always transparent that it needed more time to secure financing given the difficulties of the SISP despite its best efforts[51], Tacora's criticisms of Cargill as bidder are irrelevant to Tacora's obligation to pursue diligently an outcome that would maximize value for all stakeholders, including Cargill.[52]

39. Mr. Broking was clear that Tacora abdicated its obligations in relation to Cargill *qua* stakeholder because of its disapproval of Cargill's actions *qua* bidder: he "approached it as that if Cargill wanted to preserve the offtake, it could make a bid. And that was sort of Cargill's responsibility to do that."[53] In other words, Tacora considered it Cargill's responsibility to make a bid to avoid having its contractual entitlements extinguished. That is not a proper approach in a CCAA proceeding where Tacora is the fulcrum creditor if the Offtake Agreement is abandoned.

---

[49] Lehtinen Affidavit, para. 108, RVO RMR, Tab 2, CL p. F244; Nessim Cross, Q. 478, TB, Tab 2, CL p. A225.

[50] See for e.g., January 24, 2024 Board Minutes, p. 5, being Ex. 6 to Jackson Cross, TB, Tab 5F, CL p. A859: "Mr. Nessim pointed out that Cargill would not commit to backstop their bid".

[51] Carrelo Cross, Q. 331-333, TB, Tab 8, CL p. A1567-A1568.

[52] Nessim Cross, Q. 66-68, 76-77, TB, Tab 2, CL p. A100, A102.

[53] Broking Cross, Q. 676, TB, Tab 6, CL p. A1215..

40. Similarly, Tacora justifies the request for an RVO on the basis that Tacora needs to be relieved of the "yoke" of the Offtake Agreement. Leaving aside that this was a contract freely entered into by Tacora on terms that suited it at the time and in the years following, Tacora fell into error by pursuing an objective of ridding itself of the contract without recognizing Cargill's status as a stakeholder. In the Greenhill presentation to the Tacora Board, Cargill was not even identified as a stakeholder whose claim would be affected by the AHG RVO Transaction[54] and Mr. Nessim confirmed that Greenhill did not analyze the impacts of the AHG RVO Transaction on Cargill's claim as unsecured creditor.[55]

G. The Court Cannot Have Confidence Tacora Secured the Best Available Transaction

(i) The Consequences of Tacora's Flawed Execution

41. Tacora's misguided approach to Cargill as a bidder to be avoided rather than a stakeholder to be consulted is evident in a SISP flawed not in its design, but in its execution. David Roland, an expert in value maximizing transactions, has opined that, as a consequence of various SISP issues, Tacora and Greenhill "missed an opportunity to ensure it achieved the best available transaction by failing to exhaust all options prior to making a decision."[56]

42. Among Tacora's errors was its decision to never propose its own CCAA plan of arrangement for consideration by Tacora's stakeholders or attempt to engage in further consensual negotiations after the SISP began, and to not use the optionality afforded by the SISP to declare a winning bid and back-up bid or launch an auction.

---

[54] January 28 Board Presentation, p. 12, being Ex. 27 to Broking Cross, TB, Tab 6CC, CL p. A1373.

[55] Nessim Cross, Q. 80-84, 385, TB, Tab 2, CL p. A103-A104, A201.

[56] Expert Report of David Roland (**"Roland Report"**), para. 49-50, RVO RMR, Tab 3, CL p. F591.

43. Tacora tries to justify its failure to attempt a consensual transaction by blaming the unsuccessful pre-CCAA efforts. But as Mr. Roland noted, that justification is fallacious. As those negotiations were close to fruition until the AHG pulled out hoping to better its position after a CCAA filing, the parties had demonstrated that a consensual deal was ascertainable, and the SISP gave Tacora the tools to drive such a result.[57] Tacora simply failed to either appreciate it had the tools, or refused to use them, to promote a transaction with satisfied all stakeholders.

44. It must be noted that the Board minutes produced by Tacora for meetings regarding the SISP were prepared and approved months later in late February and March, within the course of the litigation schedule.[58] Aside from the inherent difficulties recollecting events weeks or months after they occurred, conceded by Mr. Broking,[59] the Board minutes must be read in light of the fact they were prepared with full knowledge of Cargill's positions in the litigation.[60]

(ii) Tacora's Preferred Transaction Features and Path Dependence

45. Notwithstanding the SISP's ability to accommodate a broad range of restructuring transactions, Tacora's actions and positions make clear that very early on it became wedded to certain features of a proposed transaction and was guided by irrelevant considerations. Tacora engaged in an entrenched course of conduct that was directed not *against* an RVO as an

---

[57] Roland Report, para. 79-83, RVO RMR, Tab 3A, CL p. F596-F597.

[58] Minutes from the Board meetings on Nov. 22, 2023, Dec. 5, 2023 and Jan. 4, 2024 were approved and produced along with Tacora's productions in this litigation on Feb. 23, 2024, following Cargill's Notice of Preliminary Threshold Motion and Cargill's indications it would challenge the contested RVO approval motion. Minutes from the Jan. 24, 28 and 29, 2024 Board meetings, at which the Phase 2 bids were considered and the AHG RVO Transaction formally approved, were not produced until Sunday, Mar. 17, 2024, the evening before cross examinations. See also Broking Cross, Q. 234-239, 643-645, TB, Tab 6, CL p. A1059-A101, A1203-A1204.

[59] Broking Cross, Q. 223-224, TB, Tab 6, CL p. A1056.

[60] Mr. Broking was unable to offer any reason for the delays in approving and producing Board minutes other than "a significant amount of activity." Broking Cross, Q. 239, TB, Tab 6, CL p. A1056.

extraordinary remedy prejudicial to a fulcrum stakeholder, as the law requires, but *toward* an RVO as the way to achieve the desired misguided objectives.

46. First, Tacora hoped that its tax attributes, totalling $665.1 million[61], could be an attractive feature to potential purchasers of Tacora's shares.[62] A share transaction, rather than a sale of Tacora's assets, would preserve those attributes post-CCAA for a purchaser's benefit. Mr. Nessim noted "the tax attributes were something we were trying to protect, to stay with the company."[63]

47. Second, while a share sale could have been accomplished using a CCAA plan, a plan would have required negotiating with Cargill. Tacora (and even the Monitor) could not be more clear that Tacora's desire through the SISP was to rid itself of the Offtake Agreement.[64] Mr. Broking confirmed on re-examination that his understanding of the purpose of the RVO was to allow Tacora to move forward without the Offtake Agreement while also preserving Tacora's tax attributes for use post-CCAA.[65] But an RVO is not necessary to do this. It is only necessary if the objective is to avoid negotiating with Cargill and to ignore Cargill's status as a significant creditor.

48. Finally, and notwithstanding that the purchaser is not a stakeholder in a CCAA, Tacora was more preoccupied with Tacora's cash position post-CCAA than it was with maximizing recovery for creditors. Trey Jackson, one of Tacora's Board members, in particular emphasized this aspect.[66] This focus on post-CCAA cash levels is not only of questionable legal relevance, it

---

[61] Monitor's Fourth Report, para. 50, CL p. E16.

[62] Broking Cross, Q. 328-329, 359-360, TB, Tab 6, CL p. A1096, A1107; Nessim Cross, Q. 151-153, TB, Tab 2, CL p. A128-A129.

[63] Nessim Cross, Q. 144, TB, Tab 2, CL p. A126.

[64] See for e.g., Tacora RVO Factum, para. 122, CL p. A3146; Monitor's Fourth Report, para. 29, CL p. E9.

[65] See also Broking Cross, Q. 689-691, TB, Tab 6, CL p. A1220-A1221.

[66] See for e.g. Jackson Cross, Q. 81-83, TB, Tab 5, CL p. A779-A780.

is factually unsupportable as a justification for ultimately selecting the AHG RVO Transaction over the Cargill Proposal. As acknowledged by Mr. Nessim, Cargill knew of the investments required by Tacora going forward in order to make the mine economic, and knew Tacora "as well as anybody in the world" (other than management).[67] The notion that Cargill would own 49% of Tacora and not ensure it was adequately capitalized going forward – including amending the Offtake Agreement if necessary – defies logic, as Goodmans made clear in its January 27, 2024 letter to Tacora's advisors, concluding: "Cargill's reputation and resources are fully behind the proposed recapitalization transaction."[68] Further, the Board proceeded under an erroneous assumption as to the amount of cash Cargill would inject into Tacora. The Cargill Proposal contemplated a *minimum* of $85 million (based on the cash flow projections in the data room), but said it would come to an agreement with Tacora on the amount of cash required in light of updated projections.[69] Mr. Jackson and Mr. Nessim acknowledged that this undertaking was not credited in its analysis.[70] In this light, Tacora's objection to the Cargill Proposal on the basis that the Company would not be adequately capitalized going forward was clearly without merit.

(iii) Tacora Never Pursued Alternatives to RVO Structure and Never Quantified Premium Over Asset Sale

49. Tacora knew as early as December 5, 2023 that the bid to be received from the AHG Consortium was conditional on an RVO (the "**AHG RVO Transaction**"), which required court

[67] Nessim Cross, Q. 159-162, 175, CL p. A132, A136.

[68] Broking Feb. 2 Affidavit, Ex. D, p. 3, RVO MR, Tab 2D, CL p. A2638.

[69] Broking Feb. 2 Affidavit, Ex. G, p. 3, RVO MR, Tab 2G, CL p. A2654.

[70] Jackson Cross, Q. 205-206, TB, Tab 5, CL p. A822; Nessim Cross, Q. 366-368, 395-398, TB, Tab 2, CL p. A197, A203-A204.

approval.[71] It also knew that this structure entailed replacement of the Offtake Agreement[72], creation of a sizeable unsecured claim in favour of Cargill that would not be satisfied[73], and risk associated with a contested court proceeding as the near-certain result[74]. Tacora was also in receipt of two letters from counsel to the AHG Consortium regarding risks associated with disclaimer of the Offtake Agreement and the use of an RVO.[75] Yet Tacora at no time pursued an asset transaction, rejected the proposed RVO structure, or pushed back on it, even though Greenhill advised the Board that the AHG Consortium was "open to other structures outside of an RVO"[76].

50. An asset sale was not an option that the Board pursued with the AHG Consortium (despite it being a back-up option in the AHG's subscription agreement if an RVO is not granted by the Court).[77] Mr. Broking admitted that the Board never instructed Greenhill to go back to the AHG Consortium to negotiate a non-RVO structure, and Mr. Nessim confirmed Greenhill never did so.[78]

51. Tacora never determined the dollar value attributable to Tacora's tax attributes, nor the premium a purchaser might be willing to pay for those valuable attributes[79], and has no idea what

---

[71] Broking Cross, Q. 287-291, TB, Tab 6, CL p. A1080-A1082.

[72] Broking Cross, Q. 287, TB, Tab 6, CL p. A1080; Jackson Cross, Q. 106, TB, Tab 5, CL p. A790.

[73] Broking Cross, Q. 291-294, TB, Tab 6, CL p. A1082; Nessim Cross, Q. 76, 251, TB, Tab 2, CL p. A102, A159.

[74] Jackson Cross, Q. 186-188, TB, Tab 5, CL p. A815-A816; Letter from Osler LLP dated December 7, 2023, being Ex. 1 to the Nessim Cross, TB, Tab 2A, CL p. A232; Cargill Phase 2 bid, Lehtinen Affidavit, Ex. G, RVO RMR, Tab 2G, CL p. F343. ; Cargill had also made this clear at the October 24, 2023 come-back hearing.

[75] Letter from Osler LLP dated Dec. 27, being Ex. 1 to the Nessim Cross, TB, Tab 2A, CL p. A232 and Letter from Osler LLP dated Jan. 5, being Ex. 21 to the Broking Cross, TB, Tab 6U, CL p. A1308.

[76] Tacora Board Presentation dated December 5, 2024 at p. 11, being Ex. 6 to the Nessim Cross, TB, Tab 2F, CL p. A311.

[77] Broking Cross, Q. 353, TB, Tab 6, CL p. A1104; Broking Feb. 2 Affidavit, Ex. G, RVO MR, Tab 2G, CL p. A2629.

[78] Broking Cross, Q. 315, TB, Tab 6, CL p. A1090; Nessim Cross, Q. 143, TB, Tab 2, CL p. A126.

[79] Nessim Cross, Q. 151-154, TB, Tab 2, CL p. A128-A129; Jackson Cross, Q. 220, TB, Tab 5, CL p. A827; Broking Cross, Q 328-330, TB, Tab 6, CL p. A1096-A1096.

an agreeable asset sale transaction would have been to the AHG Consortium.[80] Mr. Broking testified that he asked at a Board meeting how the AHG Consortium's bid would change absent an RVO, and according to Mr. Nessim, the AHG Consortium advised they were not in a position to tell Tacora what difference, if any, there would be to its purchase price on an asset sale.[81]

52. Instead of pushing the AHG Consortium to quantify the delta and negotiate an asset sale, which would have left the tax attributes in the Company for the benefit of unsecured creditors, Tacora proceeded as early as December 5, 2023 to negotiation of definitive documentation of the AHG RVO Transaction.[82] The RVO structure and any potential alternatives are not considered in either the Greenhill January 4, 2024 or January 24/28 Board presentation materials.[83]

53. Neither did Tacora perform any recovery analysis under different structures.[84] If they had, it would have shown that Cargill's was the superior bid from a creditor recovery perspective: both the AHG RVO Transaction and the Cargill Proposal pay secured debt and trade creditors, but only one strands Cargill as a significant unsecured creditor.[85] Mr. Jackson conceded that he "understood that, at Day One, [the Cargill Proposal] provided all creditors a better outcome".[86]

---

[80] Jackson Cross, Q. 214-220, TB, Tab 5, CL p. A826-A827.

[81] Nessim Cross, Q. 211-216, TB, Tab 2, CL p. A14; Broking Cross, Q. 326-Q. 354, TB, Tab 6, CL p. A1095.

[82] Tacora Board Deck dated December 5, 2024, p. 13, being Ex. 6 to the Nessim Cross, TB, Tab 2(F), CL p. A313; Broking Cross, Q. 303-307, TB, Tab 6, CL p. A1086.

[83] See Ex. 19, 25 and 27 to Broking Cross, TB, Tabs 6S, 6AA and 6CC, CL p. A1290, A1331, A1362.

[84] Nessim Cross, Q. 79-83, Transcript Brief, Tab 2, CL p. A103-A104.

[85] Nessim Cross, Q. 245-251, TB, Tab 2, CL p. A158.

[86] Jackson Cross, Q. 195-196, TB, Tab 5, CL p. A819.

(iv) Tacora Failed to Take Steps to Improve Outcome for Cargill

54. Contrary to incorrect assertions in Tacora's motion record and factum[87], an asset sale, if one had been negotiated, would ***not*** result in the same treatment for Cargill as under the AHG RVO Transaction. Mr. Nessim conceded that Greenhill actually never considered the impacts of the RVO as compared to an asset sale on Cargill.[88] Mr. Broking ultimately admitted on cross examination that if Tacora's tax attributes remained with Tacora, along with a claim by Cargill in respect of the Offtake Agreement, after Tacora's assets were sold, then there were scenarios where there could be value in those tax attributes.[89] Mr. Carrelo indicated in cross examination that "the [AHG] had a strong view that these tax losses had value outside, that they could be monetized . . . if they were detached from the Tacora business"[90], such that they might have been interested in acquiring them in a subsequent transaction if they were left with the Company. An asset sale clearly leaves Cargill in a better position than having an unsecured claim against ResidualCo for which it receives nothing, because of an RVO whereby Tacora's tax attributes instead provide benefit to the AHG Consortium (including those whom are not existing stakeholders of Tacora).

55. Tacora sought no consideration from the AHG Consortium on account of the massive claim proposed to be created for the sole creditor not being satisfied under the AHG RVO Transaction or for the loss of the Offtake Agreement. Mr. Nessim recalled no such request.[91] And Peter Bradley, the CEO of Javelin, had never been asked for such an improvement.[92]

---

[87] Broking Feb. 2 Affidavit, para. 54, RVO MR, Tab 2A, CL p. A2545.

[88] Nessim Cross, Q. 83-84, TB, Tab 2, CL p. A104.

[89] Broking Cross, Q. 370-379, TB, Tab 6, CL p. A1109-A1113 .

[90] Carrelo Cross, Q. 150-155, TB, Tab 8, CL p. A1507-A1509.

[91] Nessim Cross, Q. 217-223, TB, Tab 2, CL p. A149-A150.

[92] Bradley Cross, Q 159, 163, TB, Tab 9, CL p. A1686.

56. Tacora could have engaged in these further negotiations with the AHG Consortium without risk. First, as pointed out by Mr. Roland, Tacora potentially had leverage to push and extract concessions from each party given the threat of losing the transaction to the other. It should have been clear to Greenhill and Tacora that both parties were highly motivated and engaged in the process with vested interests in the Company, such that further negotiation would not materially endanger a deal.[93] And second, critically, the AHG Consortium bid ultimately submitted on January 19, 2024 was – as required under the SISP – irrevocable. The AHG Consortium could not have withdrawn their bid regardless of any attempted further negotiation from Tacora.[94]

(v) Tacora Refused to Engage with Cargill Post-Phase 2 Bids and Remained Passive to Manufacture a Need for an RVO

57. After Cargill submitted its Phase 2 bid on January 19, Tacora's advisors had two clarifying phone calls with Cargill's advisors. Mr. Matican of Jefferies characterized these calls as "just meant to confirm some aspects of our bid" and "not meant to negotiate"[95].

58. Tacora's legal advisor then sent a letter on January 25, 2024 to Cargill's legal advisor, outlining six issues with Cargill's bid, mainly the financing condition and Tacora's post-CCAA cash position.[96] Goodmans responded on January 27, 2024, addressing each of the issues.[97] In particular, Goodmans highlighted areas where it appeared its bid had been misunderstood, stated

[93] Roland Report, para. 77, RVO RMR, Tab 3A, CL p. F596.

[94] Nessim Cross, Q. 441-443, TB, Tab 2, CL p. A216; Jackson Cross, Q. 175, TB, Tab 5, CL p. A811.

[95] Matican Cross, Q. 302, TB, Tab 12, CL p. A2229.

[96] Ex. C to Broking Feb. 2 Affidavit, RVO MR, Tab 2C, CL p. A2632.

[97] Ex. D to Broking Feb. 2 Affidavit, RVO MR, Tab 2D, CL p. A2636.

its willingness to further negotiate other areas of its bid, and requested meetings with Tacora and its advisors and the ability to speak to the AHG Consortium and its advisors.[98]

59. Instead of dialoging with Cargill and seeking to obtain a satisfactory proposal, Tacora refused to engage with Cargill.[99] It never met with Cargill in the period between Cargill's bid submission and the Board's acceptance of the AHG RVO Transaction.[100] It never offered Cargill any further time to pursue financing with the support of the Company, or declared the Cargill Proposal as the successful or back-up bid.[101] It never suggested that it could waive the qualified bid criteria in exchange for certain improvements.[102]

60. This continued a trend that persisted throughout the SISP, which Mr. Matican said was distinct from other restructuring experiences: engagement with Greenhill "was limited and mostly characterized by us reaching out to them", whereas typically "there is a lot more communication and collaboration and creative thought to get to a mutually acceptable value maximizing outcome for most, if not all stakeholders, and avoid the very litigation that we find ourselves in."[103]

61. In short, Greenhill and the Board's approach to the SISP was robotic, mechanical, and limited to choosing between the AHG RVO Transaction or the Cargill Proposal as binary alternatives. [104] The fact that Mr. Jackson "did not understand" the Board was free to proactively

---

[98] Ex. D to Broking Feb. 2 Affidavit, RVO MR, Tab 2D, CL p. A2636.

[99] Ex. 6 to Jackson Cross, p. 9, TB, Tab 5F, CL p. A863; Exs. E and F to Broking Feb. 2 Affidavit, RVO MR, Tab 2E and 2F, CL p. A2641 and A2644.

[100] Broking Cross, Q. 100, TB, Tab 6, CL p. A1020.

[101] Jackson Cross, Q. 179-181, TB, Tab 5, CL p. A812; Broking Cross, Q. 104-106, TB, Tab 6, CL p. A1021.

[102] Broking Cross, Q. 93 and 106, TB, Tab 6, CL p. A1018 and A1021.

[103] Matican Cross, Q. 282-283, TB, Tab 12, CL p. A2220.

[104] Roland Report, para. 70, RVO RMR, Tab 3, CL p. F594.

negotiate with any and all bidders[105] reveals a fundamental misapprehension of the purpose of a SISP and of a transaction to be achieved under the CCAA, and underpins Mr. Roland's conclusion that "Tacora and its advisors did not take all steps available to it to ensure it reached the best possible transaction for Tacora and its stakeholders."[106] By remaining passive, Tacora was able to manufacture a scenario in which it did not generate other creative and collaborative outcomes that would have revealed the RVO is not, in fact, the only viable alternative for its recapitalization.

62. This passivity was also reflected in Tacora's lack of response to the risk and delay presented by the AHG Consortium's chosen RVO path. The AHG Consortium suggested the need to resolve gating questions about disclaiming or assigning the Offtake Agreement on December 27, 2023, noting that "the landscape for bidders is fundamentally shaped by whether the Cargill Documents, including the Offtake Agreement, can be disclaimed and/or assigned in Tacora's CCAA proceeding" and that a preliminary motion would "avoid unnecessary delay and cost".[107] Tacora declined to bring a preliminary motion, thus itself manufacturing the very urgency it now uses as a basis to force an RVO over Cargill's objections.[108]

(vi) Tacora Engaged Directly with the AHG Consortium in Violation of the SISP

63. The SISP was clear that bidders were not permitted to engage with Tacora management or directors directly, a fact Mr. Broking and Mr. Jackson understood.[109] Notwithstanding this prohibition, Mr. Broking had at least three direct phone calls with representatives of the AHG

---

[105] Jackson Cross, Q. 160-161, TB, Tab 5, CL p. A806.

[106] Roland Report, para. 85, RVO RMR, Tab 3, CL p. F598.

[107] Letter dated December 27, 2023, being Ex. 1 to the Nessim Transcript, TB, Tab 2A, CL p. A232.

[108] Tacora's counsel refused all questions in this regard. See Broking Cross, Q. 419-423, TB, Tab 6, CL p. A1129-A1130.

[109] SISP, s. 15, 32, being Ex. B to Broking Feb. 2 Affidavit, RVO MR, Tab 2B, CL p. A2614, A2620; Broking Cross, Q. 79-80, 201, TB, Tab 6, CL p. A1012-A1013; Jackson Cross, Q. 94-97, TB, Tab 5, CL p. A785.

Consortium which involved specific discussion of his going-forward employment and role at Tacora if the AHG Consortium bid were accepted – one in November 2023 with Mr. Bradley of Javelin[110], and two in January 2024 with Martin Valdes of RCF and Phill Larson of the AHG.[111] Heng Vuong, Tacora's CFO, also had a similar call with Mr. Valdes.[112] Internal discussions among the AHG Consortium were explicit that these communications were designed to generate "goodwill" toward the AHG Consortium as "anything we can do to get [Mr. Broking] more comfortable around partnering with us is effort well spent".[113]

64. Neither the Monitor nor Greenhill was present or recalls being aware of the January 2024 phone calls, though they apparently had no concern with the November 2023 phone call between Mr. Broking and Mr. Bradley and its potential impact on Mr. Broking's ability to declare a successful bidder without influence.[114] The impropriety of Mr. Bradley's job offer to Mr. Broking is clear, so much so that on cross examination Mr. Bradley denied making it.[115]

65. Mr. Jackson exchanged direct text messages and had at least one phone call during the SISP with Spencer Sloan, a Javelin representative, about a site visit in the context of Javelin's consideration of a Phase 2 bid.[116] Mr. Jackson had a pre-existing relationship with Javelin[117], and

---

[110] Broking Cross, Q. 267-268, TB, Tab 6, CL p. A1073-A1074.

[111] Broking Cross, Q. 267-268, 482-485, TB, Tab 6, CL p. A1073-A1074; Valdes Cross, Q. 263-264, TB, Tab 10, CL p. A1863.

[112] Broking Cross, Q. 486, TB, Tab 6, CL p. A1154.

[113] Pacholder Cross, Exhibit 6, TB, Tab 11F, CL p. A2102.; Valdes Cross, Exhibit 8, TB, Tab 10H, CL p. A1941.

[114] Broking Cross, Q. 493-497, TB, Tab 6, CL p. A1156-A1157; Monitor's Supplement to the Fourth Report, paras. 8-9, CL p. E92.

[115] Bradley Cross, Q. 114-116, TB, Tab 6, CL p. A1683.

[116] He also spoke once with Rebecca Pacholder of the AHG and on several occasions with Michael Kizer, the AHG Consortium's financial advisor at GLC, though he testified that these discussions did not relate to the SISP. Jackson Cross, Q. 116-119, TB, Tab 5, CL p. A792-A793.

[117] Jackson Cross, Q. 54-61, TB, Tab 5, CL p. A773-A774.

when the topic of Javelin as a potential offtake replacement was introduced at the November 22, 2023 Tacora Board meeting, Mr. Jackson shared his positive impression.[118] Mr. Sloan and Rebecca Pacholder of Snowcat discussed in texts calling Mr. Jackson in response to perceived issues in the SISP.[119] When cross-examined about those texts, Ms. Pacholder refused to acknowledge that the "Trey" being referred to was Trey Jackson, and when asked if she had any knowledge of the Javelin representative calling Mr. Jackson during the SISP, Ms. Pacholder claimed not to remember.[120] There can be no doubt that the AHG Consortium sought to surreptitiously undermine the fairness of the SISP by directly engaging one-on-one with Tacora's Board members.

66. Tacora's factum on this motion, and the Monitor's Fourth Report, attempts to paint Cargill as having similarly violated the SISP and insinuates that the mutual violations effectively offset each other. This is, of course, illogical and suggests that Tacora and the Monitor failed to safeguard an appropriate process. Regardless, Cargill disputes that it did not abide by the SISP.[121] These parallels plainly differ in consequence in any event: there is no suggestion that Cargill had any communications with Mr. Broking on non-operational matters and certainly not on his employment prospects post-CCAA, or any at all with Mr. Jackson or Randy Benson, Tacora's other Board member.

67. The Monitor's conclusion that "the few instances of non-compliance were minor and did not compromise the integrity of the Solicitation Process or Tacora's selection of the Investor Bid

---

[118] Jackson Cross, Q. 107-109, TB, Tab 5, CL p. A790-A791.

[119] Pacholder Cross, Ex. 2, p. 9, TB, Tab 11B, CL p. A2068.

[120] Pacholder Cross, Q. 174-192, TB, Tab 11, CL p. A1991-1995.

[121] Any communications Mr. Lehtinen had with his brother-in-law Mr. Sgarlata (a VP Engineering at Tacora) were in the context of diligence and ongoing operations of Tacora, and RCF was also directly engaging in such communications. Lehtinen Cross, Q. 571-574 and Ex. 16, TB, Tabs 3 and 3Q, CL p. A544 and A697; Valdes Cross, Ex. 7, TB, Tab 10G, CL p. A1940.

as the Successful Bid"[122] ignores some of the above evidence (such as Ms. Pacholder's communications). It cannot be given any probative value. It is for this Court to assess the evidence and determine if Mr. Broking's and Mr. Jackson's unsupervised communications with the AHG Consortium – which were intended to influence the decision-makers in the SISP and must be taken in the context of Tacora having only a three-member Board (and Mr. Jackson having been nominated by the AHG[123]) – may have impacted Tacora's ability to evaluate the best available transaction for approval.

(vii) Other Issues with the Tacora Process

68. While refusing to meaningfully engage with Cargill on the terms of its bid, Tacora was interacting with the AHG Consortium as if it were already the successful bidder. The documents show that Tacora advisors engaged with the AHG Consortium about "potential offtake transition matters" on at least one occasion and had an hour-long call regarding a "project element transition plan" on another,[124] despite Greenhill's caution against doing so.[125] While Mr. Broking initially denied without equivocation that Tacora had engaged with the AHG Consortium on any offtake transition planning before the conclusion of the SISP,[126] he eventually acknowledged attending

---

[122] Monitor's Supplement to the Fourth Report, para. 11, CL p. E93.

[123] Jackson Cross, Q. 7, TB, Tab 5, CL p. A760.

[124] See for e.g., Broking Cross, Ex. 17, 23 and 24, TB, Tab 6Q, 6Y, and 6Z, CL p. A1284, A1326, A1329.

[125] Nessim Cross, Q. 234-238 and Ex. 2, TB, Tab 2 and 2B, CL p. A154.

[126] Broking Cross, Q. 434, TB, Tab 6, CL p. A1136: "Q. Right. And work on that transition plan happened during Phase 2 of the SISP. Correct? A. No. We did not engage on transition of an Offtake Agreement prior to selecting a winner/winning bidder. There were requests to do that, and we verbally said that we would be prepared to transition to the extent a transition plan was needed, away from the Offtake Agreement. But, no, we did not engage in those conversations prior to the completion of Phase 2." See also Q. 469-470, CL p. A1148.

such meetings.[127] Mr. Bradley of Javelin also shared his recollection of a mid-January transition call on which their replacement offtake and working capital facility were discussed.[128]

69. By January 23, 2024, before the Board had even met to consider the Phase 2 bids, the AHG Consortium was confident they had won. They were in touch with Greenhill, and they were prepared to call Mr. Jackson, their Board nominee, in violation of the SISP rules. In texts exchanged between Ms. Pacholder and Michael Kizer of GLC, the AHG Consortium's advisor, Ms. Pacholder wrote "Inmates have taken over the asylum."[129] While Ms. Pacholder on cross examination was reluctant to concede the obvious (that the reference was to the AHG Consortium taking over Tacora[130]) Mr. Kizer's response, at least, was clear: "Yes. Agreed. We had a call with Greenhill just now. Just ticking and tying on our bid. Summary email coming later tonight."[131]

70. Tacora and its advisors then spoke with the AHG Consortium and its advisors after the Tacora Board meeting on January 24. No similar call happened with Cargill because, according to Mr. Broking, "the board had determined that Cargill did not submit a Qualified Bid".[132] This is a remarkable assertion as the Board minutes do not say that decision was made on January 24.[133]

---

[127] Broking Cross, Q. 521, TB, Tab 6, CL p. A1165.

[128] Bradley Cross, Q. 136-147, and Ex. 6 to the Bradley Cross, TB, Tabs 9 and 9I, CL p. A1684-A1885 and A1776.

[129] Pacholder Cross, Ex. 9, TB, Tab 11I, CL p. A2109.

[130] Pacholder Cross, Q. 343-377, TB, Tab 11, CL p. A2036-A2044; her credibility should further be assessed in light of her denial of having engaged with Javelin on its decision to propose a September term sheet, a fact Peter Bradley of Javelin readily acknowledged: Bradley Cross, Q97-98, TB, Tab 9, CL p. A1681.

[131] Pacholder Cross, Ex. 9, TB, Tab 11I, CL p. A2109; in answers to undertakings, Ms. Pacholder advised that no such summary email has been located: UT #14, TB, Tab 11K, CL p. A2113.

[132] Broking Cross, Q. 615-619, TB, Tab 6, CL p. A1193-A1194.

[133] Jackson Cross, Ex. 6, TB, Tab 5F, CL p. A855.

71. As well, the terms and operation of the Offtake Agreement and related arrangements are confidential information to Cargill and Tacora, which the AHG and RCF gained access to in the course of their diligence into Tacora and negotiations of a potential consensual recapitalization pre-CCAA, but which Javelin is not permitted to access as Cargill's competitor. Tacora has failed to take appropriate steps in the face of several indications that Cargill's confidential information might be vulnerable. First, the circumstances of Javelin's initial introduction to Tacora (made via a September 20, 2023 term sheet, sent directly and unsolicited to Tacora's Board) raised questions for Mr. Broking given "how they would be working on this".[134] Further, Javelin, the AHG and RCF began to be jointly represented by the same legal and financial advisors.[135] Nevertheless, Mr. Broking took no steps to require that information not be shared with Javelin.[136] To the contrary, in response to requests from the AHG Consortium for information about the Offtake Agreement to plan for transition matters, Tacora recommended that Javelin could obtain from its joint AHG Consortium lawyers any information it required.[137]

72. Finally, in contrast to Cargill's production of nearly 3500 documents and Jefferies' production of more than 4000 documents, Tacora and Greenhill produced only 300 documents in response to seven Notices of Examination directed to management, Board members, and Greenhill representatives. The quality of Tacora's production is also suspect, given for example, Mr. Broking's practice of deleting text messages. He admitted this practice continued during these

---

[134] Broking Cross, Q. 156, TB, Tab 6, CL p. A1038.

[135] Broking Cross, Exs. 16 and 21, TB, Tabs 6P and 6U, CL p. A1281, A1308; Valdes Cross, Ex. 8, TB, Tab 10H, CL p. A1941.

[136] Broking Cross, Q. 477, TB, Tab 6, CL p. A1151.

[137] Broking Cross, Ex. 22, TB, Tab 6V, CL p. A1317; Broking Cross, Q. 472-477, TB, Tab 6, CL p. A1149-A1151.

CCAA proceedings but insisted his failure to produce any texts was because he had none.[138] This explanation ultimately proved to be false: only in answer to undertaking was Ms. Pacholder forced to produce a full text exchange that Mr. Broking initiated with her on December 21, 2023 (in violation of the SISP rules) in which she complained to Mr. Broking about her belief the October 2023 DIP process was unfair. Mr. Broking responded, "Ha, the DIP process…I just look forward to getting a deal close and having a clear path forward".[139]

PART III – ISSUES AND THE LAW

A. Summary of Argument

73. The approval of the AHG RVO Transaction would set a far reaching precedent[140] and eliminate the need for any future CCAA debtor to comply with the provisions of the CCAA or to advance and successfully complete a CCAA plan. Allowing this RVO to proceed would fundamentally change the dynamics inherent in the CCAA scheme and incentivize the pursuit of non-consensual outcomes. The RVO Motion should be refused.

74. The AHG RVO Transaction provides for the secured claims to be satisfied in full. The fulcrum affected creditors are the unsecured creditors. Following any valid disclaimer of the Offtake Agreement, Cargill, the largest unsecured creditor, would have a blocking position in respect of any CCAA plan. The RVO is being used to (i) effect a transfer of Tacora's shares that removes the value of Tacora's tax attributes, which are not subject to the secured creditors'

---

[138] Broking Cross, Q. 31-41, TB, Tab 6, CL p. A1001-A1003.

[139] Pacholder Answers to Undertakings re: Qs. 199-201, 203-204 and AHG 925-926, TB, Tab 11K, CL p. A2111.

[140] Unlike a case such as *Mjardin Group, Inc. (Re)* (3 April 2023), Toronto CV-22-00682101-00CL, see paras. 12-13, Cargill Book of Authorities dated April 6, 2024 (**"Cargill BOA"**),Tab 5, CL p. F1006.

security, from the unsecured creditors, and (ii) bypass the statutory requirement of a creditor vote on a plan and thus thwart anticipated opposition from Cargill.

75. Voting rights under the CCAA are a tool to facilitate compromises and arrangements that maximize the value of a debtor's assets while ensuring that creditors are treated fairly and equitably. Negotiations and a creditor vote can lead to "innovative and fairer outcomes"[141] and to higher value being generated. They should not be bypassed absent genuinely exceptional circumstances—which are not present here.

76. Contrary to Tacora's allegations, Cargill is not acting improperly; it is simply advancing its legal rights as a material creditor in a CCAA proceeding. In the vast majority of cases in which RVOs have been approved, there was little or no creditor opposition. In several, the transaction was seen as akin to a plan approved by all classes of creditors. In one of the leading cases, *Harte Gold*, the evidence was that no creditor was being placed in a worse position because of the use of an RVO structure than it would have been in under a more traditional asset sale or under any plausible plan of compromise. The effect of the transaction on creditors and stakeholders was "overwhelmingly positive".[142]

77. Courts approving RVOs have relied on s. 11 of the CCAA, but the exercise of discretion under s. 11 "has limits and … must accord with the objectives of the CCAA". These objectives include "preserving and maximizing the value of a debtor's assets" and "ensuring fair and equitable treatment of the claims against a debtor". RVOs are an unusual or extraordinary measure whose

---

[141] J. Sarra, "Reverse Vesting Orders-Developing Principles and Guardrails to Inform Judicial Decisions", 2022 CanLIIDocs 431 (January 16, 2022) at p. 9 ("**Sarra**").

[142] *Harte Gold Corp. (Re),* 2022 ONSC 653 at paras. 58, 65 ("***Harte Gold***").

approval involves "close scrutiny" so as to ensure that the transaction is fair and reasonable to all parties, having regard to the "objectives and statutory constraints of the CCAA."[143]

78. A party seeking an RVO must be able to demonstrate that the process followed was beyond reproach. The process followed here was not, including because there was a clear failure to properly consider Cargill *qua* stakeholder and obtain a result that was fair to it. Tacora has not demonstrated that it acted with good faith and due diligence to negotiate a transaction that was appropriate, fair and reasonable for its stakeholders. In particular, Tacora did not engage in mediation, exchange of term sheets, negotiations, or any other steps to create "tension" and reach a value maximizing solution after the Phase 2 Bids were submitted, even though the SISP allowed for this; did not carry out any analysis or give any consideration to stakeholder recovery; and neither provided for nor agreed to the determination of fundamental legal issues such as those pertaining to assignment and disclaimer of the Offtake Agreement at any point prior to the RVO Motion. Rather, it proceeded with tunnel vision to seek approval of the AHG RVO Transaction.

79. The AHG RVO Transaction provides *no recovery* to affected unsecured creditors, even though there is value in the company beyond the value of the assets secured by the secured creditors. This cannot be an economic result at least as favourable as any other viable alternative.[144]

80. Cargill and other affected creditors are worse off under the AHG RVO Transaction than they would be under other alternatives.[145] An asset sale would leave the tax losses in Tacora to be monetized for the benefit of Cargill and other creditors. At a minimum, the shares of Tacora could

---

[143] *Harte Gold* at paras. 32, 38.

[144] As required by *Harte Gold* at para. 38.

[145] Contrary to *Harte Gold* at para. 38.

be sold to the asset purchaser following the closing of the asset sale (or to a future purchaser of the Scully Mine assets), as the asset purchaser could utilize those tax attributes. There may be other options; clearly, letting the tax attributes go to the AHG Consortium for no benefit to the unsecured creditors under an RVO will leave those creditors worse off than they otherwise would be.

81. Tacora never negotiated the price the AHG Consortium would have been willing to pay in an asset sale and admits it does not know if the price would be any different. There is no evidence that the consideration reflects the value of Tacora's licences, permits or other intangible assets.[146] Indeed, the facts suggest not. The AHG RVO Transaction contemplates a credit bid for the shares of Tacora. There is priority debt ahead of the AHG's debt and *pari passu* with it that the AHG Consortium would have had to pay out in any event. It would also have had to pay the pre-filing amounts owed to parties whose contracts are being preserved, and the amounts owed to critical suppliers. There is no premium being paid for the shares to reflect the value of the licences, permits, and other intangibles. Nor did Tacora make any effort to obtain any benefit for affected creditors for the loss of the value of the intangibles. Two asset sale transactions for the same or similar assets were completed in previous CCAA proceedings. The time and resources to seek third-party consents or regulatory approvals were available and continue to be available today.

82. The AHG RVO Transaction is contrary to s. 11.3 of the CCAA for assigning a contract where consent is required but refused, as ResidualCo is incapable of performing the Offtake Agreement. The AHG RVO Transaction also ignores the disclaimer procedure and requirements of s. 32 of the CCAA. No disclaimer has been sought from, let alone approved by, the Court.

---

[146] As required by *Harte Gold* at para. 38.

83. Cargill's proposed CCAA plan sought in Cargill's cross-motion presents the possibility of a value maximizing transaction that responds to the claims of all parties. It provides for the secured creditors' claims to be satisfied in full and the unsecured creditors' claims to be settled pursuant to a CCAA plan they vote on, while no $500 million claim in respect of Cargill's Offtake Agreement is created. Cargill continues to advance its plan, which remains a viable option and alternative with the benefit of more time. If the AHG RVO Transaction is not approved, Cargill's proposed plan provides the opportunity for the noteholders to be equity participants.

B. Purpose and Structure of the CCAA

84. The *Companies' Creditors Arrangements Act*, as its title indicates, provides a mechanism whereby the stakeholders of a distressed enterprise can reach a compromise that avoids the social and economic fallout of a liquidation in bankruptcy.[147] The CCAA is fundamentally about creditor democracy and incentivizing compromises.[148] Creditors are entitled to use the rights granted to them under the Act to obtain value for themselves. The CCAA is not a cram-down statute.

85. A plan of arrangement under s. 6 of the CCAA has until recently been the only vehicle for effecting a transfer of the debtor company's shares. A share sale avoids the uncertainty and delay associated with obtaining permits and licences, and allows tax attributes to be preserved. A court may also approve a sale of assets under s. 36, subject to the considerations set out in the statute.

86. A few years ago, a new device was introduced by which, where no other viable option was available, unwanted assets and liabilities of the debtor company could be "vested out" to a newly incorporated company ("residualco") and the shares of the debtor company transferred to a

---

[147] *9354-9186 Québec inc. v. Callidus Capital Corporation*, 2020 SCC 10 at paras. 41, 43 ("***Callidus***").

[148] *Callidus*, at paras. 51, 57, 78.

purchaser.[149] Unlike a plan of arrangement or a sale of assets, this new device, the "reverse vesting order", is not provided for in the CCAA.

87. The initial decisions were made in cases where there was no creditor opposition and the RVO was preferable to the expense and delay associated with going through the process associated with a plan of arrangement to achieve the same result.[150] In the first case, *Plasco Energy (Re)*, the Court approved a global settlement involving the transfer of Plasco's shares to a purchaser (thus preserving Plasco's licences and tax attributes), the sale of certain of Plasco's equipment, and the transfer of Plasco's remaining assets to "New Plasco", which would assume all the liabilities and obligations of Plasco. The Court considered that, in the context of the particular proceedings, the settlement was analogous to a CCAA plan of arrangement. There had been extensive consultation with both secured and unsecured creditors, the secured creditors and 95% of the unsecured creditors supported the settlement, and it advanced the orderly liquidation of the company while providing for the cost-effective decommissioning of its facility.[151]

88. In approving RVOs, Courts have relied on their broad discretionary powers under s. 11 to make "any order [the court] considers appropriate in the circumstances". However, the general language of s. 11 of the CCAA is limited by the requirements of appropriateness, good faith and due diligence.[152] Appropriateness is assessed "by inquiring whether the order sought advances the policy objectives underlying the CCAA" and extends not only to the purpose of the order, but also to the means it employs, as "chances for successful reorganizations are enhanced where

---

[149] *Plasco Energy (Re)* (July 17, 2015), CV-15-10869-00CL ("***Plasco***"), Cargill BOA, Tab 6, CL p. F1010.

[150] *Harte Gold*, at paras. 24-25.

[151] *Plasco*, Cargill BOA, Tab 6, CL p. F1010.; see also discussion of this case in Sarra at pp. 4-5.

[152] *Century Services Inc. v. Canada*, 2010 SCC 60 at para. 70 ("***Century Services***").

participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit."[153]

89. Caution is therefore necessary in approving an RVO, whose structure deviates from the usual CCAA framework designed to provide all creditors with an opportunity to be heard.[154] An RVO limits opportunities for participation—most notably by circumventing the requirement for a shareholder vote on a plan of arrangement—and thus increases the risk of inequitable treatment while reducing the chances for successful reorganization.

90. The restructuring bar have recently endeavoured to expand the use of RVOs beyond the circumstances in which they are both unopposed and necessary to preserve the value of non-transferable assets. But alarm bells started ringing when some Courts indicated a willingness to permit RVOs to be used to avoid the CCAA plan of arrangement process simply because it was convenient to do so to overcome creditor opposition. In *Harte Gold,* the Court cautioned against the use of an RVO except in circumstances in which it was necessary, did not prejudice any party's rights, and was demonstrably preferable to any other alternative.[155]

91. Commentators have identified the ways in which the use of an RVO outside exceptional circumstances will undermine the objectives of the CCAA.[156] Amongst many other concerns about the expanded use of RVOs, Professor Sarra has pointed out that:

---

[153] *Century Services* at para. 70.

[154] *Arrangement relatif à Blackrock Metals inc.*, 2022 QCCS 2828, lv to app ref'd, 2022 QCCA 1073 at para. 97 ("***Blackrock***"), citing Sarra at pp. 4, 26; *Re PaySlate Inc.*, 2023 BCSC 608 at paras. 89, 93, 96, 97 citing Sarra.

[155] *Harte Gold* at paras. 24, 25, 38.

[156] See generally, Sarra, and Nicholas Turco, "Reverse Vesting Orders: An Inquiry into the Emerging Phenomenon and Surrounding Concerns" in Insolvency Insider Canada (October 21, 2023).

> Absent negotiations, the purchaser gets all the forward-value of the debtors' activities and the creditors whose claims are transferred to newco receive nothing of that forward-value of their pre-filing claims. Yet the participation of creditors can enhance asset value in some cases. A presumption that the delay and costs of a vote are not worth it does not address the risk of opportunistic behaviour by debtors/secured creditors if they can bypass a vote.[157]

92. In line with the commentators, the courts of Ontario and other provinces have been unanimous in agreeing that an RVO structure should remain "the exception and not the rule" and be approved only in the "limited circumstances" where it is appropriate.[158] These authorities establish that an RVO is "exceptional relief, including in the sense of providing a process that dispenses with creditor democracy."[159]

93. Allowing RVOs to become a general-purpose tool by which a company can vest out unwanted liabilities rather than engaging with its stakeholders to produce a consensual plan is antithetical to the purpose of the CCAA. The RVO structure is not to be regarded as "the 'norm' or something that is routine or ordinary course", or as "an approach appropriate in any case merely because it may be more convenient or beneficial for the purchaser."[160] In particular, it should not be "generally employed or approved in a CCAA restructuring to simply rid a debtor of a recalcitrant creditor who may seek to exert leverage through its vote on a plan while furthering its own interests."[161]

---

[157] Sarra at p. 9.

[158] *Blackrock* at para. 96; see also *Harte Gold* at para. 38*; Quest University Canada (Re)*, 2020 BCSC 1883, lv to app ref'd, 2020 BCCA 364 at para. 171 ("***Quest University***").

[159] *NextPoint Financial, Inc. (Re),* 2023 BCSC 2378 at para. 14.

[160] *Harte Gold* at para. 38.

[161] *Quest University* at para. 171.

C. RVO is Not Appropriate Here

(i) Contrary to Requirements of the Statute and Case Law

94. This Court is faced with an attempt by Tacora to do precisely what the Courts and commentators have cautioned against: use an RVO as a tool to extinguish the rights of its largest contractual counterparty and unsecured creditor rather than finding a consensual resolution.

95. Tacora and its advisors, from an early date in the CCAA process, identified the Offtake Agreement as an encumbrance to be jettisoned, without regard for the basic protections provided by the assignment and disclaimer provisions of the Act.[162] Rather than viewing Cargill as a stakeholder with a $500 million claim in this proceeding, Tacora saw Cargill only as a bidder opposed to the AHG Consortium in the SISP.

96. Tacora now joins with the AHG Consortium in requesting the approval of the AHG RVO Transaction and portraying Cargill as a bitter bidder. This ignores Cargill's role as a stakeholder who was to be engaged and "treated as advantageously and fairly as the circumstances permit."[163] Requiring the Company to do its best to reach a transaction that maximizes value for all stakeholders, rather than simply ridding itself of a significant one, is not abusing the CCAA process as Tacora suggests,[164] but demanding that it be respected.

97. The approval of the proposed AHG RVO Transaction would set a harmful precedent. It would eliminate the need for CCAA debtors that wish to restructure through a share transaction rather than an asset sale in order to preserve licences, permits or tax attributes for the benefit of

---

[162] CCAA, ss. 11.3 and 32.

[163] *Century Services* at para. 70.

[164] Tacora RVO Factum at para. 9, CL p. A3108.

the purchaser to successfully complete a plan of arrangement subject to a creditor vote, or indeed comply with CCAA requirements at all.

98. In their factums, Tacora and the AHG Consortium treat the AHG RVO Transaction as if it were essentially the same as an asset sale. But an RVO is not equivalent to an order approving an asset sale. As Justice Wilton-Siegel observed in *Plasco,* it is more akin to a plan of arrangement.[165] The threshold for approval in the absence of the creditor vote required in the case of a plan is accordingly higher and there are many reasons why it should not be granted here.

99. Tacora seeks to divest itself of the Offtake Agreement without following the disclaimer procedure required by the CCAA, which would result in Cargill having a $500 million claim. The Court in *Quest University* found that the disclaimer procedure applied in the context of the transaction before her, which involved an RVO, and noted the importance of following the disclaimer process.[166] Cargill submits below that a disclaimer should not be approved, but for the purposes of the argument here will assume that it is.

100. Tacora seeks to thwart anticipated opposition from its fulcrum creditor by effecting a transfer of its shares through the AHG RVO Transaction, thus bypassing the statutory requirement of a creditor vote on a plan.[167] Following a disclaimer of the Offtake Agreement, Cargill would be

---

[165] *Plasco*; see also *Arrangement relatif à Nemaska Lithium inc.*, 2020 QCCA 1488 at para. 36, refusing leave to appeal but noting the appeal raised a significant issue regarding the scope of authority of a CCAA supervising judge in the context of an order that was "not strictly limited to the 'sale or disposition of assets' provided for under section 36(6) CCAA, which, according to the Applicants, results in an outcome that would normally form part of an arrangement subject to prior approval by the creditors." ("***Nemaska***")

[166] *Quest University* at paras. 95-96.

[167] *Callidus* at para. 40; *Harte Gold Corp.* at paras. 32, 57; Sarra, at pp. 14-15.

by far Tacora's largest unsecured creditor, in a situation where there is value in the company to provide recovery to unsecured creditors after satisfying all secured creditor claims.

101. This is not a case like *Harte Gold,* where there were no concerns about the reverse vesting structure being used to "thwart creditor democracy and voting rights" because almost all creditors, both secured and unsecured, would be paid in full.[168] Given those circumstances, it was "hard to see how anything would change under a creditor class vote scenario".[169]

102. Neither is this a case like *Nemaska* or *Quest University,* where, in Justice Penny's words, "the motivations and objectives of the objectors were found suspect and inadequate".[170] In *Nemaska,* the provable claims of the objecting creditor, Mr. Cantore, only represented 4% of unsecured creditors' claims. The Court of Appeal, refusing leave to appeal the decision granting an RVO, rhetorically asked "What would be the true impact of the Cantore vote on the RVO transaction if it were made subject to prior approval on the part of the creditors as he suggests?"[171] It is in that context that the Court of Appeal decided that the arguments advanced by Cantore were no more than a "bargaining tool".[172] That is not the situation here.

103. In *Quest University*, the principal creditor opposing the reverse vesting order would have had sufficient voting power to defeat the plan by which the transaction was initially to occur. Justice Fitzpatrick, though stressing as noted above that an RVO structure should not generally be

---

[168] *Harte Gold* at para. 57.

[169] *Harte Gold* at para. 57.

[170] *Harte Gold* at para. 35.

[171] *Nemaska* at para. 38.

[172] *Nemaska* at para. 39.

employed to "rid a debtor of a recalcitrant creditor", [173] found that in the "complex and unique circumstances" before her, the transaction was the fairest and most reasonable means by which the greatest benefit could be achieved "for the overall stakeholder group, a group that includes Southern Star and Dana [the objecting creditors]."[174] Here, in contrast, the RVO would achieve a benefit for the AHG Consortium at the expense of Cargill.

104. In every one of the cases on which Tacora relies for the proposition that the jurisprudence establishes that RVOs are appropriate in circumstances similar to those here, [175] either there was little or no creditor opposition to the RVO or any issues with creditors were worked out (as in *Acerus Pharmaceuticals*), and the RVO did not prejudice any of the creditors.[176]

105. Similarly, in two of the cases on which Tacora relies for its statement that RVOs are frequently used to facilitate sale transactions in the highly regulated mining industry, there was no opposition to the RVO and the court found that no creditor would be in a worse position.[177] The third case, *Nemaska,* is also distinguishable as discussed above.

106. Finally, Tacora relies on *Just Energy* for the proposition that cases where permits and licences are to be maintained and tax attributes preserved are "exactly the type of case where courts have found RVOs to be appropriate".[178] But *Just Energy* differs from this case in a number of

---

[173] *Quest University* at para. 171.

[174] *Quest University* at para.172.

[175] Tacora RVO Factum, para. 106, CL p. A3139.

[176] *Blackrock* at paras. 105-107, 124; *Harte Gold* at paras. 50-52, 65; *Acerus Pharmaceuticals Corporation (Re)*, 2023 ONSC 3314 at paras. 18, 27-30; *Comark Holdings Inc.* (July 13, 2020), Toronto CV-20-00642013-00CL (S.C.J. [Commercial List] as referred to in *Quest University* at para. 136, and *JMB Crushing Systems Inc.* (October 16, 2020), Calgary 2001-05482 (A.B.Q.B.) as referred to in *Quest University* at paras. 142-143.

[177] Tacora RVO Factum, para. 108, CL p. A3140; *PricewaterhouseCooopers Inc. v. Canada Fluorspar (NL) Inc.*, 2023 NLSC 88 at paras. 67, 70; *Rambler Metals and Mining Ltd. (Re)*, 2023 NLSC 134 at paras. 8, 69, 72.

[178] Tacora RVO Factum, para. 121, CL p. A3145.

ways: there had been a previous failed attempt at a plan;[179] the Court approved a SISP but no bids were received (other than the stalking horse bid);[180] class action claimants who had previously indicated that they may advance their own restructuring plan ultimately did not engage in the SISP;[181] the only opposition was from (i) a shareholder and (ii) a former employee whose claim was dubious;[182] and there was *no* recovery possibly available for unsecured creditors.[183]

107. Tacora has not met the test set out in the case law. In deciding whether to approve a reverse vesting transaction, Courts have looked to factors set out in s. 36 of the CCAA to provide an "analytical framework" but also required that the following issues, identified in *Harte Gold* as peculiar to RVOs, be addressed (the "*Harte Gold* requirements"):

(a) Why is the RVO necessary in this case?

(b) Does the RVO structure produce an economic result at least as favourable as any other viable alternative?

(c) Is any stakeholder worse off under the RVO structure than they would have been under any other viable alternative?

(d) Does the consideration being paid for the debtor's business reflect the importance and value of the licenses and permits (or other intangibles) being preserved under the RVO structure?[184]

---

[179] *Just Energy Group Inc. v. Morgan Stanley Capital Group Inc.*, 2022 ONSC 6354 at paras. 13-16 *("**Just Energy**")*.

[180] *Just Energy* at paras. 16-18, 49.

[181] *Just Energy* at para. 50.

[182] *Just Energy* at paras. 25, 95.

[183] *Just Energy* at para. 57.

[184] *Harte Gold* at para. 38.

(a) AHG RVO Transaction is not appropriate, fair and reasonable

108. Consideration of the s. 36 factors aims to ensure that the transaction as a whole is "appropriate, fair and reasonable".[185] Tacora has not demonstrated that it acted with good faith and due diligence, as required of an applicant seeking an order under s. 11 of the CCAA, [186] to negotiate a transaction that was appropriate, fair and reasonable for its stakeholders.

109. As detailed above, the SISP had all the features that should have enabled it to achieve a value maximizing outcome for Tacora's stakeholders, but it did not ultimately achieve that goal. Among the principal causes of the process' failure were Tacora's decision not to push back on the RVO structure and pursue an asset sale alternative where it had the leverage to do so, its insistence on seeing the SISP as mutually exclusive of consensual negotiations, and its failure to meaningfully engage with and consult Cargill in its capacity as a stakeholder rather than a bidder. Nor did it even take the obvious course of pushing the AHG Consortium for an enhanced bid that could provide some benefit to Cargill.

110. Tacora's argument that it is important to protect the "integrity" and "credibility" of the approved sales process falls flat.[187] The *Blackrock* case on which it relies stands for the proposition that the debtor cannot "modify" the approved procedure[188] - but here Cargill argues only that the flexibility for which the SISP expressly provided should have been optimized. In *Boutiques San*

---

[185] *Veris Gold Crop., Re*, 2015 BCSC 1204 at para. 23.

[186] *Century Services* at para. 70.

[187] Tacora RVO Factum, para. 76, CL p. A3130.

[188] *Blackrock* at para. 60.

Francisco, the point was that the debtor could not entertain a new offer after the process closed – but here the process explicitly provided for negotiation after Phase 2 Bids were received.[189]

111. Target's singular focus on its emergence from CCAA betrays its lack of regard for its stakeholders. Tacora twice cites paragraph 41 of the SCC's *Callidus* decision for the proposition that anything but emerging free of the Offtake Agreement would not be "consistent with" and would be "antithetical to" the remedial purpose of the CCAA and its objective of "allowing debtors to successfully rehabilitate and restructure",[190] but does not mention paragraph 42 of *Callidus*, which refers to the objective of "maximizing creditor recovery".[191] As well, there is no factual basis for Tacora's concern.

(b) The RVO Transaction does not satisfy the *Harte Gold* requirements

112. Tacora has not established that an RVO is *necessary* in this case. Given Tacora's blinkered progression along the path to the AHG RVO Transaction, its necessity has not been tested. Neither has Tacora established that the economic result is at least as favourable as any other viable alternative. The RVO provides no recovery to Cargill or other affected unsecured creditors, even though there is value in the company beyond the value of the assets secured by the secured creditors, and Tacora had the opportunity to negotiate under the SISP to obtain a more favourable transaction for its unsecured creditors.

113. Cargill and other affected creditors are worse off under the RVO than they would be under any other alternative. Tacora's assertion that maintaining the tax attributes in Tacora under an RVO

---

[189] *Boutiques San Francisco inc,.Re*, 2004 CanLII 480 (QCCS) at para. 20.

[190] Tacora RVO Factum, paras. 119, 122, CL p. A3145, A3146..

[191] *Callidus* at para. 42.

does not prejudice Cargill or any other creditor is incorrect.[192] By Tacora's own admission, subsection 111(5) of the *Income Tax Act* applies only if there has been a change of control of Tacora.[193] Absent a change of control, subsection 111(5) does not restrict the tax attributes. Accordingly, the current owners of Tacora (including Cargill) can use the tax attributes. They could, for example, contribute income-producing assets into Tacora and use the tax attributes to offset tax on that income.

114. Tacora correctly states that following a change of control, subsection 111(5) would restrict use of the tax attributes to the owner of the Scully Mine. It does not follow, however, that the tax attributes then cease to have value to Cargill and Tacora's other remaining stakeholders. The tax attributes could be monetized, for example, by selling Tacora to the purchaser of Tacora's assets, or to a subsequent purchaser of the Scully Mine. Given that Tacora's non-capital losses will not expire for more than fifteen years, there is ample and significant opportunity to do so. [194]

115. There is precedent for such transactions in the *Bellatrix* CCAA proceedings: the Court approved the sale of the assets of an oil and gas company, Bellatrix, to another energy corporation, Spartan, and subsequently approved a transfer of the shares of Bellatrix pursuant to a separate transaction for additional consideration paid for the benefit of remaining creditors.[195]

---

[192] Tacora RVO Factum, para. 113, CL p. A3142.

[193] Tacora RVO Factum, para. 113, CL p. A3142.. See also *Duha Printers (Western) Ltd. v. Canada*, [1998] 1 SCR 795, at para. 84; *Deans Knight Income Corp. v. Canada*, 2023 SCC 16, at paras. 80-82.

[194] The Canada Revenue Agency has issued a positive ruling in similar situations: CRA Ruling 2002-0151343, Cargill BOA, Tab 3, CL p. F988. See also M.A. Beaudry and D. Krause, "Selected Income Tax Considerations in Court-Approved Debt Restructurings and Liquidations", Report of the Proceedings of the Sixty-Seventh Tax Conference, 2015 Conference Report (Toronto: Canadian Tax Foundation, 2016) at p. 13:24, Cargill BOA, Tab 9, CL p. F1064.

[195] *Bellatrix Exploration Ltd. (Re)*, 2020 ABQB 332 ; *Bellatrix Exploration (Re)*, 7 July 2022, Calgary 1901-13767, Cargill BOA, Tab 2, CL p. F974.

116. There is no evidence that the consideration reflects the value of maintaining Tacora's licences, permits or other intangible assets, given the structure of the AHG Consortium's credit bid and the fact that Tacora never sought to determine the price the AHG Consortium would have been willing to pay in an asset sale.

117. Tacora's reliance on the business judgment rule[196] is misplaced. This Court is in a position to determine whether an appropriate degree of prudence and diligence was brought to bear in reaching the decision.[197] Tacora has not exhibited the diligence expected of a CCAA debtor in pursuing a value-maximizing solution for all stakeholders. Furthermore, the application raises substantive legal issues; it is for the Court, not the Board of Tacora, to decide whether the exceptional remedy of an RVO is appropriate in this case.

(ii) Refusal of the RVO is Likely to Lead to a Better Outcome

118. Tacora has made no effort to advance a consensual restructuring plan that would ensure fair treatment of Cargill as the fulcrum creditor in this proceeding.

119. Previous cases have demonstrated that, if the Court declines to approve a proposed transaction and requires the company and its stakeholders to proceed in accordance with the CCAA, they will reach an economic solution.[198] Here, two major parties have a strong incentive to find a consensual solution. The earlier negotiations demonstrated that a consensual path is within reach if the CCAA framework and tools available to Tacora are properly deployed. By approving

---

[196] Tacora RVO Factum, paras. 78, 83, 84, CL p. A3130, A3132.

[197] *Peoples Department Stores Inc. (Trustee of) v. Wise*, 2004 SCC 68 at para. 67.

[198] See for example Sarra at p. 9, citing *McEwan Enterprises Inc*, 2021 ONSC 6878 (S.C.J. [Commercial List]) and 2021 ONSC 8423 [Commercial List], Cargill BOA, Tab 4, CL p. F1000; *Target Canada Co., Re*, 2016 CarswellOnt 589 at para. 87 and 2016 CarswellOnt 21083 at paras. 4-7, 9-11, 49-50 (S.C.J.), Cargill BOA Tabs 7 and 8, CL p. F1030 and F1033-F1034, F1039.

the claims procedure and meeting order Cargill proposes, this Court will put in place the conditions for the parties to reach a value-maximizing resolution.

120. The Court should bear in mind the consequences of approving the AHG RVO Transaction. It is clear from the admonitions in the case law and commentary that an RVO should not be available as a third type of transaction structure on an equal footing with those structures specifically sanctioned by the CCAA. An RVO is to be exceptionally granted in only the clearest of cases. By any reckoning, this is not the clearest of cases. While the reasons why Tacora and the AHG Consortium see an RVO as preferable are clear, it is evident from a review of their factums that the path to their request for an RVO requires the Court to make numerous determinations of matters which are far from clear: for example, what was the impact of the flaws in the execution of the SISP; what was the impact of the Board failing to understand the purpose of and tools available in the SISP; and what was the impact of the Board's failure to exhaust the opportunities to obtain an enhanced outcome? These inquiries are the antithesis of the easy demonstration of necessity, lack of viable alternatives, and lack of prejudice required to justify an RVO. If allowed, this will be a license for debtors to abandon all too easily the primary paths to a consensual outcome, and an invitation to try an RVO on for size in every case where it seems convenient.

(iii) Neither Assignment nor Disclaimer is Available

121. As set out in its factum on the preliminary motion, Cargill submits as a threshold matter that an assignment of the Offtake Agreement by way of an RVO is not permissible, and a disclaimer is not available as the required procedure has not been followed. Even if the proper process had been followed, it would not be appropriate for the Court to authorize the disclaimer of the Offtake Agreement, as it does not enhance the prospects of a viable compromise or

arrangement.[199] Neither is it appropriate to allow a disclaimer whose purpose is simply to enable the debtor to enter into a more profitable contract.[200] Furthermore, the Offtake Agreement cannot be disclaimed as it is an eligible financial contract and/or a financing agreement.[201]

(a) The Offtake Agreement is an Eligible Financial Contract

122. The definition of "eligible financial contract" under s. 2 of the *Eligible Financial Contract Regulations* includes "(a) a derivatives agreement, whether settled by payment or delivery, that … (ii) is the subject of recurrent dealings in the … commodities markets". The term "derivatives agreement" is defined in s. 1 of the *Regulations* as "a financial agreement whose obligations are derived from, referenced to, or based on, one or more underlying reference items such as … indices .. and includes (a) a contract for differences or a swap".[202]

123. The Offtake Agreement falls within the definition of "derivatives agreement". Mr. Cusimano opined that the profit share mechanism described in paragraphs 18-20 above operates similarly to a TRS, a form of swap, by replicating the cash flows of an investment in an assessment and requiring parties to make payments to each other based on the performance of an underlying asset.[203] He explained that a TRS allows both parties to continue sharing in benefit and risk, as does the Offtake Agreement:

> 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

---

[199] CCAA, s. 32(4)(b); see also s. 11.3.

[200] *Re Doman Industries*, 2004 BCSC 733 at paras. 35-38, lv to app ref'd 2004 BCCA 382.

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

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

[203] Affidavit of Jeremy Cusimano sworn March 1, 2024 ("**Cusimano Report**"), para. 60, RVO RMR, Tab 5, CL p. F657.

> 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.[204]

124. 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 Seller a degree of insulation from anticipated iron ore market price movements."[205] 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 agreements, to better manage price and timing risk in the open market.[206]

125. The requirement of "recurrent dealings" in the commodities market relates to the underlying commodity, not to the agreement itself.[207] 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.[208]

126. 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:

> 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.[209]

---

[204] Cusimano Report, para. 60, RVO RMR, Tab 5, CL p. F657.

[205] Cusimano Report, para. 57, RVO RMR, Tab 5, CL p. F656.

[206] Cusimano Report, para. 65, RVO RMR, Tab 5, CL p. F658.

[207] *Re Bellatrix Exploration Ltd.*, [2020] A.W.L.D. 1317 (AB Q.B) at paras. 165-170 (Q.B.) *(*"***Bellatrix***").

[208] Lehtinen Affidavit, paras. 45-46, RVO RMR, Tab 2, CL p. F225.

[209] *Mattabi Mines Ltd. v . Ontario (Minister of Revenue)*, [1988] 2 S.C.R. 175 at 194.

127. In particular, an exhaustive definition introduced by the word "means", like the definition of "derivatives 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."[210] 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", "spot" or "forward", and not with respect to the definition itself. 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."[211]

(b) The Offtake Agreement is a Financing Agreement

128. The Offtake Agreement provides financing to Tacora. Since Tacora does not have any working capital loan arrangements, it has been utilizing the cash flow provided by Cargill through the Tacora Offtake Arrangements to fund its operations on a day-to-day basis.[212] William Gula, an expert in corporate financing transactions, including the mining industry, considered the Offtake Agreement in conjunction with the OPA. He opined that the provisional payments upon delivery to the port and loading onto the vessel 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."[213]

---

[210] *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.

[211] *Bellatrix* at para. 159.

[212] Broking Cross, Q. 128-133, TB, Tab 6, CL p. A1028-A1030; Affidavit of William Gula sworn March 1, 2024 ("**Gula Report**"), para. 71(a), RVO RMR, Tab 4A, CL p. F621; Lehtinen Affidavit, para. 37, RVO RMR, Tab 2, CL p. F223.

[213] Gula Report, para. 71(a)-(b), RVO RMR, Tab 4A, CL p. F621

129. Cargill also provides financing to Tacora through the margining facility under the Offtake Agreement.[214] As described above, the sequence and mechanics of the Offtake Agreement's payment mechanics and the twice-weekly marking to market leave Tacora vulnerable – absent the margining facility – to being forced to settle global price fluctuations in cash.[215] Mr. Broking, described this margining within the Offtake Agreement as "establish[ing] thresholds for, really, credit exposure to each party"[216]. As long as the marking to market does not result in a change in Cargill's favour of more than $7.5 million, Tacora is not obligated to pay that settlement in cash and it is instead noted as a credit in a ledger to be settled at a later date (and vice versa).[217]

D. The Releases Sought by Tacora are Not Proper

130. Tacora seeks very broad releases in respect of Tacora, ResidualCo, ResidualNoteCo, the Notes Trustee and the Investors, and their respective present and former directors, officers, employees, counsel and advisors, with limited carve outs. Cargill submits that such broad releases are not necessary or appropriate in the circumstances, and should not apply to or bind Cargill.

131. Courts have repeatedly cautioned that "third party releases should be the exception and should not be requested or granted as a matter of course."[218] In particular, it is important to ask whether the beneficiary of the release is providing anything to the releasing party in return for the release. As the Court observed in the very case Tacora relies on in support of its request:

---

[214] Gula Report, para. 71(c), RVO RMR, Tab 4A, CL p. F622.

[215] Lehtinen Affidavit, paras. 7, 38-43, RVO RMR, Tab 2, CL p. F213, F223-F225.

[216] Broking Cross, Q. 116, TB, Tab 6, CL p. A1024.

[217] Broking Cross, Q. 116-118, TB, Tab 6, CL p. A1024.; Lehtinen Affidavit, para. 43, RVO RMR, Tab 2, CL p. F225; beyond the $7.5 million limit under the Offtake Agreement, Tacora also benefits from a margin extension under an Advanced Payments Facility up to $25 million: Lehtinen Affidavit, para. 32, RVO RMR, Tab 2, CL p. F221.

[218] *Canwest Global Communications Corp., Re*, 2010 ONSC 4209 at para. 29 (S.C.J. [Commercial List]).

> The beneficiaries of the release by the first lien lenders are providing nothing to the first lien lenders in return for the release. The substance of the support agreement was that Nelson agreed to try to fetch as much as it could through a SISP but that if it could not get enough to satisfy the first lien lenders, it agreed to a credit bid by the first lien lenders. Neither Nelson nor the first lien agent or supplemental first lien agent or any other party gave up anything in return for a release from the first lien lenders.[219]

132. The same reasoning applies here. Cargill is Tacora's largest and only significant affected creditor, yet none of the parties to the proposed AHG RVO Transaction have provided anything to Cargill in respect of its claim under the Offtake Agreement as consideration for the proposed releases. While the AHG RVO Transaction contemplates repaying Cargill the DIP Facility and the APF (subject to set-offs to which Cargill objects), it strands Cargill's claim for repudiation of the Offtake Agreement in ResidualCo. Furthermore, the proposed releases are not mutual but one-sided only. It is neither appropriate nor fair for the releases to be approved.

E. Tacora's Request for Set-Off Should be Denied

133. Pursuant to its proposed RVO, Tacora seeks to have certain potential claims of Tacora set off against amounts owing to Cargill under the super-priority DIP Facility and the APF, and for the Monitor to hold the amounts set off pending the resolution of any dispute with respect to them. Tacora has neither provided evidence of the existence, nature or quantum of its alleged claims against Cargill, nor set out the legal basis for any potential set-off.

134. The DIP Facility and APF are undisputed secured obligations of Tacora to Cargill, and Cargill opposes any steps to set off any amount against them, including placing funds with the Monitor. These secured obligations bear interest pursuant to the terms of the applicable agreements. If the AHG RVO Transaction is approved, Cargill should be repaid all amounts of

---

[219] *Nelson Education Ltd., Re,* 2015 ONSC 5557 at para. 50 (S.C.J. [Commercial List]) ("***Nelson Education***").

principal and interest owing in full on closing. Cargill has the financial wherewithal to satisfy any claims Tacora may have against it following a proper determination of such claims.

F. Relief re Unanimous Shareholder Agreement Should Not Be Granted

135. The requested RVO provides for this Court to order that any person receiving New Common Shares under the Subscription Agreement on the Closing Date be "deemed" a party to the Unanimous Shareholder Agreement contemplated by the Subscription Agreement.[220] Contrary to the AHG Consortium's factum, there is no provision for this in the OBCA. Section 108(7) of the OBCA provides for a "person other than an existing shareholder" to be deemed to be a party to a unanimous shareholder agreement that is "in effect at the time a share is issued". A unanimous shareholder agreement is at root a contract formed by all of the existing shareholders of a corporation at a point in time. It is not appropriate for the Court to exercise its jurisdiction to "deem" shareholders to be bound by a contract to which they have not agreed under circumstances other than those set out in the CCAA, i.e. other than where a unanimous shareholder agreement is in place among all existing shareholders.[221] That would not be the case here.

PART IV - ORDER REQUESTED

136. For the foregoing reasons, Cargill respectfully requests that Tacora's motion be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

April 6, 2024

/s/ Goodmans LLP

Goodmans LLP

[220] AHG Consortium RVO Factum, paras. 99-102.

[221] *Nelson Education* at para. 52

SCHEDULE A

LIST OF AUTHORITIES

1. *9354-9186 Québec inc. v. Callidus Capital Corporation*, 2020 SCC 10
2. *Acerus Pharmaceuticals Corporation (Re)*, 2023 ONSC 3314
3. *Arrangement relatif à Blackrock Metals inc.*, 2022 QCCS 2828; lv to app ref'd, 2022 QCCA 1073
4. *Arrangement relatif à Nemaska Lithium inc.*, 2020 QCCA 1488
5. *Bellatrix Exploration Ltd. (Re)*, 2020 ABQB 332
6. *Bellatrix Exploration Ltd. (Re)* 7 July 2022), Calgary 1901-13767
7. *Re Bellatrix Exploration Ltd.*, [2020] A.W.L.D. 1317 (AB Q.B)
8. *Boutiques San Francisco inc,.Re*, 2004 CanLII 480 (QCCS)
9. *Briones v. National Money Mart Co.*, 2014 MBCA 57
10. *Canwest Global Communications Corp., Re*, 2010 ONSC 4209
11. *Century Services Inc. v. Canada*, 2010 SCC 60
12. CRA Ruling 2002-0151343
13. *Deans Knight Income Corp. v. Canada*, 2023 SCC 16
14. *Re Doman Industries*, 2004 BCSC 733; lv to app ref'd 2004 BCCA 382
15. *Duha Printers (Western) Ltd. v. Canada*, [1998] 1 SCR 795
16. *Harte Gold Corp. (Re)*, 2022 ONSC 653
17. *Just Energy Group Inc. v. Morgan Stanley Capital Group Inc.*, 2022 ONSC 6354
18. *Mattabi Mines Ltd. v . Ontario (Minister of Revenue)*, [1988] 2 S.C.R. 175
19. *McEwan Enterprises Inc*, 2021 ONSC 6878
20. *McEwan Enterprises Inc*, 2021 ONSC 8423
21. *Nelson Education Ltd., Re*, 2015 ONSC 5557

22. *NextPoint Financial, Inc. (Re)*, 2023 BCSC 2378

23. *Re PaySlate Inc.*, 2023 BCSC 608

24. *Peoples Department Stores Inc. (Trustee of) v. Wise*, 2004 SCC 68

25. *Plasco Energy (Re)* (July 17, 2015), CV-15-10869-00CL

26. *PricewaterhouseCooopers Inc. v. Canada Fluorspar (NL) Inc.*, 2023 NLSC 88

27. *Quest University Canada (Re)*, 2020 BCSC 1883; lv to app ref'd, 2020 BCCA 364

28. *Rambler Metals and Mining Ltd. (Re)*, *2023 NLSC 134*

29. *Target Canada Co., Re*, 2016 CarswellOnt 589

30. *Target Canada Co., Re*, 2016 CarswellOnt 21083

31. *Veris Gold Crop., Re*, 2015 BCSC 1204

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.

Section 11.3

Assignment of agreements

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

Exceptions

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

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

(b) an eligible financial contract; or

(c) a collective agreement.

Factors to be considered

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

(a) whether the monitor approved the proposed assignment;

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

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

Restriction

(4) The court may not make the order unless it is satisfied that all monetary defaults in relation to the agreement — other than those arising by reason only of the company's insolvency, the commencement of proceedings under this Act or the company's failure to perform a non-monetary obligation — will be remedied on or before the day fixed by the court.

Copy of order

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

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

Responding Factum of
Cargill, Incorporated and Cargill International Trading Pte Ltd.
Re: RVO Motion

Goodmans LLP
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

Alan Mark (LSO No. 21772U)
amark@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.