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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

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

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

(returnable April 10-12, 2024)

March 27, 2024

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TABLE OF CONTENTS

PART I - OVERVIEW OF REQUESTED RELIEF[1]

1. Cargill, Incorporated and Cargill International Trade PTE Ltd. (together, "**Cargill**") file this factum in support of Cargill's Responding Cross-Motion for the following Orders pursuant to the *Companies' Creditors Arrangement Act* (the "**CCAA**"):

(a) an Order (the "**Claims Procedure Order**"), among other things, approving a claims process in respect of Tacora Resources Inc. ("**Tacora**" or the "**Company**") for the identification and quantification of the Affected Unsecured Creditor Claims against the Company and claims against its directors and officers (the "**Claims Process**"); and

(b) an Order (the "**Meeting Order**"), among other things, accepting the filing of Cargill's proposed plan of compromise and arrangement (as it may be amended, the "**Plan**") in respect of Tacora, and authorizing the calling and holding of the Affected Unsecured Creditors Meeting to consider and vote on a resolution to approve the Plan;

(c) in the alternative to (b), an Order (the "**Alternative Meeting Order**") among other things, (i) authorizing and directing Tacora to file a plan of compromise and arrangement on terms acceptable to Cargill and the AHG, and (ii) authorizing and directing Tacora to call a meeting of creditors in respect thereof on otherwise substantially similar terms to the Meeting Order; or

(d) in the alternative to (b) and (c), an Order authorizing each of Cargill and the AHG to submit to the Company their respective transactions (including any amendments to

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[1] Unless otherwise stated herein, all capitalized terms used herein and not otherwise defined herein shall have the meanings ascribed to such terms in the affidavit of Matthew Lehtinen sworn March 1, 2024 ("**Lehtinen March 1 Affidavit**") or the Plan attached as Exhibit R to the Lehtinen March 1 Affidavit. Unless otherwise stated herein, all monetary amounts contained herein are expressed in U.S. dollars.

their previously proposed transactions) and directing the Company, in consultation with the Monitor, to select the best available transaction taking into account all of the applicable CCAA factors and subject to further Court approval of such transaction.

2. Cargill's request for relief pursuant to this Responding Cross-Motion is being brought, firstly, for consideration by the Court in conjunction with the Court's consideration of the Company's motion (the "**RVO Motion**") seeking approval of a reverse vesting transaction with the AHG Consortium (the "**AHG Reverse Vesting Transaction**"), which is proposed to be implemented pursuant to a reverse vesting order (an "**RVO**"), and which will "vest out" Cargill's Offtake Agreement (which is not assignable and has not been disclaimed) to a ResidualCo that cannot perform Tacora's obligations and will have no assets.

3. Cargill opposes the Company's proposed relief under the RVO Motion based on a number of key issues, which will be set forth in Cargill's factum on its preliminary threshold motion and in its responding factum in respect of the RVO Motion (the "**Cargill Responding RVO Factum**"). Cargill believes that based on the facts and circumstances of this case, an RVO cannot be approved as a matter of law under the CCAA, and even if it could be approved, it should not be approved in all of the circumstances. Cargill's proposed Plan provides for an alternative restructuring transaction in the form of a consensual share transaction that Cargill believes is superior to the AHG Reverse Vesting Transaction, and is in the best interests of Tacora and its stakeholders.

4. For clarity, Cargill's requested relief pursuant to this Responding Cross-Motion does not deal with the substance or merits of Cargill's proposed Plan at this stage. The proposed Claims Procedure Order and Meeting Order will simply set the wheels in motion, to allow the Company to begin to advance procedural matters in a timely and efficient manner to facilitate advancing the potential Plan transaction. The processes under the proposed Claims Procedure Order and Meeting

Order would run in parallel to put Tacora in the best position to complete a successful CCAA plan without delay. Any and all rights of all parties with regard to the substance and merits of the proposed Plan are unaffected, such that no stakeholders are prejudiced.

5. Secondly, Cargill's alternative relief set forth in paragraphs 1(c) and 1(d) above also provides for alternative paths for the Company to advance without delay alternative restructuring options should the Court not grant the Company's RVO or Cargill's Meeting Order.

6. This factum in support of Cargill's Responding Cross-Motion focuses on the proposed Claims Procedure Order and Meeting Order, which Cargill submits ought to be approved by the Court at this time. It should be read in conjunction with Cargill's factum in support of the preliminary threshold motion and the Cargill Responding RVO Factum.

PART II - BACKGROUND

7. Tacora determined early in its CCAA proceedings that it wished to complete a share transaction. A share transaction can only be completed pursuant to a CCAA plan or an RVO. The former approach underpins the purpose and spirit of the CCAA – to facilitate negotiations and compromises among creditors and to seek consensual, fair and balanced resolutions among stakeholders – while the latter approach is extraordinary and exceptional relief to be granted at the discretion of the Court as a last resort in limited circumstances, only after the Court has determined that all of the applicable legal requirements have been satisfied.

8. Tacora never meaningfully considered, advanced or sought to pursue a CCAA plan at any time during these CCAA proceedings. As will be set out in greater detail in the Cargill Responding RVO Factum, Tacora's choice to not advance a potential CCAA plan materially limited the options and alternatives available to the Company, which could have resulted in a better outcome for all

stakeholders. Tacora failed to consider all potential options available to it and failed to pursue maximum value for all of its stakeholders. Cargill is advancing this Responding Cross-Motion to pursue a CCAA plan in respect of Tacora, a path the Company should have itself sought to consider and advance in these circumstances.

9. Cargill submits that the extraordinary and exceptional relief of an RVO is not available based on the facts and circumstance of this case. The proposed AHG Reverse Vesting Transaction does not satisfy the applicable legal test based on a number of factors.[2] To approve the proposed AHG Reverse Vesting Transaction and grant an RVO with respect to a non-assignable and undisclaimed Offtake Agreement in these circumstances would be unprecedented and would strip a significant creditor (Cargill) of critical protections and due process in these CCAA proceedings.

10. Cargill respectfully submits that granting an RVO in these circumstances would be contrary to CCAA law, where, among other things, the Company:

(a) seeks to "transfer" (i.e. assign) the Offtake Agreement (an agreement which cannot be assigned without consent) and the Company's liabilities and obligations thereunder, without having complied with the disclaimer requirements under the CCAA;

(b) has not pursued all of its available alternatives and has not led evidence that the RVO achieves a better result than available alternatives;

(c) has not at any time during these CCAA proceedings sought to advance a consensual compromise among its affected creditors (despite efforts by Cargill over many months to encourage and request the Company to do so);

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[2] *Harte Gold Corp (Re)*, 2022 ONSC 653 at paras 37-38.

(d) has ignored and encumbered Cargill's efforts to advance potential alternatives with the Company on a dual-track basis;

(e) prematurely and improvidently terminated a value maximizing process and thereby has missed significant opportunities to seek improved results and greater recovery for its stakeholders; and

(f) is materially prejudicing Cargill, a significant stakeholder of the Company.

11. The CCAA is premised on seeking compromises with creditors, treating all creditors on a fair and reasonable basis, and maximizing value for stakeholders, which Tacora's chosen path would ignore.[3]

12. Proceeding with the Claims Procedure Order and Meeting Order at this time will put in place the processes for the evaluation of affected claims against the Company and the solicitation of votes, and allow the Company to advance such procedural matters without delay. Such Orders will not prejudice any parties' rights with regard to the merits of Cargill's proposed Plan.

13. Cargill's proposed Plan treats secured creditors as unaffected, and only affects the Affected Unsecured Claims. As such, the only persons required to vote on the Plan will be the Affected Unsecured Creditors.

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[3] *Just Energy Group Inc. et al v Morgan Stanley Capital Group Inc. et al*, 2022 ONSC 3470 ("***Just Energy***") at para 8. See also para 7: "The general language of the CCAA should not be read as being restricted by the availability of more specific orders. However, the requirements of appropriateness, good faith, and due diligence are baseline considerations that a court should always bear in mind when exercising CCAA authority. Appropriateness under the CCAA is assessed by inquiring whether the order sought advances the policy objectives underlying the CCAA. The question is whether the order will usefully further efforts to achieve the remedial purpose of the CCAA — avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs. Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit."

14. The three main variables in the proposed Plan, in respect of which Cargill will work with Tacora, the Monitor and Tacora's stakeholders, include: (a) equity financing that remains to be fully committed at this time and which under the Plan can involve a variety of participants, including Cargill (which has committed up to $100 million), the Noteholders, RCF, Javelin and/or other third parties (including those with which Cargill is continuing to advance discussions); (b) the option to make amendments to the Offtake Agreement with Cargill's consent; and (c) the option for Noteholders to have their Senior Secured Notes reinstated and unaffected or, with the consent of the applicable noteholder, receive payment in cash at a discount to par. Cargill's proposed Plan will remain subject in all respects to all parties' rights with respect to the merits of the Plan at a future Sanction Hearing.

PART III - SUMMARY OF KEY FACTS RELATING TO THE CROSS-MOTION

A. TACORA WAS SINGULARLY FOCUSED ON AN RVO AND FAILED TO PROPOSE ITS OWN PLAN

15. The following paragraphs set out only a summary of certain key facts, which will be set out in greater detail in the Cargill Responding RVO Factum.

16. Pursuant to the Company's SISP, Tacora received three Phase 2 bids: a bid from the AHG Consortium (the "**AHG Phase 2 Bid**"), a bid from Cargill (the "**Cargill Phase 2 Bid**") and a bid from another third party.[4] The Cargill Phase 2 Bid proposed a transaction (the "**Cargill Recapitalization Transaction**") involving an investment in and the recapitalization of Tacora and

[4] Affidavit of Joe Broking sworn February 2, 2024 ("**Broking February 2 Affidavit**") at para. 23, Tacora Motion Record ("**Tacora RVO MR**"), Tab 2.

its business. The Cargill Recapitalization Transaction contemplated the ability to implement such transaction by way of a CCAA plan.[5]

17. The Company had the authority under the SISP to conduct further negotiations; however, the Company selected the AHG Phase 2 Bid as the successful bid without advancing any such further negotiations (and without selecting any back-up bid, even though it was able to do so under the SISP).[6] It is now seeking approval of the proposed AHG Reverse Vesting Transaction pursuant to an RVO which, as discussed above, Cargill submits cannot be approved based on the applicable CCAA law. Among numerous other fatal flaws with respect to the Company's RVO Motion, which will be detailed in response to the RVO Motion, Tacora (a) failed to use the optionality and leverage afforded to it under the SISP to seek to obtain the best available transaction, (b) failed to advance meaningful negotiations with its creditors to seek maximum recovery for its stakeholders, (c) failed to advance any potential consensual compromises or resolutions among its stakeholders, and (d) failed to explore and advance all of its available options and alternatives throughout its CCAA proceedings, including failing to make efforts to consider and advance a CCAA plan.[7] Certain of these issues are briefly outlined below and will be addressed in further detail in the Cargill Responding RVO Factum.

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[5] Lehtinen March 1 Affidavit, paras. 86-87, Cargill Responding and Cross Motion Record ("**Cargill March 1 RMR**"), Tab 2; Cargill Phase 2 Bid, s. 2.5, Ex. G to Lehtinen March 1 Affidavit, Cargill March 1 RMR, Tab 2G; Confidential Cross Examination Transcript of Joe Broking dated March 20, 2024 ("**Broking Transcript**"), Q. 100-106.

[6] Lehtinen March 1 Affidavit at paras. 10 and 104, RMR, Tab 2; Letter from Rob Chadwick to Ashley Taylor dated January 27, 2024, Ex. D to the Broking February 2 Affidavit, Tacora RVO MR, Tab 2D.

[7] Ex. A to Affidavit of David Roland ("**Roland Affidavit**"), paras. 49-51, 71-85, RMR, Tab 3A; Confidential Cross Examination Transcript of Michael Nessim dated March 18, 2024 ("**Nessim Transcript**"), Q. 94-95; Confidential Cross Examination Transcript of Trey Jackson dated March 19, 2024 ("**Jackson Transcript**"), Q. 174.

(i) The Board Did Not Use the Optionality it was Afforded Under the SISP

18. The Company's Court-approved SISP provided for certain procedures and milestone dates to govern the submission of proposals, including a two-phase bidding schedule. The SISP afforded a significant degree of discretion and optionality to Tacora. David Roland, an expert in value maximization in deal-making, opined that such requirements are common in sale processes in order to elicit detailed proposals and create competitive tension to achieve the best possible outcome for a company, but that a company "need not feel bound by its own rules" and "has the ability to waive requirements at any time if it feels it is in its best interests to do so."[8]

19. Tacora failed to use any of the tools available to it under the SISP, despite knowing of the significant claim that would be created in respect of Cargill's Offtake Agreement if Tacora accepted the AHG Phase 2 Bid and the contested court process and associated uncertainty that would follow due to the highly conditional nature of the AHG Reverse Vesting Transaction and the requirement to obtain an RVO.[9]

20. The Company's robotic adherence to a procedure that it had the full flexibility and discretion to adapt to the facts and circumstances the Company was facing, led to a significant "missed opportunity" to use the leverage and discretion afforded by the SISP to seek a better transaction.[10]

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[8] Roland Affidavit, Ex. A, para. 78, Cargill March 1 RMR, Tab 3.

[9] Jackson Transcript, Q. 186-188; Answers to Undertakings delivered by Trey Jackson dated March 26, 2024, Tab 1; Nessim Transcript, Q. 414-415.

[10] Roland Report, paras. 49 and 78, Cargill March 1 RMR, Tab 3A; see also para. 68, where Mr. Roland notes that "Tacora appears to have concluded that its options were limited to choosing one Phase II bid or the other in the forms they were submitted."

21. Tacora's heavy reliance on the conditionality of the Cargill bid with respect to securing required financing is misplaced. The Cargill Phase 2 Bid proposed a period of three weeks from the execution of the transaction agreement by the parties to satisfy such condition. In contrast, the AHG Phase 2 Bid had an even greater conditionality – obtaining an RVO which would not be addressed by the Court for at least two months.

(ii) Tacora Never Considered or Advanced a Potential CCAA Plan

22. In addition to failing to use the levers provided under the SISP, Tacora never sought to advance its own CCAA plan for consideration by Tacora's stakeholders. Cargill had communicated to Tacora that it was prepared to proceed with consideration of a CCAA plan on a dual track alongside completing the process prescribed by the SISP.[11]

23. Jeremy Matican, Cargill's financial advisor at Jefferies, confirmed that Cargill had repeatedly endeavoured to "make proposals and seek engagement around that alternate path", but that Tacora and Greenhill were not willing to consider it.[12]

24. Mr. Nessim testified that he "[thought] we all wanted a consensual deal"[13], but that once pre-CCAA discussions between the AHG and Cargill had dissolved, Tacora (via Greenhill) did not attempt to craft its own plan of arrangement for consideration by the stakeholders within the

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[11] Lehtinen March 1 Affidavit at para. 67, Cargill March 1 RMR, Tab 2.

[12] Confidential Cross Examination Transcript of Jeremy Matican dated March 22, 2024 ("**Matican Transcript**"), Q. 276-279.

[13] Nessim Transcript at Q. 18.

bounds of the CCAA process.[14] Joe Broking, Tacora's CEO and Board member, and Trey Jackson, another Board member, also confirmed that Tacora declined to pursue such a plan.[15]

25. Tacora and Greenhill point to the failure by the AHG and Cargill to reach terms on a potential transaction prior to the commencement of the CCAA proceedings as an excuse for their failure to make any efforts to advance any discussions among the parties towards a consensual resolution or to advance a potential CCAA plan.[16] But they neglected to recognize that such failure occurred in a pre-SISP environment in which the Company did not have the leverage and tools of a CCAA process to drive the parties to a consensual transaction.

26. Importantly, the Company failed to recognize that it could engage in post-Phase 2 bid negotiations and efforts to drive a consensual transaction without any risk of losing the AHG Phase 2 Bid – it was irrevocable.[17] As pointed out by Mr. Roland on cross-examination, the opportunity to achieve a consensual deal only increased after the Phase 2 bids were submitted, and those opportunities could have been preserved with no risk to the irrevocable bids on the table.[18]

(iii) Tacora did not Pursue Improved Terms

27. Despite Tacora's substantial leverage and Mr. Nessim's agreement that both the AHG Consortium and Cargill had "substantial vested interests" in Tacora[19], the Company did not use

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[14] Nessim Transcript, Q. 92-95.

[15] Broking Transcript, Q. 366-367; Jackson Transcript, Q. 174.

[16] Broking Transcript, Q. 363-367.

[17] Roland Transcript, Q. 292, 300; Roland Affidavit, para. 79, Cargill March 1 RMR, Tab 3A; SISP, para. 37, Ex. B to Broking February 2 Affidavit, Tacora RVO MR, Tab 2B.

[18] Roland Transcript, Q. 284, 288-292, 300.

[19] Nessim Transcript, Q. 159-161.

the opportunity to seek any betterment of terms of the AHG Reverse Vesting Transaction or any compensation for Cargill for the loss of its valuable contract.[20]

28. Tacora has not acted in a manner that a debtor company ought to in a CCAA proceeding, and did not seek to find solutions or compromises with its stakeholders. Rather, Tacora has "aligned" itself with the AHG Consortium, which has focused on the "fight to win the company".[21]

29. On December 1, 2023, Tacora received a non-binding Phase 1 proposal from the AHG Consortium, which contemplated a share transaction pursuant to an RVO structure, and the Company immediately moved to advance definitive documentation with the AHG Consortium, without any effort to negotiate an asset sale transaction, negotiate any compromises or resolutions with other stakeholders, including Cargill, or to advance a CCAA plan at any time.[22] Tacora has disregarded fair treatment to stakeholders and failed to take proper and appropriate steps to seek to maximize recovery for Cargill and any other affected creditors.

30. Importantly, Tacora did nothing to ascertain what price would be paid on an asset sale – which would not require an RVO – and there is no evidence that the AHG Reverse Vesting Transaction is better than any available alternative.[23] Indeed it is clearly not. The AHG Reverse Vesting Transaction satisfies the secured creditors and most unsecured creditors, except Cargill.

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[20] Nessim Transcript, Q. 217-223; Confidential Cross Examination Transcript of Peter Bradley dated March 21, 2024, Q. 163.

[21] Affidavit of Joe Broking sworn March 11, 2024 at para. 20 ("**Broking March 11 Affidavit**"), Tacora DIP Motion Record dated March 11, 2024 ("**Tacora DIP MR**"), Tab 2; Confidential Cross-Examination Transcript of Rebecca Pacholder dated March 21, 2024, Q. 171-174, 183-184 ("**Pacholder Transcript**"); Nessim Transcript, Q. 217-223; Bradley Transcript, Q 163.

[22] Broking Transcript, Q. 295-315; December 5, 2023 Board Presentation, pp. 11 and 13, Ex. 6 to Nessim Transcript.

[23] Nessim Transcript, Q. 210-216; Jackson Transcript, Q. 214-220; Broking Transcript, Q 343-353, 379-380; December 5 Board Minutes, Ex. 11 to Broking Transcript.

Cargill's proposed Plan satisfies all secured creditors and most unsecured creditors, *including* Cargill. It is clearly superior.

31. Cargill has developed the proposed Plan on substantially the same terms as the Cargill Recapitalization Transaction proposed by Cargill pursuant to the Cargill Phase 2 Bid (discussed further below), which Cargill believes is fair and reasonable, and superior to the AHG Reverse Vesting Transaction.[24] Cargill is prepared to take input and have constructive dialogue on its proposed Plan with Tacora, the Monitor and Tacora's stakeholders.[25]

32. The proposed Claims Process would run concurrently with the process to solicit votes on the Plan pursuant to the Meeting Order, to provide for an efficient parallel process in an appropriate time frame.[26]

B. THE PROPOSED CLAIMS PROCESS[27]

33. Cargill developed the proposed Claims Process to govern: (i) the Affected Unsecured Claims of the Affected Unsecured Creditors against the Company for voting and distribution purposes in respect of the Plan, and (ii) any claims against Directors and Officers of Tacora.[28]

34. Outside of the Affected Unsecured Creditors, there are no other creditors that are proposed to have their claims against the Company affected pursuant to the Plan.[29]

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[24] Lehtinen March 1 Affidavit at paras. 113-114, Cargill March 1 RMR, Tab 2.

[25] Lehtinen March 1 Affidavit at para. 114, Cargill March 1 RMR, Tab 2.

[26] Lehtinen March 1 Affidavit at para 116, Cargill March 1 RMR, Tab 2.

[27] Unless otherwise stated herein, all capitalized terms used herein and not otherwise defined in this section shall have the meanings ascribed to such terms in the Claims Procedure Order attached at Tab 7 to the Cargill March 1 RMR.

[28] Plan at paras 3.2 and 3.7, Ex. R to Lehtinen March 1 Affidavit, Cargill March 1 RMR, Tab 2R.

[29] Lehtinen March 1 Affidavit at para 114, Cargill March 1 RMR, Tab 2.

35. The proposed Claims Process employs a "negative notice claims process" under which the Company's Affected Unsecured Creditors will be notified of their claims based on the books and records of the Company, in consultation with the Monitor, and will be given an opportunity to dispute such claims.[30] The proposed Claims Procedure Order also includes public notice provisions to provide notice to other potential affected creditors.

36. The detailed terms of the proposed Claims Process are set forth in the form of Claims Procedure Order at Tab 7 of the March 1 Motion Record.

C. THE PLAN

37. The terms of Cargill's proposed Plan are set out in the Plan attached as Exhibit "R" to the Lehtinen March 1 Affidavit and summarized in Section XIII of the Lehtinen March 1 Affidavit.

38. Among other things, the key elements of the proposed Plan include:

(a) all secured claims will be treated as Unaffected Claims under the Plan;

(b) Affected Unsecured Claims will receive distributions from the Affected Unsecured Creditors Aggregate Distribution Amount;

(c) Unaffected Claims shall include: (i) Claim secured by any of the CCAA Charges; (ii) Unaffected Secured Claim; (iii) Insured Claim; (iv) Post-Filing Trade Payable; (v) Unaffected Trade Claim; (vi) Scheduled Unaffected Claim; (vii) the Offtake Agreement Obligations and the OPA Obligations; (viii) a Claim that is not permitted to be compromised pursuant to section 19(2) of the CCAA; (ix) Claims of Employees in their capacity as Employees, Employee Priority Claims and, to the extent applicable,

[30] Claims Procedure Order at paras 14-16, Cargill March 1 RMR, Tab 7.

any Claims of Employees under or pursuant to the Collective Bargaining Agreement; (x) Government Priority Claims; and (xi) Environmental Liabilities;

(d) New Equity Financing will be funded to Tacora on the Plan Implementation Date in exchange for 100% of the New Tacora Common Shares to be issued pursuant to the Plan, which New Equity Financing shall be sufficient to pay the amounts contemplated to be paid pursuant to the Plan in cash on the Plan Implementation Date and to fund the operations of the Business, as determined by Cargill and the other New Equity Participants. Cargill acknowledges that, as of the date hereof, those amounts from any third party are not currently committed;

(e) Cargill's portion of the New Equity Financing shall be funded by way of the Exchanged Cargill Debt Amount, being up to $100 million of Debt Obligations of Tacora owing to Cargill;

(f) Noteholders shall be entitled to participate in the New Equity Financing in such proportion and on such terms as may be agreed to by Cargill and such Noteholder, subject to the terms of the Plan; and

(g) CITPL and Tacora shall agree that, from and after the Plan Implementation Date, CITPL will provide to Tacora interim access to up to seventy percent (70%) of the amounts earned by CITPL pursuant to the Offtake Agreement until the Senior Secured Notes are repaid in full, whether at or before their maturity, and CITPL shall agree to extend the OPA on similar terms as previously provided to Tacora effective as of the Plan Implementation Date.[31]

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[31] Lehtinen March 1 Affidavit at para. 113, Cargill March 1 RMR, Tab 2.

39. Cargill is prepared to take input and have constructive dialogue on the Plan with Tacora, the Monitor and Tacora's stakeholders.[32]

D. THE PROPOSED MEETING ORDER[33]

40. The proposed Meeting Order authorizes Cargill to file the Plan and authorizes the calling of the Affected Unsecured Creditors Meeting for the Affected Unsecured Creditors to consider and vote on the Plan.[34] The Affected Unsecured Creditors are the only affected creditors under the Plan and comprised the single class of creditors entitled to vote on the Plan.[35]

41. The proposed Meeting Order also provides for, among other things:

(a) the process for notifying the Affected Unsecured Creditors of the Affected Unsecured Creditors Meeting and distribution of the applicable meeting materials;

(b) procedures that will govern the conduct of the Affected Unsecured Creditors Meeting;

(c) procedures for the appointment of proxyholders by Affected Unsecured Creditors;

(d) procedures for voting at the Affected Unsecured Creditors Meeting;

(e) procedures for the tabulation by the Monitor of the Voting Claims and any Disputed Voting Claims at the Affected Unsecured Creditors Meeting;

(f) the threshold for approval of the Plan at the Affected Unsecured Creditors Meeting;

(g) the process for any adjournments of the Affected Unsecured Creditors Meeting; and

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[32] Lehtinen March 1 Affidavit at para. 114, Cargill March 1 RMR, Tab 2.

[33] Unless otherwise stated herein, all capitalized terms used herein and not otherwise defined in this section shall have the meanings ascribed to such terms in the Meeting Order attached at Tab 6 to Cargill's Responding Motion Record.

[34] Lehtinen March 1 Affidavit at para. 115, Cargill March 1 RMR, Tab 2.

[35] Meeting Order at para 16, Cargill March 1 RMR, Tab 6.

(h) the process for any amendments to the Plan.[36]

PART IV- ISSUES AND THE LAW

42. The issues to be considered on this application are whether:

(a) it is appropriate to approve the Claims Process pursuant to the proposed Claims Procedure Order; and

(b) it is appropriate to permit Cargill to file the Plan and authorize the Affected Unsecured Creditors' Meeting to proceed.

A. APPROVAL OF THE CLAIMS PROCESS

43. It is well established that the Court has the authority under the powers granted pursuant to Sections 11 and 12 of the CCAA to approve a process to determine claims against a debtor company and its directors and officers, and Courts have routinely approved claims processes in connection with CCAA restructuring proceedings.[37]

44. There is no prescribed claims process pursuant to the CCAA and claims processes are typically developed based on the facts and circumstances of the particular proceeding. CCAA Courts have frequently approved "negative notice claims procedures" pursuant to which creditors that are known to the debtor company are notified of their claims as determined based on the books and records of the debtor company and given an opportunity to dispute such claim through the filing of a notice of dispute, rather than being required to file a proof of claim with supporting

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[36] Meeting Order, Tab 6 to Cargill March 1 RMR.

[37] CCAA, Sections 11 and 12; *Toys "R" Us (Canada) Ltd.*, 2018 ONSC 609 at para. 8 ("***Toys "R" Us***"); *U.S. Steel Canada Inc., Re*, 2017 ONSC 1967 at para. 5 ("***U.S. Steel***"); *ScoZinc Ltd. (Re)*, 2009 NSSC 136 at para. 25.

evidence. Courts have found the "negative notice" approach, in appropriate circumstances, to provide a more streamlined approach that makes the process easier for known creditors and reduces the time and expense of the claims process.[38]

45. In addition, CCAA Courts have on numerous occasions approved claims processes that have run concurrently with the notice and vote solicitation process pursuant to a meeting order.[39]

46. The proposed Claims Procedure Order is based on similar Orders granted by this Court on numerous occasions. Cargill submits that the proposed Claims Process provides for a fair, efficient and reasonable process for the determination of the Affected Unsecured Creditors' claims and claims against the directors and officers of the Company, and that it is appropriate for this Court to approve the Claims Procedure Order. [40]

B. IT IS APPROPRIATE TO PERMIT CARGILL TO FILE THE PLAN AND CALL THE AFFECTED UNSECURED CREDITORS' MEETING

47. The Court has authority under Sections 4 and 5 of the CCAA to order a meeting of creditors or class of creditors to vote on a proposed plan of compromise or arrangement.[41]

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[38] *Toys "R" Us, supra* note 37 at paras. 7, 11-14; *Payless Shoesource Canada Inc. et al*, Court File No. CV-19-00614629-00CL (Ont. S.C.J. [Commercial List]), Order (Claims Procedure Order), dated April 24, 2019 at paras 18-19; *Cline Mining Corporation, Re*, 2014 ONSC 6998 at para. 64 ("***Cline Mining")***; *Forever XXI ULC*, Court File No. CV-19-00628233-00CL (Ont. S.C.J. [Commercial List]), Claims Procedure Order, dated May 28, 2020 ("***Forever 21 CPO***") at paras 15, 20-21; *Yatsen Group of Companies Inc., et al*, Court File No. CV-21-00655505-00CL (Ont. S.C.J. [Commercial List], Claims Procedure Order, dated August 5, 2021 ("***Sarku CPO***") at paras 14, 20-21.

[39] *Jaguar Mining Inc. (Re),* 2014 ONSC 494 at paras. 1, 48 and 50 ("***Jaguar Mining***"); *Cline Mining*, *supra* note 38 at para. 83; *U.S. Steel*, *supra* note 37 at paras. 7 and 17; *Forever 21 CPO*, *supra* note 38; *Forever XXI ULC*, Court File No. CV-19-00628233-00CL (Ont. S.C.J. [Commercial List]), Meeting Order, dated May 28, 2020 ("***Forever 21 Meeting Order***"); *Sarku CPO, supra note 37*; *Yatsen Group of Companies Inc., et al*, Court File No. CV-21-00655505-00CL (Ont. S.C.J. [Commercial List], Meeting Order, dated August 5, 2021).

[40] *Forever 21 CPO*, *supra* note 38; *Sarku CPO, supra* note 37.

[41] CCAA, Sections 4 and 5.

48. Section 22(1) of the CCAA provides that:

> A debtor company may divide its creditors into classes for the purpose of a meeting to be held under section 4 or 5 in respect of a compromise or arrangement relating to the company and, if it does so, it is to apply to the court for approval of the division before the meeting is held.[42]

49. Section 22(2) of the CCAA further provides that, for the purposes of Section 22(1), creditors with a "commonality of interest" may be included in the same class, and includes key factors for considerations as part of assessing the "commonality of interest".[43] A fragmentation of classes that would render it excessively difficult to obtain approval of a CCAA plan would be contrary to the purpose of the CCAA and ought to be avoided.[44]

50. The proposed Meeting Order provides for a single class of creditors, the Affected Unsecured Creditors Class, who are the only affected creditors under the Plan. Cargill submits that the proposed single class of the Affected Unsecured Creditors is appropriate given, among other things: (a) the Affected Unsecured Creditors in each case have unsecured claims against the Company; (b) the Affected Unsecured Creditors have similar remedies as against the Company in the event the Plan does not proceed; and (c) the Affected Unsecured Claims of the Affected Unsecured Creditors are getting the same treatment under the Plan. There is no valid reason to create more than one class of creditors in these proceedings.

51. Approval of the Meeting Order does not require an analysis of the substantive merits of the Plan by the Court, which is properly determined at the Sanction Hearing. The threshold for the

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[42] CCAA, Section 22(1).

[43] CCAA, Section 22(2).

[44] *Re Canadian Airlines Corp.* (2000), 19 C.B.R. (4th) 12 (Alta. Q.B.) at para. 14, leave to appeal refused 2000 ABCA 149; *Stelco Inc. (Re)* (2005), 15 C.B.R. (5th) 297 at para. 13.

Court to be satisfied for the filing of a plan and the calling of a meeting of creditors is low. The Court will generally order that the meeting be held where the plan is feasible or "not doomed to failure". In *Elan Corp. v Comiskey*, the Ontario Court of Appeal held that:

> I agree that the feasibility of the plan is a relevant and significant factor to be considered in determining whether to order a meeting of creditors: S.E. Edwards, "Reorganizations Under the *Companies' Creditors Arrangement Act*," at pp. 594-595. I would not, however, impose a heavy burden on the debtor company to establish the likelihood of ultimate success from the outset. As the Act will often be the last refuge for failing companies, it is to be expected that many of the proposed plans of reorganization will involve variables and contingencies which will make the plan's ultimate acceptability to the creditors and the Court very uncertain at the time the initial application is made. [*emphasis added*][45]

52. The Court is not required to address the fairness and reasonableness of the Plan at this stage. Unless it is obvious that a plan would not be approved by the affected creditors, a debtor company or its creditors should not be prevented from presenting a plan to a company's affected creditors at a meeting.[46]

53. While not a matter to be determined at this stage, Cargill submits that the CCAA court has the authority to approve the waiver of default provisions included in the proposed Plan. Provisions in substantially the same form are common in CCAA plans and other restructuring transactions. Such provisions have been approved by courts across Canada in transactions similar to the Cargill Recapitalization Transaction, on the basis that provisions waiving events of default relating to the completion of a transaction are necessary facilitate the completion of the transaction, to prevent

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[45] *Elan Corp. v Comiskey* (1990), 1 OR (3d) 289 at p. 36 (CA) ("***Elan Corp***"); *U.S. Steel*, *supra* note 37 at para. 6; *Just Energy* at para 15; *Just Energy Group Inc. et al v Morgan Stanley Capital Group Inc. et al,* 2022 ONSC 3698 at para 7.

[46] *ScoZinc Ltd, Re,* 2009 NSSC 163 at para 7; *U.S. Steel*, *supra* note 37 at para 12.

actions that would frustrate the purpose of the transaction and to ensure that the positive results that are to flow from such transaction are not jeopardized or subject to collateral attack.[47]

54. The Meeting Order can proceed on the basis there has been no determination of: (a) the test for approval of the Plan; (b) whether the Plan complies with the CCAA; (c) whether any aspect or term of the Plan is fair and reasonable; (d) the validity or quantum of the claims subject to the Plan; and (e) the classification of creditors for voting purposes.[48]

55. Moreover, nothing in the Meeting Order should be interpreted as preventing or limiting the ability of any party to oppose a motion for the sanction of the Plan. The granting of the Meeting Order simply allows another option and alternative path to be made available to Tacora.

56. As discussed above, Cargill believes that the Company's proposed AHG Reverse Vesting Transaction is prejudicial to Cargill and is not the best available alternative for the Company or its stakeholders. Cargill submits that based on the facts and circumstances, the Company's proposed RVO cannot be approved under CCAA law. Cargill believes that the proposed Plan is a superior alternative to the proposed AHG Reverse Vesting Transaction, and that it is in the best interests of the Company and its stakeholders to proceed with calling and holding the Affected Unsecured Creditors Meeting to allow the Affected Unsecured Creditors to consider and vote on the Plan.

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[47] *Concordia International Corp (Re)*, 2018 ONSC 4165 at paras 40-41, Cargill Book of Authorities, Tab 1; *12178711 Canada Inc., Re* (2021), [2021] AWLD 3280, 335 ACWS (3d) 88 at para 182, Book of Authorities, Tab 2; *12178711 Canada Inc v Wilks Brothers, LLC*, 2020 ABCA 430 at paras 38 and 44; Plan of Compromise and Reorganization of Sino-Forest Corporation at Article 12.2, being Schedule "A" to *Sino-Forest Corporation*, Court File No. CV-12-9667-00CL (Ont. S.C.J. [Commercial List]), Plan Sanction Order dated December 10, 2012; Plan of Compromise and Arrangement of Rubicon Minerals Corporation, et al. at Article 10.2, being Schedule "A" to *Rubicon Minerals Corporation, et al.*, Court File No. CV-16-11566-00CL (Ont. S.C.J. [Commercial List]), Sanction Order dated December 8, 2016; Plan of Compromise and Arrangement of Yatsen Group of Companies Inc., et al. at Article 10.2, being Schedule "B" of *Yatsen Group of Companies Inc., et al.*, Court File No. CV-21-00655505-00CL (Ont. S.C.J. [Commercial List]), Sanction Order dated September 20, 2021.

[48] *Sino-Forest Corporation (Re)*, 2012 ONSC 5011 at para 2.

57. For a CCAA plan to be approved, the Court must determine that all statutory requirements have been satisfied, that nothing has been done or purported to be done that is not authorized by the CCAA, and that the proposed CCAA plan is fair and reasonable.[49] The proposed Plan will need to meet such test at a future Sanction Hearing. Cargill will work with Tacora and its stakeholders to satisfy all legal matters on any motion for an Order seeking to sanction Cargill's proposed Plan.

58. As noted above, Courts have on numerous occasions granted meeting orders providing for the notice of a creditors' meeting and the solicitation of votes in respect thereof to proceed concurrently with a claims process in appropriate circumstances. Here Cargill is seeking both the Claims Procedure Order and the Meeting Order at this time it believes it is appropriate and in the best interests of the Company and its stakeholders to undertake the Claims Process in respect of the Affected Unsecured Creditors and commence the formal notification and vote solicitation process in respect of the Affected Unsecured Creditors' Meeting in order to be able to proceed to seek Plan approval and implementation on an efficient and cost-effective basis.[50]

59. Cargill submits that the provisions of the Meeting Order governing the notice and conduct of the Affected Unsecured Creditors' Meeting are reasonable and appropriate in the circumstances.

PART V- RELIEF REQUESTED

60. It is clear on the record that the Company missed meaningful opportunities to seek to obtain a better result for its stakeholders than the currently proposed AHG Reverse Vesting Transaction,

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[49] *Canwest Global Communications Corp,* 2010 ONSC 4209 at para 14.

[50] *Jaguar Mining*, *supra* note 39 at paras. 1, 48 and 50; *Cline Mining*, *supra* note 38 at 83; *U.S. Steel*, *supra* note 37 at paras. 7 and 17; *Forever 21 CPO*, *supra* note 38; *Forever 21 Meeting Order*, *supra* note 39.

and failed to discharge its obligations to achieve the best result for all stakeholders. Among other things, at no time did the Company ever meaningfully consider or seek to pursue or advance a potential CCAA plan for the benefit of its stakeholders. This was a door kept firmly shut by the Company at all times, which Cargill believes has prejudiced Cargill and other stakeholders as part of the Company's restructuring process by limiting the potential options and transactions considered by the Company that could have resulted in a better outcome for all stakeholders. Cargill believes that the Company's failure to meaningfully engage and negotiate with its creditors and seek compromise as among them has resulted in a failure to drive maximum value for its stakeholders.

61. Cargill submits that the Company's requested RVO is not capable of being approved based on the facts and circumstances of this case, and that the proposed Plan provides a superior alternative option for the benefit of the Company and its stakeholders.

62. For all of the reasons stated herein, Cargill respectfully requests that this Court grant the relief sought in the proposed Claims Procedure Order and Meeting Order, in order to enable the Company to advance matters under both Orders on a parallel basis and to move forward with seeking the approval and implementation of the proposed Plan efficiently and expeditiously.

63. The granting of such Orders will allow the Company to advance a CCAA plan structure without delay on the basis that nothing in the Orders should be interpreted as preventing or limiting the ability of any party to oppose a motion for the sanction of the Plan at a future Sanction Hearing.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

March 27, 2024

/s/ Goodmans LLP

Goodmans LLP

SCHEDULE A

LIST OF AUTHORITIES

1. *Harte Gold Corp (Re)*, 2022 ONSC 653
2. *Just Energy Group Inc. et al v Morgan Stanley Capital Group Inc. et al*, 2022 ONSC 3470
3. *Toys "R" Us (Canada) Ltd.*, 2018 ONSC 609
4. *U.S. Steel Canada Inc., Re*, 2017 ONSC 1967
5. *ScoZinc Ltd. (Re)*, 2009 NSSC 136
6. *Yatsen Group of Companies Inc., et al*, Court File No. CV-21-00655505-00CL (Ont. S.C.J. [Commercial List], Claims Procedure Order, dated August 5, 2021
7. *Payless Shoesource Canada Inc. et al*, Court File No. CV-19-00614629-00CL (Ont. S.C.J. [Commercial List]), Order (Claims Procedure Order), dated April 24, 2019
8. *Cline Mining Corporation, Re*, 2014 ONSC 6998
9. *Forever XXI ULC*, Court File No. CV-19-00628233-00CL (Ont. S.C.J. [Commercial List]), Claims Procedure Order, dated May 28, 2020
10. *Jaguar Mining Inc. (Re)*, 2014 ONSC 494
11. *Forever XXI ULC*, Court File No. CV-19-00628233-00CL (Ont. S.C.J. [Commercial List]), Meeting Order, dated May 28, 2020
12. *Yatsen Group of Companies Inc., et al*, Court File No. CV-21-00655505-00CL (Ont. S.C.J. [Commercial List], Meeting Order, dated August 5, 2021
13. *Re Canadian Airlines Corp.* (2000), 19 C.B.R. (4th) 12 (Alta. Q.B.), leave to appeal refused 2000 ABCA 149
14. *Stelco Inc. (Re)* (2005), 15 C.B.R. (5th) 297
15. *Elan Corp. v Comiskey* (1990), 1 OR (3d) 289 at p. 36 (CA)
16. *Just Energy Group Inc. et al v Morgan Stanley Capital Group Inc. et al*, 2022 ONSC 3698
17. *ScoZinc Ltd, Re*, 2009 NSSC 163
18. *Sino-Forest Corporation (Re)*, 2012 ONSC 5011
19. *Canwest Global Communications Corp*, 2010 ONSC 4209

20. *Concordia International Corp (Re)*, 2018 ONSC 4165

21. *12178711 Canada Inc., Re* (2021), [2021] AWLD 3280, 335 ACWS (3d) 88

22. *12178711 Canada Inc v Wilks Brothers, LLC*, 2020 ABCA 430

23. *Sino-Forest Corporation*, Court File No. CV-12-9667-00CL (Ont. S.C.J. [Commercial List]), Plan Sanction Order dated December 10, 2012

24. *Rubicon Minerals Corporation, et al.*, Court File No. CV-16-11566-00CL (Ont. S.C.J. [Commercial List]), Sanction Order dated December 8, 2016

25. *Yatsen Group of Companies Inc., et al.*, Court File No. CV-21-00655505-00CL (Ont. S.C.J. [Commercial List]), Sanction Order dated September 20, 2021

SCHEDULE B

STATUTORY REFERENCES

COMPANIES' CREDITORS ARRANGEMENT ACT
RSC 1985, c C-36, as amended

s. 4

Compromise with unsecured creditors – Where a compromise or an arrangement is proposed between a debtor company and its unsecured creditors or any class of them, the court may, on the application in a summary way of the company, of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.

s. 5

Compromise with secured creditors – Where a compromise or an arrangement is proposed between a debtor company and its secured creditors or any class of them, the court may, on the application in a summary way of the company or of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.

s. 11

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

s. 12

Fixing deadlines – The court may fix deadlines for the purposes of voting and for the purposes of distributions under a compromise or arrangement.

s. 22(1)

Company may establish classes – A debtor company may divide its creditors into classes for the purpose of a meeting to be held under section 4 or 5 in respect of a compromise or arrangement relating to the company and, if it does so, it is to apply to the court for approval of the division before the meeting is held.

s. 22(2)

Factors – For the purpose of subsection (1), creditors may be included in the same class if their interests or rights are sufficiently similar to give them a commonality of interest, taking into account

(a) the nature of the debts, liabilities or obligations giving rise to their claims;

(b) the nature and rank of any security in respect of their claims;

(c) the remedies available to the creditors in the absence of the compromise or arrangement being sanctioned, and the extent to which the creditors would recover their claims by exercising those remedies; and

(d) any further criteria, consistent with those set out in paragraphs (a) to (c), that are prescribed.

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

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

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at Toronto

FACTUM OF CARGILL, INCORPORATED AND CARGILL INTERNATIONAL TRADING PTE LTD. RE: RESPONDING CROSS-MOTION (returnable April 10-12, 2024)

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