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.

(Applicant)

FACTUM OF THE APPLICANT
(Re: Sale Process, KERP and Stay Extension Orders)
(Returnable June 5, 2024)

June 3, 2024

STIKEMAN ELLIOTT LLP
Barristers & Solicitors
5300 Commerce Court West
199 Bay Street
Toronto, Canada M5L 1B9

Ashley Taylor (LSO #39932E)
Tel: 416-869-5236
Email: ataylor@stikeman.com

Lee Nicholson (LSO #66412I)
Tel: 416-869-5604
Email: leenicholson@stikeman.com

Natasha Rambaran (LSO #80200N)
Tel: 416-869-5504
Email: nrambaran@stikeman.com

Philip Yang (LSO #82084O)
Tel: 416-869-5593
Email: pyang@stikeman.com

Counsel for the Applicant

TO: THE SERVICE LIST

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PART I - OVERVIEW[1]

1. The Company continues to face two fundamental obstacles in its efforts to restructure – a prohibitive offtake agreement and an overleveraged capital structure. The Ad Hoc Group and Cargill are each in a position to negotiate a consensual resolution to solve these issues and facilitate the Company's timely emergence from these CCAA Proceedings. The Company has engaged in discussions and negotiations with the Ad Hoc Group and Cargill in respect of options for a consensual restructuring and recapitalization transaction. Despite significant efforts to advance such negotiations, a consensual resolution has not been achieved to date.

2. The Company is continuing these efforts, however, given the circumstances, the Company cannot afford to pursue a consensual restructuring without also advancing a sales process in parallel to identify one or more investors and/or purchasers and a transaction to allow Tacora to exit these CCAA Proceedings.

3. Therefore, Tacora, in consultation with its advisors and the Monitor, and input from Cargill and the Ad Hoc Group, has developed a second Sale Process, which contemplates a single-phase bid process with a potential Auction (should more than one Qualified Bid be received by the Bid Deadline).

4. The Bid Deadline and other proposed milestones in the Sale Process are based on the Company's need to emerge from these CCAA proceedings as a going concern as soon as possible and the remaining availability under the Company's DIP financing. The Sale Process

[1] Capitalized terms used and not defined herein have the meanings ascribed to them in Affidavit of Heng Vuong sworn May 31, 2024 (the "**Vuong Affidavit**").

also seeks to provide clarity and a definitive timeline for investors and/or purchasers by advancing parallel litigation (to the extent such issues cannot be resolved on consent) on issues that delayed and complicated sale approval following the initial Solicitation Process. The Company cannot afford to engage in protracted litigation following the conclusion of the second Sale Process while it seeks approval of the successful bid.

5. On this motion, Tacora seeks this Court's approval of:

(a) the Sale Process Order, among other things:

(i) approving and ratifying the Sale Process;

(ii) authorizing and directing Tacora and the Monitor to continue the Sale Process; and

(iii) authorizing and directing Tacora and the Monitor to take all actions as may be necessary or desirable to implement and carry out the Sale Process in accordance with its terms and the Sale Process Order;

(b) the Stay Extension Order, among other things:

(i) extending the Stay Period until and including July 29, 2024;

(ii) authorizing Tacora to reallocate KERP Funds that were earmarked for Key Employees who have resigned from Tacora to certain other Key Employees; and

(iii) sealing the confidential appendix (the "**Confidential Appendix**") to the Ninth Report of the Monitor dated June 3, 2024 (the "**Ninth Report**"), which contains details of the reallocated KERP.

PART II - FACTS

6. The facts with respect to this motion are more fully set out in the Affidavit of Heng Vuong sworn May 31, 2024 (the "**Vuong Affidavit**").

A. Background

7. Tacora operates the Scully Mine which produces high-grade and quality iron ore products. The Company is the second largest employer in the Labrador West region, employing approximately 460 employees, and is an important part of the local and provincial economy of Newfoundland.[2]

8. Since restarting mining operations in 2019, Tacora has been attempting to ramp up production of iron ore concentrate to the Scully Mine's nameplate capacity of approximately 6.0 Mtpa. Tacora needs to implement its capital expenditure plan as soon as possible. These capital investments are critical for the sustainability and stability of Tacora's operations moving forward. Tacora has suffered losses of over $450 million since restarting the Scully Mine.[3]

9. As of the commencement of the CCAA Proceedings, Tacora had approximately $298 million in secured debt. To date, Tacora has borrowed an additional $100 million of super-priority debt pursuant to the DIP Facility. Tacora's secured debt is owed primarily to (a) holders of Senior Notes and Senior Priority Notes; and (b) Cargill in respect of an Advance Payments Facility and the DIP Facility. The secured indebtedness (other than the DIP Facility) shares the same collateral and security package and is subject to an intercreditor agreement between the parties. The Company's secured debt (not including accrued interest) and its respective priority rankings are summarized in the Vuong Affidavit.[4]

B. Pre-Filing Strategic Process

10. In January 2023, the Company engaged Greenhill to formally undertake a strategic process (the "**Pre-Filing Strategic Process**") to explore, review, and evaluate a broad range of alternatives for the Company, including sale opportunities or additional investments in Tacora. Commencing in March 2023, Greenhill reached out to 30 strategic and financial parties in connection with a potential sale or financing transaction.[5]

11. In April 2023, the Company received several LOIs and term sheets in respect of potential transactions, each of which contemplated significant concessions from Cargill on the Offtake Agreement and/or the Senior Noteholders in respect of the Senior Notes. Greenhill

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[2] Vuong Affidavit at para 5.
[3] Vuong Affidavit at para 6.
[4] Vuong Affidavit at para 7.
[5] Vuong Affidavit at para 8.

facilitated conversations for the interested parties with Cargill and the Ad Hoc Group, but no agreement was reached on any transaction.[6]

12. In May 2023, the Company entered into a non-binding LOI for a sale of the Company to a strategic party. The transaction was supported by Cargill and the Ad Hoc Group. Greenhill and the Company facilitated advanced due diligence for the strategic party in an effort to advance the transaction. However, in July 2023, the strategic party advised that it was no longer interested in the transaction contemplated by the LOI. One of the reasons the transaction did not move forward was that the Offtake Agreement would limit the strategic party's ability to use Tacora's iron ore in its own operations and prevent realization of potential synergies.[7]

13. Starting in July 2023, Cargill and the Ad Hoc Group commenced discussions regarding a possible consensual restructuring and recapitalization transaction for the Company. The discussions between Cargill and the Ad Hoc Group eventually involved RCF as a potential new equity participant. The negotiations continued through the summer with the backdrop of a potential CCAA filing in early September 2023, however, the parties were unable to reach a binding agreement.[8]

C. Solicitation Process

14. Following the failure of Cargill and the Ad Hoc Group to reach a consensual deal, the Company needed immediate liquidity and filed for CCAA protection on October 10, 2023.[9]

15. On October 30, 2023, this Court granted the Solicitation Order, which, among other things: (a) approved the Solicitation Process to solicit offers or proposals for a sale, restructuring, or recapitalization transaction in respect of Tacora's assets and business operations; (b) authorized Tacora to market and solicit offers in respect of the Offtake Opportunity; and (c) authorized and directed Tacora, Greenhill and the Monitor to immediately commence the Solicitation Process.[10]

16. Over 130 Potential Bidders were contacted by Greenhill following the commencement of the Solicitation Process. During Phase 1 of the Solicitation Process, Cargill and Jefferies also

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[6] Vuong Affidavit at para 9.
[7] Vuong Affidavit at para 10.
[8] Vuong Affidavit at para 11.
[9] Vuong Affidavit at para 12.
[10] Vuong Affidavit at para 13.

contacted 43 potential financing parties in an effort to develop a consortium bid.[11] On December 1, 2023, the Phase 1 Bid Deadline, Tacora received seven non-binding term sheets. Only one of the LOIs, received from Cargill, contemplated the assumption of the Offtake Agreement.[12]

17. On January 19, 2024, the Phase 2 Bid Deadline, Tacora received three Phase 2 Bids from: (a) the Investors; (b) Cargill; and (c) Bidder #3. On January 24, 2024, the Board held a meeting with the Company's advisors, Greenhill and Stikeman, and the Monitor and its counsel. The Board determined that only the Investors' Phase 2 Bid met all the requirements of a Phase 2 Qualified Bid. Ultimately, on January 29, 2024, the Board exercised their good faith business judgement and unanimously determined that the Investors' Phase 2 Qualified Bid should be declared the Successful Bid under the Solicitation Process.[13]

D. Litigation Regarding Approval of Successful Bid

18. On February 2, 2024, Tacora served its motion record which sought Court approval of the Successful Bid. On February 5, 2024, Cargill served a motion record which sought, among other things: (a) an order requiring Tacora, the Monitor, Cargill, and the Ad Hoc Group to attend mediation; and (b) a declaration that the Offtake Agreement could not be transferred to and vested in ResidualCo pursuant to a reverse vesting transaction without first disclaiming the Offtake Agreement.[14]

19. On February 9, 2024, the Court ordered a litigation timetable to hear the Sale Approval Motion on April 10-12, 2024.[15]

20. Prior to the Sale Approval Motion, iron price of iron ore fell from approximately $144/tonne at the beginning of January 2024 to $99.65/tonne on March 15, 2024.[16] The direct impacts of decreases in the price of iron ore resulted in, among other things, Tacora requiring additional DIP financing priming its secured creditors and increases to Post-Filing Credit Extensions.[17] It also resulted in Tacora being unable to fulfill a net debt condition in the Investors' Bid. On April 9, 2024, counsel to the Investors advised Tacora that the Investors were

[11] Vuong Affidavit at para 14.
[12] Vuong Affidavit at para 15.
[13] Vuong Affidavit at para 18.
[14] Vuong Affidavit at para 19.
[15] Vuong Affidavit at para 20.
[16] Vuong Affidavit at para 30.
[17] Vuong Affidavit at para 30.

no longer able to proceed with the Successful Bid. On April 11, 2024, Tacora and the Investors executed a mutual termination terminating the Subscription Agreement.[18]

E. Efforts to Advance a Consensual Resolution

21. Despite significant efforts by the Company during the Pre-Filing Strategic Process and the Solicitation Process to identify parties who could potentially provide Tacora with new money financing, no third-party investors were willing to invest in Tacora without significant changes to Tacora's capital structure, the Offtake Agreement, or both.[19]

22. Following termination of the Subscription Agreement between Tacora and the Investors, the Company engaged in discussions and negotiations with the Ad Hoc Group and Cargill in respect of options for a consensual restructuring and recapitalization transaction for the Company.[20]

23. Tacora has made significant efforts, with the assistance of its advisors and the Monitor, to advance negotiations between Cargill and the Ad Hoc Group and to attempt to achieve a consensual, going-concern outcome.[21]

24. Among other things, the Board separately met with Cargill and the Ad Hoc Group, the parties exchanged and negotiated term sheets in respect of a recapitalization transaction, potential third-party equity investors conducted site-visits at the Scully Mine, and the Company and its advisors participated in several meetings (both in-person and virtually) with its two major stakeholder groups.[22]

25. While negotiations are continuing, a consensual resolution for the Company's restructuring has not been achieved to date. The Company intends to continue its efforts to achieve a consensual resolution in parallel with the Sale Process.[23]

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[18] Vuong Affidavit at paras 21-22.
[19] Vuong Affidavit at para 23.
[20] Vuong Affidavit at para 25.
[21] Vuong Affidavit at para 26.
[22] Vuong Affidavit at para 27.
[23] Vuong Affidavit at para 28.

F. Need for Expedited Emergence from CCAA

26. Significant damage will result to Tacora and its stakeholders if Tacora cannot emerge from these CCAA Proceedings as a going concern in an expedited manner.[24]

27. As result of the delayed emergence from the CCAA Proceedings and the significant iron ore market volatility described above, Tacora has had to incur additional debt under the DIP Facility. As of the week ending June 23, 2024, Tacora is forecasted to add at least another $125 million of secured debt to its balance sheet through the DIP Facility on top of its already overleveraged capital structure at the time that it commenced these CCAA Proceedings. The increasing amount of debt will make the restructuring more difficult to complete as third-party investors will need to invest incremental amounts to address the DIP financing prior to investing the required amounts into the Company to make the necessary for Tacora to become a stable and sustainable operation.[25] Without attracting sufficient capital to make these capital improvements to increase production, Tacora will continue to generate losses.[26] The only manner in which Tacora can become a long-term sustainable operation is attracting investors and/or purchaser which make the necessary investments in the Scully Mine.

28. In addition, the delayed emergence from the CCAA Proceedings has caused the Company to continue to receive and respond to questions from various trade creditors and employees. As the second largest employer in the Labrador West region, delaying emergence from these CCAA Proceedings will result in uncertainty for a significant number of employees. The interests of this major stakeholder group continue to remain a key concern while Tacora seeks an alternative going-concern solution.[27] Tacora was also recently advised by one trade creditor, Caterpillar, that it intends to bring a motion to lift the stay to seize its equipment.[28] This relief, if granted, would have destabilizing effect on Tacora's operations and business at the Scully Mine.

29. Further, on May 14, 2024, Mr. Broking, Tacora's Chief Executive Officer, gave the Company notice of his resignation. Mr. Broking's notice of resignation has prompted further

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[24] Vuong Affidavit at para 29.
[25] Vuong Affidavit at para 38.
[26] Vuong Affidavit at para 36.
[27] Vuong Affidavit at para 41.
[28] Vuong Affidavit at para 40.

questions from the Company's employees as the resignation occurred at a time of uncertainty created by the ongoing CCAA Proceedings.[29]

G. Sale Process

30. For the reasons above, time is of the essence to achieve an actionable transaction to allow the Company to emerge from these CCAA Proceedings. Accordingly, the Company, in consultation with its advisors and the Monitor, has developed a Sale Process to commence in parallel as negotiations with Cargill and the Ad Hoc Group continue. A draft of the Sale Process was provided to Cargill and the Ad Hoc Group for their review and comment.[30]

31. Given the Pre-Filing Strategic Process and the Solicitation Process run during the CCAA Proceedings, the Sale Process contemplates a single-phase bid process with a potential Auction (should more than one Qualified Bid be received by the Bid Deadline).[31] The contemplated Sales Process will also occur in parallel with certain litigation related to the disclaimer of the Offtake Agreement and the availability of an RVO. Tacora is advancing these matters to provide more certainty on transaction structure and address the litigation delay by Cargill that plagued the first attempt of sale approval with the bid from the Investors.

32. Direction from the Court on the availability of an RVO will also allow the Company to provide direction to Potential Bidders as to the form of Bid that will be accepted – a share deal to be implemented through an RVO structure or an asset deal to be implemented through an APA. Directing all Potential Bidders to submit a single type of transaction structure will also allow for an "apples to apples" comparison of Bids.[32]

33. A purchase of the shares of Tacora pursuant to an RVO has many benefits. An RVO would allow Tacora to continue from the benefits of its Permits and Licenses and contracts with various commercial counterparties and avoid the risks and delay associated with transferring same. It would also permit the preservation of Tacora's tax attributes. A loss of Tacora's tax attributes could result in a significant decrease to bidders' valuation of the Company.[33] Based

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[29] Vuong Affidavit at para 42.
[30] Vuong Affidavit at para 47.
[31] Vuong Affidavit at para 48.
[32] Vuong Affidavit at para 51.
[33] Vuong Affidavit at para 49.

upon bids received in the Solicitation Process, Tacora expects all bidders will want to complete a share transaction by way of an RVO.[34]

34. The Sale Process contemplates the following key milestones, which may be extended from time to time by Tacora, in consultation with the Financial Advisor and with the consent of the Monitor:[35]

Event	Timing
1. Access to VDR and Template Subscription Agreement or Template APA, as applicable Bidders provided access to the VDR, subject to execution of an appropriate NDA and provided with a copy of the Template Subscription Agreement or Template APA, as applicable.	Access to the VDR has been and will be provided to parties on a rolling basis following request for access and execution of an appropriate NDA. Parties will be provided with a Template Subscription Agreement or Template APA three days following the Court's decision on the Preliminary Motion, the Disclaimer Motion, and the Cargill Process Motion.
2. Bid Deadline Deadline for Bidders to submit binding definitive offers in accordance with the requirements of Section 10.	July 12, 2024
3. Auction, if applicable	July 16, 2024
4. Approval Motion Hearing of Approval Motion in respect of Successful Bid (subject to Court availability).	July 26, 2024
5. Outside Date – Closing Outside Date by which the Successful Bid must close.	To be determined by Tacora, in consultation with the Financial Advisor and the Monitor. Tacora will announce such date to Bidders in advance of the Bid Deadline.

[34] Vuong Affidavit at para 50.
[35] Vuong Affidavit at para 55.

35. The July 12 Bid Deadline and other proposed milestones in the Sale Process are based on the need for the Company to emerge from these CCAA Proceedings as a going concern as soon as possible and the remaining availability under the Company's DIP financing.[36] Based on the cash flow forecast appended to the Eighth Report of the Monitor dated April 21, 2024, Tacora was expected to submit a DIP advance request during the week ending June 2, 2024, for the remaining maximum amount available under the DIP Facility.

36. The non-exhaustive list of considerations enumerated in the Sale Process to determine the Successful Bid are the same as those listed in the previous Court-approved Solicitation Process.[37]

H. Stay Extension

37. The Stay Period currently expires on June 24, 2024, and Tacora is seeking an extension of the Stay Period until and including July 29, 2024.[38]

38. Since the granting of the last order extending the Stay Period, Tacora has been working in good faith and with due diligence to advance its restructuring within these CCAA Proceedings and has, among other things:

(a) continued to operate in the ordinary course of business;

(b) made significant efforts to advance a consensual, going-concern outcome between Cargill and the Ad Hoc Group;

(c) prepared and commenced the Sale Process;

(d) commenced the Claims Procedure by delivering Claims Packages to Known Claimants and reviewing Proofs of Claims;

(e) appeared before the Court to advise of recent developments in these CCAA Proceedings;

(f) appointed Mr. Vuong to the Board following the announcement that Mr. Broking, Tacora's Chief Executive Officer, had given 30 days' notice of his resignation;

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[36] Vuong Affidavit at para 56.
[37] Vuong Affidavit at para 57.
[38] Vuong Affidavit at para 58.

(g) delivered a Notice of Disclaimer in respect of the Offtake Agreement and the Stockpile Agreement;

(h) responded to creditor and stakeholder enquiries regarding these CCAA Proceedings;

(i) entered into certain Post-Filing Hedging Arrangements (as defined in the Amended DIP Agreement) with Cargill; and

(j) appeared before the Court in relation to a dispute with 1128349 BC Ltd. ("**MFC**") on the amount of royalty payments owing to MFC.

39. As described above, the CCAA Proceedings have been prolonged. Three Key Employees have given notice of their resignation thereby forfeiting their entitlement to a KERP payment. Tacora is seeking the Court's approval to reallocate the KERP amounts under the existing KERP Funds which were allocated to the Key Employees who have resigned to certain other Key Employees.[39] Details of the KERP reallocation are set forth in the Confidential Appendix to the Ninth Report.[40]

PART II - ISSUES

40. The issues to be determined on this motion are whether this Court should grant the Sale Process Order and the Stay Extension Order.

PART III - LAW AND ANALYSIS

A. The Sale Process Order Should be Granted

1. Test for the Approval of the Sale Process is Satisfied

41. The remedial nature of the CCAA confers broad powers to the Court to facilitate restructurings, including the power to approve a solicitation process prior to, or in the absence of, a plan of compromise and arrangement.[41]

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[39] Vuong Affidavit at para 63.
[40] Ninth Report of the Monitor dated June 3, 2024 (the "**Ninth Report**") at paras 59-63.
[41] *Nortel Networks Corporation (Re)*, 2009 CanLII 39492 at paras 47-48.

42. Subsection 36(3) of the CCAA sets out certain factors for the Court to consider in approving a sale, which include:

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) whether the monitor approved the process leading to the proposed sale or disposition;

(c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.[42]

43. Section 36 does not directly address the factors a court should consider when determining whether to approve a sale process, however, such criteria can be evaluated in light of the considerations that will ultimately apply when seeking approval of a sale transaction, including whether the process is reasonable in the circumstances, whether the Monitor approved the process, and the extent to which the creditors were consulted.[43]

44. In *Walter Energy*, the Court considered the following additional factors in approving sale procedures in a CCAA proceeding:

(a) the fairness, transparency and integrity of the proposed process;

(b) the commercial efficacy of the proposed process in light of the specific circumstances; and

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[42] CCAA, s. 36(3).
[43] *Brainhunter Inc (Re)*, 2009 CanLII 72333 at para 16; CCAA, s. 36(3).

(c) whether the sales process will, in the circumstances, optimize the chances of securing the best possible price for the assets for sale.[44]

45. The factors articulated in *Walter Energy* have been cited approvingly in subsequent decisions, including in the recent CCAA proceedings of Nordstrom Canada[45] and Bron Media Corp.,[46] and in this Court's prior endorsement approving the Solicitation Process.[47]

46. The following factors support this Court's approval of the proposed Sale Process:

(a) the Sale Procedures are fair and reasonable in the circumstances;

(b) the Sale Procedures were developed by the Company, in consultation with its advisors and the Monitor;

(c) the draft Sale Procedures were provided to Cargill and the Ad Hoc Group for feedback;

(d) the Sale Process will be run by the Company's Financial Advisor with assistance from the Company and with the oversight of the Monitor;

(e) the proposed milestones and Bid Deadline enhance commercial efficacy and are based on the need for the Company to emerge from these CCAA proceedings as a going concern as soon as possible and the remaining availability under the Company's DIP financing;[48]

(f) the non-exhaustive list of considerations enumerated in the Sale Procedures to determine the Successful Bid are identical to those listed in the previous Court-approved Solicitation Procedures;[49]

(g) the Sale Process will optimize the chances of securing the best possible price for the assets for sale;[50] and

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[44] *Walter Energy Canada Holdings, Inc*, 2016 BCSC 107 at paras 20-21; *CCM Master Qualified Fund v blutip Power Technologies*, 2012 ONSC 1750 at para 6.
[45] *Nordstrom Canada Retail, Inc*, 2023 ONSC 1631 at para 9.
[46] *Bron Media Corp (Re)*, 2023 BCSC 1563 at para 41.
[47] *Tacora Resources Inc (Re)*, 2023 ONSC 6126 at para 166.
[48] Vuong Affidavit at para 56; Ninth Report at para 57.
[49] Vuong Affidavit at para 57.
[50] Vuong Affidavit at para 48.

(h) the Monitor has recommended that this Court approve the Sale Process and the Sale Procedures, as it believes the Sale Process, with the possibility of an Auction, (a) provides for a broad, open, fair and transparent process; (b) provides for an appropriate level of independent oversight; (c) should encourage and facilitate bidding by interested parties; and (d) is reasonable in the circumstances.[51]

47. For these reasons, the proposed Sale Process will best serve the interests of the Company's stakeholders as a whole by enhancing the prospects of a successful restructuring and should therefore be approved by this Court.

B. The Court Should Grant the Stay Extension Order

48. Tacora is also seeking this Court's approval of the Stay Extension Order to, among other things: (a) extend the Stay Period until and including July 29, 2024; (b) authorize Tacora to reallocate KERP Funds that were earmarked for Key Employees who have resigned from Tacora to certain other Key Employees; and (c) sealing the Confidential Appendix, which contains an overview of the reallocated KERP.

1. Stay Extension

49. Tacora is seeking an extension of the Stay Period from June 24, 2024, until and including July 29, 2024. The extension of the Stay Period is necessary and appropriate in the circumstances to provide Tacora with sufficient time to conduct the Sale Process and secure another going-concern transaction.[52]

50. The Court may grant an extension of the Stay Period "for any period that the court considers necessary" where: (a) the applicant satisfies the court that circumstances exist that make the order appropriate; and (b) the applicant satisfies the court that it has acted, and is acting, in good faith and with due diligence.[53]

51. The extension of the Stay Period until and including July 29, 2024, is necessary and appropriate in the circumstances, as:

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[51] Ninth Report at paras 57-58.
[52] Vuong Affidavit at para 58.
[53] CCAA, s. 11.02(2)-(3).

(a) the proposed extension of the Stay Period is necessary for Tacora, together with its advisors and the Monitor, to continue to review and advance its potential alternatives and pursue a value-maximizing transaction for the benefit of the Company and its stakeholders generally;[54]

(b) Tacora has acted, and continues to act, in good faith and with due diligence to advance its restructuring within these CCAA Proceedings;[55]

(c) Tacora's creditors will not be materially prejudiced by the proposed extension of the Stay Period;[56]

(d) the Updated Cash Flow Forecast reflects that, subject to the assumptions related thereto, Tacora is forecast to have sufficient liquidity to fund its obligations and the costs of the CCAA Proceedings through the end of the proposed extension of the Stay Period;[57] and

(e) the Monitor supports the requested extension of the Stay Period.[58]

52. Accordingly, Tacora believes the requested extension of the Stay Period until and including July 29, 2024, is necessary and appropriate in the circumstances.

2. Reallocation of the KERP Funds

53. Tacora is also seeking to reallocate the KERP Funds that were earmarked for Key Employees who have resigned from Tacora.[59]

54. As described above, the CCAA Proceedings have been prolonged. Three Key Employees have previously given notice of their resignation thereby forfeiting their entitlement to a KERP payment. Tacora is seeking the Court's approval to reallocate the KERP amounts under the existing KERP Funds which were allocated to the Key Employees who have resigned to certain other Key Employees.[60]

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[54] Ninth Report at paras 66 and 68.
[55] Vuong Affidavit at para 59; Ninth Report at para 68.
[56] Vuong Affidavit at para 61.
[57] Vuong Affidavit at para 60; Ninth Report at para 67.
[58] Ninth Report at para 68.
[59] Vuong Affidavit at para 62.
[60] Vuong Affidavit at para 63.

55. Courts have granted similar amendments to key employee incentive plans in other cases, including to amend and restate the list of employees eligible for such programs[61] and for the reallocation of KERP funds resulting from employee attrition.[62]

56. The Key Employees are critical to the Company's operations and restructuring activities. The additional Key Mine Employee is similarly critical to the Company's operations and restructuring activities. There is a risk that the Key Employees may pursue other employment opportunities if the KERP amounts under the existing KERP Funds are not reallocated.[63]

57. Finding alternative, qualified individuals to replace the Key Employees will be challenging, disruptive, costly, and time consuming for the Company.[64]

58. The Monitor supports the reallocation of the KERP Funds previously earmarked for Key Employees who have resigned and will be providing further details with respect to the appropriateness of the requested relief in its Ninth Report.[65]

59. Accordingly, the reallocation of the KERP Funds is appropriate, reasonable and justified in the circumstances, and the terms, conditions and amounts of such reallocation are in line with the KERP approved by this Court and employee retention plans approved in other CCAA proceedings.

3. Sealing of the Confidential Appendix

60. The Monitor will be providing an overview of the reallocation of the KERP Funds as a Confidential Appendix to its Ninth Report. This overview includes, among other things, the amounts to be reallocated to certain Key Employees and the general roles of these Key Employees.[66]

61. Tacora requests a sealing order in relation to the Confidential Appendix to protect the personal compensation information contained therein.

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[61] See, for example, *Arrangement relatif à FormerXBC Inc (Xebec Adsorption Inc)*, 2023 QCCS 834.
[62] *PCAS Patient Care Automation Services Inc (Re)*, 2012 ONSC 2423 at para 10.
[63] Vuong Affidavit at para 64.
[64] Vuong Affidavit at para 65.
[65] Vuong Affidavit at para 67; Ninth Report at para 63.
[66] Vuong Affidavit at para 66.

62. This Court has discretion under the *Courts of Justice Act* (Ontario) to order that any document filed in a civil proceeding be treated as confidential and sealed, and not form part of the public record.[67]

63. The test to determine if a sealing order should be granted is set out In *Sierra Club* as recast in *Sherman Estate*. In determining whether to grant a sealing order, the Court should consider whether:

(a) court openness poses a serious risk to an important public interest;

(b) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and

(c) as a matter of proportionality, the benefits of the order outweigh its negative effects.[68]

64. The Supreme Court in *Sierra Club* and *Sherman Estate* explicitly recognized that commercial interests, such as protecting confidential information, are an "important public interest" for the purposes of this test.[69]

65. Courts have applied the *Sierra Club* and *Sherman Estate* tests in the insolvency context and authorized sealing orders over confidential or commercially sensitive documents.[70] Courts have previously granted sealing orders in respect of individual compensation arrangements relating to key employee retention plans.[71]

66. The Confidential Appendix contains individual compensation information and the amount of the proposed and reallocated KERP payments for each eligible employee. Employees have a reasonable expectation that their names and salary information will be kept confidential. Protecting the sensitive personal compensation information of the employees is an important public interest that should be protected. The sealing order is necessary in order to protect the

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[67] *Courts of Justice Act*, RSO 1990, c. C 43, s. 137(2).
[68] *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41 at para 53 ("***Sierra Club***"); *Sherman Estate v Donovan*, 2021 SCC 25 at paras 38 and 43 ("***Sherman Estate***").
[69] *Sierra Club*, *supra* at para 55; *Sherman Estate*, *supra* at paras 41-43.
[70] See, for example, *Ontario Securities Commission v Bridging Finance Inc*, 2021 ONSC 4347 ("***Bridging Finance***") at paras 23-28; **see also** *Re Just Energy Corp*, 2021 ONSC 1793 ("***Just Energy***") at paras 123-124.
[71] *Bridging Finance*, *supra* at paras 23-28; *Golf Town Canada Holdings Inc (Re)*, Initial Order dated September 14, 2016 at para 64 (Court File No. CV-16-11527-00CL); *Acerus Pharmaceuticals Corporation et al (Re)*, Amended and Restated Initial Order dated February 3, 2023 (Court File No. CV-23-00693595-00CL); *Just Energy*, *supra* at paras 123-124.

privacy rights of Tacora's employees while permitting the Court to consider the details of the KERP. As a matter of proportionality, the benefits of sealing the Confidential Appendix outweigh its negative effects.

PART IV - ORDER SOUGHT

67. Tacora respectfully requests that this Court grant the Sale Process Order and the Stay Extension Order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 3rd day of June, 2024.

Stikeman Elliott LLP

STIKEMAN ELLIOTT LLP
Counsel for the Applicant

SCHEDULE "A"
LIST OF AUTHORITIES

1. *Acerus Pharmaceuticals Corporation et al (Re)*, Amended and Restated Initial Order dated February 3, 2023 (Court File No. CV-23-00693595-00CL).
2. *Arrangement relatif à FormerXBC Inc (Xebec Adsorption Inc)*, 2023 QCCS 834.
3. *Brainhunter Inc (Re)*, 2009 CanLII 72333.
4. *Bron Media Corp (Re)*, 2023 BCSC 1563.
5. *CCM Master Qualified Fund v blutip Power Technologies*, 2012 ONSC 1750.
6. *Golf Town Canada Holdings Inc (Re)*, Initial Order dated September 14, 2016 (Court File No. CV-16-11527-00CL).
7. *Nordstrom Canada Retail, Inc*, 2023 ONSC 1631.
8. *Nortel Networks Corporation (Re)*, 2009 CanLII 39492.
9. *Ontario Securities Commission v Bridging Finance Inc*, 2021 ONSC 4347.
10. *PCAS Patient Care Automation Services Inc (Re)*, 2012 ONSC 2423.
11. *Re Just Energy Corp*, 2021 ONSC 1793.
12. *Sherman Estate v Donovan*, 2021 SCC 25.
13. *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41.
14. *Tacora Resources Inc (Re)*, 2023 ONSC 6126.
15. *Walter Energy Canada Holdings, Inc*, 2016 BCSC 107.

SCHEDULE "B"
RELEVANT STATUTES

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

General power of court

11 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.

Stays, etc. — other than initial application

11.02(2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

> (a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);
>
> (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
>
> (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Burden of proof on application

11.02(3) The court shall not make the order unless

> (a) the applicant satisfies the court that circumstances exist that make the order appropriate; and
>
> (b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

Restriction on disposition of business assets

36(1) A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

Notice to creditors

36(2) A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

Factors to be considered

36(3) In deciding whether to grant the authorization, the court is to consider, among other things,

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) whether the monitor approved the process leading to the proposed sale or disposition;

(c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

***Courts of Justice Act*, RSO 1990, c. C 43**

Sealing documents

137(2) A court may order that any document filed in a civil proceeding before it be treated as confidential, sealed and not form part of the public record.

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

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

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

(Applicant)

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDING COMMENCED AT TORONTO

FACTUM OF THE APPLICANT
(Re: Sale Process, KERP and Stay Extension Orders)

STIKEMAN ELLIOTT LLP
5300 Commerce Court West
199 Bay Street
Toronto, ON M5L 1B9

Ashley Taylor (LSO #39932E)
Tel: 416-869-5236
Email: ataylor@stikeman.com

Lee Nicholson (LSO #66412I)
Tel: 416-869-5604
Email: leenicholson@stikeman.com

Natasha Rambaran (LSO #80200N)
Tel: 416-869-5504
Email: nrambaran@stikeman.com

Philip Yang (LSO #82084O)
Tel: 416-869-5593
Email: pyang@stikeman.com

Counsel for the Applicant