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.**

# NOTICE OF MOTION
## (Motion to Set Aside Disclaimer)

Cargill, Incorporated ("**Cargill Inc.**") and Cargill International Trading Pte Ltd. ("**CITPL**" and together, "**Cargill**") will make a motion before Justice Kimmel of the Ontario Superior Court of Justice (Commercial List) on June 26, 2024 at 330 University Avenue, Toronto, Ontario.

**PROPOSED METHOD OF HEARING**: The motion is to be heard,

☐ In writing under subrule 37.12.1(1);

☐ In writing as an opposed motion under subrule 37.12.1(4);

☒ In person;

☐ By telephone conference;

☐ By video conference.

**THE MOTION IS FOR** an order:

(a) in accordance with subsection 32(2) of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**"), that the Offtake Agreement and Stockpile

Agreement (each as defined and described below) are not disclaimed, despite the Notice of Disclaimer of Tacora Resources Inc. dated May 16, 2024 (the "**Notice of Disclaimer**");

(b) declaring that the Offtake Agreement and Stockpile Agreement continue to bind Tacora and are otherwise enforceable against it;

(c) permanently sealing the materials to be filed on this motion in connection with the Notice of Disclaimer that contain confidential information in respect of the Offtake Agreement and Stockpile Agreement; and

(d) such further and other relief as this Honourable Court may deem just.

**THE GROUNDS FOR THE MOTION ARE:**

***Tacora's CCAA Proceedings and Restructuring Efforts to Date***

2. Tacora Resources Inc. ("**Tacora**" or the "**Company**") is a private company focused on the production and sale of iron ore concentrate. It owns the Scully Mine, located in Labrador, which it acquired in 2017.

3. On October 10, 2023, Tacora was granted protection under the CCAA pursuant to an initial order (as amended, the "**Initial Orde**r") of the Ontario Superior Court of Justice (Commercial List) (the "**Court**"). Most recently, the stay of proceedings was extended to June 24, 2024.

4. From October 30, 2023 to January 19, 2024, Tacora solicited offers or proposals for a sale, restructuring or recapitalization transaction in respect of Tacora's assets and business operations, through a two-phase sale, investment and services solicitation process approved by the Court (the "**SISP**").

5. As part of the SISP, Tacora received three Phase 2 bids (including a bid from Cargill), and selected a bid from a consortium formed by an ad hoc ground of noteholders and new equity participants as the successful bid (the "**AHG Consortium Bid**").

6. As described further below, the AHG Consortium Bid is no longer available to Tacora. Tacora is now seeking approval of a new Sale Procedure Order, which would see a further sale solicitation process occur from early June to July 2024 (the "**Second Sale Process**").

7. Cargill Inc. is the DIP lender and CITPL is a secured creditor of Tacora in respect of an advanced payments facility with Tacora. CITPL is also the counterparty to the Offtake Agreement and Stockpile Agreement which are the subject of Tacora's Notice of Disclaimer, and which, if disclaimed, would make CITPL the largest unsecured creditor of Tacora.

***The Offtake Agreement and Stockpile Agreement***

8. Tacora and CITPL are parties to an Iron Ore Sale and Purchase Contract, dated April 5, 2017 and restated on or about November 11, 2018, and as further amended from time to time, whereby Cargill buys 100% of the iron ore concentrate production at the Scully Mine (the "**Offtake Agreement**"). The Offtake Agreement was amended in 2020 to last for the life of the Scully Mine.

9. Pursuant to the Offtake Agreement, Cargill purchases and takes possession of the iron ore once it is loaded onto a vessel at port for shipment. Payment from CITPL to Tacora pursuant to the Offtake Agreement is made upon vessel load and then finalized at a later date, accounting for variations in the market price of iron ore and hedging arrangements that may be entered into in the interim. Substantial price swings in the intervening shipment period are to be settled in cash, subject to a margin facility made available as part of the Offtake Agreement.

10. Tacora and CITPL are also parties to an Iron Ore Stockpile Purchase Agreement dated December 17, 2019 (the "**Stockpile Agreement**", and together with the Offtake Agreement, the "**Agreements**"), which amends the Offtake Agreement by advancing the time at which Cargill purchases and takes possession of the iron order to when it is unloaded to a stockpile at the port (i.e. before it is on the vessel).

11. The payment mechanisms in the Offtake Agreement and Stockpile Agreement function together, and offer working capital to Tacora at an earlier stage than Tacora would otherwise have access to it. The Agreements also provide a margin facility that insulates Tacora from the effects of iron ore price swings which would otherwise necessitate settlement in cash. The Agreements further provide opportunities for the parties to enter into further hedging arrangements, which they did: Cargill regularly agreed to hedging agreements with Tacora to manage Tacora's risk from price fluctuations, which were implemented through amendments to the pricing formula in the Offtake Agreement.

12. There are significant operational interdependencies and features to the Offtake Agreement and Stockpile Agreement that render their termination complicated and problematic both for Tacora and Cargill. Tacora's iron ore must be transported by train to the port, and then stored at the stockpile. Onward shipment vessels and third party contracts must be arranged, and the iron ore is then loaded onto vessels and shipped to third party purchasers around the world.

13. The Offtake Agreement and Stockpile Agreement are the Company's only sources of cash flow, apart from the DIP facility funded by Cargill.

***The Prior RVO Motion***

14. Upon selecting the AHG Consortium Bid as the successful bid in the SISP, Tacora brought a motion on February 2, 2024 seeking a reverse vesting order from this Court to approve the transaction contemplated by the AHG Consortium Bid (the "**RVO Motion**"). Tacora sought this relief in order to rid itself of its obligations under the Offtake Agreement and Stockpile Agreement (without, at that time, purporting to follow the disclaimer procedures of section 32 of the CCAA). The effect of the RVO Motion and the AHG Consortium Bid for which Tacora sought approval would have been to create a damages claim in excess of US$500 million in favour of Cargill against Tacora that would not be satisfied.

15. Cargill disputed this relief on numerous bases, including that an RVO is an extraordinary remedy that was not available or appropriate, as it was not the only available transaction or the best available alternative for Tacora and its stakeholders in the circumstances.

16. Tacora subsequently withdrew the RVO Motion as the AHG Consortium Bid had been withdrawn.

17. Tacora agreed to obtain a Claims Procedure Order in connection with a potential restructuring, though it has to date resisted seeking a Meeting Order and filing a plan of compromise or arrangement. Cargill has continued to seek to engage in dialogue and negotiation with Tacora about the best path forward for all stakeholders.

***Notice of Disclaimer of the Offtake Agreement***

18. On May 16, 2024, Tacora delivered a Notice of Disclaimer to Cargill seeking to disclaim the Offtake Agreement and the Stockpile Agreement (the "**Disclaimer**"). Tacora identified two alleged reasons for the Disclaimer in its Notice of Disclaimer:

(a) it will increase Tacora's chances of successfully identifying a going-concern transaction for its business and exiting the CCAA; and

(b) the Offtake Agreement is "off-market" in its life-of-mine term and its profit share, among other characteristics.

19. Cargill brings this motion for an order that the Offtake Agreement and Stockpile Agreement not be disclaimed.

20. The Offtake Agreement and Stockpile Agreement cannot be disclaimed pursuant to the CCAA for the following reasons:

(a) the nature of the Agreements as "eligible financial contracts" is such that they are prohibited from being disclaimed by Section 32(9)(a);

(b) the nature of the Agreements as "financing agreements" where Tacora is the borrower is such that they are prohibited from being disclaimed by Section 32(9)(c); and

(c) the proposed Disclaimer would not enhance the prospects of a viable compromise or arrangement being made in respect of the Company.

***The Offtake Agreement and Stockpile Agreement Cannot be Disclaimed***

21. The Offtake Agreement, alone and in conjunction with the Stockpile Agreement, is an eligible financial contract, including because it falls within the definition of "derivatives agreement" within the meaning of s. 2 of the Eligible Financial Contract Regulations. It allows Tacora to mitigate risk associated with iron ore pricing.

22. In addition, the Offtake Agreement and the Stockpile Agreement are financing agreements in which Tacora is the borrower. Since Tacora does not have any working capital loan arrangements, it uses the cash flow provided by Cargill through the Agreements to fund its operations on a day-to-day basis. Cargill can also provide financing to Tacora as borrower through the margining facility under the Offtake Agreement for price fluctuations up to $7.5 million in Cargill's favour.

***Disclaiming the Offtake Agreement would Not Enhance Prospects of Viable Plan***

23. The Disclaimer of the Offtake Agreement and the Stockpile Agreement will not enhance the prospects of a viable compromise or arrangement being made in respect of Tacora.

24. It is inappropriate, and not in the interests of enhancing a viable compromise, for the Disclaimer to be allowed at this critical time in the CCAA proceedings. Tacora needs operational stability in order to maximize value and achieve a successful restructuring solution in the next few months. The timing of the delivery of the Notice of Disclaimer increases risk in a number of areas for Tacora and its stakeholders.

25. If the Disclaimer is effected, an unsecured claim in excess of USD $500 million will be created in respect of Cargill.

26. The reason for Tacora's attempted Disclaimer is not to enhance the prospects of a viable compromise or arrangement, but to make an attempt to clear its path from obstacles to seeking a future RVO transaction with a hypothetical bidder in the Second Sale Process. Tacora can proceed with an asset sale and these issues would not need to be determined, or it can attempt to address the Offtake Agreement pursuant to an opposed RVO transaction.

27. An RVO is not a compromise or arrangement. The Disclaimer does not enhance the prospects of a consensual plan of compromise and arrangement to be voted on and approved by creditors. Rather, it creates the largest unsecured claim that would position Cargill to control the vote on any potential proposed CCAA plan.

28. Further, Tacora relies on the Offtake Agreement for 100% of its cash flows. If the Disclaimer were made effective on June 26, 2024, it would create significant instability for the Company, put the business at tremendous liquidity risk, and result in bidders evaluating a potential restructuring or sale transaction with a target that has no reliable cash flow.

29. Maintaining the status quo, rather than a Disclaimer, will better enhance the prospect of a viable compromise or arrangement, as Tacora will have stability and all options available to it, including a plan but also including an asset sale or an opposed RVO transaction.

30. It is not fair, appropriate or reasonable in the circumstances for Tacora to disclaim the Offtake Agreement and Stockpile Agreement.

***Sealing***

31. Certain confidential information relating to the Agreements is contained in the materials to be filed on this motion (the "**Confidential Material**").

32. The Confidential Material contains commercially sensitive information pertaining to the terms of the Agreements.

33. If the Confidential Material is publicly disclosed, competitors of Cargill could use it to harm Cargill's interests, both generally and in the context of Tacora's CCAA proceeding.

34. The Offtake Agreement contains a confidentiality clause to protect its commercially sensitive information (subject to limited exceptions).

35. Alternative measures will not protect against the risks of disclosure of the Confidential Material and sealing of the Confidential Material is reasonable in light of the circumstances.

36. The salutary effects of sealing the Confidential Material from the public record greatly outweigh the deleterious effects of doing so under the circumstances. No party will be prejudiced if the Confidential Material is sealed on the basis requested. No public interest will be served if the Confidential Material is disclosed.

***General***

37. The CCAA, including sections 11 and 32 and the Regulations thereof.

38. Rules 2.03, 3.02, 10.01, 12.07 and 37 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, as amended.

39. Such further and other grounds as counsel may advise and this Honourable Court may permit.

**THE FOLLOWING DOCUMENTARY EVIDENCE** will be used at the hearing of the motion:

40. Affidavit of Jeremy Cusimano sworn March 1, 2024, and cross-examination transcripts in relation thereto, portions of which are confidential;

41. Affidavit of William Gula sworn March 1, 2024, and cross-examination transcripts in relation thereto, portions of which are confidential;

42. Affidavit of Matthew Lehtinen sworn March 1, 2024, and cross-examination transcripts in relation thereto, portions of which are confidential;

43. Affidavit of Joe Broking sworn February 2, 2024, and cross-examination transcripts in relation thereto, portions of which are confidential;

44. Affidavit of Matthew Lehtinen, to be sworn;

45. Evidence and argument filed in respect of the dispute between Tacora and 0778539 B.C. Ltd. and 1128349 B.C. Ltd. referred to as the "MFC Royalty Dispute"; and

46. Such further and other materials as counsel may advise and this Honourable Court may permit.

May 31, 2024

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Proceeding Commenced At Toronto

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