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)

REPLY FACTUM OF THE APPLICANT
(Re: Sale Process Motion)
(Returnable June 5, 2024)

June 4, 2024

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TO: SERVICE LIST

1. This Reply Factum is filed in response to the Responding Factum of Cargill, Incorporated and Cargill International Trading Pte Ltd. (collectively, "**Cargill**") in respect of the motion to approve the Sale Process Order.[1]

A. Background

2. On October 30, 2023, this Court granted the Solicitation Order setting out clearly defined rules of a three month sale and investment solicitation process. The Investors submitted the only committed, financed Bid which complied with the criteria established by the Solicitation Order and provided Tacora with an actionable restructuring transaction to emerge from these CCAA Proceedings.

3. Cargill on the other hand, despite consenting to the terms of the Solicitation Process, submitted an uncommitted, unactionable and non-compliant Bid. The Bid was submitted because 10 days before the bid deadline, Cargill's CEO killed a fully backstopped Bid that the Cargill team was preparing to submit and restricted the Cargill team from investing any new capital into Tacora. The evidence on the Sale Approval Motion established that Cargill knew its Bid was non-compliant, but submitted it in conjunction with and as part of a litigation strategy to delay approval of the Successful Bid submitted by the Investors:

(a) On January 9, 2024, Matthew Lehtinen, the Customer Manager Americas in respect of Cargill's metals business, wrote the following to other Cargill employees "we have to submit the bid with a few conditions, it is unlikely that we get tossed out right away, and we can slow play this to buy more time for equity

[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**").

to get there… we have no option but to play this for more time … All things are on the table to preserve the Tacora flow."[2]

(b) On January 30, 2024, a day after the Investors' bid was declared as the Successful Bid, another Cargill member wrote the following to other Cargill members: "[a]s you know, Tacora decided to move with the bonds' deal but should our strategy to buy time works [sic] we may need to be clear on next steps / feasibility of the deal structuring in due time."[3]

(c) On February 9, 2024, after this Court ordered the litigation timetable to hear this Sale Approval Motion, Mr. Lehtinen wrote an email to a potential third-party equity investor stating "[b]y way of update, we have made progress on extending the litigation timetable into April to give us more time to assemble an alternative transaction." [4] (emphasis added)

4. After losing in the Court-ordered Solicitation Process, as part of their over-arching strategy to complicate and further delay approval of the Successful Bid, Cargill filed a motion seeking, among other things, (a) approval of a meeting order to advance a "cram-up" plan of arrangement, and (b) a declaration that, as a matter of law, Tacora cannot transfer the Offtake Agreement to a ResidualCo pursuant to an RVO transaction without first disclaiming the Offtake Agreement.

5. Eventually, Cargill's delay strategy proved successful to the detriment of Tacora and its other stakeholders. In conjunction with the litigation delay, iron prices fell from approximately $144/tonne at the beginning of January 2024 to $99.65/tonne on March 15, 2024. The delay resulted in the need for additional borrowings under the DIP Facility and Tacora being unable to

[2] Confidential Exhibit No. 4 to the Cross-Examination of Matthew Lehtinen held on March 19, 2024 ("**Lehtinen Cross Examination**").
[3] Confidential Exhibit No. 8 to Lehtinen Cross Examination.
[4] Confidential Exhibit No. 9 to Lehtinen Cross Examination.

satisfy a net debt condition in the Successful Bid. As a result, the Investors' Successful Bid was terminated and, to date, Tacora has been unable to achieve a going-concern solution that will allow emergence from these CCAA Proceedings and the required investment into the Scully Mine.

B. The Sale Process

6. Tacora seeks approval of a second and final Sale Process to attract an actionable transaction as soon as possible and within the remaining availability under the Company's DIP financing. The Sale Process is designed to focus bidders on a single transaction form that will allow an "apples-to-apples" comparison on the Bid Deadline and avoid the significant litigation delay that plagued the previous Sale Approval Motion and resulted in termination of the only actionable transaction available to Tacora during the last 18 months of marketing efforts.

7. Cargill has objected to the Sale Process and seeks to impose revisions to the Sale Process under the guise of "flexibility" and "value-maximization". In reality, Cargill is seeking to implement the same playbook used to devastating effect in the Solicitation Process. Cargill's proposed amendments set Cargill up to litigate for delay again if it is not satisfied with the outcome of the Sale Process, particularly as it relates to the treatment of the Offtake Agreement, which in its current form is a significant impediment to the restructuring of Tacora.[5] This is an outcome that the Company and its stakeholders, including its 460 employees, cannot afford again.

8. In *Callidus*, the Supreme Court of Canada, citing Professor Janis Sarra, stated "[i]f the CCAA is to be interpreted in a purposive way, the courts must be able to recognize when people have conflicting interests and are working actively against the goals of the statute."[6] Tacora submits this Court should recognize Cargill's comments and proposed revisions for what

[5] Supplement to the Eighth Report of the Monitor dated April 24, 2024 at para 10.
[6] *9354-9186 Québec inc v Callidus Capital Corp*, 2020 SCC 10 at para. 75.

they are – an attempt to undermine Tacora's goals of avoiding uncertainty and litigation delay for bidders participating in the Sale Process.

9. Cargill seeks to gain an advantage for itself as a potential participant in the Sale Process by creating uncertainty for other participants and creating the appearance that bidders must work with Cargill in order to be successful in the Sale Process. This approach will drive potential transactions away from the Sale Process and make it less likely that Tacora will receive actionable, committed Bids on the Bid Deadline. Greenhill, the Company's financial advisor, has already commenced solicitation of potential purchasers and investors and has received direct feedback that the potential litigation delay and uncertainty are significant concerns for potential participants.

C. Cargill's Comments on the Sale Process

10. Contrary to Cargill's suggestion that its comments on the Sale Process were not considered, Tacora, in consultation with Greenhill and the Monitor, considered Cargill's comments on the draft Sale Process and incorporated those which it believed were reasonable and appropriate in the circumstances. However, the remaining Cargill comments work contrary to Tacora's and its stakeholders' interests – achieving and implementing an actionable, going-concern transaction in a timely manner.

11. The specific reasons why Cargill's comments are not acceptable to Tacora are set out in a summary appended to this Reply Factum as Schedule "A".

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 4th day of June, 2024.

Stikeman Elliott LLP

STIKEMAN ELLIOTT LLP
Counsel for the Applicant

SCHEDULE "A"
SUMMARY OF COMMENTS ON THE SALE PROCESS

Section	Cargill's Comments	Tacora's Response
General	Ability to advance a Plan of Compromise and Arrangement (a "**Plan**") in the Sale Process	The Company remains open to the possibility of a Plan in the context of a consensual restructuring supported by both the Ad Hoc Group and Cargill. However, in the context of the Sale Process without a consensual transaction, Cargill's attempt to preserve its ability to "present its transaction with a CCAA plan" is not a good faith attempt to present an actionable transaction. Similar to its "cram-up" Plan submitted in the context of the Sale Approval Motion, presenting a Plan in the Sale Process is an attempt to confuse and complicate approval of an alternative Bid. Any transaction that will attract capital to Tacora will need to address the Company's overleveraged capital structure which will necessarily involve compromising the Senior Notes and/or the Senior Priority Notes. If such a transaction is advanced as a Plan, the Senior Noteholders will have a blocking veto as they will be required to vote separately as secured creditors pursuant to Section 5 of the CCAA.[7] Accordingly, in the Sale Process context, without a consensual restructuring, any Plan presented unilaterally by Cargill is doomed to fail. Allowing Cargill to preserve a hypothetical non-consensual Plan is of particular concern where, as recently as the last case conference, Cargill sought to advance a Plan and schedule a motion for a meeting order only to then advise that it would not be advancing the Plan and withdrawing its proposed meeting order motion. Before withdrawing the motion, Cargill did not provide any draft of its proposed Plan to Tacora or the Monitor to allow these parties to evaluate the proposal. Now Cargill seeks to keep the Plan in reserve, lie in the weeds, and presumably, if it is not satisfied with the outcome of the Sale Process, spring a new Plan and assert it is a "value-maximizing alternative." The Company and other participants in the Solicitation Process have seen this playbook before. The Company believes that such tactics should not be permitted to hamstring the Sale Process. The Company and its stakeholders need certainty that once the Company, in consultation with the Monitor, determine the Successful Bid, it will be advanced and considered for approval by the Court in a timely manner.
Recitals	The following recital should be	This recital reflects a factual statement and should remain in the Sale Procedures, as the outcome of the Preliminary Motions, will directly impact the Sale Process and the

[7] CCAA, s. 5.

Section	Cargill's Comments	Tacora's Response
	deleted: *On June 26, 2024, the Court will hear motions (the "**Preliminary Motions**") by Tacora and Cargill to determine: (a) whether or not the Offtake Agreement and/or the Note Indentures can be transferred and 'vested' into Residual Co. pursuant to a reverse vesting order (an "**RVO**") without the consent of the counterparties to such contracts; (b) whether as a point of law, an RVO transaction structure is available where unsecured creditors hold a veto on a CCAA plan of arrangement and those unsecured creditors do not support an RVO; and (c) whether the Offtake Agreement is disclaimed. Based upon the decision of the Court, Tacora will determine whether all Bidders will be required to submit their Bid in the form of a subscription agreement ("**Subscription Agreement**") for all the shares of Tacora (the "**Shares**") to be implemented pursuant to an RVO or in the form of an asset purchase agreement ("**APA**") for all or substantially all of the Property and the Business.*	type of transaction that Tacora will seek in the Sale Process to allow for an "apples to apples" comparison. As set out in Tacora's Factum, Tacora expects all bidders will want to complete a share transaction by way of an RVO, and therefore, if legally permissible as will be determined in the Preliminary Motions, Tacora may direct bidders to submit Subscription Agreements for all the Shares of Tacora.
Section 2	Parties should not be restricted to submit only one of (a) a share deal implemented through an RVO; or (b) an asset deal implemented through an APA, as directed by the Company. Parties should have flexibility to submit their preferred form of	See above responses.

Section	Cargill's Comments	Tacora's Response
	transaction, including submitting a transaction pursuant to a plan of arrangement structure.	
Section 5	Sale approval should be July 26, 2024, or as otherwise set by the Court. If there is a dispute on the motion, a proper schedule will be required.	The Sale Approval date and other proposed milestones are based on the Company's need to emerge from the CCAA Proceedings as soon as possible and the remaining availability under the Company's DIP financing. The Sale Process provides 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 the original Sale Approval Motion following the Solicitation Process. The Company cannot afford to engage in protracted litigation following conclusion of the Sale Process while it seeks approval of the Successful Bid. The Company is very concerned that, if there is not a fixed date for consideration of the Successful Bid by the Court, prospective purchasers and investors concerned about uncertainty and the potential for delay will not participate.
Section 10(e)(vii)	For a Bid to be a Qualified Bid, it must repay the DIP in full.	Repayment of the DIP Facility in full is not an appropriate Qualified Bid criterion. In *DGDP-BC Holdings Ltd. v. Third Eye Capital Corporation*,[8] the Alberta Court of Appeal recognized that there is no reason why a DIP charge is required to be paid in full to be vested off in connection with a sale under the CCAA.[9] The Court stated "the debtor-in-possession lender is never assured that its loans will be paid back at all or in full. There is always a prospect that the insolvency will evolve unfavourably, meaning that there are insufficient funds to meet all legitimate claims."[10] Cargill's attempt to add a self-serving criterion in the Sale Process that could prevent Tacora from considering potential going-concern transactions is no different from the Ad Hoc Group's attempt to add the concept of a "topping credit bid" in the first Solicitation Process if the Successful Bid did not result in full payment of the Ad Hoc Group's pre-filing secured debt. That provision was appropriately recognized by the Company, the Monitor and, ultimately, this Court as having a potential chilling effect on potential purchasers and could "cause any interested bidder to have discussions with the AHG

[8] *DGDP-BC Holdings Ltd v Third Eye Capital Corporation*, 2021 ABCA 226.
[9] *Ibid* at para. 30.
[10] *Ibid* at para. 32.

Section	Cargill's Comments	Tacora's Response
		regarding a transaction rather than the company, its advisors, and the Monitor, which could result in a loss of control and fairness in the process."[11] Cargill's proposed change should be rejected, and the Qualified Bid criteria should encourage parties to submit any potential Bids that achieve a going-concern outcome for Tacora regardless of the claims of creditors.
Section 10(g)	A Bid should not be considered unqualified simply because it adds different/additional required conditions to their transaction documents	The Template Subscription Agreement and Template APA, as applicable, will be developed to allow for an "apples to apples" comparison of Bids and reflect conditionality that the Company and the Monitor believe is appropriate in the circumstances. Tacora has already had one transaction fail to close due to conditionality and allowing free reign to bidders to add their own conditions creates risk for the Company. This comment also needs to be considered against the backdrop of Cargill's Bid in the Solicitation Process, which contained a financing condition and conditions that it knew could not be satisfied, such as the transfer of tax attributes as part of an asset sale. Similar to the other responses, the Company does not believe it is appropriate for bidders to submit unactionable bids with unacceptable conditions.
Section 12	The Company should have the flexibility to evaluate a Bid that is not a Qualified Bid	The Company does have such flexibility, as it can waive strict compliance with any one or more of the requirements specified in Section 10 and deem such non-compliant Bid to be a Qualified Bid. However, the drafting of the provision reflects the fact that, *prima facie*, Tacora will reject non-compliant Bids unless there is a compelling reason in the circumstances not to. Achieving a committed, actionable Bid by the Bid Deadline is Tacora's primary goal at the end of this Sale Process.
Section 13	If Tacora receives two (2) or more Qualified Bids, it should have the ability to further negotiate.	In response to Cargill's comments, Tacora has added Subsection 13(a) that it may request or negotiate one or more amendments to any Qualified Bid.
Section 15	The Auction date should not be fixed, as parties may need time and	In response to Cargill's comments, Tacora has incorporated the following underlined language to Section 15:

[11] *Tacora Resources Inc (Re)*, 2023 ONSC 6126 at paras. 121 – 123.

Section	Cargill's Comments	Tacora's Response
	flexibility around this.	*If Tacora, in consultation with the Financial Advisor and the Monitor, determines that an Auction should be held, Tacora shall conduct an Auction commencing at 9:00 a.m. (Eastern time) on July 16, 2024, or such other date as determined by Tacora, in consultation with the Financial Advisor and the Monitor, at the offices of Stikeman Elliott LLP located at 5300 Commerce Court West, 199 Bay Street, Toronto, Ontario M5L 1B9.*
Section 16	The DIP Lender should be entitled to attend the Auction.	The DIP Lender's attendance at an Auction is not appropriate in the circumstances. If Cargill submits a Qualified Bid in the Sale Process it can attend the Auction.
Sections 18-22	Auction specifics do not need to set out at this time and can be addressed, if needed, with the Monitor's consent.	Given the history of protracted litigation in these CCAA Proceedings, the Company believes that it is appropriate for this Court to approve the Auction terms set forth in the Sale Procedures to promote certainty and efficiency. In any event, pursuant to Section 17, Tacora, in consultation with the Financial Advisor and the Monitor, may waive and/or employ and announce at the Auction additional rules that it considers reasonable under the circumstances for conducting the Auction, provided that such rules are: (a) disclosed to each Auction Bidder; and (b) designed, in Tacora's business judgement, to result in the highest and/or best offer. Cargill has not provided any specific concerns with the Auction terms and Tacora believes prospective purchasers and/or investors will want certainty regarding the process if Tacora elects to hold an Auction to determine the Successful Bid. Approving the Auction procedures now avoids the need to, and delay associated with, seeking approval of such procedures after the Bid Deadline.
Section 25	If a Successful Bid is not completed, the Back-Up Bid should not be open indefinitely.	In response to Cargill's comments, Tacora has revised Section 25 as follows: *If the Successful Bidder fails to consummate the Successful Bid for any reason, then the Back-Up Bid will be deemed to be the Successful Bid and Tacora will proceed with the transaction pursuant to the terms of the Back-Up Bid. Any Back-Up Bid shall remain open for acceptance until the earlier of completion of the transaction or the Outside Date.*

SCHEDULE "B"
LIST OF AUTHORITIES

1. *9354-9186 Québec inc v Callidus Capital Corp,* 2020 SCC 10.

2. *DGDP-BC Holdings Ltd v Third Eye Capital Corporation,* 2021 ABCA 226.

3. *Tacora Resources Inc (Re)*, 2023 ONSC 6126.

SCHEDULE "C"
RELEVANT LEGISLATION

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

Compromise with secured creditors

5 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.

Good faith

18.6 (1) Any interested person in any proceedings under this Act shall act in good faith with respect to those proceedings.

Good faith — powers of court

(2) If the court is satisfied that an interested person fails to act in good faith, on application by an interested person, the court may make any order that it considers appropriate in the circumstances.

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