ONTARIO SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

COUNSEL SLIP/ENDORSEMENT

COURT FILE NO.: CV-23-00707394-00CL **HEARING DATE:** June 5, 2024

NO. ON LIST: 1

TITLE OF PROCEEDING: **IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TACORA RESOURCES INC**

BEFORE JUSTICE: **KIMMEL**

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ENDORSEMENT OF JUSTICE KIMMEL:

1. Tacora seeks approval of:
    a. a Sale Process Order; and
    b. a Stay Extension Order, that, among other things: (i) extends the Stay Period to July 29, 2024; (ii) authorizes Tacora to reallocate KERP Funds that were earmarked for Key Employees who have resigned from Tacora to certain other Key Employees; and (iii) seals the confidential appendix 1 (the "Confidential Appendix") to the Ninth Report of the Monitor dated June 3, 2024 (the "Ninth Report"), which contains details of the reallocated KERP.
2. Capitalized terms not otherwise defined in this endorsement shall have the meanings ascribed to them in the Company's factum filed in support of this motion.

The Stay Extension Order

3. The Stay Extension Order is supported by the Monitor and not opposed.
4. The court may grant an extension of the Stay Period pursuant to s. 11.02(2) and (3) of the CCAA "for any period that the court considers necessary" where the applicant satisfies the court that: (a) circumstances exist that make the order appropriate; and (b) it has acted, and is acting, in good faith and with due diligence.
5. Tacora has acted, and continues to act, in good faith and with due diligence to advance its restructuring within these CCAA Proceedings. 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. Tacora's Updated Cash Flow Forecast reflects that, subject to the indicated assumptions, Tacora is forecast to have sufficient liquidity to fund its obligations and the costs of the CCAA Proceedings through to the end of the proposed extension of the Stay Period. The Monitor's supports the requested extension to the Stay Period and no creditor or other stakeholder is objecting to it.
6. The same justifications apply as when the court approved the last extension of the Stay Period to June 24, 2024. See *Tacora Resources Inc. (Re)*, 2024 ONSC 2454, at paras. 52-54.
7. Tacora is also seeking the court's approval to reallocate the KERP amounts under the existing KERP Funds (that were allocated to the Key Employees who have resigned) to certain other Key Employees. 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 to the remaining Key Employees. Finding alternative, qualified individuals to replace the Key Employees will be challenging, disruptive, costly, and time consuming for the Company.

8. To date, none of the KERP Funds that were designated under the original order approving the KERP have been paid out. Orders of this nature, amending the list of eligible employees under a KERP and reallocating KERP funds, have been made in other cases. See for example, *Arrangement relatif à FormerXBC Inc. (Xebec Adsorption Inc.)*, 2023 QCCS 834, 82 *PCAS Patient Care Automation Services Inc (Re)*, 2012 ONSC 2423 at para. 10.
9. 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 KERP previously approved by this court and employee retention plans approved in other CCAA proceedings. The same justifications exist for the proposed amendments to KERP as existed when it was originally approved. See *Tacora Resources Inc. (Re)*, 2023 ONSC 6126, at para. 158 (d).
10. Similarly, the same justifications apply to the sealing of the Confidential Appendix to the Monitor's Ninth Report containing the amounts to be reallocated to eligible employees under the KERP as applied to the sealing of the confidential exhibits in respect of the KERP when it was originally approved. See *Tacora Resources Inc. (Re)*, 2023 ONSC 6126, at paras. 159-162.
11. I have signed the Stay Extension Order, dated and effective June 5, 2024.

Sale Process Order

12. Without attracting sufficient capital to make the capital improvements that Tacora needs to increase production, Tacora will continue to generate losses. It has been reiterated many times in the course of this proceeding that the only way in which Tacora can become a long-term sustainable operation is for it to attract investors and/or purchaser to make the necessary investments in the Scully Mine.
13. 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 that existed 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 further amounts to address the DIP financing prior to investing the required amounts into the Company.
14. Tacora is fielding questions from trade creditors and employees. It has already lost three of its Key Employees since the CCAA filing. 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. This delay also introduces uncertainty and the potential for distractions in Tacora's dealings with frustrated trade creditors that are needed for its continued operations. The concerns of these and other stakeholder groups continue to loom large while Tacora seeks an alternative going-concern solution.
15. Tacora continues to pursue a consensual restructuring with its two most significant stakeholders: Cargill and the Ad Hoc Group of noteholders. As has been said before, however, Tacora cannot do so without also advancing a sale process in parallel to identify one or more investors and/or purchasers and a transaction to allow Tacora to exit these CCAA Proceedings. Tacora has worked with its financial and other advisors and the Monitor, in consultation with its noteholders and Cargill, to come up with the proposed Sale Process.
16. The proposed Sale Process builds upon Tacora's pre-CCAA efforts to sell or restructure and the post-CCAA filing court approved Solicitation Process that resulted in a successful bid that was not completed. As the Monitor explains in its Ninth Report, the timeline of the Sales Process was designed to identify an actionable transaction within the time frame of its projected remaining availability under

the DIP Facility. The Monitor has reiterated in its Ninth Report that completing the restructuring so that Tacora can emerge from this CCAA proceeding as soon as possible is of critical importance to the Company and its stakeholders.

17. The Monitor is of the view that the Sale Process, including the possibility of an Auction, can be achieved within that time frame and provides for an open, fair and transparent process with an appropriate level of independent oversight. The Monitor also believes that the proposed Sale Process will encourage and facilitate bidding by interested parties and that it is reasonable in the circumstances.
18. Tacora's proposed Sale Process is designed to be efficient and focused. If a successful transaction emerges from it, Tacora will be seeking court approval on July 26, 2024, before the now extended Stay Period expires. Tacora is focused on running an efficient Sale Process that strikes a balance between the much needed certainty of an executable transaction and the need for flexibility to try to secure the best available transaction.
19. Cargill is the only party that is objecting to the Proposed Sale Process. Cargill has suggested changes, with explanations, which Tacora has responded to.
20. Some of Cargill's requested changes were accepted by the Company in advance of the June 5, 2024 hearing. Some further suggested changes from Cargill were accepted at the urging of the court during the hearing. Importantly, Tacora has agreed that it will not dictate what type of transaction the bids should be for, a share deal (RVO) or an asset deal (APA). Tacora has agreed to remove the fourth recital that Cargill was objecting to and to amend section 2 and make conforming changes elsewhere, as needed, to reflect this further change that will allow bidders to choose their transaction structure (for example in section 7 so as to provide for templates to be given to bidders for both types of transactions).
21. Some of the concerns raised by Cargill about the proposed Sale Process that it seeks to have addressed through its remaining suggested changes require the court's input and direction as they have not been accepted by Tacora.
22. As a general matter, the specific terms of the Sale Process are a matter of business judgment for Tacora. It has proposed the Sale Process with the benefit of the advice of its legal and other advisors, and input from the Monitor and both the Ad Hoc Group and Cargill. The court will not lightly interfere with the mechanics of the proposed Sale Process that the Company has proposed based on these inputs, absent some demonstration of unfairness or concerns that could undermine the eventual approval of any transaction that comes out of the Sale Process.
23. Subsection 36(3) of the CCAA sets out certain factors for the Court to consider in approving a sale. 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. See *Brainhunter Inc. (Re)*, 2009 CanLII 72333, at para. 16.
24. The remaining disputed suggested changes to Tacora's proposed Sale Process are discussed below, with reference corresponding section numbers in the Procedures for Sale Process.
25. <u>Changes to section 2:</u> Cargill requests that section 2 expressly allow for a CCAA plan as a transaction option in the Sale Process. While Tacora is not specifying a CCAA plan as a transaction option in the Sale Process, its counsel stated in court that if a viable plan is submitted by any party, whether in conjunction with a bid submitted in the Sale Process or outside of it, the Company will consider the option of pursing a plan. To that end, the Company has retained the ability to adjust the Sale Process or terminate it if there is an option presented that is not strictly within the Sale Process requirements that the Company, in consultation with the Monitor, deems to be viable and worth pursuing. I agree with Tacora that expressly providing for a CCAA plan option overly complicates the Sale Process and the suggested changes to this end need not be included Sale Process. There is sufficient flexibility in the process to allow for a CCAA plan to be put forward and for any viable plan that is presented to be considered and pursued if deemed appropriate.

26. Changes to section 5: Cargill would like the date of the sale approval motion in section 5 to be stated to be subject to change to a later date (such "other" date rather than such "earlier" date) set by the court. The court remains concerned about timing. The July 26, 2024 approval date is within the current Stay Period extension. I agree with Tacora that this date should be presented and considered to be a firm date. If contingencies arise, they can be addressed but they need not be expressly provided for now.
27. Changes to section 10 (e)(vii): Cargill would like the conditions of qualified bids in section 10 (e) (vii) to include repayment of the DIP in full. The Company is concerned that introducing the repayment of the DIP as a condition of a Qualifying Bid could have a chilling effect on other prospective bidders and give Cargill an advantage in the bidding process, which could compromise the fairness of the Sale Process. This is not dissimilar to the Ad Hoc Group's attempt to introduce a topping credit bid into the first Solicitation Process, which the court rejected (see *Tacora Resources Inc (Re)*, 2023 ONSC 6126 at paras. 121 – 123). Cargill does not need this condition to protect its position, nor is it entitled to this level of protection as a DIP lender (see *DGDP-BC Holdings Ltd v Third Eye Capital Corporation*, 2021 ABCA 226, at paras. 30-32). It can make a back-stop credit bid if it is concerned that a bid might be accepted that is below the value of the DIP. Tacora's counsel confirmed in court that it remains open to Cargill to make a credit bid within the Sale Process, in conjunction with or in addition to any other bid that Cargill may wish to make in the Sale Process. What Cargill will not be entitled to do is decline to participate at all in the Sale Process and then come forward afterwards and try to make a credit bid.
28. Changes to section 10 (g): Cargill argues, regarding section 10 (g), that a bid should not be excluded from being considered a Qualified Bid simply because a potential bidder adds in different or additional required conditions to their transaction documents beyond those included in the transaction templates. The company retains the ability to accept non-compliant Bids, but does not want to invite bidders to submit bids with additional or new conditions. Added conditions will make the comparisons of the Bids more difficult. Further, the last accepted bid was lost because of a condition; having been burned once, Tacora would like to discourage conditions beyond those that it will include in its templates that it considers to be achievable. Since the goal is an executable transaction and Tacora is best situated to identify the conditions it can tolerate, bidders should be incentivized to structure their bids accordingly. Cargill's proposed change to s. 10 (g) is not necessary or appropriate.
29. Changes to section 12: Nor are Cargill's proposed changes to section 12 necessary or appropriate, particularly since in that same section, Tacora has expressly retained the ability to waive strict compliance with any one or more of the specified Bid requirements and deem such non-compliant Bid to be a Qualified Bid. This already qualifies the earlier language indicating that a bid that is not a Qualified bid "shall" be rejected. The existing language strikes the appropriate balance and "shall" need not be changed to "may" in section 12.
30. Changes to section 16: With respect to section 16, Cargill believes that the DIP Lender, as a significant stakeholder, should be permitted to attend the auction. Tacora plans to restrict attendance at the auction to participating bidders, and it will not be open to stakeholders unless they are also bidders. Cargill will be permitted to attend the auction if it is participating as a bidder in the auction but otherwise does not have an automatic right to participate in it. If it wants to be present at the auction it will need to be a participating bidder. The company and the Monitor will communicate with stakeholders who are not part of the auction as needed. The auction process needs to be fair and focused on the objective of maximizing value for the Company and its stakeholders from the participating bidders. No justification was offered for Cargill to be there in any other capacity. If issues arise in the auction process that require input from Cargill in some other capacity (for example, as Dip Lender, or as contractual counterparty or as creditor), or input from any other stakeholder not otherwise participating in the auction process, the Company has said it will reach out to them.
31. Changes to sections 18-22: Cargill has asked that the auction procedures at sections 18-22 should be deleted and left to be settled at a later time rather than pre-determined before any bids have been received. Cargill has not raised any specific objections to the proposed auction procedures in these sections. The timelines for the Sale Process and auction procedures are such that it is better to have as

much determined in advance as possible. Flexibility has been retained in section 17 for Tacora to revise the auction procedures later if need be.

32. In summary, none of the remaining changes to the Sale Process that Cargill requested that have not already been agreed to by Tacora need to be made.
33. The Sale Procedures within the proposed Sale Process, with the amendments that have now been agreed to, are fair and reasonable:
    a. They will best serve the interests of the Company's stakeholders as a whole by enhancing the prospects of a successful restructuring;
    b. They have been approved by the Monitor;
    c. The significant creditors and stakeholders, including the Ad Hoc Group and Cargill, were consulted.

    See *Brainhunter,* at para. 16. The factors that support the approval of the proposed Sale Process are set out in detail in the Company's factum for this motion and in the Monitor's Ninth Report.

34. The Sale Process is approved. Once Tacora has made the changes that it agreed to make to the Sale Process, the revised Sale Process Order may be submitted to me to be signed.

Cargill's Global Process Motion

35. Cargill advised the other parties before the June 5, 2024 hearing that it no longer intended to proceed with its Global Process Motion on June 26, 2024 (and as a result, Cargill did not file a notice of motion by the May 31 date fixed by this Court). Tacora and the Monitor advised that the motion could only be withdrawn with prejudice. Cargill has responded that "[w]e reserve our rights to contest a RVO application and file materials to oppose such matter depending on the facts."
36. Tacora and the Monitor are concerned that Cargill may seek to advance the same arguments about the legal availability of an RVO that it had indicated it would raise in the Global Process Motion in its opposition to any RVO transaction that may emerge as the successful transaction in the Sale Process. Tacora and the Monitor seek the court's direction on this issue, and specifically for a direction that the decision not to proceed with the Global Process Motion is with prejudice to Cargill.
37. Cargill says that it reconsidered its position on this motion after the court ruled on May 24, 2024 that its Disclaimer Motion would be heard on June 26, 2024, rather than it being deferred as Cargill had suggested it be. Cargill's position is that Tacora and the Monitor have presented the court with no authority for the imposition of a term of "with prejudice" on its decision not to proceed with a motion that was never brought, and says that it cannot be prevented from raising the intended arguments on its Global Process Motion in the future. Cargill says that it has been transparent about what its arguments would be on the Global Process Motion and the parties will thus not be surprised by them if they are raised in response to future motions (including a sale approval motion) that have not yet been brought based on future facts that are not currently known.
38. The court shares the practical concerns that the Company and the Monitor have raised. The Global Process Motion, like the RVO Preliminary Motion, were presented at the May 24, 2024 case conference to be the flip side of the same hypothetical coin. They were framed as legal issues that the court could determine in advance, namely:
    a. Whether an RVO is legally impermissible if the Cargill Offtake Agreement has not been disclaimed (to be decided by the RVO Preliminary Motion: does the Offtake Agreement have to have been disclaimed for it to be assigned to ResidualCo under an RVO?); OR
    b. Whether an RVO is legally impermissible if the Cargill Offtake Agreement has been disclaimed (to be decided by the Global Process Motion: If the Offtake Agreement is disclaimed, does that preclude any assignment of liability associated with that agreement to ResidualCo?).

39. In its Aide Memoire for the May 24, 2024 case conference, Cargill described its Global Process Motion as follows:

> Cargill will bring a motion seeking a declaration that, as a point of law, an RVO transaction structure is not available to a debtor where (i) there is a large unsecured creditor in a position to vote against a CCAA plan; (ii) that unsecured creditor opposes the RVO; and (iii) there is an unsecured CCAA plan alternative which provides for consideration to all affected unsecured creditors in the form of restructured shares or other consideration. If granted, Cargill believes this declaration eliminates an RVO transaction structure which vests out the Offtake Agreement over its objection. This motion should be heard and determined prior to expending the time and resources on a disclaimer dispute that may never be necessary. The Global Process Motion should be heard on June 26, 2024, unless matters are resolved in the interim.

40. It was proposed that the proposed Global Process Motion would proceed on the basis of assumed facts (including that the disclaimer is allowed thereby creating a large unsecured liability in favour of Cargill and that there is an unsecured CCAA plan alternative; the latter assumption of a CCAA plan alternative remains a possibility based on the earlier discussion in this endorsement that allows for the presentation of a CCAA plan even though it is not expressly invited as one of the transaction options in the Sale Process).
41. The court did not accept Cargill's submission on May 24, 2024 that its Disclaimer Motion should be deferred. But it did accept that the issues raised by the Global Process Motion, if successful, could eliminate the possibility of any RVO transaction structure. The court's objective in timetabling these motions (the Global Process Motion, the Disclaimer Motion and the RVO Preliminary Motion) all together was to clear away any uncertainty about the legal impermissibility of an RVO transaction tied to the existence or non-existence of the Cargill Offtake Agreement so as not to waste the time of bidders in the Sale Process on an RVO transaction structure if it is determined to be legally impermissible for either of the reasons postulated by Cargill.
42. The court's May 24, 2024 case management direction was made with a view to a just, expeditious, streamlined and orderly process for an eventual sale approval motion that will need to be heard on a single day shortly after the conclusion of the Sale Process if there is a successful bid coming out of that process. In these multi-issue proceedings, issues need to be sequenced and determined in an orderly manner. That is part of the court's case management function.
43. If Cargill wishes to raise the issues that it identified for its Global Process Motion then it may deliver its Global Process Motion Record on June 11, 2024 when the next round of materials are due for the June 26, 2024 motions. If it elects not to bring that motion, it will be foreclosed from raising the intended arguments on that motion at the sale approval motion if the successful transaction in the Sale Process is a share (RVO) deal.
44. Following the court's decision on the June 26, 2024 motions, if an RVO transaction structure is determined to be legally permissible, any RVO transaction that is brought to the court for approval following the Sale Process will remain subject to the court's discretion and all of the *Harte Gold Corp. (Re)*, 2022 ONSC 653 factors that must be considered in that context. That is a given. No one is suggesting otherwise. Conversely, if an RVO transaction structure is determined to be legally impermissible for any of the grounds raised, the court understands that Tacora does not intend to include an RVO transaction option in the Sale Process and, thus, there will be no RVO transaction for the court to consider at the July 26, 2024 sale approval hearing.
45. What will not be permitted in the context of these proceedings and having regard to the lengthy and complex procedural history and the particular timing and liquidity constraints that Tacora is operating

under, is for an issue that was flagged as a question of legal impermissibility to be deferred and raised by Cargill after an RVO transaction has been negotiated with a successful bidder.

46. This endorsement and the orders and directions contained in it shall have the immediate effect of a court order without the necessity of a formal order being taken out.

KIMMEL J.
June 7, 2024