

**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: Comeback Motion)
(Returnable October 24, 2023)**

October 23, 2023

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TO: SERVICE LIST

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1. The Ad Hoc Group purports to characterize the relief sought by Tacora on this Comeback Motion – that is, the normally routine approval of DIP financing for a CCAA company which is supported by the Company’s advisors and the Monitor, as well as authority to commence a typical court supervised Solicitation Process – as “extraordinary and unprecedented”.¹ The Ad Hoc Group’s assertion is no doubt a mask for the fact that the AHG Cross-Motion is actually the extraordinary and unprecedented matter before this Court. That is, the Ad Hoc Group seeks, without any supporting evidence, to replace the clearly superior Cargill DIP Facility with its own inferior AHG DIP Proposal, or in the alternative, to impose terms and conditions on Tacora’s CCAA process for which it has provided no legal or factual basis. Tacora’s relief on this Comeback Motion should be granted and the AHG Cross-Motion should be dismissed.

2. The purported bases of the Ad Hoc Group’s requested relief are entirely procedural. The Ad Hoc Group complains that the Cargill DIP Facility was selected “outside of Tacora’s carefully designed DIP solicitation process” and was plagued by “unusual offline contacts” and impropriety as a result of a Tacora board meeting at which Cargill’s nominee was present (although he did not vote). There was nothing wrong with the process followed by the Company in the circumstances and in the context of this CCAA filing, and certainly nothing that would disqualify the superior Cargill DIP Facility. Moreover, the Ad Hoc Group’s procedural complaints are exaggerated and

¹ Capitalized terms used and not defined herein have the meanings ascribed to them in the Factum of the Applicant dated October 22, 2023.

mischaracterize the facts and evidence. The Company has prepared an appendix to this Reply Factum which sets out the actual evidence in relation to some of the more egregious unsubstantiated assertions made in the Ad Hoc Group's Factum.

3. The Ad Hoc Group has not even attempted to establish that the AHG DIP Proposal is superior to the Cargill DIP Facility. There is no meaningful comparison of the terms of each and no suggestion is made that the Monitor (or the Company or its advisors) was wrong to recommend the Cargill DIP Facility to the Company's Board. Nor does the Ad Hoc Group address the fact the outside director recommended to the Company by the Ad Hoc Group, voted in favour of the Cargill DIP Facility, while the Cargill nominee did not vote. The reasons for this are that the Cargill DIP Facility is clearly superior to the AHG DIP Proposal and is obviously in the best interests of the Company and its stakeholders to adopt – all for the reasons summarized at paragraphs 23 and 30 – 39 of the Company's Factum regarding the AHG Cross-Motion.

4. The Ad Hoc Group suggests that the AHG DIP Proposal should be approved by the Court because it is an updated version of a DIP agreement that had been accepted by the Company for purposes of a CCAA filing that did not occur, almost one month prior to the commencement of these CCAA Proceedings in circumstances where the Company's needs were different and it did not have the benefit of a competing proposal. The Ad Hoc Group's suggestion that Tacora is somehow obliged to proceed with an inferior DIP when all parties recognized the DIP agreement was no longer viable or actionable (as demonstrated by the Ad Hoc Group itself wanting to work on an updated DIP agreement as early as September 28, 2023). What is incredible in the present circumstances is that while the Ad Hoc Group complains that it was asked for its "best and final" DIP proposal in a "compressed time" over the Thanksgiving long weekend, it has not even taken the opportunity provided by the passage of the past two weeks, with the knowledge of the terms of the Cargill DIP Facility, to propose any improved terms, or proposed specifics on items the Company and the Monitor have repeatedly requested (for example, the KERP). The record also

demonstrates the issues with the AHG DIP Proposal had “been previously discussed with the Ad Hoc Group’s advisors, including when we were finalizing the September [11] [AHG DIP Agreement].”²

5. In order to try to find faults with the Cargill DIP Facility or the process by which it was approved, the Ad Hoc Group embarked on an extensive evidentiary fishing expedition in the past week. Without providing any evidence from a member of the Ad Hoc Group to support its contentions, the Ad Hoc Group sought to examine four 39.03 witnesses (in the end they proceeded with only two, and also obtained answers to written questions from the Monitor), made extensive last-minute document production requests, made a Request to Inspect documents in addition to those requests and cross-examined the Company’s affiants at length. The Company fully responded to the Request to Inspect, expended significant efforts to produce numerous documents (including highly confidential documents and board minutes) in the 36 hours between the late night delivery of the document requests and the commencement of the examinations, facilitated the orderly examination process over a long two days, and gave answers to undertakings over the weekend. The evidence obtained through these examinations revealed that there was nothing improper or inappropriate contact between the Company’s management or Board and Cargill, no favoritism in relation to having a Cargill DIP Facility, and no irregularity in the process. The process was necessarily expedited after meetings in New York on October 3 and 4, where it was believed there was agreement on a Consensual Recapitalization Transaction prior to the meetings, resulted in the Consensual Recapitalization Transaction negotiations falling apart at the last minute and necessitated the CCAA filing.³

6. Indeed, the only thing presently focused on by the Ad Hoc Group in relation to the evidence-gathering process is the attempt to undermine the evidence of Joe Broking, the

² Affidavit of Thomas Gray sworn October 16, 2023, Exhibit J, Motion Record of the Ad Hoc Group of Noteholders dated October 16, 2023 at Tab 2.

³ Cross-Examination Transcript of Paul Carrello taken October 19, 2023, Q231-234, pp. 83-88.

Company's CEO, by repeatedly referring to his practice of deleting text messages. This is an exercise in misdirection. Mr. Broking made extensive document production and was direct, credible and forthright in all of his evidence including under cross-examination. There is no suggestion made (nor could there be) by the Ad Hoc Group that Mr. Broking was not an honest and credible witness – and his direct evidence was that while he “was speaking directly with individuals from Cargill, yes, on October 5th. But as it related to the actual process that was run by Greenhill and our advisors to select a successful DIP party, whether that be the Ad Hoc Group or Cargill, I was not involved in those conversations at all.”⁴ And in relation to the substance of any communications he had with Cargill between October 5 and 10: “We were speaking about normal course operations and – yeah, I mean, just process-related things, but nothing regarding – no details of the DIP terms sheet.”⁵ Moreover, all relevant communications that Mr. Broking had were available, having been produced either by him (from email) or by others (such as the text exchange with Leon Davies) – all of which was candidly addressed by Mr. Broking in his cross-examination. There is simply no basis to level any substantive criticism towards Mr. Broking or his evidence or the record as a result of his practice of not keeping text messages.

7. The Company further responds to the Ad Hoc Group's arguments as follows:

- (a) **Material Prejudice**: The Ad Hoc Group has not provided any evidence or argument as to how they are materially prejudiced by the Cargill DIP Facility on any objective test - their argument is simply that they are the biggest creditor, so they should get the DIP. The Ad Hoc Group complaint that the Senior Noteholders are being “primed” ignores the fact that the AHG DIP Proposal would prime the Senior Noteholders by a larger margin than the Cargill DIP Facility. This is particularly troubling when it is unclear how much of Senior Notes and Senior Priority Notes the Ad Hoc Group hold or represent.

⁴ Cross-Examination Transcript of Joe Broking taken October 19, 2023 (“**Broking Transcript**”), response to Q160, p. 56 at lines 6-12.

⁵ Broking Transcript, response to Q170, .p. 59 at lines 18-21.

(b) **Recusal.** The Ad Hoc Group complains on numerous occasions regarding Mr. Davies' presence at Board meetings. As is evident from the record, the Board has been advised by sophisticated advisors and counsel throughout their restructuring activities. Section 132(5) of the OBCA addresses circumstances where directors are required to recuse themselves and none of the circumstances are present in this situation.

(c) **CRO Appointment:** The Ad Hoc Group has cited no authority for appointment of a CRO against the wishes of the debtor. The Applicant is not aware of any such cases. In *Victorian Order*, it was the Applicant, not a stakeholder, who sought the appointment of a CRO.⁶ In *Pascan Aviation Inc.*, the case involved a creditor-led CCAA application and there was no dispute about whether there would be a CRO; the only dispute was with respect to who would be appointed.⁷ Additionally, the Ad Hoc Group's complaint about "how management and the Board have run the restructuring thus far..." is untenable given the absence of any evidence from the Ad Hoc Group and in the face of the fact that the CCAA Proceedings were commenced 13-days ago. The Ad Hoc Group receives consistent and regular updates from the Company's advisors and management, including weekly calls regarding cash flow.

(d) **Transaction Fee.** The Ad Hoc Group's Factum baldly claims that Greenhill's fees will increase with the Cargill DIP Facility, which is untrue. Greenhill's agreed fees have remained unchanged since January 2023. If the Ad Hoc Group's complaint is simply that Greenhill's fee ranks higher than it would under the AHG DIP Proposal, this ignores the fact that the Senior Noteholders, even considering the Transaction Fee Charge, are being primed by far less under the Cargill DIP Facility than they would under the AHG DIP Proposal.

⁶ *Victorian Order of Nurses for Canada, Re*, [2015 ONSC 7371](#).

⁷ *Pascan Aviation inc., Re*, [2015 QCCS 4227](#)

8. Tacora respectfully requests that this Court deny the AHG Cross-Motion, including the Alternative Relief.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 23rd day of October, 2023.

A handwritten signature in cursive script that reads "Stikeman Elliott LLP".

STIKEMAN ELLIOTT LLP
Counsel for the Applicant

APPENDIX "A"
COMPARISON OF AHG ASSERTIONS TO THE EVIDENTIARY RECORD

Para	Statement	Evidence
2(ii)	(ii) followed multiple points of unusual "offline" contact between senior Cargill and Tacora executives;	There is no evidence of "unusual 'offline' contact" and there is no evidentiary record of such contact. The actual evidence is that Tacora management was not involved in negotiations of the DIP proposals, did not have discussions with Cargill representatives regarding the DIP, and that Leon Davies, as a board member, maintained Tacora confidences and was cognizant of his fiduciary duties to Tacora at all times.
2(v)	(v) moreover, it emerged on cross-examination that Tacora's CEO had deleted all of his text messages exchanged with Cargill executives in respect of this Cargill DIP.	The uncontroverted evidence is that Tacora's CEO had no text exchanges with Cargill executives about the Cargill DIP. The text messages that he deleted were operational in nature and not related to the DIP. The only correspondence between the CEO and Cargill that was even tangentially related to the Cargill DIP has been produced.
16	Numerous Cargill employees are on-site on a day-to-day basis in connection with the management of the Scully Mine.	The reference relied upon by the Ad Hoc Group is a summary of the Cargill DIP Facility provided in the First Broking Affidavit. The statement is, in fact, false and not supported by the record. There is a single operational employee of Cargill who regularly visits the Scully Mine.
19	The potential purchaser withdrew from the potential acquisition, including due to concerns about the Offtake Agreement	<p>This is misleading. The actual evidence is that in addition to a structural concern about the offtake agreement, there were numerous reasons unrelated to the offtake agreement that caused the potential purchaser to withdraw.</p> <p>Mr. Broking's evidence was that "... in those conversations [the potential purchaser] identified issues with, as they stated, the mine plan and the reserve life due to de-watering and pit levels; he stated they had issues with the permitting process that is ongoing relative to increasing our tailings impoundment area. And [the potential purchaser] also mentioned the QNSL Rail Transportation Agreement. [The potential purchaser] also mentioned that they</p>

		would like to have conversations with Cargill regarding the Offtake Agreement.” ⁸
20	No second DIP solicitation process was contemplated.	Mr. Broking’s evidence on this point was “No, at the time [the first DIP process] did not contemplate a second round. It did not also contemplate that on September 11th, while we were at the Scully Mine preparing to communicate a CCAA filing, that we would be made aware that there was a consensual deal reached by Cargill and the Ad Hoc Group and [another party].” ⁹
21	During the DIP Process, Greenhill, Tacora, and Stikeman Elliot prepared a "wish list" of modifications to the Offtake Agreement.	The reference to the DIP Process is inaccurate and misleading. The document was prepared in the context of discussions between the parties on a Consensual Recapitalization Transaction.
22	Greenhill received four proposals for DIP financing under the DIP Process. One such proposal was not actionable, including because it specified that the renegotiation or termination of the Offtake Agreement was a precondition to the delivery of a DIP offer.	The DIP offer in question also contemplated an 80% haircut for the Senior Noteholders and equitization of any secured debt as preconditions to the offer.
25	In spite of various concerns with respect to the AHG DIP raised by Cargill’s appointee to the Board, the Board unanimously approved the AHG DIP.	Concerns in respect of the AHG DIP Agreement were also shared by Greenhill as referenced by Mr. Bhandari who stated “[the first AHG DIP proposal] was a proposal that we had concerns with but it was the only proposal we had and we did not want to be in a position to file CCAA without a DIP in hand.” ¹⁰
30	Even more remarkably, in the context of Cargill withholding payments from Tacora, Mr. Broking, Tacora’s CEO, and Mr. Davies shared the following text message chain (that Mr. Davies alone retained a copy of): Davies: When does this need to be done by btw?	The context of the text messages between Mr. Davies and Mr. Broking was not the withholding of train payments but the day the Company was informed that Cargill, the Ad Hoc Group and another investor had reached an agreement in principal on a Consensual Recapitalization Transaction. Mr. Broking’s evidence regarding these messages was: “The context of that comment

⁸ Broking Transcript, response to Q89, pp, 27-28 at lines 22-25 (at 27) and 1-7 (at 28).

⁹ Broking Transcript, response to Q11, pp. 35-36 at lines 22-25 (at 35) and 1-3 (at 36).

¹⁰ Cross-Examination Transcript of Chetan Bhandari taken October 18, 2023 (“Bhandari Transcript”), response to Q172, p. 47 lines 1-4.

	<p>Broking: Need bridge money by Monday</p> <p>Or sooner</p> <p>Need train payments also</p> <p>Davies: Yep. Let's get ink on paper, you now Cargill will be good</p> <p>Broking: I love Cargill</p>	<p>is Cargill has been a good partner to Tacora going all the way back to 2017 and 2018.”¹¹</p>
33	<p>But unbeknownst to the AHG, Greenhill approached Cargill – <u>and Cargill alone</u> – in late September regarding potential DIP financing.</p>	<p>The statement is untrue. The Company and the Ad Hoc Group had already re-engaged on a revised DIP agreement at the time Cargill was asked to consider whether they had an interest in providing a DIP facility.</p>
36	<p>In contrast, between September 29 and October 5, 2023, Cargill representatives were in frequent contact with Mr. Davies regarding the Cargill DIP and Cargill's internal approval process.</p>	<p>The statement is not supported by the record.</p>
40	<p>As Mr. Bhandari conceded, stalking horse bids are commonly used in insolvency proceedings, including because they set a floor on bidding and may create an additional level of deal tension that would not otherwise exist if there were no other bidders.</p>	<p>Mr. Bhandari's evidence was “I have been involved in other sales processes. Some of them have had stocking horses [sic]. Others haven't. I believe it is used in bankruptcy situations. In this case, we understand that the Ad Hoc Group is looking to put forward a stocking horse [sic] but they haven't given us any details on it.”¹²</p>
43	<p><i>Third</i>, the fact that the Cargill DIP primes the Noteholders to the extent of the Cargill DIP is improper and was not properly considered by the Board.</p>	<p>As Mr. Broking stated in his evidence “I agree that a DIP primes the existing debt. This DIP or any other DIP.”¹³</p>
45	<p>Moreover, the priming of the Noteholders was not even a topic of discussion or consideration of the Tacora Board in approving the Cargill DIP (despite the fact the AHG specifically raised the material prejudice that would be suffered by the Noteholders).</p>	<p>Discussions regarding legal advice and matters at Board meetings is privileged. Tacora has not produced evidence on privileged discussions between its counsel and the Board. The Ad Hoc Group suggests that this implies legal matters were not discussed</p>

¹¹ Broking Affidavit, response to Q218, lines 20-22.

¹² Bhandari Transcript, response to Q298, p. 82 lines 20-25.

¹³ Broking Transcript, response to Q159, p. 56 lines 1-2.

<p>47</p>	<p>In contrast, the AHG is proposing a KERP that proposes payments to rank and file employees</p>	<p>As referenced at paras. 47 and 87 of the First Report of the Monitor, the Ad Hoc Group has never, in fact, proposed a KERP and the Ad Hoc Group has never filed a KERP before the Court or provided such proposed KERP to the Company or the Monitor for review.</p> <p>This was confirmed by Mr. Broking during his cross examination: “Q. ... have you ever seen KERP from the noteholders that identified the allocations of the payments or proposed allocations of payments? A. No, I have not. And we asked on numerous occasions to receive feedback on that KERP from both their advisors and the Ad Hoc Group directly and never received any feedback.”¹⁴</p>
<p>54</p>	<p>Moreover, the Board did not even consider the proper factors in approving the Cargill DIP, including the fact it primed the Noteholders, a much more significant creditor than Cargill</p>	<p>Discussions regarding legal advice and matters at Board meetings is privileged. Tacora has not produced evidence on privileged discussions between its counsel and the Board. The Ad Hoc Group suggests that this implies legal matters were not discussed</p>
<p>59</p>	<p><i>Second</i>, it is clear that the management of Tacora has entirely lost the confidence of its largest creditor, the Noteholders. And for good reason. The conduct of Tacora's Board, including the intertwinement with Cargill and the process leading to the Cargill DIP, is highly concerning.</p>	<p>This is a bald statement without any evidence. The Ad Hoc Group's primary complaint with management appeared to be the Board of Tacora selected an alternative DIP proposal. The Ad Hoc Group has not provided any evidence regarding a loss of confidence in management, or in particular regarding mismanagement of Tacora's business.</p>
<p>60</p>	<p><i>Third</i>, the Cargill DIP materially prejudices Tacora's largest creditor – the Noteholders – which critical factor was not even considered by the Board in approving the Cargill DIP despite it being expressly raised</p>	<p>Discussions regarding legal advice and matters at Board meetings is privileged. Tacora has not produced evidence on privileged discussions between its counsel and the Board. The Ad Hoc Group suggests that this implies legal matters were not discussed</p>
<p>62</p>	<p>There are only two economic stakeholders materially impacted by the Cargill DIP: the Noteholders and Cargill.</p>	<p>This is a bald statement and untrue. Tacora has numerous stakeholders, including employee, suppliers, trade creditors, first nations, and governmental authorities. The Ad Hoc Group also does not represent all Senior Noteholders and the Ad Hoc Group, to date, has not disclosed their holdings of Senior</p>

¹⁴ Broking Transcript, Q270, p. 94 lines 5-12.

		Notes or Senior Priority Notes.
73	<p><i>Second</i>, a declaration that the AHG's terms for a KERP be implemented which will ensure that all critical employees are protected, contrary to the current KERP.</p>	<p>As referenced at paras. 47 and 87 of the First Report of the Monitor, the Ad Hoc Group has never, in fact, proposed a KERP and the Ad Hoc Group has never filed a KERP before the Court or provided such proposed KERP to the Company or the Monitor for review.</p> <p>This was confirmed by Mr. Broking during his cross examination: "Q. ... have you ever seen KERP from the noteholders that identified the allocations of the payments or proposed allocations of payments? A. No, I have not. And we asked on numerous occasions to receive feedback on that KERP from both their advisors and the Ad Hoc Group directly and never received any feedback."¹⁵</p>
74	<p>Given the significant concerns with how management and the Board have run the restructuring thus far, the engagement of a CRO would</p> <p>be appropriate and essential to a successful restructuring of Tacora, and would instill much-needed</p> <p>confidence in the process</p>	<p>This is a bald statement, and the Ad Hoc Group has not filed any evidence regarding "significant concerns with how management and the Board have run the restructuring thus far..." The CCAA Proceedings were commenced 13 days ago.</p>
76	<p>Greenhill originally agreed to a lower charge under the binding AHG DIP; this provision in the</p> <p>Cargill DIP provides Greenhill with a higher fee without any corresponding justification.</p>	<p>Greenhill's fees have not increased with the Cargill DIP Facility. There have been no change to Greenhill's fees or engagement letter.</p>

¹⁵ Broking Transcript, Q270, p. 94 lines 5-12.

SCHEDULE "A"
LIST OF AUTHORITIES

1. *Victorian Order of Nurses for Canada, Re, [2015 ONSC 7371](#).*
2. *Pascan Aviation inc., Re, [2015 QCCS 4227](#)*

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