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)

RESPONDING FACTUM OF THE APPLICANT
(Re: Cross-Motion on the Cram-Up Transaction)
(Returnable April 10-12, 2024)

April 6, 2024

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TO: SERVICE LIST

1. This Court authorized and directed Tacora to run the Court-approved Solicitation Process. Cargill submitted the uncommitted and unfinanced Cram-Up Transaction as a Phase 2 Bid, which was rejected by Tacora, with the input of its advisors, and in consultation with the Monitor. Cargill now attempts to have the Court replace the business judgement of the Board, the Court-approved financial advisor, Greenhill, and the Monitor, by directing the Company and the Monitor to run an unwanted claims process and creditors' meeting in respect of an unviable transaction. To support its approach, Cargill relies on "expert" evidence from a self-proclaimed expert on "value maximization in deal making" who has never been a court-approved financial advisor under the CCAA, never run a CCAA sales process, and never been recognized by any court as an expert witness.[1]

2. The relief sought by Cargill is unprecedented. Cargill cites no authority or similar cases where a creditor filed a plan of arrangement over the objections of an operating debtor company. If the Court permits a hostile "bitter bidder" to hijack debtor-in-possession proceedings for their sole benefit and to the detriment of the debtor and its stakeholders, it will cause chaos in Canada's restructuring regime.

3. The commercial reasons why Tacora rejected Cargill's Cram-Up Transaction are addressed in Tacora's Factum filed in support of the sale approval motion. The Cram-Up Transaction is not financed, not committed and unactionable. And even if the Cram-Up Transaction was financed, it works to the detriment of Tacora and its stakeholders and does not address the issues underlying these CCAA Proceedings – a lack of capital for investment, an overleveraged capital structure and a prohibitive offtake agreement. The Cram-Up Transaction positions Tacora for failure.

4. In *Callidus*, the Supreme Court found that a supervising CCAA court has authority to fashion a remedy if it finds a creditor is acting for an "improper purpose."[2] Citing Janis Sarra, the Supreme Court stated "[i]f the CCAA is to be interpreted in a purposive way, the courts must be

[1] Cross-Examination of David Roland held on March 22, 2024 at Qs. 29, 302-303, and 310.
[2] *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10 at paras. 70-71 and 74.

able to recognize when people have conflicting interests and are working actively against the goals of the statute."[3]

5. Subsection 18.6(2) of the CCAA also provides authority to the Court to make any order it considers appropriate if an interested person fails to act in good faith.[4]

6. As set out in Tacora's Factum on the sale approval motion, ever since Cargill explicitly and consciously chose for its own commercial reasons not to put forward a transaction that complied with this Court's order – the Solicitation Order – it has unleashed a scorched earth effort to prevent Tacora from emerging from these CCAA Proceedings with a viable transaction – the Successful Bid. It decided to "play for time" and work around the SISP Procedures which it itself agreed to at the commencement of the CCAA Proceedings. The attempt to undermine Tacora's restructuring and force the Company to pursue a transaction that it does not want is another part of a pattern self-interested behavior by Cargill to entrench the Offtake Agreement.

7. This approach by Cargill has resulted in untold damage to Tacora and its stakeholders. During their "play for time", iron ore prices have fallen dramatically, the Company has had to borrow additional priming DIP financing and Tacora has been unable to execute upon its capital investment program to ramp up the Scully Mine. While this has been happening, Cargill continues to profit handsomely from its Offtake Agreement, all while other stakeholders lose.

8. Tacora submits this "strategy" that Cargill employs should not be tolerated by this Court. It is a collateral attack on the Solicitation Order, it is carried out for an improper purpose, and it is not carried out in good faith. Cargill's cross-motion to force an unwilling participant to pursue an unwanted transaction should be considered in this light.

9. For these reasons and the reasons set out in Tacora's Factum on its sale approval motion, Cargill's cross-motion for a meeting order and claims procedure should be rejected and the Successful Bid should be approved.

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[3] *Ibid* at para. 75.
[4] CCAA, s. 18.6(2).

SCHEDULE "A"

LIST OF AUTHORITIES

1. *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10 (CanLII), [2020] 1 SCR 521

SCHEDULE "B"
RELEVANT LEGISLATION

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

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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PROCEEDING COMMENCED AT TORONTO

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