

**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.**

**REPLY FACTUM OF CARGILL, INCORPORATED AND CARGILL  
INTERNATIONAL TRADING PTE LTD.**

(Comeback Motion of Tacora Resources Inc. for an Amended and Restated Initial Order, and  
Cross-Motion of the Ad Hoc Group of Noteholders, returnable October 24, 2023)

October 23, 2023

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1. Cargill files this factum in reply to the AHG's<sup>1</sup> factum dated October 22, 2023.
2. Much of the AHG's factum stems from the flawed premise that because Tacora approved the AHG's DIP proposal in mid-September 2023 (when it was the only DIP option available<sup>2</sup>), Tacora's agreement on October 9 to the superior Cargill DIP Agreement is somehow illegitimate or improper. The facts belie this premise. In addition, the evidence is clear that by the end of September, the AHG's earlier DIP proposal "was not workable."<sup>3</sup> The AHG's mid-September DIP proposal did not contain exclusivity for any future DIPs in a CCAA proceeding nor did it provide a tail period. This meant Tacora retained all rights to advance a further DIP process with any party, particularly when the circumstances and timing had changed.
3. That Tacora had approved in mid-September a DIP proposal by the AHG does nothing to undercut the fairness of Tacora's selection in October of the superior Cargill DIP Agreement. Following the September DIP process, the AHG provided a new DIP agreement to Tacora's counsel on September 28<sup>4</sup>—*before* Cargill learned on September 29 that Tacora was exploring a new DIP.<sup>5</sup> Tacora's board properly exercised its business judgement to run a further process and select the Cargill DIP Agreement, all under the proposed Monitor's supervision.
4. Contrary to the thrust of paragraph 1 of the AHG's factum, the AHG does not represent all of the noteholders who hold \$260 million in secured debt. The Service List shows noteholders are represented by four different counsel in these proceedings, plus separate counsel for the notes

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<sup>1</sup> Capitalized terms used and not otherwise defined in this Reply Factum have the meanings ascribed to them in the Factum of Cargill dated October 22, 2023.

<sup>2</sup> Davies Cross, p. 78, lines 2-3, Transcript Brief, Tab 1, p. 83; Broking Cross, p. 35, line 4 to p. 36, line 3, Transcript Brief, Tab 4, pp. 521-522.

<sup>3</sup> Bhandari Cross at p. 67, lines 17-25 and p. 97, lines 9-16, Transcript Brief, Tab 2, p. 278, p. 308.

<sup>4</sup> Undertaking Chart from Broking Cross re No. 4, Q. 234, p. 84, Transcript Brief, Tab 4, p. 570.

<sup>5</sup> Carrelo Cross at p. 64, line 8 to p. 66, line 23, Transcript Brief, Tab 3, pp. 427-429.

trustee.<sup>6</sup> To date, in these proceedings, the AHG has: made extensive unsubstantiated allegations and misleading statements against Tacora and Cargill; failed to file any direct evidence outside of a limited solicitor's affidavit; attempted to conduct a fishing expedition by requesting documents and information since January 2023 wholly unrelated to this hearing; and failed to disclose individual economic interests of the AHG. These actions suggest that the noteholders may have a different, undisclosed agenda outside of the current hearing, which appears to be directed at exerting control over Tacora's governance, management's decision making and overall sale process to gain an unfair advantage over other stakeholders of Tacora in these CCAA proceedings.

5. Paragraphs 24, 53 and 69 of the AHG's factum assert that the selection by Tacora of the superior Cargill DIP Agreement in October 2023 resulted from steps Cargill took to "manipulate" Tacora's process or Tacora itself, and question Cargill's good faith. These aggressive allegations are baseless.

6. Paragraph 24 of the AHG's factum points to Cargill having withheld train payments in early September as one such alleged example of manipulation. Cargill did not submit a binding DIP proposal to Tacora in September 2023, so could not have been manipulating that DIP process.<sup>7</sup> In any event, Cargill's counsel explained by email on September 10 that there had been an event of default under the APF, entitling Cargill to set off amounts owed for iron ore concentrate against amounts owing to Cargill under the APF:

Based on such facts and the Company potentially proceeding to a ccaa filing- the amounts are not payable by Cargill at this time. Cargill is not in breach of any of its agreements or the APF. We have a secured margin facility which is available if there is a need for

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<sup>6</sup> The service list describes noteholders represented by two law firms for the Ad Hoc Group of Senior Noteholders, one for the Consortium Bond Group and one for Crossingbridge Advisors, LLC—a party to the AHG's September DIP proposal.

<sup>7</sup> At the time, Cargill was focused on reaching a consensual restructuring transaction and helping Tacora to avoid a CCAA application altogether: Carrelo Cross, p. 55, line 14 to p. 56, line 20, Transcript Brief, Tab 3, pp. 418-419.

additional liquidity and Cargill is committed to continue to work with the Company to ensure it has sufficient liquidity to maintain its operations in the normal course.<sup>8</sup>

7. Paragraph 2(iii) of the AHG factum incorrectly asserts that Cargill withholding payments for trains in early October “put extreme pressure on Tacora” to select the Cargill DIP Agreement. In fact, Tacora’s Chief Executive Officer testified that he made demands on Cargill in early October to pay for trains in the face of an imminent CCAA filing “to take advantage of some leverage that Tacora had to try and maximize the liquidity and increase this liquidity before we filed for CCAA.”<sup>9</sup> In any event, it was entirely legitimate for Cargill to withhold certain payments to Tacora in order to protect Cargill’s interests (*i.e.*, set-off rights) in the face of Tacora advising Cargill it had booked court dates and potentially intended to commence CCAA proceedings.<sup>10</sup>

8. The AHG alleges at paragraph 36 of its factum that “between September 29 and October 5” Cargill was in frequent contact with Mr. Davies “regarding the Cargill DIP and Cargill’s internal approval process,” which is incorrect and highly misleading. Between September 29 and October 4, Cargill did not work on a DIP.<sup>11</sup> Further, Mr. Davies was not involved at all with the negotiation or preparation of the Cargill DIP, and his contact with Cargill in relation to the Cargill DIP was limited to encouraging Cargill to make a DIP proposal for the benefit of Tacora.<sup>12</sup> Notably, the AHG complains in paragraph 48(d) about the alleged failure of Cargill “to provide communications between Cargill employees relating to Tacora’s restructuring,” without acknowledging that Mr. Davies’ testimony confirmed that he looked for and found no documents

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<sup>8</sup> Email from R. Chadwick to L. Nicholson dated September 10, 2023, being Exhibit C to the Davies Cross, Transcript Brief, Tab 1.C, p. 209.

<sup>9</sup> Broking Cross, p. 51, lines 4-21, Transcript Brief, Tab 4, p. 537.

<sup>10</sup> Carrelo Cross, p. 59, line 7 to p. 61, line 7, Transcript Brief, Tab 3, pp. 422-424.

<sup>11</sup> Carrelo Cross at p. 66, lines 13-23, Transcript Brief, Tab 3, p. 429.

<sup>12</sup> Davies Cross, p. 17, line 23 to p. 18, line 6 and p. 20, lines 2-7 Transcript Brief, Tab 1, PDF pp. 22-23 and 25.

in August or September about a Cargill DIP,<sup>13</sup> and he communicated with two people at Cargill in respect of Tacora's restructuring and DIP proposals in October—Lee Kirk and Paul Carrelo—and produced his text exchanges with those individuals.<sup>14</sup> There is no basis for any AHG complaint about the documents produced by Cargill or its representatives.

9. Similarly, the AHG's assertion at paragraph 31 of its factum that "Cargill has refused to produce" text messages with Mr. Broking is entirely incorrect. Mr. Davies produced his text messages with Mr. Broking.<sup>15</sup> Mr. Carrelo produced his text messages with Mr. Broking (contained in a group text chain among Mr. Carrelo and Mr. Lehtinen of Cargill, and Mr. Broking and Mr. Vuong of Tacora, although counsel to the AHG did not examine either Mr. Carrelo or Mr. Broking about them). There is no evidence that any other relevant messages are missing.

10. The AHG's complaint in paragraph 48(c) of its factum about an alleged failure to "provide communications between Cargill employees and Tacora and its advisors" is unfounded. During Mr. Carrelo's examination, counsel to the AHG stated he was seeking such documents "since January 2023".<sup>16</sup> Seeking documents for an irrelevantly broad time period is an abuse of process.<sup>17</sup> In any event, Mr. Carrelo did produce two October emails with Tacora and its advisors (but the AHG's counsel chose not to examine him upon them), which is consistent with his testimony that in October he "was not part of the [Cargill] team that was working on" the DIP process within Cargill and only had involvement "on the periphery".<sup>18</sup> The evidence was that the DIP process

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<sup>13</sup> Davies Cross, p. 72, lines 2-24 Transcript Brief, Tab 1, PDF p. 77 and Undertaking Chart from Davies Cross re No. 7, Q. 261, p. 73.

<sup>14</sup> Davies Cross, p. 17, lines 5-22, Transcript Brief, Tab 1, PDF p. 22; Exhibit 6 to Davies Cross being Exchange of text messages between Mr. Broking and Mr. Davies and Exhibit 7 to Davies Cross being Exchange of Teams messages between Mr. Kirk and Mr. Davies, Transcript Brief, Tabs 1(F) and (G), PDF pp. 164 and 168.

<sup>15</sup> Exhibit 5 to Davies Cross being Exchange of text messages between Mr. Broking and Mr. Davies, Transcript Brief, Tab 1(E), PDF p. 156.

<sup>16</sup> Carrelo Cross at p. 20, lines 16-23, Transcript Brief, Tab 3, p. 383.

<sup>17</sup> *Elfe Juvenile Products Inc. v. Bern*, 1994 CarswellOnt 1065 (Ont. Gen. Div.) at paras. 26, 29-30, 40, Cargill BOA, Tab 1.

<sup>18</sup> Carrelo Cross at p. 66, line 18 to p. 67, line 4, Transcript Brief, Tab 3, pp. 429-430.

was led by counsel<sup>19</sup>—Cargill has not produced privileged documents about the DIP process—and the documents exchanged between Cargill’s counsel and Tacora, its advisors and the Monitor were produced to the AHG in response to its written interrogatories to the Monitor.

11. As for paragraph 48(e) of the AHG’s factum, even if the documents sought were relevant—which they are not—the AHG sought “whether Cargill had such documents,”<sup>20</sup> which amounts to an improper attempt to seek discovery of documents from Cargill.<sup>21</sup> Mr. Carrelo testified that he did not have documents about analysis regarding the implications of any disclaimer of the Offtake Agreement, he did not know if Cargill had done such analysis, and he did not understand what was being requested.<sup>22</sup>

12. The AHG’s factum demonstrates that its real complaint is about the Offtake Agreement between Tacora and Cargill. The AHG’s semantic arguments at paragraphs 19 and 21 of its factum about whether disclaiming the Offtake Agreement will create “flexibility”, or whether Tacora has a “wish list” about modifications to the Offtake Agreement, can be safely ignored in the face of the unequivocal evidence that Tacora, its advisors and the Monitor believe the best path forward for Tacora in these CCAA proceedings is to approve the ARIO sought by Tacora, and dismiss the AHG’s cross-motion.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED.**

October 23, 2023

*/s/ Goodmans LLP*

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Goodmans LLP

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<sup>19</sup> Carrelo Cross, p. 55, line 14 to p. 56, line 20, p. 67, lines 8-11, Transcript Brief, Tab 3, pp. 418-419 and 430.

<sup>20</sup> Carrelo Cross at p. 36, lines 18-19, Transcript Brief, Tab 3, p. 399.

<sup>21</sup> *Magnotta Winery Corp. v. Ontario (Alcohol and Gaming Commission)*, 2016 ONSC 3174 ([CanLII](#)) at [para. 21](#) (S.C.J.—Master); *Payne v. Ontario (Human Rights Commission)*, [2000 CanLII 5731](#) (ONCA) at [para. 166](#).

<sup>22</sup> Carrelo Cross at p. 32, line 18 to p. 33, line 7, p. 34, line 18-23, and p. 36, lines 15-19, Transcript Brief, Tab 3, pp. 395-397 and 399.

## SCHEDULE A

### LIST OF AUTHORITIES

1. *Elfe Juvenile Products Inc. v. Bern*, 1994 CarswellOnt 1065 (Ont. Gen. Div.)
2. *Magnotta Winery Corp. v. Ontario (Alcohol and Gaming Commission)*, 2016 ONSC 3174 ([CanLII](#))
3. *Payne v. Ontario (Human Rights Commission)*, [2000 CanLII 5731](#) (ONCA)

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