



SUPERIOR COURT OF JUSTICE

COUNSEL SLIP

COURT FILE NO.: To be assigned upon issuance of
Notice of Application

DATE: September 14, 2023

REGISTRAR: L. Lewis

NO. ON LIST: 1

TITLE OF PROCEEDING: In the Matter of a Plan of Compromise or Arrangement of
BioSteel Sports Nutrition Inc.

BEFORE JUSTICE: Mr. Justice Cavanagh

PARTICIPANT INFORMATION

For Plaintiff, Applicant, Moving Party, Crown:

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ENDORSEMENT OF JUSTICE CAVANAGH:

Introduction

- [1] At the close of oral submissions today, I indicated that I was prepared to grant the initial order in these CCAA proceedings and that I would issue a brief endorsement summarizing my reasons for doing so. Acronyms and other short forms, if not expressly defined, have the meanings assigned in the Applicant’s materials, filed.

Background Facts

- [2] The Applicant is BioSteel Sports Nutrition Inc. (the “Applicant”). The Applicant seeks an Initial Order under the provisions of the *Companies Creditors Arrangement Act* (“the “CCAA”). BioSteel Sports Nutrition USA LLC (“BioSteel U.S.”) and BioSteel Manufacturing LLC (“BioSteel Manufacturing” and, collectively with BioSteel U.S., the “Non-Filing Entities”) are not applicants in this proceeding but are the subject of certain relief requested.
- [3] The Applicant, operating with BioSteel U.S. and BioSteel Manufacturing (collectively, “BioSteel” or the “BioSteel Entities”), is a sports nutrition and hydration company, focused on high-quality ingredients and with a strong presence in the professional sports markets. BioSteel products, including ready to drink hydration mixes and supplements (“RTDs”), are available at retailers across Canada, the United States and online.
- [4] In connection with the planned growth of the brand in the United States, BioSteel Manufacturing acquired a facility for the production of RTD’s in the United States and BioSteel began marketing and distributing products in the United States through BioSteel U.S.
- [5] The Applicant’s operations and growth initiatives have been funded in large part by a Secured Financing Facility provided by Canopy Growth Corporation (“Canopy”) and an affiliate of Canopy, as well as through equity financing and shared services support provided by Canopy and its affiliates. Canopy directly owns over 90% of the equity interests of the Applicant and, indirectly, through wholly-owned subsidiaries, 100% of the equity interests of the remaining BioSteel Entities. Pursuant to the Secured Financing Facility, Canopy and its affiliate have collectively

advanced to date over \$366 million to the Applicant. Notwithstanding the already significant investments made by Canopy in BioSteel's development and marketing, BioSteel remains significantly cash flow negative and requires continued support from Canopy and its affiliates which is estimated, based on current operations and balance sheet position, to average approximately \$15 million per month.

- [6] Beginning in late 2022, BioSteel and Canopy undertook a broad marketing process to seek an additional investment in or sale of BioSteel. That process returned no actionable bids. In the summer of 2023, a Special Committee was formed to explore strategic alternatives for the Applicant, which included refocusing its sale efforts. The Special Committee engaged a financial advisor to assist in developing a process to solicit interest in BioSteel from potentially interested parties. The Special Committee set a deadline of September 5, 2023 to receive transaction proposals from interested parties. Multiple interested parties provided indications of interest for all or portions of the BioSteel business, but all such indications are subject to significant conditions, including additional lengthy due diligence periods and/or financing conditions, and no party offered committed financing to fund the operations of BioSteel business during its diligence period.
- [7] On September 13, 2023, Canopy informed the Applicant that neither it nor its affiliates intend to make any further cash or shared services investment in BioSteel's business and, at the same time, Canopy demanded repayment under the Secured Financing Facility. Without ongoing financial and services support from Canopy or its affiliates, the Applicant cannot meet its obligations as they come due. As a result, the Special Committee determined that it was in the Applicant's best interest to conserve cash, put the business into hibernation, and seek protection under the CCAA to allow the Applicant to maximize value for stakeholders through a court-supervised sales process.
- [8] The Applicant intends to use the CCAA process to complete the solicitation work that began pre-filing and to identify and close a transaction for the assets and/or business of BioSteel as efficiently as possible.

Discussion

- [9] The relief requested in the Initial Order is limited to what is necessary for the Initial Stay Period until the Comeback Hearing and includes, among other things,
- a. declaring that the Applicant is a "debtor company" to which the CCAA applies;
 - b. appointing KSV Restructuring Inc. ("KSV" or the "Proposed Monitor") to monitor the assets, business, and affairs of the Applicant (the "Monitor");
 - c. a stay, for an initial period of not more than 10 days (the "Initial Stay Period"), all proceedings and remedies taken or that might be taken in respect of any of the BioSteel Entities, the Monitor or the former, current or future directors or officers of any of the BioSteel Entities (other than a director or officer who is or was at any point a shareholder or option holder of the Applicant) (collectively, the "Directors and Officers"), or affecting the Applicant's business (the "Business") or any of the Applicant's current and future assets, licenses, undertakings and properties of every nature and kind whatsoever, and wherever situated including all proceeds thereof (collectively, the "Property") or the

business or property of the U.S. BioSteel Entities, except with the written consent of the Applicant and the Monitor, or with leave of the court (the “Stay of Proceedings”);

- d. authorizing the Applicant to continue to utilize the Cash Management System (as defined in the materials) including maintaining the banking arrangements currently in place for the Applicant;
- e. authorizing the Applicant to pay, with the consent of the Monitor, pre-filing amounts of certain critical suppliers to the BioSteel Entities;
- f. authorizing the Applicant to act as the foreign representative in respect of the within proceeding for the purpose of having the CCAA Proceeding recognized and approved in a jurisdiction outside of Canada, and authorizing the Applicant to apply for foreign recognition and approval of the CCAA Proceeding, as necessary, in any jurisdiction outside of Canada, including the United States, pursuant to Chapter 15 of title 11 of the United States Code, 11 U.S.C §§ 101-1532 (the “Bankruptcy Code”); and
- g. granting the following charges (collectively, the “Charges”) over the Applicant’s Property:
 - i. the Administration Charge (as defined below) up to a maximum amount of U.S. \$750,000; and
 - ii. the Directors’ Charge (as defined below) up to a maximum amount of U.S. \$1,279,000.

[10] The Applicant intends to bring a motion at the Comeback Hearing to seek the SISP Approval Order and the Amended and Restated Initial Order.

A. The Applicant Meets the CCAA Statutory Requirements

The CCAA Applies

[11] The CCAA applies to a “debtor company” if the total claims against it exceed \$5 million.

[12] The Applicant was incorporated under the Ontario *Business Corporations Act* and continued federally under the *Canada Business Corporations Act*. The Applicant is insolvent and the claims against it are in excess of \$5 million. Accordingly, the Applicant is a “debtor company” for the purposes of the CCAA.

This Court is the Appropriate Forum for these Proceedings

[13] A debtor company may bring an application under the CCAA in the province within which its head office or its place of business is located. The Applicant maintains its head office in Toronto. Accordingly, this Court is the appropriate forum.

B. The Stay of Proceedings is Appropriate

[14] This Court may grant a stay of proceedings of up to 10 days on an initial application provided is satisfied that: (i) such a stay is appropriate; and (ii) the Applicant has acted in good faith and with due diligence. The primary purpose of the CCAA stay is to maintain the *status quo* for a period while the debtor company consults with its stakeholders with a view to continuing its operations for the benefit of its creditors. The threshold for a stay is low and a debtor company only has to

satisfy this Court stay of proceedings would “usefully further” its efforts to reorganize. A sale under the CCAA is an appropriate use of the CCAA.

[15] The stay of proceedings sought by the Applicant is necessary for the Applicant to preserve value while pursuing a transaction for the benefit of stakeholders. Currently, various contract counterparties have issued default notices and may imminently take steps to terminate supply agreements, distribution arrangements and Sponsorship Agreements. Other parties may seek to initiate or continue litigation. Under the circumstances, I am satisfied that a limited stay period is in the best interests of all stakeholders.

Stay for Non-Filing Entities

[16] The Applicant’s insolvency puts the Non-Filing Entities at significant risk. If enforcement steps are taken against the Non-Filing Entities, it is expected to materially destroy value and negatively impact a sale of BioSteel’s assets or business.

[17] CCAA courts have extended the CCAA stay over non-applicant affiliates, non-affiliated third parties, and foreign non-applicant affiliates. Courts will often do so where the CCAA debtor company’s business is so intertwined with the non-applicant or indispensable to the non-applicant’s business and restructuring that not extending the stay to the other entity would significantly impair the effectiveness of the stay for the debtor company.

[18] I am satisfied that it is appropriate to extend a CCAA stay over non-filing affiliates of the Applicant for the following reasons:

- a. the Non-Filing Entities are intertwined in the Applicant’s business and operate on an integrated basis with the Applicant to manufacture, market, and distribute BioSteel products, notwithstanding that they are not subsidiaries of the Applicant.
- b. Enforcement action against the Non-Filing Entities would be detrimental to the Applicant’s efforts to sell the assets and/or business of BioSteel and would undermine a process that would otherwise benefit the stakeholders of BioSteel as a whole.
- c. The balance of convenience favours extending the stay.
- d. The Proposed Monitor supports extending the stay to the Non-Filing Entities.

[19] In this regard, see *JTI-Macdonald Corp., Re*, 2019 ONSC 1625, at para. 15.

C. The Monitor Should be Appointed

[20] The Proposed Monitor is a licensed trustee within the meaning of section 2 of the BIA and signed a consent to act as the Monitor of the Applicant. The Proposed Monitor is qualified to act as Monitor under section 11.7 of the CCAA.

D. Charges are Appropriate

[21] The Applicant is seeking charges that are usual and customary for a proceeding of this nature. At the Initial Order stage, the proposed charges are not proposed to rank in priority to any secured creditor who was not provided with notice of this proceeding.

Administration Charge

- [22] The CCAA authorizes this Court to grant a priority charge over a debtor company's assets for professional fees and disbursements on notice to affected secured creditors. This Court has recognized that, unless professional advisor fees are protected with the benefit of an administration charge, the objectives of the CCAA would be frustrated.
- [23] The Applicant seeks the Administration Charge against the Property in the maximum amount of U.S. \$750,000 to secure the fees and disbursements incurred both before and after the commencement of the CCAA Proceeding by legal counsel for the Applicant, the Proposed Monitor, and legal counsel for the Proposed Monitor, as well as the monthly fee of the Financial Advisor.
- [24] The amount of the Administration Charge has been determined with guidance from the Proposed Monitor, is supported by the Proposed Monitor, and is limited to what is necessary for the Initial Stay Period.
- [25] I am satisfied that the Administration Charge is fair and reasonable given the size and complexity of the Applicant's business, and the complexity of the restructuring proposed in this CCAA Proceeding.

Directors' Charge

- [26] The CCAA also authorizes this Court to grant a priority charge to indemnify a debtor company's directors and officers on notice to a secured creditors. Directors' charges encouraged directors and officers to remain in place, providing a potential stabilizing force for the company.
- [27] The Applicant has shown that (i) notice has been given to the likely affected secured creditors; (ii) the amount is appropriate; (iii) the Applicant could not obtain adequate indemnification insurance for the directors and officers at a reasonable cost; and (iv) the charge does not apply to obligations incurred by a director or officer as a result of their gross negligence or wilful misconduct.
- [28] The Applicant has worked with the Proposed Monitor to calculate the quantum of the Directors' Charge, and the Proposed Monitor supports the Directors' Charge.
- [29] I am satisfied that the Directors' Charge is necessary to protect the Directors and Officers in the first 10 days of the CCAA Proceeding.

E. Foreign Recognition

- [30] The Initial Order contemplates BioSteel Canada being authorized to act as the foreign representative and to apply for foreign recognition and approval of this CCAA Proceeding, as necessary, in any jurisdiction outside of Canada, including the United States, pursuant to Chapter 15 of the Bankruptcy Code.
- [31] Pursuant to section 56 of the CCAA, the Court has jurisdiction to make an order that allows the Applicant to act as a representative in respect of any proceeding under the CCAA for the purpose of having them recognized in a jurisdiction outside of Canada.
- [32] The Applicant has assets and contractual relationships with parties located in the United States. Accordingly, authorizing BioSteel Canada to seek recognition of the orders of this Court in the United States is appropriate and in the best interests of stakeholders.

Disposition

[33] For these reasons, I grant the requested Initial Order.