

**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 BIOSTEEL SPORTS NUTRITION INC.

(the "**Applicant**")

FACTUM OF THE APPLICANT

September 14, 2023

Cassels Brock & Blackwell LLP
Suite 3200, Bay Adelaide Centre – North Tower
40 Temperance St.
Toronto, ON M5H 0B4

Ryan Jacobs LSO#: 59510J
Tel: 416.860.6465
rjacobs@cassels.com

Shayne Kukulowicz LSO#: 30729S
Tel: 416.860.6463
skukulowicz@cassels.com

Natalie E. Levine LSO#: 64908K
Tel: 416.860.6568
nlevine@cassels.com

Jeremy Bornstein LSO#: 65425C
Tel: 416.869.5386
jbornstein@cassels.com

Lawyers for the Applicant

TO: SERVICE LIST

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PART I - NATURE OF THIS APPLICATION

1. This factum is filed in support of the application by BioSteel Sports Nutrition Inc. ("**BioSteel Canada**" or the "**Applicant**"), for an Initial Order¹ under the provisions of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**"). BioSteel Sports Nutrition USA LLC ("**BioSteel US**") and BioSteel Manufacturing LLC ("**BioSteel Manufacturing**") collectively with BioSteel US, the "**Non-Filing Entities**") are not applicants in this proceeding but are the subject of certain limited relief requested.

2. The Applicant, operating with BioSteel US 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 professional sports markets. BioSteel products, including RTDs, hydration mixes and supplements, are available at retailers across Canada, the United States and online.²

¹ Capitalized terms not otherwise defined herein have the meaning given to them in the Affidavit of Sarah S. Eskandari, sworn September 13, 2023 (the "**Eskandari Affidavit**").

² Eskandari Affidavit at para 2.

3. BioSteel has made significant investments in sponsorships and endorsements, including rights to “rinkside” advertisements, use of proprietary logos, athlete-centered promotions, and social media participation. BioSteel has partnered with, among others, the NHL and the NHLPA, certain NBA teams (including the Toronto Raptors), the Toronto Blue Jays, and a number of professional athletes in various sports.³

4. In connection with the planned growth of the brand in the United States, BioSteel Manufacturing acquired a facility for the production of RTDs in the United States and BioSteel began marketing and distributing products in the United States through BioSteel US.⁴

5. The Applicant’s operations and growth initiatives have been funded in large part by a Secured Financing Facility provided by Canopy and an affiliate of Canopy, as well as via 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, via 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 million⁵ 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

6. Beginning in late 2022, BioSteel and Canopy cooperatively undertook a broad marketing process to seek an additional investment in or sale of BioSteel. That process returned no actionable bids. As described in detail below, in the summer of 2023, the Special Committee was formed to explore strategic alternatives for the Applicant, which included refocusing its sale

³ Eskandari Affidavit at para 3.

⁴ Eskandari Affidavit at para 4.

⁵ All references to currency in this Factum are references to Canadian dollars unless otherwise indicated.

⁶ Eskandari Affidavit at para 5.

efforts. The Special Committee engaged the Financial Advisor (as defined below) to assist in developing a process to solicit interest in BioSteel from potentially interested parties. In light of the Applicant's rapidly deteriorating liquidity performance and based on feedback from Canopy regarding its diminishing willingness to provide financial and operational support for the business, the Special Committee set a deadline of September 5, 2023 to receive transaction proposals from interested parties. Multiple parties provided indications of interest for all or portions of the BioSteel business, but all such indications were 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 the BioSteel business during its diligence period.⁷

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.⁸

9. The relief requested in the Initial Order is limited to what is necessary for the Initial Stay Period until the Comeback Hearing, including, among other things:

⁷ Eskandari Affidavit at para 6.

⁸ Eskandari Affidavit at para 7.

- (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 (if appointed in such capacity, the “**Monitor**”);
- (c) staying, 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 optionholder 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, licences, undertakings, and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (collectively, the “**Property**”) or the business or property of the US 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 below) 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 this CCAA Proceeding recognized and approved in a jurisdiction outside of Canada, and authorizing the Applicant 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 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 US\$750,000; and
 - (ii) the Directors’ Charge (as defined below) up to a maximum amount of US\$1,279,000.

10. If the proposed Initial Order is granted, the Applicant intends to bring a motion at the Comeback Hearing to seek:

- (a) the SISP Approval Order, among other things:

- (i) approving a sale and investment solicitation process related to BioSteel (the “**SISP**”);
 - (ii) authorizing and directing the Applicant, Greenhill & Co. Canada Ltd., as financial advisor to the Applicant in this CCAA Proceeding (in such capacity, the “**Financial Advisor**”), and the Monitor, to perform their respective obligations under the SISP; and
 - (iii) providing protections to the Financial Advisor and the Monitor, in connection with the SISP; and
- (b) the ARIO, among other things:
- (i) extending the Stay of Proceedings;
 - (ii) increasing the maximum amount of the Administration Charge;
 - (iii) increasing the maximum amount of the Directors’ Charge; and
 - (iv) approving the Financial Advisor’s engagement letter and granting a Transaction Fee Charge.

PART II - FACTS

A. CORPORATE STRUCTURE

11. The Applicant was incorporated in Ontario under the province’s *Business Corporations Act*, R.S.O. 1990, c.-B-16. Its registered office and primary place of business is in Toronto.⁹

12. BioSteel US and BioSteel Manufacturing (the “**US BioSteel Entities**”) operate on an integrated basis with the Applicant to manufacture, market, and distribute BioSteel products. The US BioSteel Entities are intertwined in the Applicant’s Business, notwithstanding the fact that they are not subsidiaries of the Applicant.¹⁰

B. THE BUSINESS OF THE APPLICANT

13. The Applicant contracts with BioSteel Manufacturing and third parties for the manufacture of RTDs, “Hydration Mix”, and other products pursuant to proprietary formulas owned by the

⁹ Eskandari Affidavit at para 10.

¹⁰ Eskandari Affidavit at para 11.

Applicant. The Applicant then sells the products directly to businesses and consumers primarily in North America, including to BioSteel US, which markets and distributes to businesses in the United States. BioSteel now relies on Canopy and its affiliates to provide all employees required to operate BioSteel's business, including, without limitation, personnel providing administrative, legal, tax and other support.¹¹

14. The Applicant and Canopy are parties to a master services agreement which, *inter alia*, permits Canopy to provide services to the Applicant on an as-needed basis if and when requested, subject to the ability of Canopy to refuse (by written notice) to provide any services it is unable to provide to the Applicant. The services covered under the master services agreement relate to all business functions, including operations, supply chain, finance, human resources, legal, information technology, research and development, tax, treasury, corporate development, facilities, marketing and sales, and corporate communications.¹²

15. All other personnel providing services to BioSteel are employees of Canopy or Canopy Growth USA, LLC (an indirect, wholly-owned US subsidiary of Canopy).¹³ For August 2023, approximately 190 employees provided services to BioSteel on a fulltime basis. Of these employees, approximately 90 were providing services at the Verona, Virginia facility in the US (the "**Verona Facility**").¹⁴

16. The Applicant is the tenant under a lease for office space at 87 Wingold Avenue in Toronto, Ontario. BioSteel Manufacturing owns certain manufacturing assets in the Verona Facility which premises are also leased and where assets of the Applicant are stored.¹⁵

¹¹ Eskandari Affidavit at para 24.

¹² Eskandari Affidavit at para 43.

¹³ Eskandari Affidavit at para 46.

¹⁴ Eskandari Affidavit at para 47.

¹⁵ Eskandari Affidavit at para 26 and 49.

17. BioSteel products are sold in thousands of physical stores in Canada and the United States. The primary distribution channels include food, drug and mass retailers, convenience stores, gas stations and specialty fitness retailers. The Applicant also conducts sales through online platforms such as Amazon and its own website.¹⁶

18. BioSteel has successfully leveraged its connections with professional athletes and sports organizations into endorsement and marketing opportunities and has historically focused a significant portion of its marketing spend on athlete endorsements and team/league sponsorships.¹⁷

19. The Applicant is the owner of all intellectual property that is material to the BioSteel business, including the proprietary formulas and other information related to the production of the RTDs, Hydration Mix and powders.¹⁸

20. BioSteel's collective operations are funded by advances under the BioSteel Loan Agreement to the Applicant. In the ordinary course of business and as described above, the Applicant engages in intercompany transactions with BioSteel US, BioSteel Manufacturing, Canopy and certain of its affiliates.¹⁹

C. FINANCIAL DIFFICULTIES AND THE NEED FOR CCAA PROTECTION

21. The Applicant is insolvent. It does not have adequate liquidity to operate its Business in the ordinary course. Canopy and its affiliates are no longer willing to fund the Applicant's operating costs and protection under the CCAA is the Applicant's only option to stabilize and preserve the value of its assets.²⁰

¹⁶ Eskandari Affidavit at para 29.

¹⁷ Eskandari Affidavit at para 32.

¹⁸ Eskandari Affidavit at para 39.

¹⁹ Eskandari Affidavit at para 60.

²⁰ Eskandari Affidavit at para 63.

22. The Applicant currently owes approximately \$366 million plus interest under the BioSteel Loan Agreement and it is unable to meet its current obligations.²¹ The obligations of the Applicant under the BioSteel Loan Agreement are secured by the Security Agreement.²² The Applicant also owes Canopy and its affiliates approximately \$4.6 million on an unsecured basis.²³

23. The Applicant also has unsecured trade liabilities of approximately \$40.4 million related to, among other things, Sponsorship Agreements, marketing costs, warehousing, storage and materials supplied to CMOs for production.²⁴

24. In connection with the preparation of Canopy's consolidated financial statements for the fiscal year ended March 31, 2023, Canopy identified certain trends in the recording of sales by BioSteel and began an internal review (the "**BioSteel Review**"). Through the BioSteel Review, Canopy identified misstatements, primarily overstatements, related to the recognition of revenue, primarily related to the Applicant's business-to-business sales in markets outside of Canada and the United States.²⁵

25. As a result of the BioSteel Review, Canopy restated its consolidated financial statements. All individuals implicated in the revenue misstatements are no longer involved with BioSteel (other than certain individuals in their capacities as minority shareholders) and an independent director was later added to the board of directors of each of the BioSteel Entities.²⁶

26. At the end of 2022, BioSteel retained Goldman Sachs & Co. LLC ("**Goldman**") to conduct a broad marketing process to identify a sale or investment in the business that would allow the business to continue as a going concern, with or without Canopy's involvement. Due to concerns identified regarding BioSteel's financial reporting which resulted in a delay in preparing the

²¹ Eskandari Affidavit at para 65.

²² Eskandari Affidavit at para 57.

²³ Eskandari Affidavit at para 65.

²⁴ Eskandari Affidavit at para 65.

²⁵ Eskandari Affidavit at para 20.

²⁶ Eskandari Affidavit at para 21.

financial statements for BioSteel, the sales process stalled and BioSteel re-examined the size of the investment required to grow the business. The sales process was restarted in June 2023 following the release of the financial statements and with the benefit of refined financial information.²⁷

27. Goldman engaged with 24 potential buyers, however, the feedback from potential buyers noted, among other concerns, that significant investment would be required and that the timeline for a return on the investment in BioSteel's current form was too long. No indications of interest or bids were received by the beginning of August 2023.²⁸

28. In August 2023, after being advised that certain members of management were considering a management buy-out offer, the Special Committee was formed to explore and implement strategic alternatives for BioSteel, including evaluating any offers received from management.²⁹ The Special Committee retained the Financial Advisor to capitalize on its expertise in distressed M&A situations and explore alternative strategies to maximize the value of the BioSteel brand. The Financial Advisor designed and launched a refreshed marketing process to identify proposals for a transaction or investment in BioSteel. The Financial Advisor contacted the parties who had previously been contacted in the Goldman process, along with other industry and financial parties. The Financial Advisor called for proposals by September 5, 2023.³⁰

29. On September 5, 2023, six preliminary, non-binding proposals were received. Unfortunately, all of the proposals were highly conditional and required significant time to complete, among other things, due diligence before the parties could make a determination about whether to submit a binding bid. Importantly, none of the parties that submitted proposals fully

²⁷ Eskandari Affidavit at para 71 and 72.

²⁸ Eskandari Affidavit at para 73.

²⁹ Eskandari Affidavit at para 74.

³⁰ Eskandari Affidavit at para 75.

committed financing necessary to meet BioSteel's immediate operating needs through completion of their respective diligence periods. With no prospective buyer in sight, Canopy determined that it was unwilling to continue to advance funding to BioSteel. As a result, the Special Committee determined that seeking the benefit of Court protection would provide the best opportunity to maximize the value of BioSteel for stakeholders.³¹

30. The Applicant is insolvent and needs time to conclude a quick and efficient process to realize upon the assets and/or business of BioSteel for the benefit of stakeholders. This CCAA Proceeding is the only option to preserve value for the Applicant's stakeholders.

PART III - ISSUES AND THE LAW

31. The principal issues on this Application are whether:

- (i) the Applicant meets the criteria to obtain relief under the CCAA;
- (ii) this Court should grant the Stay of Proceedings, including to the Non-Filing Entities;
- (iii) this Court should appoint the Proposed Monitor as Monitor;
- (iv) this Court should grant the Administration Charge and the Directors' Charge; and
- (v) this Court should authorize BioSteel Canada 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.

³¹ Eskandari Affidavit at para 76.

A. THE APPLICANT MEETS THE CCAA STATUTORY REQUIREMENTS

(i) *The CCAA Applies to the Applicant*

32. The CCAA applies to a “debtor company” if the total claims against it exceed \$5 million.³²

33. The Applicant was incorporated under the Ontario *Business Corporations Act*, R.S.O. 1990, c. B-16, and continued federally under the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44. 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.

(ii) *This Court is the Appropriate Forum for these Proceedings*

34. A debtor company may bring an application under the CCAA in the province within which its head office or chief place of business is located.³³ The Applicant maintains its head office in Toronto.³⁴ Accordingly, this Court is the appropriate forum.

B. THE STAY OF PROCEEDINGS IS APPROPRIATE

(i) *The Stay of Proceedings for the Applicant is Necessary*

35. This Court may grant a stay of proceedings of up to 10 days on an initial application, provided it is satisfied that: (i) such a stay is appropriate; and (ii) the Applicant has acted in good faith and with due diligence.³⁵ 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.³⁶ The threshold for a stay is low and a debtor company only has to satisfy this Court that a stay of proceedings would “usefully further” its efforts to

³² *Companies’ Creditors Arrangement Act*, [RSC 1985, c. C-36, ss 2\(1\)](#) “company”, “debtor company”, [3\(1\)](#) [CCAA]; *Bankruptcy and Insolvency Act*, [RSC 1985, c. B-3](#), s 2 “insolvent person” [BIA]; *Stelco Inc., Re* (2004), [2004 CanLII 24933](#) at [paras 21-26](#) (Ont Sup Ct J (Commercial List)).

³³ [CCAA, s 9\(1\)](#).

³⁴ Eskandari Affidavit at para 10.

³⁵ [CCAA, ss 11.02\(1\) and 11.02\(3\)](#).

³⁶ *Re JTI-Macdonald Corp.*, [2019 ONSC 1625](#) at [para 12](#) [*JTI-Macdonald*].

reorganize.³⁷ Jurisprudence from the Supreme Court of Canada and this Court is clear that a sale under the CCAA is an appropriate use of the CCAA.³⁸

36. 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, a limited stay period is in the best interests of all stakeholders.

(ii) ***The Court Should Exercise its Jurisdiction to Grant a Stay for the Non-Filing Entities***

37. 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.³⁹

38. CCAA courts have extended the CCAA stay over non-applicant affiliates,⁴⁰ non-affiliated third parties,⁴¹ and foreign non-applicant affiliates.⁴² Courts will often do so where the CCAA debtor company's business is so intertwined with the non-applicant or indispensable to the non-

³⁷ *Century Services Inc v Canada (Attorney General)*, [2010 SCC 60](#) at [para 70](#); *Industrial Properties Regina Limited v Copper Sands Land Corp*, [2018 SKCA 36](#) at [para 21](#).

³⁸ *9354-9186 Quebec Inc v Callidus Capital Corp*, [2020 SCC 10](#) at [paras 42](#) and [43](#); *First Leaside Wealth Management Inc (Re)*, [2012 ONSC 1299](#) at [para 32](#). See also *North American Tungsten Corporation Ltd, Re*, [2015 BCSC 1376](#) at [para 27](#).

³⁹ Proposed Monitor's Pre-Filing Report dated September 14, 2023, para 6.0.4 [Pre-Filing Report].

⁴⁰ *Re Sino-Forest Corp*, [2012 ONSC 2063](#) at [paras 5](#) and [31](#); *Re Cinram International Inc*, [2012 ONSC 3767](#) at [paras 61-65](#); *Re Laurentian University of Sudbury*, [2021 ONSC 659](#) at [paras 38-42](#); *In the matter of a plan of compromise or arrangement of Wayland Group Corp*, Court File No CV-19-00632079-00CL (Ont Sup Ct J (Commercial List)), Order of Hailey J dated [December 2, 2019 \(Initial Order\)](#) at para 10.

⁴¹ *In the Matter a plan of compromise or arrangement with 9323-7055 Quebec Inc (formerly known as Aquadis International inc)*, File No. 500-11-049838-1560 (Quebec Sup Ct: District of Montreal), [order of Castonguay JC \(Initial Order\) dated December 9, 2015](#) at para 11.

⁴² *Re Tamerlane Ventures Inc*, [2013 ONSC 5461](#) at [para 21](#); *Re Target Canada Co*, [2015 ONSC 303](#) at [paras 49-50](#); *Re Nordstrom Canada Retail, Inc*, [2023 ONSC 1422](#) at [paras 36 and 42](#) [Nordstrom]; *In the matter of a plan of compromise or arrangement of Lydian Group*, Court File No CV-19-00633392-00CL (Ont Sup Ct J (Commercial List)) [Order of Morawetz J \(Initial Order\) dated December 23, 2019](#) at paras 2 and 4.

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.⁴³

39. In *JTI-Macdonald Corp*, this Court outlined the factors for determining when it is appropriate to extend a CCAA stay over non-filing affiliates.⁴⁴ The Applicant submits that *the JTI-Macdonald Corp* factors, as well as factors identified in case law cited above, support the extension of the stay to the Non-Filing Entities:

- (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 the fact that they are not subsidiaries of the Applicant.⁴⁵
- (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.⁴⁶
- (c) The balance of convenience favours extending the stay: failing of the restructuring would be more detrimental than extending the stay to the Non-Filing Entities. Extending the Stay of Proceedings to the Non-Filing Entities will protect the business of BioSteel during this CCAA proceeding for the benefit of the Applicant's creditors and other stakeholders, including suppliers and customers.⁴⁷
- (d) The Proposed Monitor supports extending the stay to the Non-Filing Entities.⁴⁸

⁴³ See *Re Imperial Tobacco Canada Limited, et al*, [2019 ONSC 1684](#) at [paras 11-12](#); also *Nordstrom* at [paras 30-32](#).

⁴⁴ *JTI-Macdonald* at [para 15](#).

⁴⁵ Eskandari Affidavit at para 11.

⁴⁶ Eskandari Affidavit at para 78.

⁴⁷ Pre-Filing Report at paras 6.0.2-4.

⁴⁸ Pre-Filing Report at para 6.0.5.

40. For the Stay of Proceedings to be effective, it must be extended to the Non-Filing Entities.

C. THE MONITOR SHOULD BE APPOINTED

41. The Proposed Monitor is a licensed trustee within the meaning of section 2 of the BIA and has signed a consent to act as the Monitor of the Applicant.⁴⁹ The Proposed Monitor is qualified to act as Monitor under section 11.7 of the CCAA.

D. THE CHARGES ARE APPROPRIATE

42. 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.

(i) Administration Charge

43. 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.⁵⁰ 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.⁵¹ The factors to be considered are well established in the case law.⁵²

44. The Applicant seeks the Administration Charge against the Property in the maximum amount of US\$750,000 to secure the fees and disbursements incurred both before and after the commencement of this CCAA Proceeding by legal counsel for the Applicant, the Proposed

⁴⁹ Pre-Filing Report at paras 1.4.1-2.

⁵⁰ [CCAA, s 11.52](#).

⁵¹ *Timminco Limited (Re)*, [2012 ONSC 506](#) at [para 66](#).

⁵² Court have considered: (i) the size and complexity of the business being restructured; (ii) the proposed role of the beneficiaries of the charge; (iii) whether there is an unwarranted duplication of roles; (iv) whether the quantum of the proposed charge appears to be fair and reasonable; (v) the position of the secured creditors likely to be affected by the charge; and (vi) the position of the Monitor: *Canwest Publishing Inc / Publications Canwest Inc, Re*, [2010 ONSC 222](#) at [para 54](#).

Monitor, and legal counsel for the Proposed Monitor, as well as the monthly fee of the Financial Advisor.

45. 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. 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.⁵³

(ii) Directors' Charge

46. The CCAA also authorizes this Court to grant a priority charge to indemnify a debtor company's directors and officers on notice to its secured creditors.⁵⁴ Directors' charges encourage directors and officers to remain in place, providing a potential stabilizing force for the company.⁵⁵

47. In deciding whether to grant a director's charge, Courts must be satisfied 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.⁵⁶

48. The Applicant seeks the Directors' Charge against the Applicant's Property in favour of the Directors and Officers in the amount of \$1.279 million to protect the Directors and Officers from the risk of significant personal exposure. The proposed Directors' Charge would apply only

⁵³ Pre-Filing Report at para 4.1.3-4.

⁵⁴ [CCAA, s 11.51\(1\)](#).

⁵⁵ *Canwest Global Communications Corp (Re)* (2009), [2009 CanLII 55114](#) at [para 48](#) (Ont Sup Ct J (Commercial List)).

⁵⁶ *Jaguar Mining Inc, Re*, [2014 ONSC 494](#) at [para 45](#).

to the extent that the Directors and Officers do not have coverage under the D&O Insurance and will rank second in priority, in accordance with the priority set out in the proposed Initial Order.⁵⁷

49. As discussed above, the Non-Filing Entities are intertwined with the operation of the Applicant. Given the intertwined nature of the BioSteel business and the overlap of certain directors on the boards of the BioSteel Entities, the continued involvement and expertise offered by the Directors and Officers of the BioSteel Entities are critical to the overall success of this CCAA Proceeding. The BioSteel Entities have certain overlapping directors, including the same independent director. The Directors and Officers have indicated that they will not continue their service with the BioSteel Entities during the post-filing period unless the Initial Order grants a charge on the Applicant's Property in a sufficient amount to secure the D&O Indemnity.⁵⁸ In *LoyaltyOne, Co.*, Justice Conway recently granted a CCAA initial order providing for a directors' charge securing an indemnity by the debtor company in favour of its directors and officer and the directors and officers of the debtor company's non-filing affiliate where the non-filing affiliate was integral to the operations of the debtor's business and there was overlap between the directors on the boards of the debtor and the non-filing affiliate.⁵⁹

50. The quantum of the Directors' Charge is necessary to protect the Directors and Officers in the first 10 days of this CCAA Proceeding, having regard to the potential personal liabilities that they may be exposed to in respect of the Applicant's obligations in the period before the Comeback Hearing.⁶⁰ The Applicant has worked with the Proposed Monitor to calculate the quantum of the Directors' Charge, and the Proposed Monitor supports the Directors' Charge.⁶¹

⁵⁷ Eskandari Affidavit at para 92.

⁵⁸ Eskandari Affidavit at para 91.

⁵⁹ *In the matter of a plan of compromise or arrangement of LoyaltyOne, Co.*, Court File No. CV-23-00696017-00CL (Ont Sup Ct J (Commercial List)) [Order of Conway J \(Initial Order\) dated March 10, 2023](#) at paras 18-19.

⁶⁰ Eskandari Affidavit at para 95.

⁶¹ Pre-Filing Report at paras 4.2.1 and 4.2.4.

E. FOREIGN RECOGNITION

51. 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.

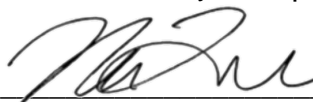
52. Pursuant to section 56 of the CCAA, the Court has jurisdiction to make an order that allows an applicant to act as a representative in respect of any proceeding under the CCAA for the purpose of having them recognized in a jurisdiction outside of Canada.⁶²

53. 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.

PART IV - ORDER REQUESTED

54. For all of the reasons above, the Applicant submits that this Court should grant the relief requested and issue an order substantially in the form of the draft Initial Order included in the Application Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 14th day of September, 2023.



Cassels Brock & Blackwell LLP
Lawyers for the BioSteel Sports Nutrition Inc.

Ryan Jacobs LSO#: 59510J
Tel: 416.860.6465
rjacobs@cassels.com

Shayne Kukulowicz LSO #: 30729S
Tel: 416.860.6463
skukulowicz@cassels.com

⁶² [CCAA, s 56.](#)

Natalie E. Levine LSO#: 64908K

Tel: 416.860.6568

nlevine@cassels.com

Jeremy Bornstein LSO #: 65425C

Tel: 416.869.5386

jbornstein@cassels.com

Lawyers for the Applicant

SCHEDULE “A”

LIST OF AUTHORITIES

1. *9354-9186 Quebec Inc v Callidus Capital Corp*, [2020 SCC 10](#).
2. *Canwest Global Communications Corp (Re)* (2009), [2009 CanLII 55114](#) (Ont Sup Ct J (Commercial List)).
3. *Canwest Publishing Inc / Publications Canwest Inc, Re*, [2010 ONSC 222](#).
4. *Century Services Inc v Canada (Attorney General)*, [2010 SCC 60](#).
5. *First Leaside Wealth Management Inc (Re)*, [2012 ONSC 1299](#).
6. *In the matter a plan of compromise or arrangement with 9323-7055 Quebec Inc (formerly known as Aquadis International inc)*, File No. 500-11-049838-1560 (Quebec Sup Ct: District of Montreal), [order of Castonguay JC \(Initial Order\) dated December 9, 2015](#).
7. *In the matter of a plan of compromise or arrangement of LoyaltyOne, Co*, Court File No CV-23-00696017-00CL (Ont Sup Ct J (Commercial List)) [Order of Conway J \(Initial Order\) dated March 10, 2023](#).
8. *In the matter of a plan of compromise or arrangement of Lydian Group*, Court File No CV-19-00633392-00CL (Ont Sup Ct J (Commercial List)) [Order of Morawetz J \(Initial Order\) dated December 23, 2019](#).
9. *In the matter of a plan of compromise or arrangement of Wayland Group Corp*, Court File No CV-19-00632079-00CL (Ont Sup Ct J (Commercial List)), Order of Hailey J dated [December 2, 2019 \(Initial Order\)](#).
10. *Industrial Properties Regina Limited v Copper Sands Land Corp*, [2018 SKCA 36](#).
11. *Jaguar Mining Inc, Re*, [2014 ONSC 494](#).
12. *North American Tungsten Corporation Ltd, Re*, [2015 BCSC 1376](#).
13. *Re Cinram International Inc*, [2012 ONSC 3767](#).
14. *Re Imperial Tobacco Canada Limited, et al*, [2019 ONSC 1684](#).
15. *Re JTI-Macdonald Corp*, [2019 ONSC 1625](#).
16. *Re Laurentian University of Sudbury*, [2021 ONSC 659](#).
17. *Re Nordstrom Canada Retail Inc*, [2023 ONSC 1422](#).
18. *Re Sino-Forest Corp*, [2012 ONSC 2063](#).
19. *Re Tamerlane Ventures Inc*, [2013 ONSC 5461](#).
20. *Re Target Canada Co*, [2015 ONSC 303](#).
21. *Stelco Inc, Re* (2004), [2004 CanLII 24933](#) (Ont Sup Ct J (Commercial List)).
22. *Timminco Limited (Re)*, [2012 ONSC 506](#).

SCHEDULE “B”

TEXT OF STATUTES, REGULATIONS & BY – LAWS

Bankruptcy and Insolvency Act, RSC 1985, c. B-3

Definitions

2. In this Act, ...

insolvent person means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and

(a) who is for any reason unable to meet his obligations as they generally become due,

(b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or

(c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due; (personne insolvable)

...

Companies' Creditors Arrangement Act, RSC 1985, c. C-36

Definitions

2 (1) In this Act, ...

Company means any company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province, any incorporated company having assets or doing business in Canada, wherever incorporated, and any income trust, but does not include banks, authorized foreign banks within the meaning of section 2 of the Bank Act, telegraph companies, insurance companies and companies to which the Trust and Loan Companies Act applies; (compagnie)

...

debtor company means any company that

(a) is bankrupt or insolvent,

(b) has committed an act of bankruptcy within the meaning of the Bankruptcy and Insolvency Act or is deemed insolvent within the meaning of the Winding-up and Restructuring Act, whether or not proceedings in respect of the company have been taken under either of those Acts,

(c) has made an authorized assignment or against which a bankruptcy order has been made under the Bankruptcy and Insolvency Act, or

(d) is in the course of being wound up under the Winding-up and Restructuring Act because the company is insolvent;

...

Application

3 (1) This Act applies in respect of a debtor company or affiliated debtor companies if the total of claims against the debtor company or affiliated debtor companies, determined in accordance with section 20, is more than \$5,000,000 or any other amount that is prescribed.

...

Jurisdiction of court to receive applications

9 (1) Any application under this Act may be made to the court that has jurisdiction in the province within which the head office or chief place of business of the company in Canada is situated, or, if the company has no place of business in Canada, in any province within which any assets of the company are situated.

...

Stays, etc. – initial application

11.02 (1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 10 days,

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act;

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

...

Burden of proof on application

(3) The court shall not make the order unless

(a) the applicant satisfies the court that circumstances exist that make the order appropriate; and

(b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

...

Security or charge relating to director's indemnification

11.51(1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the company is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.

...

Court may order security or charge to cover certain costs

11.52 (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of

(a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;

(b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and

(c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

Priority

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

...

Authorization to act as representative of proceeding under this Act

56 The court may authorize any person or body to act as a representative in respect of any proceeding under this Act for the purpose of having them recognized in a jurisdiction outside Canada.

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 BIOSTEEL SPORTS NUTRITION INC.

Court File No. CV-23-

-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

PROCEEDING COMMENCED AT
TORONTO

FACTUM OF THE APPLICANT

Cassels Brock & Blackwell LLP

Suite 3200, Bay Adelaide Centre – North Tower
40 Temperance St.
Toronto, ON M5H 0B4

Ryan Jacobs LSO#: 59510J

Tel: 416.860.6465
rjacobs@cassels.com

Shayne Kukulowicz LSO#: 30729S

Tel: 416.860.6463
skukulowicz@cassels.com

Natalie E. Levine LSO#: 64908K

Tel: 416.860.6568
nlevine@cassels.com

Jeremy Bornstein LSO#: 65425C

Tel: 416.869.5386
jbornstein@cassels.com

Lawyers for the Applicant