Court File No.: CV-23-00706033-00CL

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 BIOSTEEL SPORTS NUTRITION INC., BIOSTEEL MANUFACTURING LLC, AND BIOSTEEL SPORTS NUTRITION USA LLC

(the "**Applicants**")

FACTUM OF THE MONITOR/MOVING PARTY
(Coldhaus Motion, Returnable April 8, 2024)

April 2, 2024

BENNETT JONES LLP
One First Canadian Place
Suite 3400, P.O. Box 130
Toronto, Ontario M5X 1A4

Sean Zweig (LSO# 57307I)
Tel: 416.777.6254
Email: zweigs@bennettjones.com

Jesse Mighton (LSO# 62291J)
Tel: 416.777.6255
Email: mightonj@bennettjones.com

Jason Berall (LSO#: 68011F)
Tel: 416.777.5480
Email: berallj@bennettjones.com

Gina Azer (LSO#: 87157T)
Tel: 416.777.7839
azerg@bennettjones.com

Counsel to KSV Restructuring Inc., in its capacity as the Monitor and not in its personal capacity

TO: THE SERVICE LIST

TABLE OF CONTENTS

PART I – OVERVIEW

1. This motion is brought by KSV Restructuring Inc., in its capacity as Court-appointed monitor (in such capacity, the "**Monitor**") of BioSteel Sports Nutrition Inc. ("**BioSteel**"), seeking payment of unpaid invoices owing by Coldhaus Direct Inc. ("**Coldhaus**") for BioSteel products purchased by Coldhaus between January and July 2023.

2. Coldhaus and BioSteel are parties to a Distribution Agreement dated January 27, 2021, pursuant to which Coldhaus would purchase product from BioSteel, sell the product to retailers, and then bill certain amounts (including logistics charges and rebates) back to BioSteel. Between January and July 2023, Coldhaus ordered over $7,000,000[1] worth of BioSteel products that it never paid for. Since the commencement of these *Companies' Creditors Arrangement Act*[2] ("***CCAA***") proceedings in September 2023, Coldhaus has unjustifiably refused to pay BioSteel the millions of dollars that it owes.

3. Although Coldhaus does not dispute its liability to BioSteel, Coldhaus contends that it is entitled to set-off certain amounts allegedly owing by BioSteel against its admitted liability. Even if Coldhaus was entitled to all of the set-offs that it claims (which is disputed), Coldhaus would still owe approximately $2.6 million to BioSteel. Although Coldhaus has acknowledged this minimum liability, Coldhaus has refused to pay it, effectively taking advantage of the *CCAA* proceedings to delay its undisputed payment obligations.

4. The set-off amounts claimed by Coldhaus can be grouped into the following three categories.

---

[1] All amounts are expressed in Canadian dollars unless otherwise noted.
[2] *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, ("***CCAA***").

5. *First*, Coldhaus claims that it is entitled to sell $1,053,437 worth of inventory back to BioSteel pursuant to a post-termination provision in the Distribution Agreement. However, the Amended and Restated Initial Order ("**ARIO**") precludes parties such as Coldhaus from terminating contracts or exercising contractual remedies. Given that the Distribution Agreement has not been terminated and that the stay of enforcement that prohibits the unilateral termination of agreements has not been lifted, Coldhaus is not entitled to exercise its post-termination remedies against BioSteel.

6. In the event this Court finds that Coldhaus is entitled to exercise its post-termination remedies (which is disputed), Coldhaus brought a cross-motion asking this Court to lift the stay on pre-filing versus post-filing set-off contained in the ARIO to allow Coldhaus to set-off the $1,053,437 against the over $7,000,000 of invoices that it owes.

7. This is not an appropriate case for this Court to exercise its discretion to lift the stay on pre-post set-off. Lifting the stay would result in unfairly reordering the priority scheme underlying the *CCAA* regime, effectively giving Coldhaus (an unsecured creditor) an unwarranted priority position over BioSteel's ranking secured creditor, Canopy Growth Corporation ("**Canopy**"), and over all other unsecured creditors. To make matters worse, Coldhaus has refused to pay its undisputed $2.6 million liability, which should also disentitle it to the benefit of this Court's discretion in determining whether to lift the stay.

8. *Second*, Coldhaus claims that it is entitled to set-off $3,597,432 that it billed to BioSteel under the Distribution Agreement and a separate Warehouse Agreement. It appears that $3,321,515 of these amounts were determined and invoiced during the pre-filing period. The Monitor does not dispute the set-off of these pre-filing amounts. However, it appears that $275,917 of these amounts arose during the post-filing period. These are unsecured post-filing obligations that Coldhaus is not entitled to set-off against its pre-filing debt.

9. *Third*, after the *CCAA* proceeding was commenced, BioSteel and Coldhaus entered into an agreement under which Coldhaus agreed to provide continued warehousing and logistics services through the post-filing period. BioSteel owes $87,056 to Coldhaus under this agreement, which the Monitor agrees can be set-off against Coldhaus' debt.

10. After setting-off the amounts acknowledged by the Monitor, Coldhaus' liability to BioSteel amounts to $4,085,639 (including pre-judgment interest).

PART II – FACTS

A. CCAA Proceedings

11. On September 14, 2023 (the "**Filing Date**"), BioSteel was granted protection under the *CCAA* pursuant to an initial order (the "**Initial Order**"). KSV Restructuring Inc. was appointed as the Monitor.[3]

12. Following a comeback hearing on September 21, 2023, the Court issued the ARIO, which contains the following provisions relevant to this motion.

[3] Initial Order, dated September 14, 2023, para 20.

13. Paragraph 8 of the ARIO provides that "the Applicant shall be entitled but not required to pay all reasonable expenses incurred by the BioSteel Entities in carrying on the Business in the ordinary course after the date of the Initial Order"[4] [emphasis added].

14. Paragraph 16 of the ARIO precludes the exercise of rights and remedies against BioSteel:

> 16. THIS COURT ORDERS that during the Stay Period, all rights and remedies of any individual, firm, corporation, organization, governmental unit, body or agency, or any other entities (all of the foregoing, collectively being "Persons" and each being a "Person") against or in respect of any of the BioSteel Entities or the Monitor, or their respective employees and representatives acting in such capacities, or affecting the Business or the Property or the business or property of BioSteel US or BioSteel Manufacturing, are hereby stayed and suspended except with the written consent of the Applicant and the Monitor, or leave of this Court …[5] [emphasis added]

15. Paragraph 17 requires contracts to be honoured and prohibits the termination of contracts:

> 17. THIS COURT ORDERS that during the Stay Period, no Person shall accelerate, suspend, discontinue, fail to honour, alter, interfere with, repudiate, rescind, terminate or cease to perform any right, renewal right, contract, agreement, lease, sublease, licence, authorization or permit in favour of or held by any of the BioSteel Entities, except with the prior written consent of the Applicant and the Monitor, or leave of this Court.[6] [emphasis added]

16. Paragraph 18 precludes pre-filing versus post-filing set-off:

> 18. THIS COURT ORDERS that no Person shall be entitled to set off any amounts that: (a) are or may become due to the Applicant in respect of obligations arising prior to the date of the Initial Order with any amounts that are or may become due from the Applicant in respect of obligations arising on or after the date of the Initial Order ...[7] [emphasis added]

---

[4] Amended and Restated Initial Order, dated September 21, 2023 ("**ARIO**"), para 8.
[5] ARIO, para 16.
[6] ARIO, para 17.
[7] ARIO, para 18.

17. The Stay Period currently runs through April 30, 2024,[8] and is anticipated to be extended further to facilitate the ongoing wind down of the Applicants' remaining business.

18. All assets have now been divested pursuant to various orders by this Court and the remaining steps in these CCAA proceedings are to: (a) address the disputed amounts owed to BioSteel by Coldhaus; (b) distribute all remaining cash to the Applicants' ranking secured creditor, being Canopy; and (c) wind down the remaining business.[9]

B. The Distribution Agreement

19. Coldhaus provided distribution services to BioSteel pursuant to a distribution agreement dated January 27, 2021, as amended (the "**Distribution Agreement**").

20. Under the Distribution Agreement, Coldhaus was appointed as a non-exclusive distributor of BioSteel products in Canada.

21. Section 2.1 of the Distribution Agreement provides that the term of the agreement begins on January 27, 2021 and automatically renews unless terminated by either party on 180 days' written notice.[10]

22. Pursuant to section 3.1 of the Distribution Agreement, Coldhaus agreed to use its best efforts to sell and distribute BioSteel product within the "Territory" (as defined in the Distribution Agreement).[11]

---

[8] Distribution, Stay Extension and Expansion of Powers Order dated December 14, 2023, para 11, Motion Record of the Monitor dated March 11, 2024 ("**Motion Record**"), Tab 2A.
[9] Fifth Report, section 1.13, Motion Record, Tab 2.
[10] Distribution Agreement dated January 27, 2021, section 2.1 ("**Distribution Agreement**"), Motion Record, Tab 2B.

23. Section 4.5 of the Distribution Agreement provides that, in the event of an invoice dispute, Coldhaus "shall continue performing its obligations under this Agreement during any such dispute"[12] [emphasis added].

24. Section 5.1 of the Distribution Agreement provides that "[t]his Agreement may be terminated at any time by mutual agreement of the Parties or by either Party without cause or penalty, upon one hundred and eighty (180) days' prior written notice to the other Party."[13]

25. Section 6.3 contains a provision regarding the buy-back of "merchantable" inventory by BioSteel following the termination of the Distribution Agreement:

> Within five (5) business days after termination, Distributor shall have the option to sell, and BioSteel or its designee shall purchase, Distributor's undamaged, merchantable and originally packaged inventory of non-overage Subject Beverages purchased from BioSteel at the cost paid by the Distributor for such Subject Beverages, plus all applicable Taxes paid by the Distributor for such Subject Beverages.[14] [emphasis added]

26. Schedule "A" of the Distribution Agreement, as amended, sets out amounts such as logistics and rebates that Coldhaus would bill to BioSteel on a monthly basis.[15] The rebates billed by Coldhaus included deductions made by certain national retail chains from their

---

[11] Distribution Agreement, section 3.1, Motion Record, Tab 2B.
[12] Distribution Agreement, section 4.5, Motion Record, Tab 2B.
[13] Distribution Agreement, section 5.1, Motion Record, Tab 2B.
[14] Distribution Agreement, section 6.3, Motion Record, Tab 2B.
[15] Distribution Agreement, Schedule "A", Motion Record, Tab 2B; and Amendment No. 1 to Distribution Agreement, Schedule "A", Motion Record, Tab 2C.

payments to Coldhaus on account of discounts given to such customers directly by BioSteel.[16] These amounts could not be calculated until Coldhaus sold the applicable BioSteel inventory.[17]

C. The Warehouse and Logistics Agreements

27. Coldhaus and BioSteel are parties to a warehouse and logistics agreement dated as of February 10, 2021, as amended (the "**Warehouse Agreement**").[18]

28. On September 29, 2023, after the Filing Date, Coldhaus and BioSteel entered into a Prepayment Agreement setting out the terms on which Coldhaus agreed to continue providing warehouse and logistics services after the Filing Date (the "**Prepayment Agreement**").[19]

D. Unpaid Invoices Owed by Coldhaus and Set-Offs Claimed by Coldhaus

29. When BioSteel filed for *CCAA* protection, Coldhaus owed BioSteel $7,291,752 for products purchased by Coldhaus under the Distribution Agreement. The unpaid invoices are dated between January and September 2023.[20] After accounting for pre-judgment interest pursuant to the applicable *Courts of Justice Act*[21] rate, as of April 8, 2024 (the date of this motion), the total amount owing by Coldhaus is $7,494,211.[22]

---

[16] Affidavit of Edwina Fung sworn March 15, 2024, para. 8 ("**Fung Affidavit**"), Motion Record of Coldhaus Direct Inc. dated March 15, 2024 ("**Coldhaus Motion Record**"), Tab 2.
[17] Supplement to the Fifth Report of the Monitor dated March 20, 2024, section 2.2.1 ("**Supplement Report**"), Reply Motion Record of the Monitor dated March 20, 2024 ("**Reply Motion Record**"), Tab 1.
[18] Fifth Report, section 3.1.1, Motion Record, Tab 2; and Warehouse & Fulfillment Agreement dated February 10, 2021, ("**Warehouse Agreement**"), Motion Record, Tab 2F.
[19] Warehousing Prepayment Agreement dated September 28, 2023 ("**Prepayment Agreement**"), Motion Record, Tab 2J.
[20] Uncollected Amounts, Motion Record, Tab 2H.
[21] RSO 1990, c C.43, s. 128
[22] Uncollected Amounts, Motion Record, Tab 2H.

30. Coldhaus does not contest that it is liable for the invoices owing to BioSteel. However, it asserts that it is entitled to set-off the following amounts allegedly owing by BioSteel.

1. Buy-Backs

31. Although the Distribution Agreement has never been terminated, on December 5, 2023, Coldhaus unilaterally delivered an invoice totalling $1,053,437 for BioSteel product that Coldhaus sought to sell back to BioSteel pursuant to the post-termination provision under section 6.3 of the Distribution Agreement (the "**Buy-Backs**").[23] Coldhaus seeks to set-off this $1,053,437 against the amounts it owes to BioSteel, despite that Coldhaus failed to distribute such products pursuant to its obligations under the Distribution Agreement.

2. Billbacks

32. Coldhaus claims that amounts are owing by BioSteel under the Warehouse Agreement. Coldhaus also claims that it was entitled to bill certain amounts to BioSteel under the Distribution Agreement (such as the rebates for discounts from national retail chains) (collectively, the "**Billbacks**"). These Billbacks total $3,597,432.

33. Coldhaus' motion record includes a schedule titled "Billback Listing" which lists the Billbacks. Certain of the Billbacks are dated from before the Filing Date, while others are dated after the Filing Date.[24]

---

[23] Fifth Report, section 3.3.1, Motion Record, Tab 2; Coldhaus Invoice, Motion Record, Tab 2I.
[24] Billback Listings, Coldhaus Motion Record, Fung Affidavit, Exhibit "C", Tab 2C.

34. Based on the Monitor's review of the evidence presented by Coldhaus, it appears that $3,321,515 of the Billbacks were determined and invoiced during the pre-filing period. The Monitor does not dispute the set-off of these pre-filing Billbacks.[25]

35. It appears from the Monitor's review that certain of the Billbacks totalling $275,917 arose and were invoiced after the Filing Date. These post-filing Billbacks include items such as logistics and rebates for product it appears was sold by Coldhaus after the Filing Date. The Monitor is of the view that these post-filing Billbacks should not be set-off from the invoices owing to BioSteel as of the Filing Date.

3. Prepayment Agreement

36. A $87,056 amount remains owing to Coldhaus under the Prepayment Agreement. The Monitor agrees that this amount can be set-off against the amounts owing by Coldhaus.

E. Coldhaus' Refusal to Pay the Amounts Owing

37. The Monitor first sought payment of the amounts owing by Coldhaus on October 26, 2023. The Monitor continued discussions with Coldhaus through February 2024 to attempt to resolve and collect on the outstanding amounts owing to BioSteel. During those discussions, and again in Coldhaus' evidentiary record on this motion, Coldhaus took the position that its liability is approximately $2.6 million (after setting-off the amounts described above from the outstanding invoices it owes to BioSteel).[26]

---

[25] Supplement Report, section 2.2.5, Reply Motion Record, Tab 1, and Appendix "A", Reply Motion Record, Tab 1A.

[26] Supplement Report, section 2.1.2.ii and section 2.1.2.v, Reply Motion Record, Tab 1.

38. Notwithstanding Coldhaus' acknowledgment of this minimum liability, Coldhaus has made no efforts to pay this amount, or any portion of it, in essence leveraging the *CCAA* proceedings to delay making payment towards amounts that it acknowledges it owes.[27]

39. Instead, on February 7, 2024, Coldhaus made what it described as a "with prejudice offer" to settle the dispute for a payment of $500,000 upon settlement and the balance of $2,052,828 on June 30, 2024.[28] In other words, Coldhaus "offered" to pay what it acknowledges it owes in installments, and without contemplating the payment of any interest – effectively forcing the Applicants and their creditors to finance Coldhaus' debt, which it has already been doing given that it has refused to pay the debt owing.

40. The "with prejudice offer" appears to be an attempt to further delay payment of an acknowledged debt that has been outstanding since early to mid-2023. In light of Coldhaus' acknowledgment of the minimum liability and the long period of time for which it has been outstanding, there is no basis for Coldhaus to continue to withhold such payment. From the Monitor's perspective, the appropriate course of action would have been for Coldhaus to pay the acknowledged $2.6 million liability plus pre-judgment interest, and for any further disputed amounts to be resolved expeditiously either consensually or with the assistance of the Court.[29]

---

[27] Supplement Report, section 2.1.2.ii, Reply Motion Record, Tab 1.
[28] Coldhaus Settlement Offer dated February 8, 2024, Coldhaus Motion Record, Fung Affidavit, Exhibit "H", Tab 2H.
[29] Supplement Report, section 2.1.2.vi, Reply Motion Record, Tab 1.

PART III – LAW & ARGUMENT

A. Coldhaus is Not Entitled to Set-Off the Buy-Backs

41. Coldhaus claims that it is entitled to exercise post-termination rights under section 6.3 of the Distribution Agreement by requiring BioSteel to buy-back $1,053,437 of products it has failed to distribute thereunder. As set out below, there is no such obligation on BioSteel given that the Distribution Agreement has not been terminated and that the product is not merchantable. Even if there was such an obligation, Coldhaus is not entitled to set-off the post-filing Buy-Backs against its pre-filing debt.

1. The Distribution Agreement has not Been Terminated

(a) Neither Party has Terminated the Distribution Agreement

42. The Distribution Agreement provides for automatically renewing terms unless terminated in writing by the parties. Neither Coldhaus nor BioSteel have delivered a written notice of termination.[30]

43. Although Coldhaus unilaterally delivered an invoice for the Buy-Backs, it did so in breach of the Distribution Agreement because the Distribution Agreement had not been terminated.[31]

---

[30] Distribution Agreement, section 3.1, Motion Record, Tab 2B; Supplement Report, section 2.1.2.iii, Reply Motion Record, Tab 1.

[31] Supplement Report, section 2.1.2.iii, Reply Motion Record, Tab 1.

(b) The *CCAA* Precludes Coldhaus from Terminating the Agreement

44. Subsection 34(1) of the *CCAA* prohibits the termination of agreements with a debtor company:

> 34 (1) No person may terminate or amend, or claim an accelerated payment or forfeiture of the term under, any agreement, including a security agreement, with a debtor company by reason only that proceedings commenced under this *Act* or that the company is insolvent.[32]

45. Subsection 34(6) of the *CCAA* provides that that a party may apply for relief from the prohibition on termination if the prohibition would cause "significant financial hardship".[33]

46. Coldhaus has not brought a motion seeking a declaration that subsection 34(1) of the *CCAA* does not apply to the Distribution Agreement. Even if it had sought such relief, Coldhaus has presented no evidence that it would suffer "significant financial hardship" if it was not permitted to terminate the Distribution Agreement. Accordingly, there is no evidentiary basis to grant Coldhaus relief from section 34 of the *CCAA*.

(c) The ARIO Precludes Coldhaus from Terminating the Agreement

47. As set out above, the ARIO precludes contractual counterparties from terminating agreements with the Applicants or exercising contractual rights and remedies against the Applicants.[34] These provisions preclude Coldhaus from terminating the Distribution Agreement and exercising the post-termination buy-back option.

---

[32] *CCAA*, s. 34(1).
[33] *CCAA*, s. 34(6).
[34] ARIO, para 17.

48. Coldhaus has not brought a motion asking the Court for leave to exercise its termination or post-termination rights under the Distribution Agreement. Accordingly, the Distribution Agreement remains in effect and the ARIO precludes Coldhaus from asserting otherwise.

(d) No Basis to Lift the Stay on Terminating Contracts

49. Although Coldhaus has not brought a motion requesting a lift of the stay on terminating contracts, as set out below, there is no basis to grant such relief in any event.

(i) Applicable Legal Principles

50. The Supreme Court in *Montréal (City) v. Deloitte Restructuring Inc.*[35] ("***Montréal***") highlighted that the initial stay of proceedings is "the primary tool that allows the *CCAA* to achieve its restructuring objective".[36] The stay creates a "*status quo* period" in which the debtor company can continue to operate and engage in fair negotiations to prepare a plan of compromise or take steps to maximize the value of its assets with a view to its liquidation.[37]

51. As with the imposition of a stay, the lifting of a stay is discretionary under the *CCAA*. In determining whether to lift the stay, the court should consider whether there are sound reasons for doing so consistent with the objectives of the *CCAA*, including a consideration of the balance of convenience and the relative prejudice to the parties.[38]

---

[35] 2021 SCC 53 ("***Montréal***").
[36] *Montréal*, para 46.
[37] *Montréal*, para 47.
[38] *Canwest Global Communications Corp., Re*, 2009 CarswellOnt 7882, SCJ [Commercial List] ("***Canwest***"), para 32.

52. An opposing party faces "a very heavy onus" if it wishes to apply to the Court for an order lifting the stay.[39]

53. Although there is limited *CCAA* case law considering in what circumstances the Court will lift the stay to allow a creditor to terminate contractual arrangements, the analogous provision under the *Bankruptcy and Insolvency Act*[40] (the "***BIA***"), being subsection 65.1(6), places a high burden on a creditor seeking to terminate an agreement.[41]

54. In applying subsection 65.1(6) of the *BIA*,[42] Courts will consider:

(a) the degree of prejudice or financial hardship suffered by the moving party, evaluated objectively, meaning "the degree of prejudice suffered by the creditor in relation to the indebtedness and the security held by the creditor and not to the extent that such prejudice may affect the creditor as a person, organization or entity";[43] and

(b) the effect such an order would have on the administration of the estate and the prejudice to other stakeholders.[44]

55. The Court in *Toronto Dominion Bank v. Ty (Canada) Inc.*[45] ("***TD-Bank***") considered subsection 65.1(6) of the *BIA* and the resulting prejudice in lifting the stay to allow the termination of an agreement. In refusing to lift the stay, the Court found that the potential

---

[39] *Canwest*, para 32.
[40] RSC 1985, c B-3, s. 65.1(6) ("***BIA***").
[41] *Montréal*, para 24.
[42] *BIA*, s. 65.1(6).
[43] *Toronto-Dominion Bank v. Ty (Canada) Inc.*, 2003 CanLII 43355 (ON SC) ("***TD-Bank***"), para 22(a).
[44] *TD-Bank*, para 22(c).
[45] *TD-Bank.*

prejudice to the moving party caused by delaying the termination of an agreement was outweighed by the effect such an order would have on the administration of the estate, the proposal proceedings and the prejudice to other stakeholders.[46]

(ii) Application to the Distribution Agreement

56. Allowing Coldhaus to terminate the Distribution Agreement will have no general benefit to the administration of the estate. Coldhaus seeks only to claim the post-termination Buy-Back, the effect of which is to create a new unsecured post-filing liability owing by BioSteel.

57. In this *CCAA* proceeding, Canopy is the secured creditor and the only party with an economic interest in the estate. It is not contemplated that there will be any recoveries for unsecured creditors.[47] Accordingly, permitting the stay on contract termination to be lifted for the sole purpose of trying to create a set-off claim for Coldhaus will prejudice Canopy's interests as the secured creditor and be unfair to the other unsecured creditors who are receiving no recovery.

(e) The Buy-Back Inventory is Unmerchantable

58. Even if there was a basis to allow Coldhaus to lift the stay and terminate the Distribution Agreement (which there is not), the Buy-Back right under section 6.3 of the Distribution Agreement requires the inventory to be "merchantable".[48] Certain portions of the inventory that Coldhaus is attempting to return are not merchantable because:

---

[46] *TD*-Bank, para 22(d).
[47] Fifth Report, section 4.2, Motion Record, Tab 2.
[48] Distribution Agreement, section 6.3, Motion Record, Tab 2B.

(a) approximately one quarter of the inventory Coldhaus aims to return has an expiry date of 12 months or less. The Monitor understands that typical practice in the industry is that product with an expiry date of 12 months or less is subject to deep discounts due to the short shelf life. Accordingly, the Monitor's view is that this portion of the inventory is not "merchantable" under typical conditions; and

(b) a portion of the inventory appears to be co-branded with proprietary logos of certain sports teams and/or leagues pursuant to licensing arrangements which have since expired or been terminated by or with the consent of the Applicants and applicable counterparties in these *CCAA* proceedings. As a result of these license terminations, the Monitor's view is that the co-branded inventory is not merchantable.[49]

(f) Time Periods Under the Agreement Preclude the Buy-Backs

59. As set out above, there is no motion before this Court to lift the stay on terminating contracts, and in any event this is not an appropriate case in which to lift the stay. But even if the stay was lifted, the Distribution Agreement requires that Coldhaus provide 180 days (about six months) of notice before exercising its post-termination buy-back option under section 6.3 of the Distribution Agreement.[50]

60. Accordingly, there is no basis to allow Coldhaus to exercise the buy-back option now (before the Distribution Agreement has even been terminated).

---

[49] Coldhaus Invoice, Motion Record, Tab 2I; Buy-Back Listing, Coldhaus Motion Record, Fung Affidavit, Exhibit "F", Tab 2F.

[50] Distribution Agreement, section 5.1, Motion Record, Tab 2B.

2. Coldhaus has Breached Multiple Provisions of the ARIO

61. On December 5, 2023, Coldhaus unilaterally delivered a $1,053,437 invoice for the Buy-Backs and then refused to pay BioSteel the full amount owing on the purported basis of setting-off the Buy-Backs. Doing so breached multiple provisions of the ARIO. In particular:

(a) Paragraph 16 of the ARIO stays all rights and remedies against BioSteel. By purporting to exercise its post-termination rights against BioSteel, Coldhaus breached paragraph 16 of the ARIO.

(b) Paragraph 17 of the ARIO prohibits parties from failing to honour or terminating contracts held with BioSteel. By failing to pay the amounts owing and delivering the post-termination Buy-Back invoice, Coldhaus breached paragraph 17 of the ARIO.

(c) Paragraph 18 of the ARIO prohibits pre-filing versus post-filing set-off. Coldhaus has deliberately delayed and refused to pay the amounts it owes to BioSteel on the basis that it claims to be entitled to set-off the Buy-Backs. By unilaterally purporting to set-off these amounts, Coldhaus has breached paragraph 18 of the ARIO.

62. While each of the above provisions in the ARIO provide that those rights may be exercised with leave of the Court, Coldhaus has unilaterally attempted to exercise those rights without leave of the Court.

63. In light of Coldhaus' breaches of the ARIO and continued refusal to pay the undisputed amount of $2.6 million, the equities weigh heavily against Coldhaus on this motion. These equities factor into the Court's discretion as to whether to lift stay provisions of the ARIO.

3. No Basis to Allow Pre-Filing Versus Post-Filing Set-Off

64. Coldhaus has brought a motion asking this Court to lift the stay of proceedings imposed by paragraph 18 of the ARIO to allow Coldhaus to set-off the alleged Buy-Backs against pre-filing amounts payable by Coldhaus.[51]

65. Coldhaus' motion rests on the faulty premise that there is in fact a post-filing obligation owing by BioSteel in respect of the Buy-Backs. However, as discussed above, given that the Distribution Agreement has not been terminated and that any such termination is prohibited by the *CCAA* and the ARIO, BioSteel does not owe any post-filing obligation in respect of the Buy-Backs. Accordingly, there is nothing to set-off.

66. Even if there was any amount to set-off on account of the Buy-Backs (which is denied), as set out below, the stay should not be lifted to permit such a set-off.

(a) Applicable Legal Principles Regarding Pre-Post Set-Off

67. In *Montréal*, the Supreme Court addressed section 21 of the *CCAA*, which contemplates the applicable set-off laws, limiting it to mutual liabilities arising during the pre-filing period (so-called "pre-pre" set-off). In doing so, the Court cautioned against pre-post set-off due to the resultant reordering of creditors' priorities.

---

[51] Coldhaus Notice of Motion dated March 15, 2024, Coldhaus Motion Record, Tab 1.

68. The Court held that allowing pre-post set-off would "deviate from the principle of equality among ordinary creditors, a fundamental principle of insolvency law that applies with equal force in proceedings under the *CCAA*, one of the remedial objectives of which is to ensure the fair and equitable treatment of the claims made against a debtor."[52] The general rule is that "[o]nce a formal insolvency process commences, all unsecured creditor remedies are stayed and the creditor must stand in line behind secured and preferred creditors and share any remaining recoveries in the estate pro rata with all other unsecured creditors".[53]

69. In its warning against the reordering of priorities, the Court in *Montréal* commented:

> … giving the green light to pre-post compensation would amount to granting certain creditors an additional "type of security interest" in respect of new assets acquired by the debtor after the commencement of proceedings (for example, amounts received as interim financing). Professor Wood aptly describes the injustice that would thus befall the other ordinary creditors whose rights and remedies have been stayed …
>
> Yet the very purpose of the stay period is to ensure that no creditor gains an advantage over the others while the restructuring of the debtor company is under way … Pre-post compensation should not allow a creditor to do indirectly what it cannot do directly. Parliament could not have intended to create such an additional security interest that can be realized during the stay period simply because the creditor and the debtor company have a continuing business relationship.[54] [emphasis added]

70. While the Court retains "the discretion to lift the stay based on the specific facts of each case", the Court "must be cautious in doing so, given the high disruptive potential of such compensation."[55]

---

[52] *Montréal*, para 71.
[53] *Montréal*, para 71.
[54] *Montréal*, para 73-74.
[55] *Montréal*, para 61.

71. In exercising its discretion to lift a stay on pre-post set-off, the Court "must keep three baseline considerations in mind: (1) the appropriateness of the order being sought, (2) due diligence and (3) good faith on the applicant's part".[56]

72. The "appropriateness of the order being sought" is "assessed in light of the remedial objectives of the *CCAA*", including "maximizing creditor recovery" and "ensuring fair and equitable treatment of the claims against the debtor company".[57]

73. The "due diligence" factor "discourages parties from sitting on their rights and ensures that creditors do not strategically maneuver or position themselves to gain an advantage".[58]

(b) Pre-Post Set-Off Should not be Permitted Here

74. The ARIO prohibits setting-off post-filing amounts owing by BioSteel against pre-filing amounts owing to BioSteel, without leave of the Court.[59]

75. Even if Coldhaus was entitled to terminate the Distribution Agreement and exercise its post-termination buy-back right (which it is not), the Buy-Backs would constitute a post-filing obligation that cannot be set-off against the pre-filing amounts owing by Coldhaus.

76. Accordingly, to set-off these respective obligations, Coldhaus requires an order lifting the stay on pre-post set-off. For the reasons set out below, lifting the stay is inappropriate here.

---

[56] *Montréal*, para 85.
[57] *Montréal*, para 86.
[58] *Montréal*, para 91.
[59] ARIO, para 18.

77. *First*, lifting the stay would be contrary to the remedial objectives of the *CCAA*. The remedial objectives include fair and equitable treatment of claims against BioSteel, which means giving priority to Canopy's position as the ranking secured creditor and treating Coldhaus equally to other unsecured creditors. Coldhaus seeks to create a new post-filing liability and use that unsecured liability to reduce pre-filing amounts it owes to BioSteel, thereby effectively placing itself ahead of Canopy and other unsecured creditors with respect to the Buy-Backs.

78. Permitting this set-off would upset the priority regime that underlies the *CCAA*, in direct contrast to the Supreme Court's guidance from *Montréal*.

79. *Second*, the post-filing liability of BioSteel that Coldhaus seeks to create through the Buy-Backs is notable in that BioSteel will get nothing of value (and certainly not equal value) in return from Coldhaus. As set out above, large portions of the inventory subject to the Buy-Back are not readily merchantable.

80. This is not akin to a situation where Coldhaus provides some post-filing goods or services to BioSteel that benefits the estate as a whole. Rather, Coldhaus seeks only to exercise termination rights that it claims entitle it to over $1 million from BioSteel. Importantly, the exercise of these rights detriments the estate and benefits Coldhaus alone.

81. By contrast, under the Prepayment Agreement, Coldhaus has continued to provide warehousing and logistics services to BioSteel through the post-filing period. The Monitor acknowledges the value of these services to the estate, and agrees that the $87,056 still owing to Coldhaus for these services should be set-off against the amounts owing by Coldhaus. If Coldhaus intended to seek security for the Buy-Backs arising during the post-filing period, it

ought to have done so expressly, as it did with warehousing arrangements. Having failed to do so, however, there are no general legal principles that elevate or otherwise secure Coldhaus' unsecured post-filing receivables to prime the Applicants' other creditors.

82. *Third*, Coldhaus has not proceeded with diligence. It acknowledged in its motion materials that it stopped making efforts to sell the inventory it purchased under the Distribution Agreement.[60] Stopping those efforts was a violation of section 4.5 of the Distribution Agreement, which requires Coldhaus to continue performing its obligations – including its obligation pursuant to section 3.1 to exert its best efforts to supply and serve the inventory in the applicable territory – pending any invoice dispute.[61] Had Coldhaus attempted to sell the inventory, there might have been little or no product remaining to sell back to BioSteel under section 6.3 of the Distribution Agreement.

83. *Fourth*, Coldhaus has not conducted itself in a good faith manner. Even though it has acknowledged that it owes at least $2.6 million to BioSteel, it has refused to pay any portion of the acknowledged liability and instead taken advantage of the *CCAA* proceedings to delay payment. As described above, Coldhaus has also breached multiple provisions of the ARIO. This conduct should disentitle Coldhaus to the benefit of this Court's discretion in determining whether to lift the stay.

[60] Fung Affidavit, paras 25 and 27, Coldhaus Motion Record, Tab 2.
[61] Distribution Agreement, section 4.5, Motion Record, Tab 2B.

B. Coldhaus is Not Entitled to Set-Off the Post-Filing Billbacks

84. Coldhaus is seeking to set-off $275,917 in Billbacks from the post-filing period against pre-filing amounts it owes to BioSteel. As set out below, Coldhaus should not be permitted to do so.

1. The Post-Filing Billbacks Are Post-Filing Obligations

85. In *Newfoundland and Labrador v. AbitibiBowater Inc.*,[62] the Supreme Court established the following three-part test to determine whether a claim is a pre-filing (as opposed to post-filing) obligation: (a) there must be a debt; (b) the debt, liability or obligation must be incurred before commencement of the *CCAA* proceedings; and (c) it must be possible to attain a monetary value to the debt, liability or obligation.[63]

86. Any liability of BioSteel for the post-filing Billbacks did not arise and could not be calculated until Coldhaus provided distribution services by selling the products after the Filing Date.[64] Accordingly, the post-filing Billbacks are post-filing obligations.

2. No Requirement to Pay Post-Filing Amounts

87. Paragraph 8 of the ARIO provides that "the Applicant shall be entitled but not required to pay all reasonable expenses incurred by the BioSteel Entities in carrying on the Business".[65] Accordingly, there is no requirement on BioSteel to pay the $275,917 of Billbacks arising after the filing date.

---

[62] 2012 SCC 67 ("***AbitibiBowater***").
[63] *AbitibiBowater*, para 26.
[64] Distribution Agreement, Schedule "A", Motion Record, Tab 2B, and Supplement Report, section 2.2.1, Reply Motion Record, Tab 1.
[65] ARIO, para 8.

88. Section 11.01 of the *CCAA* (which is also reflected in paragraph 20 of the ARIO) allows service providers to refuse to provide services post-filing if they are not paid, but does not require payment to be made to them.[66]

89. In essence, Coldhaus has an unsecured claim against BioSteel for the post-filing Billbacks. In light of Canopy's ranking secured position, which is significantly impaired, it is not anticipated that there will be any return to unsecured creditors in these proceedings.

3. Leave Should not be Granted to Allow Set-Off of the Post-Filing Billbacks

90. The legal principles applicable to whether this Court should lift the stay on pre-post set-off are set out above.

91. Similar to the set-off of the Buybacks, the two primary reasons not to permit set-off of the Billbacks are that: (a) permitting the set-off would reorder the priority scheme and grant Coldhaus a security position ahead of the first priority secured creditor, Canopy, and all other unsecured creditors; and (b) Coldhaus has not acted in good faith as it refused to pay its acknowledged liability, took advantage of the *CCAA* proceeding to delay payment (effectively forcing the insolvent BioSteel to extend credit to it), and breached the ARIO.

PART IV – ORDER REQUESTED

92. The Monitor respectfully requests an order requiring Coldhaus to pay: (a) $4,085,639 to BioSteel within five business days of the date of the order; and (b) costs of the Monitor and Applicants incurred in dealing with this matter.

---

[66] *CCAA*, s. 11.01, and ARIO, para 20.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 2nd day of April, 2024.

BENNETT JONES LLP
Sean Zweig (LSO# 57307I)
Jesse Mighton (LSO# 62291J)
Jason M. Berall (LSO #68011F)
Gina Azer (LSO#: 87157T)
Lawyers for the Monitor/Moving Party

SCHEDULE "A"

LIST OF AUTHORITIES

1. *Montréal (City) v. Deloitte Restructuring Inc.*, 2021 SCC 53

2. *Canwest Global Communications Corp., Re.*, 2009 CarswellOnt 7882, SCJ [Commercial List]

3. *Toronto-Dominion Bank v. Ty (Canada) Inc.*, 2003 CanLII 43355 (ON SC)

4. *Newfoundland and Labrador v. AbitibiBowater Inc.*, 2012 SCC 67

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY - LAWS

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

General power of court

11 Despite anything in the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

R.S., 1985, c. C-36, s. 111992, c. 27, s. 901996, c. 6, s. 1671997, c. 12, s. 1242005, c. 47, s. 128

Relief reasonably necessary

11.001 An order made under section 11 at the same time as an order made under subsection 11.02(1) or during the period referred to in an order made under that subsection with respect to an initial application shall be limited to relief that is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

2019, c. 29, s. 136

Rights of suppliers

11.01 No order made under section 11 or 11.02 has the effect of

> **(a)** prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made; or
>
> **(b)** requiring the further advance of money or credit.

2005, c. 47, s. 128

Section 11.02

Stays, etc. – initial application

(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.

Stays, etc. — other than initial application

(2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

(a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);

(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.

Restriction

(4) Orders doing anything referred to in subsection (1) or (2) may only be made under this section.

2005, c. 47, s. 128, 2007, c. 36, s. 62(F)2019, c. 29, s. 137.

Section 34

Certain rights limited

34 (1) No person may terminate or amend, or claim an accelerated payment or forfeiture of the term under, any agreement, including a security agreement, with a debtor company by reason only that proceedings commenced under this Act or that the company is insolvent.

Lease

(2) If the agreement referred to in subsection (1) is a lease, the lessor may not terminate or amend the lease by reason only that proceedings commenced under this Act, that the company is insolvent or that the company has not paid rent in respect of any period before the commencement of those proceedings.

Public utilities

(3) No public utility may discontinue service to a company by reason only that proceedings commenced under this Act, that the company is insolvent or that the company has not paid for services rendered or goods provided before the commencement of those proceedings.

Certain acts not prevented

(4) Nothing in this section is to be construed as

> **(a)** prohibiting a person from requiring payments to be made in cash for goods, services, use of leased property or other valuable consideration provided after the commencement of proceedings under this Act;
>
> **(b)** requiring the further advance of money or credit; or
>
> **(c)** [Repealed, 2012, c. 31, s. 421]

Provisions of section override agreement

(5) Any provision in an agreement that has the effect of providing for, or permitting, anything that, in substance, is contrary to this section is of no force or effect.

Powers of court

(6) On application by a party to an agreement or by a public utility, the court may declare that this section does not apply — or applies only to the extent declared by the court — if the applicant satisfies the court that the operation of this section would likely cause the applicant significant financial hardship.

Eligible financial contracts

(7) Subsection (1) does not apply

> **(a)** in respect of an eligible financial contract; or
>
> **(b)** to prevent a member of the Canadian Payments Association from ceasing to act as a clearing agent or group clearer for a company in accordance with the Canadian Payments Act and the by-laws and rules of that Association.

Permitted actions

(8) The following actions are permitted in respect of an eligible financial contract that is entered into before proceedings under this Act are commenced in respect of the company and is terminated on or after that day, but only in accordance with the provisions of that contract:

(a) the netting or setting off or compensation of obligations between the company and the other parties to the eligible financial contract; and

(b) any dealing with financial collateral including

(i) the sale or foreclosure or, in the Province of Quebec, the surrender of financial collateral, and

(ii) the setting off or compensation of financial collateral or the application of the proceeds or value of financial collateral.

Restriction

(9) No order may be made under this Act if the order would have the effect of staying or restraining the actions permitted under subsection (8).

Net termination values

(10) If net termination values determined in accordance with an eligible financial contract referred to in subsection (8) are owed by the company to another party to the eligible financial contract, that other party is deemed to be a creditor of the company with a claim against the company in respect of those net termination values.

Priority

(11) No order may be made under this Act if the order would have the effect of subordinating financial collateral.

2005, c. 47, s. 1312007, c. 29, s. 109, c. 36, ss. 77, 1122012, c. 31, s. 421

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

Where proposal is conditional on purchase of new securities

65 A proposal made conditional on the purchase of shares or securities or on any other payment or contribution by the creditors shall provide that the claim of any creditor who elects not to participate in the proposal shall be valued by the court and shall be paid in cash on approval of the proposal.

R.S., 1985, c. B-3, s. 652004, c. 25, s. 35(F)

Certain rights limited

65.1 (1) If a notice of intention or a proposal has been filed in respect of an insolvent person, no person may terminate or amend any agreement, including a security agreement, with the insolvent person, or claim an accelerated payment, or a forfeiture of the term, under any agreement, including a security agreement, with the insolvent person, by reason only that

(a) the insolvent person is insolvent; or

(b) a notice of intention or a proposal has been filed in respect of the insolvent person.

Idem

(2) Where the agreement referred to in subsection (1) is a lease or a licensing agreement, subsection (1) shall be read as including the following paragraph:

"(c) the insolvent person has not paid rent or royalties, as the case may be, or other payments of a similar nature, in respect of a period preceding the filing of

(i) the notice of intention, if one was filed, or

(ii) the proposal, if no notice of intention was filed."

Idem

(3) Where a notice of intention or a proposal has been filed in respect of an insolvent person, no public utility may discontinue service to that insolvent person by reason only that

(a) the insolvent person is insolvent;

(b) a notice of intention or a proposal has been filed in respect of the insolvent person; or

(c) the insolvent person has not paid for services rendered, or material provided, before the filing of

(i) the notice of intention, if one was filed, or

(ii) the proposal, if no notice of intention was filed.

Powers of court

65.1(6) The court may, on application by a party to an agreement or by a public utility, declare that subsections (1) to (3) do not apply, or apply only to the extent declared by the court, where the applicant satisfies the court that the operation of those subsections would likely cause it significant financial hardship.

Eligible financial contracts

(7) Subsection (1) does not apply

(a) in respect of an eligible financial contract; or

(b) to prevent a member of the Canadian Payments Association established by the Canadian Payments Act from ceasing to act as a clearing agent or group clearer for an insolvent person in accordance with that Act and the by-laws and rules of that Association.

(8) [Repealed, 2007, c. 29, s. 92]

Permitted actions

(9) Despite subsections 69(1) and 69.1(1), the following actions are permitted in respect of an eligible financial contract that is entered into before the filing, in respect of an insolvent person of a notice of intention or, where no notice of intention is filed, a proposal, and that is terminated on or after that filing, but only in accordance with the provisions of that contract:

> **(a)** the netting or setting off or compensation of obligations between the insolvent person and the other parties to the eligible financial contract; and
>
> **(b)** any dealing with financial collateral including
>
> > **(i)** the sale or foreclosure or, in the Province of Quebec, the surrender of financial collateral, and
> >
> > **(ii)** the setting off or compensation of financial collateral or the application of the proceeds or value of financial collateral.

Net termination values

(10) If net termination values determined in accordance with an eligible financial contract referred to in subsection (9) are owed by the insolvent person to another party to the eligible financial contract, that other party is deemed, for the purposes of paragraphs 69(1)(a) and 69.1(1)(a), to be a creditor of the insolvent person with a claim provable in bankruptcy in respect of those net termination values.

1992, c. 27, s. 301997, c. 12, s. 412001, c. 9, s. 5732004, c. 25, s. 36(E)2005, c. 47, s. 432007, c. 29, s. 922012, c. 31, s. 415

Court File No. CV-23-00706033-00CL

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., BIOSTEEL MANUFACTURING LLC, AND BIOSTEEL SPORTS NUTRITION USA LLC

(the "**Applicants**")

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

FACTUM OF THE MONITOR/MOVING PARTY

BENNETT JONES LLP
One First Canadian Place
Suite 3400, P.O. Box 130
Toronto, Ontario M5X 1A4
Sean Zweig (LSO# 57307I)
Tel: 416.777.6254
Email: zweigs@bennettjones.com
Jesse Mighton (LSO# 62291J)
Tel: 416.777.6255
Email: mightonj@bennettjones.com
Jason Berall (LSO#: 68011F)
Tel: 416.777.5480
Email: berallj@bennettjones.com
Gina Azer (LSO#: 87157T)
Tel: 416.777.7839
Email: azerg@bennettjones.com
Counsel to KSV Restructuring Inc., in its capacity as the Monitor and not in its personal capacity.