

District of Ontario
Division No. 9 - Toronto
Court File No.: BK-23-2946534-0031
Estate File No.: 31-2946534

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
(IN BANKRUPTCY AND INSOLVENCY)

THE HONOURABLE)	FRIDAY, THE 16TH
)	
JUSTICE OSBORNE)	DAY OF JUNE, 2023

**IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*,
R.S.C. 1985, c. B-3, AS AMENDED**

**AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL
OF NANOPAY CORPORATION**

ORDER

THIS MOTION, made by Nanopay Corporation (the “**Company**”) pursuant to Sections 50.4(9) and 50.6 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the “**BIA**”), for an order extending the time for the Company to file a proposal, approving the DIP Term Sheet (as defined herein), granting the DIP Lender’s Charge (as defined herein and pursuant to the terms hereof), and authorizing the Company to engage David Kay as Chief Restructuring Officer of the Company, and granting certain other relief, was heard this day at 330 University Avenue, Toronto, Ontario by video conference.

ON READING the Affidavit of Laurence Cooke, sworn June 15, 2023 (the “**Cooke Affidavit**”), the First Report of Dodick Landau Inc., in its capacity as proposal trustee of the Company (the “**Proposal Trustee**”), dated June 15, 2023 (the “**First Report**”), and on hearing the submissions of counsel for the Company, the Proposal Trustee, the DIP Lender (as defined herein)

and such other counsel as were present, no one else appearing for any other person although duly served as appears from the Affidavit of Service of Amanda Campbell sworn June 15, 2023, filed.

SERVICE

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion and the Motion Record is hereby abridged and validated so that this Motion is properly returnable today and hereby dispenses with further service thereof.

EXTENSION OF TIME TO FILE PROPOSAL

2. **THIS COURT ORDERS** that pursuant to Section 50.4(9) of the BIA, the time for the Company to file its proposal be and is hereby extended to August 2, 2023.

DIP FINANCING

3. **THIS COURT ORDERS** that the Company is hereby authorized and empowered to obtain and borrow under a credit facility (the “**DIP Loan Facility**”) from Nephesh Partners, LLC and/or its affiliate (the “**DIP Lender**”), provided that borrowings under the DIP Loan Facility shall not exceed \$2,000,000 unless permitted by further Order of this Court.

4. **THIS COURT ORDERS** that the DIP Loan Facility shall be on the terms and subject to the conditions set forth in the term sheet between the Company and the DIP Lender, substantially in the form attached as Exhibit “D” to the Cooke Affidavit (the “**DIP Term Sheet**”). The DIP Term Sheet, subject to such minor amendments as may be acceptable to the Company and the DIP Lender, and approved by the Proposal Trustee, be and is hereby approved.

5. **THIS COURT ORDERS** that the Company is hereby authorized and empowered to execute and deliver such credit agreements, mortgages, charges, hypothecs and security documents, guarantees and other definitive documents (collectively, the “**Definitive Documents**”), as are contemplated by the DIP Term Sheet or as may be reasonably required by the DIP Lender pursuant to the terms thereof, and the Company is hereby authorized and directed to pay and perform all of its indebtedness, interest, fees, costs, liabilities and obligations to the DIP Lender under and pursuant to the DIP Term Sheet and the Definitive Documents (the “**Obligations**”) as and when the same become due and are to be performed, notwithstanding any other provision of this Order.

PROPOSAL TRUSTEE TO ADMINISTER DIP LOAN ADVANCES

6. **THE COURTS ORDERS** that, as contemplated by the DIP Term Sheet, the Proposal Trustee be and is hereby authorized to administer the advances under the DIP Loan Facility, for the benefit of the Company and the DIP Lender by: (a) receiving funds advanced under the DIP Loan Facility into a separate account maintained by the Proposal Trustee solely for such purpose; and (b) disbursing such funds in accordance with the directions of the Company, as evidenced by written directions of the CRO (as defined below).

7. **THIS COURT ORDERS** that in carrying out the administrative functions set out in paragraph 6 hereof, the Proposal Trustee shall not have or incur any liability with respect to any losses, claims, damages or liabilities, of any nature or kind, to any Person (as defined below) from and after the date of this Order except to the extent such losses, claims, damages or liabilities result from the gross negligence or wilful misconduct on the part of the Proposal Trustee.

DIP LENDER'S CHARGE

8. **THIS COURT ORDERS** that, upon execution of the DIP Term Sheet, the DIP Lender shall be entitled to the benefit of and is hereby granted a charge (the “**DIP Lender’s Charge**”) on all of the Company’s current and future, real and personal, tangible and intangible assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof, including the Company’s intellectual property, the refund due from the Government of Canada and the Government of Ontario with respect to Scientific Research and Experimental Development for the taxation year ending December 31, 2022, and other tax refunds (the “**Property**”) as security for the Obligations. The DIP Lender’s Charge shall not exceed an aggregate amount of \$2,000,000, plus interest, fees, and costs and shall not secure an obligation that exists before this Order is made. The DIP Lender’s Charge shall have the priority set out in paragraph 12 hereof.

9. **THIS COURT ORDERS** that, notwithstanding any other provision of this Order, or Section 69 of the BIA:

- (a) the DIP Lender may take such steps from time to time as it may deem necessary or appropriate to file, register, record or perfect the DIP Lender’s Charge or any of the Definitive Documents;
- (b) upon the occurrence of an event of default under the Definitive Documents or the DIP Lender’s Charge, the DIP Lender, upon 3 Business Days’ (as defined in the DIP Term Sheet) notice to the Company and the Proposal Trustee, may exercise any and all of its rights and remedies against the Company or the Property under or pursuant to the DIP Term Sheet, Definitive Documents and the DIP Lender’s

Charge, and any additional rights and remedies available to it, at law or in equity, including without limitation, to cease making advances to the Company and set off and/or consolidate any amounts owing by the DIP Lender to the Company against the obligations of the Company to the DIP Lender under the DIP Term Sheet, the Definitive Documents or the DIP Lender's Charge, to make demand, accelerate payment and give other notices, or to apply to this Court for the appointment of a receiver, receiver and manager or interim receiver, or for a bankruptcy order against the Company and for the appointment of a trustee in bankruptcy of the Company; and

- (c) the foregoing rights and remedies of the DIP Lender shall be enforceable against any trustee in bankruptcy, interim receiver, receiver or receiver and manager of the Company or the Property.

10. **THIS COURT ORDERS AND DECLARES** that the DIP Lender shall be treated as unaffected in any proposal filed by the Company under the BIA or any plan of arrangement or compromise filed by the Company under the *Companies' Creditors Arrangement Act*, with respect to any advances made under the Definitive Documents or the DIP Term Sheet.

VALIDITY OF CHARGE CREATED BY THIS ORDER

11. **THIS COURT ORDERS** that the filing, registration or perfection of the DIP Lender's Charge shall not be required, and that, upon execution of the DIP Term Sheet, the DIP Lender's Charge shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the DIP Lender's Charge coming into existence, notwithstanding any such failure to file, register, record or perfect.

12. **THIS COURT ORDERS** that, upon execution of the DIP Term Sheet, the DIP Lender's Charge shall constitute a charge on the Property and the DIP Lender's Charge shall rank in priority to all other security interests, mortgages, deemed trusts (statutory or otherwise), trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise (collectively, "**Encumbrances**") in favour of any individual, firm, corporation, governmental agency, or any other entities (each and any, a "**Person**").

13. **THIS COURT ORDERS** that except as otherwise expressly provided for herein, or as may be approved by this Court, the Company shall not grant any Encumbrances over any Property that rank in priority to, or *pari passu* with, the DIP Lender's Charge, unless the Company obtains the prior written consent of the Proposal Trustee, the DIP Lender or further Order of this Court.

14. **THIS COURT ORDERS** that the DIP Term Sheet, the Definitive Documents and the DIP Lender's Charge shall not be rendered invalid or unenforceable and the rights and remedies of the DIP Lender thereunder shall not otherwise be limited or impaired in any way by: (a) the pendency of these proceedings and the declarations of insolvency made herein; (b) any application(s) for bankruptcy order(s) issued pursuant to the BIA, or any bankruptcy order made pursuant to such applications; (c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA; (d) the provisions of any federal or provincial statutes; or (e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, sublease, offer to lease or other agreement (collectively, an "**Agreement**") which binds the Company, and notwithstanding any provision to the contrary in any Agreement:

- (a) neither the creation of the DIP Lender's Charge nor the execution, delivery, perfection, registration or performance of the DIP Term Sheet or the Definitive Documents shall create or be deemed to constitute a breach by the Company of any Agreement to which it is a party;
- (b) the DIP Lender shall not have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the Company entering into the DIP Term Sheet, the creation of the DIP Lender's Charge, or the execution, delivery or performance of the Definitive Documents; and
- (c) the payments made by the Company pursuant to this Order, the DIP Term Sheet or the Definitive Documents (including any and all fees and interest), and the granting of the DIP Lender's Charge, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct, or other challengeable or voidable transactions under any applicable law.

15. **THIS COURT ORDERS** that the DIP Lender's Charge created by this Order, insofar as it is a charge over leases of real property in Canada, shall only be a charge in the Company's interest in such real property leases.

CHIEF RESTRUCTURING OFFICER

16. **THIS COURT ORDERS** that the engagement agreement, attached as Exhibit "F" to the Cooke Affidavit (the "**CRO Engagement Agreement**"), providing for the engagement of David Kay, in his capacity as chief executive officer of Ao8 Strategic Advisors, LLC and not in his personal capacity, to act as Chief Restructuring Officer ("**CRO**") of the Company, and the payment

of the fees and expenses contemplated thereby be and is hereby approved. The Company be and is hereby authorized to execute the CRO Engagement Agreement, with such minor amendments as may be agreed to by the Company and the CRO and approved by the Proposal Trustee.

17. **THIS COURT ORDERS** that the CRO shall not be or be deemed to be a director, *de facto* director or employee of the Company.

18. **THIS COURT ORDERS** that, upon the execution of the CRO Engagement Agreement, the CRO is hereby directed and empowered to exercise and perform all of the powers, responsibilities and duties described in the CRO Engagement Agreement, as well as all other ancillary powers, responsibilities or duties as may be necessary or useful in order to give full and proper effect to the terms and conditions of the CRO Engagement Agreement or this Order.

19. **THIS COURT ORDERS** that, upon the execution of the CRO Engagement Agreement, the Company and its shareholders, directors, officers, employees, agents and representatives shall co-operate fully with the CRO in the exercise of his powers and the discharge of his obligations, including providing the CRO with access to the Company's books, records, assets and premises as the CRO requires.

20. **THIS COURT ORDERS** that the CRO shall not have any liability with respect to any losses, claims, damages or liabilities, of any nature or kind, to any Person from and after the date of this Order except to the extent such losses, claims, damages or liabilities result from the gross negligence or wilful misconduct on the part of the CRO.

21. **THIS COURT ORDERS** that no action or other proceeding shall be commenced directly, or by way of counterclaim, or otherwise, against or in respect of the CRO, and all rights and

remedies of any Person against or in respect of them are hereby stayed and suspended, except with the written consent of the CRO or with leave of this Court on notice to the Company, the Proposal Trustee and the CRO. Notice of any such motion seeking leave shall be served upon the Company, the Proposal Trustee and the CRO at least seven (7) days prior to the presentation date of any such motion for leave.

22. **THIS COURT ORDERS** that the obligations of the Company to the CRO pursuant to the CRO Engagement Agreement, the DIP Term Sheet, and this Order, including, without limitation, the CRO Fee (as defined in the DIP Term Sheet), shall be treated as unaffected and may not be compromised in any plan of arrangement or proposal under the BIA, or any other restructuring and no such plan or arrangement, proposal or restructuring shall be approved that does not provide for the payment in full of all amounts due to the CRO pursuant to the terms of the CRO Engagement Agreement, the DIP Term Sheet, and this Order.

SERVICE

23. **THIS COURT ORDERS** that the E-Service Protocol of the Commercial List (the “**Protocol**”) is approved and adopted by reference herein and, in this proceeding, the service of documents made in accordance with the Protocol (which can be found on the Commercial List website at <http://www.ontariocourts.ca/scj/practice/practice-directions/toronto/e-service-protocol/>) shall be valid and effective service. Subject to Rule 17.05 this Order shall constitute an order for substituted service pursuant to Rule 16.04 of the *Rules of Civil Procedure*. Subject to Rule 3.01(d) of the *Rules of Civil Procedure* and paragraph 21 of the Protocol, service of documents in accordance with the Protocol will be effective on transmission. This Court further orders that a

Case Website shall be established in accordance with the Protocol with the following URL
[‘https://dodick.ca/public_documents/nanopay-corporation/’](https://dodick.ca/public_documents/nanopay-corporation/).

GENERAL

24. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or elsewhere to give effect to this Order and to assist the Company, the Proposal Trustee and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Company and to the Proposal Trustee, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Proposal Trustee in any foreign proceeding, or to assist the Company and the Proposal Trustee and their respective agents in carrying out the terms of this Order.

25. **THIS COURT ORDERS** that this Order and all of its provisions are effective as of 12:01 a.m. Toronto time on the date of this Order, and this Order is enforceable without the need for entry and filing.

<p>ONTARIO SUPERIOR COURT OF JUSTICE (COMMERCIAL LIST) (IN BANKRUPTCY AND INSOLVENCY)</p> <p>PROCEEDING COMMENCED AT TORONTO</p> <p>ORDER</p>	<p>DENTONS CANADA LLP 77 King Street West, Suite 400 Toronto-Dominion Centre Toronto, ON M5K 0A1</p> <p>Kenneth Kraft (LSO #31919P) Tel: 416-863-4374 kenneth.kraft@dentons.com</p> <p>Sara-Ann Wilson (LSO #56016C) Tel: 416-863-4402 sara.wilson@dentons.com</p> <p><i>Lawyers for Nanopay Corporation</i></p>
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