

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

**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**

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**FACTUM OF THE PROPOSAL TRUSTEE  
(Motion Returnable October 3, 2023 @ 10:30am via Judicial Teleconference)**

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September 29, 2023

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## I – NATURE OF MOTION

1. This is a motion by Dodick Landau Inc., in its capacity as proposal trustee (the “**Proposal Trustee**”) in the within proposal proceedings of Nanopay Inc. (“**Nanopay**”, or the “**Company**”), for the approval of the amended proposal of the Company, dated August 30, 2023 (the “**Proposal**”).
2. On September 11, 2023, at the meeting of creditors, the creditors accepted the Proposal in the requisite majorities under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the “**BIA**”). In accordance with procedures set forth in the BIA, the Proposal Trustee makes this application to Court for the approval of the Proposal.
3. This factum is filed by the Proposal Trustee in support of a motion for, *inter alia*, an order approving the Proposal.

## II – FACTS

### Background

4. Nanopay is a start-up that provides embedded electronic payments solutions for businesses and banks that allows its clients to set up accounts, link them to verified bank accounts, send and receive invoices to the customers of its clients, and receive and make payments against those invoices.
5. Nanopay relied upon regular equity injections and loans from investors to fund its cash flow needs. It operated at a loss each fiscal year and only began generating revenue in the first quarter of 2023. Unfortunately, the market adopted the technology more slowly than expected. Nanopay was unable to raise further sufficient equity nor source debt financing.

6. Facing a liquidity crisis, Nanopay determined the only way to preserve its operations and value was to secure financing and obtain creditor protection through a formal insolvency proceeding.

### **NOI & Proposal**

7. On May 19, 2023, the Company filed a notice of intention to make a proposal (the “NOI”) under the BIA.

**Third and Final Report to Court of the Proposal Trustee, dated September 18, 2023, Caselines Bundle 007 (September 25, 2023), Document E9 (the “Third Report”), Paragraph 9; Caselines Master Bundle (September 25, 2023), Caselines Page E354.**

8. On June 16, 2023, the Company obtained a Court order approving, among other things, (a) the extension of time for the Company to file a proposal to August 2, 2023; and, (b) a Debtor-in-Possession credit facility (“**DIP Loan Facility**”) from Nephesh Partners, LLC, (the “**DIP Lender**”) in the limited amount of \$275,000. The extension and DIP funding were limited due to short service of court materials and the matter was directed to return to Court on June 23, 2023. Pursuant to the Endorsement of the Honourable Justice Osborne, dated June 23, 2023, the Court increased the DIP Loan Facility to a maximum of \$2,000,000.

9. On August 1, 2023, the Company returned to Court and obtained approval for a further extension to the time for filing the Proposal and the stay of proceedings up to and including August 21, 2023.

10. On August 21, 2023, the Company filed a proposal, which was subsequently amended. The amended Proposal was filed on August 30, 2023.

11. Thereafter, on August 31, 2023, the Proposal Trustee gave notice to the Company, the division office, and every known creditor of the Company of the creditors meeting to be held on September 11, 2023.

**Third Report, paragraph 9; Caselines Master Bundle (September 25, 2023), Caselines Page E354.**

**Proposal of Nanopay Inc, dated August 31, 2023; Third Report, Appendix “A”; Caselines Master Bundle (September 25, 2023), Caselines Page E375.**

12. The Proposal provides for the following:

- (a) payment of all Crown statutory priority claims as required under the BIA;
- (b) payment of Administrative Fees and Expenses (as defined in the Proposal);
- (c) a \$50,000 distribution to His Majesty in the Right of Ontario represented by the Ministry of Finance, the Company’s only secured creditor (other than the DIP Lender), in full satisfaction of a secured claim for unpaid employee health taxes;
- (d) payment of all employee preferred claims and all preferred claims in full;
- (e) payment to former employees in any amount equal to their respective entitlements under the *Wage Earner Protection Program Act*;
- (f) a “convenience class” of unsecured creditors who are to receive payments of \$500 on account of proven claims equal or less than \$500 or where such a creditor elects to participate in such class; and

- (g) the general unsecured creditors shall receive their proportionate share of 1% of the new equity in the Company.

**Proposal of Nanopay Inc, dated August 31, 2023; Third Report, Appendix “A”; Caselines Master Bundle (September 25, 2023), Caselines Page E375.**

13. The DIP Lender is an unaffected secured creditor under the proposal.

### **Meeting of Creditors**

14. The meeting of creditors was convened, with quorum, on September 11, 2023.
15. The vote on the Proposal proceeded and was accepted by the requisite number of unsecured creditors in number and value as required by the BIA, as set out below:

	<b>For</b>		<b>Against</b>	
Unsecured Creditors present and voting	13	\$1,511,092.62	1	\$24,891.01
Percentage of total votes	92.31%	98.38%	7.69%	1.62%

16. The only creditor in the secured creditor class, His Majesty in the Right of Ontario, also voted in favour of the Proposal.

**Third Report, paragraph 16; Caselines Master Bundle (September 25, 2023), Caselines Page E357.**

**Minutes of the First Meeting of Creditors held on September 11, 2023, Third Report, Appendix “B”; Caselines Master Bundle (September 25, 2023), Caselines Pages E461-463.**

17. Accordingly, if approved by the Court, the Proposal shall bind the affected unsecured and secured creditors and allow the Company to restructure its affairs and continue operations.

## **The Within Motion**

18. Following the meeting and vote, the Proposal Trustee scheduled the within motion to approve the Proposal and delivered notice of the same in accordance with the BIA by serving notice on September 14, 2023 to all known creditors.

**Notice to Creditors dated September 14, 2023, Third Report, Appendix “D”; Caselines Master Bundle (September 25, 2023), Caselines Page E470.**

19. On September 18, 2023, the Proposal Trustee served and filed the Third and Final Report to the Court of the Proposal Trustee in accordance with the BIA.

## **III – ISSUES AND LAW**

20. The sole question on the within motion is – *whether the court should approve the Proposal?*

21. The Proposal Trustee submits that the Proposal meets all the requirements set out in the BIA, including that it is made for the general benefit of the creditors and was accepted by the requisite number of creditors. Accordingly, the answer should be – *yes, the proposal should be approved.*

## **The Court should approve the Proposal**

### **A. General Principles**

22. The following general principles have been applied by the courts when approving BIA proposals:

- (a) The court must consider the interests of the debtor, the creditors, and the public;

*Kitchener Frame Limited (Re)*, 2012 ONSC 234 (CanLII) (“*Kitchener Frame*”) para 20.

- (b) The court must consider whether the proposal is more advantageous to creditors than a bankruptcy, and the proportion with which creditors have approved the proposal.

*Kitchener Frame*, para 21.

- (c) The court must also consider the interests of all stakeholders, and weigh effects of the proposal versus those of a bankruptcy.

*Magi (Syndic de)*, 2006 QCCS 5129 (CanLII), para 19b.

## **B. Test for Approval**

- 23. The Court must apply the following test when considering the approval of a Proposal pursuant to subsection 59(2) of the BIA:

**(2) Court may refuse to approve the proposal** – Where the court is of the opinion that the terms of the proposal are not reasonable or not calculated to benefit the general body of creditors, the court shall refuse to approve the proposal, and the court may refuse to approve the proposal whenever it is established that the debtor has committed any one of the offences mentioned in section 198 to 200.

- 24. To satisfy the test in subsection 59(2), the following three-pronged test must be met:
  - (a) the terms of proposal are reasonable;
  - (b) the proposal is calculated to benefit the general body of creditors; and
  - (c) the proposal is made in good faith.

The first two factors expressly relate to s. 59(2) itself, while the third factor requires the court to exercise its equitable jurisdiction. In doing so, consideration is to be given to the interests of the debtor, the interests of the creditors, as well as the interests of the public at large in the integrity of the bankruptcy system.

***Kitchener Frame*, para 20.**

**(i) The Proposal is Reasonable**

25. To be reasonable, a proposal must give the creditors something more than they would receive in a bankruptcy; have a reasonable probability of being successfully completed on its terms; meet the requirement of commercial morality; and maintain the integrity of the bankruptcy system.

***Lofchik, Re*, 1998 CarswellOnt 194 (Ont. SCJ [Commercial List]), para 10.**

26. The Proposal offers the creditors substantially more than they would receive upon a bankruptcy. The Company has no cash on hand and its assets, principally comprised of certain computer equipment, software, and intangible assets, have little realizable value. The Proposal Trustee estimates that the total recovery upon liquidation, should the Company cease operations and be deemed bankrupt, would be \$25,000. Such amount would be subject to the secured claims of the DIP Lender and the Ontario Ministry of Finance, on account of unpaid employee health tax. It is expected that any such realizations would be consumed by professional fees and residual payments to the DIP Lender, with no funds remaining for any other creditors.

**Report on Trustee on Amended Proposal dated August 31, 2023, Third Report, Appendix “A”, paragraphs 58-60; Caselines Master Bundle (September 25, 2023), Caselines Pages E403-404.**



27. Additionally, the creditors have overwhelmingly voted in favour of the Proposal in the requisite majorities. The Court should afford substantial deference to the majority vote of the creditors.

***Kitchener Frame, para 21.***

28. The terms of the Proposal are not onerous, and it will provide for the continuation of the Company's business operations and the employment of its employees.

29. The Proposal Trustee is satisfied that the terms of the Proposal are reasonable.

**(ii) The Proposal is Calculated to Benefit the General Body of Creditors**

30. The Proposal is consistent with common insolvency practices. Nanopay will pay the Proposal Trustee a sum equal to the aggregate of all Crown Priority Claims, Employee Preferred Claims, Former Employee Claims, and Preferred Claims (as defined in the Proposal) plus \$30,000 to be held in trust which shall be used to fund the administrative costs of a bankruptcy in the event the Proposal is annulled.

31. Unsecured creditors shall each receive their pro rata share of 1% of the new common shares of the Company. This proposal is calculated for the general benefit of the creditors.

32. In addition, the Ontario Ministry of Finance has agreed to a proposed compromise of its secured claim via the Proposal, resulting in a further benefit to the unsecured creditors and the Company and its stakeholders.

33. The Proposal Trustee is satisfied that the Proposal is calculated for the benefit of the general body of creditors and in the best interest of the stakeholders, and that no one is materially prejudiced through approval and implementation of the same. Should the Proposal not be

approved, and the Company deemed bankrupt, the creditors will receive little recovery and will be prejudiced generally.

**(iii) The Proposal is made in Good Faith**

34. Good faith requires full disclosure of the assets of the debtors and encumbrances against them.

***Kitchener Frame, para 35.***

35. In this matter, the Company made full disclosure of its assets and liabilities to the Proposal Trustee, who in turn reported on the same to the creditors.

**Statement of Affairs dated May 19, 2023, Third Report, Appendix “A”. Caselines Master Bundle (September 25, 2023), Caselines Page E439.**

36. When considering this third prong of the test, the courts will consider the interests of the debtor, the creditors, and the public at large.

***Kitchener Frame, para 20.***

37. The Company’s creditors overwhelming voted in favour of the Proposal. Their expected recoveries will be superior under the Proposal than in a bankruptcy. Further, the business will continue to operate for the benefit of all stakeholders, including its employees. In a bankruptcy, it is expected that no funds would be available for distribution to the unsecured creditors, the Ontario Ministry of Finance would likely receive no recovery and the business would cease to operate. It is in the public interest that a consideration of the Proposal proceeds in accordance with the parameters and procedures set out under the BIA.

38. The Proposal Trustee is satisfied that in filing the Proposal, the Company is acting and continuing to act in good faith.

### **C. Ancillary Authorizations to Implement Proposal**

39. In addition to the approval of the Proposal, the requested relief includes ancillary authorizations necessary to implement the terms of the Proposal, including authorizing the cancellation of all existing common shares and the issuance of new common shares, a percentage of which shall be distributed to the creditors under the Proposal. To effect the same, the Company is to be empowered to take such steps as are necessary and appropriate, including filing articles of reorganization to amend its articles.

40. Pursuant to s. 59(4) of the BIA, where a court approves a proposal, it may order the debtor's constating instrument be amended in accordance with the proposal to effect any lawful change under the law.

***Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 ("BIA") s. 59(4).***

41. The Proposal contemplates a reorganization of the share capital of the Company, which is consistent with insolvency practices in commercial proposals and permissible under the BIA and the applicable provisions of the *Canada Business Corporations Act*.

***BIA, s. 59(4).***

***Canada Business Corporations Act, R.S.C. 1985, c. C-44, ss. 173, 191, 262.***

42. The Trustee recommends and supports the ancillary authorizations be granted as they are required to implement the terms of the Proposal and consistent with established insolvency practice and the law.

### **Conclusion**

43. In view of the above, the Proposal Trustee submits that:

- (a) the Proposal has the support of the creditors – with 92.31% of voting creditors voting for the Proposal, representing 98.38% in value of the voting debt;
- (b) the Proposal is reasonable, calculated for the benefit of the general body of creditors and made in good faith; and,
- (c) accordingly, the Court should exercise its discretion to approve the Proposal.

### **V – ORDER SOUGHT**

44. The Proposal Trustee seeks an order of the Court approving the Proposal and granting the relief set out in the draft Order attached as Tab 1A of its Motion Record, dated September 18, 2023.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED.**

Date: September 29, 2023



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## **SCHEDULE “A”**

### **LIST OF AUTHORITIES**

1. *Kitchener Frame Limited (Re)*, 2012 ONSC 234 (CanLII)
2. *Lofchik, Re*, 1998 CarswellOnt 194, [1998] 1 C.B.R. (4<sup>th</sup>) 245, (Ont. S.C.J. [Commercial List])
3. *Magi (Syndic de)*, 2006 QCCS 5129 (CanLII)

## **SCHEDULE “B”**

### **RELEVANT LEGISLATION**

#### ***Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3***

##### **Application for court approval**

**58** On acceptance of a proposal by the creditors, the trustee shall

(a) within five days after the acceptance, apply to the court for an appointment for a hearing of the application for the court’s approval of the proposal;

(b) send a notice of the hearing of the application, in the prescribed manner and at least fifteen days before the date of the hearing, to the debtor, to every creditor who has proved a claim, whether secured or unsecured, to the person making the proposal and to the official receiver;

(c) forward a copy of the report referred to in paragraph (d) to the official receiver at least ten days before the date of the hearing; and

(d) at least two days before the date of the hearing, file with the court, in the prescribed form, a report on the proposal.

[...]

##### **Court to hear report of trustee, etc.**

**59 (1)** The court shall, before approving the proposal, hear a report of the trustee in the prescribed form respecting the terms thereof and the conduct of the debtor, and, in addition, shall hear the trustee, the debtor, the person making the proposal, any opposing, objecting or dissenting creditor and such further evidence as the court may require.

##### **Court may refuse to approve the proposal**

(2) Where the court is of the opinion that the terms of the proposal are not reasonable or are not calculated to benefit the general body of creditors, the court shall refuse to approve the proposal, and the court may refuse to approve the proposal whenever it is established that the debtor has committed any one of the offences mentioned in sections 198 to 200.

##### **Reasonable security**

(3) Where any of the facts mentioned in section 173 are proved against the debtor, the court shall refuse to approve the proposal unless it provides reasonable security for the payment

of not less than fifty cents on the dollar on all the unsecured claims provable against the debtor's estate or such percentage thereof as the court may direct.

#### **Court may order amendment**

**(4)** If a court approves a proposal, it may order that the debtor's constating instrument be amended in accordance with the proposal to reflect any change that may lawfully be made under federal or provincial law.

### ***Canada Business Corporations Act, R.S.C. 1985, c. C-44***

#### **Amendment of articles**

**173(1)** Subject to sections 176 and 177, the articles of a corporation may by special resolution be amended to

- (a)** change its name;
- (b)** change the province in which its registered office is situated;
- (c)** add, change or remove any restriction on the business or businesses that the corporation may carry on;
- (d)** change any maximum number of shares that the corporation is authorized to issue;
- (e)** create new classes of shares;
- (f)** reduce or increase its stated capital, if its stated capital is set out in the articles;
- (g)** change the designation of all or any of its shares, and add, change or remove any rights, privileges, restrictions and conditions, including rights to accrued dividends, in respect of all or any of its shares, whether issued or unissued;
- (h)** change the shares of any class or series, whether issued or unissued, into a different number of shares of the same class or series or into the same or a different number of shares of other classes or series;
- (i)** divide a class of shares, whether issued or unissued, into series and fix the number of shares in each series and the rights, privileges, restrictions and conditions thereof;
- (j)** authorize the directors to divide any class of unissued shares into series and fix the number of shares in each series and the rights, privileges, restrictions and conditions thereof;
- (k)** authorize the directors to change the rights, privileges, restrictions and conditions attached to unissued shares of any series;



- (l) revoke, diminish or enlarge any authority conferred under paragraphs (j) and (k);
- (m) increase or decrease the number of directors or the minimum or maximum number of directors, subject to sections 107 and 112;
- (n) add, change or remove restrictions on the issue, transfer or ownership of shares; or
- (o) add, change or remove any other provision that is permitted by this Act to be set out in the articles.

[...]

### **Definition of "reorganization"**

#### **191(1)**

In this section, "**reorganization**" means a court order made under

- (a) section 241;
- (b) the *Bankruptcy and Insolvency Act* approving a proposal; or
- (c) any other Act of Parliament that affects the rights among the corporation, its shareholders and creditors.

### **Powers of court**

#### **191(2)**

If a corporation is subject to an order referred to in subsection (1), its articles may be amended by such order to effect any change that might lawfully be made by an amendment under section 173.

[...]

### **Definition of "statement"**

**262(1)** In this section, "**statement**" means a statement of intent to dissolve and a statement of revocation of intent to dissolve referred to in [section 211](#).

### **Sending of articles and statements**

**262(2)** If this Act requires that articles or a statement relating to a corporation be sent to the Director, on receiving the articles or statement in the form that the Director fixes, any other required documents and the required fees, the Director shall

- (a) record the date of receipt;
- (b) issue the appropriate certificate;

(c) send the certificate, or a copy, image or photographic, electronic or other reproduction of the certificate, to the corporation or its agent or mandatary; and

(d) publish a notice of the issuance of the certificate in a publication generally available to the public.

**Date of certificate**

**262(3)** A certificate referred to in subsection (2) issued by the Director may be dated as of the day the Director receives the articles, statement or court order pursuant to which the certificate is issued or as of any later day specified by the court or person who signed the articles or statement.

**262(4)** [Repealed 1994, c. 24, s. 28(2).]

**Date of certificate**

**262(5)** Notwithstanding subsection (3), a certificate of discontinuance may be dated as of the day on which the corporation amalgamates pursuant to another Act or is continued.

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

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

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

PROCEEDING COMMENCED AT TORONTO

**FACTUM**  
**(motion returnable October 3, 2023)**

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