

ONTARIO  
SUPERIOR COURT OF JUSTICE  
(COMMERCIAL LIST)

THE HONOURABLE MR ) THURSDAY, THE 2<sup>ND</sup>  
JUSTICE G. DOW ) DAY OF AUGUST, 2018



IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL UNDER  
THE BANKRUPTCY AND INSOLVENCY ACT, R.S.C. 1985, c. B-3, AS AMENDED OF  
IMPOPHARMA INC.

ORDER

THIS MOTION made by Impopharma Inc. ("Impopharma"), pursuant to, *inter alia*, sections 64.1, 64.2 and 183 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "BIA") was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the affidavit of Theron E. Odlaug sworn July 26, 2018 and the exhibits thereto (the "Odlaug Affidavit"), and the First Report of Richter Advisory Group Inc. ("Richter" or the "Trustee"), in its capacity as proposal trustee of Impopharma, dated July 31, 2018, and on being advised that the secured creditors who are likely to be affected by the charges created herein were given notice, and on hearing the submissions of counsel for Impopharma, counsel for MidCap Financial Trust ("MidCap") and counsel for the Trustee, and no one else appearing although duly served as appears from the affidavit of service of Amanda Santache sworn July 26, 2018:

**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.

**STAY OF PROCEEDINGS**

2. **THIS COURT ORDERS** that the stay of proceedings resulting from the filing by Impopharma of its *Notice of Intention to Make a Proposal* (the "NOI") is extended until September 30, 2018.

**FORBEARANCE AGREEMENT**

3. **THIS COURT ORDERS** that the Forbearance Agreement entered into on July 25, 2018 between Impopharma and MidCap (Exhibit D to the Odlaug Affidavit) (the "**Forbearance Agreement**"), is hereby approved, the execution thereof is hereby approved and that Impopharma is hereby authorized and empowered to perform its obligations thereunder.

**SISP**

4. **THIS COURT ORDERS** that the sale, refinancing and investment solicitation process in respect of Impopharma's assets (the "**SISP**"), including its milestones as set out in paragraph 50 of the Odlaug Affidavit, be and is hereby approved and that Impopharma, with the assistance of the Trustee, is hereby authorized and empowered to take such steps as are necessary or desirable to carry out the SISP, provided that any definitive agreement to be

executed by Impopharma in respect of the sale of all or part of the Property (as defined below) shall require further approval of this Court.

#### **DIRECTORS' AND OFFICERS' INDEMNIFICATION AND CHARGE**

5. **THIS COURT ORDERS** that Impopharma shall indemnify its directors and officers (collectively, the "D&Os") against obligations and liabilities that they may incur as directors or officers of Impopharma after the filing of the NOI, except to the extent that, with respect to any of the D&Os, the obligation or liability was incurred as a result of the such D&O's gross negligence or wilful misconduct.

6. **THIS COURT ORDERS** that the D&Os of Impopharma shall be entitled to the benefit of and are hereby granted a charge (the "**D&O Charge**") on all of Impopharma's current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (the "**Property**"), which charge shall not exceed an aggregate amount of \$75,000, as security for the indemnity provided in paragraph 5 of this Order. The D&O Charge shall have the priority set out in paragraphs 12 and 14 herein.

7. **THIS COURT ORDERS** that, notwithstanding any language in any applicable insurance policy to the contrary, (a) no insurer shall be entitled to be subrogated to or claim the benefit of the D&O Charge, and (b) the D&Os shall only be entitled to the benefit of the D&O Charge to the extent that they do not have coverage under any directors' and officers' insurance policy, or to the extent that such coverage is insufficient to pay amounts indemnified in accordance with paragraph 5 of this Order.

#### **ADMINISTRATION CHARGE**

8. **THIS COURT ORDERS** that the Trustee, counsel to the Trustee and counsel to Impopharma shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, by Impopharma as part of the costs of these proceedings. Impopharma is hereby authorized and directed to pay the accounts of the Trustee, counsel for the Trustee and counsel for Impopharma as such accounts are rendered and, in addition, Impopharma is hereby authorized to pay the Trustee, counsel to the Trustee and counsel to the Applicant reasonable retainers to be held by them as security for the payment of their respective fees and disbursements outstanding from time to time.

9. **THIS COURT ORDERS** that the Trustee, counsel to the Trustee and counsel to Impopharma shall be entitled to the benefit of and are hereby granted a charge (the "**Administration Charge**") on the Property, which charge shall not exceed \$100,000, as security for their professional fees and disbursements incurred at their standard rates and charges, both before and after the filing of the NOI in respect of these proceedings. The Administration Charge shall have the priority set out in paragraphs 12 and 14 herein.

#### **KERP CHARGE**

10. **THIS COURT ORDERS** that the Retention Contracts (the "**Retention Contracts**") and related summary table (the "**KERP Table**") are hereby approved and that Impopharma is hereby authorized and empowered to perform its obligation thereunder and to make the payments in accordance with the terms set out therein.

11. **THIS COURT ORDERS** that the employees designated in the KERP Table shall be entitled to the benefit of and are hereby granted a charge (the "**KERP Charge**") on the

Property, which charge shall not exceed \$550,000, as security for payment of the obligations set forth under the Retention Contracts and related KERP Table. The KERP Charge shall have the priority set out in paragraphs 12 and 14 herein.

**VALIDITY AND PRIORITY OF CHARGES CREATED BY THIS ORDER**

12. **THIS COURT ORDERS** that the priorities of the D&O Charge, the Administration Charge, the KERP Charge, as among them, shall be as follows:

First - Administration Charge (to the maximum amount of \$100,000);

Second - D&O Charge (to the maximum amount of \$75,000); and

Third - KERP Charge (to the maximum amount of \$550,000).

13. **THIS COURT ORDERS** that the filing, registration or perfection of the Administration Charge, D&O Charge, and the KERP Charge (collectively, the "**Charges**") shall not be required, and that the Charges shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, notwithstanding any such failure to file, register, record or perfect.

14. **THIS COURT ORDERS** that the Charges shall constitute a charge on the Property and such Charges shall rank ahead in priority to all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise (collectively, "**Encumbrances**") in favour of any person, subject only to the following:

- (a) The Charges, as described in paragraph 12 of this Order, shall rank junior to MidCap's existing security interest over the Property, only to the extent where such security interest attaches to Impopharma's rights and interest to or in any Scientific Research and Experimental Development tax incentive claim (the "**SRED Claim**");
- (b) Otherwise, the Charges, as described in paragraph 12 of this Order, shall rank prior to MidCap's existing security interest over the Property, but only up to the following amounts:
- Administration Charge: \$100,000;
  - D&O Charge: \$75,000; and
  - KERP Charge: \$360,000 (*vis-à-vis* MidCap, the amount of the KERP Charge shall be reduced by any payment made to the beneficiary of such Charge in accordance with the Projected Statement of Cash Flow attached to the Forbearance Agreement as Schedule D);

15. **THIS COURT ORDERS** that except as otherwise expressly provided for herein, or as may be approved by this Court, Impopharma shall not grant any Encumbrances over any Property that rank in priority to, or *pari passu* with, any of the Charges, unless Impopharma also obtains the prior written consent of the Trustee, the beneficiaries of the Charges, MidCap or further Order of this Court.

16. **THIS COURT ORDERS** that the Charges shall not be rendered invalid or unenforceable and the rights and remedies of the chargees entitled to the benefit of the

Charges (collectively, the "**Chargees**") thereunder shall not otherwise be limited or impaired in any way by (a) the pendency of these proceedings and the declarations of insolvency (expressly or impliedly) made herein; (b) any motion(s) for bankruptcy order(s) issued pursuant to BIA, or any bankruptcy order made pursuant to such motion(s); (c) any assignments for the general benefit of creditors made or deemed to have been 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 Impopharma, and notwithstanding any provision to the contrary in any Agreement:

- (a) neither the creation of the Charges nor the execution, delivery, perfection, registration or performance of the Retention Contracts shall create or be deemed to constitute a breach by Impopharma of any Agreement to which it is a party;
- (b) none of the Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the creation of the Charges or Impopharma entering into the Retention Contracts or executing, delivering or performing of any obligation pursuant to any related documents; and
- (c) the payments made by Impopharma pursuant to this Order, and the granting of the Charges, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct, or other challengeable or voidable transactions under any applicable law.

17. **THIS COURT ORDERS** that any Charge created by this Order over leases of real property in Canada shall only be a Charge in Impopharma's interest in such real property leases.

#### **SEALING**

18. **THIS COURT ORDERS** that Impopharma's financial statements (Exhibit H to the Odlaug Affidavit) and the KERP Table (Exhibit J to the Odlaug Affidavit) filed with the Court shall be kept confidential and under seal with the Court until further order of this Court.

#### **SERVICE AND NOTICE**

19. **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/eservice-commercial/>) 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.

20. **THIS COURT ORDERS** that if the service or distribution of documents in accordance with the Protocol is not practicable, the Trustee is at liberty to serve or distribute this Order, any other materials and orders in these proceedings, any notices or other



correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery or facsimile transmission to Impopharma's creditors or other interested parties at their respective addresses as last shown on the records of Impopharma and that any such service or distribution by courier, personal delivery or facsimile transmission shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing.

#### **GENERAL**

21. **THIS COURT ORDERS** that the Trustee shall not take possession of the Property and shall take no part whatsoever in management or supervision of the management of the business of Impopharma and shall not, in carrying out the SISP or otherwise fulfilling its obligations hereunder or under the BIA, be deemed to have taken possession or control of the Business or Property, or any part thereof.

22. **THIS COURT ORDERS** that, in addition to the rights and protections afforded the Trustee under the BIA or as an officer of this Court, the Trustee shall incur no liability or obligation as a result of its appointment or the carrying out of the SISP or the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Trustee by the BIA or any applicable legislation.


23. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States, to give effect to this Order and to assist Impopharma, the 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 Impopharma and to the 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 Trustee in any foreign proceeding, or to assist Impopharma and the Trustee and their respective agents in carrying out the terms of this Order.

24. **THIS COURT ORDERS** that each of Impopharma and the Trustee be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, whereby located, for the recognition of this Order and for assistance in carrying out the terms of this Order, including the enforcement of any Charge established hereby.

25. **THIS COURT ORDERS** that any interested party (including Impopharma and the Trustee) may apply to this court to vary or amend this Order on not less than seven (7) days' notice to any other party or parties likely to be affected by the order sought or upon such other notice, if any as this court may order.

26. **THIS COURT ORDERS** that this Order and all of its provisions are effective as of 12:01 a.m. Eastern Standard/Daylight Time on the date of this Order.

  
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G. DOW, J.

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ON / BOOK NO:  
LE / DANS LE REGISTRE NO:

AUG 02 2018

PER / PAR: 

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

Proceeding commenced at Toronto

**ORDER**

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Lawyers for the Applicant

COUNSEL SLIP

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COURT FILE NO BK-18-02403547-32 DATE AUG 2, 2018

NO ON LIST (8)

TITLE OF PROCEEDING IMPOPHARMA INC.

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August 2, 2018

Upon being advised the responding parties do not oppose the relief sought Order to issue as signed by me

G. Dow, J.  
G. Dow, J.