



promissory notes for the outstanding amount owed of \$8,909,830 as of January 1, 2019, plus interest, fees (including reasonable attorneys' fees), costs and expenses. Capone Aff. at ¶ 2.

3. The terms of the promissory notes are plain and unambiguous, the breaches of the underlying obligations under the notes are indisputable, and no defense exists to liability under the promissory notes. Accordingly, Michaelson is entitled to summary judgment against the Defendant in the amount of \$8,909,830, plus accrued and accruing interest, costs, expenses and fees to be determined at an inquest. Capone Aff. at ¶ 1.

#### **The Parties**

4. At all material times hereinafter mentioned, Michaelson was and is a Delaware limited partnership with a place of business within the State of New York located at 509 Madison Avenue, Suite 2014, New York, New York 10022, and was and is in the business of, among other things, providing customized growth financing to entrepreneur-led technology companies. Capone Aff. at ¶ 3.

5. To my knowledge, the Defendant is a Delaware corporation having an address of 2447 Technology Way, Springdale, AR 72764. Capone Aff. at ¶ 4

#### **Consent to Jurisdiction, Venue and Service of Process**

6. This Court has jurisdiction over the Defendant pursuant to the terms of the NPA, Forbearance Agreement and the Notes (as defined below), in which the Defendant irrevocably submitted to the exclusive jurisdiction of the state or federal courts located in New York County, New York for the adjudication of any dispute and further consented to service of legal process by registered or certified mail, return receipt requested, to the Defendant at the address set forth in the NPA. Capone Aff. Ex. A at ¶ 10.10.

7. Venue is proper in this Court under CPLR § 501 because (a) pursuant to the relevant documents, the Defendant expressly submitted to this Court's jurisdiction and (b) NanoMech has an office in the State of New York, County of New York. Capone Aff. ¶¶ 3-4.

**The Note Purchase and Security Agreement**

8. NanoMech and Michaelson are parties to a certain Note Purchase and Security Agreement, dated as of April 10, 2018, as amended by that certain First Amendment to Note Purchase and Security Agreement, dated as of April 19, 2018 (collectively, the "NPA"). Capone Aff. ¶ 5, Ex. A and B.

9. Pursuant to the NPA, Michaelson made certain term loans to NanoMech evidenced by (a) the \$5 million note dated April 10, 2018 (the "Note"); and (b) the \$2 million note dated April 19, 2018 (the "Bridge Note" and collectively with the Note, the "Notes"). Capone Aff., Exs. C and D.

10. NanoMech defaulted under the NPA by, among other things, failing to make repayments with respect to the Bridge Note following NanoMech's closing of one or more debt or equity financing rounds as was required pursuant to Section 1.14(f) of the NPA. In addition to NanoMech's failure to pay the Bridge Note when due, certain other events of default arose under the NPA. Capone Aff. ¶ 7.

11. As a result of NanoMech's defaults, Michaelson was entitled to immediately exercise any and all rights and remedies available to it related to such defaults, including, without limitation, the right to declare all "Obligations", as defined in the NPA, to be immediately due and payable and to exercise any and all legal rights and remedies available to it pursuant to the terms of the NPA, the Note and the Bridge Note. Capone Aff. ¶ 8, NPA, Ex. A at ¶ 7.2

### The Forbearance Agreement

12. NanoMech requested that Michaelson temporarily forbear from exercising its rights and remedies under the NPA notwithstanding the defaults. Michaelson agreed to temporarily forbear upon the terms and conditions set forth in a Forbearance Agreement dated November 20, 2018 between NanoMech and Michaelson. Capone Aff., Ex. E.

13. Pursuant to the Forbearance Agreement, NanoMech acknowledged that as of November 16, 2018, it owed Michaelson under the Notes \$7,430,769 without setoff, counterclaim or defenses. Forbearance Agreement ¶ 2(d).

14. In accordance with the Forbearance Agreement, Michaelson agreed that until the expiration or termination of the “Forbearance Period”, it would temporarily forbear from exercising its rights and remedies against NanoMech with the respect to the defaults identified in Exhibit A to the Forbearance Agreement (the “Specified Defaults”). Forbearance Agreement ¶ 3. The Forbearance Period began upon the “Effective Date” of the Forbearance Agreement and would continue until the occurrence of a “Forbearance Default” or April 19, 2019. Forbearance Agreement ¶ 3.

15. A “Forbearance Default” is defined to include, among other things, an “Event of Default” under the NPA other than the Specified Defaults and NanoMech’s failure to comply with the covenants set forth in Section 4 of the Forbearance Agreement. In accordance with Section 4, among other things, NanoMech was required to make monthly \$100,000 payments to Michaelson beginning on or before December 1, 2018 and thereafter on the first business day of each month during the Forbearance Period to be applied towards (i) the payment of Michaelson’s expenses then due under the terms of the NPA and related documents, and (ii) then, to the repayment of principal under the Note. Capone Aff. ¶ 12.

16. Upon expiration of the Forbearance Period, the Forbearance Agreement provides that Michaelson “has the right upon expiration of the Forbearance Period to accelerate and declare the Obligations to be immediately due and payable, to make demand upon the Borrower for the payment in full of all such Obligations, and to enforce any and all rights and remedies under the NPA Documents and applicable law.” Capone Aff. ¶ 13, Forbearance Agreement, Ex. E at ¶ 2(c).

**Defaults Under the Forbearance Agreement and Remedies**

17. NanoMech defaulted under the Forbearance Agreement by, among other things, failing to (a) pay the interest payment due on January 1, 2019 under the Note and (b) pay the \$100,000 payment due on January 1, 2019 under the Forbearance Agreement. Capone Aff. ¶ 14.

18. As a result of the foregoing defaults, a “Termination Event” has occurred under the Forbearance Agreement. The Forbearance Agreement provides, in pertinent part:

Upon the occurrence of a Termination Event, the agreement of [Michaelson] hereunder to forbear from exercising its rights and remedies shall immediately terminate without the requirement of any demand, presentment, protest or notice of any kind, all of which the [NanoMech] waives. [NanoMech] agrees that [Michaelson] may at any time thereafter proceed to exercise any or all of its rights and remedies under any or all of the NPA, any other NPA Document and/or applicable law, including, without limitation, its rights and remedies with respect to the Specific Events of Default. Without limiting the generality of the foregoing, upon the occurrence of a Termination Event, [Michaelson] may, in its sole discretion and without the requirement of any demand, presentment, protest or notice of any kind...commence any legal or other action to collect any or all of the Obligations from [NanoMech] and/or any Collateral...

Capone Aff. at ¶ 15, Forbearance Agreement, Ex. E at ¶ 2(c)

19. As a result of the Termination Event, Michaelson’s obligation to forbear from exercising its rights and remedies has terminated without the requirement of any demand, presentment, protest or notice of any kind, all of which were waived by NanoMech. Accordingly, in accordance with Section 7.2 of the NPA, the Obligations are now all

immediately due and payable with declaration, notice or demand by Michaelson. Capone Aff.

¶ 16

20. The Notes also provide that “the occurrence of a Default or an Event of Default under the Agreement shall constitute a default hereunder and shall entitle Holder to exercise the rights and remedies specified in the Agreement and the other NPA Documents, as well as those available at law or in equity. These rights and remedies include, but are not limited to, the right of Holder to accelerate the maturity of the Note and all other Obligations...” Note and Bridge Note, ¶ 4

21. Exhibit F to the Capone Affidavit are true and correct copies of two internal marks sheets for each of the Notes that were generated from Michaelson’s computer system on January 30, 2019 which show that the balance due under the Note as of January 1, 2019 was \$5,799,429 plus accrued unpaid default interest in the amount of \$244,289 and the balance due under the Bridge Note as of January 1, 2019 was \$2,731,340 plus accrued unpaid and default interest of an additional \$134,772.

22. Under the Forbearance Agreement, no demand for payment from NanoMech of the foregoing amounts need be made. Capone Aff. ¶ 19. Consequently, as of January 1, 2019, NanoMech owes Michaelson at least \$6,043,718 under the Note and \$2,886,112 under the Bridge Note, all of which is immediately due and payable under paragraphs 7.2 of the NPA and no portion of which has been paid by the Defendant. Capone Aff. ¶ 20.

23. In addition to that amount, NanoMech is liable to Michaelson for accrued and accruing interest, costs, expenses and fees (including reasonable attorneys’ fees). In this respect, under the NPA, NanoMech “agrees to pay or reimburse Purchaser for all reasonable, document out of pocket costs and expenses (including the fees and expenses of all counsel, advisors,

consultants (including environmental and management consultants) and auditors retained in connection therewith), incurred in connection with....any litigation, dispute, suit, proceeding or action (whether instituted by or between any combination of Purchaser, Borrower or any other Person)..." NPA ¶ 9, Capone Aff., Ex. A.

24. Michaelson is unaware of any defense to repayment of the Notes and, NanoMech itself has admitted that it has no defenses to repayment. Capone Aff. ¶ 22.

### CONCLUSION

25. By the plain terms of the Notes and related documents, NanoMech is liable to Michaelson's in the amount of \$8,909,830, plus accrued and accruing interest, costs and fees, including reasonable attorneys' fees.

Dated: New York, New York  
February 4, 2019

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