DUANE MORRIS LLP
230 Park Avenue, Suite 1130
New York, NY 10169
Tel: (212) 404-8755
Fax: (212) 818-9606
Email: MAieta@duanemorris.com

Counsel to Ubiquiti Inc.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

---X	**Chapter 15**
In re:	
	Case No. 20-11354 (SHL)
PERASO TECHNOLOGIES INC.,	
Debtor in a Foreign Proceeding.	
---X	

LIMITED OBJECTION AND RESERVATION OF RIGHTS OF UBIQUITI INC. TO THE MONITOR'S VERIFIED PETITION FOR RECOGNITION

DUANE MORRIS LLP
Mario Aieta
Timothy Brock
230 Park Avenue, Suite 1130
New York, NY 10160
Tel: (212) 404-8755
Fax: (212) 818-9606
E-mail: MAieta@duanemorris.com

Attorneys for Ubiquiti Inc.

PRELIMINARY STATEMENT

Ubiquiti Inc. ("**Ubiquiti**") respectfully submits this Limited Objection and Reservation of Rights to the Verified Petition for Recognition of Foreign Proceeding (the "Petition") [Doc 2] filed by Ernst & Young Inc. (the "Monitor") acting as the authorized foreign representative of Peraso Technologies Inc. ("Peraso" or the "Debtor").

Ubiquiti's position remains that the Canadian Proceeding was filed as a means of forestalling the License Litigation now pending in the SDNY District Court and that these cases essentially comprise a two-party dispute. Peraso acknowledged as much in its initial filings in the proceeding. *See ECF Doc. 5-1 at* ¶¶ 7-8.[1]

Ubiquiti continues its Objection to the Monitor's request to extend the Stay entered in the Canadian Proceeding to protect non-debtor Directors (including individuals having no current affiliation with the Debtor) as contrary to United States bankruptcy law and the public policy of the United States. See ECF Doc. 019 Ubiquiti's Response and Objection to Emergency Motion dated June 8, 2020 (the "Objection", at pp. 12-16 and ECF Doc. Declaration of Hartley Nisenbaum ("Nisenbaum Declaration") dated June 8, 2020. While Canadian law provides that stays can be imposed to protect management from the distraction of lawsuits while they remain employed by the Debtor, the stays requested by Peraso are protecting ex-directors and non-employees who are not deserving of such protection. Thus, Ubiquiti believes, such non-debtors should be carved-out of the stay protections. Ubiquiti will likewise oppose any future attempt to release claims against these non-debtors, whether employees or not.

[1] Ubiquiti had no desire to be in a conflict position with Peraso, in district court or in insolvency proceedings. It is Ubiquiti's position that the parties are where we are as a result of the actions of others, and Ubiquiti reserves its rights in all respects to seek remedies in connection therewith.

Ubiquiti does not object to paragraphs two through four of the proposed Order of Recognition (ECF Doc. 2-1, the "Proposed Order") attached to the Petition in which the Monitor seeks recognition from this Court as being Peraso's foreign representative, and recognition of Peraso's insolvency proceeding (the "Canadian Proceeding") brought under Canada's Companies' Creditors Arrangement Act ("CCAA") in the Ontario Superior Court of Justice, Commercial List (the "Ontario Court") as a "foreign main" proceeding under section 1517(b)(1) of Title 11 of the U.S. Code (the "Bankruptcy Code"). Ubiquiti does not dispute that Peraso's "Center of Main Interests" ("COMI"), as such term is used in section 1517(b)(1) of the Bankruptcy Code, is in the Province of Ontario in Canada.

Ubiquiti objects to the vague scope of the additional relief sought by the Monitor on behalf of Peraso in Paragraph 5 of the Proposed Order, which states: "The Initial Order [of the Ontario Court issued on June 2, 2020] and any amendments or extensions thereof as may be granted from time to time by the Ontario Court, is given full force and effect in the United States pursuant to 11 U.S.C. §§ 1507 and 1521." Paragraph 5 is impossibly broad and purports to approve section 1507 and 1521 relief by both retrospectively and prospectively recognizing orders of the Ontario Court. Such prospective approvals could include future orders of unknown subject matter. Even retroactive or retrospective approvals would include orders that have been entered in the Canadian Proceeding after the Petition was filed seeking entry of the proposed Recognition Order.

This Court ought not to be signing a blank check pre-approving future relief in perpetuity. Ubiquiti reserves all of its rights as to any future orders and relief sought by the Monitor in the Canadian Proceeding and from this Court.

BACKGROUND

Ubiquiti herein incorporates by reference the *Background* section of the Objection and the supporting Nisenbaum Declaration, including the defined terms set forth in those filings.

ARGUMENT

I. Stays Granted to Third-Parties are Impermissibly Broad

Ubiquiti respectfully re-states and herein re-incorporates by reference its argument that the Stays granted by the Ontario Court in favor of non-debtor third-parties, especially former directors and ex-employees of Peraso who are not currently assisting the Monitor with the reorganization of the Debtor, are impermissibly broad.

II. The Proposed Order of Recognition is Flawed

Ubiquiti does not object to paragraphs two through four of the Proposed Order. Paragraph two would recognize the Monitor as the Debtor's foreign representative. Ubiquiti agrees; despite its differences with the Debtor, Ubiquiti acknowledges the good faith and professionalism of the Monitor in acquitting itself of its fiduciary responsibilities to the Debtor, not least as its foreign representative in this Chapter 15 Case, since the issuance of the Initial Order. Paragraph three would recognize the Canadian Proceeding as the Debtor's "foreign main" proceeding. Ubiquiti also agrees that Peraso has its COMI in Ontario and that such recognition is appropriate. Finally, paragraph four states that "All automatic relief under 11 U.S.C. § 1520 shall apply in this case." Ubiquiti acknowledges that this is as a lawful concomitant of this Court's recognition of the Canadian Proceeding. Ubiquiti notes that the automatic stay that comes with section 1520 relief does not include the staying of proceedings against third-parties, which would have to be requested as additional relief under sections 1507 and 1521.

Ubiquiti objects to Paragraph 5 of the Proposed Order, through which this Court would be enforcing—as additional relief under sections 1507 and 1521—the terms of orders both already entered and those yet even to be sought in the Canadian Proceeding. The scope of Paragraph 5 is impossibly broad as well as impermissibly vague on its face. It is unclear which prospective orders that conceivably might be entered in the Canadian Proceeding by the Ontario Court would constitute an "amendment or extension" of the Initial Order after the entry of an Order of Recognition by this Court.

Orders entered in the Canadian Proceeding since this Court granted provisional relief to the Monitor [ECF Doc 22], demonstrate the problem with Paragraph 5 of the Proposed Order. The Ontario Court has entered two orders (the second including a separate "Endorsement") after June 10, 2020, the date of this Court's provisional order. Both orders were filed under "Statements" on the Chapter 15 docket in this case by the Monitor [ECF Docs 27 and 33]. The first of these orders, the Ontario Court's *Amended and Restated Initial Order* of June 12, 2020 [ECF Doc 27], is a restatement of the terms of the Initial Order and an extension of the Stay Period set forth therein and is obviously an "amendment" or "extension" of the Initial Order and would be enforced by this Court via Paragraph 5 upon entry of the Proposed Order.

The second order, entered on July 2nd in the Canadian Proceeding, and the included Endorsement entered on July 3 in that proceeding, were filed in this court under a covering *Statement* several days later [ECF Doc 33]. The order, styled *Order (Approval of DIP Agreement & Extension of the Stay of Proceedings)* (the "**July 2nd Order**") [Doc 33], includes a further extension of the Stay Period which clearly falls within Paragraph 5 of the Proposed Order. The bulk of the same July 2nd Order and the accompanying Endorsement, however, address the Ontario Court's approval of the Debtor's DIP financing. Yet, the issue of DIP financing was not addressed in the Initial Order. Consequently, would this portion of the July 2nd Order, and the separate Endorsement, comprise an "amendment" or "extension" of the Initial Order such that this Court's entry of the Proposed Order, as currently drafted, would result in the automatic and retroactive approval of those DIP Loan provisions? The answer to that question ought to be "no," given that the approval of DIP financing is a weighty matter worthy of a separate request of additional relief pursuant to sections 1507 and 1521.

The vague scope of Paragraph 5 of the Proposed Order suggests that this Court will be awarding relief prospectively where it has not yet even been requested in the Canadian Proceeding as it will be enforcing and thereby pre-approving future orders, and the additional relief awarded therein, to be issued by the Ontario Court, so long as such orders constitute an "amendment" or "extension" of the Initial Order. Relief under sections 1507 and 1521 ought not to extend prospectively to relief that has not even been requested yet.

The secretive DIP relief in the July 2nd Order and the Endorsement illustrates the problem. Ubiquiti's position is that the enforcement of the DIP Agreement ought to be the subject of a separate request by the Monitor for additional relief under sections 1507 and 1521. The DIP Agreement has been filed under seal and the version made available to Ubiquiti and to the public via the Ontario Superior Court is heavily redacted so that material terms are hidden.[2] The July 2nd Order exemplifies the potential abuses that could arise from entry of the Proposed Order: if the DIP provisions of the July 2nd Order comprise a valid "amendment" of the Initial Order, recognition will entail this Court enforcing the terms of a partially secret DIP Agreement. The Court will not know what it is enforcing and parties potentially affected by the DIP

[2] The July 2nd Order references the Supplementary Affidavit of Ronald Glibbery dated July 2, 2020. A copy of that affidavit, in the redacted form made available to Ubiquiti, attached the redacted DIP Agreement. The redacted Glibbery Affidavit is annexed hereto as Exhibit A.

Agreement will not know how this Court's enforcement of that partially secret agreement impacts them.

Once the Proposed Order is entered, the effects of this Court "pre-approving" future orders that may result from the Canadian Proceeding could be as potentially abusive as that of the secretive DIP relief granted in the July 2nd Order. Ubiquiti is especially concerned that other material substantive relief could be packaged as part of an extension order and thus automatically be pre-approved in the United States without the benefit of an appropriate recognition hearing in respect of any such order in this Court.

The Monitor has already sought, and has obtained, interim Stay relief protecting parties that Ubiquiti still asserts ought not to have received such protection in the first place. Ubiquiti is concerned that Peraso may seek releases with a similarly overly broad scope and if those are part of an extension order, they could be pre-approved without a further hearing in this Court. While Ubiquiti understands that the Ontario Court, consistent with practice in that jurisdiction, might determine to protect the management of an entity seeking to restructure through a CCAA proceeding before it, Ubiquiti believes that protecting former directors and others not presently involved with the Debtor's current affairs does not advance that interest and Ubiquiti opposes a recognition order enforcing such substantively important additional relief automatically as a mere "amendment" of the Initial Order.[3]

Ubiquiti is also concerned that attempts could be made, through Paragraph 5 as proposed, to effect the automatic recognition in the United States of other material substantive issues through a future order of the Ontario Court so long as it amends the stay period in the Initial

[3] The practice in recognition proceedings under the CCAA is for the Canadian court to consider recognition of foreign orders only once they have been issued by the foreign court.

Order. For example, Paragraph 5 should not be used as a pre-approval of the recognition by this court of any future order rendered in the Ontario Court which seeks to determine the litigation between Ubiquiti and Peraso, or which approves a sale of assets or a plan of compromise or arrangement. It should be noted that the sale of assets or a plan of compromise or arrangement is significantly different in Canada and the U.S. Respectfully, the practice of this Court should be to require of the foreign representative to bring motions to seek the recognition of orders as and when (or after) they are issued by the Ontario Court, and Ubiquiti must be afforded an opportunity to address them as appropriate. This is not a mere administrative matter, given the manner in which the present paragraph 5 is drafted.

III. Reservation of Rights

Ubiquiti has played a large role in the Debtor's recent history, as its largest customer, one of its shareholders and a licensee of its intellectual property. Ubiquiti expects that the Ontario Court will be entering orders relating to Peraso's intellectual property, and possibly the License Agreement in dispute between Peraso and Ubiquiti, through the Canadian Proceeding. Ubiquiti hereby expressly reserves all of its rights to bring to this Court through this Chapter 15 case any grievances it has regarding either section 1507 or section 1521 relief sought, including in connection with any sale or other disposition of the Debtor's intellectual property and/or the License Agreement.

CONCLUSION

Ubiquiti wants to ensure that it will be allowed the full extent of adequate notice and due process to which it is entitled under the laws of both Canada and the United States. The vagueness of Paragraph 5 of the Proposed Order renders uncertain and possibly overly-broad the scope of the additional relief under sections 1507 and 1521 of the Bankruptcy Code that may be enforced upon the granting of recognition. After recognition is granted, Paragraph 5 of the

Proposed Order could prospectively allow as a mere "amendment" to the Initial Order such broad relief that the due process rights of Ubiquiti and others are threatened. Ubiquiti therefore objects to the entry of a recognition order incorporating Paragraph 5 of the Proposed Order and reserves all rights to contest the scope of such relief, whether in the Canadian Proceeding or through this Chapter 15 case.

Dated: New York, New York
July 15, 2020

Respectfully submitted,

By: *<u>/s/ Mario Aieta</u>*

Mario Aieta
Timothy Brock
[Charles J. Keely]
[Peggy S. Chen]
DUANE MORRIS LLP
230 Park Avenue, Suite 1130
New York, NY 10160
Tel: (212) 404-8755
Fax: (212) 818-9606
E-mail: MAieta@duanemorris.com

Attorneys for Ubiquiti Inc.

CERTIFICATE OF SERVICE

I, Mario Aieta, do hereby certify that, on this 15th day of July 2020, I caused a true and accurate copy of the *LIMITED OBJECTION AND RESERVATION OF RIGHTS OF UBIQUITI INC. TO THE MONITOR'S VERIFIED PETITION* to be served on all parties registered to receive electronic notice *via* this Court's CM/ECF system.

/s/ Mario Aieta
Mario Aieta