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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re: PERASO TECHNOLOGIES INC.,[1] Debtor in a Foreign Proceeding.	Chapter 15 Case No. 20-_____ (___)

MEMORANDUM OF LAW IN SUPPORT OF VERIFIED PETITION
<u>FOR RECOGNITION OF FOREIGN PROCEEDING AND RELATED RELIEF</u>

[1] The last four digits of the United States Tax Identification Number, or similar foreign identification number, as applicable, for Peraso Technologies Inc. are 8747.

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Ernst & Young Inc. is the court-appointed monitor (the "**Monitor**") and authorized foreign representative of Peraso Technologies Inc. ("**Peraso**") in a proceeding (the "**Canadian Proceeding**") under Canada's *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, (as amended, the "**CCAA**"), pending before the Ontario Superior Court of Justice, Commercial List (the "**Ontario Court**").

The Monitor commenced this chapter 15 case ancillary to the Canadian Proceeding with the filing of an official form petition and the *Verified Petition for Recognition of Foreign Proceeding and Related Relief* (collectively, the "**Chapter 15 Petition**"),[2] with accompanying documentation, pursuant to sections 1504 and 1515 of title 11 of the United States Code (as amended, the "**Bankruptcy Code**") seeking the entry of an order (i) recognizing the Canadian Proceeding as a "foreign main proceeding" under section 1517 of the Bankruptcy Code, and (ii) giving full force and effect in the United States to the Initial Order of the Ontario Court dated June 3, 2020 (together with any extensions or amendments thereof authorized by the Ontario Court, the "**Initial Order**").[3]

The Monitor respectfully files this Memorandum of Law in support of the Chapter 15 Petition.

PRELIMINARY STATEMENT

Peraso is a small, private Canadian fabless semiconductor company that specializes in the development of integrated circuits and chipsets for use in wireless technology that operates on the 60 GHz band. Since 2019, Peraso has been party to a dispute with Ubiquiti Inc. and certain

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2 Capitalized terms used but not defined herein have the meanings assigned to them in the Chapter 15 Petition.
3 A copy of the Initial Order is annexed as Exhibit 1 to the Proposed Order annexed to the Chapter 15 Petition as Exhibit A.

of its affiliates (collectively, "**Ubiquiti**") arising out of a late 2018 transaction under which Peraso would develop certain chipsets as per Ubiquiti's specifications and Ubiquiti would provide Peraso with equity financing, totalling $15 million across three tranches, upon the satisfaction of certain pre-agreed development milestones. Ubiquiti, a large publicly-traded wireless networking company based in New York City, is Peraso's largest customer and one of its shareholders. As Peraso was and remains in the early stages of generating revenue, with significant research and development, marketing, and other costs that have to date greatly exceeded its revenues, the funding under the Ubiquiti arrangement was critical for Peraso to fund its operations and remain solvent.

Peraso began to experience financial challenges last year when it did not receive $10 million of expected investment from Ubiquiti. Peraso has since attempted to obtain alternative financing, including additional investment or a sale of the business. Further, on January 16, 2020, Peraso sent notice to terminate the License Agreement (and therefore the exclusivity provision therein) on the basis that Ubiquiti failed to provide Peraso with notice of its acceptance or rejection of Peraso's satisfaction of two milestones, as was required under the License Agreement.

Shortly thereafter, Ubiquiti commenced multiple legal proceedings in Canada and the United States against Peraso and certain of its current and now-former directors, challenging, among other things, the termination of the licensing and development arrangements and the propriety of certain steps taken by Peraso to secure additional financing in 2020.

In large part because of its disputes with Ubiquiti, Peraso anticipates that it will run out of cash by late June 2020. The Monitor understands that the pending litigations with Ubiquiti substantially impair Peraso's ability to sell its products to customers other than Ubiquiti, deter potential purchasers from acquiring Peraso, and effectively prevent Peraso from obtaining viable financing. Accordingly, Peraso commenced the Canadian Proceeding to obtain a breathing spell, stabilize its business, and attempt to resolve the Ubiquiti disputes. Through the supervision of the Ontario Court and the assistance of this Court, Peraso intends to enhance its prospects for effectuating liquidity-enhancing transactions that would enable it to emerge from the Canadian Proceeding as a viable and sustainable business.

Chapter 15 authorizes this Court to (i) recognize a foreign proceeding upon a foreign representative's proper commencement of a case under chapter 15 and (ii) following recognition, to grant further relief in the United States to such foreign representative to aid the administration of the foreign proceeding, including by providing additional assistance under section 1507 and fashioning appropriate relief pursuant to section 1521.

The Chapter 15 Petition satisfies all of the requirements set forth in section 1515 of the Bankruptcy Code and the Canadian Proceeding is entitled to recognition as a "foreign main proceeding." The Monitor has been expressly appointed by order of the Ontario Court to act as foreign representative and the Canadian Proceeding is (x) an insolvency proceeding under the CCAA, (y) pending before the Ontario Court, (z) for a company that has all its operations, and therefore its center of main interests, in Canada. Further, the Initial Order conforms to the standard form of such order used in CCAA proceedings before the Ontario Court and provides relief similar to what would be available under the Bankruptcy Code. Enforcement of the Initial Order in the United States is warranted under the principles of comity that underlie chapter 15, is fully consistent with relief routinely granted by U.S. bankruptcy courts in connection with CCAA cases and will best ensure the fair and efficient administration of the Canadian Proceeding.

JURISDICTION AND VENUE

This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334, section 1501 of the Bankruptcy Code, and the *Amended Standing Order of Reference of the United States District Court for the Southern District of New York*, dated January 31, 2012, Reference M-431. *See In re Standing Order of Reference Re*: Title 11, 12 Misc. 00032 (S.D.N.Y. Jan. 31, 2012) (Preska, C.J.). This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(P). Venue is proper in this District pursuant to 28 U.S.C. § 1410. The statutory predicates for the relief requested in the Chapter 15 Petition, as discussed herein, are sections 105(a), 1504, 1507, 1509, 1515, 1517, 1520, and 1521 of the Bankruptcy Code.

BACKGROUND

1. For a detailed description of Peraso's business, corporate organization, capital structure, and circumstances leading to the Canadian Proceeding, the Court is respectfully referred to: (i) the Chapter 15 Petition; (ii) the *Affidavit of Ronald Glibbery* in support of the commencement of the Canadian Proceeding sworn to June 2, 2020 (the "**Glibbery Affidavit**"); and (iii) the *Pre-Filing Report of the Proposed Monitor* dated June 2, 2020 (the "**Pre-Filing Report**"). The Glibbery Affidavit and the Pre-Filing Report were submitted to the Ontario Court at the commencement of the Canadian Proceeding and are annexed as Exhibits A and B, respectively, to the Declaration of Ken Coleman dated June 3, 2020 and filed contemporaneously herewith (the "**Coleman Declaration**").[4]

[4] Copies of all unpublished orders referred to herein are attached for the Court's convenience to the Coleman Declaration.

ARGUMENT

I.
PERASO IS ELIGIBLE TO BE A DEBTOR UNDER THE BANKRUPTCY CODE

2. Section 103(a) of the Bankruptcy Code provides that chapter 1, including section 109(a), applies in a case under chapter 15. 11 U.S.C. 103(a). Section 109, in turn, provides that "only a person that resides or has a domicile, a place of business, or property in the United States, or a municipality, may be a debtor under [the Bankruptcy Code]." 11 U.S.C. § 109(a). Peraso must therefore have a domicile, a place of business, or property in the United States to be eligible under chapter 15. *See also Drawbridge Special Opps. Fund LP v. Barnet (In re Barnet)*, 737 F.3d 238 (2d Cir. 2013).

3. Section 109(a)'s property requirement may be "satisfied by even a minimal amount of property located in the United States." *See, e.g., In re B.C.I. Fins. Pty Ltd.*, No. 17-11266 (SHL), 2018 WL 1973723, at *4 (Bankr. S.D.N.Y. Apr. 24, 2018); *GMAM Inv. Funds Tr. I v. Globo Comunicacoes e Partipacoes S.A. (In re Globo Comunicacoes e Partipacoes S.A.)*, 317 B.R. 235, 249 (S.D.N.Y. 2004) (stating that courts have repeatedly found that there is "'virtually no formal barrier' to having federal courts adjudicate foreign debtors' bankruptcy proceedings") (*citing In re Aerovias Nacionales de Colombia S.A. (In re Avianca)*, 303 B.R. 1, 9 (Bankr. S.D.N.Y. 2003)). Peraso satisfies this requirement because it has an interest in funds deposited with its U.S. counsel, Hodgson Russ LLP, as a retainer for services in connection with its ongoing litigation and restructuring efforts. *See In re Octaviar Admin. Pty Ltd.*, 511 B.R. 361, 372 (Bankr. S.D.N.Y. 2014) ("Although the Court need not reach the issue, Octaviar also has property in the United States in the form of an undrawn retainer in the possession of the Foreign Representatives'

counsel . . . Drawbridge concedes that prepetition retainers and transfers of property can serve as a basis for section 109(a) compliance[.]"). Peraso is also party to litigation with, and has asserted counterclaims against, Ubiquiti in this District under a license agreement governed by New York law under which the parties have submitted to the non-exclusive jurisdiction of the New York courts. *See In re PT Bakrie Telecom Tbk*, 601 B.R. 707, 715 (Bankr. S.D.N.Y. 2019) ("Examples of property sufficient to satisfy the requirement include funds held in a retainer account in the possession of the foreign representative's counsel, deposits in a New York bank account, and causes of action with a situs in New York owned by the foreign debtor.").

II.
THE CANADIAN PROCEEDING IS ENTITLED TO RECOGNITION AS A FOREIGN MAIN PROCEEDING

4. Section 1517(a) of the Bankruptcy Code provides, in pertinent part, that:

> [s]ubject to section 1506, after notice and a hearing, an order recognizing a foreign proceeding shall be entered if—(1) such foreign proceeding for which recognition is sought is a foreign main proceeding or foreign non-main proceeding within the meaning of section 1502; (2) the foreign representative applying for recognition is a person or body; and (3) the petition meets the requirements of section 1515.

11 U.S.C. § 1517(a). An order recognizing the Canadian Proceeding should therefore be entered if: (i) the Canadian Proceeding is a "foreign proceeding" within the meaning of section 101(23) of the Bankruptcy Code; (ii) the Canadian Proceeding is either a "foreign main proceeding" within the meaning of section 1502(4) or a "foreign nonmain proceeding" within the meaning of section 1502(5); (iii) the Monitor is a "foreign representative" within the meaning of section 101(24) and a "person" within the meaning of section 101(41); and (iv) the Chapter 15 Petition meets the requirements of section 1515. *Id*. *See also* H.R. Rep. 109-31(I), 109 Cong., Sess. 2005, *reprinted in* 2005 U.S.C.C.A.N. 88, 169 at 175 (noting that the "decision to grant recognition is not

dependent upon any findings about the nature of the foreign proceedings of the sort previously mandated by section 304(c) of the Bankruptcy Code. The requirements of this section, which incorporates the definitions in section 1502 and sections 101(23) and (24), are all that must be fulfilled to attain recognition"). Because each of these requirements is satisfied, the Monitor respectfully submits that the Court should enter an order granting recognition to the Canadian Proceeding.

A. The Canadian Proceeding is a "Foreign Proceeding"

5. Section 101(23) of the Bankruptcy Code defines a "foreign proceeding" as "a collective judicial or administrative proceeding in a foreign country, including an interim proceeding, under a law relating to insolvency or adjustment of debt in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation." 11 U.S.C. § 101(23).

6. The Canadian Proceeding is a proceeding under the CCAA, which provides a statutory means for applicants to restructure their business and financial affairs under the supervision of a court. It is "collective in nature" because, like a Bankruptcy Code proceeding, it is a general restructuring proceeding in which all creditors are entitled to participate. *See In re ENNIA Caribe Holding N.V.*, 594 B.R. 631, 638 (Bankr. S.D.N.Y. 2018) ("When determining whether a proceeding is "collective in nature," the primary question is whether the proceeding considers the rights and obligations of all creditors."). Because the Canadian Proceeding is subject to the oversight of the Ontario Court, it is also "judicial" and the assets and affairs of Peraso are "subject to control or supervision by a foreign court." Finally, it is for the "purpose of reorganization or liquidation," as Peraso has applied for protection under the CCAA in order to

stabilize its business and maximize stakeholder value. As such, the Canadian Proceeding falls squarely within the definition in section 101(23). Indeed, since the passage of chapter 15, CCAA proceedings have routinely been granted recognition by courts in the United States. *See*, *e.g.*; *In re U.S. Steel Canada Inc.*, 571 B.R. 600, 611 (Bankr. S.D.N.Y. 2017) ("This Court and others have recognized that a Canadian CCAA restructuring proceeding can constitute a 'foreign proceeding.'") (citing *In re Sino-Forest Corp.*, 501 B.R. 655, 657 (Bankr. S.D.N.Y. 2013); *In re Metcalfe & Mansfield Alt. Invest.*, 421 B.R. 685, 687 (Bankr. S.D.N.Y. 2010); *Collins v. Oilsands Quest Inc.*, 484 B.R. 593, 596 (S.D.N.Y. 2012)); *In re Motorcycle Tires & Accessories LLC*, Case No. 19-12706 [Dkt. No. 38] (Bankr. D. Del. Jan. 22. 2020) (granting recognition to a CCAA proceeding); *In re Imperial Tobacco Canada Limited,* Case No. 19-10771 [Dkt. No. 40] (Bankr. S.D.N.Y. Apr. 17, 2019) (same); *In re Kraus Carpet Inc.*, Case No. 18-12057 [Dkt. No. 46] (Bankr. D. Del. Oct. 1, 2018) (same); *In re Pac. Exploration & Prod. Corp.*, Case No. 16-11189 [Dkt. No. 25] (Bankr. S.D.N.Y. June 10, 2016) (same); *In re Angiotech Pharm., Inc.,* No. 11-10269 (Bankr. D. Del. Feb. 22, 2011) (same); *In re Metcalfe & Mansfield Alt. Inv.,* No. 09-16709 (Bankr. S.D.N.Y. Jan. 5, 2010) (same); *In re SemCanada Crude Co.*, No. 09-12637 (Bankr. D. Del. Aug. 27, 2009) (same); *In re Quebecor World Inc.*, No. 08-13814 (Bankr. S.D.N.Y. July 1, 2009) (same).

7. Canadian proceedings were also regularly granted comity under former section 304 of the Bankruptcy Code, the statutory predecessor to chapter 15. *See*, *e.g.*, *Smith v. Dominion Bridge Corp.,* No. CIV. 96-7580, 1999 WL 111465, at *3 (E.D. Pa. Mar. 2, 1999) ("As a sister common law jurisdiction, courts have consistently extended comity to Canadian Bankruptcy proceedings."); *In re Davis*, 191 B.R. 577, 587 (Bankr. S.D.N.Y. 1996) ("Courts in the United States uniformly grant comity to Canadian proceedings"); *Cornfeld v. Inv'rs Overseas*

Servs. Ltd., 471 F. Supp. 1255, 1260-62 (S.D.N.Y. 1979), *aff'd,* 614 F.2d 1286 (2d Cir. 1979); *Caddel v. Clairton Corp*., 105 B.R. 366 (N.D. Tex. 1989). The Canadian Proceeding is therefore a "foreign proceeding" within the meaning of section 101(23) of the Bankruptcy Code.

B. The Canadian Proceeding is a "Foreign Main Proceeding"

8. Section 1502(4) of the Bankruptcy Code defines a "foreign main proceeding" as a "foreign proceeding pending in the country where the debtor has the center of its main interests," and section 1517(b)(1) provides that a foreign proceeding shall be recognized "as a foreign main proceeding if it is pending in the country where the debtor has the center of its main interests." 11 U.S.C. §§ 1502, 1517(b)(1).

9. While the Bankruptcy Code does not define "center of its main interests," courts have equated the concept with a debtor's principal place of business, examining factors such as the location of the debtor's headquarters, management, assets, creditors, and/or the law whose jurisdiction would apply to most disputes. *See Morning Mist Holdings Ltd. v. Krys (In re Fairfield Sentry Ltd.*), 714 F.3d 127, 137 (2d Cir. 2013) (quoting *In re SPhinX, Ltd.*, 351 B.R. 103, 117 (Bankr. S.D.N.Y. 2006)). A debtor's center of main interest should also "correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties." *Id*. at 138 (citing guidance from the European enactment of the UNCITRAL Model Law, European Council Regulation (EC) No 1346/2000 of 29 May 2000).

10. Peraso is, as a threshold matter, presumed to have its center of main interest in Canada because it is incorporated under the laws of Ontario and has its main office in Toronto, Ontario, 11 U.S.C. § 1516(c). The operational facts are consistent with this presumption. All of Peraso's directors are located in Ontario and all of its senior management is also located in Ontario

other than its Vice President of Finance, who is located in Arizona. The majority of its workers are located in Ontario. Further, Polar Multi-Strategy Master Fund and Roadmap Capital Inc., the holders of Peraso's only secured debt, are investment funds based in Ontario. There is therefore no basis to conclude that Peraso's center of main interests would be located in a jurisdiction other than Canada. The Canadian Proceeding is therefore pending where Peraso has its center of main interests and constitutes a "foreign main proceeding" as defined in section 1502(4) of the Bankruptcy Code.

C. This Case Was Commenced by a "Foreign Representative"

11. Section 101(24) of the Bankruptcy Code defines a "foreign representative" as "a person or body, including a person or body appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of such foreign proceeding." 11 U.S.C. § 101(24).

12. This case was commenced by the Monitor, which has been expressly appointed by the Canadian Court to act as the foreign representative of the Canadian Proceeding for the purposes of seeking recognition of the Canadian Proceeding outside of Canada, including under chapter 15. Section 20(f) of the Initial Order grants the Monitor "full and complete authority to act as the representative of the Applicant in a foreign proceeding," and Section 37 of the Initial Order provides:

> **THIS COURT ORDERS** that the Monitor is hereby authorized and empowered, but not required, to act as the foreign representative (the "**Foreign Representative**") in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside of Canada, including, if deemed advisable by the Monitor, to apply for recognition of these proceedings in the United States pursuant to chapter 15 of title 11 of the *United States Code*, 11 U.S.C. §§ 101-1532.

Initial Order ¶¶ 20(f), 37. Further, Section 40 requests that "[a]ll courts, tribunals, regulatory and administrative bodies . . . grant representative status to the Monitor in any foreign proceeding[.]" Initial Order ¶ 40. Under section 1516 of the Bankruptcy Code, this Court is entitled to presume that the foreign representative is the person or body identified as such in the relevant foreign court decision, as is the case with the Monitor and the Initial Order. As a corporation, the Monitor is a "person" within the meaning of section 101(41) and as required under section 1517(a)(2). The Monitor is therefore a proper "foreign representative" within the meaning of section 101(24).

D. This Case Was Properly Commenced under Chapter 15

13. The Monitor duly and properly commenced the case, as required by sections 1504 and 1509 of the Bankruptcy Code, by filing the Chapter 15 Petition for recognition of foreign proceeding under section 1515(a) accompanied by all documents and information required by sections 1515(b) and (c), including: (i) the Initial Order, the decision of the Ontario Court commencing the Canadian Proceeding and appointing the Monitor; and (ii) a statement identifying all foreign proceedings with respect to Peraso that are known to the Monitor. *See In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, 374 B.R. 122, 127 (Bankr. S.D.N.Y. 2007), *aff'd*, 389 B.R. 325 (S.D.N.Y. 2008) ("A case under chapter 15 is commenced by a foreign representative filing a petition for recognition of a foreign proceeding under section 1515 of the Bankruptcy Code."). The filing has also been accompanied by all documents and information required by the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure. Because the Monitor has filed the Chapter 15 Petition in accordance with section 1515 of the Bankruptcy Code, it has properly commenced this case and, further, has satisfied the requirements of section 1517(a)(3).

E. <u>The Canadian Proceeding Should be Recognized as a Foreign Main Proceeding</u>

14. The Canadian Proceeding is a "foreign main proceeding" under chapter 15 because, as demonstrated above: (i) Peraso is eligible to be a debtor under the Bankruptcy Code; (ii) the Canadian Proceeding is a "foreign proceeding" and a "foreign main proceeding;" (iii) the Chapter 15 Petition was filed by the Monitor, as a duly-appointed "foreign representative" and "person;" and (iv) the filing complies with all relevant requirements of Bankruptcy Code and the Federal Rules of Bankruptcy Procedure.

III.
THE MONITOR IS ENTITLED TO AN ORDER ENFORCING THE INITIAL ORDER

15. In connection with the recognition of the Canadian Proceeding, the Monitor seeks enforcement in the United States of the Initial Order, which, among other things: (i) authorizes Peraso to continue managing and operating its property, including the pre-existing cash management system; (ii) appoints the Monitor; (iii) authorizes Peraso to continue negotiations with stakeholders in an effort to pursue restructuring options, including all avenues of refinancing of its business or property, subject to prior approval of the Ontario Court prior to obtaining any material refinancing; and (iv) for the period until and including June 13, 2020, or such later date as the Ontario Court may subsequently order (a) prevents parties from terminating or altering their agreements with Peraso without the written consent of Peraso and the Monitor or the leave of the Ontario Court, (b) stays the commencement or continuation of proceedings against Peraso and the Monitor without the written consent of Peraso and the Monitor or the leave of the Ontario Court, and (c) stays the commencement or continuation of certain proceedings against former, current, or future directors and officers of Peraso.

16. The Monitor respectfully submits that such relief is warranted under sections 105(a), 1507, and 1521 of the Bankruptcy Code and the general principles of comity that underpin chapter 15.

A. The Requested Relief is Warranted under Sections 105(a), 1507, and 1521 of the Bankruptcy Code

17. Chapter 15 of the Bankruptcy Code embodies longstanding principles of international comity and cooperation that weigh heavily in favor of the enforcement of the Initial Order and other orders of the Ontario Court in the United States. *See Victrix S.S., Co., S.A. v. Salen Dry Cargo A.B.*, 825 F.2d 709, 713 (2d Cir. 1987) ("American courts have long recognized the need to extend comity to foreign bankruptcy proceedings."); *In re Agrokor d.d.*, 591 B.R. 163, 183 (Bankr. S.D.N.Y. 2018) ("Many of the principles—particularly comity—that were applied in ancillary proceedings under section 304 were carried forward and apply today in Chapter 15 cases.") (internal citation omitted); *In re Atlas Shipping A/S*, 404 B.R. 726, 738 (Bankr. S.D.N.Y. 2009) (chapter 15 "specifically contemplates that the court should be guided by principles of comity and cooperation with foreign courts in deciding whether to grant the foreign representative additional post-recognition relief."). As courts have recognized, while comity does not demand categorical deference to a foreign proceeding, under these principles "a foreign judgment should generally be accorded comity if its proceedings are 'fair and impartial.'" *Collins v. Oilsands Quest, Inc.*, 484 B.R. 593 (S.D.N.Y. 2012) (citing *In re Ephedra Prods. Liab. Litig.*, 349 B.R. 333, 336 (S.D.N.Y. 2006)).

18. Further, "when the foreign proceeding is in a sister common law jurisdiction with procedures akin to our own, comity should be extended with less hesitation, there being fewer concerns over the procedural safeguards employed in those foreign proceedings." (internal

quotations and citations omitted). *In re Bd. of Dirs. of Hopewell Int'l Ins. Ltd*., *Inc.*, 238 B.R. 25, 67 (Bankr. S.D.N.Y. 1999), *aff'd*, 238 B.R. 699 (S.D.N.Y. 2002). Courts in this District have particularly emphasized, with respect to Canadian proceedings, that:

> the U.S. and Canada share the same common law traditions and fundamental principles of law. Canadian courts afford creditors a full and fair opportunity to be heard in a manner consistent with standards of U.S. due process. U.S. federal courts have repeatedly granted comity to Canadian proceedings.

In re Metcalfe & Mansfield Alt. Inv., 421 B.R. at 698. *See also United Feature Syndicate, Inc. v. Miller Features Syndicate, Inc.*, 216 F.Supp.2d 198, 212 (S.D.N.Y.2002) ("There is no question that bankruptcy proceedings in Canada—a sister common law jurisdiction with procedures akin to our own—are entitled to comity under appropriate circumstances.") (internal quotation marks and citations omitted); *Tradewell, Inc. v. Am. Sensors Elecs., Inc.*, No. 96 Civ. 2474(DAB), 1997 WL 423075, at *1 n. 3 (S.D.N.Y July 29, 1997) ("It is well-settled in actions commenced in New York that judgments of the Canadian courts are to be given effect under principles of comity.").

19. Strong comity considerations therefore weigh in favor of giving full force and effect in the United States to the Initial Order, which is a standard form of order entered in CCAA proceedings in Ontario that is available in model form on the website of the Ontario Court.[5] Initial Orders are routinely enforced in full in the United States in connection with the recognition of CCAA proceedings through chapter 15. *See, e.g., In re Motorcycle Tires & Accessories LLC*, Case No. 19-12706 (Bankr. D. Del. Jan. 22. 2020) [Dkt. No. 38] (giving full force and effect to CCAA initial order); *In re Imperial Tobacco Canada Limited,* Case No. 19-10771 [Dkt. No. 40] (Bankr. S.D.N.Y. Apr. 17, 2019) (same); *In re Pac. Exploration & Prod. Corp.*, Case No. 16-

[5] The Companies' Creditors Arrangement Act Initial Order Form is available at: https://www.ontariocourts.ca/scj/practice/practice-directions/toronto/ (last accessed June 3, 2020).

11189 [Dkt. No. 25] (Bankr. S.D.N.Y. June 10, 2016) (same); *In re Kraus Carpet Inc.*, Case No. 18-12057 [Dkt. No. 46] (Bankr. D. Del. Oct. 1, 2018) (same).

20. Further, sections 1507 and 1521 of the Bankruptcy Code provide specific statutory bases for a court overseeing a chapter 15 proceeding to provide additional relief to a foreign representative following the recognition of a foreign proceeding. Section 1507 empowers a court to provide "additional assistance" to a foreign representative provided that such assistance, "consistent with the principles of comity," will reasonably assure: (1) just treatment of all holders of claims against or interests in the debtor's property; (2) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding; (3) prevention of preferential or fraudulent dispositions of property of the debtor; (4) distribution of proceeds of the debtor's property substantially in accordance with the order prescribed by this title; and (5) if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns. 11 U.S.C. § 1507. Section 1521 allows a court to grant "any appropriate relief," including "any relief that may be available to a trustee," subject to certain limitations not applicable here, and provided, as required under section 1522, that "the interests of the creditors and other interested entities, including the debtor, are sufficiently protected." 11 U.S.C. §§ 1521, 1522.

21. Courts in this District and others have observed that "the interplay between the relief available under sections 1507 and 1521 is far from clear." *In re Avanti Commc'ns Grp. PLC*, 582 B.R. 603, 615–16 (Bankr. S.D.N.Y. 2018). In practice, relief is frequently available under both sections, and in either case "the principal question in determining whether to recognize and enforce" an order issued in a foreign proceeding "ultimately boils down to a question of the

appropriateness of granting comity to the foreign court approval" of such order. *In re Agrokor d.d.*, 591 at 189 (considering enforcement of Croatian restructuring plan and noting that "[a]s with section 1521, relief under section 1507 may include recognition and enforcement of a plan approved by a foreign court"). *See also In re Olinda Star Ltd.*, 614 B.R. 28 (Bankr. S.D.N.Y. 2020) (enforcing BVI scheme of arrangement under sections 1507 and 1521); *In re Sino-Forest Corp.*, 501 B.R. at 664 ("'While recognition of the foreign proceeding turns on the objective criteria under § 1517, 'relief [post-recognition] is largely discretionary and turns on subjective factors that embody principles of comity''") (quoting *In re Metcalfe & Mansfield*, 421 B.R. at 697 and *In re Bear Stearns*, 389 B.R. at 333 (S.D.N.Y.2008)). Enforcement of the Initial Order in the United States would therefore be warranted under either section 1507 or section 1521.

B. <u>The Enforcement of the Initial Order is Warranted under Section 1521 of the Bankruptcy Code</u>

22. Section 1521 allows the Court to give full force and effect in the United States to the Initial Order as "appropriate relief." The Initial Order provides Peraso with relief similar to what is expressly available, whether on an automatic or a discretionary basis, to a foreign representative upon the recognition of a foreign proceeding under chapter 15. It is also similar to and consistent with relief that is available automatically to chapter 11 debtors under sections 362, 365, and 1108 of the Bankruptcy Code.

23. For example, section 1520(a) of the Bankruptcy Code provides that, upon recognition, section 362 applies with respect to the debtor and the property of the debtor within the territorial jurisdiction of the United States, and the foreign representative may operate the debtor's business and exercise the rights and powers of a trustee. Section 1521(a)(5) of the Bankruptcy Code expressly permits the Court to entrust the administration or realization of all or

part of a debtor's assets within the territorial jurisdiction of the United States to a foreign representative such as the Monitor, and sections 1521(a)(1) and (2) allow the Court to further stay the commencement or continuation of actions concerning Peraso's assets, rights, obligations, or liabilities to the extent not already stayed under section 1520(a).

24. Likewise, in plenary proceedings under the Bankruptcy Code, section 362 would stay the commencement or continuation of action against a debtor; section 365 would prevent the termination of contracts on the basis of a bankruptcy filing; and section 1108 would allow the trustee to operate the debtor's business. The extension of the automatic stay to former, current, or future directors and officers of a debtor in a plenary Bankruptcy Code case, while not automatic as it is under the Initial Order, is also relief that may be available in circumstances where allowing actions against such parties to continue may cause harm to the debtor. *See In re Calpine Corp.*, Case No. 05-60200 (BRL), 2007 WL 1302604, at *3 (Bankr. S.D.N.Y. Apr. 30, 2007) (noting that courts enjoin litigation against non-debtors when an adverse judgment in the litigation will collaterally estop the debtor in subsequent litigation); *In re FPSDA I, LLC*, Case No. 10-75439, 2012 WL 6681794, at *11 (Bankr. E.D.N.Y. Dec. 21, 2012) (finding that "'the purpose served by extending the stay to directors and officers indemnified by the debtor must be consistent with the purpose of the stay itself, [which is] to suspend actions that pose a serious threat to a corporate debtor's reorganization efforts'") (quoting *In re Uni-Marts, LLC*, 399 B.R. 400 (Bankr. D. Del. 2009)).

25. Without such relief, Peraso will remain vulnerable to indemnification obligations and the risk that an unfavorable judgment against co-defendant former and current directors could give rise to collateral estoppel arguments that might be utilized against it. Allowing

litigation to continue would be a distraction to Peraso's current directors and officers during a key period where their focus must be on achieving a successful outcome for Peraso's stakeholders in the Canadian Proceeding. The fact that such a stay is a standard feature of Initial Orders issued in CCAA proceedings in Ontario, rather than discretionary as it may be in a plenary Bankruptcy Code proceeding, is of no moment because courts in this District do not require the acts of foreign and U.S. courts to be identical so long as fundamental standards of fairness are met. *In re Metcalfe & Mansfield*, 421 B.R. at 697 ("The relief granted in the foreign proceeding and the relief available in a U.S. proceeding need not be identical. A U.S. bankruptcy court is not required to make an independent determination about the propriety of individual acts of a foreign court."). It is therefore appropriate for the Court to use its authority pursuant to section 1521(a)(7) to enforce this provision of the Initial Order. *See In re Spectra Premium Indus. Inc.*, Case No. 20-10611 (BLS) (Bankr. D. Del. Mar. 12, 2020) (giving full force and effect to CCAA initial order which included a stay against actions against current and former directors and officers on a provisional basis).

26. The enforcement of the Initial Order also satisfies the requirements of section 1522 of the Bankruptcy Code because the interests of creditors and other interested entities, including Peraso, are sufficiently protected thereunder. *See In re Tri-Cont'l Exch. Ltd.*, 349 B.R. 627, 637 (Bankr. E.D. Cal. 2006) ("Standards that inform the analysis of § 1522 protective measures in connection with discretionary relief emphasize the need to tailor relief and conditions so as to balance the relief granted to the foreign representative and the interests of those affected by such relief, without unduly favoring one group of creditors over another."). The Canadian Proceeding is the best, and perhaps only, means of preserving Peraso as a going concern and salvaging enterprise value for the benefit of its stakeholders. The relief provided in the Initial Order

is intended to facilitate this result by protecting Peraso during the pendency of the Canadian Proceeding.

C. The Enforcement of the Initial Order is Warranted under Section 1507 of the Bankruptcy Code

27. If the Court concludes that the enforcement of the Initial Order is not warranted under section 1521 of the Bankruptcy Code, the Monitor respectfully submits that such relief is warranted as "additional assistance" under section 1507, which empowers a court to grant relief in aid of a foreign proceeding beyond what might be available in a plenary case provided that certain considerations are satisfied. *See In re U.S. Steel Canada Inc.*, 571 B.R. at 609. The Monitor submits that enforcing the Initial Order is entirely consistent with the relevant considerations specified in section 1507:

- the Canadian Proceeding ensures the just treatment of all holders of claims against or interests in Peraso's property, as such property will be administered in accordance with the CCAA under the supervision of the Ontario Court and under the oversight of the Monitor, which is a neutral officer of the court in the Canadian Proceeding;
- there is no allegation or evidence that claim holders in the United States will suffer prejudice or inconvenience in the processing of claims in the Canadian Proceeding;
- there is no allegation or evidence that any preferential or fraudulent disposition of Peraso's property is being made under the Initial Order;
- the Initial Order will result in the distribution of the proceeds of Peraso's property consistent with the order prescribed by the Bankruptcy Code; and
- the Initial Order allows Peraso to retain its going concern value, whereas in its absence Peraso would likely be liquidated.

11 U.S.C. § 1507(b).

28. Further, as the Fifth Circuit observed in *Vitro*, relief granted in foreign insolvency proceedings may be enforced in the United States through section 1507 if it can be demonstrated that the requested relief "is substantially in accordance with the circumstances that would warrant such relief in the United States." *In re Vitro S.A.B. de C.V.,* 701 F.3d 1031, 1069 (5th Cir. 2012). By the Initial Order, the Ontario Court has approved relief that is consistent with relief available in plenary bankruptcy proceedings. Accordingly, the Monitor respectfully submits that this Court is entitled to enforce the Initial Order in the United States pursuant to section 1507 of the Bankruptcy Code.

D. The Requested Relief Does Not Violate Section 1506 of the Bankruptcy Code

29. Finally, the requested relief does not violate section 1506 of the Bankruptcy Code, which provides that a court may refuse to take an action in a chapter 15 case if such "action would be manifestly contrary to the public policy of the United States." 11 U.S.C. § 1506. The legislative history of section 1506 makes clear that the public policy exception should be "narrowly interpreted" and is restricted to "the most fundamental policies of the United States." *In re Ephedra Prods. Liab. Litig.*, 349 B.R. at 336 (citing H.R. Rep. No. 109-31(I), at 109, *as reprinted in* 2005 U.S.C.C.A.N. 88, 172); *see also In re Gold & Honey, Ltd.*, 410 B.R. 357 (Bankr. E.D.N.Y. 2009); *cf. Hilton v. Guyot*, 159 U.S. 113 (1895) (holding that a foreign judgment should generally be accorded comity if "its proceedings are according to the course of a civilized jurisprudence"). Accordingly, courts have held that the public policy exception "should be interpreted restrictively" and that "a foreign judgment should generally be accorded comity if its proceedings are . . . fair and impartial." *In re Ephedra Prods. Liab. Litig.*, 349 B.R. at 336 (internal citations omitted) (affirming foreign judgment issued in the absence of a jury trial); *see also In re Metcalfe & Mansfield*, 421 B.R. at 697 (noting that "this public policy exception is narrowly construed" and

enforcing broad third-party releases in Initial Order); *Iida v. Kitahara (In re Iida)*, 377 B.R. 243 (B.A.P. 9th Cir. 2007) ("This public policy exception is narrow and, by virtue of the qualifier 'manifestly,' is limited only to the most fundamental policies of the United States."). Courts engaging in this analysis examine (i) whether the foreign proceeding was procedurally unfair and (ii) whether the application of foreign law would "'severely impinge the value and import' of a U.S. statutory or constitutional right, such that granting comity would 'severely hinder United States bankruptcy courts' abilities to carry out . . . the most fundamental policies and purposes' of these rights." *In re Qimonda AG,* 433 B.R. 547, 569 (E.D. Va. 2010) (quoting *Gold & Honey, Ltd.*, 410 B.R. at 372).

30. In the instant matter, the Monitor requests (i) recognition of the Canadian Proceeding as a "foreign main proceeding," and (ii) the enforcement of the Initial Order in the United States. It cannot be contended that mere recognition of the Canadian Proceeding pursuant to chapter 15 of the Bankruptcy Code would violate the public policy of the United States. Similarly, the enforcement of the Initial Order would not violate the public policy of the United States because, as discussed above, the Initial Order authorizes relief that is consistent with relief available in plenary proceedings under the Bankruptcy Code.

31. Finally, Paragraph 40 of the Initial Order provides that:

> **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 the Applicant, the Monitor 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 Applicant and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Applicant and the Monitor and their respective agents in carrying out the terms of this Order.

Initial Order ¶ 40. The Ontario Court has thus requested the assistance and cooperation of courts in the United States in giving effect to the Initial Order. In the absence of any public policy concerns, such request should be granted on the basis of comity and sections 1507 and 1521 of the Bankruptcy Code.

32. Accordingly, the Monitor respectfully submits that this Court should give full force and effect to the Initial Order in the United States upon recognition of the Canadian Proceeding. Such relief would not be manifestly contrary to the public policy of the United States, as prohibited in section 1506. Indeed, granting such recognition furthers the United States public policy respecting foreign proceedings as articulated, among other ways, through the objectives set forth in sections 1501(a) and 1508 of the Bankruptcy Code.

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CONCLUSION

WHEREFORE, the Monitor respectfully requests that this Court grant the relief requested in the Chapter 15 Petition and such other and further relief as may be just and proper.

Dated: New York, New York
June 3, 2020

ALLEN & OVERY LLP

By: /s/ *Ken Coleman*_______

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