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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. 20-11354 (SHL)

MONITOR'S REPLY TO UBIQUITI INC.'S LIMITED OBJECTION AND RESERVATION OF RIGHTS TO THE MONITOR'S VERIFIED PETITION FOR RECOGNITION OF FOREIGN PROCEEDING AND RELATED RELIEF

[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., 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**"), hereby files this reply to the limited objection and reservation of rights (the "**Limited Objection**") made by Ubiquiti Inc. ("**Ubiquiti**") to the Monitor's *Verified Petition for Recognition of Foreign Proceeding and Related Relief* (the "**Chapter 15 Petition**") and respectfully states as follows.[2]

PRELIMINARY STATEMENT

1. Ubiquiti does not dispute that the Canadian Proceeding is a foreign main proceeding, that the Monitor is Peraso's duly appointed foreign representative, and that this case was properly commenced in accordance with the relevant sections of chapter 15 of the Bankruptcy Code. Thus, the Monitor respectfully submits that recognition of the Canadian Proceeding should be granted. Ubiquiti, however, raises two objections to provisions in the proposed form of order (the "**Recognition Order**") that would give full force and effect to the Ontario Court's Initial Order (the "**Initial Order**") in the United States.

2. First, Ubiquiti continues its objection raised in the early days of this case that the Court should not recognize and enforce the Initial Order's provisions staying litigation against Peraso's current and former directors (the "**Defendant Directors**") in the United States during the stay period (currently set to expire on August 14, 2020, unless extended). Second,

[2] Capitalized terms used, but otherwise not defined herein, shall have the meanings ascribed to such terms in the Chapter 15 Petition.

Ubiquiti argues that the Recognition Order's paragraph regarding enforcement of the Initial Order is overly broad because it would apply to amendments and extensions of the Initial Order.

3. Respectfully, and as will be discussed herein, Ubiquiti's arguments are unavailing. Non-debtor stays have been granted in many plenary cases under the Bankruptcy Code. They are clearly not contrary to bankruptcy law or policy and therefore clearly not manifestly contrary to public policy under section 1506 of the Bankruptcy Code. This Court recognized as much in its reasoned decision on the record granting the Monitor's motion for provisional relief and enforcing the Initial Order on an interim basis over Ubiquiti's objection. *See* June 8, 2020 Hr'g. Tr. at 36, 14:21. It is undisputed that Canadian statutes and court orders have been recognized and enforced in numerous chapter 15 cases. Here, the stays relating to officers and directors to which Ubiquiti objects are a fundamental part of the law and practice of a sister common law jurisdiction – indeed, these provisions of the Initial Order are part of the standard model form of Initial Order developed by the Commercial List Users' Committee, endorsed by the Ontario Court and used in virtually all CCAA proceedings. Given the above, the Monitor submits that the Canadian Proceeding is the proper forum to consider the scope of the Initial Order's stay. That is the route established by bankruptcy courts in chapter 15 cases. It is all the more appropriate here since Ubiquiti has appeared and actively participated at each hearing in the Canadian Proceeding where the Initial Order's stay, or extensions thereof, were considered and notably has not objected. In this regard, Ubiquiti's objection to the Initial Order's stay provisions should be barred under principles of *res judicata*.

4. Further, the proposed Recognition Order is not overly broad. The Recognition Order's language regarding enforcement of "any amendments or extensions [of the

Initial Order]" relates to the relief provided in the Initial Order that the Monitor specifically requested this Court enforce on the first day of this case. The "amendment or extension" language would cover, for example, any orders extending the Initial Order's stay period. This aspect of the Recognition Order is designed to save Peraso (and ultimately its stakeholders) the cost of moving and having a separate hearing for enforcement on each and every extension or amendment to the Initial Order granted by the Ontario Court. It also reduces the burden on this Court's time and resources.

5. The Recognition Order is not designed to be a backdoor for covert approval of new substantive relief not briefed and put before this Court. The Monitor is an officer of the Ontario Court and would not engage in such gamesmanship. With respect to any substantive relief, such as the approval of debtor-in-possession ("**DIP**") financing, the Monitor would seek recognition of such relief in the U.S. by way of motion as foreign representative, as it was done by Peraso in Canada. In any event, Ubiquiti can continue to participate in the Canadian Proceeding and will have the right to object to any relief extending or amending the Initial Order in the Canadian Proceeding. The Monitor submits that if this Court is satisfied with granting recognition and giving effect to the Initial Order in the United States, it should not require further motion practice with respect to any amendments or extensions related thereto. The Court should respectfully overrule Ubiquiti's objection and grant the Recognition Order as proposed.

ARGUMENT

A. The Initial Order's Stay Provisions Should Be Enforced in the U.S.

6. Ubiquiti asserts that enforcing the Initial Order's stay as to the Defendant Directors is contrary to U.S. bankruptcy law and public policy. However, the requested relief is supported by ample precedent and, as explained in the Memorandum of Law, should be authorized under either section 1507 or 1521 of the Bankruptcy Code. *See* Memorandum of Law [Dkt. No. 2] ¶¶ 20-30. At bottom, enforcing the Ontario Court's Initial Order to extend the stay to the non-debtors here is warranted here for three reasons. First, it is an appropriate exercise of comity and serves the purposes of the chapter 15 regime; second, it is essential for Peraso's attempt to successfully reorganize in the Canadian Proceeding; and third, it does not result in unjust treatment to Ubiquiti or any other creditor.

7. If the Court recognizes the Canadian Proceeding as a foreign main proceeding, the standard for determining whether to recognize and enforce the Initial Order's stay provisions generally comes down to whether it accords with principles of comity, is not contrary to public policy, and creditors' rights are sufficiently protected. *See In re Agrokor d.d.*, 591 B.R. 163, 187-89 (Bankr. S.D.N.Y. 2018); *In re Rede Energia S.A.*, 515 B.R. 69, 94 (Bankr. S.D.N.Y. 2014). The standard is not whether the stay would be extended in all circumstances in all plenary chapter 11 cases. Rather, the standard is whether it is appropriate to do so in the context of chapter 15 and its underlying principles. *See In re Metcalfe & Mansfield*, 421 B.R. 685, 695-98 (Bankr. S.D.N.Y. 2010) (enforcing a CCAA plan containing third party release provisions under principles of comity and acknowledging such a result may not have necessarily been obtainable in a plenary

chapter 11 proceeding).[3] As this Court recognized in its decision to provisionally enforce the Initial Order, the standard is met:

> [C]ertainly in the sense of what the Canadian court has ordered, and in thinking about this being an ancillary proceeding, and given all the other facts and circumstances of the case . . . it is not at all in the public interest to deny this relief, in fact, it's in the public interest to grant it.

June 8, 2020 Hr'g. Tr. at 36, 14:21.

8. Further, enforcing the stay provisions of the Initial Order is warranted because it is essential for Peraso's attempt to reorganize in the Canadian Proceeding. The necessity of the Initial Order's stay provisions is evidenced by the fact that these stay provisions are part of the standard published form of Initial Order used by the Ontario Court in CCAA proceedings.[4] It is therefore self-evident that the Ontario Court has found the stay provisions of the Initial Order, as drafted, to be critical to a successful restructuring. Moreover, the Ontario Court's Initial Order is consistent with the principles of United States bankruptcy law. It is well recognized that in the context of a chapter 11 case, U.S. courts may afford non-debtors protections of the automatic stay where necessary to facilitate the purposes of reorganization. *See Calpine Corp. v. Nevada Power Co. (In re Calpine Corp.)*, 354 B.R. 45, 28-49 (Bankr. S.D.N.Y. 2006) (reasoning that bankruptcy courts may extend the stay to enjoin suits by third parties if such suits would thwart or frustrate the debtor's reorganization efforts) [internal citations omitted]; *see also In re Muscletech Research and Development Inc.*, Case No. 06 C.V. 00538 (S.D.N.Y. Mar. 2, 2006) [Dkt. No. 45] (order

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[3] Ubiquiti cites to *In re Qimonda AG,* 482 B.R. 879, 893-96 (Bankr. E.D. Va. 2012) and *In re Vitro, S.A.B. de C.V.,* 455 B.R. 571, 580-83 (Bankr. N.D. Tex. 2011) for the proposition that the standard for granting a non-debtor stay is the same in both plenary chapter 11 and chapter 15 cases. *See Response and Objection of Ubiquiti Inc. to Emergency Motion of Ernst & Young Inc. as the Court-Appointed Monitor Requesting Provisional Relief* [Dkt. No. 19] at 13. However, unlike the case here, *Qimonda* and *Vitro* did not involve any request to enforce a foreign order. The cases are therefore inapposite.

[4] The *Companies' Creditors Arrangement Act* Initial Order Form is available at: https://www.ontariocourts.ca/scj/practice/practice-directions/toronto/ (last accessed July 19, 2020).

granting foreign representatives motion for injunctive relief to stay litigation against non-debtor third parties).[5]

9. Here, Peraso and the Defendant Directors are defendants in the License Litigation. Accordingly, enforcing the Initial Order in the U.S. to extend the benefits of its stay to the Defendant Directors ensures that there will be no adverse judgment in the License Litigation that could potentially be applied by way of collateral estoppel to Peraso or result in indemnification claims against it during the pendency of the Initial Order's stay period. Further, some of these Defendant Directors are actively assisting Peraso in the License Litigation, which is why a stay as to them is both necessary and appropriate. In this respect, by recognizing and enforcing the Initial Order's stay provisions, this Court will facilitate Peraso's attempts to reorganize its business in accordance with the CCAA under the supervision of the Ontario Court, which is exactly what the chapter 15 regime is designed to facilitate. *See 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.").

10. Moreover, neither Ubiquiti nor any other creditor will be prejudiced by the recognition and enforcement of the Initial Order and its stay provisions. The stay period is not infinite; and to the extent Ubiquiti or any creditor wishes to contest, or seek relief from, the Initial Order's stay provisions, the proper forum to do so is the Canadian Proceeding. *See In re Bd. of Directors of Hopewell Int'l Ins. Ltd.*, 238 B.R. 25, 61 (Bankr. S.D.N.Y. 1999) (granting comity to

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[5] Additionally, Canadian courts have extended stays to non-debtor U.S. companies in cross-border proceedings to further reorganization goals. *See* Initial Order entered in *Target Canada Co.* CCAA proceeding, CV-15-10832-00CL, ¶ 19 (extending stay to non-debtor U.S. parent and subsidiaries). Available here: https://www.alvarezandmarsal.com/sites/default/files/Initial%20Order%20%28January%2015%2C%202015%29.pdf (last accessed July 19, 2020).

a Bermudan scheme for a Bermudan reinsurer, thereby forcing U.S. parties to arbitrate their reinsurance claims against the debtor in Bermuda) *aff'd sub nom. In re Petition of Bd. of Directors of Hopewell Int'l Ins. Ltd.*, 275 B.R. 699, 708 (S.D.N.Y. 2002); *In re Bird*, 229 B.R. 90, 94 (Bankr. S.D.N.Y. 1999) (reasoning, the foreign court is "in the best position to assess where and when claims should be liquidated in order to conserve estate resources and maximize the assets available for distribution"); *see also In re Metcalfe & Mansfield Alt. Inv.*, 421 B.R. at 698 (recognizing that Canadian courts afford creditors a full and fair opportunity to be heard in a manner consistent with U.S. due process and courts routinely grant comity to Canadian proceedings).

11. Importantly, the Ontario Court has explicitly found that the debtor company in the Canadian Proceeding is acting in good faith and has held hearings to consider the Initial Order (as well as extensions). *See Declaration of D.J. Miller in Support of Recognition*, filed contemporaneously herewith (the "Miller Decl.") ¶¶ 5-6.[6] Ubiquiti has appeared in the Canadian Proceeding and has had the opportunity to object to all relief proposed by Peraso there, including the Initial Order's stay provisions. To date, after negotiations with the debtor company over certain provisions of the relief sought, Ubiquiti has chosen only to object to the sealing of certain DIP financing information and has otherwise reserved its rights with respect to any future relief that may be sought. *See id.* ¶¶ 5-9. Accordingly, Ubiquiti's arguments that giving effect to the Initial Order's stay provisions would cause it to suffer prejudice, is misplaced. It has had, and continues to have, meaningful opportunities to object to the relief in the Canadian Proceeding. In this respect,

[6] The Limited Objection does not appear to object to recognition on the grounds that Peraso has filed the Canadian Proceeding in bad faith. To the extent Ubiquiti could be construed to object on the grounds of bad faith, the Monitor respectfully submits that Ubiquiti waived any such argument by not contesting good faith in the Canadian Proceeding or explicitly making such objection in its Limited Objection. *See In re Millard,* 501 B.R. 644, 653 (Bankr. S.D.N.Y. 2013) ("[T]o the extent that the [objector] is arguing . . . that the [debtors] should not have been permitted to file the Cayman Bankruptcy Proceeding, this forum is not an appropriate venue to collaterally attack the Cayman judgment."). In any case, the Court rightly acknowledged that reorganizations initiated in response to litigation, like the one here, are not necessarily filed in bad faith. *See* June 8, 2020 Hr'g. Tr. at 32, 16:23 (discussing the commonality of "*Texaco*" cases in the Southern District of New York).

Ubiquiti's objection to the stay should be barred under principles of *res judicata*. *See In re Bd. of Directors of Telecom Argentina, S.A.*, No. 06 Civ.2352 NRB, 2006 WL 3378687, at *5 (S.D.N.Y. Nov. 20, 2006) (finding that the doctrine of *res judicata*, "applies to bar [creditor] from raising . . . objections for the first time in the Bankruptcy Court," where creditor had an opportunity to do so in foreign proceeding).

12. There is nothing in the record that suggests that enforcing the Initial Order offends the Bankruptcy Code, public policy, or unjustly prejudices Ubiquiti. Ubiquiti makes no new arguments in support of its objection to enforcement of the Initial Order's stay provisions that the Court has not already heard. Accordingly, the Court should overrule Ubiquiti's objection for the reasons stated herein and the same reasons the Court has previously articulated.

B. The Recognition Order is Not Overly Broad and Should be Entered

13. In its Limited Objection, Ubiquiti states its concern that the Initial Order could be amended in the future and essentially provide for relief not originally contemplated when the order is recognized and enforced by this Court. The Monitor respectfully submits that such a concern is misplaced. As an initial matter, the Monitor is a court officer in the Canadian Proceeding – not a litigant – and would not participate in the type of procedural gamesmanship of which Ubiquiti is concerned, nor would it have any motivation to do so. Rather, the Monitor is seeking enforcement of the Initial Order as originally presented to this Court. To save time and expense, it has requested that any amendments or extensions related to the relief provided by the Initial Order be deemed to be recognized as well. The Monitor would move for recognition (if necessary) of any substantively new relief, such as DIP financing approval, approved by the Ontario Court. The Recognition Order's language simply is not the sinister mechanism designed to automatically

recognize and approve any and all relief entered by the Ontario Court with respect to the Initial Order that Ubiquiti suggests.

14. Moreover, the fact that Ubiquiti has appeared, and has the right to continue to appear and be heard, in the Canadian Proceeding means their objection is at best meaningless and possibly designed to override principles of *res judicata*. For example, to date, Ubiquiti has already appeared at the Ontario Court hearings and has not opposed any provisions of the Initial Order, nor the amendments thereto, save for an objection regarding sealing certain DIP financing information, which was heard and overruled by the Ontario Court. *See* Miller Decl. ¶ 8. To the extent Ubiquiti has any concerns in the future regarding orders (or amendments to orders) requested in the Canadian Proceeding, their propriety, and the resulting effects in the Chapter 15 Proceeding, Ubiquiti can and should appear in the Ontario Court and raise such concerns in front of the Ontario Court. If Ubiquiti is ultimately not satisfied with the Ontario Court's decision, the appropriate path is to pursue its rights of appeal in Canada. To the extent Ubiquiti is effectively asking this Court to act as an appellate court giving Ubiquiti a mulligan on any argument that is unsuccessfully raised in the Ontario Court or not raised at all, the Monitor respectfully submits that that is inappropriate and should not be approved by this Court.

15. At bottom, Ubiquiti's concerns are misplaced and do not reflect the reality of how both the Canadian Proceeding and this Chapter 15 Proceeding will progress. Peraso is likely to seek relief that goes beyond the subject matter of the Initial Order. The Monitor, as the appointed court officer and the "eyes and ears" of the court in a Canadian Proceeding, reviews and considers any relief sought by Peraso and any objections thereto, and reports to the Ontario Court as to whether the Monitor approves the proposed relief. As a practical matter, any relief requested

by Peraso that is opposed by the Monitor is unlikely to be approved by the Ontario Court. If, after undertaking the process described above, the Ontario Court grants the substantive new relief sought by Peraso, the Monitor will seek that specific relief in this chapter 15 proceeding if corresponding relief is appropriate in the United States. With respect to amendments or extensions of the Initial Order relating to relief already provisionally granted by this Court, however, it would unnecessarily burden Peraso, and this Court, for the Monitor to move for enforcement of each and every extension of the Initial Order's stay period or other similar routine amendment in this Court.

16. Unsurprisingly, for all of the reasons discussed herein, Chapter 15 recognition orders commonly have language akin to the proposed language here. *See, e.g., In re the Aldo Grp. Inc.*, Case No. 20-11060 (Bankr. D. Del. June 3, 2020), [Dkt. No. 66], ¶ 6 (recognition order giving full force and effect to initial order of Canadian court as may be amended or extended); *In re Pac. Exploration & Prod. Corp.*, Case No. 16-11189 (Bankr. S.D.N.Y. June, 10, 2016), [Dkt. No. 25], ¶ 4 (same); *In re Cline Mining Corp.*, Case No. 14-26132 (Bankr. D. Co. Jan. 15, 2015), [Dkt. No. 44], ¶ 2 (same); *In re Angiotech Pharmaceuticals, Inc.*, Case No. 11-10269 (Bankr. D. Del. Nov. 22, 2011), [Dkt No. 83] (same); *In re Abitibi-Consolidated Inc.*, Case No. 09-11348 (Bankr. D. Del. Aug. 3, 2009), [Dkt. No. 59] (same); *In re Nortel Networks Corp.*, Case No. 09-10164 (Bankr. D. Del. Feb. 27, 2009), [Dkt. No 40]; *see also In re Xchange Tech. Grp. LLC*, Case No. 13-12809 (Bankr. D. Del. Nov. 25, 2013), [Dkt. No. 46], ¶ 2 (giving full and effect to receivership order and any amendments or extensions thereof).

CONCLUSION

WHEREFORE, the Monitor respectfully requests that this Court enter the Recognition Order and overrule the Limited Objection.

Dated: New York, New York
July 19, 2020

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By: /s/ *Ken Coleman*________

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