Court File No.: CV-20-00642010-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF PERASO TECHNOLOGIES INC.

Applicant

FACTUM OF THE APPLICANT
(Comeback Motion)
(Returnable June 12, 2020)

June 11, 2020

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PART I - OVERVIEW

1. Peraso Technologies Inc. ("**Peraso**" or the "**Applicant**") is in the business of the development, marketing and sale of wireless internet technologies that operates on the 60 GHz band. Peraso is in the early stages of generating revenue and expanding its products, services and customer base.

2. On June 3, 2020, Peraso sought and obtained protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") on account of a looming liquidity crisis caused by, amongst other things, protracted disputes and multi-jurisdictional litigation with one of its largest customers and shareholders, Ubiquiti Inc. and its affiliates (collectively, "**Ubiquiti**"). The Initial Order granted by this Court appointed Ernst & Young Inc. as Monitor of the Applicant (the "**Monitor**"), granted a stay of proceedings until June 13, 2020, and approved certain charges over the Applicant's property.

3. Also on June 3, 2020, the Monitor, in its capacity as foreign representative of the Applicant, filed the Petition under chapter 15 of title 11 of the *United States Code* in the US

Court for, amongst other things, recognition of the Initial Order in the United States. On June 8, 2020, the US Court granted provisional relief that gave the Initial Order full force and effect in the United States on an interim basis and until such time as the US Court conducts a final hearing on, and enters a final order with respect to, the relief sought by the Monitor, in its capacity as foreign representative, in the Petition.

4. This factum is filed in support of a motion by the Applicant for an Amended and Restated Order, substantially in the form of the draft order attached as Tab 3 of the Motion Record, that, *inter alia*:

(a) expands the Applicant's restructuring authority and the Monitor's ability to assist with the Applicant's restructuring efforts;

(b) increases the Administration Charge from C$200,000 to C$725,000; and

(c) extends the stay of proceedings to and including July 3, 2020, or such further and other date as determined by the Court.

PART II - THE FACTS

5. The facts with respect to this motion are more fully set out in the Affidavit of Ronald Glibbery sworn June 2, 2020 and the Affidavit of Ronald Glibbery sworn June 9, 2020 (the "**Comeback Affidavit**").

6. Capitalized terms used herein but not otherwise defined have the meanings ascribed to them in the Comeback Affidavit. All references to currency in this factum are to US dollars, unless otherwise noted.

7. Since commencing these CCAA Proceedings, the Applicant, with the assistance of the Monitor, has worked diligently and in good faith to stabilise its business by, amongst other things, communicating with key stakeholders, exploring potential interim financing opportunities, and reviewing its cash flow forecasts. The Applicant has also supported the Monitor's efforts to obtain recognition of the Initial Order in the US Court.

Comeback Affidavit at paras 11 and 13, Applicant's Motion Record, Tab 2.

8. The Applicant is in the process of considering and implementing its next steps, which include entering into an interim financing agreement, resolving its litigation with Ubiquiti and seeking a process to maximize value for all of its stakeholders. The Applicant intends to return to this Court in the near future for assistance with these efforts.

Comeback Affidavit at para 12, Applicant's Motion Record, Tab 2.

PART III - THE ISSUES

9. The issues before this Court, as addressed below, are whether:

(a) the Amended and Restated Initial Order, which, among other things, expands the Applicant's authority to restructure, should be granted;

(b) the Administration Charge should be increased; and

(c) the Stay Period should be extended to July 3, 2020.

PART IV - THE LAW

A. THE RESTRUCTURING-RELATED PROVISIONS IN THE AMENDED AND RESTATE INITIAL ORDER SHOULD BE GRANTED

10. In compliance with s. 11.001 of the CCAA, the relief sought by the Applicant in the Initial Order was limited to what was reasonably necessary for the initial ten-day stay

period. The Applicant is now seeking to expand the relief granted by the Initial Order so that it more closely aligns with the Model Initial Order.

> Comeback Affidavit at paras 16-17, Applicant's Motion Record, Tab 2.
>
> Proposed Amended and Restated Initial Order, Applicant's Motion Record, Tab 3.

11. The proposed restructuring and Monitor-related provisions being requested are largely identical to provisions found in the Model Initial Order.

> Comeback Affidavit at para 18, Applicant's Motion Record, Tab 2.

12. In recent CCAA proceedings, this Court has inserted restructuring- and Monitor-related provisions from the Model Initial Order into amended and restated initial orders granted as part of a CCAA comeback hearing. This has recently occurred in *Re Lydian International Limited (Re)*.

> *Lydian International Limited (Re)*, 2019 ONSC 473 at para 4 (Monitor's website).

32. The Applicant submits that the insertion of the restructuring-related provisions in the Amended and Restated Initial Order is necessary in the circumstances as these provisions will enable the Applicant and the Monitor to take certain steps that may become necessary during the CCAA Proceedings, including resolving the litigation with Ubiquiti, obtaining financing and pursuing a potential sale process.

> Comeback Affidavit at para 17, Applicant's Motion Record, Tab 2.

B. THE ADMINISTRATION CHARGE SHOULD BE INCREASED

13. The Applicant requests that this Court increase the Administration Charge to C$725,000 from C$200,000. The Applicant has worked with the Monitor to estimate the proposed quantum of the Administration Charge and believes it to be reasonable and

appropriate in view of the complexities of the Applicant's CCAA Proceedings and the services to be provided by the beneficiaries of the Administration Charge.

Comeback Affidavit at paras 19 and 21, Applicant's Motion Record, Tab 2.

14. As was submitted in the Applicant's initial factum when originally requesting the Administration Charge, this Court has the statutory jurisdiction to grant the Administration Charge pursuant to s. 11.52 of the CCAA. This same statutory jurisdiction can be used by the Court to increase the amount of the Administration Charge, as has frequently occurred at recent CCAA hearings following the initial ten-day stay period.

CCAA, s. 11.52.

Compare *Re AgMedica Bioscience Inc et al.* (2 December 2019), Toronto CV-19-00632052-00CL (Ont Sup Ct [Comm List]) Initial Order at para 27 (administration charge of $250,000) (Monitor's website) and *Re AgMedica Bioscience Inc et al.* (12 December 2019), Toronto CV-19-00632052-00CL (Ont Sup Ct [Comm List]) Amended and Restated Initial Order at para 34 (administration charge of $500,000) (Monitor's website).

15. The Applicant's initial factum with respect to the Initial Order outlined and applied six non-exhaustive factors developed by Pepall J. (as she then was) in *Re Canwest Publishing Inc.* to establish that the granting of the Administration Charge was warranted. Those factors were: (i) the size and complexity of the business being restructured; (ii) the proposed role of the beneficiaries of the charge; (iii) whether there is an unwarranted duplication of roles; (iv) whether the quantum of the proposed charge appears to be fair and reasonable; (v) the position of the secured creditors likely to be affected by the charge; and (vi) the position of the monitor.

Re Canwest Publishing Inc., 2010 ONSC 222 at 54 (CanLII).

16. For reasons similar to those that supported the granting of the Administration Charge as it was originally formulated, the Administration Charge should now be increased

to C$725,000 to provide adequate protection for the Monitor, Canadian and U.S. counsel to the Monitor and Canadian and U.S. counsel to the Applicant. The beneficiaries of the Administration Charge will play key roles in these CCAA Proceedings, with the Monitor having enhanced powers and responsibilities as per the proposed Amended and Restated Initial Order. There is no unwarranted duplication of roles amongst these parties. As at the time of the Initial Order, the Administration Charge will continue to rank in priority to all other court-ordered charges. Any existing secured creditors who will be affected by the increase in the amount of the Administration Charge have been provided notice of this increase.

> Comeback Affidavit at para 21, Applicant's Motion Record, Tab 2.
>
> First Report of the Monitor at para 34.

17. The Monitor supports the proposed increase to the Administration Charge.

> First Report of the Monitor at para 37.

C. THE STAY PERIOD SHOULD BE EXTENDED

18. The Stay Period expires on June 13, 2020. Pursuant to s. 11.02 of the CCAA, the Court may grant an extension of a stay of proceedings where: (a) circumstances exist that make the order appropriate; and (b) the debtor company satisfies the Court that it has acted, and is acting, in good faith and with due diligence.

> CCAA, s. 11.02(2) and (3).

19. The Applicant is seeking to extend the Stay Period to and including July 3, 2020. This will provide the Applicant with stability and, it is anticipated, allow it to begin resolving the on-going litigation with Ubiquiti.

Comeback Affidavit at paras 23 and 25, Applicant's Motion Record, Tab 2.

20. No creditors are expected to suffer material prejudice as a result of the extension of the Stay Period. The Applicant is acting in good faith and with due diligence in pursuing its restructuring strategy and will continue to do so during the proposed extension of the Stay Period through to July 3, 2020.

Comeback Affidavit at paras 27-28, Applicant's Motion Record, Tab 2.

First Report of the Monitor at para 36.

21. As detailed in the Applicant's cash flow forecast, the Applicant will have access to sufficient liquidity to continue current operations during the extension of the Stay Period.

Comeback Affidavit at para 26, Applicant's Motion Record, Tab 2.

22. The Monitor supports extending the Stay Period until July 3, 2020.

First Report of the Monitor at para 37.

44. For the reasons described above, the Stay Period should be extended to July 3, 2020.

PART V - ORDER SOUGHT

23. For the foregoing reasons, the Applicant respectfully requests that this Court grant the Amended and Restated Initial Order substantially in the form of the draft order attached at Tab 3 to the Applicant's motion record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 11th day of June, 2020.

Stikeman Elliott LLP

Stikeman Elliott LLP
Lawyers for the Applicant

SCHEDULE "A"
LIST OF AUTHORITIES

Cases

1. *Lydian International Limited (Re)*, 2019 ONSC 473 (Monitor's website)

2. *Re AgMedica Bioscience Inc et al.* (2 December 2019), Toronto CV-19-00632052-00CL (Ont Sup Ct [Comm List]) Initial Order (Monitor's website)

3. *Re AgMedica Bioscience Inc et al.* (12 December 2019), Toronto CV-19-00632052-00CL (Ont Sup Ct [Comm List]) Amended and Restated Initial Order (Monitor's website)

4. *Canwest Publishing Inc., Re*, 2010 ONSC 222 at 54 (CanLII)

SCHEDULE "B"
RELEVANT STATUTES

***Companies' Creditors Arrangement Act*, RSC 1985, c C-36**

General power of court

11 Despite anything in the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

Relief reasonably necessary

11.001 An order made under section 11 at the same time as an order made under subsection 11.02(1) or during the period referred to in an order made under that subsection with respect to an initial application shall be limited to relief that is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

[…]

Stays, etc. — initial application

11.02 (1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 10 days,

> (a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act;
>
> (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
>
> (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Stays, etc. — other than initial application

11.02 (2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

> (a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

[...]

Court may order security or charge to cover certain costs

11.52 (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of

(a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;

(b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and

(c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

Priority

11.52 (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

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(RETURNABLE JUNE 12, 2020)

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