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
(Approval of DIP Agreement & Extension of the Stay of Proceedings)
(Returnable July 2, 2020)

June 30, 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*[1] (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.

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[1] R.S.C. 1985, c. C-36.

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. On June 12, 2020, this Court granted the Amended and Restated Initial Order that, amongst other things, increased the Administration Charge and extended the stay of proceedings to and including July 3, 2020.

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

(a) approves the debtor-in-possession financing agreement (the "**DIP Agreement**") between the Applicant, as borrower, and Roadmap Capital General Partner Ltd., Roadmap Peraso LP III (U.S. and Offshore) and XCOM Labs, Inc. (collectively, the "**DIP Lenders**"), as lenders, and grants a charge over the Applicant's property in favour of the DIP Lenders (the "**DIP Lenders' Charge**");

(b) extends the Stay Period (as defined below) to and including August 14, 2020, or such further and other date as determined by the Court; and

(c) seals certain portions of the DIP Agreement, the unredacted affidavit of Ron Glibbery affirmed June 25, 2020 (the "**Third Glibbery Affidavit**"), the Applicant's cash flow forecast appended to the Third Glibbery Affidavit (the "**Cash Flow Forecast**") and the unredacted Second Report of the Monitor dated June 29, 2020 (the "**Second Report**").

PART II - THE FACTS

6. The facts with respect to this motion are more fully set out in the unredacted Third Glibbery Affidavit.

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

A. CURRENT STATUS OF THESE PROCEEDINGS

8. Since the granting of the Amended and Restated Initial Order, the Applicant, with the assistance of the Monitor, has worked diligently and in good faith to stabilise its business by, among other things:

(a) continuing business operations in the normal course and working with customers, suppliers and other stakeholders to minimize any disruptions caused by these CCAA Proceedings;

(b) identifying potential sources of interim financing and subsequently negotiating the terms of the DIP Agreement with the DIP Lenders, as discussed in greater detail below; and

(c) engaging in discussions with Ubiquiti regarding the terms of a mediation process, resulting in both parties agreeing to mediation on July 6 and July 7, 2020 with the former Associate Chief Justice Dennis O'Connor acting as the mediator.

Third Glibbery Affidavit at paras 13-17, Applicant's Motion Record, Tab 2.

9. The Applicant and Ubiquiti are hopeful that they will be able to settle their disputes in the mediation. If the mediation does not achieve a consensual resolution, the Applicant will wish to proceed to a timely determination of such disputes by this Court. The Applicant has repeatedly requested Ubiquiti to provide feedback on a timetable for such resolution.

Third Glibbery Affidavit at para 17, Applicant's Motion Record, Tab 2.

B. THE DIP AGREEMENT

10. The Applicant is facing a liquidity crisis and requires an injection of cash to continue its operations and these CCAA Proceedings beyond early July 2020.

Third Glibbery Affidavit at para 19, Applicant's Motion Record, Tab 2.

11. The Applicant began its search for potential sources of interim financing immediately following the commencement of these CCAA Proceedings on June 3, 2020. The Applicant focused its search on finding an interim lender who was already familiar with the Applicant and its business in an effort to reduce the amount of time required to execute an interim financing agreement.

Third Glibbery Affidavit at para 20-21, Applicant's Motion Record, Tab 2.

12. The Applicant spoke with approximately five parties who were identified as potential interim lenders. These discussions resulted in Roadmap and XCOM being selected as the joint DIP Lenders to the Applicant.

> Third Glibbery Affidavit at para 26, Applicant's Motion Record, Tab 2.

13. Ubiquiti expressed interest in being the Applicant's interim lender and, to this effect, provided the Applicant with the Ubiquiti Term Sheet. The Applicant and the Monitor engaged in discussions with Ubiquiti; however, the Applicant did not pursue a financing arrangement with Ubiquiti due to, among other reasons, a concern that Ubiquiti is not an appropriate interim lender at this time on account of the on-going Ubiquiti Litigation.

> Third Glibbery Affidavit at paras 28-29 and 31-35, Applicant's Motion Record, Tab 2.

14. The Applicant consulted with the Monitor throughout the search for an interim lender. At all material times, the Monitor was aware of the steps being taken in the interim financing process and participated in some of the discussions with prospective lenders.

> Third Glibbery Affidavit at para 27, Applicant's Motion Record, Tab 2.

PART III - THE ISSUES

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

(a) the DIP Agreement and the DIP Charge should be approved;

(b) certain portions of the DIP Agreement, the unredacted Third Glibbery Affidavit, the Cash Flow Forecast, and the Second Report should be sealed; and

(c) the Stay Period should be extended to August 14, 2020.

PART IV - THE LAW

A. THE DIP AGREEMENT AND THE DIP CHARGE SHOULD BE APPROVED

16. The DIP Lenders have agreed to provide the Applicant with interim financing. The entirety of the DIP Facility is to be secured by the DIP Lenders' Charge. The proposed ranking of the DIP Lenders' Charge is behind the Administration Charge and the Directors' Charge.

> Third Glibbery Affidavit at para 42, Applicant's Motion Record, Tab 2.

17. This Court's authority to authorize funding in the context of a CCAA restructuring is found in s. 11.2(1) and 11.2(2) of the CCAA, which expressly permit the granting of a charge over the property of a debtor that ranks in priority to the claims of any secured creditor.

> CCAA, s. 11.2(1) and 11.2(2).
>
> *Lydian International Limited (Re)*, 2020 ONSC 1586 at para 24 (Monitor's website).

18. In considering whether to approve DIP financing, the Court is to consider the non-exhaustive list of factors set out in s. 11.2(4) of the CCAA:

> **Factors to be considered**
>
> **11.2** (4) In deciding whether to make an order, the court is to consider, among other things,
>
> (a) the period during which the company is expected to be subject to proceedings under this Act;
>
> (b) how the company's business and financial affairs are to be managed during the proceedings;
>
> (c) whether the company's management has the confidence of its major creditors;
>
> (d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;

> (e) the nature and value of the company's property;
>
> (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
>
> (g) the monitor's report referred to in paragraph 23(1)(b), if any.
>
> CCAA, s. 11.2(4).

19. In addition to the factors set out in s. 11.2(4), the Court considers whether a board of directors exercised its business judgment to accept interim financing. If so, the Court typically takes a very deferential approach with respect to such matters given the expertise of the board of directors and their intimate knowledge of the business affairs of the debtor company.

> *Great Basin Gold Ltd. (Re)*, 2012 BCSC 1459 at para 186 (CanLII), citing *Crystallex (Re)*, 2012 ONCA 404 at para 85 (CanLII).

20. Taking into account the aforementioned considerations, the DIP Agreement and the associated DIP Lenders' Charge should be approved for the following reasons:

(a) the Applicant has an immediate cash need. The DIP Lenders are willing and able to provide the DIP Facility within the necessary timeframe, and the DIP Facility is sufficient to satisfy the Applicant's cash requirements during the proposed extension to the Stay Period;

(b) the Applicant plans to use the DIP Facility to manage and operate its business in the normal course and fund certain costs associated with this CCAA proceeding, including the forthcoming mediation. These uses of the DIP Facility are expected to assist the Applicant in its restructuring efforts;

(c) the Applicant has the confidence and support of Roadmap, the Applicant's primary creditor;

(d) the terms of the DIP Agreement were subject to intensive negotiations and are competitive and similar to what the Applicant could get from an independent third-party on the open market. For example, the DIP Agreement contemplates a 6% interest rate, which is at the lower-end range of recent fixed interest rates on debtor-in-possession loans (that range being 0% to 15%) and below the most common interest rate on fixed interest rate debtor-in-possession loans (which is 10%); and

(e) the Monitor is supportive of the Applicant entering into the DIP Agreement and the creation of the DIP Lenders' Charge.

Third Glibbery Affidavit at para 44, Applicant's Motion Record, Tab 2.

Second Report of the Monitor at paras 45 and 49.

21. The Applicant believes that the DIP Lenders are the most appropriate interim lenders in the circumstances. Ubiquiti, in contrast, is not an appropriate interim lender at this time. As described in greater detail in the Third Glibbery Affidavit at paragraphs 28 to 36, the Applicant is concerned about becoming financially dependent on Ubiquiti while the Ubiquiti Litigation remains unresolved. Such a relationship could, for example, put Ubiquiti in a position to impede, obstruct, or otherwise exercise self-interested influence on the Applicant's CCAA proceedings and/or the determination of the Ubiquiti Litigation.

Third Glibbery Affidavit at paras 28 to 36, Applicant's Motion Record, Tab 2.

22. The Monitor is also of the view that Ubiquiti is not a suitable interim lender at this stage.

> Third Glibbery Affidavit at para 36, Applicant's Motion Record, Tab 2.
>
> Second Report of the Monitor at paras 37-38.

23. As part of an effort to address certain concerns raised by Ubiquiti, the Applicant, in consultation with the Monitor, has structured a two-phase approach to its interim financing. The first phase is intended to cover the period during which the Applicant and Ubiquiti will be engaged in mediation, as well as an additional period of time to continue further settlement discussions and/or commence next steps. This first phase is anticipated to last until mid-August. Following the conclusion of the first phase, the Applicant will re-evaluate its cash needs and, in a second phase, consider alternative interim lenders such as Ubiquiti.

> Third Glibbery Affidavit at paras 37-40, Applicant's Motion Record, Tab 2.
>
> Second Report of the Monitor at paras 39-41.

24. In addition, Ubiquiti's stated desire to provide interim financing to the Applicant and its submission of the Ubiquiti Term Sheet has applied competitive pressures to the Applicant's negotiations with the DIP Lenders. As a result, the DIP Lenders agreed to remove various terms from their proposed DIP Agreement that could be perceived as prejudicial to Ubiquiti's rights in the resolution of the disputes between the parties.

25. The DIP Agreement, in the form agreed to, strikes a fair balance between the rights of the DIP Lenders to protect their investment and the Applicant's and Ubiquiti's desire to not prejudice the mediation or other resolution of the issues in dispute between them. The remaining provisions that grant certain consent rights to the DIP Lenders are entirely customary and fair in the circumstances.

See generally *Re Crystallex International Corporation*, 2012 ONSC 2125 (CanLII) and *Re TOYS "R" US (CANADA) LTD.*, 2017 ONSC 5571 (CanLII).

26. For the foregoing reasons, the requested relief in respect to the DIP Agreement and the DIP Lenders' Charge is reasonably necessary and appropriate in the circumstances.

B. THE REQUESTED MATERIALS SHOULD BE SEALED

27. The Applicant is seeking to seal certain portions of the DIP Agreement, the Third Glibbery Affidavit, the Cash Flow Forecast and the Second Report because they contain commercially sensitive information. Among other things:

(a) the unredacted DIP Agreement details the Applicant's access to financing and, in turn, its ability to fund its the Ubiquiti Litigation; and

(b) the Cash Flow Forecast details the Applicant's anticipated cash position over the period of the requested stay extension and demonstrate how much money the Applicant has budgeted for legal expenses, including how much has been budgeted for resolving the Ubiquiti Litigation;

(c) the unredacted Third Glibbery Affidavit and the Second Report describe, among other things, the Cash Flow Forecast and the DIP Agreement and should be sealed for the same reasons that the DIP Agreement and Cash Flow Forecast are proposed to be sealed.

Third Glibbery Affidavit at paras 46, Applicant's Motion Record, Tab 2.

28. Pursuant to s. 10(3) of the CCAA, this Court may make an order prohibiting the release to the public of any cash flow statement, or any part of a cash flow statement, if it is

satisfied that the release would unduly prejudice the debtor company and the making of the order would not unduly prejudice the company's creditors.

> CCAA, s. 10(3).
>
> See also *White Birch Paper Holding Co, Re*, 2010 QCCS 764 at paras 86-88 (CanLII).

29. Further, the *Courts of Justice Act*[2] (Ontario) grants this Court the discretion to order that any document filed in a civil proceeding be treated as confidential and sealed and not form part of the public record.

> *Courts of Justice of Act*, s. 137(2).

30. In *Sierra Club of Canada v Canada (Minister of Finance)*, Iacobucci J. adopted the following test to determine when a sealing order should be granted:

> A confidentiality order under Rule 151 should only be granted when:
>
> > (a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and
> >
> > (b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.
>
> *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41 at para 53 (CanLII).

31. Iacobucci J. recognized that one of the important interests that may warrant the imposition of a sealing order is the right to a fair trial, which is a principle of fundamental justice. Here, the Applicant's right to a fair mediation (and, failing that, a fair trial) with respect to the Ubiquiti Litigation might well be compromised if its financial position is

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[2] R.S.O. 1990, c. C.43.

disclosed because Ubiquiti could use the Applicant's financial information to the Applicant's detriment.

> *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 50 at para 53 (CanLII).
>
> Third Glibbery Affidavit at para 46, Applicant's Motion Record, Tab 2.

32. Neither the Applicant nor the Monitor believe that any stakeholder will be prejudiced if the requested documents are sealed or redacted. Indeed, the Applicant is mitigating the risk of potential prejudice to creditors by, among other things, sharing the unredacted DIP Agreement and Cash Flow Forecast with certain secured creditors in confidence.

> Third Glibbery Affidavit at para 47, Applicant's Motion Record, Tab 2.
>
> Second Report of the Monitor at para 51.

33. The Monitor is supportive of the Applicant's sealing request.

> Second Report of the Monitor at para 51.

34. Based on the above, the Applicant believes that it is appropriate to seal the unredacted DIP Agreement, the unredacted Third Glibbery Affidavit, the Cash Flow Forecast and the unredacted Second Report and to keep these documents sealed pending further order of the Court.

C. THE STAY PERIOD SHOULD BE EXTENDED

35. 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).

36. The Stay Period expires on July 3, 2020. The Applicant is seeking to extend the Stay Period to and including August 14, 2020.

37. The proposed Stay Period is shorter than would be usually sought and hopefully addresses the concerns raised by Ubiquiti regarding a long-term stay and preserving their arguments for any future litigation in Canada or the United States. The Applicant hopes that the mediation will resolve all outstanding matters with Ubiquiti. Thereafter, the Applicant intends to explore strategic opportunities including raising funds and/or finding a purchaser for its assets.

Third Glibbery Affidavit at paras 50, Applicant's Motion Record, Tab 2.

38. 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 their restructuring strategy and will continue to do so during the proposed extension of the Stay Period through to August 14, 2020.

Third Glibbery Affidavit at paras 52-53, Applicant's Motion Record, Tab 2.

39. Subject to this Court approving the DIP Agreement and the DIP Charge, the Applicant will have access to sufficient liquidity to continue current operations during the extension of the Stay Period.

Third Glibbery Affidavit at para 51, Applicant's Motion Record, Tab 2.

40. The Monitor supports extending the Stay Period until August 14, 2020.

Second Report of the Monitor at para 53.

44. For the reasons described above, the Stay Period should be extended to August 14, 2020.

PART V - ORDER SOUGHT

41. For the foregoing reasons, the Applicant respectfully requests that this Court grant the requested 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 30th 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. *Great Basin Gold Ltd. (Re)*, 2012 BCSC 1459 (CanLII)
3. *Crystallex (Re)*, 2012 ONCA 404 (CanLII)
4. *Re Crystallex International Corporation*, 2012 ONSC 2125 (CanLII)
5. *Re TOYS "R" US (CANADA) LTD.*, 2017 ONSC 5571 (CanLII)
6. *White Birch Paper Holding Co, Re*, 2010 QCCS 764 (CanLII)
7. *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41 (CanLII)

SCHEDULE "B"
RELEVANT STATUTES

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

Publication ban

10 (3) The court may make an order prohibiting the release to the public of any cash-flow statement, or any part of a cash-flow statement, if it is satisfied that the release would unduly prejudice the debtor company and the making of the order would not unduly prejudice the company's creditors, but the court may, in the order, direct that the cash-flow statement or any part of it be made available to any person specified in the order on any terms or conditions that the court considers appropriate.

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.

[…]

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.

Stays — directors

11.03 (1) An order made under section 11.02 may provide that no person may commence or continue any action against a director of the company on any claim against directors that arose before the commencement of proceedings under this Act and that relates to obligations of the company if directors are under any law liable in their capacity as directors for the payment of those obligations, until a compromise or an arrangement in respect of the company, if one is filed, is sanctioned by the court or is refused by the creditors or the court.

[...]

Interim financing

11.2 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

Priority — secured creditors

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

Priority — other orders

11.2 (3) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.

Factors to be considered

11.2 (4) In deciding whether to make an order, the court is to consider, among other things,

(a) the period during which the company is expected to be subject to proceedings under this Act;

(b) how the company's business and financial affairs are to be managed during the proceedings;

(c) whether the company's management has the confidence of its major creditors;

(d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;

(e) the nature and value of the company's property;

(f) whether any creditor would be materially prejudiced as a result of the security or charge; and

(g) the monitor's report referred to in paragraph 23(1)(b), if any.

***Courts of Justice Act*, R.S.O. 1990, c C.43**

Sealing documents

137 (2) A court may order that any document filed in a civil proceeding before it be treated as confidential, sealed and not form part of the public record.

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FACTUM OF THE APPLICANT
(RETURNABLE JULY 2, 2020)

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