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
(Re: Approval of Second DIP Agreement)
(Returnable August 20, 2020)

August 19, 2020

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PART I - OVERVIEW

1. 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:

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

(b) seals certain portions of the unredacted Affidavit of Ron Glibbery affirmed August 19, 2020 (the "**Sixth Glibbery Affidavit**"), the unredacted Second DIP Agreement, and the unredacted Fourth Report of the Monitor (the "**Fourth Report**").

PART II - THE FACTS

2. The facts with respect to this motion are more fully set out in the unredacted Sixth Glibbery Affidavit. Capitalized terms used herein but not otherwise defined have the meanings ascribed to them in the Sixth Glibbery Affidavit.

A. BACKGROUND

3. 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.

4. 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**"). Ernst & Young Inc. was appointed as Monitor in these proceedings (the "**Monitor**").

5. To alleviate its liquidity constraints, on July 2, 2020, the Applicant sought and obtained an order that, among other things:

(a) approved a debtor-in-possession financing agreement (the "**First 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 "**First DIP Lenders**"), as lenders;

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

(b) granted a charge over the Applicant's property in favour of the First DIP Lenders (the "**First DIP Lenders' Charge**"); and

(c) granted a stay of proceedings to and including August 14, 2020 (the "**Stay Period**").

Affidavit of Ronald Glibbery affirmed August 10, 2020 ("**Fifth Glibbery Affidavit**") at para 11, Applicant's Motion Record, Tab 2 – Exhibit A.

6. The Applicant now requires additional funds. To this effect, the Applicant has been engaged in a broad and extensive search for additional interim financing. Numerous potential lenders have been contacted, many of whom have entered into non-disclosure agreements with the Applicants.

Fifth Glibbery Affidavit at para 28, Applicant's Motion Record, Tab 2 – Exhibit A.

7. On August 13, 2020, this Court granted an order that extended the Stay Period to and including August 28, 2020. To date, the Applicant has used the time provided by this extension to the Stay Period to, among other things, further explore its financing options.

Sixth Glibbery Affidavit at para 5, Applicant's Motion Record, Tab 2.

B. CURRENT STATUS OF THE SEARCH FOR ADDITIONAL FUNDING

8. The Applicant is currently in discussions with a certain number of potential interim lenders and believes that it may reach an interim lending agreement or other funding agreement with one or more of them in the coming days and weeks. The Applicant anticipates that if it reaches an agreement with one of these parties, such agreement will provide it with a longer-term solution to its liquidity constraints.

Sixth Glibbery Affidavit at para 5, Applicant's Motion Record, Tab 2.

9. While the Applicant continues its discussions with the potential interim lenders, it requires cash to fund its on-going operations. The Second DIP Lenders are ready and willing to provide the Applicant with short-term financing to support the Applicant during this period.

Sixth Glibbery Affidavit at paras 6-7, Applicant's Motion Record, Tab 2.

10. Given that the Second DIP Agreement is not intended to be a long-term solution to Peraso's liquidity problems, the Applicant intends to return to this Court prior to the end of the Stay Period to seek approval of a longer-term solution.

Sixth Glibbery Affidavit at para 14, Applicant's Motion Record, Tab 2.

PART III - THE ISSUES

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

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

(b) whether certain portions of the Sixth Glibbery Affidavit, the Second DIP Agreement, and the Fourth Report should be sealed.

PART IV - THE LAW

A. THE SECOND DIP AGREEMENT AND THE SECOND DIP LENDERS' CHARGE SHOULD BE APPROVED

12. The Second DIP Lenders have agreed to provide the Applicant with interim financing. The entirety of the Second DIP Facility is to be secured by the Second DIP Lenders' Charge. The proposed ranking of the Second DIP Lender's Charge is behind the

Administration Charge and the Directors' Charge, but ahead of the charge related to the First DIP Agreement.

> Sixth Glibbery Affidavit at para 10, Applicant's Motion Record, Tab 2.

13. As was submitted in the Applicant's factum in connection with approval of the First DIP Agreement, this Court has the jurisdiction to authorize funding in the context of a CCAA restructuring pursuant to s. 11.2(1) and 11.2(2) of the CCAA. 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.

> CCAA, s. 11.2(1), 11.2(2) and 11.2(4).
>
> *Lydian International Limited (Re)*, 2020 ONSC 4006 (CanLII) at paras 65 to 68.

14. 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).

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

(a) the Applicant has a need for additional cash. The Second DIP Lenders are willing and able to provide the Second DIP Agreement within the necessary timeframe, and the facility thereunder is sufficient to satisfy the Applicant's cash requirements.

(b) the Applicant plans to use the funds provided by the Second DIP Agreement to continuing operating in the normal course while at the same time making arrangements for a longer-term solution;

(c) the terms of the Second DIP Agreement are substantively the same as the terms of the First DIP Agreement, which this Court previously approved;

(d) the Second DIP Lenders are the remaining two lenders under the First DIP Agreement, and the Second DIP Lenders and/or their affiliates own equity in the Applicant and are the Applicant's largest first-ranking secured creditor;

(e) the Second DIP Agreement was entered into following a competitive, market-based search for interim financing. As noted previously, the Applicant's search was broad, extensive, and involved discussions with numerous potential lenders; and

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

Sixth Glibbery Affidavit at paras 3-7, 9 and 11, Applicant's Motion Record, Tab 2.

Fifth Glibbery Affidavit at paras 25-34, Applicant's Motion Record, Tab 2 – Exhibit A.

Fourth Report of the Monitor at para 33.

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

A. THE REQUESTED MATERIALS SHOULD BE SEALED

17. The Applicant is seeking to seal certain portions of the unredacted Sixth Glibbery Affidavit, the unredacted Second DIP Agreement, and the Fourth Report because they contain commercially sensitive information. In particular, these documents contain detailed information on the Applicant's financial position and indicate how much money the Applicant has available to fund its on-going litigation with Ubiquiti.

Sixth Glibbery Affidavit at paras 15-16, Applicant's Motion Record, Tab 2.

18. Further, the unredacted Sixth Glibbery Affidavit and the unredacted Fourth Report describe the current and anticipated status of the Applicant's search for additional financing. This information, if publicly disclosed, could be detrimental to the Applicant's efforts to obtain additional financing, negatively impact the due diligence process with potential interim lenders, and impact the competitiveness of any financing terms the Applicant receives.

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

19. The information that the Applicant is seeking to seal is similar in nature to the information that this Court sealed in connection with the First DIP Agreement, and the Applicant's sealing request is animated by the same concerns that the Court previously found sufficient to justify sealing.

Sixth Glibbery Affidavit at para 18, Applicant's Motion Record, Tab 2.

20. 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).

21. 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).

22. 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 trial with respect to the litigation with Ubiquiti might well be compromised if its financial position is 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).
>
> Sixth Glibbery Affidavit at para 16, Applicant's Motion Record, Tab 2.

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

23. Neither the Applicant nor the Monitor believe that any stakeholder will be prejudiced if the requested documents are sealed or redacted.

> Sixth Glibbery Affidavit at para 19, Applicant's Motion Record, Tab 2.
>
> Fourth Report of the Monitor at para 37.

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

> Fourth Report of the Monitor at para 37.

25. Based on the above, the Applicant believes that it is appropriate to seal the unredacted Sixth Glibbery Affidavit, the unredacted Second DIP Agreement and the unredacted Fourth Report, and to keep these documents sealed pending further order of the Court.

PART V - ORDER SOUGHT

26. 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 19th day of August, 2020.

Stikeman Elliott LLP

Stikeman Elliott LLP
Lawyers for the Applicant

SCHEDULE "A"
LIST OF AUTHORITIES

Cases

1. *Lydian International Limited (Re)*, 2020 ONSC 4006 (CanLII)

2. *Great Basin Gold Ltd. (Re)*, 2012 BCSC 1459 (CanLII)

3. *Crystallex (Re)*, 2012 ONCA 404 (CanLII)

4. *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.

[…]

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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(RETURNABLE AUGUST 20, 2020)

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