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: Stock Option Plan and Pre-Filing Payments)
(Returnable September 16, 2020)

September 14, 2020

STIKEMAN ELLIOTT LLP
Barristers & Solicitors
5300 Commerce Court West
199 Bay Street
Toronto, Canada M5L 1B9

Maria Konyukhova LSO#: 52880V
Tel: (416) 869-5230
Email: mkonyukhova@stikeman.com

Nicholas Avis LSO#: 76781Q
Tel: (416) 869-5504
Email: navis@stikeman.com
Fax: (416) 947-0866

Lawyers for the Applicant, Peraso Technologies Inc.

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: Stock Option Plan and Pre-Filing Payments)
(Returnable September 16, 2020)

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

3. 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

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

proceedings to and including July 3, 2020 (the "**Stay Period**"). The Stay Period has subsequently been extended to October 2, 2020.

4. 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) authorizes the Applicant to amend its stock option plan (the "**SOP**"), as described below; and

(b) authorizes the Applicant to pay pre-filing amounts owing to certain Critical Suppliers (as defined below), subject to the approval of the Monitor.

PART II - THE FACTS

5. The facts with respect to this motion are more fully set out in the Affidavit of Ronald Glibbery affirmed September 11, 2020 (the "**Tenth Glibbery Affidavit**"). Capitalized terms used herein but not otherwise defined have the meanings ascribed to them in the Tenth Glibbery Affidavit.

A. AMENDMENT TO THE SHARE OPTION PLAN

6. Peraso's highly skilled and educated employees and contractors have been integral to its success and represent its greatest asset. Peraso's workforce has, however, shrunk in recent months. As at September 11, 2020, Peraso had 65 employees and/or contractors, down from approximately 102 employees and/or contractors in December 2019. A large portion of this attrition is due to employees voluntarily resigning from their positions with Peraso.

Tenth Glibbery Affidavit at paras 8-10, Applicant's Motion Record, Tab 2.

7. Peraso is concerned that there may be further attrition in its workforce in the coming weeks and months on account of employees and contractors seeking opportunities elsewhere. Any further attrition could impact Peraso's restructuring efforts because such attrition is detrimental to Peraso's ability to service existing clients, supply customers, and develop new and innovative products. Peraso's ability to enter into a strategic or financial transaction and/or a sales process (if Peraso chooses to pursue such options) could also be impacted by a reduced workforce.

Tenth Glibbery Affidavit at para 11, Applicant's Motion Record, Tab 2.

8. Peraso has explored various financially feasible options to retain its employees and contractors. Peraso has concluded that the best way to achieve this goal is by modifying its SOP.

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

9. The existing SOP provides a scheme for Peraso to provide "Participants" (which the SOP defines to include Peraso's directors, employees and consultants) with an "Option" (which the SOP defines to be an option to purchase a specified number of Peraso's common shares from Peraso's treasury). By providing Options to Participants, Participants obtain a proprietary interest in the business and can therefore participate in Peraso's growth and development. This should have the result of reducing and potentially eliminating attrition in Peraso's workforce.

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

10. At present, the total number of "Option Shares" (as defined in the SOP) that Peraso can issue at any particular date is capped at 10% of Peraso's outstanding common shares.

Peraso is seeking authorization to increase the number of Option Shares issuable at any particular date to 20% of its outstanding common shares (such change, the "**Option Share Increase**"). Such an increase could be used to grant Options to Peraso's employees, contractors, and management/contractor/employee directors. Peraso may currently be limited from implementing the Option Share Increase on account of the Amended and Restated Initial Order (granted on June 12, 2020), which provides that Peraso may only pay wages, salaries and benefits that are in the ordinary course of business and consistent with existing compensation policies and arrangements.

Tenth Glibbery Affidavit at para 15, Applicant's Motion Record, Tab 2.

11. Increasing the number of Option Shares issuable at any particular date to 20% of Peraso's outstanding common shares is the only material modification that the Board of Directors is seeking to make to the current SOP. Other than this change, all other material aspects of the SOP will remain the same, as will all other material aspects of Peraso's compensation and benefits schemes.

Tenth Glibbery Affidavit at para 15, Applicant's Motion Record, Tab 2.

B. PRE-FILING PAYMENTS TO CRITICAL SUPPLIERS

12. Peraso is seeking authorization to pay pre-filing arrears to certain of its suppliers that provide essential services and/or products (the "**Critical Suppliers**"). The products and/or services that these Critical Suppliers provide are essential to Peraso's on-going operations and will also be critical to implementing the commercial resolution that Peraso is currently working on with Ubiquiti.

Tenth Glibbery Affidavit at para 20, Applicant's Motion Record, Tab 2.

13. At least one Critical Supplier who is owed approximately US$46,000 refuses to engage in the necessary discussions until it is paid pre-filing arrears. Peraso is concerned that other Critical Suppliers that are also owed pre-filing amounts may take the same position. Peraso does not have any readily available means to replace uncooperative Critical Suppliers; even if it did, doing so would be time consuming and costly.

Tenth Glibbery Affidavit at paras 21-22, Applicant's Motion Record, Tab 2.

14. The proposed form of order provides that payments will only be made to Critical Suppliers following the express authorization of the Monitor. This form of order is intended to give Peraso the necessary flexibility required to deal with the circumstances in a time-sensitive manner, while also ensuring that any payments for pre-filing arrears are subject to appropriate scrutiny. The proposed maximum aggregate amount that may be paid to Critical Suppliers for pre-filing arrears is US$250,000.

Tenth Glibbery Affidavit at para 23, Applicant's Motion Record, Tab 2.

PART III - THE ISSUES

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

(a) the Option Share Increase should be authorized; and

(b) Peraso should be authorized to pay pre-filing arrears owing to Critical Suppliers, subject to the approval of the Monitor.

PART IV - THE LAW

C. THE OPTION SHARE INCREASE SHOULD BE APPROVED

16. This Court has the jurisdiction to authorize the Option Share Increase pursuant to s. 11 of the CCAA, which provides that "the court […] 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."

CCAA, s. 11.

17. This Court has frequently used its discretion to authorize various types of benefit, compensation and incentive schemes in the course of a CCAA proceeding. Such schemes are often approved when they will assist the debtor with the retention of personnel who are critical to the debtor company's restructuring. In approving such schemes, the Court gives deference to the business judgment of the debtor company.

See e.g. *Aralez Pharmaceuticals Inc. (Re)*, 2018 ONSC 6980 at paras 27-28 and 38-44 (CanLII).

See also *Grant Forest Products Inc. (Re)*, 2009 CanLII 42046 (ONSC) at para 18 (CanLII).

18. The proposed Option Share Increase is the most effective way of incenting and retaining Peraso's workforce during a pivotal moment in its restructuring, which increases the likelihood that Peraso can continue to operate in the normal course of business. Absent the ability to offer these individuals additional Options, there is a risk of increased turnover and attrition that may impair Peraso's ability to retain the workforce needed to maintain normal operations.

Tenth Glibbery Affidavit at paras 8-9 and 12, Applicant's Motion Record, Tab 2.

Seventh Report of the Monitor at para 16.

19. The specific beneficiaries of the Option Share Increase are Peraso's employees, contractors and management/contractor/employee directors. These individuals have been integral to Peraso's success and represent its greatest asset. Without their on-going contributions and support during the preceding three months in which Peraso has been

under CCAA protection, Peraso would not at present have a going-concern business and its value in any sales process would be significantly decreased. Peraso would like to avoid any further employee and contractor attrition.

> Tenth Glibbery Affidavit at paras 8-9 and 12, Applicant's Motion Record, Tab 2.

20. Increasing the number of Option Shares will not prejudice Peraso's creditors; indeed, Peraso's creditors will benefit if Peraso retains its skilled workforce, since Peraso's value is closely tied to its workforce.

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

21. Similarly, Peraso's shareholders are not expected to be prejudiced because shareholder value is preserved by retaining Peraso's workforce. Any dilutionary effects caused by the Share Option Increase are minimized – and possibly nullified – by the requirement that participants who exercise their options pay the fair market value of the Option Shares at the date of the option granting.

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

22. For the foregoing reasons, the proposed Option Share Increase should be approved.

D. THE PRE-FILING PAYMENTS TO CRITICAL SUPPLIERS SHOULD BE APPROVED

23. Peraso is seeking authorization to pay pre-filing arrears to certain of its Critical Suppliers. For greater certainty, Peraso is not seeking an order declaring that any of its suppliers are "critical suppliers" for the purposes of s. 11.4 of the CCAA.

24. This Court has previously permitted payments to be made to unsecured creditors if certain creditors refuse to continue to supply a debtor company unless they are paid their

pre-filing claims, thus imperilling the debtor company's business. In such cases, this Court has empowered the monitor to exercise its discretion in approving payments to critical unsecured creditors with respect to their pre-filing claims.

> *Re Toys "R" Us (Canada) Ltd.*, 2017 ONSC 5571 at para 9 (CanLII).
>
> See also *Air Canada (Re)*, 2003 CanLII 64280 (ONSC) (CanLII).

25. CCAA courts have permitted the payment of pre-filing obligations owing to suppliers where those payments would be of considerable future benefit to the debtor company and to the value of the estate as a whole.

> *EarthFirst Canada Inc., Re*, 2009 ABQB 78 at para 9 (CanLII).
>
> *Eddie Bauer Of Canada, Inc. (Re)*, 2009 CanLII 32699 (ONSC) at para 22 (CanLII).
>
> *Clover Leaf Holdings Company, Re.*, 2019 ONSC 6966 at paras 24-27 (CanLII).

26. Peraso's Critical Suppliers are essential to its on-going operations and its ability to implement the commercial resolution it is working on with Ubiquiti.

> Tenth Glibbery Affidavit at paras 20-21, Applicant's Motion Record, Tab 2.

27. Peraso does not have any readily available means to replace the Critical Suppliers.

> Tenth Glibbery Affidavit at para 22, Applicant's Motion Record, Tab 2.

28. The proposed form of order provides that the Monitor will oversee any and all payments of pre-filing amounts made to Critical Suppliers. Payments will only be made with the express authorization of the Monitor, and only to Critical Suppliers that the Monitor agrees are essential to Peraso's business operations. The maximum aggregate amount that may be paid to Critical Suppliers for pre-filing arrears is US$250,000.

Tenth Glibbery Affidavit at para 23, Applicant's Motion Record, Tab 2.

29. The Monitor supports the payment of certain pre-filing arrears (subject to its review and approval), and is supportive of the proposed form of order.

Seventh Report of the Monitor at para 19.

30. Peraso's debtor-in-possession lenders support Peraso's request to make payments to the Critical Suppliers.

Tenth Glibbery Affidavit at para 23, Applicant's Motion Record, Tab 2.

31. For the reasons described above, Peraso should be authorized to pay pre-filing arrears owing to Critical Suppliers, subject to the approval of the Monitor.

PART V - ORDER SOUGHT

32. 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 14th day of September, 2020.

Stikeman Elliott LLP

Stikeman Elliott LLP
Lawyers for the Applicant

SCHEDULE "A"
LIST OF AUTHORITIES

Cases

1. *Air Canada (Re)*, 2003 CanLII 64280 (ONSC) (CanLII)
2. *Aralez Pharmaceuticals Inc. (Re)*, 2018 ONSC 6980 (CanLII)
3. *Clover Leaf Holdings Company, Re.*, 2019 ONSC 6966 (CanLII).
4. *EarthFirst Canada Inc., Re*, 2009 ABQB 78 (CanLII)
5. *Eddie Bauer Of Canada, Inc. (Re)*, 2009 CanLII 32699 (ONSC) (CanLII)
6. *Grant Forest Products Inc. (Re)*, 2009 CanLII 42046 (ONSC) (CanLII)
7. *Re Toys "R" Us (Canada) Ltd.*, 2017 ONSC 5571 (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.

[…]

Critical supplier

11.4 (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, the court may make an order declaring a person to be a critical supplier to the company if the court is satisfied that the person is a supplier of goods or services to the company and that the goods or services that are supplied are critical to the company's continued operation.

Obligation to supply

(2) If the court declares a person to be a critical supplier, the court may make an order requiring the person to supply any goods or services specified by the court to the company on any terms and conditions that are consistent with the supply relationship or that the court considers appropriate.

Security or charge in favour of critical supplier

(3) If the court makes an order under subsection (2), the court shall, in the order, declare that all or part of the property of the company is subject to a security or charge in favour of the person declared to be a critical supplier, in an amount equal to the value of the goods or services supplied under the terms of the order.

Priority

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

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.

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
Proceeding commenced at Toronto

FACTUM OF THE APPLICANT
(RETURNABLE SEPTEMBER 16, 2020)

STIKEMAN ELLIOTT LLP
Barristers & Solicitors
5300 Commerce Court West
199 Bay Street
Toronto, Canada M5L 1B9

Maria Konyukhova LSO#: 52880V
Tel: (416) 869-5230
Email: mkonyukhova@stikeman.com

Nicholas Avis LSO#: 76781Q
Tel: (416) 869-5504
Email: navis@stikeman.com
Fax: (416) 947-0866

Lawyers for the Applicant