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: Extension of Stay of Proceedings)
(Returnable October 2, 2020)

October 1, 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.

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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. ("**Ubiquiti**") and its certain of its affiliates (such litigation, the "**Ubiquiti Litigation**"). 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) seals the unredacted version of the Affidavit of Ronald Glibbery affirmed October 1, 2020 (the "**Eleventh Glibbery Affidavit**") and the exhibits attached thereto, and the Eighth Report of the Monitor; and

(b) extends the stay of proceedings (the "**Stay Period**") to and including October 30, 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 Eleventh Glibbery Affidavit. Capitalized terms used herein but not otherwise defined have the meanings ascribed to them in the Eleventh Glibbery Affidavit.

A. SETTLEMENT DISCUSSIONS

6. The Ubiquiti Litigation has been the central issue throughout the entirety of these CCAA Proceedings. Accordingly, Peraso has been working diligently and under the supervision of the Monitor to resolve the Ubiquiti Litigation.

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

7. On July 6 and 7, 2020, Peraso entered into mediation with Ubiquiti with a view to resolving the Ubiquiti Litigation. No settlement arose immediately following the mediation, but Peraso and Ubiquiti continued to discuss a potential commercial resolution of the

Ubiquiti Litigation after the conclusion of the mediation. The Monitor was closely involved in the mediation and the post-mediation discussions.

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

8. In early September 2020, Peraso and Ubiquiti entered into the non-binding Settlement Term Sheet that set the framework for a universal settlement of the Ubiquiti Litigation. Since entering into the Settlement Term Sheet, Peraso and Ubiquiti have been negotiating the details of a full and final settlement agreement.

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

9. Peraso and Ubiquiti have reached an agreement as between themselves on all major issues; however, discussions with certain third parties whose consents are required to enter into and implement the settlement remain on-going. Peraso plans to continue its discussions with Ubiquiti and the third parties until no later than the end of day on October 7, 2020.

Eleventh Glibbery Affidavit at paras 12-14, Applicant's Motion Record, Tab 2.

10. If, by the end of day on October 7, 2020, no full and final settlement agreement and no agreements with third parties are reached, then Peraso change its strategy and commence an expedited sale process. Peraso intends to return to this Court late in the week of October 5, 2020 or during the week of October 12, 2020 to provide this Court with an update on the settlement discussions. As part of that update hearing, Peraso will seek the approval of a full and final settlement agreement with Ubiquiti, if such an agreement has been concluded; in the alternative, Peraso will seek the approval of a sale process.

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

PART III - THE ISSUES

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

(a) the unredacted Eleventh Affidavit and the exhibits attached thereto and the Eighth Report of the Monitor should be sealed; and

(b) the Stay Period should be extended to and including October 30, 2020.

PART IV - THE LAW

A. THE CONFIDENTIAL MATERIALS SHOULD BE SEALED

12. The Applicant is seeking to seal certain portions of the unredacted Eleventh Glibbery Affidavit and the exhibits attached thereto and the Eighth Report of the Monitor because they contain commercially sensitive information. In particular, the unredacted Eleventh Glibbery Affidavit contains and describes the Applicant's cash flow forecast. The cash flow forecast provides detailed information on the Applicant's anticipated cash position over the duration of the proposed Stay Period and demonstrates how much money the Applicant has budgeted for legal expenses, including how much has been budgeted for resolving the Ubiquiti Litigation.

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

13. The information that the Applicant is seeking to seal is similar in nature to the information that this Court sealed in connection with prior motions in these CCAA Proceedings, and the Applicant's sealing request is animated by the same concerns that the Court previously found sufficient to justify sealing.

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

14. 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).

15. Further, the *Courts of Justice Act* (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).

16. 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).

17. 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 Ubiquiti Litigation 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).
>
> Eleventh Glibbery Affidavit at para 22, Applicant's Motion Record, Tab 2.

18. The Applicant does not believe that any stakeholder will be prejudiced if the requested documents are sealed or redacted.

> Eleventh Glibbery Affidavit at para 24, Applicant's Motion Record, Tab 2.

19. Based on the above, the Applicant believes that it is appropriate to seal the unredacted Eleventh Glibbery Affidavit and the exhibits attached thereto and the Eighth Report of the Monitor and to keep these documents sealed pending further order of the Court.

B. THE STAY PERIOD SHOULD BE EXTENDED

20. 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).

21. The Stay Period expires on October 2, 2020. The Applicant is seeking to extend the Stay Period to and including October 30, 2020.

22. The proposed extension to the Stay Period will be used to continue negotiations with Ubiquiti and the third parties whose consent is required to enter into and implement the settlement with Ubiquiti.

Eleventh Glibbery Affidavit at para 28, Applicant's Motion Record, Tab 2.

23. 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 and will continue to do so during the proposed extension of the Stay Period through to October 30, 2020.

Eleventh Glibbery Affidavit at paras 29-30, Applicant's Motion Record, Tab 2.

24. The Applicant will have access to sufficient liquidity to continue current operations during the extension of the Stay Period.

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

25. For the reasons described above, the Stay Period should be extended to and including October 30, 2020.

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 1st day of October, 2020.

Stikeman Elliott LLP

Stikeman Elliott LLP
Lawyers for the Applicant

SCHEDULE "A"
LIST OF AUTHORITIES

Cases

1. *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 (CanLII)

2. *White Birch Paper Holding Co, Re,* 2010 QCCS 764 (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.

[…]

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.

Courts of Justice Act, **RSO 1990, c C.43**

Documents public

137 (1) On payment of the prescribed fee, a person is entitled to see any document filed in a civil proceeding in a court, unless an Act or an order of the court provides otherwise.

Sealing documents

(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 OCTOBER 2, 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