

**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: Settlement Approval)
(Returnable October 14, 2020)**

October 9, 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.**

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: Settlement Approval)
(Returnable October 14, 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. ("**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 30, 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 approves the settlement agreement (the “**Settlement Agreement**”) between the Applicant and Ubiquiti dated as of October 9, 2020.

PART II - THE FACTS

5. The facts with respect to this motion are more fully set out in the Affidavit of Ronald Glibbery, affirmed October 9, 2020 (the “**Twelfth Glibbery Affidavit**”). Capitalized terms used herein but not otherwise defined have the meanings ascribed to them in the Twelfth Glibbery Affidavit.

A. SETTLEMENT AGREEMENT

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

Twelfth Glibbery Affidavit at paras 6 and 26, 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; however, Peraso and Ubiquiti continued informal discussions after the conclusion of the mediation. The Monitor was closely involved in both the mediation and the post-mediation discussions.

Twelfth 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 full and final settlement of the Ubiquiti Litigation. Since then, Peraso and Ubiquiti have been negotiating the details of such an agreement.

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

9. Peraso and Ubiquiti reached an agreement as between themselves on all major issues in late September 2020; however, discussions with certain third parties whose consents are required to enter into and implement a full and final settlement remained on-going at the time. On October 2, 2020, Peraso informed the Court that it would continue its discussions with the applicable third parties until no later than the end of day on October 7, 2020.

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

10. On October 9, 2020, Peraso and Ubiquiti obtained all but one of the necessary consents that were required to enter into the full and final settlement agreement. That same day, Peraso and Ubiquiti executed the Settlement Agreement.

Twelfth Glibbery Affidavit at para 13, Applicant's Motion Record, Tab 2.

11. The Settlement Agreement provides that Peraso will grant certain licence and manufacturing rights to Ubiquiti and/or its affiliates in connection with certain intellectual property, and in exchange Ubiquiti will provide payments to Peraso. The payments provided by Ubiquiti to Peraso include a one-time US\$5 million payment, which is to be offset by the DIP financing provided by Ubiquiti Networks Canada Inc. to Peraso, and royalty amounts as contemplated by the License and Manufacturing Agreement.

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

12. The Settlement Agreement contemplates a number of agreements through which these transactions will be effected, subject to the satisfaction of certain conditions precedent as set out in the Settlement Agreement. These agreements include the License and Manufacturing Agreement, Escrow Agreement and the Step-in Rights Authorizations. All of the documents are to be executed and held by the Monitor in escrow until the conditions precedent are satisfied, at which time the settlement will become effective and the various documents are to be released from escrow by the Monitor.

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

13. The Settlement Agreement also includes as a schedule the Full and Final Mutual Release.

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

14. The Settlement Agreement is conditional upon, among other things, the issuance of an order by this Court approving:

- (a) the Settlement Agreement and the transactions contemplated therein; and
- (b) a declaration that the License and Manufacturing Agreement, along with its schedules, exhibits, appendices and all contracts contemplated thereby, is an agreement to which sections 32(6) and 36(8) of the CCAA (and the similar provisions of the *Bankruptcy and Insolvency Act*) apply, notwithstanding any current or future insolvency proceedings involving Peraso or any sale of its business or intellectual property in accordance with those statutory provisions.

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

15. When the required conditions precedent are met and the settlement becomes effective, the parties will seek the dismissal of the Ubiquiti Litigation and that no further action will to be taken to advance the Determination Motion, which will be withdrawn.

Twelfth Glibbery Affidavit at para 21, Applicant's Motion Record, Tab 2.

PART III - THE ISSUES

16. The only issue before this Court, as addressed below, is whether the Settlement Agreement should be approved.

PART IV - THE LAW

B. THE SETTLEMENT AGREEMENT SHOULD BE APPROVED

17. This Court has the jurisdiction to approve the Settlement Agreement 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.

18. This Court frequently uses its discretion to approve settlement agreements in the context of CCAA proceedings.

See e.g. *Labourers' Pension Fund of Central and Eastern Canada v Sino-Forest Corp.*, 2013 ONSC 1078 at para 82 ([CanLII](#)) [*Sino-Forest*], leave to appeal to CA refused, [2013 ONCA 456](#) (Ont. C.A.), leave to appeal to SCC refused [2014 CanLII 11054](#).

See also *Nortel Networks Corporation (Re)*, 2018 ONSC 6257 at para 38 ([CanLII](#)).

19. When approving a settlement under the CCAA, the Court must be satisfied that: (i) the transaction is fair and reasonable; (ii) the transaction will be beneficial to the debtor and

its stakeholders generally; and (iii) the settlement is consistent with the purpose and spirit of the CCAA.

Sino-Forest, supra at para 49 ([CanLII](#)).

20. When reviewing a transaction for fairness and reasonableness, the Court considers how the transaction moves the CCAA proceedings towards a successful compromise, including whether the transaction permits the debtor to move on to remaining steps that need to be accomplished before the CCAA proceedings can be concluded.

Air Canada, Re, 2004 CanLII 11700 (ONSC) at para 9 ([CanLII](#)).

21. In the present circumstances, the balance of factors weigh in the favour of approving the Settlement Agreement. The Settlement Agreement provides significant benefit to the Applicant and its stakeholders; most notably, the Settlement Agreement allows Peraso to continue as a going-concern business. This means Peraso can retain its workforce and preserve its relationships with its customers and suppliers. The Settlement Agreement also provides Peraso with the time and resources necessary to start working towards a solution for the benefit of all creditors.

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

22. There is no alternative to the Settlement Agreement that provides a better outcome for Peraso's stakeholders. Not entering into the Settlement Agreement would mean the continuation of the Ubiquiti Litigation, which would be costly, time-consuming, and full of uncertainty. Peraso's path forward without the Settlement Agreement would challenge its financial resources and likely result in an extremely expedited sale process.

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

23. The process that led to the Settlement Agreement was fair and reasonable. This process took place over many months, during which Peraso and Ubiquiti worked tirelessly to reach a consensual and final resolution in respect of the Ubiquiti Litigation. A significant milestone in the process leading up to the Settlement Agreement was the mediation where the former Associate Chief Justice Dennis O'Connor acted as a mediator.

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

24. The Monitor has been closely involved throughout this entirety of the process leading to the Settlement Agreement. The Monitor supports the Settlement Agreement.

Twelfth Glibbery Affidavit at para 29, Applicant's Motion Record, Tab 2.

25. In these circumstances, the relevant considerations support the approval of the Settlement Agreement.

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 9th day of October, 2020.



Stikeman Elliott LLP
Lawyers for the Applicant

SCHEDULE "A"
LIST OF AUTHORITIES

Cases

1. *Air Canada, Re*, 2004 CanLII 11700 (ONSC) ([CanLII](#))
2. *Labourers' Pension Fund of Central and Eastern Canada v Sino-Forest Corp.*, 2013 ONSC 1078 ([CanLII](#))
3. *Nortel Networks Corporation (Re)*, 2018 ONSC 6257 ([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.

[...]

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 OCTOBER 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