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: CCAA Termination)
(Returnable October 28, 2020)

October 27, 2020

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FACTUM OF THE APPLICANT
(Re: Settlement Approval)
(Returnable October 28, 2020)

PART I - OVERVIEW

1. Peraso Technologies Inc. ("**Peraso**") 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 the Initial Order under the *Companies' Creditors Arrangement Act*[1] (the "**CCAA**") on account of a looming liquidity crisis caused by, amongst other things, the Ubiquiti Litigation. Ernst & Young Inc. was appointed as Monitor in these proceedings. The Initial Order was amended and restated on June 12, 2020.

3. On October 14, 2020, this Court granted the Settlement Approval Order that approved the Settlement Agreement between Peraso and Ubiquiti. The Settlement Agreement, among other things, resolves the Ubiquiti Litigation and re-defines the going-forward business relationship between Peraso and Ubiquiti. With the implementation of the

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

Settlement Agreement and the resolution of the Ubiquiti Litigation, Peraso is no longer insolvent and does not require continued protection under the CCAA.

4. This factum is filed in support of a motion by Peraso for an order (the "**CCAA Termination Order**"), substantially in the form of the draft order attached as Tab 3 of the Motion Record, that, among other things:

(a) terminates these CCAA Proceedings and the CCAA Stay Period upon the expiry of the requested stay extension;

(b) terminates the Administration Charge, the Directors' Charge, the DIP Lenders' Charge, the Second DIP Lenders' Charge, and the Third DIP Lender's Charge;

(c) approves the fees and disbursements of the Monitor and its Canadian and U.S. counsel;

(d) approves the activities of the Monitor, discharges the Monitor, and releases the Monitor from any potential claims against it;

(e) extends the Stay Period to November 30, 2020; and

(f) such further and other relief as the Court deems just.

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 26, 2020 (the "**Thirteenth Glibbery Affidavit**"). Capitalized

terms used herein but not otherwise defined have the meanings ascribed to them in the Thirteenth Glibbery Affidavit.

A. SETTLEMENT AGREEMENT

6. Since the commencement of these CCAA Proceedings, Peraso has been working towards the resolution of the Ubiquiti Litigation. On October 9, 2020, Peraso entered into the full and final Settlement Agreement with Ubiquiti. On October 14, 2020, this Court granted an order that approved the Settlement Agreement.

> Thirteenth Glibbery Affidavit at paras 7 to 8, Applicant's Motion Record, Tab 2.

7. At the time the Settlement Approval Order was granted, the Settlement Agreement remained subject to certain conditions precedent. All conditions precedent to the Settlement Agreement have now been satisfied, and the Settlement Agreement (including all agreements incorporated thereto as schedules) is now in force and fully effective.

> Thirteenth Glibbery Affidavit at paras 9 to 10, Applicant's Motion Record, Tab 2.

8. With the finalization of the Settlement Agreement, all "Existing Litigation" (which is defined in the Settlement Agreement and includes the Ubiquiti Litigation) is resolved. Peraso and Ubiquiti are now in the process of filing notices of dismissal of the Existing Litigation in Ontario and New York.

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

B. TERMINATION OF THESE CCAA PROCEEDINGS

9. The implementation of the Settlement Agreement has greatly improved Peraso's financial situation. The Settlement Agreement eliminated a significant contingent liability

and resulted in Peraso receiving gross proceeds of US$5 million from Ubiquiti, a portion of which was used to fully repay Ubiquiti Networks Canada Inc. pursuant to its interim financing facility. Peraso now has approximately US$2.52 million of cash-on-hand. This is sufficient to pay Peraso's pre-filing accounts payable, which total approximately US$540,000, while leaving Peraso with approximately US$1.98 million to fund on-going expenses while it engages in an effort to raise financing and generates additional revenue through continued operations.

> Thirteenth Glibbery Affidavit at paras 10, 14 and 15, Applicant's Motion Record, Tab 2.

10. The amounts owing to Roadmap pursuant to two interim facilities are to be repaid by converting the indebtedness thereunder as described in greater detail in the Thirteenth Glibbery Affidavit (the "**Roadmap Repayment**"). Once the Roadmap Repayment is completed, Peraso's liabilities will primarily consist of long-term debts that do not mature until 2023.

> Thirteenth Glibbery Affidavit at paras 15 and 35 to 39, Applicant's Motion Record, Tab 2.

11. The cumulative effect of the above is that Peraso is no longer insolvent and no longer has a need for creditor protection. Accordingly, Peraso is seeking to terminate its CCAA Proceedings so it can return to ordinary course business operations.

> Thirteenth Glibbery Affidavit at paras 16 and 17, Applicant's Motion Record, Tab 2.

i. Proposed Method of Termination

12. The proposed CCAA Termination Order provides that the CCAA Proceedings will terminate when the Monitor serves the Monitor's Certificate on the Service List certifying

that the Monitor has been advised in writing by counsel for Peraso that the Remaining Activities have been completed. The Remaining Activities consist of the following activities:

(a) the beneficiaries of the Administration Charge are to be paid in full for any amounts covered by the Administration Charge;

(b) Peraso is to provide notice to all known creditors that the CCAA Proceedings are being terminated and the stay of proceedings lifted;

(c) the Monitor and its Canadian and U.S. counsel are to return the balance of any retainer paid to them by Peraso (less any reserves);

(d) the Existing Litigation is to be dismissed;

(e) Peraso is to receive shareholder and debenture holder consents with respect to the Roadmap Repayment (as defined below); and

(f) the Roadmap Repayment is to be completed.

Thirteenth Glibbery Affidavit at paras 27 and 28, Applicant's Motion Record, Tab 2.

13. The service of the Monitor's Certificate will have the effect of, *inter alia*:

(a) terminating these CCAA proceedings;

(b) discharging Ernst & Young Inc. from its duties as the Monitor, but notwithstanding the discharge of Ernst & Young as Monitor:

(i) Ernst & Young Inc. will remain Monitor and have the authority to carry out or complete or address any matters in its role as Monitor that are ancillary or incidental to these CCAA Proceedings, including any matter in respect of the Chapter 15 Proceeding, following the CCAA Termination Time; and

(ii) Ernst & Young Inc. and its counsel will continue to have the benefit of any of the rights, approvals, releases and protections in favour of the Monitor at law or pursuant to the CCAA, the Initial Order, and all other Orders made in these CCAA proceedings;

(c) releasing claims in favour of the Monitor and its counsel, with certain exceptions; and

(d) terminating the Administration Charge, the Directors' Charge, the DIP Lenders' Charge, the Second DIP Lenders' Charge, and the Third DIP Lender's Charge.

Thirteenth Glibbery Affidavit at paras 28, 31, 32, and 34, Applicant's Motion Record, Tab 2.

CCAA Termination Order, Applicant's Motion Record, Tab 3.

14. The proposed CCAA Termination Order provides that the Monitor, in its capacity as the foreign representative of Peraso, is authorized to seek the termination of the Chapter 15 Proceeding, notwithstanding the Monitor's discharge as Monitor.

Thirteenth Glibbery Affidavit at para 47, Applicant's Motion Record, Tab 2.

CCAA Termination Order at para 7, Applicant's Motion Record, Tab 3.

ii. Satisfaction of Liabilities

15. Peraso obtained three interim financing facilities during the course of these CCAA Proceedings. As noted above, the interim financing facility from Ubiquiti Networks Canada Inc. was fully repaid as a result of the Settlement Agreement. The remaining two interim facilities will be satisfied by means of the Roadmap Repayment, which includes a cash repayment, warrants and the conversion of a certain amount of debt into secured convertible debentures.

> Thirteenth Glibbery Affidavit at paras 35 to 39, Applicant's Motion Record, Tab 2.

16. Peraso is not seeking to impact its pre-filing secured or unsecured debts, will continue unimpaired after the termination of these CCAA Proceedings.

> Thirteenth Glibbery Affidavit at paras 41 to 43, Applicant's Motion Record, Tab 2.

17. Peraso's other outstanding indebtedness, including any post-filing indebtedness that is not covered by the Administration Charge, is to be dealt with post-CCAA termination in the ordinary course.

> Thirteenth Glibbery Affidavit at para 43, Applicant's Motion Record, Tab 2.

iii. Stay Period Extension

18. The current Stay Period expires on October 30, 2020. Peraso is requesting an extension of the Stay Period until and including November 30, 2020.

19. The proposed Stay Period extension will be used to resolve the Remaining Activities prior to terminating these CCAA Proceedings. All Remaining Activities are anticipated to be resolved by the end of October or early November 2020, and the Monitor's Certificate is expected to be served within one business day of that happening. An extension of the Stay

Period to November 30, 2020 is intended to provide Peraso with a buffer in the event of any unforeseen delays.

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

PART III - THE ISSUES

20. The issues on this motion are whether this Court should:

(a) terminate these CCAA Proceedings and the CCAA Stay Period upon the expiry of the requested stay extension;

(b) terminate the Administration Charge, the Directors' Charge, the DIP Lenders' Charge, the Second DIP Lenders' Charge, and the Third DIP Lender's Charge;

(c) approve the fees and disbursements of the Monitor and its Canadian and U.S. counsel;

(d) approve activities of the Monitor, discharge the Monitor, and release the Monitor from any potential claims against it; and

(e) extend the Stay Period to November 30, 2020.

PART IV - THE LAW

A. THE CCAA PROCEEDINGS SHOULD BE TERMINATED

21. This Court has the jurisdiction to terminate these CCAA Proceedings 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.

22. Peraso is seeking to terminate these CCAA Proceedings without the need for a reorganization; indeed, Peraso intends to return to ordinary course business operations following the conclusion of these CCAA Proceedings. Although the termination of a CCAA proceeding without the need for a reorganization or a liquidation is a "rare outcome", it is the best outcome. As the Supreme Court of Canada wrote, "[t]he best outcome [in a CCAA proceeding] is achieved when the stay of proceedings provides the debtor with some breathing space during which solvency is restored and the CCAA process terminates without reorganization being needed."

Thirteenth Glibbery Affidavit at para 25, Applicant's Motion Record, Tab 2.

Toys "R" Us (Canada) Ltd., 2018 ONSC 2744 (CanLII) at paras 9 to 11.

Century Services Inc. v. Canada (Attorney General), 2010 SCC 60 (CanLII) at para 14.

23. Parallels can be drawn between the present matter and *JTI-MacDonald*. In *JTI-MacDonald*, a debtor company sought CCAA protection to resolve a notice of assessment and oppression application brought against it by the Province of Quebec. After the debtor entered into a settlement agreement that resolved its dispute with the Province of Quebec, this Court terminated the debtor's CCAA proceedings on the grounds that the debtor was no longer insolvent and no longer in need of creditor protection. The debtor returned to ordinary course business operations.

Re JTI-MacDonald Corp, 2010 ONSC 4212 (CanLII) [***JTI-MacDonald***].

24. In the present matter, these CCAA Proceedings have provided Peraso with the breathing room to resolve the Ubiquiti Litigation and address its going-forward relationship with Ubiquiti. Peraso, as such, no longer faces the same financial and operational challenges

that it did at the start of these CCAA Proceedings. Peraso is no longer insolvent and no longer in need of creditor protection.

> Thirteenth Glibbery Affidavit at paras 23 to 25, Applicant's Motion Record, Tab 2.

25. The CCAA Termination Order provides for an effective and appropriate process for terminating these CCAA Proceedings. By the CCAA Termination Time, all matters requiring resolution under the ambit of the CCAA will have been completed, other than those matters that are ancillary and incidental to these CCAA proceedings.

> Thirteenth Glibbery Affidavit at paras 27 to 33, Applicant's Motion Record, Tab 2.

26. The Monitor supports the termination of these CCAA Proceedings on the terms set forth in the CCAA Termination Order. The Monitor does not believe that any stakeholder or creditor will be prejudiced by the termination of the CCAA Proceedings.

> Tenth Report of the Monitor dated October 27, 2020 ("**Tenth Report**") at paras 52 and 55.

27. In light of these factors, Peraso respectfully submits that the CCAA Proceedings be terminated in accordance with the proposed CCAA Termination Order.

B. THE CCAA CHARGES CAN BE DISCHARGED

28. The proposed CCAA Termination Order provides for the discharge of the Administration Charge, the Directors' Charge, the DIP Lenders' Charge, the Second DIP Lenders' Charge, and the Third DIP Lender's Charge (collectively, the "**CCAA Charges**") effective as the CCAA Termination Time.

> CCAA Termination Order at para 6, Applicant's Motion Record, Tab 3.

29. The CCAA Charges will no longer be necessary as of the CCAA Termination Time for the following reasons:

(a) all amounts owing to the beneficiaries of the Administration Charge and the Directors' Charge for the period up to the CCAA Termination Time will be paid prior to the CCAA Termination Time;

(b) all amounts owing to Roadmap, as the remaining beneficiary of the DIP Lenders' Charge and the Second DIP Lenders' Charge, will be satisfied by means of the Roadmap Repayment; and

(c) all amounts owing to Ubiquiti Networks Canada Inc., as the beneficiary of the Third DIP Lender's Charge, were fully repaid from a portion of the payment that Peraso received pursuant to the Settlement Agreement.

Thirteenth Glibbery Affidavit at paras 34 to 40, Applicant's Motion Record, Tab 2.

30. Consequently, the draft CCAA Termination Order provides for the termination of all of the CCAA Charges, effective as of the CCAA Termination Time.

C. THE MONITOR SHOULD BE DISCHARGED AND RELEASED FROM POTENTIAL CLAIMS

31. The proposed CCAA Termination Order provides that effective as of the CCAA Termination Time, the Monitor will be discharged from its duties and will have no further duties, obligations or responsibilities as Monitor from and after the CCAA Termination Time. Notwithstanding its discharge as Monitor, the Monitor will remain Monitor and have the authority to carry out the Monitor Incidental Matters (as defined in the CCAA Termination Order), which include matters related to the Chapter 15 Proceeding.

CCAA Termination Order at para 14, Applicant's Motion Record, Tab 3.

32. The Monitor and its counsel will continue to have the benefit of any rights, approvals, releases and protections in favour of the Monitor at law or pursuant to the CCAA, the Initial Order, and all other orders after the Monitor's discharge. The proposed CCAA Termination Order further provides for the release of the Monitor and its Canadian and U.S. counsel from any and all claims related to the within proceedings that any person may have or be entitled to assert against them, provided that such claims do not arise out of any gross negligence or wilful misconduct on the part of the released parties.

CCAA Termination Order at paras 15 and 17, Applicant's Motion Record, Tab 3.

33. It is well-established that this Court may grant an order discharging the Monitor on terms similar to those sought in the proposed CCAA Termination Order. The Court's jurisdiction for making such an order is grounded in s. 11 of the CCAA.

See e.g. *Re Golf Town Canada Inc. et al.* (29 March 2018), Toronto CV-16-11527-00CL (Ont Sup Ct [Comm List]) CCAA Termination Order at para 12 (Monitor's Website).

Re Toys "R" Us Canada Ltd et al. (9 May 2018), Toronto CV-17-00582960-00CL (Ont Sup Ct [Comm List]) CCAA Discharge Order at paras 22 to 28 (Monitor's Website).

JTI-MacDonald, *supra* at para 19 (CanLII).

34. This Court has previously granted CCAA termination orders that authorize the monitor to carry out, complete or address any matters in its role as monitor that are ancillary or incidental to the CCAA proceedings following its discharge. In *Re Cline Mining Corporation et al.*, such ancillary and incidental matters included the termination of a recognition proceeding in the United States pursuant to chapter 15 of title 11 of the *United States Code*.

> *Re Cline Mining Corporation et al.* (30 July 2015), Toronto CV-14-10781-00CL (Ont Sup Ct [Comm List]) CCAA Termination Order at para 13 (Monitor's Website).

> See also *Re Payless Shoesource Canada Inc. et al.* (15 September 2020), Toronto CV-19-00614629-00CL (Ont Sup Ct [Comm List]) CCAA Termination Order at para 19 (Monitor's Website).

35. In the present proceeding, all matters of significance are to be completed prior to the CCAA Termination Time (such matters being the Remaining Activities). The resolution of the Chapter 15 Proceeding is the only matter that is anticipated to extend beyond the CCAA Termination Time. Consequently, Peraso submits that it is reasonable and appropriate for the Monitor to be authorized to complete the Chapter 15 Proceeding notwithstanding its discharge as Monitor.

> Thirteenth Glibbery Affidavit at paras 31 and 33, Applicant's Motion Record, Tab 2.

> Tenth Report at paras 37 and 45.

36. Given the above considerations, Peraso submits that it is appropriate for the Monitor to be discharged at the CCAA Termination Time.

D. THE MONITOR'S ACTIVITIES AND ITS FEES AND DISBURSEMENTS SHOULD BE APPROVED

37. Peraso is seeking an order approving the Monitor's activities to date, as detailed in the Monitor's Tenth Report. This Court has not previously approved any of the Monitor's activities.

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

38. In *Re Target Canada Co*, the Court wrote that a request to approve a monitor's report "is not unusual" and that "there are good policy and practical reasons for the court to

approve of Monitor's activities and providing a level of protection for Monitors during the CCAA process."

> *Re Target Canada Co*, 2015 ONSC 7574 at paras 2 and 22 (CanLII).

39. In this case, the Monitor's activities as described in the Tenth Report should be approved. The Monitor carried out its activities in a manner consistent with the provisions of the CCAA and in compliance with the Initial Order.

> Thirteenth Glibbery Affidavit at para 45, Applicant's Motion Record, Tab 2.
>
> Tenth Report at paras 70 to 75.

40. Peraso further seek approval of the fees and disbursements of (i) the Monitor for the period May 19, 2020 to October 23, 2020, inclusive; (ii) Canadian counsel to the Monitor for the period May 13, 2020 to October 23, 2020, inclusive; and (iii) U.S. counsel to the Monitor for the period May 25, 2020 to October 23, 2020, inclusive. The breakdown of the fees and disbursements are in the Tenth Report.

> Tenth Report at paras 77 to 81.

41. In approving the fees and disbursements of the Monitor and its counsel, the Court must consider whether those fees were "fair and reasonable in all of the circumstances. The concerns are ensuring that the monitor is fairly compensated while safeguarding the efficiency and integrity of the CCAA process."

> *Nortel Networks Corp, Re*, 2017 ONSC 673 (CanLII) at para 13, citing *Winalta Inc, Re*, 2011 ABQB 399 (CanLII) at para 30.

42. Peraso has reviewed the fees of the Monitor and its counsel and supports the payment of the same. The fees and disbursements of the Monitor and its counsel are

reasonable in the circumstances and have been validly incurred in accordance with the provisions of the orders issued in these CCAA Proceedings.

Thirteenth Glibbery Affidavit at para 46, Applicant's Motion Record, Tab 2.

Tenth Report at para 82.

43. The proposed CCAA Termination Order provides that the fees and disbursements of the Monitor and its counsel that are not set out in the Tenth Report but that have been or are anticipated to be incurred in the performance of the duties of the Monitor are, up to a maximum of C$65,000 in the aggregate (plus applicable HST), approved without further order of the Court. Such relief is reasonable in the circumstances.

Tenth Report at paras 83 and 84.

E. THE STAY PERIOD SHOULD BE EXTENDED

44. 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).

45. The Stay Period expires on October 30, 2020. Peraso is seeking to extend the Stay Period to and including November 30, 2020.

46. The proposed extension to the Stay Period will be used to resolve the Remaining Activities prior to terminating these CCAA Proceedings, including the Roadmap Repayment. All Remaining Activities are expected to be resolved by the end of October or early November 2020, and the Monitor's Certificate is anticipated to be served within one business

day of that happening. Peraso is requesting a stay extension to November 30, 2020 as a buffer in the event of any unforeseen delays.

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

47. No creditors are expected to suffer material prejudice as a result of the extension of the Stay Period. Peraso 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 November 30, 2020.

> Thirteenth Glibbery Affidavit at paras 52 and 53, Applicant's Motion Record, Tab 2.
>
> Tenth Report at para 87.

48. Peraso will have access to sufficient liquidity to continue current operations during the extension of the Stay Period.

> Thirteenth Glibbery Affidavit at para 49, Applicant's Motion Record, Tab 2.

49. The Monitor supports Peraso's request to extend the Stay Period.

> Tenth Report at para 87.

PART V - ORDER SOUGHT

50. For the foregoing reasons, Peraso respectfully requests that this Court grant the CCAA Termination Order substantially in the form of the draft order attached at Tab 3 to Peraso's motion record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 27th day of October, 2020.

Stikeman Elliott LLP

Stikeman Elliott LLP
Lawyers for the Applicant

SCHEDULE "A"
LIST OF AUTHORITIES

Cases

1. *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60 (CanLII)

2. *Nortel Networks Corp, Re*, 2017 ONSC 673 (CanLII) at para 13, citing *Winalta Inc, Re*, 2011 ABQB 399 (CanLII)

3. *Re Cline Mining Corporation et al.* (30 July 2015), Toronto CV-14-10781-00CL (Ont Sup Ct [Comm List]) CCAA Termination Order (Monitor's Website)

4. *Re Golf Town Canada Inc. et al.* (29 March 2018), Toronto CV-16-11527-00CL (Ont Sup Ct [Comm List]) CCAA Termination Order (Monitor's Website)

5. *Re JTI-MacDonald Corp*, 2010 ONSC 4212 (CanLII)

6. *Re Target Canada Co*, 2015 ONSC 7574 (CanLII)

7. *Re Toys "R" Us Canada Ltd et al.* (9 May 2018), Toronto CV-17-00582960-00CL (Ont Sup Ct [Comm List]) CCAA Discharge Order (Monitor's Website)

8. See also *Re Payless Shoesource Canada Inc. et al.* (15 September 2020), Toronto CV-19-00614629-00CL (Ont Sup Ct [Comm List]) CCAA Termination Order (Monitor's Website)

9. *Toys "R" Us (Canada) Ltd.*, 2018 ONSC 2744 (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.

[…]

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FACTUM OF THE APPLICANT
(RETURNABLE OCTOBER 28, 2020)

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