

**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 VOYAGER DIGITAL LTD.

APPLICATION OF VOYAGER DIGITAL LTD. UNDER
SECTION 46 OF THE *COMPANIES' CREDITORS
ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

FACTUM OF THE APPLICANT

July 11, 2022

FASKEN MARTINEAU DuMOULIN LLP

Barristers and Solicitors
333 Bay Street, Suite 2400
Bay Adelaide Centre, Box 20
Toronto ON M5H 2T6

Stuart Brotman (LSO: 43430D)

sbrotman@fasken.com
Tel: 416 865 5419

Aubrey Kauffman (LSO: 18829N)

akauffman@fasken.com
Tel: 416 868 3538

Daniel Richer (LSO: 75225G)

dricher@fasken.com
Tel: 416 865 4445

Mitch Stephenson (LSO: 73064H)

mstephenson@fasken.com
Tel: 416 868 3502

Lawyers for the Applicant

TO: THE SERVICE LIST

TABLE OF CONTENTS

PART I - NATURE OF THE APPLICATION	1
A. VDL	2
B. The Chapter 11 Case.....	3
C. The Restructuring	4
PART II - FACTS.....	5
PART III - ISSUES.....	5
PART IV - LAW.....	5
A. The Application Need Not be Served on Any Party.....	5
B. The Chapter 11 Case is a Foreign Main Proceeding	6
i. The Chapter 11 Case is a Foreign Proceeding	7
ii. The Chapter 11 Case is a Foreign Main Proceeding.....	8
C. The Initial Recognition Order and Supplemental Order Should Be Granted.....	12
i. The stay of proceedings in the Initial Recognition Order is required and appropriate	12
ii. The Supplemental Order is appropriate in the circumstances	13
(a) Recognition of the U.S. Orders is appropriate	14
(b) A&M should be appointed Information Officer	16
(c) The Supplemental Stay should be granted.....	17
(d) The Administration Charge should be granted	17
PART V - RELIEF REQUESTED	19

PART I - NATURE OF THE APPLICATION

1. This factum is filed in support of the application of Voyager Digital Ltd. (“**VDL**”) as the foreign representative (in such capacity, the “**Foreign Representative**”) of VDL in respect of the case (the “**Chapter 11 Case**”) under Chapter 11 of title 11 of the United States Code (the “**U.S. Bankruptcy Code**”) commenced by VDL in the United States Bankruptcy Court for the Southern District of New York (the “**U.S. Bankruptcy Court**”).

Affidavit of Stephen Ehrlich sworn July 10, 2022, Application Record, Tab 6 (“Ehrlich Affidavit”) at paras 4 & 10, & Exhibit “B”.

2. On this application, the Foreign Representative seeks certain relief pursuant to Part IV of the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the “**CCAA**”), including the following two orders:

- (a) an initial recognition order (foreign main proceeding), among other things,
 - (i) declaring that VDL is the foreign representative in respect of the Chapter 11 Case, (ii) declaring that the centre of main interest of VDL is the United States of America (the “**U.S.**”), (iii) recognizing the Chapter 11 Case as a foreign main proceeding under Part IV of the CCAA and (iv) ordering mandatory relief set out in section 48(1) of the CCAA (the “**Initial Recognition Order**”); and
- (b) a supplemental order (foreign main proceeding), among other things,
 - (i) recognizing certain orders of the U.S. Bankruptcy Court¹ (the “**U.S. Orders**”),
 - (ii) appointing Alvarez & Marsal Canada Inc. (“**A&M**”) as information officer in respect of these proceedings (in such capacity, the “**Information Officer**”) and

¹ The Foreign Representative is seeking recognition of all orders granted by the U.S. Bankruptcy Court at the first day motions in the Chapter 11 Case heard July 8, 2022, except the order (I) authorizing and approving the appointment of Stretto, Inc. as claims and noticing agent to the debtors and (II) granting related relief. This order was not yet entered at the time the application record and this factum were served.

(iii) granting the Administration Charge (defined below) (the “**Supplemental Order**”).

Ehrlich Affidavit at para 5.

A. VDL

3. VDL is incorporated under the *Business Corporations Act*, S.B.C. 2002, c. 57 and its registered office is a law firm in Vancouver, British Columbia that maintains the corporate minute books. VDL has virtually no other ties to British Columbia.

Ehrlich Affidavit at paras 8–9 & 88–89, & Exhibit “A”.

4. VDL’s only real connection to Canada is based in Ontario. Specifically:
- (a) VDL is listed on the Toronto Stock Exchange (“**TSX**”) and is thus subject to the TSX Rules and Regulations, as well as to the *Securities Act*, R.S.O. 1990, c. S.5 (the “**Securities Act**”) and oversight by the Ontario Securities Commission;
 - (b) VDL’s only Canadian director resides in Toronto;
 - (c) a proposed class proceeding has been commenced in the Ontario Superior Court of Justice seeking, among other things, relief under the *Securities Act* and the *Class Proceedings Act, 1992*, SO 1992, c 6, as amended, in which VDL, its Ontario-based director, and its Ontario-based, former employee are named as defendants (the “**De Sousa Action**”);
 - (d) all of VDL’s acting professional advisors, including its Canadian legal counsel and A&M, are situated in Toronto; and
 - (e) VDL’s Canadian legal counsel and A&M are each holding material retainers in Ontario bank accounts in trust for VDL.

Ehrlich Affidavit at paras 9 & 102.

5. VDL's centre of main interest lies in the U.S., where its operating U.S. subsidiary, Voyager Digital, LLC and other affiliates (collectively and together with VDL, "**Voyager**") operate a U.S.-based enterprise providing cryptocurrency brokerage, custodial and lending services to U.S.-based customers.

Ehrlich Affidavit at paras 9, 36–45 & 88.

B. The Chapter 11 Case

6. On July 5, 2022, VDL commenced the Chapter 11 Case by filing a voluntary petition for relief under the U.S. Bankruptcy Code in the U.S. Bankruptcy Court (as amended from time to time, the "**VDL Petition**"), resulting in an automatic stay of proceedings.

Ehrlich Affidavit at para 10 and Exhibit "B".

7. Two other entities in the Voyager group of companies, Voyager Digital, LLC and Voyager Digital Holdings, Inc. (collectively with VDL, the "**Debtors**"), also filed voluntary petitions for relief under the Bankruptcy Code in the U.S. Bankruptcy Court on July 5, 2022. For cost and efficiency reasons, recognition of these cases is not presently being sought in Canada.

Ehrlich Affidavit at paras 10 & 12.

8. Contemporaneously with the commencement of the Chapter 11 Case, the Debtors filed motions seeking, among other things, the U.S. Orders, including an order appointing VDL as the foreign representative of the Debtors (the "**Foreign Representative Order**").

Ehrlich Affidavit at paras 10 & 91.

9. The Debtors' motions for, among other things, the U.S. Orders were heard on July 8, 2022 (the "**First Day Hearing**"). Following the First Day Hearing, the U.S. Bankruptcy Court granted the U.S. Orders, including the Foreign Representative Order.

Ehrlich Affidavit at paras 6 & 91; Affidavit of Mitchell Stephenson sworn July 11, 2022, Application Record, Tab 7 ("Stephenson Affidavit") at Exhibits "B"–"K".

10. No other foreign proceedings in respect of VDL have been commenced.

Ehrlich Affidavit at para 14.

C. The Restructuring

11. Voyager was facing a short-term "run on the bank" due to the downturn in the cryptocurrency industry generally and the default of a significant loan made to a third-party borrower. On July 1, 2022, VDL froze all withdrawals and trading activity on its platform.

Ehrlich Affidavit at paras 16 & 64.

12. Voyager has a viable business and a plan for the future, which includes pursuing a comprehensive marketing and sale process or a restructuring of the Debtors' business (in furtherance of such restructuring, the Debtors have already filed a proposed preliminary plan of reorganization with the U.S. Bankruptcy Court).

Ehrlich Affidavit at paras 16 & 23-24, and Exhibit "D".

13. Recognition the Chapter 11 Case in Canada under Part IV of the CCAA will provide the Debtors the opportunity to complete such sale or restructuring in an efficient manner, thereby maximizing value for stakeholders.

Ehrlich Affidavit at para 25.

PART II - FACTS

14. Please refer to the Ehrlich Affidavit for a more fulsome description of the facts supporting the relief sought on this application.

PART III - ISSUES

15. The issues to be determined on this application are:

- (a) Is the Chapter 11 Case a “foreign main proceeding” pursuant to Part IV of the CCAA?
- (b) If so, is the Foreign Representative entitled to the relief sought, including:
 - (i) the recognition of the U.S. Orders;
 - (ii) the stay of proceedings in respect of VDL;
 - (iii) the appointment of A&M as Information Officer; and
 - (iv) the creation of the Administration Charge.

16. The forgoing questions should be answered affirmatively. It is appropriate to grant the Initial Recognition Order and the Supplemental Order for the reasons set forth herein.

PART IV - LAW

A. The Application Need Not be Served on Any Party

17. VDL is not an operating company. It has no secured creditors that will be affected by the Administration Charge. VDL is not seeking interim financing and, consequently no charge

related to interim financing on its properties, assets or undertakings. VDL does not have any other stakeholders that need to be served pursuant to the CCAA or otherwise.

Ehrlich Affidavit at para 88 and Exhibit “F”.

18. Nevertheless, as counsel for the plaintiff in the De Sousa Action requested to be served or notified in connection with the Chapter 11 Case, such counsel were served with this application.

B. The Chapter 11 Case is a Foreign Main Proceeding

19. Part IV of the CCAA establishes the applicable process for addressing the administration of cross-border insolvencies to promote cooperation and coordination with foreign courts.

[Companies' Creditors Arrangement Act, RSC 1985, c C-36 \[CCAA\], Part IV.](#)

20. The central principle governing Part IV of the CCAA is comity, which mandates that Canadian courts should recognize and enforce the judicial acts of other jurisdictions, provided that those other jurisdictions have assumed jurisdiction on a basis consistent with principles of order, predictability and fairness. Canadian courts have emphasized the importance of comity and cooperation in cross-border insolvency proceedings to avoid multiple proceedings, inconsistent judgments and general uncertainty. Coordination of international insolvency proceedings is particularly critical in ensuring the equal and fair treatment of creditors regardless of their location.

[Hollander Sleep Products, LLC \(Re\), 2019 ONSC 3238 \[Hollander\] at paras 41 & 42.](#)

21. For the following reasons, it would be appropriate for this Court to recognize the Chapter 11 Case as a foreign main proceeding.

i. The Chapter 11 Case is a Foreign Proceeding

22. Pursuant to Section 46(1) of the CCAA, a foreign representative may apply to court for recognition of a foreign proceeding in respect of which that person is a foreign representative, provided that the application is accompanied by certified copies of the instruments commencing the foreign proceeding and appointing the foreign representative, and a statement identifying all foreign proceedings in respect of the debtor company that are known to the foreign representative (the Foreign Representative has met these requirements).

[CCAA, supra, s 46](#); Ehrlich Affidavit at paras 6 & 14; Stephenson Affidavit at Exhibits “A” & “B”.

23. Section 47(1) of the CCAA provides that the Court shall make an order recognizing a foreign insolvency proceeding if it is satisfied that the following two requirements are met:

- (a) the application for recognition of a foreign proceeding relates to a “foreign proceeding” within the meaning of the CCAA; and
- (b) the applicant is a “foreign representative” within the meaning of the CCAA in respect of that foreign proceeding.

[CCAA, supra, s 47\(1\)](#).

24. The definition of a “foreign proceeding” in section 45(1) of the CCAA includes a judicial proceeding “in a jurisdiction outside of Canada dealing with creditors’ collective interests generally under any law relating to bankruptcy or insolvency in which a debtor company’s business and financial affairs are subject to control or supervision by a foreign court for the purpose of reorganization.”

[CCAA, supra, s 45\(1\)](#).

25. Proceedings under the U.S. Bankruptcy Code and the supervision of a U.S. bankruptcy court are largely considered by Canadian courts to satisfy these criteria. Insolvency proceedings commenced under the U.S. Bankruptcy Code are accordingly consistently recognized by Canadian courts to be a “foreign proceeding” under the CCAA.

[Hollander, supra, at para 27; Payless Holdings LLC, \(Re\), 2017 ONSC 2242 at para 22; Zochem Inc \(Re\), 2016 ONSC 958 \[Zochem\] at para 20.](#)

26. The Chapter 11 Case is a foreign proceeding.

27. Section 45(1) of the CCAA provides that a “foreign representative” is a person who is authorized to (a) monitor the debtor company’s business and financial affairs for the purpose of reorganization or (b) act as a representative in respect of the foreign proceeding.

[CCAA, supra, s 45\(1\).](#)

28. By the Foreign Representative Order, the U.S. Bankruptcy Court ordered that VDL is authorized to act as the foreign representative of the Chapter 11 Case.

Stephenson Affidavit at Exhibit “B”.

29. Consequently, as the Chapter 11 Case is a “foreign proceeding” and VDL is a “foreign representative”, this Court ought to make an order recognizing the Chapter 11 Case.

ii. The Chapter 11 Case is a Foreign Main Proceeding

30. Pursuant to section 47(2) of the CCAA, if this Court grants an order under section 47(1), it is required to specify whether the foreign proceeding is a “foreign main proceeding” or a “foreign non-main proceeding.”

[CCAA, supra, s 47\(2\).](#)

31. Section 45(1) of the CCAA provides that a “foreign main proceeding” is a foreign proceeding in a jurisdiction where the debtor company has its centre of main interest (“COMI”).

[CCAA, supra, s 45\(1\).](#)

32. While the CCAA does not define what constitutes a debtor’s COMI, section 45(2) of the CCAA provides that, absent evidence to the contrary, a debtor’s COMI is deemed to be its registered office.

[CCAA, supra, s 45\(2\).](#)

33. However, the determination of COMI is a substantive rather than a technical exercise.

[CHC Group Ltd \(Re\), 2016 BCSC 2623 \[CHC Group\] at para 9.](#)

34. In circumstances where it is necessary to go beyond the registered office presumption provided by section 47(2) of the CCAA, courts will look to the following principal factors, considered as a whole, to determine whether the location in which the proceeding has been filed is the debtor’s COMI:

- (a) the location is readily ascertainable by creditors,
- (b) the location is one in which the debtor’s principal assets or operations are found;
and
- (c) the location is where the management of the debtor takes place.

[Zochem, supra, at para 22.](#)

35. In addition to these primary considerations, courts have also considered, among other factors:

- (a) the location where corporate decisions are made;
- (b) the location of employee administrations, including human resource functions;
- (c) the location of the company's marketing and communication functions;
- (d) whether the enterprise is managed on a consolidated basis;
- (e) the extent of integration of an enterprise's international operations;
- (f) the centre of an enterprise's corporate, banking, strategic and management functions;
- (g) the existence of shared management within entities and in an organization;
- (h) the location where cash management and accounting functions are overseen;
- (i) the location where pricing decisions and new business development initiatives are created; and
- (j) the location of an enterprise's treasury management functions, including management of accounts receivable and accounts payable.

[CHC Group, supra, at para 9; Massachusetts Elephant & Castle Group, Inc \(Re\), 2011 ONSC 4201 at paras 26-31.](#)

36. Notwithstanding the fact that VDL's registered office is a law firm in Vancouver, British Columbia, VDL has virtually no ties to British Columbia and only limited ties to Canada as a whole. VDL's COMI is in the U.S. because, among other things:

- (a) VDL's operating mind and management are located almost exclusively in the U.S., and all corporate decision making occurs in the U.S.;

- (b) Voyager's operating business is carried out by U.S. subsidiaries, and not VDL;
- (c) Voyager does not carry on its operating business in Canada;
- (d) VDL is the only active Canadian-incorporated entity in the Voyager group of companies;
- (e) VDL serves only as a publicly-traded holding company whose sole function is to raise capital from public markets by listing on the TSX, which capital VDL then uses to fund its U.S. operating subsidiaries through various intercorporate funding arrangements;
- (f) other than its capital-raising role, and role as unsecured guarantor of Voyager's obligations under an unsecured loan facility, VDL has no other operations and serves no other business purpose in Canada;
- (g) apart from the unsecured guarantee obligation, VDL has only a *de minimus* amount of trade debt and no secured debt;
- (h) VDL's only physical presence is at its principal place of business in New York;
- (i) VDL has no employees in Canada;²
- (j) five of the six directors of VDL are located in the U.S., with the one exception being a director who resides in Toronto, Ontario;
- (k) all officers of VDL are located in the U.S.; and
- (l) other than certain corporate records maintained by counsel in Canada, the balance of the books and records of Voyager are situated and maintained in the U.S.

Ehrlich Affidavit at para 88 and Exhibit "F".

² Until recently, VDL had one Canadian employee situated in Ontario. That employee was terminated on a without cause basis on June 9, 2022. VDL has since paid or otherwise satisfied all obligations owing to the employee under his employment agreement, and the employee has executed a full and final release in favour of VDL.

37. The granting of an order recognizing the Chapter 11 Case as a foreign main proceeding under section 47(2) of the CCAA is appropriate for the following reasons:

- (a) the U.S. Bankruptcy Court has assumed jurisdiction over the Chapter 11 Case;
- (b) this Court's recognition and support of those proceedings is consistent with the principles of comity and cooperation underlying Part IV of the CCAA;
- (c) given the deep interconnectedness between VDL and the operations of the Debtors in the U.S., it is most practical for the U.S. Bankruptcy Court to primarily control the Debtors', including VDL's, insolvency process; and
- (d) coordination of the insolvency proceedings in the U.S. and Canada supports the equal and fair treatment of stakeholders.

[CCAA, supra, s 47\(2\).](#)

C. The Initial Recognition Order and Supplemental Order Should Be Granted

i. The stay of proceedings in the Initial Recognition Order is required and appropriate

38. Section 48(1) of the CCAA provides that, on making an order recognizing a foreign proceeding specified by the court as a "foreign main proceeding", the Court is required to grant certain mandatory relief, including a limited stay of proceedings (the "**Limited Stay**").

[CCAA, supra, s 48\(1\).](#)

39. The Initial Recognition Order sought by the Proposed Foreign Representative provides for all the relief required under section 48(1) and is consistent with the Court's Model CCAA Initial Recognition Order (Foreign Main Proceeding).

ii. The Supplemental Order is appropriate in the circumstances

40. In addition to the required relief under section 48(1) of the CCAA, if an order recognizing a foreign proceeding is made, section 49 of the CCAA provides this Court broad discretion to make any order it considers appropriate where it is satisfied that the order is necessary for the protection of the debtor company's property or the interests of creditors. This Court may make such orders on any terms and conditions it considers appropriate in the circumstances.

[CCAA, supra, s 49\(1\).](#)

41. If an order recognizing a foreign proceeding is made, Section 52(1) of the CCAA requires that this Court "cooperate, to the maximum extent possible, with the foreign representative and the foreign court involved in the foreign proceeding."

[CCAA, supra, s 52\(1\).](#)

42. The relief set out in the Supplemental Order is requested by the Foreign Representative to facilitate and advance the objectives of the Chapter 11 Case—it will also assist this Court in meeting the requirement imposed by section 52(1) of the CCAA. Such relief includes, among other things:

- (a) recognizing the U.S. Orders;
- (b) appointing A&M as Information Officer in respect of VDL's CCAA proceedings;
- (c) implementing a more comprehensive stay of proceedings than the stay provided by the Initial Recognition Order (the "**Supplemental Stay**"); and
- (d) creating the Administration Charge.

(a) **Recognition of the U.S. Orders is appropriate**

43. The list of U.S. Orders that the Foreign Representative is seeking to have recognized is set out in the Ehrlich Affidavit at paragraph 94. The relief provided by the U.S. Orders includes, among other things:

- (a) authorizing VDL to act as Foreign Representative of the Chapter 11 Case and to seek recognition thereof;
- (b) approving and authorizing the Debtors' cash management arrangements, including performing intercompany transactions;
- (c) authorizing the Debtors to pay certain pre-filing workforce obligations;
- (d) authorizing the Debtors to pay certain pre-filing amounts related to the Debtors' continuing business and operations;
- (e) authorizing the Debtors to honour certain pre-petition obligations to the Debtors' customers and, at the Debtors sole discretion, debits by the Debtors' customers;
- (f) authorizing the Debtors to continue certain insurance policies and satisfy certain pre-filing obligations in respect thereof, as well as authorizing the Debtors to obtain new insurance coverage as needed; and
- (g) authorizing the Debtors to pay certain taxes and fees.

Ehrlich Affidavit at para 94; Stephenson Affidavit at Exhibits "B"–"K".

44. The substantive relief provided by the U.S. Orders is similar to relief that would be granted upon the commencement of proceedings in Canada under Part I of the CCAA.

45. As described above, the principles of comity and cooperation with foreign courts guide the CCAA court in the exercise of its discretion in cross-border insolvency cases.

[CCAA, supra, s 52\(1\).](#)

46. Canadian courts should recognize and enforce the judicial acts of courts in other jurisdictions provided that those courts operate consistent with principles of order, predictability and fairness.

[Hollander, supra, at para 41.](#)

47. Courts have held that, where a cross-border insolvency proceeding is most closely connected to one jurisdiction, it is appropriate for the court in that jurisdiction to exercise principal control over the insolvency process in light of the principles of comity and in order to avoid a multiplicity of proceedings.

[Magna Entertainment Corp \(Re\), \[2009\] 51 CBR \(5th\) 82 \(Ont Sup Ct J\) at para 9; see also Endorsement of Hainey J dated October 16, 2020 in Mallinckrodt Canada ULC et al, Court File No CV-20-00649441-00CL at paras 1 & 4-6.](#)

48. It is appropriate for this Court to grant an order recognizing and giving effect to the U.S. Orders for the following reasons:

- (a) the U.S. Bankruptcy Court has properly assumed jurisdiction over the Chapter 11 Case—comity will be furthered by this Court’s recognition and support of such case and the orders granted therein;
- (b) coordination of proceedings in Canada and the U.S. will ensure equal and fair treatment of all stakeholders regardless of their location;
- (c) given the close connection between VDL and the U.S., it is reasonable and sensible for the U.S. Bankruptcy Court to have principal control over VDL’s insolvency process, as is the case with the other Debtors; and

- (d) the U.S. Orders were sought by the Debtors to continue their operations and to protect their customers, business and property.

Ehrlich Affidavit at paras 94 & 96; Stephenson Affidavit at Exhibits “B”–“K”.

(b) A&M should be appointed Information Officer

49. Although the CCAA does not require that an information officer be appointed, it has become common practice in proceedings under Part IV of the CCAA for this Court to appoint an information officer pursuant to this Court’s discretionary powers. The information officer’s role is to help effect cooperation between the Canadian proceeding, the foreign representative and foreign court, including to keep this Court apprised of the status of the foreign proceedings.

[CCAA, supra, ss 49, 50 & 52\(1\).](#)

50. The Foreign Representative seeks to appoint A&M as the Information Officer in this proceeding. A&M is a licensed insolvency trustee, well-known for its expertise in CCAA matters (including cross-border plenary and ancillary proceedings under the CCAA) and has consented to act as Information Officer in this proceeding. A&M’s appointment as Information Officer will keep affected creditors, stakeholders and this Court updated on developments in the Chapter 11 Case and will be a point of contact to respond to inquiries from interested parties in Canada.

Ehrlich Affidavit at paras 97–98; Consent of Alvarez & Marsal Canada Inc. to Act as Information Officer, Application Record, Tab 8.

51. A&M’s proposed role as Information Officer is based on the terms of this Court’s model CCAA supplemental order (foreign main proceeding) (the “**Model Supplemental Order**”)

dealing with the appointment of an information officer and is consistent with the terms of orders granted in other recent recognition proceedings under Part IV of the CCAA in Ontario.

[Supplemental Order \(Foreign Main Proceeding\) dated March 12, 2021, granted by Cavanagh J in *Knotel, Inc and Knotel Canada, Inc*, Court File No CV-21-00658434-00CL at paras 5ff \[*Knotel*\]; Supplemental Order \(Foreign Main Proceeding\) dated April 14, 2022, granted by Conway J in *Sungard Availability Services \(Canada\) Ltd/Sungard, Services de Coninuité des Affaires \(Canada\) Ltée*, Court File No CV-22-00679628-00CL at paras 5ff \[*Sungard*\].](#)

(c) **The Supplemental Stay should be granted**

52. The Limited Stay set out in the Initial Recognition Order is drafted to satisfy the requirements of section 48(1) of the CCAA. The broader and more comprehensive Supplemental Stay set out in the Supplemental Order is drafted to include stay language typically found in an initial order granted under Part I of the CCAA and is consistent with the Model Supplemental Order.

53. This Court has jurisdiction under section 49(1) of the CCAA to grant the Supplemental Stay.

[*Hollander, supra*, at paras 38–40.](#)

(d) **The Administration Charge should be granted**

54. The Foreign Representative is requesting that this Court grant to the Foreign Representative's legal counsel (Fasken Martineau DuMoulin LLP), the proposed Information Officer and its legal counsel (Blakes, Cassels & Graydon LLP) an administration charge with respect to their fees and disbursements in the maximum amount of CAD\$500,000 (the "**Administration Charge**") on VDL's property in Canada.

Ehrlich Affidavit at para 99.

55. Section 11.52 of the CCAA expressly provides that this Court has jurisdiction to grant an administration charge. This section is permissive and does not contain any specific criteria for a court to consider in granting such a charge.

[CCAA, supra, s 11.52.](#)

56. In *Canwest Publishing Inc.*, this Court provided a non-exhaustive list of factors to be considered in approving an administration charge, including:

- (a) the size and complexity of the businesses being restructured;
- (b) the proposed role of the beneficiaries of the charge;
- (c) whether there is an unwarranted duplication of roles;
- (d) whether the quantum of the proposed charge appears to be fair and reasonable;
- (e) the position of the secured creditors likely to be affected by the charge; and
- (f) the position of the monitor.

[Canwest Publishing Inc, 2010 ONSC 222 at para 54.](#)

57. An administration charge and the approval of retention of professionals is appropriate in proceedings under Part IV of the CCAA because the work performed is supervised by this Court, not the foreign court.

[Knotel, supra, at para 18; Sungard, supra, at para 18.](#)

58. The amount of the Administration Charge is reasonable in the circumstances having regard to the size and complexity of these proceedings and the roles that will be required of the

Foreign Representative's legal counsel, the proposed Information Officer and its legal counsel. In addition, VDL has no secured creditors that will be affected by the Administration Charge.

Ehrlich Affidavit at para 88 and Exhibit "F".

PART V - RELIEF REQUESTED

59. The Foreign Representative requests that this Court grant the Initial Recognition Order and the Supplemental Order substantially in the forms included in the Application Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 11th day of July, 2022.

FASKEN MARTINEAU DuMOULIN LLP



Lawyers for the Applicant

SCHEDULE “A”

LIST OF AUTHORITIES

1. *Hollander Sleep Products, LLC (Re)*, 2019 ONSC 3238
2. *Payless Holdings LLC, (Re)*, 2017 ONSC 2242
3. *Zochem Inc (Re)*, 2016 ONSC 958
4. *CHC Group Ltd (Re)*, 2016 BCSC 2623
5. *Massachusetts Elephant & Castle Group, Inc (Re)*, 2011 ONSC 4201
6. *Magna Entertainment Corp (Re)*, [2009] 51 CBR (5th) 82 (Ont Sup Ct J)
7. Endorsement of Hainey J dated October 16, 2020 in *Mallinckrodt Canada ULC et al*, court file no CV-20-00649441-00CL
8. Supplemental Order (Foreign Main Proceeding) dated March 12, 2021, granted by Cavanagh J in *Knotel, Inc and Knotel Canada, Inc*, court file no CV-21-00658434-00CL
9. Supplemental Order (Foreign Main Proceeding) dated April 14, 2022, granted by Conway J in *Sungard Availability Services (Canada) Ltd/Sungard, Services de Coninuité des Affaires (Canada) Ltée*, Court File No CV-22-00679628-00CL
10. *Canwest Publishing Inc*, 2010 ONSC 222

SCHEDULE “B”

TEXT OF STATUTES, REGULATIONS & BY-LAWS

Companies’ Creditors Arrangement Act, RSC 1985, c C-36

PART IV

Cross-border Insolvencies

Purpose

Purpose

44 The purpose of this Part is to provide mechanisms for dealing with cases of cross-border insolvencies and to promote

- (a) cooperation between the courts and other competent authorities in Canada with those of foreign jurisdictions in cases of cross-border insolvencies;
- (b) greater legal certainty for trade and investment;
- (c) the fair and efficient administration of cross-border insolvencies that protects the interests of creditors and other interested persons, and those of debtor companies;
- (d) the protection and the maximization of the value of debtor company’s property; and
- (e) the rescue of financially troubled businesses to protect investment and preserve employment.

Interpretation

Definitions

45 (1) The following definitions apply in this Part.

foreign court means a judicial or other authority competent to control or supervise a foreign proceeding. (tribunal étranger)

foreign main proceeding means a foreign proceeding in a jurisdiction where the debtor company has the centre of its main interests. (principale)

foreign non-main proceeding means a foreign proceeding, other than a foreign main proceeding. (secondaire)

foreign proceeding means a judicial or an administrative proceeding, including an interim proceeding, in a jurisdiction outside Canada dealing with creditors’ collective interests generally under any law relating to bankruptcy or insolvency in which a debtor company’s business and financial affairs are subject to control or supervision by a foreign court for the purpose of reorganization. (instance étrangère)

foreign representative means a person or body, including one appointed on an interim basis, who is authorized, in a foreign proceeding respect of a debtor company, to

- (a) monitor the debtor company’s business and financial affairs for the purpose of reorganization; or
- (b) act as a representative in respect of the foreign proceeding. (représentant étranger)

Centre of debtor company’s main interests

(2) For the purposes of this Part, in the absence of proof to the contrary, a debtor company’s registered office is deemed to be the centre of its main interests.

Recognition of Foreign Proceeding

Application for recognition of a foreign proceeding

46 (1) A foreign representative may apply to the court for recognition of the foreign proceeding in respect of which he or she is a foreign representative.

Documents that must accompany application

(2) Subject to subsection (3), the application must be accompanied by

- (a)** a certified copy of the instrument, however designated, that commenced the foreign proceeding or a certificate from the foreign court affirming the existence of the foreign proceeding;
- (b)** a certified copy of the instrument, however designated, authorizing the foreign representative to act in that capacity or a certificate from the foreign court affirming the foreign representative's authority to act in that capacity; and
- (c)** a statement identifying all foreign proceedings in respect of the debtor company that are known to the foreign representative.

Documents may be considered as proof

(3) The court may, without further proof, accept the documents referred to in paragraphs (2)(a) and (b) as evidence that the proceeding to which they relate is a foreign proceeding and that the applicant is a foreign representative in respect of the foreign proceeding.

Other evidence

(4) In the absence of the documents referred to in paragraphs (2)(a) and (b), the court may accept any other evidence of the existence of the foreign proceeding and of the foreign representative's authority that it considers appropriate.

Translation

(5) The court may require a translation of any document accompanying the application.

Order recognizing foreign proceeding

47 (1) If the court is satisfied that the application for the recognition of a foreign proceeding relates to a foreign proceeding and that the applicant is a foreign representative in respect of that foreign proceeding, the court shall make an order recognizing the foreign proceeding.

Nature of foreign proceeding to be specified

(2) The court shall specify in the order whether the foreign proceeding is a foreign main proceeding or a foreign non-main proceeding.

Order relating to recognition of a foreign main proceeding

48 (1) Subject to subsections (2) to (4), on the making of an order recognizing a foreign proceeding that is specified to be a foreign main proceeding, the court shall make an order, subject to any terms and conditions it considers appropriate,

- (a)** staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken against the debtor company under the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act;

- (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the debtor company;
- (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the debtor company; and
- (d) prohibiting the debtor company from selling or otherwise disposing of, outside the ordinary course of its business, any of the debtor company's property in Canada that relates to the business and prohibiting the debtor company from selling or otherwise disposing of any of its other property in Canada.

Scope of order

- (2) The order made under subsection (1) must be consistent with any order that may be made under this Act.

When subsection (1) does not apply

- (3) Subsection (1) does not apply if any proceedings under this Act have been commenced in respect of the debtor company at the time the order recognizing the foreign proceeding is made.

Application of this and other Acts

- (4) Nothing in subsection (1) precludes the debtor company from commencing or continuing proceedings under this Act, the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act in respect of the debtor company.

Other orders

- 49 (1)** If an order recognizing a foreign proceeding is made, the court may, on application by the foreign representative who applied for the order, if the court is satisfied that it is necessary for the protection of the debtor company's property or the interests of a creditor or creditors, make any order that it considers appropriate, including an order
- (a) if the foreign proceeding is a foreign non-main proceeding, referred to in subsection 48(1);
 - (b) respecting the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor company's property, business and financial affairs, debts, liabilities and obligations; and
 - (c) authorizing the foreign representative to monitor the debtor company's business and financial affairs in Canada for the purpose of reorganization.

Restriction

- (2) If any proceedings under this Act have been commenced in respect of the debtor company at the time an order recognizing the foreign proceeding is made, an order made under subsection (1) must be consistent with any order that may be made in any proceedings under this Act.

Application of this and other Acts

- (3) The making of an order under paragraph (1)(a) does not preclude the commencement or the continuation of proceedings under this Act, the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act in respect of the debtor company.

Terms and conditions of orders

- 50** An order under this Part may be made on any terms and conditions that the court considers appropriate in the circumstances.

Commencement or continuation of proceedings

51 If an order is made recognizing a foreign proceeding, the foreign representative may commence and continue proceedings under this Act in respect of a debtor company as if the foreign representative were a creditor of the debtor company, or the debtor company, as the case may be.

Obligations

Cooperation — court

52 (1) If an order recognizing a foreign proceeding is made, the court shall cooperate, to the maximum extent possible, with the foreign representative and the foreign court involved in the foreign proceeding.

Cooperation — other authorities in Canada

(2) If any proceedings under this Act have been commenced in respect of a debtor company and an order recognizing a foreign proceeding is made in respect of the debtor company, every person who exercises powers or performs duties and functions under the proceedings under this Act shall cooperate, to the maximum extent possible, with the foreign representative and the foreign court involved in the foreign proceeding.

Forms of cooperation

- (3)** For the purpose of this section, cooperation may be provided by any appropriate means, including
- (a)** the appointment of a person to act at the direction of the court;
 - (b)** the communication of information by any means considered appropriate by the court;
 - (c)** the coordination of the administration and supervision of the debtor company's assets and affairs;
 - (d)** the approval or implementation by courts of agreements concerning the coordination of proceedings; and
 - (e)** the coordination of concurrent proceedings regarding the same debtor company.

Obligations of foreign representative

- 53** If an order recognizing a foreign proceeding is made, the foreign representative who applied for the order shall
- (a)** without delay, inform the court of
 - (i)** any substantial change in the status of the recognized foreign proceeding,
 - (ii)** any substantial change in the status of the foreign representative's authority to act in that capacity, and
 - (iii)** any other foreign proceeding in respect of the same debtor company that becomes known to the foreign representative; and
 - (b)** publish, without delay after the order is made, once a week for two consecutive weeks, or as otherwise directed by the court, in one or more newspapers in Canada specified by the court, a notice containing the prescribed information.

Multiple Proceedings

Concurrent proceedings

54 If any proceedings under this Act in respect of a debtor company are commenced at any time after an order recognizing the foreign proceeding is made, the court shall review any order made under section 49 and, if it determines that the order is inconsistent with any orders made in the proceedings under this Act, the court shall amend or revoke the order.

Multiple foreign proceedings

55 (1) If, at any time after an order is made in respect of a foreign non-main proceeding in respect of a debtor company, an order recognizing a foreign main proceeding is made in respect of the debtor company, the court shall review any order made under section 49 in respect of the foreign non-main proceeding and, if it determines that the order is inconsistent with any orders made under that section in respect of the foreign main proceedings, the court shall amend or revoke the order.

Multiple foreign proceedings

(2) If, at any time after an order is made in respect of a foreign non-main proceeding in respect of the debtor company, an order recognizing another foreign non-main proceeding is made in respect of the debtor company, the court shall, for the purpose of facilitating the coordination of the foreign non-main proceedings, review any order made under section 49 in respect of the first recognized proceeding and amend or revoke the order if it considers it appropriate.

Miscellaneous Provisions

Authorization to act as representative of proceeding under this Act

56 The court may authorize any person or body to act as a representative in respect of any proceeding under this Act for the purpose of having them recognized in a jurisdiction outside Canada.

Foreign representative status

57 An application by a foreign representative for any order under this Part does not submit the foreign representative to the jurisdiction of the court for any other purpose except with regard to the costs of the proceedings, but the court may make any order under this Part conditional on the compliance by the foreign representative with any other order of the court.

Foreign proceeding appeal

58 A foreign representative is not prevented from making an application to the court under this Part by reason only that proceedings by way of appeal or review have been taken in a foreign proceeding, and the court may, on an application if such proceedings have been taken, grant relief as if the proceedings had not been taken.

Presumption of insolvency

59 For the purposes of this Part, if an insolvency or a reorganization or a similar order has been made in respect of a debtor company in a foreign proceeding, a certified copy of the order is, in the absence of evidence to the contrary, proof that the debtor company is insolvent and proof of the appointment of the foreign representative made by the order.

Credit for recovery in other jurisdictions

60 (1) In making a compromise or an arrangement of a debtor company, the following shall be taken into account in the distribution of dividends to the company's creditors in Canada as if they were a part of that distribution:

- (a)** the amount that a creditor receives or is entitled to receive outside Canada by way of a dividend in a foreign proceeding in respect of the company; and
- (b)** the value of any property of the company that the creditor acquires outside Canada on account of a provable claim of the creditor or that the creditor acquires outside Canada by way of a transfer that, if it were subject to this Act, would be a preference over other creditors or a transfer at undervalue.

Restriction

(2) Despite subsection (1), the creditor is not entitled to receive a dividend from the distribution in Canada until every other creditor who has a claim of equal rank in the order of priority established under this Act has received a dividend whose amount is the same percentage of that other creditor's claim as the aggregate of the amount referred to in paragraph (1)(a) and the value referred to in paragraph (1)(b) is of that creditor's claim.

Court not prevented from applying certain rules

61 (1) Nothing in this Part prevents the court, on the application of a foreign representative or any other interested person, from applying any legal or equitable rules governing the recognition of foreign insolvency orders and assistance to foreign representatives that are not inconsistent with the provisions of this Act.

Public policy exception

(2) Nothing in this Part prevents the court from refusing to do something that would be contrary to public policy.

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF VOYAGER DIGITAL LTD.

APPLICATION OF VOYAGER DIGITAL LTD. UNDER SECTION 46 OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

Court File No. CV-22-00683820-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

**Proceeding commenced at
Toronto**

FACTUM OF THE APPLICANT

FASKEN MARTINEAU DuMOULIN LLP

Barristers and Solicitors
333 Bay Street, Suite 2400
Bay Adelaide Centre, Box 20
Toronto ON M5H 2T6

Stuart Brotman (LSO: 43430D)

sbrotman@fasken.com
Tel: 416 865 5419

Aubrey Kauffman (LSO: 18829N)

akauffman@fasken.com
Tel: 416 868 3538

Daniel Richer (LSO: 75225G)

driche@fasken.com
Tel: 416 865 4445

Mitch Stephenson (LSO: 73064H)

mstephenson@fasken.com
Tel: 416 868 3502

Lawyers for the Applicant