

**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, VOYAGER DIGITAL LTD.
(Supporting the Second Recognition Motion and Opposing the De Sousa Motion)**

August 10, 2022

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TO: THE SERVICE LIST

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PART I - OVERVIEW

Introduction

1. This factum is submitted in support of the motion of Voyager Digital Ltd. as the Foreign Representative (defined below) returnable August 11, 2022 for an order recognizing certain orders of the U.S. Bankruptcy Court (defined below) and giving them full force and effect in Canada.

2. This factum is also submitted in opposition to the motion of Francine De Sousa returnable August 11, 2022.

PART II - FACTS

Background

3. 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 commenced by VDL in the United States Bankruptcy Court for the Southern District of New York (the “**U.S. Bankruptcy Court**”), brings this motion (the “**Second Recognition Motion**”) for, among other relief, an order recognizing certain orders entered by the U.S. Bankruptcy Court in the Chapter 11 Case.

Second Affidavit of Stephen Ehrlich sworn August 6, 2022, Motion Record of the Applicant, Voyager Digital Ltd., dated August 6, 2022, Tab 3 (“Ehrlich Affidavit”) at paras 3–4.

4. VDL is incorporated under the *Business Corporations Act* (British Columbia) and its shares have traded on the Toronto Stock Exchange since 2021. VDL’s 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 7–9.

5. On July 5, 2022, VDL commenced the Chapter 11 Case upon filing a voluntary petition for relief under the U.S. Bankruptcy Code in the U.S. Bankruptcy Court. 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—at this time, recognition of these cases has not been sought in Canada.

Ehrlich Affidavit at paras 10–11.

6. Contemporaneously with the commencement of the Chapter 11 Case, the Debtors filed motions seeking, among other things, certain orders of the U.S. Bankruptcy Court (the “**First Day Orders**”), including an order authorizing and approving the appointment of Stretto, Inc. as claims and noticing agent and granting related relief (the “**Stretto Appointment Order**”). The Debtors’ motions for, among other things, the First Day Orders were heard on July 8, 2022 (the “**First Day Hearing**”). Following the First Day Hearing, the U.S. Bankruptcy Court granted the First Day Orders.

Ehrlich Affidavit at paras 12–14.

7. On July 8, 2022, the Foreign Representative commenced this application (the “**Canadian Proceeding**”) under Part IV of the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the “**CCAA**”), seeking:

- (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 (“**COMI**”) of VDL is 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; and

- (b) a supplemental order (foreign main proceeding), among other things,
 - (i) recognizing the First Day Orders, (ii) appointing Alvarez & Marsal Canada Inc. (“**A&M**”) as information officer in respect of these proceedings (in such capacity, the “**Information Officer**”) and (iii) granting a charge for the benefit of VDL’s legal counsel, the Information Officer and the Information Officer’s legal counsel in the amount of \$500,000 (the “**Administration Charge**”)

Ehrlich Affidavit at para 15.

8. At a hearing held on July 12, 2022 (the “**Initial Recognition Hearing**”), this Court granted the following orders:

- (a) an initial recognition order (the “**Initial Recognition Order**”), among other things
 - (i) recognizing VDL as the Foreign Representative in respect of the Chapter 11 Cases, (ii) recognizing the Chapter 11 Case as a “foreign proceeding” and (iii) ordering mandatory relief set out in section 48(1) of the CCAA—as described further below, the Court neither declared the U.S. as the COMI for VDL nor recognized the Chapter 11 Case as a “foreign main proceeding” at the Initial Recognition Hearing; and
- (b) a supplemental order (foreign main proceeding) (the “**Supplemental Order**”), among other things, (i) recognizing the First Day Orders except the Stretto Appointment Order, which had not been entered by the U.S. Bankruptcy Court

before the Initial Recognition Hearing, (ii) appointing A&M as Information Officer and (iii) granting the Administration Charge;

Ehrlich Affidavit at para 16.

9. At the Initial Recognition Hearing, Ms. Francine De Sousa, the plaintiff in a proposed class action who wishes to represent a putative class of VDL equity holders (“**Ms. De Sousa**”), raised issue with certain relief sought by the Foreign Representative, namely (i) the declaration that VDL’s COMI is the U.S. and (ii) the recognition of the Chapter 11 Case as a “foreign main proceeding” under Part IV of the CCAA (together, the “**Adjourned Relief**”); this Court directed that submissions in support and in opposition to the Adjourned Relief were to be heard on July 19, 2022.

Ehrlich Affidavit at para 17.

10. Submissions for and against the Adjourned Relief were heard on July 19, 2022, and on August 4, 2022, this Court released a decision declaring that VDL’s COMI is the U.S. and recognizing the Chapter 11 Case as a “foreign main proceeding” under Part IV of the CCAA (the “**Adjourned Relief Endorsement**”). An amended and restated version of the Initial Recognition Order reflecting the Adjourned Relief Endorsement was signed by this Court on August 5, 2022 (the “**Amended and Restated Initial Recognition Order**”).

Ehrlich Affidavit at para 18.

11. On August 4, 2022, the Debtors’ motions for certain second day orders were heard by the U.S. Bankruptcy Court (the “**Second Day Hearing**”). On or around the Second Day

Hearing, the U.S Bankruptcy Court granted the orders sought by the Debtors on their motions, in some cases with amendments (the “**Second Day Orders**”).

Affidavit of Raajan Aery sworn August 6, 2022, Motion Record of the Applicant, Voyager Digital Ltd., dated August 6, 2022, Tab 4 (“Aery Affidavit”) at para 4.

12. The Foreign Representative brings this Second Recognition Motion to request that this Court grant an order recognizing, and giving full force and effect to, the following Second Day Orders (together with the Stretto Appointment Order, the “**Additional U.S. Orders**”):

- (i) final order (I) authorizing Debtors to (A) pay their obligations under prepetition insurance policies, (B) continue to pay certain brokerage fees, (C) renew, supplement, modify, or purchase insurance coverage, and (D) maintain their surety bond program; and (II) granting related relief;
- (ii) final order (I) approving notification and hearing procedures for certain transfers of and declarations of worthlessness with respect to common stock; and (II) granting related relief;
- (iii) final order (I) authorizing the Debtors to (A) pay prepetition employee wages, salaries, other compensation, and reimbursable expenses and (B) continue employee benefits programs; and (II) granting related relief;
- (iv) second interim order (I) authorizing the Debtors to (A) continue to operate the Cash Management System (defined below), (B) honor certain prepetition obligations related thereto, (C) maintain existing business forms, and (D) continue to perform Intercompany Transactions (defined

below); (II) granting superpriority administrative expense status to postpetition intercompany balances; and (III) granting related relief;

(v) final order (I) authorizing the payment of certain taxes and fees; and (II) granting related relief;

(vi) order authorizing the retention and compensation of professionals utilized in the ordinary course of business;

(vii) order (I) setting deadlines for submitting proofs of claim; (II) approving procedures for submitting proofs of claim; and (III) approving notice thereof; and

(viii) order (I) approving the bidding procedures; (II) scheduling the bid deadlines and the auction; (III) approving the form and manner of notice thereof; (IV) scheduling hearings and objection deadlines with respect to the Debtors' sale, disclosure statement, and plan confirmation; and (V) granting related relief.

Aery Affidavit at para 4.

13. Ms. De Sousa has brought a motion to be heard contemporaneously with the Second Recognition Motion (the “**De Sousa Motion**”) for, among other relief:

(a) production by VDL of (i) insurance policies that may be responsive to Ms. De Sousa's claim and (ii) details of intercorporate funding arrangements between VDL and its subsidiaries;

- (b) an order amending the Supplemental Order to (i) remove paragraph 10 (*i.e.*, the stay of proceedings against VDL's directors and officers), (ii) include so-called additional duties for the Information Officer, (iii) include a provision tolling prescription, time or limitation periods relating to certain rights as against VDL and in respect of Ms. De Sousa's action; and
- (c) an order (i) appointing the Siskinds LLP and Aird & Berlis LLP firms as representative counsel for all securities claimants and current shareholders of VDL to be funded by a charge on VDL's estate or other similar financial arrangement and (ii) authorizing the creation of an equity committee from which the proposed representative counsel will take instruction.

Notice of Motion of Francine De Sousa dated August 4, 2022, Motion Record of Francine De Sousa dated August 4, Tab 1.

14. Upon reviewing the factum filed by Ms. De Sousa in support of the De Sousa Motion, it appears that Ms. De Sousa is no longer pursuing the relief described at paragraph 13(a)(ii) and 13(b)(ii) above.

Factum of Francine De Sousa dated August 10, 2022 ("De Sousa Factum") at para 9.

PART III - ISSUES

15. The issues to be determined by this Court are:
- (a) whether the Additional U.S. Orders should be recognized and given full force and effect in Canada; and
 - (b) whether the relief sought on the De Sousa Motion should be granted.

PART IV - LAW & ARGUMENT

Issue 1 – The Additional U.S. Orders should be Recognized and Given Full Force and Effect in Canada

16. The Second Day Orders were granted on or around the Second Day Hearing. Various stakeholders of the Debtors appeared at the Second Day Hearing and opposed certain relief provided by the Second Day Orders. Mr. Steve Graff of Aird & Berlis LLP (insolvency counsel representing Ms. De Sousa in these proceedings) appeared on behalf of Ms. De Sousa and was permitted to make submissions to the U.S. Bankruptcy Court; Mr. Graff opposed some of the relief sought at the Second Day Hearing. After hearing submissions from the Debtors and the other parties present at the Second Day Hearing, the U.S. Bankruptcy Court made the Second Day Orders, in some cases with some amendments.

Answers to Written Interrogatories in Lieu of Cross-Examination on the Affidavit of Francine De Sousa sworn August 3, 2022 and the Affidavit of Tamie Dolny sworn August 4, 2022 dated August 6, 2022, Motion Record of the Applicant, Voyager Digital Ltd., Tab 5 (“Answers to Written Interrogatories”) at question and answer 6.

17. The Foreign Representative is seeking to have the Additional U.S. Orders recognized and given full force and effect in Canada. The Additional U.S. Orders are described in the second affidavit of Stephen Ehrlich sworn August 6, 2022 and in the first report of the Information Officer dated August 8, 2022 (the “**First Report**”). The Additional U.S. Orders are all typical orders granted in the ordinary course in proceedings similar to the Chapter 11 Case. As set out in the First Report, the Information Officer is supportive of the relief sought on the Second Recognition Motion. The Applicant is not aware of any opposition to such relief.

Ehrlich Affidavit at paras 20–30; First Report of the Information Officer, Alvarez & Marsal Canada Inc. dated August 8, 2022 (“First Report”) at para 10 and Appendix “F”.

18. This Court should recognize the Additional U.S. Orders and give them full force and effect in Canada. They were made in the Chapter 11 Case, VDL’s plenary restructuring proceeding, which has been recognized by this Court as a foreign main proceeding. The Additional U.S. Orders are not contrary to Canadian public policy.

Issue 2 – The Relief Sought on the De Sousa Motion Should Not Be Granted

Who is Ms. De Sousa?

19. Ms. De Sousa purports to be a shareholder holding 13,000 shares of VDL.

Affidavit of Francine De Sousa sworn August 3, 2022, Motion Record of Francine De Sousa dated August 4, 2022, Tab 5 (“De Sousa Affidavit”) at para 10.

20. Ms. De Sousa is also the proposed representative plaintiff of a putative class of VDL shareholders who acquired their shares in the secondary markets, which class action has not been certified. Ms. De Sousa’s action was commenced by notice of action issued July 6, 2022, the day after the Chapter 11 Case was commenced.

Notice of De Sousa Action, Affidavit of Tamie Dolny sworn August 4, 2022, Motion Record of Francine De Sousa dated August 4, 2022 at Exhibit “R”.

21. The claims asserted by Ms. De Sousa in her action are contingent. In fact, Ms. De Sousa’s claims have not even been pleaded as no statement of claim has been served. Furthermore, a substantial portion of the allegations proffered by or on behalf of Ms. De Sousa in support of the

De Sousa Motion are not based upon the affiants' personal knowledge; Ms. De Sousa and Ms. Tamie Donly do not swear to the truth of such allegations.

Answers to Written Interrogatories at question and answer 7.

22. Ms. De Sousa's claims with respect to her purported shareholdings and the claims she asserts in her action would all be equity claims under Canadian insolvency law for which she and the class members who she wishes to represent would only be entitled to payment after all of VDL's creditors are repaid in full, including the USD\$75,000,000 guarantee claim of Alameda Ventures Ltd.

[Companies' Creditors Arrangement Act, RSC 1985, c C-36 at s 6\(8\).](#)

23. Ms. De Sousa's request for the appointment of representative counsel for VDL's equity holders funded by VDL's estate, which request is discussed further below, would reorder priorities by using estate assets that should be available first to satisfy creditors for the benefit of holders of subordinate equity claims.

The Information Production Requests

24. Ms. De Sousa is seeking the production of insurance policies covering VDL's directors and officers and details on certain intercorporate transactions involving VDL.

25. The Information Officer has addressed intercorporate transactions involving VDL in the First Report. The factum filed by Ms. De Sousa in support of the De Sousa Motion indicates that she is no longer seeking relief related to the production of such information.

First Report at paras 4.13 & 4.19–4.20.

26. With respect to the production of insurance policies covering VDL's directors and officers, such policies have been provided to the Information Officer on a privileged and confidential basis and have been produced to stakeholders in the Chapter 11 Case on a professionals' eyes only and confidential basis while the terms of a protective order to be entered by the U.S. Bankruptcy Court are negotiated; VDL is willing to provide the policies to Ms. De Sousa in the Chapter 11 Case (as she is a stakeholder in the proceeding) subject to the same rules.

Removal of the D&O Stay Is Not Appropriate and Should Be Denied

27. The Supplemental Order stays proceedings against VDL's directors and officers (the "**D&O Stay**"). The D&O Stay was made under this Court's original jurisdiction to grant stays of proceedings pursuant to Part IV of the CCAA.

Ehrlich Affidavit, Exhibit "B" at para 10.

28. The D&O Stay language in the Supplemental Order corresponds to the standard language for stays of proceedings against directors and officers in the model supplemental order (foreign main proceeding) approved for use before the Commercial List.

**Blackline from Model Supplemental Order to Draft Supplemental Order,
Application Record dated July 11, Tab 5 at para 10.**

29. As set out in the First Report, the Debtors will be filing a motion before the U.S. Bankruptcy Court for an order staying Ms. De Sousa's action and the claims against VDL's directors and officers set out therein.

First Report at para 7.4.

30. Ms. De Sousa's request to delete the D&O Stay from the Supplemental Order should be considered at a later date given (i) the Debtors' motion to the U.S. Bankruptcy Court and (ii) that Ms. De Sousa's action is the only action commenced against VDL's directors and officers in Canada.

Request to Appoint Representative Counsel Should Be Denied

31. Ms. De Sousa is seeking to have her legal counsel appointed as representative counsel to VDL's equity holders to be funded by VDL's estate and to have an equity committee created in the Canadian Proceeding.

32. VDL's Chapter 11 Case, which has been recognized as a foreign main proceeding by this Court, is a plenary proceeding and the U.S. Bankruptcy Court is the forum in which the restructuring of VDL and the other Debtors will take place. The Chapter 11 cases of VDL and the other Debtors have been administratively—but not substantively—consolidated. This Court recognized VDL's Chapter 11 Case. The Foreign Representative has not sought recognition in Canada of the Chapter 11 cases of the other Debtors at this time.

Ehrlich Affidavit at para 11; Amended and Restated Initial Recognition Order, First Report at Appendix "B"; Joint Administration Order, Affidavit of Mitchell Stephenson sworn July 11, 2022, Application Record dated July 11, Tab 7 at Exhibit "C".

33. The Canadian Proceeding is ancillary to the plenary Chapter 11 cases of all Debtors. Appointing representative counsel for VDL's equity holders, or any stakeholders, and creating an equity committee in VDL's Canadian ancillary proceedings would be ineffective and would have the backward result of requiring such representative counsel and equity committee to seek recognition by the U.S. Bankruptcy Court (the court with principal jurisdiction over the Debtors'

restructuring) of an order of the Canadian court in ancillary proceedings. Essentially, were this Court to make an order appointing representative counsel and creating an equity committee in the Canadian Proceeding, such order would automatically not give such representative counsel or equity committee standing before the U.S. Bankruptcy Court or in the Chapter 11 Case.

34. If such an appointment is to be made, it should be made by the U.S. Bankruptcy Court at first instance on a motion brought and served on the stakeholders appearing and represented in the Debtors' plenary Chapter 11 cases. Those Chapter 11 cases are where the restructuring of the Debtors is taking place, and the U.S. Bankruptcy Court is the forum where the stakeholders with an interest in the relief sought are substantially engaged.

35. In the modern world, businesses operate internationally. When challenges push such an international business toward insolvency, the best solution for the business and its stakeholders is often an international one. For that reason, cross-border insolvency protocols were developed. The U.S. and Canada each have legislation that substantially adopts the UNCITRAL Model Law on Cross-Border Insolvency, namely Chapter 15 of the U.S. Bankruptcy Code and Part IV of the CCAA. Such legislation, and other legislation like it, provides a framework that promotes the efficient and fair administration of cross-border, multi-jurisdictional restructurings.

36. The one case cited by Ms. De Sousa as precedent for the appointment of representative counsel for equity holders in U.S.-Canada cross-border proceedings, *Re Grace Canada Inc.*, concerned proceedings governed by former section 18.6 of the CCAA and not by Part IV of the CCAA as the amendments creating that part were not yet in force. Former section

18.6 of the CCAA did not incorporate the concept of “foreign main proceeding” or “foreign non-main proceeding”.

[Re Grace Canada, Inc, 2008 CanLII 54779 \(Ont Sup Ct J\); Companies' Creditors Arrangement Act, RSC 1985, c C-36 \(past version in force before September 18, 2009\) at s 18.6.](#)

37. In this case, the cross-border insolvency protocols adopted in Canada found in Part IV of the CCAA should be followed—appointment of representative counsel for, and creation of an equity committee of, VDL’s equity holders should not be ordered in the Canadian Proceeding.

38. For the reasons stated above, funding should not be provided to any representative counsel appointed in the Canadian Proceeding.

PART V - RELIEF SOUGHT

39. The Foreign Representative requests that this Court:

- (a) grant an order substantially in the form of the draft recognition order included in the motion record filed in connection with the Second Recognition Motion;
- (b) dismiss the De Sousa Motion; and
- (c) grant such further and other relief as this Honourable Court may deem just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 10th day of August, 2022.

FASKEN MARTINEAU DuMOULIN LLP

A handwritten signature in blue ink, consisting of a stylized 'S' followed by a horizontal line and a small flourish.

Lawyers for the Applicant

SCHEDULE “A”
LIST OF AUTHORITIES

N/A.

SCHEDULE “B”

TEXT OF STATUTES, REGULATIONS & BY - LAWS

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

Payment – equity claims

6 (8) No compromise or arrangement that provides for the payment of an equity claim is to be sanctioned by the court unless it provides that all claims that are not equity claims are to be paid in full before the equity claim is to be paid.

Companies’ Creditors Arrangement Act, RSC 1985, c C-36 (past version in force before September 18, 2009)

INTERNATIONAL INSOLVENCIES

Definitions

18.6 (1) In this section,

“**foreign proceeding**” means a judicial or administrative proceeding commenced outside Canada in respect of a debtor under a law relating to bankruptcy or insolvency and dealing with the collective interests of creditors generally;

“**foreign representative**” means a person, other than a debtor, holding office under the law of a jurisdiction outside Canada who, irrespective of the person’s designation, is assigned, under the laws of the jurisdiction outside Canada, functions in connection with a foreign proceeding that are similar to those performed by a trustee in bankruptcy, liquidator or other administrator appointed by the court.

Powers of court

(2) The court may, in respect of a debtor company, make such orders and grant such relief as it considers appropriate to facilitate, approve or implement arrangements that will result in a co-ordination of proceedings under this Act with any foreign proceeding.

Terms and conditions of orders

(3) An order of the court under this section may be made on such terms and conditions as the court considers appropriate in the circumstances.

Court not prevented from applying certain rules

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

Court not compelled to give effect to certain orders

(5) Nothing in this section requires the court to make any order that is not in compliance with the laws of Canada or to enforce any order made by a foreign court.

Court may seek assistance from foreign tribunal

(6) The court may seek the aid and assistance of a court, tribunal or other authority in a foreign proceeding by order or written request or otherwise as the court considers appropriate.

Foreign representative status

(7) An application to the court by a foreign representative under this section 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 section conditional on the compliance by the foreign representative with any other order of the court.

Claims in foreign currency

(8) Where a compromise or arrangement is proposed in respect of a debtor company, a claim for a debt that is payable in a currency other than Canadian currency shall be converted to Canadian currency as of the date of the first application made in respect of the company under section 10 unless otherwise provided in the proposed compromise or arrangement.

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

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**Proceeding commenced at
Toronto**

**FACTUM OF THE APPLICANT,
VOYAGER DIGITAL LTD.**

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