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

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 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

REPLY FACTUM OF THE APPLICANT

July 16, 2022

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TO: **THE SERVICE LIST**

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REPLY FACTUM OF THE APPLICANT

1. VDL submits this factum in reply to the responding materials of Francine De Sousa ("**Ms. De Sousa**"), who is requesting that this Court declare that VDL's "centre of main interest" is Canada and recognize the Chapter 11 Case as a "foreign non-main proceeding".

2. VDL repeats and relies upon the facts and arguments set out in its factum filed in this proceeding on July 11, 2022 (the "**First Factum**"). Capitalized terms not defined herein have the meanings given to them in the First Factum.

The Claim Asserted by Ms. De Sousa

3. Ms. De Sousa is the plaintiff in a proposed class action in which she desires to represent equity holders of VDL that invested in Voyager's business ("**Equity Holders**").[1] Ms. De Sousa initiated her action by issuance of a notice of action on July 6, 2022 (the day after VDL

[1] In reorganizations under the CCAA, equity claims can only be paid if all other clams against the debtor, including those of unsecured creditors, have been paid: *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, s 6(8). Equity claims include claims asserted by shareholders through litigation: *Sino-Forest Corporation (Re)*, 2012 ONCA 816.

and the other Chapter 11 debtors filed their Chapter 11 petitions. The proposed class action has not been certified.

Affidavit of Stephen Ehrlich sworn July 10, 2022 ("Ehrlich Affidavit") at Exhibit "G", Application Record, Tab 6.

4. None of the allegations asserted by Ms. De Sousa have been proven. There is no evidence before this Court in support of any allegation of Ms. De Sousa. In her response to this Application, Ms. De Sousa does not assert that her allegations are actually a fact. For example, she states at paragraph 5 of her factum, "The Canadian Debtor is potentially implicated in inappropriate conduct that violates Canadian securities legislation in multiple provincial jurisdictions." [Emphasis added.]

5. Ms. De Sousa mounts her position on this application on two foundational assertions: (i) that if the Chapter 11 Case is recognized as a "foreign main proceeding", Canadian securities regulators and police would be prohibited from carrying out their investigative functions, and (ii) that if the Chapter 11 Case is recognized as a "foreign main proceeding", Ms. De Sousa and the Equity Holders she wishes to represent will be excluded from participating in the restructuring proceedings of VDL.

6. As demonstrated below, both assertions are incorrect.

Equity Holders Invested in a US Cryptocurrency Business

7. To accept the arguments put forward by Ms. De Sousa would be to ignore the realities of the case. Equity Holders may have purchased shares of a corporation incorporated in British Columbia and listed on the Toronto Stock Exchange (the "**TSX**"), but they invested in a

cryptocurrency business operated exclusively in the U.S. through subsidiaries incorporated in the U.S. (and whose shares traded not only on the TSX but also on the OTCQX in the U.S.).

Affidavit of Rory Smith affirmed July 14, 2022 ("Smith Affidavit") at Exhibit "B" at pp 2, 8 & 36, Responding Application Record of the Proposed Class Action Plaintiff, Tab 1B; Ehrlich Affidavit at para 35, Application Record, Tab 6.

8. The short form base shelf prospectus dated August 17, 2021 (the "**Prospectus**") referred to and relied upon by Ms. De Sousa at paragraph 13 of her factum makes this reality clear. Not only does it state clearly that VDL's "principal place of business is in the United States", but it also includes the following statements:

(a) at page 22 of the Prospectus:

> The Company is a corporation formed under the laws of British Columbia, Canada; however its principal place of business is in the United States. Most of the Company's directors and officers, the Company's auditors, and the majority of the Company's assets, are located in the United States.

(b) at page 8 of the Prospectus:

> The Company is a technology company involved in the business of developing and commercializing a digital platform focused on enabling users to buy and sell digital assets (cryptocurrencies) in one account across multiple centralized or decentralized marketplaces that unite and match buyers and sellers of cryptocurrencies. Voyager is a licensed digital asset Money Services Business that provides investors with a turnkey solution to trade digital assets. References in this prospectus, including the documents incorporated by reference herein, to the Company being licensed or registered refer to its status as a Money Services Business in the United States under FinCEN, a bureau of the United States Department of the Treasury. The Company has implement [sic] procedures in order to prevent residents in the provinces and territories of Canada from become [sic] clients or customers of its crypto-asset trading and investing business, these measures include KYC procedures and geofencing the availability of the Voyager app.

> To the best of the Company's knowledge, the Company does not have any clients or customers who are ordinarily resident in, or have immigrated to, Canada. [Emphasis added.]
>
> **Smith Affidavit at Exhibit "B" at p 19, Responding Application Record of the Proposed Class Action Plaintiff, Tab 1B.**

9. Further, as it pertains to the claims that Ms. De Sousa asserts against current and former directors or officers of VDL, six of eight of whom are resident in the U.S.,[2] the Prospectus states at page 22:

> It may be difficult for investors in the United States to effect service of process within the United States upon those directors who are not residents of the United States or to enforce against them judgments of the United States courts based upon civil liability under the United States federal securities laws or the securities laws of any state within the United States. There is doubt as to the enforceability in Canada against the Company or against any of its non-United States directors, in original actions or in actions for enforcement of judgments of United States courts of liabilities based solely upon the United States federal securities laws or securities laws of any state within the United States.
>
> Similarly, it may be difficult for investors in Canada to effect service of process within Canada upon those directors, officers and experts who are residents of the United States, or to enforce against them judgments of the Canadian courts based upon civil liability under Canadian securities laws. There is doubt as to the enforceability in the United States against any of the Company's non-Canadian directors, in original actions or in actions for enforcement of judgments of Canadian courts of liabilities based solely upon Canadian law.
>
> **Smith Affidavit, Exhibit "B" at p 33, Responding Application Record of the Proposed Class Action Plaintiff, Tab 1B.**

[2] In fact, only one of the current directors is a Canadian resident; the remaining five are U.S. residents.

Insolvency Law Favours a Single Proceeding Model

10. Ms. De Sousa's position is effectively that, in the insolvency of an international corporate group, each stakeholder should be entitled to assert claims against the group, or a constituent part thereof, under the laws of that stakeholder's jurisdiction.

11. Such position runs counter to modern conceptions of how insolvency proceedings in general, and cross-border proceedings, including proceedings recognized under Part IV of the CCAA, in particular, ought to operate. Canadian insolvency law promotes and favours a single proceeding model and seeks to avoid multiple proceedings.

> ***Century Services Inc v Canada (Attorney General)*, 2010 SCC 60 at para 22; *Hollander Sleep Products, LLC et al, Re*, 2019 ONSC 3238 [*Hollander*] at para 42.**

12. Ms. De Sousa's proposed approach is akin to the now discredited "territorialism" approach. As held by Justice Newbould in *Re MtGox Co., Ltd.*, the "modified universalism" approach is to be preferred:

> Various theories as to how multinational bankruptcies should be dealt with have long existed. Historically, many countries adopted a territorialism approach under which insolvency proceedings had an exclusively national or territorial focus that allowed each country to distribute the assets located in that country to local creditors in accordance with its local laws. Universalism is a theory that posits that the bankruptcy law to be applied should be that of the debtor's home jurisdiction, that all of the assets of the insolvent corporation, in whichever country they are situated, should be pooled together and administered by the court of the home country. Local courts in other countries would be expected, under universalism, to recognize and enforce the judgment of the home country's court. This theory of universalism has not taken hold.
>
> There is increasingly a move towards what has been called modified universalism. The notion of modified universalism is court recognition of main proceedings in one jurisdiction and non-main proceedings in other jurisdictions, representing some compromise of state sovereignty under domestic proceedings to advance international comity and co-operation. It has been advanced by the United Nations

> Commission on International Trade Law ("UNCITRAL") UNCITRAL Model Law on Cross Border Insolvency (the "Model Law"), which Canada largely adopted by 2009 amendments to the CCAA and the BIA. Before this amendment, Canada had gone far down the road in acting on comity principles in international insolvency. See *Babcock & Wilcox Canada Ltd. (Re)*, 2000 CanLII 22482 (ON SC), [2000] O.J. No. 786, 18 C.B.R. (4th) 157 (S.C.J.) and *Lear Canada (Re)*, 2009 CanLII 37931 (ON SC), [2009] O.J. No. 3030, 55 C.B.R. (5th) 57 (S.C.J.).
>
> ***MtGox Co, Ltd (Re)*, 2014 ONSC 5811 [*MtGox*] at paras 10–11.**

VDL's COMI is in the U.S. and the Chapter 11 Case is a "Foreign Main Proceeding"

13. VDL's COMI is in the U.S. and, consequently, the Chapter 11 Case is a "foreign main proceeding" under Part IV of the CCAA.

Case law is clear on how to establish COMI of a Canadian entity within a corporate group

14. Case law is abundantly clear on how to establish the COMI of a Canadian entity within an international corporate group. COMI is not the jurisdiction where any one claimant or group of claimants resides. This would be unworkable in a business of any meaningful scope. Rather, as set out below, COMI is determined by a number of objective factors focused primarily on the location of the business, assets and operating minds.

15. As set out at paragraphs 34 and 35 in the First Factum, in circumstances such as these 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 Inc (Re)*, 2016 ONSC 958 [*Zochem*] at para 22.**

16. In this case, all three factors must be in the U.S.

17. In addition to these primary considerations, when determining the COMI of a Canadian entity operating as part of a larger corporate group, 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.

***Hollander, supra*, at para 33**; ***CHC Group Ltd (Re)*, 2016 BCSC 2623 at para 9**; ***Massachusetts Elephant & Castle Group, Inc (Re)*, 2011 ONSC 4201 at paras 26–31**.

18. Again, on the facts of this case, the location of all of these criteria is the U.S.

19. The mere fact that the parent company of a U.S. business is incorporated in Canada and listed on a Canadian stock exchange does not alter the analysis. In *Probe Resources*, a case whose facts are remarkably similar to the present case, the debtor was a British Columbia-incorporated, TSX-listed parent company of four U.S.-based operating companies with virtually no presence in Canada. In her reasons for decision, Justice Fitzpatrick of the Supreme Court of British Columbia set out the facts relevant to COMI as follows:

> [2] By way of background, Probe Canada is a British Columbia corporation incorporated pursuant to the Business Corporations Act, S.B.C. 2002, c.57 (the "BCA"). Its registered office is located in Vancouver, British Columbia. It is listed as a public company on the TSX Venture Exchange. As at December 10, 2010, Probe Canada had approximately 106 million issued and outstanding common shares. At present, Probe Canada is subject to a cease trade order issued by securities regulators.
>
> [3] Probe Canada operates through four wholly owned subsidiaries, all of which are incorporated in the U.S. Its business operations include oil and natural gas exploration and production. I am advised that those subsidiaries operate businesses near the Gulf of Mexico in Texas and Louisiana. None of the business operations take place in Canada.
>
> …
>
> [24] In this case, Mr. Gallatin has provided certain evidence in support of his contention that the U.S. is the COMI of Probe Canada and its subsidiaries. Probe Canada and its subsidiaries operate within Texas and Louisiana near the Gulf of Mexico. All of Probe Canada's business operations are through the U.S. subsidiaries. I was referred to consolidated financial statements of Probe Canada and its subsidiaries which indicate that all of the group's revenues are derived in the U.S. and that all of the operating assets are located in the U.S. Only nominal

> assets are located in Canada. All of the operations of Probe Canada, other than administration and organization matters, are in the U.S.
>
> [25] During counsel's submission, it was not apparent what the connection to British Columbia was, apart from Probe Canada's incorporation under the BCA. Although there was no evidence on these matters, I am prepared to accept the submissions of Mr. Reardon on these points. There does not appear to be any physical presence of Probe Canada in British Columbia, or in Canada. I was advised that the registered office of Probe Canada is in fact Mr. Reardon's law offices. Only one of the directors resides in British Columbia. I was not, unfortunately, advised as to where other directors might be located. Finally, I was also advised that the Chief Executive Officer and Chairman of Probe Canada, who was terminated shortly after the appointment of Mr. Gallatin, resided in Texas.
>
> ***Probe Resources Ltd (Re)*, 2011 BCSC 552 [*Probe Resources*] at paras 2–3 & 24–25.**

20. Justice Fitzpatrick went on to concluded that on the above facts, which substantially mirror the facts herein, Probe Canada's Chapter 11 proceeding should be recognized as a "foreign main proceeding" under Part IV of the CCAA:

> In any event, I do agree with Mr. Gallatin. I conclude that, in all of the circumstances, the centre of main interest, or COMI, of Probe Canada and its subsidiaries is in the U.S. and that the Chapter 11 proceedings should be recognized on that basis. Looking objectively at the factors present in this case, I conclude that the legitimate expectations of third parties dealing with the group would consider that U.S. law would govern. These are the stakeholders who stand to be materially affected by the restructuring proceedings in the U.S. Accordingly, I find that the presumption in s. 45(2) of the CCAA has been rebutted in respect of Probe Canada.
>
> ***Probe Resources*, *supra*, at paras 28.**

21. Probe Canada was in the oil business. VDL is in the cryptocurrency business. Apart from this difference which should not impact the determination of COMI, the two cases are near-identical insofar as the test for COMI is concerned.

22. Applying the principles in *Probe Resources* to the facts of this case can only produce one result: VDL's COMI is located in the U.S. and the Chapter 11 Case is a "foreign main

proceeding". The fact that VDL is incorporated in British Columbia and listed on the TSX does nothing to change this.

COMI is not affected by VDL's operation of a cryptocurrency business

23. Ms. De Sousa also cites *Re MtGox Co., Ltd*., apparently for the purpose of highlighting it as exemplar of the purported ills of recognizing the insolvency of a foreign-based cryptocurrency business.

> ***MtGox, supra.***

24. *MtGox* was not appealed. It has not been overturned or limited to its facts. Its authority has not been impugned by a Canadian court. *MtGox* is good law and has been cited by this Court as authority for the application of Part IV of the CCAA, including determinations that foreign insolvency proceedings are "foreign main proceedings".

> ***Zochem, supra*, at para 15**; ***Caesars Entertainment Operating Company, Inc (Re)*, 2015 ONSC 712 at para 33**.

25. *MtGox* concerned the recognition of a Japanese insolvency proceeding of a cryptocurrency exchange as a "foreign main proceeding".

26. MtGox shows that VDL's involvement with a foreign cryptocurrency exchange is not an impediment to this Court's finding that VDL's COMI is in the U.S. or that the Chapter 11 Case is a "foreign main proceeding".

The Foundational Underpinnings of Ms. De Sousa's Position are Wrong

Underpinning (i) - if the Chapter 11 proceeding is recognized as a "foreign main proceeding" Canadian securities regulators and police would be prohibited from carrying out their investigative functions

27. Nothing in the orders granted or recognized by this Court in connection with these CCAA proceedings or the Chapter 11 Case has the effect of prohibiting Canadian securities regulators or police from carrying out their investigative functions. Ms. De Sousa cites no authority providing that such orders have such effect.

28. The sole support proffered by Ms. De Sousa for that statement is a reference to the MtGox case which says no such thing.

29. While it may—or may not—be true that there was no "Canadian police, regulatory or criminal authority involvement" related to the *MtGox* case (this is a bald statement made at paragraph 40 of Ms. De Sousa's factum), this Court is not told why there was not and nothing in the decision provided on behalf of Ms. De Sousa addresses this.

30. At paragraph 40 of her factum, Ms. De Sousa states, "All ongoing litigation and investigations against MtGox were enjoined and halted within Canada." Ms. De Sousa cites paragraph 25 of the *MtGox* decision in support of that statement. In fact, what Justice Newbould actually wrote was:

> The trustee seeks recognition of the Japan bankruptcy proceeding in an effort to maximize recoveries to, and provide for an equitable distribution of value among, all creditors. In particular, the trustee believes that the enjoining of the ongoing litigation against MtGox in Canada, in conjunction with the protections afforded by the Japan bankruptcy proceeding, is essential to this effort.
>
> ***MtGox*, *supra*, at para 25.**

31. Irrespective of what may or may not have occurred in *MtGox*, the Chapter 11 Case in respect of which the Foreign Representative seeks recognition as a "foreign main proceeding" and the orders that it has sought and that have been made and recognized herein are inconsistent with Ms. De Sousa's position.

32. In its Supplemental Order issued July 12, 2022, this Court recognized, among others, an Order of the U.S. Bankruptcy Court, *inter alia*, restating and enforcing the worldwide automatic stay. The operative provision of that Order at paragraph 2 begins with the words "Subject to the exceptions to the automatic stay contained in Bankruptcy Code section 362(b)…". A copy of Section 362 of the U.S. Bankruptcy Code is attached to the Order as Exhibit A. Section 362(b) appears in that Exhibit and states, in part, as follows:

> (b) The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970, does not operate as a stay—
>
> (1) under subsection (a) of this section, of the commencement or continuation of a criminal action or proceeding against the debtor;
>
> …
>
> (25) under subsection (a), of-- (A) the commencement or continuation of an investigation or action by a securities self regulatory organization to enforce such organization's regulatory power; (B) the enforcement of an order or decision, other than for monetary sanctions, obtained in an action by such securities self regulatory organization to enforce such organization's regulatory power; or (C) any act taken by such securities self regulatory organization to delist, delete, or refuse to permit quotation of any stock that does not meet applicable regulatory requirements;
>
> **Order (I) Restating and Enforcing the Worldwide Automatic Stay, Anti-Discrimination Provisions, and *Ipso Facto* Protections of the Bankruptcy Code, (II) Approving the Form and Manner of Notice, and (III) Granting Related Relief, Affidavit of Mitchell Stephenson sworn July 11, 2022 at Exhibit "D" at pp 12 & 16, Application Record, Tab 7D.**

Underpinning (ii) - if the Chapter 11 proceeding of VDL is recognized as a "foreign main proceeding" Ms. De Sousa and the Equity Holders she wishes to represent will be excluded from participating in the restructuring proceedings of VDL

33. Ms. De Sousa also contends that recognizing the Chapter 11 Case as a "foreign main proceeding" will deprive the Equity Holders of representation in the Chapter 11 Case. Again, no authority or other basis is given for this statement.

34. The recognition of the Chapter 11 Case as a "foreign main proceeding" (as opposed to a "foreign non-main proceeding") would not impair the ability of Canadian class action plaintiffs (or any other Canadian stakeholders) to participate in the Chapter 11 Case.

35. Illustrative of the point is the recognition proceeding of LTL Management LLC under Part IV of the CCAA, which is ongoing before this Court. In that proceeding Canadian class action plaintiffs were included in a U.S. Court-ordered mediation. The Order of the U.S. Court ordering a mediation is included in the Third Report of the information officer appointed in the case and includes the following language:

> The following parties (collectively, the "Mediation Parties") are referred to the Mediation: (i) the Debtor and its affiliates; (ii) the TCC, by their member representatives; (iii) Randi Ellis, the Court-appointed Future Talc-Claimants Representative; (iv) the ad hoc committee of states holding consumer protection claims; (v) the insurers identified on Exhibit I attached hereto; (vi) the DiSanto Canadian Class Action Plaintiffs (as defined in Dkt. 2027), the Baker Plaintiffs (as defined in Dkt. 2175), the proposed representative plaintiff in the action styled *Williamson v. Johnson &* Johnson, British Columbia Supreme Court (Case No. 179011), and any other Canadian representative(s), including the Canadian representatives of the other putative classes active in Canada**,** who request to participate in the Mediation and agree to be bound by the terms of this Order if the Co-Mediators determine, in their sole discretion, such additional representative(s) should participate in the Mediation or the Court orders that such representatives should participate; and (vii) any other party who wishes to participate in the Mediation and agrees to be bound by the terms of this Order if the Co-Mediators determine, in their sole discretion, such party should participate in the Mediation.

> Any reference in this Order to a "Mediation Party" shall include each Mediation Party identified in this paragraph irrespective of whether such party participates in any particular Mediation session. [Emphasis added.]
>
> **Third Report of the Information Officer dated May 20, 2022 in *Re LTL Management LLC*, Court File No. CV-21-00673856-00CL at para 17 and Appendix "C" at para 3, Affidavit of Mitchell Stephenson sworn July 16, 2022 at Exhibit "C", Supplementary Application Record, Tab 1C.**

36. Further, whether a "foreign main proceeding" or "foreign non-main proceeding", Section 61(2) of the CCAA applies and provides as follows: "Nothing in [Part IV of the CCAA] prevents the court from refusing to do something that would be contrary to public policy."

> ***Companies' Creditors Arrangement Act*, RSC 1985, c C-36, s 61(2).**

37. The recognition of a foreign proceeding as a "foreign main proceeding" is provided for under Part IV of the CCAA and could not be said to be contrary to public policy.

38. Unlike many issues that arise in insolvency proceedings, the test for determining COMI is not a balancing of prejudices. Even if it were, the allegations of prejudice made by Ms. De Sousa are unfounded, whether in the context of a "foreign main proceeding" or a "foreign non-main proceeding".

39. The centre of main interest of VDL is in the U.S. and its Chapter 11 proceeding should be recognized as a "foreign main proceeding".

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 16th day of July, 2022.

FASKEN MARTINEAU DuMOULIN LLP

Lawyers for the Applicant

SCHEDULE "A"

LIST OF AUTHORITIES

1. *Sino-Forest Corporation (Re)*, 2012 ONCA 816
2. *Century Services Inc v Canada (Attorney General)*, 2010 SCC 60
3. *Hollander Sleep Products, LLC (Re)*, 2019 ONSC 3238
4. *MtGox Co, Ltd (Re)*, 2014 ONSC 5811
5. *Zochem Inc (Re)*, 2016 ONSC 958
6. *CHC Group Ltd (Re)*, 2016 BCSC 2623
7. *Massachusetts Elephant & Castle Group, Inc (Re)*, 2011 ONSC 4201
8. *Probe Resources Ltd (Re)*, 2011 BCSC 552
9. *Caesars Entertainment Operating Company, Inc (Re)*, 2015 ONSC 712

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY - LAWS

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

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.

Public policy exception

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

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