



SUPERIOR COURT OF JUSTICE

**COUNSEL SLIP/ENDORSEMENT**

COURT FILE NO.: CV-22-00683820-00CL DATE: 11 August 2022

NO. ON LIST: \_\_\_\_\_

TITLE OF PROCEEDING: **VOYAGER DIGITAL LTD**

BEFORE JUSTICE: **CAVANAGH**

**PARTICIPANT INFORMATION**

**For Plaintiff, Applicant, Moving Party, Crown:**

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## **ENDORSEMENT OF JUSTICE CAVANAGH:**

There are two motions before me.

First, Voyager Digital Ltd. (“VDL”), as the foreign representative of VDL in respect of the 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”) (the “U.S. Proceeding”), moves for an order recognizing and enforcing in Canada certain orders entered by the U.S. Bankruptcy Court in the Chapter 11 case.

Second, Francine De Sousa, on behalf of the proposed class-action plaintiff under Court File No. 22-00683699-00 CP, moves for certain relief as set out in her Notice of Motion.

### **Motion by VDL**

VDL, as foreign representative of VDL in the Chapter 11 Case seeks an order recognizing and enforcing in Canada certain Orders entered by the U.S. Bankruptcy Court. This motion is unopposed.

The Orders sought to be recognized are described in the First Report of the Information Officer at Appendix F, section B.

I am satisfied that the requested recognition order should be made.

Order to issue in form of order signed by me.

### **Motion by Francine De Sousa**

The relief sought by Ms. De Sousa that is contentious is her motion for an order (i) appointing representative counsel for all securities claimants and current shareholders of VDL impacted in the proceeding commenced in this Court pursuant to the *Companies’ Creditors Arrangement Act*, as amended (the “CCAA”) and the U.S. Proceeding, to be funded by the charge on the estate of VDL; and (ii) allowing for the creation of an equity committee in the CCAA proceeding from which representative counsel shall take instructions, which will include the appointment of Ms. De Sousa as one of its members, to represent the VDL Shareholders.

### **Background**

VDL is a public company traded on the Toronto Stock Exchange. Through its wholly-owned US subsidiary entities, Voyager Digital, LLC, and Voyager Digital Holdings, Inc., VDL and its subsidiaries operated a non-custodial cryptocurrency exchange.

Ms. De Sousa is a shareholder of VDL. She is the proposed representative plaintiff in the proposed class action against VDL and other defendants. In the proposed class action, Ms. De Sousa alleges, on her own behalf and on behalf of all persons and entities who purchased VDL shares on the secondary market from October 28, 2021 to July 5, 2022, that the defendants made misrepresentations related to the crypto asset loans made by VDL and that, as a result of these misrepresentations, she and other class members suffered financial losses.

On July 5, 2022 VDL and other related debtors commenced voluntary reorganization proceedings pursuant to Chapter 11 of the US Bankruptcy Code before the US Bankruptcy Court. On July 8, 2022, the US Bankruptcy Court granted various interim and final orders including an order authorizing VDL to act as foreign representative of the debtors in a proceeding to be commenced in this Court pursuant to the CCAA. On July 11, 2022, VDL, as foreign representative, brought an application before this court for certain relief pursuant to Part IV the CCAA. On July 12, 2022, VDL obtained two Orders of this Court: an initial recognition order and a supplemental order.

On July 19, 2022, this Court conducted a hearing with respect to determination of whether (i) the U.S. Proceeding is a “foreign main proceeding” or a “foreign non-main proceeding”, and (ii) whether VDL’s centre of main interest (“COMI”) is the United States. On August 4, 2022, this Court issued an endorsement declaring that the U.S. Proceeding is a “foreign main proceeding” and that VDL’s COMI is the United States.

In the U.S. Proceeding, the U.S. Bankruptcy Court appointed the Official Committee of Unsecured Creditors. This committee represents all unsecured creditors of the debtors in the U.S. Proceeding, including VDL. The Official Committee has retained Canadian counsel to represent its interests in the Canadian proceeding.

### Analysis

Ms. De Sousa submits that this Court has jurisdiction to grant the requested order pursuant to the broad powers conferred by s. 11 of the CCAA. Ms. De Sousa submits that she meets the tests set out in the jurisprudence for the appointment of representative counsel and that this Court should grant the requested order.

I first address the preliminary objection raised by VDL, which is supported by the Official Committee of Unsecured Creditors, that is, that this motion is brought in the wrong court, and that it should properly have been brought to the U.S. Bankruptcy Court.

Ms. De Sousa submits that there is no legal requirement, under the CCAA or otherwise, for her to bring this motion in the U.S. Bankruptcy Court. She submits that her motion is properly brought to this Court. Ms. De Sousa submits that she and other the shareholders would be treated inequitably if she is required to move in the U.S. Proceeding for an order appointing representative counsel.

Ms. De Sousa points to the Order made by the U.S. Bankruptcy Court authorizing VDL to act as foreign representative in which the debtors are authorized to pay the costs of the Information Officer and its counsel, consistent with any orders of the Canadian Court. No charge is ordered. A charge was ordered in this court.

Ms. De Sousa submits that a charge to secure payment of fees of Canadian representative counsel would have to be ordered by this Court, in the first instance. Ms. De Sousa submits that that it would be a waste of judicial resources to require her to first seek an order appointing representative counsel from the U.S. Bankruptcy Court and then to come to this Court to seek recognition of this Order and an Order authorizing a charge.

Ms. De Sousa accepts that if an order is made in the Canadian proceeding appointing representative counsel, one role of representative counsel will be to retain and instruct U.S. counsel, and she assures the court that steps would be taken to ensure that there is no unnecessary duplication of work. Therefore, Ms. De Sousa accepts that there will be a need for representation of VDL shareholders in the U.S. Proceeding. Nevertheless, she submits, there will be a role for Canadian counsel given that VDL is a public company listed on the TSX and the shareholders’ claims will be determined under Ontario law which will require advice from Canadian counsel.

Ms. De Sousa submits that there is authority for this Court to grant an order appointing representative counsel in ancillary Canadian proceedings that are alongside foreign main proceedings initiated under Chapter 11 of

the U.S. Bankruptcy Code. Ms. De Sousa cites as authority an order appointing representative counsel that is referenced in *Grace Canada Inc., Re*, [2008] O.J. 4208.

In *Grace*, W.R. Grace and its subsidiaries filed a joint Chapter 11 plan of reorganization with the U.S. Bankruptcy Court. Two days after the Chapter 11 proceedings were commenced, Grace Canada, Inc. commenced proceedings under the CCAA seeking ancillary relief to facilitate and coordinate the U.S. proceedings in Canada. By 2005, ten class actions were commenced across Canada in relation to the manufacture, distribution and sale of a certain product. In his decision, at para. 22, Farley J. noted that an order was made appointing Canadian counsel as representative counsel on behalf of the Canadian claimants to advocate their interests in the restructuring process.

I do not regard the Order made in the *Grace* proceeding to be a helpful authority for several reasons. First, unlike this motion, the motion was made by the Canadian applicant, Grace Canada, Inc., and not by the class representative in any of the class actions. Second, there is no analysis in the decision of Farley J. of the issue before me. Third, the Canadian proceedings were not subject to Part IV of the CCAA, as these amendments were not yet in force.

The U.S. Proceeding has been recognized as the foreign main proceeding and it is the plenary proceeding. The U.S. Bankruptcy Court is the forum within which the restructuring of VDL and the other debtors will take place. The requested order, even if it were to be granted, would still require a motion to the U.S. Bankruptcy Court for the appointment of representative counsel to represent the interests of the VDL shareholders in relation to the U.S. Proceeding, including any restructuring plan, so any efficiencies in having this motion heard in this Court are limited.

In my view, given that the U.S. Bankruptcy Court is presiding over the plenary proceeding, and this Court has recognized the U.S. Proceeding as the foreign main proceeding under Part IV of the CCAA, the requested order to appoint representative counsel should be sought from the U.S. Bankruptcy Court and not from this Court. This is consistent with the scheme of Part IV of the CCAA. It is open to the U.S. Bankruptcy Court to seek the assistance and cooperation of this Court in respect of any such request, including recognition of any Order made in the U.S. Proceeding and a request for consideration of any ancillary Order in the Canadian proceeding that may be needed to give effect in Canada to such an Order.

#### Disposition

For these reasons, Ms. De Sousa's motion for an Order appointing representative counsel to be funded by a charge on the estate of VDL is dismissed, without prejudice to her right to seek such relief from the U.S. Bankruptcy Court in the U.S. proceeding.

Ms. De Sousa advises that other relief requested in her Notice of Motion has been or is likely to be resolved and she does not seek this relief on this motion. If this relief is not, as expected, resolved on a consensual basis, Ms. De Sousa may renew her motion.