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Details of Filing

Document Lodged:	Outline of Submissions
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In the matters of Virgin Australia Holdings Ltd (Subject to Deed of Company Arrangement) & Ors

Federal Court of Australia Proceeding No. NSD 464 of 2020

Vaughan Strawbridge, Salvatore Algeri, John Greig and Richard Hughes in their capacity as joint and several voluntary administrators of Virgin Australia Holdings Ltd (subject to deed of company arrangement)

First Plaintiffs / First Applicant

Virgin Australia Holdings Ltd (subject to deed of company arrangement)

Second Plaintiff / Second Applicant

FIRST AND SECOND PLAINTIFFS' OUTLINE OF SUBMISSIONS ON S 444GA APPLICATION

A. INTRODUCTION

1. These are the submissions of the First and Second Plaintiffs, Virgin Australia Holdings Ltd (subject to deed of company arrangement) (**VAH**) and the administrators of its deed of company arrangement, Vaughan Strawbridge, Salvatore Algeri, John Greig and Richard Hughes of Deloitte (together, **the Deed Administrators**), with respect to the Interlocutory Process filed on 20 October 2020.

2. On 4 September 2020, at the second meeting of creditors of each of VAH and certain of its subsidiaries that were in external administration (**Virgin Companies**), the creditors of each of the Virgin Companies resolved that Messrs Strawbridge, Algeri, Greig and Hughes, as the then administrators of each of the Virgin Companies (**Administrators**), execute a number of inter-related deeds of company arrangement that had been proposed by BC Hart Aggregator, L.P (**Bain Capital**) as a mechanism to complete the restructure of the Virgin Companies with Bain Capital (**Bain DOCA Proposal**).

3. On 25 September 2020, the various deeds of company arrangement were executed by the Deed Administrators, Bain Capital and the applicable Virgin Companies (**Bain DOCAs**).

4. Pursuant to the terms of the deed of company arrangement between the Deed Administrators, Bain Capital, VAH and the Third, Seventh to Tenth, Thirteenth, Fifteenth, Eighteenth to Thirty-First, Thirty-Forth, Thirty-Seventh to Thirty-Ninth and Forty-First to Forty-Second Plaintiffs (**Primary DOCA**), and as a condition precedent to completion of the Primary DOCA, the Deed Administrators are obliged to make an application for leave to transfer the shares in VAH to Bain Capital or its nominee.

5. Accordingly, the Applicants seek orders under s 444GA(1)(b) of the *Corporations Act 2001* (Cth) (**Corporations Act**) for leave to transfer the shares in VAH to Bain Capital or its nominee (**Share Transfer**). Machinery orders are also sought under s 447A of the Corporations Act to permit the Deed Administrators to give effect to the proposed Share Transfer.

6. The Court should exercise its discretion to make the orders sought because, in short:

   (a) they will benefit unsecured creditors of VAH and the Virgin Companies, by increasing estimated returns from 4-7 cents in the dollar to 9-13 cents in the dollar: Section B.3 (paragraphs 24-26) and Section D below;

   (b) they will not prejudice VAH's current shareholders, or have any financial impact on them, because VAH has no residual value to its current shareholders: Section B.2 (paragraphs 27-28) and Section D below; and

   (c) the Australian Securities and Investments Commission (**ASIC**) raises no objection to the orders; there are no prospective recovery actions that will not be proceeded with if the orders are made; and the orders will promote the purpose of Part 5.3A of the Corporations Act by ensuring the continuation of the Virgin Companies' business (which will otherwise be dependent on the asset sale transaction completing): Section E below.

7. In accordance with the procedural orders made by the Court on 20 October 2020, the Applicants have given notice of the application to all interested parties, including the creditors of VAH, the members of VAH, and ASIC: see affidavit of Vaughan Neil Strawbridge dated 6 November 2020 (**Supplemental Strawbridge Affidavit**) and the affidavit of Matthew James Carr dated 6 November 2020 (**Carr Affidavit**). As at the date of these submissions, the Deed Administrators have received the following

correspondence indicating opposition (or apparent opposition) to the application, which are addressed in paragraphs 58-63 below:

(a) email correspondence from Anthony Collopy on behalf of Shelleycom Pty Ltd ACN 113 671 266 (**Shelleycom**) and Tymar Pty Ltd ACN 006 856 159 (**Tymar**) attaching an unsealed Notice of Appearance for Shellycom and Tymar indicating the intention of those entities to appear at the hearing of the application and to oppose the orders sought: Supplemental Strawbridge Affidavit at [20];

(b) email correspondence from Perry Leonard McNeil on behalf of Colonial Airways as trustee for the McNeil Family Self-Managed Superannuation Fund: Supplemental Strawbridge Affidavit at [17]-[19]; and

(c) email correspondence from Rebecca Chen: Carr Affidavit at [22].

B. FACTUAL BACKGROUND

B.1 The course of the administrations

8. The background to the administration of each of the Virgin Companies has been canvassed in a number of earlier judgments in the proceedings, including: *Strawbridge, in the matter of Virgin Australia Holdings Ltd (administrators appointed) (No 2)* (2020) 144 ACSR 347; [2020] FCA 717 at [2]-[29]; *Strawbridge, in the matter of Virgin Australia Holdings Ltd (administrators appointed) (No 4)* [2020] FCA 927 at [2]-[3] and [14]-[17]; and *Strawbridge, in the matter of Virgin Australia Holdings Ltd (administrators appointed) (No 8)* [2020] FCA 1344 (***Virgin No 8***) at [9]-[11].

9. Relevantly for the purposes of the present application, the following is a summary of the sale of the assets and business of the Virgin Companies, the endorsement of the Bain DOCA Proposal by the creditors of the Virgin Companies, and the terms of the Bain DOCAs, as set out in the affidavit of Vaughan Neil Strawbridge dated 20 October 2020 (**Strawbridge Affidavit**).

10. Commencing in April 2020, immediately following their appointment, the Administrators commenced a process for the sale of the business and assets of the Virgin Companies, which involved (Strawbridge Affidavit at [18]-[20]):

(d) the establishment of a secure data room containing documents regarding the business and the financial position of the Virgin Companies;

(e) the preparation of an information memorandum and its distribution to possible purchasers;

(f) the formation of a shortlist of interested parties, who had an opportunity to perform detailed due diligence, including by attending meetings with stakeholders including management personnel, unions and contractual counter-parties;

(g) the receipt of non-binding indicative proposals and the subsequent selection of two final preferred bidders; and

(h) extensive dealings with the two final preferred bidders in relation to all aspects of a proposed transaction, including the form of the documents to give effect to a transaction, leading to intensive and comprehensive negotiations over a period of approximately 10 days.

11. That sale process culminated in the acceptance of an offer by Bain Capital for the acquisition of the business and the assets of the Virgin Companies and the execution of a number of binding transaction documents on 26 June 2020 (**Bain Transaction**).

12. As noted in *Virgin No 8* at [9]-[11], the effect of the Bain Transaction was that a binding agreement came into force for the sale, to Bain Capital, of the business and assets of the Virgin Companies, with two different pathways for completion of the sale and restructure. The first pathway was pursuant to the terms of an agreed asset sale agreement (**Bain ASA**) and the second pathway was through the proposal of the Bain DOCAs and their subsequent execution and proposed effectuation: Strawbridge Affidavit at [24].

13. Following the entry into the Bain Transaction, Bain developed its proposal for the various deeds of company arrangement: Strawbridge Affidavit at [34].

14. As set out in the Strawbridge Affidavit at [37], under the Bain DOCA Proposal:

(a) a creditors' trust would be formed and a creditors' trust fund would be established (**Trust Fund**) to meet the claims of creditors of the Virgin Companies (other than excluded claims for which Bain Capital would assume liability);

(b) Bain Capital would make a cash contribution of between $447.2 million and $572.2 million to the Trust Fund and it would comprise separate 'pools' or 'pots' of money, each with different eligibility criteria and depending in certain cases on whether each of the Bain DOCAs proceeded;

(c) the shares of VAH would be transferred to Bain Capital or its nominee subject to the leave of the Court;

(d) the shareholders of VAH would receive no payment from the Trust Fund and no other payment in return for the transfer of their shares to Bain Capital or its nominee;

(e) Bain Capital would assume control of the business of the Virgin Companies and continue to trade the Virgin Companies as a going concern;

(f) continuing employees of the Virgin Companies would be paid in the normal course of their employment (with their existing entitlements remaining unaffected) and those employees whose employment with the Virgin Companies would not continue would have their entitlements paid out in full;

(g) Bain Capital would provide customers who hold, or who are entitled to, a conditional credit (under the conditional credit policy implemented by the Administrators) with a new credit to be available to be used on a future flight for an amount equal to any remaining value on any conditional credit, with such future flight credits being made available for flights booked in the period to 31 July 2022 and for travel in the period to 30 June 2023; and

(h) Bain Capital would also assume:

    (i) certain liabilities accrued by the Virgin Companies from the date of the Administrators' appointment up to 30 June 2020 (totalling approximately $35 million), including unearned revenue and accrued leave entitlements of employees;

(ii) liability for a loan owing by the Virgin Companies of $150 million to Velocity Rewards Pty Ltd as trustee for The Loyalty Trust, another entity in the Virgin group of companies that is not in external administration; and

(iii) liability for all travel credits and unearned travel revenue relating to the conditional credits offered by the Administrators.

15. On 25 August 2020, the Administrators issued their report to the creditors of the Virgin Companies pursuant to s 75-225 of the *Insolvency Practice Rules (Corporations) 2016* (Cth) (**75-225 Report**) and convened the second meeting of creditors (**Second Meetings**): Strawbridge Affidavit at [28].

16. The Administrators recommended that, at the Second Meetings, the creditors of the Virgin Companies vote in favour of the Bain DOCA Proposal and the associated resolutions that the Administrators enter into the Bain DOCAs, on the basis that the completion of the Bain DOCAs would provide the greatest return to creditors: Strawbridge Affidavit at [40]-[41].

17. On 4 September 2020, the Second Meetings were held concurrently. The creditors of the Virgin Companies overwhelmingly endorsed and voted in favour of the Bain DOCA Proposal. With respect to the Primary DOCA (which included VAH), of the creditors voting on the resolution, 99.03% by number and 97.72% by value voted in favour: Strawbridge Affidavit at [47]-[48]. The resolutions with respect to the other proposed deeds of company arrangement for the other Virgin Companies were also overwhelmingly passed by creditors: Strawbridge Affidavit at [49].

18. On 25 September 2020, the Bain DOCAs (including the Primary DOCA) were executed: Strawbridge Affidavit at [51].

B.2 Completion of the restructure

19. The restructure of the Virgin Companies involves a transfer of the shares in VAH, the parent company of the Virgin Companies, to Bain Capital or its nominee: clause 10.3 of the Primary DOCA in VNS-7 at Tab 2.

20. A condition precedent to effectuation of the Primary DOCA is that the Court makes orders granting the Deed Administrators leave to transfer the shares in VAH to Bain Capital or its nominee (clause 4.1(c)): Strawbridge Affidavit at [10].

21. Because VAH is a company whose shares are listed on the Australian Securities Exchange (**ASX**), it is also subject to the prohibitions in s 606 of the Corporations Act, which has required the Deed Administrators to seek relief from ASIC from the takeover provisions in Chapter 6 of the Corporations Act, pursuant to the power conferred on ASIC by s 655A(1)(a): Strawbridge Affidavit at [79]-[80]. This is also a condition precedent to effectuation of the DOCA (see clause 4.1(b)): Strawbridge Affidavit at [81].

22. On 24 September 2020, the Deed Administrators submitted an application with ASIC seeking s 606 relief to facilitate the transfer of all the issued shares in VAH to Bain Capital or its nominee and, on 16 October 2020, ASIC made an "in-principle" decision to provide that relief (the relief being conditional on the Court making the orders sought on this application): Strawbridge Affidavit at [82]-[83]. Such an approach is ASIC's usual practice in applications of this kind: *Re Paladin Energy Limited (subject to Deed of Company Arrangement)* [2018] NSWSC 11 (***Paladin Energy***) at [12] (Black J).

23. On satisfaction of the various conditions precedent, Bain Capital will pay monies into the Trust Fund (clause 10.4). The precise amount to be paid into the Trust Fund depends on certain variables but, in broad terms, Bain Capital will make a cash contribution of $575 million (inclusive of the $125 million of interim funding advanced shortly after the Bain Transaction was entered into) (section 10.2.1 of the 75-225 Report in VNS-7 at Tab 14).

B.3 The alternative to completion of the Bain DOCAs

24. In the event that the Primary DOCA is not effectuated, completion of the Bain Transaction through the transfer of shares in VAH will not proceed. The Deed Administrators will instead be obliged to complete the Bain Transaction via a sale of the assets of the Virgin Companies (clause 4.4(a)): Strawbridge Affidavit at [74(a)]. In that scenario, following completion of the Bain ASA, the Deed Administrators are obliged to call a meeting of the creditors of VAH and the other Virgin Companies (clauses 4.4(b)

and 16) and, if that were to occur, it is overwhelmingly likely that each of the Virgin Companies would then be wound up: Strawbridge Affidavit at [74(b)-(c)].

25. In the event that the Bain Transaction is not completed through the Bain DOCAs and is instead completed under the Bain ASA, then: (a) asset realisations are estimated to be substantially lower; (b) realisation costs are expected to be substantially greater, and (c) the time taken to complete the restructure is expected to be much longer (and possibly as long as three years): Strawbridge Affidavit at [54]-[55]; section 11.2.4 of the 75-225 Report. That is essentially because all assets and securities would be purchased by Bain Capital in accordance with the Bain ASA on completion, which would require the Deed Administrators to transfer or novate contractual agreements to new entities associated with Bain Capital, thereby creating operational challenges and difficulties prior to completion.

26. Accordingly, under the Bain ASA, returns to creditors would be smaller. In that scenario, ordinary unsecured creditors are estimated to receive between 4 and 7 cents in the dollar. In contrast, under the Bain DOCAs and associated Trust Deed, ordinary unsecured creditors are estimated to receive between 9 and 13 cents in the dollar: Strawbridge Affidavit at [52] and [57]-[58].

27. As set out in more detail below, in either scenario there is not expected to be any return to the shareholders of VAH and, as such, their shares have no economic value: Strawbridge Affidavit at [59] and [75]-[77].

28. The same conclusion is expressed in an Independent Expert's Report prepared by FTI Consulting (Australia) Pty Ltd (**FTI**) dated 19 October 2020 (**IER**), which is exhibited to an affidavit of John-Henry Eversgerd sworn 26 October 2020 (**Eversgerd Affidavit**).[1] The IER is addressed in detail in Section D below. The ultimate opinion reached by FTI is that, in a liquidation scenario (and, indeed, even in a going concern scenario), the shares in VAH are worthless: Executive Summary at pp. iv-vii of the IER.

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[1] The Eversgerd Affidavit, at [6], confirms that the IER has been prepared in accordance with the Federal Court's Expert Evidence Practice Note. The IER has also been prepared in accordance with ASIC Regulatory Guides 111 and 112, which confirms the independence of FTI (see the Executive Summary at p. iii and the Statement of Independence at pp. 101-102 of the IER).

C. LEGAL PRINCIPLES

29. Section 444GA(1) provides:

> **444GA Transfer of shares**
>
> (1) The administrator of a deed of company arrangement may transfer shares in the company if the administrator has obtained:
>
> (a) the written consent of the owner of the shares; or
>
> (b) the leave of the Court.

30. The applicable legal principles are well settled: *Dickerson, in the matter of McWilliam's Wines Group Ltd (subject to Deed of Company Arrangement) (No 3)* [2020] FCA 1564 (***McWilliam's***) at [14].

31. They were set out at length by Black J in *Paladin Energy* at [28]-[35] and were, in turn, summarised by Banks-Smith J in *Tucker, in the matter of Black Oak Minerals Ltd (Subject to a Deed of Company Arrangement) (in liq)* (2019) 134 ACSR 472; [2019] FCA 293 (***Black Oak***) as follows:

> [32] As noted in the Explanatory Memorandum to the *Corporations Amendment (Insolvency) Bill 2007* (Cth), the requirement that the transfer not unfairly prejudice shareholders is intended to direct the Court to consider the impact of a compulsory sale on shareholders where there may be some residual value in the company.
>
> [33] As Martin CJ noted in *Weaver v Noble Resources Ltd* [2010] WASC 182; (2010) 41 WAR 301:
>
> > [79]… [t]he notion of unfairness only arises if prejudice is established. If the shares have no value, if the company has no residual value to the members and if the members would be unlikely to receive any distribution in the event of a liquidation, and if liquidation is the only alternative to the transfer proposed, then it is difficult to see how members could in those circumstances suffer any prejudice, let alone prejudice that could be described as unfair. …
> >
> > [80]… So, something more would have to be established before it could said that unfair prejudice to the members of the company could arise.
>
> [34] As White J explained in *Lewis, in the matter of Diverse Barrel Solutions Pty Ltd (Subject to a Deed of Company Arrangement)* [2014] FCA 53 at [19]:
>
> > Whether or not 'unfair prejudice' will result from a transfer of the shares is to be determined having regard to all the circumstances of the case and to the

> policy of the legislation. Relevant matters would seem to include whether the shares have any residual value which may be lost to the existing shareholders if the leave is granted; whether there is a prospect of the shares obtaining some value within a reasonable time; the steps or measures necessary before the prospect of the shares attaining some value may be realised; and the attitude of the existing shareholders to providing the means by which the shares may obtain some value or by which the company may continue in existence. A relevant comparison will be between the position of the shareholders if the proposal does not proceed and their position if leave to transfer shares is granted.
>
> [35] According to *Re Nexus Energy Ltd (Subject to Deed of Company Arrangement)* [2014] NSWSC 1910; (2015) 105 ACSR 246 at [27] (Black J), there is an evidentiary onus on the shareholders to raise any consideration telling against the exercise of the discretion, but the ultimate onus of satisfying the court that the discretion should be extended remains on the Deed Administrators. This requires that the Administrators prove that the transfer would not unfairly prejudice the interests of the company.

32. Accordingly, the fact that shares are to be transferred without compensation is not sufficient, in itself, to establish unfair prejudice: *Weaver v Noble Resources Ltd* (2010) 41 WAR 301; [2010] WASC 182 (***Noble Resources***) at [80]; *Re Mirabela Nickel Ltd (subject to deed of company arrangement)* [2014] NSWSC 836 (***Mirabela Nickel***) at [39].

33. The question of whether shareholders hold any residual equity of value in a relevant sense (for the purpose of assessing the existence and nature of any unfair prejudice) is determined by comparison with the position of the shareholders in a winding up, at least where that is the likely or necessary consequence of the transfer of shares not being approved: *Mirabela Nickel* at [42]; *Paladin Energy* at [31]. That makes it necessary to consider a valuation of the assets and liabilities of the company by reference to a liquidation scenario, rather than as a going concern: *Paladin Energy* at [7]; *Re OrotonGroup Limited (Subject to Deed of Company Arrangement); Application of Strawbridge and Kanevsky* [2018] NSWSC 1213 (***OrotonGroup***) at [28].

34. There would not ordinarily be any prejudice, or at least no prejudice that has the requisite quality of "unfairness", if the shares to be transferred would receive no distribution in the event of a liquidation as the only realistic alternative to the proposed

transfer: *Re Kupang Resources Limited (subject to Deed of Company Arrangement) (receivers and managers appointed)* (2016) 12 BFRA 347; [2016] NSWSC 1895 at [16].[2]

35. Thus, as White J pithily observed in *OrotonGroup* at [37][3], if liquidation is the only realistic alternative to a proposed transfer of the shares, and the shares would have no value in a liquidation, then there is no prejudice, or no unfair prejudice, to the interests of members if leave is given pursuant to section 444GA(1)(b). That conclusion is wholly apposite to the present case.

36. The First and Second Plaintiffs bear the legal onus of proving that the discretion to allow the share transfer should be exercised in their favour: *Nexus Energy* at [27] (Black J). However, as noted above, shareholders bear an evidentiary onus to establish the facts relevant to any prejudice on which they rely in such an application: *Nexus* at [27] (Black KJ); *Paladin Energy* at [33] (Black J).

37. Finally, orders may be made under s 447A of the Corporations Act to provide the machinery by which a proposed transfer of shares in the subject company may be put into effect. This includes orders permitting administrators of a deed of company arrangement: (a) to execute and lodge share transfer documents; and (b) to ensure the entry of the acquirer's name on the company's register of members: *Black Oak Minerals* at [39]-[40]; *McWilliam's* at [17]-[19].

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[2] As was noted in *Mirabela Nickel* at [40], this approach is consistent with that adopted by the authorities in respect of the similar concept used in section 445D of the Corporations Act, where the question whether a deed of company arrangement gives a class of creditors less than they would receive in a liquidation is highly material to whether unfair prejudice to creditors is established: *Lam Soon Australia Pty Ltd (admin apptd) v Molit (No 55) Pty Ltd* (1996) 70 FCR 34 at 48.

[3] Citing *Noble Resources* at [79]; *Re BCD (Operations) NL (subject to Deed of Company Arrangement)* (2014) 100 ACSR 450; [2014] VSC 259 at [55]-[57]; *Re Lewis; Diverse Barrel Solutions Pty Ltd* [2014] FCA 53 at [25]; *Mirabela Nickel* at [42]; *Re Kupang Resources Limited (subject to Deed of Company Arrangement) (receivers and managers appointed)* [2016] NSWSC 1895 at [16]; *Re Nexus Energy Limited (subject to Deed of Company Arrangement)* (2014) 105 ACSR 246; [2014] NSWSC 1910 at [22]; *Re TEN Network Holdings Ltd (subject to Deed of Company Arrangement (Receivers and Managers Appointed)* [2017] NSWSC 1529; 123 ACSR 253 at [32]-[39]; *Re 3GS Holdings Pty Ltd (subject to Deed of Company Arrangement)* [2015] VSC 145 at [22]; *Paladin Energy* at [35].

D. THERE IS NO UNFAIR PREJUDICE TO MEMBERS

38. VAH is a public company, the shares of which are listed on the ASX.

39. It has five major shareholders (together, **the Major Shareholders**) – Etihad Airways (which has approximately 20.03% of the total share capital), Singapore Airlines Ltd (20.01%), Nanshan Group (20.01%), HNA Group (19.86%) and Virgin Group Ltd (a company incorporated in the United Kingdom and not otherwise related to VAH other than through its shareholding) (10.02%): Strawbridge Affidavit at [66]. Between them, the Major Shareholders own approximately 90% of the equity of VAH. In addition to the Majority Shareholders, VAH has 19,181 other shareholders: Strawbridge Affidavit at [66].

40. For the reasons that follow, there will be no unfair prejudice to the Major Shareholders or the residual shareholders upon the transfer of their shares to Bain Capital or its nominee.

41. As set out in the Strawbridge Affidavit at [29] and section 6.4 of the 75-225 Report, the Virgin Companies are insolvent (and were likely to be insolvent on 22 March 2020, and possibly as early as 18 March 2020). The reasons for the insolvency of the Virgin Companies include that: they suffered substantial reductions to capacity and projected revenue due to travel restrictions announced by the Commonwealth and various State Governments in response to the COVID-19 pandemic; they had suffered continual losses in the 2019 financial year and the portion of the 2020 financial year prior to the appointment of the Administrators; and they were unable to access further debt or equity funding (including from the Major Shareholders).

42. Critically, the Deed Administrators have expressed the opinion that there is a substantial deficiency in assets available to meet the debts and claims owing to the creditors of the Virgin Companies: Strawbridge Affidavit at [33]. As noted in the 75-225 Report:

    (a) the total value of available assets in the winding up, after taking into account liquidation expenses, to meet the claims of unsecured creditors is estimated to be: in the range of:

(i) $207.2 million to $310.1 million in the event that the Bain Transaction completes under the Bain ASA; and

(ii) $52.4 million in the event that the Bain Transaction does not proceed at all and the assets of the Virgin Companies are realised on a piece-meal basis (see section 11.2, Table 32); and

(b) the total unsecured creditor pool in the winding up is estimated to be $6.007 billion in the 75-225 Report (see section 11.4, Table 34).

43. These opinions are supported by the analysis and conclusions detailed in the IER.

44. In the IER, FTI has undertaken a valuation of the equity in VAH on a liquidation basis and on a going concern basis. As noted above, given that the alternative to completion of the Bain DOCAs is a winding up of the Virgin Companies (likely with an asset sale to Bain Capital), the going concern valuation is not the relevant counter-factual on which the valuation ought proceed.[4] Nevertheless, both bases of valuation are considered below.

45. With respect to the ***liquidation valuation***, the IER considers two scenarios. *First*, where the business and assets of the Virgin Companies are sold as a whole (for example, to Bain Capital or another purchaser); and *secondly*, where the assets of the Virgin Companies are sold separately in a piece-meal fashion (section 8.1). The IER concludes that:

(a) if sold as a whole, the enterprise value of the Virgin Companies is between $1.6 billion and $2.1 billion, plus a further $289 million to $343 million for VAH's stake in the Velocity Frequent Flyer (**Velocity**) business and $35 million for surplus cash (see section 8.2); and

(b) if sold on a piece-meal basis, the business and assets of the Virgin Companies are valued at between $2.4 billion and $2.8 billion (see section 8.3). It is significant that the valuation of the assets of the Virgin Companies is supported by a separate

[4] The going concern valuation is required by ASIC Regulatory Guide 111 and may be relevant to ASIC's decision as to whether to grant relief from the takeover provisions in Chapter 6: *OrotonGroup* at [28]. That is the likely reason for its inclusion in the IER.

independent valuation of the aircraft fleet owned by the Virgin Companies, which has been carried out by David Crick of DavAir Group.[5]

46. Because the debts of the Virgin Companies exceed $5 billion (section 7.4, Table 29), the equity in the VAH is between:

    (a) negative $2.5 billion and negative $3.2 billion, on the assumption that the assets and business are sold as a whole and there are certain assumed liabilities by the purchaser (see section 8.2, Table 33); and

    (b) negative $5.6 billion and negative $6.1 billion, on the assumption that the assets are sold in a piece-meal fashion and all liabilities to creditors will be provable in the winding up (see section 8.3.3, Table 36).

47. In other words, the IER concludes that the equity in VAH is worthless in practical terms (because VAH is a limited liability company).

48. With respect to the ***going concern valuation***, the IER assumes that the Virgin Companies will continue their operations for the foreseeable future (Executive Summary at page iii and section 7.1). Of course, as the Virgin Companies are insolvent, this assumption is not necessarily apt. Nevertheless, the fact that the Virgin Companies are in external administration appears to be taken into account by FTI: the methodology for determining the value of the equity in VAH on a going concern basis takes into account that VAH cannot discharge its debts in the course of its ordinary business and therefore proceeds on the basis of a valuation of the business of the Virgin Companies on a going concern basis and then excludes debt and adds surplus cash and the value of the equity in Velocity (section 6.1).

49. The IER concludes that the enterprise value of the business as a going concern is between $3.1 billion and 3.5 billion (section 7.2), plus the equity in Velocity, which is worth somewhere between $640 million and $704 million (section 7.3, Table 26) and net surplus cash of $35 million (section 7.4, Table 29). From that figure, total debt of between $5 billion and $5.2 billion is to be deducted (section 7.4, Table 29). That leaves a net

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[5] The report from the DavAir Group has also been prepared in accordance with ASIC Regulatory Guides 111 and 112, which confirms its independence (see the Executive Summary at p. iv of the IER and the DavAir Report at Appendix I of the IER at p. 4).

figure for the value of the equity in VAH as between negative $786 million and negative $1.4 billion (section 7.4, Table 30).

50. Again, therefore, even on a going concern valuation, the equity in VAH is worthless.

51. These conclusions are supported by the cross-check taken of bids received by the Administrators during the campaign for the sale of the business and assets of the Virgin Companies. None of these was sufficient to discharge the claims of creditors, thereby confirming that the value of the equity in VAH is nil (section 7.5.2).

52. There are two further matters that suggest that a conservative approach must be taken to any valuation of the business and assets of the Virgin Companies (and therefore to an assessment of the value of the equity in VAH).

53. *First*, a valuation of any airline business at present is necessarily affected by the current COVID-19 pandemic. As noted in section 4.1.1 of the IER, the impact of the pandemic on the airline industry has been severe, with global airline revenue expected to contract by 50% in calendar 2020 and passenger traffic (by kilometre travelled) not expected to return to 2019 levels until 2025. The pandemic also introduces obvious uncertainty as to the prospect of increased airline travel by business and leisure passengers, both domestically and internationally.

54. *Secondly*, even before the pandemic, the Virgin Companies (and other entities in the Virgin group that are not presently in external administration, such as Velocity) suffered collective losses of over $1.2 billion in the period between 1 July 2016 and 30 June 2019 (see section 5.7 of the IER and, in particular, Table 11).

55. The ineluctable fact is that, in all scenarios, the shares in VAH have no economic value. Thus, the members of VAH would be in the same financial position regardless of the mechanism by which the Bain Transaction is completed (or, indeed, even if the Bain Transaction does not complete at all and the assets of the Virgin Companies are sold to other parties in a winding up): Strawbridge Affidavit at [76]. As explained by the Deed Administrators, the members of VAH can never stand to receive any return from their shareholding: Strawbridge Affidavit at [73] and [77]. Thus, there is no prospect of unfair

prejudice being suffered by shareholders from a transfer of their shares to Bain Capital or its nominee.

56. Importantly, though, completion of the Bain Transaction by the effectuation of the Bain DOCAs is expected to provide a better return to creditors in comparison with the Bain ASA. That is principally because the Bain DOCAs enable completion of the sale to occur on a more expedited and streamlined basis (through a retention of the existing corporate structure premised upon the transfer of the shares in VAH to Bain Capital or its nominee), thereby avoiding transaction costs associated with an asset sale: Strawbridge Affidavit at [25].

57. In other words, although the method of completion of the Bain Transaction makes no financial difference to VAH's shareholders (because their shares are worthless), the proposed Share Transfer and the subsequent effectuation of the Bain DOCAs will provide a materially better outcome for creditors: Strawbridge Affidavit at [78]. That strongly favours the making of orders to permit the Share Transfer to proceed.

58. Finally, as noted above, opposition to the application has been expressed by four separate parties (as at the date of these submissions). The correspondence received from Rebecca Chen and Colonial Airways as trustee for the McNeil Family Self-Managed Superannuation Fund does not contain any supporting grounds or reasons for their opposition to the orders sought.

59. The opposition expressed by the remaining parties (together, Shelleycom and Tymar) raises four issues: (a) the need to consider the (best) interests of all shareholders; (b) the suggestion that there is some value in the shares of VAH, because Velocity is not in external administration; (c) the absence of direct consultation with smaller shareholders in the restructure or sale process; and (d) the lack of communication given that notice of the application was only received by post on 2 or 3 November (see paragraph 62 below).

60. The *first* and *third* issues may be considered together. The interests of members are necessarily subsidiary to creditors in the context of an external administration where there is a deficiency of assets to meet the claims of creditors. Members have no entitlement to participate in the restructuring process and are bound by the Bain DOCAs pursuant to s 444G of the Corporations Act. Further, members were informed of the

progress of the administration by various ASX releases that were issued during this period: Strawbridge Affidavit at [20(m)] and [70]-[71].

61. The *second* issue raises the question of the value of the equity in VAH. It is correct that VAH's stake in Velocity is a valuable asset. As noted above, it is valued at between $640 million and $704 million in a going concern scenario and between $289 million to $343 million in a liquidation scenario. However, the shares in VAH have no economic value because the total value of VAH's assets (includes its shareholding in Velocity) is substantially outweighed by its total liabilities.

62. The *fourth* issue concerns the timing of notice of the application having been received. The Notices of Appearance for Shelleycom and Tymar (see Tabs 12 and 13 of Exhibit VNS-8) indicate that notice of the application was received by post on 2 November, whereas the covering email from Mr Collopy providing those notices indicates the relevant date was 3 November (Tab 11 of Exhibit VNS-8). It is unfortunate that Shelleycom and Tymar only received notice of the application by post on 2 or 3 November. However, in accordance with the Court's orders, notice was given by the Deed Administrators by uploading material to the ASX website and the Deloitte website and by sending relevant correspondence (by email and post, as applicable) on 23 October 2020: Carr Affidavit at [6]-[20]. In any event, there is no suggestion that the receipt of the materials earlier than 2 or 3 November would have led to any different circumstances.

63. Nothing raised in the opposition to the application expressed by these shareholders warrants the Court not making the orders sought.

E. OTHER CONSIDERATIONS ALSO FAVOUR THE SHARE TRANSFER

64. A number of supplementary considerations favour the conclusion that leave should be granted to permit the Share Transfer.

65. *First*, as noted above, ASIC has granted in-principle relief from the takeover provisions in Chapter 6 of the Corporations Act: Strawbridge Affidavit at [83]. ASIC was provided with the Explanatory Statement and IER and has had an opportunity to scrutinise the restructure and raise any objection that it considers may be warranted. The fact that it

has not done so provides an indication that there is no principled concern arising with respect to the transaction: *Black Oak* at [53].

66. *Secondly*, the Deed Administrators have considered the prospect of recovery actions in the event of a winding up of the Virgin Companies. The Deed Administrators have identified possible insolvent trading, including against the directors of the Virgin Companies, but have formed the view that the directors may be entitled to rely on various defences to such a claim, including the new provisions inserted into the Corporations Act following the COVID-19 pandemic (such as s 588GAAA), which may immunise a director from liability for insolvent trading with respect to debts incurred after 25 March 2020: section 6.5 of the 75-225 Report. In any event, the maximum possible recovery from that claim is in the range of $17-35 million, which does not come close to making up the deficiency owing to creditors in a notional winding up. Thus, this is not a case where the effectuation of the Bain DOCAs, by making the orders sought, will deprive the Virgin Companies of substantial recoveries available only to a liquidator in the event of a winding up, which are sufficient to lead to a surplus in the liquidation.

67. *Thirdly*, the transaction contemplated by the Principal DOCA and the Trust Deed advances the objects of Part 5.3A of the Corporations Act (as embodied in s 435A), insofar as it provides for a continuation of the business of the Virgin Companies. These benefits are potentially at risk if the transaction does not complete. Further, as noted above, creditors will be in a substantially worse position if the Share Transfer does not occur, the Bain DOCAs are not effectuated and VAH is wound up. The Court is to have regard to each of these considerations in the exercise of its discretion: *Mirabela Nickel* at [43]; *OrotonGroup* at [41]-[42], and they favour the making of the orders to give effect to the proposed Share Transfer.

F. CONCLUSION

68. The Court should make orders in the form of the short minutes of order provided together with these submissions.

6 November 2020

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