

NOTICE OF FILING

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Details of Filing

Document Lodged: Affidavit - Form 59 - Rule 29.02(1)
File Number: NSD714/2020
File Title: WELLS FARGO TRUST COMPANY, NATIONAL ASSOCIATION (AS OWNER TRUSTEE) & ANOR v VB LEASECO PTY LTD (ADMINISTRATORS APPOINTED) ACN 134 268 741 & ORS
Registry: NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA



Sia Lagos

Dated: 21/07/2020 11:42:38 AM AEST

Registrar

Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

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Form 59
Rule 29.02(1)

Affidavit

Federal Court of Australia
District Registry: New South Wales
Division: Commercial and Corporations List

No. NSD 714 of 2020

IN THE MATTER OF VB LEASECO PTY LTD (ADMINISTRATORS APPOINTED) ACN 134 268 741 & ORS

WELLS FARGO TRUST COMPANY, NATIONAL ASSOCIATION (AS OWNER TRUSTEE) AND ANOTHER NAMED IN SCHEDULE 1

Plaintiffs

VB LEASECO PTY LTD (ADMINISTRATORS APPOINTED) ACN 134 268 741 AND OTHERS NAMED IN SCHEDULE 2

Defendants

Affidavit of: Salvatore Algeri
Address: 447 Collins Street, Melbourne, Victoria 3000
Occupation: Registered Liquidator and Chartered Accountant
Date: 17 July 2020

I, Salvatore Algeri, of Deloitte Touche Tohmatsu (of which Deloitte Financial Advisory Pty Ltd is a wholly owned subsidiary) (**Deloitte**), at 447 Collins Street, Melbourne, Victoria 3000, Registered Liquidator and Chartered Accountant, say on oath:

1. I am a partner in the Financial Advisory Group of the professional services firm trading as Deloitte. I am a Chartered Accountant and a Registered Liquidator and I practise as an accountant specialising in corporate restructuring and insolvency-related matters, with key experience in the consumer business, retail and transport sectors.
2. I am one of the four joint and several voluntary administrators of the First and Second Defendants and the other 37 companies set out in schedule 3 to this affidavit (collectively, the **Virgin Companies**), together with Mr Vaughan Strawbridge, Mr John Greig and Mr Richard Hughes (together, the **Administrators** and each an

Filed on behalf of (name & role of party) The Plaintiffs
 Prepared by (name of person/lawyer) Timothy James Sackar
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 (include state and postcode)

Administrator). Mr Strawbridge, Mr Greig and Mr Hughes are also partners of Deloitte. The Administrators are the Third Defendants in the proceeding.

3. I am authorised by Mr Strawbridge, Mr Greig and Mr Hughes to make this affidavit on behalf of the Administrators. Where I depose below to the view or views of the Administrators, they are the views which I and each of Mr Strawbridge, Mr Greig and Mr Hughes hold at the date of swearing this affidavit.
4. Unless otherwise stated, I make this affidavit based on my own knowledge and belief and from information staff members at Deloitte and I have obtained in connection with my role as an Administrator of the First and Second Defendants and the other Virgin Companies, which I believe to be true.
5. Exhibited to me at the time of making this affidavit is a bundle of documents, to which I make reference in this affidavit marked "**SA-2**" (**Exhibit SA-2**).
6. I make this affidavit on behalf of the Defendants:
 - (a) in response to the Plaintiffs' application made by way of originating process dated 30 June 2020 (**Originating Process**) and interlocutory process dated 14 July 2020 (**Plaintiffs' Interlocutory Process**); and
 - (b) in support of the Defendants' application made by way of interlocutory process dated 17 July 2020 (**Defendants' Interlocutory Process**).
7. In this affidavit, I refer to the:
 - (a) the affidavit of Dean Poulakidas dated 29 June 2020 (**Poulakidas Affidavit**) and its exhibit marked "DP-2" (**Exhibit DP-2**) and the affidavit of Garry Failler affirmed 8 July 2020 (**Failler Affidavit**), both filed in this proceeding on behalf of the Plaintiffs;
 - (b) the affidavits of Vaughan Strawbridge dated 24 April 2020 (**First Strawbridge Affidavit**), 11 May 2020 (**Second Strawbridge Affidavit**), 2 July 2020 (**Third Strawbridge Affidavit**) and 9 July 2020 (**Fourth Strawbridge Affidavit**) and my affidavit dated 22 May 2020 (**First Algeri Affidavit**), each filed in proceeding number NSD464/2020 (**Virgin Companies Proceeding**) on behalf of the Administrators and Virgin Companies; and
 - (c) the affidavit of Darren Dunbier dated 17 July 2020 (**Dunbier Affidavit**), filed in this proceeding on behalf of the Defendants.

8. I am informed by Orla McCoy of Clayton Utz, and believe that:
- (a) copies of the First, Second, Third and Fourth Strawbridge Affidavits and the First Algeri Affidavit have been provided to the solicitors for the Plaintiffs, Norton Rose Fulbright (**NRF**); and
 - (b) NRF have been informed that those affidavits, and all additional material filed in the Virgin Companies Proceeding which is not the subject of confidentiality and non-disclosure orders, together with orders and judgments made in the Virgin Companies Proceeding, can be downloaded from the Federal Court of Australia website.
9. I also note that:
- (a) in paragraph [34] of the Poulakidas Affidavit, Mr Poulakidas refers to "*reviewing documents lodged [by the Administrators] with the Federal Court of Australia and made publicly available on the Court's website*";
 - (b) NRF (on behalf of the Plaintiffs) received a copy of the First Algeri Affidavit on 22 May 2020, at the time that the Administrators' solicitors, Clayton Utz, provided notice of the application made in the Virgin Companies Proceeding on 25 May 2020. The First Algeri Affidavit was filed in support of the application heard on that date. Paragraphs [4] to [6] of the affidavit of Cassandra Adams dated 24 May 2020 filed in the Virgin Companies Proceeding describe the provision of notice to NRF on behalf of the Plaintiffs.

General Background

10. The First and Second Defendants are, together with the other Virgin Companies, part of a corporate group that conducts a business offering a variety of domestic and international aviation products and services to the Australian and international market, including corporate, government, leisure, low cost, regional and charter travellers and air freight customers (collectively, the **Business**). The role of the First Defendant in the Business is to lease aircraft, engines and other associated personal property (collectively, **Aircraft Property**) from aircraft lessors (including the Plaintiffs) and then sub-lease the Aircraft Property to the Second Defendant.
11. Following our appointment, the Administrators formed the view that we should continue to trade the Business on a 'business as usual' basis (subject to the restrictions resulting from the COVID-19 pandemic), in order to maximise the chances of the Business continuing in existence and to preserve the value of the Business with a view to achieving a sale of the Business or restructure of the Virgin Companies.

12. To implement that strategy, the Administrators took steps to retain as much of the Aircraft Property in the possession of the Virgin Companies as possible, so that it remained available to the Business to continue trading activities and/or be assumed by any purchaser in line with their plans for the future of the Business, having regard to the constraints imposed by the financial position of the Virgin Companies and the Administrators' personal liabilities arising under the *Corporations Act 2001* (Cth) (**Corporations Act**). As set out in more detail in the Second Strawbridge Affidavit at paragraphs [94] to [96], the Administrators considered that, if the Aircraft Property was not retained, the practicalities, costs and time associated with the acquisition, financing and mobilisation of new aircraft would make the sale of the Business as a going concern impractical, if not impossible. The Administrators also formed the view that retaining Aircraft Property (on appropriate terms) created an opportunity for the aircraft lessors and financiers to have a continuing commercial relationship with the Business (under the control of a new owner or an incoming purchaser) (see paragraph [47] of the First Algeri Affidavit).
13. The steps taken to retain Aircraft Property have included:
- (a) in the Virgin Companies Proceeding, applying for and obtaining, on 24 April 2020, in respect of the Aircraft Property and other leased property an order pursuant to sections 443B(8) and 447A(1) of the Corporations Act:
- (i) limiting the personal liability of the Administrators under sections 443A(1)(c) and 443B(2) of the Corporations Act; and
- (ii) extending the time within which a notice under section 443B(3) of the Corporations Act may be issued,
- until 26 May 2020 (**First Extension Order**). The rationale for the First Extension Order is set out in detail at paragraphs [65] to [69] of the First Strawbridge Affidavit. In short, having regard to the number of real property and personal property leases, the significant liabilities associated with them and the complexity of the Business (among other things), the Administrators needed a longer period than provided for in section 443B(3) of the Corporations Act to consider whether it was necessary or desirable, in the interests of preserving the value of the Business, to exercise rights in relation to each piece of leased property;
- (b) seeking to agree, with each of the 73 lessors and financiers of Aircraft Property (including the Plaintiffs), a protocol in relation to the ongoing possession, maintenance and preservation of, and, where applicable, any usage of Aircraft Property by the Virgin Companies during the administration period (**Aircraft**

- Protocol).** The rationale for, terms of and negotiations in relation to the Aircraft Protocol (up to 22 May 2020) are set out in detail in paragraphs [87]-[99] of the Second Strawbridge Affidavit and paragraphs [13] to [43] of the First Algeri Affidavit;
- (c) applying for in the Virgin Companies Proceeding and obtaining, on 15 May 2020, an order limiting the Administrators' personal liability under any Aircraft Protocol subsequently executed; and
- (d) applying for in the Virgin Companies Proceeding and obtaining, on 25 May 2020, in relation to Aircraft Property (only) an order extending the First Extension Order until 16 June 2020 (**Second Extension Order**). As out in the First Algeri Affidavit at paragraph [45], the Second Extension Order was necessary to allow more time in which to attempt to agree the Aircraft Protocol with each of the (numerous) aircraft lessors and financiers.
14. The Administrators have relied on information and advice provided by appropriately qualified and experienced staff within the Business, including Mr Dunbier, in relation to the technical and operational aspects of dealing with the Aircraft Property. Staff within the Business have also been directly involved in negotiations in relation to the Aircraft Protocol, in particular where there is an existing professional relationship with the relevant lessor/financier.
15. As at the date of this affidavit, 70 out of the 73 lessors and financiers of Aircraft Property have signed Aircraft Protocols, and a total of 84 Aircraft Protocols have been signed. Notices pursuant to section 443B(3) of the Corporations Act have been issued to three lessors and financiers of Aircraft Property (including the Plaintiffs). The Aircraft Property the subject of those notices has been made available for collection by the Administrators, and collected by two lessors and financiers of Aircraft Property (not including the Plaintiffs).
16. As foreshadowed in paragraph [39(e)] of the First Algeri Affidavit, while the Aircraft Protocol has a unified form and structure and the subject matter of each individual agreement is the same, the precise terms of each individual agreement vary, taking into account the particular circumstances of the relevant lessor/financier (including the applicable lease/finance documents), the nature of the applicable Aircraft Property, specific commercial terms including usage charges and any specific amendments proposed during the course of negotiations.
17. In general terms, the Aircraft Protocols provide for, among other things, appropriate insurances to be maintained in respect of the Aircraft Property in accordance with applicable lease/finance documents, payments to be made if the relevant Aircraft

Property is used by the Business, the provision of information to the lessor/financier and usage and maintenance to be conducted in accordance with Civil Aviation Safety Authority (**CASA**) requirements.

18. In circumstances where the majority of the Aircraft Property cannot be utilised to generate revenue due to the COVID-19 pandemic, the Aircraft Protocol seeks to strike a balance between the rights of financiers and lessors and the interests of the Virgin Companies having regard to the operational needs of the Business and the value generated by providing optionality to the purchaser in relation to the future of the aircraft fleet and opportunities for the financiers and lessors to continue with the new purchaser. In particular, the Aircraft Protocol provides for certain costs arising under pre-appointment agreements (including costs in relation to maintenance and insurance of Aircraft Property) to be borne by the Virgin Companies, when such costs would ordinarily need to be met by the lessor or financier following the issuance of a notice under section 443B(3) of the Corporations Act. At the same time, the Aircraft Protocol facilitates the retention of Aircraft Property without exposing the Virgin Companies or the Administrators to the cost and personal liability risk of having to satisfy the full ongoing costs applicable under the lease and finance arrangements. In my opinion, the Aircraft Protocol promotes the objectives of Part 5.3A of the Corporations Act as, without the Aircraft Protocol (or a similar arrangement) being in place, it would have been very difficult to preserve the value of the Business through the administration process and the sale of the Business as a going concern would have been impractical or impossible to achieve (leading to a worse outcome for creditors).
19. The Aircraft Protocol also provides a framework (the precise terms of which vary according to each individual agreement) to facilitate the return of aircraft that are not required by the Business, following the issuance of a notice under section 443B(3) of the Corporations Act. The redelivery framework is, in general, tailored to the particular nature of Aircraft Property and is more favourable to lessors and financiers than the usual right to recover property on a strict 'as, is, where is' basis under section 443B of the Corporations Act (which I describe below). Among other things, the redelivery framework provides for the comprehensive delivery of records pertaining to Aircraft Property and for the Administrators to work collaboratively with the lessor/financier in relation to redelivery. I note, however, that none of the Aircraft Protocols includes an undertaking that the Administrators or Virgin Companies will incur the costs of returning Aircraft Property. In every case, the lessor or financier is required to collect their property from the Virgin Companies (at their own cost).

20. As set out in the Third Strawbridge Affidavit at paragraphs [14] and [31(a)] and in the Fourth Strawbridge Affidavit at paragraph [14], on 26 June 2020 the Administrators and the Virgin Companies entered into a transaction with Bain Capital Private Equity LP, Bain Capital Credit LP and their affiliates and related entities (**Bain Capital**) in relation to the acquisition of the Business (**Transaction**).

The section 443B(3) notice issued to the Plaintiffs

21. During the period between the date of the Administrators' appointment and the date on which the section 443B(3) Notice was issued to the Plaintiffs, the Administrators had very frequent and comprehensive dialogue with the Plaintiffs to try to reach a mutually acceptable position in respect of the Engines and Associated Property and on the Aircraft Protocol. The Administrators' staff, Virgin staff and our solicitors engaged in multiple telephone calls and exchanged a significant volume of written correspondence with the Plaintiffs and their solicitors. Consistently with our view that it was in the best interests of the Virgin Companies and their creditors, including lessors and financiers of Aircraft Property for as much Aircraft Property to be retained by the Business as possible, and in line with our negotiations with other Aircraft Property lessors and financiers, the Administrators' preference has at all times (prior to issuing the section 443B(3) Notice), been for the Virgin Companies to retain the four engines (**Engines**) and the associated property specified in schedule 2 to the Originating Process (**Associated Property**) leased from the Plaintiffs by entering into an Aircraft Protocol with them.
22. In an email dated 2 June 2020 from Dean Poulakidas of the Plaintiffs to Mukhtader Mohammed of Deloitte (a copy of which is at page 479 of Exhibit DP-2), the Plaintiffs stated that they did not *"agree to sign this Protocol and reiterate that we wish to have our engines back immediately"*, and further stated *"[i]f the Administrator accepts our lease agreements with Virgin Australia, we will expect prompt compliance with the terms of those agreements"*, being the applicable leases pertaining to the Engines and Associated Property (collectively, with applicable sub-leases and security documents, **Lease Documents**). The Lease Documents are described in paragraphs [13]-[32] of the Poulakidas Affidavit and exhibited in Exhibit DP-2. In his letter to me dated 4 June (a copy of which is at page 481 of Exhibit DP-2), Brian Hole of the Plaintiffs said that *"we wish for our engines to remain with Virgin Australia subject to the terms of our valid leases"* or, alternatively, *"we renew our request that you return our engines now in accordance with our leases"*.
23. I interpreted the correspondence referred to in paragraph 22 to amount to a request that the Administrators effectively adopt the Lease Documents. Accordingly, in my letter

dated 9 June 2020 responding to Mr Hole (a copy of which is at pages 482-484 of Exhibit DP-2), I said among other things that:

"4. [...] there are no circumstances in which the Administrators will be in a position to adopt the leases of your Engines as you seem to request in your letter. This is because of the manner in which Australian insolvency law works, and the circumstances Virgin Australia finds itself in due to COVID-19 all of which have been detailed in numerous conversations and communications with yourselves and other aircraft and engine lessors and secured financiers.

5. Any other position would be prejudicial to the Administration, other creditors and potentially the success of the sale process. Specifically:

a. if the Administrators adopt the leases then they will continue to be liable on them if the successful bidder does not adopt those leases, a position which you can appreciate is not something the Administrators could realistically consider for long term engine leases;

b. COVID-19 continues to substantially impact Virgin Australia's ability to generate earnings with revenue dropping substantially from pre COVID-19 levels and its inability to meet costs over and above operating costs directly linked to current income generation. You may be aware that that circa 80% of Virgin Australia's workforce has been stood down without wages other than the Australian government support package being made available to employees of Australian businesses impacted adversely by COVID-19;

c. your proposal would require the Administrators to prefer Willis over all creditors including employees and particularly other lessors and secured financiers in relation to their Aircraft and Engines, by paying Willis the full amount of the lease costs as per the leases of your Engines, rather than a usage charge referable to actual usage of your Engines. This is not something that can be considered

[...]

7. [...] the court orders in favour of the Administrators extending the period under which they do not have liability for the use of the engines expires on 16 June 2020 and in the absence of an alternative agreement with Willis in the form of a signed protocol you will unfortunately leave the Administrators no choice and, as contemplated by the court orders, the Administrators intend to issue a section 443B(3) notice in relation to your Engines on that date.

8. [...] After the [section 443B notice] is issued, you will have to recover possession of the Engines at your own cost on an "as is, where is" basis, without the benefit of the undertakings being offered by the Administrators in Schedule 7 of the Protocol."

24. My letter dated 9 June 2020 reflects my understanding, based on my experience as a registered liquidator who has been appointed as an administrator in numerous voluntary administrations, as to how section 443B of the Corporations Act operates with respect to leased property. In particular, I have always understood that a lessor must collect their property on an 'as is, where is' basis and bears all of the risks and costs associated with the collection process (which can later be claimed by way of the proof of debt process). In the conduct of administrations, I always insist on this position because to do otherwise would have the effect of preferring the lessor over other unsecured creditors (including employee priority creditors), who would likely have their return diluted in proportion to the amount of such costs paid by the company in administration. I am, however, generally willing to offer some limited practical assistance to a lessor to assist them in recovering property that is subject to a notice under section 443B(3), on the basis that this often prevents disputes and promotes the efficient conduct of the administration process and, therefore, conveys overall benefits to the company and its creditors.
25. While I have not previously dealt with property subject to the Cape Town Convention, I note that the Aircraft Protocol in effect assumes that the collection process under section 443B of the Corporations Act will be applicable in relation to any Aircraft Property that is ultimately not required by the Business upon completion of the Transaction. The Plaintiffs are the only lessor or financier which has both declined to sign an Aircraft Protocol and insisted that the Defendants return (rather than provide opportunity to take possession of) their Aircraft Property.
26. In his email dated 10 June 2020 (a copy of which is at page 485 of Exhibit DP-2), Mr Hole said that "*[w]e obviously expect the Administrators to comply with our leases and applicable law, including the Capetown Convention (which we think the comments in paragraph 8 of your letter forget), in taking all good care of our equipment now and during your facilitation of the engine return*".
27. On 16 June 2020, prior to the expiry of the Second Extension Order on that day, I issued a notice pursuant to section 443B(3) to the Plaintiffs notifying them that the Virgin Companies did not intend to exercise any of their rights in respect of the property leased from the Plaintiffs (**443B Notice**). Copies of the 443B Notice and the covering letters from me and the Administrators' solicitors (Clayton Utz) are at pages 490 to 495 of Exhibit DP-2. I note that:

(a) the 443B Notice specified the serial numbers, applicable Lease Documents and location of each of the four Engines (see page 495 of Exhibit DP-2); and

(b) my covering letter said that:

(i) *"it is our intention to discuss and agree an orderly hand back arrangement with you. Gordon Chan and Ian Boulton from Deloitte will work with you and the Virgin team to co-ordinate the orderly return of your engines and all their respective technical and historical records"* (page 491 of Exhibit DP-2);

(ii) the insurances applicable to the Engines would be maintained for 14 days from the date of the 443B Notice as a matter of good faith; and

(iii) the Engines were *"available for you to take possession and arrange collection from the date of this letter"*.

28. The 443B Notice stated that the Administrators did not propose to exercise rights in relation to "the specified property in Schedule B" to the notice. Schedule B to the 443B Notice is in the form of a table listing each relevant Lease Document and the serial numbers and locations for each of the four Engines. In circumstances where:

(a) I assumed that the Engines comprised the overwhelming majority of the economic value of the property leased from the Plaintiffs and that the Associated Property was purely ancillary to the Engines or akin to components of the Engines (which is supported by the estimates of the relative value of the Engines and Associated Property in paragraph 11–15 of the Dunbier Affidavit); and

(b) the Engines were the exclusive or at least the dominant focus of the prior communications between the parties, as is evident from Mr Poulakidas' emails dated 30 May and 2 June 2020 (copies of which are in the email chain at pages 479 to 480 of Exhibit DP-2), Mr Hole's letter dated 4 June 2020 (a copy of which is at page 481 of Exhibit DP-2) and Mr Hole's email dated 10 June 2020 (a copy of which is at page 485 of Exhibit DP-2) all of which refer to return of the Engines without reference to the Associated Property,

I considered that issuing a notice with respect to all of the Engines and relevant Lease Documents unambiguously conveyed the Administrators' intention not to exercise rights in relation to any property leased from the Plaintiffs and that there was no need or benefit to undertaking the task of compiling a list of the Associated Property for the purposes of the 443B Notice.

29. I observe that in correspondence following service of the 443B Notice, the Plaintiffs conveyed an understanding that the Associated Property formed part of the property the

subject of the 443B Notice. For example, in his email dated 16 June 2020 to Gordon Chan of Deloitte (a copy of which is at page 506 of Exhibit DP-2), Steve Chirico of the Plaintiffs gave details of engine stands and quick engine change units in manner which clearly indicated his expectation that they would form part of the "*redelivery of the engines*" and would not be retained by the Virgin Companies.

Steps undertaken to assist the Plaintiffs

30. The Engines have not been used by the Business at any time during the administrations of the Virgin Companies (apart from 'ground runs' which have been conducted as part of regular maintenance), nor has any revenue been generated from them. They have been affixed to 'parked up' aircraft since before the Administrators were appointed and remain at the locations specified in the 443B Notice.
31. The Administrators do not intend to use the Engines (or the Associated Property) or otherwise exercise any rights in respect of them, as stated in the 443B Notice.
32. Despite the issuance of the 443B Notice, and the attempts made by the Administrators to facilitate the prompt collection of the Engines and the Associated Property (which are set out below), the Plaintiffs have refused to collect the Engines or the Associated Property from the Virgin Companies pending the outcome of the proceedings, in line with their position that the Defendants should bear the costs of delivering that property to the Plaintiffs (among other things, the Plaintiffs have not to the Administrators' knowledge obtained insurance in respect of the Engines or Associated Property). For example, on 1 July 2020, Garry Failer of the Plaintiffs sent an email to Mr Chan of Deloitte (on which I was copied), a copy of which is located at page 1 of Exhibit SA-2, stating that:

"the Administrators have asserted that their only obligation is to identify the location of our assets (which, as noted, still has not been done) and it allegedly is our obligation to remove the engines from airframes Virgin Australia doesn't own and complete the return ourselves. We have made clear on multiple occasions that we disagree with your position and we don't see any benefit in continuing to argue about this between us. This fundamental issue needs to be resolved and we have taken steps to achieve that end."
33. On 4 July 2020, Clayton Utz received a letter from NRF, a copy of which is located at page 13 of Exhibit SA-2.
34. On 9 July 2020, I instructed Clayton Utz to send a letter in response to NRF's letter dated 4 July, a copy of which is located at pages 14 and 15 of Exhibit SA-2 (**4 July Letter**), which has not, to my knowledge, been responded to as at the date of this affidavit. Among other things, the 4 July Letter made clear that the Administrators would

hold the Plaintiffs liable for all costs incurred after 30 June 2020 in relation to the Engines and Associated Property (including insurance costs, maintenance costs and the Administrators' professional time in dealing with the property).

35. Notwithstanding the disputed position and the commencement of the proceedings by the Plaintiffs on 30 June 2020, the Administrators have both before the proceedings were commenced and since that date continued to engage directly with the Plaintiffs and have taken steps to facilitate the Plaintiffs' recovery process. Those activities have included the steps set out below.

Engine records

36. As reflected in the correspondence referred to in paragraphs 37 to 38 below, the Administrators' staff have assembled documentary and electronic records forming part of the Associated Property under the Lease Documents, being the records listed in paragraph [7] of Schedule 2 to the Originating Process, and facilitated the return of those records in Willis' preferred format, being an online secure data room. Other than the "Non Incident Statements, History & Combination Statements, and LLP & AD status statements and certifications" (**Status Statements**) which the Plaintiffs have requested the First Defendant to sign, and thereafter obtaining FAA Form 8130-3 or EASA Form 1 serviceable tags (which are issued upon the "engineering shop" assessment of an engine following the end of lease inspection), as at the date of this affidavit the Administrators' staff have made all documents identified at paragraphs 24 and 25 of the Failer Affidavit available to Willis. The Administrators are not prepared to cause or permit the Virgin Companies to issue signed Status Statements without an appropriate disclaimer or limitation of liability from the Plaintiffs that reflects the external administration of the Virgin Companies and the inability of the Administrators to provide warranties in relation to facts and circumstances which are not within our direct area of control or expertise. In my opinion, proceeding to sign the Status Statements in the absence of such a disclaimer or limitation of liability would expose the Administrators and the Virgin Companies to an unacceptable level of risk, where no commensurate benefit is being offered.
37. In response to Mr Boulton's email of 18 June 2020, Mr Kinnane sent an email on 25 June 2020, on which I was copied, outlining preliminary steps for the process of returning engine records. Mr Boulton forwarded that email to the Second Defendant's Technical Assets team, copying Mr Dunbier, instructing them to collate the engine records. Mr Boulton stated in the email that, although the Administrators are not obliged to collate the engine records, they would do so as a courtesy to Willis if it was not too

much work. A copy of the email chain containing Messrs Kinnane's and Boulton's emails is located at pages 16 to 21 of Exhibit SA-2.

38. Between 1 and 10 July, the Administrators' staff continued to correspond with Willis to fulfil their requests for engine records. An email chain between and among Mr Failler of the Plaintiffs, Mr Chan and Mr Boulton of Deloitte and Andy Symons of the Business, on which I was copied, containing that correspondence, is at pages 22 to 35 of Exhibit SA-2. In particular, on 9 July 2020, Mr Failler sent an email to Mr Boulton stating that Willis' technical records team had completed their review of the engine records in the secure data room and would make a further request for engine records (see pages 28 of Exhibit SA-2). On 9 and 10 July 2020, Mr Kinnane of the Plaintiffs sent emails to Mr Boulton regarding Willis' further request (see pages 24 to 27 of Exhibit SA-2). Also on 10 July 2020, Mr Boulton sent an email to Andy Symons, Leader, Technical Assets of the Second Defendant, asking Mr Symons to consider the Plaintiffs' further document request (see pages 89 and 90 of Exhibit SA-2). Mr Symons sent an email in reply on the same day stating that he would start collating the records requested in the further request (see page 89 of Exhibit SA-2). A copy of the spreadsheet making the further request is located at pages 36 to 44 of Exhibit SA-2.

Engine stands

39. The Administrators have caused the Second Defendant to undertake a national physical audit of engine stands, which Mr Dunbier described in his email of 25 June 2020 to Mr Kinnane, on which I was copied. A copy of that email is at page 45 of Exhibit SA-2. The Administrators identified that two of Willis' engine stands were in Melbourne (being those stands identified in sub-paragraphs [5](c) and [5](d) of Schedule 2 to the Originating Process) and two were at the facilities of Delta Air Lines, Inc (**Delta**) in the United States of America (being those stands identified in sub-paragraphs [5](a) and [5](b) of Schedule 2 to the Originating Process).
40. On 29 June 2020, Virgin Companies' staff obtained photographs of the data plates of the engine stands and cradles located in Melbourne and sent them to Mr Rogers of the Plaintiffs. An email from Mr Chan to Mr Rogers of the Plaintiffs attaching the photographs, on which I was copied, dated 30 June 2020, is at page 3 of the email chain at pages 1 to 12 of Exhibit SA-2.
41. Virgin Companies' staff also took steps to locate Willis' engine stands that were at Delta's facilities in Atlanta, Georgia. Mr Dunbier observed in his email of 24 June 2020, to which I refer above, that Delta initially denied being in possession of the engine stands. On 26 June 2020, Virgin Companies staff participated in a teleconference with Delta employees to locate the engine stands. On 30 June 2020, Mr Dunbier sent a

further email to staff at Delta inquiring as to the outcome of Delta's searches for the stands. A copy of that email is located at page 52 of Exhibit SA-2. Mr Dunbier and Virgin Companies staff then investigated whether there was supporting evidence (such as bills of lading) to provide to Willis to establish that Delta were in possession of 2 engine stands. Email chains between Virgin staff and the Administrators' staff in relation to that investigation, dated 2 July 2020, are located at pages 56 to 59 of Exhibit SA-2.

42. On 3 July 2020, staff at Delta sent an email to Mr Dunbier (which was forwarded to me and my staff) located at pages 60 to 65 of Exhibit SA-2 informing Mr Dunbier that they had located both of the Willis engine stands on their property and attaching photographs of the physical locations and serial numbers of those stands. Delta has confirmed to me that it had been in possession of those engine stands since at least the appointment of the Administrators. Also on 3 July 2020, Mr Chan sent an email to Mr Failler, on which I was copied, confirming the location of the engine stands at Delta's facilities and attaching the photographs. A copy of that email is located at pages 71–73 of Exhibit SA-2.

Dealings with airframe lessors

43. The Engines are fixed to airframes leased to Virgin Companies by Bocomm Leasing and Dubai Aerospace Enterprise.
44. The Administrators have liaised with Bocomm Leasing and Dubai Aerospace Enterprise to facilitate the process of the Engines being removed from the airframes and taken by Willis.
45. On 3 July 2020, I wrote to Bocomm Leasing and Dubai Aerospace Enterprise in relation to the Engines. Copies of those letters are located at 77–78 and 79–80 of Exhibit SA-2 respectively.
46. An email chain with emails in relation to the letter between Mr Chan and Dubai Aerospace Enterprise, dated 3 July 2020, is located at 81–82 of Exhibit SA-2.
47. An email chain with emails in relation to the letter between Mr Chan and Bocomm Leasing, dated 7 July 2020, is located at 83–85 of Exhibit SA-2.

Giving possession of the Engines to Willis, and insuring and maintaining the Engines

48. On 18 June 2020, Mr Boulton sent an email to Mr Failler that:
- (a) confirmed that the Administrators would liaise with Willis' staff to facilitate an orderly hand-back of the Engines;
 - (b) summarised the status and locations of the Engines and engine stands;

(c) offered to assist in providing services to Willis in removing and delivering the Engines (at Willis' cost); and

(d) confirmed that the Administrators continued to insure and store the Engines.

49. A copy of that email is located at pages 503–505 of Exhibit DP-2.
50. On 19 June 2020, Mr Chan sent an email to Mr Failler, on which I was copied, suggesting some alternative ways to return the Engines and proposing that the best way forward would be for the Administrators and Willis to have a discussion. A copy of that email is located at page 502 of Exhibit DP-2.
51. On 30 June 2020, Mr Chan sent an email to Mr Rogers, on which I was copied, again requesting a telephone call with Mr Rogers and his team to discuss the way forward. In that email, Mr Chan again confirmed that the Administrators kept the Engines maintained and insured and that the Administrators were making continued inquiries of Delta as to the exact location of the engines stands at Delta's facilities. Mr Failler responded to that email, 1 July 2020, without accepting the invitation for a telephone call. Copies of those emails are located at pages 1–2 of Exhibit SA-2.
52. Mr Chan's email of 3 July 2020 to Mr Failler, to which I refer above, attached a letter confirming that the Engines remained insured. Mr Chan also confirmed in that email that Virgin continued to adhere to its statutory and regulatory maintenance obligations in relation the Engines. Mr Chan reiterated the Administrators' offer to have a telephone call with Willis.
53. On 13 July 2020, Mr Chan sent an email to Mr Kinnane, offering the Administrators' assistance and again reiterating the Administrators' offer to have a telephone call with Willis. A copy of an email chain that includes that email and Mr Kinnane's response is located at pages 86–88 of Exhibit SA-2.

The prejudice that will be caused to the Virgin Companies and their creditors if the orders sought by the Plaintiffs in relation to the Cape Town Convention are made

54. In my view, having regard to my experience as an administrator, if the Cape Town Convention has the effect asserted by the Plaintiffs, namely requiring the First and Second Defendants to comply with the Lease Documents in full, including meeting the costs of a redelivery process in accordance with schedule 3 to the Originating Process, it would amount to a complete inversion of the way leased property is dealt with in Australian voluntary administrations in that an insolvent lessee in administration would be forced to incur very substantial costs in complying with pre-appointment agreements, regardless of whether it had funds to do so or what effect that would have on the viability of the company's business or the ultimate return to other unsecured creditors of the

company. Such a position would, in my view, be contrary to the pari passu principle that underlies insolvency law and be commercially unreasonable because an insolvent company should not be subject to unavoidable costs that it may not have assets to meet. I am not aware of any other such mandatory and unavoidable costs which are stipulated under Australian insolvency law, except for taxes, where they arise, and the modest filing fees imposed by the Australian Securities and Investments Commission (**ASIC**).

55. In relation to the administrations of the Virgin Companies, specifically, as explained in the Fourth Strawbridge Affidavit at paragraph [21], pursuant to the terms of the Transaction, Bain Capital assumed economic risk for the financial position of the Virgin Companies on and from 1 July 2020. All liabilities arising before that date (including liabilities arising in relation to pre-appointment lease and financing arrangements) must be met by the Administrators from the assets of the Virgin Companies, without recourse to the finance facility extended by Bain Capital as part of the Transaction. It is only the net assets remaining after such liabilities and the costs of the administration are satisfied that will be available to creditors.
56. It follows that all costs incurred in relation to causing the Virgin Companies to comply with the terms of schedule 3 to the Originating Process (which are estimated in paragraph 16 of the Dunbier Affidavit to amount to a total of over AU\$1 million and potentially significantly more), together with the costs of defending the proceeding brought by the Plaintiffs and satisfying any adverse costs orders made in the proceeding (should the Plaintiffs be successful), will ultimately be borne by the unsecured creditors of the Virgin Companies.

The orders sought in the Defendants' Interlocutory Process should be made

57. The Defendants' Interlocutory Process seeks:
 - (a) in paragraph 1, an order pursuant to section 443B(8) or section 447A(1) of the Corporations Act excusing the Administrators from liability in respect of the Engines and Associated Property; and
 - (b) in paragraph 2, an order that the Administrators may exercise a lien over the Engines and Associated Property in respect of the reasonable and proper remuneration, costs and expenses attributable to work done in identifying, caring for, preserving or facilitating the return of that property to the Plaintiffs (**Administrators' Lien**).
58. The factual basis for the order sought in paragraph 1 of the Defendants' Interlocutory Process is set out at paragraphs 21 to 29 above.

59. In relation to the order sought in paragraph 2 of the Defendants' Interlocutory Process, as noted in paragraph 24 above, I would ordinarily be of the view that taking reasonable steps to assist a lessor to recover property (without charge) would be in the overall interest of a company and its creditors. However, having regard to:
- (a) the complexity and the quantum of costs involved in maintaining, insuring, locating, isolating and readying the Engines and the Associated Property for collection by the Plaintiffs, in light of the applicable technical and regulatory requirements and the constraints imposed by the COVID-19 pandemic; and
 - (b) the fact that the Plaintiffs have effectively rejected our explanations of the conventional manner in which leased property in which the lessee no longer claims any interest is recovered from a company in administration and have sought to enforce their position through a Court proceeding, which will likely lead to significant costs being borne by the Virgin Companies and their creditors (even if the Defendants are ultimately successful in the proceeding),

I do not consider that it is in the interests of the First and Second Defendants and their creditors (or the Virgin Companies more broadly) to bear the costs of taking the steps set out in paragraphs 30 to 53 above, as well as any further or other steps that may be required to identify, care for, preserve or facilitate the recovery of the Engines and Associated Property (including all steps insisted on by the Plaintiffs).

60. Given that those steps are solely for the benefit of the Plaintiffs, I consider that the applicable costs should be borne by the Plaintiffs and, until paid, the Administrators intend to exercise a lien over the Engines and Associated Property which must be discharged before the property can be collected by the Plaintiffs and seek a declaration or order that they may do so. The Plaintiffs are on notice, by way of the 4 July Letter, that the Administrators will seek to recover those costs from the Plaintiffs. However, in line with my covering letter to the 443B Notice and the 4 July Letter, the Administrators have voluntarily agreed to meet insurance and maintenance costs and the Administrators' professional time arising between 16 and 30 June 2020.
61. Should the lien which the Administrators intend to assert over the Engines and Associated Property be upheld by the Court, the Administrators intend to file further evidence in support of the quantum of costs to which the lien relates, at that time.

Swearing of this Affidavit

62. I have not been able to swear this affidavit in proper form at the time that I have signed it due to the measures I have taken to minimise the spread of COVID-19.

63. I have been informed by Orfhlaith (Orla) Maria McCoy, as the proposed witness to this affidavit, and believe, that the relaxation of formality with respect to the unsworn nature of this affidavit does not diminish the need for me to satisfy myself that the contents of this affidavit are true and correct. I have satisfied myself that that is the case.
64. I will formally swear this affidavit when circumstances allow and will instruct Clayton Utz to file the sworn version with the Court.

Sworn by the deponent
at Melbourne,
in Victoria
on 17 July 2020
Before me:

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)
)
)
)

Signature of deponent

Signature of witness
Orfhlaith Maria McCoy, solicitor.

SCHEDULE 1

Federal Court of Australia
District Registry: New South Wales
Division: Commercial and Corporations List

No. NSD 714 of 2020

IN THE MATTER OF VB LEASECO PTY LTD (ADMINISTRATORS APPOINTED) ACN 134 268 741 & ORS

Plaintiffs

First Plaintiff: Wells Fargo Trust Company, National Association (as owner trustee)

Second Plaintiff: Willis Lease Finance Corporation

SCHEDULE 2

Federal Court of Australia
District Registry: New South Wales
Division: Commercial and Corporations List

No. NSD 714 of 2020

IN THE MATTER OF VB LEASECO PTY LTD (ADMINISTRATORS APPOINTED) ACN 134 268 741 & ORS

Defendants

First Defendant: VB Leaseco Pty Ltd (Administrators Appointed) ACN 134 268 741

Second Defendant: Virgin Australia Airlines Pty Ltd (Administrators Appointed)
ACN 090 670 965

Third Defendant Vaughan Strawbridge, Salvatore Algeri, John Greig and Richard Hughes, in their capacity as joint and several voluntary administrators of the First and Second Defendants

SCHEDULE 3

Federal Court of Australia
District Registry: New South Wales
Division: Commercial and Corporations List

No. NSD 714 of 2020

IN THE MATTER OF VB LEASECO PTY LTD (ADMINISTRATORS APPOINTED) ACN 134 268 741 & ORS**Virgin entities in administration**

1. Virgin Australia Holdings Ltd (Administrators Appointed) ACN 100 686 226
2. Virgin Australia International Operations Pty Ltd (Administrators Appointed) ACN 155 859 608
3. Virgin Australia International Holdings Pty Ltd (Administrators Appointed) ACN 155 860 021
4. Virgin Australia International Airlines Pty Ltd (Administrators Appointed) ACN 125 580 823
5. Virgin Australia Airlines (SE Asia) Pty Ltd (Administrators Appointed) ACN 097 892 389
6. Virgin Australia Airlines Holdings Pty Ltd (Administrators Appointed) ACN 093 924 675
7. VAH Newco No.1 Pty Ltd (Administrators Appointed) ACN 160 881 345
8. Tiger Airways Australia Pty Limited (Administrators Appointed) ACN 124 369 008
9. Virgin Australia Airlines Pty Ltd (Administrators Appointed) ACN 090 670 965
10. VA Borrower 2019 No. 1 Pty Ltd (Administrators Appointed) ACN 633 241 059
11. VA Borrower 2019 No. 2 Pty Ltd (Administrators Appointed) ACN 637 371 343
12. Virgin Tech Pty Ltd (Administrators Appointed) ACN 101 808 879
13. Short Haul 2018 No. 1 Pty Ltd (Administrators Appointed) ACN 622 014 831
14. Short Haul 2017 No. 1 Pty Ltd (Administrators Appointed) ACN 617 644 390
15. Short Haul 2017 No. 2 Pty Ltd (Administrators Appointed) ACN 617 644 443
16. Short Haul 2017 No. 3 Pty Ltd (Administrators Appointed) ACN 622 014 813
17. VBNC5 Pty Ltd (Administrators Appointed) ACN 119 691 502
18. A.C.N. 098 904 262 Pty Ltd (Administrators Appointed) ACN 098 904 262
19. Virgin Australia Regional Airlines Pty Ltd (Administrators Appointed) ACN 008 997 662
20. Virgin Australia Holidays Pty Ltd (Administrators Appointed) ACN 118 552 159

21. VB Ventures Pty Ltd (Administrators Appointed) ACN 125 139 004
22. Virgin Australia Cargo Pty Ltd (Administrators Appointed) ACN 600 667 838
23. VB Leaseco Pty Ltd (Administrators Appointed) ACN 134 268 741
24. VA Hold Co Pty Ltd (Administrators Appointed) ACN 165 507 157
25. VA Lease Co Pty Ltd (Administrators Appointed) ACN 165 507 291
26. Virgin Australia 2013-1 Issuer Co Pty Ltd (Administrators Appointed) ACN 165 507 326
27. 737 2012 No.1 Pty. Ltd (Administrators Appointed) ACN 154 201 859
28. 737 2012 No. 2 Pty Ltd (Administrators Appointed) ACN 154 225 064
29. Short Haul 2016 No. 1 Pty Ltd (Administrators Appointed) ACN 612 766 328
30. Short Haul 2016 No. 2 Pty Ltd (Administrators Appointed) ACN 612 796 077
31. Short Haul 2014 No. 1 Pty Ltd (Administrators Appointed) ACN 600 809 612
32. Short Haul 2014 No. 2 Pty Ltd (Administrators Appointed) ACN 600 878 199
33. VA Regional Leaseco Pty Ltd (Administrators Appointed) ACN 127 491 605
34. VB 800 2009 Pty Ltd (Administrators Appointed) ACN 135 488 934
35. VB Leaseco No 2 Pty Ltd (Administrators Appointed) ACN 142 533 319
36. VB LH 2008 No. 1 Pty Ltd (Administrators Appointed) ACN 134 280 354
37. VB LH 2008 No. 2 Pty Ltd (Administrators Appointed) ACN 134 288 805
38. VB PDP 2010-11 Pty Ltd (Administrators Appointed) ACN 140 818 266
39. Tiger International Number 1 Pty Ltd (Administrators Appointed) ACN 606 131 944