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A handwritten signature in blue ink that reads 'Sia Lagos'.

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Registrar

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**IN THE MATTER OF VIRGIN AUSTRALIA HOLDINGS LTD (ADMINISTRATORS
APPOINTED) & ORS**

Federal Court of Australia proceedings No. NSD 464 of 2020

**SUBMISSIONS OF BC HART AGGREGATOR, L.P. AND
BC HART AGGREGATOR (AUSTRALIA) PTY LTD
ON THE INTERLOCUTORY PROCESS LISTED FOR HEARING ON 10 JULY 2020**

Introduction

1. These are the submissions of BC Hart Aggregator, L.P. and BC Hart Aggregator (Australia) Pty Ltd (**the Purchasers**) in respect of the interlocutory process filed 7 July 2020 (**Interlocutory Process**) by Broad Peak Investment Advisers Pte. Ltd and Tor Investment Management (Hong Kong) Ltd (**the Applicants**). The Purchasers are subsidiaries of Bain Capital Private Equity LP, Bain Capital Credit LP and their related entities (**Bain Capital**).
2. The Purchasers were served with the Interlocutory Process and seek leave to appear and make submissions at the hearing of the Interlocutory Process as an interested person pursuant to rule 2.13(1)(c) of the *Federal Court (Corporations) Rules 2000*.
3. The Purchasers oppose the Applicants being granted the relief sought in paragraphs 4 (Extension of time to apply) and 6 (Variation of non-publication and confidentiality orders) of the Interlocutory Process.

Extension of time to apply

4. Bain Capital has provided a facility to the Administrators to assist the ongoing funding of the Administrators and the business of the second to fortieth plaintiffs (**the Virgin Companies**). That funding is secured over certain assets and collateral of some of the Virgin Companies. As a condition precedent to any drawing down of the funding, the Administrators were required to obtain an order from the Court pursuant to s 588FM of the *Corporations Act 2001* (Cth) (**Corporations Act**) extending the time

for registration of the security interests provided by the Virgin Companies (**s 588FM Order**). The s 588FM Order was made by the Court on 2 July 2020.¹

5. Order 7 made by the Court on 2 July 2020 provided any person affected by the orders (including the s 588FM Order) with liberty to apply to vary or discharge the orders within 5 business days of being provided with notice of the orders. That regime allows any issue concerning the s 588FM Order to be addressed promptly, with the consequence that the funding can then be advanced with a degree of certainty that the security granted by the Virgin Companies is efficacious. It diminishes the risk that Bain Capital advances funds on the faith of a security, only to find the security vests in the companies pursuant to s 588FL because the 588M Order is later set aside.
6. The effect of the relief sought in paragraph 4 of the Interlocutory Process is to extend indefinitely or, at least, until 31 July 2020 or resolution of the Applicants' application in the Takeovers Panel, the ability of the Applicants (and others) to seek to discharge or vary the s 588FM Order. That variation, if made, would require Bain Capital either to advance funds under the shadow of losing its security at one of these later dates, or not advance them and face the prospect that the Virgin Companies cannot continue to trade. The only apparent reason for it is to satisfy the litigious predilection of the Applicants to pursue a complaint in the Takeovers Panel before deciding whether to challenge the s 588FM Order. That should not be permitted. No order sought in the Applicants' Panel application purports to unwind the SID or Bain Capital's funding facility. Nothing the Panel does could provide a basis for reconsidering the s 588FM Order. The argument for setting aside that order (if there is one) is as good now as it will ever be.
7. Further, so far as the Purchasers are aware, the Applicants have advanced no prima facie basis for challenging the s 588FM Order; it is not evident how they could be prejudiced by it; and it should be uncontroversial that (as the Court accepted on 2 July 2020²) the s 588FM Order is justified because:
 - a. the funding is necessary to ensure the ongoing trading of the Virgin Companies and to meet the ongoing liabilities to progress the external administration of the Virgin Companies;

¹ *Strawbridge, in the matter of Virgin Australia Holdings Ltd (administrators appointed) (No 4)* [2020] FCA 927 at [3].

² *Strawbridge, in the matter of Virgin Australia Holdings Ltd (administrators appointed) (No 4)* [2020] FCA 927 at [23].

- b. the Virgin Companies are unable to continue to trade the business up to the date of the second meeting of creditors without the funding; and
 - c. the repayment of that funding will not alter the outcome for the Virgin Companies' unsecured creditors or employees.
8. In so far as Prayer 4 in the Interlocutory Process seeks to vary the time to discharge Order 2 made on 2 July 2020, that variation appears to be unnecessary given that Order 2 is expressly made "until further order".

Non-publication and confidentiality orders

9. Order 2 made by the Court on 2 July 2020 is an order under sections 37AF(1)((b)(i) and (ii) of the *Federal Court of Australia Act 1976* (Cth) in respect of certain confidential material relied on by the Administrators (**Confidentiality Order**).³
10. That material includes the Implementation and Sale Deed executed by the Administrators on 26 June 2020 by which the business and assets of the Virgin Companies were sold to the Purchasers (**Sale Deed**), and other transaction documents in connection with the sale.⁴ Those documents are subject to confidentiality provisions and undertakings, and contain information pertaining to the Virgin Companies, the Purchasers and Bain Capital, which is not presently in the public domain and is not otherwise publicly available.⁵
11. By the variation sought in prayer 6 sought in the Interlocutory Process, the Applicants seek access to these documents. This variation should not be made.
12. It must be recalled that the Sale Deed and other transaction documents were entered into following an extensive process for the sale or recapitalisation of the business and assets of the Virgin Companies conducted by the Administrators.⁶ The transaction contained in the Sale Deed and transaction documents reflected the culmination of that sale process and, in the Administrators' view, provided the most favourable

³ Order 2 made by Middleton J on 2 July 2020.

⁴ *Strawbridge, in the matter of Virgin Australia Holdings Ltd (administrators appointed) (No 4)* [2020] FCA 927 at [2], [10].

⁵ *Strawbridge, in the matter of Virgin Australia Holdings Ltd (administrators appointed) (No 4)* [2020] FCA 927 at [10].

⁶ *Strawbridge, in the matter of Virgin Australia Holdings Ltd (administrators appointed) (No 4)* [2020] FCA 927 at [14]-[15].

terms available for the sale or recapitalisation for the benefit of the creditors of the Virgin Companies as a whole.⁷

13. The Applicants participated in the sale process undertaken by the Administrators and submitted a “back-up recapitalisation proposal” on 24 June 2020.⁸ That proposal was considered and rejected by the Administrators.⁹ The Applicants are therefore an underbidder following a completed sale process.
14. Notwithstanding that, the Applicants, by their application to the Takeovers Panel, seek to re-open the sale process and submit another proposal to the Administrators. For that purpose, they seek orders from the Takeovers Panel permitting them to engage with officers, management, employees, contractors, creditors, customers, suppliers, landlords, shareholders, financiers and other stakeholders in the Virgin Companies.¹⁰
15. In that context, there is a very real prejudice to the Virgin Companies and the Purchasers in allowing the Applicants to pursue their unsuccessful proposal, armed with the detail of the Purchasers’ successful proposal.
16. First, following entry into the Sale Deed and other transactions documents, the Purchasers and the Administrators have been engaged in confidential discussions with a wide range of stakeholders in the business of the Virgin Companies, including contractual counterparties, aircraft lessors and trade unions. The aim of those discussions is to facilitate the transaction contained in the Sale Deed and to negotiate new terms with those stakeholders. By those negotiations, the Purchasers and the Administrators aim to maximise the likelihood of the business of the Virgin Companies being successfully conducted in the future. The outcome of those discussions will also have a bearing on the final outcome for creditors in the administration of the Virgin Companies, including under any deed of company arrangement.¹¹

⁷ *Strawbridge, in the matter of Virgin Australia Holdings Ltd (administrators appointed) (No 4)* [2020] FCA 927 at [23(2)].

⁸ *Strawbridge, in the matter of Virgin Australia Holdings Ltd (administrators appointed) (No 4)* [2020] FCA 927 at [15(11)]. See also Applicants’ Application to the Takeovers Panel dated 3 July 2020.

⁹ *Strawbridge, in the matter of Virgin Australia Holdings Ltd (administrators appointed) (No 4)* [2020] FCA 927 at [15(12)].

¹⁰ See Applicants’ Application to the Takeovers Panel dated 3 July 2020 “Final/Interim order(s) sought”.

¹¹ Affidavit of Vaughan Strawbridge sworn 9 July 2020 at [27]-[28].

17. The prospect of the Applicants endeavouring to engage with the same stakeholders, with a view to negotiating their own terms with them,¹² is liable to disrupt this process and impede the ability of the Administrators and the Purchasers to complete the transaction the subject of the Sale Deed in a manner that produces the most favourable return to creditors. The potential for disruption is maximised if the Applicants have access to the confidential detail of the Purchasers' proposal. There is no warrant for them doing so when that proposal is the product of a competitive bidding process that has closed, and the Applicants are seeking to pursue a rival proposal that was rejected by the Administrators.
18. Secondly, to allow the Applicants access to the confidential details of the Purchasers' successful bid at this stage undermines the extensive sale process which the Administrators put in place. If a successful bidder could be faced with the risk of being gazumped, before the transaction completes, by a dissatisfied underbidder armed with the confidential details of the successful bid, that would provide a considerable disincentive to bidders submitting final and binding offers in the first place. The matter was put in these terms by Black J in *Re TEN Network Holdings Limited (Administrators Appointed) (Receivers and Managers Appointed)* [2017] NSWSC 1247 at [39]

It is perhaps difficult to see why, in a complex administration, the administrators should not or do not have power to take steps to negotiate a deed of company arrangement which will be put to creditors for approval, even if their doing so potentially narrows the range of other options that may be available to creditors. The administrators have wide statutory powers while a company is under voluntary administration ...Where a bidding process for assets is conducted by receivers and administrators, one might expect that bidders would generally not make their best offer until that offer can lead to a concluded (although potentially conditional) transaction, and not if that offer would simply be the starting point for further negotiations at or after a second meeting of creditors.

19. One further point should be made. One of the interim orders which the Applicants seek from the Takeovers Panel is access to the Bain Proposal, including the Sale Deed. It cannot be said that the Applicants' proposed variation to Order 2 is necessary to enable the Applicants to pursue that interim relief in the Takeovers Panel, at least in so far as the proposed variation contemplates access to the Sale Deed and other transaction documents being granted to the Applicants and their legal representatives and other interested parties before the Panel. It is one thing to say the Panel should be able to see the Bain Proposal which the Applicants wish to

¹² That this is what the Applicants seek to do is evident from conditions (a), (b) and (c) set out on pages 3 to 4 of the Applicants' Application to the Takeovers Panel dated 3 July 2020.

obtain; but another altogether to allow the Applicants to see it when that is the very thing they are asking the Panel to determine they should have access to.

20. Any suggestion that the variation the Applicants seek is designed to avoid the possibility that the Panel is precluded from ordering disclosure of the Bain Proposal by reason of the existence of the Confidentiality Order is not supported by the terms of Prayer 6 as crafted. At any rate, the question does not arise given that at this stage the Panel has not yet decided to commence proceedings.

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