

ASX ANNOUNCEMENT

24 February 2022

VIRTUS HEALTH LIMITED (ASX: VRT)

Takeovers Panel announcement

Virtus Health Limited ("Virtus", ASX: VRT) refers to the decision and final orders of the Takeovers Panel ("Panel") in response to the application dated 2 February 2022 submitted by BGH Capital Pty Ltd ("BGH") (the "Panel Decision"). The Panel's media release, including final orders, was released yesterday.

The Panel Decision relates to the Process Deed entered into by Virtus and CapVest Partners LLP ("CapVest") following receipt of CapVest's proposal, as set out in Virtus' ASX announcement on 20 January 2022, to acquire 100% of Virtus by way of scheme of arrangement offering \$7.60 cash per share with alternative transaction structure offering \$7.50 cash per share (the "CapVest Proposal"), and the earlier proposal received from BGH as set out in Virtus' ASX announcement on 14 December 2021 to acquire all of Virtus' shares via scheme of arrangement at \$7.10 cash per share (the "BGH Proposal").

The Panel orders provide, in summary, that:

1. Virtus and CapVest cannot enter into an agreement to effect the CapVest Proposal until 11 March 2022;
2. certain exclusivity arrangements contained in the Process Deed needed to be amended to clarify how they would operate in the event that Virtus does receive a competing proposal; and
3. Virtus must disclose the amended terms of the Process Deed and the "Data Room Open Date".

Attached is the amended Process Deed that has been agreed with CapVest. Virtus notes that the "Data Room Open Date" under the Process Deed occurred on 31 January 2022.

The CapVest Proposal was made on the basis that CapVest required exclusivity and other protections in order to proceed with the CapVest Proposal. The Virtus Board agreed to provide exclusivity on the terms of the Process Deed as it considered that the CapVest Proposal was attractive for shareholders in the context of a change of control transaction, was superior to the BGH Proposal and it was therefore in the best interests of Virtus shareholders.

As previously announced on 20 January 2022, subject to Virtus and CapVest agreeing an implementation deed on terms acceptable to Virtus, it is the Virtus Board's intention to unanimously recommend that shareholders vote in favour of, or accept, the CapVest Proposal in the absence of a superior proposal and subject to an independent expert concluding it is in the best interests of Virtus shareholders, or fair and reasonable, as applicable.

While CapVest's due diligence is progressing and the parties are negotiating the terms of an implementation agreement, there is no certainty that the CapVest Proposal will result in any transaction being put to Virtus shareholders for their consideration. Virtus shareholders do not need to take any action at this stage in relation to the CapVest Proposal or the BGH Proposal.

The Virtus Board will continue to keep shareholders and the market informed of further developments.

This announcement is authorised by the board of directors of the company.

-ENDS-

Further information:

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Virtus Health Limited (ASX:VRT) brings together leading clinicians, scientists, researchers and support staff to provide the very best in fertility care and related specialised diagnostic and day hospital services. We have developed one of the most successful ARS collaborations in the world. With 126 of the world's leading fertility specialists supported by over 1300 professional staff, we are the largest network and provider of fertility services in Australia, Ireland and Denmark, Singapore and UK.



Conformed Version as at 23 February 2022

Process Deed

CapVest Partners LLP

and

Virtus Health Limited

ACN 129 643 492

THIS DEED is made on

2022

BETWEEN:

- (1) **CapVest Partners LLP** whose registered office is at 100 Pall Mall, St. James's, London SW1Y 5NQ (**CapVest**); and
- (2) **Virtus Health Limited** ACN 129 643 492 whose registered office is at Level 3, 176 Pacific Highway, Greenwich, NSW 2065 (**Virtus**).

RECITALS:

- (A) On or about the date of this document, CapVest provided to Virtus a non-binding indicative offer letter in respect of a Transaction.
- (B) Each party has agreed to progress a Transaction on the terms and conditions of this document.

THE PARTIES AGREE AS FOLLOWS:

1. DEFINITIONS AND INTERPRETATION

1.1 The following definitions apply in this document:

Affiliate means, in respect of a person (**Primary Person**), a person:

- (a) Controlled directly or indirectly by the Primary Person;
- (b) Controlling directly or indirectly the Primary Person;
- (c) who is Controlled, directly or indirectly, by a person or persons who Control the Primary Person; or
- (d) directly or indirectly under the common Control of the Primary Person and another person or persons.

Agreed Fee means an amount equal to:

- (a) where an Agreed Fee is payable by Virtus solely by reason of an event described in clause 5.1(a) having occurred, A\$2,000,000; or
- (b) where an Agreed Fee is payable by Virtus by reason of an event described in any one or more of clauses 5.1(b) to 5.1(d) having occurred (notwithstanding that an event described in clause 5.1(a) has or may have occurred), A\$4,000,000, provided that, where an Agreed Fee described in paragraph (a) has been paid by Virtus, Virtus shall only be required to pay an additional amount of A\$2,000,000.

Associate has the meaning set out in Division 2 of Part 1.2 of the Corporations Act, as if section 12(1) of the Corporations Act included a reference to this document and Virtus was the designated body.

ASX means ASX Limited or the financial market known as the Australian Securities Exchange that it operates, as the context requires.

BGH Proposal means the non-binding offer from BGH Capital Pty Ltd as announced to ASX by Virtus on 14 December 2021.

Business means the business currently conducted by the Virtus Group.

Business Day means a day on which banks are open for general banking business in Sydney, New South Wales and London, England (not being a Saturday, Sunday or public holiday in either of those places).

CapVest Counterproposal has the meaning given to that term in clause 4.9.

Competing Proposal means any offer, proposal, agreement, arrangement or transaction, whether existing before, on or after the date of this document (including for the avoidance of doubt any offer, proposal, agreement, arrangement or transaction arising out of or in connection with the BGH Proposal but excluding any Virtus shares that BGH acquired or agreed to acquire before that ASX announcement while that shareholding is less than 20%), which, if entered into or completed, could mean that a person other than CapVest or its Affiliates (either alone or with any Associate thereof) would:

- (a) directly or indirectly acquire Voting Power in, or have a right to acquire a legal, beneficial or economic interest in, or control of, more than 20% of the securities in any member of the Virtus Group;
- (b) acquire Control of any member of the Virtus Group;
- (c) directly or indirectly acquire or become the holder of, or otherwise acquire or have a right to acquire a legal, beneficial or economic interest in, or control of, all or substantially all or a material part of the Business or assets of any member of the Virtus Group;
- (d) otherwise directly or indirectly acquire, be stapled with or merge with Virtus; or
- (e) require CapVest to abandon, or otherwise fail to proceed with, a Transaction,

whether by way of a takeover bid, scheme of arrangement, shareholder approved acquisition, capital reduction, buy back, sale, lease or purchase of shares, other securities or assets, assignment of assets or liabilities, joint venture, dual listed company (or other synthetic merger), deed of company arrangements, any debt for equity arrangement or other transaction or arrangement.

Confidentiality Deed means any confidentiality agreement or deed between Virtus and/or any Affiliate of Virtus and CapVest or any Affiliate of CapVest.

Control means with respect to any person (other than an individual) the possession, directly or indirectly, of the power to direct or cause the direction of the management or policies of such person whether through the ownership of voting securities, by agreement or otherwise, and for the avoidance of doubt:

- (a) a general partner is deemed to Control a limited partnership of which it is the general partner and a fund advised or managed directly or indirectly by a person will also be deemed to be Controlled by such person; and
- (b) a trust will Control another entity if its trustee Controls the entity, a partnership will Control another entity if a partner (including a general partner) Controls the entity in its capacity as partner and a fund or investment vehicle will Control another entity if the manager or responsible entity Controls the entity in its capacity as manager or responsible entity of the fund or investment vehicle.

Corporations Act means the *Corporations Act 2001* (Cth), as modified or varied by ASIC.

Cut Off Date means the date that is 5 Business Days after the date of the provision of the information referred to in clause 4.8(b).

Data Room Open Date means the first Business Day after the date on which Virtus gives notice to CapVest in accordance with clause 2.4(a) and such data room is open and made available to CapVest.

Diligence Period means the period from and including the date of this document to the date that is 10 Business Days after the date on which the Exclusivity Period ends.

End Date means the date that is four months after the last day of the Diligence Period.

Exclusivity Period means the period from and including the date of this document to the date that is 40 Business Days after the Data Room Open Date.

Fee Payment Date means:

- (a) in respect of clauses 5.1(a), 5.1(b), 5.1(d), 10 Business Days after the date on which the relevant event occurs; or
- (b) in respect of clause 5.1(c), the date on which a relevant legally binding agreement is entered into or a takeover bid is announced that is unanimously recommended by the Virtus Board.

Government Agency means any governmental, semi-governmental, administrative, fiscal, judicial or quasi-judicial body, department, commission, authority, tribunal, agency or entity, including the Australian Competition and Consumer Commission and the Foreign Investment Review Board.

GST means a tax imposed under the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) or any related legislation.

Implementation Agreement means an implementation agreement or deed to be entered into between Virtus and CapVest or its nominee for the purposes of a Transaction, which agreement will reflect any agreed terms and conditions as at the date of this document (which must, for the avoidance of doubt but without limitation, include the price, terms and conditions reflected in the public announcement set out at **Annexure A**).

Insolvency Event means, in relation to any entity:

- (a) the entity resolving or applying to court for an order that it be wound up or a court making an order for the winding up or dissolution of the entity;
- (b) a liquidator, provisional liquidator, administrator, receiver, receiver and manager, trustee or other insolvency official being appointed to the entity or in relation to the whole, or a substantial part, of its assets;
- (c) the entity executing a deed of company arrangement or other compromise or arrangement with its creditors or any class of them;
- (d) the entity ceases, or threatens to cease to, carry on substantially all the business conducted by it as at the date of this document
- (e) the entity is or becomes unable to pay its debts when they fall due within the meaning of the Corporations Act (or, if appropriate, legislation of its place of incorporation);
- (f) the entity being deregistered as a company or otherwise dissolved; or
- (g) something having a substantially similar effect to any of the things described in paragraphs (a) to (f) happens in connection with the entity under the law of Australia or any foreign jurisdiction,

but in respect of CapVest or any of its Affiliates, does not include any solvent internal or voluntary amalgamation, reorganisation, restructuring, termination, deregistration or dissolving of entities or vehicles.

Phase 1 Requested Due Diligence Materials means the due diligence materials reflected in the phase 1 request list provided by CapVest to Virtus on or before the date of this document and agreed by email between the parties or their Representatives.

Phase 2 Requested Due Diligence Materials means the due diligence materials reflected in the phase 2 request list provided by CapVest to Virtus on or before the date of this document and agreed by email between the parties or their Representatives.

Representative, in relation to a person, means:

- (a) an Affiliate of the person;
- (b) any trustee, partner, manager or responsible entity of an entity or vehicle (including a trust, a partnership or a fund or investment vehicle) or an Affiliate of the person;
- (c) officers, employees, agents and contractors of the person, an Affiliate of the person or a person specified in paragraph (b) above; and
- (d) financial, tax, accounting, legal or other adviser or other adviser to the person or an Affiliate of the person or a person specified in paragraph (b) above.

Requested Due Diligence Materials means the Phase 1 Requested Due Diligence Materials and the Phase 2 Requested Due Diligence Materials.

Superior Proposal means a bona fide Competing Proposal (and not resulting from a breach by Virtus (or any of its Affiliates or Representatives) of any of its obligations under this document) which the Virtus Board, acting in good faith in the interests of Virtus and its shareholders, and after taking advice from its legal and financial advisers, determines:

- (a) is reasonably capable of being valued and completed taking into account all aspects of the Competing Proposal, including any timing considerations, its conditions, the identity, reputation and financial condition of the person making such proposal, and all relevant legal, regulatory and financial matters; and
- (b) would be more favourable to Virtus shareholders (as a whole) than the latest proposal provided by CapVest to Virtus, taking into account all aspects of the Competing Proposal and the latest proposal provided by CapVest to Virtus, including the identity, reputation and financial condition of the person making such proposal, legal, regulatory and financial matters, certainty and any other matters affecting the probability of the relevant proposal being completed in accordance with its terms.

Subsidiary of an entity means another entity which is a subsidiary of the first entity within the meaning of the Corporations Act.

Scheme means a members' scheme of arrangement under Part 5.1 of the Corporations Act to effect a Transaction.

Transaction means a potential transaction whereby CapVest and/or any one or more Affiliates of CapVest (either alone or together with any other equity investor) would acquire from 50.1% to 100% (inclusive) of the ordinary shares in Virtus by way of a scheme of arrangement proposing scheme consideration of no less than \$7.60 per Virtus share and a simultaneous control transaction with an offer price of no less than \$7.50 per Virtus share (with conditions that include a minimum acceptance condition of no more than 50.1% and the simultaneous scheme of arrangement being unsuccessful).

Virtus Board means the board of directors of Virtus.

Virtus Group means Virtus and its Subsidiaries.

Virtus Material Adverse Event means any matter directly concerning the operations and affairs of Virtus which has resulted in, or is reasonably likely to result in a diminution in the net assets of the Virtus Group by an amount equal to 7.5% or more, as compared to what the net assets of the Virtus Group could reasonably be expected to have been but for the relevant matter, other than a matter:

- (a) disclosed to ASX prior to the date of this document or in a document lodged with any Government Agency that is publicly available prior to the date of this document;
- (b) that is within the actual knowledge of CapVest or its Affiliates as at the date of this document;
- (c) arising from any change in any law, or rule or regulation of any Government Agency (excluding any change in any law, or rule or regulation of any Government Agency in respect of fertility treatment and health or impacting the market in which the Business operates), or any change in generally accepted accounting standards;
- (d) arising from general economic, business or financial market conditions or changes in those conditions that impact Australian businesses generally;
- (e) arising from an act of terrorism, war, natural disaster or adverse weather conditions or the like; or
- (f) arising from the COVID-19 virus (or any mutation, variation or derivative), or from any law, order, rule or direction of any Government Agency in relation thereto.

Voting Power has the meaning it is given in section 610 of the Corporations Act.

1.2 Headings are for convenience only, and do not affect interpretation. The following rules also apply in interpreting this document, except where the context makes it clear that a rule is not intended to apply:

- (a) the singular includes the plural and vice versa;
- (b) if a word or phrase is defined, any other grammatical form of that word or phrase has a corresponding meaning;
- (c) if an example is given of anything (including a right, obligation or concept), such as by saying it includes something else, the example does not limit the scope of that thing;
- (d) a reference to:
 - (i) a legislative provision or legislation (including subordinate legislation) is to that provision or legislation as amended, re-enacted or replaced, and includes any subordinate legislation issued under it;
 - (ii) dollars, \$ or A\$ is a reference to the currency of Australia;
 - (iii) a person includes any type of entity or body of persons, whether or not it is incorporated or has a separate legal identity, and any executor, administrator or successor in law of the person;
 - (iv) a party to this document or to any other document or agreement includes a successor in title, permitted substitute or a permitted assign of that party;

- (v) a document (including this document) or agreement, or a provision of a document (including this document) or agreement, is to that document, agreement or provision as amended, supplemented, replaced or novated; and
- (vi) a clause, term, party, schedule or attachment is a reference to a clause or term of, or party, schedule or attachment to this document;
- (e) a period of time starting from a given day or the day of an act or event, is to be calculated exclusive of that day;
- (f) when the day on which something must be done is not a Business Day, that thing must be done on the following Business Day; and
- (g) no rule of construction applies to the disadvantage of a party because that party was responsible for the preparation of this document or any part of it.

2. ACCESS AND SUPPORT TO BE PROVIDED BY VIRTUS TO FACILITATE A TRANSACTION

2.1 Provision of due diligence materials

Virtus agrees that, during the Exclusivity Period, it will promptly provide or make available (as applicable) to CapVest and its Representatives all Requested Due Diligence Materials and all other due diligence materials reasonably requested by CapVest or its Representatives for the purposes of discussing, assessing, negotiating or implementing a Transaction.

2.2 Provision of access to premises, officers and employees

Virtus agrees that, during the Exclusivity Period, it will promptly:

- (a) organise and facilitate arranged visits by Representatives of CapVest to the premises used, leased, licenced or owned by the Virtus Group, as nominated by CapVest, where such visits are for the purposes of assessing a Transaction; and
- (b) provide Representatives of CapVest with reasonable access to executives and senior management of the Virtus Group and any medical professionals (including any doctors) of the Business or that are employed or contracted by the Virtus Group on reasonable notice, where such access (as applicable) is for the purposes of discussing, assessing and/or negotiating a Transaction (as applicable) (including for the purposes of discussing rollover consideration or equity consideration in connection with a Transaction),

provided that such access or meetings are at all times in the presence of representatives of Virtus.

2.3 Provision of management presentations

Virtus agrees that, during the Exclusivity Period, it will promptly organise and facilitate presentations by executives and senior management of the Virtus Group on reasonable notice where such presentations are for the purposes of assessing a Transaction.

2.4 Data room establishment and timing for provision of Requested Due Diligence Materials

Virtus must procure that, as soon as reasonably practicable, a virtual data room is made available to the Representatives of CapVest nominated by CapVest, which virtual data room must:

- (a) within 5 Business Days of the date of this document, be substantially populated with the Phase 1 Requested Due Diligence Materials and Virtus must provide CapVest with written notice once this has occurred;
- (b) within 10 Business Days of the date of this document, be substantially populated with the Phase 2 Requested Due Diligence Materials and Virtus must provide CapVest with written notice once this has occurred;
- (c) provide for a facility for CapVest or its Representatives to request further information from Virtus during the Exclusivity Period and track the progress of responses to those requests; and
- (d) be populated with any information reasonably requested under clause 2.4(c) within a reasonable period.

2.5 **Reasonable ad hoc requests**

After the Exclusivity Period until the end of the Diligence Period, Virtus will:

- (a) provide CapVest with access to the virtual data room described in clause 2.4; and
- (b) respond in good faith and in a timely manner to reasonable ad hoc requests for information from CapVest where such information is necessary for CapVest to obtain debt or equity financing in relation to a Transaction or for the purposes of discussing, assessing and/or negotiating a Transaction.

Virtus and CapVest agree that any requests in clause 2.5(b) may include the provision of information by Virtus and senior management participating in discussions via telephone or other method of audio visual link.

2.6 **Limits on Virtus' obligations**

The obligations in this clause 2 do not require Virtus to:

- (a) do anything which would cause undue disruption to the operation of its business in the ordinary course;
- (b) do anything which would cause or potentially cause harm to any person, including by virtue of the COVID-19 virus (or any mutation, variation or derivative);
- (c) require a member of the Virtus Group to take any action that would be reasonably expected to result in a Virtus Group member breaching any applicable law, order, rule or direction of any Government Agency, including in relation to the COVID-19 virus (or any mutation, variation or derivative), or the entity's constituent documents;
- (d) require a member of the Virtus Group to take any action that would breach an obligation to any person (including any confidentiality obligations), provided Virtus Group takes reasonable steps to satisfy the reasonable information requests of CapVest concerning that matter;
- (e) provide information to CapVest concerning the Virtus Board's and management's consideration of the Transaction or any Competing Proposal; or

- (f) provide any confidential, competitively sensitive or privileged information where the provision of such information is reasonably likely to cause prejudice to the commercial or legal interests of the Virtus Group taken as a whole, or would be reasonably likely to jeopardise any attorney-client, work product or other legal privilege, provided Virtus Group takes reasonable steps to satisfy the reasonable information requests of CapVest concerning that matter (which includes, for the avoidance of doubt, redacting any confidential, competitively sensitive or privileged information).

2.7 Confidentiality Deed applies

The parties acknowledge that all information that is provided pursuant to this clause 2 will be provided subject to the terms of the Confidentiality Deed.

3. ANNOUNCEMENT, NEGOTIATION OF IMPLEMENTATION AGREEMENT AND COMMITMENT OF RESOURCES

3.1 Announcement and intention to recommend

- (a) Immediately after the execution of this document, Virtus must issue a public announcement in the form set out at **Annexure A**.
- (b) Virtus warrants that as at the date of this document, each of its directors has confirmed that he or she intends, upon entry into an Implementation Agreement on acceptable terms, to unanimously recommend to Virtus' shareholders to accept any offer under, or vote in favour of, (as the case may be) any Transaction in respect of which the consideration per ordinary share in Virtus is equal to or greater than the price specified in the public announcement set out at **Annexure A**, in the absence of a Superior Proposal and subject to an independent expert concluding that the offer under the relevant Transaction is in the best interests of Virtus' shareholders in respect of the Scheme and is fair and reasonable in respect of the takeover bid.

3.2 Good faith negotiation of the Implementation Agreement

Virtus and CapVest must, during the Exclusivity Period, negotiate in good faith an Implementation Agreement and any other transaction documentation required to implement a Transaction.

3.3 First draft of Implementation Agreement

Virtus must provide a first draft of the Implementation Agreement as soon as practicable and in any event within 10 Business Days of the date of this document.

3.4 Commitment of necessary resources

Virtus and CapVest must commit all reasonably necessary resources (including management and financial, legal and other professional advisory resources) to enable:

- (a) an Implementation Agreement and any other transaction documentation required to implement a Transaction to be prepared, negotiated and finalised before the expiry of the Exclusivity Period; and
- (b) CapVest to complete its due diligence investigations in relation to the Virtus Group before the expiry of the Exclusivity Period,

and in any event continue to commit all reasonably necessary resources to enable the matters contemplated in paragraphs (a) and (b) to be completed before the expiry of the Diligence Period.

3.5 **Ceasing to progress Transaction**

CapVest agrees to progress the Transaction in good faith and if at any time during the Exclusivity Period, CapVest decides to no longer progress a Transaction in respect of which the consideration per ordinary share in Virtus is equal to or greater than the price specified in the public announcement set out at **Annexure A**, it must immediately notify Virtus.

4. **EXCLUSIVITY**

4.1 **No current discussions regarding a Competing Proposal**

Virtus represents and warrants that, other than the discussions with CapVest and its Representatives in respect of a Transaction and its evaluation of the BGH Proposal, as at the date of this document neither Virtus nor any Representative of Virtus has agreed, entered into an arrangement or understanding, or is otherwise in negotiations or discussions in respect of any Competing Proposal with any person.

4.2 **Enforcement of existing confidentiality agreements**

Unless otherwise agreed by CapVest, Virtus must:

- (a) on and from the date of this document, cease any existing discussions with any third party in respect of any offer, proposal, agreement, arrangement or transaction in respect of a Competing Proposal, including for the avoidance of doubt in relation to the BGH Proposal;
- (b) promptly enforce the terms of any confidentiality agreement, deed or undertaking (or similar document) entered into with a person other than CapVest in the 12 months prior to the date of this document in relation to any Competing Proposal (**Other Confidentiality Deed**);
- (c) as soon as reasonably practicable (and in any event within 2 Business Days of the date of this document) request the return or destruction of all confidential information of the Virtus Group in accordance with the terms of that Other Confidentiality Deed, and terminate their access to the Virtus Group's confidential information under that Other Confidentiality Deed; and
- (d) not waive, and must promptly enforce, any standstill obligations of any such person.

4.3 **No shop**

During the Exclusivity Period, Virtus must ensure that neither it nor any of its Representatives directly or indirectly:

- (a) solicits, invites, encourages or initiates any enquiries, expressions of interest, offers, proposals, negotiations or discussions; or
- (b) communicates any intention to do any of these things,

with a view to, or that may be reasonably expected to encourage or lead to, obtaining any offer, proposal or expression of interest from any person in relation to a Competing Proposal.

4.4 **No talk**

Subject to clause 4.6, during the Exclusivity Period, Virtus must ensure that neither it nor any of its Representatives:

- (a) negotiates or enters into; or

(b) participates in negotiations or discussions with any other person regarding,

a Competing Proposal or any agreement, understanding or arrangement that may be reasonably expected to lead to a Competing Proposal, even if that person's Competing Proposal was not directly or indirectly solicited, invited, encouraged or initiated by Virtus or any of its Representatives or the person has publicly announced the Competing Proposal.

4.5 **No due diligence**

Subject to clause 4.6, during the Exclusivity Period Virtus must ensure that neither it nor any of its Representatives in relation to a Competing Proposal:

- (a) enables any other person other than CapVest and any other person nominated by CapVest to undertake due diligence investigations on any member of the Virtus Group, any of the operations or assets of the Business or any part thereof;
- (b) makes available to any other person, or permits any other person to receive, other than CapVest and any other person nominated by CapVest (in the course of due diligence investigations or otherwise) any non-public information relating to any member of the Virtus Group, any of the operations or assets of the Business or any part thereof;
- (c) makes available to any other person, or permits any other person to have access to, other than CapVest and any other person nominated by CapVest (in the course of due diligence investigations or otherwise) any premises used, leased, licenced or owned by the Virtus Group; or
- (d) makes available to any other person, or permits any other person to have access to, other than CapVest and any other person nominated by CapVest (in the course of due diligence investigations or otherwise) any officers or employees of the Virtus Group.

4.6 **Fiduciary carve out to the no talk and no diligence requirements**

Clauses 4.4 and 4.5 do not apply to the extent that the relevant clause (and only to such an extent) restricts Virtus or the Virtus Board from taking or refusing to take any action with respect to a genuine Competing Proposal (which was not solicited, invited, encouraged or initiated in contravention of clause 4.3) provided that the Virtus Board has determined, in good faith and acting reasonably that:

- (a) after consultation with its financial advisors, such a genuine Competing Proposal is, or could reasonably be considered to become, a Superior Proposal; and
- (b) after receiving written legal advice from its external legal advisers failing to respond to such a genuine Competing Proposal would, or would be reasonably likely to, constitute a breach of the Virtus Board's fiduciary or statutory obligations.

In that regard the Virtus Board may facilitate, or continue to facilitate, a Competing Proposal notwithstanding that the relevant Competing Proposal may not be more favourable to Virtus Shareholders than any matching or superior proposal to the terms of the Competing Proposal that may be made by CapVest.

Further, for the avoidance of doubt, CapVest and Virtus agree that the provisions of, and requirements to comply with, clauses 4.11 and 4.8 do not restrict in any way the ability of the Virtus Board to determine that clauses 4.4 and 4.5 do not apply with respect to a genuine Competing Proposal under this clause 4.6 and clause 4.11 does not oblige Virtus to notify CapVest of a Competing Proposal before the Virtus Board has made a determination under this clause 4.6 as to whether clauses 4.4 and 4.5 apply with respect to a genuine Competing Proposal.

4.7 **Non-public information**

- (a) Subject to clause 4.7(b), if any non-public information about the business or affairs of the Virtus Group is provided or made available to any person in connection with an actual, proposed or potential Competing Proposal which has not previously been provided or made available to CapVest, Virtus must promptly, and in any event within 2 Business Days of the date on which such non-public information has been provided or made available to such person, provide to CapVest:
 - (i) in the case of written materials, a copy of: and
 - (ii) in any other case, a written statement of,that non-public information.
- (b) Clause 4.7(a) does not require Virtus to provide or make available to CapVest any information which Virtus reasonably considers is likely to disclose information relating to that other person which is commercially sensitive information of that person.

4.8 **Matching right**

Before any member of the Virtus Group, during the Exclusivity Period, enters into any legally binding agreement to give effect to any Competing Proposal, each of the following conditions must be satisfied:

- (a) the actual, proposed or potential Competing Proposal was not directly or indirectly brought about by, or facilitated by, a breach of clause 4.3;
- (b) Virtus must have complied with its notification obligations under clause 4.11 (which at a minimum must include the offer price per share and material terms and conditions and the identity of the third party making the Competing Proposal); and
- (c) Virtus must give CapVest (or any of its Affiliates) until the Cut Off Date to provide a matching or superior proposal to the terms of the Competing Proposal, and the Virtus Board must not publicly recommend, endorse or support a Competing Proposal prior to the Cut Off Date.

Virtus agrees that each successive modification of any Competing Proposal (including a change to the consideration offered, the addition of any consortium member to a third party consortium proposal, a change to the conditions of the proposal or a non-binding proposal becoming complete, capable of acceptance or binding on the third party) will constitute a new Competing Proposal for the purposes of the requirements under this clause 4.8 and clause 4.11.

4.9 **Matching or superior CapVest proposal**

If, in accordance with clause 4.8(c), CapVest provides to Virtus a proposal (**CapVest Counterproposal**), Virtus must procure that the Virtus Board considers the CapVest Counterproposal and determines whether, acting reasonably and in good faith, the CapVest Counterproposal would provide an equivalent or superior outcome to Virtus shareholders as a whole compared with the Competing Proposal. Following that determination, Virtus must:

- (a) procure that the Virtus Board promptly, and in any event within 2 Business Days, notifies CapVest of the determination in writing, stating reasons for that determination; and

- (b) if the determination is that the CapVest Counterproposal would provide an equivalent or superior outcome to Virtus shareholders as a whole compared with the Competing Proposal, then for a period of 3 Business Days after Virtus delivers to CapVest the notice referred to in clause 4.9(a), Virtus and CapVest must use their best endeavours to agree the transaction documentation required to implement the CapVest Counterproposal as soon as reasonably practicable.

4.10 **Exceptions to the exclusivity arrangement**

Nothing in this clause 4 prevents Virtus from:

- (a) communicating to any person that the Virtus Board has unanimously resolved to reject the BGH Proposal;
- (b) providing information to its Representatives;
- (c) providing information to any Government Agency;
- (d) providing information to its auditors, customers, financiers, joint venturers and suppliers acting in that capacity in the ordinary course of business;
- (e) engaging with its shareholders (in their capacity as a shareholder of Virtus) in relation to the Virtus Group, provided that such engagement does not relate to Virtus soliciting, inviting, encouraging or initiating an actual, proposed or potential Competing Proposal;
- (f) continuing to make presentations to, and to respond to enquiries from, brokers, portfolio investors, analysts and institutional lenders in the ordinary course in relation to its business generally; or
- (g) fulfilling its legal obligations, including continuous disclosure requirements.

4.11 **Notification obligation**

During the Exclusivity Period, Virtus must, subject to clause 4.6:

- (a) promptly, and in any event within 1 Business Day of the approach, inform CapVest in writing if it or any of its Representatives receives any approach with respect to any actual, proposed or potential Competing Proposal and must disclose to CapVest:
 - (i) the fact that the approach has been made;
 - (ii) all material terms and conditions of, and the nature of, the Competing Proposal, including as to value and price;
 - (iii) the details of the person making the approach (and if different, details of and the identity of the proposed bidder or acquirer), the material terms of the Competing Proposal and any material updates to the proposal, to allow Virtus to properly exercise its right under clause 4.9; and
- (b) as soon as practicable, and in any event within 1 Business Day after Virtus decides to provide information or the Virtus Board resolves to consider the approach (or the actual, proposed or potential Competing Proposal), notify CapVest if Virtus proposes to provide confidential information of Virtus to any third party in relation to any actual, proposed or potential Competing Proposal,

but nothing in this clause 4.11 limits the obligations of Virtus under clauses 4.3 (No shop), clause 4.4 (No talk) or clause 4.5 (No due diligence) and nothing in this clause 4.11 obliges Virtus to notify CapVest of a Competing Proposal until after the board of Virtus has determined in accordance with clause 4.6 whether clauses 4.4 and 4.5 apply with respect to a genuine Competing Proposal.

4.12 **Virtus legal advice**

- (a) Virtus acknowledges that it has received legal advice on this document and the operation of this clause 4 and clause 5.
- (b) The parties must not make or cause or permit to be made, any application to a court or the Takeovers Panel for or in relation to a determination in relation to clause 4.

5. **AGREED FEE**

5.1 **Payment of Agreed Fee**

Virtus must, on the relevant Fee Payment Date, pay to CapVest the Agreed Fee in cleared and immediately available funds (without withholding or set off) into a bank account notified in writing to Virtus by CapVest if any of the following occurs:

- (a) CapVest has, before the end of the Diligence Period, given to Virtus an Implementation Agreement (that Implementation Agreement to be accompanied by binding equity commitment letters in favour of Virtus and debt commitment letters that are sufficient to satisfy CapVest's (or any of its Affiliates') obligations to pay the cash consideration under the Transaction) that has been negotiated in good faith with Virtus, having regard to market precedent where applicable, is executed by CapVest (or any of its Affiliates) and is open for Virtus to execute within 4 Business Days and Virtus does not, within 4 Business Days of receiving the executed agreement, execute and return the agreement to CapVest; or
- (b) on or before the Diligence Period, Virtus has breached any material provision of this document and Virtus does not remedy that breach within 5 Business Days of receipt of written notice of such breach from CapVest; or
- (c) a member of the Virtus Group has, before the end of the Diligence Period, received a Competing Proposal and, on or before the End Date:
 - (i) a member of the Virtus Group has entered into any legally binding agreement to give effect to a Superior Proposal; or
 - (ii) a person (either alone or with other persons) has made, or has publicly announced their proposal to make, a takeover bid under Chapter 6 of the Corporations Act for ordinary shares in Virtus and such a takeover bid has been recommended by the Virtus Board; or
- (d) during the Diligence Period, a matter directly concerning the operations and affairs of Virtus which existed, and was known to Virtus (including the impact of that matter if the impact of the matter can reasonably be determined), at the date of this document but was not public, becomes public or otherwise known to CapVest or its Representatives, in circumstances where:
 - (i) Virtus' failure to disclose that matter prior to the date of this document constituted a breach of Virtus' continuous disclosure obligations; and
 - (ii) the matter constitutes a Virtus Material Adverse Event.

5.2 **Acknowledgement**

The parties agree that the Agreed Fee is an amount to compensate CapVest for:

- (a) advisory costs;
- (b) costs of management and directors' time;
- (c) out-of-pocket expenses (including any domestic or international travel costs (whether by air, land, sea or otherwise));
- (d) the distraction of CapVest's management from conducting CapVest's business as usual caused by pursuing a Transaction;
- (e) reasonable opportunity costs incurred by CapVest in pursuing a Transaction or in not pursuing alternative acquisitions or strategic initiatives which CapVest could have developed to further its business and objectives; and
- (f) damage to CapVest's reputation associated with a failed transaction and the implications of that damage to CapVest's business.

The parties agree that the costs incurred are of a nature that they cannot be accurately quantified and that a genuine pre-estimate of the costs would equal or exceed the Agreed Fee.

5.3 **Other claims**

The maximum aggregate amount which Virtus is required to pay in relation to this document (including any breach of this document by Virtus) is the Agreed Fee and in no event will the aggregate liability of Virtus under or in connection with this document exceed the Agreed Fee.

5.4 **Exclusive remedy**

Notwithstanding any other provision under this document, where the Agreed Fee is paid to CapVest under this document, CapVest cannot make any claim against Virtus, its Affiliates or their respective directors, officers and employees under or in connection with document.

6. **TERM AND TERMINATION**

6.1 This document, and the parties' obligations under it, will terminate on the earliest of the following to occur:

- (a) the expiry of the Diligence Period;
- (b) Virtus giving CapVest written notice of termination with immediate effect following any notification by CapVest to Virtus pursuant to clause 3.5;
- (c) the parties executing an Implementation Agreement;
- (d) Virtus giving CapVest written notice of termination with immediate effect if:
 - (i) the Virtus Board has changed, withdrawn or modified its recommendation of the Transaction as a result of Virtus receiving a Competing Proposal that a majority of the Virtus Board determines, after all of CapVest's rights under clause 4.8 and 4.9 have been exhausted, is a Superior Proposal;
 - (ii) CapVest or any of its Affiliates breach any of their material obligations under this document or the Confidentiality Deed and they do not remedy that breach within 5 Business Days of receipt of written notice of such breach from Virtus;

- (iii) CapVest or any of its Affiliates is subject to an Insolvency Event; or
 - (iv) CapVest or any of its Affiliates breach any law that any applicable regulator or Government Agency would reasonably consider renders CapVest or any of its Affiliates unfit to Control Virtus.
- 6.2 No party may terminate or rescind this document except as permitted under this clause 6.
- 6.3 The parties acknowledge and agree that clause 5 (Agreed Fee) (including any obligation to pay and entitlement to receive payment of an Agreed Fee):
 - (a) where this document is terminated under:
 - (i) clause 6.1(a) or clause 6.1(b) following receipt by Virtus of a Competing Proposal; or
 - (ii) clause 6.1(d)(i),shall remain operative whether or not that right arises before, on or after termination of this document; and
 - (b) where this document is terminated for any other reason, shall remain operative only if an obligation to pay and right to receive payment of an Agreed Fee has arisen prior to the termination of this document.
- 7. **GENERAL**
- 7.1 **Valuable consideration**

Each party acknowledges entering into this document and incurring obligations and giving rights under this document for valuable consideration received from each other party.
- 7.2 **No offer**

Each party agrees that:

 - (a) this document is not intended to constitute, and does not constitute, an offer capable of acceptance or to otherwise give rise to a binding contract to proceed with a Transaction;
 - (b) there is no certainty that a Transaction will proceed; and
 - (c) this document does not constitute a proposal to make a takeover bid for the purposes of section 631 of the Corporations Act.
- 7.3 **Further steps**

Each party agrees, at its own expense, to do anything another party reasonably asks (such as obtaining consents, signing and producing documents and getting documents completed and signed):

 - (a) to bind the party and any other person intended to be bound under this document; or
 - (b) to show whether the party is complying with this document.
- 7.4 **Costs**

Without limiting clause 5 (Agreed Fee) in any way, the parties agree to pay their own legal and other costs and expenses in connection with the preparation, execution and completion of this document and other related documentation except for stamp duty.

7.5 Survival

- (a) Subject to clause 7.8 (Entire agreement), clauses 5 (Agreed Fee), 6 (Term and Termination), and 7 (General) survive expiry of the Exclusivity Period and termination of this document.
- (b) If the document is terminated, each party will retain the rights it has or may have against the other party in respect of any past breach of this document.

7.6 Public announcements

Without limiting clause 3.1(a) in any way, each party agrees that, to the extent practicable and permitted by law or the rules of any stock exchange, it will consult with the other party as to the form of any public announcement about this document, a Transaction or the content or existence of negotiations between the parties prior to making any such announcement.

7.7 GST

- (a) Unless expressly stated otherwise in this document, all amounts payable or consideration to be provided under this document are exclusive of GST.
- (b) If GST is payable on any supply made under this document, for which the consideration is not expressly stated to include GST, then subject to receiving a valid tax invoice Virtus agrees to pay to CapVest an additional amount equal to the GST payable at the same time that the consideration for the supply is to be provided.

7.8 Entire agreement

- (a) This document and the Confidentiality Deed constitute the entire agreement of the parties about its subject matter and supersedes all previous agreements, understandings, negotiations, representations and warranties about that subject matter.
- (b) The parties acknowledge that it is their intention that an Implementation Agreement will be entered into that will supersede this document.

7.9 Severability

If any provision of this document is held by a court of competent jurisdiction to be invalid, void or unenforceable, the remainder of the terms and provisions of this document shall remain in full force and effect and shall not be affected, impaired or invalidated.

7.10 Notices

- (a) Unless expressly stated otherwise in this document, all notices, certificates, consents, approvals, waivers and other communications in connection with this document must be:
 - (i) in writing;
 - (ii) signed by the sender (if an individual) or an authorised officer of the sender; and

- (iii) marked for the attention of the person to whom it is given or, if the recipient has notified otherwise, then marked for attention in the way last notified.
- (b) A notice, consent, request or any other communication is taken to be received:
 - (i) if sent by personal delivery, when it is delivered;
 - (ii) if by post, three days after the date of postage, or if to or from a place outside Australia, seven days after the date of postage; or
 - (iii) when delivered or transmitted by email (and the sender does not receive an email delivery failure notification),

provided that, if the delivery is on a day which is not a Business Day or is after 7.00pm (addressee's time), it is regarded as received at 9.00am on the next Business Day or if it is received between midnight and 9.00am (addressee's time) on a Business Day, it is regarded as received at 9.00am on that Business Day.

- (c) A person's address and email address are those set out below, or as the person notifies the sender:

Virtus

Address: Level 3, 176 Pacific Highway, Greenwich, NSW 2065

Email Address: kate.munnings@virtushealth.com.au

Attention: Kate Munnings

With a copy to: Costas Condoleon, Partner, Gilbert + Tobin
ccondoleon@gtlaw.com.au
 Karen Evans-Cullen, Partner, Gilbert + Tobin
kevans-cullen@gtlaw.com.au

CapVest

Address: 100 Pall Mall, St. James's, London SW1Y 5NQ

Email Address: nradia@capvest.co.uk

Attention: Neil Radia, Chief Financial Officer c/o CapVest Partners LLP

With a copy to: Anton Harris, Partner, Ashurst
anton.harris@ashurst.com
 Greg Golding, Partner, Ashurst
greg.golding@ashurst.com

- (d) CapVest appoints Ashurst as its process agent to receive any document in an action in connection with this document and agrees any such document may be served on CapVest by being delivered to or left for CapVest at the following address:

Attention to: Anton Harris and Greg Golding c/o CapVest
Ashurst
Level 11
5 Martin Place
Sydney NSW 2000

7.11 Variation

A provision of this document or a right created under it, may not be waived or varied except in writing, signed by the party or parties to be bound.

7.12 Rights

- (a) If a party does not exercise a right, power or remedy in connection with this document fully or at a given time they may still exercise it later.
- (b) A party's rights arising from or under this document are cumulative and do not exclude any other of the party's rights.

7.13 Approvals and consents

A party may exercise a right or remedy or give or refuse its approval or consent in any way it considers appropriate (including by imposing conditions), unless this document expressly states otherwise.

7.14 Assignment

A party may not assign or otherwise deal with its rights under this document or allow any interest in them to arise or be varied in each case, without the consent of each other party.

7.15 Counterparts

- (a) This document may be executed in counterparts. All counterparts when taken together are to be taken to constitute one instrument.
- (b) Delivery of a counterpart of this document by email attachment constitutes an effective mode of delivery.

7.16 Governing law

- (a) This document and any dispute arising out of this document is governed by the laws of the State of New South Wales, Australia.
- (b) Each party submits to the exclusive jurisdiction of the courts of that state and the courts of appeal from them, in respect of any proceedings arising out of this document.

EXECUTED AS A DEED

Each person who executes this document on behalf of a party under a power of attorney declares that he or she is not aware of any fact or circumstance that might affect his or her authority to do so under that power of attorney.

EXECUTED by **VIRTUS HEALTH LIMITED** in accordance with section 127 of the *Corporations Act 2001* (Cth):

Signature of director

Signature of director/secretary

Name

Name

SIGNED, SEALED AND DELIVERED for
and on behalf of **CAPVEST PARTNERS**
LLP in the presence of:



Signature of witness

Signature of authorised signatory

Name of witness

Name of authorised signatory

This document was signed in counterpart and witnessed over audio visual link in accordance with section 14G of the *Electronic Transactions Act 2000*.

Annexure A

Public Announcement