



SHAREHOLDER ANNOUNCEMENT

2 August 2005

Defence of Legal Action Initiated by Ventracor

HeartWare Limited (ASX:HTW) wishes to advise its shareholders that its subsidiary, HeartWare, Inc., today filed its defence to the patent infringement action commenced against it in a United States District Court by VentrAssist Pty. Limited, a subsidiary of Ventracor Limited (ASX:VCR), and the University of Technology at Sydney (“UTS”). A copy of the documentation lodged today with the Court is attached.

In providing its response to these allegations, HeartWare has emphatically denied infringement. Further, in the attached documentation HeartWare maintains that the patents asserted against it by Ventracor and UTS are invalid and unenforceable on the grounds of “inequitable conduct”. In this regard, detailed information can be found in the attached documentation.

In addition to denying infringement, HeartWare has filed six counterclaims against Ventracor and UTS including counterclaims seeking damages and costs based on unfair competition and violations of United States antitrust laws. HeartWare is seeking a decision that the relevant patents are invalid, not infringed and unenforceable.

HeartWare Chief Executive Officer Stuart McConchie commented on HeartWare’s defence as follows:

“Ventracor has asserted that HeartWare had not denied that it was infringing VentrAssist patents. The filing of HeartWare’s defence today with the United States District Court makes HeartWare’s position on this issue abundantly clear; that is, there can be no doubt that we deny infringing these patents. We intend to vigorously defend ourselves in these proceedings and are seeking damages from Ventracor and UTS for commencing this lawsuit against us. We are confident that our position will ultimately be upheld by the Court.

Today’s developments confirm that we remain resolute in our determination to defend both our position and the very considerable value of our intellectual property portfolio. HeartWare will continue to seek the best possible outcome for its shareholders.”



About HeartWare

HeartWare is developing a family of proprietary circulatory heart assist devices to treat patients with congestive heart failure. Heart failure affects 10 million people globally, with over one million new patients diagnosed every year.

HeartWare's first left ventricular assist device, the HVAD, is expected to commence human clinical trials in early 2006, with first sales planned for 2007. With a volume of 45cc, the HVAD is substantially smaller than other "third generation" full output pumps in development, giving rise to significant potential clinical advantages. Further information on HeartWare is available at www.heartware.com.au

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**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA**

VENTRASSIST PTY LTD. and)	x	
UNIVERSITY OF TECHNOLOGY AT)		Case No.:04-61703-CIV-MARRA/
SYDNEY,)		SELTZER
)	
Plaintiffs,)		
)	
vs.)		
)	
HEARTWARE, INC.,)		
)	
Defendant and)		
Counterclaimant)		
)	
vs.)		
)	
VENTRASSIST PTY LTD.;)		
UNIVERSITY OF TECHNOLOGY)		
SYDNEY and VENTRACOR LIMITED)		
)	
Counterclaim Defendants)		
	x	

**DEFENDANT HEARTWARE'S ANSWER TO
FIRST AMENDED COMPLAINT AND COUNTERCLAIMS**

Defendant, HeartWare, Inc. ("HeartWare"), by and through its counsel, hereby responds to plaintiffs' First Amended Complaint as follows:

1. With respect to paragraph 1 of the First Amended Complaint, HeartWare admits that plaintiffs' alleged cause of action for patent infringement arises under the Patent Laws of the United States.

2. With respect to paragraph 2 of the First Amended Complaint, HeartWare denies that this court has subject matter jurisdiction over plaintiffs' cause of action for patent infringement.

3. With respect to paragraph 3 of the First Amended Complaint, HeartWare admits that its principal place of business is within this district, that venue is proper in this judicial district and that this court has personal jurisdiction over it; but defendant denies that it has committed acts of patent infringement and denies that this court has subject matter jurisdiction.

4. With respect to paragraph 4 of the First Amended Complaint, HeartWare is without knowledge or information sufficient to form a belief as to the truth of the allegations and therefore denies the same.

5. With respect to paragraph 5 of the First Amended Complaint, HeartWare is without knowledge or information sufficient to form a belief as to the truth of the allegations and therefore denies the same.

6. With respect to paragraph 6 of the First Amended Complaint, HeartWare admits that it has a place of business at 3351 Executive Way, Miramar, Florida 33025, but denies the remaining allegations contained in paragraph 6.

7. Paragraph 7 of the First Amended Complaint does not contain factual allegations which require a response from HeartWare.

8. With respect to paragraph 8 of the First Amended Complaint, HeartWare denies that named plaintiff "University of Technology at Sydney" is an owner of the patents-in-suit, is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations and therefore denies the same.

9. HeartWare denies the allegations contained in paragraph 9 of the First Amended Complaint.

10. HeartWare denies the allegations contained in paragraph 10 of the First Amended Complaint.

11. With respect to paragraph 11 of the First Amended Complaint, HeartWare restates all of the foregoing responses as if fully set forth herein.

12. HeartWare denies the allegations contained in paragraph 12 of the First Amended Complaint.

13. With respect to paragraph 13 of the First Amended Complaint, HeartWare admits that it does not have the permission, license or consent of plaintiffs for any of its actions, but denies that such permission, license or consent is required, and is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 13 and therefore denies the same.

14. HeartWare denies the allegations of paragraph 14 of the First Amended Complaint.

15. HeartWare denies the allegations of paragraph 15 of the First Amended Complaint.

AFFIRMATIVE DEFENSES

1. U.S. Patents Nos. 6,227,797 and 6,609,883 have not been infringed by HeartWare.

2. U.S. Patents Nos. 6,227,797 and 6,609,883 are invalid because the alleged inventions embodied in the claims of such patents fail to meet one or more of the requirements for patentability set forth in 35 U.S.C. §101 *et seq.* and/or because of obviousness-type double patenting, and are therefore unenforceable.

3. HeartWare's activities complained of are exempt from infringement under 35 U.S.C. §271(e)(1), and therefore this Court lacks jurisdiction over the subject matter of this case.¹

4. The First Amended Complaint fails to state a claim upon which relief can be granted.

¹ In the Court's Order dated July 15, 2005 the Court stated that a Section 271(e)(1) exemption is an affirmative defense. Defendant HeartWare respectfully disagrees, maintaining that a statutory exemption relates to a lack of subject matter jurisdiction. Nevertheless, to the extent the Court maintains the exemption is an affirmative defense, defendant HeartWare is entitled to this defense.

5. U.S. Patents Nos. 6,227,797 and 6,609,883 are unenforceable for inequitable conduct.
6. Plaintiffs are not entitled to the relief sought because of unclean hands.
7. Plaintiffs have misused U.S. Patents Nos. 6,227,797 and 6,609,883 due to inequitable conduct before the U.S. Patent and Trademark Office.
8. Plaintiffs have not suffered any injury or damages.

COUNTERCLAIMS

For its counterclaims against plaintiffs HeartWare alleges as follows:

1. HeartWare is a Delaware corporation having a principal place of business at 3351 Executive Way, Miramar, Florida 33025.
2. Plaintiff Ventrassist Pty Ltd. ("Ventrassist") has alleged that it is an Australian corporation having a principal place of business at 126 Greville Street, Chatswood NSW 2067, Australia.
3. Plaintiff University of Technology at Sydney ("UTAS") has alleged that it is a university located in Sydney, Australia.
4. Plaintiffs Ventrassist and UTAS have alleged that they own U.S. Patents Nos. 6,227,797 ("797 Patent") and 6,609,883 ("883 Patent"), and have charged HeartWare with acts of infringing the '797 and '883 Patents.
5. On information and belief, UTAS is not an owner of either of the patents-in-suit because the record owner appears to be University of Technology Sydney.
6. HeartWare has denied infringement and alleges that the '797 Patent and '883 Patent are invalid and unenforceable, thereby creating a justiciable controversy with respect to the infringement, validity, and enforceability of each of these patents.

7. HeartWare's First through Fourth Counterclaims are for declaratory judgment and arise under the Patent Laws of the United States, 35 U.S.C. §101 *et seq.*

8. This Court has personal jurisdiction over the plaintiffs and has jurisdiction over the subject matter of HeartWare's First through Fourth Counterclaims pursuant to 28 U.S.C. §§1331, 1332 and 1338. Declaratory judgment jurisdiction with respect to HeartWare's First through Fourth Counterclaims is invoked under 28 U.S.C. §§2201-02.

FIRST COUNTERCLAIM
(Invalidity Of The '797 and '883 Patents)

9. HeartWare re-alleges paragraphs 1-8 of its Counterclaims as though set forth fully herein.

10. The '797 and '883 Patents are invalid for failure to meet one or more of the conditions of patentability specified in Title 35 of the United States Code, including without limitation, Sections 101, 102, 103, 112, and 132 thereof and/or because of obviousness-type double patenting.

11. HeartWare is entitled to a declaration that the '797 and '883 Patents are invalid

SECOND COUNTERCLAIM
(Non-Infringement of the '797 and '883 Patents)

12. HeartWare re-alleges paragraphs 1-11 of its Counterclaims as though set forth fully herein.

13. The claims of the '797 and '883 Patents are not entitled to a scope which would embrace or encompass a VAD, as defined in plaintiffs' First Amended Complaint, which was constructed, tested and evaluated by HeartWare.

14. HeartWare is entitled to a declaration that none of the claims of the '797 and '883 Patents is infringed by any of its activities complained of in plaintiffs' First Amended Complaint.

THIRD COUNTERCLAIM
(Exemption)

15. HeartWare re-alleges paragraphs 1-8 of its Counterclaims as though set forth fully herein.

16. The activities complained of in Plaintiffs' First Amended Complaint are exempt from infringement under 35 U.S.C. §271(e)(1).

17. Plaintiffs have been advised of facts demonstrating that HeartWare's activities complained of are exempt from infringement under 35 U.S.C. §271(e)(1). Accordingly, HeartWare is entitled to a declaration that this is an exceptional case within the provisions of Title 35 U.S.C. §285 and is therefore entitled to an award of reasonable attorneys fees.

FOURTH COUNTERCLAIM
(Unenforceability of the '797 and '883 Patents For Inequitable Conduct)

18. HeartWare re-alleges paragraphs 1-8, 10, 13 and 16-17 of its Counterclaims as though set forth fully herein.

19. The '797 and '883 Patents are unenforceable because of plaintiffs' inequitable conduct during the prosecution in the U.S. Patent and Trademark Office ("PTO") of the patent applications from which the '797 and '883 Patents issued, U.S. Serial Nos. 09/281,608 and 09/734,532, respectively.

20. Plaintiffs, individually and collectively, and all individuals associated with the filing and prosecution of the U.S. patent applications from which the '797 and '883 Patents issued had a duty of candor, good faith, and honesty in dealing with the PTO during the prosecution before the PTO of those applications. In addition to the party plaintiffs, individually and collectively, individuals having such a duty of candor, good faith and honesty in dealing with the PTO include each inventor, each attorney or agent who prepared or prosecuted the applications and any other

person substantively involved in the preparation or prosecution of the applications and associated with any inventor, any assignee of one or both of the applications, or anyone to whom there is any obligation to assign either or both of the applications. This obligation includes a duty to disclose to the PTO all information known to such individuals to be material to patentability of any claim presented to the PTO for examination.

21. Plaintiffs, individually and collectively, together with the foregoing individuals (hereinafter referred to collectively as "plaintiffs"), breached their duty of candor, good faith and honesty in dealing with the PTO. Specifically, with the intent to deceive the PTO and the PTO examiners reviewing the applications which issued as the '797 and '883 Patents, plaintiffs wrongfully withheld or misrepresented information material to the patentability of the claims of the '797 and '883 Patents from the PTO.

A. Withholding of Required Copies of Published Prior Art And Related Misrepresentations

22. The information wrongfully withheld by plaintiffs from the PTO with the intent of deceiving the PTO examiners includes, but is not limited to, German Patent Application No. DE 3343186 entitled "Magnetische Rotorlagerung" (Magnetic Rotor Bearing) ("the Bramm patent") and PCT International Patent Publication No. WO 88/07842 entitled "Magnetically Suspended Rotor Axial Flow Blood Pump" ("the Moise patent").

23. The plaintiffs purported to cite the Bramm patent and the Moise patent in an Information Disclosure Statement ("IDS") signed on February 13, 2001 and received by the PTO on February 20, 2001 during the prosecution of the application from which the '883 patent issued and while the '797 Patent was still pending. In that IDS plaintiffs' prosecution counsel states that "the references listed are of record in the parent applications hereto, U.S. Serial Nos. 09/281,608,

filed March 30, 1999 and 09/299,038, filed April 23, 1999. Pursuant to 37 C.F.R. §1.98(d), copies of these references are not included." The statement that U.S. Serial No. 09/299,038, filed April 23, 1999 is a parent application was untrue, and therefore the assertion that copies of these references were not required pursuant to 37 C.F.R. §1.98(d) was a misrepresentation. In response to the IDS, the PTO in an Office Action dated June 12, 2002 indicated it was not considering the Bramm patent or the Moise patent (as well as certain other foreign references) because plaintiffs' February 20, 2001 IDS "fails to comply with 37 CFR 1.98(a)(2), which requires a legible copy of each foreign patent; each publication or that portion which caused it to be listed; and all other information or that portion which caused it to be listed." Despite being aware that (1) the Bramm patent and the Moise patent existed and were not of record in a parent application, (2) the Bramm patent and the Moise patent would have been considered by the PTO to be material, and (3) a copy of each was required to be submitted during the pendency of the applications leading to each of the '797 and '883 Patents, plaintiffs did not thereafter submit to the PTO either the Bramm patent or the Moise patent for the PTO's consideration. Moreover, in plaintiffs' Amendment mailed October 3, 2002 and received by the PTO on October 7, 2002, during the prosecution of the '883 Patent, plaintiffs' prosecution counsel, on behalf of the plaintiffs and the inventors, asserted that "Applicant is submitting herewith a legible copy of each of the foreign references cited in the IDS." This statement was untrue and no copy, legible or otherwise, was submitted in October 2002 or at any other time.

24. As a result of plaintiffs' intentional withholding of the Bramm patent and the Moise patent and/or untrue and/or misleading statements, the PTO did not consider these patents in assessing the patentability of the claims of the '797 and '883 Patents. The '797 Patent and the

'883 Patent are therefore unenforceable due to plaintiffs' inequitable conduct during their prosecution.

B. Withholding of European Novelty-Destroying Cited Art From '883 Application

25. The information wrongfully withheld by plaintiffs also includes, but is not limited to, PCT International Patent Publication No. WO 96/31934 entitled "Rotary Machine with an Electromagnetic Rotary Drive" ("the Schöb patent"). The plaintiffs were made aware of the Schöb patent when it was cited in an office action dated November 18, 2002 issued in connection with the prosecution of European Patent Application No. 98 941 153.3, which is the plaintiffs' European patent application corresponding to the '797 and '883 Patents. In that Office Action plaintiffs' claim 1 was rejected as lacking novelty over the Schöb patent. Therefore, one or more of the party plaintiffs, one or more of the named inventors in the '797 or '883 Patents, and/or patent prosecution counsel for plaintiffs or other individuals having a duty of candor knew of the Schöb patent, knew that the PTO would have considered the Schöb patent to be material as a result of its having been cited by the European Patent Examiner as novelty-destroying, and yet withheld the Schöb patent from the PTO examiner, with the intent to deceive the PTO. At the time when the Schöb patent was cited during the prosecution of the corresponding European patent, the '883 patent was an application pending in the PTO.

26. As a result of plaintiffs' intentional withholding of the Schöb patent during the prosecution of the '883 Patent, the PTO did not consider the Schöb patent in assessing the patentability of the claims of the '883 Patent. The '883 Patent is therefore unenforceable due to plaintiffs' inequitable conduct.

C. Withholding Related Copending Applications

27. The wrongfully withheld information also includes, but is not limited to, information concerning relating copending applications. For example, U.S. Serial No. 09/281,608 ("608 application") was filed April 23, 1999 as a continuation-in-part of the application which issued as the '797 Patent. The '608 application issued as U.S. Patent No. 6,250,880 on June 26, 2001 and contains a disclosure substantially similar to that of the '797 Patent, names the same inventors, is assigned on its face to a plaintiff, and was prosecuted by the same prosecution counsel. Nevertheless, during the prosecution of the copending applications which issued as the '797 and '883 Patents, one or more of the party plaintiffs, one or more of the named inventors of the '797 and '883 Patents, and/or patent prosecution counsel or other individuals having a duty of candor, good faith and honesty to the PTO failed to disclose the existence of the '608 application and/or certain of the references cited therein to the PTO Examiner examining the '797 and '883 Patents. Such persons having a duty of candor knew of the '608 application, knew that the PTO Examiner would have considered the '608 application material, and yet withheld information about the '608 application from the PTO examiner with the intent to deceive the PTO.

28. As a result of plaintiffs' intentional withholding of information concerning the '608 application the PTO did not consider this application is assessing the patentability of the claims of the '797 and '883 Patents. The '797 and '883 Patents are therefore unenforceable due to plaintiffs' inequitable conduct.

D. Withholding Information In Inventors' Technical Publication

29. The wrongfully withheld information also includes, but is not limited to, Jed A. Walowit et al. "The Analysis, Design and Testing of a Blood Lubricated Hydrodynamic Journal

Bearing," ASAIO J 1997;43:M556-9 ("Walowit et al."). Walowit et al. is listed as reference No. 1 in "VentrAssist Hydrodynamically Suspended, Open, Centrifugal Blood Pump" co-authored by Peter A. Watterson, John C. Woodard, V. S. Ramsden and J. A. Reizes, Artif Organs, 2000 June 24 (6):475-5 ("Watterson et al."). Watterson et al. was received by the Journal of Artificial Organs in December 1999 and its content was presented in part on August 26-27, 1999 in Tokyo, Japan. Two of the authors of Watterson et al. are named inventors on the '797 and '883 Patents establishing that at least these inventors had knowledge of Walowit et al. as of at least December 1999 and knowledge of the materiality of Walowit et al. at the time Watterson et al. was submitted for publication. Thus, one or more of the party plaintiffs, one or more of the named inventors of the '797 and '883 Patents, and/or patent prosecution counsel for plaintiffs or other individuals having a duty of candor knew of Walowit et al., knew that the PTO would have considered Walowit et al. to be material to the examination of '797 and '883 Patents, and yet withheld Walowit et al. from the PTO Examiner with the intent to deceive the PTO.

30. As a result of plaintiffs' intentional withholding of Walowit et al. from the PTO during the prosecution of both the '797 and '883 Patents, the PTO did not consider Walowit et al. in assessing the patentability of the claims of either the '797 Patent or the '883 Patent. The '797 Patent and the '883 Patent are therefore each unenforceable due to plaintiffs' inequitable conduct.

E. Withholding of U.S. Prior Art Patents From the '797 Application

31. The information wrongfully withheld by plaintiffs also includes, but is not limited to each of U.S. Patent Nos. 5,145,333 (the "Smith patent"); 5,147,187 (the "Ito et al. patent"); 5,211,546 (the "Isaacson et al. patent"); and 5,725,357 (the "Nakazeki et al. patent"). All of the Smith, Ito et al., Isaacson et al. and Nakazeki et al. patents were cited by plaintiffs as part of an

Information Disclosure Statement mailed February 14, 2001 (received by the PTO February 20, 2001) in the prosecution of the later filed '883 patent application, at which time the '797 patent application was still a pending application. One or more of the party plaintiffs, one or more of the named inventors, and/or patent prosecution counsel for plaintiffs or other individuals having a duty of candor knew of each of the Smith patent, the Ito et al. patent, the Isaacson et al. patent, and the Nakazeki et al. patent, knew that the PTO would have considered each of these patents to be material to the prosecution of the '797 Patent because they were cited to the PTO in the '883 application, and yet withheld these patents from the examiner in the application that issued as the '797 Patent with the intent to deceive the PTO. No Information Disclosure Statement citing any of the Smith, Ito et al., Isaacson et al. and Nakazeki et al. patents was filed during the prosecution of the '797 Patent.

32. As a result of plaintiffs' intentional withholding of the foregoing U.S. patents from the PTO in the prosecution of the earlier filed '797 patent application, the PTO did not consider these patents in assessing the patentability of the claims of the '797 Patent. The '797 Patent and the later issued '883 Patent are therefore both unenforceable due to plaintiffs' inequitable conduct during prosecution of the '797 Patent.

F. Withholding of European Search Report Citations From '797 and '883 Applications

33. The information wrongfully withheld by plaintiffs also includes, but is not limited to, Fengxiang Wang et al. "Design and Analysis of a Permanent Magnet Motor Integrated with Journal Bearing," Conference Record of the IEEE Industry Applications Conference Annual Meeting (IAS), U.S., New York, IEEE, 5 October 1997, pages 24-28 ("Wang et al."). Wang et al. was cited in a Supplementary European Search Report dated August 9, 2000 issued in connection with the prosecution of European Patent Application No. EP 98941153.3, which is

the plaintiffs' European patent application corresponding to the '797 and '883 Patents. One or more of the party plaintiffs, one or more of the inventors named on the '797 and '883 Patents, and/or patent prosecution counsel for plaintiffs or other individuals having a duty of candor therefore knew of Wang et al., knew that the PTO would have considered Wang et al. material as a result of its having been cited in the European Search Report, and yet withheld Wang et al. from the PTO examiners with the intent to deceive the PTO. At the time when plaintiffs were made aware of Wang et al. by the European Patent Office, the '797 and '883 Patents were pending patent applications.

34. As a result of plaintiffs' intentional withholding of the Wang et al. reference, the PTO did not consider this reference in assessing the patentability of the claims of the '797 and '883 Patents. The '797 and '883 Patents are therefore unenforceable due to plaintiffs' inequitable conduct.

35. HeartWare is entitled to a declaration that plaintiffs have misused the '797 and '883 Patents by unlawfully attempting to extend the monopoly of such patents by commencing the present action with the knowledge that these patents are unenforceable.

36. HeartWare is entitled to a declaration that plaintiffs do not come into this Court with clean hands with respect to such patents and are not entitled to enforce such patents.

37. This is an exceptional case within the provisions of Title 35 U.S.C. §285 and HeartWare is accordingly entitled to an award of reasonable attorneys fees.

FIFTH COUNTERCLAIM
(Unfair Competition)

38. HeartWare re-alleges the subject matter contained in paragraphs 1-37 of its Counterclaims as though set forth fully herein.

39. HeartWare has been formed for the purpose of developing and marketing a circulatory heart-assist pump.

40. Plaintiff Ventrassist Pty Ltd. purports to own and, on information and belief, University of Technology Sydney owns, together with plaintiff Ventrassist Pty Ltd, the '797 and '883 Patents.

41. On information and belief, Counterclaim-defendant Ventracor Limited ("Ventracor") is an Australian corporation having a place of business at 126 Greville Street, Chatswood, Sydney NSW 2067, Australia and is the sole owner of and controls plaintiff Ventrassist Pty Ltd. On information and belief, the acts ascribed to any of the Counterdefendants were done with the permission, consent, knowledge and active inducement on the part of the other Counterdefendants, which acted as co-conspirators and/or agents in the performance of the acts described herein. As an example, Ventracor made the decision to initiate, ordered the initiation of, controls, is paying for and purports to have the authority to settle this litigation and has otherwise acted in concert with plaintiff Ventrassist Pty Ltd or the conspiracy effected between them with respect to the transactions and occurrences which give rise to HeartWare's Fifth and Sixth Counterclaims.

42. On information and belief, Ventracor has developed or is developing a circulatory heart-assist pump covered by the '797 and '883 patents-in-suit and has entered into agreements in this country, for example with Columbia University in New York City, New York, to initiate clinical trials of its heart-assist pump covered by the '797 and '883 Patents. Ventracor has publicized that clinical trials will begin in this country using its heart-assist pump covered by the '797 and '883 Patents in 2005.

43. This Court has personal jurisdiction over Ventracor by virtue of the conspiracy set forth herein and its ownership of and control over plaintiff Ventrassist Pty Ltd. and this litigation, and has subject matter jurisdiction over this pendent claim of unfair competition against plaintiffs and Ventracor under 28 U.S.C. §1338(b). Venue is proper pursuant to 28 U.S.C. §1391.

44. Plaintiffs and Ventracor have conspired to engage and have engaged in a pattern of repeated instances of inequitable conduct during the prosecution of each of the applications that eventually issued as the '793 and '883 Patents.

45. As a result of their inequitable conduct, plaintiffs and Ventracor well knew that the '797 and '883 Patents were invalid and/or unenforceable at the time this action was first filed in December 2004 and at the time of filing of plaintiffs' First Amended Complaint in March 2005. The actions of plaintiffs and Ventracor in obtaining the '797 and '883 Patents are so culpable that neither patent should be enforced.

46. Nevertheless, plaintiffs have initiated and have continued this action in bad faith as evidenced by plaintiffs' internal communications, with which directors and/or officers of Ventracor were involved, and of which HeartWare and this Court are already aware, by alleging infringement of the '797 and '883 Patents which plaintiffs and Ventracor knew were invalid and/or unenforceable. Plaintiffs have continued their bad faith litigation by filing their First Amended Complaint alleging infringement of those same patents.

47. Plaintiffs have publicized this lawsuit and their spurious allegations that HeartWare infringes the '797 and '883 Patents with the sole purpose and with the intent to benefit Ventracor by damaging HeartWare's reputation and constraining or preventing the ability of HeartWare to

raise money from public or private sources to finance the development of its circulatory heart-assist pumps, as further evidenced by plaintiffs' aforementioned internal communications.

48. Each and all of the aforesaid acts of plaintiffs and Ventracor were intentional and directed toward competing unfairly with HeartWare.

49. As a direct and proximate result of plaintiffs' bad faith litigation and published statements concerning HeartWare and this action, HeartWare has suffered damages in at least the amount of their attorneys fees, and in a total amount to be determined at the trial of this action.

SIXTH COUNTERCLAIM (Antitrust Violations)

50. HeartWare repeats and re-alleges the subject matter of each of paragraphs 1-49 of its Counterclaims as if set forth fully herein.

51. This Court has personal jurisdiction over the plaintiffs and Ventracor in this Sixth Counterclaim alleging violation of the Antitrust Laws of the United States, and has subject matter jurisdiction of such claims for relief pursuant to 28 U.S.C. §§1331 and 1337. Venue is proper pursuant to 28 U.S.C. §1391 and 15 U.S.C. §15.

52. Plaintiffs and Ventracor have acted in concert and have conspired to embark and have embarked upon an illegal plan and scheme to monopolize and/or attempt to monopolize, in violation of 15 U.S.C. §2, the market for the manufacture and sale of a new generation of circulatory heart-assist pumps which plaintiffs allege are covered by plaintiffs' patents. By this bad faith litigation, plaintiffs are attempting to benefit Ventracor by eliminating HeartWare as a potential competitor in such market, thereby effecting their scheme to monopolize, that market. In furtherance of their attempt to monopolize such market plaintiffs fraudulently acquired the '797 and '883 patents-in-suit, as well as a large number of other patents, all purportedly directed to a new generation of circulatory heart-assist pumps. Ventracor sought to benefit from the

conspiracy to monopolize such market and to eliminate HeartWare as a potential competitor in that market.

53. Plaintiffs, Ventracor and each of them, have knowledge of, and/or have knowingly and willfully caused misrepresentations and untrue statements to be made to the PTO and/or have omitted to state to the PTO and deliberately withheld from the PTO facts material to the patentability of the '797 and '883 Patents during the course of prosecution of the '797 and '883 Patents before the PTO, all in furtherance of their illegal scheme. Such misrepresentations and withholdings occurred with the knowledge, approval, or assistance or at the behest of plaintiffs, Ventracor and each of them, in an effort to procure such patents, and such misrepresentations and withholdings resulted in the issuing of such patents by the PTO, whereas but for such misrepresentations and withholdings the '797 and '883 Patents would not have issued.

54. Prior to filing this action, plaintiffs and Ventracor knew that the '797 and '883 Patents were invalid, unenforceable and not infringed by HeartWare. Nevertheless, in bad faith and in furtherance, of and as an integral part of, plaintiffs' illegal scheme, plaintiffs have asserted such patents against HeartWare and without any right have invoked the power of this Court in an attempt to benefit Ventracor and eliminate competition from HeartWare by demanding in this action a permanent injunction against HeartWare that, if granted, would prohibit HeartWare from developing and marketing circulatory heart-assist pumps covered by plaintiffs' unenforceable patents, all with the full knowledge, consent, approval and cooperation of Ventracor.

55. The acquisition of the '797 and '883 Patents by the aforesaid inequitable conduct was for the purpose of illegally enabling Ventracor to acquire monopoly power in the market for circulatory heart-assist pumps and there is a dangerous probability that through their wrongful

patenting and litigation activities plaintiffs will succeed in their illegal schemes to monopolize such relevant market for Ventracor unless this Court intervenes to prevent it.

56. HeartWare is entitled to a declaration that plaintiffs and Ventracor have conspired to initiate this infringement suit against HeartWare in bad faith and in furtherance of their illegal scheme to enable Ventracor to monopolize such relevant market for heart-assist pumps.

57. As a result of plaintiffs' and Ventracor's actions described herein, HeartWare has been and continues to be injured in an amount to be determined at trial.

WHEREFORE, HeartWare prays for judgment in its favor and against plaintiffs and Ventracor as follows:

(a) An order and judgment dismissing the First Amended Complaint with prejudice;

(b) An order and judgment that the '797 and '883 Patents are invalid;

(c) An order and judgment that the '797 and '883 Patents are unenforceable because of plaintiffs' inequitable conduct.

(d) An order and judgment that the '797 and '883 Patents are not infringed by HeartWare;

(e) An order and judgment that HeartWare's activities complained of are exempt from infringement of the '797 and '883 Patents under 35 U.S.C. §271(e)(1);

(f) An order and judgment that plaintiffs and Ventracor have unfairly competed with HeartWare;

(g) An order and judgement that plaintiffs and Ventracor have violated the Antitrust Laws, 15 U.S.C. §2;

(h) An order that this case is an exceptional case under 35 U.S.C. §285 and an award to HeartWare of reasonable attorneys fees, costs and other expenses for defending this frivolous action;

(i) An order awarding HeartWare treble damages pursuant to Section 4 of the Clayton Act, 15 U.S.C. §15, for plaintiffs' and Ventracor's violation of 15 U.S.C. §2; and

(j) Such other and further relief as the Court deems just and proper.

Dated: August 1, 2005

Respectfully submitted,

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CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that a true and correct copy of the foregoing Defendant HeartWare's Answer to First Amended Complaint and Counterclaims has been sent via Federal Express this 1st day of August, 2005, to: Jeffrey I. Kaplan, Esq., Kaplan Gilman Gibson & Dernier , L.L.P., 900 Route 9 North, Woodbridge, NJ 07095, and by U.S. first class mail to: Marc J. Gottlieb, Esq., Akerman Senterfitt, Las Olas Centre II, Suite 1600, 350 East Las Olas Blvd., Ft. Lauderdale, FL 33301-2229.



1 document(s) submitted 8/1/2005 4:26:18 PM.

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Title of Document: Defendant Heartware's Answer to First Amended Complaint and Counterclaim

Gregory L. Hillyer, would you like to file more documents? Yes No