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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

SUPERIOR COURT DEPARTMENT
BUSINESS LITIGATION SESSION

JAMES MAGIDSON and CHRISTOPHER MILLSON, Individually and on Behalf of All Others Similarly Situated,

Plaintiffs,

v.

HEARTWARE, INC., HEARTWARE INTERNATIONAL, INC., SETH HARRISON, DAVID MCINTYRE, ROBERT THOMAS, DENIS WADE, CHRISTINE BENNETT, ROBERT STOCKMAN, C. RAYMOND LARKIN, JR., TIMOTHY J. BARBERICH, and DOUGLAS GODSHALL,

Defendants.

Civil Action No.: 11-2398

RECEIVED
JUN 27 2011
SUPERIOR COURT - CIVIL
MICHAEL JOSEPH DONOVAN
CLERK / MAGISTRATE

CLASS ACTION COMPLAINT

Plaintiffs James Magidson and Christopher Millson ("Plaintiffs"), by and through their attorneys, allege the following upon information and belief, except as to those allegations concerning Plaintiffs, which are alleged upon personal knowledge:

I. NATURE OF THE ACTION AND OVERVIEW

1. Plaintiffs bring this action on behalf of themselves and a class of all persons who hold HeartWare, Inc. Series A-1 Preferred Stock ("Series A-1 Stock") and/or Series A-2 Preferred Stock ("Series A-2 Stock"), excluding defendants and their affiliates (the proposed "Class", as fully defined below), to recover for amounts owed to them pursuant to their rights as holders of Series A-1 Stock and Series A-2 Stock.

2. Plaintiffs and members of the Class were original preferred investors in a medical device company known as Kriton Medical, Inc. ("Kriton"). However, in a move to squeeze out Kriton's other preferred investors, Defendant Seth Harrison, the lead investor in Kriton by way of his investment vehicle Apple Tree Partners I, L.P. ("Apple Tree"), orchestrated a quick reorganization of Kriton in 2003 by which he created a new entity called HeartWare, Inc. that continued the former operations of Kriton while substantially stripping former Kriton preferred shareholders of their rights. Pursuant to the 2003 Kriton reorganization, Plaintiffs and members of the Class were issued HeartWare, Inc. non-voting preferred stock – the Series A-1 Stock and Series A-2 Stock – with just a single valuable right: a right to a liquidation distribution upon a liquidation (as fully defined below, a "Liquidation Event") or a change of control event (as fully defined below, a "Deemed Liquidation Event").

3. Not content with having stripped Plaintiffs and the Class of most of their rights as former Kriton preferred shareholders, Seth Harrison amended HeartWare, Inc.'s certificate of incorporation in June 2003 and inserted provisions which granted him unfettered and unilateral authority to nullify the liquidation right of Series A-1 Stock and Series A-2 Stock holders, contrary to the bankruptcy plan adopted by the bankruptcy court overseeing the Kriton reorganization, which did not qualify the liquidation rights of Series A-1 Stock and Series A-2 Stock holders.

4. Subsequently, Defendants have refused to recognize Plaintiffs' and the Class's rights to receive a liquidation distribution upon a Deemed Liquidation Event, and have likewise concealed from Plaintiffs and the Class the occurrence of a Deemed Liquidation Event and their corresponding right to a liquidation distribution.

5. Following the Kriton reorganization, Defendants engaged in a "shell game" of corporate transactions, obfuscating the true owner of HeartWare, Inc.'s voting shares and the triggering of a Deemed Liquidation Event. First, Seth Harrison created a new Australian corporate entity HeartWare Limited ("HeartWare Ltd.") in November 2004, of which he was the sole shareholder. Second, HeartWare Ltd. went public in Australia in January 2005, pursuant to which HeartWare Ltd. acquired all of the outstanding voting stock of HeartWare, Inc. from Apple Tree. Second, yet another entity, HeartWare International, Inc. ("HeartWare Int'l") was created in July 2008 as a wholly-owned subsidiary of HeartWare Ltd. Third, Defendants then orchestrated a redomiciliation from Australia to Delaware, according to which HeartWare Ltd. was renamed HeartWare Pty. Limited; and HeartWare Ltd. became a wholly-owned subsidiary of HeartWare Int'l.

6. After the foregoing set of transactions, HeartWare Int'l became the ultimate parent company of the HeartWare Group and is the entity that is now publicly traded on the NASDAQ stock exchange under the ticker "HTWR".

7. One of the ostensible purposes of the aforementioned shell game has been revealed: to squeeze out the Series A-1 Stock and Series A-2 Stock holders. Indeed, the then-director of Corporate Development at what was then HeartWare Ltd. informed a Class member in a February 7, 2008 communication that Plaintiffs and the Class "no longer have any economic interest in the parent company" (HeartWare Ltd.) and that other similar holders of Series A-1 Stock and Series A-2 Stock "have essentially written the value down to zero."

8. Defendants have indicated their intent to ensure that the Plaintiffs and the Class never receive a liquidation distribution. Defendants have taken the position that no Deemed Liquidation Event has occurred, despite the reshuffling of HeartWare Ltd.'s shares to HeartWare

Int'l shareholders in 2008 and the 2005 transaction by which HeartWare Ltd. acquired all of the outstanding voting stock of HeartWare, Inc., and Defendants have foreclosed and will continue to foreclose Plaintiffs' and the Class's right to a distribution upon a merger – clearly a Deemed Liquidation Event.

9. As a result of Defendants' wrongful acts and omissions, as alleged herein, Plaintiffs and other Class members have suffered significant losses and damages.

II. JURISDICTION AND VENUE

10. Jurisdiction is proper pursuant to M.G.L. c. 223A §3 because defendant HeartWare Int'l is headquartered in Massachusetts and has an interest in, uses, and possesses real property within the Commonwealth of Massachusetts; Defendants regularly transact business within the Commonwealth of Massachusetts; Defendants have committed torts within the Commonwealth of Massachusetts; and/or Defendants have committed torts and solicit business in the Commonwealth or should reasonably expect the acts to have consequences in the Commonwealth or derive substantial revenue from interstate or international commerce.

11. Venue is proper in the Business Litigation Session ("BLS") pursuant to Superior Court Administrative Directive No. 09-1 because the claims: relate to the governance of an entity (a.1); relate to the liability of directors, officers and partners (a.3); relate to or arise out of securities transactions (b.2); involve the issuance of debt, equity and like interests (c.1); and involve breaches of fiduciary duties, fraud, misrepresentation, business torts, or other violations involving business relationships (e.1).

III. PARTIES

12. Plaintiff James Magidson is a resident of New York. Plaintiff Magidson was a holder of Kriton Medical, Inc.'s Series A and/or Series B Preferred Shares, and following the bankruptcy of Kriton Medical, Inc., was and currently is a holder of HeartWare, Inc. Series A-1 Stock and/or Series A-2 Stock.

13. Plaintiff Christopher Millson is a resident of Nevada. Plaintiff Millson was a holder of Kriton Medical, Inc.'s Series A and/or Series B Preferred Shares, and following the bankruptcy of Kriton Medical, Inc., was and currently is a holder of HeartWare, Inc. Series A-1 Stock and/or Series A-2 Stock.

14. Defendant HeartWare, Inc. is a Delaware corporation which was incorporated on April 8, 2003 under the name Perpetual Medical, Inc., and which had its named changed to HeartWare, Inc. on July 10, 2003. HeartWare, Inc. has operated the business formerly owned and operated by Kriton Medical, Inc. following the bankruptcy of Kriton Medical, Inc. In January 2005, all of the voting shares of HeartWare, Inc. were acquired by HeartWare Limited.

15. Defendant HeartWare Int'l is a medical device company focused on developing the world's smallest implantable blood pumps for the treatment of advanced heart failure. HeartWare Int'l was incorporated in Delaware on July 29, 2008 and became the successor issuer to HeartWare Limited, an Australian corporation, on November 13, 2008, as a result of the Australian Court approving redomiciliation of HeartWare Limited from Australia to Delaware. Prior to this date, HeartWare Limited was the ultimate parent company of the HeartWare Group and, following the redomiciliation, HeartWare International, Inc. became the ultimate parent company. The principal executive offices of HeartWare Int'l are located in Framingham, Massachusetts; HeartWare Int'l also has an operations and manufacturing facility in Miami Lakes, Florida and a small development and operations facility in Sydney, Australia.

16. Defendant Seth Harrison is, and has been at all relevant times, a director of HeartWare, Inc. Seth Harrison was also the Chief Executive Officer of HeartWare, Inc. from its inception through November 2004. Seth Harrison has also been Deputy Chairman and non-executive director of HeartWare Ltd. and subsequently HeartWare Int'l since 2004. Seth Harrison has been the major shareholder of Kriton Medical, HeartWare, Inc., HeartWare Ltd. and HeartWare Int'l largely through his venture capital firm, Apple Tree Partners I, L.P. The sole General Partner of Apple Tree Partners I, LP is Apple Tree Ventures I, LLC, of which Seth Harrison is the sole General Partner. Defendant Harrison is a resident of New York.

17. Defendant David McIntyre is, and has been at all relevant times, the Chief Financial Officer of HeartWare, Inc. Defendant McIntyre is also currently the Executive Vice President, Chief Financial Officer and Chief Operating Officer of HeartWare Int'l. Defendant McIntyre is a resident of Australia.

18. Defendant Robert Thomas has been a non-executive director of HeartWare Int'l from November 2004 through the present. Defendant Thomas has also been a director of HeartWare, Inc. since approximately 2008. Defendant Thomas is a resident of Australia.

19. Defendant Denis Wade has been a non-executive director of HeartWare Int'l from December 2004 through the present. Defendant Wade has also been a director of HeartWare, Inc. since approximately 2008. Defendant Wade is a resident of Australia.

20. Defendant Christine Bennett has been a non-executive director of HeartWare Int'l from December 2004 through the present. Defendant Bennett has also been a director of HeartWare, Inc. since approximately 2008. Defendant Bennett is a resident of Australia.

21. Defendant Robert Stockman has been a non-executive director of HeartWare Int'l from December 2006 through the present. Defendant Stockman has also been a director of HeartWare, Inc. since approximately 2006. Defendant Stockman is a resident of New Jersey.

22. Defendant C. Raymond Larkin, Jr. has been the non-executive Chairman of the HeartWare Int'l Board of Directors since October 2009. Defendant Larkin has also been a director of HeartWare, Inc. since approximately 2008. Defendant Larkin is a resident of Florida.

23. Defendant Timothy J. Barberich has been a non-executive director of HeartWare Int'l from April 2009 through the present. Defendant Barberich has also been a director of HeartWare, Inc. since approximately 2008. Defendant Barberich is a resident of Massachusetts.

24. Defendant Douglas Godshall has been the Chief Executive Officer, President and Executive Director of HeartWare Int'l since approximately October 2006. Defendant Godshall has also been a director of HeartWare, Inc. since approximately 2007. Defendant Godshall is a resident of Massachusetts.

25. Defendant Apple Tree Partners I, L.P. ("Apple Tree") is a venture capital firm specializing in early stage investments in life science sectors. Apple Tree was founded in 1999 by Defendant Seth Harrison. The sole General Partner of Apple Tree is Apple Tree Ventures I, LLC, of which Seth Harrison is the sole General Partner. Apple Tree is incorporated in Delaware with its principle place of business in Cambridge, Massachusetts.

26. The individual defendants named above in ¶¶16-24 are hereinafter referred to as the "Individual Defendants."

IV. SUBSTANTIVE ALLEGATIONS

27. Kriton Medical, Inc. ("Kriton"), the ultimate *de facto* predecessor to what is now HeartWare Int'l, was founded in or around 1995 and began developing what would later become

the HeartWare Ventricular Assist System (the "HeartWare System"), including, among other things, a left ventricular assist device ("LVAD"). The HeartWare System is currently HeartWare Int'l's sole commercially available product.

28. As part of its capital structure, Kriton had over 7 million shares of Series A Preferred Stock and over 6 million shares of Series B Preferred Stock outstanding. Both Kriton Series A and Series B Preferred Stock were convertible to common stock and had certain voting rights. Plaintiffs Magidson and Millson and the other Class members owned shares of Kriton Series A and/or Series B Preferred Stock.

29. In or around late 2002/early 2003, Seth Harrison ousted many of the other members of the Kriton board of directors by conditioning bridge financing from Apple Tree on such a "restructuring" of the board. Seth Harrison then quickly moved to protect his interests in Kriton – and cut other investors out – by seeking a restructuring of Kriton under terms quite favorable to him.

30. In May 2003, Kriton filed for Chapter 11 bankruptcy in the United States Bankruptcy Court for the Southern District of Florida. In an effort to squeeze out the rights of Kriton's shareholders and protect his own interests, Seth Harrison, by way of Apple Tree, orchestrated a quick reorganization of Kriton pursuant to which he became the dominant figure in what would later become HeartWare Int'l.

31. Over the objections of some of the holders of Kriton Series A and Series B Preferred Stock, Seth Harrison utilized his large Kriton holdings and his absolute control over Kriton (achieved by his aforementioned ouster of the other Kriton directors) to force through a bankruptcy plan (the "Bankruptcy Plan") which, to his own benefit, stripped prior Kriton Series A and Series B Preferred Stock holders of their rights.

32. As part of the Bankruptcy Plan, which was confirmed by the bankruptcy court on or about June 20, 2003, three steps took place.

33. First, Seth Harrison, by way of his investment vehicle Apple Tree, created a new corporate entity, Perpetual Medical, Inc., which was quickly renamed HeartWare, Inc. Seth Harrison, by way of Apple Tree, was the dominating majority owner of HeartWare, Inc., with a 98.87% stake of the voting stock on a converted basis.

34. Second, pursuant to the Bankruptcy Plan, HeartWare, Inc. and Kriton executed an Asset Purchase Agreement on July 10, 2003, according to which Kriton sold substantially all of its assets to HeartWare, Inc. free and clear of any and all liens, security interests, encumbrances and claims. Ever protecting his own interest, Seth Harrison ensured that the only liability assumed by HeartWare, Inc. as part of the reorganization and asset sale was the assumption of certain secured indebtedness of Kriton Medical owed to Apple Tree in the aggregate principal amount of up to $3,064,596.

35. Third, pursuant to the Bankruptcy Plan and the First Amended Disclosure Statement filed by Kriton and Apple Tree with the bankruptcy court on or about May 21, 2003 (the "Disclosure Statement"), HeartWare, Inc. issued approximately 626,000 shares of Series A-1 Non-Voting Preferred Stock ("Series A-1 Stock") and approximately 436,000 shares of Series A-2 Non-Voting Preferred Stock ("Series A-2 Stock"). The Series A-1 Stock was issued to the former holders of Kriton Series A Preferred Stock; the Series A-2 Stock was issued to the former holders of Kriton Series B Preferred Stock. Immediately following the reorganization, HeartWare, Inc. also issued Series B Convertible Participating Preferred Stock – the only stock at that time with voting rights. Seth Harrison, by way of Apple Tree, owned 98.87% of HeartWare, Inc.'s voting stock.

36. Immediately following the reorganization, Seth Harrison had nearly absolute control over HeartWare, Inc.:

a. He owned 98.87% of HeartWare, Inc.'s voting stock.

b. He also locked up the remaining 1.13% interest's vote. As part of the reorganization of Kriton, the "Kriton Medical Angel Investors," who were the owners of the remaining 1.13% interest in HeartWare, Inc.'s Series B Convertible Preferred Stock, executed a Voting Agreement on July 10, 2003, according to which they agreed to vote their shares as instructed by Apple Tree.

c. He was the sole director of HeartWare, Inc. following the reorganization.

d. As the controller of the Series B Stock, he was entitled to elect up to three more directors of HeartWare, Inc.

37. Immediately following the reorganization, not only did Seth Harrison have absolute control over HeartWare, Inc., but he also stripped the former preferred shareholders of nearly all of their rights. In fact, the new HeartWare, Inc. Series A-1 Stock and Series A-2 Stock issued to the former Kriton preferred shareholders, including Plaintiffs Magidson and Millson: (1) have no voting rights (the prior corresponding Kriton shares did have voting rights); (2) are not convertible (the prior corresponding Kriton shares were convertible); and (3) do not enjoy anti-dilution protection.

38. According to the Bankruptcy Plan and the Disclosure Statement, the only right held by holders of the new HeartWare, Inc. Series A-1 Stock and Series A-2 Stock is a liquidation right. Pursuant to this sole liquidation right, the holders of Series A-1 Stock are entitled to $10 per share (based on the purchase price of the former, corresponding share of

Kriton Series A Preferred Stock) and the holders of Series A-2 Stock are entitled to $21 per share (based on the purchase price of the former, corresponding share of Kriton Series B Preferred Stock) that is triggered either by a liquidation event ("Liquidation Event") or a deemed liquidation event ("Deemed Liquidation Event").

39. The Disclosure Statement defines Liquidation Event as follows: "In the event of any liquidation or winding up of [HeartWare, Inc.], the holders of [HeartWare, Inc. Series A-1 and Series A-2 Stock] shall be entitled to receive...an amount equal to the original purchase price such holder paid in respect of Kriton's Series A or B Preferred Stock plus any accrued but unpaid dividends which would have accrued on such Kriton Preferred Stock."

40. The Disclosure Statement also defines Deemed Liquidation Event as follows: "A merger, reorganization, sale of stock or sale of substantially all of the assets of [HeartWare, Inc.] or similar transaction in which the shareholders of [HeartWare, Inc.] immediately prior to such event do not own a majority of the outstanding shares of the surviving entity (a sale transaction) will be deemed to be a liquidating event thereby triggering application of the liquidation preference."

41. Importantly, the Disclosure Statement does not place any qualification on the liquidation right of HeartWare Series A-1 Stock or Series A-2 Stock shareholders beyond the triggering occurrence of either a Liquidation Event or a Deemed Liquidation Event. Likewise, the Bankruptcy Plan, as filed with the bankruptcy court, states that "[t]he attributes of the [HeartWare, Inc.] junior preferred stock are set forth in the Disclosure Statement," again without qualification.

42. Despite having stripped virtually all of the economic and voting rights of the holders of the former Kriton Series A and Series B Preferred Stock, Seth Harrison continued to undermine even the sole liquidation right those shareholders were granted in HeartWare, Inc.

43. Notwithstanding the clear right – in fact, the only right – of Series A-1 Stock and Series A-2 Stock shareholders to a liquidation distribution upon a Liquidation Event or Deemed Liquidation Event as set forth in the Bankruptcy Plan and Disclosure Statement, Seth Harrison amended HeartWare, Inc.'s certificate of incorporation (filed with the Secretary of State of Delaware on or about June 30, 2003) and included a provision limiting the rights of Series A-1 Stock and Series A-2 Stock shareholders in violation of the Bankruptcy Plan and Disclosure Statement. Specifically, Seth Harrison included a provision which granted him ***unfettered and unilateral authority to nullify the liquidation right of Series A-1 Stock and Series A-2 Stock shareholders upon a Deemed Liquidation Event***:

> ***Unless voted to be treated otherwise by a Majority Interest***, each of the following events shall be treated as if a Liquidation Event: (A) any merger or consolidation of the Corporation into or with another corporation (except one in which the holders of capital stock of the Corporation immediately prior to such merger or consolidation continue to hold at least a majority of the voting power of the capital stock of the surviving corporation), (B) any sale of all or substantially all of the assets of the Corporation in a single transaction or series of related transactions, or (C) any other transaction or series of related transactions pursuant to or as a result of which a single person (or group of affiliated persons) acquires or holds capital stock of the Corporation representing a majority of the Corporation's outstanding voting power (a "Change of Control Transaction"). ***Unless voted by a Majority Interest not to be treated as a Liquidation Event***, all consideration payable to the stockholders of the Corporation in connection with any such merger, consolidation, or Change of Control Transaction, or all consideration payable to the Corporation and distributable to its stockholders, together with all other available assets of the Corporation, in connection with any such asset sale, shall be, as applicable, paid by the purchaser to the holders of, or distributed by the Corporation in redemption (out of funds legally available therefor) of, the Series B Convertible Preferred Stock, Series A Preferred Stock and any other capital stock of the Corporation in accordance with the preferences and priorities set forth [above]....

Amended and Restated Certificate of Incorporation of Perpetual Medical, Inc. [HeartWare, Inc.], at Article IV, ¶A(3)(a)(iv) (emphasis added).

44. Of course, the "Majority Interest" was none other than Seth Harrison himself. Seth Harrison, by way of Apple Tree, owned 98.87% of HeartWare, Inc.'s Series B Convertible Preferred Stock and controlled 100% of the votes through the Voting Agreement with the Kriton Medical Angel Investors, and the Amended Certificate of Incorporation defined "Majority Interest" as "[t]he holders of Series B Convertible Preferred Stock constituting at least a majority of the voting power of the shares of Series B Convertible Preferred Stock then outstanding." Amended and Restated Certificate of Incorporation of Perpetual Medical, Inc. [HeartWare, Inc.], at Article IV, ¶A(1)(a).

45. Despite violating the terms of the Bankruptcy Plan and Disclosure Statement, the provisions allowing a "Majority Interest" to nullify the triggering effect of a Deemed Liquidation Event continued to be included in subsequent amendments to HeartWare, Inc.'s Certificate of Incorporation. *See* Amended and Restated Certificate of Incorporation, filed with the Secretary of State of Delaware on June 30, 2003; Second Amended and Restated Certificate of Incorporation, filed with the Secretary of State of Delaware on September 13, 2005.

46. Beginning in 2005, Defendants initiated a series of corporate transactions that, among other things, created a "shell game" as to the identity of the owners of HeartWare, Inc.'s voting shares, thus obfuscating the trigger of a Deemed Liquidation Event.

47. In furtherance of the aforementioned "shell game," Seth Harrison first created a new Australian corporate entity, HeartWare Limited ("HeartWare Ltd."), on or about November 26, 2004. Seth Harrison, by way of Apple Tree, was the sole shareholder of HeartWare Ltd. On

January 24, 2005, HeartWare Ltd. completed its initial public offering in Australia. In a transaction related to the initial public offering, HeartWare Ltd. acquired all of the outstanding voting stock of HeartWare, Inc. from Apple Tree. HeartWare Ltd. became the ultimate parent company of the HeartWare Group.

48. Then, in preparing HeartWare Inc.'s move back to the United States, a new entity, HeartWare International, Inc. ("HeartWare Int'l"), was incorporated in Delaware on or about July 29, 2008, as a wholly-owned subsidiary of HeartWare Ltd. Subsequently, on November 13, 2008, HeartWare Ltd. completed its redomiciliation from Australia to Delaware and: HeartWare Ltd. was renamed HeartWare Pty. Limited; HeartWare Ltd. became a wholly-owned subsidiary of HeartWare Int'l. HeartWare Int'l became the ultimate parent company of the HeartWare Group and is the entity that is now publicly traded on the NASDAQ stock exchange under the symbol "HTWR".

49. It appears that currently, the voting shares of the original HeartWare, Inc. are owned by HeartWare Pty. Limited, which was previously named HeartWare Ltd., and HeartWare Ltd. (HeartWare Pty. Limited) is now a wholly-owned subsidiary of HeartWare Int'l.

50. Indeed, Defendants have used this shell game to obfuscate when a Deemed Liquidation Event is triggered, concealing from Plaintiffs and the Class their rights to a liquidation payout on their Series A-1 and Series A-2 Stock. HeartWare Int'l and HeartWare, Inc. have taken the position that no Liquidation Event or Deemed Liquidation Event has taken place, despite the reshuffling of HeartWare Ltd.'s shares to HeartWare Int'l's shareholders in 2008 and the 2005 transaction by which HeartWare Ltd. acquired all of the outstanding voting stock of HeartWare, Inc. – clearly a Deemed Liquidation event. At all relevant times,

Defendants have failed to recognize, let alone disclose, that a Deemed Liquidation Event or a Liquidation Event has occurred.

51. Defendants have also actively concealed the occurrence of a Liquidation Event or Deemed Liquidation Event by affirmatively misrepresenting to the Class that a Liquidation Event or Deemed Liquidation Event had not occurred. For example, in an email communication to a class member on November 18, 2005, Defendant McIntyre wrote on behalf of HeartWare Ltd.:

> As you may know, HeartWare, Inc. was acquired by HeartWare Limited on 24 January 2005. This transaction was effected by HeartWare Limited acquiring all of HeartWare, Inc.'s Series B Preferred Stock, together with all outstanding promissory notes. ***Please note however that the above transaction did not involve or otherwise affect Series A [preferred] stock; that is, Series A stock remains unaffected by the acquisition.***
>
> Following the acquisition, stock in HeartWare Limited (not HeartWare, Inc) became listed for quotation on the Australian Stock Exchange.
>
> ***I therefore confirm that, as indicated above, you retain your Series A [Preferred] Stock holding in HeartWare, Inc.*** [sic] This stock is a non-voting, junior liquidation preference stock which is not convertible. The limited rights which attach to this stock apply in a liquidation event.

(Emphasis added.)

52. Likewise, in a February 7, 2008 email communication to another class member, Howard Leibman, then-director of Corporate Development at what was then HeartWare Ltd., wrote:

> Unfortunately, as a result of the [Kriton] bankruptcy and subsequent recapitalization, the early investors in Kriton Medical no longer have any economic interest in the parent company – HeartWare limited. ***These early investors still hold Series-A shares in HeartWare Inc., the unlisted US subsidiary of HeartWare Limited but this Series A stock gives rise to little more than certain rights in the event of a liquidation of the company. I understand that other holders of this stock have essentially written the value down to zero.***

(Emphasis added.)

53. Furthermore, it has become clear that HeartWare Int'l and HeartWare, Inc. have foreclosed and will continue to foreclose Plaintiff's and the Class's right to liquidation of their shares upon a merger, *i.e.* a Deemed Liquidation Event, while concealing from the Class members their right to a liquidation distribution. When HeartWare Int'l entered into a merger agreement with Thoratec Corporation in 2009, valued at approximately $282 million at the time, pursuant to which HeartWare Int'l would be acquired by and merged into Thoratec, HeartWare Int'l and HeartWare, Inc. took the position that "the pending merger among the Company [and] Thoratec Corporation...will not constitute such a[] [Liquidation or Deemed Liquidation] event."[1] Indeed, in the HeartWare Int'l 2010 Form 10-K that was filed with the SEC on or about February 24, 2011, HeartWare Int'l indicated: "We do not believe we have abrogated the rights, or in any way failed to satisfy obligations owed to any of our stockholders, including holders of Series A Preferred Stock in HeartWare, Inc."

54. While Defendants were busy choking off Plaintiffs' and the Class's liquidation right, the business of HeartWare Int'l and HeartWare, Inc. skyrocketed. The HeartWare System has enjoyed immense success, having received Conformite Europenne Marking approval in January 2009, allowing the HeartWare System to be marketed and sold in Europe. In April 2008, HeartWare Int'l received conditional Investigational Device Exemption approval from the U.S. Food and Drug Administration (the "FDA") to enroll patients in a bridge-to-transplant

[1] While the proposed merger with Thoratec ultimately was called off after the Federal Trade Commission indicated its intent to challenge the merger, HeartWare Int'l and HeartWare, Inc.'s position is clear: no merger involving HeartWare Int'l will constitute either a Liquidation Event or Deemed Liquidation Event.

clinical study, and in September 2008, HeartWare Int'l received full approval. In October 2009, HeartWare Int'l received FDA approval to expand the clinical study.

55. Not surprisingly, the price of HeartWare Int'l common stock has appreciated significantly in the past two years. On March 11, 2009, the price of HeartWare Int'l common stock closed at $24.04 per share and on March 11, 2010, the price of HeartWare Int'l common stock closed at $39.90 per share. On March 11, 2011, the common stock of HeartWare Int'l closed at $83.10 per share – over ***double*** its value one year prior and over ***triple*** its value from two years prior – with a corresponding market capitalization of over $1.1 billion. At $83.10 per share, Apple Tree's 1,673,962 shares of HeartWare Int'l common stock alone are valued at over $139 million.

V. CLASS ACTION ALLEGATIONS

56. Plaintiffs bring this action as a class action pursuant to Rule 23 of the Massachusetts Rules of Civil Procedure on behalf of a Class consisting of all persons who hold HeartWare, Inc. Series A-1 Stock and/or Series A-2 Stock, excluding defendants, the officers and directors of HeartWare Int'l, HeartWare, Inc. and HeartWare Pty. Limited (formerly HeartWare Ltd.), members of their immediate families and their legal representatives, heirs, successors or assigns and any entity in which Defendants have or had a controlling interest.

57. This action has been brought and may properly be maintained as a class action pursuant to Rule 23 of the Massachusetts Rules of Civil Procedure.

58. The members of the Class are so numerous that joinder of all members is impracticable. While there are less than 100 class members, there are likely dozens of members in the proposed Class. As of 2004, there were over 626,000 shares of Series A-1 Stock outstanding and over 436,000 shares of Series A-2 Stock outstanding.

59. There is a well-defined community of interest in the questions of law and fact affecting the parties represented in this action.

60. Common questions of law and fact exist as to all members of the Class. These common questions predominate over any questions affecting only individual Class Members. The questions common to members of the Class include, *inter alia*:

a. whether the Individual Defendants, as directors and/or officers of HeartWare Int'l and HeartWare, Inc. have breached their fiduciary duties owed to Plaintiffs and the Class, including their duties of fairness, loyalty, due care, and candor;

b. whether the defendants aided and abetted the foregoing breaches of fiduciary duties;

c. the declaration of the respective rights of Plaintiffs and the Class as holders of Series A-1 Stock and Series A-2 Stock;

d. whether the provisions in HeartWare, Inc.'s amended certificate of incorporation, and subsequent amendments thereto, qualifying the liquidation right of Plaintiffs and Class members upon the occurrence of a Deemed Liquidation Event, were improperly adopted in violation of the Bankruptcy Plan, the Disclosure Statement, and/or Delaware GCL §241;

e. whether HeartWare's current certificate of incorporation should be reformed to excise the aforementioned provisions qualifying the liquidation right of Plaintiffs and Class members upon the occurrence of a Deemed Liquidation Event; and

f. whether HeartWare, Inc. has materially breached its contractual obligations owed to Plaintiffs and members of the Class as holders of Series A-1 Stock and Series A-2 Stock.

61. Plaintiffs' claims are typical of the claims of the members of the Class as all members of the Class are similarly affected by Defendants' wrongful conduct that is complained of herein.

62. Plaintiffs will fairly and adequately protect the interests of the members of the Class and have retained counsel competent and experienced in class and shareholder litigation.

63. A class action is superior to all other available methods for the fair and efficient adjudication of this controversy since joinder of all Class members is impracticable. Furthermore, as the damages suffered by individual Class members may be relatively small, the expense and burden of individual litigation may make it cost prohibitive for members of the Class to individually redress the wrongs done to them. There will be no difficulty in the management of this action as a class action.

64. Prosecuting separate actions by individual class members would create the risk of adjudications with respect to individual Class members that, as a practical matter, would be dispositive of the interests of the other Class members not parties to the individual adjudications and would substantially impair or impede their ability to protect their interests.

65. Defendants have also acted on grounds generally applicable to the members of the whole Class, thereby making appropriate final injunctive relief with respect to the Class as a whole.

FIRST CLAIM

Breach of Fiduciary Duty Against the Individual Defendants

66. Plaintiffs repeat and reallege each and every allegation set forth above as if fully set forth herein.

67. By reason of their positions as officers and/or directors of HeartWare, Inc. and/or HeartWare Int'l; their ability to control the business and corporate affairs of HeartWare, Inc. and/or HeartWare Int'l; and their possession of non-public information concerning the affairs and prospects of HeartWare, Inc. and/or HeartWare Int'l, each Individual Defendant owed Plaintiffs and members of the Class the duties to exercise a high degree of loyalty, honesty, care and diligence in the management and administration of the affairs of HeartWare, Inc. and HeartWare Int'l.

68. The Individual Defendants have breached their fiduciary duties by, *inter alia*:

a. adopting provisions in HeartWare, Inc.'s amended certificate of incorporation that give the voting stock of HeartWare, Inc. the unfettered discretion to not acknowledge a Deemed Liquidation Event and to not honor Series A-1 Stock and Series A-2 Stock shareholders' right to a liquidation distribution, to the detriment of Plaintiffs and members of the Class and in violation of the Bankruptcy Plan, the Disclosure Statement and Delaware General Corporation Law §241;

b. failing to remove or otherwise remedy the above-described improper provisions in subsequent amendments to HeartWare, Inc.'s certificate of incorporation;

c. engaging in a shell game of transactions to change the corporate structure of HeartWare, Inc. in an effort to improperly nullify the liquidation rights of

Plaintiffs and the members of the Class, and to conceal the triggering of a Deemed Liquidation Event;

d. failing to acknowledge and honor the Series A-1 Stock and Series A-2 Stock shareholders' liquidation rights upon a Deemed Liquidation Event in 2005 when HeartWare Ltd. acquired all of the voting stock of HeartWare, Inc.;

e. concealing from Plaintiffs and members of the Class their liquidation rights upon the 2005 Deemed Liquidation Event; and

f. failing to recognize the Series A-1 Stock and Series A-2 Stock shareholders' liquidation rights upon announcements in 2009 that HeartWare Int'l would be merged into Thoratec Corporation and determining that such a transaction resulting in a change in control would not be a Deemed Liquidation Event.

69. As a direct and proximate result of the Individual Defendants' breaches of their fiduciary duties, Plaintiffs and members of the Class have suffered significant economic losses.

70. Furthermore, the Individual Defendants will continue to breach their fiduciary duties owed to Plaintiffs and members of the Class, and threaten to fulfill their plan to merge with or into another company without recognizing the liquidation rights upon a Deemed Liquidation Event of Plaintiffs and members of the Class.

SECOND CLAIM

Aiding and Abetting Breach of Fiduciary Duty Against the Individual Defendants, HeartWare, Inc., HeartWare Int'l and Apple Tree

71. Plaintiffs repeat and reallege each and every allegation set forht above as if fully set forth herein.

72. The Individual Defendants, HeartWare, Inc., HeartWare Int'l and Apple Tree aided and abetted, encouraged, and rendered substantial assistance to one another in order to accomplish the wrongful acts alleged above. In aiding and abetting and substantially assisting the commission of the acts complained of, Defendants acted with an awareness of their wrongdoing and realized that their conduct would substantially assist the accomplishment of the wrongful conduct and scheme alleged herein.

73. As a result of the wrongful conduct of the Individual Defendants, HeartWare, Inc. and HeartWare Int'l, and each of them, Plaintiffs and members of the Class have suffered economic losses.

THIRD CLAIM

Breach of Contract Against HeartWare, Inc.

74. Plaintiffs repeat and reallege each and every allegation set forht above as if fully set forth herein.

75. By virtue of being holders of Series A-1 Stock and Series A-2 Stock with rights flowing from the Kriton bankruptcy and the corresponding Bankruptcy Plan and Disclosure Statement, Plaintiffs and the Class had contractual relationships with HeartWare, Inc.

76. Plaintiffs and members of the Class have performed their obligations under the contracts.

77. HeartWare, Inc. materially breached its contract with Plaintiffs and other Class members by failing to pay $10 per share of Series A-1 Stock and $21 per share of Series A-2 Stock upon the 2005 Deemed Liquidation Event when HeartWare Ltd. acquired all of the voting stock of HeartWare, Inc. in 2005, as described in greater detail above.

78. As a direct and proximate consequence of HeartWare, Inc.'s material breaches of contract, Plaintiffs and members of the Class suffered damages and are entitled, among other things, to recover their damages.

FOURTH CLAIM

Declaratory Relief Against All Defendants

79. Plaintiffs repeat and reallege each and every allegation set forth above as if fully set forth herein.

80. Under the Bankruptcy Plan and Disclosure Statement, holders of Series A-1 Stock are entitled to $10 per share and holders of Series A-2 Stock are entitled to $21 per share – both unconditionally – upon the occurrence of a Deemed Liquidation Event.

81. In violation of Delaware GCL §241 and in contravention of the Bankruptcy Plan and Disclosure Statement, Defendants restricted that liquidation right of Plaintiffs and members of the Class by inserting and maintaining a condition allowing them to nullify the effect of a Deemed Liquidation Event.

82. Furthermore, Defendants have refused to acknowledge that a Deemed Liquidation Event occurred in 2005 when HeartWare Ltd. acquired all of the voting stock of HeartWare, Inc., or that a Deemed Liquidation Event would occur, thus triggering Plaintiffs' and the Class's liquidation right, if HeartWare Int'l were to merge with and into another corporation, despite the Disclosure Statement's mandate that a Deemed Liquidation Event would be triggered upon a "merger, reorganization, sale of stock or sale of substantially all of the assets of [HeartWare, Inc.] or similar transaction in which the shareholders of [HeartWare, Inc.] immediately prior to such event do not own a majority of the outstanding shares of the surviving entity (a sale transaction)."

83. As a consequence of the foregoing, Defendants have caused injury to Plaintiffs and members of the Class, entitling them to a declaration as to the rights and legal relations between the parties with respect to the Series A-1 Stock and Series A-2 Stock.

FIFTH CLAIM

Accounting Against All Defendants

84. Plaintiffs repeat and reallege each and every allegations set forth above as if fully set forth herein.

85. Defendants owe Plaintiffs and the Class an amount of money, as alleged fully herein.

86. Defendants have failed to disclose critical information to Plaintiffs and the Class members regarding their ownership stakes and their rights to distribution. Without a proper accounting, Plaintiffs cannot ascertain the precise amounts owed by Defendants to Plaintiffs and each of the Class members.

87. Defendants' unique access to particular information regarding the amounts they owe – information not available to Plaintiffs and the Class – entitles Plaintiffs and the Class to an accounting.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for relief and judgment, as follows:

A. Determining that this action is a proper class action under Rule 23 of the Massachusetts Rules of Civil Procedure and certifying Plaintiffs as Class Representatives and Plaintiffs' counsel as Class Counsel;

B. Awarding compensatory damages in favor of Plaintiffs and the other Class members against all defendants, jointly and severally, for all damages sustained as a result of Defendants' wrongdoing, in an amount to be proven at trial, including interest thereon;

C. Ordering an accounting for all amounts of money owed to Plaintiffs and the other Class members in connection with Series A-1 Stock and Series A-2 Stock;

D. Enjoining Defendants from treating as otherwise a Deemed Liquidation Event as complained of herein;

E. Ordering the Individual Defendants to carry out their fiduciary duties to Plaintiffs and the other members of the Class;

F. Declaring that the Individual Defendants have breached and are breaching their fiduciary and other duties to Plaintiffs and members of the Class;

G. Declaring that HeartWare, Inc. is in material breach of its contractual obligations owed to Plaintiffs and members of the Class;

H. Declaring that the amended Certificates of Incorporation for HeartWare, Inc. contain void, voidable, or otherwise invalid provisions that are contrary to the Bankruptcy Plan and Disclosure Statement;

I. Reforming the operative Certificate of Incorporation for HeartWare, Inc. to conform to the express terms of the Bankruptcy Plan and Disclosure Statement;

J. Declaring that a transaction by which HeartWare Int'l or HeartWare, Inc. are merged with and into another company, pursuant to which the prior shareholders do not own a majority of the outstanding shares of the surviving company, constitutes a Deemed Liquidation Event and triggers HeartWare, Inc.'s obligation to pay holders of Series A-1 Stock $10 per share and holders of Series A-2 Stock $21 per share;

K. Awarding Plaintiffs and the Class their reasonable costs and expenses incurred in this action, including counsel fees and expert fees; and

L. Such other and further relief as the Court may deem just and proper.

JURY TRIAL DEMANDED

Plaintiffs hereby demand a trial by jury.

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