

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

MTB INVESTMENT PARTNERS, LP, on
behalf of itself and all others similarly situated,

Plaintiff,

v.

SIEMENS HEARING INSTRUMENTS, INC.,

Defendant.

Civil Action No. 2:12-cv-00340 (SDW)

**FIRST AMENDED CLASS ACTION
COMPLAINT FOR VIOLATIONS OF
FEDERAL SECURITIES LAWS.**

JURY TRIAL DEMANDED

Plaintiff MTB Investment Partners, LP, (“MTB” or “Plaintiff”) makes the following allegations against Siemens Hearing Instruments, Inc. (“SHI” or “Defendant”) based on the investigation of Plaintiff’s counsel, which included a review of relevant U.S. Securities and Exchange Commission (“SEC”) filings; press releases, public statements, news articles, and other publications; records of judicial proceedings in the Supreme Court of New York, New York County and the United States Bankruptcy Court for the Southern District of Florida related to HearUSA, Inc. (“HearUSA”) and its acquisition by SHI in a bankruptcy auction; and other readily obtainable information. Plaintiff believes that substantial, additional evidentiary support will exist for the allegations set forth herein after a reasonable opportunity for discovery.

NATURE OF THE ACTION

1. This is a federal securities class action brought on behalf of all persons who sold HearUSA common stock (the “Class”) between January 18, 2011 and July 31, 2011, inclusive (the “Class Period”), for violations of the Securities Exchange Act of 1934 (the “Exchange Act”) and Rule 10b-5 promulgated thereunder, against SHI for its unlawful suppression of the price of HearUSA’s publicly-traded common stock prior to SHI’s acquisition of HearUSA.

2. Between April 11, 1986 and September 13, 2011, HearUSA was a Delaware Corporation with its principal office located in West Palm Beach, Florida.¹ Prior to SHI's purchase of HearUSA on August 1, 2011, HearUSA was a national leader in hearing care products and services. Through its network of nearly 2,000 independently practicing audiologists and hearing care professionals and its more than 180 company-owned hearing centers, HearUSA administered hearing benefits and provided related products and services.

3. SHI manufactures and sells hearing aids and other related products purchased by HearUSA. From at least 2006 until August 1, 2011, SHI was HearUSA's largest supplier, shareholder, and creditor. At the beginning of the Class Period, for example, SHI supplied roughly 90% of HearUSA's hearing aids and owned 14.1% of HearUSA common stock. In addition, SHI held a non-voting seat on HearUSA's Board of Directors prior to and during the Class Period.

4. Around June 2010, SHI decided to acquire HearUSA. However, SHI failed to inform the investing public of its intentions to do so.

5. Instead, beginning on or at least as early as January 18, 2011, SHI made materially false and misleading public statements in SEC filings to drive down the price of HearUSA common stock so that it could acquire HearUSA's assets for less than their fair market value. SHI knew or should have known that such statements were materially false and misleading, as it had intimate knowledge of HearUSA's operations and financial outlook, gained both through its close working relationship with HearUSA and the due diligence it undertook with respect to the acquisition. Nonetheless, SHI materially misrepresented HearUSA's economic outlook and the potential returns to holders of HearUSA common stock. As a result,

¹ As part of the August 1, 2011 bankruptcy auction, HearUSA signed an Asset Purchase Agreement with SHI's wholly-owned subsidiary (Audiology Distribution, LLC). Pursuant to this agreement, on September 13, 2011, HearUSA filed a Certificate of Amendment to its Restated Certificate of Incorporation with the Delaware Secretary of State in order to change its name to "HUSA Liquidating Corporation."

the price of HearUSA common stock plummeted – falling, at its nadir, to just one-third of its pre-January 18, 2011 value.

6. In order to protect itself from SHI’s predatory behavior, HearUSA filed for bankruptcy protection on May 16, 2011. Because HearUSA was able to secure a stalking horse bidder,² SHI’s scheme to acquire HearUSA at a suppressed price was thwarted. At the bankruptcy auction on August 1, 2011, the stalking horse bidder’s presence forced SHI to acquire HearUSA at around the price that HearUSA’s common stock was trading prior to SHI’s January 18, 2011 Schedule 13D filing. However, between January 18, 2011 and July 31, 2011, numerous holders of HearUSA common stock – acting in reliance on SHI’s public statements and/or the resulting, artificially suppressed market price – sold HearUSA common stock at a depressed price and were, therefore, injured by SHI’s unlawful conduct.

JURISDICTION AND VENUE

7. The claims asserted herein arise under and pursuant to Sections 10(b), 9(a)(2) and 18(a) of the Exchange Act [15 U.S.C. §§ 78j(b), 78i(a)(2), and 78r(a)] and Rule 10b-5 promulgated thereunder by the SEC [17 C.F.R. § 240.10b-5].

8. This Court has jurisdiction over the subject matter of this action pursuant to Section 27 of the Exchange Act [15 U.S.C. § 78a(a)] and 28 U.S.C. § 1331.

9. Venue is proper in this District pursuant to Section 27 of the Exchange Act and 28 U.S.C. §§ 1391(b), because SHI resides in this District, many of the acts and practices complained of herein occurred in substantial part in this District, and many of the acts and transactions that constitute violations of law complained of herein, including the dissemination to the public of untrue statements of material facts, occurred in this District.

10. In connection with the acts and conduct alleged in this complaint, SHI, directly or indirectly, used the means and instrumentalities of interstate commerce, including, but not

² A stalking horse bidder is an entity that places an initial bid on a bankrupt company’s assets. “From a pool of bidders, the bankrupt company chooses the stalking horse to make the first bid. This method allows the distressed company to avoid low bids on its assets.” <http://www.investopedia.com/terms/s/stalkinghorsebid.asp#ixzz1jAYws2VQ>.

limited to, the mail, interstate wire and telephone communications, and the facilities of the national securities markets.

THE PARTIES

11. Plaintiff MTB is an investment fund with its primary place of business in the State of New York. During the Class Period, as set forth in the certification attached to the initiating complaint, MTB sold its HearUSA common stock in reliance on SHI's intentional, materially false and/or misleading statements and was damaged as a result of SHI's wrongdoing as alleged in this complaint.

12. Defendant SHI is a Delaware Corporation with its principal office located at 10 Constitution Avenue, Piscataway, New Jersey 08855. SHI is a subsidiary of Siemens AG, a German corporation. The actions complained of herein were taken by SHI and/or SHI's affiliates for the benefit of SHI in its unlawful attempt to acquire HearUSA at a suppressed price.

FACTUAL ALLEGATIONS

13. SHI engaged in an aggressive and fraudulent course of action designed to acquire HearUSA at an artificially low price. In order to do so, SHI violated a number of its obligations under the federal securities laws, including its duty to disclose its intention to acquire HearUSA pursuant to Section 13(d) of the Exchange Act. While SHI was eventually unable to acquire HearUSA at an undervalued price, stockholders, acting in reliance on SHI's materially false and/or misleading statements, disposed of their HearUSA common stock at greatly reduced prices.

14. SHI is liable to Plaintiff and the Class for the following: (a) making materially false statements in filings with the SEC; (b) failing to disclose its firmly-established intent to acquire HearUSA; and (c) failing to disclose all relevant, known facts about HearUSA in its filings with the SEC. SHI's fraudulent scheme, accomplished by the aforementioned acts and omissions: (a) deceived the investing public about HearUSA's prospects and business; (b) artificially suppressed the prices of HearUSA common stock; and (c) caused Plaintiff and other members of the Class to sell their HearUSA common stock at artificially suppressed prices.

A. BACKGROUND

15. The United States is the single largest market for hearing aids in the world. According to iData Research, the United States hearing aid and audiology device market was worth over \$5.7 billion in 2011. By 2018, annual sales are expected to reach almost \$8 billion. This growth is being driven by America's aging population and increased exposure to high-decibel sounds (*i.e.*, the use of in-ear headphones for portable music players). Further, continued economic difficulties and health-care reform are unlikely to impact this industry's growth.

16. In general, the hearing aid market has two levels: wholesale (manufacturing) and retail (distribution). While the retail market remains highly fragmented, the wholesale market is dominated by six manufacturers: SHI, Sonova Holding AG (sold under brand names "Phonak", "Unitron", and "Sona"), William Demant Holding Group (sold under brand names "Sonic", "Oticon", and "Bernafon"), GN Resound (sold under brand name "Resound"), Starkey Hearing Technologies, Inc. (sold under brand names "Starkey Laboratories", "NuEar", "MicroTech", "Audiosynch", and "Audibel"), and Widex A/S. These manufacturers fiercely compete with each other for business; this competition is only expected to increase as the number of senior citizens around the world increases. In North America, for instance, the population over the age of 65 is expected to double by 2035 (2.7% annual growth).

17. In recent years, hearing aid manufacturers have been defending their position in key markets, especially the United States, by acquiring retailers. Financial analysts have noted that by vertically integrating their operations, hearing aid manufacturers can capture more revenue and gain market leverage. To this end, in the years leading up to the beginning of the Class Period, SHI's competitors were actively acquiring additional distribution channels in the United States. For instance, Sonova purchased InSound Medical in 2010.³ Similarly, William Demant Holdings, after a bidding war with GN Resound, purchased Otix Global, Inc. in 2010. In

³ In addition to InSound, Sonovo acquired other large group practices to broaden its U.S. distribution channels. As a result, Sonovo gained significant market share in the U.S. retail and wholesale hearing-aid markets from 2010 to 2011.

addition, GN Resound purchased Moore Hearing Centers LP and other “minor hearing instrument chains and distributors” in the United States. Finally, in 2010 Widex A/S acquired its U.S. distributor, Widex Hearing Aid Company and announced that it would begin to pursue a U.S. distribution strategy based on direct ownership of the retail channels.

18. SHI’s competitors noted that these acquisitions were a necessary part of growing their hearing aid business in the booming American hearing aid market. For instance, William Demant Holdings remarked in its 2010 Annual Report that “in the future, only a few manufacturers will have the resources and competencies required to be able to offer a complete product programme.” Similarly, Widex A/S realized in 2010 that “the changing market dynamics in the United States presented increasing challenges for an independent distributor. Margins eroded and, at the same time, significant investments were necessary to expand Widex’s position in the market while ensuring a high level of service to dispensing professionals.” Finally, Sonic, before its acquisition by William Demant Holdings, noted that its competitors were vertically integrating and stated, “[F]or us to be successful, we need to develop and acquire distribution capacities.” (2007, Form 10-Q).

19. Unlike its competitors, SHI’s parent company, Siemens Aktiengesellschaft (“Siemens AG”), began investigating the sale of its hearing aid division, Siemens Audiologische Technik GMBH, in 2009; this division includes SHI.⁴ Specifically, Siemens AG solicited bids for its hearing aid division from prospective purchasers. However, on or around March 16, 2010, Siemens AG scrapped this plan when it did not receive a high enough bid. Instead, Siemens AG appointed a new executive, Roger Radke, to head its hearing aid division.

20. Siemens AG’s appointment of Mr. Radke signaled that it would, like its competitors, be pursuing a vertical integration strategy in its hearing aid division. In a press release, the CEO of Siemens’ Healthcare Sector stated, “I’m convinced that [Mr. Radke] will expand our leading position in hearing systems even further.” Further, at his prior position as

⁴ Siemens Audiologische Technik GMBH manufactures and imports some or all of the hearing aids distributed by SHI in the United States.

CEO of Siemens Water Technologies, Mr. Radke oversaw an aggressive acquisition strategy, shedding poorly performing business units and acquiring others that closed gaps in its business portfolio. Part of Siemens' strategy was the acquisition of HearUSA at the lowest price SHI could obtain.

21. Prior to its acquisition of HearUSA, SHI and HearUSA had a strategic relationship that spanned roughly 15 years. As a result of their relationship, HearUSA expanded its business operations and SHI increased its hearing aid sales. Because SHI had no distribution business for its hearing aid products, it relied on HearUSA (and HearUSA's competitors) to sell its hearing products in the United States.

22. Since approximately December 7, 2001, SHI and HearUSA were parties to a supply agreement, a credit agreement, an investors' rights agreement, and a security agreement. Pursuant to these agreements, SHI extended a credit line to HearUSA in exchange for HearUSA's promise to purchase 90% of its hearing aids from SHI. These agreements further provided that certain debt would be automatically forgiven so long as HearUSA continued to purchase hearing aids from SHI but also permitted SHI to convert certain debt into an equity stake in HearUSA.

23. Thus, on or around December 23, 2008, SHI converted \$3,840,000 of HearUSA debt into 6,400,000 common shares of HearUSA common stock. As a result of this conversion, SHI became HearUSA's single largest shareholder, owning between 14.1% and 19.9% of all outstanding shares between December 23, 2008 and August 1, 2011. In addition, this conversion resulted in SHI (or its affiliates) obtaining a non-voting seat on HearUSA's Board of Directors.

24. As a further result of this debt-to-equity conversion, and because SHI owned more than 5% of HearUSA common stock, SHI was required to make certain periodic filings with the SEC regarding its intentions with respect to HearUSA under Section 13(d) of the Exchange Act. These disclosures are for the protection of other investors. Specifically, by no later than December 23, 2008, SHI was required to disclose any intention to acquire control of HearUSA. Moreover, if it had such intent, SHI was required to disclose whether it had any plans

to liquidate HearUSA, sell its assets, merge HearUSA with itself or another entity, or to make any other major change in HearUSA's business or corporate structure.

25. As a result of their decade-long, strategic relationship, SHI had significant insider information about HearUSA's finances, operations, strengths, and vulnerabilities, including the American Association of Retired Persons' ("AARP") award of an exclusive contract to HearUSA that made HearUSA the sole provider of hearing aids to the AARP. As a result of this long standing relationship, SHI acquired a position of trust and confidence with HearUSA's board and executives. Indeed, Siemens AG noted in its 2010 Annual Report that it had "significant influence [over HearUSA] due to contractual arrangements or other circumstances".

B. PROJECT HARMONY

26. On June 1, 2010, SHI began investigating the purchase of HearUSA's assets. Based on the facts set forth below, SHI initially intended to acquire HearUSA through a negotiated buyout process. SHI and HearUSA named the negotiated buyout process "Project Harmony."

27. In the months that followed, SHI undertook numerous overt acts in furtherance of its intention to acquire HearUSA. For instance, SHI or its affiliates retained an independent auditing firm, outside legal counsel, and one or more investment banks to explore the negotiated buyout of HearUSA. In addition, SHI CFO Nicolau Gaeta contacted HearUSA's CFO, Frank Punal, on July 15, 2010, October 6, 2010, and November 3, 2010 requesting additional support and information to hasten the completion of SHI's due diligence review.

28. Beginning in late September 2010, Kenneth Meyers, the vice president and head of corporate development at Siemens Corporation, repeatedly told HearUSA's officers and directors that an offer for HearUSA was imminent. On information and belief, other high-ranking executives at SHI and its affiliates promised the same. Acting in reliance on Siemens' assurances, from September 2010 through November 2010, HearUSA refrained from raising the following, important issues related to its strategic relationship with SHI:

- (a) HearUSA's belief that SHI owed HearUSA restitution of \$7 million for overcharges related to their supply agreement;
- (b) Whether SHI would support HearUSA's upcoming lucrative contract to be the exclusive supplier of hearing aids to the AARP;
- (c) SHI's failure to develop new technologies that would allow HearUSA to better compete in the hearing aid market; and
- (d) A dispute over SHI's calculation of the amount owed to it by HearUSA arising from the sale of HearUSA's Canadian subsidiary on April 27, 2009.

29. Despite its repeated assurances and numerous actions in furtherance of a negotiated buyout, SHI informed HearUSA on December 8, 2010 that it had abandoned Project Harmony. Roger Radke - who, for the prior two months had repeatedly assured HearUSA that an offer was imminent - informed HearUSA's investment bank that it was backing out of Project Harmony because HearUSA was a "turnaround company" and Siemens "preferred to acquire growth companies." Yet, despite its statements, SHI - armed with HearUSA's detailed financial information from the Project Harmony audit, its strategic relationship with HearUSA, and position on HearUSA's Board of Directors, including information on the enormous financial value of the AARP's contract with HearUSA - had previously decided to engage in a fraudulent scheme to acquire HearUSA's assets for less than their fair market value.

30. In order to effectuate its fraudulent scheme, SHI first needed to hide Project Harmony from the investing public. In order to accomplish this task, SHI attempted to disguise the purpose of the Project Harmony audit. For example, on November 10, 2010, SHI's CFO wrote a letter to HearUSA falsely stating that the Project Harmony audit was undertaken to assess HearUSA's "compliance with the terms of the Credit and Supply Agreements between our companies pursuant to its access and audit rights." No mention of Project Harmony or of the negotiated buyout was made in this letter. Similarly, in subsequent litigation between the parties, SHI submitted a memorandum to the court that characterized the audit in a similar manner and made no mention of Project Harmony.

31. SHI has never publicly acknowledged the existence of Project Harmony or of any intention to acquire HearUSA through a negotiated buyout. Its failure to do so has harmed the investing public and violated federal securities laws.

C. SHI'S INTENTIONAL MANIPULATION OF HEARUSA'S STOCK PRICE

32. In furtherance of its fraudulent scheme to acquire HearUSA at an undervalued price, on January 18, 2011 - just one month after it informed HearUSA that it would not be pursuing a negotiated buyout - SHI filed a Schedule 13D with the SEC (the "January 18, 2011 Schedule 13D", attached hereto as Exhibit A) that contained material misrepresentations or omitted material facts necessary to make such statements not misleading. Rather than describing Project Harmony, SHI specifically disclaimed any interest in pursuing a negotiated buyout, stating instead that if SHI or its affiliates acquired HearUSA, it would be for the purpose of settling HearUSA's debts. The level of these debts, according to SHI, meant that SHI could acquire HearUSA without paying any consideration to HearUSA's common stock holders.

33. Specifically, SHI's January 18, 2011 Schedule 13D stated that SHI "may seek to pursue a transaction in which they or their affiliates would acquire [HearUSA] or some or all of its assets." The Schedule 13D further provided that should SHI pursue this type of transaction, (1) it could "do so on terms that do not involve the payment of any material amount of consideration to holders of Common Stock", and (2) it expected HearUSA's common stock to "be de-listed from the NYSE Amex" and "become eligible for termination of registration pursuant to Section 12(g)(4) of the Securities Exchange Act of 1934."

34. SHI filed the January 18, 2011 Schedule 13D with the intent to manipulate the price of HearUSA common stock. SHI had an obligation to disclose to the market any firm intentions that it had to acquire HearUSA. Thus, no later than September 2010 - when SHI began repeatedly assuring HearUSA that an offer was forthcoming - SHI was legally obligated to disclose to the investing public that it intended to acquire HearUSA through a negotiated buyout process. Instead, just one month after it told HearUSA that it was abandoning Project Harmony,

it disclosed to the market that it could - if it wanted to - acquire HearUSA without paying HearUSA's common stockholders.

35. Interestingly, SHI also told the market that it had yet decided whether or not to acquire HearUSA. As such, taking SHI's purported indecision to be true, SHI was not required to make this "disclosure" under Section 13(d) of the Exchange Act; section 13(d) does not require disclosure of yet-to-be decided plans. Rather, SHI's January 18, 2011 Schedule 13D filing was nothing more than a thinly disguised attempt to convince the market that HearUSA's common stock was worthless.

36. The market responded accordingly. On January 18, 2011, HearUSA common stock lost roughly 37.66% of its value, declining from about 0.90¢/share to 0.561¢/share. At the same time, daily trading volume in HearUSA common stock increased nearly 6000% from the previous trading day. By the week's end, HearUSA common stock had lost roughly 56% of its value, closing at about 57¢/share. The weekly trading volume of 5,266,673 was more than twenty-one times greater than the volume of trades in the preceding week.

D. SHI'S FALSE AND MISLEADING STATEMENTS

37. The January 18, 2011 Schedule 13D contained at least four materially false or misleading statements.

38. *First*, SHI falsely stated in its January 18, 2011 Schedule 13D that it had "acquired and held [HearUSA] Shares since December 23, 2008 without any purpose of, and without the effect of, changing or influencing the control of the Issuer, and not in connection with or as a participant in any transaction having that purpose or effect, including any transaction subject to Rule 13d-3(b)." This statement was materially false because SHI was in the advanced stages of a negotiated buyout of HearUSA just one month prior to the Schedule 13D filing.

39. *Second*, SHI falsely stated in its January 18, 2011 Schedule 13D that it had not yet decided on the course of action it wished to take with regard to HearUSA. According to SHI, it had "requested additional information regarding [HearUSA's] financial condition and prospects," and it could not make a decision until such information was received. Yet, SHI

already had all of this information as a result of (a) its long-term business relationship with HearUSA, (b) its status as HearUSA's largest creditor, (c) its seat on HearUSA's board of directors, and (d) its audit of HearUSA undertaken as part of Project Harmony that was completed in November 2010. In addition, SHI had already declared its intentions with regard to HearUSA; SHI sent a letter to HearUSA on January 7, 2011 stating that "If HearUSA's board of directors wishe[d] to pursue a restructuring transaction," SHI was "prepared to discuss ways in which it might assist in that process including, potentially, by acquiring HearUSA's assets in a sale conducted pursuant to Section 363 of the Bankruptcy Code." However, SHI's January 18, 2011 Schedule 13D made no mention of these intentions.

40. *Third*, SHI's January 18, 2011 Schedule 13D falsely recounted a December 22, 2010 phone conversation between representatives of SHI and HearUSA, at which certain debts allegedly owed by HearUSA to SHI were discussed. SHI stated in its January 18, 2011 Schedule 13D that HearUSA owed SHI \$1.9 million of immediately-due trade payables and that, by the end of January 2011, in addition to the additional trade payables that would come due during that month, a further amount of approximately \$2.2 million would be due. Moreover, SHI claimed that HearUSA responded that it "would be unable to pay the full amount of the trade payables due to [SHI] in December 2010," and "[w]hile [HearUSA] declined to agree that any loan payment was due to [SHI] in January 2011 under the Credit Agreement, [HearUSA] indicated that if any amount was due [it] would be unable to pay it." SHI's characterization of the December 22, 2010 phone conversation was materially false and/or misleading in that it omitted material facts. Specifically, SHI failed to disclose that HearUSA's Lead Independent Director, David McLachlan, sent a letter to SHI on January 10, 2011 disputing this very characterization of the December 22 meeting. In his letter, Mr. McLachlan wrote, "In the telephone conference call of December 22, 2010, HearUSA's CEO did not state that HearUSA would be unable to pay amounts owed to [SHI] in December 2010. He told [SHI's CEO and CFO] that the serious problems caused by [SHI's] predatory pricing, refusal to honor [its] commitment to support the AARP Program, and failure to keep [its] technology competitive, coupled with the four months

lost as HearUSA put matters on hold at [SHI's] request as [it] considered a deal between the companies, has left HearUSA in extremis." In addition, SHI's January 18, 2011 Schedule 13D failed to disclose that the amount owed by HearUSA to SHI was in dispute. Rather than acknowledging that there was a genuine dispute between HearUSA and SHI regarding what happened during this conversation and the amounts owed, SHI's January 18, 2011 Schedule 13D failed to disclose material information regarding the disputed amount and the agreed-upon deferral of reaching resolution on that dispute. Instead, the January 18, 2011 Schedule 13D mischaracterized the parties' December 22 conversation in SHI's favor, characterizing SHI's opinions as fact. In so doing, SHI misled the investing public by making materially false or misleading statements about HearUSA's financial health and the nature of the debt owed to SHI.

41. *Fourth*, SHI falsely stated in its January 18, 2011 Schedule 13D that, as a result of the aforementioned debts, if it decided to acquire HearUSA, it could do so "on terms that [did] not involve the payment of any material amount of consideration to holders of Common Stock." In making this statement, SHI falsely implied that HearUSA's common stock was worthless. However, as demonstrated by SHI's eventual valuation of HearUSA common stock as consistent with pre-January 18, 2011 market levels, SHI knew or should have known that HearUSA's common stock was not worthless. Further, on information and belief, SHI could not have acquired HearUSA's assets on terms that did not involve the payment of a material amount of consideration to HearUSA's shareholders under the Amended Credit Agreement or applicable law.

42. Further, taking all of the assertions in SHI's January 18, 2011 Schedule 13D to be true, SHI had no legal duty to make this filing. If, as SHI claimed, it had not yet decided on its intentions, it was under no duty to report under Section 13(d) of the Exchange Act. Thus, the only plausible explanation for SHI's January 18, 2011 Schedule 13D is that it was part of SHI's aggressive attempt to acquire control of HearUSA at a discounted price. Rather than being worthless, SHI knew that HearUSA's long-term financial outlook was strong, most notably because of the recently-awarded contract making HearUSA the exclusive supplier of hearing aids

to the AARP. SHI further knew that the only impediment to HearUSA's short-term stability stemmed from questions over the amounts allegedly owed to SHI – questions which SHI had consistently requested that HearUSA table because SHI intended to moot such questions by making its “imminent” offer for HearUSA's assets. Moreover, SHI knew that its contentions with regard to HearUSA's outstanding debt were unfounded and only taken to increase its negotiating position with HearUSA in order to acquire it at an undervalued price. Most notably, HearUSA provided – and SHI never disputed prior to November 2010 – an accounting of the amount owed to SHI for the April 2009 sale of the Canadian subsidiary. Thus, SHI's January 18, 2011 Schedule 13D was intended to, and did, mislead the investing public about HearUSA's strength and financial viability.

E. SHI'S CONTINUED EFFORTS TO ACQUIRE HEARUSA AT AN UNDERVALUED PRICE

43. Subsequent to SHI's false and misleading January 18, 2011 Schedule 13D, HearUSA filed suit in New York state court seeking declaratory judgment against SHI regarding the amount of debt immediately due to SHI. The parties stipulated that HearUSA could file an amended complaint by March 18, 2011. However, on March 17, 2011, SHI, disregarding the New York court's jurisdiction over the pending matter, declared HearUSA to be in default of their credit agreement and filed an amended Schedule 13D with the SEC (the “Amended Schedule 13D”, attached hereto as Exhibit B).

44. In the Amended Schedule 13D, SHI finally disclosed to the investing public its intention to acquire HearUSA. The Amended Schedule 13D stated that SHI “intends shortly to begin the process of exercising its rights as a secured creditor under the Credit Agreement by taking possession of [HearUSA's] assets.” Moreover, SHI stated that after taking possession of HearUSA's assets, “it will seek to use those assets to continue [HearUSA's] business operations.” Finally, SHI concluded by stating that, should HearUSA seek bankruptcy protection, it “may seek to acquire some or all of [HearUSA's] assets through the bankruptcy proceeding.”

45. Although the Amended Schedule 13D is more detailed than the January 18, 2011 Schedule 13D, nothing in the Amended Schedule 13D corrects the material misstatements and/or omissions contained in the January 18, 2011 Schedule 13D.

46. *First*, the Amended Schedule 13D failed to disclose Project Harmony. SHI made no mention that it had been in the late stages of a negotiated buyout of HearUSA in the prior year. As such, investors were still under the false impression that SHI never intended to acquire HearUSA through a negotiated buyout.

47. *Second*, the Amended Schedule 13D did not recant or revise SHI's January 18, 2011 Schedule 13D's account of the December 22 telephone conversation. As such, the dismal financial picture painted by SHI's January 18, 2011 Schedule 13D's version of the December 22 meeting remained intact.

48. *Third*, the Amended Schedule 13D did not address what, if anything, SHI had concluded from the financial information that it mentioned in the January 18, 2011 Schedule 13D. Instead, the Amended Schedule 13D simply stated that SHI "remain[s] concerned about the condition of [HearUSA's] business, which [SHI] believe[s] may be deteriorating." Based on the amount of financial information that SHI had access to at the time it filed the Amended Schedule 13D, SHI knew or should have known HearUSA's financial condition. As such, this statement did nothing to alleviate investors' concerns that were created by the false and misleading January 18, 2011 Schedule 13D.

49. *Fourth*, the Amended Schedule 13D did not reverse the January 18, 2011 Schedule 13D's assertion that SHI – should it decide to purchase HearUSA or some or all of its assets – could do so "on terms that [did] not involve the payment of any material amount of consideration to holders of Common Stock." This statement took on increased importance to investors in light of the Amended Schedule 13D because SHI was now affirmatively declaring its intention to acquire HearUSA's assets. Therefore, investors were still under the false impression that SHI could acquire HearUSA's assets without compensating shareholders, and consequently, that HearUSA's common stock was worthless.

50. In addition, the Amended Schedule 13D contained a materially false or misleading statement. Specifically, SHI stated that it was concerned that HearUSA's business was deteriorating. However, the sole reason HearUSA's business was in a precarious position was because of SHI's predatory behavior and its decision to protract its credit dispute with HearUSA. Furthermore, HearUSA had recently been awarded an exclusive, lucrative contract to be the exclusive provider of hearing aids to the AARP.

51. The market's response to SHI's Amended Schedule 13D was predictably negative. On March 17, 2011, HearUSA common stock lost roughly 16.408% of its remaining value, declining from about 0.58¢/share to 0.49¢/share. Daily trading volume increased more than 612% from the previous trading day.

52. On May 5, 2011, HearUSA common stock fell to its lowest price, about 0.299¢/share. HearUSA common stock had lost roughly 66% of its value from its opening of 0.90¢/share on January 18, 2011.

53. On May 16, 2011, as a result of SHI's predatory behavior, HearUSA was forced to file for Chapter 11 Bankruptcy Protection. As a result of its bankruptcy filing, HearUSA's common stock was delisted from NYSE:AMEX on May 19, 2011. However, trading in HearUSA common stock resumed on the Over-the-Counter Markets ("OTC") on or around May 25, 2011. As a result of this market change, HearUSA's symbol changed from "EAR" to "HEARQ."

F. SHI'S ACQUISITION OF HEARUSA

54. Prior to filing for bankruptcy protection, HearUSA entered into an agreement to sell substantially all of its assets to William Demant Holdings, pursuant to Sections 105, 363 and 365 of the Bankruptcy Code, for \$80 million. This agreement made William Demant Holdings the stalking horse bidder for HearUSA's assets.

55. By securing a stalking horse bidder, HearUSA put SHI's fraudulent plan into jeopardy. William Demant Holdings is the hearing aid industry's fastest growing company and one of SHI's key competitors. Indeed, in 2010 William Demant Holdings successfully acquired

Otix Global, a U.S. hearing aid manufacturer and distributor. As part of this acquisition, William Demant Holdings increased its already well-developed U.S. distribution network. Thus, SHI was forced to decide between permitting HearUSA, a key distribution asset, go to a competitor or paying substantially more for HearUSA's assets than it originally planned.

56. This was an easy choice for SHI. As planned from at least November 2010, if not earlier, SHI purchased HearUSA's assets in the Section 363 Bankruptcy Auction on August 1, 2011. However, due to HearUSA's protective measures, namely, securing a stalking horse bidder, SHI paid substantially more for HearUSA's assets than it had intended when it devised its plan to defraud HearUSA's investors by paying a substantially undervalued price for HearUSA's assets.

57. SHI's winning bid of \$129.3 million was comprised of cash equal to \$66.8 million (including repayment of the \$10 million debtor-in-possession loan from William Demant Holdings), credit equal to \$30.7 million outstanding on the SHI-HearUSA credit agreement, the assumption of liabilities and court costs of approximately \$11.7 million, and the waiver of distribution of its ownership of EAR stock, which SHI valued at \$6 million to \$7 million.

58. By valuing its HearUSA common stock at between \$6 and \$7 million, SHI acknowledged that HearUSA common stock was worth, at a minimum, between 0.93¢ and \$1.09/share. This is exponentially more valuable than SHI had indicated the shares were worth in its January 18, 2011 Schedule 13D and Amended Schedule 13D.

59. The market responded accordingly. On August 1, 2011, when SHI was declared to be the winner of the bankruptcy auction, HearUSA's common stock jumped in price almost 96%, climbing from 0.45¢/share to 0.88¢/share. In addition, daily trading volume reached 6,444,047, over an 8400% increase from the previous trading day. By August 5, 2011, the volume of trades in HearUSA common stock had reached 9,924,586, or nearly three times the volume of the previous week. Of the acquisition, one investor commented on investorshub.com, "wow...looks like dollar-land just appeared right after the bell".

60. Between August 1, 2011 and November 30, 2011, inclusive, HearUSA common stock prices floated between, roughly, 0.88¢/share and 0.96¢/share. These prices are consistent with both SHI's own valuation in its bankruptcy auction and the price of HearUSA common stock prior to SHI engaging in its unlawful course of conduct.

61. On February 16, 2012, HearUSA Liquidating Corporation, as the debtor-in-possession, filed its Chapter 11 Plan of Liquidation. In the analysis that accompanied this plan, HearUSA estimated that equity shareholders would receive \$1.016 per share. The Bankruptcy Court conditionally approved the liquidation plan on March 16, 2012 and set a distribution record date of May 14, 2012.

62. On May 8, 2012, HearUSA Liquidating Corporation announced that "Holders of common stock . . . will receive approximately \$0.97 per share of common stock." Although this is less than initially estimated in the Plan of Liquidation, it is still materially more than SHI misled the investing public into believing HearUSA was worth. Moreover, it is consistent with the price of HearUSA common stock immediately following the announcement that SHI was purchasing HearUSA's assets on August 1, 2011.

63. Although the bankruptcy cash-out price is closer to the true market value of HearUSA common stock than what SHI claimed those shares to be worth in its Schedule 13Ds, because SHI acquired HearUSA through a bankruptcy auction, the price it paid – and the amount of money that common shareholders will receive – is still less than what SHI should – and would – have paid if Project Harmony was as "imminent" as SHI had led HearUSA's directors and officers to believe. Thus, despite HearUSA's protective measures in New York State Court and in Bankruptcy Court, SHI was still able to accomplish its fraudulent goal of acquiring HearUSA at an artificially suppressed price.

CLASS ACTION ALLEGATIONS

64. Plaintiff brings this class action pursuant to Federal Rules of Civil Procedure 23(a) and 23(b) on his own behalf and on behalf of:

All persons and entities, their agents, successors in interest, assigns, heirs executors and administrators (but excluding SHI and any persons, trust, firm, corporation or entity affiliated with or related to it) who sold or otherwise disposed of HearUSA common stock between January 18, 2011 and July 31, 2011 (the “Class”), through which the Class members, either directly or indirectly, were damaged thereby.

65. This action is properly maintainable as a class action. The Class for whose benefit this action is brought is so numerous that joinder of all Class members is impracticable. While Plaintiff does not presently know the exact number of Class members, Plaintiff is informed and believes that there are thousands of Class members and that those Class members can only be determined and identified through Defendant’s files and, if necessary, other appropriate discovery.

66. There are questions of law and fact which are common to Class members and which predominate over any questions affecting only individual members of the Class. These common questions include:

(a) Whether the SHI’s January 18, 2011 or Amended Schedules 13D contained material misrepresentations or omitted to state material facts necessary to make such statements not misleading such that they were materially false or misleading in violation of 15 U.S.C. § 78m(d);

(b) Whether the statements contained in the January 18, 2011 Schedule 13D and/or the Amended Schedule 13D are forward looking statements not subject to suit under Private Securities Litigation Reform Act of 1995 (“PSLRA”);

(c) Whether SHI participated in a fraudulent scheme to misrepresent the value of HearUSA’s common stock in order to artificially suppress HearUSA’s common stock price;

- (d) Whether SHI acted intentionally with direct knowledge of the falsity of such statements and/or with deliberate recklessness in making such statements;
- (e) Whether the price of HearUSA common stock during the Class Period was artificially suppressed due to the material misstatements and/or omissions complained of herein;
- (f) Whether the individual Class members were improperly induced to sell or dispose of their shares of HearUSA common stock;
- (g) Whether SHI, by way of the conduct alleged herein, used any device, scheme, or artifice to defraud or participated in any activity, practice, or course of business that perpetrated fraud on HearUSA's investors in violation of SEC Rules 10b-5(a) and (c);
- (h) Whether SHI, by way of the conduct alleged herein, made any untrue statement of material fact and/or omitted a material fact necessary to make the statements made, in the light of the circumstances under which they were made, not misleading that perpetrated fraud on HearUSA's investors in violation of SEC Rule 10b-5(b);
- (i) Whether SHI, by way of the conduct alleged herein, effected, alone or with one another, a series of transactions in HearUSA common stock that depressed the price of the stock in order to induce the holders of HearUSA to sell their shares in violation of Section 9(a)(2) of the Exchange Act (15 U.S.C. § 78i);
- (j) Whether SHI, by way of the conduct alleged herein, made or caused to be made statements which were, at the time and in light of the circumstances under which they were made, false or misleading with respect to material facts in one or more SEC filings in violation of Section 18(a) of the Exchange Act (15 U.S.C. § 78r(a));
- (k) Whether Plaintiff and the other Class members have been damaged by SHI's actions or conduct alleged herein; and
- (l) The proper measure of damages.

67. Plaintiff is committed to prosecuting this action and has retained competent counsel experienced in litigation of this nature. Plaintiff's claims are typical of the claims of the other Class members and Plaintiff has the same interests as the other Class members. Plaintiff

has no interests that are antagonistic to, or in conflict with, the interests of the other members of the Class. Plaintiff is an adequate representative of the class and will fairly and adequately protect the interests of the Class.

68. The prosecution of separate actions by individual members of the Class could create a risk of inconsistent or varying adjudications with respect to individual members of the Class which could establish incompatible standards of conduct for Defendant or adjudications with respect to individual members of the Class which would, as a practical matter, be dispositive of the interests of the members of the Class not parties to the adjudications.

69. Furthermore, as the damages suffered by some of the individual Class members may be relatively small, the expense and burden of individual litigation make it impracticable for the individual members of the Class to redress the wrongs done to them individually.

70. Plaintiff anticipates no unusual difficulties in the management of this litigation as a class action. Class members may be identified from HearUSA's records and such Class members may be notified of the pendency of this action by mail or by electronic means (like email), using techniques and a form of notice customarily used in class actions.

71. For the above reasons, a class action is superior to other available methods for the fair and efficient adjudication of this action.

ADDITIONAL SCIENTER ALLEGATIONS

72. As alleged herein, SHI acted with scienter in that it knowingly or with extreme or deliberate recklessness engaged in acts, practices, and a scheme and course of business that artificially suppressed HearUSA's common stock price beginning on or around January 18, 2011 and continuing during the Class Period. Specifically, SHI knew that the aforementioned statements in SHI's January 18, 2011 Schedule 13D and Amended Schedule 13D were each materially false and misleading; knew that the statements in these filings would be issued or disseminated to the investing public; and knowingly and substantially participated or acquiesced in the issuance of such statements anyway.

73. As set forth elsewhere herein in detail, SHI, by virtue of its receipt of information reflecting the true facts regarding HearUSA, participated in the fraudulent scheme alleged herein.

74. As a result of SHI's scheme to deceive investors as to the true financial condition of HearUSA, thereby causing the value of HearUSA common stock to become artificially suppressed, SHI defrauded HearUSA shareholders of a yet-to-be-determined amount of money.

APPLICABILITY OF PRESUMPTION OF RELIANCE; FRAUD-ON-THE-MARKET DOCTRINE

75. At all relevant times, HearUSA had market capitalization of 45,451,160 shares. SHI owned 6,400,000 of these shares.

76. As to the period in which HearUSA common stock was traded on NYSE:AMEX, the market for HearUSA common stock was an open, well-developed and efficient market for the following reasons, among others:

(a) HearUSA common stock met the requirements for listing, and was listed and actively traded on NYSE:AMEX, a highly efficient and automated market;

(b) As a regulated issuer, HearUSA was required to file and did file periodic reports with the SEC;

(c) HearUSA regularly communicated with public investors via established market communication mechanisms, including through regular disseminations of press releases on the national and international circuits of major newswire services and through other wide-ranging public disclosures, such as communications with the financial press and other similar reporting services; and

(d) The trading volume of HearUSA common stock was substantial during the Class Period.

77. As to the period in which HearUSA common stock was traded on the OTC market, the market for HearUSA common stock was an open, well-developed and efficient market for the following reasons, among others:

- (a) HearUSA common stock was actively traded on the OTC market, a highly efficient market;
- (b) HearUSA continued to be a regulated issuer, and as such, HearUSA continued to file periodic, public reports with the SEC;
- (c) HearUSA continued to regularly communicate with public investors via established market communication mechanisms, including through regular disseminations of press releases on the national and international circuits of major newswire services and through other wide-ranging public disclosures, such as communications with the financial press and other similar reporting services;
- (d) HearUSA met the SEC's requirements to register securities filed on Form S-3, and in fact, filed post-effective amendments to its Form S-3 on November 4, 2011, which the SEC accepted on November 8, 2011;
- (e) The trading volume of HearUSA common stock continued to be substantial;
- (f) There continued to be substantial and regular pricing available for HearUSA's common stock. For example, Bloomberg, CNN Money, and Yahoo continued to provide real-time quotes for HearUSA common stock;
- (g) On the days of the material disclosures (*e.g.*, August 1, 2011), volume in HearUSA common stock greatly exceeded the volume in the immediately surrounding days; and
- (h) In all other ways, HearUSA common stock was traded in a like manner to how it was traded on NYSE:AMEX.

78. As a result, the market for HearUSA common stock at all times promptly digested current information regarding HearUSA from all publicly available sources and reflected such information in HearUSA's common stock price. Under these circumstances, all persons in the Class who sold or otherwise disposed of HearUSA common stock during the Class Period based on SHI's false and misleading statements suffered similar injury through their sale and/or disposition of shares of HearUSA common stock at artificially suppressed prices.

LOSS CAUSATION AND ECONOMIC LOSS

79. During the Class Period, as detailed herein, SHI engaged in a scheme to deceive the market through a course of conduct that artificially suppressed HearUSA's common stock price and operated as a fraud or deceit on the sellers of HearUSA common stock. As detailed above, when the truth about SHI's misconduct and the true value of HearUSA common stock was revealed, HearUSA's common stock increased as the prior, artificial suppression came out of its stock price. This increase in HearUSA's common stock price was a direct result of the nature and extent of SHI's fraud finally being revealed to investors and the market. The timing and magnitude of the common stock price increase negates any inference that the loss suffered by Plaintiff and other members of the Class was caused by changed market conditions, macroeconomic or industry factors or company-specific facts unrelated to SHI's fraudulent conduct. The economic loss, *i.e.*, the damages suffered by Plaintiff and other Class members, was a direct result of SHI's fraudulent scheme to artificially suppress HearUSA's common stock price and the subsequent, significant increase in the value of HearUSA's common stock when SHI's prior misrepresentations and other fraudulent conduct was revealed to the market.

80. At all relevant times, SHI's materially false or misleading statements or omissions of material fact alleged herein directly or proximately caused the damages suffered by the Plaintiff and other Class members. As alleged herein, those statements were materially false and misleading because they failed to disclose a true and accurate picture of HearUSA's financial health and SHI's intentions. During the Class Period, SHI issued two materially false and misleading Schedule 13Ds and omitted material facts necessary to make its statements not false or misleading, causing HearUSA's common stock price to be artificially suppressed. Plaintiff

and other Class members sold HearUSA common stock at those artificially suppressed prices, causing them to suffer the damages complained of herein.

NO SAFE HARBOR

81. The statutory safe harbor under the Private Securities Litigation Reform Act of 1995, which applies to forward-looking statements under certain circumstances, does not apply to any of the allegedly false and misleading statements pled in this complaint. The statements alleged to be false and misleading herein all relate to then-existing facts and conditions. In addition, to the extent certain statements alleged to be false may be characterized as forward-looking, they were not adequately identified as “forward-looking statements” when made, and there were no meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those in the purportedly forward-looking statements. Alternatively, to the extent that the statutory safe harbor is intended to apply to any forward-looking statements pled herein, SHI is liable for those false forward-looking statements because, at the time each of those forward-looking statements was made, SHI had actual knowledge that the particular forward-looking statement was materially false or misleading, and/or the forward-looking statement was authorized and/or approved by an executive officer of SHI who knew that those statements were false, misleading or omitted necessary information when they were made.

FIRST CAUSE OF ACTION

**Violation of Section 10(b) of the Exchange Act and Rule 10b-5(a) and (c)
Promulgated Thereunder**

82. Plaintiff repeats and realleges each and every allegation contained above, as though fully set forth herein.

83. This cause of action is based on Section 10(b) of the Exchange Act (15 U.S.C. 78j(b)) and Rule 10b-5(a) and (c) (17 C.F.R. 240.10b-5), promulgated thereunder.

84. During the Class Period, SHI, singularly and in concert with its affiliates acting on its behalf, directly carried out a common plan, scheme and unlawful course of conduct, pursuant to which it intended to and in fact did, through the entire Class period: (a) deceive the investing public, including Plaintiff and the other Class members, as alleged herein; (b) artificially depress, and so maintain, the market price of HearUSA's common stock; and (c) cause Plaintiff and the other Class members to sell or otherwise dispose of HearUSA common stock at artificially suppressed prices.

85. SHI, intentionally or with deliberate recklessness, employed devices, schemes, and artifices to defraud and engaged in acts, practices, and a course of business, which operated as a fraud and deceit upon the sellers and disposers of HearUSA common stock in an effort to maintain artificially low market prices for HearUSA's common stock in violation of Section 10(b) of the Exchange Act and Rule 10b-5(a) and (c).

86. SHI engaged in the fraudulent activity described above knowingly and intentionally or with such extreme or deliberate recklessness as to constitute willful deceit and fraud upon Plaintiff and the Class. SHI knowingly or with extreme or deliberate recklessness employed a fraudulent scheme and deceitful course of business as alleged herein, which caused HearUSA's common stock price to be suppressed at the time of Plaintiff and the other Class members' times of sale or other disposition.

87. As a result of SHI's fraudulent activity, the market price of HearUSA's common stock was artificially suppressed during the Class Period, and remained so until August 1, 2011, when SHI finally disclosed a value closer to the true value of HearUSA's common stock. SHI's acts, practices, scheme, and course of business induced a disparity between the transaction price and the true investment quality and value of HearUSA's common stock at the time Plaintiff and the other Class members sold or otherwise disposed of this security.

88. In ignorance of SHI's intentions and of HearUSA's true financial condition and health of its business, Plaintiff and the other Class members, relying to their detriment on the integrity of the market and/or on the statements and reports of SHI that contained materially false

and misleading information, sold or otherwise disposed of HearUSA common stock at artificially suppressed prices during the Class Period.

89. Had Plaintiff and the other Class members known the truth, they would not have sold their HearUSA common stock or would not have otherwise disposed of their HearUSA common stock at the suppressed prices at which they did.

90. Plaintiff and the other Class members' losses were proximately caused by SHI's scheme to acquire HearUSA for less than its fair market value by, in part, using materially false or misleading statements to damage suppressing the public's perception of the value of HearUSA and its continued ability to remain in business.

91. Plaintiff and the other Class members sold HearUSA common stock in reliance on the integrity of the market price of the stock and/or SHI's fraudulent scheme and deceitful course of business, and SHI manipulated the price of HearUSA's stock through its misconduct.

92. Further, SHI's misconduct proximately caused the losses of Plaintiff and the other Class members. Plaintiff and the other Class members' losses were a direct and foreseeable consequence of SHI's fraudulent devices, schemes, acts, practices and course of business. As a direct and proximate cause of SHI's wrongful conduct, Plaintiff and the other Class members suffered substantial damages in connection with their respective sales of HearUSA common stock during the Class Period.

SECOND CAUSE OF ACTION

Violation of Section 9(a)(2), as Brought under Section 9(e), of the Exchange Act

93. Plaintiff repeats and realleges each and every allegation contained above, as though fully set forth herein.

94. Section 9(a)(2) of the Exchange Act, 15 U.S.C. § 78i, provides in relevant part that it shall be unlawful for any person "[t]o effect, alone or with one or more other persons, a series of transactions in any security registered on a national securities exchange ... creating actual or apparent active trading in such security, or raising or depressing the price of such security, for the purpose of inducing the purchase or sale of such security by others."

95. Section 9(e) provides that: “Any person who willfully participates in any act or transaction in violation of [this section] shall be liable to any person who shall purchase or sell any security at a price which was affected by such act or transaction, and the person so injured may sue in law or in equity in any court of competent jurisdiction to recover the damages sustained as a result of any such act or transaction.”

96. As set forth above, SHI effected a series of transactions in HearUSA common stock that had the result of artificially suppressing its price.

97. SHI artificially suppressed the prices of HearUSA common stock for the manipulative purpose of acquiring HearUSA for less than its fair market value.

98. SHI intentionally and directly participated in this scheme to manipulate the market price for HearUSA common stock, either knowing that its scheme would artificially suppress the market prices of this stock and induce investors to sell their shares, or acting with deliberate, reckless disregard as to whether their scheme would artificially suppress the market prices of this stock and induce investors to sell their shares.

99. Plaintiff and the other Class members were unaware that SHI had directly participated in an unlawful scheme to artificially suppress the market prices of HearUSA common stock.

100. In deciding to sell their shares of HearUSA common stock, Plaintiff and the other Class members relied on the artificially suppressed market prices that resulted from SHI’s market manipulation.

101. By virtue of the foregoing, SHI violated Section 9 of the Exchange Act.

102. As a result of SHI’s violations, Plaintiff and the other Class members were harmed.

103. Plaintiff and the other Class members are entitled to recover out-of-pocket damages as a result of SHI’s violations.

104. In addition, Plaintiff and the other Class members are entitled to a declaration that SHI is liable for any losses Plaintiff and the other Class members have suffered and will continue

to suffer in connection with the pending proceedings and lawsuits brought against it by its own investors, including but not limited to any amounts Plaintiff and the other Class members may pay in settlement of those actions or be adjudged liable to pay as damages in those actions. This constitutes an actual and substantial controversy, of sufficient immediacy and reality to warrant declaratory relief.

THIRD CAUSE OF ACTION
Violation of Section 18(a) of the Exchange Act

105. Plaintiff repeats and realleges each and every allegation contained in above as though fully set forth herein.

106. As set forth above, in both the January 18, 2011 Schedule 13D and the Amended 13D, SHI made or caused to be made statements which were, at the time and in light of the circumstances under which they were made, false or misleading with respect to material facts.

107. Each of the above reports was filed with the SEC during the Class Period pursuant to the Securities Exchange Act of 1934.

108. SHI knew, or with extreme or deliberate recklessness disregarded, that the following statements in its January 18, 2011 Schedule 13D were materially false and misleading:

(a) That SHI acquired and held its HearUSA common stock “since December 23, 2008 without any purpose of, and without the effect of, changing or influencing the control of [HearUSA]” when SHI had the intention to control HearUSA by no later than 2010, and in fact, were in the advanced stages of a negotiated buyout;

(b) That HearUSA, during the December 22, 2010 meeting, stated it “would be unable to pay the full amount of the trade payables due to [SHI] in December 2010 . . . [and] that if any amount was due [HearUSA] would be unable to pay it” when HearUSA made clear, in multiple written and verbal correspondences with SHI and its affiliates, that HearUSA disputed this characterization of the December 22 meeting;

(c) That SHI’s path forward with HearUSA depended on an evaluation of recently “requested additional information regarding [HearUSA’s] financial condition and prospects”

when this information had no bearing on SHI's course of action because SHI had this information as a result of its longstanding relationship with HearUSA and the Project Harmony audit and had analyzed, in detail, this information before determining that HearUSA was not a "growth company"; and

(d) That, should SHI pursue a transaction in which it acquired HearUSA and some or all of its assets, "it is possible that [it] may do so on terms that do not involve the payment of any material amount of consideration to holders of [HearUSA] Common Stock" when, as proven, at least in part, by the eventual bankruptcy auction of HearUSA, SHI was both unlikely to succeed in this plan and did not have a right under the SHI-HearUSA credit agreement or any applicable law to act in this manner.

109. SHI knew, or with extreme or deliberate recklessness disregarded, that the following statement in its Amended Schedule 13D was materially false and misleading: That SHI was concerned that HearUSA's business "may be deteriorating" when, as detailed herein, the sole reason HearUSA's business was in a precarious position was because of SHI's predatory behavior and SHI's decision to drag on its credit dispute with HearUSA, and when HearUSA had recently been awarded a lucrative contract to be the exclusive provider of hearing aids to the AARP.

110. In connection with the sale of HearUSA common stock, Plaintiff and the Class reasonably relied on the statements contained in the January 18, 2011 Schedule 13D and the Amended Schedule 13D, not knowing that such statements were false and misleading.

111. As a direct result of the false and misleading statements in the January 18, 2011 Schedule 13D and the Amended Schedule 13D described herein, Plaintiff and the Class sold HearUSA common stock at an artificially suppressed price and were significantly damaged as a result.

112. By virtue of the foregoing, SHI violated Section 18 of the Exchange Act.

113. As a direct and proximate result of the Defendants' wrongful conduct, Plaintiff and the Class suffered damages in connection the sale of HearUSA common stock during the relevant period.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, on behalf of itself and the other putative Class members, pray for judgment against SHI as follows:

- A. Determining that this is a proper class action, designating Plaintiff as Lead Plaintiff and certifying Plaintiff as class representative under Rule 23 of the Federal Rules of Civil Procedure;
- B. On each Cause of Action, a judgment awarding Plaintiff and the other Class members restitution and/or compensatory damages, the exact amount to be proven at a trial of this action, together with interest thereon;
- C. Awarding Plaintiff and the other Class members pre- and post-judgment interest, as well as their reasonable attorneys' fees, expert fees, costs and expenses, as may be permitted by law; and
- D. Awarding such other and further relief as the Court may deem just and proper.

JURY TRIAL DEMANDED

Plaintiff, for itself and the class, hereby demands a trial by jury.

Dated: June 1, 2012

Respectfully Submitted,

s/ Lisa J. Rodriguez
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