



2. Between April 11, 1986 and September 13, 2011, HearUSA was a Delaware Corporation with its principal office located in West Palm Beach, Florida.<sup>1</sup> 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, 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 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 market of its intentions to do so.

5. Instead, beginning 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 process undertaken in order to acquire HearUSA. Nonetheless, SHI materially misrepresented the economic outlook of HearUSA and the potential returns to holders of HearUSA common stock. As a result, the price of HearUSA common stock plummeted – at its nadir, falling to just one-third of its pre-January 18, 2011 value.

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<sup>1</sup> 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."

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,<sup>2</sup> SHI's scheme to acquire HearUSA at an undervalued price was thwarted. At the bankruptcy auction on August 1, 2011, the stalking horse bidder 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 deflated 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 limited to, the mail, interstate wire and telephone communications, and the facilities of the national securities markets.

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<sup>2</sup> 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>.

## THE PARTIES

11. Plaintiff, [REDACTED]

[REDACTED] During the Class Period, as set forth in the certification attached hereto, [REDACTED] 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 an undervalued price.

## FACTUAL ALLEGATIONS

13. SHI engaged in an aggressive and fraudulent course of action designed to acquire HearUSA at an undervalued 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 deflated prices.

**A. BACKGROUND.**

15. 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.

16. 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 Hear USA.

17. Thus, on or around December 23, 2008, SHI converted \$3,840,000 of HearUSA debt into 6,400,000 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.

18. 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 as to HearUSA under Section 13(d) of the Exchange Act. These disclosures are for the protection of other investors. Specifically, beginning December 23, 2008, SHI was required to disclose any intention to acquire control of HearUSA, and if such an intention existed, 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.

19. As a result of their decade-long, strategic relationship, SHI had significant insider information about HearUSA's finances, operations, strengths, and vulnerabilities, including AARP's 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.

**B. PROJECT HARMONY.**

20. In December 2009, SHI's parent company, Siemens Aktiengesellschaft ("Siemens AG"), began investigating the sale of its hearing aid division: Siemens Audiologische Technik GMBH; this division includes SHI.<sup>3</sup> Specifically, Siemens AG solicited bids for its hearing aid division from prospective purchasers. 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.

21. Siemens AG's appointment of Mr. Radke signaled that it would be pursuing a strategy of acquisitions 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 CEO of Siemens Water Technologies, Mr. Radke oversaw an aggressive acquisition strategy, shedding low 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.

22. Subsequently, sometime between March 16, 2010 and June 1, 2010, SHI decided to acquire 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."

23. 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

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<sup>3</sup> Siemens Audiologische Technik GMBH manufactures and imports some or all of the hearing aids distributed by SHI in the United States.

auditing firm, outside legal counsel, and investment bank(s) to explore the negotiated buyout of HearUSA. In addition, SHI CFO Nicolau Gaeta contacted HearUSA 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.

24. 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.

25. 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 - had previously decided to engage in a fraudulent scheme to acquire HearUSA's assets for less than their fair market value.

26. 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.

27. 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.**

28. 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") 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 through no consideration to HearUSA's common stock holders.

29. 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.”

30. 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, SHI should have disclosed to the market that it was in the process of acquiring HearUSA through a negotiated buyout process in 2010. 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 (though it had made no decision either way) - acquire HearUSA and pay nothing to its common stockholders. This was not a statement of intent, as required to be made under Section 13(d) of the Exchange Act. Rather, SHI’s January 18, 2011 Schedule 13D filing was nothing more than a thinly disguised attempt to convince the market that Hear USA’s common stock was worthless.

31. 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 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 volume of 5,266,673 was over twenty-one times greater than the volume of trades in the preceding week.

**D. SHI’S FALSE AND MISLEADING STATEMENTS.**

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

33. *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.

34. *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 well knew 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.

35. *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. 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.

36. *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.

37. 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 was HearUSA's failure to resolve questions over the amounts allegedly owed to SHI – questions which SHI had consistently requested that HearUSA table because an offer for HearUSA was imminent. Moreover, SHI knew that its positions 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 the strength and viability of HearUSA.

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

38. 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").

39. In the Amended Schedule 13D, SHI finally disclosed its intention to acquire HearUSA to the investing public. 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.”

40. 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.

41. *First*, the Amended Schedule 13D failed to disclose Project Harmony. SHI made no mention that it was in the late stages of a negotiated buyout of HearUSA earlier in 2010. As such, investors were still under the false impression that SHI never intended to HearUSA through a negotiated buyout.

42. *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.

43. *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 they believe 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 the exact nature of HearUSA’s financial condition. As such, this statement did nothing to alleviate investors’ concerns that were created by the January 18, 2011 Schedule 13D.

44. *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.

45. 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.

46. 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 value, declining from about 0.58¢/share to 0.49¢/share. Daily volume increased over 612% from the previous trading day.

47. On May 5, 2011, HearUSA common stock reached 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.

#### **F. SHI'S ACQUISITION OF HEARUSA.**

48. On May 16, 2011, as a result of SHI's predatory behavior, HearUSA was forced to file for Chapter 11 Bankruptcy Protection. Prior to doing so, HearUSA entered into an agreement to sell substantially all of its assets to William Demant Holdings, a competitor of SHI, pursuant to Sections 105, 363 and 365 of the Bankruptcy Code. As a result, William Demant Holdings became the stalking horse bidder for HearUSA's assets.

49. Because HearUSA filed for Chapter 11 bankruptcy protection, its 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."

50. 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.

51. 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 the \$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.

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

53. With the true value of HearUSA's common stock finally revealed, 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 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.

54. 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.

#### **CLASS ACTION ALLEGATIONS**

55. 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.

56. 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.

57. 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 Schedules 13D are forward looking statements not subject to suit under PSLRA;

(c) Whether SHI participated in a fraudulent scheme to misrepresent the value of HearUSA's common stock in order to artificially deflate 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 deflated 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.

58. 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.

59. 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.

60. 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.

61. 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.

62. 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**

63. 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 deflated HearUSA's common stock price beginning on or around January 18, 2011 and continuing during the Class Period. Specifically, SHI knew that its 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.

64. 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.

65. 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 deflated, SHI defrauded HearUSA shareholders of a yet-to-be-determined amount of money.

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

66. 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.

67. 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) HearUSA continued to have market capitalization of over 46 million shares of common stock;

(g) 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;

(h) 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

(i) In all other ways, HearUSA common stock was traded in a like manner to how it was traded on NYSE:AMEX.

68. 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 deflated prices.

#### **LOSS CAUSATION AND ECONOMIC LOSS**

69. During the Class Period, as detailed herein, SHI engaged in a scheme to deceive the market through a course of conduct that artificially deflated the 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 deflation 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 deflate 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.

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

**NO SAFE HARBOR**

71. 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**

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

73. 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.

74. 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 deflated prices.

75. 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).

76. 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 deflated at the time of Plaintiff and the other Class members' times of sale or other disposition.

77. As a result of SHI's fraudulent activity, the market price of HearUSA's common stock was artificially deflated during the Class Period, and remained deflated until August 1, 2011, when SHI finally disclosed 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.

78. 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 deflated prices during the Class Period.

79. 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 deflated prices at which they did.

80. 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, artificially deflating the public's perception of the value of HearUSA and its continued ability to remain in business.

81. 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 their misconduct.

82. 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**

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

84. 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."

85. 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.”

86. As set forth above, SHI affected a series of transactions in HearUSA common stock that had the result of artificially deflating its price.

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

88. SHI intentionally and directly participated in this scheme to manipulate the market price for HearUSA common stock, either knowing that its scheme would artificially deflate 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 deflate the market prices of this stock and induce investors to sell their shares.

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

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

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

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

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

94. 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**

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

96. As set forth above, in 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.

97. Each of the above reports was filed with the SEC during the Class period and pursuant to the Securities and Exchange Act of 1934.

98. 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 since sometime in 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.

99. 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 was deteriorating when 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.

100. 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.

101. 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-deflated price and were significantly damaged as a result.

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

103. 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 himself and the class, hereby demands a trial by jury.

Dated: January 18, 2012

Respectfully Submitted,