ORIGINAL

UNITED STATES OF AMERICA

BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of	
Thoratec Inc. & HeartWare International, Inc.	**FTC File No. 091-0064**

PETITION TO LIMIT OR QUASH SUBPOENAS *AD TESTIFICANDUM* DATED APRIL 24, 2009

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Dated: June 26, 2009

Pursuant to 16 C.F.R. § 2.7(d), HeartWare International, Inc. ("HeartWare") petitions the Federal Trade Commission ("Commission") to limit or quash the subpoenas *ad testificandum* issued on April 24, 2009 for the investigational hearings of Messrs. Douglas Godshall and James Schuermann (attached hereto as Exhibits A and B, respectively). As Messrs. Godshall and Schuermann have both already appeared for complete investigational hearings in Washington D.C., HeartWare seeks to limit or quash the subpoenas to the extent that the Staff purports to recall Messrs. Godshall and Schuermann for further testimony pursuant to those subpoenas.

Staff's demand that Messrs. Godshall and Schuermann provide testimony regarding their communications with third party fact witnesses and potential expert witnesses – that were held specifically at counsel's direction and with counsel's direct supervision and involvement – is a flagrant attempt to circumvent the work product protection and obtain the fruits of HeartWare's efforts to devise an effective defense to anticipated litigation with the Commission regarding the Thoratec/HeartWare transaction. Staff's demand is particularly egregious in this case because Staff can easily gather the views of any such witnesses itself, and in fact, has already done so in its extensive field investigation. Staff's demand contravenes the core policy of *Hickman v. Taylor*, 329 U.S. 495 (1947) that to maintain an effective adversarial system, a party (and his or her counsel) must have freedom to prepare his or her defense with a certain degree of privacy and free from the prospect that his or her adversary will simply "free-ride" on the work performed to prepare for litigation. HeartWare is a very small, developmental company with extremely limited funds and a clear need to husband its resources. It is therefore particularly outrageous that the Staff, with approximately 10 attorneys assigned to this matter, seeks to exploit HeartWare's own efforts to prepare its defense, when the substantial equivalent of such information can easily be

obtained by a Federal Agency staffed by hundreds of qualified attorneys and backed by the virtually unlimited resources of the United States Government.

Staff's demand that Mr. Schuermann appear for a "second bite of the apple" is also improper and fundamentally unfair. In Mr. Schuermann's investigational hearing, no questions were posed, and the witness was never instructed by Counsel, not to divulge the information that is only now sought being sought in Staff's demand. Staff's demand that Mr. Schuermann return to Washington, D.C. at substantial burden and expense, merely to repair Staff's own oversight in failing to ask questions when the Investigational Hearing Officer has already had the unrestricted opportunity to do so violates procedural fairness and constitutes harassment of a witness who has already appeared for a lengthy investigational hearing in this matter.

BACKGROUND

On April 24, 2009, the Commission issued subpoenas *ad testificandum* for investigational hearings with Messrs. Douglas Godshall and James Schuermann (attached hereto as Exhibits A and B, respectively).

Mr. Godshall appeared for his investigational hearing on June 5, 2009.[1] During the course of the investigational hearing, the designated Investigational Hearing Officer attempted to enter as an exhibit privileged documents that had been inadvertently produced by HeartWare. As soon as the documents were identified, and prior to any questions being posed regarding the substance of the document, HeartWare's counsel immediately asserted that the documents were protected by the attorney-client privilege and the work product

[1] Although the return date for Mr. Godshall was May 27, 2009, James Southworth agreed to extend the date for Mr. Godshall's appearance until June 5, 2009. Despite counsel's request for modification to the subpoena in writing, Staff failed to produce a written modification. It is undisputed, however, that Mr. Godshall appeared pursuant to the subpoena and not voluntarily. Godshall IH Tr. at 6:4-8.

doctrine, as the documents had been prepared at Counsel's request in order to enable Counsel to provide legal advice in defense of the transaction and in anticipation of potential litigation with the Commission regarding the transaction.

Subsequently, the Investigational Hearing Officer also questioned Mr. Godshall about his discussions with customers regarding the proposed transaction with Thoratec. Counsel cautioned Mr. Godshall not to reveal communications that were protected by the attorney-client privilege or the work-product doctrine, and instructed Mr. Godshall that he could answer the question posed to the extent he had information not protected by any applicable privilege. Mr. Godshall then indicated his discussions with customers were carried out at the direction of Counsel, at which point counsel for HeartWare advised Mr. Godshall not to answer questions regarding the substance of such communications. Mr. Godshall was further instructed by Counsel that he could answer questions regarding the identity of customers spoken to, but that the substance of such communications was protected by the work product doctrine as the communications had been carried out at Counsel's request in anticipation of potential litigation with the Commission regarding the transaction.

Mr. Schuermann appeared for his investigational hearing on June 11, 2009.[2] Similar to Mr. Godshall's hearing, when asked by the Investigational Hearing Officer about his communications with customers regarding the proposed transaction with Thoratec, Mr. Schuermann followed Counsel's instruction not to reveal the substance of his communications with customers to the extent such communications were undertaken at direction of Counsel and protected from disclosure as work product prepared in anticipation of potential litigation with the Commission regarding the transaction. However, Mr.

[2] As was the case with Godshall, James Southworth also agreed to extend the date for Mr. Schuermann's appearance until June 11, 2009. Despite counsel's request for modification to the subpoena in writing, Staff failed to produce a written modification. It is undisputed, however, that Mr. Schuermann appeared pursuant to the subpoena and not voluntarily. Schuermann IH Tr. at 5:17-21.

Schuermann did answer many questions relating to certain other (post-transaction) customer communications that had not been held in anticipation of litigation. *See, e.g.,* Schuermann IH Tr. at 235:12 - 250:4. The Investigational Hearing Officer did not ask Mr. Schuermann any questions regarding the inadvertently produced privileged documents described above, even though Mr. Schuermann was the author of the documents. Neither did the Investigational Hearing Officer ask Mr. Schuermann what he thought, independent of his counsel's request, about market shares in April 2009.

On June 24, 2009, at 6:35pm, Staff sent a letter to HeartWare's counsel (attached hereto as Exhibit C) directing Messrs. Godshall and Schuermann to reappear for further investigational hearings. The letter directs both witnesses to reappear in order to "provide testimony regarding communications they had with customers about the proposed acquisition." The letter also asserts that HeartWare had not "established the necessary factual predicate to show that this information is protected work product." Additionally, the letter directs Mr. Schuermann to return to provide testimony regarding "sales and market shares with respect to any relevant product being developed by HeartWare," apparently on the basis that counsel's assertion of HeartWare's attorney-client privilege and the work product protection with respect to three inadvertently produced documents during Mr. Godshall's hearing somehow caused the Investigational Hearing Officer not to question Mr. Schuermann regarding sales and market shares independently of the documents HeartWare claims are protected attorney-client privilege and work product protection, despite no objections being raised by Counsel to any such line of inquiry.

ARGUMENT

I. THE INFORMATION REGARDING WITNESS INTERVIEWS THAT IS SOUGHT BY THE STAFF'S DEMAND IS PROTECTED FROM DISCLOSURE UNDER THE WORK PRODUCT DOCTRINE

The purpose of the work product doctrine is to establish a zone of privacy in which a lawyer can develop legal theories, tactics and strategies and to prevent one party from piggybacking on its adversary's preparation. *Hickman v. Taylor*, 329 U.S. 495, 510-11 (1947); *see also United States v. Aldman*, 134 F.3d 1194, 1196 (2d Cir. 1998). For work product protection to apply, materials must be prepared "with an eye towards litigation," and may be reflected in "interviews, statements, memoranda, correspondence, briefs, mental impressions, personal briefs, and countless other tangible and intangible ways." *Hickman*, 329 U.S. at 511.

Work product protection is not absolute, but in order to overcome the protection a party must show a "substantial need" for the materials and an inability to obtain the materials without "undue hardship." Fed. R Civ. P. 26(b)(3)(A)(ii); *see also Hickman,* 329 U.S. at 511-12. In addition, if the materials reflect the mental processes, tactics or theories of the attorney, the material is accorded "opinion" work product status and a higher standard must be met in order to compel discovery. *Upjohn v. United States*, 449 U.S. 383 (1981).

Staff claims in its demand that HeartWare has failed to establish the factual predicates for its assertion that the information sought is entitled to work product protection. This is demonstrably false and belied by the record in the investigational hearing, where Counsel permitted the Investigational Hearing Officer to inquire freely into the background facts in order to establish the foundations for the assertion of work product protection. In addition, Staff's demand conveniently ignores that HeartWare's assertions of work product protection – and the factual predicates supporting such claims – were raised well in advance of the investigational hearing in HeartWare's May 13 response to Specification 24(d) of the

Commissions's Request for Additional Information and Documentary Materials, to which Staff failed to raise any timely objection.[3]

Staff seeks to inquire into interviews carried out by HeartWare personnel at the specific request of counsel, with the direct supervision of counsel, and often-times with the simultaneous participation of counsel, in order to gather evidence and to test various theories and strategies in connection with HeartWare's defense of the Commission's investigation of, and in anticipation of the Commission's litigation in respect of, the transaction. HeartWare's counsel developed a number of defensive theories and strategies over the course of many detailed discussions with senior HeartWare personnel, including Messrs. Godshall and Schuermann. HeartWare's counsel then participated in various interviews with company personnel and with third parties – including customers and potential experts in the field – to gather evidence in support of those tactics, theories and defenses, and to test various assumptions and views essential to a credible defense of the transaction. HeartWare's counsel designed a number of questions and topics to be covered with potential witnesses in connection with this defense effort, and such questions and topics were discussed extensively with HeartWare personnel, in particular, Mr. Godshall. As noted, Counsel participated in many in-depth interviews with third parties in connection with the litigation defense effort. In some cases, Mr. Godshall held interviews without Counsel, but at counsel's explicit direction, in order to continue to gather information and formulate HeartWare's litigation defense effort. Mr. Schuermann also had communications without Counsel for the same purpose.

As such, the communications with third parties undertaken by HeartWare personnel at the direction of Counsel are protected for the following reasons: (1) the information gathered

[3] HeartWare Interrog. Resp. 24(d), pg. 46, May 13, 2009.

was prepared by a party or by the party's lawyer in anticipation of litigation, and would not have been prepared but for the anticipated litigation; (2) work-product protection clearly extends to activities and information gathered by a party in anticipation of litigation, and is not limited to activities conducted personally by counsel; (3) the protection afforded by *Hickman v. Taylor* is not limited to written memoranda or documentary material, and extends to intangible communications, such as interviews with witnesses that are not documented; (4) the communications in question reflect the mental processes, personal beliefs, impressions, tactics, theories and strategies of counsel regarding the optimal defense of the transaction and as such are entitled to the highest degree of protection from disclosure; (5) even if the communications are not considered "opinion work product" but merely ordinary work product, the Staff can not meet its burden of showing substantial need and undue hardship in obtaining the information itself. All of the witnesses are free to be contacted by Staff – indeed many, if not all, have already been interviewed by Staff – and HeartWare has not raised and does not raise any no objection to Staff interviewing third-parties regarding their views on any range of topics, including any topics that they discussed with HeartWare and/or HeartWare's counsel in connection with HeartWare's defense effort.

A. The communications and other activities were performed in anticipation of litigation

There is no question that the work product doctrine applies to investigations under the HSR Act and the FTC Act and the rules promulgated thereunder. Investigations by federal agencies have been held to present "more than a remote prospect of future litigation, and provide[] reasonable grounds for anticipating litigation sufficient to trigger application of the work product doctrine." *Martin v. Monfort, Inc.* 150 F.R.D. 172, 173 (D. Colo. 1993); *see also In re Sealed Case*, 146 F. 3d 881, 886-87 (D.C. Cir. 1998) (specifically acknowledging

the importance of protecting antitrust advice from government inspection in merger investigations).

The communications in question were prepared in anticipation of the above investigation and would not have occurred but for the above investigation and anticipated litigation that could ensue as a result of the Commission's investigation. As Mr. Godshall testified during his investigational hearing, various customer interviews were held "at the direction of counsel" in order "to help educate counsel" as part of the formulation of the antitrust defense in response to the Commission's investigation of the proposed transaction. Godshall IH Tr. at 286:22-23. These communications were initiated for the purpose of determining what facts and theories and tactics might be relevant to an antitrust defense of the transaction, and to develop and test various defensive litigation tactics in connection with the Commission's investigation of the transaction. The specific questions and topics discussed by Messrs. Godshall and Schuermann with various third parties, including some customers, were questions and topics devised by Counsel as essential to the antitrust defense of the transaction and would not have been raised or discussed by Messrs. Godshall and Schuermann in the absence of the anticipated litigation, or in the absence of explicit direction from Counsel.

B. Work product protection includes activities undertaken by a party directly in connection with its own defense, as well as by counsel

Work product protection extends to materials prepared by or for a party or a party's representative and is not restricted to material prepared by counsel. The law is clear that the protection applies regardless of whether the material or communication was undertaken at the request of an attorney. *United States v. Nobles,* 422 U.S. 225, 238-39 (1975) ("[I]t is therefore necessary that the doctrine protect material prepared by agents for the attorney as well as those prepared by the attorney himself."). *Alltmont v. United States*, 177 F.2d 971 (3d

Cir. 1949) (Hickman applies to all witness statements irrespective of whether attorney or party actually obtained the statement); 8 CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE & PROCEDURE § 2024 (2d ed. 1994) (protection should not depend on who obtained the statement).

In any event, as Mr. Godshall testified, the activities were undertaken "at the explicit direction of counsel." As such, Mr. Godshall was not merely acting in his own capacity in creating work product, but was also acting as the agent of counsel in creating the work product. The courts have recognized that the work product doctrine extends to activities undertaken by the attorney's (or the client's) agents at the attorney's direction, in just the same way as it applies to activities undertaken by the attorney directly. *See, e.g., Allendale Mut. Ins. Co. v. Bull Data Sys.*, 152 F.R.D. 132 (N.D. Ill. 1993) (finding that work product extends to non-lawyer employees as long it assists in preparation for litigation); *Sterling Drug Inc. v. Harris*, 488 F. Supp. 1019 (S.D.N.Y. 1980) (documents prepared by non-lawyers under the supervision of attorneys were considered work product).

C. *Hickman v. Taylor* work product is not limited to written memoranda or documentary material, and extends to intangible communications

The fact that the form of work product is intangible is of no consequence to the applicability of the work product doctrine, as oral statements or other intangible manifestations can be protected under the doctrine. *Hickman,* 329 U.S. at 510 (prohibiting an attempt to secure "personal recollections" of counsel without any showing of necessity or hardship); *Banks v. Office of Senate Sergeant-at-Arms*, 222 F.R.D. 1, 4 (D.D.C. 2004) (holding that the federal courts also protect work product even if it has not been memorialized in a document: "Questions of a witness that would disclose counsel's mental impressions, conclusions, opinions, or legal theories may be interdicted to protect 'intangible work product."); *see also In re Cendant Corp. Sec. Litig.*, 343 F.3d 658, 662- 63 (3d Cir.

2003) (holding that it is "clear" from Hickman that work product protection extends to both tangible and intangible work product); *U.S. Info. Sys., Inc. v. IBEW Local Union No. 3*, No. 00 Civ. 4763, 2002 WL 31296430 (S.D.N.Y. Oct. 11, 2002) (work product doctrine extends beyond Rule 26(b)(3) and applies to intangibles such as conversations); *see also* Restatement (Third) of the Law Governing Lawyers § 87 ("Intangible work product is equivalent work product in unwritten, oral or remembered form.").[4]

Much more important than the form of the information are the policy concerns that it implicates. Forced disclosure of attorney work product of this nature would have an extremely adverse effect on the ability of attorney or a party to prepare its litigation strategy in the same way as forced disclosure of written work product. *See Ford v. Phillips Elecs. Instruments Co.*, 82 F.R.D. 359, 360 (E.D. Pa. 1979) (The "same general policy against invading the privacy of an attorney's course of preparation of a case" enunciated in *Hickman* applies regardless of whether the work product is elicited through oral testimony or otherwise). Attorneys would be unable to depend on their clients to gather vital information without having the fruits of their labor be subject to discovery upon the mere curiosity of the opposing party, which would pose grave threats to the efficiency of litigation, demoralize the legal profession and the "interests of clients and the cause of justice would be poorly served." *Hickman*, 329 U.S. at 511; *see also In re Sealed Case,* 146 F.3d at 886-87.

D. The substance of the communications by HeartWare personnel reflected the mental impressions and legal strategy of counsel

When counsel did not participate in the conversations with third parties, including customers, counsel provided HeartWare employees with directions as to the questions and

[4] Federal Rule 26 is not exhaustive and represents a codification of Hickman only for documents and tangible materials. *Garcia v. City of El Centro*, 214 F.R.D. 587, 591 (S.D. Cal. 2003); *Anderson v. Hale*, 202 F.R.D. 548, 554 (N.D. Ill. 2001). The work product protection provided under Hickman is broader than Rule 26. *See Stanley v. Trinchard*, No. Civ.A. 02-1235, 2004 WL 1562850, at *2 (E.D. La. July 12, 2004) ("Rule 26(b)(3) only provides protection for the disclosure of tangible things. For protection for nontangible work product, Mr. Smith must look to Hickman v. Taylor . . .").

topics that ought to be gathered and relayed back to counsel. These directions encapsulated various defensive mental impressions and tactics being developed by counsel and were formulated to elicit specific information to prepare for potential litigation. Moreover, Messrs. Godshall and Schuermann discussed the information obtained from these interviews extensively with counsel, and, together with counsel, analyzed the implications of such information for the antitrust defense of the transaction and assessed how certain information might be further developed in connection with HeartWare's litigation strategy. Therefore, the information sought by the Staff is inextricably infused with the mental impressions and legal strategies of counsel and constitutes opinion work product. Forcing HeartWare employees, who were acting as agents for counsel in obtaining information, directly implicates the concerns raised in *Hickman v. Taylor* as any underlying facts as to what was said cannot be divorced from attorney opinion work product. Moreover, particularly when the Staff can, and has, interviewed customers and third parties itself, hearsay testimony from HeartWare employees also raises substantial questions about accuracy and trustworthiness that could be prejudicial to HeartWare if disclosed in the manner sought by Staff. *Hickman*, 329 U.S. at 512-13 ("[F]orcing an attorney to write out all that witnesses have told him and to deliver that account to his adversary gives rise to grave dangers of inaccuracy and untrustworthiness. No legitimate purpose is served by such production.")

E. The Staff can not show a substantial need for the substance of the communications with third parties undertaken by HeartWare to defend the transaction, nor can the Staff show any inability to obtain the same information without undue hardship

The party seeking production of protected material has the burden of showing that "substantial need" and "undue hardship" warrants production of ordinary work product. Fed. R Civ. P. 26(b)(3)(A)(ii); *Hickman*, 329 U.S. at 511-12; *see also Hodges, Grant & Kaufmann v. U.S. Gov't,* 768 F.2d 719, 721 (5th Cir. 1985). The Staff has made no showing as to why it

has a substantial need for the substance of the communications, or why it is unable to gather the same information without "undue hardship."

The Courts have consistently held that substantial need cannot be shown when the information is readily available through other means and there is no prejudice to the party seeking to obtain the information to obtain it through other means. *AT&T Corp. v. Microsoft Corp.*, No. 02-0164, 2003 WL 21212614, at *6 (N.D. Cal. Apr. 18, 2003) ("If the party seeking production could elicit the same information through deposition, then the need for the documents is diminished, unless there is undue hardship"); *Stampley v. State Farm Fire & Cas. Co.*, No. 00-1540, 23 Fed. Appx. 467, 2001 WL 1518787, at *3 (6th Cir. Nov. 20, 2001) (unpublished) (affirming lower court decision that because plaintiff had the opportunity to take the deposition of investigator that prepared insurance investigation report there was no substantial need for work product). Similarly, in this case, the Staff has no substantial need. Using the customer lists given to the Staff during the second request investigation and the customers identified in the Staff's investigation, the Staff can easily interview or subpoena HeartWare's customers directly rather than force HeartWare employees to return to Washington, D.C. to simply recount their months-old conversations. *See, e.g., United States v. International Bus. Machs. Corp.,* 79 F.R.D. 378, 380 (S.D.N.Y 1978) ("The Supreme Court did not hold or even intimate that opposing counsel could not subsequently inquire of the witnesses themselves what they said at the interview.")

In the course of the Godshall investigational hearing, without being prompted, Counsel instructed Godshall that he could reveal the names of the third parties that he interviewed, so long as he did not reveal the substance of the communications and activities undertaken in connection with the litigation defense. Godshall IH Tr. at 287:10-12. As noted

above, prior to the investigational hearing, in connection with its assertion of work product protection, HeartWare's interrogatory responses stated that

> HeartWare is unaware of any non-privileged documents that systematically record or reference all statements or actions by any person expressing opinions about the transaction and its effects. To the extent that any privileged documents include any such statements or actions that have been recorded, referenced, summarized and annotated at the explicit direction of external counsel in relation to this transaction, such documents have been withheld and the grounds for privilege have been stated in HeartWare's privilege log . . . . The FTC is aware of the identity of the parties' largest customers, from the customer lists provided by the parties during the course of the investigation, from its field investigation, and from the parties' response to Specification 2, above. HeartWare is aware that the FTC staff has contacted many customers and other industry participants during its field investigation to obtain their view of the competitive effects of the transaction. Accordingly, any non-privileged information requested by this Specification is already in the possession of the FTC or may be obtained directly from the parties' customers and competitors themselves.[5]

Any claim that the Staff faces an undue burden in conducting its own interviews of third party witnesses cannot be supported. The courts have consistently rejected claims of undue burden when there are readily available means of obtaining substantially similar evidence. *See In re Grand Jury* (OO-2H), 211 F. Supp. 2d 555, 561 (M.D. Pa. 2001) (rejecting government claim of substantial need for attorney's interview notes of party, where government could have interviewed party itself); *Nat'l Union Fire Ins. Co. v. AARPO, Inc.*, No. 97 Civ. 1438, 1998 WL 823611 (S.D.N.Y. Nov. 25, 1998) (witness interviews conducted by counsel should not be disclosed because opposing counsel seeking disclosure had the opportunity to depose same witnesses).

The Staff has already conducted countless interviews of third party witnesses from customer names provided by the parties and has apparently begun to take declarations from certain customers. For over six weeks, the Staff has had access to almost two million pages of HeartWare's documents which identify countless other potential customers, suppliers,

[5] HeartWare Interrog. Resp. 24(d), pg. 46, May 13, 2009.

consultants and competitors. The Staff has approximately 10 attorneys assigned to the investigation, access to hundreds of other attorneys employed by the Commission, and the vast resources of the Federal Government. It is fanciful to believe that the Staff cannot obtain substantially similar information on its own, or that the Staff faces an undue burden and must piggy-back off the defensive efforts of a small, highly resource-constrained company such as HeartWare. It is well settled that "attorneys often must rely on the assistance of investigators and other agents in the compilation of materials in preparation for trial [and that i]t is therefore necessary that the doctrine protect material prepared by agents for the attorney as well as those prepared by the attorney himself." *Nobles,* 422 U.S. at 238-39; *see also Allendale Mut. Ins. Co.*, 152 F.R.D. 132 (finding that work product extends to non-lawyer employees as long it assists in preparation for litigation). This justification is even greater in the case of HeartWare, which has minimal in-house legal resources and limited capacity to fund an extensive force of legal advisors, and therefore must have its employees share the burden of preparing for litigation.

II. HEARTWARE PROPERLY ASSERTED ATTORNEY-CLIENT PRIVILEGE AND WORK PRODUCT PROTECTION WITH RESPECT TO INADVERTANTLY PRODUCED DOCUMENTS THAT WERE DISCOVERED DURING MR. GODSHALL'S INVESTIGATIONAL HEARING

Communications between and among non-legal employees of a company are protected under the attorney-client privilege where the communications were made in order to gather information for the purpose of assisting counsel's provision of legal advice. *See, e.g., FTC v. GlaxoSmithKline*, 294 F.3d 141, 147 (D.C. Cir. 2002) (holding that attorney-client privilege attached to documents that were distributed widely within the company where the documents were provided to employees who "need[ed] to provide input to the legal department and/or receive the legal advice and strategies formulated by counsel.").

Moreover, even apart from any attorney involvement, materials prepared by a company's employees, agents, and consultants in anticipation of litigation are protected by the work product doctrine. *See, e.g., United States ex rel. Bagley*, 212 F.R.D. 554, 559 (C.D. Cal. 2003) ("Work product may include documents prepared by a party, as well as by the party's attorney.").

The three inadvertently produced documents that were discovered during Mr. Godshall's hearing (two emails and an attachment), and with respect to which Counsel immediately objected and requested their return as soon as they were discovered, were specifically prepared at the request of HeartWare's counsel to enable the provision of legal advice in defense of the transaction and in anticipation of potential litigation with the Commission regarding the transaction. As Mr. Godshall testified in response to the question of why one of documents (the attachment) was prepared, "Jim [Schuermann] was asked by counsel to produce an updated revenue model for the purpose of the joint defense . . . ." Doug Godshall IH Tr. at 275:6-8. *See also* "Q. Did any attorneys participate in the creation of this revenue model? A. Attorneys requested, attorneys reviewed. I discussed with Jessica [Delbaum of Shearman & Sterling] the need for this model." *Id.* at 276:5-8. The record of the investigational hearing clearly establishes all the necessary predicates for the claim of work product protection, and we understand that Staff's demand does not contest the validity of this claim. We further understand that Staff does not seek to question Mr. Schuermann with respect to the substance of the document or the specific reasons why the document was requested by counsel in relation to HeartWare's defensive litigation strategy.

III. THE STAFF HAS ALREADY HAD A FULL OPPORTUNITY TO QUESTION MR. SCHUERMANN REGARDING SALES AND MARKET SHARES AND ANY ATTEMPT TO RECALL MR. SCHUERMANN IS UNDULY BURDENSOME AND UNREASONABLE

As described above, the Staff's June 24, 2009 letter purports to recall Mr. Schuermann to appear in Washington, D.C. to provide testimony regarding "sales and market shares with respect to any relevant product being developed by HeartWare," apparently on the grounds that, as a result of HeartWare's assertion of attorney-client privilege and the work product protection over the inadvertently produced documents during Mr. Godshall's hearing, the Investigational Hearing Officer had elected not to question Mr. Schuermann generally about sales and market shares.[6]

Following Mr. Godshall's investigational hearing, HeartWare's counsel sent a letter to Staff on June 9, 2009, requesting the return of the inadvertently produced privileged documents recalled during the investigational hearing (attached hereto as Exhibit D). On June 12, 2009, the Staff responded with a letter agreeing that it would delete the inadvertently produced documents, while reserving its right to challenge the privilege claims (attached hereto as Exhibit E). The Staff made no such challenge prior to Mr. Schuermann's investigational hearing and have made no such challenge to date.

HeartWare's counsel has never disputed or objected to Mr. Schuermann being questioned as to his views on "sales and market shares with respect to any relevant product being developed by HeartWare." HeartWare's counsel's sole objection has been with respect to questions about the substance of the document (and communications surrounding the

[6] Although no explanation is given in the FTC's letter demand for this additional opportunity, in our June 24, 2009, telephone conference, Mr. Southworth appeared to indicate that Staff mistakenly thought Counsel's/HeartWare's objections with respect to the inadvertently produced documents somehow extended further than the objections that were particularized in Mr. Godshall's investigational hearing and in our follow-up letter dated June 9, 2009. Counsel has done nothing that could lead to such an inference.

document) to the extent that such questions would divulge information protected by the work product doctrine or the attorney-client privilege.

Aside from questions about the protected document, the Investigational Hearing Officer was free to ask Mr. Schuermann questions about market shares at any time during his investigational hearing. The Investigational Hearing Officer asked one question related to other market projections, to which counsel did not object. The Investigational Hearing Officer could have asked any number of follow-up questions but simply elected not to do so, or neglected to do so. Since no questions were raised, no objections were made by Counsel, and Counsel would not have objected to a properly formulated question. At no time was Mr. Schuermann directed by Counsel not to answer any questions regarding "sales and market shares" generally. Mr. Schuermann was free to answer any such questions to the extent that the questions did not relate to the protected documents or the work Mr. Schuermann was performing at Counsel's request in anticipation of litigation.

Accordingly, there is no justification for subjecting Mr. Schuermann to the further burden and expense of being recalled to Washington for further questions with respect to market shares. Mr. Schuermann's investigational hearing lasted almost 9½ hours, with certain breaks taken at the request of the Investigational Hearing Officer. In light of the Investigational Hearing Officer's failure to take advantage of Mr. Schuermann's appearance to ask questions about market shares generally, despite having an unrestricted opportunity to do so over several hours of intensive questioning, it would be unduly burdensome to require Mr. Schuermann to return to Washington, D.C. for further hearings. Further, this blatant attempt by Staff to remedy their oversight, and obtain a "second bite of the apple" with

respect to Mr. Schuermann constitutes abuse of process and is presumptively unreasonable in light of the 7 hour limit on depositions provided for in the Federal Rules.[7]

CONCLUSION

For all of the foregoing reasons, HeartWare respectfully requests that the Commission limit or quash the subpoenas *ad testificandum* issued on April 24, 2009 for the investigational hearings of Messrs. Douglas Godshall and James Schuermann to the extent that they are being used to direct the witnesses to reappear for further investigational hearings.

[7] FED. R. CIV. P. 30(d)(1).

STATEMENT REQUIRED BY 16 C.F.R. § 2.7(d)(2)

Pursuant to 16 C.F.R. § 2.7(d)(2), counsel for HeartWare hereby certifies that they have repeatedly attempted to confer with FTC Staff in a good faith effort to resolve by agreement the issues raised by this petition. Beau W. Buffier and Jessica K. Delbaum, counsel for HeartWare, had oral and written communications with FTC Staff, including James Southworth, Stephanie Wilkinson, William Ashley Gum, and Mark Hegedus on the occasions set forth below. For each teleconference listed below, HeartWare's counsel telephoned from the New York office of Shearman & Sterling LLP.

The following is a chronological list of the oral and written communications between the FTC Staff and HeartWare's counsel regarding the issues raised by this petition:

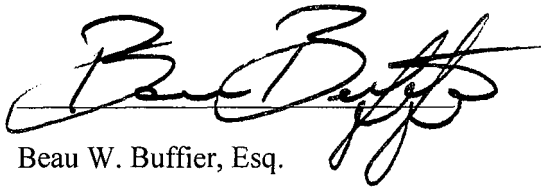
1. June 24, 2009: Conference call with Mr. Southworth, Ms. Wilkinson, Mr. Gum, Mr. Buffier and Ms. Delbaum. During that call, Mr. Southworth said that HeartWare would need to respond to his forthcoming letter within two days.

2. June 24, 2009: Mr. Southworth sent a letter to Mr. Buffier directing Messrs. Godshall and Schuermann to reappear before the FTC for further investigational hearings.

3. June 25, 2009: Mr. Buffier and Ms. Delbaum telephone Mr. Gum and left a detailed message requesting a discussion regarding these issues and requesting a meet and concern.

4. June 26, 2009: Mr. Buffier and Ms. Delbaum contacted Mr. Gum twice and Mr. Southworth once, but were unable to reach them. Mr. Buffier and Ms. Delbaum again requested an immediate opportunity to meet and confer.

5. June 26, 2009: Conference call with Ms. Delbaum and Messrs. Gum, Hegedus and Buffier.



Beau W. Buffier, Esq.

Counsel for HeartWare International, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on June 26, 2009, I caused a copy of the attached Petition to Limit or Quash with attached exhibits to be filed with the following persons by Federal Express or email:

1. The original and ten paper copies filed by Federal Express, and one electronic copy via email to:

   Donald S. Clark, Secretary
   Federal Trade Commission, Room 159
   600 Pennsylvania Avenue, N.W.
   Washington, D.C. 20580
   E-mail: secretary@ftc.gov

2. Two paper copies filed by Federal Express and one electronic copy via email to:

   James Southworth
   Federal Trade Commission
   601 New Jersey Avenue, N.W.
   Washington, D.C. 20580
   E-mail: jsouthworth@ftc.gov

I further certify that the electronic copy sent to the Secretary of the Commission is a true and correct copy of the paper original, and that a paper copy with an original signature is being filed with the Secretary of the Commission by being sent via Federal Express.

Executed in New York, N.Y. on June 26, 2009

Vittorio E. Cottafavi, Esq.
Shearman & Sterling LLP
599 Lexington Avenue
New York, NY 10022
Tel: (212) 848-4843
Fax: (646) 848-4843
Email: vittorio.cottafavi@shearman.com

EXHIBITS

A

SUBPOENA AD TESTIFICANDUM

1. TO	2. FROM
Doug Godshall, President and Chief Executive Officer HeartWare International, Inc. C/O Beau W. Buffier-Shearman & Sterling, LLP 599 Lexington Avenue New York, NY 10022	UNITED STATES OF AMERICA FEDERAL TRADE COMMISSION

This subpoena requires you to appear and testify at the request of the Federal Trade Commission at a hearing [or deposition] in the proceeding described below (Item 6).

3. LOCATION OF HEARING	4. YOUR APPEARANCE WILL BE BEFORE
Federal Trade Commission 601 New Jersey Avenue, NW Suite 5201 Washington, D.C. 20001	James E. Southworth, Esq. 5. DATE AND TIME OF HEARING OR DEPOSITION 05/27/2009 at 9:00 AM (ET)

6. SUBJECT OF INVESTIGATION

Proposed acquisition by Thoratec Corporation of HeartWare International, Inc., File No. 091-0064. See attached compulsory process resolution.

7. RECORDS CUSTODIAN/DEPUTY RECORDS CUSTODIAN	8. COMMISSION COUNSEL
Michael R. Moiseyev (Custodian) Randall Long (Deputy Custodian)	James E. Southworth, Esq. (202) 326-2822

DATE ISSUED	COMMISSIONER'S SIGNATURE
04/24/09	J. Thomas Rosch

GENERAL INSTRUCTIONS

The delivery of this subpoena to you by any method prescribed by the Commission's Rules of Practice is legal service and may subject you to a penalty imposed by law for failure to comply.

PETITION TO LIMIT OR QUASH

The Commission's Rules of Practice require that any petition to limit or quash this subpoena be filed within 20 days after service or, if the return date is less than 20 days after service, prior to the return date. The original and ten copies of the petition must be filed with the Secretary of the Federal Trade Commission. Send one copy to the Commission Counsel named in Item 8.

TRAVEL EXPENSES

Use the enclosed travel voucher to claim compensation to which you are entitled as a witness for the Commission. The completed travel voucher and this subpoena should be presented to Commission Counsel for payment. If you are permanently or temporarily living somewhere other than the address on this subpoena and it would require excessive travel for you to appear, you must get prior approval from Commission Counsel.

This subpoena does not require approval by OMB under the Paperwork Reduction Act of 1980.

RETURN OF SERVICE

I hereby certify that a duplicate original of the within subpoena was duly served: (check the method used)

☐ *in person.*

☐ *by registered mail.*

☐ *by leaving copy at principal office or place of business, to wit:*

---

on the person named herein on:

(Month, day, and year)

(Name of person making service)

(Official title)

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Jon Leibowitz, Chairman**
Pamela Jones Harbour
William E. Kovacic
J. Thomas Rosch

RESOLUTION AUTHORIZING USE OF COMPULSORY PROCESS IN A NONPUBLIC INVESTIGATION

File No. 091-0064

Nature and Scope of Investigation:

To determine whether the proposed acquisition of HeartWare International, Inc. by Thoratec Corporation is in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, as amended; to determine whether the aforesaid proposed acquisition, if consummated, would violate Section 7 of the Clayton Act, 15 U.S.C. § 18, as amended, or Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, as amended; and to determine whether the requirements of Section 7A of the Clayton Act, 15 U.S.C.§ 18a, have been or will be fulfilled with respect to said transaction.

The Federal Trade Commission hereby resolves and authorizes that any and all compulsory processes available to it be used in connection with the investigation.

Authority to Conduct Investigation:

Sections 6, 9, 10, and 20 of the Federal Trade Commission Act, 15 U.S.C. §§ 46, 49, 50, and 57b-1, as amended; F.T.C. Procedures and Rules of Practice, 16 C.F.R. § 1.1, et seq. and supplements thereto.

By direction of the Commission.

Donald S. Clark
Secretary

Issued: April 1, 2009

B

SUBPOENA AD TESTIFICANDUM

1. TO

James Schuemann, Vice President, Sales and Marketing
HeartWare International, Inc.
C/O Beau W. Buffier-Shearman & Sterling, LLP
599 Lexington Avenue
New York, NY 10022

2. FROM

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

This subpoena requires you to appear and testify at the request of the Federal Trade Commission at a hearing [or deposition] in the proceeding described below (Item 6).

3. LOCATION OF HEARING

Federal Trade Commission
601 New Jersey Avenue, NW
Suite 5201
Washington, D.C. 20001

4. YOUR APPEARANCE WILL BE BEFORE

James E. Southworth, Esq.

5. DATE AND TIME OF HEARING OR DEPOSITION

06/04/2009 at 9:00 AM (ET)

6. SUBJECT OF INVESTIGATION

Proposed acquisition by Thoratec Corporation of HeartWare International, Inc., File No. 091-0064. See attached compulsory process resolution.

7. RECORDS CUSTODIAN/DEPUTY RECORDS CUSTODIAN

Michael R. Moiseyev (Custodian)
Randall Long (Deputy Custodian)

8. COMMISSION COUNSEL

James E. Southworth, Esq.
(202) 326-2822

DATE ISSUED

4/24/09

COMMISSIONER'S SIGNATURE

J. Thomas Rosch

GENERAL INSTRUCTIONS

The delivery of this subpoena to you by any method prescribed by the Commission's Rules of Practice is legal service and may subject you to a penalty imposed by law for failure to comply.

PETITION TO LIMIT OR QUASH

The Commission's Rules of Practice require that any petition to limit or quash this subpoena be filed within 20 days after service or, if the return date is less than 20 days after service, prior to the return date. The original and ten copies of the petition must be filed with the Secretary of the Federal Trade Commission. Send one copy to the Commission Counsel named in Item 8.

TRAVEL EXPENSES

Use the enclosed travel voucher to claim compensation to which you are entitled as a witness for the Commission. The completed travel voucher and this subpoena should be presented to Commission Counsel for payment. If you are permanently or temporarily living somewhere other than the address on this subpoena and it would require excessive travel for you to appear, you must get prior approval from Commission Counsel.

This subpoena does not require approval by OMB under the Paperwork Reduction Act of 1980.

RETURN OF SERVICE

I hereby certify that a duplicate original of the within subpoena was duly served: (check the method used)

☐ *in person.*

☐ *by registered mail.*

☐ *by leaving copy at principal office or place of business, to wit:*

---

on the person named herein on:

(Month, day, and year)

(Name of person making service)

(Official title)

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Jon Leibowitz, Chairman**
Pamela Jones Harbour
William E. Kovacic
J. Thomas Rosch

RESOLUTION AUTHORIZING USE OF COMPULSORY PROCESS IN A NONPUBLIC INVESTIGATION

File No. 091-0064

Nature and Scope of Investigation:

To determine whether the proposed acquisition of HeartWare International, Inc. by Thoratec Corporation is in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, as amended; to determine whether the aforesaid proposed acquisition, if consummated, would violate Section 7 of the Clayton Act, 15 U.S.C. § 18, as amended, or Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, as amended; and to determine whether the requirements of Section 7A of the Clayton Act, 15 U.S.C.§ 18a, have been or will be fulfilled with respect to said transaction.

The Federal Trade Commission hereby resolves and authorizes that any and all compulsory processes available to it be used in connection with the investigation.

Authority to Conduct Investigation:

Sections 6, 9, 10, and 20 of the Federal Trade Commission Act, 15 U.S.C. §§ 46, 49, 50, and 57b-1, as amended; F.T.C. Procedures and Rules of Practice, 16 C.F.R. § 1.1, et seq. and supplements thereto.

By direction of the Commission.

Donald S. Clark
Secretary

Issued: April 1, 2009

C

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Bureau of Competition

James E. Southworth
Attorney

Direct Dial
(202) 326-2822

June 24, 2009

VIA ELECTRONIC MAIL

Beau W. Buffier, Esq.
Shearman & Sterling LLP
599 Lexington Avenue
New York, NY 10022-6069
Email: bbuffier@shearman.com

Re: Proposed Acquisition of HeartWare International, Inc. by Thoratec Corporation, FTC File No. 091-0064

Dear Mr. Buffier:

The Federal Trade Commission issued subpoenas *ad testificandum* ("subpoenas") to Doug Godshall and James Schuermann on May 7, 2009. Investigational hearings of these individuals were conducted on June 5 and June 11, 2009, respectively. In each of these hearings, the witnesses refused at counsel's direction to answer questions regarding communications they had with customers about the proposed acquisition. Counsel for the witnesses claimed that these communications were protected by the work product doctrine because the witnesses initiated these conversations at the advice of counsel and in some instances, counsel was present for these conversations. We do not believe you have established the necessary factual predicate to show that this information is protected work product. Accordingly, we are directing these witnesses to reappear before the Commission to provide testimony regarding communications they had with customers about the proposed acquisition.

Furthermore, Doug Godshall refused to answer questions regarding documents identified as JSchuermann 000111434, which is an email communication between Doug Godshall and James Schuermann, and JSchuermann 000115581, which was identified as a revised revenue model created by James Schuermann. Counsel claimed that these documents were inadvertently produced and protected by both the attorney-client privilege and the work product doctrine because the revised revenue model was generated at the direction of counsel. James Schuermann was not questioned about this document in light of counsel's claim that it was

privileged. We intend to inquire about sales and market shares with respect to any relevant product being developed by HeartWare.

If these witnesses fail to reappear to provide the testimony required by the subpoenas issued to them, we will ask the General Counsel to file an enforcement action in a federal district court to compel this testimony. In light of the stringent time constraints under which the Commission is required to proceed, we will ask the General Counsel to proceed immediately.

Please call me if you have any questions.

Sincerely,

James E. Southworth /SW

James E. Southworth

cc: Christine Naglieri, Esq.
Randall Long, Esq.
William Ashley Gum, Esq., FTC General Counsel's office

D

SHEARMAN & STERLING LLP

599 LEXINGTON AVENUE | NEW YORK | NY | 10022-6069

WWW.SHEARMAN.COM | T +1.212.848.4000 | F +1.212.848.7179

bbuffier@shearman.com
212-848-4843

June 9, 2009

CONFIDENTIAL TREATMENT REQUESTED

VIA EMAIL

James E. Southworth, Esq.
Federal Trade Commission
601 New Jersey Avenue, Suite 5108
Washington, DC 20001

Proposed Acquisition of HeartWare International, Inc. by Thoratec Corporation
Transaction Identification Number 2009-0308

Dear Jim:

This letter is in follow-up to the request we made at the June 5, 2009 investigational hearing of Doug Godshall. Please return to us the documents bearing the Bates numbers JSchuermann 000111434 and JSchuermann 000115581,[1] and destroy any copies thereof. These documents were inadvertently produced in response to the Federal Trade Commission's Request for Additional Information and Documentary Material issued to HeartWare on March 26, 2009, as modified by letters and emails dated April 7, April 8, April 14, April 20, and April 21, 2009, from Christine Naglieri to Jessica K. Delbaum. Although the documents were not labeled as privileged and confidential, attorney-client communication or work product, as described below, they are clearly protected from disclosure and were inadvertently produced despite extensive protections put in place by us to safeguard against the disclosure of any privileged material. As I am sure you are aware, in response to your request, at Dr. Sun's meeting, that we fast track production of documents of HeartWare's CEO and other senior officers noticed for the investigational hearings, HeartWare produced over 2.8 million pages of documents in a matter of weeks. All reasonable precautions were taken with respect to privileged documents; however with a production of this size and intensity, it appears that a small number of documents were

[1] We also request the return of the document bearing the Bates number JSchuermann 000115580, which is the earlier of the two emails contained in JSchuermann 000111434.

inadvertently produced. In those instances where we have identified such documents, we have requested they be returned as promptly as reasonably practicable.

The documents referenced above are properly protected from disclosure for the following reasons: attorney-client privilege and the work product doctrine.

Communications between and among non-legal employees of a company are protected under the attorney-client privilege where the communications were made for the purpose of gathering information for the purpose of assisting counsel's provision of legal advice. *See, e.g., FTC v. GlaxoSmithKline*, 294 F.3d 141, 147 (D.C. Cir. 2002) (holding that attorney-client privilege attached to documents that were distributed widely within the company where the documents were provided to employees who "need[ed] to provide input to the legal department and/or receive the legal advice and strategies formulated by counsel.").

Moreover, even apart from any attorney involvement, materials prepared by a company's employees, agents, and consultants in anticipation of litigation are protected by the work product doctrine. *See, e.g., United States ex rel. Bagley*, 212 F.R.D. 554, 559 (C.D. Cal. 2003) ("Work product may include documents prepared by a party, as well as by the party's attorney."). Significantly, in the transactional context, work product protection applies where the work is performed in connection with a proposed transaction, which, if it went forward, could pose the threat of litigation. *See, e.g., United States v. Adlman*, 134 F.3d 1194, 1196 (2d Cir. 1998). Moreover, work product prepared in anticipation of a government agency investigation is plainly protected by the work-product immunity. *Martin v. Monfort, Inc.* 150 F.R.D. 172, 173 (D. Colo. 1993); *see also In re Sealed Case*, 146 F.3d 881, 886-87 (D.C. Cir. 1998) (ellipses and brackets in original) (quoting *Hickman v. Taylor*, 329 U.S. 495, 511 (1947)).

The Excel file and two emails were prepared by Mr. Schuermann and Mr. Godshall specifically at my request and the request of Jessica K. Delbaum to enable us, as HeartWare's external antitrust counsel, to provide legal advice in defense of the transaction and in anticipation of potential litigation with the Federal Trade Commission regarding the transaction. As Mr. Godshall himself testified in response to the question of why the excel spreadsheet was prepared, "Jim [Schuermann] was asked by counsel to produce an updated revenue model for the purpose of the joint defense . . . ." Doug Godshall IH Tr. at 275:6-8. *See also* "Q. Did any attorneys participate in the creation of this revenue model? A. Attorneys requested, attorneys reviewed. I discussed with Jessica the need for this model." *Id.* at 276:5-8.

Because these documents, which were inadvertently produced, are privileged and constitute work product protected from disclosure, HeartWare requests that you return these documents as soon as possible and destroy any copies of these documents, confirming to us in writing that you have done so.

* * *

This letter contains confidential business information of HeartWare. Accordingly, we request that it be kept confidential to the full extent provided by all applicable laws and regulations, including protection from disclosure under Exemption 4 of the Freedom of Information Act, 5 U.S.C. § 552(b)(4).

Please do not hesitate to contact us if you have any questions regarding HeartWare's submission.

Sincerely,

Beau W. Buffier/10

Beau W. Buffier

cc: Jessica K. Delbaum

E

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Bureau of Competition

James E. Southworth
Attorney

Direct Dial
(202) 326-2822

June 12, 2009

VIA FEDERAL EXPRESS

Beau W. Buffier, Esq.
Shearman & Sterling LLP
599 Lexington Avenue
New York, NY 10022-6069
Email: bbuffier@shearman.com

Re: Proposed Acquisition of HeartWare International, Inc. by Thoratec Corporation, FTC File No. 091-0064

Dear Mr. Buffier:

In accordance with Federal Trade Commission policy, we hereby return all hard drives and disks containing electronic documents claimed as inadvertently produced in response to the Request for Additional Information and Documentary Material ("Second Request") issued to HeartWare, International, Inc. ("HeartWare") on March 26, 2009, as modified. This includes the documents referenced in Jessica Delbaum's letters to Christine Naglieri dated May 22 and June 1, 2009. We also agree to delete or destroy any electronic and hard copies of these documents that are found in our files. Furthermore, we have deleted from our Concordance database the documents referenced in your letter to me dated June 9, 2009. If you require the return of the hard drive(s) containing the documents referenced in your letter of June 9, you will need to submit a replacement hard drive(s) excluding these documents.

The return of these documents does not mean the Commission agrees that the documents are, in fact, privileged or that they were inadvertently produced. We reserve our right to challenge your privilege claims at a later date and request that all returned documents be preserved until the above-referenced investigation is closed. In addition, we request a written description of the process used to review HeartWare's submission for privileged materials.

If you have any questions, please do not hesitate to contact me.

Sincerely,

James E. Southworth

Enclosures: HD1 - submitted to the FTC by HeartWare's counsel on May 13, 2009
HD2 - submitted to the FTC by HeartWare's counsel on May 13, 2009
CD21 - submitted to the FTC by HeartWare's counsel on May 13, 2009

cc: Christine Naglieri, Esq.
Randall Long, Esq.
William Ashley Gum, Esq., FTC General Counsel's office