AIJA – Mock Trial 2016

Statement of complaint [cf. Rules 12, 13 of the UPC Rules of Procedure] to the Unified Patent Court, Munich Local Division,

(a) **Claimant**: PLAQUAWAY BV, with a registered office at [address], Netherlands, represented by Abbott, Mayer & Kobler; authorized to accept service:

- **Paul Abbott** c/o Arnold & Porter (UK) LLP, Tower 42, 25 Old Broad Street, London EC2n 1HQ; paul.abbott@aporter.com
- **Hans Mayer** c/o Knobbe, Martens, Olson & Bear, LLP, 10100 Santa Monica Boulevard, Suite 1600, Los Angeles, CA 90067 310-551-450; hans.mayer@knobbe.com
- **Michael Kobler** c/o Bardehle Pagenberg Partnerschaft mbB, Prinzregentenplatz 7, 80765 München; michael.kobler@bardehle.de

(b) **Defendant**: OMYHEART GmbH, with a registered office at [address], Germany;

(c) **Patent proprietor**: PLAQUAWAY, Inc., Washington DC, AB 11000, USA

(d) **Standing to sue**: Claimant is entitled to commence proceedings pursuant to Article 47(2) of the Agreement on a Unified Patent Court of 19 February 2013 (the *"Agreement"*), since

- Claimant has an exclusive license under the patent-in-suit for Europe [cf. confidential license agreement to be submitted should the existence of the license be disputed];
- Claimant has given prior notice to patent proprietor (which is its parent company).

(e) **Patent-in-suit**: **EP 1 123 123** [submitted as **Exhibit C1**]

- Priority date: 11.12.2000 (US 223344 P);
- Date of filing of application: 11.12.2001;
- Date of publication and mention of grant of the patent: 20.10.2010;
- Currently in force in AT, BE, CH, CY, DE, DK, ES, FI, FR, GB, GR, IE, IT, LI, LU, MC, NL, PT, SE and TR. All other than CH, ES, MC and TR have ratified and

implemented the UPC Agreement. No opt-out. Relief is sought in respect of all other territories.

(f) **Prior proceedings**:

- Opposition proceedings initiated by the parent company of the Defendant, OMYHEART, Inc.; result: patent-in-suit was upheld by EPO opposition division with interlocutory decision of March 21, 2014 [submitted as **Exhibit C2**];

- Pending appeal proceedings against decision by the EPO opposition division before the EPO Technical Board of Appeal; Claimant estimates that Oral Proceedings in the appeal will not take place before Q3 2017.

(g) **Competent UPC division**: Munich Local Division, Germany, is competent

- pursuant to Article 33(1)(a) of the Agreement, since infringement of the patent-in-suit has occurred in Germany (offer and distribution of infringing embodiments by Defendant in Germany); as well as

- pursuant to Article 33(1)(b) of the Agreement, since Defendant has its principal place of business in Germany;

(h) **Requests**:

- **Preliminary injunction and Seizure of Accused stent** (Article 62(1), (3) of the Agreement)

- **Permanent injunction re. offering and placing on the market, and importing or storing for these purposes the Accused stents in Europe** (Article 63(1) of the Agreement); order of penalty payment in the amount of EUR 250,000.- for each case of non-compliance with the injunction (Article 63(2) of the Agreement);

- **Recall** and **definite removal** of Accused stents from channels of commerce in Europe (Article 64(2)(b), (d) of the Agreement) at the expense of the Defendant (Article 64(3) of the Agreement);

- **Destruction** of Accused stents (Article 64(2)(e) of the Agreement) at the expense of the Defendant (Article 64(3) of the Agreement);

- **Order Defendant to inform Claimant** about (i) the origin and distribution channels of the Accused stents, (ii) the quantities produced, manufactured,

delivered, received or ordered, as well as the price obtained for the Accused stents; and (iii) the identity of any third person involved in the production or distribution of the Accused stents in Europe (Article 67(1) of the Agreement);

- **General finding that Defendant is liable for damages** (Article 68 of the Agreement);

- **Legal costs** shall be borne by Defendant (Article 69 of the Agreement)

(i) **Underlying facts**:

- Instance of infringement of claim 1 of the patent-in-suit: Defendant has since on or around 2013 advertised and made available to the public the so-called *"ACCU Super Elegant Design"* (the *"Accused stent"*).
  evidence: to be submitted should the acts of infringement be disputed;

- Claimant is unable to particularise all acts of infringement by the Defendant pending disclosure and evidence, but shall seek relief in respect of all such acts at the trial of the action.

(j) **Reasoning of the complaint**:

- Patent relates to prosthetic stents having helical elements. Advantages of the stent of the invention of the patent include *inter alia* relatively uniform stent-to-vessel ratios when expanded (cf. [0006] of the patent-in-suit). The Accused stents seek to achieve the same advantages by utilizing the technical features protected by the patent-in-suit.

- Patent-in-suit has a single claim (claim 1). The relevant features are broken down and their presence in the Accused stents illustrated in a claim chart [submitted as **Exhibit C3**]. All features of claim 1 of the patent-in-suit are present in the Accused stents.

- **Legal consequences (1) – permanent injunction:** Defendant has committed infringing activities with respect to Accused stents, namely offering and placing on the market (cf. Article 25(a) of the Agreement); therefore: risk of future infringing activities, including importing or storing for these purposes; weighing of interests in favor of Claimant: Claimant's own product (on market since 2011) is in direct competition with infringing Accused stent; already drop in market share by 40% - consequences on Claimant's market shares are very difficult to reverse once the Defendant's products are in the market; Defendant

has knowingly infringed the patent-in-suit (cf. above: direct competition); helical stents are *"door opener"* products, which largely contribute to the reputation of companies and also to the sale of related products (e.g. catheters for inserting stents);
high penalty payment should be set to prevent Defendant from further marketing the Accused stents; further drop in market share should be prevented (cf. above)

- **Legal consequences (2) – recall and removal from commercial channels**: Recall and definite removal of Accused stents are appropriate measures pursuant to Article 64(2) of the Agreement, further infringing activities by hospitals/doctors, caused by Defendant, must be stopped; Defendant has knowingly infringed the patent-in-suit (cf. above) and put the infringing stents on the market in large quantities (cf. above: drop of Claimant's market share by 40%); in contrast, Defendant's interest in reputation is not worthy of protection, due to intentional infringement of the patent-in-suit;

- **Legal consequences (3) – destruction**: Destruction of Accused stents is appropriate and proportionate since Accused stents cannot be re-built or otherwise deprived of their infringing property and Defendant intentionally committed the infringing activities (cf. above);

- **Legal consequences (4) – information**: Defendant must inform Claimant in accordance with Article 67(1) of the Agreement, because (i) otherwise it is not possible to calculate damages claims (infringer's profits or reasonable royalties); and (ii) Claimant must be enabled to assert patent-in-suit against other commercial entities down the chain of distribution;

- **Legal consequences (5) – damages**: Court shall order Defendant to pay damages, since Defendant knowingly committed infringing activities (cf. above); in this context, it must be considered that Claimant's market shares dropped by 40% (cf. Article 68(2) of the Agreement), that Claimant lost corresponding profits and reputation as *"technology leader"*, that Defendant – in contrast – profited from infringing activities on a large scale; lump sum payment (Article 68(3)(b) of the Agreement) would not be appropriate in a case of intentional and large-scale infringement;

(k) **Orders** to be sought by Claimant during the interim procedure:

- Permission to rely upon the expert statement of Prof. Willy White in support of the Claimant's construction of claim 1 of the patent-in-suit.

- Disclosure of all documents in the Defendant's control relating to (i) the origin and distribution channels of the Accused stents, (ii) the quantities produced, manufactured, delivered, received or ordered, as well as the price obtained for the Accused stents; and (iii) the identity of any third person involved in the production or distribution of the Accused stents in Europe.

(l) Estimated **value in litigation**: EUR **50 million.**

(m) **List of documents** referred to in this Statement of claim (no need of translation):

- **Exhibit C1** (EP 1 123 123 B2) [not included as already in the materials];
- **Exhibit C2** (interlocutory decision of March 21, 2014 by EPO opposition division) [not included as already in the materials];
- **Exhibit C3** (claim chart);
- **Exhibit C4** (certificate of transfer of Court fees in the amount of EUR xxx) [not included].

(n) **Language** of proceedings: English