



ASX / MEDIA RELEASE

31<sup>st</sup> January 2017

## **Foreshadowed Federal Court of Australia Proceeding**

**Sydney, Australia: 31<sup>st</sup> January 2017** – On 30<sup>th</sup> January 2017, Sirtex Medical Limited (ASX:SRX) received the attached letter and draft statement of claim, foreshadowing the commencement of a representative proceeding against the Company in the Federal Court of Australia.

The statement of claim alleges breaches by the Company of its continuous disclosure obligations, and alleged misleading and deceptive conduct, arising out of a statement made by the Company on 24<sup>th</sup> August 2016, “*double digit dose sales growth to continue in FY17*”.

The class of members identified in the statement of claim is “*all persons who acquired ordinary shares in the [Company] on or after 24<sup>th</sup> August 2016 and who were at the commencement of trading on 9<sup>th</sup> December 2016 holders of any of those shares*”.

If the foreshadowed proceeding is commenced, Sirtex will vigorously defend the proceeding.

In the meantime, Sirtex is considering the foreshadowed proceeding and is obtaining legal advice about it. The Company has, through its lawyers, acknowledged receipt of the letter, and asked for an extension of time until 13<sup>th</sup> February 2017 to respond formally to the letter.

A further announcement will be made by Sirtex regarding the matter as soon as practicable, not later than the time that the Company responds to the letter.

### **About Sirtex Medical**

Sirtex Medical Limited (ASX: SRX) is an Australian-based global healthcare business working to improve outcomes in people with cancer. Our current lead product is a targeted radiation therapy for liver cancer. Over 73,000 doses have been supplied to treat patients with liver cancer at more than 1,000 medical centres in over 40 countries. For more information, please visit [www.sirtex.com](http://www.sirtex.com).

For further information, please contact:

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Our Ref: AZ:RM:171069

30 January 2017

Mr Darren Smith  
Chief Financial Officer and Company Secretary  
Sirtex Medical Limited  
Level 33 101 Miller Street  
NORTH SYDNEY NSW 2060  
By Email: [info-au@sirtex.com](mailto:info-au@sirtex.com)

Dear Mr Smith

**Re: Hayward -v- Sirtex Medical Limited**

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I act for Mr Todd Hayward.

Mr Hayward acquired Sirtex Medical Limited shares on 1 December 2016 and continued to hold those shares at the commencement of trading on 9 December 2016.

I am instructed to commence a representative proceeding to recover the loss sustained by my client and other affected shareholders by reason of Sirtex Medical Limited's breach of its continuous disclosure obligations and misleading or deceptive conduct. The Proposed Statement of Claim enclosed with this letter explains the nature of the case.

In compliance with the provisions of the *Civil Dispute Resolution Act 2011* (Cth), the purpose of this letter and its enclosure is to notify Sirtex Medical Limited of the issues in dispute and to offer to enter into settlement discussions.

Unless Sirtex Medical Limited notifies me by 12pm on 6 February 2017 that it wishes to enter into settlement discussions, a proceeding will be commenced in the Victorian Registry of the Federal Court of Australia thereafter.

Yours sincerely

**PORTFOLIO LAW PTY LTD**

Per: Anthony Zita

## Statement of claim

No. \_\_\_\_\_ of 20\_\_\_\_

Federal Court of Australia

District Registry: Victoria

Division: Commercial and Corporations NPA

### TODD HAYWARD

Applicant

### SIRTEX MEDICAL LIMITED (ACN 078 166 122)

Respondent

1. The Applicant brings this group proceeding pursuant to Part 4A of the *Federal Court Act 1976* (Cth).
2. The proceeding is commenced by the Applicant on his own behalf and on behalf of all persons who acquired ordinary shares in the Respondent on or after 24 August 2016 and who were at the commencement of trading on 9 December 2016 holders of any of those shares (**Group Members**).
3. The Respondent is, and at all material times was:
  - a. a company incorporated pursuant to the *Corporations Act 2001* (Cth) and is capable of being sued;
  - b. a listed disclosing entity within the meaning of section 111AL(1) of the *Corporations Act 2001* (Cth);
  - c. subject to and bound by the Listing Rules (**Listing Rules**) of the Australian Securities Exchange Limited (**ASX**); and
  - d. engaged in the production and sale of a targeted radioactive treatment for liver cancer called SIR-Spheres® Y-90 resin microspheres (**SIR-Spheres**).

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Filed on behalf of (name & role of party)	Todd Hayward - Applicant		
Prepared by (name of person/lawyer)	Anthony Zita, Solicitor		
Law firm (if applicable)	Portfolio Law Pty Ltd		
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### **Applicant's shareholding**

4. The Applicant purchased 340 ordinary fully paid shares in Sirtex Medical Limited (**SRX ED securities**) on 1 December 2016, with settlement on 5 December 2016.

#### Particulars

The Applicant's purchase is recorded in a Commonwealth Securities Limited buy confirmation.

The document is available for inspection.

5. The Applicant paid \$27.79 for each SRX ED security which were acquired on-market on 1 December 2016.
6. The Applicant held those 340 SRX ED securities at the opening of the market on 9 December 2016 and is accordingly a group member. The Applicant continues to hold his SRX ED securities.

### **The Respondent's internal reporting systems**

7. At all material times, the Respondent had internal reporting systems that, per the Respondent's public claims, ensured adequate and timely reporting of all material or significant developments concerning the Respondent's performance that a reasonable person would expect to have a material effect on the price or value of the Respondent's securities.

#### Particulars

The Respondent's internal reporting systems are described in:

- i. the 2016 Corporate Governance Statement referred to in the Respondent's 2016 Annual Report (**the 2016 Annual Report**) at page 16, in which the Respondent's compliance with the Australian Securities Exchange Corporate Governance Principles and Recommendations is described. The principles include, amongst others, a requirement to "lay solid foundations for management oversight" and the Respondent has represented that its compliance is achieved in part through its implementation of its Board Charter (**Board Charter**), a requirement to "safeguard integrity in corporate reporting" which the Respondent has represented is achieved in part through the existence of the Audit Committee with the Audit Committee's role and operations documented in a charter approved by the board (**Audit Committee Charter**), a requirement to make timely and balanced disclosure which the Respondent has represented is achieved through the implementation of

the Respondent's Corporate Communications and Continuous Disclosure Policy (**Disclosure Policy**), and a requirement to "recognise and manage risk" which the Respondent has represented that it achieves through implementation of its Business Risk Management Policy and Procedure (**Risk Management Policy**);

- ii. the Board Charter which provides that the Board's key responsibilities are, amongst others, to establish and monitor corporate governance policies, provide leadership and set corporate strategy and performance objective, ensure appropriate policies and procedures are in place to manage risks and internal compliance, ensure appropriate policies procedures and systems are in place to monitor performance controls, approve and monitor financial reporting and budgets, ensure compliance with applicable laws and regulations, and oversee the Respondent's process for making timely and balanced disclosure of all material information concerning the Respondent that a reasonable person would expect to have a material effect on the price or value of SRX ED securities;
- iii. the Audit Committee Charter and Risk Management Policy which provide for oversight of the Respondent's financial and management reporting and management of the process of identifying and managing business risk; and
- iv. the Respondent's Disclosure Policy.

#### **Disclosures concerning the Respondent's outlook for dose sales in the 2017 financial year**

8. On 24 August 2016, the Respondent disclosed to the market that it had sold 11,931 doses of SIR-Spheres in the 2016 financial year and had achieved a 16.4% increase in dose sales over the 2015 financial year when the Respondent had sold 10,252 doses of SIR-Spheres.

##### **Particulars**

The Applicant refers to the Respondent's ASX Release concerning "Results for the full year ended 30<sup>th</sup> June 2016" published on 24 August 2016 at page 2.

9. On 24 August 2016, the Respondent disclosed to the market that it forecast "double digit dose sales growth [of SIR-Spheres] to continue" in the 2017 financial year.

### Particulars

The Applicant refers to the Respondent's ASX Release concerning "Results for the full year ended 30<sup>th</sup> June 2016" published on 24 August 2016 at page 19.

### Misleading or deceptive conduct

10. The Respondent's disclosure to the market on 24 August 2016 of "double digit dose sales growth" in the 2017 financial year was a representation with respect to a future matter.
11. The Respondent had no reasonable grounds for making the representation alleged in paragraph 10 above and accordingly the representation is taken to be misleading pursuant to s 769C(1) of the Act.

### Particulars

The Respondent had no reasonable grounds for making the representation because:

- a. the Respondent on 24 August 2016 in its ASX Release concerning "Results for the full year ended 30<sup>th</sup> June 2016" made no disclosure as to the basis for its representation that "double digit dose sales growth" would be achieved in the 2017 financial year other than that:
  - i. the market for SRI-Spheres was "large [and] under-penetrated" and that the Respondent had achieved "~2% [penetration] to date"; and
  - ii. the Respondent would continue "strong investment into sales and marketing, clinical and medical [sic] required to build awareness and drive adoption";
- b. in the investor presentation of the 2016 full year results on 24 August 2016 (available at <http://www.sirtex.com/au/investors/investor-resources/investor-videos/2016-full-year-results/>) the Respondent's Chief Executive Officer, Mr Gilman Wong, said in response to a question asked by Will Dunlop of Merrill Lynch, who sought a specific range for the forecast growth in sale of doses, that the Respondent did not have sufficient control over the factors affecting sales of SRI-Spheres to give a specific range for expected sales growth in the 2017 financial year. Mr Wong said that he was "not prepared to provide a range or else we would have done so in our release, it's just because as I made the comment to an earlier question, the vagaries outside our control make it very difficult for us to give a if you like guidance, we did it last year we got caught out a

bit because of as I said areas outside of our direct control and so we are very as a company we've always been very conservative, we like to under promise and over deliver and I think if you look at our record that's what we have achieved, and it doesn't I guess from an investor viewpoint it doesn't do a lot of good if we put a number out there that we can't necessarily have a direct control over and if we don't achieve it can you know put a few people off. Unfortunately no I can't and won't give you a range";

- c. the Respondent stated in its 15 December 2016 letter to the ASX in response to the "Aware Query" sent to the Respondent on 12 December 2016 (**15 December 2016 Aware Response**) that, amongst other things:
  - i. the Respondent's "business has a very short sales cycle, measured in days. As a result there is no transparency on dose sales beyond a very short window"; and
  - ii. "[i]t is primarily for this reason that [the Respondent] does not provide specific financial guidance to the market. Rather, it uses historical dose sale numbers, and indications of estimated dose sales growth, as a means of assisting the market to better assess [the Respondent's] future business potential."

all of which implies that the Respondent's forecast of "double digit dose sales growth" in FY2017 lacked reasonable grounds.

- 12. The Respondent's publication of the statement alleged in paragraph 9 above was conduct by the Respondent in relation to a financial product (namely SRX ED securities) that was misleading or deceptive or was likely to mislead or deceive in breach of s 1041H of the Act because the publication is taken to be misleading or deceptive by operation of s 769C(1) of the Act.

#### **Corrective disclosure**

- 13. On 9 December 2016 the Respondent issued a release to the ASX which disclosed for the first time that the full year growth in dose sales was anticipated to be in the range of 5-11%.

#### **Particulars**

The Respondent disclosed its revised forecast dose sales for the 2017 financial year in an ASX Release of 9 December 2016 entitled "Trading Update".

14. The Respondent's disclosure to the ASX on 9 December 2016 alleged in paragraph 13 above advised the market for the first time that:
- a. the Respondent was unlikely to achieve double digit growth in dose sales in FY2017;
  - b. the Respondent was likely to achieve materially lower growth in dose sales in the 2017 financial year than in the 2016 financial year; and
  - c. the Respondent had encountered volatile trading conditions in the first half of the 2017 financial year, including increased competition and restrictions in reimbursements to patients for supply of SIR-Spheres,
- (the dose sales matters).**

#### **Disclosure failure**

15. The information concerning the dose sales matters that a reasonable person would have expected to have a material effect on the price or value of the Respondent's ED securities, if that information was made generally available, was that:
- a. the Respondent had no reasonable grounds for representing that it would achieve double digit growth in dose sales in the 2017 financial year;
  - b. the Respondent was unlikely to achieve double digit growth in dose sales in the 2017 financial year;
  - c. the Respondent was likely to achieve materially lower growth in dose sales in the 2017 financial year than it had achieved in the 2016 financial year; and
  - d. the Respondent had encountered volatile trading conditions in the first half of the 2017 financial year, including increased competition and restrictions in reimbursements to patients for supply of SIR-Spheres,
- (together the information about the dose sales matters).**

#### **Particulars**

When information about the dose sales matters was released by the Respondent to the ASX on 9 December 2016, there was an immediate and sharp drop in the Respondent's share price, totalling approximately \$767 million of the Respondent's pre-disclosure market capitalisation, reflecting the fact that information about those matters was price sensitive.

16. On 24 August 2016, the Respondent was aware that the Respondent had no reasonable grounds for representing that it would achieve double digit growth in dose sales in the 2017 financial year (as alleged in paragraph 15(a) above).



### Particulars

The Applicant refers to the particulars to paragraph 11 above and the operation of the Respondent's internal reporting systems as alleged in paragraph 7 above.

17. On a date that the Applicant is unable to specify prior to discovery of documents from the Respondent's internal reporting systems (as alleged in paragraph 7 above), but which was not later than 26 October 2016, the Respondent was aware of the information about the dose sales matters which is alleged in paragraphs 15(b)-(d) above.

### Particulars

It is reasonable to infer that the Respondent was aware of the information about the dose sales matters on or before 26 October 2016 because:

- i. the Respondent has and at all material times had in place internal reporting systems, as alleged in paragraph 7 above, which systems would have informed the Respondent at all relevant times how the Respondent's business was performing;
- ii. the Respondent's Chief Executive Officer, Mr Gilman Wong, sold 74,968 SRX ED securities on 26 October 2016 for a total consideration of \$2,135,378.37 or approximately \$28.48 per share (see Mr Wong's Amended Change of Director's Interest Notice dated 2 November 2016);
- iii. Mr Wong, as Chief Executive Officer, was obliged to comply with the Respondent's Securities Trading Policy (**Securities Trading Policy**);
- iv. the Securities Trading Policy is directed inter alia to the prevention of insider trading, and it states that a consequence of non-compliance includes termination of employment without notice;
- v. the Respondent commenced an investigation into Mr Wong's share trading on 16 December 2016 (Respondent's ASX Release dated 16 December 2016 with subject "Investigation of Concerns around CEO Share Trading") and, following receipt of the report of that investigation, the Respondent's board summarily terminated Mr Wong's employment with the Respondent (Respondent's ASX Release dated 13 January 2017 with subject "Investigation of Concerns around CEO Share Trading & Action Taken By Board");
- vi. by reason of the matters set out in paragraphs (ii)-(v) above, it is reasonable to infer that Mr Wong knew the information about the dose sales matters, or some of the information about the dose sales matters, prior to selling his SRX ED securities on 26 October 2016; and

- vii. as Mr Wong was the Respondent's Chief Executive Officer at material times, Mr Wong's knowledge of any inside information, including information about the dose sales matters, was also the knowledge of the Respondent.

18. Despite the Respondent's awareness alleged in paragraphs 16 and 17 above, the information about the dose sales matters was not generally available until the Respondent made it generally available by releasing the information about the dose sales matters to the ASX on 9 December 2016.

#### Particulars

The Respondent did not release to the ASX any information about the dose sale matters until 9 December 2016 (paragraphs 13 to 15 above).

19. The Respondent's failure to disclose the information about the dose sales matters to the market immediately upon becoming aware of the dose sales matters constituted a breach of s 674(2) of the *Corporations Act 2001* (Cth) (the Act).
20. The Respondent's publication to the ASX of the "Chief Executive Officer's Address" to the Respondent's Annual General Meeting on 25 October 2016 was conduct by the Respondent that was misleading or deceptive or was likely to mislead or deceive, in breach of s 1041H of the Act, because the publication failed to disclose any information about the dose sales matters.

#### Loss and damage

21. The Applicant and Group Members held their interests in SRX ED securities in a market:
  - a. regulated by, inter alia, the Listing Rules and the Act; and
  - b. where the price or value of SRX ED securities would reasonably be expected to be informed and affected by information disclosed in accordance with the Listing Rules and the Act.
22. The Applicant:
  - a. expected that the Respondent had complied with its obligations under the Listing Rules and the Act as alleged in paragraph 21; and
  - b. had no knowledge of the information about the dose sales matters,

when he purchased the 340 SRX ED securities on 1 December 2016.

*Inflated price prior to the commencement of trading on 9 December 2016*

23. The Applicant and the Group Members acquired their SRX ED securities in a market:

- a. in which the Respondent had failed to disclose information about the dose sales matters that a reasonable person would expect to have a material effect on the price or value of SRX ED securities;
  - b. in which the Respondent had engaged in the misleading or deceptive conduct alleged in paragraphs 12 and 20 above (where each instance of misleading or deceptive conduct affected the Applicant and those sub-groups of Group Members who acquired their SRX ED securities after the occurrence of each respective instance of misleading or deceptive conduct alleged in paragraphs 12 and 20 above); and
  - c. in which the significant falls in the price of SRX ED securities on and after 9 December 2016 were caused by and were a result of the disclosure of information about the dose sales matters.
- 24. The failure to disclose the information about the dose sales matters caused the market price for SRX ED securities prior to 9 December 2016 to be substantially greater than:
  - a. their true value; further or alternatively
  - b. the market price for SRX ED securities that would have prevailed but for the Respondent's failure to disclose the information about the dose sales matters at any time prior to 9 December 2016.
- 25. The Applicant and Group Members have each suffered loss and damage because of and resulting from the failure to disclose the information about the dose sales matters to the market, and the Applicant and those sub-groups of Group Members who acquired their SRX ED securities after the occurrence of each respective instance of misleading or deceptive conduct by the Respondent alleged in paragraphs 12 and 20 above have also suffered loss by that misleading or deceptive conduct, and all Group Members are entitled to compensation pursuant to sections 1041I, 1317HA and 1325 of the Act.

#### Particulars

The Respondent's failure to disclose the information about the dose sales matters caused the Applicant and the Group Members to suffer loss and damage because the failure to disclose caused the market price for SRX ED securities prior to 9 December 2016 to be substantially greater than their true value, further or alternatively the market price for SRX ED securities that would have prevailed but for the Respondent's failure to disclose the information about the dose sales matters. Accordingly the Applicant and the Group Members overpaid for their SRX ED securities.

The losses will be the subject of expert evidence in due course. They are comprised of the difference between the prices at which the SRX ED securities were acquired by the Applicant and the Group Members and the prices that would have prevailed at the times of those acquisitions had the information about the dose sales matters been disclosed at that time and, as relevant to the Applicant and those sub-groups of Group Members who acquired their SRX ED securities after the occurrence of each respective instance of misleading or deceptive conduct alleged in paragraphs 12 and 20 above, had the Respondent not engaged in the alleged misleading or deceptive conduct.

AND THE APPLICANT AND GROUP MEMBERS SEEK:

- A. Declaration that the Respondent has contravened s 1041H of the Act.
- B. Compensation pursuant to s 1041I, s 1317HA and s 1325 in respect of the Respondent's contraventions of s 674(2) and s 1041H of the Act.
- C. Interest pursuant to statute.
- D. Costs.
- E. Such further or other relief as the Court considers just.

This pleading was prepared by Norman O'Bryan SC and Michael Symons of counsel. Date: []  
January 2017

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Signed by Anthony Zita  
Lawyer for the Applicant

**Certificate of lawyer**

I Anthony Zita certify to the Court that, in relation to the statement of claim filed on behalf of the Applicant, the factual and legal material available to me at present provides a proper basis for each allegation in the pleading.

Date: [] January 2017

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Signed by Anthony Zita  
Lawyer for the Applicant