

**UNITED STATES OF AMERICA**  
**Before the**  
**SECURITIES AND EXCHANGE COMMISSION**

**SECURITIES EXCHANGE ACT OF 1934**  
**Release No. 54172 / July 19, 2006**

**ACCOUNTING AND AUDITING ENFORCEMENT**  
**Release No. 2460 / July 19, 2006**

**ADMINISTRATIVE PROCEEDING**  
**File No. 3-12369**

**In the Matter of**

**L. MICHAEL HART,**

**Respondent.**

**ORDER INSTITUTING CEASE-AND-  
DESIST PROCEEDINGS, MAKING  
FINDINGS, AND IMPOSING A CEASE-  
AND-DESIST ORDER PURSUANT TO  
SECTION 21C OF THE SECURITIES  
EXCHANGE ACT OF 1934**

**I.**

The Securities and Exchange Commission (“Commission”) deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 21C of the Securities Exchange Act of 1934 (“Exchange Act”), against L. Michael Hart (“Hart” or “Respondent”).

**II.**

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the “Offer”) which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission’s jurisdiction over him and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Cease-and-Desist Proceedings, Making Findings, and Imposing a Cease-and-Desist Order Pursuant to Section 21C of the Securities Exchange Act of 1934 (“Order”), as set forth below.

### III.

On the basis of this Order and Respondent's Offer, the Commission finds that:

#### **Respondent**

1. Hart, 58, is a resident of Fort Pierce, Florida. He was Endocare, Inc.'s director of sales for the Southeastern region throughout the relevant period and was an employee of Endocare from July 1, 1999 to June 3, 2004. Prior to joining Endocare in 1999, Hart had almost twenty years of sales and/or managerial experience in the healthcare industry. His experience ranged from selling disposable healthcare products and healthcare software to managing pharmacies and sales associates.

#### **Relevant Entity**

2. Endocare, Inc. is a Delaware corporation, with its principal place of business in Irvine, California. Endocare's common stock is registered with the Commission pursuant to Section 12(g) of the Exchange Act and was listed on the Nasdaq Stock Market until January 16, 2003, when it was delisted for Endocare's failure to file its periodic reports with the Commission. Endocare's common stock currently trades in the Pink Sheets.

#### **Background**

3. The conduct described in this order concerns the reporting of false financial information and other misleading disclosures caused by an Endocare regional sales manager in Endocare's reports filed with the Commission for fiscal years 2001 and 2002. Endocare develops and distributes medical devices for use in the treatment of various types of cancers and urological ailments. Endocare generates most of its revenue from the sale of its cryocare surgical system (known as a "box") and disposable probes that are used with the box in the treatment. Throughout 2001 and 2002, Endocare engaged in improper revenue recognition practices and improperly understated or delayed the recognition of expenses to inflate earnings. These actions resulted in Endocare's filing of financial statements that overstated revenue by at least 16% for fiscal year 2001, 17% for the first quarter of 2002, and 33% for the second quarter of 2002. Additionally, Endocare's financial statements understated its pre-tax loss for 2001 by at least 20%, and falsely reported profits for the first two quarters of 2002, rather than substantial losses.

4. Endocare improperly recognized revenue on box sales involving various contingent terms. These transactions included improper bill-and-hold sales in which product was shipped to an Endocare-controlled storage facility until the equipment could be resold or until it generated sufficient revenues to support payment, and side letters that included indeterminate payment terms, continuing obligations, or certain guarantees regarding minimum procedures. As Endocare's Southeast regional sales director during the relevant time, Hart was involved in negotiating and executing several of these side letters with customers.

## Side Letters

5. In September 2001, Hart was involved in negotiating a box sale to a physician in Gainesville, Florida that contained an undisclosed side letter. Specifically, Hart and Endocare's chief executive officer ("CEO") contacted the physician and requested that he take delivery of a box for \$250,000 pending the ultimate sale to the physician's associate, who was interested in forming a physician partnership to purchase a box. This contingency was not included on the purchase order. The box was shipped to Endocare's storage facility in Florida, where it remained through October 2002. Endocare recognized revenue on the box for the quarter ended September 30, 2001, which was improper given the contingency.

6. In December 2001, Hart executed a side letter with a physician in Celebration, Florida regarding a box purchase. Endocare's CEO initiated the negotiations with the physician and then directed Hart to send the physician a purchase order and side-letter agreement. Hart's side letter to the physician stated that the physician was purchasing the unit on behalf of a physician-owned company and that the company was still in the process of formation. The side letter also stated that Endocare would assist in the formation and resale of the box into existing targeted or future partnerships and that when the company was formed, the physician could transfer some or all ownership of the box to the company. The contingency was not included on the purchase order. Endocare recognized revenue on the box for the quarter ended December 31, 2001, which was improper given the contingency.

7. In March 2002, Hart provided a side letter to the representative/managing partner of a South Florida venture partnership that memorialized their discussions regarding the sale of a box for \$250,000. The side letter stated that the box being sold to the partnership's representative was intended for another physician and that Endocare would pay this representative a \$25,000 commission upon the resale of the unit. Endocare then shipped the box to the Endocare storage facility in Florida. Hart did not include the contingency on the purchase order. Endocare recognized revenue on the box for the quarter ended March 31, 2002, which was improper given the contingency.

8. In June 2002, Hart negotiated the sale of a box to a partnership that included five limited partners and one general partner, in a transaction that included a side letter committing Endocare to help resell the box. The purchase order was only signed by the limited partner physicians, not representatives of the general partner in the venture. The partnership agreement included a clause whereby the physicians were able to sell back their interest in the partnership to the general partner in the event the venture failed. Hart knew about the physicians' option to withdraw from the partnership. Endocare recognized revenue on the box for the quarter ended June 30, 2002, which was improper given the contingency.

## Legal Discussion

9. Section 13(a) of the Exchange Act and Rules 13a-1 and 13a-13 thereunder require issuers of securities registered pursuant to Section 12 of the Exchange Act, such as Endocare, to file with the Commission accurate annual and quarterly reports. An issuer violates these

provisions if it files a report that contains materially false or misleading information. SEC v. Falstaff Brewing Corp., 629 F.2d 62, 72 (D.C. Cir. 1980); SEC v. Savoy Indus., Inc., 587 F.2d 1149, 1165 (D.C. Cir. 1978). Rule 12b-20 under the Exchange Act similarly requires that these reports contain any material information necessary to make the required statements made in the reports not misleading. Moreover, Regulation S-X requires that financial statements filed with the Commission pursuant to Section 13(a) of the Exchange Act be prepared in accordance with Generally Accepted Accounting Principles. Otherwise, such financial statements shall be presumed inaccurate.

10. Section 13(b)(2)(A) of the Exchange Act requires reporting companies registered pursuant to Section 12 of the Exchange Act to “make and keep books, records, and accounts, which in reasonable detail, accurately and fairly reflect the transactions . . . of the issuer.”

11. Section 21C of the Exchange Act provides that the Commission may order any person who is or was a cause of a violation of any provision of the Exchange Act, due to an act or omission the person knew or should have known would contribute to the violation, to cease and desist from committing or causing such violations.

12. Hart caused Endocare’s violations of Sections 13(a) and 13(b)(2)(A) of the Exchange Act and Rules 12b-20, 13a-1, and 13a-13 thereunder by providing undisclosed side letters to customers that contained contingent terms that Endocare would help resell the equipment. Hart’s failure to include the contingent terms in the purchase orders caused Endocare to improperly recognize revenue and file misleading reports.

### **Undertakings**

13. Respondent has undertaken to cooperate fully with the Commission and its staff in connection with this action and any related judicial or administrative proceeding or investigation commenced by the Commission or to which the Commission is a party. In particular, Respondent agrees to: (i) make himself available for interviews and appearances at such times and places as the staff requests upon reasonable notice; (ii) accept service and promptly respond to notices or subpoenas issued by the Commission for documents or testimony at depositions, hearings, or trials, or in connection with any related investigation by Commission staff; (iii) appoint Respondent’s attorney in this matter as agent to receive service of such notices and subpoenas; (iv) with respect to such notices and subpoenas, waives the territorial limits on service contained in Rule 45 of the Federal Rules of Civil Procedure and any applicable local rules, provided that the party requesting the testimony reimburses Respondent’s travel, lodging, and subsistence expenses at the then-prevailing U.S. Government per diem rates; and (v) consent to personal jurisdiction over Respondent in any United States District Court for purposes of enforcing any such subpoena.

14. In determining whether to accept the Offer, the Commission has considered these undertakings.

**IV.**

In view of the foregoing, the Commission deems it appropriate to impose the sanctions agreed to in Respondent's Offer.

Accordingly, it is hereby ORDERED that:

Respondent cease and desist from causing any violations and any future violations of Sections 13(a) and 13(b)(2)(A) of the Exchange Act and Rules 12b-20, 13a-1, and 13a-13 thereunder.

By the Commission.

Nancy M. Morris  
Secretary