

**UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:)
) Chapter 11
BAXANO SURGICAL, Inc.,)
) Chapter 11 Case No. 14-12545-CSS
Debtor.)
) Related to Docket No. 570

**ORDER CONFIRMING THE SECOND AMENDED CHAPTER 11 PLAN OF
REORGANIZATION PROPOSED BY BAXANO SURGICAL, INC.**

AND NOW upon consideration of the Second Amended Chapter 11 Plan of Reorganization Proposed by Baxano Surgical, Inc. (the “**Second Amended Plan**”), it is hereby found and determined as follows:

BACKGROUND

A. The above captioned debtor (the “**Debtor**”) filed its voluntary petition for relief under Chapter 11 of Title 11 of the United States Code (the “**Bankruptcy Code**”) on November 12, 2014. No trustee or examiner has been appointed and the Debtor has operated as debtor-in-possession during the course of these proceedings.

B. On April 27, 2015, the Debtor filed the Chapter 11 Plan of Reorganization of Baxano Surgical, Inc. (the “**Original Plan**”) [D.I. 432] and a disclosure statement in support of the Original Plan (the “**Original Disclosure Statement**”) [D.I. 433].

C. On June 2, 2015, the Debtor filed the First Amended Chapter 11 Plan of Reorganization of Baxano Surgical, Inc. (the “**First Amended Plan**”) [D.I. 490] and a disclosure statement in support of the First Amended Plan (the “**Amended Disclosure Statement**”) [D.I. 494].

D. On June 3, 2015, this Court entered an Order approving the Amended Disclosure Statement and providing for certain procedures with respect to the solicitation of votes with respect to the First Amended Plan (the “**Disclosure Statement Order**”) [D.I. 503].

E. On July 22, 2015, the Debtor filed the Second Amended Chapter 11 Plan of Reorganization of Baxano Surgical, Inc. (the “**Second Amended Plan**”) [D.I. 570]¹ which incorporates technical and non-substantive modifications to the First Amended Plan.

FINDINGS RELATING TO NOTICE OF CONFIRMATION HEARING

F. The Affidavit of Service filed at Docket No.517 establishes that, pursuant to the Disclosure Statement Order, on June 10, 2015, Rust Consulting / Omni Bankruptcy (“**Rust Omni**”), the Debtor’s noticing agent, served

- the Solicitation Package (as defined in the Disclosure Statement Order) on all holders of Claims in the Voting Classes (as defined in the Disclosure Statement Order);
- the Notice of Non-Voting Status (as defined in the Disclosure Statement Order) on each record holder of a Class 4 Interest as of the Record Interest Holder Date (as defined in the Disclosure Statement Order); and
- the Confirmation Hearing Notice (as defined in the Disclosure Statement Order) on: (i) each record holder of an Administrative Claim or Priority Tax Claim, (ii) all holders of claims or interests in the Debtor including,

¹ Capitalized terms used but not defined herein shall have the meaning stated in the Second Amended Plan.

without limitation, each record holder of an Administrative Claim or Priority Tax Claim, and regardless of whether any of such persons or entities are in a Voting Class; (ii) all parties to executory contracts or unexpired leases with the Debtor; (iii) counsel to the Committee; (iv) the U.S. Trustee; (v) the Internal Revenue Service; (vi) all applicable state taxing authorities; (vii) any federal or state authorities that regulate any aspect of the Debtor's business; and (viii) any other party that has filed a request for notice under Fed. R. Bankr. P. 2002. [D.I. 517]

G. The notice provided by Rust Omni constitutes sufficient and adequate notice of the hearing to consider confirmation of the Second Amended Plan (the "**Confirmation Hearing**") in accordance with the Bankruptcy Code, the Federal Rules of Bankruptcy Procedures (the "**Bankruptcy Rules**"), the Local Rules of this Court (the "**Local Rules**"), and the Disclosure Statement Order.

FINDINGS RELATING TO VOTING

H. Pursuant to the Disclosure Statement Order, on June 10, 2015, Rust Omni, in its capacity as the Debtor's balloting agent, served all holders of Claims in the Voting Classes as of the Record Date with Ballots for voting in the applicable Class. [D.I.517]

I. On July 17, 2015, the Debtor filed the Certification of Plan Voting (the "**Voting Report**") [D.I.564], which reported the results of voting on the First Amended Plan.

J. The procedure followed by the Debtor and Rust Omni with respect to qualifying and tabulating votes was fair, reasonable and consistent with the Bankruptcy Code, Bankruptcy Rules and the Disclosure Statement Order.

K. The Voting Report reflects that the First Amended Plan has been accepted by all impaired Classes of Claims.

L. The First Amended Plan has been deemed rejected by Class 4, consisting of Interests in the Debtor.

FINDINGS RELATED TO JURISDICTION

M. This Court has jurisdiction over the Debtor's request that the Second Amended Plan be confirmed pursuant to 28 U.S.C. § 1334 and 157(a) and proceedings related to such request are core proceedings pursuant to 28 U.S.C. § 157(b)(2)(L).

FINDINGS CONCERNING THE SECOND AMENDED PLAN

N. The modifications to the First Amended Plan effected by the Second Amended Plan do not adversely change the treatment of the holder of any Claim or any Interest and, as a result, the Second Amended Plan is deemed accepted by all creditors who accepting the First Amended Plan pursuant to Bankruptcy Rule 3019(a).

O. The Second Amended Plan complies with all applicable provisions of the Bankruptcy Code.

P. The Debtor has complied with all applicable provisions of the Bankruptcy Code.

Q. The Second Amended Plan was proposed in good faith and not by any means forbidden by law.

R. Any payments made or promised by the Debtor for services or for costs and expenses in connection with this case, or in connection with the Second Amended Plan and

incident to the case, have been approved by, or are subject to the approval of, this Court as reasonable.

S. The Debtor has disclosed that John L. Palmer (“**Palmer**”) will serve on and after the Effective Date as the initial Liquidation Trustee. The appointment of Palmer as the initial Liquidation Trustee is consistent with the interest of creditors and with public policy.

T. The Debtor has disclosed that, on the Effective Date, the Debtor will be dissolved and, as a result, after the Effective Date, no individual will serve as an officer or director of the Debtor and no insider will be employed or retained by the Debtor.

U. No governmental regulatory commission has or, after confirmation, will have jurisdiction over rates charged by the Debtor.

V. With respect to each Class designated under the Second Amended Plan, each holder of a Claim or Interest in such Class: (a) has accepted the Second Amended Plan; or (b) will receive or retain under the Second Amended Plan, on account of such Claim or Interest property of a value, as of the Effective Date, that is not less than such holder would so receive or retain if the Debtor were liquidated under Chapter 7 of the Bankruptcy Code on such date.

W. The Second Amended Plan provides that with respect to a Claim of the kind specified in Section 507(a)(1),(4), (5), (6) and (7) of the Bankruptcy Code, the holder of such Claim will receive, on account of such Claim, deferred cash payments of a value, as of the Effective Date, equal to the Allowed amount of such Claim.

X. At least one impaired Class of Claims has accepted the Second Amended Plan, determined without including any acceptance of the Amended Plan by any Insider.

Y. Confirmation of the Second Amended Plan, which is a liquidating plan, is not likely to be followed by any further liquidation, or the need for further reorganization, of the Debtor.

Z. All fees payable under 28 U.S.C. § 1930 have been paid or will be timely paid.

AA. The Debtor is not obligated on account of any retiree benefits, as such term is defined in Section 1114 of the Bankruptcy Code, and as a result the requirements of Section 1129(a)(13) of the Bankruptcy Code are inapplicable..

BB. The Second Amended Plan does not discriminate unfairly, and is fair and equitable with respect to Class 4.

CC. All objections to confirmation from any party-in-interest, including the United States Trustee and the United States of America Internal Revenue Service, have been overruled, to the extent that such objections were not withdrawn before or during the Confirmation Hearing.

NOW, THEREFORE, it is hereby ORDERED:

1. The Second Amended Plan is confirmed pursuant to 11 U.S.C. § 1129.
2. The Second Amended Plan and its provisions shall be binding upon the Debtor, any successor thereto, and any holder of a Claim or Interest, whether or not the Claim or Interest has been impaired under the Second Amended Plan and whether or not such holder has accepted the Second Amended Plan.
3. On the Effective Date, all property of the Debtor shall be vested in the Liquidation Trust free and clear of all Liens, Claims, encumbrances and Interests except as otherwise provided in the Second Amended Plan.

4. Except as may otherwise be provided in the Second Amended Plan, unless already assumed or rejected by Final Order of the Bankruptcy Court prior to the Effective Date, all executory contracts and unexpired leases of the Debtor which are not the subject of a pending application to assume as of the Effective Date shall be deemed rejected. Within three (3) Business Days following the Effective Date, the Debtor shall provide written notice to any counter party to an executory contract or unexpired lease deemed rejected pursuant hereto advising that the applicable executory contract or unexpired lease has been deemed rejected and stating the deadline for filing any Claim as a result of such rejection pursuant to Section 8.3 of the Second Amended Plan. For the avoidance of doubt, no such notice shall be required in connection with any executory contract or unexpired lease rejected by Final Order of the Bankruptcy Court prior to the Effective Date.

5. All holders of Administrative Claims not subject to an Administrative Claim Bar Date established by prior order of this Court, other than holders of Professional Administrative Claims (the "**Covered Administrative Claims**"), shall file a request for payment of such Covered Administrative Claim within sixty (60) days of the Effective Date. Any party required to file a request for payment of a Covered Administrative Claim in accordance with this paragraph who fails to do so within the said sixty (60) day period shall be forever barred, estopped, and enjoined from asserting such Covered Administrative Claim (or filing a request with respect to such Covered Administrative Claim) against the Debtor and the Liquidation Trust and such holders shall not be permitted to participate in any Distribution in this Chapter 11 case on account of such Covered Administrative Claim or to receive further notices regarding such Covered Administrative Claim. The Debtor, the Liquidation Trustee and any other parties in interest shall file any objections to requests for payment of Covered Administrative Claims by

the applicable Claims Objection Deadline; provided that objections to Fee Applications shall be filed in accordance with the time specified by the Rules governing practice in the Bankruptcy Court.

6. All holders of Professional Administrative Claims shall file their respective final application for allowance of compensation for services rendered and reimbursement of expenses incurred through the Effective Date within thirty (30) days after the Effective Date.

7. The Debtor is hereby authorized, directed and empowered to execute such documents and do such things as may be necessary and appropriate to effectuate the provisions of the Second Amended Plan.

8. The Bankruptcy Court shall have and retain jurisdiction as provided in the Second Amended Plan.

9. The Debtor be, and it hereby is, authorized and directed to execute, acknowledge, deliver, file and record such agreements, deeds, assignments, conveyances, and other assurance, documents, and instruments of transfer and take such other action that may be necessary or appropriate to implement, effectuate, consummate and perform the terms and provisions of the Second Amended Plan whether or not specifically referred to in the Second Amended Plan and without further application to or order of this Court.

10. Unless otherwise provided herein, all injunctions or stays provided for in the Chapter 11 Case pursuant to sections 105 or 362 of the Bankruptcy Code or otherwise extant on the date of entry of this Order shall remain in full force and effect until the Effective Date.

11. Except as otherwise provided in the Second Amended Plan, the Liquidation Trust Agreement or the Confirmation Order, as of the Confirmation Date, but subject to the occurrence of the Effective Date, all Entities that have held, hold or may hold a Claim or other debt or liability against the Debtor or Interest in the Debtor are permanently enjoined from taking any of the following actions against any of the Debtor, the Committee, the Liquidating Trustee and/or the Liquidating Trust, along with each of their respective present or former affiliates, members, employees, agents, officers, directors and principals and professionals on account of any such Claims or Interests: (a) commencing or continuing, in any manner or in any place, any action or other proceeding against any property transferred to the Liquidation Trust; (b) enforcing, attaching, collecting or recovering in any manner any judgment, award, decree or order against any property transferred to the Liquidation Trust; (c) creating, perfecting or enforcing any lien or encumbrance against any property transferred to the Liquidation Trust; (d) exercising a setoff of any kind against any debt, liability or obligation due to the Debtor to the extent such right of setoff was or could have been asserted on or before the applicable bar date on account of any such Claim or Interest; (e) commencing or continuing, in any manner or in any place, any action that does not comply with or is inconsistent with the provisions of the Second Amended Plan on account of any such Claim or Interest; (f) taking any action derivatively on behalf of the Debtor; or (g) taking any actions to interfere with the implementation of the Second Amended Plan; provided, however, that nothing contained herein shall preclude such persons from exercising their rights pursuant to and consistent with the terms of the Second Amended Plan.

12. Notwithstanding any provision to the contrary in the Second Amended Plan or this Order confirming the Second Amended Plan, nothing shall affect the ability of the Internal Revenue Service (the "IRS") to pursue any non-debtors to the extent allowed by non-bankruptcy

law for any liabilities that may be related to any federal tax liabilities owed by the Debtor. IRS Allowed Administrative Claims shall be paid in full on the later of the applicable due date and the Effective Date. All IRS Allowed Administrative Claims not paid in full on the later of the applicable due date and the Effective Date due to a dispute on which the IRS eventually prevails shall accrue interest and penalties to the extent provided by non-bankruptcy law (but only to the extent permitted by applicable bankruptcy law) until paid in full. Finally, in accordance with 28 U.S.C. § 1334(b), the district courts shall have original, but not exclusive, jurisdiction over civil proceedings related to any Claims asserted by the IRS.

13. After the Effective Date, all actions required of and/or otherwise specified herein to be performed by the Debtor shall be performed by the Liquidation Trustee, or its designee, in the name of, and on behalf of, the Debtor. To the extent as of the Effective Date the Debtor is party to any pending Claim objection, motion, contested matter or adversary proceeding in the Bankruptcy Court, the Liquidation Trustee shall be automatically substituted for the Debtor in such Claim objection, motion, contested matter or adversary proceeding without the need for any further order of the Bankruptcy Court.

14. In connection with the Liquidation Trust Assets, including the Causes of Action, any attorney client privilege, work product privilege, or other privilege or immunity (including any privilege arising prior to the Effective Date under the common interest doctrine) attaching to any documents or communications (whether written or oral) in favor of the Debtor shall also exist for the benefit of the Liquidation Trust and shall vest in the Liquidation Trustee and its Representatives. The Liquidation Trustee is authorized to take all necessary actions to benefit from or waive such privileges.

15. The Committee shall continue in existence until the Effective Date, and until the Effective Date shall continue to exercise those powers and perform those duties specified in Section 1103 of the Bankruptcy Code, and shall perform such other duties as it may have been assigned by the Bankruptcy Court prior to the Effective Date.

16. On the Effective Date, the Committee shall be dissolved and its members shall be deemed released of all of their duties, responsibilities and obligations in connection with the Chapter 11 Case or the Second Amended Plan and its implementation, and the retention or employment of the Committee's attorneys, financial advisors, and other agents shall terminate, provided, however, the Committee shall continue to have standing and a right to be heard following dissolution of the Committee solely with respect to: (a) Professional Administrative Claims; and (b) any appeals of the Confirmation Order.

17. From and after the Effective Date, the Debtor shall be deemed dissolved for all purposes without the necessity for any other or further actions to be taken by or on behalf of the Debtor or payments to be made in connection therewith; provided, however, that the Liquidation Trustee on behalf of the Debtor may file with the appropriate governmental authority or authorities a certificate or statement of dissolution referencing the Second Amended Plan and any and all required tax returns or other documents required by the Second Amended Plan or applicable law. From and after the Effective Date, the Debtor shall not be required to file any document, or take any other action, to withdraw its business operations from any states in which the Debtor was previously conducting business. Upon the Effective Date, all of the Debtor's officers, directors and Professionals shall be deemed to have been terminated by the Debtor without the necessity of any further action or writing, and they shall be released from any responsibilities, duties and obligations that arise after the Effective Date to the Debtor, its

creditors or any holder of an Interest under the Second Amended Plan, the Liquidation Trust Agreement, or applicable law. Under no circumstances shall such parties be entitled to any compensation from the Debtor or the Liquidation Trustee for services provided after the Effective Date, unless such individuals are subsequently employed by the Liquidation Trustee to assist it in the consummation of the Plan or in its administration of the Liquidation Trust.

18. The last sentence of Section 13.5 of the Second Amended Plan is deemed stricken.

19. Notwithstanding any provision of the Second Amended Plan to the contrary, any Claim (other than an Administrative Claim) Filed after the applicable deadline established by an order of this Court but on or before the date of this order shall not be deemed automatically disallowed and expunged (and ineligible for Distributions) but, rather, shall only be disallowed and expunged by further order of this Court pursuant to the Claims objections procedures stated in the Second Amended Plan.

20. Notwithstanding any provision of the Second Amended Plan to the contrary:

- a) Upon entry of a Final Order approving the Non-Deferred Professional Administrative Claims of Stevens & Lee, Stevens & Lee will apply to its Allowed Non-Deferred Professional Administrative Claim (i) the \$106,687.14 retainer that it was paid pre-petition, and (ii) \$50,849 of the \$90,801.84 being held by Stevens & Lee in its trust account as the remaining professional fee carve-out from the sales of the Debtor's assets;

- b) Upon entry of Final Orders approving the Non-Deferred Professional Administrative Claims of Pillsbury and Morris Nichols, Stevens & Lee will distribute to Pillsbury and Morris Nichols (jointly and to be allocated between them as they decide) the \$39,952.84 balance of the professional fee carve out being held by Stevens & Lee in its trust account;

- c) From cash in the Liquidation Trust, at the times and in the amounts determined by the Liquidation Trustee in his good faith judgment (taking into account availability of cash and anticipated future trust expenses and trust obligations to pay holders of other allowed administrative expenses and holders of allowed priority claims) to be practicable, the Liquidation Trustee shall distribute to Stevens & Lee, Pillsbury and Morris Nichols such amounts as the Liquidation Trustee shall determine provided all such distributions shall be made to Stevens & Lee, Pillsbury and Morris Nichols at the same time and shall be allocated 56% to Stevens & Lee and 44% to Pillsbury and Morris Nichols (jointly and to be allocated between them as they decide);

- d) In the event, upon liquidation of all Liquidation Trust assets the amounts available for distribution to Stevens & Lee, Pillsbury and Morris Nichols are insufficient to pay all Non-Deferred Professional Administrative Claims in full, Stevens & Lee, Pillsbury and Morris Nichols will waive payment of any unpaid balances; and

e) Nothing in this paragraph is intended to alter any other provision of the Second Amended Plan, including any provisions restricting payment of Claims prior to the payment in full of the Non-Deferred Professional Administrative Claims.”

21. The failure to include specifically any particular provision of the Second Amended Plan in this Order shall not diminish or impair the efficacy of such provision, it being the intent of the Court that, except as otherwise specifically provided herein, the Second Amended Plan be authorized and approved in its entirety.

22. Within 10 days of the entry of this Order, the Debtor shall mail to all creditors and other parties in interest notice of the entry of this Order together with a copy of this Order.

Dated: Wilmington, Delaware
July 24, 2015



CHRISTOPHER S. SONTCHI
UNITED STATES BANKRUPTCY JUDGE