

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

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

~~FIRST~~SECOND AMENDED CHAPTER 11 PLAN OF BAXANO SURGICAL, Inc.

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TABLE OF CONTENTS

	<u>Page</u>
ARTICLE 1	
DEFINITIONS, RULES OF	
INTERPRETATION AND COMPUTATION OF TIME.....	2
A. Scope of Definitions.....	2
B. Definitions.....	2
C. Rules of Construction.....	13
D. Computation of Time.....	14
ARTICLE 2	
ADMINISTRATIVE CLAIMS, STATUTORY	
FEEs, INSURED CLAIMS AND PRIORITY TAX CLAIMS.....	14
ARTICLE 3	
CLASSIFICATION OF CLAIMS AND INTERESTS.....	19
ARTICLE 4	
TREATMENT OF CLASSES OF	
CLAIMS AND INTERESTS UNDER THE PLAN.....	19
ARTICLE 5	
ACCEPTANCE OR REJECTION OF THE PLAN.....	22
ARTICLE 6	
CONDITIONS TO EFFECTIVENESS AND MEANS OF IMPLEMENTATION OF THE	
PLAN.....	23
ARTICLE 7	
DISTRIBUTIONS.....	28
ARTICLE 8	
EXECUTORY CONTRACTS AND	
UNEXPIRED LEASES UNDER THE PLAN.....	33
ARTICLE 9	
RETENTION OF SUBJECT MATTER JURISDICTION.....	35
ARTICLE 10	
MODIFICATION OF PLAN.....	35
ARTICLE 11	
PROVISIONS REGARDING INJUNCTIONS,	
EXCULPATION AND THIRD PARTY RELEASES.....	36
ARTICLE 12	
BAR DATES FOR CERTAIN CLAIMS.....	39
ARTICLE 13	
MISCELLANEOUS PROVISIONS.....	39

EXHIBIT "A" - LIQUIDATION TRUST AGREEMENT

Baxano Surgical, Inc., debtor and debtor-in-possession in the above Chapter 11 Case (the “Debtor”) hereby proposes this Plan for completion of the business of the Debtor and the resolution of the outstanding claims against and interests in the Debtor.

ARTICLE 1

DEFINITIONS, RULES OF INTERPRETATION AND COMPUTATION OF TIME

A. Scope of Definitions

For purposes of this Plan, unless the context otherwise requires, all capitalized terms not otherwise defined shall have the meanings ascribed to them in Article 1.B. of this Plan. Any term used in this Plan that is not defined herein, but is defined in the Bankruptcy Code or the Bankruptcy Rules, shall have the meaning ascribed to that term in the Bankruptcy Code or the Bankruptcy Rules.

B. Definitions

1.1 “1% Distribution Determination” shall have the meaning stated in Section 7.14 hereof.

1.2 “Administrative Claim Bar Date” means (a) May 28, 2015 at 4:00 p.m. (EDT) with respect to Administrative Claims incurred from the Petition Date through April 6, 2015, other than Administrative Claims which are Excluded Claims, as defined in the Primary Administrative Claims Bar Date Motion; ~~and~~ (b) June 30, 2015 at 4:00 p.m. (PDT) with respect to Administrative Claims incurred from April 7, 2015 through May 31, 2015, other than Administrative Claims which are Excluded Claims, as defined in the Second Administrative Claims Bar Date Motion, and (c) the date set by order of the Bankruptcy Court as the deadline for Filing requests for payment of Administrative Claims incurred from June 1, 2015 to the Effective Date.

1.3 “Administrative Claim” means (a) any right to payment constituting a cost or expense of administration of the Chapter 11 Case under Section 503(b) of the Bankruptcy Code and (b) any fees or charges assessed against and payable by the Debtor under Section 1930 of Title 28 of the United States Code.

1.4 “Allowed” means (a) any pre-petition or post-petition Claim, other than a Professional Administrative Expense Claim, (1) as to which a Proof of Claim was Filed by the General Claims Bar Date or Administrative Claim Bar Date, as applicable, and as to which no objection has been filed on or before any applicable Claims Objection Deadline; (2) which was listed on the Schedules, as amended, as other than disputed, contingent or unliquidated; (3) that has been allowed by a Final Order of the Bankruptcy Court (provided, however, that Claims Allowed solely for the purpose of voting to accept or reject the Plan shall not be considered Allowed Claims hereunder); or (4) which is expressly allowed under or pursuant to the terms of this Plan, and (b) as to any Professional Administrative Expense Claim, a Claim that has been allowed by Final Order of the Bankruptcy Court. The foregoing notwithstanding, a governmental unit shall not be required to file a request for payment of an expense described in subparagraph (B) or (C) of Section 503(b)(1) of the Bankruptcy Code as a condition of its being allowed as an Administrative Expense.

1.5 “Assets” means all assets and property of the Debtor, regardless of whether reflected in the financial records of the Debtor, including but not limited to: cash, deposits, refunds, rebates, abatements, fixtures, equipment, inventory, contractual interests, intangibles, Claims, Causes of Action, suits, setoffs, recoupments, equitable or legal rights, interests and remedies.

1.6 “Balloting Agent” means Rust Consulting Omni Bankruptcy.

1.7 “Ballots” means the ballots accompanying the Disclosure Statement upon which holders of Impaired Claims entitled to vote shall, among other things, indicate their acceptance or rejection of the Plan in accordance with the Plan and the procedures governing the solicitation process, and which must be actually received on or before the Voting Deadline.

1.8 “Bankruptcy Code” means Title 11 of the United States Code.

1.9 “Bankruptcy Court” means the United States Bankruptcy Court for the District of Delaware.

1.10 “Bankruptcy Rules” means (a) the Federal Rules of Bankruptcy Procedure as promulgated by the United States Supreme ~~Bankruptcy~~ Court under Section 2075 of Title 28 of the United States Code and (b) the local rules of the Bankruptcy Court.

1.11 “Beneficiaries” mean holders of: Allowed Claims that are entitled to receive Distributions under the Plan ~~and/or~~from the Liquidation Trust.

1.12 “Business Day” means any day other than: (a) a Saturday; (b) a Sunday and (c) a “legal holiday” as defined in Bankruptcy Rule 9006(a).

1.13 “Cash” means legal tender of the United States of America.

1.14 “Cash Equivalents” means equivalents of Cash in the form of readily marketable securities or instruments issued by an Entity, including readily marketable direct obligations of, or obligations guaranteed by, the United States of America, commercial paper of domestic corporations carrying a Moody’s rating of “P2” or better, or equivalent rating of any other nationally recognized rating service, or interest bearing certificates of deposit or other similar obligations of domestic banks or other financial institutions having a shareholders’ equity or capital of not less than five hundred million dollars (\$500,000,000) having maturities of not

more than one year, at the then generally prevailing rates of interest for like amounts and like periods.

1.15 “Causes of Action” means any and all actions, causes of action, rights, suits, debts, sums of money, damages, judgments, claims, and demands whatsoever, whether known or unknown, existing or hereafter arising, in law, equity, or otherwise, including but not limited to Chapter 5 Claims and D&O Causes of Action, based in whole or in part upon any act or omission or other event occurring prior to the Commencement Date or during the course of the Chapter 11 Case, including through the Effective Date, that belong to the Debtor.

1.16 “Chapter 11 Case” means the bankruptcy case of the Debtor, being Case No. 14 12545 (CSS) in the United States Bankruptcy Court for the District of Delaware.

1.17 “Chapter 5 Claims” means any and all avoidance, recovery, subordination or other actions or remedies that may be brought on behalf of the Debtor under the Bankruptcy Code or applicable non-bankruptcy law, including actions or remedies under Sections 510, 542, 543, 544, 545, 547, 548, 549, 550, 551, 552, 553(b) and 724(a) of the Bankruptcy Code.

1.18 “Claim” means any claim against the Debtor, regardless of whether asserted and regardless of whether known, as the term “claim” is defined in Section 101(5) of the Bankruptcy Code, and shall include, but is not limited to: Administrative Claims; Disputed Claims; any claims arising from or related to any Interests and Claims; General Unsecured Claims; Priority Claims; and Secured Claims.

1.19 “Claims Objection Deadline” means: (a) as to Administrative Claims (other than Professional Administrative Claims), Priority Claims and Secured Claims, ninety (90) days after the Effective Date, which may be extended for an additional ninety (90) days by the Liquidation Trustee provided the Liquidation Trustee Files a notice of such extension prior to expiration of

the initial ninety (90) day period; and (b) for all other Claims (i) as to the Liquidation Trustee, the date of the first Distribution from the Liquidation Trust to holders of Allowed General Unsecured Claims or such later date as is authorized by the Bankruptcy Court, and (ii) as to all other Entities, ninety (90) days after the Effective Date.

1.20 “Class” means each of the groups of holders of Claims or Interests described in Article 4 of this Plan of Liquidation.

1.21 “Commencement Date” means November 12, 2014, the date on which a Petition under Chapter 11 of the Bankruptcy Code was filed by the Debtor.

1.22 “Committee” means the Official Committee of Unsecured Creditors appointed in the Chapter 11 Case on November 25, 2014, as may have been reconstituted from time to time.

1.23 “Confirmation Date” means the date on which the Confirmation Order becomes a Final Order.

1.24 “Confirmation Hearing” means the hearing held by the Bankruptcy Court to consider the confirmation of the Plan, as it may be adjourned or continued from time to time.

1.25 “Confirmation Order” means an order of the Bankruptcy Court confirming the Plan under Section 1129 of the Bankruptcy Code that has become a Final Order.

1.26 Reserved

1.27 “D&O Policies” mean, policy #01-468-27-07 issued by National Union Fire Insurance Co. of Pittsburgh, PA, policy #11228604 issued by Berkley Insurance Co, and policy ELU131739-13 issued by XL Specially Insurance Co.

1.28 “D&O Causes of Action” means Causes of Action commenced prior or subsequent to the Effective Date against any current or past officer or director of the Debtor and any Causes

of Action against an insurer under any D&O Policy concerning coverage under such D&O Policy.

1.29 “Debtor” means Baxano Surgical, Inc., including in its capacity as debtor-in-possession in the Chapter 11 Case.

1.30 “Deferred Hercules Claim” means \$75,000.

1.31 “Deferred Professional Administrative Claims” means all Allowed Administrative Claims of (a) Stevens & Lee, P.C. in excess of \$694,767.09, and (b) Pillsbury Winthrop Shaw Pittman, LLP and Morris, Nichols, Arsht and Tunnell in excess of \$414,161.70 in the aggregate with such excess amount to be allocated between Pillsbury Winthrop Shaw Pittman, LLP and Morris, Nichols, Arsht and Tunnell consistently with the allocation of the Non-Deferred Professional Administrative Claims.

1.32 “Disclosure Statement” means the Disclosure Statement filed pursuant to Section 1125 of the Bankruptcy Code with respect to this Plan, including all exhibits, appendices, and schedules thereof, if any, as same may be amended, modified, or supplemented from time to time, all as approved by the Bankruptcy Court pursuant to Sections 1125 and 1127 of the Bankruptcy Code and Bankruptcy Rule 3017.

1.33 “Disputed Claim” means a Claim, or any portion thereof ~~that~~, as to which a Proof of Claim or request for payment of an Administrative Expense was Filed on or before any applicable deadline established by an order of the Bankruptcy Court and which is not an Allowed Claim.

1.34 “Disputed Claims Reserves” shall have the meaning ascribed to it in Section 7.5 hereof.

1.35 “Distribution” means a Distribution of Cash or other property made in accordance with the Plan ~~of Liquidation and~~ from the Liquidation Trust.

1.36 “Distribution Date” means the date on which the Liquidation Trustee shall make a Distribution.

1.37 “Effective Date” means the first Business Day which is after the conditions to the occurrence of the Effective Date described in Section 6.1 hereof, have been satisfied or waived by the Debtor.

1.38 “Entity” means an entity as defined in Section 101(15) of the Bankruptcy Code.

1.39 “Executory Contract” means a contract to which the Debtor is a party that is subject to assumption or rejection under Section 365 of the Bankruptcy Code.

1.40 “File” or “Filed” means, with respect to any pleading, entered on the docket of the Chapter 11 Case.

1.41 “Final Order” means a Filed order or judgment of a court that (a) has not been reversed, stayed, modified or amended, and (b) as to which (i) no appeal, motion for re-argument or rehearing or petition for certiorari, is pending, and either (A) all rights to appeal, petition for certiorari or seek rehearing or re-argument have been waived in writing in a manner satisfactory to the Debtor, or (B) the time to appeal or petition for certiorari has expired.

1.42 “General Claims Bar Date” means May 18, 2015 at 4:00 p.m. (Eastern Time).

1.43 “General Claims Bar Date Order” means the order entered by the Bankruptcy Court on March 24, 2015, which established the General Claims Bar Date.

1.44 “General Unsecured Claim” means an unsecured Claim that ~~is not a Priority-~~ Claim arose prior to the Commencement Date, including rejection damage Claims, which is not an Administrative Claim, a Tax Priority Claim or an Other Priority Claim.

1.45 “Hercules” means Hercules Technology Growth Capital, Inc.

1.46 “Hercules Allowed Secured Claim” means the Secured Claim of Hercules, which is an Allowed Secured Claim in the amount of \$575,000 minus all payments by the Debtor to Hercules from March 26, 2015 to and including the Effective Date.

1.47 “Impaired” shall have the meaning ascribed to it in Section 1124 of the Bankruptcy Code.

1.48 “Insiders” shall have the meaning ascribed to it in Section 101(31) of the Bankruptcy Code.

1.49 “Insured Claim” means any Claim against the Debtor payable, in whole or in part, by an insurance policy or policies issued by an insurance company on behalf of the Debtor.

1.50 “Interest” means the legal, equitable, contractual, and other rights of any Person with respect to existing common stock ~~or other Interest~~, or any other equity securities of, or ownership interests in, the Debtor.

1.51 “Liabilities” means the liabilities of the Debtor, whether or not reflected in the financial records of the Debtor.

1.52 “Lien” shall have the meaning ascribed to it in Section 101(37) of the Bankruptcy Code, except that a lien that has been avoided shall not constitute a Lien for the purposes of the Plan.

1.53 “Liquidation Trust” means that Liquidation Trust established pursuant to this Plan in which the Liquidation Trust Assets shall vest on the Effective Date.

1.54 “Liquidation Trust Agreement” means that Liquidation Trust Agreement that governs the operation and management of the Liquidation Trust, in a form substantially similar to Exhibit A hereof.

1.55 “Liquidation Trustee” means the person vested with the authority under the Liquidation Trust to administer the Liquidation Trust, as further described in Section 6.3(b) of this Plan.

1.56 “Liquidation Trust Assets” means all of the assets transferred or granted to the Liquidation Trust, consisting of: (i) the Causes of Action; (ii) the Liquidation Trust Proceeds; and (iii) all other Assets of the Debtor.

1.57 “Liquidation Trust Proceeds” means the proceeds from the collection, liquidation, sale or other disposition of the Debtor’s Assets as of the Effective Date, including the proceeds received from any Causes of Action.

1.58 “Non-Deferred Hercules Claim” means \$500,000 of the Hercules Allowed Secured Claim minus all payments by the Debtor to Hercules from March 26, 2015 to and including the Effective Date.

1.59 “Non-Deferred Professional Administrative Claims” all Allowed Administrative Claims of (a) Stevens & Lee, P.C. in amounts less than or equal to \$694,767.09, and (b) Pillsbury Winthrop Shaw Pittman, LLP and Morris, Nichols, Arsht and Tunnell in amounts less than or equal to \$414,161.70, in the aggregate, with such amount to be allocated between Pillsbury Winthrop Shaw Pittman, LLP and Morris, Nichols, Arsht and Tunnell as they shall agree.

1.60 “Non-Recovery Funds” shall have the meaning ascribed in Section 2.2(b)(i) hereof.

1.61 “Other Priority Claim” means any Claim accorded priority in right of payment under Section 507(a) of the Bankruptcy Code, other than a Priority Tax Claim or an Administrative Claim.

1.62 “Other Priority Claim Compromise Election” means an election made by the holder of an Allowed Other Priority Claim on its Ballot if before the Effective Date, or by notice to the Liquidation Trustee, if after the Effective Date, to receive payment of 50% of its Allowed Other Priority Claim in the manner described in Section 4.1 hereof, in full satisfaction of such Allowed Other Priority Claim.

1.63 “Person” means a person as defined in Section 101(41) of the Bankruptcy Code.

1.64 “Plan” means this plan of liquidation under Chapter 11 of the Bankruptcy Code as the same may be amended, modified, or supplemented from time to time in accordance with its terms.

1.65 “Plan Supplement” means any supplement to the Plan Filed prior to the Confirmation Date.

1.66 “Primary Administrative Claims Bar Date Motion” means that certain motion filed by the Debtor seeking the entry of an order establishing a bar date for certain Administrative Claims [D.I. 407].

1.67 “Priority Tax Claim” means any Claim of a governmental unit of the kind specified in Section 507(a)(8) of the Bankruptcy Code.

1.68 “Priority Tax Compromise Election” means an election made by the holder of an Allowed Priority Tax Claim by written notice to the Debtor, if before the Effective Date, or to the Liquidation Trustee, if after the Effective Date, to receive payment of 50% of its Allowed Priority Tax Claim in the manner described in Section 2.5 hereof, in full satisfaction of such Allowed Priority Tax Claim.

1.69 “Professional” means any person or Entity employed by the Debtor or the Committee in accordance with Sections 327, 328, or 1103 of the Bankruptcy Code, and who

shall be compensated for services rendered prior to the Effective Date pursuant to Sections 327, 328, 329, 330, or 331 of the Bankruptcy Code.

1.70 “Professional Administrative Claims” means Administrative Claims of Professionals subject to final allowance pursuant to Section 330 of the Bankruptcy Code.

1.71 “Proof of Claim” means a Claim Filed against the Debtor in the Chapter 11 Case.

1.72 “Pro Rata” means, with reference to any Distribution, the ratio (expressed as a percentage) that the amount of the Allowed Claim bears to the aggregate amount of all Allowed Claims sharing in such Distribution. Until all Disputed Claims are Resolved, Disputed Claims shall be treated as Allowed Claims in the amount used for calculation of the Disputed Claims Reserves, for purposes of calculating Pro Rata Distributions.

1.73 “Recovery Funds” shall have the meaning ascribed in Section 2.2(b)(ii) hereof.

1.74 “Record Date” means the date the order of the Bankruptcy Court approving the Disclosure Statement is entered, which shall be the date used for determining the entitlement to receive Distributions under the Plan on account of Allowed Claims.

1.75 Reserved

1.76 “Representatives” means, without limitation, any existing or former affiliate, subsidiary, member, officer, director, partner, stockholder, trustee, member, representative, employee, agent, attorney, business advisor, financial advisor, accountant, other Professional, their successors or assigns, or any person who is or was in control of any of the foregoing.

1.77 “Schedules” means the schedules of assets and liabilities and the statements of financial affairs Filed by the Debtor pursuant to Section 521 of the Bankruptcy Code, and as such schedules and statements have been or may be supplemented or amended from time to time.

1.78 “Second Administrative Claims Bar Date Motion” means that certain motion filed by the Debtor seeking the entry of an order establishing a supplemental bar date for certain Administrative Claims [D.I. 466].

1.79 “Secured Claim” means an Allowed Claim that is secured by a Lien (which is valid, perfected and enforceable under applicable law or by reason of a Final Order) on the property in which the Debtor has an interest or that is subject to a setoff under Section 553 of the Bankruptcy Code, to the extent of the value of the collateral, as determined in accordance with Section 506(a) of the Bankruptcy Code, or to the extent of the amount subject to the setoff.

1.80 “Trust Expenses” means the reasonable expenses of the Liquidation Trust, including professional fees and expenses.

1.81 “Unclaimed Property” means any Distributions that are returned as: (i) undeliverable to a Beneficiary, or (ii) unclaimed by a Beneficiary, as further described in Section 7.2 hereof.

1.82 “Unimpaired” means an Allowed Claim or Interest that is not “Impaired” within the meaning of Section 1124 of the Bankruptcy Code.

1.83 “United States Trustee” means the United States Trustee appointed under Section 591 of Title 28 of the United States Code to serve in the District of Delaware.

1.84 “Voting Deadline” means the date and time by which all Ballots must be received.

C. Rules of Construction

Wherever from the context it appears appropriate, each term stated in either the singular or the plural shall include both the singular and the plural, and pronouns stated in the masculine, feminine, or neuter gender shall include the masculine, feminine, and neuter. For purposes of the Plan: (a) any reference in the Plan to a contract, instrument, release, indenture, or other

agreement or document being in a particular form or on particular terms and conditions means that the document shall be substantially in that form or substantially on those terms and conditions; (b) any reference in the Plan to an existing document or Exhibit Filed or to be Filed means the document or Exhibit as it may have been or may be amended, modified, or supplemented; and (c) unless otherwise specified, all references in the Plan to Articles, Schedules, and Exhibits are references to articles, schedules, and exhibits of or to the Plan. Unless otherwise specified, the words “herein,” “hereof,” “hereof,” “hereunder,” and other words of similar meaning refer to the Plan as a whole and not to any particular article, section, subsection, or clause contained in the Plan. A capitalized term used but not defined herein shall have the meaning given to that term in the Bankruptcy Code. The rules of construction contained in Section 102 of the Bankruptcy Code shall apply to the construction of the Plan.

The headings in the Plan are for convenience of reference only and shall not expand, limit, or otherwise affect the provisions of the Plan. Unless otherwise indicated herein, all references to dollars are to United States dollars.

D. Computation of Time

Unless otherwise expressly provided herein, in computing any period of time prescribed or allowed by the Plan, the provisions of Bankruptcy Rule 9006(a) shall apply. If any payment or act under the Plan is required to be made or performed on a date that is not a Business Day, then the making of such payment or the performance of such act may be completed on the next succeeding Business Day, but shall be deemed to have been completed as of the required date.

ARTICLE 2

ADMINISTRATIVE CLAIMS, STATUTORY FEES, INSURED CLAIMS AND PRIORITY TAX CLAIMS

2.1 Administrative Claims other than Professional Administrative Claims

All Allowed Administrative Claims, other than Professional Administrative Claims and the Deferred Hercules Claim, shall be paid in Cash, in full, on the latest of (i) the due date, (ii) if such Administrative Claim is disputed by the Liquidation Trustee and is not an Allowed Claim, thirty (30) days after entry of a Final Order of the Bankruptcy Court Allowing such Administrative Claim or, if such Administrative Claim is not disputed by the Liquidation Trustee and is an Allowed Claim, thirty (30) days after the Effective Date, and (iii) the date agreed to by the holder of such Administrative Claim.

2.2 Professional Administrative Claims

Each Professional shall have an Allowed Administrative Claim for all fees and expenses incurred through and including the Effective Date to the extent such Claim is ultimately approved by the Bankruptcy Court. Each Allowed Professional Administrative Claim, other than Deferred Professional Administrative Claims, shall be paid by the Liquidation Trustee from the Liquidation Trust Assets within ten (10) days after the entry of a Final Order approving such Professional Administrative Claims or such later date as the holder of such Professional Administrative Claim may agree.

All Deferred Professional Administrative Claims shall be paid by the Liquidation Trustee as follows:

a. If the Liquidation Trustee elects not to pursue any Causes of Action (other than Causes of Action relating to collection of accounts receivable, return of unearned insurance premiums and/or return of deposits), as soon as practicable following such determination, the

Deferred Professional Administrative Expenses shall be paid, *pari passu* and pro-rata, with each other and with the Deferred Hercules Claim from Liquidation Trust Assets remaining after payment of all reasonable Trust Expenses and any remaining amounts of the Allowed Priority Tax Claims, Allowed Other Priority Claims, Non-Deferred Hercules Claim and Non-Deferred Professional Administrative Claims until an amount equal to the Deferred Professional Administrative Claims shall have been distributed to the holders thereof.

b. In the event the Liquidation Trustee elects to pursue any Causes of Action (other than Causes of Action relating to collection of accounts receivable, return of unearned insurance premiums and/or return of deposits), as soon as practicable after resolution of any such Causes of Action:

i. all Liquidation Trust Assets other than Recovery Funds (the “Non-Recovery Funds”) remaining after payment of all reasonable Trust Expenses and any remaining amounts of the Allowed Priority Tax Claims, Allowed Other Priority Claims, Non-Deferred Hercules Claim and Non-Deferred Professional Administrative Claims (with such Trust Expenses and any remaining amounts of the Allowed Priority Tax Claims, Allowed Other Priority Claims, Non-Deferred Hercules Claim and Non-Deferred Professional Administrative Claims to be paid first from Recovery Funds to the extent Recovery Funds exist at the time of payment and, otherwise, from Non-Recovery Funds) shall be distributed to holders of Deferred Professional Administrative Claims *pari passu* and pro-rata with Distributions to Hercules on account of the Deferred Hercules Claim until an amount equal to the Deferred Professional Administrative Claims shall have been distributed to the holders thereof; and

ii. to the extent the Non Recovery Funds are insufficient to pay the Deferred Professional Administrative Claims and the Deferred Hercules Claim in full, but provided the

Liquidation Trustee has not made the 1% Distribution Determination pursuant to Section 7.14 hereof, fifty percent (50%) of all Liquidation Trust Assets generated by Causes of Action (other than Causes of Action relating to collection of accounts receivable, return of unearned insurance premiums and/or the return of deposits) (the “Recovery Funds”) remaining after payment of all reasonable Trust Expenses and any remaining amounts of the Allowed Priority Tax Claims, Allowed Other Priority Claims, Non-Deferred Hercules Claim and Non-Deferred Professional Administrative Claims and after payment or reservation of a total of \$1,000,000 (including any amounts distributed to holders of Allowed General Unsecured Claims from the Non Recovery Funds) on account of Distributions to holders of Allowed General Unsecured Claims shall be distributed to holders of Deferred Professional Administrative Claims pari passu and pro rata with Distributions to Hercules on account of the Deferred Allowed Hercules Claim.

iii. to the extent the Non-Recovery Funds are insufficient to pay the Deferred Professional Administrative Claims and the Deferred Hercules Claim in full and the Liquidation Trustee has made the 1% Distribution Determination pursuant to Section 7.14 hereof, all Recovery Funds remaining after payment of all reasonable Trust Expenses and any remaining amounts of the Allowed Priority Tax Claims, Allowed Other Priority Claims, Non-Deferred Hercules Claim and Non-Deferred Professional Administrative Claims shall be distributed to holders of Deferred Professional Administrative Claims pari passu and pro rata with Distributions to Hercules on account of the Deferred Allowed Hercules Claim.

c. The foregoing notwithstanding, the Liquidation Trustee shall have the power to reserve up to \$50,000 in proceeds of Causes of Action unrelated to D&O Causes of Action to fund pursuit of D&O Causes of Action.

2.3 Insured Claims

To the extent not previously provided for by order of the Bankruptcy Court, and to the extent permitted pursuant to applicable non-bankruptcy law, holders of Insured Claims are entitled to maintain actions after the Effective Date against the Debtor and/or any insurance company pursuant to an insurance policy issued to or for the benefit of the Debtor, subject to the terms and provisions of the said insurance policies, provided, however, that payment on account of any such action shall be recoverable only from such insurance company. The Allowed Claim of any holder of an Insured Claim shall be reduced, dollar for dollar, by any payment on account of the Insured Claim from any insurance company.

2.4 Statutory Fees

All fees due and payable pursuant to Section 1930 of Title 28 of the U.S. Code prior to the Effective Date shall be paid by the Debtor on the Effective Date. After the Effective Date, the Liquidating Trustee shall pay any and all such fees when due and payable, and shall file with the Bankruptcy Court quarterly reports in a form reasonably acceptable to the U.S. Trustee, until the earliest of the Debtor's case being closed, dismissed or converted to a case under Chapter 7 of the Bankruptcy Code.

2.5 Priority Tax Claims

Each holder of an Allowed Priority Tax Claim who does not make the Priority Tax Compromise Election shall receive from the Liquidating Trust Assets deferred payments of Cash, in the full amount of such Allowed Priority Tax Claim, payable in equal, annual principal installments beginning on the first anniversary of the Effective Date and ending on the earlier of the fifth anniversary of the Effective Date and the fifth Anniversary of the date of the assessment of such Allowed Priority Tax Claim, together with interest (payable quarterly in arrears) on the

unpaid balance of such Allowed Priority Tax Claim, at an annual rate equal to 3.25%. At the option of the Liquidation Trustee, any Allowed Priority Tax Claim may be paid earlier than the dates stated above, but not earlier than payment in full of all Non-Deferred Professional Administrative Claims absent the consent of each holder of such Non-Deferred Professional Administrative Claims.

Each holder of an Allowed Priority Tax Claim who makes the Priority Tax Compromise Election shall receive as soon as reasonably practicable after the later of the Effective Date and the date of such election (but not earlier than payment in full of each Non-Deferred Professional Administrative Claims and the Non-Deferred Hercules Claim, absent the consent of the holder of any such non-deferred Claim) Cash in an amount equal to 50% of such Allowed Priority Tax Claim in full settlement of such Allowed Priority Tax Claim.

ARTICLE 3

CLASSIFICATION OF CLAIMS AND INTERESTS

3.1 Pursuant to Section 1122 of the Bankruptcy Code, set forth below is a designation of classes of Claims against and Interests in the Debtor. A Claim or Interest is placed in a particular Class for the purposes of voting on this Plan and or receiving Distributions pursuant to this Plan only to the extent that such Claim or Interest is an Allowed Claim or an Allowed Interest in that Class and such Claim or Interest has not been paid, released, or otherwise settled prior to the Effective Date. In accordance with Section 1123(a)(1) of the Bankruptcy Code, Administrative Claims and Priority Tax Claims of the kinds specified in Sections 507(a)(1) and 507(a)(8) of the Bankruptcy Code, respectively, have not been classified and their treatment is set forth in Article 2 above.

3.2 The classification of Claims against and Interests in the Debtor pursuant to the Plan are as follows:

Class	Claim	Status	Voting Rights
1	Other Priority Claims	Impaired	Entitled to Vote
2	Hercules Allowed Secured Claim	Impaired	Entitled to Vote
3	General Unsecured Claims	Impaired	Entitled to Vote
4	Interests	Impaired	Deemed to Reject, No Right to Vote

ARTICLE 4

TREATMENT OF CLASSES OF CLAIMS AND INTERESTS UNDER THE PLAN

The following treatment set forth in this Article 4 shall be accorded to Allowed Claims against the Debtor and Interests in the Debtor:

4.1 Class 1: Other Priority Claims

Class 1 consists of all Allowed Other Priority Claims against the Debtor. Each holder of an Allowed Other Priority Claim who does not make the Other Priority Claim Compromise Election shall receive from the Liquidating Trust Assets deferred payments of Cash, in the full amount of such Allowed Other Priority Claim, payable in equal, annual principal installments beginning on the first anniversary of the Effective Date and ending on the fifth anniversary of the Effective Date, together with interest (payable annually in arrears with each principal payment) on the unpaid balance of such Allowed Other Priority Claim, at an annual rate equal to 3.25%. At the option of the Liquidation Trustee, any Allowed Other Priority Claim may be paid earlier than the dates stated above but not earlier than payment in full of each Non-Deferred Professional Administrative Claims and the Non-Deferred Hercules Claim, absent the consent of the holder of any such non-deferred Claim.

Each holder of an Allowed Other Priority Claim who makes the Other Priority Claim Compromise Election shall receive as soon as reasonably practicable after the later of the Effective Date and the date such Claim becomes an Allowed Claim (but, absent the consent of the holder, not earlier than payment in full of each Non-Deferred Professional Administrative Claim and the Non-Deferred Hercules Claim) Cash in an amount equal to 50% of such Allowed Other Priority Claim in full settlement of such Allowed Other Priority Claim.

4.2 Class 2: Hercules Allowed Secured Claim

Class 2 consists of the Hercules Allowed Secured Claim. The Non-Deferred Hercules Claim shall be paid in full, in Cash from the Liquidating Trust Assets on the Effective Date. The Deferred Hercules Claim shall be paid by the Liquidation Trustee *pari passu* and pro-rata with payment of the Deferred Professional Administrative Claims. On the Effective Date, Hercules shall be deemed to have waived any and all Liens securing the Deferred Hercules Claim and, in return, the Deferred Hercules Claim shall be deemed to be an Allowed Administrative Claim.

4.3 Class 3: General Unsecured Claims

Class 3 consists of all Allowed General Unsecured Claims.

If the Liquidation Trustee elects not to pursue any Causes of Action (other than Causes of Action relating to collection of accounts receivable, return of unearned insurance premiums and/or return of deposits), no Distributions shall be made on account of General Unsecured Claims provided, however, the Liquidation Trustee shall not make such election unless the Liquidation Trustee believes, in the exercise of his reasonable discretion, that pursuit of such Causes of Action would not generate at least \$1,000,000 in Recovery Funds.

If the Liquidation Trustee elects to pursue any Causes of Action (other than Causes of Action relating to collection of accounts receivable, return of unearned insurance premiums

and/or return of deposits), as soon as practicable after resolution of one or more such Causes of Action but subject to Section 7.9 and 7.14 hereof, each holder of an Allowed General Unsecured Claim shall receive its pro-rata portion (taking into account any Disputed Claims Reserves) of (a) the first \$1,000,000 of Recovery Funds remaining after payment of all Trust Expenses and any remaining amounts of the Allowed Priority Tax Claims, Allowed Other Priority Claims, Non-Deferred Hercules Claim and Non-Deferred Professional Administrative Claims (b) fifty percent (50%) of any such Recovery Funds in excess of the said \$1,000,000 until the Deferred Hercules Claim and all Deferred Professional Administrative Claims are paid in full, (c) one hundred percent (100%) of all such Recovery Funds in excess of the said \$1,000,000 after all Deferred Professional Administrative Claims and the Deferred Hercules Claim are paid in full, and (d) one hundred percent (100%) of all other Liquidation Trust Assets after payment in full of (or reservation for) all other Allowed Claims, including the Deferred Hercules Claim and the Deferred Professional Administrative Claims, and all Trust Expenses.

4.4 Class 4: Interests

Class 4 consists of the Interests in the Debtor. The holders of Interests will not receive any Distributions or other consideration on account of such Interests. On the Effective Date, all Interests shall be cancelled, extinguished, and of no further force and effect.

ARTICLE 5

ACCEPTANCE OR REJECTION OF THE PLAN

5.1 Voting Classes

Classes 1, 2 and 3 are Impaired under the Plan, and the holders of Classes 1, 2 and 3 Claims as of the Record Date shall be entitled to vote to accept or reject the Plan.

5.2 Deemed Rejection of Plan

The holders of Interests are not entitled to receive any Distribution or other consideration under the Plan on account of their Interests and are therefore deemed to have rejected the Plan pursuant to Section 1126(g) of the Bankruptcy Code. As a consequence, the holders of Class 4 Interests shall not be entitled to vote.

ARTICLE 6

CONDITIONS TO EFFECTIVENESS AND MEANS OF IMPLEMENTATION OF THE PLAN

6.1 Conditions Precedent to the Effective Date

The following are conditions precedent to the Effective Date that must be satisfied or waived by the Debtor:

- a. Entry of the Confirmation Order and the Confirmation Order having become a Final Order.
- b. No request for revocation of the Confirmation Order under Section 1144 of the Bankruptcy Code shall be pending.
- c. The Liquidation Trust Agreement shall have been executed.

6.2 Vesting of Assets of the Debtor

On the Effective Date, subject only to the terms of this Plan, all Assets of the Debtor, wherever situated, shall vest in the Liquidation Trust, free and clear of all Liens, Claims, encumbrances and Interests except as otherwise provided in the Plan.

6.3 Liquidation Trust

- a. Execution of the Liquidation Trust Agreement. On or before the Effective Date, the Liquidation Trustee and the Debtor will execute the Liquidation Trust Agreement.

b. Appointment of Liquidation Trustee. The initial Liquidation Trustee shall be ~~selected by the Committee and identified by the Debtor in the Plan Supplement~~John L. Palmer.

The Liquidation Trustee shall have the powers, duties, and obligations set forth in this Plan and in the Liquidation Trust Agreement. 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.

c. Preservation and Vesting of Causes of Action. Except as expressly provided herein, and unless expressly waived, relinquished, exculpated, released, compromised or settled in the Plan, the Confirmation Order, any Final Order, or in any contract, instrument, release or other agreement entered into or delivered in connection with the Plan, the Liquidation Trust shall exclusively retain and may enforce, and the Debtor expressly reserves and preserves for these purposes, in accordance with Sections 1123(a)(5)(B) and 1123(b)(3) of the Bankruptcy Code, all Causes of Action, all of which shall vest in the Liquidation Trustee. Accordingly, no preclusion doctrine, including, without limitation, the doctrines of res judicata, collateral estoppel, issue preclusion, claim preclusion, estoppel (judicial, equitable or otherwise) or laches shall apply to such Causes of Action by virtue of, or in connection with, the confirmation or effectiveness of this Plan. The Liquidation Trustee and its successors and assigns, shall have the exclusive right, power, and interest to pursue, settle, or abandon all Causes of Action as the sole representative of the Debtor, in ~~each~~the Chapter 11 Case without approval of the Bankruptcy Court or any other

court provided, however, approval of the Bankruptcy Court shall be required for settlement of (a) any D&O Cause of Action commenced in the Bankruptcy Court, and (b) any other Cause of Action commenced in the Bankruptcy Court seeking in excess of \$100,000. Further, in the event the Liquidation Trustee elects not to pursue any D&O Causes of Action, the Liquidation Trustee shall send a notice of such election to all Beneficiaries who Filed requests for service under Bankruptcy Rule 2002 and to the United States Trustee. In addition, if such determination is made prior to the date the Chapter 11 Case is closed, a copy of such notice shall be Filed. The foregoing notwithstanding, any election by the Liquidation Trustee not to pursue any D&O Cause of Action is not subject to challenge by any Beneficiary, the United States Trustee or any other party and the notice of such election is for informational purposes only.

d. Preservation of Confidences and Attorney Client Privilege. In order for the Liquidation Trustee to effectively investigate, defend, and pursue the Causes of Action and administer the Liquidation Trust Assets, the Debtor and the Liquidation Trustee, and all counsel thereof must be able to exchange information with each other on a confidential basis and cooperate in common interest efforts without waiving any applicable privilege. Given the common interests of the parties and the Liquidation Trust's position as successor to the Liquidation Trust Assets, including the Causes of Action, sharing such information in the manner described in the previous sentence shall not waive or limit any applicable privilege or exemption from disclosure or discovery related to such information. 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.

e. Reservation of Rights. With respect to any Chapter 5 Claim that the Liquidation Trustee abandons in accordance with Section 6.3(c) of the Plan, the Liquidation Trustee reserves all rights, including the right under Section 502(d) of the Bankruptcy Code to use defensively the abandoned Chapter 5 Claim as a basis to object to all or any part of a Claim asserted by a creditor which remains in possession of, or otherwise obtains the benefit of, the avoidable transfer.

f. Sale Free and Clear. Any asset of the Liquidation Trust may be sold by the Liquidation Trustee, by auction, private sale or otherwise without further order of the Bankruptcy Court and the Confirmation Order shall constitute authorization for the Liquidation Trustee to consummate such sales and shall be binding on all parties-in-interest. Any sale of assets shall be free and clear of all Claims, Liens, encumbrances or Interests with any such Claims, Liens encumbrances or Interests attaching to proceeds of such sale.

g. Consultation Rights of Holders of Deferred Professional Administrative Claims and Deferred Hercules Claim. Until the Deferred Hercules Claim and the Deferred Professional Administrative Claims are paid in full, the Liquidation Trustee, upon reasonable request by any holder of such Claims, shall consult with such holder and respond to its reasonable inquiries and requests for information concerning all non-privileged matters relating to the Liquidation Trust and the implementation of the Plan, including but not limited to the status of litigation, the reasonableness of the fees and expenses incurred by the Trust and the Liquidation Trustee and information relating to income expenses and balances on hand in the Liquidation Trust

h. Status Reports At least once every six months following the Effective Date until the Chapter 11 Case is closed, the Liquidation Trustee shall File, and serve upon the United States Trustee, a status report which shall report on the status of the investigation and pursuit of Causes of Action and such other matters as may be reasonably requested by the United States Trustee.

6.4 Nonconsensual Confirmation

If any impaired Class of Claims entitled to vote does not accept the Plan by the requisite statutory majorities provided in Section 1126(c) of the Bankruptcy Code, the Debtor reserves the right to amend the Plan or request confirmation of the Plan under Section 1129(b) of the Bankruptcy Code or both. With respect to any impaired classes of Claims or Interests that is deemed to reject the Plan, the Debtor shall request confirmation of the Plan under Section 1129(b) of the Bankruptcy Code.

6.5 Closing of Chapter 11 Case

When appropriate, the Liquidation Trustee shall seek entry of the final decree closing the Chapter 11 Case.

6.6 Dissolution of Committee

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.

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 Plan and its implementation, and the retention or employment of the Committee's attorneys, financial advisors, and other agents shall terminate.

Notwithstanding anything in this Article 6, 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. All reasonable fees and expenses incurred therein shall be paid from the Liquidation Trust Assets without further order of the Bankruptcy Court.

6.7 Dissolution of the Debtor and Resignation of Officers and Directors

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 Plan and any and all required tax returns or other documents required by this 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 ~~and~~, 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 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.

ARTICLE 7

DISTRIBUTIONS

7.1 Reserved

7.2 Distributions/Unclaimed Distributions

Distributions to holders of Allowed Claims shall be made by the Liquidation Trustee: (a) at the address set forth on the Proof of Claim filed by the applicable holder (or at the last known addresses of such holder if no Proof of Claim is filed or if the Debtor has been notified of a change of address), (b) at the addresses set forth in any written notices of address changes delivered to the Debtor or the Liquidation Trustee after the date of any related Proof of Claim, or (c) at the address reflected on the Schedules if no Proof of Claim has been filed and the Debtor or the Liquidation Trustee has not received a written notice of a change of address. If any Allowed Claim holder's Distribution is returned as undeliverable, no further Distributions to such holder shall be made unless and until the Liquidation Trustee is notified in writing of such holder's then current address, at which time all missed Distributions shall be made to such holder without interest. Any undeliverable Distribution made shall be held for redistribution under this Plan. All claims for undeliverable Distributions must be made no later than six (6) months after the Distribution is made, after which date all unclaimed property shall revert to the Liquidation Trust free of any restrictions thereon, and the Claim of any holder or successor to such holder with respect to such property shall be discharged and forever barred notwithstanding any federal or state escheat laws to the contrary. Nothing contained in the Plan shall require the Debtor or

the Liquidation Trustee or any professional retained by the foregoing to attempt to locate any holder of an Allowed Claim.

7.3 Withholding Taxes. Any federal, state, or local withholding taxes or other amounts required to be withheld under applicable law shall be deducted from Distributions hereunder. All holders of Allowed Claims shall be required to provide the Liquidation Trustee with any information necessary to effect the withholding of such taxes.

7.4 Time of Payment

Except as may be provided herein, all Distributions provided for by the Plan will be made as soon as it is feasible in the reasonable discretion of the Liquidation Trustee. One or more Distributions may be made pursuant to the provisions of the Plan. Payments on any Disputed Claim that becomes an Allowed Claim shall be distributed by the Liquidation Trustee from the Disputed Claims Reserves on the first Business Day that is twenty (20) calendar days after the end of the calendar quarter in which such Disputed Claim becomes an Allowed Claim (each such date, a “Quarterly Distribution Date”). Distributions shall be made only to the extent of the aggregate Distributions that the holder of any such Allowed Claim would have received had such Claim been Allowed as of the Effective Date (less any taxes paid with respect to amounts held in the Disputed Claims Reserves). Any Distribution due on a day other than a Business Day shall be made, without interest, on the next Business Day.

7.5 Disputed Claims Reserves

On any date that any Distributions are to be made on account of Allowed Claims, the Liquidation Trustee shall make reasonable reserves (the “Disputed Claims Reserves”) on account of Disputed Claims which, had they been Allowed Claims as of the date of such Distribution, would have shared in such Distribution. For such Disputed Claims that are

liquidated (either in a Proof of Claim or in the Schedules) as of the applicable Distribution Date, the amount to be reserved shall be the amount the holder of such Disputed Claim would have received had its Disputed Claim been Allowed on the applicable Distribution Date in the liquidated amount. For all other Disputed Claims, the amount to be reserved shall be based on the maximum amount of such Disputed Claim, as estimated by the Liquidation Trustee in the exercise of reasonable discretion. Each Disputed Claim Reserve shall be adjusted periodically as Disputed Claims are resolved and any amounts in such Disputed Claims Reserve in excess of amounts needed to make Distributions to the applicable holder of a Disputed Claim upon allowance of such Claim shall be redistributed in accordance with the provisions of this Plan.

7.6 Estimation of Claims

The Liquidation Trustee may, at any time, request that the Bankruptcy Court estimate any contingent or unliquidated Claims, including any Claim for taxes, to the extent permitted by Section 502(c) of the Bankruptcy Code regardless of whether the Debtor or the Liquidation Trustee, as the ~~Chapter 11 Case~~case may be, has previously objected to such Claim or whether the Bankruptcy Court has ruled on any such objection. The Bankruptcy Court shall retain jurisdiction to estimate any Claim at any time, including during the pendency of any appeal relating to any such objection. In the event that the Bankruptcy Court estimates any contingent or unliquidated Claim, that estimated amount shall constitute either the Allowed amount of such Claim or a maximum limitation on such Claim, as determined by the Bankruptcy Court. If the estimated amount constitutes a maximum limitation on such Claim, the Liquidation Trustee may elect to pursue supplemental proceedings to object to any ultimate allowance of such Claim. All of the aforementioned Claims objection, estimation and resolution procedures are cumulative and not necessarily exclusive of one another. Claims may be estimated and subsequently

compromised, settled, withdrawn or resolved by any mechanism approved by the Bankruptcy Court. The foregoing notwithstanding, the Liquidation Trustee shall not be required to obtain approval of the Bankruptcy Court (or any other court) in connection with an estimation of any Claim for purposes of setting the amount of any Disputed Claim Reserve pursuant to Section 7.6 hereof.

7.7 Objections

All objections to Claims shall be Filed on or before the applicable Claims Objection Deadline. All objections shall be litigated to Final Order; provided, however, the Liquidation Trustee has the authority to compromise, settle, otherwise resolve or withdraw any objection without further order of the Bankruptcy Court. Notwithstanding any requirement that may be imposed pursuant to Bankruptcy Rule 9019, from and after the Effective Date, the Liquidation Trustee may settle Disputed Claims ~~and Causes of Action~~ without supervision or approval of the Bankruptcy Court, free of any restrictions of the Bankruptcy Code, the Bankruptcy Rules, the local rules of the Bankruptcy Court and the guidelines of the United States Trustee.

7.8 Untimely Claims

Except as otherwise expressly provided in this Plan, any Claim not deemed filed pursuant to Section 1111(a) of the Bankruptcy Code as to which a Proof of Claim is not Filed on or before ~~the~~any applicable ~~Claims-Objection-Deadline~~deadline established by an order of the Bankruptcy Court shall (a) not be treated as an Allowed Claim for voting purposes and Distribution and (b) shall be expunged from the Claims register in the Chapter 11 ~~Case~~Case.

7.9 Fractional Cents/Deminimus Distributions

Notwithstanding any other provision of the Plan to the contrary, no payment of fractional cents shall be made pursuant to the Plan. Whenever any payment of a fraction of a cent under the Plan would otherwise be required, the actual Distribution made shall reflect a rounding of

such fraction to the nearest whole penny (up or down), with half cents or more being rounded up and fractions less than half of a cent being rounded down. No Distributions of less than \$50.00 will be made on account of Allowed Claims.

7.10 Reserved

7.11 Setoffs

Except as otherwise provided in the Plan, the Liquidation Trustee may, upon written notice to any affected holder of a Claim, set off against any Claim and the Distributions to be made pursuant to the Plan in respect of such Claim, any claims of any nature whatsoever that the ~~Debtor~~[Liquidation Trustee](#) may have against the holder of such Claim, but neither the failure to do so nor the allowance of any Claim under the Plan shall constitute a waiver or release by the Liquidation Trustee of any right of setoff against the holder of such Claim. [Any holder of a Claim that has been the subject of a set-off by the Liquidation Trustee may challenge such setoff in Bankruptcy Court or, after the Chapter 11 Case has been closed, any other court of competent jurisdiction.](#)

7.12 Waiver of Transfer Taxes

Pursuant to Section 1146(a) of the Bankruptcy Code, the issuance, transfer or exchange of security or the making or delivery of an instrument of transfer under the Plan after the Effective Date shall not be taxed under any law imposing a stamp tax or similar tax.

7.13 Time Bar to Cash Payments by Check

Checks issued by the Liquidation Trustee on account of Allowed Claims shall be null and void if not negotiated within one hundred twenty (120) days after the date of issuance thereof, except those returned as undeliverable which shall be dealt with in accordance with Section 7.2 of the Plan. After such date, all Claims in respect of void checks shall be forever barred, and the

proceeds of such checks shall revert in the Liquidation Trust and be subject to redistribution, as appropriate, in accordance with the provisions of the Plan.

7.14 Distribution of Liquidation Trust Assets to Charity

Notwithstanding anything else in this Plan or the Liquidation Trust Agreement, (a) if the Liquidation Trustee elects not to pursue any Causes of Action (other than Causes of Action related to collection of accounts receivable, return of unearned insurance premiums and/or return of deposits), or (b) if the Liquidation Trustee determines that it is likely that the Liquidation Trust Assets that will be available for Distribution will be insufficient to generate a recovery of at least one percent (1%) to holders of Allowed General Unsecured Claims (taking into account, among other things, the anticipated cost of resolving objections to General Unsecured Claims and effecting such Distributions), the Liquidation Trustee may elect (the “1% Distribution Determination”) to Distribute all available Liquidation Trust Assets, after payment of all Trust Expenses and any remaining Non-Deferred Professional Administrative Claims, Allowed Priority Tax Claims and Allowed Other Priority Claims and after reservation of reasonable amounts for anticipated future Trust Expenses; (x) first, *pari passu* and pro-rata, to Hercules, Stevens & Lee, P.C., Pillsbury Winthrop Shaw Pittman, LLP and Morris, Nichols, Arsht and Tunnell on account of the Deferred Hercules Claim and the Deferred Professional Administrative Claims, respectively, until an amount equal to the Deferred Hercules Claim shall have been distributed to Hercules and the Deferred Professional Administrative Claims shall have been distributed to Stevens & Lee, P.C., Pillsbury Winthrop Shaw Pittman, LLP and Morris, Nichols, Arsht and Tunnell, and (y) second, any remainder to a non-profit 503(c) organization providing bankruptcy related services to consumer debtors selected by the Liquidation Trustee. In the event the Liquidation Trustee makes the 1% Distribution

Determination, the Liquidation Trustee shall send a notice of such determination to all Beneficiaries who Filed requests for service under Bankruptcy Rule 2002 and to the United States Trustee. In addition, if such determination is made prior to the date the Chapter 11 Case is closed, a copy of such notice shall be Filed. The foregoing notwithstanding, the 1% Distribution Determination is not subject to challenge by any Beneficiary, the United States Trustee or any other party and the notice of such determination is for informational purposes only.

ARTICLE 8

EXECUTORY CONTRACTS AND UNEXPIRED LEASES UNDER THE PLAN

8.1 Executory Contracts and Unexpired Leases

Except as may otherwise be provided in the 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 deemed rejected pursuant to this Section 8.1 advising that the applicable executory contract has been deemed rejected and stating the deadline for filing any Claim as a result of such rejection pursuant to Section 8.3 hereof. For the avoidance of doubt, no such notice shall be required in connection with any executory contract rejected by Final Order of the Bankruptcy Court prior to the Effective Date.

8.2 Reserved

8.3 Rejection Claims

Any creditor who has a Claim as a result of a rejection of an executory contract or unexpired lease shall file a proof of claim for rejection damages on or before the earlier of (a) the

date required under any applicable order of the Bankruptcy Court, and (b) thirty days after the Effective Date. Any claim for rejection damages not filed by the applicable deadline shall be forever barred from assertion against the Debtor, its Assets, the Liquidation Trust and the Liquidation Trust Assets.

ARTICLE 9

RETENTION OF SUBJECT MATTER JURISDICTION

9.1 Retention of Subject Matter Jurisdiction

The Bankruptcy Court shall continue to have subject matter jurisdiction, of all matters, and over all Entities arising out of, and relating to, the Chapter 11 Case and the Plan to the maximum extent permitted by the Bankruptcy Code.

ARTICLE 10

MODIFICATION OF PLAN

10.1 Prior to the Confirmation Order

The Debtor may alter, amend or modify the Plan or any exhibits thereof under Section 1127(a) of the Bankruptcy Code at any time prior to entry of the Confirmation Order. The Debtor shall provide parties-in-interest with notice of such amendments or modifications as may be required by the Bankruptcy Code or Bankruptcy Rules or order of the Bankruptcy Court. A holder of a Claim that has accepted the Plan shall be deemed to have accepted the Plan, as altered, amended, modified or clarified, if the proposed alteration, amendment, modification or clarification does not materially and adversely change the treatment of the Claim of such holder.

10.2 After the Confirmation Order

After the entry of the Confirmation Order and prior to substantial consummation (as defined in Section 1101(2) of the Bankruptcy Code) of the Plan, the Debtor may, under Section 1127(b) of the Bankruptcy Code, institute proceedings in the Bankruptcy Court to remedy any

defect or omission or to reconcile any inconsistencies in the Plan or the Confirmation Order, and such matters as may be necessary to carry out the purpose and effect of the Plan so long as such proceedings do not materially and adversely affect the treatment of holders of Claims under the Plan; provided, however, that, to the extent required, prior notice of such proceedings shall be served in accordance with the Bankruptcy Code or Bankruptcy Rules or an order of the Bankruptcy Court. A holder of a Claim that has accepted the Plan shall be deemed to have accepted the Plan, as altered, amended, modified or clarified, if the proposed alteration, amendment, modification or clarification does not materially and adversely change the treatment of the Claim of such holder.

ARTICLE 11

PROVISIONS REGARDING INJUNCTIONS, EXCULPATION AND THIRD PARTY RELEASES

11.1 Injunction Relating to the Plan

Except as otherwise provided in the 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~~Liquidation Trustee and/or the ~~Liquidating~~Liquidation 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, debts, liabilities 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) ~~asserting~~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 Plan on account of any such Claim, debt, liability or Interest; (f) taking any action derivatively on behalf of the Debtor; or (g) taking any actions to interfere with the implementation of the Plan; provided, however, that nothing contained herein shall preclude such persons from exercising their rights pursuant to and consistent with the terms of the Plan.

11.2 Releases

a. Claim Holders' Release of Claims Against Officers, Directors and Professionals of the Debtor. As of the Effective Date, each holder of a Claim who votes in favor of the Plan and does not elect to opt out of the releases contained in this Section 11.2 by making such election on its Ballot, shall be deemed to have released all direct and derivative claims in connection with or related to any action or omission taking place after the Commencement Date and prior to the Effective Date in any way relating to the Debtor, the Chapter 11 Case or the Plan against the Debtor's present and former directors, officers, employees, agents, financial advisors, attorneys and professionals (including Tamarack Associates, Inc. and John L. Palmer); provided, however, the foregoing shall not waive or release any causes of action arising out of (i) any contractual obligations owing by any such party or (ii) the willful misconduct, gross negligence, intentional fraud or criminal conduct of any such party.

b. Claim Holders' Release of Claims Against Committee. As of the Effective Date, each holder of a Claim who votes in favor of the Plan and does not elect to opt out of the releases

contained in Section 11.2 of the Plan by making such election on its timely-submitted Ballot, shall be deemed to have released all direct and derivative claims in connection with or related to any action or omission taking place after the Commencement Date and prior to the Effective Date, in any way relating to the Debtor, the Chapter 11 Case or the Plan, against the Committee and its members and any of their respective employees, agents, financial advisors, attorneys and professionals; provided, however, the foregoing shall not waive or release any causes of action arising out of (i) any contractual obligations owing by any such party or (ii) the willful misconduct, gross negligence, intentional fraud or criminal conduct of any such party.

c. Claim Holders' Release of Claims Against Hercules. As of the Effective Date, each holder of a Claim who votes in favor of the Plan and does not elect to opt out of the releases contained in Section 11.2 of the Plan by making such election on its timely-submitted Ballot, shall be deemed to have released all direct and derivative claims in connection with or related to any action or omission taking place after the Commencement Date and prior to the Effective Date in any way relating to the Debtor, the Chapter 11 Case or the Plan, against Hercules and its members and any of their respective employees, agents, financial advisors, attorneys and professionals; provided, however, the foregoing shall not waive or release any causes of action arising out of (i) any contractual obligations owing by any such party or (ii) the willful misconduct, gross negligence, intentional fraud or criminal conduct of any such party.

11.3 Reserved

11.4 Reserved

11.5 Exculpation

To the fullest extent provided by applicable law, neither the Debtor or any of its officers, directors, advisors, agents or Professionals, nor the Committee, its members, in their capacity as

such, or the individuals appointed to the Committee, in their capacity as such, or the Committee's Professionals shall have or incur any liability to any holder of a Claim or any other Entity for any action or omission in connection with, related to, or arising out of, the Chapter 11 Case, the preparation or formulation of the Plan, the pursuit of confirmation of the Plan, the consummation of the Plan, or the administration of the Plan, except for willful misconduct or gross negligence; provided, however, that nothing in this Plan shall, or shall be deemed to, release or exculpate the Debtor with respect to its obligations and covenants arising pursuant to this Plan.

ARTICLE 12

BAR DATES FOR CERTAIN CLAIMS

12.1 Bar Date for Professionals

Subject to the provisions of Sections 328, 330 and 331 of the Bankruptcy Code, all Professionals seeking an award by the Bankruptcy Court 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.

12.2 Bar Date for Administrative Expenses

No Administrative Claim (other than a Professional Administrative Claim) will be an Allowed Administrative Claim and such a Claim shall be forever barred and enjoined if a proof of such Claim was not filed by the applicable Administrative Claim Bar Date.

12.3 Bar Date for Rejection Claims

The bar date for rejection Claims is set forth in Section 8.3 of the Plan.

ARTICLE 13

MISCELLANEOUS PROVISIONS

13.1 Governing Law

EXCEPT TO THE EXTENT THAT THE BANKRUPTCY CODE OR OTHER FEDERAL LAW IS APPLICABLE, OR TO THE EXTENT A SCHEDULE OR EXHIBIT HEREOF OR INSTRUMENT, AGREEMENT OR OTHER DOCUMENT EXECUTED UNDER THE PLAN PROVIDES OTHERWISE, THIS PLAN, THE RIGHTS, DUTIES AND OBLIGATIONS ARISING UNDER THIS PLAN, AND ANY CLAIM OR CONTROVERSY DIRECTLY OR INDIRECTLY BASED UPON OR ARISING OUT OF THIS PLAN OR THE TRANSACTIONS CONTEMPLATED BY THIS PLAN (WHETHER BASED ON CONTRACT, TORT, OR ANY OTHER THEORY), INCLUDING ALL MATTERS OF CONSTRUCTION, VALIDITY AND PERFORMANCE, SHALL IN ALL RESPECTS BE GOVERNED BY AND INTERPRETED, CONSTRUED AND DETERMINED IN ACCORDANCE WITH, THE INTERNAL LAWS OF DELAWARE WITHOUT REGARD TO ANY CONFLICTS OF LAW PROVISION THAT WOULD REQUIRE THE APPLICATION OF THE LAW OF ANY OTHER JURISDICTION. THE FOREGOING NOTWITHSTANDING, THE LAW APPLICABLE TO ANY CAUSE OF ACTION PURSUED BY THE LIQUIDATION TRUSTEE SHALL BE DETERMINED BY APPLICABLE LAW AND SHALL NOT BE CONTROLLED OR AFFECTED, IN ANY WAY, BY THE PRECEDING SENTENCE.

13.2 Notices

All notices, requests and demands to be effective shall be in writing (including by facsimile transmission and email) and, unless otherwise expressly provided herein, shall be deemed to have been duly given or made when actually delivered or, in the Chapter 11 Case of notice by facsimile transmission, when received and telephonically confirmed, addressed as follows:

To the Debtor:

Stevens & Lee, P.C.
1818 Market St., 29th Floor
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13.3 Conflicts

In the event of any conflict or inconsistency between the terms of (a) the Plan (including all exhibits to the Plan), and (b) the Disclosure Statement, the terms of the Plan shall control.

13.4 Reservation of Rights

If the Plan is not confirmed by a Final Order, or if the Plan is confirmed and does not become effective, the rights of all parties in interest in the Chapter 11 Case are and shall be reserved in full. Any concessions or settlements reflected herein, if any, are made for purposes of the Plan only, and if the Plan does not become effective, no party in interest in the Chapter 11 Case shall be bound or deemed prejudiced by any such concession or settlement.

13.5 Binding Effect

The rights, benefits and obligations of any Entity named or referred to in the Plan, or whose actions may be required to effectuate the terms of the Plan shall be binding on, and shall inure to the benefit of, any heir, executor, administrator, successor or assign of such Entity (including, but not limited to, any trustee appointed for Debtor under Chapters 7 or 11 of the Bankruptcy Code). The Confirmation Order shall provide that the terms and provisions of the Plan and the Confirmation Order shall survive and remain effective after entry of any order which may be entered converting the Chapter 11 Case to a case under Chapter 7 of the Bankruptcy Code, and the terms and provisions of the Plan shall continue to be effective in this or any superseding Chapter 11 Case under the Bankruptcy Code.

Dated: ~~June 2,~~July 22, 2015

BAXANO SURGICAL, Inc.

By: /s/ John L. Palmer

John L. Palmer, Chief Executive Officer

EXHIBIT "A"

LIQUIDATION TRUST AGREEMENT

Document comparison by Workshare Compare on Wednesday, July 22, 2015
10:53:17 AM

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Document 2 ID	interwovenSite://RDIMAN01/SL1/1375314/4
Description	#1375314v4<SL1> - Second Amended Baxano Plan of Liquidation / Baxano Surgical, Inc. / General
Rendering set	Standard with color

Legend:	
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Style change	
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Deleted cell	
Moved cell	
Split/Merged cell	
Padding cell	

Statistics:	
	Count
Insertions	43
Deletions	30
Moved from	0
Moved to	0
Style change	0
Format changed	0
Total changes	73

LIQUIDATION TRUST AGREEMENT

Liquidation Trust Agreement (the “Agreement”) is made and entered into, as of the ____ day of ____, 2015, by and among Baxano Surgical, Inc. (the “Debtor”), a debtor-in-possession in proceedings under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware (the “Bankruptcy Court”), Case No. 14-12545-CSS and John L. Palmer, as Liquidation Trustee (the “Liquidation Trustee” and together with the Debtor, the “Parties”), and executed in connection with and pursuant to the terms of the Debtor’s ~~First~~Second Amended Plan of Liquidation (the “Plan”), dated ~~June 2~~July 22, 2015, and contemplated to be confirmed by an order of the Bankruptcy Court (the “Confirmation Order”). Capitalized terms used herein and not otherwise defined shall have the meanings ascribed to them in the Plan.

RECITALS

WHEREAS, on November 12, 2014 (the “Commencement Date”), a petition under chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”) was filed by the Debtor in the Bankruptcy Court (the “Case”); and

WHEREAS, on ____, 2015, the Bankruptcy Court entered an order (the “Confirmation Order”) confirming the Plan; and

WHEREAS, it is contemplated that the Plan will become effective on or about ____, 2015 (the “Effective Date”); and

WHEREAS, the Plan contemplates (a) the creation of a Liquidation Trust (the “Liquidation Trust”) and the creation of beneficial interests in the Liquidation Trust solely for the benefit of the Beneficiaries, and (b) the Liquidation Trust will be vested with all of the Debtor’s assets including, without limitation, the right to prosecute, settle, withdraw or resolve in any manner any and all Causes of Action (collectively, the “Liquidation Trust Assets”); and

WHEREAS, the Plan contemplates that, pursuant to Treasury Regulation Section 301.7701-4(d), the Liquidation Trust shall be created for the purpose of: (a) administering the Liquidation Trust Assets; (b) resolving all Disputed Claims; (c) pursuing the Causes of Action, and (d) making all distributions to the Beneficiaries provided for under the Plan (“Distributions”), with

no objective to continue or engage in the conduct of a trade or business, except to the extent reasonably necessary to and consistent with the liquidating purpose of the Liquidation Trust and the Plan; and

WHEREAS, the Liquidation Trust is intended to qualify as a “grantor trust” for U.S. federal income tax purposes, pursuant to Sections 671-677 of the Internal Revenue Code of 1986, as amended (the “IRC”), with the Beneficiaries to be treated as the grantors of the Liquidation Trust and deemed to be the owners of the Liquidation Trust Assets (subject to the rights of creditors of the Liquidation Trust), and consequently, the transfer of the Liquidation Trust Assets to the Liquidation Trust shall be treated as a deemed transfer of those assets from the Debtor and the Estate to the Beneficiaries followed by a deemed transfer by such Beneficiaries to the Liquidation Trust for federal income tax purposes; and

WHEREAS, the Plan provides that the Official Committee of Unsecured Creditors appointed in the Case (the “Committee”) shall select the Liquidation Trustee; and

WHEREAS, the Committee has selected John L. Palmer as Liquidation Trustee, and he has agreed to serve as the Liquidation Trustee.

NOW, THEREFORE, pursuant to the Plan and the Confirmation Order, in consideration of the promises, the mutual agreements of the parties contained herein, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged and affirmed, the Parties hereby agree as follows:

I. ESTABLISHMENT, PURPOSE AND FUNDING OF TRUST

1.1. Creation and Purpose of the Liquidation Trust. The Debtor and the Liquidation Trustee hereby create the Liquidation Trust for the primary purpose of liquidating and distributing the Liquidation Trust Assets to the Beneficiaries in accordance with the Plan, the Confirmation Order, and applicable tax statutes, rules, and regulations, and in an expeditious but orderly manner, with no objective to continue or engage in the conduct of a trade or business. In particular, the Liquidation Trustee shall (a) make continuing efforts to collect and reduce the Liquidation Trust Assets to Cash, (b) make timely Distributions and (c) not unduly prolong the duration of the Liquidation Trust.

56 **1.2. Declaration of Trust.** To declare the terms and conditions hereof, and in consideration
57 of the confirmation of the Plan, the Debtor and the Liquidation Trustee have executed this
58 Agreement and, effective on the Effective Date, the Debtor hereby irrevocably transfers to the
59 Liquidation Trust, all of the right, title, and interests of the Debtor in and to the Liquidation Trust
60 Assets, to have and to hold unto the Liquidation Trust and its successors and assigns forever, under
61 and subject to the terms of the Plan and the Confirmation Order for the benefit of the Beneficiaries
62 and their successors and assigns as provided for in this Agreement and in the Plan and the
63 Confirmation Order.

64 **1.3. Vesting of Estate Assets.** On the Effective Date, pursuant to the terms of the Plan, the
65 Liquidation Trust Assets (not otherwise abandoned pursuant to the terms of the Plan) shall be
66 vested in the Liquidation Trust, which also shall be authorized to obtain, liquidate, and collect all
67 of the Liquidation Trust Assets in the possession of third parties and pursue all of the Causes of
68 Action. Subject to the provisions of the Plan, all such Liquidation Trust Assets shall be delivered
69 to the Liquidation Trust free and clear of interests, Claims, Liens, or other encumbrances of any
70 kind except as otherwise provided in the Plan. The Liquidation Trustee shall have no duty to
71 arrange for any of the transfers contemplated hereunder and shall be conclusively entitled to rely
72 on the legality and validity of such transfers. Moreover, on the Effective Date, all privileges with
73 respect to any Liquidation Trust Assets, including the attorney/client privilege, to which the
74 Debtor is entitled, shall be automatically vested in, and available for assertion by or waiver by the
75 Liquidation Trustee on behalf of the Liquidation Trust. To the extent any of the foregoing does not
76 automatically occur on the Effective Date or is not effectuated through the Confirmation Order or
77 this Agreement, the Debtor shall, on the Effective Date, execute such other and further documents
78 as are reasonably necessary to effectuate all of the foregoing.

79 **1.4. Funding of the Trust.** The Liquidation Trust shall be funded, on the Effective Date,
80 with the Liquidation Trust Assets, as provided for in the Plan and in the Confirmation Order.

81 **1.5. Acceptance by Liquidation Trustee.** The Liquidation Trustee hereby accepts the trust
82 imposed upon it by this Agreement and agrees to observe and perform the trust on and subject to
83 the terms and conditions set forth in this Agreement, the Plan, and the Confirmation Order. In

connection with and in furtherance of the purposes of the Liquidation Trust, the Liquidation Trustee hereby accepts the transfer of the Liquidation Trust Assets.

1.6. Name of the Liquidation Trust. The Liquidation Trust established hereby shall be known as the “Baxano Liquidation Trust”.

1.7. Statement of Intent, No Partnership. The Parties intend (i) the Liquidation Trust to qualify as a “grantor trust” for U.S. federal income tax purposes, (ii) that the Liquidation Trust shall not be a partnership or joint venture, and (iii) that no Party shall be a partner or joint venturer of any other Party, for any purpose, and the provisions of this Agreement shall not be construed otherwise.

1.8. Separate Books and Records.

(a) Upon receipt of the Liquidation Trust Assets, the Liquidation Trustee shall keep and maintain in segregated books and records, or as otherwise provided in this Agreement, an accounting of the Liquidation Trust Assets being held in trust for the Beneficiaries of the Debtor. The separate books and records are referred to in this Agreement the “Ledger.”

(b) The Liquidation Trustee shall allocate to the Ledger (i) the income and gains from any investment of Liquidation Trust Assets, as well as the proceeds from the sale, transfer or other disposition of Liquidation Trust Assets (collectively, “Gains”), and (ii) the losses incurred from any investment of Liquidation Trust Assets, as well as losses from the sale, transfer or other disposition of Liquidation Trust Assets, as well as the fees and expenses payable pursuant to this Agreement (collectively, “Expenses”), to the Ledger pro rata in proportion to the interest the Beneficiaries have in the Liquidation Trust Assets as a whole.

II. THE LIQUIDATION TRUSTEE

2.1. Appointment. The Liquidation Trustee has been appointed pursuant to the provisions of the Plan. The Liquidation Trustee’s appointment shall continue until the earlier of (a) the termination of the Liquidation Trust or (b) the Liquidation Trustee’s resignation, death, or removal.

110 **2.2. General Powers.** Except as otherwise provided in this Agreement, the Plan, or the
111 Confirmation Order, the Liquidation Trustee shall control and exercise authority over the
112 Liquidation Trust Assets, over the acquisition, management, and disposition thereof, and over the
113 management and conduct of the business of the Liquidation Trust. No Person dealing with the
114 Liquidation Trust shall be obligated to inquire into the Liquidation Trustee's authority in
115 connection with the acquisition, management, or disposition of Liquidation Trust Assets. Without
116 limiting the foregoing, but subject to the Plan, the Confirmation Order, and other provisions of this
117 Agreement, the Liquidation Trustee shall be expressly authorized to, with respect to the
118 Liquidation Trust and the Liquidation Trust Assets:

119 (a) Exercise all power and authority that may be or could have been exercised,
120 commence all proceedings that may be or could have been commenced, and take all actions that
121 may be or could have been taken with respect to the Liquidation Trust Assets by any officer,
122 director, shareholder, or other party acting in the name of the Debtor or the Estate with like effect
123 as if duly authorized, exercised, and taken by action of such officers, directors, shareholders, or
124 other party.

125 (b) Open and maintain bank accounts on behalf of or in the name of the Liquidation
126 Trust, calculate and make Distributions, and take other actions consistent with the Plan and the
127 implementation thereof, including the establishment, re-evaluation, adjustment, and maintenance
128 of appropriate reserves, in the name of the Liquidation Trust.

129 (c) Receive, manage, invest, supervise, and protect the Liquidation Trust Assets,
130 subject to the limitations provided herein.

131 (d) Hold legal title to any and all Liquidation Trust Assets.

132 (e) Subject to the applicable provisions of the Plan and this Agreement, collect and
133 liquidate all Liquidation Trust Assets pursuant to the Plan.

134 (f) Review, and where appropriate, object to claims, and supervise and administer the
135 commencement, prosecution, settlement, compromise, withdrawal, or resolution of all Disputed
136 Claims and the Distributions to the Beneficiaries and creditors of the Liquidation Trust, in any

manner permitted by this Agreement, the Plan, and the Confirmation Order or as approved by the Bankruptcy Court.

(g) Seek to extend any Claims Objection Bar Date, whether through motion or otherwise.

(h) Commence, prosecute, compromise, settle, withdraw, abandon, or resolve all Causes of Action in any manner permitted by this Agreement, the Plan, and the Confirmation Order or as approved by the Bankruptcy Court.

(i) Seek a determination of tax liability under Section 505 of the Bankruptcy Code; (2) file, if necessary, any and all tax and information returns required with respect to the Liquidation Trust; (3) make tax elections for and on behalf of the Liquidation Trust; and (4) pay taxes, if any, payable for and on behalf of the Liquidation Trust.

(j) Pay all lawful expenses, debts, charges, taxes, and liabilities of the Liquidation Trust.

(k) Take all other actions consistent with the provisions of the Plan which the Liquidation Trustee deems reasonably necessary or desirable to administer the Plan.

(l) Make Distributions to the Beneficiaries, and to creditors of the Liquidation Trust as provided for, or contemplated by, the Plan, the Confirmation Order or this Agreement.

(m) Request and require as a condition to receiving a distribution under the Plan a W-9 or similar federal tax form for any party who is entitled to receive distributions on account of a Claim;

(n) Withhold from the amount distributable to any Person or Entity such amount as may be sufficient to pay any tax or other charge which the Liquidation Trustee has determined, based upon the advice of its agents or professionals, may be required to be withheld therefrom under the income tax laws of the United States or of any state or political subdivision thereof.

(o) Enter into any agreement or execute any document or instrument required by or consistent with the Plan, the Confirmation Order, or this Agreement and perform all obligations thereunder.

(p) Subject to Section 4.5 of this Agreement, purchase and carry all insurance policies and pay all insurance premiums and costs it deems reasonably necessary or advisable.

(q) Implement, enforce, or discharge all of the terms, conditions, and all other provisions of, and all duties and obligations under, the Plan, the Confirmation Order, and this Agreement.

(r) Employ and compensate attorneys, accountants, appraisers, or other parties necessary to assist in the proper administration of the Liquidation Trust, including attorneys, accountants, appraisers, or other parties previously employed by the Debtor, without the necessity of approval of the Bankruptcy Court.

(s) Undertake all administrative functions in the Chapter 11 Case, including the ultimate closing of the Chapter 11 Case.

(t) Invest in demand and time deposits in banks or savings institutions, or temporary investments such as short term certificates of deposit or Treasury bills or other investments that a “Liquidation Trust” within the meaning of Treasury Regulation Section 301.7701-4(d) may be permitted to hold, pursuant to the Treasury Regulations or any modification in the Internal Revenue Services (“IRS”) guidelines, whether set forth in IRS rulings, revenue procedures, other IRS pronouncements or otherwise.

(u) Hire former employees of the Debtor to the extent their services are needed to assist in the wind down of the Estate.

2.3. Limitations on the Liquidation Trustee. Notwithstanding anything under applicable law, this Agreement or the Plan to the contrary, the Liquidation Trustee shall not do or undertake any of the following, provided, however, that nothing in this Agreement shall be deemed to prevent the Liquidation Trustee from taking, or failing to take, any action that, based upon the

advice of counsel, it is obligated to take (or fail to take) in the performance of any fiduciary or similar duty which the Liquidation Trustee owes to the Beneficiaries or any other Person.

(a) Take, or fail to take, any action that would jeopardize treatment of the Liquidation Trust as a “Liquidation Trust” for federal income tax purposes.

(b) Receive transfers of any listed stocks or securities, any readily-marketable assets or any operating assets of a going business, except as is absolutely necessary or required under the Plan and the Confirmation Order; provided, however, that in no event shall the Liquidation Trustee receive any such investment that would jeopardize treatment of the Liquidation Trust as a “Liquidation Trust” for federal income tax purposes.

(c) Exercise any investment power other than the power to invest in demand and time deposits in banks or savings institutions, or temporary investments such as short term certificates of deposit or Treasury bills or other investments that a “Liquidation Trust” within the meaning of Treasury Regulation Section 301.7701-4(d) may be permitted to hold, pursuant to the Treasury Regulations or any modification in the IRS guidelines, whether set forth in IRS rulings, revenue procedures, other IRS pronouncements or otherwise.

(d) Receive or retain any operating assets of a going business, a partnership interest in a partnership that holds operating assets, or fifty percent (50%) or more of the stock of a corporation with operating assets; provided, however that in no event shall the Liquidation Trustee receive or retain any such asset or interest that would jeopardize treatment of the Liquidation Trust as a “Liquidation Trust” for federal income tax purposes.

(e) Notwithstanding any of the foregoing, the Liquidation Trustee shall not be prohibited from engaging in any trade or business on its own account, provided that such activity does not interfere with the Liquidation Trustee’s administration of the Liquidation Trust or the tax status of the Liquidation Trust.

2.4. Court Approval of Liquidation Trustee Actions. Except as provided in the Plan or otherwise specified in this Agreement, the Liquidation Trustee need not obtain the order or approval of the Bankruptcy Court (or any other court) in the exercise of any power, rights, or discretion conferred hereunder, or account to the Bankruptcy Court (or any other court). The

Liquidation Trustee shall exercise its business judgment for the benefit of the Beneficiaries in order to maximize the value of the Liquidation Trust Assets and Distributions, giving due regard to the cost, risk, and delay of any course of action. Notwithstanding the foregoing, the Liquidation Trustee shall have the right to submit to the Bankruptcy Court any question or questions regarding which the Liquidation Trustee may desire to have explicit approval of the Bankruptcy Court for the taking of any specific action proposed to be taken by the Liquidation Trustee with respect to the Liquidation Trust Assets, this Liquidation Trust, the Agreement, the Plan, including the administration and distribution of the Liquidation Trust Assets and the sale of any Liquidation Trust Asset free and clear of any and all liens, claims and encumbrances. The Bankruptcy Court shall retain jurisdiction for such purposes and shall approve or disapprove any such proposed action upon motion by the Liquidation Trustee, provided, however, if the Bankruptcy Court declines to exercise such jurisdiction or determines that it does not have such jurisdiction, the Liquidation Trustee may seek approval of any such proposed action from any court of competent jurisdiction.

2.5. Compensation of Liquidation Trustee and its Agents and Professionals and Expenses of the Liquidation Trust.

(a) The Liquidation Trustee will be compensated as follows: (a) a non-contingent fee equal to \$350 per hour, but not more than \$20,000 in any twelve (12) month period, plus (ii) a percentage of all recoveries on account of D&O Causes of Action and Chapter 5 Claims equal to the maximum percentages payable to a Chapter 7 trustee pursuant to Section 326(a) of the Bankruptcy Code at each level of distribution (with the said recoveries treated as if they were Chapter 7 distributions), plus (iii) the reimbursement of all reasonable out-of-pocket expenses incurred in connection with the Liquidation Trust Agreement..

(b) . Any successor to the Liquidation Trustee shall be entitled to the compensation provided herein, plus the reimbursement of reasonable out-of-pocket expenses from the date of such successor's appointment.

(c) The Liquidation Trustee's fees shall be paid monthly, in arrears, from the Liquidation Trust Assets by check or wire transfer on the fifth business day of each month

commencing in the month following the Effective Date; provided, however, that the first monthly payment shall be pro-rated.

(d) The Liquidation Trustee may pay the reasonable expenses of the Liquidation Trust, including salaries of employees and reasonable fees and expenses of retained professionals, including contingency fees, in each case from the Liquidating Trust Assets in the ordinary course.

2.6. Consultation Rights of Holders of Deferred Professional Administrative Claims and Deferred Hercules Claim. Until the Deferred Hercules Claim and the Deferred Professional Administrative Claims are paid in full, the Liquidation Trustee, upon reasonable request by any holder of such Claims, shall consult with such holder and respond to its reasonable inquiries and requests for information concerning all non-privileged matters relating to the Liquidation Trust and the implementation of the Plan, including but not limited to the status of litigation, the reasonableness of the fees and expenses incurred by the Trust and the Liquidation Trustee and information relating to income expenses and balances on hand in the Liquidation Trust.

2.7. Replacement of the Liquidation Trustee. The Liquidation Trustee may resign at any time upon thirty (30) days' written notice Filed with the Bankruptcy Court (or, if the Case has been closed, with any other court of competent jurisdiction), provided that such resignation shall only become effective upon the appointment of a permanent or interim successor Liquidation Trustee. The Liquidation Trustee may be removed by the Bankruptcy Court (or, if the Case has been closed, by any other court of competent jurisdiction) upon application and after notice and a hearing, which application may be brought by any Beneficiary. Counsel to the Liquidation Trust as of the date any resignation or removal of the Liquidation Trustee shall provide notice of such resignation or removal to the United States Trustee and, if the Case has not been closed, shall File a notice of such resignation or removal. In the event of the resignation or removal of the Liquidation Trustee, any Beneficiary shall have standing to seek appointment of a successor Liquidation Trustee ~~shall be appointed~~ by the Bankruptcy Court (or, if the Case has been closed, by any other court of competent jurisdiction). Upon its appointment, the successor Liquidation Trustee, without any further act, shall become fully vested with all of the rights, powers, duties, and obligations of its predecessor and all responsibilities of the predecessor Liquidation Trustee relating to the Liquidation Trust shall be terminated. In the event the Liquidation Trustee's appointment

terminates by reason of death, dissolution, liquidation, resignation, or removal (other than removal as a result of the bad faith, willful misconduct and/or gross negligence of the Liquidation Trustee), such Liquidation Trustee or its heirs or representative, as the case shall be, shall be immediately compensated for all reasonable fees and expenses accrued through the effective date of termination, whether or not previously invoiced.

2.8. Liquidation Trust Continuance. The death, dissolution, liquidation, resignation, or removal of the Liquidation Trustee shall not terminate the Liquidation Trust or revoke any existing agency created by the Liquidation Trustee pursuant to this Agreement or invalidate any action theretofore taken by the Liquidation Trustee, and the provisions of this Agreement shall be binding upon and inure to the benefit of the successor Liquidation Trustee and all its successors or assigns.

III. RESERVED

IV. RESERVED

V. LIABILITY OF LIQUIDATION TRUSTEE

5.1. Standard of Care; Exculpation. Neither the Liquidation Trustee, nor any director, officer, affiliate, employee, employer, professional, successors, assigns, agent, or representative of the Liquidation Trustee (each, an “Exculpated Party” and collectively, the “Exculpated Parties”) shall be liable for any losses, claims, damages, liabilities, obligations, settlements, proceedings, suits, judgments, causes of action, litigation, actions, or investigations, (whether civil or administrative and whether sounding in tort, contract, or otherwise), penalties, costs, and expenses, including reasonable fees and disbursements (collectively referred to herein as “Losses”), whether or not in connection with litigation in which any Exculpated Party is a party, or enforcing this Agreement (including these exculpation provisions), as and when imposed on the Liquidation Trustee, incurred, caused by, relating to, based upon or arising out of (directly or indirectly) the Liquidation Trustee’s execution, delivery, and acceptance of or the performance or nonperformance of its powers, duties and obligations under this Agreement, the Plan, or the Confirmation Order or as may arise by reason of any action, omission, or error of an Exculpated Party; provided, however, that the foregoing limitation shall not apply to any Losses suffered or incurred by any holder of a Claim or Interest or Beneficiary that are found in a final judgment by a

court of competent jurisdiction (not subject to further appeal) to have resulted primarily and directly from acts of bad faith, gross negligence or willful misconduct of such Exculpated Party. Every act taken or omitted, power exercised, or obligation assumed by the Liquidation Trust or any Exculpated Party pursuant to the provisions of this Agreement shall be held to be taken or omitted, exercised, or assumed, as the case may be, by the Liquidation Trust or any Exculpated Party acting for and on behalf of the Liquidation Trust and not otherwise; provided, however, that none of the foregoing Entities or Persons are deemed to be responsible for any other such Entities' or Persons' actions or intentions. Except as provided in the first proviso of the first sentence of this Section 5.1, every Person, firm, corporation, or other Entity contracting or otherwise dealing with or having any relationship with the Liquidation Trust or any Exculpated Party shall have recourse only to the Liquidation Trust Assets for payment of any liabilities or other obligations arising in connection with such contracts, dealings or relationships and the Liquidation Trust and the Exculpated Parties shall not be individually liable therefore. In no event shall the Liquidation Trust or any Exculpated Party be liable for indirect, punitive, special, incidental, or consequential damage or loss (including but not limited to lost profits) whatsoever, even if the Liquidation Trust or such Exculpated Party has been informed of the likelihood of such loss or damages and regardless of the form of action. Any liability of the Liquidation Trustee under this Agreement will be limited to the amount of annual fees actually paid to the Liquidation Trustee.

5.2. Indemnification.

(a) The Liquidation Trustee and any director, officer, affiliate, employee, employer, professional, successor, assign, agent, or representative of the Liquidation Trustee (each, an "Indemnified Party" and collectively, the "Indemnified Parties") shall be defended, held harmless, and indemnified from time to time by the Liquidation Trust against any and all Losses, including, without limitation, the costs for counsel or others in investigating, preparing, defending, or settling any action or claim, whether or not in connection with litigation in which any Indemnified Party is a party, or enforcing this Agreement (including these indemnity provisions), as and when imposed on the Liquidation Trustee, incurred, caused by, relating to, based upon or arising out of (directly or indirectly) the Liquidation Trustee's execution, delivery, and acceptance of or the performance or nonperformance of its powers, duties, and obligations under this Agreement, the Plan, or the Confirmation Order or as may arise by reason of any action, omission, or error of an indemnified

Party; provided, however, such indemnity shall not apply to any such Losses to the extent it is found in a final judgment by a court of competent jurisdiction (not subject to further appeal) to have resulted primarily and directly from acts of bad faith, gross negligence, or willful misconduct of such Indemnified Party. Satisfaction of any obligation of the Liquidation Trust arising pursuant to the terms of this Section shall be payable only from the Liquidation Trust Assets, shall be advanced prior to the conclusion of such matter and such right to payment shall be prior and superior to any other rights to receive a distribution of the Liquidation Trust Assets.

(b) The Liquidation Trust shall promptly pay to the indemnified Party the expenses set forth in subparagraph (a) above upon submission of invoices therefore on a current basis. Each indemnified Party hereby undertakes, and the Liquidation Trust hereby accepts its undertaking, to repay any and all such amounts so paid by the Liquidation Trust if it shall ultimately be determined that such Indemnified Party is not entitled to be indemnified therefore under this Agreement.

5.3. No Liability for Acts of Successor/Predecessor Liquidation Trustees. Upon the appointment of a successor Liquidation Trustee and the delivery of the Liquidation Trust Assets to the successor Liquidation Trustee, the predecessor Liquidation Trustee and any director, officer, affiliate, employee, employer, professional, agent, or representative of the predecessor Liquidation Trustee shall have no further liability or responsibility with respect ~~thereto~~ to the Liquidation Trust Assets. A successor Liquidation Trustee shall have no duty to examine or inquire into the acts or omissions of its immediate or remote predecessor ~~and no~~ but may, in his or her sole discretion, undertake such examination or inquiry. No successor Liquidation Trustee shall be in any way liable for the acts or omissions of any predecessor Liquidation Trustee unless a successor Liquidation Trustee expressly assumes such responsibility. A predecessor Liquidation Trustee shall have no liability for the acts or omissions of any immediate or subsequent successor Liquidation Trustee for any events or occurrences subsequent to the cessation of its role as Liquidation Trustee.

5.4. Insurance. The Liquidation Trustee may purchase, using the Liquidation Trust Assets, and carry all insurance policies and pay all insurance premiums and costs the Liquidation Trustee deems reasonably necessary or advisable, including, without limitation, purchasing any errors and omissions insurance with regard to any Losses it may incur, arising out of or due to its actions or

omissions, or consequences of such actions or omissions, other than as a result of its fraud or willful misconduct, with respect to the implementation and administration of the Plan or this Agreement.

5.5. **Survival.** The provisions of this Article V shall survive the termination of this Agreement and the death, resignation, removal, liquidation, dissolution, or replacement of the Liquidation Trustee.

VI. GENERAL PROVISIONS CONCERNING ADMINISTRATION OF THE LIQUIDATION TRUST

6.1. **Register of Beneficiaries.** The Liquidation Trustee shall maintain at all times a register of the names, distribution addresses, amounts of Allowed Claims, and the ratable interests in the Liquidation Trust of the Beneficiaries (the “Register”). The initial Register shall be delivered to the Liquidation Trustee by the Debtor and shall be based on the list of holders of Claims maintained by the Debtor as of the Effective Date and prepared in accordance with the provisions of the Plan and the Confirmation Order. All references in this Agreement to holders of beneficial interests in the Liquidation Trust shall be read to mean holders of record as set forth in the Register maintained by the Liquidation Trustee and shall exclude any beneficial owner not recorded on such Register. The Liquidation Trustee shall cause the Register to be kept at its office or at such other place or places as may be designated by the Liquidation Trustee from time to time.

6.2. Books and Records.

(a) On the Effective Date, the Debtor shall transfer and assign to the Liquidation Trust full title to, and the Liquidation Trust shall be authorized to take possession of, all of the books and records of the Debtor. The Liquidation Trust shall have the responsibility of storing and maintaining books and records transferred hereunder until the Case is closed, after which time such books and records may, to the extent not prohibited by applicable law, be abandoned or destroyed without further Bankruptcy Court order. For the purpose of this Section 6.2, books and records include computer generated or computer maintained books and records and computer data, as well as electronically generated or maintained books and records or data, along with books and

records of the Debtor maintained by or in possession of third parties and all of the claims and rights of the Debtor in and to its books and records, wherever located.

(b) The Liquidation Trustee also shall maintain in respect of the Liquidation Trust and the Beneficiaries books and records relating to the Liquidation Trust Assets and any income or proceeds realized therefrom and the payment of expenses of and claims against or assumed by the Liquidation Trust in such detail and for such period of time as may be necessary to enable it to make full and proper reports in respect thereof. Except as expressly provided in this Agreement, the Plan, or the Confirmation Order, or as may be required by applicable law, nothing in this Agreement is intended to require the Liquidation Trust to file any accounting or seek approval of any court with respect to the administration of the Liquidation Trust, or as a condition for making any payment or distribution out of the Liquidation Trust Assets.

6.3. Confidentiality of Human Resources and Medical Information. The Liquidation Trustee and the Debtor will not disclose to any Person, either directly or indirectly, any information related to the Debtor's employees, including medical information, unless otherwise permitted or required by applicable law; provided, that the Liquidation Trustee and the Debtor may disclose such information to their respective directors, officers, stockholders, employees, agents, or advisors (including attorneys, accountants, and financial advisors) who need to know such information to consummate the Plan who are bound by confidentiality obligations in favor of the Liquidation Trustee and the Debtor.

6.4. Reserved.

6.5. Final Accounting of Liquidation Trustee. The Liquidation Trustee (or any such successor Liquidation Trustee) shall within ninety (90) days after the termination of the Liquidation Trust or the death, dissolution, liquidation, resignation, or removal of the Liquidation Trustee, render an accounting containing the following information:

(a) A description of the Liquidation Trust Assets.

(b) A summarized accounting in sufficient detail of all gains, losses, receipts, disbursements and other transactions in connection with the Liquidation Trust and the Liquidation Trust Assets during the Liquidation Trustees term of service, including their source and nature.

(c) Separate entries for all receipts of principal and income.

(d) The ending balance of all Liquidation Trust Assets as of the date of the accounting, including the Cash balance on hand and the name(s) and locations) of the depository or depositories where the Cash is kept.

(e) All known liabilities of the Liquidation Trust.

(f) All pending actions.

6.6. Filing of Accounting. The final accounting described in Section 6.5 shall be filed with the Bankruptcy Court (or, if the Case has been closed, with another court of competent jurisdiction) and all Beneficiaries shall have notice that the final accounting has been filed and an opportunity to have a hearing on the approval of the accounting and the discharge and release of the Liquidation Trustee.

VII. BENEFICIAL INTERESTS AND BENEFICIARIES

7.1. Trust Beneficial Interests. Each holder of an Allowed Claim, shall be entitled to receive beneficial interests in accordance with the treatment of such Claim under the Plan, and shall be entitled to Distributions as set forth in the Plan.

7.2. Interest Beneficial Only. Ownership of a beneficial interest in the Liquidation Trust shall not entitle any Beneficiary to any title in or to the Liquidation Trust Assets or to any right to call for a partition or division of the Liquidation Trust Assets or to require an accounting.

7.3. Evidence of Beneficial Interest. Ownership of a beneficial interest in the Liquidation Trust shall not be evidenced by any certificated security, or receipt or in any other form or manner whatsoever, except as maintained on the books and records of the Liquidation Trust by the Liquidation Trustee, which may be the Register.

7.4. Exemption from Registration. The parties hereto intend that the rights of the holders of the beneficial interests arising under this Agreement shall not be “scantiest” under applicable laws, but none of the parties hereto represents or warrants that such rights shall not be securities or shall be entitled to exemption from registration under applicable securities laws. If such rights

constitute securities, the parties hereto intend for the exemption from registration provided by Section 1145 of the Bankruptcy Code and by other applicable law to apply to their issuance under the Plan.

7.5. Transfers of Beneficial Interests. Beneficial interests in the Liquidation Trust shall be nontransferable except upon death of the holder or by operation of law. The Liquidation Trust shall not have any obligation to recognize any transfer of Claims occurring after the Record Date. Only those holders of Claims of record stated on the transfer Ledger as of the close of business on the Record Date, to the extent applicable, shall be entitled to be recognized for all purposes hereunder.

7.6. Absolute Owners. The Liquidation Trustee may deem and treat the Beneficiary reflected as the owner of a beneficial interest on the Register as the absolute owner thereof for the purposes of receiving Distributions and payments on account thereof for federal and state income tax purposes and for all other purposes whatsoever.

7.7. Change of Address. A Beneficiary may, after the Effective Date, select an alternative Distribution address by written notice to the Liquidation Trustee identifying such alternative distribution address. Absent such notice, the Liquidation Trustee shall not recognize any such change of distribution address. Such notification shall be effective only upon receipt by the Liquidation Trustee.

7.8. Effect of Death, Dissolution, Incapacity, or Bankruptcy of Beneficiary. The death, dissolution, incapacity, or bankruptcy of a Beneficiary during the term of the Liquidation Trust shall not operate to terminate the Liquidation Trust during the term of the Liquidation Trust nor shall it entitle the representative or creditors of the deceased, incapacitated or bankrupt Beneficiary to an accounting or to take any action in any court or elsewhere for the Distribution of the Liquidation Trust Assets or for a partition thereof nor shall it otherwise affect the rights and obligations of the Beneficiary under this Agreement or in the Liquidation Trust.

7.9. Standing. Except as expressly provided in this Agreement, the Plan or the Confirmation Order, a Beneficiary does not have standing to direct the Liquidation Trustee to do

or not to do any act or to institute any action or proceeding at law or in equity against any party upon or with respect to the Liquidation Trust Assets.

VIII. DISTRIBUTIONS

8.1. Distributions to Beneficiaries from Liquidation Trust Assets. All Distributions shall be made in accordance with the Plan, the Confirmation Order, and this Agreement and from the Liquidation Trust Assets (or from the income and proceeds realized from the Liquidation Trust Assets). The Liquidation Trustee shall honor all subordination agreements with respect to the priority of Allowed General Unsecured Claims that are entitled to receive Distributions from the Liquidation Trust but only if (a) the entitlement to the benefit of such subordination agreement was stated in a proof of claim timely filed by the holder of the allegedly senior Claim, and (b) if, at least thirty (30) days in advance of any such Distribution, the Liquidation Trustee has provided notice to the parties to any such subordination agreement that such Distribution will be made, then at least ten (10) days in advance of such Distribution the Liquidation Trustee has been provided with written confirmation from all of the parties to such agreement detailing the impact of such agreement on such Distribution. If there is a dispute regarding the applicability and/or impact of a subordination agreement on any Distribution, (x) the party or parties claiming seniority under the subordination agreement shall be required to seek court relief and, (y) provided the Liquidation Trustee receives evidence of the filing of such request at least ten (10) days in advance of any such Distribution, (i) the Liquidation Trustee shall refrain from releasing the disputed Distribution until such litigation has been concluded or settled, and (ii) upon the settlement of such dispute and/or the entry of a final order resolving such dispute, the Liquidation Trustee shall effect the disputed Distribution pursuant to the terms of any such settlement or final order. In the event the conditions stated in subsections 8.1(a) and (b) or 8.1(y) are not timely satisfied, the Liquidation Trustee may effect the applicable Distributions without regard to the alleged subordination agreement. Distributions of net income and proceeds of sales of assets, minus amounts reasonably necessary to meet claims and contingent liabilities (including disputed claims), shall be made at least annually.

494 **IX. TAXES**

495 **9.1. Income Tax Status.** Consistent with Revenue Procedure 94-45, 1994-2 CB 684, the
 496 Liquidation Trust shall be treated as a Liquidation Trust pursuant to Treasury Regulation Section
 497 301.7701-4(d) and as a grantor trust pursuant to IRC Sections 671-677. As such, the Beneficiaries
 498 will be treated as both the grantors and the deemed owners of the Liquidation Trust. Any items of
 499 income, deduction, credit, and loss of the Liquidation Trust shall be allocated for federal income
 500 tax purposes to the Beneficiaries in accordance with Section 1.8 hereof.

501 **9.2. Tax Returns.** In accordance with IRC Section 6012 and Treasury Regulation Section
 502 1.671-4(a), the Liquidation Trust shall file with the IRS annual tax returns on Form 1041. In
 503 addition, the Liquidation Trust shall file in a timely manner such other tax returns, including any
 504 state and local tax returns, as are required by applicable law and pay any taxes shown as due
 505 thereon out of the Liquidation Trust Assets (or the income or proceeds thereof). Within a
 506 reasonable time following the end of the taxable year, the Liquidation Trust shall send to each
 507 Beneficiary a separate statement setting forth the Beneficiary's share of items of income, gain,
 508 loss, deduction or credit and will instruct each such Beneficiary to report such items on their
 509 federal income tax returns- provided, however, no such statement shall be required to be sent to
 510 any Beneficiary who, in the taxable year in question, does not have a share of items of income,
 511 gain, loss, deduction or credit

512 **9.3. Withholding of Taxes and Reporting Related to Liquidation Trust Operations.**
 513 The Liquidation Trust shall comply with all withholding and reporting requirements imposed by
 514 any federal, state, local, or foreign taxing authority, and all distributions made by the Liquidation
 515 Trust shall be subject to any such withholding and reporting requirements. To the extent that the
 516 operation of the Liquidation Trust or the liquidation of the Liquidation Trust Assets creates a tax
 517 liability, the Liquidation Trust shall promptly pay such tax liability out of the Liquidation Trust
 518 Assets (or the income or proceeds thereof) and any such payment shall be considered a cost and
 519 expense of the operation of the Liquidation Trust payable without Bankruptcy Court order. The
 520 Liquidation Trust may reserve a sum, the amount of which shall be determined by the Liquidation
 521 Trust in its sole discretion, sufficient to pay the accrued or potential tax liability arising out of the
 522 operations of the Liquidation Trust or the operation of the Liquidation Trust Assets. The

Liquidation Trustee, on behalf of the Liquidation Trust, may enter into agreements with taxing authorities or other governmental units for the payment of such amounts as may be withheld. Any federal, state, or local withholding taxes or other amounts required to be withheld under applicable law shall be deducted from Distributions hereunder. All Beneficiaries shall be required to provide any information necessary to effect the withholding of such taxes.

9.4. Valuations. As soon as possible after the Effective Date, the Liquidation Trustee shall make a good faith determination of the value of all of the Liquidation Trust Assets. The Liquidation Trustee shall establish appropriate means to apprise the Beneficiaries of such valuation and such valuation shall be used consistently by all parties (including, without limitation, the Liquidation Trust, and the Beneficiaries) for all federal income tax purposes. The Liquidation Trustee also shall file (or cause to be filed) any other statements, returns, or disclosures relating to the Liquidation Trust that are required by any governmental unit.

9.5. Treatment of Disputed Reserves. Notwithstanding any other provision of this Agreement to the contrary, subject to definitive guidance from the IRS or a court of competent jurisdiction to the contrary, the Liquidation Trust shall (a) treat any Liquidation Trust Assets allocable to, or retained on account of, a Disputed Claim Reserve as held by one or more discrete trusts for federal income tax purposes, consisting of separate and independent shares to be established in respect of each Disputed Claim, in accordance with the trust provisions of the IRC (sections 641 et seq.), (b) treat as taxable income or loss of each Disputed Claim Reserve, with respect to any given taxable year, the portion of the taxable income or loss of the Liquidation Trust that would have been allocated to the holders of Disputed Claims had such Claims been Allowed on the Effective Date (but only for the portion of the taxable year with respect to which such Claims are unresolved), (c) treat as a distribution from the Disputed Claim Reserve any increased amounts distributed by the Liquidation Trust as a result of any Disputed Claims resolved earlier in the taxable year, to the extent such Distributions relate to taxable income or loss of the Disputed Claim Reserve determined in accordance with the provisions hereof, and (iv) to the extent permitted by applicable law, report consistent with the foregoing for state and local income tax purposes. All Beneficiaries shall report, for income tax purposes, consistent with the foregoing. In the event, and to the extent, any Cash retained on account of Disputed Claims in the Disputed Claim Reserve is insufficient to pay the portion of any such taxes attributable to the taxable income

arising from the assets allocable to, or retained on account of, Disputed Claims, such taxes shall be (a) reimbursed from any subsequent Cash amounts retained on account of Disputed Claims, or (b) to the extent such Disputed Claims have subsequently been resolved, deducted from any amounts distributable by the Liquidation Trustee as a result of the resolutions of such Disputed Claims.

9.6. Expedited Determination of Taxes. The Liquidation Trust may request an expedited determination of taxes of the Debtor and of the Liquidation Trust, including the Disputed Reserves, under section 505 of the Bankruptcy Code for all returns filed for, or on behalf of, the Debtor and the Liquidation Trust for all taxable periods through the termination of the Liquidation Trust.

X. TERMINATION OF LIQUIDATION TRUST

10.1. Termination of Liquidation Trust. The Liquidation Trustee shall be discharged and the Liquidation Trust shall be terminated, at such time as (a) all Disputed Claims have been resolved, (b) all of the Liquidation Trust Assets have been liquidated, (c) all duties and obligations of the Liquidation Trustee hereunder have been fulfilled, (d) all Distributions required to be made by the Liquidation Trustee under the Plan and this Agreement have been made, and (e) the Case has been closed. If the Liquidation Trust has not terminated pursuant to the foregoing at the end of five (5) years from the date of its creation, the Liquidation Trust will terminate unless within six (6) months after the end of such five (5) year term such court as shall have jurisdiction over the Liquidation Trust in accordance with Section 2.4 approves an extension of the term of the Liquidation Trust for a specified additional period of time.

10.2. Events upon Termination. At the conclusion of the term of the Liquidating Trust, the Liquidation Trustee shall distribute the Liquidation Trust Liquidation Trust Assets, if any, to the Beneficiaries, in accordance with the Plan, the Conformation Order, and this Liquidating Trust Agreement.

10.3. Winding Up, Discharge, and Release of the Liquidation Trustee. For the purposes of winding up the affairs of the Liquidation Trust at the conclusion of its term, the Liquidation Trustee shall continue to act as Liquidation Trustee until its duties under this Agreement have been fully discharged or its role as Liquidation Trustee is otherwise terminated under this Agreement

and the Plan. Upon a motion by the Liquidation Trustee, the Bankruptcy Court (or, if the Case has been closed or the Bankruptcy Court declines to exercise jurisdiction, any other court of competent jurisdiction) may enter an order relieving the Liquidation Trustee, its agents and employees of any further duties, discharging, and releasing the Liquidation Trustee and releasing its bond, if any.

XI. MISCELLANEOUS PROVISIONS

11.1. Amendments. The Liquidation Trustee may, with the approval of the Bankruptcy Court, modify, supplement, or amend this Agreement in any way that is not inconsistent with the Plan or the Confirmation Order.

11.2. Waiver. No failure by the Liquidation Trust or the Liquidation Trustee to exercise or delay in exercising any right, power, or privilege hereunder shall operate as a waiver, nor shall any single or partial exercise of any right, power, or privilege hereunder preclude any further exercise thereof, or of any other right, power, or privilege.

11.3. Cumulative Rights and Remedies. The rights and remedies provided in this Agreement are cumulative and are not exclusive of any rights under law or in equity.

11.4. No Bond Required. Notwithstanding any state law to the contrary, the Liquidation Trustee (including any successor Liquidation Trustee) shall be exempt from giving any bond or other security in any jurisdiction other than as provided under this Agreement.

11.5. Irrevocability. This Agreement and the Liquidation Trust created hereunder shall be irrevocable, except as otherwise expressly provided in this Agreement.

11.6. Tax Identification Numbers. The Liquidation Trustee may require any Beneficiary to furnish to the Liquidation Trustee its social security number or employer or taxpayer identification number as assigned by the IRS and the Liquidation Trustee may condition any Distribution to any Beneficiary upon the receipt of such identification number.

11.7. Relationship to the Plan. The principal purpose of this Agreement is to aid in the implementation of the Plan and, therefore, this Agreement incorporates and is subject to the provisions of the Plan and the Confirmation Order. In the event that any provision of this

Agreement is found to be inconsistent with a provision of the Plan or the Confirmation Order, the provisions of the Plan or the Confirmation Order, as applicable, shall control. In the event that any provision of the Plan is found to be inconsistent with a provision of the Confirmation Order, the Confirmation Order shall control.

11.8. Division of Liquidation Trust. Under no circumstances shall the Liquidation Trustee have the right or power to divide the Liquidation Trust unless authorized to do so by the Bankruptcy Court (or, if the Case has been closed or the Bankruptcy Court declines to exercise jurisdiction, any other court of competent jurisdiction).

11.9. Applicable Law. This Liquidation Trust shall be governed by and construed in accordance with the laws of the State of Delaware, without giving effect to rules governing the conflict of laws.

11.10. Retention of Jurisdiction. To the fullest extent permitted by law, the Bankruptcy Court shall retain exclusive jurisdiction over the Liquidation Trust after the Effective Date, including, without limitation, jurisdiction to resolve any and all controversies, suits and issues that may arise in connection therewith, including, without limitation, this Agreement, or any entity's obligations incurred in connection herewith, including without limitation, any action against the Liquidation Trustee or any professional retained by the Liquidation Trustee, in each case in its capacity as such. Each party to this Agreement hereby irrevocably consents to the exclusive jurisdiction of the Bankruptcy Court in any action to enforce, interpret or construe any provision of this Agreement or of any other agreement or document delivered in connection with this Agreement, and also hereby irrevocably waives any defense of improper venue, forum *non conveniens* or lack of personal jurisdiction to any such action brought in the Bankruptcy Court. Each party further irrevocably agrees that any action to enforce, interpret, or construe any provision of this Agreement will be brought only in the Bankruptcy Court. Each party hereby irrevocably consents to the service by certified or registered mail, return receipt requested, of any process in any action to enforce, interpret or construe any provision of this Agreement. The foregoing notwithstanding, after the Case is closed or if the Bankruptcy Court declines to exercise jurisdiction over any controversy, suit or issue that may arise in connection herewith or any entity's obligations incurred in connection herewith, including without limitation, any action

against the Liquidation Trustee or any professional retained by the Liquidation Trustee, such jurisdiction may be exercised by any other court of competent jurisdiction.

11.11. **Severability.** In the event that any provision of this Agreement or the application thereof to any person or circumstance shall be determined by the Bankruptcy Court to be invalid or unenforceable to any extent, the remainder of this Agreement, or the application of such provision to persons or circumstances, other than those as to which it is held invalid or unenforceable, shall not be affected thereby, and such provision of this Agreement shall be valid and enforced to the fullest extent permitted by law.

11.12. **Limitation of Benefits.** Except as otherwise specifically provided in this Agreement, the Plan or the Confirmation Order, nothing herein is intended or shall be construed to confer upon or to give any person other than the parties hereto and the Beneficiaries any rights or remedies under or by reason of this Agreement.

11.13. **Notices.** Except as provided in Section 12.10 of this Agreement, all notices, requests, demands, consents, and other communications hereunder shall be in writing and shall be deemed to have been duly given to a person, if delivered in person or by facsimile with an electromagnetic report of delivery or if sent by overnight mail, registered mail, certified mail, or regular mail, with postage prepaid, to the following addresses:

To the Debtor:	Stevens & Lee, P.C. 1818 Market Street, 29 th Floor Philadelphia, PA. 19103 Attn: Robert Lapowsky (215) 751-2866
To the Liquidation Trustee:	<u>Baxano Surgical Liquidating Trust</u> <u>1301 Skippack Pike</u> <u>Suite 7A-391</u> <u>Blue Bell PA 19422</u>
If to a Beneficiary:	To the name and distribution address set forth in the Register with respect to such Beneficiary.

The parties may designate in writing from time to time other and additional places to which notices may be sent. Promptly following the Effective Date, the Liquidation Trustee shall cause a notice of the Effective Date to be mailed to all Beneficiaries, which notice shall provide the above notice address for the Liquidation Trustee.

11.14. **Further Assurances.** From and after the Effective Date, the parties hereto covenant and agree to execute and deliver all such documents and notices and to take all such further actions as may reasonably be required from time to time to carry out the intent and purposes of this Agreement, and to consummate the transactions contemplated hereby.

11.15. **Integration.** This Agreement, the Plan, and the Confirmation Order constitute the entire agreement with, by and among the parties thereto, and there are no representations, warranties, covenants, or obligations except as set forth herein, in the Plan and in the Confirmation Order. This Agreement, together with the Plan and the Confirmation Order, supersede all prior and contemporaneous agreements, understandings, negotiations, and discussions, written or oral, of the parties hereto, relating to any transaction contemplated hereunder. Except as otherwise provided in this Agreement, the Plan or Confirmation Order, nothing herein is intended or shall be construed to confer upon or give any person other than the parties hereto and the Beneficiaries any rights or remedies under or by reason of this Agreement.

11.16. **Interpretation.** The enumeration and Section headings contained in this Agreement are solely for convenience of reference and shall not affect the meaning or interpretation of this Agreement or of any term or provision hereof. Unless context otherwise requires, whenever used in this Agreement the singular shall include the plural and the plural shall include the singular, and words importing the masculine gender shall include the feminine and the neuter, if appropriate, and vice versa, and words importing persons shall include partnerships, associations, and corporations. The words herein, hereby, and hereunder and words with similar import, refer to this Agreement as a whole and not to any particular Section or subsection hereof unless the context requires otherwise. Any reference to the "Liquidation Trustee" shall be deemed to include a reference to the "Liquidation Trust" and any reference to the "Liquidation Trust" shall be deemed to include a reference to the "Liquidation Trustee" except for the references in Sections 4.1 and 4.2, and such other provisions in which the context otherwise requires.

11.17. **Counterparts.** This Agreement may be signed by the parties hereto in counterparts, which, when taken together, shall constitute one and the same document, Delivery of an executed counterpart of this Agreement by facsimile or email in “pdf” format shall be equally effective as delivery of a manually executed counterpart.

IN WITNESS WHEREOF, the Parties hereto have either executed and acknowledged this Agreement, or caused it to be executed and acknowledged on their behalf by their duly authorized officers or representatives, all as of the date first above written.

BAXANO SURGICAL, INC.

By: _____
John L. Palmer, Chief Executive Officer

LIQUIDATION TRUSTEE

By: _____

Document comparison by Workshare Professional on Wednesday, July 22, 2015
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