Docket #0303 Date Filed: 4/8/2020

James C. Thoman, Esq. (*pro hac vice*)
HODGSON RUSS LLP
The Guaranty Building
140 Pearl Street, Suite 100
Buffalo, New York 14202
Telephone: (716) 856-4000
Facsimile: (716) 849-0349

Counsel to Integer Holdings Corporation

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

In Re:	§	Chapter 11
NUVECTRA CORPORATION,	§	Case No. 19-43090
Debtor.	§	

INTEGER HOLDINGS CORPORATION'S
OBJECTION TO CONFIRMATION OF THE DEBTOR'S
AMENDED CHAPTER 11 PLAN OF LIQUIDATION

Integer Holdings Corporation, formally known as Greatbatch, Inc. ("Integer"), on behalf of itself and its wholly-owned subsidiary, Greatbatch Ltd. ("Greatbatch"), hereby objects to confirmation of the Amended Plan of Liquidation of Nuvectra Corporation Under Chapter 11 of the Bankruptcy Code [Dkt. No. 253] (as may be amended, supplemented, or otherwise modified, the "Plan")[1] and respectfully states as follows.

BACKGROUND

1. On November 12, 2019 (the "Petition Date"), the Debtor commenced this case by filing a voluntary petition for relief under Chapter 11 of the Bankruptcy Code with the United States Bankruptcy Court for the Eastern District of Texas (the "Court").

[1] Capitalized terms used in this Objection, but not otherwise defined, have the meanings given in the Plan.

1943090200408000000000001

2. The Debtor remains in possession of its assets and continues to operate and manage its business as a debtor in possession pursuant to sections 1107 and 1108 of title 11 of the Bankruptcy Code.

3. On November 21, 2019, the Office of the United States Trustee appointed the Official Committee of Unsecured Creditors (the "Committee"), which continues to serve in this case.

4. Prior to the Petition Date, Greatbatch manufactured and supplied component devices for the Debtor's products. Greatbatch is a creditor of the Debtor as acknowledged by the Debtor in its schedules of assets and liabilities. Accordingly, Greatbatch is a party in interest with standing to object to the Plan pursuant to sections 1109(b) and 1128 of the Bankruptcy Code.

OBJECTION[2]

5. A debtor in bankruptcy bears the burden of proving each applicable element of 11 U.S.C. § 1129 by a preponderance of the evidence in order to attain confirmation of its plan. *See In re Barnes*, 309 B.R. 888, 895 (Bankr. N.D. Tex. 2004) (citing *In re T-H New Orleans Ltd. P'ship*, 116 F.3d 790, 801 (5th Cir. 1997)). In addition to the debtor's burden, bankruptcy courts have an independent duty to determine whether the plan has met all of the requirements for confirmation, whether specifically raised by dissenting creditors or not. *Williams v. Hibernia Nat'l Bank*, 850 F.2d 250, 253 (5th Cir. 1988).

[2] Should the Court confirm the Plan, Integer requests that that the confirmation order include language clarifying that nothing in the Plan or related documents, including the confirmation order, shall impair Integer's rights, remedies, or defenses in any litigation filed by or on behalf of the Debtor, including by the Plan Administrator, alleging damages or other remedies in connection with, relating to, or arising out of the Debtors' formation or business operations, and that any dispute regarding the scope or application of the releases, exculpations, and injunctions contained in the Plan be brought before the Court or such other court as the Court may direct.

6. As set forth more fully below, the Debtor will be unable to meet its burden to attain confirmation because the Plan (i) grants the Debtor a disguised discharge in the form of a broad, third-party release and injunction in violation of 11 U.S.C. § 1141(d)(3), and (ii) improperly releases and exculpates the Debtor's officers, directors, and various unnamed Affiliates and Representatives in contravention to 11 U.S.C. § 524(e) and binding Fifth Circuit precedent.

A. The Plan Violates Section 1141(d) of the Bankruptcy Code.

7. Section 1141(d)(3) of the Bankruptcy Code prohibits a corporate debtor that is liquidating under Chapter 11 and that will cease to do business post-confirmation from receiving a discharge. Specifically, § 1141(d)(3) states that:

> The confirmation of a plan does not discharge a debtor if—the plan provides for the liquidation of all or substantially all of the property of the estate; the debtor does not engage in business after consummation of the plan; and the debtor would be denied a discharge under section 727(a) of this title if the case were a case under Chapter 7 of this title.

11 U.S.C. § 1141(d)(3); *see also Matter of T-H New Orleans Ltd. P'ship*, 116 F.3d 790, 803 (5th Cir. 1997). In turn, 11 U.S.C. § 727(a)(1) bars a discharge in a Chapter 7 case if the debtor is not an individual. *See e.g., T-H New Orleans Ltd*., 116 F.3d at 804 n.14 ("[I]f the debtor would be denied a discharge under section 727 (such as if the debtor were not an individual…), then the Chapter 11 discharge is not granted."); *In re Wood Family Interests, Ltd.,* 135 B.R. 407, 410 (Bankr. D. Col. 1989) ("[A] discharge is not available to corporate or partnership debtors who propose a liquidating plan of reorganization.").

8. Notwithstanding these unambiguous provisions of the Bankruptcy Code, the Plan attempts to broadly release the Debtor from "all claims, obligations, suits, judgments, damages, demands, debts, rights, Causes of Action, and liabilities whatsoever in connection with or in any

way relating to the Debtor" under two separate provisions of the Plan. Plan §§ IX.B.2, C. Those releases are then supported by a Plan injunction. *Id.* § IX.D.

9. There can be no dispute that the releases and injunction set forth in the Plan are tantamount to the discharge of a liquidating debtor in violation of 11 U.S.C. § 1141(d)(3). Accordingly, the Plan cannot be confirmed until these improper releases, exculpations, and injunctions are either eliminated or limited so that they no longer constitute an impermissible discharge. *See* 11 U.S.C. § 1129(a)(1).

B. The Release of the Debtor's Officers, Directors, and Other Unidentified Affiliates and Representatives is Impermissible Under the Bankruptcy Code and Fifth Circuit Precedent.

10. The Plan is also unconfirmable because it (i) contains non-consensual, third-party releases that are both unnecessary in the context of a liquidating plan and in violation of Fifth Circuit precedent; (ii) attempts to release valuable claims held by the estate against the Debtor's officers, directors and others for no consideration; and (iii) contains exculpation language beyond the scope of that permitted by Fifth Circuit precedent.

11. First, the liquidating Plan's non-consensual, third-party releases (Plan §§ IX.B.2, IX.C) are prohibited under the Bankruptcy Code. Section 524(e) of the Bankruptcy Code provides that "the discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt." 11 U.S.C. § 524(e); *see also Feld v. Zale Corp. (In re Zale Corp.)*, 62 F.3d 746, 760 (5th Cir. 1995) ("Section 524 prohibits the discharge of debts of nondebtors.") (collecting cases). Additionally, the bankruptcy discharge of a debtor, by itself, does not operate to relieve non-debtors of their liabilities. *Citizens Bank & Trust v. Case (In re Case)*, 937 F.2d 1014, 1025 (5th Cir. 1991) (holding that bankruptcy court can only determine dischargeability of debts owed by debtor, not those owed by third party); *see also First Fidelity Bank v. McAteer,* 985 F.2d 114, 118 (3d Cir. 1993) ("While it is true that the bankruptcy court's

confirmation of the plan binds the debtor and all creditors vis-a-vis the debtor, it does not follow that a discharge in bankruptcy alters the right of a creditor to collect from third parties. Section 524(e) specifically limits that discharge.").

12. Indeed, the Fifth Circuit has taken a very restrictive approach to non-debtor releases in bankruptcy cases and has consistently deemed such provisions prohibited. *See In re Vitro S.A.B. de CV*, 701 F.3d 1031, 1051–53, 1054–55, 1058–59 (5th Cir. 2012); *Bank of N.Y. Trust Co. v. Off'l Unsecured Creditors' Comm. (In re Pacific Lumber Co.)*, 584 F.3d 229, 252 (5th Cir. 2009) (citing *In re Coho Res., Inc.*, 345 F.3d 338, 342 (5th Cir. 2003); *Hall v. Nat'l Gypsum Co.*, 105 F.3d 225, 229 (5th Cir. 1997); *Matter of Edgeworth*, 993 F.2d 51, 53–54 (5th Cir. 1993); *Feld v. Zale Corp. (In re Zale Corp.),* 62 F.3d 746 (5th Cir. 1995)). For example, in *Pacific Lumber*, the Fifth Circuit disallowed a release of a debtor's officers, directors, and professionals because there was no evidence that they "were jointly liable for any . . . pre-petition debt. They are not guarantors or sureties, nor are they insurers." *Pacific Lumber*, 584 F.3d at 252.

13. Because of this, bankruptcy courts within the Fifth Circuit may approve a *consensual* third-party release contained in a plan only if the release is integral to the plan, given for adequate consideration, and reached as a result of arms-length negotiations. *See, e.g., In re CJ Holding Co.*, 597 B.R. 597, 609 (Bankr. S.D. Tex. 2019) ("If a claimant votes in favor of the plan and receives consideration in exchange for a third-party release integral to it, that act is treated as consenting to the bankruptcy court's jurisdiction to approve the third-party release."); *In re Wool Growers Cent. Storage Co.*, 371 B.R. 768, 775–76 (Bankr. N.D. Tex. 2007) ("Consensual nondebtor releases that are specific in language, integral to the plan, a condition of the settlement, and given for consideration do not violate section 524(e).").

14. As drafted, the liquidating Plan's third-party release clearly violates the Bankruptcy Code and Fifth Circuit precedent by attempting to release the Debtor's officers, directors, and various unidentified Affiliates and Representatives from prepetition claims and causes of action. Plan §§ IX.B.2, I.A.77 (definition of "Releasees").[3] And, despite representing to this Court and creditors that each Releasee gave "good and valuable consideration" in return for their release (Plan § IX.B.2), there is nothing in the Plan or the record of this case indicating that the Debtor will receive anything in return.

15. Notably, courts in other jurisdictions have concluded that a non-consensual, third-party release can *never* be considered integral under a liquidating plan because liquidation can successfully be accomplished without releases. *See In re Nickels Midway Pier, LLC*, 2010 WL 20345442, at *13 (Bankr. D.N.J. May 21, 2010), *cited by In re Wash. Mut., Inc.*, 442 B.R. 314, 352 (Bankr. D. Del. 2011). That is clearly the case with this liquidating Plan.

16. Second, in addition to being impermissible under 11 U.S.C. § 524(e), the Plan's proposed release of all claims and causes of actions that the estate holds against the Debtor's officers, directors, and unidentified Affiliates and Representatives does not pass the best interests test under 11 U.S.C. § 1129(a)(7). *See* 11 U.S.C. § 1129(a)(7)(A)(ii) ("[E]ach holder of a claim or interest of [an impaired] class . . . [must] receive or retain . . . property of a value . . . that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this title . . . ."). Here, the Debtor has limited assets which are insufficient to pay its

[3] "Affiliates" has the meaning ascribed in the Bankruptcy Code (Plan § I.A.4), while "Representatives" is defined as "with regard to an Entity or Releasee, its direct and indirect shareholders, managers, officers, directors, employees, advisors, members, attorneys, Professionals, accountants, investment bankers, financial advisors, consultants, and agents (including their respective officers, directors, employees, independent contractors, members and Professionals) and each of their predecessors, successors and assigns" (*id.* § I.A.79). Creditors are unable to identify who the Releasees are based on these definitions, must less what consideration, if any, each gave in return for its releases under the Plan.

most senior creditors. As such, the estate's causes of action and any related proceeds are the only valuable assets of the estate. Because the Plan proposes to release the Debtor's officers and directors (among others) from all claims and causes of action, and such claims and causes of action may be the only source of recovery for unsecured creditors, the unsecured creditors will not be better off under the Plan than they would if this Chapter 11 case were converted to a Chapter 7 case and a Chapter 7 trustee were appointed who could pursue such actions.

17. Finally, the Plan's broad exculpation of the unidentified "Releasees" for actions taken in relation to the bankruptcy case (Plan § IX.C) clearly violates the Bankruptcy Code and Fifth Circuit precedent. *See* 11 U.S.C. § 524(e) ("[T]he discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt."); *Pacific Lumber* 584 F.3d at 253. For example, in *Pacific Lumber*, the Fifth Circuit struck down all plan exculpation language except that releasing the unsecured creditors' committee and its members because "its members are the only disinterested volunteers" seeking release. *Id*. at 253. Thus, as drafted, the Plan's exculpation provision cannot be approved.[4]

RESERVATION OF RIGHTS

18. Greatbatch, as lessor, and the Debtor, as lessee, are parties to a lease agreement (as amended, the "Sublease") pursuant to which the Debtor agreed to sublease from Greatbatch a portion of the 11th floor of 5830 Granite Parkway, Plano, Texas (the "Plano Office"). On March 26, 2020, the Court entered an agreed order [Dkt. No. 293] extending the time within which the Debtor must assume or reject the Sublease to the earlier of June 9, 2020 and the confirmation date

[4] To the extent that the Debtor may argue that the Plan exculpation does not violate § 524(e) because it is a release in settlement of claims under 11 U.S.C. § 1123(b)(3), the exculpation must still be stricken because it (1) would be a nonconsensual third-party release with no opt-out mechanism, and (2) covers unidentified individuals that are not parties to the cases and who provided no consideration in return for the release. *See In re Bigler*, 442 B.R. 537, 544 (Bankr. S.D. Tex. 2010) (holding such a release violates the consent and consideration elements necessary for a valid settlement of claims).

of any Chapter 11 plan of the Debtor. To the extent that the Debtor cannot vacate the Plano Office prior to the confirmation hearing, Integer reserves its rights to further object to the Plan on the basis that the Sublease should not be deemed rejected while the Debtor continues to occupy the Plano Office. *See* Plan § VII.A.

19. Integer also reserves its right to object to the Plan Supplement, which the Debtor failed to file on or before April 6, 2020 as required by the Plan. Plan § I.A.66. Because the Debtor failed to timely file the Plan Supplement, Integer was unable to review key documents prior to filing this Objection.

CONCLUSION

For these reasons, Integer requests that the Court deny confirmation of the Plan and grant it such other and further relief to which it may be justly entitled.

Dated: April 8, 2020

Respectfully submitted,

s/James C. Thoman
James C. Thoman, Esq. (admitted *pro hac vice*)
HODGSON RUSS LLP
The Guaranty Building
140 Pearl Street, Suite 100
Buffalo, New York 14202
Telephone: (716) 856-4000
Facsimile: (716) 849-0349
E-mail: jthoman@hodgsonruss.com

Counsel to Integer Holdings Corporation