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Attorneys for Cerner Corporation

**UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF WASHINGTON**

In re. . .

ASTRIA HEALTH, et al.,

Debtors and Debtors in Possession.¹

Jointly Administered Under:
Lead Case No. **19-01189-WLH11**
Chapter 11

**OBJECTION OF CERNER
CORPORATION TO DEBTORS'**

¹ The Debtors and their respective case numbers are as follows: Astria Health (19-01189-11); Glacier Canyon, LLC (19-01193-11); Kitchen and Bath Furnishings, LLC (19-01194-11), Oxbow Summit, LLC (19-01195-11); SHC Holdco, LLC (19-01196-11); SHC Medical Center-Toppenish (19-01190-11); SHC Medical Center-Yakima (19-01192-11); Sunnyside Community Hospital Association (19-01191-11); Sunnyside Community Hospital Home Medical Supply, LLC (19-01197-11); Sunnyside Home Health (19-01198-11), Sunnyside Professional Services, LLC (19-01199-11); Yakima Home Care Holdings, LLC (19-01201-11); and Yakima HMA Home Health, LLC (19-01200-11).



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**SECOND AMENDED JOINT
CHAPTER 11 PLAN OF
REORGANIZATION OF ASTRIA
HEALTH AND ITS DEBTOR
AFFILATES**

**Hearing Date: December 18, 2020, at
10:00 a.m.**

Objection Deadline: December 4, 2020

COMES NOW, Cerner Corporation on behalf of itself and its affiliates (collectively, “Cerner”), by and through counsel, and in support of its objection to the confirmation of the Debtors' Second Amended Plan (defined below), states as follows:

I. INTRODUCTION

1. As of November 5, 2020, a dispute has arisen over damages alleged by Debtors against Cerner arising out of the CBA (defined below) between Cerner and the Debtors (the “Cerner Dispute”). Cerner has filed a pending motion for relief from the stay to refer the Cerner Dispute to arbitration per the CBA (the “Cerner Arbitration Motion”). The Second Amended Plan identifies the Cerner Dispute as the Vendor Claim and appears to generally reserve to Debtors the right to pursue the Vendor Claim. In addition, the Plan Supplement (defined below) filed by Debtors does not list the CBA among the contracts to be assumed. Accordingly, the Second Amended Plan deems the CBA to be rejected as of the Effective Date of the Second Amended Plan. Cerner does not oppose confirmation of the Second Amended Plan, including rejection of the CBA, so long as (i) the relief requested in

1 the Cerner Arbitration Motion is granted, (ii) the confirmation order is clear that Debtors
2 have affirmatively opted to terminate all services under the CBA and accept all
3 consequences associated with their decision to discontinue use of all software, services, and
4 support from Cerner as of the Effective Date of the Second Amended Plan,² and (iii) the
5 Second Amended Plan does not impair, prevent or otherwise adversely affect all rights,
6 remedies, claims, and defenses of Cerner after the Cerner Dispute is fully resolved in the
7 arbitration noted in the Cerner Arbitration Motion. For example (and as Cerner notes in the
8 Cerner Arbitration Motion), if the arbitrator or arbitration panel denies all claims by Debtors
9 against Cerner sometime in 2021 or 2022, then Cerner shall be free at that point in time to
10 pursue all available rights, claims, and remedies against Debtors, including but not limited
11 to pursuing full payment of all amounts Cerner is owed by Debtors on the Cerner
12 Administrative Claim (defined below) on the Effective Date of the Second Amended Plan.
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17 2. Alternatively, if the relief requested in the Cerner Arbitration Motion is
18 denied, then Cerner objects to confirmation of the Second Amended Plan for failure to
19 either pay, or provide an appropriate deposit for payment, of the Cerner Administrative
20 Claim (defined below) on the Effective Date of the Second Amended Plan.
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24 ² As discussed further below, Cerner questions whether Debtors truly want to reject the
25 CBA when they realize the consequences of their decision to reject the contract and
immediately terminate their relationship with their electronic health records (“EHR”) vendor. Nevertheless, Cerner acknowledges Debtors may reject the CBA and refrain from using Cerner’s EHR platform as of the Effective Date of the Second Amended Plan.

1 **II. STATEMENT OF FACTS**

2 3. On May 6, 2019 (“Petition Date”), Astria and its debtor affiliates and debtors
3 in possession (collectively, the “Debtors”), each filed a Petition for relief under Chapter 11
4 of Title 11 of the United States Code, 11 U.S.C. §§ 101 – 1532 (the “Bankruptcy Code”), in
5 the United States Bankruptcy Court for the Eastern District of Washington.
6

7 4. The Chapter 11 cases are jointly administered under the lead bankruptcy case
8 number 19-01189-11 (the “Chapter 11 Cases”). Since the Petition Date, the Debtors have
9 remained in possession of their assets, and managed their business as debtors in possession,
10 pursuant to §§ 1107 and 1108.
11

12 5. On the Petition Date, Debtors filed a Declaration of John M. Gallagher in
13 Support of Emergency First-Day Motions (“First Day Declaration”) [Dkt. No. 21] which
14 states:
15

16 in preparation for its acquisitions of SHC Yakima and SHC Toppenish,
17 Astria contracted for a new system-wide Electronic Health Record
18 (“EHR”) platform for ambulatory and inpatient services for all three
19 Hospitals and their clinics. Shortly thereafter, Astria also contracted for
20 the outsourcing of its revenue cycle, billing and collection functions
21 and extended business office services. In connection with the system
22 conversion and the outsourcing of its revenue cycle functions, Astria
23 has experienced certain unexpected challenges including, among other
24 things, a significant decline in cash flow from collections on accounts
25 receivable.

First Day Declaration, ¶55. Nonetheless, Debtors did nothing after the Petition Date to reject
the CBA or to affirmatively collect any alleged damages from Cerner until November 2020,

1 when Debtors filed an objection, discussed below, to an administrative expense claim filed
2 by Cerner.

3
4 6. Cerner is a company that provides EHR software platforms, support, and
5 related services to allow hospitals, health systems (and their related clinics) to operate their
6 facilities and manage a single patient electronic medical record across the entire continuum
7 of care. The contract referenced in the First Day Declaration is known as a Cerner Business
8 Agreement. Thereafter, Debtors entered into various additional sales orders, amendments,
9 schedules and arrangement letters with Cerner (collectively with the Cerner Business
10 Agreement, these sales orders, amendments, schedules and arrangement letters are a single,
11 integrated, executory contract referred to herein as the “CBA”).
12
13

14 7. Under the terms of the CBA, Debtors licensed from Cerner certain software
15 EHR solutions, software support, and professional services that allowed Debtors to operate
16 their hospital facilities using an electronic record for each patient.
17

18 8. After the Petition Date, Debtors have continued to operate their health system
19 using Cerner’s software, services, and support under the CBA and the accompanying
20 licenses granted by Cerner. And from the Petition Date through today, Cerner has continued
21 to provide the healthcare information technology and services Debtors have requested
22 without interruption. However, Debtors have not stayed current in their payments to Cerner
23 for post-petition use of the licenses or services.
24
25

9. On August 1, 2019, Cerner filed a Proof of Claim against Debtors in the

1 aggregate amount of \$5,543,238.83 as of the Petition Date [Claim No. 364-1] (the "Cerner
2 Pre-Petition Claim"). In addition, the Cerner Pre-Petition Claim noted aggregate
3 administrative claims as of that date in the aggregate amount of \$1,368,732.36. To date,
4 Debtors have not filed any objection to the Cerner Pre-Petition Claim.
5

6 10. On June 5, 2020, Debtors filed a Motion for Entry of an Order (I) Fixing the
7 First Interim Bar Date for Filing Certain Postpetition Administrative Expense Claims and
8 (II) Approving the Form of Notice of the Administrative Expense Claims Bar Date [Dkt.
9 No. 1350] which was granted by an order entered on June 17, 2020 [Dkt. No. 1416]. These
10 pleadings set a bar date of July 22, 2020, for administrative claims against the closed
11 regional medical center operated by Astria and Yakima.
12
13

14 11. On July 7, 2020, the Debtors, on behalf of themselves, and Lapis Advisers, LP
15 and various affiliates, as lender under the Debtor in Possession Facility in the Chapter 11
16 Cases, agent under the Debtors' prepetition Credit Agreement, and as investment advisor
17 and investment manager for certain funds which are beneficial holders of those certain
18 Washington Health Care Facilities Authority Revenue Bonds, and any fund managed or
19 affiliated with the foregoing (collectively the "Lapis Parties" and, together with the Debtors,
20 the "Plan Proponents") filed their Joint Chapter 11 Plan of Reorganization of Astria Health
21 and Its Affiliates. [Dkt. No. 1471].
22
23

24 12. On July 7, 2020, the Plan Proponents filed a Joint Motion for an Order
25 Approving (I) Proposed Disclosure Statement; (II) Solicitation And Voting Procedures; (III)

1 Notice And Objection Procedures for Confirmation Of Joint Plan; and (IV) Granting
2 Related Relief. [Dkt. No. 1473].

3
4 13. On July 22, 2020, Cerner filed a Request for Allowance and Payment of
5 Administrative Expense Claim of Cerner Corporation [Dkt. No. 1573] (the "Yakima
6 Administrative Expense Claim") seeking allowance and payment of \$2,125,497.75 for
7 equipment, software, maintenance, support, licensing fees and related obligations provided
8 to Yakima under the Agreement. However, as noted in footnote 2 of the Yakima
9 Administrative Expense Claim, the total administrative amount owed as of around July 22,
10 2020 was \$5,135,736.00.

11
12
13 14. On November 5, 2020, after six stipulations to extend the deadline (which
14 gave Cerner and Debtors time to engage in additional settlement discussions), Debtors filed
15 a certain Objection to Cerner Corporation's Motion for Allowance of Administrative
16 Expense Claim [Dkt. No. 1973] (the "Yakima Administrative Expense Claim Objection").

17
18 15. On November 11, 2020, the Plan Proponents filed the Second Amended Joint
19 Chapter 11 Plan of Reorganization of Astria Health and its Debtor Affiliates [Dkt. No.
20 1986] (the "Second Amended Plan") and the related disclosure statement [Dkt. No. 1987]
21 (the "Disclosure Statement").

22
23 16. The Second Amended Plan contains several provisions relevant to the Cerner
24 Dispute and this Objection. First, the Second Amended Plan states as follows regarding the
25 "Vendor Claims" against Cerner:

1 The Debtors (or the Reorganized Debtors, if after the Effective Date) and the
2 Lapis Parties, in consultation with the Committee (or the GUC Distribution
3 Trustee, if after the Effective Date), will jointly use their best efforts to settle
4 or otherwise resolve each of the Debtors' Vendor Claims subject to the
following principles:

5 Prior to the Effective Date, the Debtors (with the prior consent of the Lapis
6 Parties) shall have the right to settle any and all Vendor Claims in their sole
7 and absolute discretion after consultation with the Committee, and the
Committee shall not have the right to object to any such settlement.

8 After the Effective Date, the Liquidation Trustee shall have the right of the
9 Liquidation Trust (including any consent terms by the primary beneficiaries)
10 to settle any and all Vendor Claims after consultation with the Debtors and
11 the Committee, and the Debtors, Committee, and GUC Distribution Trustee
shall not have the right to object to such settlement.

12 Prior to or after the Effective Date, the Debtors (with the prior consent of the
13 Lapis Parties) or the Liquidation Trustee (subject to the terms of the
14 Liquidation Trust, including any consent terms by the primary beneficiaries)
15 may commence and prosecute litigation to resolve the Vendor Claims.
16 Consent shall be conditioned on, *inter alia*, the retention of counsel and
17 retention terms acceptable to the Lapis Parties.

18 Second Amended Plan, § III.C.

19 17. Second, the Second Amended Plan states as follows regarding executory
20 contracts not listed in the Plan Supplement:

21 Immediately prior to the Effective Date, all Executory Contracts of the
22 Debtors will be deemed rejected in accordance with the provisions and
23 requirements of §§ 365 and 1123 except those Executory Contracts that (i)
24 have been assumed by order of the Court, (ii) are subject to a motion to
25 assume pending on the Effective Date, or (iii) have been identified on a list
of assumed contracts to be filed with the Court prior to the Voting Deadline,
which shall be a date prior to the Effective Date of the Plan. The
Confirmation Order will constitute a Court order approving such rejections
of Executory Contracts as of the Effective Date pursuant to §§ 365 and 1123.

1
2 Second Amended Plan, § IV.B.1.

3 18. Third, the Second Amended Plan states as follows regarding administrative
4 claims as of the Effective Date of the Second Amended Plan:

5 Except for Ordinary Course Administrative Expenses (which will be paid in
6 the ordinary course of business) and DIP Claims, all Administrative Claims,
7 including Cure Payments, 503(b)(9) Claims, and U.S. Trustee Fees, will be
8 paid in full in Cash (a) on the later of the Effective Date or the date such
9 Claims are Allowed under § 503, or (b) upon such other terms as may be
10 mutually agreed upon between the Holder of such Claim and the Plan
Proponents, and consistent with the terms of the Definitive Documents.

11 Second Amended Plan, Section II.D.1).d.(ii). The definition of Ordinary Course
12 Administrative Expenses is:

13 *Ordinary Course Administrative Expense* means Administrative Claims for
14 goods and services of types consistent with the Debtors' ordinary course
15 business operations as of the Petition Date that will be paid as they come due
16 after the Effective Date in the ordinary course of Reorganized Debtors'
business.

17 Second Amended Plan, Section I.A.1.115. Cerner respectfully submits that the Cerner
18 Administrative Expense Claim should be considered an Ordinary Course Administrative
19 Claim because it involves "goods and services of types consistent with the Debtors' ordinary
20 course business operations as of the Petition Date." However, the Cerner Administrative
21 Expense Claim has not been "paid as they come due [prior to] the Effective Date in the
22 ordinary course of Reorganized Debtors' business."
23

24 19. Accordingly, if the Cerner Administrative Expense Claim is not considered an
25 Ordinary Course Administrative Expense, then it appears to be subject to an Administrative,

1 Professional and Priority Claims Cap, as follows:

2 *Administrative and Priority Claims Reserve Amount* means Cash in an
3 amount to be determined by Plan Proponents on or before the Effective Date,
4 subject to the Administrative, Professional and Priority Claims Cap, to be
5 funded by the Debtors to the Reorganized Debtors in an amount sufficient to
6 pay in full all accrued but unpaid U.S. Trustee Fees and Administrative,
7 Priority Tax, Priority, and Professional Fee Claims other than Ordinary
8 Course Administrative Expenses that are Allowed after the Effective Date to
9 the extent that such Claims have not been paid in full on or before the
10 Effective Date consistent with § 1129(a)(9).

11 Second Amended Plan, Section I.A.1.3. The Administrative, Professional and Priority
12 Claims Cap referenced above is defined as follows:

13 *Administrative, Professional and Priority Claims Cap* means \$4,624,674,
14 which shall be the maximum amount payable under the Plan for the payment
15 of pre-Effective Date U.S. Trustee Fees and Administrative, Priority Tax,
16 Priority, and Professional Fee Claims on or after the Effective Date. To be
17 clear, DIP Claims and Ordinary Course Administrative Expenses are not
18 subject to this Cap.

19 Second Amended Plan, Section I.A.1.7.

20 20. Finally, to the extent relevant (see below), the Second Amended Plan states as
21 follows regarding cure amounts for assumed executory contracts:

22 Any monetary amounts by which each Executory Contract to be assumed is
23 in default shall be satisfied, pursuant to § 365(b)(1), by payment from the
24 Administrative and Priority Claims Reserve, of the default amount (as set
25 forth in the Debtors' books and records), a schedule of which will be Filed
and served by the Voting Deadline, in full in Cash on the later of the
Effective Date or when such Cure Claim is Allowed, or on such other terms
as the parties to each such Executory Contract may otherwise agree. In these
Chapter 11 Cases, prior to Confirmation of the Plan, some known Cure
Payments will have already been paid or resolved by stipulation or
agreement. In the event of a dispute regarding (a) the amount of any Cure

1 Payments, (b) the ability of Reorganized Debtors to provide “adequate
2 assurance of future performance” (within the meaning of § 365) under the
3 contract or lease to be assumed, or (c) any other matter pertaining to
4 assumption, the cure payments required by § 365(b)(1) shall be made
5 following the entry of a Final Order resolving the dispute and approving the
6 assumption. Pending the Court’s ruling on such motion, the Executory
7 Contract at issue shall be deemed assumed by Reorganized Debtors as of the
8 Effective Date, unless otherwise ordered by the Court on a motion to reject
9 the agreement, and the Debtors will reserve amounts for Disputed Cure
10 Payments in the full amounts claimed by objecting contract counterparties.
11 In no event shall the GUC Distribution Trust be liable or otherwise
12 responsible for any Cure Payment. Further, the GUC Distribution Trustee
13 shall have no authority to direct or otherwise oppose any assumption or
14 rejection of an Executory Contract.

15 Second Amended Plan, § IV.A.2.

16 21. On November 12, 2020, the Court entered the Order Granting Joint Motion for
17 the Order (I) Proposed Disclosure Statement; (II) Solicitation And Voting Procedures; (III)
18 Notice And Objection Procedures for Confirmation Of Joint Plan; and (IV) Granting
19 Related Relief. [Dkt. No. 1991].

20 22. On November 13, 2020, Cerner filed the Motion of Cerner Corporation for (1)
21 Relief from the Automatic Stay to Allow Arbitration; (2) for Determination that Arbitration
22 is Required and Should Proceed; and (3) Recognizing Federal Arbitration Act Stay of
23 Further Proceedings on Objection to Administrative Expense Claim; and Notice Thereof
24 [Dkt. No. 1995] ("Cerner Arbitration Motion"). The Cerner Arbitration Motion is set for
25 hearing after this Objection is filed and prior to the hearing on confirmation of the Second
Amended Plan.

1 23. On November 25, 2020, Debtors filed a Notice of Filing Certain Plan
2 Supplements to the Second Amended Joint Chapter 11 Plan of Reorganization of Astria
3 Health and Its Debtor Affiliates [Dkt. No. 2043] ("Plan Supplement") which does not appear
4 to list the CBA on Exhibit A, Schedule of Assumed Agreements. Accordingly, Cerner
5 assumes that Debtors intend to reject the CBA pursuant to Section IV.B.1. of the Second
6 Amended Plan noted above.³
7

8
9 24. Cerner notes that Debtors' decision to not assume the CBA may be an
10 oversight for two reasons. First, Debtors' rejection of the CBA will entitle Cerner to
11 withdraw provision of all software licenses, services, and support under the CBA as of the
12 Effective Date of the Second Amended Plan. To be clear, Debtors' decision to reject the
13 CBA would cause Debtors to forfeit all benefits of using the Cerner EHR to operate their
14 health system (and would include Debtors' termination of all undisputed electronic medical
15 record services provided by Cerner throughout these cases in addition to the disputed
16 "revenue cycle" services included within the Cerner Dispute).
17

18
19 25. Second, Debtors have continued to use the software, services, and support
20 provided by Cerner under the CBA throughout these cases notwithstanding Debtors'
21 decision not to make timely payment for the software, services, and support to date.
22

23
24 _____
25 ³ Cerner notes that Section IV.A.1 of the Second Amended Plan allows Debtors to amend
the Plan Supplement until the Voting Deadline (December 4, 2020). However, Section
IV.B.1 of the Second Amended Plan also appears to allow Debtors to assume executory
contracts that "are subject to a motion to assume pending on the Effective Date."

1 Accordingly, Debtors have accumulated aggregate administrative claims owed to Cerner as
2 of November 19, 2020 in the amount of \$6,894,806.75 (the "Cerner Administrative Claim").
3
4 If Debtors' intent was always to reject the CBA, Debtors could have avoided or mitigated
5 the Cerner Administrative Claim by rejecting the CBA anytime on or after the Petition Date.

6 26. Under the circumstances, Cerner assumes Debtors have already lined up some
7 other software and services solution for their health system that will be operative as of the
8 Effective Date of the Second Amended Plan. However, Debtors (or whatever EHR software
9 provider they have chosen to contract with going forward) have not reached out to Cerner to
10 begin the necessary transition/migration of archival EHR information, which would require
11 a separately negotiated agreement and payment. If Debtors have not already lined up
12 another EHR vendor—and if Debtors are not ready to go-live with the new vendor by the
13 Effective Date of the Second Amended Plan—Cerner believes Debtors' only recourse upon
14 rejection of the CBA would be to return to paper record-keeping (which seems unlikely to
15 be Debtors' intent).

16 27. Finally, if Debtors reverse course and decide to assume the CBA, Cerner notes
17 that the total "cure" amount that will be owed to Cerner as of the Effective Date will be the
18 Cerner Administrative Claim, plus the Cerner Pre-Petition Claim, plus any additional
19 amounts owed to Cerner under the CBA between November 19, 2020 and the Effective
20 Date of the Second Amended Plan (the "Cerner Cure Claim"). The first two components add
21 up to \$12,438,045.58.
22
23
24
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1 **III. LIMITED OBJECTION IF THE CERNER ARBITRATION MOTION**
2 **IS GRANTED**

3
4 28. If the relief requested in the Cerner Arbitration Motion is granted, then Cerner
5 objects to the confirmation of the Second Amended Plan only if and to the extent that it (a)
6 seeks to impair, prevent or otherwise adversely affect all rights, remedies, claims, and
7 defenses of Cerner after the Cerner Dispute is resolved pursuant to the arbitration noted in
8 the Cerner Arbitration Motion, and (b) there is any dispute that Cerner can terminate all
9 services under the CBA as of the Effective Date of the Second Amended Plan. Thus, for
10 example, as noted above, if the result of the arbitration noted in the Cerner Arbitration
11 Motion is a denial of all claims by Debtors against Cerner sometime in 2021, then Cerner
12 shall be free at that point in time to pursue all available rights, claims, and remedies against
13 Debtors, including but not limited to the Cerner Administrative Claim owed to Cerner under
14 the CBA at that time.
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18 29. The Second Amended Plan provision noted above that Debtors or the
19 Liquidation Trustee "may commence and prosecute litigation to resolve the Vendor Claims"
20 does not appear to impair, prevent or otherwise adversely affect all rights, remedies, claims,
21 and defenses of Cerner. However, out of an abundance of caution, Cerner respectfully
22 requests that any order confirming the Second Amended Plan explicitly state that nothing in
23 the Second Amended Plan shall impair, prevent or otherwise adversely affect all rights,
24 remedies, claims, and defenses Cerner may have after the Cerner Dispute is resolved
25

1 pursuant to the arbitration noted in the Cerner Arbitration Motion.

2 30. The Second Amended Plan provision noted above that "[i]mmediately prior to
3 the Effective Date, all Executory Contracts of the Debtors will be deemed rejected in
4 accordance with the provisions and requirements of §§ 365 and 1123..." also does not
5 appear to impair, prevent, or otherwise adversely affect Cerner's ability to terminate the
6 CBA as of the Effective Date of the Second Amended Plan due to Debtors' material
7 nonpayment of Cerner prior to and after the Petition Date. However, out of an abundance of
8 caution, Cerner respectfully requests that any order confirming the Second Amended Plan
9 explicitly state that nothing in the Second Amended Plan shall impair, prevent or otherwise
10 adversely affect Cerner's ability to terminate the CBA as of the Effective Date of the Second
11 Amended Plan.
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14

15 31. The Second Amended Plan provisions noted above regarding payment of
16 administrative claims may or may not create issues for the Cerner Administrative Claim. If
17 the Cerner Administrative Claim is considered an Ordinary Course Administrative Claim
18 that is not subject to the Administrative, Professional and Priority Claims Cap, then the
19 administrative expense provisions of the Second Amended Plan do not appear to impair,
20 prevent or otherwise adversely affect Cerner's ability to collect the Cerner Administrative
21 Claim. However, if the Cerner Administrative Claim is not considered an Ordinary Course
22 Administrative Claim, and therefore is subject to the Administrative, Professional and
23 Priority Claims Cap, then the cap amount needs to be modified to include an amount
24
25

1 adequate for the potential Cerner Administrative Claim pursuant to the requirements of
2 Section 1129 of the Bankruptcy Code and Bankruptcy Rule 3020(a). Assuming that Debtors
3 have not yet included any amount for the Cerner Administrative Expense Claim in the
4 Administrative, Professional and Priority Claims Cap, then Cerner respectfully suggests that
5 the Administrative, Professional and Priority Claims Cap needs to be increased by the
6 Cerner Administrative Expense Claim amount which, as noted above, was \$6,894,806.75 as
7 of November 20, 2020 and will need to be increased for amounts due to Cerner as of the
8 Effective Date of the Second Amended Plan. This may require the Administrative,
9 Professional and Priority Claims Cap to be increased from \$4,624,674 to at least
10 \$11,519,480.75.
11
12
13

14 32. Finally, if Debtors end up assuming the CBA, the statement above that
15 "Debtors will reserve amounts for Disputed Cure Payments in the full amounts claimed by
16 objecting contract counterparties" also appears to address Cerner's concern about being able
17 to assert all rights, remedies, and claims of Cerner after the Cerner Dispute is resolved
18 pursuant to the arbitration noted in the Cerner Arbitration Motion. To be clear, Cerner
19 hereby asserts the full amount to be claimed by Cerner, and therefore included in the
20 Administrative and Priority Claims Reserve, is \$12,438,045.58 plus an amount to be
21 determined is owed to Cerner between November 20, 2020 and the Effective Date of the
22 Second Amended Plan.
23
24
25

33. Moreover, Cerner notes that, if Cerner's understanding of the above Second

1 Amended Plan provisions is correct, there is no reason to deny the Cerner Arbitration
2 Motion for the following reasons. First, as explained in the Cerner Arbitration Motion, the
3 only reason to deny the Cerner Arbitration Motion is because the Cerner Dispute is
4 “inextricably intertwined” with something under the Bankruptcy Code. *See* Cerner
5 Arbitration Motion ¶¶ 17-21. Second, Cerner does not see how anything in the Cerner
6 Arbitration Motion could be "inextricably intertwined" with anything under the Bankruptcy
7 Code because the Second Amended Plan proposes to (a) resolve any disputed administrative
8 or cure claim after confirmation, and (b) create a reserve for any disputed cure claim "in the
9 full amounts claimed by objecting contract counterparties [i.e. Cerner]."
10
11
12

13 **IV. ALTERNATIVE OBJECTION IF THE CERNER ARBITRATION**
14 **MOTION IS DENIED.**

15 34. As noted above and explained in the Cerner Arbitration Motion, the only
16 reason to deny the Cerner Arbitration Motion is because the Cerner Dispute is “inextricably
17 intertwined” with something under the Bankruptcy Code. *See* Cerner Arbitration Motion ¶¶
18 17-21.
19

20 35. Since no party has responded yet to the Cerner Arbitration Motion, and this
21 Court has not ruled on the Cerner Arbitration Motion, Cerner will not speculate as to what
22 the parties or the Court may determine on this point.
23

24 36. However, Cerner respectfully submits that whatever the parties allege as to
25 whether the Cerner Dispute is "inextricably intertwined" with the Bankruptcy Code, unless

1 the Court determines that it is required to resolve the Cerner Dispute prior to confirmation
2 of the Seconded Amended Plan, there cannot be any issues that are "inextricably
3 intertwined" with the Bankruptcy Code within the meaning of relevant law that would
4 justify delaying confirmation.
5

6 37. Determination of the Cerner Dispute prior to confirmation of the Second
7 Amended Plan will require Debtors to file a separate adversary action that will require
8 appropriate discovery and contested hearings. Simultaneously, Cerner likely will pursue an
9 appeal of any order denying the Cerner Arbitration Motion.
10

11 38. As discussed in the Yakima Administrative Expense Objection and the Cerner
12 Arbitration Motion, Debtors acknowledge that the Cerner Dispute will require "extensive"
13 discovery and "significant" pre-trial proceedings. Cerner Arbitration Motion, ¶ 10.
14 Moreover, unlike the arbitration agreed to by the Debtors and Cerner in the CBA, this
15 litigation will be subject to appeals to at least two other courts.
16
17

18 39. Accordingly, due to the assumed determination by this Court of the
19 "inextricably intertwined" nature of the Cerner Dispute and other Bankruptcy Code
20 concepts, Cerner respectfully suggest that confirmation of the Second Amended Plan either
21 be denied or delayed pending entry of final orders determining the Cerner Dispute and the
22 assumed "inextricably intertwined" Bankruptcy Code issues.
23

24 **V. INDEPENDENT OPT-OUT OF THE THIRD PARTY RELEASES**
25 **PROVIDED IN THE SECOND AMENDED PLAN.**

1 40. Regardless of whether the Cerner Arbitration Motion is granted, Cerner
2 hereby independently opts out of the Third Party Releases provided in the Second Amended
3 Plan.
4

5 41. In relevant part, the Second Amended Plan provides for certain Released
6 Parties to be released from certain claims by certain Releasing Parties. See Second
7 Amended Plan, §§ 1.133, VII.F.2, VII. G, and VII.H.
8

9 42. However, there is a way for a Released Party to opt out of any release of the
10 Released Parties. In the definition of Releasing Parties, it states:

11 ***Releasing Party*** means (a) the Released Parties; and (b) all Holders of
12 Claims that (i) vote to accept the Plan, and (ii) do not affirmatively opt out of
13 the third party release provided by Section VII.F.2 hereof pursuant to a duly
14 executed Ballot; provided, that, notwithstanding anything contained herein to
15 the contrary, in no event shall an Entity that (x) does not vote to accept or
16 reject the Plan, (y) votes to reject the Plan, or (z) appropriately marks the
17 Ballot to opt out of the third party release provided in Section VII.F.2 hereof
and returns such Ballot in accordance with the Solicitation Procedures Order,
be a Releasing Party.

18 Second Amended Plan, §1.133. And in the Release provisions, it states:

19 THE RELEASING PARTIES SHALL INCLUDE (A) THE RELEASED
20 PARTIES, AND (B) ALL HOLDERS OF CLAIMS THAT (I) VOTE TO
21 ACCEPT THE PLAN, AND (II) DO NOT AFFIRMATIVELY OPT OUT
22 OF THE THIRD PARTY RELEASE PROVIDED BY THIS SECTION
23 PURSUANT TO A DULY EXECUTED BALLOT. NOTWITHSTANDING
24 ANYTHING TO THE CONTRARY HEREIN, IN NO EVENT SHALL AN
25 ENTITY THAT (X) DOES NOT VOTE TO ACCEPT OR REJECT THE
PLAN, (Y) VOTES TO REJECT THE PLAN, OR (Z) APPROPRIATELY
MARKS THE BALLOT TO OPT OUT OF THE THIRD PARTY
RELEASE PROVIDED IN THIS SECTION AND RETURNS SUCH
BALLOT IN ACCORDANCE WITH THE SOLICITATION

1 PROCEDURES ORDER, BE A RELEASING PARTY.

2 Second Amended Plan, § VII.F.2.

3 43. Cerner intends to submit a ballot opting out of the Release provisions of the
4 Second Amended Plan. Independently, if and to the extent Cerner is not entitled to vote on
5 the Plan and could be considered a Releasing Party, Cerner hereby affirmatively opts out of
6 the Release provisions of the Plan and otherwise reserves, retains, and does not waive,
7 compromise or release any of the Released Parties identified in the Second Amended Plan.
8
9

10 WHEREFORE, Cerner Corporation respectfully requests that this Court enter an
11 Order denying confirmation of the Second Amended Plan to the extent inconsistent with this
12 Objection, and granting such other and further relief as this Court may deem equitable and
13 proper.
14

15 DATED this 4th day of December 2020.

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Attorneys for Cerner Corporation Admission Pro Hac Vice

1 **CERTIFICATE OF SERVICE**

2 I certify that a copy of the foregoing Objection of Cerner Corporation to the
3 Confirmation of the Debtors' Second Amended Joint Chapter 11 Plan of Reorganization of
4 Astria Health and its Debtor Affiliates was served this 4th day of December, 2020,
5 electronically through the Court's ECF system and by first class mail, postage prepaid, upon
6 the following:
7

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23 DATED this 4th day of December 2020.

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