IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re	:	
	:	**Chapter 11**
CANO HEALTH, INC.,	:	
	:	**Case No. 24–10164 (KBO)**
Debtor.[1]	:	
		Re: Docket No. 1491

OBJECTION OF REORGANIZED DEBTORS TO DR. CASEY BOYER'S MOTION TO COMPEL ENFORCEMENT OF EMPLOYMENT AGREEMENT

Cano Health, Inc., together with the Closed Case Debtors (the "**Reorganized Debtors**," and prior to the Effective Date (as defined below), the "**Debtors**"), hereby file this objection to *Dr. Casey Boyer's Motion to Compel Enforcement of Employment Agreement* [Docket No. 1491] (the "**Boyer Motion**") and respectfully represent as follows:

Background

a. General Background

1. Beginning on February 4, 2024 (the "**Petition Date**"), the Debtors each commenced a voluntary case under chapter 11 of title 11 of the United States Code (the "**Bankruptcy Code**") with the United States Bankruptcy Court for the District of Delaware (the "**Court**"). No trustee or examiner was appointed in the Debtors' chapter 11 cases.

2. The Debtors' chapter 11 cases were jointly administered for procedural purposes only pursuant to Rule 1015(b) of the Federal Rules of Bankruptcy Procedure and Rule

[1] The Reorganized Debtor in this chapter 11 case, along with the last four digits of the Reorganized Debtor's federal tax identification number, is Cano Health, Inc. (4224) ("**CHI**"). On August 13, 2024, the Court entered an order closing the chapter 11 cases of CHI's debtor affiliates (collectively, the "**Closed Case Debtors**"). A complete list of the Closed Case Debtors may be obtained on the website of the Reorganized Debtor's claims and noticing agent at https://veritaglobal.net/canohealth. The Reorganized Debtor's mailing address is 9725 NW 117th Avenue, Miami, Florida 33178.

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1015-1 of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware.

3. On February 21, 2024, the Office of the United States Trustee for the District of Delaware appointed the Official Committee of Unsecured Creditors (the "**Creditors' Committee**").[2]

4. On June 28, 2024, the Court entered an order [Docket No. 1148] (the "**Confirmation Order**") confirming the *Modified Fourth Amended Joint Chapter 11 Plan of Reorganization of Cano Health, Inc. and Its Affiliated Debtors* [Docket No. 1125] (including any exhibits, schedules, and supplements thereto and as may be amended, restated, supplemented, or otherwise modified from time to time in accordance with the terms thereof, the "**Plan**"). On the same day (the "**Effective Date**"), the Plan was substantially consummated and became effective. *See* Docket No. 1152.

b. The Boyer Agreement

5. On or around May 7, 2021, Dr. Casey G. Boyer ("**Boyer**") and Debtor Cano Health, LLC ("**Cano LLC**") entered into that certain *Asset Purchase Agreement*, pursuant to which the Debtors agreed to acquire Boyer's medical practice. In connection therewith, Boyer and Cano LLC entered into that certain *Employment Agreement*, dated as of May 11, 2021 (the "**Boyer Agreement**"), pursuant to which the Debtors employed Boyer as a physician providing outpatient medical services.

6. Boyer's compensation under the Boyer Agreement included a base salary, plus performance-based bonuses and reimbursement for certain expenses. By the Boyer Motion,

[2] Pursuant to section 12.3 of the Plan (as defined herein), except for certain limited purposes, including to prosecute fee applications, the Creditors' Committee dissolved on the Effective Date (as defined herein). *See* Plan § 12.3.

Boyer argues that the Boyer Agreement was assumed pursuant to the Plan, and, as a result, the following components of his compensation are due and owing and must promptly be paid by the Reorganized Debtors: (i) $107,569.00 (the "**Bonus Claim**") on account of the third annual performance bonus (the "**Third Annual Bonus**"), and (ii) $1,700.00 as reimbursement for certain continuing education and licensing expenses (the "**Reimbursement Claim**," and together with the Bonus Claim, the "**Boyer Claims**"). The following provisions of the Boyer Agreement are relevant to the Boyer Claims:

> (i) Third Annual Bonus: [Boyer] shall be paid a Third Annual Bonus within ninety (90) days following the third anniversary of [the Boyer Agreement's] Effective Date, in the amount of $692 per Humana Medicare Advantage Member in the Clinic's patient membership panel on the third anniversary of the [Boyer Agreement's] Effective Date. In no case will the Third Annual Bonus exceed $110,000.
>
> Boyer Agreement, Schedule 4.1(a)(iii).
>
> In the event that [Boyer's] employment terminates prior to the third anniversary of the Effective Date . . . the Third Annual Bonus . . . and the "not to exceed amount" shall be pro-rated to the date of termination.
>
> Boyer Agreement, Schedule 4.1(b)(iii).
>
> (ii) Continuing Medical Education and Licensing: [The Debtors] will reimburse [Boyer], up to a maximum of $2,000 per year, for necessary Continuing Education and licensing and board expenses . . . . No Fringe benefit is paid or payable to [Boyer] or to any heir, beneficiary or successor to [Boyer] in the event of a termination with, or without, cause.
>
> Boyer Agreement, Schedule 4.2.

7. In addition to setting forth the terms of Boyer's employment and his compensation, the Boyer Agreement included, among other things, certain restrictive covenants. Specifically, section 7.1 of the Boyer Agreement provided:

> (i) [Boyer] shall not, directly or indirectly, own, manage, operate, control or be employed by, participate in or be connected in any manner with the ownership, management, operation or control of any medical practice or clinic, nor engage in the practice of medicine, in any of its branches . . .

> within a twenty (20) mile radius of the Clinic (i) during the Term and for a period of two (2) years following the date of any voluntary or involuntary termination of [the Boyer Agreement] for any reason whatsoever . . . .
>
> Boyer Agreement, § 7.1(a).

(ii) During the Term and for a period of two (2) years following the date of any voluntary or involuntary expiration or termination of this Agreement for any reason whatsoever, [Boyer] shall not directly or indirectly . . . induce any patients of [the Debtors] within a twenty (20) mile radius of the Clinic to patronize any professional health care provider other than [the Debtors]; canvas or solicit any business relationship from any patients of [the Debtors]; directly or indirectly request or advise any patients of [the Debtors] to withdraw, curtail, or cancel any patients' business with [the Debtors]; or directly or indirectly disclose to any other person, firm or corporation the names or addresses of any patients of [the Debtors].

Boyer Agreement, § 7.1(b).

8. The Boyer Agreement was terminable "at will." Specifically, section 6.2 of the Boyer Agreement provides, "[T]his Agreement and employment hereunder is subject to voluntary termination, without cause . . . by [Boyer] upon not less than ninety (60) days' prior written notice to [the Debtors] . . . specifying the date of termination." Boyer Agreement, § 6.2. On April 15, 2024, Boyer terminated the Boyer Agreement effective as of April 25, 2024.[3]

c. The Plan

9. The Plan provided certain procedures for the assumption, assumption and assignment, and rejection of executory contracts and unexpired leases. Specifically, Section 8.1 of the Plan, which established procedures for the assumption and rejection of all categories of executory contracts and unexpired leases, provides that terminated contracts were not assumed by the Debtors. Section 8.1 provides, in pertinent part, "[a]s of and subject to the occurrence of the Effective Date, all executory contracts and unexpired leases to which any of the Debtors are parties

[3] *See* April 15, 2024 email from Boyer to Rebecca Suarez, a true and correct copy of which is attached hereto as **Exhibit A** (the "**April 15 Email**").

shall be deemed assumed or assumed and assigned, as applicable, except for any executory contract or unexpired lease that . . . (ii) *previously expired or was terminated pursuant to its own terms or by agreement of the parties thereto*." Plan § 8.1.

10. Section 5.12 of the Plan, which pertains to employment agreements specifically, likewise provides that terminated employment agreements were not assumed or assumed and assigned. Specifically, section 5.12 provides, "[t]he Debtors shall assume or assume and assign to the applicable Reorganized Debtors on the Effective Date . . . all Employment Agreements unless previously assumed or rejected by the Debtors . . . ." Plan § 5.12. The term "Employment Agreement" is defined in the Plan to mean, "as to an employee, officer, director, or individual independent contractor, all employment and compensation agreements, in each case, *existing as of the Effective Date*, including any employment, services, separation, retention, incentive, bonus, or similar or related agreements, arrangements, plans, programs, policies or practices, in each case, *as in effect as of the Effective Date*." Plan §1.92 (emphasis added).

d. The Boyer Motion

11. By the Boyer Motion, Boyer seeks entry of an order enforcing the Boyer Agreement and directing prompt payment of the Boyer Claims. In support of the relief requested, Boyer argues that the Boyer Agreement was an executory contract that was assumed under the Plan. According to Boyer, the Boyer Agreement was assumed because: (i) the Boyer Agreement was an Employment Agreement as that term is defined in the Plan, and accordingly, was assumed pursuant to Section 5.12 of the Plan, and/or (ii) the Boyer Agreement was an executory contract that was assumed pursuant to Section 8.1 of the Plan.

The Boyer Motion Should be Denied

I. The Boyer Agreement was Terminated Prior to the Effective Date and Was Not Assumed by the Reorganized Debtor

12. Pursuant to the Plan, contracts, including employment agreements, that were terminated prior to the Effective Date were not assumed or assumed and assigned pursuant to the Plan. *See* Plan § 8.1 ("all executory contracts and unexpired leases . . . shall be deemed assumed or assumed and assigned . . . except for an executory contract or unexpired lease that . . . *previously expired or was terminated pursuant to its own terms*) (emphasis added); Plan §1.92 (limiting the definition of Employment Agreements that were assumed pursuant to section 5.12 of the Plan to those that were "in effect as of the Effective Date.").

13. The Plan is consistent with applicable Third Circuit Law, which provides terminated contracts cannot be assumed. *Counties' Contracting and Construction Co. v. Constitution Live Insurance Co.*, 855 F.2d 1054, 1061 (3d Cir. 1988) ("A contract may not be assumed under section 365 if it has already expired according to its terms.") (citing 2 Collier on Bankr. P. 365.04); *In re Meridian Automotive Systems-Composites Operations, Inc.*, 372 B.R. 710, 723 (Bankr. D. Del. 2007) (finding terminated agreement could not be assumed even though non-material obligations remained outstanding).

14. As set forth above, Boyer terminated the Boyer Agreement as of April 25, 2024. Specifically, in the April 15 Email, Boyer provided: "I will not be renewing my *agreement* with Cano Health. My last day of employment is 4/25/2024." *See* April 15 Email (emphasis added). By the April 15 Email Boyer expresses his intent not just to terminate his employment, but also his intent to terminate the *agreement*. Thus, Boyer's employment and the Boyer Agreement terminated as of April 25, 2024.

15. The Boyer Agreement is not an "Employment Agreement" as such term is defined in the Plan because it was terminated and not "in effect" as of the Effective Date. Accordingly, section 5.12 of the Plan, which provided for the assumption of Employment Agreements, is not applicable to the Boyer Agreement. Further, the Boyer Agreement was "terminated pursuant to its terms" prior to the Effective Date and, thus, was not assumed pursuant to section 8.1 of the Plan. Accordingly, as a result of Boyer's termination of the Boyer Agreement on April 25, 2024, the Boyer Agreement was not assumed pursuant to the terms of the Plan.

II. Even If the Boyer Agreement Was Not Terminated, the Boyer Agreement Could Not Have Been Assumed Because It Was Not Executory

16. Boyer appears to argue that, despite the April 15 Email terminating the Boyer Agreement, the agreement remained an executory contract because the Boyer Agreement contains certain restrictive covenants. Assuming the Boyer Agreement was not terminated as of April 25 (it was), the Boyer Agreement was not assumed because the obligations allegedly outstanding are not sufficient to render the contract executory.

17. Section 365 of the Bankruptcy Code provides a debtor in possession "may assume or reject any executory contract or unexpired lease of the debtor." 11 U.S.C. § 365. Boyer argues that "the time for determining if a contract is executory is when the bankruptcy petition is filed." *See* Boyer Motion at ¶ 9-20 (quoting *In re HQ Global Holdings, Inc.*, 290 B.R. 507, 510 (Bankr. D. Del. 2003)). However, Courts have found that "events after the filing of the bankruptcy petition may cause the contract to be regarded as not executory . . . such as contracts which expire post-petition by their own terms after the date of filing. . . ." *In re Child World*, 147 B.R. 147 B.R. 847, 851-52 (Bankr. S.D.N.Y. 1992) (Citing *Gloria Mfg. Corp. v. Int'l Ladies Garment Workers' Union*, 734 F.2d 1020 (4th Cir. 1984)); *In re Gov't Sec. Corp.*, 101 B.R. 343, 349 (Bankr. S. D. Fla. 1989) ("Although a contract may be executory on the date the bankruptcy petition is filed . . .

circumstances may arise which render the contract no longer executory. For example, if the agreement expires of its own terms . . . there is no longer anything to assume or reject.") (citing *In re Pesce Baking Co., Inc.*, 43 B.R. 949, 457 Bankr. N.D. Ohio 1984)); *see also In re Clearpoint Bus. Res., Inc.*, 442 B.R. 292, 296 (Bankr. D. Del. 2010) ("Once a contract ends, a debtor's rights, such as to assume, ends as well").

18. In the Third Circuit, "an executory contract is a contract under which the obligations of both the bankrupt and the other party to the contract are so far unperformed that the failure of either to complete performance would constitute a material breach excusing the performance of the other." *In re Exide Techs.*, 607 F.3d 957, 962 (3d Cir. 2010) (citing *Enter. Energy Corp. v. U.S.* (*In re Columbia Gas Sys. Inc.)*, 50 F.3d 233, 239 (3d Cir. 1995)). In determining whether there are outstanding obligations owing by both parties that would constitute a material breach if not performed, courts look to applicable state law. *Id.*

19. The Boyer Agreement is governed by Florida Law. *See* Boyer Agreement § 9.8. Under Florida Law, "to constitute a vital or material breach, a party's nonperformance must 'go to the essence of the contract.'" *MDS (Can.) Inc. v. Rad Source Techs., Inc.*, 720 F.3d 833, 849 (11th Cir. 2013) (Citing *Beefy Trail, Inc. v. Beefy King Int'l, Inc.*, 267 So. 2d 853, 857 (Fla. Dist. C. App. 1972)). Conversely, "[a] party's 'failure to perform some minor part of his contractual duty cannot be classified as a material breach.'" *Id.*

20. Here, the "essence of the contract" was for Boyer to treat patients in exchange for a salary. As of the Effective Date, however, the only obligations that remained outstanding were Boyer's compliance with certain restrictive covenants and the Debtors' obligations to make the bonus and reimbursement payments. Courts have determined employment agreements with similar outstanding obligations are not executory. *See In re Spectrum Info. Techs.,*

Inc., 190 B.R. 741, 748 (Bankr. E.D.N.Y. 196) (finding former employee's remaining obligations of confidentiality and non-interference were "vestiges of [his employment agreement] that do not rise to the level of material future performance" because his employer "received the substantial benefit of its bargain under the Employment Agreement, i.e. the services rendered by [the employee]."); *see also Shults & Tamm v. Brown (In re Hawaiian Telcom Communs., Inc.)*, Case No. 08-02005, Adv. Pro. No. 11-90011, 2012 WL 273614 at *4 (Bankr. D. Haw. Jan. 30, 2012) (finding employment agreement was not an executory contract); *In re Capps*, No. 16-10141, 2018 WL 3635708 (Bankr. D. Kan. July 26, 2018) (finding that non-compete agreement was not executory); *In re Schneeweiss*, 233 B.R. 28 (Bankr. N.D.N.Y. 1998) (same); *but see In re Rupari Holding Corp.*, No. 17-10793 (KJC), 2017 WL 5903498 (Bankr. D. Del. Nov. 28, 2017) (finding separation agreements, which included non-compete provisions, were executory contracts and authorizing their rejection).[4]

21. The remaining obligations under the Boyer Agreement, the bonus payment and the restrictive covenants, are insufficient to render the contract executory. Accordingly, even if the Boyer Agreement was not terminated prior to the Effective Date, it was not an executory contract subject to assumption or assignment pursuant to the Plan.

III. The Reimbursement Claim Is Not Payable Under the Terms of the Boyer Agreement

22. Notwithstanding whether the Boyer Agreement was assumed pursuant to the Plan, the terms of the Boyer Agreement do not provide for the payment of the Reimbursement Claim. As set forth in the Boyer Motion, the Reimbursement Claim requests payment of $1,799

[4] In *Rupari*, the Court found *separation* agreements that included restrictive covenants were executory contracts. While restrictive covenants may very well be the essence of a contract entered into to prevent a departing employee from competing with an employer, the same cannot be said with respect to an *employment* agreement, the essence of which is an agreement to provide services in exchange for a salary.

for unspecified continuing education, licensing and board expenses. *See* Boyer Motion at ¶ 6. Schedule 4.2 of the Boyer Agreement describes such expenses as "fringe benefits," and specifically provides that "[n]o Fringe benefit is . . . payable to [Boyer] or to any heir, beneficiary or successor to [Boyer] in the event of a *termination with, or without, cause*." Schedule 4.2 of Boyer Agreement (emphasis added). Boyer terminated the Boyer Agreement as of April 25, 2025. As a result, the Debtors are not liable to pay any fringe benefits, including the Reimbursement Claim, upon his termination pursuant to the express terms of the Boyer Agreement.

IV. Any Claims Based on the Boyer Agreement Are General Unsecured Claims

23. Boyer argues that payment of the Boyer Claims is due solely on the basis that the Boyer Agreement was assumed pursuant to the Plan, and thus, the Boyer Claims must be paid presumably as a cure claim or an assumed obligation of the Debtors. As discussed above, the Boyer Agreement was not assumed pursuant to the terms of the Plan. *See* Plan § 8.1. Accordingly, there is no obligation to pay the Boyer Claims as cure claims. *See* 11 U.S.C. § 365 (b)(1)(A) (requiring cure costs to be paid to cure defaults on *assumed* contracts). Moreover, Courts have held that Debtors are not bound by the terms of employment agreements that are not assumed. *See In re Bernard Techs., Inc.*, 342 B.R. 174, 178 (Bankr. D. Del. 2006) ("Because the Employment Contract was never assumed by the Debtor post-petition, it was not binding on the estate").

24. At most, Boyer has a prepetition claim for the Debtors' breach to pay the Third Annual Bonus. The Third Circuit has held that claims based on prepetition contracts generally arise when the parties enter into the contract. *In re Mallinckrodt PLC*, 99 F.4th 617, 621 (3d Cir. 2024) ("Most contract claims arise when the parties sign the contract."). As a result, claims under prepetition contracts are typically general unsecured claims, even if they come due post-petition. *See id.* (finding claim for postpetition royalty payments arising from prepetition contract for sale of pharmaceutical product was unsecured); s*ee also In re APG Co.*, 270 B.R. 567,

571 (Bankr. D. Del. 2001) ("The fact that the payments under a contract come due after the bankruptcy filing does not alter the conclusion that the payments are prepetition obligations.").

25. The Boyer Agreement is clearly a prepetition contract. Boyer entered into the Boyer Agreement in 2021, over three years prior to the Petition Date. Boyer's right to payment of the Third Annual Bonus arose when he entered into such contract. Accordingly, to the extent the Debtors breached the Boyer Agreement by failing to make any payments thereunder, such claims are general unsecured claims.

Reservation of Rights

26. This Objection is intended to address only the arguments raised in the Boyer Motion. To the extent Boyer raises additional arguments in any reply to this Objection or at the hearing on the Boyer Motion, the Reorganized Debtors reserve the right to respond to such additional arguments and to argue that any such arguments have been waived. *See In re AmeriFirst Fi., Inc.*, Case No. 23-11240, 2024 WL 2965215, at *1, n.7 (Bankr. D. Del. June 12, 2024) ("The Court generally ignores arguments raised for the first time in a reply").

Conclusion

27. For the reasons set forth above, the Reorganized Debtors respectfully request the Boyer Motion be denied in its entirety.

[*Remainder of page intentionally left blank*]

WHEREFORE the Reorganized Debtors respectfully request that (1) the Boyer Motion be denied and (2) the Court grant the Reorganized Debtors such other relief as is just and proper.

Dated: November 1, 2024
Wilmington, Delaware

/s/ Amanda R. Steele

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Exhibit A

April 15 Email

From: Casey Boyer <Casey.Boyer@healthypartners.com>
Sent: Monday, April 15, 2024 12:58 PM
To: Rebecca Suarez <rebecca.suarez@canohealth.com>
Subject: Boyer: Questions about CME, United health

Good afternoon Rebecca,

Hope you are well.

As I plan to persue other interests, I will not be renewing my agreement with Cano Health.
My last day of employment is 4/25/24.

Could you tell me when my last day of coverage will be with United health? Will there be an exit meeting with HR?

Also, do you know if there is a written reimbursement policy regarding payment for CME if a person has submitted their resignation prior to the request, but took the course during the remainder of their employment.

In advance, I would like to thank you for all the help you have provided to me during my time with Cano.

Dr. Boyer

Casey G Boyer MD