IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re	:	**Chapter 11**
CANO HEALTH, INC., *et al.*,	:	**Case No. 24-10164 (KBO)**
Debtors.[1]	:	**(Jointly Administrated)**

STATEMENT OF DIP LENDERS
AND AD HOC FIRST LIEN GROUP IN SUPPORT OF
CONFIRMATION OF FOURTH AMENDED JOINT CHAPTER 11 PLAN
OF REORGANIZATION OF CANO HEALTH, INC. AND ITS AFFILIATED DEBTORS

The DIP Lenders and Ad Hoc First Lien Group hereby file this statement (this "***Statement***") in support of confirmation of the *Fourth Amended Joint Chapter 11 Plan of Reorganization of Cano Health, Inc. and Its Affiliated Debtors* [Docket No. 864] (as amended, modified, or supplemented from time to time, and together with all exhibits and schedules thereto, the "***Plan***"),[2] join in the *Debtors' Memorandum of Law in Support of Confirmation of Fourth Amended Joint Chapter 11 Plan of Reorganization of Cano Health, Inc. and Its Affiliated Debtors*, filed contemporaneously herewith (the "***Debtors' Confirmation Brief***"), and respond to the Plan Objections.[3] In support thereof, the DIP Lenders and Ad Hoc First Lien Group respectfully represent as follows:

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1 The last four digits of Cano Health, Inc.'s tax identification number are 4224. A complete list of the Debtors in the chapter 11 cases may be obtained on the website of the Debtors' proposed claims and noticing agent at https://www.kccllc.net/CanoHealth. The Debtors' mailing address is 9725 NW 117th Avenue, Miami, Florida 33178.

2 Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the Plan.

3 "***Plan Objections***" refers to: (i) the objections filed at Docket Nos. 1076 (the "***MSP Objection***"), 1093 (the "***Humana Rejection Objection***"), 1094 (together with the Humana Rejection Objection, the "***Humana Objection***"), 1061, 1066, 1067, 1068, 1070, 1071, 1072, 1074, 1075, and 1101 (collectively, the "***Confirmation Objections***"); and (ii) the objections filed at Docket Nos. 1031, 1032, 1035, 1036, 1039, 1040, 1041, 1042, 1043, 1044, 1045, 1046, 1049, 1083, 1087, 1088, 1089, 1091, 1092, 1093, and 1101 (collectively, the "***Cure Objections***").

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STATEMENT

1. The Ad Hoc First Lien Group fully supports confirmation of the Plan. Most classes entitled to vote on the Plan accepted it, including at least one at each Debtor with asserted Impaired Claims for which votes were cast.[4] This achievement should not be understated, as reaching this level of consensus required extensive efforts among the Debtors, the Ad Hoc First Lien Group, the Creditors' Committee, and other stakeholders. The Ad Hoc First Lien Group appreciates the Debtors' efforts in advancing the process in a constructive, efficient, and successful manner.

2. The Restructuring Support Agreement—which represents the culmination of prepetition negotiations among the Debtors and the Consenting Creditors—provides the foundation for the Plan. The Restructuring Support Agreement was designed to deleverage the Debtors' balance sheet by approximately a billion dollars, while also providing the Debtors with the financing necessary to not only fund these Chapter 11 Cases but the Debtors' post-emergence obligations as well.

3. As established by the liquidation analysis attached as **Exhibit E** to the Disclosure Statement, holders of Non-RSA GUC Claims are woefully out of the money and would not have received anything on account of their Claims in a chapter 7 liquidation of the Debtors' Estates. Nevertheless, the Ad Hoc First Lien Group worked tirelessly with the Debtors and agreed to substantial economic concessions to forge consensus among such stakeholders, which efforts led to the Global Settlement. Furthermore, the Ad Hoc First Lien Group, who already provided urgent liquidity relief at the outset of these cases through the DIP Loans, has agreed to fund incremental new money exit loans of up to $50 million.

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[4] *See Certification of James Lee Regarding the Solicitation and Tabulation of Votes on the Fourth Amended Joint Chapter 11 Plan of Reorganization of Cano Health, Inc. and Its Affiliated Debtors* (the "***Voting Certification***"), filed contemporaneously herewith, ¶¶ 18-19.

4. The Plan incorporates the terms of the Global Settlement, as well as the numerous other integrated settlements set forth in the Restructuring Support Agreement. Each of the settlements incorporated into the Plan, including the settlements reflected in the Restructuring Support Agreement and the Global Settlement, is fair, reasonable, and in the paramount interests of the Debtors' creditors. Without the carefully crafted and value-maximizing compromises and settlements that lay at the heart of the Plan, the Debtors would incur significant delay and expense litigating myriad issues with various stakeholders—each with distinct interests—which would have a deleterious impact on creditor recoveries and the Debtors' ability to reorganize. Accordingly, each settlement satisfies the standard for approval under rule 9019 of the Federal Rules of Bankruptcy Procedure and should therefore be approved.

5. Additionally, as set forth in the Debtors' Confirmation Brief and as will be demonstrated by the Debtors through the evidence submitted at the Confirmation Hearing, the Plan satisfies the confirmation requirements enumerated in section 1129 of the Bankruptcy Code, is unquestionably in the best interests of the Debtors and their estates, and represents an optimal outcome for all of the Debtors' stakeholders.

RESPONSE TO OBJECTIONS

6. Once confirmed, the Plan and the underlying Restructuring Transaction will accomplish precisely what chapter 11 is intended to achieve: a value-maximizing consensual resolution among the Debtors and their stakeholders. Nevertheless, a few creditors seek to thwart this outcome in favor of their respective parochial interests. As the Debtors amply demonstrate in the Debtors' Confirmation Brief, each of the Plan Objections should be overruled. Nevertheless, the Ad Hoc First Lien Group seeks to highlight certain issues raised by certain Confirmation Objections.

I. THE RELEASES CONTAINED IN THE PLAN ARE CONSENSUAL AND APPROPRIATE.

7. The MSP Objection claims the Plan fails to comply with 1129(a)(1) of the Bankruptcy Code. This is not true. The Plan fully preserves MSP's rights under the Bankruptcy Code and the exculpation provisions are narrowly tailored to cover estate fiduciaries in a manner that is typical in this District. There is no requirement the Debtors use any magic words to effectuate this result.

8. Of more immediate interest to the Ad Hoc First Lien Group, the Plan's release and injunction provisions, including those in favor of the Ad Hoc First Lien Group, are appropriate and accord with applicable precedent. Such releases are fully consensual because they were conspicuously noticed in bold font and parties-in-interest were afforded the opportunity to opt out. *See In Boy Scouts of America and Delaware BSA, LLC*, 642 B.R. 504, 675 (Bankr. D. Del. 2022) (finding releases consensual where "claimants . . . were well aware of the opportunity and need to opt-out or object to the third-party releases in the Plan" because "the need to opt-out of the releases is prominently placed . . . in bold, all caps and surrounded by a box."). Further, the release provisions carve out medical malpractice claims from their ambit. Thus, as a practical matter, the parties granting the release are parties to the Restructuring Support Agreement and creditors who voted to accept the Plan and did not opt out of granting releases. Given this consensual release structure, contrary to the assertions contained in the MSP Objection, this Court is not being asked to "release" claims. Rather, the parties who do not opt-out release the claims, and the Plan's injunction provisions enforce such releases. MSP's remedy is to opt-out of such releases, which it has done, it is not entitled to go further than this. *See Mallinckrodt*, 639 B.R. at 877 (finding a party that opted-out of and thus was not bound by releases did not have standing to object to them). The Plan's third-party release and injunction provisions should be approved.

II. SECTION 1129(B) DOES NOT APPLY TO THE PLAN.

9. The MSP Objection is similarly incorrect in its assertion that the Plan fails to comply with section 1129(b) of the Bankruptcy Code. Section 1129(b) allows the confirmation of a plan over the objection of an impaired dissenting class "if the plan does not discriminate unfairly, and is fair and equitable, with respect to each *class* of claims or interests that is impaired under, and *has not accepted*, the plan." 11 U.S.C. § 1129(b)(1) (emphasis added). Here, the only party objecting based on section 1129(b) is MSP—a holder of claims in Class 5 of the Debtor Cano Health, LLC, which voted to accept the Plan.[5] Ample authority across jurisdictions makes clear that "[o]nly after it is apparent that an impaired *class* objects is it necessary for the court to determine whether or not the plan is capable of confirmation under § 1129(b)," as the absolute priority rule "applies only to each class as a whole, and not to minority dissenters within a class." *In re Winters*, 99 B.R. 658, 663 (Bankr. W.D. Pa. 1989) (emphasis in original).[6]

10. The same is true with respect to unfair discrimination: Section 1129(b)'s text "makes plain that unfair discrimination applies only to classes of creditors (not the individual creditors that comprise them), and then only to classes that dissent. Thus, a disapproving creditor within a class that approves a plan cannot claim unfair discrimination, and the standard does not apply directly with respect to other classes unless they too have dissented." *In re Tribune Co.*, 972 F.3d 228, 242 (3d Cir. 2020) (internal quotation marks omitted).

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5 *See* Voting Certification, Ex. A (providing that all Cano Health, LLC Voting Classes voted to accept the plan).

6 *See also In re United Marine*, 197 B.R. 942, 948 (Bankr. S.D. Fla. 1996) ("A lone dissenter in an accepting class . . . cannot invoke the absolute priority rule. Such a creditor's only remedy is the best interest of creditors test under § 1129(a)(7)"); *In re Wetdog, LLC*, 518 B.R. 126, 139-40 (Bankr. S.D. Ga. 2014) ("A plan does not need to satisfy the absolute priority rule with respect to an impaired class that votes to accept the plan"); *Official Comm. of Equity Sec. Holders v. Official Comm. of Unsecured Creditors (In re Adelphia Communs. Corp.)*, 544 F.3d 420, 426 (2d Cir. 2008) ("a plan need not satisfy the Absolute Priority Rule so long as any class adversely affected by the variation accepts the plan."); 7 Collier on Bankruptcy ¶ 1100.09 (16th ed. 2024) ("the plan need not satisfy the absolute priority rule as long as any class adversely affected by deviation from the absolute priority rule has accepted the plan").

11. Additionally, given that unsecured creditors are wholly out of the money, unfair discrimination does not apply. This is because any distribution to Class 4 "does not diminish the distributions to [Class 5] . . . the surplus distribution would revert to secured creditors and not [Class 5]." *In re Nuverra Evtl. Sols., Inc.*, 590 B.R. 75 (D. Del. 2018); *see also In re Genesis Health Ventures, Inc.*, 266 B.R. 591 (Bankr. D. Del. 2001) ("The disparate treatment between Classes . . . is a permissible allocation by the secured creditors of a portion of the distribution to which they would otherwise be entitled, rather than unfair discrimination"); *In re Mallinckrodt PLC*, 639 B.R. 837, 903 (Bankr. D. Del. 2022) (finding it "irrelevant" that one class received more than its entitlement and reasoning that "any presumption of unfair discrimination that may arise due to the disparity between the Plan's distributions to Class 6 and Class 7 is rebutted by the fact that Class 6's distribution is no less than the *de minimus* distribution to which it is entitled in the first place" (emphasis in original)).

12. Finally, as shown in the Disclosure Statement, any discrimination *benefits*, rather than harms, MSP because creditors in Class 5 are projected to receive a percentage recovery well in excess to that of Class 4. Thus, MSP lacks standing to press such an objection. *See In re Indianapolis Downs, LLC*, 486 B.R. 286, 304 (Bankr. D. Del. 2013) ("In the context of a confirmation hearing, creditors 'have standing only to challenge those parts of a reorganization plan that affect their direct interests'" (quoting *In re Orlando Investors, L.P.*, 103 B.R. 593, 596-97 (Bankr. E.D. Pa. 1989))).

13. Accordingly, the MSP Objection's section 1129(b)-based arguments are misplaced given that MSP has been overruled by its Class's support for the plan.

III. THE HUMANA ROFR AGREEMENT CAN BE REJECTED UNDER SECTION 365.[7]

14. The Humana Objection seeks to preserve the ROFR Agreement in favor of Humana. Rejection of the ROFR Agreement was one of the key pillars of the Plan and the Restructuring Support Agreement on which the Plan is based. *See* Plan § 8.1(c) (specifically providing that, "unless otherwise agreed by the Requisite Consenting Creditors," the Humana ROFR shall be deemed rejected under the Plan on the Effective Date); Plan § 1.181 (defining "Rejection Schedule" to explicitly note that the Humana ROFR will be included on the Rejection Schedule).[8] Further, the Ad Hoc First Lien Group's support and votes to accept the Plan were predicated and conditioned on receiving the New Equity Interests unburdened by the ROFR Agreement that significantly depresses the value of such equity. The inability to reject the ROFR Agreement would imperil the Plan and force the key parties to formulate a new plan or undertake an alternative process.

15. Rejection of agreements, such as the ROFR Agreement, which impose material burdens on a debtor and depress its go-forward value is a valid use of the Bankruptcy Code. *See In re Waldron*, 36 B.R. 633, 635-36 (Bankr. S.D. Fla. 1984) (finding that a bankruptcy case filed solely to reject an option contract was filed in good faith). In response, the Humana Objection cites a single case from outside the Third Circuit[9] for the proposition that the ROFR Agreement cannot be rejected because it includes only "contingent obligation" and thus fails the Countryman

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[7] Capitalized terms in this section that are not defined in this Statement or the Plan have the meaning ascribed to them in the Humana Objection.

[8] The Restructuring Term Sheet (as defined in the Restructuring Support Agreement) also explicitly provides that "the Humana ROFR shall not be assumed under the Stand-Alone Restructuring Plan." Docket No. 14 at 69.

[9] *See* Humana Objection ¶¶ 14-18 (citing *In re Le Yang*, Case No. 23-00075-RLM-11, 2023 WL 7104764 (Bankr. S.D. Ind. Oct. 23, 2023)).

test for what constitutes an executory contract.[10] This is incorrect for two reasons—not to mention that it is also incorrect that, assuming the contract was non-executory, the Reorganized Debtors would have no choice but to inherit any remaining obligations therein.

16. First, as "numerous" courts have recognized—including this Court on three separate occasions—"contingent option agreements are executory when material obligations will arise on each side if the option is exercised." *In re AbitibiBowater, Inc.*, 418 B.R. 815, 830-31 (Bankr. D. Del. 2009); *see also In re CB Holding Corp.*, 448 B.R. 684, 689 (Bankr. D. Del. 2011) (agreeing with "the majority of courts which have held that a right of first refusal is an executory contract subject to rejection under section 365"); *In re Kellstrom Industries, Inc.*, 286 B.R. 833, 835 (Bankr. D. Del. 2002) ("we conclude, like the majority of the courts before us, that the right of first refusal . . . is an executory contract which may be rejected by the Debtors under section 365"). Such an approach "is consistent with the Countryman test of practical logic" because rejection "converts a contingent in rem obligation into a fixed monetary one so as to permit the Debtor to deal with the property in order immediately to benefit [its] reorganizational efforts." *In re A.J. Lane & Co.*, 107 B.R. 435, 437 (Bankr. D. Mass. 1989). Accordingly, the Court should follow the majority view and reject the *Yang* court's novel theory that the "contingent nature of option contracts" render them non-executory. *See* Humana Objection ¶ 15 (quoting *Yang*, 2023 WL 7104764, at *4).

17. Second, the ROFR Agreement contains non-contingent obligations, which are measured as of the Petition Date. *See Enterprise Energy Corp. v. United States (In re Columbia*

[10] The Countryman test provides that a contract is considered "executory," and thus subject to section 365 of the Bankruptcy Code, if "a contract under which the obligation 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 performance of the other." *In re Weinstein Co. Holdings. LLC*, 997 F.3d 497, 504 (3d Cir. 2021) (quoting Vern Countryman, *Executory Contracts in Bankruptcy: Part I*, 57 MINN. L. REV. 439, 460 (1973)).

Gas Sys., Inc.), 50 F.3d 233, 240 (3d Cir. 1995) ("The time for testing whether there are material unperformed obligations on both sides is when the bankruptcy petition is filed."); *see also In re Exide Techs.*, 378 B.R. 762, 766 (Bankr. D. Del. 2007); *In re HQ Global Holdings, Inc.*, 290 B.R. 507, 510 (Bankr. D. Del. 2003); *In re Waste Systems Int'l, Inc.*, 280 B.R. 824, 827 (Bankr. D. Del. 2002). For example, the Debtors must provide thirty days' notice to Humana prior to commencing any sale process. ROFR Agreement § 3.2. Each party covenants to deliver instruments and documents requested by the other to carry out the provisions and purposes of the agreement. ROFR Agreement § 5.1. These provisions were all material unperformed obligations as of the Petition Date; further, such provisions, in conjunction with the prevailing case law that factors in contingent obligations when determining whether sufficient performance obligations remain to render a contract executory, clearly make the ROFR Agreement executory and subject to rejection under section 365 of the Bankruptcy Code.

18. Moreover, in the alternative that the ROFR is deemed non-executory, controlling case law—*Columbia Gas Systems*—requires that it cannot be assumed or rejected by a debtor, and that this merely entitles the contract counterparty to a general unsecured claim that may arise. *Columbia Gas Sys.*, 50 F.3d at 239 (holding that a non-executory contract counterparty is "relegated to the position of a general creditor of the bankrupt estate"); *see Waste Systems Int'l*, 280 B.R. at 827 ("Since the Consulting Agreement is a pre-petition non-executory contract, any claims arising from it are general unsecured claims"). Therefore, even accepting the premise of Humana's position for the sake of argument only, the result is no different: The burdens of the ROFR Agreement cannot and will not pass to the Reorganized Debtors, and Humana has nothing more than a general unsecured claim arising therefrom. In sum, the Humana Objection must be overruled.

RESERVATION OF RIGHTS

19. The DIP Lenders and Ad Hoc First Lien Group expressly reserve all of their respective rights, claims, defenses, and remedies under the DIP Documents, the Prepetition Loan Documents, the Bankruptcy Code, the Plan, orders of the Court, and applicable law, including, without limitation, the right to amend, modify, or supplement this Statement, seek discovery and diligence with respect to same, and introduce evidence at any hearing relating to the Plan or this Statement.

20. Specifically, the DIP Lenders and Ad Hoc First Lien Group expressly reserve all of their respective rights with respect to the many Cure Objections, some of which are material in nature, as well as the proposed assumption and rejection of executory contracts related thereto, which are subject to the consent rights of the DIP Lenders and Ad Hoc First Lien Group incorporated in Article I.D of the Plan.

CONCLUSION

WHEREFORE, for the reasons set forth above, as well as the reasons set forth in the Debtors' Confirmation Brief, the DIP Lenders and the Ad Hoc First Lien Group respectfully request that the Court (i) overrule the Plan Objections, (ii) confirm the Plan, and (iii) grant such other and further relief as the Court may deem just and proper.

Dated: June 25, 2024

PACHULSKI STANG ZIEHL & JONES LLP

/s/ Laura Davis Jones

Laura Davis Jones (DE Bar No. 2436)
James E. O'Neill (DE Bar No. 4042)
919 North Market Street, 17th Floor
Wilmington, Delaware 19801
Telephone: (302) 652-4100
Facsimile: (302) 652-4400
E-mail: ljones@pszjlaw.com
E-mail: joneill@pszjlaw.com

-and-

GIBSON, DUNN & CRUTCHER LLP
Scott J. Greenberg (admitted *pro hac vice*)
Michael J. Cohen (admitted *pro hac vice*)
Christina M. Brown (admitted *pro hac vice*)
200 Park Avenue
New York, New York 10166
Telephone: (212) 351-4000
Facsimile: (212) 351-4035
Email: sgreenberg@gibsondunn.com
mcohen@gibsondunn.com
christina.brown@gibsondunn.com

Attorneys for the DIP Lenders and Ad Hoc First Lien Group