IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re: CANO HEALTH, INC., *et al.*, Reorganized Debtors.	Chapter 11 Case Nos. 24-10164 (KBO), *et seq.* (Jointly Administered) **Hearing Date: November 14, 2024, 9:30 a.m.** **Objections Due By: November 1, 2024**

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

Dr. Casey Boyer ("Movant" or "Dr. Boyer"), by Movant's undersigned counsel, files this Motion To Compel Enforcement of Employment Agreement (the "Motion"), and in support hereof states as follows:

BACKGROUND

1. This Court has jurisdiction over this Motion pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). Venue is proper pursuant to 28 U.S.C. § 1409(a). The bases for the relief requested in this motion are 11 U.S.C. §§ 105 and 365.

2. Beginning on February 4, 2024 (the "Petition Date"), Cano Health, Inc. and certain of its subsidiaries, as debtors and reorganized debtors (collectively, the "Debtors," or as reorganized pursuant to the Plan (as defined below) the "Reorganized Debtors") filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code. The Reorganized Debtors' chapter 11 cases are being jointly administered for

procedural purposes only pursuant to Fed. R. Bankr. P. 1015(b) and Del. Bankr.LR 1015-1.

3. On June 28, 2024 (the "Confirmation Date"), 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.

4. Movant is a licensed physician. On or about May 11, 2021, the Debtors agreed to acquire Movant's medical practice, in furtherance of which the parties entered into two prepetition agreements: an Employment Agreement between Movant and the Debtor dated May 7, 2021 (the "Employment Agreement") and a certain Asset Purchase Agreement between Movant and the Debtor dated May 11, 2021 (the "APA," and collectively with the Employment Agreement, the "Agreements"). The Agreements effectuated both the acquisition of Movant's equity interest in the entity operating the medical practice (Casey G. Boyer, M.D., P.A) and also the ongoing employment of Movant as a physician by debtor Cano Health LLC. On the Petition

Date, the Agreements were executory contracts as that term is used in § 365 of the Bankruptcy Code.

5. In addition to his salary and other benefits, the Debtors agreed to pay Dr. Boyer certain performance bonuses, including but not limited to a Third Annual Bonus (the "Bonus"). Employment Agreement, Schedule 4.1(a)(iii). Under the formula set forth in that section, Dr. Boyer was entitled to receive the Bonus in an amount up to1 $110,000 within 90 days after the third anniversary of the Effective Date of his hiring, which was May 11, 2024. The Employment Agreement further provides that in the event Dr. Boyer terminated his employment before the Third Anniversary Date, the Bonus would be pro-rated to the date of termination. Employment Agreement, Schedule 4.1(b)(ii).

6. Under the Employment Agreement, the Debtors also agreed to reimburse Dr. Boyer for necessary Continuing Education and licensing and board expenses, up to $2,000 per year. Employment Agreement, Schedule 4.2 ("Continuing Medical Education and Licensing"). Dr. Boyer incurred $1,799.00 in unreimbursed expenses.

7. Additionally, the Employment Agreement contains a set of restrictive covenants prohibiting him from ownership, management, operation or control of any medical practice or clinic, or engaging in the practice of medicine, in any branches for any third party, including but not limited to medical groups, hospitals or insurance

companies, within a twenty (20) mile radius of his former place of business, for a period of two years after the termination of his employment. Employment Agreement § 7.1.

8. A similar set of covenants prohibiting Dr. Boyer from competing within the 20-mile radius also appears in the APA, except that the applicable prohibition period is 5 years, unless the Debtors terminate the employment without cause. APA § 4.1.

9. Dr. Boyer properly gave notice of the termination of his employment on April 25, 2024 under the Employment Agreement. Due to the prorating clause of Schedule 4.1(b)(ii), this means that only $105,770.00 of the $110,000 bonus amount came due on August 9, 2024.[2]

10. The impact of the Non-Compete remains a burden on Dr. Boyer and his family. To date, he has complied with the Non-Compete.

11. Section 5.13(a)(1) of the Plan provides: "The Debtors shall assume or assume and assign to the applicable Post-Emergence Entities on the Effective Date . . . . all Employment Agreements unless previously assumed or rejected by the Debtors in their sole discretion pursuant to an order of the Bankruptcy Court . . . ." The Employment Agreement was not assumed or rejected prior to the Effective Date.

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[1] According to Dr. Boyer's calculations, he earned the full $110,000 amount of the Bonus. The Debtors are in full possession of the data giving rise to this calculation.
[2] The $110,000 bonus amount prorates to $302.20 per day.

12. Section 1.82 of the Plan defines "Employment Agreements" 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."[3]

13. The Plan also contains a catch-all provision for the assumption of executory contracts: "As of and subject to the occurrence of the Effective Date, all executory contracts and unexpired leases to which any of the Debtors are parties shall be deemed assumed or assumed and assigned, as applicable," subject to certain exceptions not applicable here. Plan § 8.1(a).

14. Even though Dr. Boyer's employment terminated under the Agreements on April 25, 2024, Dr. Boyer's Employment Agreement is nevertheless an "Employment Agreement" as defined in the Plan. He is still undertaking the burden of the Agreements due to the Non-Compete. Therefore, under the Plan the Debtors assumed the Agreements and the Bonus is thus payable.

[3] The Plan also provided for various contracts to be listed on assumption and rejection notices filed by the Debtors from time to time before confirmation. To the best of the undersigned ability to search these documents, it does not appear that the Agreements were listed on any of them. Before filing this Motion, the undersigned contacted counsel for the Reorganized Debtor and was not told otherwise.

15. The Bonus was due on August 9, 2024, but the Debtors have paid neither the Bonus nor the unreimbursed expenses.

RELIEF REQUESTED AND BASIS THEREFOR

16. Courts in the Third Circuit look to the classic test described by Vern Countryman to determine whether an agreement is an executory contract: "[An executory contract is] 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." *Sharon Steel Corp. v. National Fuel Gas Distrib.,* 872 F.2d 36, 39 (3rd Cir. 1989) (quoting COUNTRYMAN, EXECUTORY CONTRACTS IN BANKRUPTCY, Part 1, 57 MINN.L.REV. 439, 460 (1973)) (other citations omitted).

17. The Debtors concede that at least some employment agreements are executory contracts, by virtue of the language in § 5.13(a)(1) of the Plan quoted above.

18. Moreover, a duty of forbearance by a party constitutes sufficient unperformed duty to render a contract executory. *Lubrizol Enterprises v. Richmond Metal Finishers,* 756 F.2d 1043, 1045-46 (4th Cir. 1985) (citing *Fenix Cattle Co. v.*

Silver (In re Select-A-Seat Corp.), 625 F.2d 290, 292 (9th Cir.1980)).[4] An ongoing obligation not to pursue an otherwise valid business venture is also sufficient. *See generally In re HQ Global Holdings, Inc.,* 290 B.R. 507 (Bankr. D.Del. 2003) (Debtors' obligation under license agreement not to use proprietary marks in exclusive franchisee territories rendered the contract executory).

19. "The time for determining if a contract is executory is when the bankruptcy petition is filed." *In re HQ Global Holdings, Inc.,* 290 B.R. 507, 510 (Bankr. D.Del. 2003) (citing *Columbia Gas,* 50 F.3d at 240). As described above, the Agreements were in effect as of the Petition Date, and—although not relevant—Movant was still actively employed by the Debtors on that date.

20. In this case, the Employment Agreement remains unperformed on both sides: the Debtors are obligated to pay Movant the Bonus and reimburse Movant for his unreimbursed expenses, and Movant is obligated to comply with the Non-Compete.

[4] *Lubrizol* was also cited favorably by the Third Circuit in the *Sharon Steel* opinion cited *supra.*

21. The Agreements were assumed under the Plan, either by operation of § 5.13(a)(1) or § 8.1(a).[5]

22. Service by mail upon the entire 2002 notice list in this case would be unduly burdensome and cost significant resources, as most parties on that list receive automatic notification of new docket entries contemporaneously with their filing. Therefore, Movant is causing copies of this Motion to be served by mail only upon counsel for the Debtors and counsel for the United States Trustee and intends to rely on CM/ECF service for the remaining interested parties.

WHEREFORE, Movant requests that this Court enter an order, substantially in the form appended hereto, enforcing the Agreements by requiring the Debtors to pay the prorated Bonus in the amount of $107,569.00 and the unreimbursed expenses in the amount of $1,799.00; and grant Movant such further relief as this Court deems just

[5] Although the Bankruptcy Code and case law confer a generous business judgment discretion on whether a debtor in possession may assume or reject an executory contract, the deadline to do so in Chapter 11 is confirmation of a plan. See § 365(d)(2) of the Bankruptcy Code. That deadline has now passed. "In the unlikely event that the contract is neither accepted nor rejected, it will 'ride through' the bankruptcy proceeding and be binding on the debtor even after a discharge is granted. The nondebtor party's claim will therefore survive the bankruptcy proceeding." *NLRB v. Bildisco & Bildisco,* 465 U.S. 513, 546 n.12 (1984).

and proper.

Dated: October 15, 2024
Wilmington, Delaware

Respectfully submitted,

HILLER LAW, LLC

/s/ Adam Hiller

Adam Hiller (DE No. 4105)
300 Delaware Avenue, Suite 210, #227
Wilmington, Delaware 19801
(302) 442-7677 telephone
ahiller@adamhillerlaw.com

Attorneys for Movant, Dr. Casey Boyer

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re: CANO HEALTH, INC., *et al*., Reorganized Debtors.	Chapter 11 Case Nos. 24-10164 (KBO), *et seq.* (Jointly Administered) **Hearing Date: November 14, 2024, 9:30 a.m.** **Objections Due By: November 1, 2024**

NOTICE OF MOTION

TO: Parties listed on the Certificate of Service

Dr. Casey Boyer ("Movant") has filed a Motion To Compel Enforcement of Employment Agreement (the "Motion"), which seeks the following relief: Entry of an order compelling the Debtors to comply with a certain Employment Agreement between Claimant and the Debtor dated May 7, 2021.

HEARING ON THE MOTION WILL BE HELD ON NOVEMBER 14, 2024 AT 9:30 A.M. PREVAILING EASTERN TIME.

You are required to file a response, if any, on or before November 1, 2024 at 4:00 P.M. Prevailing Eastern Time. At the same time, you must also serve a copy of the response upon Movant's attorneys:

Adam Hiller, Esquire
Hiller Law, LLC
300 Delaware Avenue
Suite 210, #227
Wilmington, Delaware 19801
(302) 442-7677 telephone
ahiller@adamhillerlaw.com

IF YOU FAIL TO RESPOND IN ACCORDANCE WITH THIS NOTICE, THE RELIEF REQUESTED IN THE MOTION MAY BE GRANTED BY THE COURT WITHOUT FURTHER NOTICE OR HEARING.

Dated: October 15, 2024
Wilmington, Delaware

Respectfully submitted,

HILLER LAW, LLC

/s/ Adam Hiller

Adam Hiller (DE No. 4105)
300 Delaware Avenue, Suite 210, #227
Wilmington, Delaware 19801
(302) 442-7677 telephone
ahiller@adamhillerlaw.com

Attorney for Movant, Dr. Casey Boyer

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re: CANO HEALTH, INC., *et al.*, Reorganized Debtors.	Chapter 11 Case Nos. 24-10164 (KBO), *et seq.* (Jointly Administered) **Re: Docket No(s).**

ORDER GRANTING DR. CASEY BOYER'S MOTION TO COMPEL ENFORCEMENT OF EMPLOYMENT AGREEMENT

UPON CONSIDERATION of the Motion To Compel Enforcement of Employment Agreement (the "Motion") filed by Dr. Casey Boyer ("Movant"), and any response thereto; the Court having determined that (A) the Court has jurisdiction over the Motion pursuant to 28 U.S.C. §§ 1334 and 157; (B) this is a core proceeding pursuant to 28 U.S.C. § 157; (C) venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and (D) service to the parties stated on the Certificate of Service is adequate under the circumstances; and the Court having further determined that cause exists to grant the relief requested in the Motion; it is hereby ORDERED as follows:

1. The Motion is GRANTED, as set forth herein. All capitalized terms not otherwise defined herein shall have the respective meanings set forth in the Motion.

2. The Debtors shall pay the amounts due under the Employment Agreement (as defined in the Motion), consisting of a Bonus in the prorated amount of

$107,569.00 and unreimbursed expenses in the amount of $1,799.00, within 14 days after entry hereof by the Court.

3. Nothing in this order shall limit or affect Movant's other rights under the Employment Agreement.

4. No stay of this Order shall be in effect.

5. The Court retains jurisdiction to interpret and enforce the terms of this order.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 15, 2024, I caused copies of the foregoing Motion To Compel Enforcement of Employment Agreement to be served via first-class mail, postage prepaid, upon the parties listed on the attached matrix and via CM/ECF electronic noticing on parties registered to receive electronic notices in this case.

Dated: October 15, 2024
Wilmington, Delaware

/s/ Adam Hiller

Adam Hiller (DE No. 4105)
HILLER LAW, LLC
300 Delaware Avenue, Suite 210, #227
Wilmington, Delaware 19801
(302) 442-7677 telephone

G. David Dean, Justin R. Alberto, Patrick J. Reilley, Andrew J. Roth-Moore
COLE SCHOTZ P.C.
500 Delaware Avenue, Suite 1410
Wilmington, Delaware 19801

Kristopher M. Hansen, Erez Gilad, Ryan Montefusco, Jillian McMillan
Paul Hastings LLP
200 Park Ave
New York, NY 10166

Gary T. Holtzer
Jessica Liou
Matthew P. Goren
Weil, Gotshal & Manges LLP
767 Fifth Avenue
New York, NY 10153

Office of the United States Trustee
Benjamin A. Hackman & Jon Lipshie
844 King St Ste 2207
Lockbox 35
Wilmington, DE 19801

Michael J. Merchant
Amanda R. Steele
Richards, Layton & Finger, P.A.
One Rodney Square
920 North King Street
Wilmington, DE 19801