IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

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

CREDITOR MSP RECOVERY LLC'S OBJECTION TO CONFIRMATION OF THE FOURTH AMENDED PLAN OF REORGANIZATION [ECF NO. 864]

Creditor, MSP Recovery LLC ("**MSP**" or the "**Creditor**"), pursuant to sections 1123 and 1129 of title 11 of the United States Code, 11 U.S.C. §§ 101 *et seq*. (the "**Bankruptcy Code**"), hereby files its objection (the "**Objection**") to confirmation of the *Fourth Amended Plan of Reorganization* [ECF No. 864] (the "**Amended Plan**") filed by Cano Health, Inc. and its affiliated debtors and debtors-in-possession (collectively, the "**Debtors**"). In support of the Objection, MSP respectfully states as follows:

FACTUAL BACKGROUND

1. On February 4, 2024 (the "**Petition Date**"), the Debtors filed voluntary petitions for relief under chapter 11 of title 11 of the United States Code, 11 U.S.C. §§ 101, *et seq*. (the "**Bankruptcy Code**"), in the United States Bankruptcy Court for the District of Delaware. The chapter 11 cases are jointly administered for procedural purposes.

2. As of the Petition Date, Debtors have remained in possession of their assets and have continued to operate and manage their businesses as debtors-in-possession pursuant to

[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' claims and noticing agent at https://www.kccllc.net/CanoHealth. The Debtors' mailing address is 9725 NW 117th Avenue, Miami, Florida 33178.

sections 1107(a) and 1108 of the Bankruptcy Code. No trustee or examiner has been appointed in these cases.

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 "**Committee**").

Creditor Filed a Proof of Claim in these Jointly Administered Chapter 11 Cases Preserving Rights to Assert a Setoff or Recoupment

4. On April 22, 2024, MSP timely filed a Proof of Claim (the "**Proof of Claim**") asserting an unsecured claim against Cano Health LLC ("**Cano Health**" or the "**Debtor**")[2] of no less than $5 million, together with unliquidated damages**,** prejudgment interest, and an award of its reasonable attorney's fees and costs, arising from its pre-petition causes of action against the Debtor, all as more fully set forth in the pending Amended Complaint filed in that certain litigation captioned as *MSP Recovery LLC v. Cano Health LLC,* Case No. 2023-21106-CA-01 (the "**MSP Litigation**"), which is pending before the Complex Business Litigation Division of the Eleventh Judicial Circuit in and for Miami-Dade County, Florida. MSP has alleged pending claims against Cano Health relating to (i) breach of the Amended Claims Agreement; (ii) specific performance

[2] Prior to the Petition Date, Debtor, Cano Health, contracted with MSP Recovery to assist in managing the collection of payments for the cost of care for its members. As set forth in the Proof of Claim, the business relationship was evidenced by, among other things: (a) that certain *Claim Cost Recovery and Recovery Agreement* dated as of January 19, 2021 (the "**Claims Agreement**"), as amended and restated under (i) the *Amended and Restated Claims Cost Recovery Agreement* ("**Amended Claims Agreement**") dated December 31, 2021, by and among Cano Health, as Assignor, Series 17-03-569, a designated series of MSP Recovery Claims, Series LLC ("**MSP Recovery Series**"), as Assignee, and MSP Recovery, (ii) the *First Amendment to the Amended and Restated Claim Cost Recovery and Recovery Agreement* dated September 30, 2022 (the "**First Amended Claims Agreement**"), by and among Cano Health, Series 17-03-569, a designated series of MSP Recovery Claims, Series LLC ("**MSP Recovery Series**"), and MSP Recovery, and (iii) the *Second Amendment to the Amended and Restated Claim Cost Recovery and Recovery Agreement* dated March 31, 2023 (the "**Second Amended Claims Agreement**" and collectively, the "**Claims Agreement**"), by and among, Cano Health, Series 17-03-569, a designated series of MSP Recovery Series and MSP Recovery; (b) that certain *Purchase Agreement* dated September 30, 2022 (the "**Purchase Agreement**"), as amended under *the First Amendment to Purchase Agreement* dated March 31, 2023 (the "**First Amendment to Purchase Agreement**" and collectively, the "**Purchase Agreement**"); (c) that certain *Services Agreement* effective as of August 1, 2022 (the "**Services Agreemen**t") by and between, Cano Health, and MSP Recovery; and (d) that certain *Claims Assignment Agreement* dated May 11, 2023 ("**Assignment Agreement**"), by and between Cano Health and Claims RR LLC.

of the Amended Claims Agreement; (iii) breach of the Purchase Agreement; (iv) breach of the Service Agreement; (v) defamation; (vi) defamation *per se*; and (vii) unjust enrichment. The damages suffered by Claimant include $5,000,000.00 owed to Claimant under the terms of its Service Agreement with the Debtor, as well as other unliquidated amounts owed in connection with the causes of action in the Amended Complaint.

5. MSP is also a party in two other pre-petition lawsuits commenced by the Debtor, which are based on the same operative facts and agreements at issue in the MSP Litigation, *i.e.*, *Cano Health, LLC v. MSP Recovery, Inc. d/b/a LifeWallet, et al.*, Case No. 2023-021166-CA-01, which was filed after the commencement of the MSP Litigation (the "**Cano Responsive Litigation**"), and *Cano Health, LLC v. Simply Healthcare Plans, Inc., et al.*, Case No. 2024-000284-CA-01, pursuant to which the Debtor seeks to assert rights with regard to claims previously assigned to MSP. Both of the foregoing actions are pending before the Complex Business Litigation Division of the Eleventh Judicial Circuit in and for Miami-Dade County, Florida. The Debtor has alleged eight causes of action against MSP in the Cano Responsive Litigation, including for (i) unjust enrichment; (ii) fraud in the inducement; (iii) breach of contract; and (iv) tortious interference with regard to the parties' pre-petition agreements.

6. The Proof of Claim expressly preserves MSP's legal right to assert a set-off and recoupment. It states, in relevant part that "[t]he execution and filing of the Proof of Claim is: (a) without waiver of, without prejudice to, and with full reservation of the Claimant's rights and claims in any action by or against the Debtor or any other party, including, without limitation, the right to assert a set-off or otherwise recoupment; (b) without waiver or release of, and with the express preservation of, any of the Claimant's rights, claims, actions, defenses, setoffs, or counterclaims against the Debtor or against any other entity or person liable for all or part of the

claims or rights of the Claimant under applicable law, including, but not limited to, all such rights of setoff relating to the claims asserted by the Debtor against Claimant in that certain litigation captioned as *Cano Health, LLC v. MSP Recovery, Inc. D/B/A LifeWallet, et al.*, Case No. 2023-021166-CA-01, and *Cano Health, LLC v. Simply Healthcare Plans, Inc., et al.*, Case No. 2024-000284-CA-01, which are pending before the Complex Business Litigation Division of the Eleventh Judicial Circuit in and for Miami-Dade County[.]"

Debtors Filed an Unconfirmable Amended Plan

7. On May 21, 2024, Debtors filed the Amended Plan, together with the supporting *Disclosure Statement for Fourth Amended Joint Chapter 11 Plan of Reorganization* [ECF No. 866] (the "**Disclosure Statement**"), consistent with the *Restructuring Support Agreement* (the "**RSA**") dated February 4, 2024, with an ad hoc group of holders of 86% of the Debtors' secured debt and 92% of the Debtors' unsecured notes (collectively, the "**Consenting Creditors**").[3]

8. On May 21, 2024, the Bankruptcy Court entered the *Order (I) Approving Proposed Disclosure Statement and Form and Manner of Notice of Disclosure Statement Hearing, (II) Establishing Solicitation and Voting Procedures, (III) Scheduling Confirmation Hearing, (IV) Establishing Notice and Objection Procedures for Confirmation of Proposed Plan, and (V) Granting Related Relief* [ECF No. 865] (the "**Disclosure Statement Order**").

The Amended Plan Classifies Unsecured Creditors into Three Separate Classes with Different Treatement

9. The Amended Plan proposed the following classes and treatment for claims:

Class	Designation	Impairment	Allowed Amount	Projected Recovery
1	Other Priority Claims	Unimpaired	$1-2 million	100%
2	Other Secured Claims	Unimpaired	TBD	100%

[3] Any capitalized term that is not otherwise defined herein shall have the meaning ascribed to such term in the Amended Plan.

3	First Lien Claims	Impaired	≈ $974 million	≈ 48.1%
4	RSA GUC Claims	Impaired	≈ $850 million	≈ 1%
5	Non-RSA GUC Claims	Impaired	≈ $38 million	≈ 13.6% - 19.1%
6	Convenience Claims	Impaired	≈ $1 million	≈ 14.8% - 43.0%
7	Intercompany Claims	Unimpaired / Impaired	$1.45 billion	N/A
8	Subordinated Claims	Impaired	TBD	0%
9	Existing Subsidiary Interests	Unimpaired / Impaired	N/A	N/A
10	Existing CH LLC Interests	Unimpaired	N/A	N/A
11	Existing PCIH Interests	Unimpaired / Impaired	N/A	N/A
12	Existing CHI Interests	Impaired	$0	0%

10. Unsecured creditors are separated into three separate classes (Classes 4-6) with distinct treatment:

a. **Class 4 (RSA GUC Claims)**. RSA GUC Claims shall be entitled to *pro rata* distributions to holders of Allowed RSA GUC Claims (comprised of the Allowed First Lien Deficiency Claims, Allowed Senior Note Claims, and the Allowed Kent Claims) of warrants to purchase up to 5% of the New Equity Interests. Amended Plan, Art. I.D.

b. **Class 5 (Non-RSA GUC Claims)**. Non-RSA GUC Claims shall be entitled to receive their *pro rata* share of: (i) MSP Recovery Proceeds (approximately $5.6 million in net cash proceeds from the liquidation of certain shares in MSP Recovery, Inc. held by Debtor, Cano Health, as of the Petition Date); (ii) proceeds of certain causes of action against (among others) certain of the Debtors' former officers and directors to be assigned to a trust for the benefit of General Unsecured Creditors; and (iii) incremental cash (capped at $1 million in the aggregate), comprised of a combination of one or more of the foregoing: (a) De Minimis Asset Sale Proceeds (i.e., cash proceeds from pre-effective date sales of de minimis assets (subject to a cap of $350,000); (b) cash proceeds from the sale of CPE Assets (i.e., pharmacy equipment located at 3301 NW 107th Avenue, Miami, FL 33178); and (c) up to $1 million in Simply/MSP Proceeds (i.e., first-out dollars from the net proceeds resulting from a judgment or settlement of the Simply Claims and/or the MSP Claims, subject, as described in the Plan, to the Simply Cashout Amount of $500,000) stemming from claims of Debtor, Cano Health. *Id.* However, none of the foregoing amounts represent a guaranteed recovery to creditors in Class 5, as the Amended Plan authorizes the Committee, in its sole discretion, to reallocate *some or all* of the Cash otherwise entitled to be distributed to holders of Allowed Non-RSA GUC Claims, instead, to fund the Litigation Trust and the Litigation Trust

Expenses. *Id.*[4] Stated differently, while Class 5 provides the Creditors' Committee with substantial distributions to fund certain expenses, in its sole discretion, it does not do the same with respect to distributions to Class 5 creditors.

c. **Class 6 (Convenience Claims).** Holders of Allowed Convenience Claims shall be entitled to receive Cash in an amount equal to the lesser of (a) 50% of its Allowed Convenience Claim or (b) its pro rata share of $400,000, which cash shall be funded from the MSP Recovery Proceeds (and any holder of an Non-RSA GUC Claim in an allowed amount exceeding $10,000 will have the option to reduce the allowed amount of their Non RSA GUC Claim to $10,000 and opt into Class 6 (Convenience Claims). *Id.*

The Amended Plan Seeks to Extinguish or Limit Pre-Petition Setoff and Recoupment Rights of all Creditors

11. As currently drafted, the Amended Plan purports to extinguish and/or substantially impair the rights of all creditors to assert rights of set-off, recoupment, and/or arguably, to take basic actions in furtherance of any defense in any pending litigation involving the Debtors. Section 10.5(b) of the Amended Plan states that "all Entities who have held, hold, or may hold Claims . . . are permanently enjoined, on and after the Effective Date . . . from [among other things] . . . (i) commencing, *conducting*, or *continuing in any manner*, directly or indirectly, any suit, action, or other proceeding of any kind (including any proceeding in a judicial, arbitral, administrative or other forum) against or *affecting the Released Parties* or *the property of any of the Released Parties* . . . [and/or] (iv) asserting *any right of setoff*, directly or indirectly, *against any obligation due the Released Parties or the property of any of the Released Parties*, except (x) as contemplated or allowed by the Plan or (y) to the extent asserted in a timely filed Proof of Claim or timely filed objection to the confirmation of the Plan, and (v) acting or proceeding in any manner, in any place

[4] *See* Disclosure Statement at 11 n. 8-9 (explaining that estimates of amount of RSA GUC Claims do not include numerous claims and that recovery estimates may be materially lower, including as a result of the Creditors' Committee's broad discretion to use proceeds in its sole discretion.

whatsoever, that does not conform to or comply with the provisions of the Plan[.]" Amended Plan, § 10.5(b).

The Amended Plan's Discharge Provisions Create Ambiguity Regarding the Scope of the Discharge and Purported Extinguishnent of Claims, Regardless of the Amended Plan's Opt-Out Procedure

12. The Amended Plan's ambiguous language concerning the discharge injunction, appears to potentially seek to insulate non-debtor third parties (who are not entitled to a discharge) from future claims, irrespective of whether a creditor has elected to opt out of the releases in the Amended Plan. Specifically, Section 10.5 of the Amended Plan provides for a discharge injunction, which purports to apply to numerous non-released non-Debtor parties, stating that: "[e]xcept as expressly provided in the Plan, the Confirmation Order, or a separate order of the Bankruptcy Court or as agreed to by the Debtors and a holder of a Claim against or Interest in the Debtors, ***all Entities who have held, hold, or may hold Claims against or Interests in any or all of the Debtors*** (whether proof of such Claims or Interests has been filed or not and whether or not such Entities vote in favor of, against or abstain from voting on the Plan or are presumed to have accepted or deemed to have rejected the Plan) and other parties in interest, along with their respective present or former employees, agents, officers, directors, principals, and affiliates, are permanently enjoined, on and after the Effective Date, ***solely with respect to any Claims, Interests, and Causes of Action that will be or are extinguished, discharged, released, or treated pursuant to the Plan from (i) commencing, conducting, or continuing in any manner, directly or indirectly, any suit, action, or other proceeding of any kind (including any proceeding in a judicial, arbitral, administrative or other forum) against or affecting the Released Parties*** or the property of any of the Released Parties, (ii) enforcing, levying, attaching (including any prejudgment attachment), collecting, or otherwise recovering by any manner or means, whether

directly or indirectly, any judgment, award, decree, or order against the Released Parties or the property of any of the Released Parties, (iii) creating, perfecting, or otherwise enforcing in any manner, directly or indirectly, any encumbrance of any kind against the Released Parties or the property of any of the Released Parties, ***(iv) asserting any right of setoff, directly or indirectly, against any obligation due the Released Parties*** or the property of any of the Released Parties, ***except (x) as contemplated or allowed by the Plan or (y) to the extent asserted in a timely filed Proof of Claim or timely filed objection to the confirmation of the Plan***[.]"Amended Plan, at § 10.5.

13. The Released Parties include numerous non-Debtors that are not entitled to a discharge in these cases.[5]

ARGUMENT

14. A plan must comply with the requirements listed in section 1129(a) of the Bankruptcy Code for it to be confirmed. See 11 U.S.C. § 1129(a). As the proponent of the Amended Plan, Debtors bear the burden of establishing the Amended Plan complies with each confirmation requirement by a preponderance of the evidence. *See Natl Union Fire Ins. v. BSA (In re BSA)*, 650 B.R. 87, 157 (Bankr. D. Del. 2023); *In re rue21, Inc.*, 575 B.R. 314, 322 (Bankr. E.D. Pa. 2017).

[5] Article I of the Amended Plan defines Released Parties as, "collectively, and in each case, solely in their capacities as such: (a) the Debtors, (b) the Reorganized Debtors, (c) each Consenting Creditor, (d) the DIP Agent, (e) the DIP Lenders and the DIP Backstop Parties, (f) the Fronting Lender, (g) the Escrow Agent, (h) the Ad Hoc First Lien Group and the Prepetition Secured Parties, (i) the Senior Notes Indenture Trustee, (j) the Patient Care Ombudsman, (k) the Exit Facility Agent, (l) the Exit Facility Lenders, (m) the Creditors' Committee and its members, (n) the Total Health Sellers, (o) Mark D. Kent, (p) Frederick Green, in his capacity as former officer of the Debtors, (q) Jacqueline Guichelaar, in her capacity as former director of the Debtors, and (r) with respect to each of the foregoing, all Related Parties. For the avoidance of doubt and notwithstanding anything herein or in any Definitive Document to the contrary, (x) the Debtors' officers, directors, and the Debtor Professionals employed at any time on and after the Petition Date through the Effective Date shall be Released Parties under the Plan and (y) the Debtors' former employees, officers and directors, or any former employee, member, manager, officer or director of any predecessor in interest of the Debtors employed prior to, but not on or after, the Petition Date (other than as enumerated in (p) and (q) herein) shall not be Released Parties under the Plan." Amended Plan, Art. I.186.

15. The Amended Plan fails to meet the requirements of section 1129(a) in numerous respects.

A. The Amended Plan Effectuates a De Facto Substantive Consolidation.

16. As an initial matter, the Amended Plan substantively consolidates the Debtors' estates and creditors with respect to Class 5. While the Plan expressly states it is not based on substantive consolidation,[6] confirmation would produce a result identical to what would happen if Debtors were substantively consolidated. The Debtors classify claims against each of them into one aggregate group for purposes of distributions to Class 5 and fail to explain what recoveries to such creditors will be if distributions were based on the assets held by each separate Debtor entity. As a result, holders of Non-RSA GUC Claims against Debtors other than Cano Health are scheduled to receive their *pro rata* share of proceeds from assets of Debtor Cano Health, including the $5,589,958.00 in MSP Recovery Proceeds obtained from Cano Health's sale of the MSP Recovery Class A Stock. The same holds true for purported recoveries from future litigation and asset sales, which are not attributed to any particular debtor entity, but simply lumped together for distribution to all.

17. Debtors, as proponents of the Amended Plan, have the burden of demonstrating that substantive consolidation is appropriate. *See In re Owens Corning*, 419 F.3d 195, 211 (3d Cir. 2005) ("What must be proven (absent consent) concerning the entities for whom substantive consolidation is sought is that (i) prepetition they disregarded separateness so significantly their creditors relied on the breakdown of entity borders and treated them as one legal entity, or (ii)

[6] Article 5.1 of the Amended Plan states that the "Plan is being proposed as a joint plan of reorganization of the Debtors for administrative purposes only and constitutes a separate chapter 11 plan for each Debtor. The Plan is not premised on, and does not provide for, the substantive consolidation of the Debtors with respect to the Classes of Claims or Interests set forth in the Plan, or otherwise." Plan, at Art. 5.1.

postpetition their assets and liabilities are so scrambled that separating them is prohibitive and hurts all creditors.").[7] Here, the Amended Plan should be immediately rejected as courts have found *de facto* substantive consolidation in a plan to be "a ploy to deprive one group of creditors of their rights while providing a windfall to other creditors," and thus "fail[ing] even to qualify for consideration." *Id.* at 216. Unless substantive consolidation is approved, the Amended Plan can only provide that each creditor's claim will only receive a distribution from the assets of that particular Debtor.

18. In short, Debtors have failed to move for, let alone present any evidence demonstrating that substantive consolidation is appropriate. Accordingly, Plan confirmation should be denied.

B. <u>The Amended Plan Fails to Comply with the Bankruptcy Code.</u>

19. Section 1129(a)(1) of the Bankruptcy Code states that the plan must comply "with the applicable provisions of this title." 11 U.S.C. § 1129(a). Both the express language of section 1129(a)(1) and the case law demonstrate the subsection's requirement that a plan comply with applicable provisions of the Bankruptcy Code extends to any relevant provision of Title 11. *See In re Ditech Holding Corp*., 606 B.R. 544, 573 (Bankr. S.D.N.Y. 2019) ("Under sections 1129(a)(1) and (a)(2), both the plan and the plan proponents must comply with all applicable provisions of the Bankruptcy Code") (emphasis added); *In re Tribune Co*., 464 B.R. 126, 201 (Bankr. D. Del. 2011). Here, the Amended Plan violates the express provision of the Bankruptcy Code because it

[7] Substantive consolidation is "deemed" when the effect of substantive consolidation occurs, but the debtors remain separate legal entities. *See Owens Corning*, 419 F.3d at 199, 200. Even where the "deemed consolidation" is not complete, courts have held that a debtor may not effectuate a partial deemed consolidation without satisfying one of the Owens Corning prongs. *See In re New Century TRS Holdings, Inc*., 407 B.R. 576, 591, 592 (D. Del. 2009).

(i) purports to strip creditors of their setoff and recoupment rights under section 553; and (ii) contains release and exculpation provisions in violation of section 524(e).

(i) The Amended Plan Purports to Extinguish or Limit the Creditors' Rights to Assert Setoff and Recoupment.

20. The Amended Plan's discharge and release provisions are unenforceable to the extent they purport to eliminate or prejudice MSP's setoff or recoupment rights against the causes of action by the Debtor in the pending litigation. *See* Amended Plan, § 10.5(b) (stating that "right of setoff" is preserved "to the extent asserted in a timely filed Proof of Claim", but otherwise providing that "continuing in any manner, directly or indirectly, any suit, action, or other proceeding of any kind (including any proceeding in a judicial . . . forum) against *or affecting the Released Parties or the property of any of the Released Parties*" is permanently enjoined (emphasis added)). MSP objects to the Amended Plan to ensure its setoff and recoupment rights, including all rights to adjudicate those rights, are not prejudiced and fully preserved consistent with the Proof of Claim previously filed.

21. Any attempt to extinguish setoff and recoupment rights is contrary to the Bankruptcy Code and well-established law. Debtors clearly understand this as the Amended Plan makes clear that Debtor are expressly preserving and not waiving or relinquishing their own "any rights of setoff or recoupment, or other legal or equitable defenses that Debtors had immediately prior to the Effective Date on behalf of the Estates or of themselves in accordance with the Bankruptcy Code or any applicable non-bankruptcy law . . . ." *See* Amended Plan at Section 10.9.

22. By its plain language, the Bankruptcy Code preserves a creditors' setoff rights under state law. *See* 11 U.S.C. § 553(a). Section 553 states that the Bankruptcy Code "does not affect any right of a creditor to offset a mutual debt owing by such creditor to the debtor that arose before the commencement of the case under this title against a claim of such creditor against the

debtor that arose before the commencement of the case[.]" *Id*; *In re Continental Airlines*, 134 F.3d 536, 541 (3d Cir. 1998) (explaining that the right of a creditor to setoff in a bankruptcy reorganization proceeding must be duly exercised in the bankruptcy court before the plan of reorganization is confirmed); *In re Alta+Cast LLC*, 2004 WL 484881, at *6 (Bankr. D. Del. Mar. 2, 2004); *see also Citizens Bank of Maryland v. Strumpf*, 516 U.S. 16, 20 (1995) (holding that "any right of setoff that a creditor possessed prior to the debtor's filing for bankruptcy is not affected by the Bankruptcy Code.").

23. In upholding an objection to a chapter 11 plan that extinguished a creditor's setoff rights, this Court held "there is no basis in the [Bankruptcy] Code to eliminate [a creditor's] setoff rights. In fact, section 553 expressly preserves whatever setoff rights [the creditor] may have under state law." *In re Alta+Cast, LLC*, 2004 WL 484881, at *6. This Court reasoned that a creditor that "asserted [its] right to setoff prior to confirmation . . . is entitled to preserve" that right, but a "plan of reorganization may eliminate a creditor's right of setoff if not raised until after confirmation." *Id*. n. 5. The key to such cases is the requirement for pre-confirmation assertion of setoff rights through a timely filed proof of claim or a motion for relief from the automatic stay. *See In re Zohar III, Corp*., 650 B.R. 622, 636-637 (Bankr. D. Del. 2023) (citing *In re Continental Airlines*).

24. Here, MSP timely asserted setoff rights. MSP timely filed the Proof of Claim asserting the potential for and reserving all setoff rights. Further, this Objection also constitutes a pre-confirmation assertion of MSP's setoff rights.

25. Further, MSP's right of recoupment, like its right to take any necessary action to raise defenses to any claims that may be brought by the Debtors, likewise survives plan confirmation. Defenses to enforcement, such as recoupment, cannot be extinguished in bankruptcy—whether through a sale or discharged under a plan—because they are neither

"claims" nor "debts," nor "interests." *See, e.g., Folger Adam Sec., Inc. v. DeMatteis/MacGregor*, JV, 209 F.3d 252, 261 (3d Cir. 2000) (holding that "a right of recoupment is a defense and not an interest and therefore is not extinguished by a § 363(f) sale"); *Lee v. Schweiker*, 739 F.2d 870, 875 (3d Cir. 1984) (finding recoupment an available defense to a creditor in bankruptcy to extinguish certain mutual claims that could not be setoff under section 553 of the Bankruptcy Code); Recoupment is unaffected by discharge. *Megafoods Stores, Inc. v. Flagstaff Realty Assocs. (In re Flagstaff Realty Assocs.)*, 60 F.3d 1031, 1035-36 (3rd Cir. 1995) (holding that recoupment survives discharge following confirmation and implementation of chapter 11 plan even if creditor did not object to plan or seek a stay pending appeal); *see also Beaumont v. Dep't of Veteran Affairs (In re Beaumont*), 586 F.3d 776 (10th Cir. 2009); *Saif Corp. v. Harmon (In re Harmon)*, 188 B.R. 421, 425 (B.A.P. 9th Cir. 1995) ("Because recoupment only reduces a debt as opposed to constituting an independent basis for a debt, it is not a claim in bankruptcy, and is therefore unaffected by the debtor's discharge.").

26. In sum, the Amended Plan cannot extinguish MSP's right to setoff, recoupment, or the ability of it, or any of its affiliates, to raise legal defenses to any of the Debtors' claims. Read literally and expansively, Section 10.5 of the Amended Plan appears to seek to do otherwise. Accordingly, the Amended Plan is also unconfirmable in this regard.

(ii) The Amended Plan's Injunction Provisions Are Too Broad.

27. The Amended Plan is also unconfirmable because it contains broad and otherwise unjustifiable plan injunction language, which appears intended to override prohibitions on nonconsensual third-party releases. Under the Plan, general unsecured creditors who do not affirmatively opt out of the releases will be deemed to have released any claims against any Released Party. That release, however, is buttressed by a plan injunction at Section 10.5 that

purports to enjoin all Holders of claims against the Debtors from taking numerous actions against any Released Parties (which includes numerous non-Debtors), regardless of whether the individual creditor opted out of the releases. The prohibitions are triggered, in the disjunctive, for any Claim that it extinguished, discharged, released, *or* treated pursuant to the Plan. *See* Amended Plan at Section 10.5(b).

28. ***First***, to the extent Debtors seek to use Section 10.5 as a non-debtor discharge, they are barred from doing so under various sections of the Bankruptcy Code, including for debts that are related. See, e.g., 11 U.S.C. § 524(e) (the "discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt.").

29. ***Second***, the Bankruptcy Court lacks constitutional authority to release direct claims against former directors and officers of Debtors. The Supreme Court has determined that it is unconstitutional for non-Article III judges to finally adjudicate state law private rights when those rights will not necessarily be adjudicated and resolved as part of the claims allowance process. *See Stern v. Marshall*, 131 S. Ct. 2594, 2604-20 (2011) (Holding unconstitutional a bankruptcy court's final adjudication of a debtor's state common law counterclaim because it was a private right and the Court had no "reason to believe that the process of ruling on [the] proof of claim would necessarily result in the resolution of [the] counterclaim."). Here, MSP's direct claims qualify as private rights created under state law and outside the Bankruptcy Court's authority to finally adjudicate as an Article I court.

30. ***Third***, the Bankruptcy Court lacks jurisdiction to release such direct claims. It is axiomatic that "federal courts are courts of limited jurisdiction" and, as such, "lack the power to disregard such limits as have been imposed by the Constitution or Congress." *Durant, Nichols, Houston, Hodgson, & Cortese-Costa, P.C. v. Dupont*, 565 F.3d 56, 62 (2d Cir. 2009). The source

of a bankruptcy court's jurisdiction is found in 28 U.S.C. § 1334(b), which provides in relevant part that "the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11." 28 U.S.C. § 1334(b)*; Family Realty Trust v. U.S. National Bank, N.A. (In re Scott)*, 607 B.R. 211, 224 (Bankr. W.D. Pa. 2019) ("Although 28 U.S.C. § 157 "sets the framework in which matters may be referred by the United States District Court to the judges of the United States Bankruptcy Court for determination…, the contours of original subject matter jurisdiction regarding bankruptcy matters rests in 28 U.S.C. § 1334 and reliance on 28 U.S.C. § 157 is misplaced.").[8]

31. ***Fourth***, the Bankruptcy Code does not authorize the third-party releases. Courts in this District have determined that third party releases of non-debtors should be allowed only to the extent the releasing parties have given affirmative consent. *See In re Wash. Mut., Inc*., 442 B.R. 314 (Bankr. D. Del. 2011). In *Washington Mutual* the Court held that "any third-party release is effective only with respect to those who affirmatively consent to it by voting in favor of the Amended Plan and not opting out of the third party releases." *Id*. at 355 (emphasis added). Moreover, the Court clarified that merely having an opt out mechanism is not enough, holding that an "opt out mechanism is not sufficient to support the third-party releases . . . particularly with respect to parties who do not return a ballot (or are not entitled to vote in the first place). Failing to return a ballot is not a sufficient manifestation of consent to a third-party release." *Id*.

[8] In *Callaway v. Benton*, 336 U.S. 132 (1949), the Supreme Court held that a referee in bankruptcy did not have subject matter jurisdiction to enjoin permanently a state court lawsuit between non-debtor entities. Although one court has found *Callaway* to be inapplicable to the Bankruptcy Code based on the broader jurisdictional grant in 28 U.S.C. § 1334(b), which was not in effect under the Bankruptcy Act, *In re Dow Corning Corp*., 255 B.R. 445, 486 (E.D. Mich. 2000), aff'd and remanded 280 F.3d 648 (6th Cir. 2002), it has been cited approvingly for the proposition that "[a]s a general rule, a bankruptcy court has no power to say what happens to property that belongs to a third party, even if that third party is a creditor or otherwise a party in interest." *In re Aegean Marine Petroleum Network, Inc*., 599 B.R. 717, 723 (Bankr. S.D.N.Y. 2019).

32. In *In re Emerge Energy Services LP*, the Bankruptcy Court reviewed a plan that, like here, proposed third-party releases and provided that unless the releasing parties completed and returned an opt-out form or a ballot indicating an affirmative opt out, they would be "deemed to have consented to the release and waiver of current or future claims" against the released parties. *In re Emerge Energy Services LP*, 19-11563 (KBO), 2019 WL 7634308, at *17 (Bankr. D. Del. Dec. 5, 2019). The court found that "it cannot be said with certainty that those failing to return a ballot or Opt-Out Form did so intentionally to give the third-party release, and that is what the Court must find under the law to approve a third-party release absent the satisfaction of the Continental standard." *Id*. at *18.

33. Other decisions from Courts in this District are in accord with *Washington Mutual* and *Emerge. See In re Coram Healthcare Corp*., 315 B.R. 321, 335 (Bankr. D. Del. 2004) (holding that the "Trustee (and the Court) do not have the power to grant a release of the Noteholders on behalf of third parties," and that such release must be based on consent of the releasing party); *In re Exide Techs*., 303 B.R. 48, 74 (Bankr. D. Del. 2003) (approving releases which were binding only on those creditors and equity holders who accepted the terms of the plan).

34. Here, Debtors' Amended Plan contains third-party releases indicating that holders of claims that vote to reject the Amended Plan must also "opt out" of the releases. The extra step of needing to also opt out of the release is improper when a creditor demonstrates their opposition to the entire plan when they vote to reject. It is nonsensical to attribute a vote to reject a plan with consent to the third-party release embedded in such a plan.

35. Moreover, the Debtors cannot meet *Continental*'s test, which requires that any non-consensual releases be fair and necessary to the reorganization. *In re Continental Airlines*, 203 F.3d 203, 214 (3d Cir. 2000) ("The hallmarks of permissible non-consensual releases—fairness,

necessity to the reorganization, and specific factual findings to support these conclusions—are all absent here"). Courts in the Third Circuit typically consider four factors in determining whether a non-consensual release satisfies *Continental*, namely whether: (i) the non-consensual release is necessary to the success of the reorganization; (ii) the releasees have provided a critical financial contribution to the debtor's plan; (iii) the releasees' financial contribution is necessary to make the plan feasible; and (iv) the release is fair to the non-consenting creditors, *i.e.*, whether the non-consenting creditors received reasonable compensation in exchange for the release. *In re Spansion, Inc.*, 426 B.R. 114, 144 (Bankr. D. Del. 2010). This standard is an exacting one and "non-consensual releases by a non-debtor of other non-debtor third parties are to be granted *only in 'extraordinary cases.'*" *In re Exide Techs.*, 303 B.R. 48, 72 (Bankr. D. Del. 2003) (emphasis added).

36. Worse yet, the Amended Plan's representation that the releases are being provided in exchange for good and valuable consideration is inaccurate in that for many—if not most—Released Parties, it is doubtful that their releases are being provided for any consideration at all, let alone good and valuable consideration. For a release to benefit an estate and its creditors, whatever the estate is surrendering must be of commensurate value to whatever the estate is receiving in exchange. That is why a key "factor[] to consider when determining the validity of debtor releases" is "whether they are [] in exchange for the good and valuable consideration provided by the released parties[.]" *Genesis Glob.*, 2024 WL 2264719, at *54 (citing *In re Residential Cap., LLC*, No. 12-12020 (MG), 2013 WL 12161584, at *13 (Bankr. S.D.N.Y. Dec. 11, 2013)). Releases are not appropriate for parties that "have not contributed cash or anything else of a tangible value to the Plan or to creditors nor provided an extraordinary service that would

constitute a substantial contribution to the Plan or case." *In re Wash. Mut., Inc*., 442 B.R. 314, 348 (Bankr. D. Del. 2011).

37. Here, there is no evidence that the Released Parties have contributed anything that would warrant a release, much less a release that is effectuated (indirectly) through a plan injunction that cannot be avoided by the Debtors' creditors. Debtors are simply given blanket, third-party releases *en masse*. Indeed, nowhere in the Amended Plan or in any filing of which MSP is aware do Debtors identify any appropriate consideration that any Releasing Party is providing for the Debtors' estate or its creditors or to achieve the purposes of the Amended Plan. Nor are these releases dependent on or tied to anything the released Non-Debtor Party has done or will do in connection with the Amended Plan or even Debtors' bankruptcy. For instance, the Disclosure Statement states that the substantial contributions include, but are not limited to, "(i) negotiating the restructuring, as embodied in the Plan; (ii) obtaining substantial recoveries for unsecured creditors to which they may have not otherwise been entitled; and (iii) devoting significant time to navigating the Debtors through the Chapter 11 Cases in addition to their regular duties, including through participation in regular meetings of the Restructuring Committee, as well as meetings of the Debtors' boards of directors." Disc. Statement, Art. XIII. C.iii. That plainly fails as matter of law.

38. Although MSP is exercising its election to opt-out of the Debtors' Plan releases, there is a concern that the Amended Plan's vague and overly broad injunction provisions are intended to extend to non-Debtor released parties in a manner that is indistinguishable from the release, which is otherwise optional.

39. To the extent the Debtors intend Section 10.5 to apply only to the Debtors and only to non-Debtor Released Parties in the event that a creditor opts-in to the releases, the Amended Plan should clearly say so. Otherwise, confirmation should be denied.

(iii) The Amended Plan's Exculpation Provision Is Too Broad.

40. Likewise, the Amended Plan's exculpation provisions are overbroad as to breadth and scope. *See* Amended Plan at Section 10.7.

41. ***First***, the exculpation provisions are not limited to estate fiduciaries. In *In re PWS Holding Corp.*, the Third Circuit considered whether an official committee of unsecured creditors could be exculpated and held that 11 U.S.C. § 1103(c) implies both a fiduciary duty and a limited grant of immunity to members of the unsecured creditors' committee. 228 F.3d 224, 246 (3d Cir. 2000). This Court has repeatedly interpreted *PWS* as requiring a party's exculpation to be based upon its status as an estate fiduciary. *See In re Indianapolis Downs, LLC*, 486 B.R. 286, 304 (Bankr. D. Del. 2013); *Tribune*, 464 B.R. at 189; Wash. Mut., 442 B.R. at 350-51; *In re PTL Holdings LLC*, No. 11-12676 (BLS), 2011 WL 5509031, at *12 (Bankr. D. Del. Nov. 10, 2011)

42. ***Second***, the period covered by the Exculpation Provision is overbroad. This Court has confirmed that exculpation "only extends to conduct that occurs between the Petition Date and the effective date." *In re Mallinckrodt PLC*, 639 B.R. 837, 883 (Bankr. D. Del. 2022) (sustaining U.S. Trustee's objection to temporal scope of exculpation provision and ordering debtors to strike contrary language from same); *see also In re Washington Mut., Inc.*, 442 B.R. at 350-351(holding that exculpations cover "actions in the bankruptcy case"). Applied here, the Amended Plan provides that Exculpated Parties are released and exculpated from claims arising out of "any" acts or omissions relating to, among other things, the RSA, the Chapter 11 case, the Plan, any Plan Document, the filing of the Chapter 11 Case, the pursuit of confirmation, the pursuit of

consummation of the Plan, and the administration and implementation of the Plan, including distributions. This provision improperly covers acts and omissions occurring at any time related to the aforementioned categories. Because the Amended Plan was essentially a prepackaged chapter 11 case, substantially all of the negotiations and work related to the RSA, the Plan, the Plan Documents and the filing of the Chapter 11 Case occurred prepetition. Likewise, the administration and implementation of the Plan will necessarily continue past the Effective Date. Therefore, the Exculpation Provision "exceeds the bounds of what the Code allows" because it improperly insulates the Exculpated Parties for acts and omissions both prepetition and post Effective Date.

43. In sum, the proposed exculpation insulates from liability acts and omissions that do not warrant this protection under the case law in this district. Accordingly, the Court should deny confirmation of the Plan.

C. The Amended Plan is Unconfirmable under 11 U.S.C. 1129(b)

(i) The Amended Plan Violates the Absolute Priority Rule.

44. Section 1129(b)(2) provides that "the condition that a plan be fair and equitable with respect to a class includes the following requirements." 11 U.S.C. § 1129(b)(2). With respect to unsecured claims, section 1129(b)(2)(B) allows a plan to be confirmed notwithstanding the dissent of a class of unsecured creditors if the plan does not offer a junior claimant any property before each unsecured claimant receives full satisfaction of its allowed claim. 11 U.S.C. § 1129(b)(2)(B).

45. This portion of section 1129(b) is often referred to as the "absolute priority rule." *See Bank of America National Trust & Savings Ass'n v. 203 North LaSalle St. Partnership*, 526 U.S. 434, 441-42 (1999). "The absolute priority rule is codified at 11 U.S.C. § 1129(b)(2)(B)(ii)

and provides that a dissenting class of unsecured creditors must be provided for in full before any junior class can receive or retain any property under a plan." *In re LaForgia*, 2019 WL 4894870, at *1 (Bankr. D.N.J. Sept. 3, 2019). A corollary to the absolute priority rule is that a senior class of creditors cannot receive "more than full compensation for its claims." *In re MCorp. Financial Inc*., 137 B.R. 219, 225 (Bankr. S.D. Tex. 1992). It is the plan proponents' burden to show that a plan is fair and equitable. *In re Briscoe Enterprises, Ltd.*, II, 994 F.2d 1160, 1165 n.26 (5th Cir.), cert. denied, 510 U.S. 992 (1993).

46. By consolidating the assets, claims, and recoveries of general unsecured creditors at various different Debtor entities through the treatment contemplated in Class 5, creditors that have junior claims within the Debtors' corporate structure (or, worse, creditors who have no cognizable interest or right to recovery from a particular Debtor) are slated to receive *pro rata* distributions from assets of other Debtor entities when the claims of creditors at those entities have not been paid in full.

(ii) <u>The Amended Plan Unfairly Discriminates against Class 5.</u>

47. Section 1129(b) of the Bankruptcy Code provides that, "if all of the applicable requirements of subsection (a) of this section other than paragraph (8) are met with respect to a plan, the court, on request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of such paragraph 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). "Although the Bankruptcy Code does not specify what constitutes unfair discrimination, the focus of the inquiry ... [is] whether a plan segregates two similar claims or groups of claims into separate classes and provides disparate treatment for

those classes." *In re Murray Metallurgical Coal Holdings, LLC*, 623 B.R. 444, 520 (Bankr. S.D. Ohio 2021).

48. In *In re Tribune Co.*, the Third Circuit adopted a rebuttable presumption of unfair discrimination where there is (i) a dissenting class; (ii) another class of the same priority; and (iii) a difference in the plan's treatment of the two classes that results in either (a) a materially lower percentage recovery for the dissenting class (measured in terms of the net present value of all payments) or (b) regardless of percentage recovery, an allocation under the plan of materially greater risk to the dissenting class in connection with its proposed distribution. 972 F.3d 228, 241–45 (3d Cir. 2020). Unfair discrimination is determined from the perspective of the dissenting class. *Id.* at 242 (citing H.R. Rep. No. 95-595, at 416-17 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6372-73).

49. Here, the Debtors' estimate that the value of the consideration being given to deficiency creditors in Class 4 is approximately $8.5 million, or 1% of total claims in the Class. *See* Disclosure Statement at 11. In contrast, although the Debtors estimate the recoveries to creditors in Class 5 as being between 13.6% and 19.1%, the Debtors have explained that the estimation does not account for numerous categories of possible claims and, further, does not account for the fact that the Creditors' Committee may, in its sole discretion, use most if not all of the assets slated for distributions to creditors to cover expenses and fees, including in connection with the Litigation Trust. *See id.* at n.8-9. In other words, value to Class 4 is estimated at $8.5 million and value to Class 5 will be determined at the discretion of the Creditors' Committee. Accordingly, Class 5 is slated to receive no fixed form of recovery related to a class of the same priority and being asked to incur materially greater risk in connection with its proposed distribution. *See* Article 4.5 of the Amended Plan (providing that the Litigation Trustee may, in

exercise in its business judgment, "reallocate all or a portion of any Litigation Trust Distributable Proceeds and/or CPE Asset Sale Proceeds (if any) received after the Effective Date to fund the Litigation Trust."). Additionally, as noted above, because Class 5 appears to distribute value from all of the Debtors' causes of action and assets to all of the Debtors' unsecured creditors, irrespective of which creditor holds which claim, or which Debtor holds which asset, recoveries to the creditors are further diluted and unfairly distributed.

50. The guaranteed treatment afforded to general unsecured claims in Class 4, as compared to the speculative and consolidated treatment to claims in Class 5, is unfounded. As such, the Amended Plan discriminates unfairly and is not confirmable.

RESERVATION OF RIGHTS

51. MSP reserves the right to object to confirmation of the Amended Plan on the basis of any objection asserted herein, or on the basis of any other objection raised by any other party in interest, at or before the hearing on confirmation of the Amended Plan.

WHEREFORE, MSP Recovery Claims LLC respectfully seeks entry of an order; (i) sustaining the Objection; (ii) denying confirmation of the Amended Plan; and (iii) granting such other and further relief as this Court deems just and proper.

Date: June 21, 2024

Respectfully submitted,

By: */s/ Michael Busenkell*

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CERTIFICATE OF SERVICE

I, Michael Busenkell, Esq., hereby certify that on June 21, 2024, I caused a true and correct copy of the foregoing to be electronically filed and served through the Court's CM/ECF system which will send notification that such filing is available for viewing and downloading to all registered participants and additionally served in the manner indicated upon the parties listed below.

Dated: June 21, 2024

/s/ Michael Busenkell
Michael Busenkell (DE 3933)

Via Electronic Mail

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