

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:)
) Chapter 11
NOVAN, INC., *et al.*,¹)
) Case No. 23-10937 (LSS)
 Debtors.)
) (Joint Administration Requested)
)
_____)

**MOTION OF DEBTORS FOR ENTRY OF INTERIM AND FINAL ORDERS
(I) AUTHORIZING DEBTORS TO PAY CERTAIN PREPETITION TAXES AND
RELATED OBLIGATIONS AND (II) AUTHORIZING BANKS TO HONOR AND
PROCESS CHECKS AND TRANSFERS RELATED TO SUCH PREPETITION TAXES
AND RELATED OBLIGATIONS**

The above-captioned debtors and debtors in possession (collectively, the “Debtors”) hereby submit this motion (this “Motion”) for entry of interim and final orders, substantially in the forms attached hereto as **Exhibit A** and **Exhibit B**, respectively, (a) authorizing, but not directing, the Debtors to pay certain prepetition taxes and related obligations and (b) authorizing and directing applicable banks and financial institutions to honor and process checks and transfers related to such prepetition taxes and related obligations. In support of this Motion, the Debtors rely upon, and incorporate by reference, the *Declaration of Paula Brown Stafford in Support of Debtors’ Chapter 11 Petitions and First Day Motions* (the “First Day Declaration”),² filed contemporaneously herewith. In further support of this Motion, the Debtors respectfully state as follows:

¹ The Debtors in these chapter 11 cases, along with the last four digits of the Debtors’ federal tax identification number (if applicable), are: Novan, Inc. (7682) and EPI Health, LLC (9118). The corporate headquarters and the mailing address for the Debtors is 4020 Stirrup Creek Drive, Suite 110, Durham, NC 27703.

² Capitalized terms used but not otherwise defined in this Motion shall have the meaning ascribed to them in the First Day Declaration.



JURISDICTION AND VENUE

1. The United States Bankruptcy Court for the District of Delaware (the “Court”) has jurisdiction over these chapter 11 cases (the “Chapter 11 Cases”), the Debtors and their estates and this matter under 28 U.S.C. §§ 157 and 1334 and the *Amended Standing Order of Reference* from the United States District Court for the District of Delaware, dated February 29, 2012. This is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2).

2. Pursuant to Rule 9013-1(f) of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware (the “Local Rules”), the Debtors consent to the entry of a final order with respect to this Motion if it is determined that the Court, absent consent of the parties, cannot enter final orders or judgments consistent with Article III of the United States Constitution.

3. Venue of these Chapter 11 Cases and this Motion in this District is proper under 28 U.S.C. §§ 1408 and 1409.

4. The statutory bases for the relief requested in this Motion are sections 105(a), 363(b), 507(a)(8), and 541 of title 11 of the United States Code (the “Bankruptcy Code”) and Rules 6003 and 6004 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”).

BACKGROUND

5. On the date hereof (the “Petition Date”), the Debtors each filed with the Court a voluntary petition for relief under chapter 11 of the Bankruptcy Code.

6. The Debtors are authorized to operate their businesses and manage their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. As of the date hereof, no trustee, examiner, or official committee of unsecured creditors has been appointed in these Chapter 11 Cases.

7. Additional factual background regarding the Debtors, including their business operations, capital structure, and the events leading to the filing of these Chapter 11 Cases, is set forth in detail in the First Day Declaration, which is fully incorporated into this Motion by reference.

RELIEF REQUESTED

8. In the ordinary course of business, the Debtors are subject to various taxes, regulatory fees and assessments, and related obligations (collectively, the “Taxes”) that are payable directly to various taxing authorities (collectively, the Taxing Authorities”). By this Motion, the Debtors seek interim and final authority (but not direction) to pay various unpaid taxes, fees, and related obligations that accrued or were assessed before the Petition Date, up to a maximum of \$50,000.00 on an interim basis and \$200,000.00, in the aggregate, on a final basis.³ The tax obligations described herein are comprised entirely of current tax obligations, and are not in respect of “catch-up” payments (except with respect to certain trust fund tax obligations that are not property of the Debtors’ estates).

9. The Debtors seek the relief requested in this Motion in the event and to the extent that: (a) the various Taxes and related obligations that accrued or were assessed prior to the Petition Date: (i) were not paid prepetition; (ii) were not processed prepetition; or (iii) were paid in an amount that was less than is actually owed, including amounts subsequently determined upon any audit or otherwise to be due and owing for periods prior to the Petition Date; (b) any payments made prepetition were rejected, lost, not collected, or otherwise not received in full by any Taxing

³ By this Motion, the Debtors are not seeking authorization with respect to certain payroll taxes and withholdings related to the Debtors’ employees. Rather, such authorization is sought pursuant to the *Debtors’ Motion for Entry of Interim and Final Orders (I) Authorizing Debtors to (A) Pay Certain Prepetition Employment Obligations and (B) Maintain Employee Benefit Programs and (II) Granting Related Relief* (the “Employee Wage Motion”), filed contemporaneously herewith.

Authority; or (c) any Taxes and related obligations that accrued or were assessed prepetition, or will accrue or be assessed postpetition with respect to any prepetition period, will become due during the pendency of these Chapter 11 Cases in the ordinary course of business.

10. Further, the Debtors request that the Court authorize the Debtors' banks to receive, process, honor, and pay all checks, drafts, or other forms of payment drawn or issued on the Debtors' bank accounts prior to the Petition Date with respect to such Taxes (or to re-issue checks and electronic transfers, as may be necessary), *provided* that sufficient funds are on deposit in the applicable accounts to cover such payments.

11. As set forth below, the Debtors submit that the Taxes at issue are appropriate for payment to the extent that they are priority or secured claims that are payable in full under a plan or, alternatively, under the "trust fund" theory or on the basis of administrative convenience.

THE DEBTORS' PREPETITION TAXES

12. In connection with the normal operation of their business, the Debtors collect, withhold, and/or incur an assortment of Taxes that they remit periodically to various Taxing Authorities. Certain of the Debtors' cash on hand may be earmarked for payment of the Taxes, as such funds are collected from third parties and held in trust for payment to various Taxing Authorities, and, therefore, may not be property of the Debtors' estates. The United States and many states in which the Debtors operate have laws providing that the Debtors' officers, directors, or other responsible employees could, under certain circumstances, be held personally liable for the nonpayment of such Taxes. To the extent that any Taxes remain unpaid as of the Petition Date and thereafter in these jurisdictions, the Debtors' officers and directors could be subject to lawsuits or other collection efforts during the pendency of these Chapter 11 Cases. In addition, non-payment of such Taxes may give rise to priority claims pursuant to section 507(a)(8) of the Bankruptcy Code. In such events, collection efforts by the Taxing Authorities would be extremely

distracting for the Debtors and their directors and officers and their efforts to bring these Chapter 11 Cases to an expeditious, successful conclusion. Accordingly, the Debtors submit that the requested relief is in the best interests of the Debtors' estates.

I. Types of Taxes

A. Income Taxes

13. The Debtors are subject to income taxation by the federal government and certain state governments (collectively "Income Taxes"). The Debtors pay Income Taxes annually and sometimes quarterly depending on the jurisdiction. The Debtors believe that they are current on all Income Taxes as of the Petition Date. However, to the extent that any Income Taxes were accrued but not paid prior to the Petition Date, the Debtors seek authority and discretion to pay any Income Taxes that come due during these Chapter 11 Cases, whether or not attributable to the prepetition period.

B. Sales and Use Taxes

14. Certain state and local Taxing Authorities require the Debtors to pay sales, business, use, and occupation taxes (collectively, the "Sales Taxes").⁴ In various jurisdictions, the Debtors pay such taxes to state and local governments in order to remain in good standing for purposes of conducting business within the state. Generally, the Debtors collect Sales Taxes from their customers and remit such Sales Taxes to the Taxing Authorities in the month following their collection. The Debtors estimate that, as of the Petition Date, approximately \$2,875.00 of Sales Taxes are accrued and unpaid, and the Debtors seek authority, but not direction, to pay any Sales Taxes that come due during these Chapter 11 Cases, whether or not attributable to the prepetition period.

⁴ The Debtors pay Sales Taxes in North Carolina and South Carolina.

C. Property Taxes

15. In the ordinary course of business, certain Taxing Authorities in jurisdictions where the Debtors' operations are located are granted the authority to levy property taxes against the Debtors' real property (collectively, the "Property Taxes"). The Debtors anticipate receiving a property tax notice from Durham County North Carolina during August 2023, with a due date of September 1, 2023.⁵ As such, the Debtors have accrued approximately \$130,000.00 in Property Taxes as of the Petition Date. The Debtors seek authority and discretion to pay any Property Taxes that come due during these Chapter 11 Cases, whether or not attributable to the prepetition period.

D. Regulatory and Licensing Fees

16. Laws and regulations in jurisdictions in which the Debtors operate require the Debtors to pay fees (collectively, the "Regulatory and Licensing Fees") to obtain a range of licenses and permits from a number of different governmental units. The methods for calculating amounts due for such licenses and permits, and the deadlines for paying such amounts, vary by jurisdiction. The Debtors have accrued approximately \$40,000.00 that will become due on September 1, 2023, for the franchise tax owed to the State of Delaware. Aside from this amount, the Debtors believe that they are current on all Regulatory and Licensing Fees incurred as part of normal operations. To the extent that any other such fees were accrued but not paid prior to the Petition Date, the Debtors request authority and discretion to pay such amounts as they come due in the ordinary course of business.

E. Other Taxes

17. In the ordinary course of business, the Debtors may collect, withhold, or incur other miscellaneous taxes, fees, or charges, all as determined by the particular state within which the

⁵ The Debtors paid \$117,000.00 in property taxes in 2022 relating to 2021. It is anticipated that this amount will increase to \$125,000 - \$130,000.00 for the year 2022.

Debtors operate (collectively, the “Other Taxes”). The Debtors believe that they are substantially current on their obligations with respect to Other Taxes. However, out of an abundance of caution, the Debtors request authority, but not direction, to pay Other Taxes that are due or become due and payable during these Chapter 11 Cases, whether such Other Taxes relate to the pre or postpetition period.

II. Method of Payment

18. As stated above, in connection with the normal operation of their business, the Debtors incur and collect Income Taxes, Sales and Use Taxes, Property Taxes, Regulatory and Licensing Fees, and Other Taxes (collectively referred to herein as “Taxes,” as defined above). These Taxes are paid to the Taxing Authorities on a periodic basis (generally monthly, quarterly, or annually), depending on the particular tax.

19. In the ordinary course of business, the Debtors from time to time undergo audits and reviews conducted by the various Taxing Authorities. While the estimates set forth in this Motion are based on the Debtors’ good-faith assessment of such amounts due on a prepetition basis, there is a possibility that, because of such audits, one or more of the various Taxing Authorities may at some later date assess additional Taxes. Accordingly, by this Motion, the Debtors also request authority, but not direction, to pay any such undisputed amounts that are later determined to be due and owing on a postpetition basis, including any interest and penalties imposed by any Taxing Authorities with respect thereto.

BASIS FOR RELIEF

A. Payment of Certain Taxes Is Authorized Under Section 541 of the Bankruptcy Code as Such Funds Are Not Property of the Debtors’ Estates.

20. Certain of the Taxes may constitute so-called “trust-fund” obligations that are required to be collected from third parties and held in trust for payment to taxing and regulatory

authorities. *See, e.g., Official Comm. of Unsecured Creditors of the Columbia Gas Transmission Corp. v. Columbia Gas Sys. Inc. (In re Columbia Gas Sys. Inc.)*, 997 F.2d 1039, 1051 (3d Cir. 1993) (determining that refunds required to be collected by federal law-created trust fund was not property of debtors' estates).

21. Consequently, the funds that would be used to pay the trust-fund Taxes are not property of the Debtors' estates. *See* 11 U.S.C. § 541(d); *Begier v. I.R.S.*, 496 U.S. 53, 55–67 (1990) (finding that taxes such as excise taxes, FICA taxes, and withholding taxes are property held by debtor in trust for another and, as such, do not constitute property of estate); *City of Farrell v. Sharon Steel Corp.*, 41 F.3d 92, 96 (3d Cir. 1994) (determining that withheld taxes were subject to a trust); *In re Am. Int'l Airways, Inc.*, 70 B.R. 102, 103 (Bankr. E.D. Pa. 1987) (stating that funds held in trust for federal excise and withholding taxes are not property of debtor's estate and, therefore, not available for distribution to creditors). Because these funds are not property of the Debtors' estates and are not available for distribution to creditors, timely payment of the trust-fund Taxes would not prejudice the Debtor's estates and its creditors.

B. Payment of Certain of the Taxes Is Appropriate Under Section 507(a)(8) of the Bankruptcy Code

22. Many of the Taxes are priority claims entitled to priority status pursuant to section 507(a)(8) of the Bankruptcy Code.⁶ Thus, they must be paid in full under any chapter 11 plan before any distribution is made to general unsecured creditors. As such, authorizing the payment of the Taxes at this time impacts the timing and not the amount of the Taxes, and, therefore, the timely payment of such Taxes will not prejudice other parties in interest. Moreover, by paying

⁶ Priority status is afforded to unsecured claims of governmental units for a tax on or measured by income or gross receipts for a taxable year ending on or before the Petition Date, property taxes incurred before the Petition Date and last payable without penalty after one year before the Petition Date, and taxes required to be collected or withheld and for which the Debtors are liable in whatever capacity. 11 U.S.C. § 507(a)(8)(A-C).

legitimate priority claims for the Taxes now, the Debtors will avoid any unnecessary fees, interest, or penalties that might otherwise accrue.

C. Payment of the Prepetition Taxes and Assessments Is Appropriate in the Debtors' Business Judgment and Under the Doctrine of Necessity.

23. Finally, the Debtors submit that timely payment of the Taxes is appropriate because it is necessary for the success of the Debtors' Chapter 11 Cases and the ongoing sale process. Under section 363(b) of the Bankruptcy Code, a bankruptcy court may authorize a chapter 11 debtor to use property of the estate other than in the ordinary course of business where the debtor has articulated a valid business justification for the requested use of estate assets. *See In re Montgomery Ward Holding Corp.*, 242 B.R. 147, 153 (D. Del. 1999) ("In determining whether to authorize the use, sale or lease of property of the estate under this section, courts require the debtor to show that a sound business purpose justifies such actions."); *In re Filene's Basement, LLC*, No. 11-13511, 2014 WL 1713416, *12 (Bankr. D. Del. Apr. 29, 2014) ("Where the debtor articulates a reasonable basis for its business decisions . . . courts will generally not entertain objections to the debtor's conduct.") (quoting *In re Johns-Manville Corp.*, 60 B.R. 612, 616 (Bankr. S.D.N.Y. 1986)); *In re Ionosphere Clubs, Inc.*, 98 B.R. 174, 175 (Bankr. S.D.N.Y. 1989) (noting that section 363(b) gives the court "broad flexibility" for the debtor to pay prepetition wages as long as the debtor articulates a business justification).

24. Once a debtor articulates such a valid business justification, a presumption exists in favor of the debtor's business decisions. *See In re Tower Air, Inc.*, 416 F.3d 229, 238 (3d Cir. 2005) ("Overcoming the presumption of the business judgment rule on the merits is a near-Herculean task."); *see also Smith v. Van Gorkom*, 488 A.2d 858, 872 (Del. 1985) (describing the business judgment rule as "a presumption that in making a business decision, the directors of a

corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company”).

25. Moreover, section 105(a) of the Bankruptcy Code empowers the Court to “issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.” 11 U.S.C. § 105(a). A bankruptcy court’s use of its equitable powers to “authorize the payment of pre-petition debt when such payment is needed to facilitate the rehabilitation of the debtor is not a novel concept.” *Ionosphere Clubs*, 98 B.R. at 175; *see also Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 985 (2017) (noting that courts are authorized to approve orders allowing payment of prepetition claims that are necessary for the debtors to have a successful reorganization); *In re Just For Feet, Inc.*, 242 B.R. 821, 824–25 (D. Del. 1999) (noting that, in the Third Circuit, debtors may pay prepetition claims that are essential to the continued operation of the debtor’s business); *In re Columbia Gas Sys., Inc.*, 171 B.R. 189, 191–92 (Bankr. D. Del. 1994) (same). “Under 11 U.S.C. § 105 the court can permit pre-plan payment of a pre-petition obligation when essential to the continued operation of the debtor.” *In re NVR L.P.*, 147 B.R. 126, 127 (Bankr. E.D. Va. 1992) (citing *Ionosphere Clubs*, 98 B.R. at 177);); *see also In re Lehigh & New England Ry. Co.*, 657 F.2d 570, 581 (3d Cir. 1981) (recognizing the doctrine of necessity and authorizing the debtor to pay prepetition claims if such payment was essential to the continued operation of the debtor).

26. With these statutory underpinnings, the “doctrine of necessity” functions in a chapter 11 case as a mechanism by which the bankruptcy court can exercise its equitable power to allow payment of critical prepetition claims not explicitly authorized by the Bankruptcy Code. *See Lehigh*, 657 F.2d at 581 (holding that the court may authorize payment of prepetition claims if such payment was essential to continued operation of the debtor); *In re Boston & Me. Corp.*, 634

F.2d 1359, 1382 (1st Cir. 1980) (recognizing existence of judicial power to authorize trustees to pay claims for goods and services that are indispensably necessary to the debtors' continued operation). This doctrine is frequently invoked early in a chapter 11 case, particularly in connection with the payment of prepetition claims. The rationale for the doctrine of necessity rule is consistent with the paramount goal of chapter 11 "facilitating the continued operation and rehabilitation of the debtor." *Ionosphere Clubs*, 98 B.R. at 176; *see also In re Friedman's Inc.*, No. 09-10161 CSS, 2011 WL 5975283, at *3 (Bankr. D. Del. Nov. 30, 2011) ("[N]ormally, a debtor only pays pre-petition, unsecured claims through a confirmed plan of reorganization . . . most courts will allow such payments under the 'doctrine of necessity,' if the debtor establishes that in its business judgment making such payments is critical to the survival of the debtor's business."). Accordingly, pursuant to section 105(a) of the Bankruptcy Code, the Debtors submit that the Court is empowered to grant the relief requested in this Motion.

27. Satisfaction of the prepetition Taxes in the ordinary course of business is necessary to preserve the Debtors' resources, thereby better positioning the Debtors to realize maximum value from the sale process. Delayed payment of the Taxes may cause the Taxing Authorities to take disruptive actions, including audits, lien filings, moving for relief from the automatic stay, and other administrative procedures, all of which would consume valuable time and resources and divert the Debtors' attention from their business operations and sale efforts. Prompt and regular payment of the Taxes will avoid these avoidable distractions. Thus, even if the Debtors could avoid payment of certain accrued Taxes, the Debtors believe that the collateral consequences on the Debtors' proposed sale process would vastly exceed whatever modest short-run cost savings the Debtors might achieve.

28. Moreover, payment of certain of the prepetition Taxes is necessary for the Debtors to maintain their good standing to operate in the jurisdictions in which they do business throughout the sale process.

29. Therefore, for the reasons outlined here and in the First Day Declaration, the Debtors submit that payment of the Taxes is appropriate in the Debtors' business judgment and should be authorized pursuant to sections 105(a) and 363(b) of the Bankruptcy Code and the doctrine of necessity.

D. Financial Institutions Should Be Authorized to Honor and Process Related Checks and Transfers.

30. The Debtors also request that all applicable banks and other financial institutions (the "Banks") be authorized to (a) receive, process, honor, and pay all checks presented for payment of, and to honor all fund transfer requests made by the Debtors related to the claims that the Debtors request authority to pay in this Motion, regardless of whether the checks were presented or fund transfer requests were submitted before or after the Petition Date, and (b) rely on the Debtors' designation of any particular check as approved by the Court's order.

THE REQUIREMENTS OF BANKRUPTCY RULE 6003(b) ARE SATISFIED

31. Certain aspects of the relief requested herein are subject to Bankruptcy Rule 6003, which governs the availability of certain types of relief within 21 days after the Petition Date. Pursuant to Bankruptcy Rule 6003, a court may grant this relief on an expedited basis if it is necessary to avoid immediate and irreparable harm. The Debtors submit that the facts set forth herein and in the First Day Declaration demonstrate that the relief requested is necessary to avoid immediate and irreparable harm to the Debtors and, thus, Bankruptcy Rule 6003 has been satisfied.

REQUEST FOR WAIVER OF BANKRUPTCY RULE 6004(h)

32. For the successful implementation of the foregoing, the Debtors seek a waiver of the fourteen-day stay of an order authorizing the use, sale, or lease of property under Bankruptcy Rule 6004(h). As set forth above, and in the First Day Declaration, the relief requested in this Motion is necessary to avoid immediate and irreparable harm to the Debtors. Specifically, the payment of the Taxes is essential to prevent potentially irreparable damage to the Debtors' Chapter 11 Cases and ability to preserve, generate, and recover value for the benefit of their estates. Accordingly, the Debtors submit that ample cause exists to justify the waiver of the fourteen-day stay imposed by Bankruptcy Rule 6004(h), to the extent it applies.

RESERVATION OF RIGHTS

33. Nothing contained herein is intended or shall be construed as (a) an admission as to the amount of, basis for, or validity of any claim against the Debtors under the Bankruptcy Code or other applicable nonbankruptcy law; (b) a waiver of the Debtors' or any other party in interest's right to dispute any claim on any grounds; (c) a promise or requirement to pay any claim; (d) an implication or admission that any particular claim is of a type specified or defined in this Motion; (e) a request or authorization to assume, adopt, or reject any agreement, contract, or lease pursuant to section 365 of the Bankruptcy Code; (f) an admission to the validity, priority, enforceability, or perfection of any lien on, security interest in, or encumbrance on property of the Debtors' estates; or (g) a waiver of any claims or causes of action which may exist against any entity under the Bankruptcy Code or any other applicable law. Likewise, if the Court grants the relief sought herein, any payment made pursuant to the interim order or final order is not intended and should not be construed as an admission as to the validity of any particular claim or a waiver of the Debtors' rights to subsequently dispute such claim.

NOTICE

34. Notice of this Motion will be provided to: (a) the Office of the United States Trustee (Attn: Linda J. Casey, Esq. (linda.casey@usdoj.gov)); (b) counsel to the Debtors' proposed debtor in possession financing lender; (c) the Internal Revenue Service; (d) the parties included on the Debtors' consolidated list of their 30 largest unsecured creditors; (e) the United States Attorney for the District of Delaware; (f) the state attorneys general in states where the Debtors are authorized to do business; (g) the Taxing Authorities; (h) the Banks; (i) the Securities and Exchange Commission; and (j) all parties entitled to notice pursuant to Bankruptcy Rule 2002-1. Notice of this Motion and any order entered in connection with this Motion will be served on all parties in accordance with Local Rule 9013-1(m). The Debtors respectfully submit that, in light of the nature of the relief requested, no further notice of this Motion is required.

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CONCLUSION

WHEREFORE, the Debtors respectfully request that the Court (i) enter the interim order, substantially in the form attached hereto as **Exhibit A**, granting the relief requested in this Motion on an interim basis, (ii) schedule a final hearing on the Motion and thereafter enter the final order substantially in the form attached hereto as **Exhibit B**, and (iii) grant such other and further relief as the Court may deem proper.

Dated: July 17, 2023
Wilmington, Delaware

Respectfully submitted,

/s/ Derek C. Abbott

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*Proposed Counsel to the Debtors and
Debtors in Possession*

EXHIBIT A

Proposed Interim Order

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:)	
)	Chapter 11
NOVAN, INC., <i>et al.</i> , ⁷)	
Debtors.)	Case No. 23-10937 (LSS)
)	(Joint Administration Requested)
)	
)	Re: D.I. __
)	

INTERIM ORDER (I) AUTHORIZING DEBTORS TO PAY CERTAIN PREPETITION TAXES AND RELATED OBLIGATIONS AND (II) AUTHORIZING BANKS TO HONOR AND PROCESS CHECKS AND TRANSFERS RELATED TO SUCH PREPETITION TAXES AND RELATED OBLIGATIONS

Upon the *Motion of Debtors for Entry of Interim and Final Orders (I) Authorizing Debtors to Pay Certain Prepetition Taxes and Related Obligations and (II) Authorizing Banks to Honor and Process Checks and Transfers Relating to Such Prepetition Taxes and Related Obligations* (the “Motion”)⁸ filed by the above-captioned debtors and debtors in possession (collectively, the “Debtors”) for entry of an interim order (this “Interim Order”), (a) authorizing, but not directing, the Debtors to pay, in their discretion, certain prepetition taxes and related obligations and (b) authorizing and directing applicable banks and financial institutions to honor and process checks and transfers related to such prepetition taxes and related obligations, all as further described in the Motion; and upon consideration of the First Day Declaration and the record of these Chapter 11 Cases; and this Court having found that (i) this Court has jurisdiction over the Debtors, their estates, property of their estates and to consider the Motion and the relief requested

⁷ The Debtors in these chapter 11 cases, along with the last four digits of the Debtors’ federal tax identification number (if applicable), are: Novan, Inc. (7682) and EPI Health, LLC (9118). The corporate headquarters and the mailing address for the Debtors is 4020 Stirrup Creek Drive, Suite 110, Durham, NC 27703.

⁸ Capitalized terms used but not otherwise defined herein shall have the respective meaning ascribed to such terms in the Motion.

therein under 28 U.S.C. §§ 157 and 1334 and the *Amended Standing Order of Reference* from the United States District Court for the District of Delaware, dated February 29, 2012, (ii) this Court may enter a final order consistent with Article III of the United States Constitution, (iii) this is a core proceeding under 28 U.S.C § 157(b)(2)(A), (iv) venue of this Motion in this District is proper under 28 U.S.C. §§ 1408 and 1409, and (v) no further or other notice of the Motion is required under the circumstances; and this Court having reviewed the Motion and having heard the statements in support of the relief requested in the Motion at a hearing before this Court; and having determined that the legal and factual bases set forth in the Motion and the First Day Declaration establish just cause for the relief granted in this Interim Order; and this Court having found and determined that the relief sought in the Motion is in the best interests of the Debtors' estates, their creditors and other parties in interest; and after due deliberation and sufficient cause appearing therefor,

IT IS HEREBY ORDERED THAT:

1. The Motion is GRANTED on an interim basis as set forth herein.
2. The final hearing (the "Final Hearing") on the Motion shall be held on _____, 2023 at ____:____.m. (EST). Any objections or responses to entry of a final order on the Motion (each, an "Objection") shall be filed on or before **4:00 p.m. (EST) on _____, 2023**, and served on the following parties: (i) proposed counsel to the Debtors, Morris, Nichols, Arsht & Tunnell LLP, 1201 Market Street, 16th Floor, Wilmington, Delaware 19801 (Attn: Derek C. Abbott, Esq. (dabbott@morrisnichols.com)); (ii) the Office of the United States Trustee, J. Caleb Boggs Federal Building, 844 King St., Lockbox 35, Wilmington, DE 19801 (Attn: Linda J. Casey, Esq. (linda.casey@usdoj.gov)); (iii) counsel to Ligand Pharmaceuticals, Incorporated, Morgan Lewis and Bockius LLP, 101 Park Ave. New York, NY 10174 (Attn: Craig

A. Wolfe, Esq. (craig.wolfe@morganlewis.com), Jason R. Alderson (jason.alderson@morganlewis.com), and David K. Shim (david.shim@morganlewis.com)); and (iv) counsel to any statutory committee appointed in these Chapter 11 Cases. In the event no Objections to entry of a final order on the Motion are timely received, this Court may enter such final order without need for the Final Hearing

3. Without further order of this Court, the Debtors are authorized, but not directed, to pay prepetition Taxes to the Taxing Authorities in the ordinary course of their business, including, without limitation, all Taxes subsequently determined upon audit or otherwise to be owed for periods prior to the Petition Date, subject to an interim aggregate maximum of \$50,000.00.

4. Nothing in this Interim Order shall be construed as authorizing the Debtors to pay any amounts on account of past-due taxes or to prepay any taxes, except with respect to trust fund taxes that do not constitute property of the Debtors' estates.

5. This Interim Order is without prejudice to the rights of the Debtors and their estates to contest the validity, priority or amounts of any Taxes or audit amounts on any grounds they deem appropriate, and any rights of the Debtors and their estates with respect to such matters shall be reserved.

6. Notwithstanding the relief granted in this Interim Order and any actions taken pursuant to such relief, nothing in this Interim Order or any payment made pursuant to this Interim Order shall constitute, nor is it intended to constitute: (a) an admission as to the amount of, basis for, or validity of any claim against the Debtors under the Bankruptcy Code or other applicable nonbankruptcy law; (b) a waiver of the Debtors' or any other party in interest's right to dispute any claim on any grounds; (c) a promise or requirement to pay any claim; (d) an implication or admission that any particular claim is of a type specified or defined in this Interim Order or the

Motion; (e) a request or authorization to assume, adopt, or reject any agreement, contract, or lease pursuant to section 365 of the Bankruptcy Code; (f) an admission to the validity, priority, enforceability, or perfection of any lien on, security interest in, or encumbrance on property of the Debtors' estates; or (g) a waiver of any claims or causes of action which may exist against any entity under the Bankruptcy Code or any other applicable law.

7. The Banks shall be and hereby are authorized and directed to receive, process, honor and pay all checks and fund transfers on account of the Taxes that had not been honored and paid as of the Petition Date, *provided* that sufficient funds are on deposit in the applicable accounts to cover such payments. The Banks are authorized to rely on the representations of the Debtors as to which checks and fund transfers are authorized to be honored and paid pursuant to this Interim Order.

8. Bankruptcy Rule 6003(b) has been satisfied because the relief requested in the Motion is necessary to avoid immediate and irreparable harm to the Debtors and their estates.

9. Notwithstanding the possible applicability of Bankruptcy Rule 6004(h), the terms and provisions of this Interim Order shall be immediately effective and enforceable upon its entry.

10. The Debtors are hereby authorized to take all actions they deem necessary to effectuate the relief granted in this Interim Order.

11. This Court shall retain jurisdiction to hear and determine all matters arising from or related to the implementation or interpretation of this Interim Order.

EXHIBIT B

Proposed Final Order

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:)	
)	Chapter 11
NOVAN, INC., <i>et al.</i> , ¹)	
Debtors.)	Case No. 23-10937 (LSS)
)	(Jointly Administered)
)	
)	Re: D.I. __
)	

FINAL ORDER (I) AUTHORIZING DEBTORS TO PAY CERTAIN PREPETITION TAXES AND RELATED OBLIGATIONS AND (II) AUTHORIZING BANKS TO HONOR AND PROCESS CHECKS AND TRANSFERS RELATED TO SUCH PREPETITION TAXES AND RELATED OBLIGATIONS

Upon the *Motion of Debtors for Entry of Interim and Final Orders (I) Authorizing Debtors to Pay Certain Prepetition Taxes and Related Obligations and (II) Authorizing Banks to Honor and Process Checks and Transfers Relating to Such Prepetition Taxes and Related Obligations* (the “Motion”)² filed by the above-captioned debtors (the “Debtors”) for entry of an interim order and final order (this “Final Order”), (a) authorizing, but not directing, the Debtors to pay, in their discretion, certain prepetition taxes and related obligations and (b) authorizing and directing applicable banks and financial institutions to honor and process checks and transfers related to such prepetition taxes and related obligations, all as further described in the Motion; and upon consideration of the First Day Declaration and the record of these Chapter 11 Cases; and this Court having found (i) this Court has jurisdiction over the Debtors, their estates, property of their estates and to consider the Motion and the relief requested therein under 28 U.S.C. §§ 157 and

¹ The Debtors in these chapter 11 cases, along with the last four digits of the Debtors’ federal tax identification number (if applicable), are: Novan, Inc. (7682) and EPI Health, LLC (9118). The corporate headquarters and the mailing address for the Debtors is 4020 Stirrup Creek Drive, Suite 110, Durham, NC 27703.

² Capitalized terms used but not otherwise defined herein shall have the respective meaning ascribed to such terms in the Motion.

1334 and the *Amended Standing Order of Reference* from the United States District Court for the District of Delaware, dated February 29, 2012, (ii) this Court may enter a final order consistent with Article III of the United States Constitution, (iii) this is a core proceeding under 28 U.S.C § 157(b)(2)(A), (iv) venue of this Motion in this District is proper under 28 U.S.C. §§ 1408 and 1409, and (v) no further or other notice of the Motion is required under the circumstances; this Court having reviewed the Motion and the First Day Declaration and having considered the statements of counsel and the evidence adduced with respect to the Motion; and this Court having granted the interim relief requested in the Motion [D.I. ___]; and that the legal and factual bases set forth in the Motion establish just cause for the relief granted in this Final Order; and any objections to the requested relief having been withdrawn or overruled;

IT IS HEREBY ORDERED THAT:

1. The Motion is GRANTED on a final basis, as set forth herein.
2. The Debtors are authorized, but not directed, to pay prepetition Taxes to the Taxing Authorities in the ordinary course of their business, including, without limitation, all Taxes subsequently determined upon audit or otherwise to be owed for periods prior to the Petition Date, subject to a final aggregate maximum of \$200,000.00.
3. Nothing in this Final Order shall be construed as authorizing the Debtors to pay any amounts on account of past-due taxes or to prepay any taxes, except with respect to trust fund taxes that do not constitute property of the Debtors' estates.
4. This Final Order is without prejudice to the rights of the Debtors and their estates to contest the validity, priority or amounts of any Taxes or audit amounts on any grounds it deems appropriate, and any rights of the Debtors and their estates with respect to such matters shall be reserved.

5. Notwithstanding the relief granted in this Final Order and any actions taken pursuant to such relief, nothing in this Final Order or any payment made pursuant to this Final Order shall constitute, nor is it intended to constitute: (a) an admission as to the amount of, basis for, or validity of any claim against the Debtors under the Bankruptcy Code or other applicable nonbankruptcy law; (b) a waiver of the Debtors' or any other party in interest's right to dispute any claim on any grounds; (c) a promise or requirement to pay any claim; (d) an implication or admission that any particular claim is of a type specified or defined in this Final Order or the Motion; (e) a request or authorization to assume, adopt, or reject any agreement, contract, or lease pursuant to section 365 of the Bankruptcy Code; (f) an admission to the validity, priority, enforceability, or perfection of any lien on, security interest in, or encumbrance on property of the Debtors' estates; or (g) a waiver of any claims or causes of action which may exist against any entity under the Bankruptcy Code or any other applicable law.

6. The Banks shall be and hereby are authorized and directed to receive, process, honor and pay all checks and fund transfers on account of the Taxes that had not been honored and paid as of the Petition Date, *provided* that sufficient funds are on deposit in the applicable accounts to cover such payments. The Banks are authorized to rely on the representations of the Debtors as to which checks and fund transfers are authorized to be honored and paid pursuant to this Final Order.

7. Notwithstanding the possible applicability of Bankruptcy Rule 6004(h), the terms and provisions of this Final Order shall be immediately effective and enforceable upon its entry.

8. The Debtors are authorized to take all actions they deem necessary to effectuate the relief granted in this Final Order.

9. This Court shall retain jurisdiction to hear and determine all matters arising from or related to the implementation or interpretation of this Final Order.