

**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
AUTHORIZING DEBTORS TO (I) CONTINUE THEIR INSURANCE PROGRAM,
(II) PAY ALL PREPETITION AND POSTPETITION OBLIGATIONS WITH RESPECT
THERE TO, AND (III) AUTHORIZING BANKS TO HONOR AND PROCESS CHECKS
AND TRANSFERS RELATED TO SUCH INSURANCE 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 (i) continue their insurance program, including their insurance premium finance agreements, and honor prepetition and postpetition obligations with respect thereto; and (ii) renew, supplement, modify, extend, terminate, or purchase insurance coverage (including through obtaining “tail” coverage) in the ordinary course of business; (b) authorizing and directing applicable banks and financial institutions to honor and process checks and transfers related to such insurance obligations; and (c) granting related relief. 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*

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.



(the “First Day Declaration”),² filed contemporaneously with this Motion. In further support of this Motion, the Debtors respectfully state as follows:

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, 363, 364, 503(b), 1107, and 1108 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.

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

6. The Debtors are authorized to operate their business 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.

I. Insurance Program

8. The Debtors' insurance program (the "Insurance Program") is comprised of commercial insurance policies maintained by the Debtors, a summary of which is attached hereto as **Schedule 1** (each, a "Commercial Insurance Policy" and, collectively, the "Commercial Insurance Policies") that are administered through various insurers (the "Insurers"), and which provide coverage for, among other things, automobile, crime, cyber liability, director and officer liability, employment practices liability, fiduciary liability, general liability, property, cargo, pollution legal liability, products and completed operations liability, workers compensation, umbrella and excess third party liability.³

9. Maintenance of the Insurance Program is essential to the continued operation of the Debtors' business through the proposed sale process and is required under the *Operating*

³ The Debtors believe that **Schedule 1** is a complete list of their Commercial Insurance Policies as of the Petition Date. However, if any Commercial Insurance Policy has been omitted from that list, the Debtors request that any order granting the relief sought herein apply to any and all of the Commercial Insurance Policies. In addition to the Commercial Insurance Policies listed on **Schedule 1**, the Debtors maintain other insurance policies and programs with respect to employee benefits including, without limitation, health, dental, disability, and life insurance. These programs and policies are addressed in detail in 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.

Guidelines for Chapter 11 Cases (the “Operating Guidelines”) promulgated by the Office of the United States Trustee for Region 3 (the “U.S. Trustee”), the laws of the various states in which the Debtors operate, applicable federal law, and certain of the Debtors’ contracts and leases. Thus, the Debtors submit that they should be authorized, but not directed, to continue to pay premiums, claims, deductibles, taxes, charges, fees, and other obligations owed under or with respect to the Insurance Program as such obligations come due in the ordinary course of the Debtors’ business.

A. Commercial Insurance Policies

10. For the 2022 to 2023 policy period, the Debtors incurred approximately \$1,558,124.00 in annual premiums relating to the Commercial Insurance Policies, including associated fees and taxes. Further, the Debtors spent additional funds for certain extensions of Commercial Insurance Policies (including “tail” insurance) prepetition. As of the Petition Date, approximately \$62,509.00 of certain of the Commercial Insurance Policies that was necessitated by their expiration on July 1, 2023 (the “Additional Premiums”) remain unpaid.

11. The Debtors have diligently reviewed their records and believe that the only outstanding amounts owed in premiums to their Insurers under the Commercial Insurance Policies is for the Additional Premiums. If there are any outstanding prepetition amounts owed on account of the Commercial Insurance Policies, other than for the Additional Premiums, the Debtors request that the Court authorize, but not direct, the Debtors to pay any such outstanding amounts in their discretion. The Debtors’ maintenance of their relationships with the Insurers is critical to ensuring the continued availability of insurance coverage and reasonable pricing of such coverage for future policy periods, during the pendency of these Chapter 11 Cases. Further, there may be prepetition amounts due and owing to the Insurers of which the Debtors are unaware; for example, if audits are conducted after the Petition Date.

B. Insurance Brokers

12. In the ordinary course of business, the Debtors employ Arthur J. Gallagher Broker & Risk Management Services, LLC (the “Broker”), to assist the Debtors in procuring and negotiating elements of the Debtors’ Insurance Program. For Broker-related services, the Debtors pay the Broker’s commissions in the ordinary course of business (the “Broker Fees”).⁴ The Broker is essential to the Debtors’ ability to secure insurance coverage, as it structures and manages the Insurance Program in a reasonable and prudent manner and enable the Debtors to realize considerable savings in the procurement of aspects of the Insurance Program. The Debtors do not have access to certain key markets unless represented by the Broker as of the date hereof. The Debtors believe that they are current in their obligations to the Broker. The Debtors seek Court authority to continue to employ the Broker in the ordinary course of business and to pay Broker Fees as necessary in connection with procurement and maintenance of the Insurance Program.

RELIEF REQUESTED

13. By this Motion, the Debtors seek entry of interim and final orders, substantially in the forms attached to this Motion as **Exhibit A** and **Exhibit B**, respectively, (i) authorizing the Debtors to (a) continue their Insurance Program on an uninterrupted basis in the ordinary course of the Debtors’ business, (b) renew, supplement, modify, extend, or terminate their Commercial Insurance Policies (including by obtaining “tail” insurance) and (c) as applicable, pay all prepetition and postpetition insurance obligations for all Broker Fees and related claims, deductibles, administrative fees, and other obligations relating to the Insurance Program, as applicable, (collectively, the “Insurance Obligations”), up to a maximum of \$80,000.00 on an interim basis; and (ii) authorizing and directing the applicable banks and financial institutions to

⁴ The Debtors do not pay any funds directly to the Brokers, however; the Brokers collect their fees related to the Debtors’ policies via the Debtors’ Insurers’ commission-based programs throughout the policy year.

receive, process, honor and pay all checks and fund transfers on account of the Insurance Obligations that had not been honored and paid as of the Petition Date, as well as to rely on the representations of the Debtors regarding the same, provided there are sufficient funds on deposit.

A. Continuation of the Insurance Program Is Necessary to Comply with the Operating Guidelines and Applicable Law.

14. Maintenance of the Debtors' insurance coverage under the Insurance Program is required under the Operating Guidelines, the laws of the various states in which the Debtors operate, and the Debtors' various financial agreements. *See, e.g.*, Operating Guidelines ¶ 3. Given these requirements, the Debtors submit that the continuation of the Debtors' Insurance Program—through payment of the Insurance Obligations, and the renewal, revision, extension, supplementation, modification, or entry into new insurance coverage, as needed in the Debtors' business judgment and as set forth in this Motion without further order of the Court—is necessary and essential to the Debtors' operation of their business during these Chapter 11 Cases. In addition, the Debtors are required to maintain insurance under many of their agreements, including leases and customer contracts. Because such agreements are a key component of the Debtors' liquidity and revenue, the Debtors' inability to continue their insurance coverage would be disastrous and could doom the Debtors' prospects for a successful sale process to the detriment of all stakeholders.

B. Payment of the Insurance Obligations Is Authorized Under Sections 1107(a) and 1108 of the Bankruptcy Code.

15. Payment of the Insurance Obligations is also authorized under sections 1107 and 1108 of the Bankruptcy Code. The Debtors are operating their business as debtors in possession under Bankruptcy Code sections 1107(a) and 1108 as fiduciaries for their estates. *See In re Marvel Entm't Grp., Inc.*, 140 F.3d 463, 474 (3d Cir. 1998) (citation omitted); *In re CoServ, LLC*, 273 B.R. 487, 497 (Bankr. N.D. Tex. 2002). Implicit in the duties of a chapter 11 debtor in possession is

the duty “to protect and preserve the estate, including an operating business’s going-concern value.” *Id.* at 497.

16. Payment of the Insurance Obligations and the renewal, revision, extension, supplementation, modification, or entry into new insurance policies, as needed in the Debtors’ business judgment and as set forth in this Motion, will protect the Debtors’ ongoing operations through the proposed sale process. As noted above, not only is insurance coverage required by the Operating Guidelines, it is also mandated by applicable state and federal law, as well as under certain of their contractual arrangements. Moreover, as fiduciaries for the bankruptcy estates, the Debtors could be violating their duties if they jeopardize the coverage provided under the Insurance Program. Non-payment of the Insurance Obligations could result in cancellation of the Insurance Program, and the Debtors may be unable to find alternative insurance coverage, or find such alternatives only at a much higher cost than the Debtors currently incur. Therefore, the relief requested in this Motion is essential to satisfy the Debtors’ fiduciary obligations.

C. Continuing the Insurance Program and Paying All Associated Undisputed Obligations Is Necessary to Preserve the Value of the Debtors’ Estates.

17. Pursuant to section 503(b)(1) of the Bankruptcy Code, a debtor may incur administrative expenses as “actual, necessary costs and expenses of preserving the estate.” 11 U.S.C. § 503(b)(1)(A). Additionally, 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 Debtors have 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 Debtors 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 debtors to pay prepetition wages as long as the debtors articulate a business justification).

18. 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”). The Debtors submit that the use of estate funds for payment of undisputed prepetition Insurance Obligations is permitted by sections 503(b)(1) and 363(b) of the Bankruptcy Code as necessary costs of preserving the Debtors’ estates and should be approved as such.

19. Further, section 105(a) of the Bankruptcy Code supplements these explicit powers and permits 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 debtors 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 debtors to pay prepetition claims if such payment was essential to the continued operation of the debtors).

20. 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 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 Court is empowered to grant the relief requested in this Motion.

21. The nature and extent of the Debtors’ business operations and the proposed sale process make it essential to maintain their Insurance Program on an uninterrupted basis. If the Debtors fail to pay any premiums, deductibles, or related fees under the Insurance Program, then the Insurers may seek to terminate existing Commercial Insurance Policies, or they may decline to renew the Commercial Insurance Policies or refuse to insure the Debtors in the future. If the Commercial Insurance Policies lapse without renewal, the Debtors could be exposed to substantial liability for personal and/or property damages to the detriment of all stakeholders. In addition, the Debtors would be in default under certain key contracts and applicable law, which require that the Debtors maintain adequate insurance coverage. Consequently, if the Debtors’ Commercial Insurance Policies lapsed, the Debtors would be required to obtain replacement coverage on an emergency basis and, likely, at significant expense. Therefore, the continuation of the Insurance Program on an uninterrupted basis and the payment of the Insurance Obligations are essential to preserve the value of the Debtors’ estates.

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

22. 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

23. 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)

24. 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 Insurance Program 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, 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

25. 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 the validity of any particular claim or a waiver of the Debtors' rights to subsequently dispute such claim.

NOTICE

26. Notice of this Motion will be provided to: (a) the Office of the United States Trustee (Attn: Linda J. Casey, Esq. (linda.casey@usdoj.com)); (b) counsel to the Debtors' proposed debtor in possession financing lenders; (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 Insurers; (i) the Broker; (h) the Banks; and (i) 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 requests that the Court (i) enter an interim order, substantially in the form attached hereto as **Exhibit A** granting the relief requested in this Motion, (ii) schedule a final hearing on this Motion and thereafter enter a 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

MORRIS, NICHOLS, ARSHT & TUNNELL LLP

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*Proposed Counsel to the Debtors and
Debtors in Possession*

SCHEDULE 1

Commercial Insurance Policies

| <u>COMMERCIAL INSURANCE POLICIES</u> | | | | | |
|---|----------------------------------|---------------------------------|-----------------------------|-----------------------|---|
| <u>Insurer</u> | <u>Coverage</u> | <u>Previously Funded</u> | <u>Policy Number</u> | <u>Premium</u> | <u>Period</u> |
| AIG | Primary D&O \$5M | Yes | 01-571-81-06 | \$50,000.00 | Three-month extension 9/21/2023-12/21/2023 (Tail policy funded separately) |
| XL | 1st Excess D&O \$5M xs. \$5M | Yes | ELU185444-22 | \$25,000.00 | Three-month extension 9/21/2023-12/21/2023 (Tail policy funded separately) |
| CNA | 2nd Excess D&O \$5M xs. \$10M | Yes | 652463079 | \$10,000.00 | Three-month extension 9/21/2023-12/21/2023 (Tail policy funded separately) |
| Old Republic | 3rd Excess D&O \$5M xs. \$15M | Yes | ORPRO 12 102647 | \$10,000.00 | Three-month extension 9/21/2023-12/21/2023 (Tail policy funded separately) |

| <u>COMMERCIAL INSURANCE POLICIES</u> | | | | | |
|---|-------------------------------------|---------------------------------|-----------------------------|-----------------------|---|
| <u>Insurer</u> | <u>Coverage</u> | <u>Previously Funded</u> | <u>Policy Number</u> | <u>Premium</u> | <u>Period</u> |
| Hudson | 4th Excess D&O \$5M xs. \$20M | Yes | HN-0303-5921-092122 | \$10,000.00 | Three-month extension 9/21/2023-12/21/2023 (Tail policy funded separately) |
| AWAC | Lead Side A D&O \$5M xs. \$25M | Yes | 0310-3410 | \$0.00 | Three-month extension 9/21/2023-12/21/2023 (Tail policy funded separately) |
| AIG | Excess Side A/DIC \$5M xs. \$30M | Yes | 01-571-81-11 | \$0.00 | Three-month extension 9/21/2023-12/21/2023 (Tail policy funded separately) |
| Travelers | Package | No | 630-9K312390-22 | \$11,790.00 | Three-month extension (7/1/2023-10/1/2023) |
| Travelers | Business Auto | No | BA-1N677752-22 | \$1,407.00 | Three-month extension (7/1/2023- |

| <u>COMMERCIAL INSURANCE POLICIES</u> | | | | | |
|---|------------------------|---------------------------------|-----------------------------|-----------------------|--|
| <u>Insurer</u> | <u>Coverage</u> | <u>Previously Funded</u> | <u>Policy Number</u> | <u>Premium</u> | <u>Period</u> |
| | | | | | 10/1/2023) |
| Travelers | International | No | ZGC-51N17334-22 | \$1,544.00 | Three-month extension (7/1/2023-10/1/2023) |
| Travelers | Workers Compensation | No | UB-6K821154-22 | \$6,366.00 | Three-month extension (7/1/2023-10/1/2023) |
| Travelers | Umbrella | No | CUP-0L382985 | \$2,268.00 | Three-month extension (7/1/2023-10/1/2023) |
| Medmarc | Products Liability | No | N22NC380025 | \$9,481.00 | Three-month extension (7/1/2023-10/1/2023) |
| Falvey | Cargo | No | MC-FAL-1000741 | \$22,558.00 | Three-month extension (7/1/2023-10/1/2023) |

| <u>COMMERCIAL INSURANCE POLICIES</u> | | | | | |
|---|------------------------|---------------------------------|-----------------------------|-----------------------|--|
| <u>Insurer</u> | <u>Coverage</u> | <u>Previously Funded</u> | <u>Policy Number</u> | <u>Premium</u> | <u>Period</u> |
| Navigators | Pollution | No | NY22ESP0BW32KNC | \$2,639.00 | Three-month extension (7/1/2023-10/1/2023) |
| Beazley | Cyber | No | W2F88C220201 | \$4,456.00 | Three-month extension (7/1/2023-10/1/2023) |
| Berkshire Hathaway | Fiduciary | Yes | 47-EPC-324344-01 | \$3,000.00 | 9/21/2023-9/21/2024 |

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> , ¹ |) | |
| |) | Case No. 23-10397 (LSS) |
| Debtors. |) | |
| |) | (Joint Administration Requested) |
| |) | |
| |) | Re: D.I. __ |
| |) | |

**INTERIM ORDER AUTHORIZING DEBTORS TO (I) CONTINUE THEIR
INSURANCE PROGRAM, (II) PAY ALL PREPETITION AND POSTPETITION
OBLIGATIONS WITH RESPECT THERETO, (III) AUTHORIZING BANKS TO
HONOR AND PROCESS CHECKS AND TRANSFERS RELATED TO SUCH
INSURANCE OBLIGATIONS**

Upon the *Motion of Debtors for Entry of Interim and Final Orders Authorizing Debtors to (I) Continue Their Insurance Program, (II) Pay All Prepetition and Postpetition Obligations With Respect Thereto; (III) Authorizing Banks to Honor and Process Checks and Transfers Related to Such Insurance Obligations* (the “Motion”),² 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 (i) continue their insurance program and honor prepetition and postpetition obligations with respect thereto; and (ii) renew, supplement, modify, extend, terminate, or purchase insurance coverage (including “tail” insurance

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 or in the Interim or Final Order (I) *Authorizing the Debtors to Obtain Postpetition Financing Pursuant to Section 364 of the Bankruptcy Code*, (II) *Authorizing the Use of Cash Collateral Pursuant to Section 363 of the Bankruptcy Code*, (III) *Granting Adequate Protection to the Prepetition Secured Lender Pursuant to Sections 361, 362, 363, and 364 of the Bankruptcy Code*, (IV) *Granting Liens and Superpriority Claims*, (V) *Modifying the Automatic Stay*, (VI) *Scheduling a Final Hearing*, and (VII) *Granting Related Relief* (“the “DIP Order”), whichever is then in effect.

policies) in the ordinary course of business, as necessary; (b) authorizing and directing applicable banks and financial institutions to honor and process checks and transfers related to such insurance obligations; and (c) granting related relief, 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 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), (iv) venue of the 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, sufficient cause appearing therefor,

IT IS HEREBY ORDERED THAT:

1. The Motion is GRANTED on an interim basis, as set forth therein.
2. The final hearing (the "Final Hearing") on the Motion shall be held on _____, **2023, at __:00 .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 (the “DIP Lender”), 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. The Debtors are authorized, but not required, to pay all prepetition Insurance Obligations in connection with the Insurance Program and those Insurance Obligations that were due and payable as of the Petition Date, or will become due and payable in the ordinary course of business, subject to an aggregate maximum of \$80,000.00 on an interim basis, provided that that any payment made by the Debtors pursuant to the authority granted herein shall be in accordance with the terms and conditions of the DIP Facility, including the Initial DIP Budget and Approved Budget, and the requirements of the DIP Order and any other or subsequent orders approving debtor-in-possession financing or use of cash collateral by this Court in these Chapter 11 Cases.

4. The Debtors are authorized, but not directed, after consulting with the DIP Lender to maintain the Insurance Program without interruption on the same basis and to the extent consistent with their practices and procedures that were in effect prior to the Petition Date and to modify, renew, and enter into new arrangements consistent therewith, including through obtaining “tail” coverage, in the ordinary course of business.

5. Except as set forth in this Interim Order, without further order of this Court, the Debtors are authorized, but not directed, after consulting with the DIP Lender, to honor their Insurance Obligations under the Insurance Program and to renew the existing Commercial Insurance Policies or enter into new arrangements in the ordinary course of business, as may be required as the annual terms of existing arrangements expire.

6. Except as set forth in this Interim Order, without further order of this Court, the Debtors are authorized, but not directed, after consulting with the DIP Lender, to amend, supplement, change, or enter into new broker retention agreements in connection with the Insurance Programs and to pay any Broker Fees, whether incurred or due and payable before or after the Petition Date, in the ordinary course of business.

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

9. To the extent that any Insurance Program or any related contract or agreement is deemed an executory contract within the meaning of section 365 of the Bankruptcy Code, neither this Interim Order nor any payments made in accordance with this Interim Order shall constitute

the postpetition assumption of any such Insurance Program or any related contract or agreement pursuant to section 365 of the Bankruptcy Code.

10. 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 it is 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.

11. 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.

12. 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.

13. The Debtors are hereby authorized to take all actions they deem necessary to effectuate the relief granted in 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 |) | |
| |) | Case No. 23-10937 (LSS) |
| Debtors. |) | |
| |) | (Jointly Administered) |
| |) | |
| |) | Re: D.I. __ |
| |) | |

FINAL ORDER AUTHORIZING DEBTORS TO (I) CONTINUE THEIR INSURANCE PROGRAM (II) PAY ALL PREPETITION AND POSTPETITION OBLIGATIONS WITH RESPECT THERETO, (III) AUTHORIZING BANKS TO HONOR AND PROCESS CHECKS AND TRANSFERS RELATED TO SUCH INSURANCE OBLIGATIONS

Upon the *Motion of Debtors for Entry of Interim and Final Orders Authorizing Debtors to (I) Continue Their Insurance Program, (II) Pay All Prepetition and Postpetition Obligations With Respect Thereto; (III) Authorizing Banks to Honor and Process Checks and Transfers Related to Such Insurance Obligations* (the “Motion”),² filed by the above-captioned debtors and debtors in possession (collectively, the “Debtors”) for entry of a final order (this “Final Order”) (a) authorizing, but not directing, the Debtors to (i) continue their insurance program and honor prepetition and postpetition obligations with respect thereto; and (ii) renew, supplement, modify, extend, terminate, or purchase insurance coverage (including by obtaining “tail” coverage) in the ordinary course of business, as necessary; (b) authorizing and directing applicable banks and financial institutions to honor and process checks and transfers related to such insurance

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.

obligations; and (c) granting related relief; 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 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), (iv) venue of the 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, as applicable; and this Court having granted the interim relief requested in the Motion [D.I. ___]; 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 Final 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, sufficient cause appearing therefor;

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 required, to pay all Insurance Obligations in connection with the Insurance Program and those Insurance Obligations that were due and payable in the ordinary course of business as of the Petition Date; provided that that any payment made by the Debtors pursuant to the authority granted herein shall be in accordance with the terms and conditions of the DIP Facility, including the Initial DIP Budget and Approved Budget, and the

requirements of the DIP Order and any other or subsequent orders approving debtor-in-possession financing or use of cash collateral by this Court in these Chapter 11 Cases.

3. The Debtors are authorized, but not directed, after consulting with the DIP Lender, to maintain the Insurance Program without interruption on the same basis and to the extent consistent with their practices and procedures that were in effect prior to the Petition Date and to modify, renew, and enter into new arrangements consistent therewith, including through obtaining “tail” coverage, in the ordinary course of business.

4. Subject to paragraph 2 of this Final Order, the Debtors are hereby authorized, but not directed, to pay any undisputed prepetition amounts that are later determined to be due and owing as a result of an audit, including any additional fees and costs imposed as a result of any audit.

5. Except as set forth in this Final Order, without further order of this Court, the Debtors are authorized, but not directed, after consulting with the DIP Lender, to honor their Insurance Obligations under the Insurance Program and to renew the existing Commercial Insurance Policies or enter into new arrangements in the ordinary course of business, as may be required as the annual terms of existing arrangements expire.

6. Except as set forth in this Final Order, without further order of this Court, the Debtors are authorized, but not directed, after consulting with the DIP Lender, to amend, supplement, change, or enter into new broker retention agreements in connection with the Insurance Programs and to pay any Broker Fees, whether incurred or due and payable before or after the Petition Date, in the ordinary course of business.

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 Insurance Obligations 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.

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

9. To the extent that any Insurance Program or any related contract or agreement is deemed an executory contract within the meaning of section 365 of the Bankruptcy Code, neither this Final Order nor any payments made in accordance with this Final Order shall constitute the postpetition assumption of any such Insurance Program or any related contract or agreement pursuant to section 365 of the Bankruptcy Code.

10. 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 it is 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.

11. 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.

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

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