

**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)
)

**DEBTORS’ MOTION FOR INTERIM AND FINAL ORDERS
(I) AUTHORIZING PAYMENT OF PREPETITION CLAIMS OF
CERTAIN CRITICAL VENDORS AND (II) GRANTING RELATED RELIEF**

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: (i) authorizing, but not directing, the Debtors to pay prepetition claims of certain vendors that are critical to the Debtors’ ongoing business operations (the “Critical Vendors”) in an amount not to exceed \$500,000.00 on an interim basis and \$1,641,000.00, in the aggregate, on a final basis (the “Critical Vendors Claims Cap”); and (ii) 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* (the “First Day Declaration”),² filed contemporaneously with this Motion. 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. This Court has jurisdiction to consider this Motion pursuant to 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 as of February 29, 2012. This is a core proceeding under 28 U.S.C. § 157(b). Venue of these cases and the Motion is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

2. The Debtors consent 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 (“Local Rules”) to the entry of a final order by the Court in connection with this Motion to the extent that it is later determined that the Court, absent consent of the parties, cannot enter final orders or judgments in connection herewith consistent with Article III of the United States Constitution.

3. The statutory bases for the relief requested herein are sections 105(a), 363(b), 364, 503(b)(9), 507(a), 1107(a) and 1108 of title 11 of the United States Code, 11 U.S.C. §§ 101–1532 (as amended, the “Bankruptcy Code”), as supplemented by rules 6003 and 6004(h) of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”) and Local Rule 9013-1(m).

BACKGROUND

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

5. 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.

6. 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

7. 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, but not directing, the Debtors to pay prepetition claims of certain vendors that are critical to the Debtors' ongoing business operations (the "**Critical Vendors**") in an amount not to exceed \$500,000.00 on an interim basis and \$1,641,000.00, in the aggregate, on a final basis (the "**Critical Vendors Claims Cap**"); and (ii) granting related relief.

CRITICAL VENDORS

8. The Debtors are a medical dermatology company focused on developing and commercializing innovative therapeutic products for skin diseases. They are developing SB206 (berdazimer gel, 10.3%) as a topical prescription gel for the treatment of viral skin infections, with the focus on molluscum contagiosum, or molluscum. The Debtors' continued business operations require uninterrupted goods and services from the Debtors' Critical Vendors. The Debtors have relied upon and plan to continue to rely upon third-party contract development and manufacturing organizations, drug manufacturing suppliers and service providers, regulatory consultants, commercial product vendors and related supporting activities, laboratories, shippers, data analytic firms, contractors, and other various Critical Vendors. These Critical Vendors conduct, manage or support the ongoing SB206 development program and commercial business, including product manufacturing, regulatory progression, responding to the FDA, storing or

shipping raw materials, finished products, and ensuring compliance with various regulatory guidelines for both commercial and developmental product activities. The uninterrupted supply of these goods and services is necessary to ensure the continued progression of and value retention of commercial and developmental products including maintenance and ongoing patient safety. The Debtors must be able to assure their customers, employees, and vendors that the business will continue to operate at a successful and sustainable level.

Criteria for Selecting Critical Vendors

9. To identify vendors that are essential to the Debtors' business, the Debtors carefully reviewed their vendor and service providers to determine which could satisfy the criteria of being deemed critical to the Debtors' continued operations. Among other things, the Debtors reviewed their accounts payable and prepetition vendor list to identify any and all creditors who are critical based upon the necessity of the goods or services supplied by the vendor, the likelihood that the vendor would cease to do business with the Debtors or otherwise materially disrupt the Debtors' businesses absent payment, and the ease or possibility of replacing the vendor if necessary.

10. The Debtors are confident that this process appropriately identified only those vendors that, if the Debtors failed to pay for the vital goods and services it provided prepetition, would likely cease providing necessary goods and services in the future or would impose unworkable terms or conditions, and for which alternatives are not available or practicable.

11. The Critical Vendors are essential to the Debtors' operations and the ongoing commercial and developmental product progression, such that any disruption in the supply of their respective goods or services, even for a short duration, would jeopardize the

Debtors' ability to maintain the safety of the commercial products and the progression of its developmental product candidate. Moreover, many of the Critical Vendors offer highly specialized or regulated goods and services, and thus cannot be readily replaced. Accordingly, the Debtors believe it is necessary to maintain positive business relationships with the Critical Vendors. To assure these business relationships, the Debtors seek the authority to pay, in their business judgment, all or a portion of the prepetition claims owed to the Critical Vendors (the "Critical Vendor Claims") not to exceed the applicable Critical Vendor Claims Cap.³

12. The Critical Vendor Claims Cap represents the Debtors' best estimate as to how much must be paid to such creditors to continue an uninterrupted supply of critical goods and services. The Debtors may pay less than the requested amount. The Debtors further request that the Court grant the Debtors the authority to allocate the foregoing amounts in consultation with the Ligand Pharmaceuticals, Incorporated in their role as the DIP Lender (the "DIP Lender"), without prejudice to seeking additional relief on an emergency basis, and subject to an agreement to receive terms consistent with Customary Trade Terms (as defined herein) from the Critical Vendors.

Proposed Terms and Conditions of Payment of the Critical Vendor Claims

13. To preserve liquidity during these Chapter 11 Cases and ensure that the Debtors continue to receive vital goods and services, the Debtors propose to condition payment on account of Critical Vendor Claims on such Critical Vendor's agreement that it will continue supplying goods and services to the Debtors on terms that are consistent with the historical trade terms between the parties (including, but not limited to, credit limits, pricing, cash discounts, timing of payments, allowances, rebates, normal product mix and availability and other

³ Certain Critical Vendor Claims qualify, or may qualify, for priority status under Bankruptcy Code section 503(b)(9), as they relate to goods received by the Debtors within 20 days before the Petition Date in the ordinary course of the Debtors' business.

applicable terms and programs), which were most favorable to the Debtors and in effect between such Critical Vendor and the Debtors on a historical basis for the period within one hundred eighty (180) days of the Petition Date (the “Customary Trade Terms”). The Debtors, however, reserve the right to negotiate different trade terms with any Critical Vendor, as a condition to paying any Critical Vendor Claim, whether or not memorialized by a Trade Agreement (as defined herein), to the extent the Debtors determine that, in consultation with the DIP Lender, such trade terms are necessary to procure essential goods or services or are otherwise in the best interests of the Debtors’ estates.

14. The Debtors further propose that in the event the Debtors are making a payment pursuant to this Motion, the Debtors may send a letter, in the form, or substantially similar to that, attached hereto as **Exhibit C**, to the Critical Vendors to which it is making such payment, along with a copy of the order (the “Order”) granting this Motion, including, without limitation the following terms:

- (a) The amount of such Critical Vendor’s estimated claim, after accounting for any setoffs, other credits and discounts thereto, shall be as mutually determined in good faith by the Critical Vendor and the Debtors and in consultation with the DIP Lender (but such amount shall be used only for purposes of the Order and shall not be deemed a claim allowed by the Court, and the rights of all parties in interest to object to such claim shall be fully preserved until further order of the Court);
- (b) The amount of payment toward the Critical Vendor’s estimated claim;
- (c) The Critical Vendor’s agreement to be bound by the Customary Trade Terms, or such other trade terms as mutually agreed to by the Debtors and such Critical Vendor and in consultation with the DIP Lender;
- (d) The Critical Vendor’s agreement to provide goods and services to the Debtors based upon Customary Trade Terms, and the Debtors’ agreement to pay the Critical Vendor postpetition in accordance with such terms;

- (e) The Critical Vendor's agreement not to file or otherwise assert against the Debtors, their estates or their respective assets or property (real or personal) any lien (a "Lien") (regardless of the statute or other legal authority upon which such Lien is asserted) related in any way to any remaining prepetition amounts allegedly owed to the Critical Vendor by the Debtors arising from goods or services provided to the Debtors prior to the Petition Date, and that, to the extent that the Critical Vendor has previously obtained such a Lien, the Critical Vendor shall immediately take all necessary action to release such Lien;
- (f) The Critical Vendor's acknowledgement that it has reviewed the terms and provisions of the Order and consents to be bound thereby;
- (g) The Critical Vendor's agreement that it will not separately assert or otherwise seek payment of any reclamation or Bankruptcy Code section 503(b)(9) claim; and
- (h) If a Critical Vendor who has received payment toward a Critical Vendor Claim subsequently refuses to supply goods or services to the Debtors on Customary Trade Terms, any payments received by the Critical Vendor on account of its Critical Vendor Claim will be deemed to have been in payment of then outstanding postpetition obligations owed to such Critical Vendor, and that such Critical Vendor shall immediately repay to the Debtors any payments received on account of its Critical Vendor Claim to the extent that the aggregate amount of such payments exceed the postpetition obligations then outstanding, without the right of setoff or reclamation.

15. Such a letter, once agreed to and accepted by a Critical Vendor, shall be the agreement between the parties that governs their postpetition trade relationship, whether on Customary Trade Terms or on terms different from their Customary Trade Terms (the "Trade Agreement"). The Debtors hereby seek authority to enter into Trade Agreements with the Critical Vendors if the Debtors determine, in consultation with the DIP Lender, that such an agreement is necessary to their postpetition operations.

16. In addition to the Trade Agreement described in paragraphs 13–14, the Debtors seek authority to agree on Customary Trade Terms with Critical Vendors, in

consultation with the DIP Lender, by less formal means, including email correspondence. While the Critical Vendors provide crucial goods and services to the Debtors' business, many of these Critical Vendors are small businesses and the amounts owed to many vendors are relatively small. These Critical Vendors may find the process of entering into a formal Trade Agreement overly burdensome, which for some may require hiring outside counsel to review the Trade Agreement. To avoid the risk of Critical Vendors refusing to provide their goods and services and potential interruptions to the supply of vital goods and services, the Debtors request authority, in consultation with the DIP Lender, to negotiate and agree on Customary Trade Terms with certain Critical Vendors absent a Trade Agreement as the Debtors deem appropriate.

17. If a Critical Vendor refuses to supply goods or services to the Debtors on Customary Trade Terms following any postpetition payment toward its Critical Vendor Claim, or fails to comply with any Trade Agreement it entered into with the Debtors, the Debtors hereby seek authority, in consultation with the DIP Lender and without further order of the Court but with notice to the affected Critical Vendor (i) to declare such Trade Agreement immediately terminated (if applicable) and (ii) to declare any payments made to such Critical Vendor on account of its Critical Vendor Claim to have been in payment of then outstanding postpetition obligations owed to such Critical Vendor without further order of the Court.

18. In the event that the Debtors exercise either of the rights set forth in the preceding paragraph, in consultation with the DIP Lender, the Debtors request that the Critical Vendor against which the Debtors exercise such rights be required to immediately return to the Debtors any payments made on account of its Critical Vendor Claim to the extent that such payments exceed the postpetition amounts then owed to such Critical Vendor, without giving effect to any rights of setoff or reclamation. In essence, the Debtors seek to return the parties to

their respective positions immediately prior to entry of the Order in the event a Trade Agreement is terminated or a Critical Vendor refuses to supply goods or services to the Debtors on Customary Trade Terms following any payment of its Critical Vendor Claim.

BASIS FOR RELIEF REQUESTED

A. Section 105 of the Bankruptcy Code and the doctrine of necessity supports paying Critical Vendor Claims.

19. The proposed payments of Critical Vendor Claims should be authorized pursuant to section 105 of the Bankruptcy Code and under the “doctrine of necessity.” The Court’s power to utilize the doctrine of necessity in chapter 11 cases derives from the Court’s inherent equity powers and its statutory authority 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). The United States Supreme Court first articulated the doctrine of necessity over a century ago, in *Miltenberger v. Logansport Ry. Co.*, 106 U.S. 286 (1882), in affirming the authorization by the lower court of the use of receivership funds to pay pre-receivership debts owed to employees, vendors and suppliers, among others, when such payments were necessary to preserve the receivership property and the integrity of the business in receivership. *See id.* at 311. The modern application of the doctrine of necessity is largely unchanged from the Court’s reasoning in *Miltenberger*. *See In re Lehigh & New Eng. Ry. Co.*, 657 F.2d 570, 581-82 (3d Cir. 1981) (“[I]n order to justify payment under the ‘necessity of payment’ rule, a real and immediate threat must exist that failure to pay will place the continued operation of the [debtor] in serious jeopardy.”).

20. The doctrine of necessity “recognizes the existence of the judicial power to authorize a debtor in a reorganization case to pay pre-petition claims where such payment is essential to the continued operation of the debtor.” *In re Ionosphere Clubs, Inc.*, 98 B.R. 174,

176 (Bankr. S.D.N.Y. 1989); *see also In re Just for Feet, Inc.*, 242 B.R. 821, 826 (D. Del. 1999) (stating that where the debtor “cannot survive” absent payment of certain prepetition claims, the doctrine of necessity should be invoked to permit payment); *In re NVR L.P.*, 147 B.R. 126, 127 (Bankr. E.D. Va. 1992) (“[T]he court can permit pre-plan payment of a pre-petition obligation when essential to the continued operation of the debtor.”); *In re Eagle-Picher Indus., Inc.*, 124 B.R. 1021, 1023 (Bankr. S.D. Ohio 1991) (“[T]o justify payment of a pre-petition unsecured creditor, a debtor must show that the payment is necessary to avert a serious threat to the Chapter 11 process.”).

21. The doctrine of necessity is an accepted component of modern bankruptcy jurisprudence. *See Just For Feet*, 242 B.R. at 826 (approving payment of key inventory suppliers’ prepetition claims when such suppliers could destroy debtor’s business by refusing to deliver new inventory on eve of debtor’s key sales season); *In re Payless Cashways, Inc.*, 268 B.R. 543, 546–47 (Bankr. W.D. Mo. 2001) (authorizing payment of critical prepetition suppliers’ claims when such suppliers agree to provide postpetition trade credit); *see also In re Columbia Gas Sys., Inc.*, 171 B.R. 189, 191–92 (Bankr. D. Del. 1994); *In re Ionosphere Clubs, Inc.*, 98 B.R. at 175–76.

22. As stated above, paying Critical Vendor Claims is essential to the continued operation of the Debtors’ business. Accordingly, this Court should allow the payment of the Critical Vendor Claims as requested herein.

B. Paying Critical Vendor Claims is authorized under section 363 of the Bankruptcy Code.

23. The relief requested in this Motion is appropriate under Bankruptcy Code section 363. *See In re UAL Corp.*, Case No. 02-48191 (Bankr. N.D. Ill. Dec. 11, 2002) (essential trade motion relying upon Bankruptcy Code section 363 is “completely consistent with the

Bankruptcy Code”); *Armstrong World Indus., Inc. v. James A. Phillips, Inc.*, 29 B.R. 391, 397 (S.D.N.Y. 1983) (under section 363, court authorized contractor to pay prepetition claims of some suppliers who were potential lien claimants, because payments were necessary for general contractors to release funds owed to debtors, thus benefiting estate); *see also In re Hancock Fabrics, Inc.*, Case No. 07-10353 (BLS) (Bankr. D. Del. Mar. 22, 2007) (pursuant to section 363, authorizing payment of prepetition claims to certain vendors deemed critical by debtors).

24. Certain of the relief requested in this Motion contemplates payments to Critical Vendors who agree to provide materials, goods or services on Customary Trade Terms resulting in a benefit to the Debtors’ estates. As a result, paying Critical Vendor Claims is consistent with and appropriate under Bankruptcy Code section 363. As detailed above, the goods and services provided by the Critical Vendors are vital to continued operation of the Debtors’ business.

25. In light of these factors, paying Critical Vendor Claims is plainly in the best interests of the Debtors’ estates and their creditors. Thus, the Debtors respectfully submit that this Court should grant the requested relief under section 363 of the Bankruptcy Code.

C. Paying Critical Vendor Claims that satisfy Bankruptcy Code section 503(b)(9) will have little to no impact on creditor recoveries in these cases.

26. Section 503(b)(9) of the Bankruptcy Code provides that “there shall be allowed administrative expenses . . . including . . . the value of any goods received by the debtor within 20 days before the date of commencement of a case under this title in which the goods have been sold to the debtor in the ordinary course of such debtor’s business.” Because such claims are entitled to priority status, they must be paid in full for the Debtors to confirm a chapter 11 plan. *See* 11 U.S.C. § 1129(a)(9)(A). As such, paying claims now only provides such parties with what they would be entitled to receive under a chapter 11 plan.

27. Although section 503(b)(9) does not specify a time for paying these expenses, bankruptcy courts have the discretion to allow for distributions to administrative claimants prior to confirmation if the debtor has the ability and there is a need to pay. *See In re Global Home Prods., LLC*, 2006 WL 3791955, at *3 (Bankr. D. Del. Dec. 21, 2006) (“[T]he timing of the payment of that administrative expense claim is left to the discretion of the Court.”). Thus, paying Critical Vendor Claims with section 503(b)(9) priority only affects the timing, but not the amount, of any such payment. Here, the Debtors have a need to pay claimants who could potentially disrupt operations prior to the closing of a sale of their business.

28. As a result, the Debtors request that they should have the authority, but not direction, to pay Critical Vendor Claims subject to the Critical Vendor Claims Cap, a substantial amount of which would be paid ahead of general unsecured creditors even absent the relief requested in the motion. Providing the Debtors with the ability to pay these claims will help maximize the value of the estates as it will allow the Debtors to more efficiently and effectively operate their business by being able to secure more favorable trade terms with their vendors.

D. Paying Critical Vendor Claims is authorized under sections 1107(a) and 1108 of the Bankruptcy Code.

29. The Debtors, operating their businesses as debtors in possession under Bankruptcy Code sections 1107(a) and 1108, are fiduciaries “holding the bankruptcy estate[s] and operating the business[es] for the benefit of [its] creditors and (if the value justifies) equity owners.” *In re CoServ, L.L.C.*, 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.*

30. Courts have noted that there are instances in which a debtor in possession can fulfill its fiduciary duty “only . . . by the preplan satisfaction of a prepetition claim.” *Id.* The

CoServ court specifically noted that preplan satisfaction of prepetition claims would be a valid exercise of a debtor's fiduciary duty when the payment "is the only means to effect a substantial enhancement of the estate," and also when the payment was to "sole suppliers of a given product." *Id.* at 498. The court provided a three-pronged test for determining whether a preplan payment on account of a prepetition claim was a valid exercise of a debtor's fiduciary duty:

First, it must be critical that the debtor deal with the claimant. Second, unless it deals with the claimant, the debtor risks the probability of harm, or, alternatively, loss of economic advantage to the estate or the debtor's going concern value, which is disproportionate to the amount of the claimant's prepetition claim. Third, there is no practical or legal alternative by which the debtor can deal with the claimant other than by payment of the claim.

Id. at 498.

31. Paying the Critical Vendor Claims meets each element of the *CoServ* court's standard. As described above, the Debtors have narrowly tailored the Critical Vendor Claims to encompass only those suppliers that are the sole source of a particular good or service without which the Debtors' operations would be severely impacted or those suppliers or service providers who are critical because the time and expense that would be involved in transitioning to a new supplier would be prohibitive and would significantly disrupt the Debtors' business. The potential harm and economic disadvantage that would stem from the failure of any of the Critical Vendors to perform is grossly disproportionate to the amount of any prepetition claim that may be paid. Finally, with respect to each Critical Vendor, the Debtors have examined other options short of paying Critical Vendor Claims and have determined that any attempt to re-source or shift business to alternative vendors would require significant resources and time due to the difficulties attendant in developing the Debtors' specific manufacturing requirements, resulting in supply disruptions to the Debtors' customers and potentially irreparable harm to the Debtors' estate. Thus, the Debtors have concluded there is no practical or legal alternative to

paying the Critical Vendor Claims and paying such claims is the only way the Debtors can meet their fiduciary duties as debtors in possession under Bankruptcy Code sections 1107(a) and 1108.

E. Cause exists to authorize the Debtors' financial institutions to honor checks and electronic fund transfers.

32. The Debtors represent that they will have sufficient funds to pay the amounts described herein in the ordinary course of business by virtue of cash reserves and expected cash flows from ongoing business operations, or otherwise through the use of cash collateral. Accordingly, the Debtors believe that checks or wire transfer requests, other than those relating to authorized payments, will not be honored inadvertently and that all applicable banks should be authorized, when requested by the Debtors, to receive, process, honor and pay any and all checks or wire transfer requests with respect to the Critical Vendor Claim.

SATISFACTION OF BANKRUPTCY RULE 6003

33. Bankruptcy Rule 6003 empowers the Court to issue an order, within 21 days after the Petition Date, granting a motion to "use . . . property of the estate, including a motion to pay all or part of a claim that arose before the filing of the petition" if such requested relief "is necessary to avoid immediate and irreparable harm." Fed. R. Bankr. P. 6003(b). For the reasons discussed above, entry of an interim order granting this Motion is integral to the Debtors' ability to successfully transition into chapter 11. As described above, any lapse in payment of Critical Vendor Claims could subject the Debtors to significant disruption of the Debtors' business, and the ongoing clinical trials, thereby causing immediate and irreparable harm to the Debtors' estates and, consequently, other interested parties. Accordingly, the Debtors submit that they have satisfied the "immediate and irreparable harm" standard of Bankruptcy Rule 6003 to support granting the relief requested herein.

WAIVER OF BANKRUPTCY RULES 6004(a) AND 6004(h)

34. The Debtors also request that the Court waive the stay imposed by Bankruptcy Rule 6004(h), which provides that “[a]n order authorizing the use, sale, or lease of property other than cash collateral is stayed until the expiration of 14 days after entry of the order, unless the court orders otherwise.” Fed. R. Bankr. P. 6004(h). As described above, the relief that the Debtors seek in this Motion is necessary for the Debtors to continue their business operations without interruption and to preserve value for the estate. Accordingly, the Debtors respectfully request that the Court waive the 14-day stay imposed by Bankruptcy Rule 6004(h), as the exigent nature of the relief sought herein justifies immediate relief.

35. To implement the foregoing immediately, the Debtors respectfully request a waiver of the notice requirements of Bankruptcy Rule 6004(a) to the extent they are deemed to apply.

RESERVATION OF RIGHTS

36. Nothing contained herein is intended or shall be construed as: (i) an admission as to the validity, amount or priority of any claim against the Debtors; (ii) a waiver of the Debtors’ rights to dispute any claim; (iii) a promise or requirement to pay any claim; (iv) a waiver of any claim or cause of action of the Debtors that exist against any entity; (v) a ratification or assumption of any agreement, contract or lease under section 365 of the Bankruptcy Code; (vi) a waiver of limitation of the Debtors’ rights under the Bankruptcy Code, any other applicable law, or any agreement; or (vii) an admission or concession by the Debtors that any lien acknowledged or satisfied under this Motion is valid, and the Debtors expressly reserve and preserve their rights to contest the extent, validity, or perfection, or seek avoidance of, any such lien.

NOTICE

37. 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; (g) the United States Attorney's Office for the District of Delaware; (h) the state attorneys general in states where the Debtors are authorized to do business; (i) the Securities and Exchange Commission; and (j) any party that has requested notice pursuant to Bankruptcy Rule 2002. As this Motion is seeking first-day relief, the Debtors will serve copies of this Motion and any order entered in respect of this Motion as required by Local Rule 9013-1(m). The Debtors respectfully submit that no further notice of this Motion is required under the circumstances.

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CONCLUSION

WHEREFORE, the Debtors respectfully request that the Court enter the Proposed Orders granting the relief requested in this Motion, and such other and further relief as the Court may deem just and appropriate.

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> , ¹)	
)	Case No. 23-10937 (LSS)
Debtors.)	
)	(Joint Administration Requested)
)	
)	Re: D.I. __
)	

INTERIM ORDER (I) AUTHORIZING PAYMENT OF PREPETITION CLAIMS OF CERTAIN CRITICAL VENDORS AND (II) GRANTING RELATED RELIEF

Upon the *Debtors’ Motion for Interim and Final Orders (I) Authorizing Payment of Prepetition Claims of Certain Critical Vendors and (II) Granting Related Relief* (the “Motion”)² of the above-captioned debtors and debtors in possession (collectively, the “Debtors”) for entry of an interim order (this “Interim Order”) and final order pursuant to sections 105(a), 363(b), 503(b)(9), 507(a), 1107(a) and 1108 of the Bankruptcy Code, Bankruptcy Rules 6003(b) and 6004, and Local Rule 9013-1(m): authorizing, but not directing, the Debtors to make payments toward the prepetition fixed, liquidated and undisputed claims of Critical Vendors, all as more fully described in the Motion; 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

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.

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 herein.
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 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 directed, to pay the prepetition Critical Vendor Claims up to \$500,000.00 prior to the Final Hearing on the Motion; provided that the Debtors shall provide no less than one (1) business day prior notice to counsel to the DIP Lender (as defined in the DIP Order) which shall be provided through electronic mail and set forth details of such payments.

4. The Debtors shall maintain a matrix or schedule of amounts directly or indirectly paid, subject to the terms and conditions of this Interim Order, including the following information: (a) the names of the payee; (b) the amount of the payment; (c) the category or type of payment; (d) the Debtor or Debtors that made the payment; and (e) the payment date. The Debtors shall provide a copy of such matrix or schedule to the U.S. Trustee, any statutory committee appointed in these Chapter 11 Cases, and counsel to the DIP Lender within seven (7) days following the conclusion of each calendar month, beginning upon entry of this Order.

5. The Debtors are further authorized, but not directed, to undertake appropriate efforts to enter into Trade Agreements with the Critical Vendors if the Debtors determine, in consultation with the DIP Lender, that such an agreement is necessary to their postpetition operations, including, without limitation on the following terms:

- (a) The amount of such Critical Vendor's estimated claim, after accounting for any setoffs, other credits and discounts thereto, shall be as mutually determined in good faith by the Critical Vendor and the Debtors and in consultation with the DIP Lender (but such amount shall be used only for purposes of the Order and shall not be deemed a claim allowed by the Court, and the rights of all parties in interest to object to such claim shall be fully preserved until further order of the Court);
- (b) The amount of payment toward the Critical Vendor's estimated claim;

- (c) The Critical Vendor's agreement to be bound by the Customary Trade Terms, or such other trade terms as mutually agreed to by the Debtors and such Critical Vendor and in consultation with the DIP Lender;
- (d) The Critical Vendor's agreement to provide goods and services to the Debtors based upon Customary Trade Terms, and the Debtors' agreement to pay the Critical Vendor postpetition in accordance with such terms;
- (e) The Critical Vendor's agreement not to file or otherwise assert against the Debtors, their estates or their respective assets or property (real or personal) any lien (a "Lien") (regardless of the statute or other legal authority upon which such Lien is asserted) related in any way to any remaining prepetition amounts allegedly owed to the Critical Vendor by the Debtors arising from goods or services provided to the Debtors prior to the Petition Date, and that, to the extent that the Critical Vendor has previously obtained such a Lien, the Critical Vendor shall immediately take all necessary action to release such Lien;
- (f) The Critical Vendor's acknowledgement that it has reviewed the terms and provisions of the Interim Order and consents to be bound thereby;
- (g) The Critical Vendor's agreement that it will not separately assert or otherwise seek payment of any reclamation or Bankruptcy Code section 503(b)(9) claim; and
- (h) If a Critical Vendor who has received payment toward a Critical Vendor Claim subsequently refuses to supply goods or services to the Debtors on Customary Trade Terms, any payments received by the Critical Vendor on account of its Critical Vendor Claim will be deemed to have been in payment of then outstanding postpetition obligations owed to such Critical Vendor, and that such Critical Vendor shall immediately repay to the Debtors any payments received on account of its Critical Vendor Claim to the extent that the aggregate amount of such payments exceed the postpetition obligations then outstanding, without the right of setoff or reclamation.

6. Notwithstanding the foregoing, the Debtors may, in consultation with the DIP Lender, reinstate a Trade Agreement if the underlying default under the Trade Agreement is fully cured by the Critical Vendor not later than five (5) business days following the Debtors'

notification to the Critical Vendor of such default; or the Debtors, in consultation with the DIP Lender, reach a favorable alternative agreement with the Critical Vendor.

7. For the avoidance of doubt and notwithstanding the foregoing, the Debtors may, in consultation with the DIP Lender, negotiate and agree on Customary Trade Terms with Critical Vendors absent a Trade Agreement.

8. The Debtors' banks shall be and hereby are authorized and directed to receive, process, honor and pay all prepetition and postpetition checks and fund transfers on account of the Critical Vendor Claims 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 Debtors shall be and hereby are authorized to issue new postpetition checks or effect new postpetition fund transfers on account of the Critical Vendor Claims to replace any prepetition checks or fund transfer requests that may be dishonored or rejected.

9. Nothing herein shall be construed to limit, or in any way affect, the Debtors' ability to dispute any Critical Vendor Claim.

10. The authorization granted hereby to pay Critical Vendor Claims shall not create any obligation on the part of the Debtors or their officers, directors, attorneys or agents to pay the Critical Vendor Claims, none of the foregoing persons shall have any liability on account of any decision by the Debtors not to pay a Critical Vendor Claim, and nothing contained in this Interim Order shall be deemed to increase, reclassify, elevate to an administrative expense status or otherwise affect the Critical Vendor Claims to the extent they are not paid.

11. Nothing in the Motion or in this Interim Order is intended or should be construed as (a) an admission as to the validity or priority of any claim against the Debtors, (b) a waiver of the Debtors' rights to dispute any claim, including the validity or priority thereof, or

(c) an approval or assumption of any agreement, contract or lease whether under section 365(a) of the Bankruptcy Code or otherwise. Likewise, any payment made pursuant to this Interim Order is not intended and should not be construed as an admission as to the validity of any claim or a waiver of the Debtors' rights to subsequently dispute such claim.

12. The Debtors are authorized to take any and all actions necessary to effectuate the relief granted herein.

13. The requirements of Bankruptcy Rule 6003(b) are satisfied because the relief requested in the Motion is necessary to avoid immediate and irreparable harm to the Debtors.

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

15. Notice of the Motion as provided therein shall be deemed good and sufficient and the requirements of Bankruptcy Rule 6004(a) and the Local Rules are satisfied by such notice.

16. The Court retains jurisdiction with respect to all matters arising from or related to the interpretation or implementation of this 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 (I) AUTHORIZING PAYMENT OF PREPETITION CLAIMS OF CERTAIN CRITICAL VENDORS AND (II) GRANTING RELATED RELIEF

Upon the *Debtors’ Motion for Interim and Final Orders (I) Authorizing Payment of Prepetition Claims of Certain Critical Vendors and (II) Granting Related Relief* (the “Motion”) ² of the above-captioned debtors and debtors in possession (collectively, the “Debtors”) for entry of an interim order (the “Interim Order”) and a final order (this “Final Order”) pursuant to sections 105(a), 363(b), 503(b)(9), 507(a), 1107(a) and 1108 of the Bankruptcy Code, Bankruptcy Rules 6003(b) and 6004, and Local Rule 9013-1(m): authorizing, but not directing, the Debtors to make payments toward the prepetition fixed, liquidated and undisputed claims of Critical Vendors, all as more fully described in the Motion; 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.

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.

§ 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 directed, to pay the Critical Vendor Claims as described in the Motion in amounts not to exceed \$1,641,000.00 in the aggregate; provided that the Debtors shall provide no less than one (1) business day prior notice to counsel to the DIP Lender (as defined in the DIP Order) which shall be provided through electronic mail and set forth details of such payments.
3. The Debtors shall maintain a matrix or schedule of amounts directly or indirectly paid, subject to the terms and conditions of this Final Order, including the following information: (a) the names of the payee; (b) the amount of the payment; (c) the category or type of payment; (d) the Debtor or Debtors that made the payment; and (e) the payment date. The Debtors shall provide a copy of such matrix or schedule to the U.S. Trustee, any statutory committee appointed in these Chapter 11 Cases, and counsel to the DIP Lender within seven (7) days following the conclusion of each calendar month, beginning upon entry of this Order.

4. The Debtors are further authorized, but not directed, to undertake appropriate efforts to enter into Trade Agreements with the Critical Vendors if the Debtors determine, in consultation with the DIP Lender, that such an agreement is necessary to their postpetition operations, including, without limitation on the following terms:

- (a) The amount of such Critical Vendor's estimated claim, after accounting for any setoffs, other credits and discounts thereto, shall be as mutually determined in good faith by the Critical Vendor and the Debtors and in consultation with the DIP Lender (but such amount shall be used only for purposes of the Order and shall not be deemed a claim allowed by the Court, and the rights of all parties in interest to object to such claim shall be fully preserved until further order of the Court);
- (b) The amount of payment toward the Critical Vendor's estimated claim;
- (c) The Critical Vendor's agreement to be bound by the Customary Trade Terms, or such other trade terms as mutually agreed to by the Debtors and such Critical Vendor and in consultation with the DIP Lender;
- (d) The Critical Vendor's agreement to provide goods and services to the Debtors based upon Customary Trade Terms, and the Debtors' agreement to pay the Critical Vendor postpetition in accordance with such terms in consultation with the DIP Lender;
- (e) The Critical Vendor's agreement not to file or otherwise assert against the Debtors, their estates or their respective assets or property (real or personal) any lien (a "Lien") (regardless of the statute or other legal authority upon which such Lien is asserted) related in any way to any remaining prepetition amounts allegedly owed to the Critical Vendor by the Debtors arising from goods or services provided to the Debtors prior to the Petition Date, and that, to the extent that the Critical Vendor has previously obtained such a Lien, the Critical Vendor shall immediately take all necessary action to release such Lien;
- (f) The Critical Vendor's acknowledgement that it has reviewed the terms and provisions of the Order and consents to be bound thereby;

- (g) The Critical Vendor's agreement that it will not separately assert or otherwise seek payment of any reclamation or Bankruptcy Code section 503(b)(9) claim; and
- (h) If a Critical Vendor who has received payment toward a Critical Vendor Claim subsequently refuses to supply goods or services to the Debtors on Customary Trade Terms, any payments received by the Critical Vendor on account of its Critical Vendor Claim will be deemed to have been in payment of then outstanding postpetition obligations owed to such Critical Vendor, and that such Critical Vendor shall immediately repay to the Debtors any payments received on account of its Critical Vendor Claim to the extent that the aggregate amount of such payments exceed the postpetition obligations then outstanding, without the right of setoff or reclamation.

5. Notwithstanding the foregoing, the Debtors may, in consultation with the DIP Lender, reinstate a Trade Agreement if the underlying default under the Trade Agreement is fully cured by the Critical Vendor not later than five (5) business days following the Debtors' notification to the Critical Vendor of such default; or the Debtors, in consultation with the DIP Lender, reach a favorable alternative agreement with the Critical Vendor.

6. For the avoidance of doubt and notwithstanding the foregoing, the Debtors may, in consultation with the DIP Lender, negotiate and agree on Customary Trade Terms with Critical Vendors absent a Trade Agreement.

7. The Debtors' banks shall be and hereby are authorized and directed to receive, process, honor and pay all prepetition and postpetition checks and fund transfers on account of the Critical Vendor Claims 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 Debtors shall be and hereby are authorized to issue new postpetition checks or effect new postpetition fund transfers on account of the Critical Vendor Claims to replace any prepetition checks or fund transfer requests that may be dishonored or rejected.

8. Nothing herein shall be construed to limit, or in any way affect, the

Debtors' ability to dispute any Critical Vendor Claim.

9. The authorization granted hereby to pay Critical Vendor Claims shall not create any obligation on the part of the Debtors or their officers, directors, attorneys or agents to pay the Critical Vendor Claims, none of the foregoing persons shall have any liability on account of any decision by the Debtors not to pay a Critical Vendor Claim, and nothing contained in this Final Order shall be deemed to increase, reclassify, elevate to an administrative expense status or otherwise affect the Critical Vendor Claims to the extent they are not paid.

10. Nothing in the Motion, the Interim Order or in this Final Order is intended or should be construed as (a) an admission as to the validity or priority of any claim against the Debtors, (b) a waiver of the Debtors' rights to dispute any claim, including the validity or priority thereof, or (c) an approval or assumption of any agreement, contract or lease whether under section 365(a) of the Bankruptcy Code or otherwise. Likewise, any payment made pursuant to this Final Order is not intended and should not be construed as an admission as to the validity of any claim or a waiver of the Debtors' rights to subsequently dispute such claim.

11. The Debtors are authorized to take any and all actions necessary effectuate the relief granted herein.

12. The requirements of Bankruptcy Rule 6003(b) are satisfied because the relief requested in the Motion is necessary to avoid immediate and irreparable harm to the Debtors.

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

14. Notice of the Motion as provided therein shall be deemed good and sufficient and the requirements of Bankruptcy Rule 6004(a) and the Local Rules are satisfied by

such notice.

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

EXHIBIT C

Proposed Letter

_____, 2023

TO: [Critical Vendor/Service Provider]
[Name]
[Address]

Dear [Critical Vendor/Service Provider]:

As you are aware, Novan, Inc. and certain of its affiliates (together, the “Company”) filed voluntary petitions (the “Chapter 11 Cases”) for relief under chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware (the “Bankruptcy Court”) on July 17, 2023 (the “Petition Date”). On the Petition Date, in recognition of the importance of its relationship with such vendors and suppliers and its desire that the Chapter 11 Cases have as little effect on such parties as possible, the Company requested the Bankruptcy Court’s approval to pay the prepetition claims of certain critical vendors and suppliers. On July [●], 2023, the Bankruptcy Court entered an order (the “Order”) authorizing the Company, under certain conditions, to pay the prepetition claims, in accordance with the terms of the Order, of certain trade creditors that agree to the terms set forth below and agree to be bound by the terms of the Order. A copy of the Order is enclosed for your reference.

Pursuant to the Order, to receive payment of its prepetition claim, each selected trade creditor must agree to continue to supply goods and/or services to the Company based on “Customary Trade Terms.” In the Order, Customary Trade Terms are defined as the normal and customary trade terms, practices and programs (including, but not limited to, credit limits, pricing, cash discounts, timing of payments, allowances, rebates, normal product mix and availability and other applicable terms and programs), which were most favorable to the Company and in effect between such trade creditor and the Company on a historical basis for the period within 180 days before the Petition Date, or such other trade terms as mutually agreed to by the Company and such trade creditor.

For purposes of administering this trade program, as authorized by the Bankruptcy Court and in accordance with the terms of the Order, the Company and [Name of Trade Vendor] agree as follows (the “Agreement”):

- (a) The estimated balance of the prepetition trade claim (net of any setoffs, credits or discounts) (the “Trade Claim”) that the Company will pay to [Name of Trade Vendor] is \$ _____. Your Trade Claim does not constitute a claim allowed by the Bankruptcy Court in the Chapter 11 Cases, and signing this Trade Agreement does not excuse you from any requirement of filing a proof of claim in the Chapter 11 Cases.
- (b) The Company shall pay \$ _____ toward the Trade Claim (the “Payment”).
- (c) [Name of Trade Vendor] agrees to supply goods/services to the Company in accordance with the Customary Trade Terms, and the Company agrees to pay [Name of Trade Vendor] in accordance

with such terms, provided that following the Payment, **[Name of Trade Vendor]** will supply postpetition goods/services to the Company on the longer of (i) net 30 day terms or (ii) such other trade terms most favorable to the Company in place with **[Name of Trade Vendor]** at any point within 180 days before the Petition Date.

For purposes of this paragraph (c), the term “net 30 day terms,” as the case may be, shall refer to the number of days from the date that the particular goods/services are received by the Company.

- (d) In consideration for the Payment, you agree not to file or otherwise assert against the Company, its estate or any other person or entity or any of its respective assets or property (real or personal) any lien (a “Lien”) or claim for reclamation (“Reclamation Claim”) or claim under Bankruptcy Code section 503(b)(9) (a “503(b)(9) Claim”), regardless of the statute or other legal authority upon which such Lien, Reclamation Claim or 503(b)(9) Claim may be asserted, related in any way to any remaining prepetition amounts allegedly owed to you by the Company arising from agreements or other arrangements entered into prior to the Petition Date and, to the extent you have already obtained or otherwise asserted such a Lien, Reclamation Claim or 503(b)(9) Claim, you shall take (at your own expense) whatever actions are necessary to remove such Lien or withdraw such Reclamation Claim or 503(b)(9) Claim unless your participation in the trade payment program authorized by the Order (the “Trade Payment Program”) is terminated.

Your execution of this Agreement and return of the same to the Company constitutes an agreement by **[Name of Trade Vendor]** and the Company:

1. to be bound by the Customary Trade Terms (as modified herein) and, subject to the reservations set forth in the Order, to the amount of the Trade Claim set forth above;
2. that **[Name of Trade Vendor]** will continue to supply the Company with goods and/or services pursuant to the Customary Trade Terms (as modified herein) and that the Company will pay for such goods and/or services in accordance with the Customary Trade Terms (as modified herein);
3. that **[Name of Trade Vendor]** has reviewed the terms and provisions of the Order and that it consents to be bound by such terms, except as modified herein;
4. that **[Name of Trade Vendor]** will not separately seek payment for Reclamation Claims or 503(b)(9) Claims and similar claims outside of the terms of the Order unless its participation in the trade payment program authorized by the Order (the “Trade Payment Program”) is terminated;

5. that if either the Trade Payment Program or your participation therein terminates as provided in the Order, any payments received by you on account of your Trade Claim will be deemed to have been in payment of postpetition obligations owed to you and you will immediately repay to the Company any payments made to you on account of your Trade Claim to the extent that the aggregate amount of such payments exceed the postpetition obligations, without the right of any setoffs, claims, provision for payment of reclamation or trust fund claims, or other defense;

6. that the Company will agree to pay **[Name of Trade Vendor]** on the longer of (i) net 30-day terms or (ii) such other trade terms most favorable to the Company in place with **[Name of Trade Vendor]** at any point within 180 days before the Petition Date.

7. that if the Company shall be in default under this Agreement, **[Name of Trade Vendor]** shall have no obligation to supply goods and/or services to the Company on Customary Trade Terms (as modified herein) until the Company cures such default and **[Name of Trade Vendor]** shall have the right to terminate this Agreement upon written notice to the Company detailing the Company’s defaults hereunder (which the Company shall have the right to dispute) and the Company’s failure to cure such default within five (5) business days of such notice, in which event **[Name of Trade Vendor]** may retain all sums paid to it hereunder on account of its Trade Claim.

The Company and **[Name of Trade Vendor]** also hereby agree that any dispute with respect to this Agreement, the Order and/or **[Name of Trade Vendor]**’s participation in the Trade Payment Program shall be determined by the Bankruptcy Court.

If you have any questions about this Agreement or our Chapter 11 Cases, please do not hesitate to call **[Contact Person]** at (____) ____-____.

Very truly yours,

By: _____
Name:**[Name]**
Title: **[Title]**

Agreed and Accepted by:

[Name of Trade Vendor]

By: _____
Name:**[Name]**
Title: **[Title]**

Dated: _____, 2023