

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 ENTRY OF INTERIM AND FINAL ORDERS
(I) AUTHORIZING DEBTORS TO (A) OBTAIN POSTPETITION
FINANCING AND (B) USE CASH COLLATERAL, (II) GRANTING ADEQUATE
PROTECTION TO PREPETITION SECURED LENDER, (III) SCHEDULING
FINAL HEARING, AND (IV) GRANTING RELATED RELIEF**

The above-captioned debtors and debtors in possession (collectively, the “Debtors”) respectfully move (this “Motion”) for entry of interim and final orders granting the relief described below and represent as follows:

RELIEF REQUESTED

1. The Debtors respectfully request entry of an interim order, substantially in the form attached hereto as **Exhibit A** (the “Interim Order”), and a final order (the “Final Order”) and, together with the Interim Order, the “Proposed Orders”), that grant:

- a. authority to obtain a senior secured debtor-in-possession credit facility in an aggregate principal amount of up to \$15,000,000 (the “DIP Facility”), consisting of up to \$12,000,000 in new money advances, plus the roll-up of all outstanding Prepetition Bridge Loan Obligations, on the terms and conditions set forth in the Interim Order and that certain credit agreement attached to the Interim Order as Exhibit 1 (the “DIP Credit Agreement”);
- b. authority to grant the DIP Lender, the DIP Liens in all DIP Collateral (each as defined below), as set forth in the Interim Order, subject to

¹ The Debtors in these chapter 11 cases, along with the last four digitals 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 Carve-Out and the relative priorities set forth in the Interim Order;

- c. authority to grant the DIP Lender allowed super-priority administrative expense claims pursuant to section 364(c)(1), with priority over all administrative expense claims and unsecured claims now existing or hereafter arising, against the Debtors in respect of all DIP Obligations (as defined below) (the “DIP Superpriority Claims”), subject to the Carve-Out, as set forth in the Interim Order;
- d. authority to incur obligations under the DIP Credit Agreement, including to borrow under the DIP Facility (collectively, the “DIP Obligations”), and to use the proceeds of the DIP Facility on the terms and conditions set forth in the Interim Order and DIP Credit Agreement, including the budget attached to the Interim Order as Exhibit 2 (the “Approved Budget”), subject to any variances expressly permitted under the DIP Credit Agreement and Interim Order (the “Permitted Variances”);
- e. authority to use cash collateral (“Cash Collateral”) of the Prepetition Secured Lender and the Prepetition Factor within the meaning of sections 363(a) and 363(c) of the Bankruptcy Code to the extent of the Approved Budget;
- f. approval of the form and manner of adequate protection to be provided to the Prepetition Secured Lender and the Prepetition Factor solely to the extent of any diminution in the value of its collateral as a result of the Debtors’ use thereof during the Approved Budget period;
- g. subject to and upon entry of a Final Order, waiver of the Debtors’ ability to surcharge against the Prepetition Collateral or DIP Collateral pursuant to section 506(c) of the Bankruptcy Code; (b) the applicability of the “equities of the case” exception under section 552(b) of the Bankruptcy Code with respect to the proceeds, products, offspring or profits of the Prepetition Collateral or DIP Collateral; and (c) the equitable doctrine of “marshaling” and any similar equitable doctrine with respect to any of the Prepetition Collateral or DIP Collateral;
- h. waiver of any applicable stay, including (to the extent applicable) under Bankruptcy Rule 6004, to provide for immediate effectiveness of the Interim Order;

- i. the scheduling of a final hearing to consider entry of the Final Order authorizing and approving, on a final basis, the DIP Facility, use of cash collateral and other reliefs granted herein; and
- j. related relief.

JURISDICTION AND VENUE

2. 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.

3. 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.

4. The statutory bases for the relief requested in this Motion are sections 105(a), 361, 362, 363, 364, 503 and 507 of title 11 of the United States Code, 11 U.S.C. §§ 101–1532 (as amended, the “Bankruptcy Code”), as supplemented by rules 2002, 4001, 6004 and 9014 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), and Local Rules 2002-1, 4001-1, 4001-2 and 9013-1.

GENERAL BACKGROUND

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

6. The Debtors are authorized to operate their 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. The Debtors are a medical dermatology company primarily focused on researching, developing and commercializing innovative therapeutic products for skin diseases in the United States market. Founded in 2006, Debtor Novan, Inc. ("Novan") is a publicly traded company with its shares listed on the Nasdaq Stock Market (ticker symbol: NOVN). Novan is a corporation organized under the laws of the State of Delaware and maintains its headquarters in Durham, North Carolina.

8. The Debtors entered these chapter 11 cases to pursue a value-maximizing, going-concern sale process and, shortly before filing, entered into a stalking horse purchase agreement with Ligand Pharmaceuticals, Incorporated ("Ligand") for the sale of substantially all the Debtors' assets for a purchase price of \$15,000,000. In addition, Ligand provided the Debtors with a \$3,000,000 secured prepetition bridge loan and has agreed to provide further postpetition liquidity of up to \$12,000,000 in new money senior secured superpriority debtor-in-possession financing to fund Debtors' operations during these chapter 11 cases and the sale process. Absent the incremental liquidity provided under the proposed DIP Facility, the Debtors' estates will be materially and possibly irreparably harmed.

9. 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 *Declaration of Paula Brown Stafford in Support of the Chapter 11 Petitions and First Day Motions*, which is fully incorporated into this Motion by reference.

DEBTORS' CAPITAL STRUCTURE

10. Factoring Agreement. In early December 2022, EPI Health entered into an accounts receivable-backed factoring agreement (the "Factoring Agreement") with Bay View Funding, a wholly-owned subsidiary of Heritage Bank of Commerce ("Bay View" or the "Prepetition Factor"). Pursuant to the Factoring Agreement, EPI Health sells certain trade accounts receivable to Bay View from time to time, with recourse. The factoring facility provides for EPI Health to have access to the lesser of (i) \$15.0 million, or (ii) the sum of all undisputed receivables purchased by Bay View multiplied by 70% (which percentages may be adjusted by Bay View in its sole discretion), less any reserved funds. Upon receipt of any advance, EPI Health will have sold and assigned all of its rights in such receivables and all proceeds thereof. EPI Health factors the accounts receivable on a recourse basis. The proceeds were used to fund general working capital needs.

11. As of the Petition Date, approximately \$2.6 million of advances were outstanding under the Factoring Agreement. The Debtors believe that Bay View has been paid in full for the current loans under the Factoring Agreement and are in negotiations concerning an appropriate termination that should release the remaining cash to the Debtors' estates.

12. Prepetition Bridge Loan. On July 14, 2023, Novan, Inc., as borrower, EPI Health, as borrower, and Ligand (together with its successors and assigns in such capacity, the "Prepetition Secured Lender"), as lender, entered into that certain Loan and Security Agreement (as amended, supplemented, restated or otherwise modified prior to the Petition Date, the "Prepetition Credit Agreement"), under which the Debtors incurred certain Obligations (as defined in the Prepetition Credit Agreement, the "Prepetition Bridge Loan Obligations") to the Prepetition Secured Lender on a joint and several basis.

13. As of the Petition Date, the Debtors were justly and lawfully indebted and liable to the Prepetition Secured Lender without defense, challenge, objection, claim, counterclaim, or offset of any kind, for the Loan (as defined in the Prepetition Credit Agreement) in the aggregate principal amount of not less than \$3,000,000, plus accrued and unpaid interest thereon and any fees, expenses and disbursements (including attorneys' fees, accountants' fees, appraisers' fees, auditors' fees, and financial advisors' fees), costs, charges, indemnities, and any other Prepetition Bridge Loan Obligations.

SUMMARY OF DIP FACILITY AND USE OF CASH COLLATERAL

14. In accordance with Bankruptcy Rules 4001(b)(1) and 4001(c)(1), and Local Rule 4001-2(a)(i) and (ii), a summary of certain key terms of the proposed DIP Facility and the Interim Order, as applicable, is set forth below. The below summary is qualified in its entirety by reference to the applicable provisions of the Interim Order and DIP Credit Agreement, and the Interim Order and DIP Credit Agreement will control in the event of any inconsistency between the below summary and the Interim Order and DIP Credit Agreement, as applicable.

Summary of Material Terms of DIP Facility and Use of Cash Collateral²	
<p>DIP Facility Parties</p> <p>Bankruptcy Rule 4001(c)(1)(B)</p> <p>DIP Credit Agreement, p. 1</p>	<p><u>Borrower:</u> Novan, Inc., and EPI Health, LLC</p> <p><u>Lender:</u> Ligand Pharmaceuticals, Incorporated (the "<u>DIP Lender</u>")</p>
<p>DIP Facility Amount</p> <p>Bankruptcy Rule</p>	<p>The DIP Lender will provide the Debtors with a multiple draw term loan facility in the aggregate principal amount of up to \$12,000,000 in new money advances <u>plus</u> the roll-up of all outstanding</p>

² Capitalized terms used in this summary but not defined in the summary shall have the meanings ascribed to them in the DIP Credit Agreement.

<p>4001(c)(1)(B)</p> <p>Local Rule 4001-2(a)(i)(A)</p> <p>DIP Credit Agreement, Section 2.1</p> <p>Interim Order, ¶ 2</p>	<p>Prepetition Bridge Loan Obligations (the “<u>DIP Facility</u>”) consisting of:</p> <p>(a) \$1,000,000 in new money (the “<u>Initial DIP Loan</u>”) to be made available in a single draw in accordance with the Approved Budget (as defined below) upon entry of the Interim Order;</p> <p>(b) Additional new money loans (the “<u>Additional Interim DIP Loans</u>”, together with the Initial DIP Loan, the “<u>Initial Order Loans</u>”) to be made available in multiple draws in accordance with the Approved Budget; provided that, in the aggregate, all amounts funded between entry of the Interim Order and immediately prior to entry of the Final Order shall not exceed \$2,500,000;</p> <p>(c) \$9,500,000 in new money (the “<u>Final DIP Loan</u>”, and together with the Initial Order Loans, the “<u>DIP New Money Loans</u>”) to be made available in multiple draws upon entry of the Final Order in accordance with the Approved Budget; and</p> <p>(d) a roll-up of the Prepetition Bridge Loan Obligations upon entry of the Interim Order (the “<u>DIP Roll-Up Loan</u>,” and together with the DIP New Money Loans, the “<u>DIP Loans</u>”).</p>
<p>Use of Cash Collateral</p> <p>Bankruptcy Rule 4001(c)(1)(B)</p> <p>Local Rule 4001-2(a)(i)(A)</p> <p>Interim Order, ¶ 11</p>	<p>The Debtors will use Cash Collateral subject to, and in accordance with the terms and conditions, set forth in the Interim Order, Approved Budget, and the DIP Documents.</p>
<p>Liens and Priorities</p> <p>Bankruptcy Rule 4001(c)(1)(B)(i)</p> <p>DIP Credit Agreement, Section 10.1</p> <p>Interim Order, ¶ 6</p>	<p>The DIP Loans and other liabilities and obligations owed to the DIP Lender under or in connection with the DIP Credit Agreement, the DIP Documents, and the Interim Order (collectively, the “<u>DIP Obligations</u>”), in all cases subject to the Carve-Out, shall be:</p> <p>(a) pursuant to section 364(c)(1) of the Bankruptcy Code, entitled to superpriority administrative expense claim status in the chapter 11 cases of the Debtors with priority over any and all administrative expenses, whether heretofore or</p>

	<p>hereafter incurred, of the kind specified in sections 503(b) or 507(a) of the Bankruptcy Code (the “<u>DIP Superpriority Claim</u>”);</p> <p>(b) pursuant to sections 364(c)(2) of the Bankruptcy Code, secured by a perfected first-priority lien on the DIP Collateral (as defined below), to the extent that such DIP Collateral is unencumbered;</p> <p>(c) pursuant to section 364(c)(3) of the Bankruptcy Code, secured by a second-priority lien on all DIP Collateral, to the extent that (i) valid, perfected and non-avoidable liens exist on such collateral as of the Petition Date or (ii) valid liens exist as of the Petition Date and are subsequently perfected as permitted under section 546(b) of the Bankruptcy Code ((i) and (ii) collectively, the “<u>Prepetition Permitted Liens</u>”); and</p> <p>(d) pursuant to section 364(d)(1) of the Bankruptcy Code, a perfected senior priming lien on all DIP Collateral and Prepetition Collateral that is subject only to the Carve-Out and the Prepetition Permitted Liens ((b) through (d) collectively, the “<u>DIP Liens</u>”).</p>
<p>Parties with Interest in Cash Collateral</p> <p>Bankruptcy Rule 4001(c)(1)(B)(i)</p> <p>Interim Order, ¶ G(iv)</p>	<p>Ligand Pharmaceuticals, Incorporated, as the Prepetition Secured Lender, holds an interest in the Cash Collateral.</p> <p>Bay View, as the Prepetition Factor, holds an interest in the Cash Collateral of Debtor EPI Health.</p>
<p>Use of Proceeds and Cash Collateral</p> <p>Bankruptcy Rules 4001(b)(1)(B)(ii), 4001(c)(1)(B)</p> <p>DIP Credit Agreement, Section 2.7</p> <p>Interim Order, ¶ H</p>	<p>The DIP Facility proceeds and cash collateral shall be used for (a) payment of professional fees and other costs of administering these chapter 11 cases, (b) payment of any Bankruptcy Court approved prepetition obligations of the Debtors or otherwise approved by the DIP Lender, and (c) working capital and other general corporate purposes of the Debtors, in each case in accordance with the Approved Budget (subject to the Permitted Variances).</p>

<p>Adequate Protection</p> <p>Bankruptcy Rules 4001(b)(1)(B)(iv), 4001(b)(1)(C)(ii)</p> <p>DIP Credit Agreement, Section 10.17</p> <p>Interim Order, ¶ 12</p>	<p>The Prepetition Secured Lender shall be granted the following adequate protection for, and equal in amount to, the diminution in the value of the prepetition security interests of the Prepetition Secured Lender securing the Prepetition Bridge Loan Obligations:</p> <p>(a) <u>Adequate Protection Liens</u>. Effective and perfected as of the date of entry of the Interim Order, replacement security interests in and liens on the collateral securing the Prepetition Bridge Loan Obligations. The adequate protection liens shall be subordinated only to (i) the DIP Liens, (ii) the Prepetition Permitted Liens, if any, (iii) with respect to the DIP Collateral of Debtor EPI and its estate, the Bay View Adequate Protection Liens, and (iv) the Carve-Out;</p> <p>(b) <u>Adequate Protection Super-Priority Claim</u>. To the extent of any diminution in value of the Prepetition Secured Lender's security interests, a superpriority administrative expense claim as provided for in section 507(b) of the Bankruptcy Code, which shall be subject and subordinate only to (i) the Carve-Out, (ii) the DIP Superpriority Claims, and (iii) the Prepetition Permitted Liens, if any; and</p> <p>(c) <u>Prepetition Secured Lender Fees and Expenses</u>. The Debtors shall pay to the Prepetition Secured Lender, in cash, all reasonable and documented prepetition and postpetition fees and out-of-pocket expenses of the Prepetition Secured Lender's advisors, including, without limitation, those of Morgan, Lewis & Bockius LLP and local legal counsel (if any), subject to the review procedures set forth in the Interim Order; and</p> <p>(d) <u>Postpetition Interest Payments</u>. From and after entry of the Interim Order, to the extent that the Roll-Up Loans (as defined in the DIP Credit Agreement) is less than the full amount of the Prepetition Bridge Loan Obligations outstanding as of the Petition Date, the Prepetition Secured Lender shall receive current cash payment during the Chapter 11 Cases of all accrued interest on the then outstanding Prepetition Bride Loan Obligations as such interest becomes due and payable at the Contract Rate (as defined in the Prepetition Credit Agreement).</p> <p>Bay View shall be granted the following adequate protection for, and equal in amount to, the diminution in the value of its prepetition</p>
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	<p>security interests in the Prepetition Collateral of Debtor EPI Health and its estate:</p> <p>(a) <u>Bay View Adequate Protection Liens</u>. Effective and perfected as of the date of entry of the Interim Order, replacement security interests in and liens on the same property of Debtor EPI Health on which Bay View had a perfected, first-priority security interest and lien prior to the Petition Date. The adequate protection liens shall be subordinated only to (i) the Prepetition Permitted Liens (as defined under the Factoring Agreement) and (ii) the Carve-Out.</p>
<p>Fees</p> <p>Bankruptcy Rule 4001(c)(1)(B)</p> <p>Local Rule 4001-2(a)(i)(B)</p>	<p><u>Commitment Fee</u>: The Debtors shall pay the DIP Lender a non-refundable closing fee in an amount equal to two percent (2%) of the DIP Commitments on the Effective Date (as defined in the DIP Credit Agreement) (\$240,000), which shall be fully earned and due and payable in full on the Effective Date.</p> <p><u>Exit Fee</u>: The Debtors shall pay to the DIP Lender, when the DIP Loans are prepaid, repaid or otherwise paid, in whole or in part, for any reason and at any time (whether by mandatory or voluntary prepayment by the Debtors, by reason of the occurrence of an Event of Default (including without limitation as the result of an insolvency event), upon the maturity of any DIP Loan, or otherwise), as compensation for the costs of DIP Lender making funds available to the Debtors under the DIP Credit Agreement, an exit fee equal to two percent (2.0%) of the aggregate principal amount of the DIP Loans. The Exit Fee shall be fully earned on the Effective Date and due and payable in an amount that is ratable with the amount of principal amounts of DIP Loans prepaid, repaid or otherwise paid on such payment date.</p>
<p>Interest Rate</p> <p>Bankruptcy Rule 4001(c)(1)(B)</p> <p>Local Rule 4001-2(a)(i)(B)</p> <p>DIP Credit Agreement, Section 2.4</p>	<p>The rate equal to 12.00% per annum, payable on the first day of each month, beginning on August 1, 2023, and monthly thereafter, and on the Maturity Date. If an Event of Default (as defined below) occurs and is continuing, the interest rate shall increase by the Default Rate (as defined in the DIP Credit Agreement).</p>

<p>Limitation on Court’s Power or Discretion to Enter Future Orders</p> <p>Local Rule 4001-2(a)(i)(C)</p>	<p>N/A</p>
<p><u>Funding to Non-Debtor Affiliates</u></p> <p>Local Rule 4001-2(a)(i)(D)</p>	<p><u>N/A</u></p>

<p><u>Conditions of Closing and Borrowing</u></p> <p>Bankruptcy Rule 4001(c)(1)(B)</p> <p>Local Rule 4001-2(a)(i)(E)</p> <p>DIP Credit Agreement, Article 3</p>	<p><u>Conditions Precedent to DIP Loans</u></p> <p>Each of the following conditions must be satisfied prior to the DIP Lender funding the Initial DIP Loan:</p> <p>(a) The DIP Lender shall have received and reviewed to its satisfaction the following fully-executed documents or deliverables: (i) the DIP Credit Agreement; (ii) the Fee Letter; (iii) the Initial DIP Budget certified by an officer of the Debtors; (iv) a certificate of each Debtor certifying the resolutions of its board of directors, members or other body authorizing the execution, delivery and performance of the DIP Credit Agreement and DIP Documents to which it is a party; (v) the certificate or articles of incorporation or organization of each Debtor certified by the relevant authority of the jurisdiction of organization of such Debtor and a true and correct copy of each Debtor’s by-laws or operating, management or partnership agreement; (vi) a long form good stand certificate for each Debtor from its jurisdiction of organization; (vii) an opinion of Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan LLP, in form and substance satisfactory to the DIP Lender in its sole discretion; (viii) filing of appropriate financing statements in such office or offices as may be determined as necessary by the DIP Lender to perfect the security interests and DIP Liens purported to be created under the DIP Credit Agreement; (ix) a certificate from an officer of the Debtors stating that the conditions precedent have been fully satisfied; (x) evidence satisfactory to the DIP Lender in its sole discretion that the Asset Purchase Agreement has been executed; and (xi) a request for loan delivered to the DIP Lender.</p> <p>(b) The representations and warranties contained in the DIP Credit Agreement and in all other DIP Documents shall be</p>
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true and correct on and as of the date of the Interim Order in all material respects, except to the extent that any such representation and warranty is qualified by materiality, “Material Adverse Effect” or other similar qualification, such representation and warranty shall be true and correct in all respects.

- (c) There shall be no Event of Default under the DIP Credit Agreement, the DIP Documents or the Interim Order.
- (d) There shall not be any pending unstayed suit, action, proceeding or investigation against the Debtors which could reasonably be expected to have a material adverse effect, or any proceedings challenging the DIP Credit Agreement or the DIP Orders or any part thereof.
- (e) The DIP Lender shall have a valid first priority perfected lien on the assets of the Debtors, subject only to the Carve-Out and Prepetition Permitted Liens, and the DIP Lender shall have received the results of a recent lien search in such jurisdictions as the DIP Lender shall deem appropriate, and such search shall reveal no liens on any of the assets of the Debtors (other than Prepetition Liens and the Prepetition Permitted Liens).
- (f) The Debtors shall have paid all fees (including, without limitation, all reasonable and documented attorneys’ fees), costs, and expenses incurred by the DIP Lender in connection with the negotiation, execution and delivery of the DIP Credit Agreement and the other DIP Documents in connection therewith in the amount of \$540,000, which shall be deducted by the DIP Lender from the DIP Loans and the balance of which shall be added to the DIP Obligations.
- (g) Such DIP Loan shall not be prohibited by any applicable law of any governmental authority as a result of the promulgation or enactment thereof or any changes therein, or change in the interpretation thereof by any governmental authority, subsequent to the date of the DIP Credit Agreement.
- (h) No event shall have occurred or failed to occur since July 14, 2023, which occurrence or failure could be expected to have a Material Adverse Effect (as defined in the DIP Credit Agreement).

- (i) All governmental and third party approvals in connection with the Transaction (as defined in the DIP Credit Agreement) necessary for the Debtors and their respective subsidiaries to conduct their business have been obtained and remain in effect. The Debtors and their respective subsidiaries have obtained all necessary regulatory approvals, and the absence of any injunction, temporary restraining order or judgment which prohibits the making or purchase of the DIP Loans.
- (j) The Debtors shall have filed petitions commencing the chapter 11 cases and all “first day orders” entered shall be in form and substance satisfactory to the DIP Lender in its sole discretion.
- (k) The DIP Lender shall have received a certified copy of the Interim Order, which Interim Order (i) shall have been entered on the docket of the Bankruptcy Court and (ii) shall be in full force and effect and shall not have been vacated, stayed, reversed, modified or amended in any respect without the written consent of the DIP Lender in its sole discretion; and, if the Interim Order is the subject of a pending appeal in any respect, neither the DIP Loans, nor the performance by the Debtors of any of their respective obligations hereunder, under the other DIP Documents or under any other instrument or agreement shall be the subject of a presently effective stay pending appeal. Such Interim Order shall authorize and approve the DIP Credit Agreement and the DIP Documents. All motions, orders (including the “first day” orders) and other documents to be filed with and submitted to the Bankruptcy Court on the Petition Date shall be in form and substance satisfactory to the DIP Lender in its sole discretion.
- (l) No unstayed action, suit, investigation or other proceeding (including without limitation, the enactment or promulgation of a statute or rule) by or before any arbitrator or any governmental authority shall be threatened in writing or pending (other than the chapter 11 cases) and no preliminary or permanent injunction or order by a state or federal court shall have been entered (i) in connection with the DIP Credit Agreement, any other DIP Document, or any transaction contemplated thereby or (ii) which could be expected to result in a Material Adverse Effect, including, in

each case, any proceedings challenging the DIP Credit Agreement or the Proposed Orders or any part thereof.

Each of the following conditions must be satisfied prior to the DIP Lender funding any Final DIP Loans:

- (a) The DIP Lender shall have received and reviewed to its satisfaction the following fully-executed documents or deliverables: (i) a certificate from an officer of the Debtors stating that the conditions precedent have been fully satisfied; and (ii) a request for loan delivered to the DIP Lender.
- (b) The representations and warranties contained in the DIP Credit Agreement and in all other DIP Documents shall be true and correct on and as of the date of the Final Order in all material respects, except to the extent that any such representation and warranty is qualified by materiality, "Material Adverse Effect" or other similar qualification, such representation and warranty shall be true and correct in all respects.
- (c) There shall be no Event of Default under the DIP Credit Agreement, the DIP Documents or the Final Order.
- (d) No event shall have occurred or failed to occur since the Effective Date (as defined in the DIP Credit Agreement), which occurrence or failure could be expected to have a Material Adverse Effect (as defined in the DIP Credit Agreement).
- (e) The DIP Lender shall have received a certified copy of the Final Order, which Final Order (i) shall have been entered on the docket of the Bankruptcy Court on or before the date that is twenty-five (25) days after the Petition Date and (ii) shall be in full force and effect and shall not have been vacated, stayed, reversed, modified or amended in any respect without the written consent of the DIP Lender in its sole discretion; and, if the Final DIP Order is the subject of a pending appeal in any respect, the performance by the Debtors of any of their respective obligations hereunder, under the other DIP Documents or under any other instrument or agreement shall not be the subject of a presently effective stay pending appeal. Such Final Order shall authorize and approve the DIP Credit Agreement and the DIP Documents. All motions, orders and other

	<p>documents to be filed with and submitted to the Bankruptcy Court in connection therewith shall be in form and substance satisfactory to the DIP Lender in its sole discretion</p> <p>(f) No unstayed action, suit, investigation or other proceeding (including without limitation, the enactment or promulgation of a statute or rule) by or before any arbitrator or any governmental authority shall be threatened in writing or pending (other than the chapter 11 cases) and no preliminary or permanent injunction or order by a state or federal court shall have been entered (i) in connection with the DIP Credit Agreement, any other DIP Document, or any transaction contemplated thereby or (ii) which could be expected to result in a Material Adverse Effect, including, in each case, any proceedings challenging the DIP Credit Agreement or the Proposed Orders or any part thereof.</p> <p>(g) The Final Order shall be in full force and effect and shall not have been vacated, stayed, reversed, modified or amended in any respect without the written consent of the DIP Lender in its sole discretion.</p> <p>(h) The use of the proceeds of the DIP Loans shall be in compliance with the Approved Budget.</p>
<p>Budget & Variances</p> <p>Bankruptcy Rule 4001(b)(1)(B)(ii)</p> <p>Local Rule 4001-2(a)(i)(E)</p> <p>DIP Credit Agreement, Sections 6.1 & 7.8</p> <p>Interim Order, ¶ 7</p>	<p>The Debtors have delivered to the DIP Lender a detailed budget that sets forth projected cash receipts and cash disbursements on a weekly basis for the 13 weeks commencing on the projected date of the entry of the Interim Order (the “<u>Initial Budget</u>” and each update thereto, which shall be approved by the DIP Lender, the “<u>Budget</u>”), a copy of which is attached as <u>Exhibit 2</u> to the Interim Order. The Budget shall be updated by the Debtors (with delivery to the DIP Lender) at two-week intervals thereafter. Until replaced by an updated Budget approved by the DIP Lender, the prior Budget shall remain in effect.</p> <p>Commencing on the second Thursday after the date of entry of the Interim Order, and every other calendar week thereafter on each applicable Thursday, or the successive business day if such Thursday is not a business day, a “<u>Variance Report Date</u>”), the Debtors shall deliver by email to the DIP Lender a variance report (each, a “<u>Budget Variance Report</u>”) for the immediately preceding two-week <u>Variance Period</u> (as defined below), comparing, in each case not to exceed 15% (the “<u>Permitted Variances</u>”), (i) actual aggregate cumulative cash disbursements for such Variance Period</p>

	<p>to the projected disbursements for such Variance Period (without consideration of professional fees) and (ii) actual aggregate cumulative cash receipts for such Variance Period to the projected cash receipts for such Variance Period, and in each case, set forth in the Budget for such two-week look-back period (each such period, a “<u>Variance Period</u>”). For clarity, the Permitted Variances do not increase in any way, the DIP Lender’s obligation to increase the amount of the DIP Facility.</p>
<p>Carve Out</p> <p>Bankruptcy Rule 4001(c)(1)(B)</p> <p>Local Rule 4001-2(a)(i)(F)</p> <p>Interim Order, ¶ 4</p>	<p>The Carve-Out shall comprise (i) all fees required to be paid to the Clerk of the Bankruptcy Court and to the Office of the United States Trustee pursuant to 28 U.S.C. § 1930(a) (without regard to the notice set forth in (iii) below); (ii) all reasonable fees and expenses incurred by a trustee under section 726(b) of the Bankruptcy Code in an amount not exceeding \$25,000 (without regard to the notice set forth in (iii) below); (iii) to the extent allowed at any time, whether by interim order, procedural order, or otherwise, all Allowed Professional Fees incurred by Professional Persons at any time before or on the first business day following delivery by the DIP Lender of a Carve Out Trigger Notice, whether allowed by the Bankruptcy Court prior to or after delivery of a Carve Out Trigger Notice; and (iv) Allowed Professional Fees not to exceed \$400,000, incurred after the first business day following delivery by the DIP Lender of the Carve Out Trigger Notice, to the extent allowed at any time, whether by interim order, procedural order, or otherwise.</p>
<p>DIP Liens on Unencumbered Assets</p> <p>Local Rule 4001-1(a)(i)(G)</p> <p>DIP Credit Agreement, Section 10.1</p> <p>Interim Order, ¶ 6(a)</p>	<p>The DIP Facility shall be secured, pursuant to section 364(c)(2) of the Bankruptcy Code, by a perfected first-priority lien on the DIP Collateral, to the extent that such DIP Collateral is unencumbered or subject to invalid, unperfected, unenforceable, or avoidable liens.</p>
<p>Chapter 11 Milestones</p> <p>Bankruptcy Rule 4001(c)(1)(B)(vi)</p> <p>Local Rule</p>	<p>Unless waived by the DIP Lender, the failure of the Debtors to meet the following milestones by the applicable specified deadlines set forth therefor shall constitute an Event of Default:</p> <p>(a) No later than five (5) days after the Petition Date, entry by the Bankruptcy Court of the Interim Order.</p>

<p>4001-2(a)(i)(H)</p> <p>DIP Credit Agreement, Section 7.7</p> <p>Interim Order, ¶ 20(b)</p>	<p>(b) No later than twenty-five (25) days after the Petition Date, entry by the Bankruptcy Court of an order approving the Asset Purchase Agreement and bidding procedures for the sale of all or substantially all the Debtors' assets (the "<u>Bidding Procedures</u>").</p> <p>(c) No later than twenty-five (25) days after the Petition Date, entry by the Bankruptcy Court of the Final Order.</p> <p>(d) No later than forty-two (42) days after the Petition Date, the submission deadline for all bids for the sale of the Debtors' assets as set forth in the Bidding Procedures.</p> <p>(e) No later than forty-five (45) days after the Petition Date, holding of an auction (if necessary) for the sale of the Debtors' assets as set forth in the Bidding Procedures.</p> <p>(f) No later than fifty-five (55) days after the Petition Date, entry by the Bankruptcy Court of an order approving the sale of all or substantially all the Debtors' assets.</p> <p>(g) No later than seventy (70) days after the Petition Date, consummation of the sale of the Debtors' assets.</p>
<p>Prepayment Penalty</p> <p>Local Rule 4001-2(a)(i)(I)</p> <p>DIP Credit Agreement, Section 2.8</p>	<p>None.</p>
<p>Joint Liability of Debtors</p> <p>Local Rule 4001-2(a)(i)(J)</p> <p>DIP Credit Agreement, p. 1</p>	<p>The Debtors shall be jointly and severally liable for the DIP Obligations.</p>
<p>Payment of Lender Expenses</p> <p>Bankruptcy Rule 4001(c)(1)(B)(ix)</p> <p>Local Rule 4001-2(a)(i)(K)</p>	<p>All reasonable and documented expenses of the DIP Lender and Prepetition Secured Lender relating to the chapter 11 cases (including, without limitation, prepetition and post-petition reasonable and documented fees and disbursements of counsel and advisors) shall be payable by the Debtors, subject to a cap in the aggregate amount of \$675,000. A copy of the summary invoice</p>

<p>DIP Credit Agreement, Section 11.4</p> <p>Interim Order, ¶¶ 2(c) & 12(c)</p>	<p>(without detailed time entries) shall be provided by the DIP Lender to the Debtors, the U.S. Trustee, and the Committee.</p>
<p>Limitations on Investigations of Liens</p> <p>Local Rule 4001-2(a)(i)(L)</p> <p>Interim Order, ¶ 26</p>	<p>Up to \$50,000 in the aggregate of the DIP Facility, DIP Collateral, Prepetition Collateral (including Cash Collateral) and Carve-Out may be used by the Committee during the Challenge Period to investigate, but not pursue, the validity and enforceability of the liens and obligations under the Prepetition Credit Agreement and Prepetition Loan Documents (as defined in the Interim Order).</p>
<p>Events of Default</p> <p>Bankruptcy Rule 4001(c)(1)(B)</p> <p>Local Rule 4001-2(a)(i)(M)</p> <p>DIP Credit Agreement, Article 8</p> <p>Interim Order, ¶ 20(a)</p>	<p>Until the DIP Obligations are indefeasibly paid in full and all commitments thereunder are terminated, the occurrence of any of the following events, unless waived by the DIP Lender in writing and in accordance with the terms of the DIP Documents, shall constitute an event of default (collectively, the “<u>Events of Default</u>”):</p> <ul style="list-style-type: none"> (a) The failure of the Debtors to perform, in any material respect, any of the terms, provisions, conditions, covenants or obligations under the Interim Order, including, without limitation, failure to make any payment under the Interim Order when due or comply with any Milestones; (b) The occurrence and continuation of any Events of Default under, and as defined in, the DIP Credit Agreement or any other DIP Documents; and (c) The Debtors’ failure to comply with the terms of the Interim Order.
<p>Cross-Collateralization</p> <p>Local Rule 4001-2(a)(i)(N)</p>	<p>N/A</p>
<p>Roll Up</p> <p>Local Rule 4001-2(a)(i)(O)</p> <p>DIP Credit Agreement, Section 2.1(3).</p> <p>Interim Order, ¶ 2</p>	<p>The DIP Facility includes, a roll-up of the Prepetition Bridge Loan Obligations held by the Prepetition Secured Lender.</p>

<p>Non-Consensual Priming Liens</p> <p>Local Rule 4001-2(a)(i)(P)</p>	<p>N/A</p>
<p>Debtors' Stipulations</p> <p>Bankruptcy Rule 4001(c)(1)(B)(iii)</p> <p>Local Rule 4001-2(a)(i)(Q)</p> <p>Interim Order, ¶ G</p>	<p>Pursuant to the Interim Order, the Debtors for themselves and their estates, make the stipulations set forth in paragraph G of the Interim Order.</p>
<p>Immediate Approval of DIP Documents</p> <p>Local Rule 4001-2(a)(i)(R)</p>	<p>N/A</p>
<p>Notice of an Event of Default</p> <p>Local Rule 4001-2(a)(i)(S)</p>	<p>N/A</p>
<p>Limitations on Arguments in the Event of a Default</p> <p>Local Rule 4001-2(a)(i)(T)</p>	<p>N/A</p>
<p>Liens on Chapter 5 Causes of Action</p> <p>Bankruptcy Rule 4001(c)(1)(B)(xi)</p> <p>Local Rule 4001- 2(a)(i)(U)</p> <p>Interim Order, ¶ 6(a)</p>	<p>Upon entry of a Final Order, the DIP Lender will be granted liens on the Debtors' claims and causes of action under chapter 5 of the Bankruptcy Code and proceeds thereof.</p>
<p>506(c) Waiver</p> <p>Bankruptcy Rule 4001(c)(1)(B)(x)</p> <p>Local Rule 4001- 2(a)(i)(V)</p>	<p>Subject to entry of the Final Order, the DIP Lender and Prepetition Secured Lender shall be entitled to a waiver of the provisions of section 506(c) of the Bankruptcy Code.</p>

Interim Order, ¶ 8	
<p>Section 552(b)(1) “Equities of the Case” Waiver</p> <p>Local Rule 4001-2(a)(i)(W)</p> <p>Interim Order, ¶ 9</p>	Subject to entry of the Final Order, the Prepetition Secured Lender shall be entitled to a waiver of the exceptions provided in section 552(b) of the Bankruptcy Code.
<p>Marshaling Waiver</p> <p>Local Rule 4001-2(a)(i)(X)</p> <p>Interim Order, ¶ 9</p>	Subject to entry of the Final Order, the DIP Lender and the Prepetition Secured Lender shall not be subject to the equitable doctrine of marshaling with respect to the DIP Collateral, the DIP Obligations, the Prepetition Bridge Loan Obligations, or the Prepetition Collateral, as applicable.
<p>Waiver/Modification of the Automatic Stay</p> <p>Bankruptcy Rule 4001(c)(1)(B)(iv)</p> <p>Interim Order, ¶¶ 7(c), 14(a), 39</p>	The automatic stay is modified solely to (a) permit the Debtors to grant the security interests, liens, and superpriority claims described above and to perform such acts as may be requested to assure the perfection and priority of such security interests and liens, and (b) permit the DIP Lender and Prepetition Secured Lender to exercise rights and remedies under certain circumstances.
<p>Waiver/Modification of Applicability of Nonbankruptcy Law Relating to Perfection or Enforceability of Liens</p> <p>Bankruptcy Rule 4001(c)(1)(B)(vii)</p>	N/A
<p>Release, Waiver, or Limitation on Any Claim or Cause of Action Belonging to the Estate</p> <p>Bankruptcy Rule 4001-2(c)(1)(B)(viii)</p> <p>Interim Order, ¶ G(viii)</p>	The Interim Order includes a release of the DIP Lender and Prepetition Secured Lender, each in their capacity as such, with respect to any and all claims and causes of action that exist on the date of entry of the Interim Order with respect to and relating to the DIP Obligations, the DIP Liens, the DIP Documents, the Prepetition Bridge Loan Obligations, and the Prepetition Liens.

<p>Indemnification</p> <p>Bankruptcy Rule 4001(c)(1)(B)(ix)</p> <p>DIP Credit Agreement, Section 11.4</p>	<p>Debtors shall indemnify, pay and hold harmless the DIP Lender (and its affiliates, partners, members, directors, officers, employees, agents and advisors, collectively, the “<u>Indemnitees</u>”) against any and all losses, claims, damages, liabilities and related expenses (including the fees, charges and disbursements of any counsel), and shall indemnify and hold harmless each Indemnitee from all fees and time charges and disbursements for attorneys, who may be employees of any Indemnitee, incurred by any Indemnitee or asserted against any Indemnitee by any third party or by such Debtor arising out of, in connection with, or as a result of: (i) the execution or delivery of the DIP Credit Agreement, any other DIP Document or any document contemplated thereby, the performance by the parties of the DIP Credit Agreement of their respective obligations hereunder or thereunder or the consummation of the transactions contemplated thereby (including (a) the handling of any collateral of a Debtor as herein provided, (b) the DIP Lender’s relying on any instructions of a Debtor, or (c) any other action taken by the DIP Lender under the DIP Credit Agreement or under the other DIP Documents); (ii) the DIP Loans or the use or proposed use of the proceeds thereof; or (iii) any actual or prospective claim, litigation, investigation or proceeding relating to any of the foregoing, whether based on contract, tort or any other theory, whether brought by a third party or by a Debtor or any subsidiary thereof, and regardless of whether any Indemnitee is a party thereto.</p>
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BASIS FOR RELIEF

I. The Court Should Approve the DIP Facility.

15. The Debtors’ ability to maximize the value of their estates and successfully market and sell their assets hinges on the Debtors’ ability to access postpetition financing. Section 364 of the Bankruptcy Code distinguishes among (a) obtaining unsecured credit in the ordinary course of business, (b) obtaining unsecured credit outside the ordinary course of business, and (c) obtaining credit with specialized priority or on a secured basis. Pursuant to section 364(c) of the Bankruptcy Code, if a debtor cannot obtain postpetition credit on an unsecured basis, a court may authorize such debtor to obtain credit or incur debt that is entitled to super-priority administrative expense status, secured by a senior lien on unencumbered property, or secured by a junior lien on encumbered property. *See* 11 U.S.C. § 364(c). Further, under section 364(d) of the Bankruptcy

Code, courts also may authorize postpetition credit secured by a senior or equal lien on encumbered property if the debtor cannot obtain credit elsewhere and the interests of existing lienholders are adequately protected. *See* 11 U.S.C. § 364(d)(1).

A. Entry into the DIP Documents is an Exercise of the Debtors' Sound Business Judgment.

16. The Court should authorize the Debtors to enter into the DIP Documents, obtain postpetition financing under the DIP Facility, and continue using the Cash Collateral of the Prepetition Secured Lender as a sound exercise of their business judgment. Courts grant considerable deference to a debtor's business judgment in obtaining postpetition secured credit so long as the agreement to obtain such credit does not run afoul of the provisions and underlying policy considerations of the Bankruptcy Code. *See, e.g., In re L.A. Dodgers LLC*, 457 B.R. 308, 313 (Bankr. D. Del. 2011) (“[C]ourts will almost always defer to the business judgment of a debtor in the selection of the lender.”); *In re Trans World Airlines, Inc.*, 163 B.R. 964, 974 (Bankr. D. Del. 1994) (approving postpetition loan and receivables facility because such facility “reflect[ed] sound and prudent business judgment”); *In re Ames Dep't Stores, Inc.*, 115 B.R. 34, 40 (Bankr. S.D.N.Y. 1990) (“[C]ases consistently reflect that the court's discretion under section 364 is to be utilized on grounds that permit reasonable business judgment to be exercised so long as the financing agreement does not contain terms that leverage the bankruptcy process and powers or its purpose is not so much to benefit the estate as it is to benefit a party-in-interest.”).

17. To determine whether a debtor has met the business judgment standard, a court need only “examine whether a reasonable business person would make a similar decision under similar circumstances.” *In re Exide Techs.*, 340 B.R. 222, 239 (Bankr. D. Del. 2006); *see also In re Curlew Valley Assocs.*, 14 B.R. 506, 513–14 (Bankr. D. Utah 1981) (noting that courts should not second guess a debtor's business decision when that decision involves “a business

judgment made in good faith, upon a reasonable basis, and within the scope of [the debtor's] authority under the [Bankruptcy] Code”).

18. Courts generally will not second-guess a debtor's business decisions when those decisions involve a minimum level of care in arriving at the decision on an informed basis, in good faith, and in the honest belief that the action was taken in the best interest of the debtor. See *In re Los Angeles Dodgers LLC*, 457 B.R. at 313. To determine whether the business judgment test is met, “the court ‘is required to examine whether a reasonable business person would make a similar decision under similar circumstances.’” *In re Dura Auto. Sys., Inc.*, No. 06-11202 (KJC), 2007 WL 7728109, at *97 (Bankr. D. Del. Aug. 15, 2007) (citation omitted). Further, in considering whether the terms of postpetition financings are fair and reasonable, courts consider the terms in light of the relative circumstances of both the debtor and the potential lender. *In re Farmland Indus., Inc.*, 294 B.R. 855, 886 (Bankr. W.D. Mo. 2003); see also *Unsecured Creditors' Comm. Mobil Oil Corp. v. First Nat'l Bank & Trust Co. (In re Ellingsen MacLean Oil Co.)*, 65 B.R. 358, 365 n.7 (W.D. Mich. 1986) (recognizing a debtor may have to enter into “hard bargains” to acquire funds for its reorganization); *In re Johns-Manville Corp.*, 60 B.R. 612, 615–16 (Bankr. S.D.N.Y. 1986) (“[T]he [Bankruptcy] Code favors the continued operation of a business by a debtor and a presumption of reasonableness attaches to a debtor's management decisions.”).

19. The Debtors' entry into the DIP Facility represents a sound exercise of their business judgment. The Debtors require access to the DIP Facility because access to the proceeds thereof will permit the Debtors to continue to operate their business, navigate a process to pursue a sale transaction in these chapter 11 cases to maximize value for all of their stakeholders, and reassure their suppliers, customers, vendors, employees, and other stakeholders that the Debtors have adequate liquidity to satisfy their obligations going forward in these chapter 11 cases. The

terms of the DIP Facility were negotiated in good faith and at arm's length, resulting in the most favorable terms the Debtors could obtain under the circumstances. Accordingly, the Court should authorize the Debtors' entry into the DIP Facility as a reasonable exercise of the Debtors' business judgment.

B. No Comparable Alternative to the DIP Facility Is Reasonably Available.

20. A debtor need only demonstrate "by a good faith effort that credit was not available without" the protections afforded to potential lenders by section 364(c) of the Bankruptcy Code. *In re Snowshoe Co., Inc.*, 789 F.2d 1085, 1088 (4th Cir. 1986); *see also In re Plabell Rubber Prods., Inc.*, 137 B.R. 897, 900 (Bankr. N.D. Ohio 1992). Moreover, in circumstances where only a few lenders likely can or will extend the necessary credit to a debtor, "it would be unrealistic and unnecessary to require [the debtor] to conduct such an exhaustive search for financing." *Sky Valley, Inc.*, 100 B.R. at 113; *see also In re Snowshoe Co.*, 789 F.2d at 1088 (demonstrating that credit was unavailable absent the senior lien by establishment of unsuccessful contact with other financial institutions in the geographic area); *In re Stanley Hotel, Inc.*, 15 B.R. 660, 663 (D. Colo. 1981) (bankruptcy court's finding that two national banks refused to grant unsecured loans was sufficient to support conclusion that section 364 requirement was met); *In re Ames Dep't Stores*, 115 B.R. at 37–39 (debtor must show that it made reasonable efforts to seek other sources of financing under section 364(a) and (b)).

21. Here, the Debtors have made a good faith effort to seek out optimal postpetition financing arrangements to meet their short-term liquidity needs. Although the Debtors have engaged with other interested parties with respect to an alternative financing facility, to date, no other party has committed to provide funding. Accordingly, the Debtors determined in their business judgment that the DIP Facility constitutes the best available solution to the Debtors'

financing needs under the current circumstances of these chapter 11 cases. Among other things, the DIP Facility provides the Debtors with immediate, critical financing and the relief requested in the Interim Order adequately protects the Prepetition Secured Lender to allow the Debtors' continued use of Cash Collateral. Therefore, the DIP Facility represents the best option available to address the Debtors' immediate liquidity needs, and the terms and conditions of the DIP Facility are reasonable and appropriate under the circumstances.

C. The Milestones under the DIP Credit Agreement are Reasonable.

22. The DIP Facility contemplates, as a product of negotiation with and as required by the DIP Lender as a condition to providing the DIP Facility, certain milestones the Debtors must meet throughout these chapter 11 cases, the failure of which would constitute an Event of Default under the DIP Credit Agreement. These milestones were heavily negotiated and required by the DIP Lender as a condition to providing the DIP Facility.

23. The DIP Facility, including the milestones, serves as an important component of these chapter 11 cases because it will provide the Debtors with the stability and certainty they need to operate in the ordinary course of business while consummating the proposed sale, subject to identifying higher or better offers. The continued and viable operation of the Debtors' business would not be possible absent access to the DIP Facility. The DIP Facility, and the Debtors' ability to achieve the milestones contemplated therein, will prevent interruptions to the Debtors' operations, preserve the Debtors' ability to maintain ordinary course relationships with, among other parties in interest, employees, customers, and vendors, satisfy working capital needs in the ordinary course, and enable the Debtors to facilitate the proposed sale to maximize the value of their estates.

D. The Proposed Roll-Up of the Prepetition Bridge Loan Obligations is Appropriate.

24. Repayment of the Prepetition Bridge Loan Obligations held by the Prepetition Secured Lender in accordance with the DIP Documents is necessary, as the Prepetition Secured Lender is not otherwise willing to enter into the DIP Facility unless the Prepetition Bridge Loan Obligations are paid consistent with the roll-up set forth in the DIP Documents. In addition, the Interim Order preserves the rights of other parties in interest, including the Committee, to investigate and challenge the validity, enforceability, perfection, and priority of the Prepetition Bridge Loan Obligations and the liens and security interests granted in connection therewith. This Court has previously approved similar debtor-in-possession financing agreements where the debtor was not able to obtain postpetition financing under other conditions. *See, e.g., I Media Brands, Inc., et al.*, Case No. 23-10852 (KBO) [D.I. 116] (Bankr. D. Del. July 6, 2023); *In re Indep. Pet Partners Holdings, LLC, et al.*, Case No. 23-10153 (LSS) [D.I. 242] (Bankr. D. Del. Mar. 3, 2023); *In re EYP Grp. Holdings, Inc.*, Case No. 22-10367 (MFW) [D.I. 149] (Bankr. D. Del. May 25, 2022). Accordingly, the requested roll-up is reasonable and appropriate under the circumstances of these cases and should be approved.

II. The Use of Cash Collateral Is Warranted and Should Be Approved.

25. In addition to the DIP Facility, the Debtors require use of Cash Collateral to continue operating their business. Accordingly, the Prepetition Secured Lender and the Prepetition Factor have consented to the Debtors' use of their Cash Collateral in exchange for the adequate protection detailed in the DIP Documents.

26. A debtor's use of property of the estate, including cash collateral, is governed by section 363 of the Bankruptcy Code, which provides, in pertinent part, as follows:

If the business of the debtor is authorized to be operated under section . . . 1108 . . . of [the Bankruptcy Code] and unless the court orders otherwise,

the [debtor] may . . . use property of the estate in the ordinary course of business without notice or a hearing.

11 U.S.C. § 363(c)(1). A debtor may use cash collateral (a) with the consent of the secured party or (b) without the consent of the secured party if the court, after notice and a hearing, authorizes the debtor to use cash collateral in accordance with the provisions of section 363 of the Bankruptcy Code. *See* 11 U.S.C. § 363(c)(2).

27. Section 363 of the Bankruptcy Code further provides that a debtor must “provide adequate protection” of the secured party’s interest in the property against any diminution in value of such interest resulting from the debtor’s use of the property. *See* 11 U.S.C. § 363(e). Notably, the Bankruptcy Code does not define “adequate protection.” Instead, section 361 of the Bankruptcy Code provides a non-exhaustive list of examples of adequate protection, including cash payments, additional or replacement liens and other relief that will “result in the realization by such [secured party] of the indubitable equivalent of such entity’s interest in such property.” *See* 11 U.S.C. § 361; *see also* *Resolution Tr. Corp. v. Swedeland Dev. Grp., Inc. (In re Swedeland Dev. Grp., Inc.)*, 16 F.3d 552, 564 (3d Cir. 1994) (“The Code does not expressly define adequate protection, but section 361 states that it may be provided by (1) periodic cash payments; (2) additional or replacement liens; or (3) other relief resulting in the ‘indubitable equivalent’ of the secured creditor’s interest in such property.”).

28. Thus, determining what constitutes adequate protection is necessarily a fact-specific inquiry. *See Swedeland Dev. Grp.*, 16 F.3d at 564 (“[A] determination of whether there is adequate protection is made on a case by case basis”) (citing *In re O’Connor*, 808 F.2d 1393, 1397 (10th Cir. 1987)). The focus of the adequate protection requirement is to preserve the secured party’s position at the time of the bankruptcy filing and protect the secured party from diminution in the value of its collateral during the reorganization process. *Id.* (“The whole purpose of adequate

protection for a creditor is to insure that the creditor receives the value for which he bargained prebankruptcy”) (quoting *In re O’Connor*, 808 F.2d at 1396); *see also In re WorldCom, Inc.*, 304 B.R. 611, 618–19 (Bankr. S.D.N.Y. 2004) (“The legislative history for section 361 of the Bankruptcy Code, which sets forth how adequate protection may be provided under section 363, makes clear that the purpose . . . is to insure that the secured creditor receives the value for which the creditor bargained for prior to the debtor’s bankruptcy.”). “However, neither the legislative history nor the Bankruptcy Code require the Court to protect a creditor beyond what was bargained for by the parties.” *WorldCom*, 304 B.R. at 619.

29. Furthermore, the Bankruptcy Code mandates that a secured party be protected against diminution in the value of its interest in cash collateral only during the period of use. *See In re Cont’l Airlines, Inc.*, 146 B.R. 536, 539–40 (Bankr. D. Del. 1992) (noting that a secured party is only entitled to adequate protection to the extent the collateral declined in value); *In re Pursuit Athletic Footwear, Inc.*, 193 B.R. 713, 716 (Bankr. D. Del. 1996) (holding that if there is no diminution in the value of the secured party’s collateral and the debtor can operate profitably postpetition, then the secured creditor is adequately protected against the use of cash collateral); *see also In re 495 Cent. Park Ave. Corp.*, 136 B.R. 626, 631 (Bankr. S.D.N.Y. 1992) (“The goal of adequate protection is to safeguard the secured creditor from diminution in the value of its interest during the Chapter 11 reorganization.”). The preservation of a debtor’s business as a going concern itself provides “adequate protection” under the Bankruptcy Code. *See id.* (noting that whether the value of a debtor’s property will increase as a result of the use of collateral is part of considering whether a party is adequately protected).

30. In connection with the DIP Facility, the Prepetition Secured Lender and Prepetition Factor have consented to the Debtors’ use of Cash Collateral only with the additional

adequate protection described in this Motion and the DIP Documents. As set forth above, the Debtors urgently need to use Cash Collateral to continue to fund the continued operation of their business. Failure to obtain authority to use Cash Collateral would cause irreparable harm to the Debtors and their creditors. Accordingly, to ensure their continued access to the Cash Collateral during these cases, the Debtors propose to provide the Prepetition Secured Lender and Prepetition Factor with adequate protection to the extent of any actual diminution in value of its interest in the Prepetition Collateral (including Cash Collateral) during the pendency of these chapter 11 cases.

31. Specifically, the Debtors propose to provide the Prepetition Secured Lender with the following primary forms of adequate protection against the postpetition diminution in value of its interest in the Cash Collateral resulting from the Debtors' use of such property: (a) fully perfected, first priority senior replacement liens on and security interests in all of the DIP Collateral (as defined in the Interim Order); (b) superpriority claims to the extent of any diminution; and (c) payment of the Prepetition Noteholder's fees and expenses in connection with these chapter 11 cases, including the reasonable prepetition and postpetition fees and expenses of legal counsel and financial advisors. The Debtors also propose to provide the Prepetition Factor with fully perfected, first priority senior replacement liens on, and security interests in, the same property of Debtor EPI on which the Prepetition Factor had a perfected, first-priority security interest and lien prior to the Petition Date.

32. Courts have held that granting replacement liens on assets generated by the debtors postpetition is an appropriate form of adequate protection. *See Swedeland Dev. Grp.*, 16 F.3d at 564, 566; *In re Conference of African Union First Colored Methodist Protestant Church*, 184 B.R. 207, 220 n.9 (Bankr. D. Del. 1995) (“[P]ursuant to Code § 361, ‘adequate protection’ to a secured creditor may be provided in the form of an additional or replacement lien.”). In addition,

considered in the context of the Debtors' current and projected cash—and because the Debtors will use the Cash Collateral to preserve the value of the Debtors' business as a going concern—the proposed adequate protection is more than sufficient to protect the Prepetition Secured Lender against any actual diminution in value of their interests in the Cash Collateral. As such, the Debtors assert that their proposal to provide the Prepetition Secured Lender with replacement liens and superpriority administrative expense claims adequately protects the Prepetition Secured Lender, and supports the Debtors' use of Cash Collateral during these chapter 11 cases. Further, under the circumstances of these cases, the Debtors submit that the adequate protection provided in the Interim Order is fair and reasonable under the circumstances, satisfies the requirements of sections 363(c)(2) and 363(e) of the Bankruptcy Code, and is in the best interests of the Debtors, their estates, and all parties in interest.

33. Moreover, courts in this district have approved similar adequate protection packages for use of cash collateral on a standalone basis and in connection with debtor in possession financing in recent chapter 11 cases. Similar authorization is appropriate in these cases.

III. The 506(c) Surcharge Waiver Should be Approved.

34. Section 506(c) of the Bankruptcy Code provides that the debtor in possession may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim. 11 U.S.C. § 506(c). It is customary for debtors to waive their ability to surcharge against their prepetition collateral or collateral securing a DIP financing in exchange for the DIP lender's agreement that its liens and superpriority claims shall be subject to payment of a carve-out and permitted liens, subject to entry of a final order, and courts in this district routinely grant such relief. Here, in light of the DIP Lender's agreement that its DIP Superpriority Claims shall be subject to the Carve-Out in all respects, which paves way for a competitive bidding process

that could benefit all the Debtors' creditors and stakeholders, the Debtors submit that the 506(c) surcharge waiver should be approved.

IV. The DIP Lender Should be Deemed a Good Faith Lender

35. Section 364(e) of the Bankruptcy Code protects a good faith lender's right to collect on loans extended to a debtor, and its right in any lien securing those loans, even if the authority of the debtor to obtain such loans or grant such liens is later reversed or modified on appeal. Section 364(e) of the Bankruptcy Code provides that:

The reversal or modification on appeal of an authorization under this section [364 of the Bankruptcy Code] to obtain credit or incur debt, or of a grant under this section of a priority or a lien, does not affect the validity of any debt so incurred, or any priority or lien so granted, to an entity that extended such credit in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and the incurring of such debt, or the granting of such priority or lien, were stayed pending appeal.

11 U.S.C. § 364(e).

36. Here, the Debtors believe the DIP Facility embodies the most favorable terms on which the Debtors could obtain postpetition financing and, as noted above, negotiations of the terms of the DIP Credit Agreement with the DIP Lender were conducted in good faith and at arm's length. Ligand is neither an insider nor an affiliate of the Debtors. The terms and conditions of the DIP Documents are fair and reasonable, and the proceeds of the DIP Facility will be used only for purposes that are permissible under the Bankruptcy Code, and in accordance with the DIP Orders and the DIP Documents, including, for the avoidance of doubt, any Approved Budget, as applicable, in each case subject to any Permitted Variances. Accordingly, the Court should find that the DIP Lender is a "good faith" lender within the meaning of section 364(e) of the Bankruptcy Code, and is entitled to all of the protections afforded by that section.

V. Modification of the Automatic Stay is Warranted.

37. The relief requested in this Motion contemplates a modification of the automatic stay to permit the Debtors and the DIP Lender, as applicable, to, among other things: (i) grant the security interests, liens, and superpriority claims described above and to perform such acts as may be requested to assure the perfection and priority of such security interests and liens; (ii) upon the occurrence of an Event of Default under the DIP Credit Agreement, subject to any applicable notice periods set forth in the DIP Orders, exercise any remedies available to them; and (iii) implement the terms of the proposed DIP Orders, including payment of all amounts referred to in the DIP Financing Documents.

38. Stay modifications of this kind are ordinary and standard features of debtor-in-possession financing arrangements and, in the Debtors' business judgment, are reasonable and fair under the circumstances of these chapter 11 cases. *See, e.g., In re FB Debt Financing Guarantor, LLC*, No. 23-10025 (KBO) (Bankr. D. Del. Feb. 16, 2023); *In re OSG Group Holdings, Inc.*, No. 22-10718 (JTD) (Bankr. D. Del. Aug. 9, 2022); *In re RentPath Holdings, Inc.*, No. 20-10312 (BLS) (Bankr. D. Del. Mar. 10, 2020); *In re Blackhawk Mining LLC*, No. 19-11595 (LSS); (Bankr. D. Del. Aug. 13, 2019); *In re Z Gallerie, LLC*, No. 19-10488 (LSS) (Bankr. D. Del. Apr. 9, 2019).

REQUEST FOR A FINAL HEARING

39. Pursuant to Bankruptcy Rules 4001(b)(2) and 4001(c)(2), the Debtors request the Court set a date for the final hearing that is as soon as practicable, to allow entry of a Final Order no more than twenty-five (25) days from the Petition Date in accordance with the Milestones, and fix the time and date prior to the final hearing for parties to file objections to this Motion.

IMMEDIATE AND UNSTAYED RELIEF IS NECESSARY

40. The Court may grant the relief requested in this Motion immediately if the “relief is necessary to avoid immediate and irreparable harm.” Fed. R. Bankr. P. 6003; *In re First NLC Fin. Servs., LLC*, 382 B.R. 547, 549 (Bankr. S.D. Fla. 2008). The Third Circuit has interpreted the language “immediate and irreparable harm” in the context of preliminary injunctions. In that context, the Third Circuit has instructed that irreparable harm is that which “cannot be redressed by a legal or an equitable remedy following a trial.” *Instant Air Freight Co. v. C.F. Air Freight, Inc.*, 882 F.2d 797, 801 (3d Cir. 1989). As explained above and in the First Day Declaration, access to the DIP Facility and the use of Cash Collateral, in the interim amounts proposed, are essential and the relief requested is narrowly tailored to only the relief that is necessary to prevent immediate and irreparable damage to the Debtors’ operations, and therefore, Bankruptcy Rule 6003 is satisfied.

WAIVER OF BANKRUPTCY RULES 6004 AND 4001

41. The Debtors request a waiver of the notice requirements under Bankruptcy Rule 6004(a) and any stay of the order granting the relief requested herein pursuant to Bankruptcy Rules 4001(a)(3) and 6004(h). As explained above, the relief requested herein is necessary to avoid immediate and irreparable harm to the Debtors. Accordingly, ample cause exists to justify the waiver of the notice requirements under Bankruptcy Rule 6004(a) and the 14-day stay imposed by Bankruptcy Rules 4001(a)(3) and 6004(h), to the extent such stay applies.

RESERVATION OF RIGHTS

42. Nothing contained in this Motion or any actions taken pursuant to any order granting the relief requested by this Motion is intended or shall be construed as: (a) an admission as to the validity of any claim against a Debtor entity; (b) a waiver of the Debtors’ rights 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 or any order granting the relief requested by this Motion; (e) a request or authorization to assume any agreement, contract, or lease pursuant to section 365 of the Bankruptcy Code; or (f) a waiver or limitation of the Debtors' rights under the Bankruptcy Code or any other applicable law.

NOTICE

43. Notice of this Motion has been or will be provided to: (i) the Office of the United States Trustee for Region 3; (ii) the Office of the United States Attorney for the District of Delaware; (iii) the Internal Revenue Service; (iv) the DIP Lender; (v) the Prepetition Secured Lender; (vi) CSNK Working Capital Finance Corp. d/b/a Bay View Funding; (vii) the parties included on the Debtors' consolidated list of their 30 largest unsecured creditors; (viii) the Securities and Exchange Commission; (ix) all parties known to hold or assert liens against the Debtors' assets; and (x) any parties that have filed a notice of appearance in these chapter 11 cases 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.

WHEREFORE, the Debtors respectfully request entry of the Proposed Orders granting the relief requested herein and such other and further relief as the Court may deem just and equitable.

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

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.)	(Jointly Administered)
)	

**INTERIM ORDER (I) AUTHORIZING DEBTORS
TO (A) OBTAIN POSTPETITION FINANCING AND
(B) USE OF CASH COLLATERAL, (II) GRANTING ADEQUATE
PROTECTION TO THE PREPETITION SECURED LENDER, (III)
SCHEDULING A FINAL HEARING, AND (IV) GRANTING RELATED RELIEF**

Upon the motion (the “**Motion**”)² of Novan, Inc. and EPI Health, LLC (collectively, the “**Debtors**” or the “**Borrowers**”), pursuant to sections 105, 361, 362, 363(b), 363(c)(2), 363(m), 364(c)(1), 364(c)(2), 364(c)(3), 364(d)(1), 364(e), 503, 506(c) and 507 of title 11 of the United States Code, 11 U.S.C. §§ 101, *et seq.* (as amended, the “**Bankruptcy Code**”), rules 2002, 4001, 6003, 6004 and 9014 of the Federal Rules of Bankruptcy Procedure (the “**Bankruptcy Rules**”), rules 2002-1, 4001-2, 7007-1, 9013-4, and 9014-2 of the Local Bankruptcy Rules for the District of Delaware (the “**Local Rules**”), seeking entry of this interim order (this “**Interim Order**”) and the Final Order (as defined herein and, together with this Interim Order, the “**DIP Orders**”) among other things:

- authorizing the Borrowers to obtain postpetition financing (“**DIP Financing**”) pursuant to a senior, secured, superpriority, debtor in possession multi-draw term loan facility (the “**DIP Facility**”) subject to the terms and conditions set forth in this Interim Order and that certain Superpriority Debtor in Possession Loan and Security Agreement, attached hereto in substantially final form as **Exhibit 1** (as amended, restated, amended and restated, supplemented, or otherwise modified from time to time, the “**DIP Credit**”

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 defined herein are given the meanings ascribed to such terms in the Motion or DIP Credit Agreement (as defined herein).

Agreement”) by and among the Borrowers, and one or more affiliates of Ligand Pharmaceuticals, Incorporated (“**Ligand**”) or its designee (the “**DIP Lender**”), consisting of (i) new money term loans in an aggregate principal amount of up to \$12,000,000, of which \$1,000,000 will be available upon entry of this Interim Order, subject to the Initial DIP Budget, of which up to \$2,500,000 in the aggregate will be available prior to the entry of the Final Order (as defined below), and the remainder will be available upon the entry of the Final Order, and (ii) the DIP Roll-Up Loans (as defined below), which will be deemed rolled up and converted into DIP Obligations (as defined below) (the loans to be made available under the foregoing clauses (i) and (ii), the “**DIP Loans**” and the commitments therefor, the “**DIP Commitments**”);

- authorizing the Borrowers (the “**DIP Loan Parties**”) to incur the DIP Loans and all extensions of credit, financial accommodations, reimbursement obligations, fees and premiums (including, without limitation, commitment fees or premiums and other fees), costs, expenses and other liabilities and obligations (including indemnities and similar obligations, whether contingent or absolute) due or payable under the DIP Documents (as defined below) (collectively, the “**DIP Obligations**”);
- authorizing the Borrowers to execute, deliver and perform under the DIP Credit Agreement and all other documents and instruments that may be reasonably requested by the DIP Lender in connection with the DIP Facility (in each case, as amended, restated, supplemented, waived or otherwise modified from time to time in accordance with the terms thereof and hereof, together with the DIP Credit Agreement, the “**DIP Documents**”);
- subject to the Carve-Out (as defined below) and otherwise solely to the extent set forth herein, granting to the DIP Lender allowed superpriority administrative expense claims pursuant to section 364(c)(1) of the Bankruptcy Code;
- granting to the DIP Lender valid, enforceable, non-avoidable and automatically perfected liens pursuant to sections 364(c)(2), 364(c)(3), and 364(d) of the Bankruptcy Code on the DIP Collateral (as defined below), on the terms described herein;
- authorizing the DIP Lender to take all commercially reasonable actions to implement the terms of this Interim Order;
- upon entry of a Final Order, waiving (a) the Debtors’ right to surcharge the Prepetition Collateral (as defined below) and the DIP Collateral (as defined below) pursuant to section 506(c) of the Bankruptcy Code and (b) any “equities of the case” exception under section 552(b) of the Bankruptcy Code;
- waiving the equitable doctrine of “marshaling” and other similar doctrines (a) with respect to the DIP Collateral for the benefit of any party other than the DIP Lender and (b) with respect to the Prepetition Collateral (including the Cash Collateral) for the benefit of any party other than the DIP Lender; *provided* that the foregoing waiver shall be without prejudice to any provisions of the Final Order;

- authorizing the Debtors to use proceeds of the DIP Facility and Cash Collateral (as defined below) solely in accordance with the DIP Orders and the DIP Documents;
- authorizing the Debtors to pay the DIP Obligations as they become due and payable in accordance with the DIP Documents;
- subject to the restrictions set forth in the DIP Documents and the DIP Orders, authorizing the Debtors to use Prepetition Collateral and provide adequate protection to the Prepetition Secured Lender (as defined below) for any diminution in value of its interests in the Prepetition Collateral (including Cash Collateral), for any reason provided for in the Bankruptcy Code (collectively, the “**Diminution in Value**”);
- solely to the extent entitled under applicable law, granting adequate protection to CSNK Working Capital Finance Corp. d/b/a Bay View Funding (“**Bay View**”), in its capacity as buyer, under that certain Factoring Agreement dated as of December 1, 2022 (as amended, restated, amended and restated, modified, supplemented, or extended from time to time, the “**Factoring Agreement**”), between EPI Health, LLC (“**EPI Health**”), as seller, and Bay View, all such adequate protection on the terms set forth in this Interim Order, with respect to the use and aggregate Diminution in Value, if any, of Bay View’s interests in the Collateral (as defined under the Factoring Agreement);
- vacating and modifying the automatic stay to the extent necessary to permit the Debtors and the DIP Lender to implement and effectuate the terms and provisions of the DIP Orders and the DIP Documents;
- waiving any applicable stay (including under Bankruptcy Rule 6004) and providing for immediate effectiveness of this Interim Order and, upon entry, the Final Order; and
- scheduling a final hearing (the “**Final Hearing**”) to consider final approval of the DIP Facility and use of Cash Collateral on the terms of a proposed order (the “**Final Order**”) to be posted to the docket prior to the Final Hearing.

The Court having considered the interim relief requested in the DIP Motion, the exhibits attached thereto, the *Declaration of Paula Brown Stafford in Support of Chapter 11 Petitions and First Day Pleadings* (the “**First Day Declaration**”), the available DIP Documents, and the evidence submitted and arguments made at the interim hearing held on July [●], 2023 (the “**Interim Hearing**”); and due and sufficient notice of the Interim Hearing having been given in accordance with Bankruptcy Rules 2002, 4001(b), (c) and (d), and all applicable Local Rules; and the Interim Hearing having been held and concluded; and all objections, if any, to the interim relief

requested in the Motion having been withdrawn, resolved or overruled by the Court; and it appearing that approval of the interim relief requested in the Motion is necessary to avoid immediate and irreparable harm to the Debtors and their estates pending the Final Hearing, otherwise is fair and reasonable, in the best interests of the Debtors and their estates, and essential for the continued operation of the Debtors' businesses and the preservation of the value of the Debtors' assets; and it appearing that the Debtors' entry into the DIP Documents is a sound and prudent exercise of the Debtors' business judgment; and after due deliberation and consideration, and good and sufficient cause appearing therefor.

BASED UPON THE RECORD ESTABLISHED AT THE INTERIM HEARING, THE COURT MAKES THE FOLLOWING FINDINGS OF FACT AND CONCLUSIONS OF LAW:³

A. *Petition Date.* On July 17, 2023 (the "**Petition Date**"), each of the Debtors filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code (collectively, the "**Chapter 11 Cases**") in the United States Bankruptcy Court for the District of Delaware (the "**Court**").

B. *Debtors in Possession.* The Debtors have continued in the management and operation of their businesses and properties as debtors in possession pursuant to sections 1107 and 1108 of the Bankruptcy Code.

C. *Jurisdiction and Venue.* This Court has core jurisdiction over these cases, the Motion, and the parties and property affected hereby pursuant to 28 U.S.C. §§ 157(a)–(b) and the *Amended Standing Order of Reference* from the United States District Court for the District of Delaware, dated February 29, 2012. Consideration of the Motion constitutes a core proceeding

³ The findings and conclusions set forth herein constitute the Court's findings of fact and conclusions of law pursuant to Bankruptcy Rule 7052, made applicable to this proceeding pursuant to Bankruptcy Rule 9014. To the extent that any of the following findings of fact constitute conclusions of law, they are adopted as such. To the extent any of the following conclusions of law constitute findings of fact, they are adopted as such.

pursuant to 28 U.S.C. § 157(b)(2). The Court may enter a final order approving the relief sought in the Motion consistent with Article III of the United States Constitution. Venue for these cases and proceedings on the Motion is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409. The predicates for the relief sought herein are sections 105, 361, 362, 363(b), 363(c), 363(e), 364(c), 364(d)(1), 364(e), 503 and 507 of the Bankruptcy Code, Bankruptcy Rules 2002, 4001, 6003, 6004 and 9014, and the Local Rules.

D. *Committee Formation.* As of the date hereof, the Office of the United States Trustee for the District of Delaware (the “**U.S. Trustee**”) has not appointed an official committee of unsecured creditors in these cases (a “**Committee**”).

E. *Notice.* The Interim Hearing was held pursuant to Bankruptcy Rule 4001(b)(2) and (c)(2). Proper, timely, adequate and sufficient notice of the Motion and the Interim Hearing has been provided to (a) the U.S. Trustee; (b) entities listed as holding the 30 largest unsecured claims against the Debtors (on a consolidated basis); (c) counsel to the DIP Lender and Prepetition Secured Lender, Morgan, Lewis & Bockius LLP, 101 Park Ave., New York, NY 10036, Attn: Craig A. Wolfe, Kristen V. Campana, Jason R. Alderson, and T. Charlie Liu; (d) the United States Attorney’s Office for the District of Delaware; (e) the Internal Revenue Service; (f) the state attorneys general for states in which the Debtors conduct business; and (g) any party that has requested notice pursuant to Bankruptcy Rule 2002, (collectively, the “**Notice Parties**”), in accordance with the Bankruptcy Code, Bankruptcy Rules and Local Rules. The interim relief granted herein is necessary to avoid immediate and irreparable harm to the Debtors and their estates pending the Final Hearing.

F. *Cash Collateral.* As used herein, the term “**Cash Collateral**” shall mean all of the Debtors’ cash, wherever located and held, including cash in deposit accounts, that constitutes or

will constitute “cash collateral” of the DIP Lender and the Prepetition Secured Lender within the meaning of section 363(a) of the Bankruptcy Code.

G. *Debtors’ Stipulations.* Subject to the provisions and limitations contained in paragraph 25 hereof, and after consultation with their attorneys, the Debtors admit, stipulate and agree that:

(i) *Prepetition Bridge Loan.* Pursuant to that certain Loan and Security Agreement dated as of July 14, 2023 (as amended, supplemented, restated or otherwise modified prior to the Petition Date, the “**Prepetition Credit Agreement**” and, collectively with the other “Loan Documents” (as defined in the Prepetition Credit Agreement) and any other agreements and documents executed or delivered in connection therewith, each as may be amended, restated, amended and restated, supplemented, waived, or otherwise modified prior to the Petition Date, the “**Prepetition Loan Documents**”) by and among (a) Novan, Inc. (“**Novan**”), as borrower, (b) EPI Health, as borrower (together with Novan, the “**Prepetition Loan Parties**”) and (c) Ligand (together with its successors and assigns, the “**Prepetition Secured Lender**”), the Prepetition Loan Parties incurred “Obligations” (as defined in the Prepetition Credit Agreement, the “**Prepetition Bridge Loan Obligations**”) to the Prepetition Secured Lender on a joint and several basis;

(ii) *Prepetition Bridge Loan Obligations.* As of the Petition Date, the Prepetition Loan Parties were justly and lawfully indebted and liable to the Prepetition Secured Lender without defense, challenge, objection, claim, counterclaim, or offset of any kind, for the Loan (as defined in the Prepetition Credit Agreement) in the aggregate principal amount of not less than \$3,000,000, plus accrued and unpaid interest thereon and any fees, expenses and disbursements (including attorneys’ fees, accountants’ fees, appraisers’ fees, auditors’ fees, and

financial advisors' fees), costs, charges, indemnities, and any other Prepetition Bridge Loan Obligations incurred under the Prepetition Loan Documents;

(iii) *Validity of Prepetition Bridge Loan Obligations.* The Prepetition Bridge Loan Obligations constitute legal, valid, binding, and non-avoidable obligations of the Prepetition Loan Parties, enforceable in accordance with the respective terms of the relevant documents, and no portion of the Prepetition Bridge Loan Obligations or any payment made to the Prepetition Secured Lender or applied to or paid on account of the Prepetition Bridge Loan Obligations prior to the Petition Date is subject to any contest, attack, rejection, recovery, reduction, defense, counterclaim, offset, subordination, recharacterization, avoidance or other claim (as such term is defined in the Bankruptcy Code), cause of action (including any avoidance actions under Chapter 5 of the Bankruptcy Code), chases in action or other challenge of any nature under the Bankruptcy Code or any applicable non-bankruptcy law;

(iv) *Validity, Perfection and Priority of Prepetition Liens.* As of the Petition Date, pursuant to the Prepetition Loan Documents, the Prepetition Loan Parties granted to the Prepetition Secured Lender, a security interest in and continuing lien on (the "**Prepetition Liens**") substantially all of their respective assets and property, including (but, for the avoidance of doubt, not including any Excluded Assets (as defined in the Prepetition Credit Agreement)) (i) a valid, binding, properly perfected, enforceable, non-avoidable first priority security interest in and continuing lien on the Collateral (as defined in the Prepetition Credit Agreement), which, for the avoidance of doubt, includes Cash Collateral, and all proceeds, products, accessions, rents, and profits thereof, in each case whether then owned or existing or thereafter acquired or arising (collectively, the "**Prepetition Collateral**"), junior, subject and subordinate only to the liens permitted by the Prepetition Loan Documents, solely to the extent such permitted liens are (a) valid, perfected and non-avoidable on the Petition Date, or (b) valid liens in existence on the

Petition Date that are perfected subsequent to the Petition Date in accordance with section 546(b) of the Bankruptcy Code (collectively, the “**Prepetition Permitted Liens**”);

(v) *Waiver of Challenge.* None of the Prepetition Liens are subject to any contest, attack, rejection, recovery, reduction, defense, counterclaim, subordination, recharacterization, avoidance or other cause of action (including any avoidance actions under Chapter 5 of the Bankruptcy Code), choses in action or other challenge of any nature under the Bankruptcy Code or any applicable non-bankruptcy law;

(vi) *No Control.* The Prepetition Secured Lender does not control (or have not in the past controlled) any of the Debtors or their respective properties or operations, does not have authority to determine the manner in which any Debtor’s operations are conducted or control persons or insiders of any Debtor by virtue of any actions taken with respect to, in connection with, related to or arising from any Prepetition Loan Documents;

(vii) *No Claims or Causes of Action.* No claims or causes of action held by the Debtors or their estates exist against, or with respect to, the Prepetition Secured Lender and each of their respective Representatives (as defined below), in each case, in their capacity as such, under or relating to any agreements by and among the Debtors and the Prepetition Secured Lender that is in existence as of the Petition Date; and

(viii) *Release.* Effective as of the date of entry of this Interim Order, each of the Debtors and each of their estates, on its own behalf and on behalf of its and their respective predecessors, successors, heirs, and past, present and future subsidiaries and assigns, hereby absolutely, unconditionally and irrevocably releases and forever discharges and acquits the Prepetition Secured Lender, the DIP Lender, and each of their respective Representatives (solely in their capacities as such) (collectively, the “**Released Parties**”), from any and all liability to the Debtors (and their successors and assigns) and from any and all claims, counterclaims, demands,

defenses, offsets, debts, accounts, contracts, liabilities, actions and causes of action of any kind, nature and description, whether matured or unmatured, known or unknown, asserted or unasserted, foreseen or unforeseen, accrued or unaccrued, suspected or unsuspected, liquidated or unliquidated, pending or threatened, arising in law or equity, in contract or tort, in each case arising out of or related to the Prepetition Loan Documents, the DIP Facility, the DIP Documents, the DIP Roll-Up Loans, the negotiation thereof and the transactions and agreements reflected thereby, that the Debtors at any time had, now have or may have, or that their predecessors, successors or assigns at any time had or hereafter may have against any of the Released Parties for or by reason of any act, omission, matter, or cause arising at any time on or prior to the date of this Interim Order; *provided* that the release set forth in this section shall not release (i) any claims against or liabilities of a Released Party that a court of competent jurisdiction determines has resulted from such Released Party's bad faith, fraud, gross negligence or willful misconduct or (ii) the DIP Lender from honoring its obligations to the Debtors under the DIP Documents.

H. *Findings Regarding DIP Financing and Use of Cash Collateral.*

(i) Good and sufficient cause has been shown for the entry of this Interim Order and for authorization of the DIP Loan Parties to obtain financing pursuant to the DIP Documents.

(ii) The Debtors have demonstrated an immediate and critical need to obtain the DIP Financing and to use Prepetition Collateral (including Cash Collateral) in accordance with the Approved Budget (as defined below) in order to permit, among other things, the orderly continuation of the operation of their businesses, to maintain business relationships with vendors, suppliers and customers, to make payroll, to satisfy other working capital and operational needs, and to fund administrative expenses of these Chapter 11 Cases. Access to sufficient working capital and liquidity under the DIP Documents and other financial accommodations provided under the DIP Documents, as well as through the use of Cash Collateral and other Prepetition

Collateral, is necessary for the avoidance of immediate irreparable harm to the Debtors' estates and for the preservation and maintenance of their going concern value.

(iii) The Debtors are unable to obtain adequate unsecured credit allowable under section 503(b)(1) of the Bankruptcy Code as an administrative expense or secured financing on more favorable terms from sources other than the DIP Lender under the DIP Documents. The Debtors are also unable to obtain secured credit without granting to the DIP Lender the DIP Liens and the DIP Superpriority Claims (each as defined below) and incurring the Adequate Protection Obligations (as defined herein) on the terms and subject to the conditions set forth in this Interim Order and in the DIP Documents.

(iv) The Debtors continue to collect cash, rents, income, offspring, products, proceeds, and profits generated by the Prepetition Collateral and acquire equipment, inventory and other personal property, all of which constitutes Prepetition Collateral and the Prepetition Secured Lender's Cash Collateral under section 363(a) of the Bankruptcy Code. The Debtors desire and need to use the Prepetition Secured Lender's Cash Collateral for general corporate purposes.

(v) Based on the Motion, the First Day Declaration, and the record and argument presented to the Court at the Interim Hearing, the terms of the DIP Financing, the terms of the adequate protection granted to the Prepetition Secured Lender and Bay View as provided in paragraphs 12–13 of this Interim Order (collectively, the "**Adequate Protections**"), and the terms on which the Debtors may continue to use Prepetition Collateral (including Cash Collateral) pursuant to this Interim Order and the DIP Documents are consistent with the Bankruptcy Code, including section 506(b) thereof, are fair and reasonable, and reflect the DIP Loan Parties' exercise of prudent business judgment consistent with their fiduciary duties under the circumstances.

(vi) This Interim Order, the DIP Financing, the Adequate Protections, and the use of the Prepetition Collateral (including Cash Collateral) have been negotiated in good faith

and at arm's length among the DIP Loan Parties, the DIP Lender, and the Prepetition Secured Lender (each of whom acted in good faith in negotiating such documents), and all of the loans and other financial accommodations extended by the DIP Lender to the DIP Loan Parties under, in respect of, or in connection with, the DIP Financing and the DIP Documents (including the granting of the Adequate Protections provided herein), shall be deemed to have been extended by the DIP Lender in good faith, as that term is used in section 364(e) of the Bankruptcy Code and in express reliance upon the protections offered by section 364(e) of the Bankruptcy Code, and the DIP Lender (and its respective successors and assigns) shall be entitled to the full protection of section 364(e) of the Bankruptcy Code in the event that this Interim Order or any provision hereof is vacated, reversed or modified, on appeal or otherwise.

(vii) The Prepetition Secured Lender and the DIP Lender have acted in good faith and without negligence, misconduct, or violation of public policy or law, in respect of all actions taken by them in connection with or related in any way to negotiating, implementing, documenting, or obtaining requisite approvals of this Interim Order, the DIP Facility and the use of Cash Collateral, including in respect of the granting of the DIP Liens and the Adequate Protection Liens, any challenges or objections to the DIP Facility or the use of Cash Collateral, the DIP Documents, and all other documents related to and all transactions contemplated by the foregoing. Accordingly, without limitation to any other right to indemnification, the Prepetition Secured Lender and the DIP Lender shall be and hereby are indemnified (as applicable) as provided in the Prepetition Loan Documents and the DIP Documents, as applicable, including, without limitation, Section 11.4 of the DIP Credit Agreement.

(viii) The Prepetition Secured Lender and Bay View are entitled to the Adequate Protections as and to the extent set forth herein pursuant to sections 361, 362, 363 and 364 of the Bankruptcy Code. Based on the Motion and on the record presented to the Court, the terms of the

proposed Adequate Protections are fair and reasonable, reflect the Debtors' prudent exercise of business judgment and constitute reasonably equivalent value and fair consideration for the use of Prepetition Collateral, including Cash Collateral.

(ix) To the extent their consent is required, the Prepetition Secured Lender and Bay View have consented or are deemed to have consented to the use of, as applicable, the Prepetition Collateral, including Cash Collateral, the imposition of the Carve-Out, and the priming of the Prepetition Liens on the Prepetition Collateral by the DIP Liens (subject to the Prepetition Permitted Liens), on the terms set forth in this Interim Order and the DIP Documents; *provided* that nothing in this Interim Order or the DIP Documents shall (x) be construed as the affirmative consent by the Prepetition Secured Lender for the use of Cash Collateral other than on the terms set forth in this Interim Order and in the context of the DIP Financing authorized by this Interim Order, (y) be construed as a consent by any party to the terms of any other financing or any other lien encumbering the Prepetition Collateral (whether senior or junior) other than as contemplated by this Interim Order, or (z) prejudice, limit or otherwise impair the rights of the Prepetition Secured Lender or Bay View to seek new, different or additional adequate protection or assert any other right, and the rights of any other party in interest, including the DIP Loan Parties, to object to such relief are hereby preserved.

(x) The Debtors have prepared and delivered to the advisors to the DIP Lender an initial budget (the "**Initial DIP Budget**"), attached hereto as **Exhibit 2**. The Initial DIP Budget reflects, among other things, the Debtors' anticipated operating receipts, operating disbursements, non-operating disbursements, net operating cash flow, and liquidity for each calendar week covered thereby. The Initial DIP Budget may be modified, amended, extended, and updated from time to time in accordance with the DIP Credit Agreement and this Interim Order. Each subsequent budget, once approved by the DIP Lender (in accordance with the DIP Credit

Agreement), shall modify, replace, supplement or supersede, as applicable, the Initial DIP Budget for the periods covered thereby (the Initial DIP Budget and each subsequent approved budget, an “**Approved Budget**”).

(xi) The Prepetition Secured Lender shall be entitled to all of the rights and benefits of section 552(b) of the Bankruptcy Code and the “equities of the case” exception under section 552(b) of the Bankruptcy Code shall not apply to the Prepetition Secured Lender with respect to proceeds, product, offspring, or profits of any of the Prepetition Collateral; *provided that* the foregoing shall be without prejudice to the terms of the Final Order with respect to the period from and after the entry of the Final Order.

I. *Immediate Entry.* Sufficient cause exists for immediate entry of this Interim Order pursuant to Bankruptcy Rules 4001(b)(2) and (c)(2) and the applicable Local Rules. Absent the relief granted in this Interim Order, the Debtors’ estates will be immediately and irreparably harmed. Consummation of the DIP Financing and continued use of Prepetition Collateral (including Cash Collateral), in accordance with this Interim Order and the DIP Documents, are therefore in the best interests of the Debtors’ estates and consistent with the Debtors’ exercise of their fiduciary duties. The Motion and this Interim Order comply with the requirements of Bankruptcy Rules 4001(b)(2) and 4001(c)(2), and the applicable Local Rule.

J. *Prepetition Permitted Liens; Continuation of Prepetition Liens.* Nothing herein constitutes a finding or ruling by this Court that any alleged Prepetition Permitted Lien is valid, senior, enforceable, prior, perfected, or non-avoidable. Moreover, nothing herein shall prejudice the rights of any party-in-interest, including, but not limited to, the Debtors, the DIP Lender, or the Prepetition Secured Lender to challenge the validity, priority, enforceability, seniority, avoidability, perfection, or extent of any alleged Prepetition Permitted Lien. For the avoidance of doubt, the right of a seller of goods to reclaim goods under section 546(c) of the Bankruptcy Code

does not constitute a Prepetition Permitted Lien, and such right is expressly subject to the DIP Liens (as defined herein) and Prepetition Liens. The Prepetition Liens and the DIP Liens are continuing liens and the DIP Collateral is and will continue to be encumbered by such liens.

K. *DIP Roll-Up Loans.* Upon entry of this Interim Order, but subject to the provisions of paragraph 25 of this Interim Order, all outstanding Prepetition Bridge Loan Obligations shall be rolled up, and converted into DIP Obligations (the “**DIP Roll-Up Loans**”). The Prepetition Secured Lender who is also the DIP Lender would not have consented to extend the DIP Financing or other financial accommodations to the Debtors without the inclusion of the DIP Roll-Up Loans in the DIP Obligations. Thus, the roll-up is consideration for, and solely on account of, the agreement of the DIP Lender to extend the DIP Loans and not on account of the Prepetition Bridge Loan Obligations.

Based upon the Motion, the foregoing findings and conclusions, and the overall record before the Court, and after due consideration, and good and sufficient cause appearing therefor,

IT IS HEREBY ORDERED THAT:

1. *Motion Granted.* The Motion is granted on an interim basis on the terms and conditions set forth in this Interim Order. All objections to the Interim Order to the extent not withdrawn, waived, settled, or resolved are hereby overruled on the merits.

2. *Authorization of the DIP Financing and the DIP Documents.*

(a) The DIP Loan Parties are hereby authorized to execute, deliver, enter into and perform all of their obligations under the DIP Documents and perform such other acts as may be necessary, appropriate or desirable in connection therewith. The Borrowers are hereby authorized to borrow up to \$15,000,000 in the aggregate pursuant to the DIP Credit Agreement, subject to any limitations set forth in the DIP Documents. The proceeds of the DIP Loans shall be

used for all purposes permitted under the DIP Documents and the Interim Order, subject to and in accordance with the Approved Budget (subject to any permitted variances).

(b) Upon entry of this Interim Order, all outstanding Prepetition Bridge Loan Obligations shall be deemed rolled up and converted into DIP Obligations, subject to the provisions of paragraph 25 hereof. The Debtors are authorized to take such acts as shall be necessary or desirable to effect the roll-up and conversion of the Prepetition Bridge Loan Obligations to DIP Obligations.

(c) In furtherance of the foregoing and without further approval of this Court, each DIP Loan Party is authorized and directed to perform all acts, to make, execute and deliver all instruments, certificates, agreements, charges, deeds and documents, execute or record pledge and security agreements, mortgages, financing statements and other similar documents, if any, and to pay all fees, expenses and indemnities in connection with or that may be reasonably required, necessary, or desirable in connection with the DIP Financing, including, without limitation:

(i) the execution and delivery of, and performance under, each of the DIP Documents;

(ii) the execution and delivery of, and performance under, one or more amendments, waivers, consents or other modifications to and under the DIP Documents, in each case, in such form as the DIP Lender may accept, it being understood that no further approval of this Court shall be required for any such amendments, waivers, consents or other modifications or the payment of any fees, including attorneys', accountants', appraisers' and financial advisors' fees, and other expenses, charges, costs, indemnities and other like obligations in connection therewith, that do not shorten the maturity of the DIP Facility, increase the aggregate DIP Commitments, increase the rate of interest or fees payable thereunder, or release any DIP Liens.

Updates, modifications, and supplements to the Approved Budget shall not require any further approval of this Court;

(iii) the non-refundable payment to the DIP Lender of any fees in connection with the DIP Facility, including any amendment fees, premiums, servicing fees, audit fees, structuring fees, upfront fees, closing fees, commitment premiums, exit fees, closing date fees, prepayment fees or agency fees, and any amounts due in respect of any indemnification and expense reimbursement obligations, in each case, as provided in the DIP Documents; the payment of the foregoing amounts shall be irrevocable, and shall be deemed to have been approved upon entry of this Interim Order, whether any such obligations arose before or after the Petition Date, and whether or not the transactions contemplated hereby are consummated, and upon payment thereof, shall not be subject to any contest, attack, rejection, recoupment, reduction, defense, counterclaim, offset, subordination, recharacterization, avoidance, disallowance, impairment, or other claim, cause of action or other challenge of any nature under the Bankruptcy Code or applicable non-bankruptcy law; and

(iv) the non-refundable payment to the DIP Lender for fees and expenses incurred by its professionals, whether any such fees and expense arose before or after the Petition Date, as provided under the terms of the DIP Credit Agreement and subject to a cap in the aggregate amount of \$675,000 unless an Event of Default (as defined below) has occurred. Any such professional shall not be required to comply with the U.S. Trustee fee guidelines or file applications or motions with, or obtain approval of, this Court for compensation and reimbursement of fees and expenses but shall submit copies of summary invoices to the Debtors, the U.S. Trustee, and counsel for any Committee. The summary invoices shall provide only the total aggregate number of hours billed and a summary description of services provided and the expenses incurred by the applicable party and/or professionals, and shall be subject to all

applicable privilege and work product doctrines. If the Debtors, U.S. Trustee or any Committee object to the reasonableness of the fees and expenses of any professional and cannot resolve such objection within ten (10) days after receipt of such invoices, then the Debtors, U.S. Trustee, or the Committee, as the case may be, shall file with this Court and serve on such professional an objection (the “**Fee Objection**”), and any failure by any such party to file a Fee Objection within such ten (10) day period shall constitute a waiver of any right of such party to object to the applicable invoice. Notwithstanding any provision herein to the contrary, any objection to, and any hearing on an objection to, payment of any fees, costs, and expenses set forth in a professional fee invoice in respect of the professional shall be limited to the reasonableness of the particular items or categories of the fees, costs, and expenses that are the subject of such objection. The Debtors shall timely pay in accordance with the terms and conditions of this Interim Order (a) the undisputed fees, costs, and expenses reflected on any invoice to which a Fee Objection has been timely filed and (b) all fees, costs and expenses on any invoice to which no Fee Objection has been timely filed.

3. *DIP Obligations.* Upon execution and delivery of the DIP Documents, the DIP Documents shall constitute legal, valid, binding and non-avoidable obligations of the DIP Loan Parties, enforceable against each DIP Loan Party and its estate in accordance with their respective terms and this Interim Order, and any successors thereto, including any trustee appointed in these Chapter 11 Cases, or in any case under chapter 7 of the Bankruptcy Code upon conversion of any of these cases, or in any other proceedings superseding or related to any of the foregoing (collectively, the “**Successor Cases**”). Upon execution and delivery of the DIP Documents, the DIP Obligations shall include all loans and any other indebtedness or obligations, contingent or absolute, which may from time to time be owing by any of the DIP Loan Parties to the DIP Lender, in such capacities, in each case, under the DIP Documents and this Interim Order, including all

principal, interest, costs, fees, expenses, premiums, indemnities and other amounts. The DIP Loan Parties shall be jointly and severally liable for the DIP Obligations. Except as permitted hereby, no obligation, payment, transfer, or grant of security hereunder or under the DIP Documents to the DIP Lender shall be stayed, restrained, voidable, avoidable, or recoverable, under the Bankruptcy Code or under any applicable law (including, without limitation, under sections 502(d), 544, and 547 to 550 of the Bankruptcy Code or under any applicable state Uniform Voidable Transactions Act, Uniform Fraudulent Transfer Act, Uniform Fraudulent Conveyance Act, or similar statute or common law), or subject to any defense, avoidance, reduction, setoff, recoupment, offset, recharacterization, subordination (whether equitable, contractual, or otherwise), disallowance, impairment, claim, counterclaim, cross-claim, or any other challenge under the Bankruptcy Code or any applicable law or regulation by any person or entity.

4. *Carve-Out.*

(a) As used herein, “**Carve-Out**” means the following expenses: (i) all fees required to be paid to the Clerk of the Bankruptcy Court and to the Office of the United States Trustee pursuant to 28 U.S.C. § 1930(a) (without regard to the notice set forth in (iii) below); (ii) all reasonable fees and expenses incurred by a trustee under section 726(b) of the Bankruptcy Code in an amount not exceeding \$25,000 (without regard to the notice set forth in (iii) below); (iii) to the extent allowed at any time, whether by interim order, procedural order, or otherwise, all unpaid fees and expenses (plus any restructuring, sale, success, or other transaction fee of any investment bankers or financial advisors of the Debtors) (the “**Allowed Debtor Professional Fees**”) incurred by persons or firms retained by the Debtors pursuant to section 327, 328, or 363 of the Bankruptcy Code, including, for the avoidance of doubt, counsel of the Debtors (the “**Debtors Professionals**”) and unpaid fees and expenses (the “**Allowed Committee Professional Fees**” and together with the Allowed Debtor Professional Fees, collectively, the “**Allowed Professional Fees**”) incurred

by persons or firms retained by a Committee (if appointed), pursuant to section 328 or 1103 of the Bankruptcy Code (the “**Committee Professionals**” and, together with the Debtor Professionals, the “**Professional Persons**”) at any time before or on the first business day following delivery by the DIP Lender of a Carve Out Trigger Notice (as defined below), whether allowed by the Bankruptcy Court prior to or after delivery of a Carve Out Trigger Notice (these clauses (i) through (iii), the “**Pre-Carve Out Amounts**”) and (iv) Allowed Professional Fees not to exceed \$400,000, incurred after the first business day following delivery by the DIP Lender of the Carve Out Trigger Notice, to the extent allowed at any time, whether by interim order, procedural order, or otherwise (the amounts set forth in this clause (iv) being the “**Post-Carve Out Trigger Notice Cap**”). For purposes of the foregoing, “**Carve Out Trigger Notice**” shall mean a written notice delivered by email (or other electronic means) by the DIP Lender to the Debtors, their restructuring counsel, the U.S. Trustee, and counsel to the Committee (if appointed), which notice may be delivered following the occurrence and during the continuation of an Event of Default (as defined below), stating that the Post-Carve Out Trigger Notice Cap has been invoked. Notwithstanding the foregoing, the Carve Out Trigger Notice shall be deemed to have been delivered to the required notice parties on the Maturity Date (as defined in the DIP Credit Agreement).

(b) Carve Out Reserves. On the day on which a Carve Out Trigger Notice is given by the DIP Lender to the Debtors with a copy to counsel to the Committee (the “**Termination Declaration Date**”), the Carve Out Trigger Notice shall (i) be deemed a draw request and notice of borrowing by the Debtors for DIP Loans under the DIP Commitment (each, as defined in the DIP Credit Agreement), in an amount equal to the then unpaid amounts of the Allowed Professional Fees (any such amounts actually advanced shall constitute DIP Loans) and (ii) also constitute a demand to the Debtors to utilize all cash on hand as of such date and any available cash thereafter held by any Debtor to fund a reserve in an amount equal to the then unpaid

amounts of the Allowed Professional Fees. The Debtors shall deposit and hold such amounts in a segregated account in trust to pay such then unpaid Allowed Professional Fees (the “**Pre-Carve Out Trigger Notice Reserve**”) prior to any and all other claims. On the Termination Declaration Date, the Carve Out Trigger Notice shall also (i) be deemed a request by the Debtors for DIP Loans under the DIP Commitment, in an amount equal to the Post-Carve Out Trigger Notice Cap (any such amounts actually advanced shall constitute DIP Loans) and (ii) constitute a demand to the Debtors to utilize all cash on hand as of such date and any available cash thereafter held by any Debtor, after funding the Pre-Carve Out Trigger Notice Reserve, to fund a reserve in an amount equal to the Post-Carve Out Trigger Notice Cap. The Debtors shall deposit and hold such amounts in a segregated account in trust to pay such Allowed Professional Fees benefiting from the Post-Carve Out Trigger Notice Cap (the “**Post-Carve Out Trigger Notice Reserve**” and, together with the Pre-Carve Out Trigger Notice Reserve, the “**Carve Out Reserves**”) prior to any and all other claims. On the first business day after the DIP Lender gives such notice, notwithstanding anything in the DIP Credit Agreement to the contrary, including with respect to the existence of a Default (as defined in the DIP Credit Agreement) or Event of Default, the failure of the Debtors to satisfy any or all of the conditions precedent for DIP Loans under the DIP Facility, any termination of the DIP Commitment following an Event of Default, or the occurrence of the Maturity Date, the DIP Lender shall be obligated to make DIP Loans to the Borrowers to fully fund the Carve Out Reserves in an amount not to exceed the aggregate undrawn amount of DIP Commitment. All funds in the Pre-Carve Out Trigger Notice Reserve shall be used first to pay the obligations set forth in clauses (i) through (iii) of the definition of Carve-Out set forth above (the “**Pre-Carve Out Amounts**”), but not, for the avoidance of doubt, the Post-Carve Out Trigger Notice Cap, until paid in full, and then, to the extent the Pre-Carve Out Trigger Notice Reserve has not been reduced to zero, to pay the DIP Lender, unless the DIP Obligations have been indefeasibly paid in full, in

cash, and all DIP Commitments have been terminated, in which case any such excess shall be paid to the Prepetition Secured Lender in accordance with their rights and priorities as set forth in this Interim Order. All funds in the Post-Carve Out Trigger Notice Reserve shall be used first to pay the obligations set forth in clause (iv) of the definition of Carve-Out set forth above (the “**Post-Carve Out Amounts**”), and then, to the extent the Post-Carve Out Trigger Notice Reserve has not been reduced to zero, to pay the DIP Lender, unless the DIP Obligations have been indefeasibly paid in full, in cash, and all DIP Commitments have been terminated, in which case any such excess shall be paid to the Prepetition Secured Lender on account of any Prepetition Bridge Loan Obligations that remain outstanding to the extent not rolled up and converted into DIP Obligations, and then, to the extent all DIP Obligations and Prepetition Bridge Loan Obligations have been indefeasibly paid in full in cash, any excess shall be paid to the Debtors’ estate. Notwithstanding anything to the contrary in the DIP Documents, or this Interim Order, if either of the Carve Out Reserves is not funded in full in the amounts set forth in this paragraph 4, then, any excess funds in one of the Carve Out Reserves following the payment of the Pre-Carve Out Amounts and Post-Carve Out Amounts, respectively, shall be used to fund the other Carve Out Reserve, up to the applicable amount set forth in this paragraph 4, prior to making any payments to the DIP Lender or the Prepetition Secured Lender, as applicable. For the avoidance of doubt and notwithstanding anything to the contrary in this Interim Order, the DIP Facility, or in any Prepetition Loan Document, the Carve-Out shall be senior to all liens and claims securing the DIP Facility, the Adequate Protections and any and all other forms of adequate protection, liens, or claims securing the DIP Obligations or the Prepetition Bridge Loan Obligations.

(c) No Direct Obligation To Pay Allowed Professional Fees. Neither of the DIP Lender nor the Prepetition Secured Lender shall be responsible for the payment or reimbursement of any fees or disbursements of any Professional Person incurred in connection

with the Chapter 11 Cases or any Successor Cases under any chapter of the Bankruptcy Code. Nothing in this Interim Order or otherwise shall be construed to obligate the DIP Lender or the Prepetition Secured Lender, in any way, to pay compensation to, or to reimburse expenses of, any Professional Person or to guarantee that the Debtors have sufficient funds to pay such compensation or reimbursement.

(d) Payment of Carve-Out On or After the Termination Declaration Date. Any payment or reimbursement made on or after the occurrence of the Termination Declaration Date in respect of any Allowed Professional Fees shall permanently reduce the Carve-Out on a dollar-for-dollar basis. Any funding of the Carve-Out shall be added to, and made a part of, the DIP Obligations secured by the DIP Collateral and shall be otherwise entitled to the protections granted under this Interim Order, the DIP Documents, the Bankruptcy Code, and applicable law.

5. *DIP Superpriority Claims.* Pursuant to section 364(c)(1) of the Bankruptcy Code, all of the DIP Obligations, including the DIP Roll-Up Loans, shall constitute allowed superpriority administrative expense claims (the “**DIP Superpriority Claims**”) against the DIP Loan Parties on a joint and several basis (without the need to file any proof of claim) with priority over any and all claims against the DIP Loan Parties (but for the avoidance of doubt, junior to the Carve-Out), now existing or hereafter arising, of any kind whatsoever, including, without limitation, all administrative expenses of the kind specified in sections 503(b) and 507(b) of the Bankruptcy Code and any and all administrative expenses or other claims arising under sections 105, 326, 327, 328, 330, 331, 365, 503(b), 506(c) (subject to entry of a Final Order), 507(a), 507(b), 726, 1113, or 1114 of the Bankruptcy Code (including the Adequate Protection Obligations (defined below)), whether or not such expenses or claims may become secured by a judgment lien or other non-consensual lien, levy or attachment. The DIP Superpriority Claims shall be payable from, and have recourse to, all prepetition and postpetition property of the DIP Loan Parties and all proceeds

thereof, including upon entry of a Final Order proceeds or property recovered, whether by judgment, settlement or otherwise (“**Avoidance Proceeds**”) as a result of any claims and causes of action under sections 502(d), 544, 545, 547, 548 and 550 of the Bankruptcy Code, or any other avoidance actions under the Bankruptcy Code (collectively, the “**Avoidance Actions**”), but excluding the Carve-Out Reserves and amounts held therein other than the Debtors’ reversionary interest therein, and subject only to the Carve-Out. The DIP Superpriority Claims shall be entitled to the full protection of section 364(e) of the Bankruptcy Code in the event that this Interim Order or any provision hereof is vacated, reversed or modified, on appeal or otherwise.

6. *DIP Liens.* As security for the DIP Obligations, effective and automatically properly perfected on the date this Interim Order is entered, and without the necessity of execution, recordation or filing of any perfection document or instrument, or the possession or control by the DIP Lender of, or over, any Collateral (as defined under the DIP Credit Agreement), without any further action by the DIP Lender, the following valid, binding, continuing, fully perfected, enforceable and non-avoidable security interests and liens (the “**DIP Liens**”) are hereby granted to the DIP Lender (all property identified in clauses (a) through (c) below being collectively referred to as the “**DIP Collateral**,” and, together with the Prepetition Collateral, the “**Collateral**”):

(a) *Liens on Unencumbered Property.* Pursuant to section 364(c)(2) of the Bankruptcy Code, a first priority lien on and security interest in (subject only to the Carve-Out) all tangible and intangible prepetition and postpetition property of the DIP Loan Parties, whether existing on the Petition Date or thereafter acquired, and the proceeds, products, rents, and profits thereof, that, on or as of the Petition Date, is not subject to (i) a valid, perfected and non-avoidable lien or (ii) a valid and non-avoidable lien in existence as of the Petition Date that is perfected subsequent to the Petition Date as permitted by section 546(b) of the Bankruptcy Code, including

upon entry of a Final Order Avoidance Actions and Avoidance Proceeds, but excluding Carve-Out Reserves (and any amounts held therein) (collectively, the “**Unencumbered Property**”).

(b) *Liens Priming the Prepetition Secured Lender’s Liens.* Pursuant to section 364(d)(1) of the Bankruptcy Code, a valid, binding, continuing, enforceable, fully-perfected first priority senior priming security interest (subject to the Carve-Out) in, and lien upon, all tangible and intangible prepetition and postpetition property of the DIP Loan Parties of the same nature, scope, and type as the Prepetition Collateral, regardless of where located (the “**DIP Priming Liens**”). Notwithstanding anything herein to the contrary, the DIP Priming Liens shall be (A) senior in all respects to the Prepetition Liens on the Prepetition Collateral, (B) senior to any Adequate Protection Liens on the Prepetition Collateral and (C) not subordinate to any lien, security interest or mortgage that is avoided and preserved for the benefit of the Debtors and their estates under section 551 of the Bankruptcy Code. The Prepetition Liens with respect to the Prepetition Collateral shall be primed by and made subject and subordinate to the DIP Priming Liens.

(c) *Liens Junior to Certain Other Liens.* Pursuant to section 364(c)(3) of the Bankruptcy Code, a valid, binding, continuing, enforceable, fully perfected security interest in and lien upon all tangible and intangible prepetition and postpetition property of the DIP Loan Parties that, on or as of the Petition Date, is subject to any Prepetition Permitted Liens, which shall be immediately junior and subordinate to any such Prepetition Permitted Liens, *provided*, that with respect to Prepetition Collateral subject to any Prepetition Permitted Liens of Bay View, upon the Obligations (as defined under the Prepetition Factoring Agreement) that are secured by an existing prepetition security interest in favor of Bay View first reaching a zero balance, then the DIP Liens granted to the DIP Lender shall be elevated to rank senior to the Prepetition Permitted Liens of Bay View.

(d) *No Senior Liens.* The DIP Liens shall not be (i) subject or subordinate to or made *pari passu* with (A) any lien or security interest that is avoided and preserved for the benefit of the Debtors or their estates under section 551 of the Bankruptcy Code, (B) unless otherwise provided for in the DIP Documents or in this Interim Order, any liens or security interests arising after the Petition Date, including, without limitation, any liens or security interests granted in favor of any federal, state, municipal or other governmental unit (including any regulatory body), commission, board or court for any liability of the DIP Loan Parties, or (C) any intercompany liens; or (ii) subordinated to or made *pari passu* with any other lien or security interest under section 363 or 364 of the Bankruptcy Code.

7. *Protection of DIP Lender's and Prepetition Secured Lender's Rights.*

(a) The Debtors shall at all times comply with the Approved Budget, subject to the Permitted Variances (as defined below). Commencing on the second Thursday after the date of entry of the Interim Order, and on a weekly basis thereafter on each applicable Thursday, or the successive business day if such Thursday is not a business day, a “**Variance Report Date**”), the Debtors shall deliver by email to the DIP Lender a variance report (each, a “**Budget Variance Report**”) for the immediately preceding two-week Variance Period (as defined below), comparing, in each case not to exceed 15% (the “**Permitted Variances**”), (i) actual aggregate cumulative cash disbursements for such Variance Period to the projected disbursements for such Variance Period (without consideration of Allowed Professional Fees to be paid during such Variance Period) and (ii) actual aggregate cumulative cash receipts for such Variance Period to the projected cash receipts for such Variance Period, and in each case, set forth in the Budget for such two-week look-back period (each such period, a “**Variance Period**”). For clarity, the Permitted Variances do not increase in any way, the DIP Lender's obligation to increase the amount of the DIP Facility.

(b) The Debtors shall provide (a) counsel to the Prepetition Secured Lender, and (b) advisors to the Committee, if one is appointed, with all reporting and other information required to be provided to the DIP Lender under the DIP Documents. In addition to, and without limitation, whatever rights to access the DIP Lender has under the DIP Documents, upon reasonable notice, at reasonable times during normal business hours, the Debtors shall permit representatives, agents and employees of the DIP Lender to (i) have access to and inspect the Debtors' assets, (ii) visit and inspect any of the Debtors' respective properties, to tour the Debtors' business premises and other properties, to discuss, and provide advice with respect to, their respective affairs, finances, properties, business operations, and accounts with their respective officers, employees, independent public accountants, and other professional advisors, (iii) examine the Debtors' books and records, and (iv) discuss the Debtors' affairs, finances and condition with the Debtors' officers and financial advisors.

(c) The automatic stay of section 362 of the Bankruptcy Code is hereby modified and vacated to the extent necessary to permit the Debtors, the DIP Lender and the Prepetition Secured Lender to accomplish the transactions contemplated by this Interim Order.

8. *Limitation on Charging Expenses Against Collateral.* Subject to entry of a Final Order, except to the extent of the Carve-Out, no costs or expenses of administration of these cases or any Successor Case or any future proceeding that may result therefrom, including liquidation in bankruptcy or other proceeding under the Bankruptcy Code, shall be charged against or recovered from the DIP Collateral or Prepetition Collateral (in each case, including Cash Collateral) pursuant to section 506(c) of the Bankruptcy Code or any similar principle of law, without the prior written consent of the DIP Lender and the Prepetition Secured Lender, and no consent shall be implied from any action, inaction or acquiescence by any of the DIP Lender or Prepetition Secured Lender, and nothing contained in this Interim Order shall be deemed to be a consent by the DIP Lender or

Prepetition Secured Lender to any charge, lien, assessment or claims against the Collateral under section 506(c) of the Bankruptcy Code or otherwise.

9. *No Marshaling.* In no event shall the DIP Lender or the Prepetition Secured Lender be subject to the equitable doctrine of “marshaling” or any similar doctrine with respect to the DIP Collateral, the DIP Obligations, the Prepetition Bridge Loan Obligations, or the Prepetition Collateral, as applicable. Further, in no event shall the “equities of the case” exception in section 552(b) of the Bankruptcy Code apply to the Prepetition Secured Lender; *provided* that the foregoing waiver shall be without prejudice to any provisions of the Final Order.

10. *Payments Free and Clear.* Any and all payments or proceeds remitted to the DIP Lender or Prepetition Secured Lender pursuant to the provisions of this Interim Order, the DIP Documents or any subsequent order of the Court shall be irrevocable, received free and clear of any claim, charge, assessment or other liability, including without limitation, any such claim or charge arising out of or based on, directly or indirectly, sections 506(c) or 552(b) of the Bankruptcy Code, whether asserted or assessed by through or on behalf of the Debtors.

11. *Use of Cash Collateral.* The Debtors are hereby authorized, solely on the terms and conditions of this Interim Order, to use all Cash Collateral in accordance with the DIP Documents and Approved Budget (subject to the Permitted Variances).

12. *Adequate Protection of Prepetition Secured Lender.* Pursuant to sections 361, 362, 363(e), 364(d)(1) and 507 of the Bankruptcy Code, as adequate protection of the Prepetition Secured Lender’s interests in the Prepetition Collateral (including Cash Collateral) for the aggregate Diminution in Value and as an inducement to consent to the priming of the Prepetition Liens, the use of its Cash Collateral and the imposition of the Carve-Out, the Prepetition Secured Lender is granted the following Adequate Protection (collectively, the “**Adequate Protection Obligations**”):

(a) *Adequate Protection Liens.* The Prepetition Secured Lender is hereby granted, effective and perfected upon the date of this Interim Order and without the necessity of the execution of any mortgages, security agreements, pledge agreements, financing statements or other agreements, a valid, perfected replacement security interest in and lien on account of the Prepetition Secured Lender's Diminution in Value upon all of the DIP Collateral (the "**Adequate Protection Liens**"), subject and subordinate to (A) the DIP Liens, (B) the Prepetition Permitted Liens, if any, (C) with respect to the DIP Collateral of Debtor EPI Health and its estate, the Bay View Adequate Protection Liens, and (D) the Carve-Out.

(b) *Prepetition Secured Lender's Adequate Protection Superpriority Claim.* The Prepetition Secured Lender is hereby granted an allowed superpriority administrative expense claim against the DIP Loan Parties on a joint and several basis (without the need to file any proof of claim) on account of the Prepetition Secured Lender's Diminution in Value under section 507(b) of the Bankruptcy Code (the "**Adequate Protection Superpriority Claim**") which Adequate Protection Superpriority Claim shall be payable from and have recourse to all DIP Collateral and all proceeds thereof. The Adequate Protection Superpriority Claim shall be subject and subordinate only to (i) the Carve-Out, (ii) the DIP Superpriority Claims, and (iii) the Prepetition Permitted Liens, if any.

(c) *Prepetition Secured Lender Fees and Expenses.* As further adequate protection, subject solely to the Carve-Out, the DIP Loan Parties shall currently pay to the Prepetition Secured Lender, in cash, all reasonable and documented prepetition and postpetition fees and out-of-pocket expenses of the Prepetition Secured Lender's advisors, including, without limitation, those of Morgan, Lewis & Bockius LLP and local legal counsel (if any) (collectively, the "**Adequate Protection Fees and Expenses**"), subject to the review procedures set forth in paragraph 2(c)(iv) of this Interim Order;

(d) *Postpetition Interest Payments.* From and after entry of this Interim Order, to the extent that the DIP Roll-Up Loans is less than the full amount of the Prepetition Bridge Loan Obligations outstanding as of the Petition Date, the Prepetition Secured lender shall receive current cash payment during the Chapter 11 Cases of all accrued interest on the then outstanding Prepetition Bridge Loan Obligations as such interest becomes due and payable at the Contract Rate (as defined in the Prepetition Credit Agreement as in effect on the Petition Date).

13. *Adequate Protection of Bay View.* Pursuant to sections 361 and 363(e) of the Bankruptcy Code, as adequate protection of its interests in the Prepetition Collateral (including Cash Collateral) of Debtor EPI Health and its estate for the aggregate Diminution in Value (if any), the use of Cash Collateral of Debtor EPI Health, and the imposition of the Carve-Out, Bay View is granted the following Adequate Protection:

(a) *Bay View Adequate Protection Liens.* Bay View is hereby granted, effective and perfected upon the date of this Interim Order and without the necessity of the execution of any mortgages, security agreements, pledge agreements, financing statements or other agreements, a valid, perfected replacement security interest in and lien on account of Bay View's Diminution in Value (if any) upon the same property of Debtor EPI Health on which Bay View had a perfected, first-priority security interest and lien prior to the Petition Date (the "**Bay View Adequate Protection Liens**"), whether arising prepetition or postpetition, which liens and security interest shall be subordinate only to (A) any Permitted Lien (as defined under the Factoring Agreement) and (B) the Carve-Out.

14. *Perfection of DIP Liens, Adequate Protection Liens and Bay View Adequate Protection Liens.*

(a) Without in any way limiting the validity of the automatic perfection of the DIP Liens, the Adequate Protection Liens and the Bay View Adequate Protection Liens under the

terms of this Interim Order, the DIP Lender, the Prepetition Secured Lender and Bay View are hereby authorized, but not required, to execute in the name of the DIP Loan Parties or the Prepetition Loan Parties (as applicable), as their true and lawful attorneys (with full power of substitution, to the maximum extent permitted by law) and to file or record financing statements, trademark filings, copyright filings, mortgages, notices of lien or similar perfection instruments in any jurisdiction, or take possession of certificated securities, or take any other similar action in a manner not inconsistent herewith to document, validate or perfect the liens and security interests granted to them hereunder (the “**Perfection Actions**”). All such Perfection Actions shall be deemed to have been taken on the date of entry of this Interim Order. The automatic stay shall be modified to the extent necessary to permit the DIP Lender, the Prepetition Secured Lender and Bay View to take any Perfection Action. For the avoidance of doubt, the DIP Liens, the Adequate Protection Liens and the Bay View Adequate Protection Liens shall be deemed valid, perfected, allowed, enforceable, non-avoidable, and not subject to challenge, dispute or subordination, at the time and on the date of entry of this Interim Order, whether or not the DIP Lender, the Prepetition Secured Lender or Bay View take such Perfection Actions.

(b) A certified copy of this Interim Order may, in the discretion of the DIP Lender, the Prepetition Secured Lender and Bay View, be filed or recorded in the filing or recording offices in addition to or in lieu of any financing statements, mortgages, notices of lien or similar instruments, and all filing and recording offices are hereby authorized and directed to accept a certified copy of this Interim Order for filing and/or recording, as applicable.

15. *Preservation of Rights Under this Interim Order.*

(a) Other than the claims and liens expressly granted or permitted by this Interim Order, including the Carve-Out, no claim or lien having a priority superior to or *pari passu* with those granted by this Interim Order shall be permitted while any of the DIP Obligations or

the Adequate Protection Obligations remain outstanding, and, except as otherwise expressly provided in or permitted under this Interim Order, the DIP Liens and the Adequate Protection Liens shall not be: (i) junior to any lien or security interest that is avoided and preserved for the benefit of the Debtors' estates under section 551 of the Bankruptcy Code; (ii) subordinated to or made *pari passu* with any other lien or security interest, whether under section 364(d) of the Bankruptcy Code or otherwise; (iii) subordinated to or made *pari passu* with any liens arising after the Petition Date including, without limitation, any liens or security interests granted in favor of any federal, state, municipal or other domestic or foreign governmental unit (including any regulatory body), commission, board or court for any liability of the DIP Loan Parties; or (iv) junior to any intercompany liens or security interests of the DIP Loan Parties.

(b) No rights, protections or remedies of the DIP Lender or the Prepetition Secured Lender granted by this Interim Order or the DIP Documents shall be limited, modified or impaired in any way by: (i) any actual or purported withdrawal of the consent to the Debtors' authority to continue to use Cash Collateral; (ii) any actual or purported termination of the Debtors' authority to continue to use Cash Collateral; or (iii) the terms of any other order or stipulation related to the Debtors' continued use of Cash Collateral or the provision of adequate protection to any party.

16. *Access to Books and Records.* The Debtors will (i) maintain books, records, and accounts to the extent and as required by the Prepetition Loan Documents and the DIP Documents, (ii) cooperate with, consult with, and provide to the DIP Lender and the Prepetition Secured Lender all such information and documents that any or all of the Debtors are obligated to provide under the Prepetition Loan Documents and the DIP Documents or the provisions of this Interim Order or as otherwise reasonably requested by the DIP Lender and the Prepetition Secured Lender, (iii) during normal business hours, upon reasonable advance notice, permit consultants, advisors and

other representatives (including third party representatives) of the DIP Lender and the Prepetition Secured Lender to visit and inspect any of the Debtors' respective properties, to examine and make abstracts or copies from any of their respective books and records, to conduct a collateral audit and analysis of their respective inventory and accounts, to tour the Debtors' business premises and other properties, and to discuss, and provide advice with respect to, their respective senior management independent public accountants to the extent required by the DIP Documents or the Prepetition Loan Documents, and (iv) permit the DIP Lender, the Prepetition Secured Lender, and their respective consultants, advisors and other representatives, to consult with the Debtors' management and advisors on matters concerning the Debtors' businesses, financial condition, operations and assets, as provided for in the DIP Documents and the Prepetition Loan Documents.

17. *Cash Management.* The Debtors shall maintain their cash management system consistent with the terms and conditions of any interim and/or final order granting the Debtors authorization to continue their cash management systems and certain related relief (as amended, supplemented or otherwise modified, the "**Cash Management Order**"), the DIP Documents, and this Interim Order.

18. *Maintenance of Collateral.* Until the indefeasible payment in full in cash of all DIP Obligations, all Prepetition Bridge Loan Obligations, and the termination of the DIP Commitment, the Debtors shall: (a) insure the DIP Collateral as required under the DIP Documents or the Prepetition Credit Documents, as applicable; and (b) maintain the cash management system consistent with the terms and conditions of the Cash Management Order and the DIP Documents.

19. *Survival.* Notwithstanding any order that may be entered dismissing any of the Chapter 11 Cases under section 1112 of the Bankruptcy Code or converting these cases to a Successor Case: (A) the DIP Superpriority Claims, the Adequate Protection Superpriority Claims, the DIP Liens, the Adequate Protection Liens, and the Prepetition Liens shall continue in full force

and effect, shall maintain their priorities as provided in this Interim Order, and shall remain binding on all parties in interest until all DIP Obligations, Adequate Protection Obligations and Prepetition Bridge Loan Obligations shall have been indefeasibly paid in full in cash; (B) the other rights granted by this Interim Order, including with respect to the Carve-Out, shall not be affected; and (C) this Court shall retain jurisdiction, notwithstanding such dismissal, for the purposes of enforcing the claims, liens and security interests referred to in this paragraph and otherwise in this Interim Order.

(a) If any or all of the provisions of this Interim Order are hereafter reversed, modified, vacated, or stayed, such reversal, modification, vacatur, or stay shall not affect (i) the validity, priority, or enforceability of any DIP Obligations or Adequate Protection Obligations incurred prior to the actual receipt of written notice by the DIP Lender or Prepetition Secured Lender, as applicable, of the effective date of such reversal, modification, vacatur, or stay; or (ii) the validity, priority, and enforceability of the DIP Liens, the Prepetition Liens, the Adequate Protection Liens, and the Carve-Out, each to the fullest extent provided under section 364(e) of the Bankruptcy Code. Notwithstanding any such reversal, modification, vacatur or stay, the DIP Obligations, DIP Liens, Adequate Protection Obligations, Adequate Protection Liens, DIP Superpriority Claims, and the Adequate Protection Superpriority Claims incurred prior to the actual receipt of written notice by the DIP Lender or the Prepetition Secured Lender, as applicable, of the effective date of such reversal, modification, vacatur, or stay shall be governed in all respects by the original provisions of this Interim Order, and the DIP Lender and the Prepetition Secured Lender shall be entitled to, and are hereby granted, all the rights, remedies, privileges and benefits arising under section 364(e) of the Bankruptcy Code.

(b) Except as expressly provided in this Interim Order or in the DIP Documents, the DIP Liens, the DIP Superpriority Claims, the Adequate Protection Liens, the Adequate

Protection Superpriority Claims, and all other rights and remedies of the DIP Lender and the Prepetition Secured Lender granted by this Interim Order and the DIP Documents, as well as the Carve-Out, shall survive, and shall not be modified, impaired or discharged by the entry of an order (i) converting or dismissing any of these cases, or terminating the joint administration of these cases; (ii) approving the sale of any DIP Collateral pursuant to section 363(b) of the Bankruptcy Code (except to the extent permitted by the DIP Documents); or (iii) confirming a chapter 11 plan in any of the Chapter 11 Cases. The terms and provisions of this Interim Order and the DIP Documents shall continue in full force and effect in these Chapter 11 Cases and in any Successor Cases until all DIP Obligations and Adequate Protection Obligations are indefeasibly paid in full in cash, the DIP Commitments have been terminated, and all Prepetition Bridge Loan Obligations have been indefeasibly paid in full in cash.

20. *Termination Event.* On the applicable Termination Date (as defined below), all DIP Obligations shall be immediate due and payable and, all DIP Commitment under the DIP Facility will terminate.

(a) Until the DIP Obligations are indefeasibly paid in full and all commitments thereunder are terminated, the occurrence of any of the following events, unless waived by the DIP Lender in writing (which may be by electronic mail) and in accordance with the terms of the DIP Documents, shall constitute an event of default (collectively, the “**Events of Default**”):

- (i) the failure of the Debtors to perform, in any material respect, any of the terms, provisions, conditions, covenants or obligations under this Interim Order, including, without limitation, failure to make any payment under this Interim Order when due or comply with any Milestones;

- (ii) the occurrence and continuation of any Events of Default under, and as defined in, the DIP Credit Agreement or any other DIP Documents; and
- (iii) the Debtors' failure to comply with the terms of this Interim Order shall constitute Events of Default.

(b) As a condition to the DIP Facility and the use of Cash Collateral, the Debtors have agreed to the following milestones (the "**Milestones**"):

- (i) No later than five (5) business days after the Petition Date, entry by the Court of this Interim Order;
- (ii) No later than twenty-five (25) calendar days after the Petition Date, entry by the Court of an order approving the Asset Purchase Agreement and the Bidding Procedures (as defined in the DIP Credit Agreement) for the Purchased Assets;
- (iii) No later than twenty-five (25) calendar days after the Petition Date, entry by the Court of the Final Order;
- (iv) No later than forty-two (42) calendar days after the Petition Date, the submission deadline for all bids for the sale of the Purchased Assets as set forth in the Bidding Procedures;
- (v) No later than forty-five (45) calendar days after the Petition Date, holding an auction (if necessary) for the sale of the Purchased Assets as set forth in the Bidding Procedures;
- (vi) No later than fifty-five (55) calendar days after the Petition Date, entry by the Court of the Sale Order (as defined in the Asset Purchase Agreement); and

- (vii) No later than seventy (70) calendar days after the Petition Date, consummation of the sale of Purchased Assets.

For the avoidance of doubt, unless waived in writing by the DIP Lender in its sole discretion, the failure of the Debtors to meet the Milestones by the applicable specified deadlines set forth herein shall constitute an Event of Default under the DIP Documents and this Interim Order.

21. *Rights and Remedies Upon Event of Default.* Upon the occurrence and during the continuation of an Event of Default, notwithstanding the provisions of Bankruptcy Code section 362, without any application, motion or notice to, hearing before, or order from the Court, and subject only to the terms of this Interim Order: (a) the DIP Lender may send a written notice to the Debtors, counsel to the Committee (if any), and the U.S. Trustee (any such notice shall be referred to herein as a “**Termination Declaration**”), which shall be filed on the docket of the Chapter 11 Cases, declaring (1) all DIP Obligations owing under the DIP Documents to be immediately due and payable, (2) the DIP Commitment of the DIP Lender to be terminated, whereupon such commitments and obligation shall be terminated to the extent any such commitment remains under the DIP Facility, (3) the termination of the DIP Facility and the DIP Documents as to any future liability or obligation of the DIP Lender other than those contained in para 4.b. hereof with respect to funding the Carve-out Reserves, but without affecting any of the DIP Liens or the DIP Obligations, and (4) the application of the Carve-Out has occurred following the delivery of the Carve Out Trigger Notice to the Debtors; (b) interest, including, where applicable, default interest, shall accrue and be paid as set forth in the DIP Documents; and (c) upon delivery of the Termination Declaration, the DIP Lender shall be deemed to have declared a termination, reduction, or restriction on the ability of the Debtors to use Cash Collateral, other than to pay expenses set forth in the Approved Budget that are necessary to avoid immediate and irreparable harm to the Debtors’ estates absent further order of the Court. The earliest date on which a

Termination Declaration is delivered by the DIP Lender and filed on the docket shall be referred to herein as the “**Termination Date.**” Following a Termination Date, neither the DIP Lender nor the Prepetition Secured Lender shall be required to consent to the use of any Cash Collateral or provide any loans or other financial accommodations under the DIP Facility, absent further order of the Court. The Termination Declaration shall be given by electronic mail (or other electronic means) to counsel to the Debtors, counsel to the Committee (if appointed) and the U.S. Trustee.

22. *Emergency Hearing.* Upon the delivery of a Termination Declaration, the Debtors, the Committee (if appointed), the DIP Lender, and the Prepetition Secured Lender consent to a hearing on an emergency basis regarding, among other things, such Termination Declaration. During the five (5) business days following the date that a Termination Declaration is delivered (such five (5) business day period, the “**Remedies Notice Period**”), the Debtors shall continue to have the right to use Cash Collateral in accordance with the terms of the Interim Order, solely to pay necessary expenses set forth in the Approved Budget to avoid immediate and irreparable harm to the Estates. At the end of the Remedies Notice Period, unless the Court has entered an order to the contrary, the Debtors’ right to use Cash Collateral shall immediately cease, unless otherwise provided herein and the DIP Lender shall have the rights set forth immediately below.

23. *Certain Rights and Remedies Following Termination Date.* Following the Termination Date and upon either the expiration of the Remedies Notice Period or pursuant to an order of the Court (which may authorize the remedies set forth in this paragraph or any other appropriate remedy as then determined by the Court) upon an emergency motion by the DIP Lender to be heard on no less than three (3) business days’ notice (and the Debtors shall not object to such shortened notice) (the “**Termination Enforcement Order**”), the DIP Lender shall be entitled to exercise all rights and remedies in accordance with the DIP Documents, the DIP Orders and applicable law and shall be permitted to satisfy the relevant DIP Obligations and DIP Liens

based on the priorities set forth in the DIP Documents, subject to the Carve-Out and any Prepetition Permitted Liens. Following entry of the Termination Enforcement Order, except as otherwise ordered by the Court (including in any Termination Enforcement Order): (a) the Debtors are hereby authorized and directed to, with the exclusion of the Carve-Out, remit to the DIP Lender one-hundred percent (100%) of all collections, remittances, and proceeds of the DIP Collateral in accordance with the DIP Documents; (b) the DIP Lender may compel the Debtors to seek authority to, (i) sell or otherwise dispose of all or any portion of the DIP Collateral (or any other property of the Debtors to the extent a lien is not permitted by law to attach to such property, the proceeds of which are DIP Collateral) pursuant to section 363 of the Bankruptcy Code (or any other applicable provision) on terms and conditions pursuant to sections 363, 365, and other applicable provisions of the Bankruptcy Code, and (ii) assume and assign any lease or executory contract included in the DIP Collateral to the DIP Lender's designees in accordance with and subject to section 365 of the Bankruptcy Code, (c) the DIP Lender may direct the Debtors to (and the Debtors shall comply with such direction to) dispose of or liquidate the DIP Collateral (or any other property of the Debtors to the extent a lien is not permitted by law to attach to such property, the proceeds which are DIP Collateral) via one or more sales of such DIP Collateral or property and/or the monetization of other DIP Collateral or property, (d) the DIP Lender may, or may direct the Debtors to (and the Debtors shall comply with such direction to), collect accounts receivable, without setoff by any account debtor, (e) the DIP Lender shall be authorized to succeed to any of the Debtors' rights and interests under any licenses for the use of any intellectual property in order to complete the production and sale of any inventory with respect to the DIP Collateral, and (f) the Debtors shall take all action that is reasonably necessary to cooperate with the DIP Lender in the exercise of their rights and remedies and to facilitate the realization of the DIP Collateral by the DIP Lender as set forth in the DIP Documents.

24. *Discharge.* Except as otherwise agreed in writing by the DIP Lender and the Prepetition Secured Lender, the DIP Obligations and the Adequate Protection Obligations of the Debtors shall not be discharged by the entry of an order confirming any plan of reorganization in any of the Chapter 11 Cases, notwithstanding the provisions of section 1141(d) of the Bankruptcy Code, unless such obligations have been indefeasibly paid in full in cash, on or before the effective date of such confirmed plan of reorganization. If any of the Debtors propose or support any plan of reorganization or sale of all or substantially all of the Debtors' assets, or order confirming such plan or approving such sale, that is not conditioned upon the indefeasible payment (including by credit bid) of the DIP Obligations, the Prepetition Bridge Loan Obligations, and the payment of the Debtors' Adequate Protection Obligations, in full in cash within a commercially reasonable period of time (and in no event later than the effective date of such plan of reorganization or sale) (a "**Prohibited Plan or Sale**") without the written consent of the DIP Lender and the Prepetition Secured Lender, the Debtors' proposal or support of a Prohibited Plan or Sale, or the entry of an order with respect thereto, shall constitute an Event of Default hereunder.

25. *Effect of Stipulations on Third Parties.* The Debtors' stipulations, admissions, agreements and releases contained in Paragraph G of this Interim Order shall be binding upon the Debtors in all circumstances and for all purposes. The Debtors' stipulations, admissions, agreements and releases contained in Paragraph G of this Interim Order shall be binding upon all other parties in interest, including, without limitation, any statutory or non-statutory committees appointed or formed in these cases and any other person or entity acting or seeking to act on behalf of the Debtors' estates, including any chapter 7 or chapter 11 trustee or examiner appointed or elected for any of the Debtors, in all circumstances and for all purposes unless: (a) such committee or other party in interest with requisite standing has timely filed an adversary proceeding or contested matter (subject to the limitations contained herein) by no later than seventy-five (75)

calendar days following entry of the Interim Order (the “**Challenge Period**”), (A) objecting to or challenging the amount, validity, perfection, enforceability, priority or extent of the Prepetition Bridge Loan Obligations or the Prepetition Liens, or (B) asserting or prosecuting any Avoidance Action or any other claims, counterclaims or causes of action, objections, contests or defenses (collectively, the “**Challenges**”) against the Prepetition Secured Lender or its respective subsidiaries, affiliates, officers, directors, managers, principals, employees, agents, financial advisors, attorneys, accountants, investment bankers, consultants, representatives and other professionals and the respective successors and assigns thereof, in each case in their respective capacity as such (collectively, the “**Representatives**”) in connection with or related to the Prepetition Loan Documents, the Prepetition Bridge Loan Obligations, the Prepetition Liens and the Prepetition Collateral; and (b) there is a final non-appealable order in favor of the plaintiff sustaining any such Challenge; *provided, however*, that any pleadings filed in connection with a Challenge shall set forth with specificity the basis for such Challenge and any Challenges not so specified prior to the expiration of the Challenge Period shall be deemed forever waived, released and barred. If no Challenge is timely and properly filed during the Challenge Period or the Court does not rule in favor of the plaintiff in any such Challenge then: (1) the Debtors’ stipulations, admissions, agreements and releases contained in this Interim Order shall be binding on all parties in interest; (2) the obligations of the Prepetition Loan Parties under the Prepetition Loan Documents shall constitute allowed claims not subject to defense avoidance, reduction, setoff, recoupment, recharacterization, subordination (whether equitable, contractual, or otherwise), disallowance, impairment, counterclaim, cross-claim, or any other challenge under the Bankruptcy Code or any applicable law or regulation by any person or entity for all purposes in these cases and any Successor Case(s); (3) the Prepetition Liens shall be deemed to have been, as of the Petition Date, legal, valid, binding, perfected, security interests and liens, not subject to defense,

avoidance, reduction, setoff, recoupment, recharacterization, subordination (whether equitable, contractual or otherwise), disallowance, impairment, counterclaim, cross-claim, or any other challenge under the Bankruptcy Code or any applicable law or regulation by any person or entity, including any statutory or non-statutory committees appointed or formed in these cases or any other party in interest acting or seeking to act on behalf of the Debtors' estates, including, without limitation, any chapter 7 or chapter 11 trustee or examiner, and any defense, avoidance, reduction, setoff, recoupment, recharacterization, subordination (whether equitable, contractual, or otherwise), disallowance, impairment, counterclaim, cross-claim, or any other challenge under the Bankruptcy Code or any applicable law or regulation by any statutory or non-statutory committees appointed or formed in these cases or any other party acting or seeking to act on behalf of the Debtors' estates, including, without limitation, any chapter 7 or chapter 11 trustee or examiner, whether arising under the Bankruptcy Code or otherwise, against the Prepetition Secured Lender and its Representatives shall be deemed forever waived, released and barred. If any Challenge is timely filed during the Challenge Period, the stipulations, admissions, agreements and releases contained in Paragraph G of this Interim Order shall nonetheless remain binding and preclusive (as provided in the second sentence of this paragraph) on each person or entity, except to the extent that such stipulations, admissions, agreements and releases were expressly and successfully challenged in such Challenge as set forth in a final, non-appealable order of a court of competent jurisdiction. Nothing in this Interim Order vests or confers on any person or entity (each as defined in the Bankruptcy Code), including any statutory or non-statutory committees appointed or formed in these cases, standing or authority to pursue any claim or cause of action belonging to the Debtors or their estates, including, without limitation, any Challenges with respect to the Prepetition Loan Documents, Prepetition Bridge Loan Obligations or Prepetition Liens, and any ruling on standing,

if appealed, shall not stay or otherwise delay confirmation of any plan of reorganization in these cases.

26. *Limitation on Use of DIP Financing Proceeds and Collateral.* Notwithstanding any other provision of this Interim Order or any other order entered by the Court, no DIP Loans, DIP Collateral, Prepetition Collateral (including Cash Collateral) or any portion of the Carve-Out, may be used directly or indirectly, including without limitation through reimbursement of professional fees of any non-Debtor party, in connection with (a) the investigation, threatened initiation or prosecution of any claims, causes of action, adversary proceedings or other litigation (i) against the DIP Lender, or the Prepetition Secured Lender, or their respective Representatives (in their capacities as such), or any action purporting to do the foregoing in respect of the DIP Obligations, DIP Liens, DIP Superpriority Claims, Prepetition Bridge Loan Obligations, Adequate Protection Liens, or Adequate Protection Superpriority Claims or (ii) challenging the amount, validity, perfection, priority or enforceability of or asserting any defense, counterclaim or offset with respect to the DIP Obligations, the Prepetition Bridge Loan Obligations and/or liens, claims, rights, or security interests securing or supporting the DIP Obligations granted under the DIP Orders, the DIP Documents or the Prepetition Loan Documents in respect of the Prepetition Bridge Loan Obligations, including, in the case of each (i) and (ii), without limitation, for lender liability or pursuant to sections 105, 510, 544, 547, 548, 549, 550 or 552 of the Bankruptcy Code, applicable non-bankruptcy law or otherwise (provided that, notwithstanding anything to the contrary herein, the proceeds of the DIP Loans and DIP Collateral (including Cash Collateral) may be used by the Committee to investigate, but not to prosecute, (A) the claims and liens of the Prepetition Secured Lender and (B) potential claims, counterclaims, causes of action or defenses against the Prepetition Secured Lender, up to an aggregate cap of no more than \$50,000 (the “**Investigation Cap**”), (b) attempts to prevent, hinder, or otherwise delay or interfere with the Prepetition Secured Lender’s

or the DIP Lender's, as applicable, enforcement or realization on the Prepetition Bridge Loan Obligations, Prepetition Collateral, DIP Obligations, DIP Collateral, as applicable, and the liens, claims and rights granted to such parties under the DIP Orders; (c) attempts to seek to modify any of the rights and remedies granted to the Prepetition Secured Lender or the DIP Lender under this Interim Order, the Prepetition Loan Documents or the DIP Documents, as applicable, other than in accordance with this Interim Order; (d) to apply to the Court for authority to approve superpriority claims or grant liens (other than the liens and claims permitted by the DIP Documents) or security interests in the DIP Collateral or any portion thereof that are senior to, or on parity with, the DIP Liens, DIP Superpriority Claims, Adequate Protection Liens and Adequate Protection Superpriority Claims; or (e) to pay or to seek to pay any amount on account of any claims arising prior to the Petition Date unless such payments are authorized by the Court, agreed to in writing by the DIP Lender, expressly permitted under this Interim Order or under the DIP Documents (including the Approved Budget, subject to permitted variances), in each case unless all DIP Obligations, Prepetition Bridge Loan Obligations, Adequate Protection Obligations, and claims granted to the DIP Lender and Prepetition Secured Lender under this Interim Order, have been paid in full in cash or otherwise agreed to in writing by the DIP Lender and the Prepetition Secured Lender, as applicable.

27. *Interim Order Governs.* In the event of any inconsistency between the provisions of this Interim Order, the DIP Documents or Prepetition Loan Documents, the provisions of this Interim Order shall govern. Any authorization contained in any other order entered by this Court shall be consistent with and subject to the requirements set forth in this Interim Order and the DIP Documents, including, without limitation, the Approved Budget (subject to the Permitted Variances).

28. *Binding Effect; Successors and Assigns.* Subject to paragraph 25 of this Interim Order where applicable, the DIP Documents and the provisions of this Interim Order, including all findings herein, shall be binding upon all parties in interest in these cases, including, without limitation, the DIP Lender, the Prepetition Secured Lender, any statutory or non-statutory committees appointed or formed in these cases, the Debtors and their respective successors and assigns (including any chapter 7 or chapter 11 trustee hereinafter appointed or elected for the estate of any of the Debtors, an examiner appointed pursuant to section 1104 of the Bankruptcy Code, or any other fiduciary appointed as a legal representative of any of the Debtors or with respect to the property of the estate of any of the Debtors) and shall inure to the benefit of the DIP Lender, the Prepetition Secured Lender, the Debtors, and their respective successors and assigns; *provided that* the DIP Lender and the Prepetition Secured Lender shall have no obligation to permit the use of the Prepetition Collateral (including Cash Collateral) by, or to extend any financing to, any chapter 7 trustee or chapter 11 trustee or similar responsible person appointed for the estates of the Debtors.

29. Nothing in this Interim Order, the DIP Documents, the Prepetition Loan Documents or any other documents related to the transactions contemplated hereby shall in any way be construed or interpreted to impose or allow the imposition upon the DIP Lender or the Prepetition Secured Lender any liability for any claims arising from the prepetition or postpetition activities of the Debtors in the operation of their businesses, or in connection with their restructuring efforts. The DIP Lender and Prepetition Secured Lender shall not, in any way or manner, be liable or responsible for (i) the safekeeping of the DIP Collateral or Prepetition Collateral, (ii) any loss or damage thereto occurring or arising in any manner or fashion from any cause, (iii) any diminution in the value thereof or (iv) any act or default of any carrier, servicer, bailee, custodian, forwarding agency or other person, and all risk of loss, damage or destruction of the DIP Collateral or Prepetition Collateral shall be borne by the Debtors.

30. *Limitation of Liability.* In determining to make any loan or other extension of credit under the DIP Documents, to permit the use of the DIP Collateral or Prepetition Collateral (including Cash Collateral) or in exercising any rights or remedies as and when permitted pursuant to this Interim Order or the DIP Documents or Prepetition Loan Documents, as applicable, none of the DIP Lender or Prepetition Secured Lender shall (a) have any liability to any third party or be deemed to be in “control” of the operations of the Debtors; (b) owe any fiduciary duty to the Debtors, their respective creditors, shareholders or estates; or (c) be deemed to be acting as a “Responsible Person” or “Owner” or “Operator” or “managing agent” with respect to the operation or management of any of the Debtors (as such terms or similar terms are used in the United States Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9601, *et seq.*, as amended, or any other federal or state statute, including the Internal Revenue Code). Furthermore, nothing in this Interim Order shall in any way be construed or interpreted to impose or allow the imposition upon any of the DIP Lender or Prepetition Secured Lender of any liability for any claims arising from the prepetition or postpetition activities of any of the Debtors and their respective Representatives.

31. *Proofs of Claim.* Notwithstanding any order entered by this Court in relation to the establishment of a bar date in any of these Chapter 11 Cases or any Successor Cases, the Prepetition Secured Lender shall not be required to file proofs of claim in these cases or any Successor Cases in order to assert claims for payment of any of the Prepetition Bridge Loan Obligations, including, without limitation, any principal, unpaid interest, fees, expenses and other amounts payable under the Prepetition Loan Documents or this Interim Order. The Debtors’ stipulations, admissions and acknowledgments of the claim and liens in respect of the Prepetition Bridge Loan Obligations set forth in this Interim Order is deemed to constitute timely proofs of claim in respect of all indebtedness, secured status and claims arising under the Prepetition Loan Documents and this

Interim Order. The provisions of this paragraph 31 are intended solely for the purpose of administrative convenience and shall not affect the right of the Prepetition Secured Lender (or its successors in interest) to vote on any plan filed in these Chapter 11 Cases. The DIP Lender shall not be required to file proofs of claim with respect to the DIP Obligations.

32. *Insurance.* Upon entry of this Interim Order and to the fullest extent provided by applicable law, the DIP Lender shall be, and shall be deemed to be, without any further action or notice, named as additional insured and loss payee on each insurance policy maintained by the Debtors that in any way relates to the DIP Collateral.

33. *Allocation and Payment of All Sale Proceeds to Ligand to Pay DIP Obligations and Prepetition Bridge Loan Obligations.* In connection with any sale or other disposition of the Debtors' or their estates' assets, including any sales occurring under or pursuant to section 363 of the Bankruptcy Code, any plan of reorganization or plan of liquidation under section 1129 of the Bankruptcy Code, or a sale or disposition by a chapter 7 trustee for any of the Debtors under section 725 of the Bankruptcy Code (any of the foregoing sales or dispositions, a "Sale"), all proceeds from any such Sale shall be paid over to Ligand first to repay the DIP Obligations in full and thereafter to pay the Prepetition Bridge Loan Obligations (if such obligations have not been converted to DIP Roll-Up Loans pursuant to a Final Order) after which the residual sale proceeds, if any, shall be held by the Debtors or the chapter 7 trustee (if appointed) until further order of the Court.

34. *Preservation of 363(k) Rights.* For the avoidance of doubt, nothing in this Interim Order shall eliminate or otherwise impair Ligand's rights, in its capacity as a pre-petition secured lender and/or post-petition secured lender, including without limitation, the DIP Lender and/or the Prepetition Secured Lender, which rights are expressly reserved, preserved, and authorized hereby, to credit bid up to the full amount of the DIP Obligations, inclusive of the DIP Roll-Up Loans (and

to the extent applicable, the Prepetition Bridge Loan Obligations), pursuant to section 363(k) of the Bankruptcy Code. In such case, Ligand shall be considered a “Qualified Bidder” under the Sale Motion and any other bid procedures motion with respect to its rights to acquire all and any of the Debtors’ and their estates’ assets by credit bid and shall not be required to post a good faith deposit in connection with such sale. Ligand also shall have the right, but no obligation, to supplement its credit bid with additional cash consideration such that the amount of additional cash plus the credit bid is the amount of Ligand’s subsequent bid. Ligand shall have the absolute right to assign, transfer, sell, or otherwise dispose of its rights to credit bid as set forth in this paragraph to any acquisition vehicle formed in connection with such credit bid or other designee.

35. *Effectiveness.* Notwithstanding Bankruptcy Rules 4001(a)(3), 6004(h), 6006(d), 7062, or 9014 of the Bankruptcy Rules or any Local Rule, or Rule 62(a) of the Federal Rules of Civil Procedure, this Interim Order shall be immediately effective and enforceable upon its entry and there shall be no stay of execution or effectiveness of this Interim Order.

36. *Headings.* Paragraph headings used herein are for convenience only and shall not affect the construction of, or to be taken into consideration in interpreting, this Interim Order.

37. *Payments Held in Trust.* Except as expressly permitted in this Interim Order or the DIP Documents and except with respect to the DIP Loan Parties, in the event that any person or entity receives any payment on account of a security interest in the DIP Collateral, receives any DIP Collateral or any proceeds of the DIP Collateral or receives any other payment with respect thereto from any other source prior to indefeasible payment in full in cash of all DIP Obligations and termination of all DIP Commitments, such person or entity shall be deemed to have received, and shall hold, any such DIP Collateral or any payment on account or proceeds thereof in trust for the benefit of the DIP Lender and shall immediately turn over such collateral or its proceeds to the

DIP Lender, or as otherwise instructed by this Court, for application in accordance with the DIP Documents and this Interim Order.

38. *Bankruptcy Rules.* The requirements of Bankruptcy Rules 4001, 6003 and 6004, in each case to the extent applicable, are satisfied by the contents of the Motion.

39. *No Third Party Rights.* Except as explicitly provided for herein, this Interim Order does not create any rights for the benefit of any third party, creditor, equity holder or any direct, indirect or incidental beneficiary.

40. *Necessary Action.* The Debtors, the DIP Lender and the Prepetition Secured Lender are authorized to take all reasonable actions as are necessary or appropriate to implement the terms of this Interim Order. The automatic stay is modified to permit affiliates of the Debtors who are not debtors in these cases to take all actions as are necessary or appropriate to implement the terms of this Interim Order.

41. *Retention of Jurisdiction.* This Court shall retain jurisdiction to enforce the provisions of this Interim Order, and this retention of jurisdiction shall survive the confirmation and consummation of any chapter 11 plan for any one or more of the Debtors notwithstanding the terms or provisions of any such chapter 11 plan or any order confirming any such chapter 11 plan.

42. *Final Hearing.* A final hearing to consider the relief requested in the Motion on a final basis shall be held on August __, 2023 at __:__ p.m. (Prevailing Eastern Time).

43. *Objections.* Any objections or responses to the Motion shall be filed on or prior to August __, 2023 at 4:00 p.m. (Prevailing Eastern Time). Any party objecting to the relief sought at the Final Hearing shall file and serve (via mail and e-mail) written objections, which objections shall be served upon (a) the Debtors, (b) counsel to the Debtors; (c) counsel to the DIP Lender and Prepetition Secured Lender, Morgan, Lewis & Bockius LLP, 101 Park Ave., New York, NY 10178, Attn: Craig A. Wolfe, Kristen V. Campana, Jason R. Alderson, and T. Charlie Liu, (c) the

Office of the United States Trustee for the District of Delaware; and (d) if appointed, counsel to the Committee.

44. The Debtors shall promptly serve copies of this Interim Order (which shall constitute adequate notice of the Final Hearing) on the Notice Parties and to any other party that has filed with this Court a request for notices in these cases.

Exhibit 1

DIP Credit Agreement

SUPERPRIORITY DEBTOR IN POSSESSION LOAN AND SECURITY AGREEMENT

THIS SUPERPRIORITY DEBTOR IN POSSESSION LOAN AND SECURITY AGREEMENT (as amended, restated, supplemented or otherwise modified from time to time, “**Agreement**”) is entered into as of July 17, 2023 (“**Effective Date**”), among LIGAND PHARMACEUTICALS, INCORPORATED, a Delaware corporation (together with its successors and assigns, “**Lender**”), NOVAN, INC. a Delaware corporation (“**Novan**”) and EPI Health, LLC, a South Carolina limited liability company (“**EPI**” and, together with Novan, each, a “**Borrower**” and collectively, the “**Borrowers**”).

On July 17, 2023 (the “**Petition Date**”), the Borrowers commenced Chapter 11 case numbers [____], as jointly administered for procedural purposes at Chapter 11 case number [____] (each a “**Case**”, and collectively, the “**Cases**”) by filing with the United States Bankruptcy Court for the District of Delaware (the “**Bankruptcy Court**”) voluntary petitions for relief under Chapter 11 of Title 11 of the United States Code, 11 U.S.C. §§ 101 et seq., and have continued to operate their business as debtors-in-possession pursuant to Sections 1107 and 1108 thereof.

Prior to the Petition Date, Lender provided financing to the Borrowers pursuant to that certain Loan and Security Agreement, dated as of July 14, 2023, by and among the Borrowers and the Prepetition Secured Lender (as amended, amended and restated, supplemented or otherwise modified from time to time through the Petition Date, the “**Prepetition Loan Agreement**”).

On the Petition Date, the outstanding principal balance of the Loans (as defined in the Prepetition Loan Agreement) under the Prepetition Loan Agreement was approximately \$3.0 million plus interest, fees, costs and expenses and all other Prepetition Obligations under the Prepetition Loan Agreement.

The Prepetition Obligations under the Prepetition Loan Agreement are secured by security interest and liens in substantially all of the existing and after-acquired assets of the Borrowers as more fully set forth in the Prepetition Loan Agreement, and such security interest is perfected, and, with certain exceptions as described in the Prepetition Loan Agreement, has priority over all other security interests.

The Borrowers have requested, and, upon the terms and subject to the conditions set forth in this Agreement, Lender has agreed, to extend credit to the Borrowers in the form a secured term loan credit facility in an aggregate principal amount of \$15.0 million, consisting of two tranches: (i) a \$12.0 million in aggregate principal amount senior secured term loan facility and (ii) a \$3.0 million in aggregate principal amount senior secured term loan resulting from the roll-up and refinancing of certain of the Prepetition Loans outstanding on the Effective Date in accordance with the DIP Orders, each to fund the working capital requirements of the Borrowers and their respective Subsidiaries during the pendency of the Cases and the Carve-Out, in each case, pursuant to and in accordance with the DIP Budget.

NOW, THEREFORE, the parties hereto, in consideration of the premises and their mutual covenants and agreements herein set forth, and intending to be legally bound hereby, covenant and agree as follows:

ARTICLE 1
CERTAIN DEFINITIONS

Section 1.1 **Certain Definitions**. Capitalized terms used herein but not otherwise defined herein shall have the meanings defined in the UCC (as defined below). As used herein, the following terms have the meanings indicated:

- (1) “**13-Week Cash Flow Projections**” has the meaning assigned in Section 6.1.

(2) “**Acceptable Security Interest**” shall mean a security interest which (a) exists in favor of Lender, (b) has superpriority lien status and is superior to all other security interests (other than the Carve-Out and the Prepetition Permitted Liens), (c) secures the Obligations, (d) is enforceable against Borrower which created such security interest and (d) is, proposed or intended to be, perfected.

(3) “**Adequate Protection Liens**” has the meaning specified in the DIP Orders.

(4) “**Adequate Protection Superpriority Claims**” has the meaning set forth in the Interim DIP Order or, upon entry of the Final DIP Order, in the Final DIP Order, as applicable.

(5) “**Affiliate**” means, with respect to any Person, another Person that directly, or indirectly through one or more intermediaries, controls or is controlled by or is under common control with the Person specified.

(6) “**Agreement**” means this Superpriority Debtor in Possession Loan and Security Agreement, as amended, restated, supplemented or otherwise modified from time to time.

(7) “**Allowed Professional Fees**” has the meaning set forth in the DIP Orders.

(8) “**Anti-Money Laundering Measures**” has the meaning assigned in Section 4.10(3).

(9) “**Anti-Terrorism Laws**” has the meaning assigned in Section 4.10(1).

(10) “**Asset Disposition**” means any sale, lease, license, transfer, assignment, statutory division or other consensual disposition by a Borrower of any asset.

(11) “**Asset Purchase Agreement**” means that certain Asset Purchase Agreement, dated as of July 17, 2023, by and among Novan, Inc. and EPI Health, LLC, as Sellers and Ligand Pharmaceuticals, Incorporated, as Buyer.

(12) “**Assignee**” has the meaning assigned in Section 11.23(2).

(13) “**Authority Documents**” means the following: (a) (i) a certificate of good standing from Borrowers’ state of organization and (ii) certificates of good standing from such other states in which such Borrower does business and is required to domesticate or otherwise register, except where the failure to domesticate or otherwise register would not reasonably be expected to result in a Material Adverse Effect; (b) a copy of the Borrowers’ articles of organization or other applicable document; (c) a copy of the Borrowers’ operating agreement or other applicable agreement; and (d) a consent in form and content satisfactory to Lender in its sole discretion, authorizing each Borrower to execute the Loan Documents to which it is a party.

(14) “**Automatic Stay**” means the automatic stay imposed under Section 362 of the Bankruptcy Code.

(15) “**Bankruptcy Code**” means Title 11 of the United States Code, 11. U.S.C. §§ 101 *et seq.* and any amendments or successor statute thereto.

(16) “**Bankruptcy Court**” has the meaning assigned in the recitals of this Agreement.

(17) “**Bankruptcy Rules**” means the Federal Rules of Bankruptcy Procedure as now and hereafter in effect, or any successor statute.

(18) “**Bay View Adequate Protection Liens**” has the meaning in the Interim DIP Order.

(19) “**Bidding Procedures**” means bidding procedures in connection with the sale as contemplated under the Asset Purchase Agreement, which such bidding procedures shall be in form and substance acceptable to Lender in its sole discretion.

(20) “**Borrower Financial Advisor**” means, as the context may require, each of SierraConstellation Partners, LLC, in its capacity as a financial advisor retained by Borrower to advise on cash management and reporting and/or Raymond James & Associates, in its capacity as a financial advisor retained by the Borrower to manage the process for, and consummating, a Sale Transaction.

(21) “**Borrowing**” means a borrowing consisting of simultaneous Loans made by Lender.

(22) “**BSA**” has the meaning assigned in Section 4.10(2).

(23) “**Budget Testing Date**” means, with respect to the Budget, 6:00 p.m. Central Standard Time on the Wednesday that is one full week occurring after the Petition Date and each Wednesday thereafter.

(24) “**Budget Testing Period**” means, the week period ending immediately prior to the Budget Testing Date.

(25) “**Business Day**” means a day other than a Saturday, a Sunday, or a legal holiday on which national banks located in the State of New York are not open for general banking business.

(26) “**Capital Stock**” means any and all shares, interests, participations, units or other equivalents (however designated) of capital stock of a corporation, membership interests in a limited liability company, partnership interests of a limited partnership, any and all equivalent ownership interests in a Person and any and all warrants, rights or options to purchase any of the foregoing.

(27) “**Carve-Out**” has the meaning assigned in the DIP Orders.

(28) “**Carve-Out Reserve**” has the meaning assigned in Section 2.3(3).

(29) “**Carve-Out Trigger Notice**” has the meaning assigned in the DIP Orders.

(30) “**Case**” has the meaning assigned in the recitals of this Agreement.

(31) “**Cash Management Order**” has the meaning assigned in Section 3.1(9).

(32) “**Change of Control**” means, with respect to any Borrower:

(a) any person or group of persons (within the meaning of Section 13(d) or 14(a) of the Exchange Act) shall have acquired beneficial ownership (within the meaning of Rule 13d-3 promulgated by the SEC under the Exchange Act) of thirty-five percent (35%) or more of the voting Equity Interests of such Borrower;

(b) any person or group of persons shall have acquired, by contract or otherwise, or shall have entered into a contract or arrangement that, upon consummation thereof, will result in its or their acquisition of the power to exercise, directly or indirectly, control over the Equity Interests of such persons entitled to vote for members of the board of directors of such Borrower (on a fully diluted basis and taking into account all such Equity Interests that such person or group of persons has the right to acquire pursuant to any option right) representing thirty-five percent (35%) or more of the combined voting power of such Equity Interests;

(c) except pursuant to a transaction permitted hereunder, the failure of such Borrower to beneficially own, directly or indirectly (on a fully diluted basis), one hundred percent (100%) of the voting Equity Interests of any of its Subsidiaries; or

(d) the consummation of a Sale Transaction.

(33) “**Collateral**” shall include the following properties, assets and rights of the Borrowers, wherever located, whether now owned or hereafter acquired or arising, and all proceeds and products thereof, in each case, to the extent of the Borrowers’ right, title or interest therein:

(a) all Accounts;

(b) all Chattel Paper (whether tangible or electronic);

(c) all Contracts;

(d) all Deposit Accounts. Securities Accounts, cash, cash equivalents and money;

(e) all Documents;

(f) all Equipment;

(g) all Equity Interests;

(h) all General Intangibles (including, without limitation, all Payment Intangibles);

(i) all Instruments (including, without limitation, promissory notes);

(j) all Intellectual Property;

(k) all Inventory;

(l) all Investment Property;

(m) all IP Licenses;

(n) all Letter-of-Credit Rights;

(o) all Goods and other property not otherwise described above (except for any property specifically excluded from any clause in this section above, and any property specifically excluded from any defined term used in any clause of this section above);

(p) all income, royalties, proceeds and liabilities at any time due or payable or asserted under or with respect to any Intellectual Property, including all rights to sue or recover at law or in equity for any past, present or future infringement, misappropriation, dilution or violation of any Intellectual Property;

(q) all books and records pertaining to the Collateral;

(r) all Commercial Tort Claims;

(s) to the extent not otherwise included, all Proceeds, including all Cash Proceeds and Noncash Proceeds, Supporting Obligations and products of any and all of the foregoing and all collateral security and guarantees given by any Person with respect to any of the foregoing;

(t) to the extent not covered by clauses (a) through (r) of this definition, all other assets, personal property and rights of the Borrowers, whether tangible or intangible; and

(u) the Borrowers' rights under any agreement, including without limitation, the Borrowers' rights to claim a reversionary interest in any Intellectual Property pursuant to an underlying agreement;

(v) provided that, notwithstanding anything to the contrary in this Agreement, the Collateral shall not include, and no security interest shall be granted in the Excluded Assets, except that such exclusion shall not in any way limit, impair or otherwise affect Lender's continuing security interest upon any rights or interests of the Borrowers in or to (x) monies due or to become due in respect of the Excluded Assets or (y) any and all proceeds from the sale, transfer, assignment, license, franchise, lease or other disposition of the Excluded Assets, in each case, to the extent that such monies and proceeds in clauses (x) and (y) are not themselves part of the Excluded Assets.

(34) "**Committee**" means an official creditors' committee of creditors holding unsecured claims appointed by the Bankruptcy Court in respect of the Cases pursuant to Section 1102(a) of the Bankruptcy Code.

(35) "**Commitment**" means the Lender's New Money Delayed Draw Commitment and the Lender's Roll-Up Commitment or any combination thereof.

(36) "**Contract Rate**" means twelve percent (12%) per annum.

(37) "**Contractual Rights**" has the meaning assigned in Section 10.14.

(38) "**Control Agreement**" means, with respect to each deposit account, securities account and commodities account of a Borrower (other than an Excluded Account), a control agreement that establishes control by the Lender over such accounts in accordance with Section 9.104 of the UCC,

among Lender, such Borrower and the applicable depository institution, in form and substance acceptable to Lender.

(39) **“Copyrights”** means, with respect to each Borrower, (a) all copyrights arising under the laws of the United States, any other country or any political subdivision thereof, whether registered or unregistered and whether published or unpublished, all registrations and recordings thereof, and all applications in connection therewith, including, without limitation, all registrations, recordings and applications in the United States Copyright Office, and (b) the right to obtain all renewals thereof.

(40) **“Copyright Licenses”** means any written agreement naming a Borrower as licensor or licensee, granting any right under any Copyright, including, without limitation, the grant of rights to manufacture, distribute, exploit and sell materials derived from any Copyright.

(41) **“Debt”** means, for any Person, without duplication and limitation: (a) all indebtedness of such Person for borrowed money or for amounts drawn under a letter of credit, (b) all unfunded amounts under a loan agreement, letter of credit, or other credit facility for which such Person would be liable, if such amounts were advanced under the credit facility, (c) all amounts required to be paid by such Person as a guaranteed payment to members (or other equity holders) or a preferred or special dividend, including any mandatory redemption of shares or interests, (d) all guaranties of Debt, endorsements (other than for collection or deposit in the ordinary course of business and consistent with past practice), and other contingent obligations to purchase, to provide funds for payment of Debt, to supply funds to invest in any Person or entity, or otherwise to assure a creditor against loss, (e) all obligations under leases that constitute capital leases for which such Person is liable, (f) obligations evidenced by bonds, debentures, notes, or other similar instruments, (g) obligations for the deferred purchase price of property or services (including trade obligations), (h) obligations under acceptance facilities, (i) obligations secured by any Liens, whether or not the obligations have been assumed, (j) all obligations of such Person under interest rate swaps, caps, floors, collars and other interest hedge agreements, in each case whether such Person is liable contingently or otherwise, as obligor, guarantor or otherwise, or in respect of which obligations such Person otherwise assures a creditor against loss and/or (k) any other items which would properly be included in the liability section of a balance sheet or in a footnote to a financial statement in accordance with GAAP, and shall also include all contingent liabilities.

(42) **“Default”** means any event or condition that constitutes an Event of Default or that, with the giving of any notice, the passage of time, or both, would be an Event of Default.

(43) **“Default Rate”** means, the lesser of (a) the Maximum Rate and (b) six percent (6%) per annum in excess of the Contract Rate.

(44) **“Designated Person”** has the meaning assigned in Section 4.10(1).

(45) **“DIP Budget”** means the 13-week cash flow budget of anticipated and forecasted revenues and expenses and, as in effect from time to time, in form and substance satisfactory to Lender in its sole discretion, including the Initial DIP Budget, as the same may be updated from time to time by the Borrowers with the consent of Lender in its sole discretion. Any reference contained herein to compliance with the DIP Budget shall include any permitted variance permitted by Section 7.10.

(46) **“DIP Liens”** means an Acceptable Security Interest in the Collateral granted to Lender pursuant to this Agreement, the other Loan Documents and the DIP Orders.

(47) **“DIP Priority Collateral”** has the meaning given that term in the DIP Orders.

(48) **“DIP Orders”** shall mean the Interim DIP Order and/or the Final DIP Order, as in effect at such time and as the context may require, and any amendment, modification or supplement thereto, in each case, in form and substance acceptable to Lender in its sole discretion.

(49) **“Equity Interests”** means (a) all shares of capital stock (whether denominated as common stock or preferred stock), equity interests, beneficial, partnership or membership interests, joint venture interests, participations or other ownership or profit interests in or equivalents (regardless of how designated) of or in a Person (other than an individual), whether voting or non-voting and (b) all securities convertible into or exchangeable for any of the foregoing and all warrants, options or other rights to purchase, subscribe for or otherwise acquire any of the foregoing, whether or not presently convertible, exchangeable or exercisable.

(50) **“Event of Default”** has the meaning assigned in Article 8.

(51) **“Excluded Account”** means a deposit account that is used exclusively to hold any and all amounts to be used exclusively for payroll, payroll taxes, and other employee wage and benefit accounts.

(52) **“Excluded Assets”** means, collectively, (i) any of such Borrowers’ right, title or interest in any lease, license, contract, property right or agreement to which such Borrower is a party or any of its right, title or interest thereunder to the extent, but only to the extent, that such a grant (A) would, under the express terms of such lease, license, contract or agreement result in a breach of the terms of, or constitute a default under, such lease, license, contract or agreement or (B) violate any law applicable thereto or principles of equity, (ii) any property of a Borrower to the extent and for so long as the grant of a security interest pursuant to this Agreement in such Borrower’s right, title or interest therein (A) is prohibited by any applicable law, or (B) requires a consent pursuant to any law that has not been obtained from any Governmental Authority, (iii) any “intent-to-use” application for registration of a trademark filed pursuant to Section 1(b) of the Lanham Act, 15 U.S.C. § 1051, prior to the filing of a “Statement of Use” pursuant to Section 1(d) of the Lanham Act or an “Amendment to Allege Use” pursuant to Section 1(c) of the Lanham Act with respect thereto, solely to the extent, if any, that and solely during the period, if any, in which, the grant of a security interest therein would impair the validity or enforceability of any registration that issues from such intent-to-use application under applicable federal law and (iv) any Excluded Account; provided that such security interest shall attach immediately and automatically when such prohibition, termination right or consent requirement is repealed, rescinded or otherwise ceases to be effective, when such consent is obtained, or such filing has been made; provided, however, that (I) Excluded Assets shall not include any Proceeds of property described above (unless such Proceeds would otherwise constitute Excluded Assets) and (II) any Excluded Assets that ceases to be Excluded Assets shall automatically, without the action of any other Person, become Collateral.

(53) **“Excluded Taxes”** means, with respect to the Lender,

(a) (A) any tax on such Lender’s net income or profits (or franchise tax in lieu of such tax on net income or profits) imposed by a jurisdiction as a result of Lender being organized under the laws of or having its principal office or applicable Lending Office located in such jurisdiction or (B) any Tax imposed as a result of any other present or former connection between Lender and the taxing jurisdiction (including as a result of Lender carrying on a trade or business, having a permanent establishment or being a resident for tax purposes in such jurisdiction) other than a connection arising solely from Lender having executed, delivered, enforced, become a party to, performed its obligations under, received payments under,

received or perfected a security interest under, engaged in any other transaction pursuant to, or sold or assigned an interest in, any Loans or Loan Document,

(b) any branch profits tax or similar tax imposed by any jurisdiction described in clause (a),

(c) any U.S. federal withholding tax that is imposed on amounts payable to Lender pursuant to a Law in effect at the time Lender becomes a party hereto (or designates a new Lending Office), except, in the case of Lender's designation of a new Lending Office or becoming an assignee, to the extent that Lender (or its assignor, if any) was entitled, immediately prior to the time of designation of a new Lending Office (or assignment), to receive additional amounts from a Borrower with respect to such U.S. federal withholding tax pursuant to Section 2.6(3),

(d) any withholding tax attributable to Lender's failure to comply with Section 2.6,

(e) any U.S. federal withholding tax imposed under FATCA and

(f) any interest, additions to taxes and penalties with respect to any taxes described in clauses (a) through (f) of this definition.

(54) “**Executive Orders**” has the meaning assigned in Section 4.10(1).

(55) “**Factoring Agreement**” means that certain Factoring Agreement dated as of December 1, 2022 by and between EPI and CSNK Working Capital Finance Corp. d/b/a Bay View Funding (“**Bay View**”), as in effect on the Petition Date.

(56) “**FATCA**” means Sections 1471 through 1474 of the Internal Revenue Code of 1986, as amended as of the date of this Agreement (or any amended or successor version that is substantively comparable and not materially more onerous to comply with), any current or future regulations or official interpretations thereof, any agreements entered into pursuant to Section 1471(b)(1) thereof and any fiscal or regulatory legislation, rules or practices adopted pursuant to any intergovernmental agreement, treaty or convention among Governmental Authorities and implementing such provisions.

(57) “**Fee Letter**” means the Fee Letter, dated as of the Effective Date, by and among the Borrowers and Lender.

(58) “**Final DIP Order**” means, collectively, the order of the Bankruptcy Court entered in the Cases after notice and final hearing pursuant to the Bankruptcy Rules or such other procedures as approved by the Bankruptcy Court which, among other matters (but not by way of limitation), authorizes the Borrowers to obtain credit and to incur (or guaranty) the Obligations and grant Liens under the Loan Documents, as the case may be, and provides for the superpriority of Lender's claims, and authorizes the use of cash collateral, as the same shall be approved by, and may be modified or supplemented from time to time after the Final Order Entry Date with the written consent of, Lender in its sole and absolute discretion.

(59) “**Final Order Effective Date**” means the date on which the conditions under Sections 3.2 are satisfied or waived as determined by Lender.

(60) “**Final Order Entry Date**” means the date on which the Final DIP Order is entered on the docket of the Bankruptcy Court.

(61) “**FRB**” means the Board of Governors of the Federal Reserve System or any successor thereto.

(62) “**GAAP**” means United States generally accepted accounting principles, as in effect from time to time, consistently applied.

(63) “**Governmental Authority**” means the United States, and any state, county, city or other political subdivision, agency or instrumentality exercising jurisdiction over the Borrowers.

(64) “**Health Care Laws**” means, to the extent applicable to any Borrower, the Subsidiaries, or their respective assets, businesses, and operations: (i) any and all federal, state and local fraud and abuse laws, including, without limitation, the federal Anti-Kickback Statute (42 U.S.C. § 1320a-7(b)), the Stark Law (42 U.S.C. § 1395nn), the civil False Claims Act (31 U.S.C. § 3729 et seq.), the administrative False Claims Law (42 U.S.C. § 1320a-7b(a)), the Anti-Inducement Law (42 U.S.C. § 1320a-7a(a)(5)), the exclusion laws (42 U.S.C. § 1320a-7), the civil monetary penalty laws (42 U.S.C. § 1320a-7a), the regulations promulgated pursuant to such statutes and any comparable state laws; (ii) the Health Insurance Portability and Accountability Act of 1996 (42 U.S.C. § 1320d et seq.), and the regulations promulgated thereunder and any comparable state laws, (iii) Medicare (Title XVIII of the Social Security Act) and the regulations promulgated thereunder; (iv) Medicaid (Title XIX of the Social Security Act) and the regulations promulgated thereunder; (v) the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (Pub. L. No. 108-173) and the regulations promulgated thereunder; (vi) quality, safety and accreditation standards and requirements of all applicable state laws or Governmental Authorities; and (vii) any and all other applicable health care laws, rules, codes, statutes, ordinances, regulations, manual provisions, policies and administrative guidance, each of (i) through (vii) as may be amended from time to time.

(65) “**Historical Financial Statements**” means with respect to each Borrower, information filed by or on their behalf on Forms 10-Q, 10-K and 8-K with the U.S. Securities and Exchange Commission.

(66) “**Indemnitees**” means, collectively, Lender and any Affiliates of Lender, together with the respective partners, members, directors, officers, employees, agents and advisors of Lender and any Affiliates of Lender.

(67) “**Initial DIP Budget**” means the DIP Budget delivered to Lender on the Effective Date, which shall be acceptable to Lender in its sole discretion. The Initial DIP Budget is attached hereto as Exhibit B and is acceptable to Lender in its sole discretion.

(68) “**Intellectual Property**” means with respect to each Borrower, collectively, all rights, priorities and privileges (including, without limitation, any IP Ancillary Rights) relating to intellectual property, now owned or hereafter acquired and owned by such Borrower, whether arising under United States, multinational or foreign laws or otherwise, including, without limitation, the Copyrights, the Copyright Licenses, the Patents, and the Trademarks.

(69) “**Interim DIP Order**” means the order of the Bankruptcy Court substantially in the form attached hereto as Exhibit C (except as may otherwise be agreed in writing or on the record by Lender at the interim hearing with respect to such order in the Cases) entered in the Cases after an interim hearing pursuant to the Bankruptcy Rules, which, among other matters (but not by way of limitation),

authorizes, on an interim basis, the Borrowers to obtain credit and incur (or guaranty) the Obligations and grant Liens under the Loan Documents, as the case may be, and provides for the superpriority of Lender's claims, and authorizes the use of cash collateral, as the same shall be approved by, and may be modified or supplemented from time to time after the Interim Order Entry Date but before the Final Order Entry Date, with the written consent of the Lender in its sole and absolute discretion.

(70) “**Interim Order Entry Date**” means the date on which the Interim DIP Order is entered on the docket of the Bankruptcy Court.

(71) “**IP Ancillary Rights**” means, with respect to any Intellectual Property, as applicable, all foreign counterparts to, and all divisionals, reversions, continuations, continuations-in-part, reissues, reexaminations, renewals and extensions of, such Intellectual Property, and, in each case, all rights to obtain any other IP Ancillary Right throughout the world.

(72) “**IP License**” means all contractual obligations (and any related IP Ancillary Rights), whether written or oral, granting any right, title and interest in or relating to any Intellectual Property.

(73) “**Lien**” means any lien, security interest, encumbrance or other similar creditor's right or claim in or against an asset, securing an obligation owed to, or a claim by, any Person other than the owner of such asset, whether such interest is based on common law, statute or contract, including the lien or security interest arising from a deed of trust, mortgage, assignment, encumbrance, pledge, security agreement, conditional sale or trust receipt or a lease, consignment or bailment for security purposes.

(74) “**Lists**” has the meaning assigned in Section 4.10(1).

(75) “**Loans**” means the loans to be made by Lender to Borrowers under this Agreement, whether in the form of a New Money Loan or a Roll-Up Loan, as applicable, and all other amounts secured by the Loan Documents in an aggregate amount not to exceed the Commitment.

(76) “**Loan Documents**” means: (a) this Agreement, (b) the Fee Letter, (c) the DIP Orders, (d) the Sale Order, (e) the Cash Management Order, (f) each Request for Loan, (g) each Variance Report, (h) such assignments and/or consent agreements pertaining to management agreements, contracts and other rights as may be required under this Agreement, (i) any Control Agreement, (j) all other documents evidencing, securing, governing or otherwise pertaining to any Obligations, and (k) all amendments, modifications, renewals, substitutions and replacements of any of the foregoing.

(77) “**Material Adverse Effect**” means (a) a material adverse change in, or a material adverse effect upon, the operations, business, properties, liabilities (actual or contingent) or financial, condition of the Borrowers; (b) a material impairment of the ability of the Borrowers to perform their respective Obligations under any Loan Document to which they are a party; or (c) a material adverse effect upon the legality, validity, binding effect or enforceability against the Borrowers of any Loan Document to which it is a party. Notwithstanding the foregoing, in no event shall any Material Adverse Effect be deemed to exist as a result of the commencement of the Cases or the circumstances and events leading up thereto to the extent that such event(s) would reasonably be expected to result therefrom.

(78) “**Material Contract**” means, with respect to any Person, (a) the Factoring Agreement and (b) each contract to which such Person is a party (i) the termination of which contract could reasonably be expected to have a Material Adverse Effect or (ii) involving aggregate payments to or by any Borrower in an amount greater than \$100,000 and (iii) each contract which Lender designates as “material” from time to time.

(79) “**Maturity Date**” means the earliest of (a) seventy (70) days after the Petition Date (b) the consummation of a sale of all or substantially all of the assets of the Borrowers pursuant to Section 363 of the Bankruptcy Code or otherwise, (c) the effective date of a Plan of Reorganization or liquidation in the Case, and (d) the date of termination of the Lender’s Commitments and the acceleration of any outstanding extensions of credit upon an Event of Default, in each case, under this Agreement in accordance with the terms hereof and the other Loan Documents.

(80) “**Maximum Rate**” means the maximum interest rate allowed by applicable law in effect with respect to any Loan on the date for which a determination of interest accrued hereunder is made and after taking into account all fees, payments and other charges which are, under applicable law, characterized as interest.

(81) “**New Money Delayed Draw Commitment**” means the Lender’s obligation to make (a) New Money Loans to the Borrowers hereunder on the Effective Date and (b) New Money Delayed Draw Loans to the Borrowers hereunder after the Effective Date, expressed as an amount representing the maximum principal amount of New Money Delayed Draw Loans to be made by the Lender under this Agreement. The aggregate amount of the New Money Delayed Draw Commitments on the Effective Date is \$12.0 million, before giving effect to the issuance of the New Money Initial Loans funded on the Effective Date.

(82) “**New Money Delayed Draw Loans**” has the meaning specified in Section 2.1.

(83) “**New Money Delayed Draw Termination Date**” means the earliest to occur of (i) the date on which the New Money Delayed Draw Commitments are fully drawn, (ii) the Maturity Date and (iii) unless otherwise agreed by the Lender, the date that is three (3) Business Days prior to the consummation of a sale of all or substantially all of the assets of the Borrowers pursuant to Section 363 of the Bankruptcy Code or otherwise.

(84) “**New Money Initial Loan**” has the meaning specified in Section 2.1.

(85) “**New Money Loans**” means the New Money Initial Loans and the New Money Delayed Draw Loans.

(86) “**Non-Excluded Taxes**” means all Taxes other than Excluded Taxes imposed on or with respect to any payment made by or on account of any obligation of any Borrower under any Loan Documents.

(87) “**Obligations**” mean the full and punctual observance and performance of all present and future duties, covenants and responsibilities due to Lender by the Borrowers under this Agreement and all other Loan Documents, all present and future obligations and liabilities of the Borrowers to Lender for the payment of money under any of the Loan Documents (including, without limitation, the Roll-Up Loan, all principal amounts, interest, late charges, fees and all other charges and sums, as well as all costs and expenses payable by the Borrowers under this Agreement and the other Loan Documents and whether or not allowed or allowable in any proceeding), whether direct or indirect, contingent or non-contingent, matured or unmatured, accrued or not accrued, related or unrelated to this Agreement, whether or not now contemplated and whether or not of the same character or class as the Borrowers’ obligations under this Agreement or any other Loan Document, as well as all renewals, refinancings, consolidations and extensions of any of the foregoing.

(88) “**OFAC**” has the meaning assigned in Section 4.10(1).

(89) **“OFAC Laws and Regulations”** has the meaning assigned in Section 4.10(1).

(90) **“Other Lists”** has the meaning assigned in Section 4.10(1).

(91) **“Participant”** has the meaning assigned in Section 11.23(3).

(92) **“Patents”** means with respect to the Borrowers, (a) all letters patent of the United States, and any other jurisdiction, country or any political subdivision thereof, all foreign counterparts to, and all divisionals, reversions, continuations, continuations-in-part, reissues, reexaminations, renewals and extensions thereof and all goodwill associated therewith, (b) all applications for letters patent of the United States and any other jurisdiction, country or any political subdivision thereof, all foreign counterparts to, and all divisionals, reversions, continuations, continuations-in-part, reissues, reexaminations, renewals and extensions thereof and (c) all rights to obtain any foreign counterparts to, divisionals, reversions, continuations, continuations-in-part, reissues, reexaminations, renewals and extensions of the foregoing.

(93) **“Permits”** means, with respect to any Person, any permit, approval, clearance, authorization, enrollment, license, registration, certificate, concession, grant, franchise, variance or permission from, and any other contractual obligations with, any Governmental Authority, and applicable to or binding upon such Person or any of its property or Products or to which such Person or any of its property or Products is subject.

(94) **“Permitted Debt”** means, collectively:

(a) any Debt owing to Lender under this Agreement and the other Loan Documents;

(b) the Prepetition Obligations; and

(c) the other Debt outstanding on the Petition Date as set forth on Schedule 1.1(94) hereto; *provided* that any principal amounts incurred under each category of Debt listed therein shall not increase from and after the Petition Date other than to the extent expressly contemplated by and permitted under the DIP Budget;

provided, that, notwithstanding anything to the contrary, other than with respect to the Carve-Out, no Debt shall be permitted to have an administrative expense claim status under the Bankruptcy Code senior to or *pari passu* with the super priority administrative expense claims of Lender as set forth herein and in the DIP Orders.

(95) **“Permitted Liens”** means, collectively:

(a) Liens in favor of Lender;

(b) the Prepetition Liens;

(c) the Bayview Adequate Protections Liens and the Adequate Protection Liens;

(d) the Prepetition Permitted Liens; and

(e) the other Liens outstanding on the Petition Date as set forth on Schedule 1.1(95) hereto; *provided* that (i) the principal amount of the underlying obligations

that such Liens secure shall not increase in amount from and after the Petition Date other than to the extent expressly contemplated by and permitted under the DIP Budget and (ii) no additional or other assets shall secure such Obligations other than as in effect on the Petition Date.

provided, that that all Permitted Liens (other than the Carve-Out and the Prepetition Permitted Liens), while any portion of the Obligations remain outstanding, shall at all times be junior and subordinate to the Liens granted under the Loan Documents and the DIP Orders. The prohibition provided for in this definition specifically restricts, without limitation, any Borrower, the Committee, or any other party-in-interest in the Cases or any successor case, from priming or creating claims, Liens or interests pari passu with any claims, Liens or interests of Lender, any Lien (other than for the Carve-Out and the Prepetition Permitted Liens) irrespective of whether such claims, Liens or interests may be “adequately protected”.

(96) “**Person**” means any individual, corporation, partnership, joint venture, association, joint stock company, trust, trustee, estate, limited liability company, unincorporated organization, government or any agency or political subdivision thereof, or any other form of entity.

(97) “**Petition**” means the voluntary petitions for relief under Chapter 11 of the Bankruptcy Code filed by the Borrowers with the Bankruptcy Code.

(98) “**Petition Date**” has the meaning assigned in the recitals of this Agreement.

(99) “**Plan of Reorganization**” means a Chapter 11 plan of reorganization submitted by the Borrowers to the Bankruptcy Court in connection with the Cases, or any Case, as applicable.

(100) “**Pledged Issuers**” has the meaning specified therefor in the definition of the term “Pledged Shares”.

(101) “**Pledged Shares**” means, subject to Section 10.1, (i) the shares of Equity Interests described in Schedule 4.17(6) hereto, whether or not evidenced or represented by any stock certificate, certificated security or other Instrument, issued by the Persons described in such Schedule 4.17(6) (the “**Existing Issuers**”), (ii) the rights, privileges, authorities, and powers of such Borrower as an owner or holder of such Equity Interests, including all economic rights, all control rights, authority, and powers, all status rights of such Borrower as a member, shareholder, or other owner (as applicable), and all rights and interests, if any, to participate in the management of each Pledged Issuer (as defined below), (iii) the shares of Equity Interests at any time and from time to time owned or acquired by a Borrower of any and all Persons now or hereafter existing (such Persons, together with the Existing Issuers, being hereinafter referred to collectively as the “**Pledged Issuers**” and each individually as a “**Pledged Issuer**”), whether or not evidenced or represented by any stock certificate, certificated security or other Instrument, (iv) the certificates representing such shares of Equity Interests, all options and other rights, contractual or otherwise, in respect thereof and all dividends, distributions, cash, financial assets, securities, other Equity Interests, stock options and commodity contracts, notes, debentures, bonds, promissory notes or other evidences of indebtedness and all other property (including, without limitation, any stock dividend and any distribution in connection with a stock split) from time to time received, receivable or otherwise distributed in respect of or in exchange for any or all of such Equity Interests and (v) without affecting the obligations of any Borrower under any provision prohibiting such action under this Agreement or any other Loan Document, in the event of any consolidation or merger involving any Pledged Issuer and in which such Pledged Issuer is not the surviving entity or any division of any Pledged Issuer, all Equity Interests of the successor entity formed by or resulting from such consolidation, merger or division.

(102) “**Post-Carve Out Amounts**” has the meaning assigned in Section 2.3(3).

- Orders.
- (103) “**Post-Carve Out Trigger Notice Cap**” has the meaning assigned in the DIP
- 2.3(3).
- (104) “**Post-Carve Out Trigger Notice Reserve**” has the meaning assigned in Section 2.3(3).
- (105) “**Pre-Carve Out Amounts**” has the meaning assigned in Section 2.3(3).
- (106) “**Pre-Carve Out Trigger Notice Reserve**” has the meaning assigned in Section 2.3(3).
- Agreement.
- (107) “**Prepetition Facility**” means the credit facility governed by the Prepetition Loan
- (108) “**Prepetition Secured Lender**” has the meaning set forth in the DIP Orders.
- (109) “**Prepetition Liens**” means any Liens securing the Prepetition Obligations.
- Agreement.
- (110) “**Prepetition Loan**” means the “Loan” as defined in the Prepetition Loan
- Agreement.
- (111) “**Prepetition Loan Agreement**” has the meaning assigned in the recitals of this
- (112) “**Prepetition Loan Documents**” means the Prepetition Loan Agreement and the “Loan Documents” as defined in the Prepetition Loan Agreement (as such Prepetition Loan Documents have been amended, restated, amended and restated, supplemented or otherwise modified prior to the Petition Date).
- (113) “**Prepetition Permitted Liens**” has the meaning assigned in the DIP Orders.
- Loan Agreement.
- (114) “**Prepetition Obligations**” means the “Obligations” as defined in the Prepetition
- (115) “**Professional Fees**” means all accrued and unpaid claims for fees and expense reimbursements of Professional Persons retained by the Borrowers (but not any success or transaction fees).
- (116) “**Professional Person**” means a Person who is an attorney, accountant, appraiser, auctioneer or financial advisor or other professional person who is retained with approval of the Bankruptcy Court by any Borrower pursuant to Section 327 of the Bankruptcy Code.
- (117) “**Proposed DIP Budget**” has the meaning assigned in Section 7.10(6).
- Agreement.
- (118) “**Purchased Assets**” has the meaning assigned to it in the Asset Purchase
- (119) “**Remedies Notice Period**” has the meaning assigned in Section 9.1(1).
- (120) “**Request for Loan**” means a request in form attached hereto as Exhibit D and otherwise in form and substance acceptable to Lender directing where the proceeds of the Loan are to be made and attaching a funds-flow memorandum setting forth the sources and uses of such proceeds, which funds-flow memorandum shall be in form and substance satisfactory to Lender in its sole discretion and

shall contain the details of how funds from each source are to be transferred to particular uses and the wire transfer instructions for the particular uses of such funds.

(121) “**Responsible Officer**” means any of the Chief Executive Officer, President, Chief Financial Officer, Vice President, Treasurer, Controller or Secretary of each Borrower.

(122) “**Roll-Up Loan**” means the Loan made pursuant to Section 2.1(3) resulting from the roll-up and refinancing of the Prepetition Obligations outstanding on the Effective Date, in accordance with the DIP Orders.

(123) “**Roll-Up Loan Commitment**” means, Lender’s obligation to make the Roll-Up Loan to the Borrowers pursuant to Section 2.1(3), immediately prior to giving effect to the roll-up. The aggregate principal amount of the Roll-Up Loan Commitment on the Effective Date is \$3.0 million plus all other outstanding Prepetition Obligations, which amount shall (i) comprise a roll-up and refinancing of the Prepetition Obligations (including any fees due and owing pursuant to the “Fee Letter” thereunder) approved pursuant to the DIP Orders and (ii) be deemed funded by Lender pursuant to Section 2.1.

(124) “**Sale**” has the meaning assigned in the DIP Order.

(125) “**Sale Milestone**” has the meaning assigned in Section 7.7(4).

(126) “**Sale Transaction**” means a sale of the entire business of the Borrowers and their respective Subsidiaries as a going concern.

(127) “**SDN List**” has the meaning assigned in Section 4.10(1).

(128) “**State**” means the State of New York.

(129) “**Statutory Rights**” has the meaning assigned in Section 10.14.

(130) “**Subsidiary**” means, with respect to any Person, (a) any corporation or limited liability company more than fifty percent (50%) of whose Voting Stock having by the terms thereof power to elect a majority of the directors or managers of such corporation or limited liability company (irrespective of whether or not at the time stock of any class or classes of such corporation or limited liability company shall have or might have voting power by reason of the happening of any contingency) is at the time owned by such Person, directly or indirectly, through Subsidiaries and (b) any partnership, association, joint venture or other entity in which such Person, directly or indirectly, through Subsidiaries, has more than a fifty percent (50%) voting Equity Interest at the time. Unless otherwise expressly provided, all references herein to a “Subsidiary” shall mean a Subsidiary of a Borrower.

(131) “**Tax**” means any present or future tax, levy, impost, duty, assessment, charge, fee, deduction or withholding (including backup withholding) of any nature and whatever called, imposed by any Governmental Authority, including any interest, additions to tax and penalties applicable thereto.

(132) “**Tax Indemnitee**” has the meaning assigned in Section 2.6(3)(a).

(133) “**Termination Declaration Date**” has the meaning assigned in Section 2.3(3).

(134) “**Trademarks**” means, with respect to the Borrowers, (a) all trademarks, trade names, corporate names, company names, business names, fictitious business names, trade styles, service marks, logos and other source or business identifiers, and all goodwill associated therewith, now existing

or hereafter adopted or acquired, all registrations and recordings thereof, and all applications in connection therewith, whether in the United States Patent and Trademark Office or in any similar office or agency of the United States, any State thereof or any other country or any political subdivision thereof, or otherwise, and all common-law rights related thereto and (b) the right to obtain all extensions or renewals thereof.

(135) “**Transition Services Agreement**” has the meaning assigned in the Asset Purchase Agreement.

(136) “**UCC**” means the Uniform Commercial Code, as adopted and enacted and as in effect from time to time in the State of New York or the Uniform Commercial Code or any successor provision thereof (or similar code or statute) of another jurisdiction, to the extent it may be required to apply to any item or items of Collateral.

(137) “**U.S. Publicly-Traded Entity**” has the meaning assigned in Section 4.10(1).

(138) “**U.S. Trustee**” means the United States Trustee for the District of Delaware.

(139) “**Voting Stock**” means with respect to any Person, shares of such Person’s Capital Stock having the right to vote for the election of directors or managers (or Persons acting in a comparable capacity) of such Person under ordinary circumstances.

ARTICLE 2 **LOAN TERMS**

Section 2.1 **The Loans.**

(1) Subject to the terms and conditions set forth in Sections 3.1 and 3.2 hereof and in the DIP Orders, the Lender agrees following the Bankruptcy Court’s entry of the Interim DIP Order, to make a term loan to the Borrowers in a single Borrowing on, or on the Business Day after, the Effective Date (the “**New Money Initial Loan**”) out of a portion of the Lender’s New Money Delayed Draw Commitment in an aggregate principal amount not to exceed the Lender’s New Money Delayed Draw Commitment; *provided*, that the total amount of the Borrowing of New Money Delayed Draw Loans made on the Effective Date shall not exceed \$1.0 million. Amounts borrowed under this Section 2.1(1) and repaid or prepaid may not be reborrowed.

(2) Subject to the terms and conditions set forth in Section 3.2 hereof and in the DIP Orders, the Lender agrees following the Bankruptcy Court’s entry of the Interim DIP Order, to make additional delayed draw term loans to the Borrower in one or more Borrowings at any time from time to time until the New Money Delayed Draw Termination Date (the “**New Money Delayed Draw Loans**”) in an aggregate principal amount not to exceed such Lender’s New Money Delayed Draw Commitment; provided, that (i) there shall be no more than one (1) Borrowing of New Money Delayed Draw Loans per calendar week (which may be more frequent in the Lender’s sole discretion) and (ii) the total amount of Borrowings of New Money Delayed Draw Loans made prior to the Final DIP Order Entry Date shall not exceed \$2.5 million. Each New Money Delayed Draw Loan shall be in a minimum amount of \$1,000,000 or a whole multiple of \$100,000 in excess thereof. Amounts paid or prepaid in respect of the Delayed Draw Term Loan may not be reborrowed. The New Money Delayed Draw Commitments shall terminate automatically in their entirety on the New Money Delayed Draw Termination Date. Amounts borrowed under this Section 2.1(2) and repaid or prepaid may not be reborrowed.

(3) Subject to the terms and conditions set forth herein and in the DIP Orders, the Lender shall automatically, and without further action or order of the Bankruptcy Court, be deemed on the

Interim Order Entry Date to have “rolled-up” and refinanced as the Roll-Up Loan all Prepetition Obligations held by the Lender immediately prior to the Effective Date. The Roll-Up Loan shall be deemed fully funded in the amount of the Roll-Up Loan Commitment on the Effective Date, the Roll-Up Loan Commitment shall immediately terminate thereafter and the Roll-Up Loan shall be due and payable in accordance with the terms and conditions set forth in this Agreement as if originally funded hereunder on the Effective Date. On the Effective Date when the Roll-Up Loan is deemed funded, the outstanding aggregate amount of the Prepetition Loans shall be automatically and irrevocably deemed reduced by the amount of, and refinanced by, such Roll-Up Loan deemed funded.

Section 2.2 **Maturity.** All Obligations of the Borrowers under this Agreement, if not already paid pursuant to the provisions herein, including all accrued and unpaid interest thereto and all fees and other amounts owing by Borrower to Lender with respect thereto, will be due and payable upon the Maturity Date.

Section 2.3 **Method of Borrowing.**

(1) Each Borrowing of New Money Loans shall be made upon the Borrowers’ irrevocable written notice, on behalf of the Borrowers, to the Lender. Each such notice must be received by the Lender not later than 12:00 p.m. Eastern time, one (1) Business Day prior to the requested date of any Borrowing. Each Borrowing shall be in a principal amount of \$1,000,000 or a whole multiple of \$100,000 in excess thereof. Each Request for Loan shall specify:

- (a) the requested date of the Borrowing (which shall be a Business Day),
- (b) the principal amount of the Loan to be borrowed, and
- (c) wire instructions of the account(s) of the Borrower to which funds are to be disbursed.

(2) Borrowers hereby irrevocably authorizes Lender to rely on telephonic, facsimile, electronic transmission or written instructions of any person identifying themselves as one of the individuals listed herein (or any other individual from time to time authorized to act on behalf of Borrowers) with respect to any request to make a Loan or a repayment hereunder.

(3) On the day on which a Carve-Out Trigger Notice is given by the Lender to the Borrowers with a copy to counsel to the Committee (the “**Termination Declaration Date**”), the Carve-Out Trigger Notice shall (i) be deemed a Request for Loan, in an amount equal to the then unpaid amounts of the Allowed Professional Fees and (ii) also constitute a demand to the Borrowers to utilize all cash on hand as of such date and any available cash thereafter held by the Borrowers to fund a reserve in an amount equal to the then unpaid amounts of the Allowed Professional Fees. The Borrowers shall deposit and hold such amounts in a segregated account in trust to pay such then unpaid Allowed Professional Fees (the “**Pre-Carve Out Trigger Notice Reserve**”) prior to any and all other claims. On the Termination Declaration Date, the Carve-Out Trigger Notice shall also (i) be deemed a Request for Loan in an amount equal to the Post-Carve Out Trigger Notice Cap and (ii) constitute a demand to the Borrowers to utilize all cash on hand as of such date and any available cash thereafter held by the Borrowers, after funding the Pre-Carve Out Trigger Notice Reserve, to fund a reserve in an amount equal to the Post-Carve Out Trigger Notice Cap. The Borrowers shall deposit and hold such amounts in a segregated account in trust to pay such Allowed Professional Fees benefiting from the Post-Carve Out Trigger Notice Cap (the “**Post-Carve Out Trigger Notice Reserve**” and, together with the Pre-Carve Out Trigger Notice Reserve, the “**Carve-Out Reserves**”) prior to any and all other claims. On the first Business Day after the Lender gives such Request for Loan, notwithstanding anything herein to the contrary, including with respect to the existence of a Default or an

Event of Default, the failure of the Borrowers to satisfy any or all of the conditions precedent for a Borrowing under this facility, any termination of the Commitments following an Event of Default, or the occurrence of the Maturity Date, the Lender shall be obligated to make New Money Loans to the Borrowers to fully fund the Carve Out Reserve in an amount not to exceed the aggregate outstanding amount of New Money Delayed Draw Commitments as of the Effective Date; provided that in no event shall the aggregate principal amount of all New Money Loans exceed \$12.0 million. All funds in the Pre-Carve Out Trigger Notice Reserve shall be used first to pay the obligations set forth in clauses (i) through (iii) of the definition of Carve-Out (the “**Pre-Carve Out Amounts**”), but not, for the avoidance of doubt, the Post-Carve Out Trigger Notice Cap, until paid in full, and then, to the extent the Pre-Carve Out Trigger Notice Reserve has not been reduced to zero, to pay the Lender, unless the Obligations have been indefeasibly paid in full, in cash, and all Commitments have been terminated, in which case any such excess shall be paid to the Prepetition Secured Lender in accordance with its rights and priorities as set forth in the Interim Dip Order. All funds in the Post-Carve Out Trigger Notice Reserve shall be used first to pay the obligations set forth in clause (iv) of the definition of Carve Out (the “**Post-Carve Out Amounts**”), and then, to the extent the Post-Carve Out Trigger Notice Reserve has not been reduced to zero, to pay the Lender, unless the Obligations have been indefeasibly paid in full, in cash, and all Commitments have been terminated, in which case any such excess shall be paid to the Prepetition Secured Lender on account of any Prepetition Obligations that remain outstanding to the extent not rolled up and converted into Obligations hereunder, and then, to the extent all Obligations and Prepetition Obligations have been indefeasibly paid in full in cash, any excess shall be paid to the Borrowers’ estate. Notwithstanding anything to the contrary in the Loan Documents or the DIP Orders, if either of the Carve Out Reserves is not funded in full in the amounts set forth in this Section 2.03(3), then, any excess funds in one of the Carve Out Reserves following the payment of the Pre-Carve Out Amounts and Post-Carve Out Amounts, respectively, shall be used to fund the other Carve-Out Reserve, up to the applicable amount set forth in this Section 2.03(3), prior to making any payments to the Lender or the Prepetition Secured Lender, as applicable. For the avoidance of doubt and notwithstanding anything to the contrary herein or in any Prepetition Loan Document, the Carve-Out shall be senior to all liens and claims securing this facility, the Adequate Protection Liens, and any and all other forms of adequate protection, liens or claims securing the Obligations or the Prepetition Obligations.

Section 2.4 **Interest; Default Rate.** The outstanding principal balance of the Loans (including any amounts added to principal under the Loan Documents) shall bear fixed, non-compounding interest at the Contract Rate. Payments of interest shall be due monthly in cash, in arrears on the first day of each month, commencing with August 1, 2023.

Section 2.5 **Payments; Fees and Maturity.** Except as otherwise provided herein, interest shall be computed and accrue on the principal amount hereof from time to time outstanding at a rate per annum equal to the Contract Rate.

(1) On the Maturity Date, Borrower shall pay the principal balance of the Loans, together with any and all remaining unpaid interest thereon at the Contract Rate.

(2) Any prepayments are to be applied: *first*, to any fees and expenses due to Lender under the Loan Documents; *second*, to the payment of interest on the principal balance from time to time remaining unpaid at the applicable rate provided herein; and *third*, to reduce the principal balance. Any prepayments shall be applied to installments in the inverse order of incurrence.

(3) The Borrower shall pay to the Lender such fees as shall have been separately agreed upon in writing in the amounts and at the times so specified in the Fee Letter. Such fees shall be fully earned when and as set forth therein and shall not be refundable for any reason whatsoever.

Section 2.6 **Additional Payment Terms.**

(1) All sums payable to Lender hereunder shall be payable in lawful currency of the United States of America in immediately available funds without deduction, set-off or counterclaim no later than 12:00 p.m. Eastern time on the date when due at the principal office of Lender, or to or from such other account or address as Lender may from time to time designate in a written notice to Borrowers. No credit shall be given for any payment received by check, draft or other instrument or item until such time as Lender shall have received credit therefor from the bank or other financial institution upon which said check, draft or other instrument or item is drawn.

(2) When any payment hereunder is due on a day that is not a Business Day, such payment shall be made on the next succeeding Business Day, and such extension of time shall be included in the computation of interest.

(3) **Taxes.**

(a) The Borrowers shall, jointly and severally, indemnify Lender (each a "Tax Indemnitee"), within ten (10) days after written demand therefor, for the full amount of any Non-Excluded Taxes paid or payable by such Tax Indemnitee or required to be withheld or deducted from a payment to such Tax Indemnitee attributable to any payment under or with respect to any Loan Document, and any Other Taxes paid or payable by such Tax Indemnitee (including Non-Excluded Taxes or Other Taxes imposed on or attributable to amounts payable under this Section 2.6(3)), and any reasonable expenses arising therefrom or with respect thereto, whether or not such Taxes were correctly or legally imposed or asserted by the relevant Governmental Authority. A certificate as to the amount of such payment or liability prepared in good faith and delivered by the Tax Indemnitee or by Lender on its own behalf or on behalf of another Tax Indemnitee, shall be conclusive absent manifest error.

(b) If and to the extent that a Tax Indemnitee, in its sole discretion (exercised in good faith), determines that it has received a refund of any Taxes as to which it has been indemnified pursuant to this Section 2.6(3) (including by the payment of additional amounts pursuant to this Section 2.6(3)), then such Tax Indemnitee shall pay to the relevant Borrower the amount of such refund, net of all out-of-pocket expenses of the Tax Indemnitee (including any Taxes imposed with respect to such refund), and without interest (other than any interest paid by the relevant Governmental Authority with respect to such refund), provided that the Borrowers, upon the request of the Tax Indemnitee, agrees to repay the amount paid over by the Tax Indemnitee (plus any penalties, interest or other charges imposed by the relevant Governmental Authority) to the Tax Indemnitee to the extent the Tax Indemnitee is required to repay such refund to such Governmental Authority. Notwithstanding anything to the contrary in this paragraph (b), in no event will the Tax Indemnitee be required to pay any amount to a Borrower pursuant to this paragraph (b) the payment of which would place the Tax Indemnitee in a less favorable net after-Tax position than the Tax Indemnitee would have been in if the Tax subject to indemnification and giving rise to such refund had not been deducted, withheld or otherwise imposed and the indemnification payments or additional amounts with respect to such Tax had never been paid. This paragraph (b) shall not be construed to require a Tax Indemnitee to make available its Tax returns (or any other information relating to its Taxes that it deems confidential) to any Borrower or any other Person.

(c) If Lender is entitled to an exemption from or reduction of withholding with respect to payments made under any Loan Document, Lender shall deliver to such Borrower such properly completed and executed documentation reasonably requested by such Borrower as will permit such payments to be made without withholding or at a reduced rate of withholding; including, if Lender is a U.S. person (as defined in Section 7701(a)(30) of the Internal Revenue Code of 1986, as amended), an IRS Form W-9 or, if Lender is not a U.S. person, the appropriate IRS Form W-8. In addition, if reasonably requested by such Borrower, Lender shall deliver such other documentation prescribed by applicable law or reasonably requested by such Borrower as will enable such Borrower (i) to determine whether or not Lender is subject to backup withholding or information reporting requirements and (ii) to comply with FATCA, as applicable.

(d) The agreements in this Section 2.6 survive the termination of this Agreement and the payment of the Loans and all other amounts payable hereunder.

Section 2.7 **Use of Proceeds.** The proceeds of the Loans shall be used by the Borrowers solely (i) to pay fees and expenses incurred in connection with this Agreement and related transactions, (ii) to pay approved Prepetition Obligations in accordance with the DIP Budget and (iii) for working capital and general corporate purposes of the Borrowers in accordance with the DIP Budget. No part of the proceeds of the Loans will be used, whether directly or indirectly:

(1) in any manner that causes such Loan or the application of such proceeds to violate the Regulations of the Board, including Regulation T, Regulation U and Regulation X, or any other regulation thereof, or to violate the Securities Exchange Act;

(2) for any purpose that is prohibited under the Bankruptcy Code or the DIP Orders;

(3) to finance in any way: (x) any adversary action, suit, arbitration, proceeding, application, motion, contested matter or other litigation of any type materially adverse to the interests of any or all of Lender or the Prepetition Secured Lender or their respective rights and remedies under the Loan Documents, the DIP Orders or the Prepetition Loan Documents or (y) any other action which with the giving of notice or passing of time would result in an Event of Default hereunder or under any of the Loan Documents;

(4) for the payment of fees, expenses, interest, or principal under any prepetition obligations other than under the Prepetition Loan Documents pursuant to the roll-up hereunder and adequate protection payments permitted under the DIP Order;

(5) unless otherwise agreed by Lender, to make any distributions under a Plan of Reorganization in the Cases that does not provide for the indefeasible payment of the Loans in full and in cash;

(6) except as expressly permitted by the DIP Budget (including any permitted variances) to make any payment in settlement of any prepetition claim, action or proceeding without the prior written consent of Lender; *provided* that, advisors to any Committee, may investigate the liens granted pursuant to, or any claims under or causes of action with respect to, the Prepetition Obligations at an aggregate expense for such investigation not to exceed \$50,000, *provided* that no portion of such amount may be used to prosecute any claims; or

(7) to make any post-petition payments or disbursements not otherwise expressly authorized by an entered order of the Bankruptcy Court that constitute critical vendor payments as described in the DIP Budget, without the prior written consent of the Lender.

Nothing herein shall in any way prejudice or prevent Lender from objecting, for any reason, to any requests, motions, or applications made in the Bankruptcy Court, including any application of final allowances of compensation for services rendered or reimbursement of expenses incurred under Sections 105(a), 330 or 331 of the Bankruptcy Code, by any party in interest (and each such order shall preserve Lender's right to review and object to any such requests, motions or applications).

Section 2.8 **Prepayments.** The Loans may be prepaid, in whole at any time, or in any part from time to time, without premium or penalty, and must be prepaid in the following amounts and at the following times:

(1) unless Lender shall otherwise consent in writing, contemporaneously with the refinancing of the Debt owing to Lender under this Agreement, in an amount equal to one hundred percent (100%) of the outstanding Obligations;

(2) unless Lender shall otherwise consent in writing, on the date on which a Borrower (or Lender as loss payee or assignee) receives any casualty proceeds with respect to any asset upon which Lender maintained a Lien, an amount equal to one hundred percent (100%) of such proceeds (net of reasonable and documented out-of-pocket expenses and fees), or such lesser portion of such proceeds as Lender shall elect to apply to the Obligations;

(3) an amount equal to any interest that is deemed to be in excess of the Maximum Rate and is required to be applied to the reduction of the principal balance of the Loans as provided for in this Agreement;

(4) unless Lender shall otherwise consent in writing, upon receipt by a Borrower of the proceeds of any Asset Disposition that is not made in the ordinary course of business and consistent with past practice or that pertains to any Collateral securing the Obligations, an amount equal to one hundred percent (100%) of the net cash proceeds of such asset disposition (net of reasonable and documented out-of-pocket fees and expenses) or such lesser portion as Lender shall elect to apply to the Obligations; and

(5) unless Lender shall otherwise consent in writing, upon receipt by a Borrower of proceeds (net of reasonable and documented out-of-pocket fees and expenses) of any other extraordinary receipts or from the incurrence of Debt or issuance and sale of any Debt or equity securities at any time, in each case, which is prohibited by the terms herein, an amount equal to one hundred percent (100%) of such net proceeds, or such lesser portion as Lender shall elect to apply to the Obligations.

Section 2.9 **Recourse Obligations.** Each Loan shall be a fully recourse Obligation of the Borrowers and upon the occurrence of an Event of Default, Lender may exercise all of its rights and remedies under the Loan Documents, including, without limitation, its right to seek and obtain a monetary judgment against Borrower with respect to the Obligations evidenced hereby and to hold the Borrowers liable for such Obligations.

ARTICLE 3
CONDITIONS PRECEDENT TO LENDER'S OBLIGATIONS

Section 3.1 **Conditions to Effective Date.** It is expressly agreed that Lender shall not be obligated to make the Loans hereunder until the following conditions have been satisfied, unless waived by Lender in writing at its sole discretion:

(1) **Documents.** Lender shall have received and reviewed to its satisfaction the following fully-executed documents or deliverables:

- (a) this Agreement;
- (b) the Fee Letter;
- (c) the Initial DIP Budget certified by a Responsible Officer of the Borrowers, certifying that the projections therein have been prepared in good faith based on reasonable assumptions, and that such projections contain no statements or conclusions (and there are no omissions of information) which are based upon or include information known to the Borrowers to be misleading in any material respect or which fail to take into account information known to the Borrowers regarding materials reported therein;
- (d) (i) a certificate of each Borrower, dated the Effective Date and executed by its Secretary, which shall (A) certify the resolutions of its board of directors, members or other body authorizing the execution, delivery and performance of the Agreement and Loan Documents to which it is a party, (B) identify by name and title and bear the signatures of each financial officer and any other officers of such Borrower authorized to sign the Loan Documents to which it is a party, and (C) contain appropriate attachments, including (i) the certificate or articles of incorporation or organization of each Borrower certified by the relevant authority of the jurisdiction of organization of such Borrower and a true and correct copy of its by-laws or operating, management or partnership agreement and (ii) a long form good standing certificate for each Borrower from its jurisdiction of organization;
- (e) an opinion of Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, LLP, counsel to the Borrowers, addressed to Lender and dated the Effective Date, in form and substance satisfactory to Lender in its sole discretion (and the Borrowers hereby instruct such counsel to deliver such opinion to Lender);
- (f) filing of appropriate financing statements in such office or offices as may be determined as necessary by Lender to perfect the security interests and Liens purported to be created hereunder;
- (g) a certificate dated as of the Effective Date from a Responsible Officer of the Borrowers stating that the conditions specified in this Section 3.1 have been fully satisfied;
- (h) evidence satisfactory to Lender in its sole discretion that the Asset Purchase Agreement has been executed; and

(i) a Request for Loan delivered to Lender by 10:00 a.m. Eastern time at least one (1) Business Day in advance of the Effective Date; provided that such Request for Loan will not be deemed final and ready for Lender's review until Borrower delivers to Lender all information or documents as Lender may require to evaluate the Request for Loan.

(2) **Representations and Warranties; No Default or Event of Default.** (i) The representations and warranties contained in this Agreement and in all other Loan Documents are true and correct on and as of the date of the Interim Order in all material respects, except to the extent that any such representation and warranty is qualified by materiality, "Material Adverse Effect" or other similar qualification, such representation and warranty shall be true and correct in all respects and (ii) no Default or Event of Default shall have occurred or is continuing.

(3) **Litigation.** There is not presently pending any unstayed suit, action, proceeding or investigation against the Borrowers which could reasonably be expected to have a Material Adverse Effect, or any proceedings challenging this Agreement or the DIP Orders or any part thereof

(4) **Lien Searches.** Lender shall have a valid first priority perfected Lien on the assets of the Borrowers, subject only to the Carve-Out and Prepetition Permitted Liens, and Lender shall have received the results of a recent lien search in such jurisdictions as Lender shall deem appropriate, and such search shall reveal no liens on any of the assets of the Borrowers (other than Prepetition Liens and the Prepetition Permitted Liens).

(5) **Fees, Costs and Expenses.** The Borrowers shall have paid all fees (including, without limitation, all reasonable and documented attorneys' fees), costs, and expenses incurred by Lender in connection with the negotiation, execution and delivery of this Agreement and the other Loan Documents in connection therewith in the amount of \$540,000, which shall be deducted by Lender from the Loans and the balance of which shall be added to the Obligations hereunder.

(6) **Legal Investment.** On the Effective Date, such Loan shall not be prohibited by any applicable law of any Governmental Authority (including, without limitation, Regulations T, U or X of the FRB) as a result of the promulgation or enactment thereof or any changes therein, or change in the interpretation thereof by any Governmental Authority, subsequent to the date of this Agreement.

(7) **Material Adverse Effect.** No event shall have occurred or failed to occur since July 14, 2023, which occurrence or failure could be expected to have a Material Adverse Effect.

(8) **Governmental and Third Party Approvals.** All governmental and third party approvals in connection with the Transaction necessary for the Borrowers and their respective Subsidiaries to conduct their business as conducted as of the date hereof without materially adverse financial consequences have been obtained and remain in effect. The Borrowers and their respective Subsidiaries have obtained all necessary regulatory approvals, and the absence of any injunction, temporary restraining order or judgment which prohibits the making or purchase of the Loans.

(9) **Cases.** Borrowers shall have filed the Petitions with the Bankruptcy Court commencing the Cases and all "first day orders" (including a cash management order (the "**Cash Management Order**") entered at the time of commencement of the Cases shall be in form and substance satisfactory to Lender in its sole discretion).

(10) **Interim DIP Order and First Day Orders.** Lender shall have received a certified copy of the Interim DIP Order, which Interim DIP Order (i) shall have been entered on the docket of the

Bankruptcy Court on or before the Effective Date and (ii) shall be in full force and effect and shall not have been vacated, stayed, reversed, modified or amended in any respect without the written consent of Lender in its sole discretion; and, if the Interim DIP Order is the subject of a pending appeal in any respect, neither the Loans, nor the performance by the Borrowers of any of their respective obligations hereunder, under the other Loan Documents or under any other instrument or agreement referred to herein shall be the subject of a presently effective stay pending appeal. Such Interim DIP Order shall authorize and approve this Agreement and the Loan Documents contemplated hereby and thereby. All motions, orders (including the “first day” orders) and other documents to be filed with and submitted to the Bankruptcy Court on the Petition Date shall be in form and substance satisfactory to the Lender in its sole discretion.

(11) **Other Proceedings.** No unstayed action, suit, investigation or other proceeding (including without limitation, the enactment or promulgation of a statute or rule) by or before any arbitrator or any Governmental Authority shall be threatened in writing or pending (other than the Cases) and no preliminary or permanent injunction or order by a state or federal court shall have been entered (i) in connection with this Agreement, any other Loan Document, or any transaction contemplated hereby or thereby or (ii) which could be expected to result in a Material Adverse Effect, including, in each case, any proceedings challenging this Agreement or the DIP Orders or any part thereof.

Section 3.2 **Conditions to Final Order Effective Date.** It is expressly agreed that Lender shall not be obligated to make any Loan on or after the Final Order Effective Date until the following conditions have been satisfied, unless waived by Lender in writing at its sole discretion:

(1) **Documents.** Lender shall have received and reviewed to its satisfaction the following fully-executed documents or deliverables:

(a) a certificate dated as of the Effective Date from a Responsible Officer of the Borrowers stating that the conditions specified in this Section 3.2 have been fully satisfied;

(b) a Request for Loan delivered to Lender by 10:00 a.m. Eastern time at least three (3) Business Days in advance of the Final Order Effective Date; *provided* that such Request for Loan will not be deemed final and ready for Lender’s review until Borrowers delivers to Lender all information or documents as Lender may require to evaluate the Request for Loan.

(2) **Representations and Warranties; No Default or Event of Default.** (i) The representations and warranties contained in this Agreement and in all other Loan Documents are true and correct on and as of the date of the Final Order Effective Date in all material respects, except to the extent that any such representation and warranty is qualified by materiality, “Material Adverse Effect” or other similar qualification, such representation and warranty shall be true and correct in all respects and (ii) no Default or Event of Default shall have occurred or is continuing.

(3) **Material Adverse Effect.** No event shall have occurred or failed to occur since the Effective Date, which occurrence or failure could be expected to have a Material Adverse Effect.

(4) **Final DIP Order.** Lender shall have received a certified copy of the Final DIP Order, which Final DIP Order (i) shall have been entered on the docket of the Bankruptcy Court on or before the date that is twenty-five (25) days after the Petition Date and (ii) shall be in full force and effect and shall not have been vacated, stayed, reversed, modified or amended in any respect without the written consent of Lender in its sole discretion; and, if the Final DIP Order is the subject of a pending appeal in any respect, the performance by the Borrowers of any of their respective obligations hereunder, under the other

Loan Documents or under any other instrument or agreement referred to herein shall not be the subject of a presently effective stay pending appeal. Such Final DIP Order shall authorize and approve this Agreement and the Loan Documents contemplated hereby and thereby. All motions, orders and other documents to be filed with and submitted to the Bankruptcy Court in connection therewith shall be in form and substance satisfactory to Lender in its sole discretion.

(5) **No Investigations or Injunctions.** No unstayed action, suit, investigation or other proceeding (including without limitation, the enactment or promulgation of a statute or rule) by or before any arbitrator or any governmental authority shall be threatened in writing or pending (other than the Cases) and no preliminary or permanent injunction or order by a state or federal court shall have been entered (i) in connection with this Agreement, any other Loan Document, or any transaction contemplated hereby or thereby or (ii) which could be expected to result in a Material Adverse Effect, including, in each case, any proceedings challenging this Agreement or the DIP Orders or any part thereof.

(6) **DIP Order.** The applicable DIP Order shall be in full force and effect and shall not have been vacated, stayed, reversed, modified or amended in any respect without the written consent of Lender in its sole discretion.

(7) **Use of Proceeds.** The use of the proceeds of the Loans shall be in compliance with the DIP Budget.

ARTICLE 4 **REPRESENTATIONS AND WARRANTIES**

Each Borrower represents and warrants to Lender that:

Section 4.1 **Organization and Power.** Each Borrower and each of its Subsidiaries is duly organized, validly existing and in good standing under the laws of its jurisdiction of organization. Each Borrower and each of its Subsidiaries has all requisite limited liability company or similar power and authority under the laws of its jurisdiction of organization to own, lease and operate its properties and to carry on its business as now being conducted. No Borrower is a “foreign person” within the meaning of § 1445(f)(3) of the Internal Revenue Code of 1986, as amended. A true, correct and complete copy of the organizational structure of the Borrowers and their respective Subsidiaries is attached hereto as Exhibit A.

Section 4.2 **Validity of Loan Documents.** Each Borrower has all requisite organizational power and authority to execute and deliver the Loan Documents and to perform its obligations thereunder. The execution and delivery of the Loan Documents, and performance of its obligations hereunder, by each Borrower: (1) are duly authorized and do not require the consent, approval, order or authorization of, or registration, qualification, designation, declaration or filing with, any other party or Governmental Authority which has not been obtained; (2) will not violate any applicable law in any material respect or result in the imposition of any Lien, charge or encumbrance upon the assets of such Borrower, except as contemplated by the Loan Documents; and (3) will not conflict with or result or cause a breach of any of the terms or provisions of, or constitute a default under, any material indenture, pledge, mortgage, deed of trust, loan agreement, partnership agreement, operating agreement or any other agreement or instrument to which any Borrower is party or by which any Borrower’s property or assets are subject or bound. The Loan Documents constitute the legal, valid and binding obligations of each Borrower, enforceable in accordance with their respective terms, except as may be limited by bankruptcy, insolvency, reorganization, moratorium or similar laws relating to or limiting creditors’ rights generally or by equitable principles.

Section 4.3 **Compliance with Laws; No Violations.** Each Borrower and each of its Subsidiaries is in compliance with all applicable laws, rules, statutes, regulations and ordinances in all

material respects. Each Borrower and each of its Subsidiaries has duly obtained and now holds all material licenses, permits, certifications, approvals and the like required by federal, state and local laws of the jurisdictions in which such Borrower or such Subsidiary conducts its business, and each remains valid and in full force and effect. There exists no violations of any statutes, rules, orders, ordinances, regulations or requirements of any Governmental Authorities with respect to the operation of the business of each Borrower and each of its Subsidiaries.

Section 4.4 **Financial Condition; Liabilities; Litigation.**

(1) The Historical Financial Statements and the other financial statements of each Borrower and each of its Subsidiaries delivered to Lender are true and correct in all material respects and fairly present the financial condition of such Borrower and such Subsidiary as of the dates indicated therein and the results of its operations for the indicated periods and were or will be, as the case may be, prepared in accordance with GAAP and applied on a consistent basis with prior periods. All Debt of each Borrower and each of its Subsidiaries as of the Effective Date is reflected on the most recently dated Historical Financial Statements of such Borrower and such Subsidiary. No information, exhibit, or report furnished by the Borrowers to Lender in connection with the negotiation of this Agreement contains any material misstatement of fact or omits to state a material fact or any fact necessary to make the statement contained therein not materially misleading.

(2) Except as otherwise disclosed to Lender, there is no litigation, administrative proceeding, investigation or other legal action (including any proceeding under any state or federal bankruptcy or insolvency law) pending or, to the knowledge of a Borrower, threatened against any Borrower or any of its Subsidiaries that (a) questions the validity of the Loan Documents or the right of such Borrower to enter into the Loan Documents and consummate the transactions contemplated thereby, (b) prevents, delays, interferes or would otherwise make illegal the consummation of the transactions contemplated by the Loan Documents, or (c) could reasonably be expected to cause, either individually or in the aggregate, any Material Adverse Effect.

Section 4.5 **Other Agreements; Defaults.** No Borrower nor any of its Subsidiaries is a party to any agreement or instrument or subject to any court order, injunction, permit, or restriction that could reasonably be expected to have a Material Adverse Effect. No Borrower nor any of its Subsidiaries is in violation or default of any provisions of its organizational documents, each as amended from time to time and as currently in effect, or of any material instrument, judgment, order, writ, decree or contract to which it is a party or by which it is bound. The execution, delivery and performance of and compliance with the Loan Documents will not result in any such violation or default.

Section 4.6 **Location of Borrower.** Each Borrower's principal place of business and chief executive offices are located at the address stated in Schedule 4.6 hereof.

Section 4.7 **Tax Filings.** Each Borrower and each of its Subsidiaries has filed (or has obtained effective extensions for filing) all federal, state and local tax returns required to be filed and has paid or made adequate provision for the payment of all federal, state and local taxes, charges and assessments payable by such Borrower or such Subsidiary except (a) taxes that are being contested in good faith by appropriate proceedings and for which the Borrowers, as applicable, have set aside on their books adequate reserves in accordance with GAAP or (b) to the extent that the failure to do so could not reasonably be expected to result in a material adverse effect.

Section 4.8 **Outstanding Debt.** No Borrower nor any of its Subsidiaries has outstanding Debt except as set forth in its most recently dated Historical Financial Statement and as set forth on Schedule 1.1(92) hereto. No Borrower nor any of its Subsidiaries intends to incur Debt or liabilities (including

contingent liabilities and other commitments) beyond its ability to pay such Debt as they mature (taking into account the timing and amounts of cash to be received by such Borrower or such Subsidiary and the amounts to be payable on or in respect of obligations of such Borrower or such Subsidiary).

Section 4.9 **Full and Accurate Disclosure.** No statement of fact made by or on behalf of any Borrower or any of its Subsidiaries in this Agreement or in any of the other Loan Documents contains any untrue statement of a material fact or omits to state any material fact necessary to make statements contained herein or therein not misleading. There is no fact presently known to any Borrower or any of its Subsidiaries which has not been disclosed to Lender which could reasonably be expected to have a Material Adverse Effect.

Section 4.10 **Anti-Terrorism and Anti-Money Laundering Compliance.**

(1) No Borrower nor any of its Subsidiaries is, and no Person who (a) owns a controlling interest in or otherwise controls a Borrower, or (b) holds, directly or indirectly, any legal or beneficial interest whatsoever in such Borrower or such Subsidiary, is: (i) listed on the Specially Designated Nationals and Blocked Persons List (the “**SDN List**”) maintained by the Office of Foreign Assets Control (“**OFAC**”), Department of the Treasury, and/or on any other similar list (“**Other Lists**”) and, collectively with the SDN List, the “**Lists**”) maintained by the OFAC pursuant to any authorizing statute, Executive Order or regulation (collectively, “**OFAC Laws and Regulations**”); or (ii) a Person (a “**Designated Person**”) either (A) included within the term “designated national” as defined in the Cuban Assets Control Regulations, 31 C.F.R. Part 515, or (B) designated under Sections 1(a), 1(b), 1(c) or 1(d) of Executive Order No. 13224, 66 Fed. Reg. 49079 (published September 25, 2001) or similarly designated under any related enabling legislation or any other similar Executive Orders (collectively, the “**Executive Orders**”). The OFAC Laws and Regulations and the Executive Orders are collectively referred to in this Agreement as the “**Anti-Terrorism Laws**”. This Section 4.10(1) shall not apply to any Person to the extent that such Person’s interest in a Borrower is through a U.S. Publicly-Traded Entity. As used in this Agreement, “**U.S. Publicly-Traded Entity**” means a Person (other than an individual) whose securities are listed on a national securities exchange, or quoted on an automated quotation system, in the United States, or a wholly-owned subsidiary of such a Person.

(2) Each Borrower and each of its Subsidiaries has taken reasonable measures appropriate to the circumstances (and in any event as required by law), with respect to each holder of a direct or indirect interest in such Borrower, to assure that funds invested by such holders in such Borrower or such Subsidiary are derived from legal sources (“**Anti-Money Laundering Measures**”). The Anti-Money Laundering Measures have been undertaken in accordance with the Bank Secrecy Act, 31 U.S.C. §§ 5311 *et seq.* (“**BSA**”), and all applicable laws, regulations and government guidance on BSA compliance and on the prevention and detection of money laundering violations under 18 U.S.C. §§ 1956 and 1957 (collectively with the BSA, “**Anti-Money Laundering Laws**”).

(3) No Borrower nor any of its Subsidiaries, nor to the knowledge of the Borrowers any Person who (1) owns a controlling interest in or otherwise controls such Borrower or such Subsidiary, or (2) holds, directly or indirectly, any legal or beneficial interest whatsoever in such Borrower or such Subsidiary, (i) is under investigation by any Governmental Authority for, or has been charged with, or convicted of, money laundering under 18 U.S.C. §§ 1956 and 1957, drug trafficking, terrorist-related activities or other money laundering predicate crimes, or any violation of the BSA, (ii) has been assessed civil penalties under any Anti-Money Laundering Laws, or (iii) has had any of its funds seized or forfeited in an action under any Anti-Money Laundering Laws.

Section 4.11 **Health Care Matters.**

(1) Compliance with Health Care Laws; Permits. Each Borrower and each of its Subsidiaries is and, in the five (5) years prior to the Effective Date, has been in compliance in all material respects with all Health Care Laws applicable to it, its products and its properties or other assets or its business or operation. Each Borrower, and each of its Subsidiaries is, and any Person acting on its behalf, has in effect all Permits, including, without limitation, all Permits necessary for it to own, lease or operate its properties and other assets and to carry on its business and operations, as presently conducted, except as immaterial. All such Permits are in full force and effect and there exists no material default under, or material violation of, any such Permit and neither Borrower nor any Subsidiary has received written notice of any current or proposed limitation, suspension, termination or revocation of any such Permit. No action, proceeding, litigation, demand, or investigation by any Governmental Authority and no suit, action or proceeding by any other person, in each case with respect to any Borrower or any of its Subsidiaries is pending or, to the knowledge of such Person, threatened.

(2) Material Statements. In the five (5) years prior to the Effective Date, neither Borrower nor any Subsidiary has made an untrue statement of a material fact or fraudulent statement to any Governmental Authority, or, to the knowledge of such Borrower or such Subsidiary, failed to disclose a material fact required to any Governmental Authority, or committed an act, or made a statement that, at the time such statement was made, would constitute a violation of any Health Care Law. As applicable, neither Borrower nor any Subsidiary, or any of their respective affiliates, employees or agents, has made any untrue statement of fact to any Governmental Authority regarding material claims incurred but not reported, in the five (5) years prior to the Effective Date.

Section 4.12 Acknowledgment of Lender's Reliance. Each Borrower and each of its Subsidiaries acknowledges that Lender will extend the Loans in reliance upon the representations and warranties contained in the Loan Documents or any certificate delivered to Lender pursuant to the Loan Documents. Lender shall be entitled to such reliance notwithstanding any investigation which has been or will be conducted by Lender on its behalf.

Section 4.13 Business Purpose. The proceeds of the Loans will be used entirely for Borrowers' business purposes.

Section 4.14 [Reserved].

Section 4.15 Factoring Agreement. Under the Factoring Agreement, there are (i) no outstanding amounts or obligations due and payable, (ii) no invoices issued or outstanding, (iii) no assets transferred and (iv) as of the Effective Date, no more than \$4,300,000 cash is posted as collateral for the obligations.

Section 4.16 Borrower Information. Schedule 4.16 hereto sets forth a complete and accurate list as of the Effective Date of (i) the exact legal name of each Borrower, (ii) the state or jurisdiction of organization of each Borrower, (iii) the type of organization of each Borrower and (iv) the organizational identification number of each Borrower or states that no such organizational identification number exists.

Section 4.17 Collateral.

(1) Except as otherwise provided or referenced in this Agreement, each Borrower has good, marketable and indefeasible title to the Collateral, and the Collateral is free from all encumbrances and rights of setoff of any kind (other than Permitted Liens).

(2) Except as otherwise provided or referenced in this Agreement, no Borrower will hereafter, without Lender's prior written consent, sell, pledge, encumber, assign or otherwise dispose of

any of the Collateral other than in the ordinary course of business and consistent with past practice or permit any lien or security interest to exist thereon except to Lender (other than Permitted Liens).

(3) Upon the filing of any UCC-1 financing statements in the appropriate filing office, Lender will have a perfected security interest (subject only to Permitted Liens and subject in priority only to the Carve-Out and Prepetition Permitted Liens) in the Collateral (including, without limitation, after-acquired Collateral at the time any Borrower acquires rights therein) to the extent that a security interest in the Collateral can be perfected by such filing.

(4) Except as otherwise provided or referenced in this Agreement, each Borrower will defend the Collateral against all claims and demands of all persons at any time claiming the same or any interest therein.

(5) Set forth in Schedule 4.17(5) hereto is a complete and accurate list, as of the Effective Date, of each Deposit Account, Securities Account and Commodities Account of each Borrower, together with the name and address of each institution at which each such account is maintained, the account number for each such account and a description of the purpose of each such account.

(6) The Pledged Issuers set forth in Schedule 4.17(6) identified as a Subsidiary of a Borrower are each such Borrower's only Subsidiaries existing on the Effective Date. The Pledged Shares have been duly authorized and validly issued and the Pledged Shares of any issuer that is a corporation are fully paid and nonassessable and the holders thereof are not entitled to any preemptive, first refusal or other similar rights. Except as noted in Schedule 4.17(6) hereto, the Pledged Shares constitute 100% of the issued shares of Equity Interests of the Pledged Issuers as of the date hereof. All other shares of Equity Interests of each Borrower's Subsidiaries constituting Pledged Interests will be duly authorized and validly issued, fully paid and nonassessable (other than Equity Interests in limited liability companies and partnerships which are validly issued and fully paid).

Section 4.18 **Survival; Updates of Representations and Warranties**. All representations and warranties contained in or made in connection with this Agreement and the other Loan Documents shall survive the Effective Date and any advance made hereunder. Lender acknowledges and agrees that any and all representations and warranties contained in or made under or in connection with this Agreement may be amended, changed or otherwise modified by the Borrowers, with the consent of Lender, at any time and from time to time after the Effective Date so as to accurately reflect the matters represented and warranted therein; provided, that such amendments, changes and/or modifications are disclosed in writing to and approved by Lender. Lender shall have no obligation to waive any Event of Default due to any present or future inaccuracy of such representation or warranty or to agree to any amendment, change or modification of such representation or warranty.

ARTICLE 5

[RESERVED]

ARTICLE 6

REPORTING AND INFORMATION

Section 6.1 **Projections.** On or before the Thursday of every other calendar week (or, solely to the extent any applicable Thursday is not a Business Day, on or before the next Business Day), commencing with the first week following the Effective Date, the Borrowers shall deliver to Lender financial projections that set forth: (i) projections of the weekly cash flows for the 13-week period commencing on the first day of such fiscal week (the “*13-Week Cash Flow Projections*”) that reflect the Borrowers’ consolidated projected cash receipts and cash expenditures for their corporate and other operations; and (ii) a Variance Report comparing, for each line of such 13-Week Cash Flow Projections, the actual disbursements and receipts for the previous reporting weeks and the variance of such actual results from those projected for such previous reporting week on the most current 13-Week Cash Flow Projections delivered under the terms of this Agreement prior to such date. Upon Lender’s request and upon reasonable notice, the Borrowers and the Borrower Financial Advisor shall (and the Borrowers shall cause the Borrower Financial Advisor to) participate in a telephone call with Lender whereby the Borrowers and the Borrower Financial Advisor shall provide an explanation of any material variance between the projected weekly cash flows and the actual disbursements and receipts for any fiscal week.

Section 6.2 **Access to Books and Records.** Each Borrower and each of their Subsidiaries shall keep and maintain proper and current books and records in accordance with GAAP and permit Lender and its agents and representatives, upon prior reasonable notice and during normal business hours, (i) to examine and produce copies of, as applicable, all of the facilities, processes, records, books and papers of such Borrower and its Subsidiaries and (ii) to discuss the business, affairs and finances of the Borrowers and their respective Subsidiaries with any of its officers and managers and such Borrower’s independent accountants. Each Borrower shall permit, and cause each of its Subsidiaries to permit, the Lender and the duly authorized agents and representatives of Lender, at such reasonable times during normal business hours and intervals as Lender may designate to examine and make copies of and abstracts from its records and books of account, to visit and inspect its properties, to verify materials, records, books, papers, leases, contracts, notes, accounts receivable, deposit accounts and its other assets, to conduct audits, physical counts, valuations, appraisals or examinations and to discuss its affairs, finances, contracts and accounts with any of its directors, officers, employees, senior managerial employees, independent public accountants, other professional advisors or any of its other representatives. In furtherance of the foregoing, each Borrower hereby authorizes its officers, employees, independent public accounts and other professional advisors of each of its Subsidiaries, to discuss the affairs, finances and accounts of such Person with the Lender and the duly authorized agents and representatives of Lender in accordance with this Section 6.2. All reasonable costs and expenses of such inspections, examinations and discussions shall be paid by the Borrowers.

Section 6.3 **Notices.**

(i) Promptly after the occurrence of a Default or Event of Default, Borrowers shall deliver to Lender notice thereof together with a description of the nature and effect of such event and the remedial steps being taken by the Borrowers as a result thereof.

(i) Promptly after delivery thereof, Borrowers shall deliver to Lender any written notice from any Governmental Authority of any investigation or audit, or pending or threatened proceedings relating to, any violation by the Borrowers or any Subsidiary of any applicable laws, including any Health Care Laws, in each case, solely to the extent the same would reasonably be expected to result in any material liability to any Borrower or any Subsidiary.

(ii) Each Borrower shall promptly notify Lender in writing of (a) any condition or event which constitutes (or which upon the giving of notice or lapse of time, or both would constitute) an Event of Default under this Agreement or any other Loan Documents, including any event or circumstance which causes any information which has previously been provided by such Borrower to Lender to include an untrue statement of material fact or to omit to state any material fact or any fact necessary to make the statements therein, in the light of the circumstances under which they were made, not misleading, and, in such event, such Borrower shall promptly furnish to Lender updated or revised information which will correct such untrue statement or include such omitted fact; (b) any written notice of breach or default received by such Borrower or its Subsidiaries or otherwise material to such Borrower's business; (c) any threatened or pending legal, judicial or regulatory proceedings or investigation, including any dispute between such Borrower and/or any of its Subsidiaries and any Governmental Authority affecting such Borrower or such Subsidiary; and (d) any event causing extraordinary loss or depreciation of the value of such Borrower's assets (whether or not insured) or business and the facts with respect thereto.

(iii) Immediately (and in no event later than one (1) Business Day after actual knowledge thereof), Borrowers shall deliver to Lender (1) any information publicly disclosed in any document filed with the Bankruptcy Court and (2) copies of all material written reports and presentations delivered by or on behalf of any Borrower to the Committee in any of the Cases to the extent not publicly filed.

(iv) Each Borrower shall provide Lender copies of all certificates, notices and other information delivered to such Borrower or its Subsidiaries by, or received by such Borrower or its Subsidiaries from, any other Material Contract counterparty, contemporaneously with such delivery or promptly after such receipt.

Section 6.4 **Financials.** During the duration of the Cases, each Borrower shall deliver to Lender (a) operating reports shared with the U.S. Trustee, (b) any financial information shared with the U.S. Trustee, the Committee and any other third-party Person in connection with the Cases and (c) such other financial information as Lender reasonably requests.

ARTICLE 7 **COVENANTS**

Each Borrower covenants and agrees with Lender that, so long as Borrower has any outstanding Obligations (other than unasserted contingent Obligations) under the Loan Documents, without the prior written consent of Lender:

Section 7.1 **Due on Sale and Encumbrances; Authority Documents.**

(1) No Borrower nor any of its Subsidiaries shall sell, convey, assign or otherwise transfer its properties, assets or contractual rights other than (a) in the ordinary course of business and consistent with past practice in accordance with the DIP Budget; or (b) mortgage, pledge, encumber, alienate, grant any other Lien on or grant any other interest in its properties or assets other Liens in favor of Lender (other than Permitted Liens); and

(2) No Borrower nor any of its Subsidiaries shall amend, modify, or otherwise supplement its respective Authority Documents.

Section 7.2 **Taxes on Security.** Each Borrower and each of its Subsidiaries shall pay all taxes, charges, filing, registration and recording fees, excises and levies payable with respect to the Liens (if any) created or secured by the Loan Documents. If there shall be enacted any law changing existing laws of taxation of security interests, mortgages, deeds of trust, security deeds, or debts secured by real property, or changing the manner of collecting any such taxes, such Borrower or such Subsidiary shall promptly pay to Lender, on demand, all additional taxes, costs and charges for which Lender is or may be liable as a result thereof.

Section 7.3 **Limitations on Other Debt.** No Borrower nor any of its Subsidiaries shall incur any Debt (whether secured or unsecured) (other than Permitted Debt). Notwithstanding anything to the contrary, other with respect to the Carve-Out, no Debt shall be permitted to have an administrative expense claim status under the Bankruptcy Code senior to or *pari passu* with the super priority administrative expense claims of Lender as set forth herein and in the DIP Orders.

Section 7.4 **Compliance with Laws, etc.** Each Borrower and each of its Subsidiaries shall do or cause to be done all things necessary to preserve, renew and keep in full force and effect its existence, and all material licenses and permits and comply with all applicable laws, rules, statutes, regulations and ordinances in all material respects.

Section 7.5 **Compliance with Health Care Laws.**

(1) Without limiting or qualifying any other provision of this Agreement, each Borrower will comply, and will cause each Subsidiary, to comply in all material respects, with all applicable Health Care Laws relating to the operation of such Person's business.

(2) Notwithstanding anything to the contrary in this Agreement, neither Borrower nor any of its Subsidiary shall be required to furnish to Lender any protected health information or any patient related information, to the extent such disclosure to Lender is prohibited by Health Care Laws or other applicable laws.

Section 7.6 **Continued Business Operations.** Each Borrower and each of its Subsidiaries shall continue to conduct such Borrower's or such Subsidiary's business operations in substantially the same manner as is currently being conducted. Each Borrower and each of its Subsidiaries shall keep or cause to be kept adequately insured by financially sound and reputable insurers such Borrower's or such Subsidiary's business activities in the manner usually insured by businesses engaged in the same or similar businesses. Without limiting the generality of the foregoing, each Borrower and each of its Subsidiaries shall at all times maintain adequate business liability insurance applicable to such Borrower's or such Subsidiary's operations, shall be in full compliance with all terms and conditions of such insurance and shall pay all insurance premiums payable by it.

Section 7.7 **Prohibited Actions.** No Borrower nor any of its Subsidiaries shall: (a) enter into any agreements other than in the ordinary course of business and consistent with past practice or any

agreements adversely affecting the operation of such Borrower's or such Subsidiary's business or amend or terminate any existing agreement; (b) enter into any line of business substantially different from those lines of business conducted by such Borrower or such Subsidiary on the date hereof or any business substantially related or incidental thereto; (c) commence any legal action or proceeding against any person or settle any legal action or proceeding against such Borrower or such Subsidiary brought by any third party or Governmental Authority; (d) make loans or advances to any person or entity; (e) engage in, or seek or consent to, any dissolution, winding up, liquidation, consolidation, merger or asset sale unless otherwise permitted hereby; (f) enter into or be a party to any transaction with its members or any of its affiliates, except on terms that are no less favorable to any party thereto than would be obtained in a comparable arm's length transaction with an unrelated third party; (g) except as permitted by Section 10.2 of hereof), change its name; and/or (h) use any trade name other than such Borrower's or such Subsidiary's true name.

Section 7.8 **Further Assurances.** Each Borrower shall (a) cure any defects in the execution and delivery of the Loan Documents, and (b) execute and deliver, or cause to be executed and delivered, all such other documents, agreements and instruments as Lender may reasonably request to further evidence and more fully describe the collateral for the Loans, to correct any omissions in the Loan Documents, or to obtain any consents as may be necessary or appropriate in connection therewith.

Section 7.9 **Borrower Financial Advisor; Sale Process and Transaction.**

(1) The Borrowers shall provide to the Lender, as soon as possible but in no event more than (i) one (1) Business Day after sending or receipt thereof, copies of all bid letters and term sheets and (ii) two (2) Business Days after sending or receipt thereof, associated valuation analyses that the Borrower Financial Advisor or any Borrower or any of its Subsidiaries sends to, or receives from, any potential buyer. Lender shall have the consent rights as set forth in the Bidding Procedures, as acceptable to the Lender in its sole discretion.

(2) Each Borrower irrevocably authorizes the Borrower Financial Advisor to (i) regularly consult with, and respond to the inquiries of, Lender concerning any and all matters relating to the affairs, finances and businesses of the Borrowers, the assets and capital stock of the Borrowers and any aspect of the sale process or any refinancing transaction and (ii) provide periodic updates to Lender (which may be provided telephonically), in each case at such times as Lender may reasonably request, to discuss progress and developments regarding the sale or any refinancing.

(3) The Borrowers shall, and shall cause each of their Subsidiaries to, comply with the following deadlines (each a "**Sale Milestone**"), and the Borrowers hereby acknowledge and agree that, by entering into this Agreement or otherwise, the Lender does not consent to, and nothing contained herein shall be deemed to be a consent to, any particular Sale Transaction or other Disposition of assets of the Borrowers:

(a) No later than five (5) business days after the Petition Date, entry by the Bankruptcy Court of the Interim DIP Order;

(b) No later than twenty-five (25) calendar days after the Petition Date, entry by the Bankruptcy Court of an order approving (i) the Asset Purchase Agreement and (ii) the Bidding Procedures for the Purchased Assets;

(c) No later than twenty-five (25) calendar days after the Petition Date, entry by the Bankruptcy Court of the Final Order;

(d) No later than forty-two (42) calendar days after the Petition Date, the submission deadline for all bids for the sale of the Purchased Assets as set forth in the Bidding Procedures;

(e) No later than forty-five (45) calendar days after the Petition Date, holding of an auction (if necessary) for the sale of the Purchased Assets as set forth in the Bidding Procedures;

(f) No later than fifty-five (55) calendar days after the Petition Date, entry by the Bankruptcy Court of the Sale Order (as defined in the Asset Purchase Agreement); and

(g) No later than seventy (70) calendar days after the Petition Date, consummation of the sale of the Purchased Assets.

(4) **Case Matters.**

(a) All Professional Fees at any time paid by the Borrowers, or any of them, shall be paid by the Borrowers pursuant to procedures established by an order of the Bankruptcy Court and pursuant to the DIP Budget.

(b) The Borrowers will not return any inventory or other property to any vendor pursuant to Section 546(g) of the Bankruptcy Code, unless otherwise ordered by the Bankruptcy Court in accordance with Section 546(g) of the Bankruptcy Code upon prior notice to Lender or unless otherwise consented to by Lender.

(c) No Borrower shall submit to the Bankruptcy Court a Plan of Reorganization without the prior written consent of Lender, unless such Plan of Reorganization will indefeasibly pay the Obligations and the Prepetition Obligations in full, in cash and terminate any commitment to extend credit hereunder.

(d) No Borrower shall propose to the Bankruptcy Court, or otherwise, a sale of all or substantially all of the Collateral, without the prior written consent of Lender, unless such sale will indefeasibly pay the Borrowers' liabilities in full, in cash and terminate any commitment to extend credit hereunder.

Section 7.10 **Disbursements, DIP Budget Variance and Updated DIP Budget.**

(1) The Borrowers may not make any disbursements other than those set forth in the DIP Budget.

(2) Each Borrower shall deliver to Lender a certificate signed by an Authorized Officer of such Borrower, on the Thursday of each week (or the succeeding Business Day if such Thursday is not a Business Day), commencing on the second Thursday after the Petition Date, certifying the cash disbursements and receipts, on a line by line basis, for the week ended (and on a cumulative basis since the Petition Date) the immediately prior Saturday, together with a variance report, on an individual line item basis and an aggregate basis, comparing such disbursements to the DIP Budget.

(3) Each Borrower shall deliver to Lender a certificate signed by an Authorized Officer of such Borrower on the Thursday of every other week, commencing on the third Thursday after the Petition Date, certifying as to the accrued Professional Fees for the two week period ended (and on a cumulative basis since the Petition Date) the Saturday ten days prior to such date, together with a variance report comparing such Professional Fees to the DIP Budget.

(4) Each Borrower shall deliver to Lender a certificate signed by an Authorized Officer of such Borrower on the Thursday of each week (or the succeeding Business Day if such Thursday is not a Business Day), commencing on the second Thursday after the date of entry of the Interim DIP Order, a variance report (the “**Variance Report**”) for the immediately preceding two-week Variance Period comparing, in each case, (i) the actual aggregate cumulative cash disbursements for such Variance Period (without consideration of Professional Fees) which shall not exceed the projected disbursements for such Variance Period by more than fifteen percent (15%) and (ii) the actual aggregate cumulative cash receipts for such Variance Period which shall not be less than the projected cash receipts for such period, by more than fifteen percent (15%) to the projected cash receipts for such Variance Period, and, in each case, as set forth in the DIP Budget for such two-week look-back period (the “**Variance Period**” and, such variance of up to fifteen percent (15%) during each Variance Period, the “**Permitted Variance**”).

(5) Every two weeks after the Petition Date, the Borrowers shall propose an updated budget (the “**Proposed DIP Budget**”) which shall reflect the Borrower’s good faith projection of all weekly receipts and disbursements in connection with the operation of the Borrowers’ and their respective Subsidiaries’ business during the next thirteen-week period, including but not limited to, collections, payroll, capital expenditures, Professional Fees and other cash outlays, in each case, consistent in form and substance (other than dollar amounts) with the Initial DIP Budget. Lender may approve such Proposed DIP Budget, which will then become the “DIP Budget” then in effect in the Lender’s sole and absolute discretion. If Lender does not approve such Proposed DIP Budget, then the current DIP Budget will remain in effect. If at any time there is no approved DIP Budget in effect for the current period, such event shall be an immediate Event of Default hereunder.

Section 7.11 **Factoring Agreement**. No Borrower nor any of its Subsidiaries shall utilize, or issue any invoices or transfer any assets under, the Factoring Agreement and the balance thereunder shall remain at \$0 at all times. No later than fourteen (14) days after the Petition Date, the Borrowers shall file a motion pursuant to section 363 of the Bankruptcy Code and Bankruptcy Rule 9019 to approve a settlement with respect to the termination of the Factoring Agreement, which motion and settlement term shall be in form and substance satisfactory to the Lender in its sole discretion.

Section 7.12 **Transition Services Agreement**. Upon the request by Lender following the date of this Agreement and prior to the date that is five (5) Business Days prior to the Closing Date (as defined in the Asset Purchase Agreement), the Borrowers and Lender shall negotiate in good faith the Transition Services Agreement, in a form reasonably satisfactory to Lender and the Borrowers, pursuant to which the parties shall provide reasonable assistance in transitioning the Purchased Assets (as defined in the Asset Purchase Agreement) from the Borrowers to Lender for a period mutually agreed, with each of the parties bearing their own respective costs in connection with the Transition Services Agreement (unless otherwise agreed in the Transition Services Agreement).

Section 7.13 **Amendments to Orders**. No Borrower nor any of its Subsidiaries shall amend, modify or waive (or make any payment consistent with an amendment, modification or waiver of), or apply to the Bankruptcy Court for authority to make any amendment, modification or waiver of, any provision of the Interim DIP Order, the Cash Management Order, the Sale Order or the Final DIP Order without in each case the prior written consent of Lender in its sole discretion.

Section 7.14 **Post-Closing Obligations.**

(1) Not later than the date that is two (2) weeks after the Effective Date, Lender shall have received all insurance certificates and accompanying endorsements naming Lender as additional insured or lender's loss payee under Borrowers' insurance policies and providing that such policies may be terminated or canceled (by the insurer or the insured thereunder) only upon thirty (30) days' prior written notice to Lender and each such named insured or lender's loss payee (or 10 days' prior written notice in the event of a cancellation due to a failure to pay premiums).

(2) Not later than the date that is thirty (30) days after the Effective Date (or such longer time as Lender shall agree in writing in its sole discretion), Lender shall have received a Control Agreement with respect to each deposit account, securities account and commodities account of the Borrowers (other than Excluded Accounts), and each duly executed by the applicable Borrower, the applicable depository bank or securities intermediary.

ARTICLE 8
EVENTS OF DEFAULT

Each of the following shall constitute an "Event of Default" under the Loans:

Section 8.1 **Payments.** Any Borrower's failure to pay (a) any payment of principal, interest, fees or other amount due under the Loan Documents when and as due, (b) any payment obligations under the DIP Orders when and as due and/or (c) each Loan at the Maturity Date, whether by acceleration or otherwise.

Section 8.2 **Covenants.** Any Borrower's failure to perform or observe any of the agreements and covenants contained in Section 6.3 or Article 7.

Section 8.3 **Other Covenants.** Any Borrower's failure to perform or observe any of the other agreements and covenants contained in this Agreement or any other Loan Documents for a period of more than five (5) days following the occurrence thereof.

Section 8.4 **Representations and Warranties.** Any representation or warranty made in any Loan Document or in any financial statement, application, schedule, report or any other document given by any Borrower under any Loan Document proves to be untrue in any material respect when made or deemed made, except to the extent that any such representation and warranty is qualified by materiality, "Material Adverse Effect" or other similar qualification, such representation and warranty shall be true and correct in all respects, or if any warranty shall cease to be complied with in any material respect, or if any Borrower omitted to state any material fact necessary to make such information not misleading.

Section 8.5 **Exclusivity.** An order shall be entered terminating or reducing Borrowers' exclusivity period for proposing a Plan of Reorganization (to the extent such motion is not made by Lender).

Section 8.6 **Sale Milestones and Variance.** Failure of Borrower to comply with any of the Sale Milestones; provided that Lender may agree to an extension of any of the Sale Milestone dates in its sole and absolute discretion. The actual amount of aggregate cumulative disbursements for a Variance Period exceeds the projected cumulative disbursements in the DIP Budget for such Variance Period by more than a Permitted Variance or the actual amount of aggregate cumulative receipts for such Variance Period are less than the projected cumulative receipts for such Variance Period by more than the Permitted Variance.

Section 8.7 **Business Change.** Any Borrower consummates any (i) dissolution, liquidation, consolidation or merger with or into any other business entity, (ii) any transaction which results in a Change of Control, (iii) any transaction for the sale, transfer or other disposition of all or a material portion of any Borrower's or any of their Subsidiaries' assets or (iv) any sale of all or substantially all assets of the Borrowers pursuant to Section 363 of the Bankruptcy Code or entry into an agreement obligating any Borrower to consummate any such sale, other than a sale pursuant to the Asset Purchase Agreement, unless (x) the proceeds of such sale are used to indefeasibly satisfy the Obligations in full in cash, or (y) such sale is consented to by Lender.

Section 8.8 **Material Business Disruption.** Any Borrower is enjoined, restrained or in any way prevented by order of a court or regulatory agency from continuing to conduct all or any material part of its business affairs for a period in excess of five (5) consecutive days.

Section 8.9 **Other Encumbrances.** A final post-petition judgment or other claim shall be entered that, together with any other undischarged final judgments against any Borrower or any of their Subsidiaries during the term of this Agreement, exceeds an aggregate of \$25,000, and within five (5) days after the entry thereof, has not been discharged or execution thereof stayed pending appeal, or, within five (5) days after the expiration of such stay, has not been discharged.

Section 8.10 **Loan Documents.** Any of the Loan Documents or the security interests and Liens thereunder are challenged by any Borrower or any Loan Document is revoked or rescinded.

Section 8.11 **Collateral.** (A) Lender fails to have a perfected first priority security interest in the Collateral subject only to the Carve-Out and Prepetition Permitted Liens or (B) a forfeiture or loss of all or a material portion of the Collateral to any Governmental Authority occurs.

Section 8.12 **Cross Default.** (A) Any Borrower or any Subsidiary thereof fails to make any payment when due (whether by scheduled maturity, required prepayment, acceleration, demand, or otherwise but subject to any applicable grace periods applicable thereto) or otherwise fails to observe or perform any other agreement or condition relating to any Debt or guarantee, whether individually or in the aggregate, having an aggregate principal amount in excess of \$25,000 contained in any instrument or agreement evidencing, securing or relating thereto, or any other event occurs, the effect of which default or other event is to cause, or to permit the holder or holders of such Debt or the beneficiary or beneficiaries of such guarantee (or a trustee or agent on behalf of such holder or holders or beneficiary or beneficiaries) to cause, with the giving of notice if required, such Debt to be demanded or to become due or to be repurchased, prepaid, defeased or redeemed (automatically or otherwise), or an offer to repurchase, prepay, defease or redeem such Debt to be made, prior to its stated maturity, or such guarantee to become payable or cash collateral in respect thereof to be demanded (subject, in each case, to any applicable grace or cure periods applicable thereto and after giving effect to any amendments or waivers thereof) or (B) a material breach of the Asset Purchase Agreement occurs, other than as a result of Lender's material breach.

Section 8.13 **Case Orders.**

(1) An order shall be entered in any of the Cases appointing, or any Borrower shall file an application for an order with respect to any of the Cases seeking (x) the appointment of, in either case without the prior written consent of Lender, (i) a trustee under Section 1104 of the Bankruptcy Code or (ii) an examiner or any other Person with enlarged powers relating to the operation of the business (i.e., powers beyond those set forth in Sections 1104(d) and 1106(a)(3) and (4) of the Bankruptcy Code) under Section 1106(b) of the Bankruptcy Code or (y) a change of venue with respect to any Case or any related adversary proceeding.

(2) An order shall be entered dismissing a Case or converting a Case to a case under Chapter 7 of the Bankruptcy Code.

(3) An order shall be entered with respect to the Case or Cases, without the prior written consent of Lender, (i) to revoke, reverse, stay, vacate or otherwise modify the DIP Orders, (ii) to permit any administrative expense or any claim (now existing or hereafter arising, of any kind or nature whatsoever) to have administrative priority equal or superior to the priority of Lender in respect of the Obligations other than the Carve-Out and the Adequate Protection Liens granted to the Prepetition Secured Lender and the Bay View Adequate Protection Liens pursuant to the DIP Orders, (iii) terminating or denying the use of cash collateral, or (iv) granting or permitting the grant of a lien that is equal in priority with or senior to the liens securing the Obligations other than the Carve-Out and the Adequate Protection Liens granted to the Prepetition Secured Lender and the Bay View Adequate Protection Liens pursuant to the DIP Orders.

Section 8.14 **Automatic Stay.** An order shall be entered that is not stayed pending appeal granting relief from the Automatic Stay to any creditor of a Borrower (other than Lender) with respect to any claim against any property that, when taken together with all other orders entered on the docket of the Bankruptcy Court that are not stayed pending appeal granting relief from the Automatic Stay with respect to Borrowers' Collateral having a value in excess of \$25,000 individually or in the aggregate.

Section 8.15 **Plan of Reorganization.** An order shall be entered by the Bankruptcy Court confirming a Plan of Reorganization or liquidation in any of the Cases which does not (i) contain a provision for termination of all commitments to extend credit hereunder and indefeasible payment in full in cash of all Obligations hereunder and under the other Loan Documents and all Prepetition Obligations under the Prepetition Credit Agreement on or before the effective date of such plan or plans upon entry thereof and (ii) provide for the continuation of the Liens and security interests granted to Lender for the benefit of Lender (as Lender hereunder and as Prepetition Secured Lender) with the same priorities under the DIP Orders until such plan effective date.

Section 8.16 **Violation of DIP Orders.** A violation by any Borrower or Subsidiary thereof of any of the provisions of the DIP Orders, the Cash Management Order or the Sale Order occurs.

Section 8.17 **Rejection of Contracts.** Any Borrower rejects or assumes an unexpired lease or other contract, other than with the prior written consent of Lender in its sole discretion.

Section 8.18 **Litigation Regarding DIP Liens.** Any Borrower, any of Borrower's affiliates, any creditor or the Committee commences, or supports, any person, in any litigation challenging or seeking to challenge the DIP Liens against Lender, except as may be permitted under the DIP Orders.

Section 8.19 **Payments of Debt.** Any Borrower shall make a payment or grants adequate protection with respect to Debt existing prior to the Petition Date (other than as permitted under this Agreement, the DIP Orders or the "first day" orders or otherwise and approved by Lender and the Bankruptcy Court).

Section 8.20 **Post-Petition Payments.** Any Borrower or any Subsidiary thereof fails to make any post-petition payment when due (whether by scheduled maturity, required prepayment, acceleration, demand, or otherwise) in respect of any Material Contract or fails to observe or perform any other material agreement or condition relating to any such Material Contract or contained in any instrument or agreement evidencing, securing or relating thereto, or any other event occurs, the effect of which default or other event is to cause, or to permit the counterparty to such Material Contract to terminate such Material Contract, in each case, except to the extent as permitted with the express prior consent of the Lender in its sole discretion.

Section 8.21 **Asset Purchase Agreement**. Termination of the Asset Purchase Agreement; provided that such termination (x) was not caused by, or the result of, a breach by Buyer (as defined in the Asset Purchase Agreement) of its obligations thereunder, or (y) is the result of a party other than Buyer winning the Auction (as defined in the Asset Purchase Agreement) with respect to the sale of the Purchased Assets.

ARTICLE 9
CONSEQUENCES OF AN EVENT OF DEFAULT

Section 9.1 **Remedies**.

(1) If an Event of Default exists, the Lender may, at any time or times and in any order, without notice to or demand on any Borrower (except for such notice or consent that is expressly provided for hereunder, under the DIP Order, or required by applicable law): (i) restrict the amount of or refuse to permit the Lender to fund any Loans, (ii) terminate any commitment to extend any credit hereunder, and thereupon such commitments shall terminate immediately, (iii) declare the Obligations then outstanding to be due and payable in whole (or in part, in which case any principal not so declared to be immediately due and payable may thereafter be declared to be due and payable), and thereupon the principal of the Loans so declared to be immediately due and payable, together with accrued interest thereon and all fees and other Obligations of the Borrowers accrued hereunder and under the other Loan Documents, shall become due and payable immediately, without presentment, demand, protest, notice of intent to accelerate, notice of acceleration or other notice of any kind, all of which are hereby waived by the Borrowers, (iv) exercise the right (after providing three (3) Business Days' prior notice to the Borrowers, the U.S. Trustee, and counsel to the Committee (but this shall not serve as a consent to the use of the Loans hereunder to pay Professional Fees incurred by any other such official committee)) to realize on all Collateral without the necessity of obtaining any further relief or order from the Bankruptcy Court, subject to the right of the Borrowers to seek continuation of the automatic stay during such three (3) Business Day period (such three (3) Business Day period, the "**Remedies Notice Period**"); and (v) pursue its other rights and remedies under the Loan Documents, the DIP Orders and/or applicable law. Except as otherwise provided in the DIP Orders, the foregoing remedies may be exercised without demand and without further application to or order of the Bankruptcy Court. In any hearing regarding any exercise of remedies under this Section 9.1(1) (which hearing must take place within the Remedies Notice Period), the only issue that may be raised by any party in opposition thereto shall be whether, in fact, an Event of Default has occurred and is continuing the Borrowers, any committee and all other parties in interest shall not be entitled to seek relief, including, without limitation, under Section 105 of the Bankruptcy Code, to the extent such relief would in any way impair or restrict the rights and remedies of Lender set forth in the DIP Orders, this Agreement or the Loan Documents, as applicable. If no such order is entered during the Remedies Notice Period, all use of the Collateral shall cease and the Lender shall be entitled to enforce the remedies hereunder.

(2) While any Event of Default exists, Lender shall have no obligation to make any Loans hereunder. Upon the occurrence of an Event of Default under Article 8 hereof, at the option and upon the declaration of Lender, (x) all Obligations (including, without limitation, any and all costs and expenses, including professional fees) shall be immediately due and payable, without presentment, demand, protest or notice of any kind, all of which are hereby expressly waived, and the Default Rate will apply in accordance with Section 2.6; and (y) the Commitments and obligation, if any, of Lender to make any further Loans hereunder shall be terminated.

(3) Upon the occurrence of an Event of Default under Article 7 hereof, Lender may, immediately enforce payment of all amounts due and owing under the Loan Documents and exercise all rights and remedies therefor under the Loan Documents and at law or in equity, including, without limitation, instituting any proceeding or proceedings to enforce the Obligations. The rights, powers and

remedies of Lender under the Loan Documents shall be in addition to all rights, powers and remedies given to Lender by virtue of any statute or rule of law, or any other agreement between Lender and any Borrower, all of which rights, powers and remedies shall be cumulative and may be exercised successively or concurrently without impairing Lender's rights in any security interests created by the Loan Documents.

(4) The acceptance of any payment by any Borrower to Lender shall not be deemed to cure or constitute a waiver of any Event of Default and Lender retains its rights under this Agreement and the other Loan Documents to accelerate and to continue to demand payment of the Loans upon the happening of any Event of Default, despite any payments made to Lender after the occurrence of such Event of Default.

(5) Lender's exercise of any right or remedy which has the effect of remedying an Event of Default under the Loan Documents shall not constitute a cure or waiver of such Event of Default.

(6) The failure of Lender to insist upon strict performance of any term, covenant or condition contained in the Loan Documents shall not be deemed to be a waiver, modification, amendment or estoppel with respect to the enforcement of such term, covenant or condition. No Borrower shall be relieved or released from its Obligations by reason of (a) the failure of Lender to comply with any request of such Borrower to take any action to enforce any of the provisions of the Loan Documents; (b) the release, regardless of consideration, of any Person liable for the Loans or any portion thereof; or (c) any agreement or stipulation by Lender extending the time of payment or otherwise modifying or supplementing the terms of the Loan Documents. The rights of Lender under each of the Loan Documents shall be separate, distinct and cumulative and none shall be given effect to the exclusion of the others. No act of Lender shall be construed as an election to proceed under any one provision of any Loan Document to the exclusion of any other provision. Lender shall not be limited exclusively to the rights and remedies herein stated, but shall be entitled to every right and remedy now or hereafter afforded at law or in equity.

(7) Upon the occurrence and during the continuance of any Event of Default, Lender may declare all Obligations secured hereby immediately due and payable and shall have, in addition to any remedies provided herein or by any applicable law or in equity, all the remedies of a Lender under the UCC. All of the rights and remedies of Lender, whether evidenced by this Agreement or by any other writing, shall be cumulative and may be exercised singularly or concurrently by Lender. Election by Lender to pursue any remedy shall not exclude pursuit of any other remedy, and an election to make expenditures or to take action to perform an obligation of the Borrowers under this Agreement, after failure to perform, shall not affect the right of Lender to declare a default and to exercise remedies available to Lender under this Agreement. Nothing under this Agreement or otherwise shall be construed so as to limit or restrict the rights and remedies available to Lender under this Agreement following the occurrence and during the continuance of an Event of Default, or in any way to limit or restrict the rights and ability of Lender to proceed directly against the Borrowers and/or to proceed against any other collateral directly or indirectly securing the Obligations. Nothing under this Agreement or otherwise shall be construed so as to require Lender to proceed against or resort to any collateral directly or indirectly securing the Obligations at any time.

(8) Without limiting the generality of the foregoing, upon the occurrence and during the continuance of an Event of Default, Lender, without demand of performance or other demand, presentment, protest, advertisement or notice of any kind (except any notice required by law referred to below or as otherwise required herein) to or upon the Borrowers or any other Person (all and each of which demands, defenses, advertisements and notices are hereby waived), may in such circumstances forthwith collect, receive, appropriate and realize upon the Collateral, or any part thereof, and/or may forthwith sell, lease, assign, give option or options to purchase, or otherwise dispose of and deliver the Collateral or any part thereof, which rights shall include, without limitation, the right to (a) peaceably by its own means or

with judicial assistance enter the premises of the Borrowers and take possession of the Collateral without prior notice to the Borrowers or the opportunity for a hearing, (b) render the Collateral unusable, (c) dispose of the Collateral on the Borrower's premises, and (d) require the Borrowers to assemble the Collateral and make it available to Lender at a place designated by Lender. Unless the Collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, Lender will give the Borrowers reasonable notice of the time and place of any public sale thereof or of the time after which any private sale or any other intended disposition thereof is to be made. The requirements of commercially reasonable notice shall be met if such notice is sent to the Borrowers at least ten (10) days before the time of the intended sale or disposition. Expenses of retaking, holding, preparing for sale, selling or the like shall include Lender's reasonable attorney's fees and legal expenses, incurred or expended by Lender to enforce any payment due it under this Agreement either as against the Borrowers, as applicable, or in the prosecution or defense of any action, or concerning any matter growing out of or connection with the subject matter of this Agreement and the Collateral pledged hereunder. The Borrower waives all relief from all appraisal or exemption laws now in force or hereafter enacted.

Section 9.2 **Sales, UCC.**

(1) Each Borrower recognizes that Lender may be unable to effect a public sale of any or all of the Collateral that constitutes securities to be sold by reason of certain prohibitions contained in the laws of any jurisdiction outside the United States or in applicable federal or state securities laws but may be compelled to resort to one or more private sales thereof to a restricted group of purchasers who will be obliged to agree, among other things, to acquire such Collateral to be sold for their own account for investment and not with a view to the distribution or resale thereof. Each Borrower acknowledges and agrees that any such private sale may result in prices and other terms less favorable to the seller than if such sale were a public sale and, notwithstanding such circumstances, agrees that any such private sale shall, to the extent permitted by law, be deemed to have been made in a commercially reasonable manner. Unless required by law, Lender shall not be under any obligation to delay a sale of any of such Collateral to be sold for the period of time necessary to permit the issuer of such securities to register such securities under the laws of any jurisdiction outside the United States or under any applicable federal or state securities laws, even if such issuer would agree to do so. Each Borrower further agrees to do or cause to be done, to the extent that such Borrower may do so under all applicable, all such other acts and things as may be necessary to make such sales or resales of any portion or all of such Collateral or other property to be sold valid and binding and in compliance with any applicable law at Borrowers' expense. Each Borrower further agrees that a breach of any of the covenants contained in this Section 9.2(1) will cause irreparable injury to Lender for which there is no adequate remedy at law and, as a consequence, agrees that each covenant contained in this Section 9.2(1) shall be specifically enforceable against such Borrower, and each Borrower hereby waives and agrees, to the fullest extent permitted by law, not to assert as a defense against an action for specific performance of such covenants that (i) such Borrower's failure to perform such covenants will not cause irreparable injury to Lender or (ii) Lender has an adequate remedy at law in respect of such breach. Each Borrower further acknowledges the impossibility of ascertaining the amount of damages which would be suffered by Lender by reason of a breach of any of the covenants contained in this Section 9.1(1) and consequently, agrees that, if such Borrower shall breach any of such covenants and Lender shall sue for damages for such breach, such Borrower shall pay to Lender, as liquidated damages and not as a penalty, an aggregate amount equal to the value of the Collateral or other property to be sold on the date Lender shall demand compliance with this Section 9.2(1).

(2) If an Event of Default has occurred and is continuing, Lender shall have, in addition to all other rights of Lender, the rights and remedies of a secured party under the UCC, and without limiting the generality of the foregoing, Lender shall be empowered and entitled to, subject to the terms of the DIP Orders: (i) take possession of, foreclose on and/or request a receiver of the Collateral and keep it on any Borrower's premises at any time, at no cost to Lender, or remove any part of it to such other place

or places as the Lender may determine, or the Borrowers shall, upon Lender's demand, at the Borrowers' cost, assemble the Collateral and make it available to the Lender at a place convenient to the Lender; (ii) sell and deliver any Collateral at public or private sales, for cash, upon credit, or otherwise, at such prices and upon such terms as Lender deems advisable, in its sole discretion, and may postpone or adjourn any sale of the Collateral by an announcement at the time and place of sale or of such postponed or adjourned sale; (iii) hold, lease, develop, manage, operate, control and otherwise use the Collateral upon such terms and conditions as may be reasonable under the circumstances (making such repairs, alterations, additions and improvements and taking other actions, from time to time, as may be reasonably necessary or desirable), exercise all such rights and powers of each Borrower with respect to the Collateral, whether in the name of such Borrower or otherwise, including, without limitation, the right to make, cancel, enforce or modify leases, obtain and evict tenants, and demand, sue for, collect and receive all rents, in each case, in accordance with the standards applicable to the Lender under the Loan Documents, (iv) employ consultants to inspect the Collateral and to assure compliance by each Borrower of the terms and conditions of the Loan Documents and (v) take any other actions, as may be necessary or desirable, in connection with the Collateral (including preparing for the disposition thereof), and all actual, out-of-pocket fees and expenses incurred in connection therewith shall be borne by the Borrowers. Upon demand from the Lender, the applicable Borrower shall direct the grantor or licensor of, or the contracting party to, any property agreement with respect to any Property to recognize and accept the Lender as the party to such agreement for any and all purposes as fully as it would recognize and accept such Borrower and the performance of such Borrower thereunder and, in such event, without further notice or demand and at such Borrower's sole cost and expense, the Lender may exercise all rights of such Borrower arising under such agreements. Without in any way requiring notice to be given in the following manner, each Borrower agrees that any notice by the Lender of sale, disposition, or other intended action hereunder or in connection herewith, whether required by the UCC or otherwise, shall constitute reasonable notice to such Borrower if such notice is mailed by registered or certified mail, return receipt requested, postage prepaid, or is delivered personally against receipt, at least ten (10) Business Days prior to such action to the Borrower's address in accordance with Section 11.1 of this Agreement. If any Collateral is sold on terms other than payment in full at the time of sale, no credit shall be given against the Obligations until the Lender receive payment, and if the buyer defaults in payment, the Lender may resell the Collateral. In the event the Lender seeks to take possession of all or any portion of the Collateral by judicial process, each Borrower irrevocably waives: (A) the posting of any bond, surety, or security with respect thereto which might otherwise be required; (B) any demand for possession prior to the commencement of any suit or action to recover the Collateral; and (C) any requirement that the Lender retain possession and not dispose of any Collateral until after trial or final judgment. Each Borrower agrees that the Lender has no obligation to preserve rights to the Collateral or marshal any Collateral for the benefit of any Person. The proceeds of sale shall be applied as set forth in the DIP Orders. The Lender will return any excess to the Borrowers and the Borrowers shall remain liable for any deficiency.

Section 9.3 **Attorney-in-Fact.** Each Borrower hereby irrevocably appoints Lender as its agent and attorney-in-fact, with full power of substitution, in the name of such Borrower, for the sole use and benefit of Lender, but at the expense of such Borrower, to exercise, at any time and from time to time during the continuance of an Event of Default, all or any of the following powers with respect to all or any of the Collateral:"

(1) to demand, collect, receive, receipt for, sue and recover all sums of money or other property which may now or hereafter become due, owing or payable from the Collateral,

(2) to endorse such Borrower's name to any instruments, chattel paper and documents comprising part of the Collateral (including endorsing such instruments, chattel paper and documents to Lender (for the benefit of Lender)),

(3) to assign, on behalf of such Borrower, any instruments, chattel paper or documents comprising part of the Collateral to Lender (for the benefit of Lender),

(4) to execute, sign and endorse any and all claims, instruments, receipts, checks, drafts or warrants issued in payment for the Collateral,

(5) to settle or compromise any and all claims arising under the Collateral, and, in the place and stead of such Borrower, to execute and deliver its release and settlement for the claim,

(6) to file any claim or claims or to take any action or institute or take part in any proceedings, either in its role as Lender, as applicable, or in the name of such Borrower, or otherwise, which in the discretion of Lender may seem to be necessary or advisable,

(7) to receive, open, and dispose of all mail addressed to such Borrower pertaining to the Collateral (or appearing to Lender to possibly pertain to the Collateral),

(8) to notify postal authorities to change the address for delivery of mail addressed to such Borrower to such address as Lender may designate, and

(9) to assume such Borrower's role in its relationships and contractual obligations and rights as to any custodian or administrator.

This power is given as security for the Obligations, and, upon the occurrence and during the continuation of an Event of Default, the authority hereby conferred is, and shall be, irrevocable and coupled with an interest and shall remain in full force and effect until renounced by Lender.

ARTICLE 10 **COLLATERAL**

Section 10.1 **Grant of Security Interest.**

(1) To secure the payment and performance in full of the Obligations, each Borrower hereby assigns and grants to Lender a continuing Lien (subject only to Permitted Liens) on and security interest in the Collateral. Each Borrower hereby irrevocably authorizes Lender at any time and from time to time to file in any UCC jurisdiction any initial financing statements and amendments thereto that (a) indicate the Collateral (i) as all assets of such Borrower or words of similar effect, regardless of whether any particular asset comprised in the Collateral falls within the scope of Article 9 of the UCC of such jurisdiction, or (ii) as being of an equal or lesser scope or with greater detail, and (b) contain any other information required by part 5 of Article 9 of such UCC for the sufficiency or filing office acceptance of any financing statement or amendment, including, but not limited to (i) whether such Borrower is an organization, the type of organization and (ii) any organization identification number issued to such Borrower. Each Borrower agrees to furnish any such information to Lender promptly upon request. Each Borrower also ratifies its authorization for Lender to have filed in any UCC jurisdiction any like initial financing statements or amendments thereto if filed prior to the date hereof.

(2) However, notwithstanding anything to the contrary, subject to the Carve-Out and subject to the scheme of priority set forth in the DIP Order, pursuant to Bankruptcy Code Section 364(c)(1), Lenders have been granted a superpriority administrative claim over any and all administrative expenses of the kind specified in sections 503(b) and 507(b) of the Bankruptcy Code and any and all administrative expenses or other claims arising under sections 105, 326, 327, 328, 330, 331, 365, 503(b), 506(c), 507(a), 507(b), 726, 1113, or 1114 of the Bankruptcy Code. As collateral for the Loans and security for the full and

timely payment and performance of all Obligations when due (whether at stated maturity, by acceleration or otherwise), Lender is hereby granted (i) pursuant to Section 364(c)(2) of the Bankruptcy Code, a perfected first priority Lien on the Collateral that is otherwise unencumbered as of the commencement of the Cases, including upon entry of the Final DIP Order, avoidance actions under Sections 502(d), 544-553 of the Bankruptcy Code or the proceeds therefrom, or as otherwise recovered under 506(c) or any other avoidance actions under the Bankruptcy Code; (ii) pursuant to Section 364(c)(3) of the Bankruptcy Code, a perfected Lien on all Collateral of the Borrowers (other than the assets referred to in the following clause), junior only to (A) the valid, perfected and non-avoidable Liens on such assets as of the Petition Date, and (B) valid Liens in existence at the time of such commencement that are perfected subsequent to such commencement as permitted by Section 546(b) of the Bankruptcy Code; and (iii) pursuant to Section 364(d)(1) of the Bankruptcy Code, a perfected senior priming Lien on all of the Borrowers' Collateral that is subject only to the Carve-Out and the Prepetition Permitted Liens.

Section 10.2 **Change in Name or Locations.** Each Borrower agrees that (a) such Borrower will not change its name, its chief executive office or organizational identification number, (b) such Borrower will not change its type of organization or jurisdiction of organization and (c) such Borrower will not cause any Equipment or Inventory of such Borrower to be located at any location other than as set forth on Schedule 10.2 attached hereto (or in transit between such locations).

Section 10.3 **Intellectual Property.**

(1) With respect to each Trademark, each Borrower (either itself or through licensees) will, to the extent material to the conduct of its business, (i) continue to use such Trademark on each and every trademarked class of goods applicable to its then current lines of products and services as reflected in its current catalogs, brochures, price lists and other sales materials to the extent necessary to maintain such Trademark in full force and effect free from any reasonable claim of abandonment for non-use, (ii) maintain the quality of products and services offered under such Trademark, (iii) reasonably use such Trademark with the appropriate notice of registration and all other notices and legends required by applicable law, and (iv) not (and not permit any licensee or sublicensee thereof to) do any act or knowingly omit to do any act whereby such Trademark is reasonably likely to become invalidated or materially impaired in any way.

(2) No Borrower (either itself or through licensees) will, except as its reasonable business judgment otherwise dictates, do any act, or knowingly omit to do any act, whereby any Patent material to such Borrower's business is reasonably likely to become forfeited, abandoned or dedicated to the public.

(3) No Borrower (either itself or through licensees) will (and will not permit any licensee or sublicensee thereof to), except as its reasonable business judgment otherwise dictates, do any act or knowingly omit to do any act whereby any such Copyright is reasonably likely to become invalidated or otherwise impaired. No Borrower will (either itself or through licensees), except as its reasonable business judgment otherwise dictates otherwise, do any act whereby any such Copyright may fall into the public domain (other than by expiration).

(4) No Borrower (either itself or through licensees) will, except as its reasonable business judgment otherwise dictates otherwise, do any act that knowingly infringes the intellectual property rights of any other Person.

(5) Each Borrower will, to the extent necessary or useful in the conduct of its business, take all necessary steps, including, without limitation, in any proceeding before the United States Patent and Trademark Office, the United States Copyright Office or any similar office or agency in any other

country or any political subdivision thereof, to maintain and pursue each application (and to obtain the relevant registration) and to maintain each registration of any Intellectual Property material to its business, including, without limitation, paying of maintenance fees, filing of applications for renewal, affidavits of use and affidavits of incontestability.

(6) Each Borrower shall notify Lender reasonably promptly if it knows that any United States Patent, Trademark or Copyright owned by such Borrower and material to the business of such Borrower, and is the subject of an application or registration, has or is reasonably likely to become abandoned, lost or dedicated to the public (except by expiration), or of any materially adverse and final determination (including the institution of, or any such materially adverse and final determination in, any proceeding in the United States Patent and Trademark Office or United States Copyright Office, as applicable, in connection with the prosecution of any application for issuance of a Patent or registration of a Trademark or Copyright) regarding such Borrower's ownership of any such Patent, Trade-mark or Copyright, its right to register the same, or its right to keep and maintain the same.

(7) Each Borrower agrees that, should it obtain an ownership or other interest in any Intellectual Property that constitutes Collateral after the Effective Date, (i) the provisions of this Agreement shall automatically apply thereto and (ii) any such Intellectual Property shall automatically become Intellectual Property subject to the terms and conditions of this Agreement, except, with respect to each of (i) and (ii) above, if such interest in Intellectual Property is obtained under a license from a third party under which the grant of a security interest would not be permitted.

Section 10.4 Covenants.

(1) **Possessory Collateral.** As of the date hereof, each Borrower shall have delivered to Lender (or any other custodian approved by Lender) all other instruments and tangible chattel paper included in the Collateral to the extent Lender has requested such delivery.

(2) **Electronic Chattel Paper.** If any Borrower at any time holds or acquires an interest in any Collateral that is electronic chattel paper or a "transferable record," as that term is defined in Section 201 of the federal Electronic Signatures in Global and National Commerce Act, or in Section 16 of the Uniform Electronic Transactions Act as in effect in any relevant jurisdiction, such Borrower shall promptly notify Lender thereof and, at the request and option of Lender, shall take such action as Lender may reasonably request to vest in Lender control, under Section 9-105 of the UCC, of such electronic chattel paper or control under Section 201 of the federal Electronic Signatures in Global and National Commerce Act or, as the case may be, Section 16 of the Uniform Electronic Transactions Act, as so in effect in such jurisdiction, of such transferable record.

(3) **No Filings Required; Priority.** The Liens and security interests referred to herein shall be deemed valid and perfected by entry of the DIP Orders. Lender shall not be required (but shall have the option and authority) to file any financing statements, mortgages, notices of Lien or similar instruments in any jurisdiction or filing office or to take any other action in order to validate or perfect the Lien and security interest granted by or pursuant to this Agreement, any other Loan Document or the DIP Orders. The DIP Liens in the Collateral will not be junior in priority to any Lien other than the Carve-Out and the Prepetition Permitted Liens (to the extent, and only to the extent, set forth in the DIP Orders).

(4) **Perfection of Security Interests; Further Assurances.**

(a) Notwithstanding the perfection of any security interest granted hereunder pursuant to the order of the Bankruptcy Court under the applicable DIP Order, each Borrower shall, as applicable, at such Borrower's expense, perform all steps

requested by the Lender at any time to perfect, maintain, protect, and enforce the DIP Liens, including: upon request by the Lender, delivering to Lender) (1) the originals of all certificated Investment Property, instruments, documents, and chattel paper, and all other Collateral of which the Lender should have physical possession in order to perfect and protect the Lender's security interest therein, duly pledged, endorsed, or assigned to the Lender without restriction and (2) certificates of title (excluding deeds for real estate) covering any portion of the Collateral for which certificates of title have been issued and (3) all letters of credit on which such Borrower is named beneficiary. To the fullest extent permitted by applicable law, Lender may file one or more financing statements disclosing the DIP Liens on the Collateral.

(b) Each Borrower shall take any other action reasonably requested by Lender to insure the attachment, perfection and priority of, and the ability of Lender, at the written direction of Lender, the security interests including, without limitation, (a) executing, delivering and, where appropriate, filing financing statements and amendments relating thereto under the UCC, to the extent, if any, that the signature of such Borrower thereon is required therefor, (b) causing the name of Lender, for the benefit of Lender, to be noted as Lender on any certificate of title for a titled good if such notation is a condition to attachment, perfection or priority of, or ability of Lender to enforce, the security interests in such Collateral, (c) complying with any provision of any statute, regulation or treaty of the United States as to any Collateral if compliance with such provision is a condition to attachment, perfection or priority of, or ability of Lender to enforce, the security interests in such Collateral, including, without limitation, executing and delivering any filings necessary to perfect the security interests in the Intellectual Property, (d) using commercially reasonable efforts to obtain governmental and other third party consents and approvals, including without limitation any consent of any licensor, lessor or other Person with rights in the Collateral, and (e) taking all actions required by any UCC or by other applicable law; provided, however, that in no event shall Control Agreements be required with respect to Excluded Accounts. Each Borrower also hereby appoints Lender and its employees and agents as its irrevocable attorney-in-fact for the purpose of executing and/or filing any documents necessary to perfect or to continue any security interest, such appointment being coupled with an interest and irrevocable until such time as the Obligations (excluding any contingent indemnification claims not yet asserted) are paid and performed in full.

(5) **Notice to Lender.** Each Borrower shall promptly notify Lender in writing upon such Borrower's knowledge of the filing of any Lien on such Borrower or any of the Collateral, other than Permitted Liens.

(6) **Preservation of Collateral.** Each Borrower shall be fully responsible for any losses that any Lender may suffer as a result of anyone other than any Lender (or any custodian on behalf of such Lender) and/or holders of Permitted Liens asserting any rights or interest in or to the Collateral. Each Borrower shall appear in and to defend all actions or proceedings purporting to affect the security rights and interests granted to Lender under this Agreement. In the event that Lender elects to defend any such action or proceeding, each Borrower agrees to reimburse Lender for the documented costs associated therewith, including without limitation, the reasonable attorneys' fees of Lender, which costs will be payable upon demand.

(7) **Compliance with Laws.** Each Borrower shall comply in all material respects with all federal, state or local laws applicable to it or in connection with its acquisition of, or any actions taken with respect to, the Collateral.

(8) **Accounts.** No Borrower shall maintain, or cause any of its Subsidiaries to maintain, any Deposit Account, Securities Account or Commodities Account other than such accounts listed on Schedule 4.17(5) hereto, without the prior written consent of Lender.

(9) **Pledged Shares.** If any Borrower shall be or become entitled to receive or shall receive any certificate in respect of any Pledged Stock (including, without limitation, any certificate representing a stock dividend or a distribution in connection with any reclassification, increase or reduction of capital or any certificate issued in connection with any reorganization of such Pledged Stock), option or rights in respect of any Pledged Stock, whether in addition to, in substitution of, as a conversion of, or in exchange for, any shares of the Pledged Stock, or otherwise in respect thereof, such Borrower shall accept and hold the same for the benefit of Lender and promptly deliver the same forthwith to Lender in the exact form received, duly endorsed by such Borrower to Lender, if required, together with an undated stock transfer power covering such certificate duly executed in blank by such Borrower and otherwise in form and substance satisfactory to Lender in its sole discretion, to be held by Lender as additional Collateral for the Obligations. Notwithstanding the foregoing, with respect to Pledged Shares owned by any Borrower on the Effective Date, such Borrower shall deliver to Lender all certificates and undated stock transfer powers with respect thereto duly executed in blank by such Borrower and otherwise in form and substance satisfactory to Lender in its sole discretion on or prior to the Effective Date.

(10) **Negative Pledge; No Transfer.** No Borrower will sell or offer to sell or otherwise transfer or grant or allow the imposition of a Lien or security interest upon the Collateral (other than Permitted Liens) or use any portion thereof in any manner inconsistent with this Agreement. So long as this Agreement remains in effect, no Borrowers shall, without the prior written consent of Lender compromise, settle, adjust, or extend payment under or with regard to any material payment obligations, except in the ordinary course of business and consistent with past practice.

Section 10.5 **Further Assurances.** Upon the request of Lender, each Borrower will promptly (a) correct any defect, error or omission which may be discovered in any financing statement relating to this Agreement; (b) execute, acknowledge, deliver and record such further instruments (including, without limitation, further security agreements, financing statements, continuation statements and assignments of accounts, contract rights, general intangibles and proceeds) and do such further acts as may be necessary, desirable or proper to carry out more effectively the purposes of this Agreement as determined by Lender in its reasonable discretion and to more fully identify and subject to the security interest hereof any property intended to be covered hereby, including without limitation any renewals, additions, substitutions, replacements or accessions to the Collateral; (c) execute, acknowledge, deliver and record any document or instrument (including specifically any financing statement) necessary, desirable or proper, as determined by Lender in its reasonable discretion, to protect the Lien and security interest hereunder against the rights or interests of third persons; and (d) execute, deliver and file such filings as Lender in its reasonable discretion deems appropriate, to the extent, if any, that the signature of such Borrower thereon is required therefor. Each Borrower shall pay all actually incurred costs connected with any of the foregoing.

Section 10.6 **Limitation on Duty of Lender.** Beyond the exercise of reasonable care in the custody thereof, Lender shall have no duty as to any Collateral in its custody or control or in the custody or control of any agent or bailee or any income thereon. Lender shall be deemed to have exercised reasonable care in the custody of the Collateral in its possession or custody if the Collateral is accorded treatment substantially equal to that which it accords its own property, and shall not be liable or responsible for any loss or damage to any of the Collateral (except for gross negligence, willful misconduct or bad faith of

Lender) or for any diminution in the value thereof, by reason of the act or omission of any warehouseman, carrier, forwarding agency, consignee or other agent or bailee selected by Lender in good faith.

Section 10.7 **Payment of Expenses.** Each Borrower will reimburse Lender for all documented expenses actually incurred by Lender in connection with the perfection, termination, and the continuation of the perfection of any security interest in the Collateral (not to exceed \$675,000 unless an Event of Default has occurred). At its option, upon the occurrence and during the continuation of an Event of Default, Lender may, but is not required to discharge taxes, Liens, security interests or such other encumbrances as may attach to the Collateral; pay for required insurance on the Collateral; and pay for the maintenance, appraisal or reappraisal, and preservation of the Collateral, as determined by Lender to be necessary. Each Borrower will reimburse Lender on demand for any payment so made or any expense incurred by Lender pursuant to the foregoing authorization, and the Collateral also will secure any advances or payments so made or expenses so incurred by Lender.

Section 10.8 **Preservation of Rights.** No delay or omission on Lender's part to exercise any right or power arising hereunder will impair any such right or power or be considered a waiver of any such right or power, nor will Lender's action or inaction impair any such right or power. Lender's rights and remedies hereunder are cumulative and not exclusive of any other rights or remedies that Lender may have under other agreements, at law or in equity.

Section 10.9 **Waivers.** Each Borrower has waived, and/or does by these presents waive, presentment for payment, protest, notice of protest and notice of nonpayment under all of the Obligations secured by this Agreement. Each Borrower further agrees that discharge or release of any party who is, may be, or will be liable to Lender under any of the Obligations, or the release of the Collateral or any other collateral directly or indirectly securing repayment of the same, shall not have the effect of releasing or otherwise diminishing or reducing the actual or potential liability of such Borrower and/or any other party or parties guaranteeing payment of the Obligations, who shall remain liable to Lender. Each Borrower additionally agrees that the acceptance of payments by Lender other than in accordance with the terms of any agreement, or agreements governing repayment of the Obligations, or the subsequent agreement of Lender to extend or modify such repayment terms, shall likewise not have the effect of releasing such Borrower, and/or any other party or parties guaranteeing payment of the Obligations, from their respective obligations to Lender under this Agreement and to Lender under the Obligations, and/or of releasing any of the Collateral or other collateral directly or indirectly securing repayment of the Obligations. In addition, no course of dealing between any Borrower and Lender nor any failure or delay on the part of Lender to exercise any of the rights and remedies granted to Lender under this Agreement shall have the effect of waiving any of the rights and remedies of Lender. Any partial exercise of any rights and remedies granted to Lender shall furthermore not constitute a waiver of any other rights and remedies of Lender, it being each Borrower's intent and agreement that the rights and remedies of Lender shall be cumulative in nature. Each Borrower further agrees that, upon the occurrence and continuance of any Event of Default, any waiver or forbearance on the part of Lender to pursue the rights and remedies available to Lender under this Agreement shall be binding upon Lender only to the extent that Lender specifically agrees to any such waiver or forbearance in writing. A waiver or forbearance as to one Event of Default shall not constitute a waiver or forbearance as to any other Event of Default. None of the warranties, conditions, provisions and terms contained in this Agreement or any Loan Document, shall be deemed to have been waived by any act or knowledge of Lender or the agents, officers or employees of Lender; but only by an instrument in writing specifying such waiver, signed by a duly authorized officer of Lender and delivered to the Borrowers.

Section 10.10 **Possession; Sale of Collateral.**

(1) Upon the occurrence and during the continuance of an Event of Default, Lender may: (i) require each Borrower to assemble the tangible assets that comprise part of the Collateral and

make them available to Lender at any place or places reasonably designated by Lender; (ii) to the extent permitted by applicable Law and subject to any applicable agreement with the owner of the real property, with or without notice or demand for performance and without liability for trespass, enter any premises where the Collateral may be located and peaceably take possession of the same, and may demand and receive such possession from any person who has possession thereof, and may take such measures as it may deem necessary or proper for the care or protection thereof (including, but not limited to, the right to remove all or any portion of the Collateral); and (iii) with or without taking such possession may sell or cause to be sold, in one or more sales or parcels, for cash, on credit or for future delivery, without assumption of any credit risk, all or any portion of the Collateral, at public or private sale or at any broker's board or any securities exchange, without demand of performance or notice of intention to sell or of time or place of sale, except ten (10) Business Days' written notice to the applicable Borrower of the time and place of such sale or sales (and such other notices as may be required by applicable statute, if any, and which cannot be waived), which each Borrower hereby expressly acknowledge is commercially reasonable. Lender shall have no obligation to clean-up or otherwise prepare any Collateral for sale. Each purchaser at any such sale shall hold the property sold absolutely, free from any claim or right on the part of any Borrower, and each Borrower hereby waives (to the extent permitted by law) all rights of redemption, stay and appraisal that such Borrower now has or may at any time in the future have under any rule of law or statute now existing or hereafter enacted. At any such sale, the Collateral, or portion thereof, to be sold may be sold in one lot as an entirety or in separate parcels, as Lender may (in its sole and absolute discretion) determine. Lender shall not be obligated to make any sale of any Collateral if it shall determine not to do so, regardless of the fact that notice of sale of such Collateral shall have been given. Lender may, without notice or publication, adjourn any public or private sale or cause the same to be adjourned from time to time by announcement at the time and place fixed for sale, and such sale may, without further notice, be made at the time and place to which the same was so adjourned. Lender may comply with any applicable state or federal law requirements in connection with a disposition of the Collateral and compliance will not be considered adversely to affect the commercial reasonableness of any disposition of the Collateral. In case any sale of all or any part of the Collateral is made on credit or for future delivery, the Collateral so sold may be retained by Lender until the sale price is paid by the purchaser or purchasers thereof. Lender shall not incur any liability for the failure to collect or realize upon any or all of the Collateral or for any delay in doing so and, in case of any such failure, shall not be under any obligation to take any action with respect thereto; provided, such Collateral may be sold again upon like notice. If any Collateral is sold upon credit, the applicable Borrower will be credited only with payments actually made by the purchaser, received by Lender and applied to the Obligations in accordance with this Agreement. In the event the purchasers fail to pay for the Collateral, Lender may resell the Collateral. At any public sale, or, to the extent permitted by applicable law, at any private sale, made pursuant to this Agreement, Lender may bid for or purchase, free from any right of redemption, stay or appraisal and all rights of marshalling, the Collateral and any other security for the Obligations or otherwise on the part of the Borrowers (all said rights being also hereby waived and released by each Borrower to the fullest extent permitted by law), and may make payment on account thereof by using any claim then due and payable to Lender from any Borrower as a credit against the purchase price, and Lender may, upon compliance with the terms of sale, hold, retain and dispose of such property without further accountability to any Borrower therefor. For purposes hereof, a written agreement to purchase the Collateral or any portion thereof shall be treated as a sale thereof. Lender shall be free to carry out any such sale pursuant to such agreement, and no Borrower shall be entitled to the return of the Collateral or any portion thereof subject thereto, notwithstanding the fact that after Lender shall have entered into such an agreement, all Events of Default shall have been remedied and any obligations to Lender shall have been paid in full. As an alternative to exercising the power of sale herein conferred upon it, Lender may proceed by a suit or suits at law or in equity to foreclose this Agreement and to sell the Collateral or any portion thereof pursuant to a judgment or decree of a court or courts having competent jurisdiction or pursuant to a proceeding by a court-appointed receiver. In any action hereunder, Lender shall be entitled to the appointment of a receiver without notice, to peaceably take possession of all or any portion of the Collateral and to exercise such powers as the Bankruptcy Court

shall confer upon the receiver. Notwithstanding the foregoing, if an Event of Default shall occur and be continuing, Lender shall be entitled to apply, without notice to any Borrower, any cash or cash items constituting Collateral in its possession to payment of the Obligations.

(2) If an Event of Default shall occur and be continuing, Lender shall, in addition to exercising any and all rights and remedies afforded to them hereunder, have all the rights and remedies of a secured party under all applicable provisions of law, including but not limited to, the Code.

(3) Each Borrower agrees that notwithstanding anything to the contrary contained in this Agreement, such Borrower shall remain liable under each contract or other agreement giving rise to Accounts and General Intangibles and all other contracts or agreements constituting part of the Collateral and Lender shall not have any obligation or liability in respect thereof.

(4) After the occurrence and during the continuance of an Event of Default, upon Lender's request, but subject to the rights of any other secured party having rights senior to Lender, each Borrower shall deliver to Lender all original and other documents, evidencing and relating to the sale and delivery of Inventory or Accounts, including but not limited to, all original orders, invoices and shipping receipts.

Section 10.11 **Authority of Lender.** Lender shall have and be entitled to exercise all such powers hereunder as are specifically delegated to Lender by the terms hereof, together with such powers as are reasonably incidental thereto. Lender may execute any of its duties hereunder by or through its agents or employees and shall be entitled to retain counsel and to act in reliance upon the advice of such counsel concerning all matters pertaining to its duties hereunder.

Section 10.12 **Certain Waivers; Borrowers Not Discharged.** Each Borrower expressly and irrevocably waives (to the extent permitted by applicable law) presentment, demand of payment and protest of nonpayment in respect of its Obligations under this Agreement. The obligations and duties of each Borrower hereunder are irrevocable, absolute, and unconditional and shall not be discharged, impaired or otherwise affected by (a) the failure of Lender to assert any claim or demand or to enforce any right or remedy against any Borrower or any grantee under the provisions of this Security Agreement or any waiver, consent, extension, indulgence or other action or inaction in respect thereof, (b) any extension or renewal of any part of the Obligations, (c) any rescission, waiver, amendment or modification of any of the terms or provisions of any agreement related to this Agreement, (d) the release of any liens on or security interests in any part of the Collateral or the release, sale or exchange of or failure to foreclose against any security held by or for the benefit of Lender for payment or performance of the Obligations, (e) the bankruptcy, insolvency or reorganization of any Borrower or any grantee or any other Persons, (f) any change, restructuring or termination of the organization structure or existence of any Borrower or any grantee or any restructuring or refinancing of all or any portion of the Obligations, or (g) any other event that under law would discharge the obligations of a surety other than payment and satisfaction in full of all Obligations.

Section 10.13 **Transfer of Security Interest.** In connection with a transfer of the Loans permitted under this Agreement (including Section 11.23), Lender may transfer to any other Person all or any part of the liens and security interests granted hereby, and all, or any part of the Collateral which may be in Lender's possession. Upon such transfer, the transferee shall be vested with all the rights and powers of Lender hereunder with respect to such of the Collateral as is so transferred but, with respect to any of the Collateral not so transferred, Lender shall retain all of its rights and powers (whether given to it in this Agreement, or otherwise). In connection with a transfer of the Loans permitted under this Agreement (including Section 11.23), Lender may, at any time, assign its rights as the secured party hereunder to any Person, in Lender's discretion, and upon notice to the Borrowers, provided that any such transferee shall

agree to be subject to the subordination provisions hereof, if any, but without any requirement for consent or approval by or from any Borrower, and any such assignment shall be valid and binding upon each Borrower, as fully as if it had expressly approved the same.

Section 10.14 **Contractual Rights.** The security interests and other rights granted or reserved to Lender and its successors and assigns under this Agreement (the “**Contractual Rights**”) and the other rights available to Lender under applicable law by reason of the existence of this Agreement and the attachment and perfection of the security interests created under this Agreement (the “**Statutory Rights**”) are for the benefit of the Lender. All Contractual Rights and Statutory Rights shall be exercised from time to time by Lender in accordance with such instructions as may be required by the Loan Agreement. All recoveries attributable to enforcement of Contractual Rights or Statutory Rights, or both, shall (except as otherwise expressly set forth herein or in the other Purchase Documents) be for the benefit of the Lender as provided in the Loan Agreement.

Section 10.15 **Borrowers’ Obligations.** The provisions of this Article 10 are for the purpose of defining the relative rights of the Lender with respect to the Collateral and the exercise of Contractual Rights and Statutory Rights. Nothing herein shall impair the obligations of Borrower, which are absolute and unconditional, to pay and perform the Obligations as and when due. No provision of this Agreement shall be construed to prevent Lender from exercising remedies that may otherwise be available to it.

Section 10.16 **Continuing Lien; Termination.** It is the intent of the parties hereto that (a) this Agreement shall constitute a continuing agreement as to any and all future, as well as existing transactions, between each Borrower and Lender under or in connection with the Loans, and (b) the security interest provided for herein shall attach to after-acquired as well as existing Collateral. Upon payment in cash and satisfaction in full of the Obligations and termination of all commitments relating thereto, Lender shall reassign, redeliver and release (or cause to be so reassigned, redelivered and released), without recourse upon or warranty by Lender, and at the sole expense of each Borrower, to such Borrower, against receipt therefor, such of the Collateral (if any) as shall not have been sold or otherwise applied by Lender pursuant to the terms hereof and not theretofore reassigned, redelivered and released to any Borrower, together with appropriate instruments of reassignment and release.

Section 10.17 **Adequate Protection.** The Prepetition Secured Lender has been granted adequate protection in accordance with the DIP Orders to the extent of any diminution in the value of the Collateral as of the Petition Date, including but not limited to any diminution in value resulting from (i) the use, sale or lease of Collateral pursuant to Bankruptcy Code Section 363(c) or (ii) the imposition of the automatic stay pursuant to Bankruptcy Code Section 362(a), in the form of Adequate Protection Liens.

Section 10.18 **Validity and Priority of Security Interest; Administrative Priority.**

(1) The provisions of this Agreement and the other Loan Documents create Liens upon the Collateral in favor of the Lender, which shall be deemed valid and perfected as of the Petition Date by entry of the DIP Orders with respect to the Borrowers and which shall constitute continuing Liens on the Collateral having priority over all other Liens on the Collateral (other than the Carve-Out and the Prepetition Permitted Liens), securing all the Obligations. The Lender shall not be required to file or record (but shall have the option and authority to file or record) any financing statements, mortgages, notices of Lien or similar instruments, in any jurisdiction or filing office or to take any other action in order to validate, perfect or establish the priority of the Liens and security interest granted by or pursuant to this Agreement, the DIP Orders or any other Loan Document.

(2) Pursuant to Section 364(c)(1) of the Bankruptcy Code, the Obligations of the Borrowers shall at all times constitute allowed administrative expenses against each of the Borrowers in

the Cases (without the need to file any proof of claim or request for payment of administrative expense), with priority over any and all other administrative expenses, adequate protection claims, diminution claims (including all Adequate Protection Superpriority Claims) and all other claims against the Borrowers, now existing or hereafter arising, of any kind or nature whatsoever, including, without limitation, all administrative expenses of the kind specified in Sections 503(b) and 507(b) of the Bankruptcy Code, and over any and all other administrative expense claims arising under Sections 105, 326, 328, 330, 331, 503(b), 507(a), 507(b), 546, 726, 1113 and 1114 of the Bankruptcy Code, whether or not such expenses or claims may become secured by a judgment lien or other non-consensual lien, levy or attachment, which allowed claims shall for purposes of Section 1129(a)(9)(A) of the Bankruptcy Code be considered.

ARTICLE 11
MISCELLANEOUS

Section 11.1 **Notices**. Any notice required or permitted to be given under this Agreement shall be in writing and shall be sent by overnight air courier service, or personally delivered to a representative of the receiving party, or sent by electronic mail (email). All such communications shall be mailed, sent or delivered, addressed to the party for whom it is intended at its address set forth below.

If to Lender: Ligand Pharmaceuticals, Incorporated
3911 Sorrento Valley Blvd., Suite 110
San Diego, California 92121
Attention: Matthew Korenberg, President & COO and
Andrew T. Reardon, Chief Legal Officer and Secretary
Email: MKorenberg@ligand.com and AReardon@ligand.com

with a copy to: Morgan, Lewis & Bockius LLP
101 Park Avenue
New York, New York 10178-0060
Attention: Kristen V. Campana
Email: kristen.campana@morganlewis.com

If to the Borrowers: Novan, Inc.
4020 Stirrup Creek Drive, Suite 110
Durham, North Carolina 27703
Attention: Paula Brown Stafford; John M. Gay
Email: pbstafford@novan.com; jgay@novan.com

with a copy to: Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P.
150 Fayetteville Street, Suite 2300
Raleigh, North Carolina 27609
Attention: Gerald F. Roach; Christopher B. Capel; James R. Jolley
Email: groach@smithlaw.com; ccapel@smithlaw.com;
jjolley@smithlaw.com

Any communication so addressed and mailed shall be deemed to be given on the earliest of (a) when actually delivered, or (b) on the first (1st) Business Day after deposit with an overnight air courier service, in each case to the address of the intended addressee, and any communication so delivered in person shall be deemed to be given when received for by, or actually received by Lender or Borrower, as the case may

be. If given by email, a notice shall be deemed given and received when the email is transmitted to the party's email address specified above and confirmation of complete receipt is received by the transmitting party during normal business hours or on the next Business Day if not confirmed during normal business hours. Either party may designate a change of address by promptly giving prior written notice of such change of address.

Section 11.2 **Limitation on Interest.** It is the intention of the parties hereto to conform strictly to applicable usury laws. Accordingly, all agreements among the Borrowers and Lender with respect to the Loans are hereby expressly limited so that in no event, whether by reason of acceleration of the Loans, termination of the Commitments or otherwise, shall the amount paid or agreed to be paid to Lender or charged by Lender for the use, forbearance or detention of the money to be lent hereunder or otherwise, exceed the maximum amount allowed by law. The terms and provisions of this Section 11.2 shall control and supersede every other provision of the Loan Documents. The Loan Documents are contracts made under and shall be construed in accordance with and governed by the laws of the State, except that if at any time the laws of the United States of America permit Lender to contract for, take, reserve, charge or receive a higher rate of interest than is allowed by the laws of the State (whether such federal laws directly so provide or refer to the law of any state), then such federal laws shall to such extent govern as to the rate of interest which Lender may contract for, take, reserve, charge or receive under the Loan Documents.

Section 11.3 **Invalid Provisions.** If any provision of any Loan Document is held to be illegal, invalid or unenforceable, such provision shall be fully severable; the Loan Documents shall be construed and enforced as if such illegal, invalid or unenforceable provision had never comprised a part thereof; the remaining provisions thereof shall remain in full effect and shall not be affected by the illegal, invalid, or unenforceable provision or by its severance therefrom; and in lieu of such illegal, invalid or unenforceable provision there shall be added automatically as a part of such Loan Document a provision as similar in terms to such illegal, invalid or unenforceable provision as may be possible to be legal, valid and enforceable.

Section 11.4 **Expenses; Attorneys' Fees; Indemnification.**

(1) The Borrowers will pay on demand, all documented out-of-pocket fees, costs and expenses incurred by or on behalf of Lender, including without limitation, documented out-of-pocket fees, costs, client charges and expenses of, for Lender, one primary outside counsel, arising from or relating to: (a) the negotiation, preparation, execution, delivery, performance and administration of this Agreement and the other Loan Documents, (b) any requested amendments, waivers or consents to this Agreement or the other Loan Documents whether or not such documents become effective or are given, (c) the preservation and protection of Lender's rights under this Agreement or the other Loan Documents, (d) the defense of any claim or action asserted or brought against Lender by any Person that arises from or relates to this Agreement, any other Loan Document, the Lender's claims against any Borrower, or any and all matters in connection therewith, (e) the commencement or defense of, or intervention in, any court proceeding arising from or related to this Agreement or any other Loan Document, (f) the filing of any petition, complaint, answer, motion or other pleading by Lender, or the taking of any action in respect of the Collateral or other security, in connection with this Agreement or any other Loan Document, (g) the protection, collection, lease, sale, taking possession of or liquidation of, any Collateral or other security in connection with this Agreement or any other Loan Document, (h) any attempt to enforce any Lien or security interest in any Collateral or other security in connection with this Agreement or any other Loan Document, (i) any attempt to collect from any Borrower and (j) the receipt by Lender of any advice from professionals with respect to any of the foregoing. Without limitation of the foregoing or any other provision of any Loan Document, if the Borrowers fail to perform any covenant or agreement contained herein or in any other Loan Document, Lender may itself perform or cause performance of such covenant or agreement, and the expenses of Lender incurred in connection therewith shall be reimbursed on demand by the Borrowers. The obligations of the

Borrowers under this Section 11.4 shall survive the repayment of the Obligations and discharge of any Liens granted under the Loan Documents.

(2) Subject to Section 7.4 and Section 11.5(1) above, each Borrower shall indemnify each Indemnitee against, and hold each Indemnitee harmless from, any and all losses, claims, damages, liabilities and related expenses (including the fees, charges and disbursements of any counsel for any Indemnitee), and shall indemnify and hold harmless each Indemnitee from all fees and time charges and disbursements for attorneys, who may be employees of any Indemnitee, incurred by any Indemnitee or asserted against any Indemnitee by any third party or by such Borrower arising out of, in connection with, or as a result of: (i) the execution or delivery of this Agreement, any other Loan Document or any document contemplated hereby or thereby, the performance by the parties hereto of their respective obligations hereunder or thereunder or the consummation of the transactions contemplated hereby or thereby (including (a) the handling of any collateral of a Borrower as herein provided, (b) Lender's relying on any instructions of a Borrower, or (c) any other action taken by Lender hereunder or under the other Loan Documents); (ii) the Loans or the use or proposed use of the proceeds thereof; or (iii) any actual or prospective claim, litigation, investigation or proceeding relating to any of the foregoing, whether based on contract, tort or any other theory, whether brought by a third party or by a Borrower or any subsidiary thereof, and regardless of whether any Indemnitee is a party thereto.

(3) Each Borrower agrees to save harmless and indemnify Lender from and against any claim, demand, action, suit, proceeding or liability for any such fee or commission, including any costs and expenses (including attorneys' fees) incurred by Lender in connection with any broker's or finder's or commission in connection with this Agreement or the transactions contemplated hereby.

Section 11.5 Conditions. All conditions of the obligations of Lender hereunder, including the obligation to make the Loans, are imposed solely and exclusively for the benefit of Lender, its successors and assigns, and no other Person shall have standing to require satisfaction of such conditions or be entitled to assume that Lender will refuse to make the Loans in the absence of strict compliance with any or all of such conditions, and no other Person shall, under any circumstances, be deemed to be a beneficiary of such conditions, any and all of which may be freely waived in whole or in part by Lender at any time in Lender's sole discretion.

Section 11.6 Lender Not in Control; No Partnership. None of the covenants or other provisions contained in this Agreement shall, or shall be deemed to, give Lender the right or power to exercise control over the affairs or management of the Borrowers, the power of Lender being limited to the rights to exercise the remedies referred to in the Loan Documents. The relationship between the Borrowers and Lender is, and at all times shall remain, solely that of debtor and creditor. No covenant or provision of the Loan Documents is intended, nor shall it be deemed or construed, to create a partnership, joint venture, agency or other similar interest between Lender and the Borrowers, and the rights of Lender to receive interest, fees and other compensation for the credit made available by Lender to Borrowers shall be interpreted at all times to make Lender a creditor of the Borrowers. Lender and the Borrowers disclaim any intention to create any partnership, joint venture, agency or other similar interest between Lender and the Borrowers by virtue of this Agreement.

Section 11.7 Time of the Essence. Time is of the essence with respect to this Agreement.

Section 11.8 Successors and Assigns. This Agreement shall be binding upon and inure to the benefit of Lender, Borrowers and their respective successors and assigns, provided that no Borrower shall, without the prior written consent of Lender, assign any rights, duties or obligations hereunder.

Section 11.9 **Renewal, Extension or Rearrangement.** All provisions of the Loan Documents shall apply with equal effect to each and all amendments thereof hereinafter executed which in whole or in part represent a renewal, extension, increase or rearrangement of the Loans, including any other documents issued in substitution for the existing Loan Documents.

Section 11.10 **Cumulative Rights.** Rights and remedies of Lender under the Loan Documents shall be cumulative, and the exercise or partial exercise of any such right or remedy shall not preclude the exercise of any other right or remedy.

Section 11.11 **Singular and Plural.** Words used in this Agreement and the other Loan Documents in the singular, where the context so permits, shall be deemed to include the plural and vice versa. The definitions of words in the singular in this Agreement and the other Loan Documents shall apply to such words when used in the plural where the context so permits and vice versa.

Section 11.12 **Phrases.** When used in this Agreement and the other Loan Documents, the phrase “including” shall mean “including, but not limited to,” the phrase “satisfactory to Lender” shall mean “in form and substance satisfactory to Lender in all respects”, the phrase “as agreed by Lender” shall mean as agreed in Lender’s sole discretion and the phrase “as determined by Lender” shall mean as determined in Lender’s sole discretion.

Section 11.13 **Exhibits and Schedules.** The exhibits and schedules attached to this Agreement are incorporated herein and shall be considered a part of this Agreement for the purposes stated herein.

Section 11.14 **Titles of Articles, Sections and Subsections.** All titles or headings to articles, sections, subsections or other divisions of this Agreement and the other Loan Documents or the exhibits hereto and thereto are only for the convenience of the parties and shall not be construed to have any effect or meaning with respect to the other content of such articles, sections, subsections or other divisions, such other content being controlling as to the agreement between the parties hereto.

Section 11.15 **Confidentiality.** Neither party shall disclose or make public any information concerning the Loans and the Loan Documents, all of which shall be strictly confidential save where disclosure is required by law or by a regulatory or tax authority having jurisdiction over the transaction contemplated by this Agreement; provided, that both parties may disclose information concerning the Loans and the Loan Documents to either party’s advisors, managers and officers on a need-to-know basis.

Section 11.16 **Survival.** All of the representations, warranties, covenants, and indemnities hereunder, and under the indemnification provisions of the other Loan Documents shall survive the repayment in full of each Loan and the release of the Liens evidencing or securing such Loan.

Section 11.17 **Waiver of Jury Trial; Venue.** IN THE EVENT THAT THE BANKRUPTCY COURT DOES NOT HAVE OR REFUSES TO EXERCISE JURISDICTION WITH RESPECT THERETO, TO THE MAXIMUM EXTENT PERMITTED BY LAW, EACH BORROWER AND LENDER HEREBY KNOWINGLY, VOLUNTARILY AND INTENTIONALLY WAIVES THE RIGHT TO A TRIAL BY JURY IN RESPECT OF ANY LITIGATION BASED HEREON, ARISING OUT OF, UNDER OR IN CONNECTION WITH THIS AGREEMENT OR ANY OTHER LOAN DOCUMENT, OR ANY COURSE OF CONDUCT, COURSE OF DEALING, STATEMENT (WHETHER VERBAL OR WRITTEN) OR ACTION OF EITHER PARTY OR ANY EXERCISE BY ANY PARTY OF THEIR RESPECTIVE RIGHTS UNDER THE LOAN DOCUMENTS OR IN ANY WAY RELATING TO THE LOANS (INCLUDING ANY ACTION TO RESCIND OR CANCEL THIS AGREEMENT, AND ANY CLAIM OR DEFENSE ASSERTING THAT THIS AGREEMENT WAS FRAUDULENTLY INDUCED OR IS OTHERWISE VOID OR VOIDABLE). THIS WAIVER IS A MATERIAL INDUCEMENT FOR

LENDER TO ENTER THIS AGREEMENT. LENDER IS HEREBY AUTHORIZED TO SUBMIT THIS AGREEMENT TO ANY COURT HAVING JURISDICTION OVER THE SUBJECT MATTER AND THE BORROWERS AND LENDER, SO AS TO SERVE AS CONCLUSIVE EVIDENCE OF SUCH WAIVER OF RIGHT TO TRIAL BY JURY. EACH BORROWER REPRESENTS AND WARRANTS THAT IT HAS BEEN REPRESENTED IN THE SIGNING OF THIS AGREEMENT AND IN THE MAKING OF THIS WAIVER BY INDEPENDENT LEGAL COUNSEL, SELECTED OF ITS OWN FREE WILL, AND/OR THAT IT HAS HAD THE OPPORTUNITY TO DISCUSS THIS WAIVER WITH COUNSEL. EACH BORROWER AGREES THAT THE NEW YORK COUNTY DISTRICT COURT SHALL HAVE EXCLUSIVE JURISDICTION WITH REGARD TO ALL MATTERS RELATING HERETO AND EACH BORROWER SUBMITS ITSELF TO SUCH VENUE, SUBJECT TO ANY LAWFUL REQUIREMENT TO SUBMIT TO OTHER JURISDICTIONS SO REQUIRED WITH RESPECT TO ENFORCEMENT OF COLLATERAL.

Section 11.18 **Waiver of Punitive or Consequential Damages.** In no event shall Lender be liable to the Borrowers for any punitive, exemplary or consequential damages which may be alleged as a result of any Loan or the transactions contemplated hereby, including any breach or other default by Lender, and each Borrower, for itself and its affiliates, hereby waives all claims for consequential damages.

Section 11.19 **Sole Discretion.** Unless otherwise specifically provided in this Agreement, whenever the consent or approval of Lender is required under this Agreement, the decision as to whether or not to consent or approve shall be in the sole and exclusive discretion of Lender, and the decision of Lender shall be final and conclusive. Unless otherwise specifically provided in this Agreement, whenever the consent or approval of Lender is required under this Agreement, the decision as to whether or not to consent or approve shall be in the sole and exclusive discretion of Lender, and the decision of Lender shall be final and conclusive.

Section 11.20 **Governing Law.** Except to the extent governed by the Bankruptcy Code, the Loan Documents are being executed and delivered, and are intended to be performed, in the State, and the laws of the State and of the United States of America shall govern the rights and duties of the parties hereto and the validity, construction, enforcement and interpretation of the Loan Documents, except to the extent otherwise specified in any of the Loan Documents.

Section 11.21 **Entire Agreement.** This Agreement and the other Loan Documents embody the entire agreement and understanding among Lender and the Borrowers and supersede all prior agreements and understandings between such parties relating to the subject matter hereof and thereof. Accordingly, the Loan Documents may not be contradicted by evidence of prior, contemporaneous, or subsequent oral agreements of the parties. There are no unwritten oral agreements between the parties. If any conflict or inconsistency exists between this Agreement or any of the other Loan Documents, the terms of this Agreement shall control.

Section 11.22 **Levy; Attachment.** Neither Lender's obligation hereunder nor any monies, property or funds deposited or required to be deposited under this Agreement shall be subject or liable to attachment or levy by suit or action of any creditor of the Borrowers or of any agent, contractor, subcontractor or supplier of the Borrowers.

Section 11.23 **Successors and Assigns; Participations and Assignments.**

(1) The provisions of this Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors and assigns permitted hereby, except that no Borrower may assign or otherwise transfer any of its respective rights or obligations hereunder without the prior written consent of Lender. Nothing in this Agreement, expressed or implied, shall be construed to confer

upon any Person (other than the parties hereto, their respective successors and assigns permitted hereby and, to the extent expressly contemplated hereby, the Indemnitees) any legal or equitable right, remedy or claim under or by reason of this Agreement or to the Borrowers or any Subsidiary thereof.

(2) Each Borrower agrees and consents that Lender may assign to one or more assignees (together with its successors and assigns, each an “**Assignee**”) all or a portion of its rights and obligations under this Agreement (including all or a portion of its Commitment and the Loans at the time owing to it) without any limitation whatsoever. Each Borrower hereby waives any and all notices of assignment by Lender or by any Assignee. Each Borrower also agrees that any Assignee will be considered the absolute owner of such Assignee’s interest in the Commitment and the Loans at the time owing to it and will have all the rights and obligations granted to such Assignee. Each Borrower further waives all rights of offset or counterclaim that it may have now or hereafter against Lender or against any Assignee and unconditionally agrees that either Lender or such Assignee may enforce such Borrower’s obligations under the Loan Documents irrespective of the failure or insolvency of any holder of any interest in the Commitment and the Loans at the time owing to it. Each Borrower further agrees that any Assignee may enforce its interests irrespective of any personal claims or defenses that such Borrower may have against Lender.

(3) Each Borrower agrees and consents to Lender’s sale or transfer, whether now or hereafter, of one or more participation interests in this loan facility to one or more purchasers (together with its successors and assigns, each a “**Participant**”), whether related or unrelated to Lender. Lender may provide, without any limitation whatsoever, to any one or more purchasers, or potential purchasers, any information of knowledge Lender may have about the Borrowers or about any other matter relating to this loan facility, and each Borrower hereby waives any rights to privacy Borrower may have with respect to such matters. Each Borrower additionally waives any and all notices of sale of participation interests, as well as all notices of any repurchase of such participation interests. Each Borrower also agrees that any Participant will be considered the absolute owner of such Participant’s interest in the Commitment and the Loans at the time owing to it and will have all the rights granted to it under the participation agreement or agreements governing the sale of such Participant’s interest. Each Borrower further waives all rights of offset or counterclaim that it may have now or hereafter against Lender or against any Participant and unconditionally agrees that either Lender or such Participant may enforce such Borrower’s obligations under the Loan Documents irrespective of the failure or insolvency of any holder of any interest in its Commitment and the Loans at the time owing to such Lender or such Participant. Each Borrower further agrees that any Participant may enforce its interests irrespective of any personal claims or defenses that such Borrower may have against Lender.

Section 11.24 **USA Patriot Act Notification.** Lender hereby notifies the Borrowers that pursuant to the requirements of the USA PATRIOT Act of 2001, 31, U.S.C. 5318, it is required to obtain, verify and record information that identifies Borrower, which information includes the name and address of the Borrowers and other information that will allow Lender to identify the Borrowers in accordance therewith.

Section 11.25 **Right to Defend.** Lender shall have the right, but not the obligation, at each Borrower’s expense, to commence, to appear in or to defend any action or proceeding purporting to affect the rights or duties of the parties hereunder and, in connection therewith, pay out of the funds of the Loans all necessary expenses, including fees of counsel satisfactory to Lender in its sole discretion, except in a suit by the Borrowers against Lender, in which case the prevailing party shall be entitled to such fees and expenses as a part of any judgment obtained.

Section 11.26 **No Joint Venture.** Each Borrower and Lender intend that the relationship created under this Agreement and the other Loan Documents be solely that of debtor and creditor. Nothing herein

or in the other Loan Documents is intended to create a joint venture, partnership, tenancy-in-common or joint tenancy relationship between the Borrowers and Lender.

Section 11.27 **Incorporation of DIP Orders by Reference**. Each of the Borrowers and Lender agrees that any reference contained herein to (i) the Interim DIP Order shall include all terms, conditions, and provisions of such Interim DIP Order and that the Interim DIP Order is incorporated herein for all purposes, and (ii) the Final DIP Order shall include all terms, conditions, and provisions of such Final DIP Order and that the Final DIP Order is incorporated herein for all purposes. To the extent there is any inconsistency between the terms of this Agreement and the terms of the DIP Orders, the terms of the DIP Orders shall govern.

Section 11.28 **Counterparts**. This Agreement may be executed in multiple counterparts, each of which shall constitute an original, but all of which shall constitute one document.

**[REMAINDER OF PAGE INTENTIONALLY LEFT BLANK;
SIGNATURES APPEAR ON THE FOLLOWING PAGE]**

EXECUTED as of the date first written above.

NOVAN, INC, a Delaware corporation, as a Borrower

By: Paula Brown Stafford

Name: Paula Brown Stafford

Title: President, Chief Executive Officer, and Chairman

EPI HEALTH, LLC, a South Carolina limited liability company, as a Borrower

By: Paula Brown Stafford

Name: Paula Brown Stafford

Title: Chief Executive Officer

LIGAND PHARMACEUTICALS, INCORPORATED, a
Delaware corporation, as Lender

DocuSigned by:

By: Matthew Korenberg

Name: Matthew Korenberg

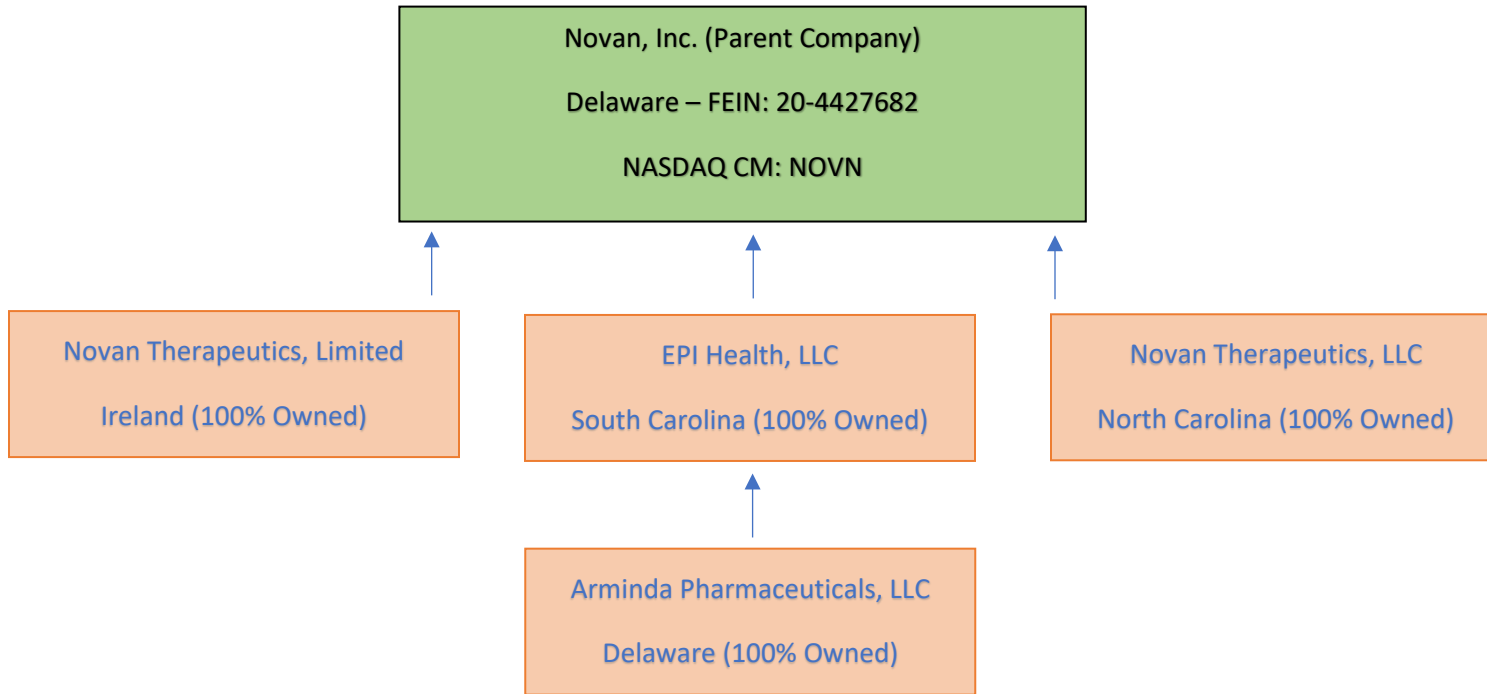
Title: President and Chief Operating Officer

EXHIBIT A

BORROWERS' ORGANIZATIONAL STRUCTURE

[To be Attached]

NOVAN, INC. – Corporate Structure



Novan, Inc. (“Novan” and together with its subsidiaries, the “Company”) is a medical dermatology company focused primarily on researching, developing and commercializing innovative therapeutic products for skin diseases. Its goal is to deliver safe and efficacious therapies to patients, including developing product candidates where there are unmet medical needs. The Company is developing SB206 (berdazimer gel, 10.3%) as a topical prescription gel for the treatment of viral skin infections, with a current focus on molluscum contagiosum. On March 11, 2022, the Company acquired EPI Health, LLC, a specialty pharmaceutical company focused on medical dermatology (“EPI Health”), from Evening Post Group, LLC, a South Carolina limited liability company (“EPG” or the “Seller”). The acquisition of EPI Health (the “EPI Health Acquisition”) has provided the Company with a commercial infrastructure to sell a marketed portfolio of therapeutic products for skin diseases. Subsequent to the acquisition, the Company sells various medical dermatology products for the treatments of plaque psoriasis, rosacea, acne and dermatoses.

Novan was incorporated in January 2006 under the state laws of Delaware. In 2015, Novan Therapeutics, LLC, was organized as a wholly owned subsidiary under the state laws of North Carolina; in March 2019, the Company completed registration of a wholly owned Ireland-based subsidiary, Novan Therapeutics, Limited; and in March 2022, the Company acquired its wholly owned subsidiary, EPI Health, a South Carolina limited liability company.

EXHIBIT B

INITIAL DIP BUDGET

[To be Attached]

Novan DIP Budget (9 Weeks) - Working Draft

DRAFT - CONFIDENTIAL - SUBJECT TO CHANGE - PRELIMINARY AND FOR DISCUSSION PURPOSES ONLY

Work in Process

	DIP										Total
	1	2	3	4	5	6	7	8	9	Tail	Total
	7/21/2023	7/28/2023	8/4/2023	8/11/2023	8/18/2023	8/25/2023	9/1/2023	9/8/2023	9/15/2023		
(+) Factoring Recovery	-	-	-	-	-	-	-	-	-	3,384,827	3,384,827
Total Inflows	-	-	-	-	-	-	-	-	-	3,384,827	3,384,827
Payroll, Benefits & Taxes	-	312,004	-	317,200	-	303,200	-	303,200	-	372,420	1,608,024
Credit Card	-	-	-	-	5,000	-	-	-	-	2,000	7,000
Vendor Payments - EPI	31,250	281,250	31,250	31,250	31,250	31,250	31,250	31,250	31,250	-	531,250
Vendor Payments - Novan	425,883	425,883	425,883	425,883	425,883	425,883	425,883	425,883	425,883	-	3,832,943
Insurance	60,000	-	-	-	-	-	-	-	-	-	60,000
Professional Fees - BK Restructuring	-	-	75,000	100,000	-	-	50,000	408,000	-	3,747,000	4,380,000
Professional Fees - OCPs	-	-	50,000	-	-	-	-	50,000	-	80,000	180,000
Professional Fees - Trustee Fees (est.)	-	-	-	-	-	-	-	-	-	250,000	250,000
PIK Interest/Origination Fee/Exit Fee	-	-	20,712	-	-	-	64,156	-	-	603,626	688,494
Other/Contingency	-	50,000	50,000	50,000	50,000	50,000	50,000	50,000	50,000	50,000	450,000
Total Outflows	517,133	1,069,136	652,845	924,333	512,133	810,333	621,289	1,268,333	507,133	5,105,046	11,987,711
Net Cash Flow	(517,133)	(1,069,136)	(652,845)	(924,333)	(512,133)	(810,333)	(621,289)	(1,268,333)	(507,133)	(1,720,219)	(8,602,884)
Beginning Cash	141,383	(375,750)	(1,444,886)	(2,097,731)	(3,022,063)	(3,534,196)	(4,344,528)	(4,965,817)	(6,234,150)	(6,741,283)	141,383
+/- Net Cash Flow	(517,133)	(1,069,136)	(652,845)	(924,333)	(512,133)	(810,333)	(621,289)	(1,268,333)	(507,133)	(1,720,219)	(8,602,884)
Ending Cash	(375,750)	(1,444,886)	(2,097,731)	(3,022,063)	(3,534,196)	(4,344,528)	(4,965,817)	(6,234,150)	(6,741,283)	(8,461,501)	(8,461,501)
Incremental Employee/Vendor/Other Obligations	25,000	-	-	-	-	1,641,340	-	-	-	1,834,347	3,500,687
Subtotal - working draft	25,000	-	-	-	-	1,641,340	-	-	-	1,834,347	3,500,687
<i>cumulative</i>	25,000	25,000	25,000	25,000	25,000	1,666,340	1,666,340	1,666,340	1,666,340	3,500,687	
Ending Cash after additional Items	(400,750)	(1,469,886)	(2,122,731)	(3,047,063)	(3,559,196)	(6,010,868)	(6,632,157)	(7,900,490)	(8,407,622)	(11,962,188)	(8,461,501)
<u>DIP Financing</u>											
Beginning Book Balance	3,141,383	3,599,250	2,530,114	1,877,269	2,452,937	4,440,804	1,989,132	1,367,843	4,099,510	3,592,378	3,141,383
Net Cash Flow	(542,133)	(1,069,136)	(652,845)	(924,333)	(512,133)	(2,451,672)	(621,289)	(1,268,333)	(507,133)	(3,554,566)	(12,103,571)
DIP Financing (incl. Roll-up of Bridge)	<u>1,000,000</u>	-	-	<u>1,500,000</u>	<u>2,500,000</u>	-	-	<u>4,000,000</u>	-	-	9,000,000
Ending Book Balance after DIP Financing	3,599,250	2,530,114	1,877,269	2,452,937	4,440,804	1,989,132	1,367,843	4,099,510	3,592,378	37,812	37,812
	-	-	-	-	-	-	-	-	-	-	
<u>DIP Rollforward</u>											
Beginning DIP Balance	3,000,000	4,000,000	4,000,000	4,000,000	5,500,000	8,000,000	8,000,000	8,000,000	12,000,000	12,000,000	
Draw(s)	1,000,000	-	-	1,500,000	2,500,000	-	-	4,000,000	-	-	
Ending DIP Balance	4,000,000	4,000,000	4,000,000	5,500,000	8,000,000	8,000,000	8,000,000	12,000,000	12,000,000	12,000,000	
Remaining Availability	<u>11,000,000</u>	<u>11,000,000</u>	<u>11,000,000</u>	<u>9,500,000</u>	<u>7,000,000</u>	<u>7,000,000</u>	<u>7,000,000</u>	<u>3,000,000</u>	<u>3,000,000</u>	<u>3,000,000</u>	

¹ The timing and amount of the Raymond James' Transaction Fee depends on the closing date of the transaction as well as the amount of the transaction.

Novan DIP Budget Snapshot

DRAFT - CONFIDENTIAL - SUBJECT TO CHANGE - PRELIMINARY AND FOR DISCUSSION PURPOSES ONLY*Work in Process*

	60 Days		Total
	Funding Pre-Petition	Build-Up DIP/Tail	
(+) Existing Invoices	-	-	-
(+) Fcst Invoices Paid	-	-	-
(+) Sitavig	-	-	-
(+) Factoring Recovery (est.)	-	3,384,827	3,384,827
Total Inflows	-	3,384,827	3,384,827
Payroll, Benefits & Taxes	436,034	1,608,024	2,044,058
Credit Card	267,057	7,000	274,057
Vendor Payments - EPI	170,581	531,250	701,831
Vendor Payments - Novan	38,079	3,832,943	3,871,022
Insurance	-	60,000	60,000
Professional Fees - BK Restructuring ¹	1,871,717	4,380,000	6,251,717
Professional Fees - OCPs	-	180,000	180,000
Professional Fees - Trustee Fees (est.)	-	250,000	250,000
PIK Interest/Origination Fee/Exit Fee	60,000	688,494	748,494
Other/Contingency	-	450,000	450,000
Total Outflows	2,843,468	11,987,711	14,831,179
Net Cash Flow	(2,843,468)	(8,602,884)	(11,446,352)
Beginning Cash	2,984,851	141,383	2,984,851
+/- Net Cash Flow	(2,843,468)	(8,602,884)	(11,446,352)
Ending Cash	141,383	(8,461,501)	(8,461,501)
<u>Incremental Employee/Other Obligations</u>			
Accrued Vacation/ Accrued bonuses	-	200,000	200,000
Tax Claims (SC, NC S&U; NC Business Pers. Prop.)	-	134,347	134,347
Severance/Retention Consideration (KEIP/KERP)	-	1,100,000	1,100,000
Winddown Consideration	-	400,000	400,000
Critical Vendor/Potential Cure Payments	-	1,641,340	1,641,340
Utility Deposit	-	25,000	25,000
Subtotal - working draft	-	3,500,687	3,500,687
<i>cumulative</i>	-	3,500,687	3,500,687
Ending Cash after additional Items	141,383	(11,962,188)	(11,962,188)
DIP Financing (incl. Roll-up of Bridge)	3,000,000	12,000,000	12,000,000
Ending Cash after DIP facility Draws	3,141,383	37,812	37,812

¹ The timing and amount of the Raymond James' Transaction Fee depends on the closing date of the transaction as well as the amount of the transacti

Novan DIP Budget (9 Weeks) - Working Draft

DRAFT - CONFIDENTIAL - SUBJECT TO CHANGE - PRELIMINARY AND FOR DISCUSSION PURPOSES ONLY

Work in Progress

Filing (WIP) 7/17/2023

+21 Days 8/11/2023 (W/E 8/11)

9/15/2023

	Pre-Petition	DIP									Tail	Funding Build-Up		
	0 7/14/2023	1 7/21/2023	2 7/28/2023	3 8/4/2023	4 8/11/2023	5 8/18/2023	6 8/25/2023	7 9/1/2023	8 9/8/2023	9 9/15/2023	Post Close	Pre-Petition	DIP	Tail
(+) Existing Invoices	-	-	-	-	-	-	-	-	-	-	-	-	-	-
(+) Fcst Invoices Paid	-	-	-	-	-	-	-	-	-	-	-	-	-	-
(+) Sitavig	-	-	-	-	-	-	-	-	-	-	-	-	-	-
(+) Factoring Recovery	-	-	-	-	-	-	-	-	-	-	-	-	-	3,384,827
Total Inflows	-	-	-	-	-	-	-	-	-	-	-	-	-	3,384,827
Payroll, Benefits & Taxes	436,034	-	312,004	-	317,200	-	303,200	-	303,200	-	372,420	436,034	1,235,604	372,420
Credit Card	267,057	-	-	-	-	5,000	-	-	-	-	2,000	267,057	5,000	2,000
Rent	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Vendor Payments - EPI	170,581	31,250	281,250	31,250	31,250	31,250	31,250	31,250	31,250	31,250	-	170,581	531,250	-
Vendor Payments - Novan	38,079	425,883	425,883	425,883	425,883	425,883	425,883	425,883	425,883	425,883	-	38,079	3,832,943	-
CapEx	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Bank Fees/Interest	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Taxes	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Hosting	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Insurance	-	60,000	-	-	-	-	-	-	-	-	-	-	60,000	-
Professional Fees - BK Restructuring	1,871,717	-	-	75,000	100,000	-	-	50,000	408,000	-	3,747,000	1,871,717	633,000	3,747,000
Professional Fees - OCPs	-	-	-	50,000	-	-	-	-	50,000	-	80,000	-	100,000	80,000
Professional Fees - Trustee Fees (est.)	-	-	-	-	-	-	-	-	-	-	250,000	-	-	250,000
PIK Interest/Origination Fee/Exit Fee	60,000	-	-	20,712	-	-	-	-	-	-	603,626	60,000	84,869	603,626
Royalties	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Other/Contingency	-	-	50,000	50,000	50,000	50,000	50,000	50,000	50,000	50,000	50,000	-	400,000	50,000
Total Outflows	2,843,468	517,133	1,069,136	652,845	924,333	512,133	810,333	621,289	1,268,333	507,133	5,105,046	2,843,468	6,882,665	5,105,046
Net Cash Flow	(2,843,468)	(517,133)	(1,069,136)	(652,845)	(924,333)	(512,133)	(810,333)	(621,289)	(1,268,333)	(507,133)	(1,720,219)	(2,843,468)	(6,882,665)	(1,720,219)
Beginning Cash	2,984,851	141,383	(375,750)	(1,444,886)	(2,097,731)	(3,022,063)	(3,534,196)	(4,344,528)	(4,965,817)	(6,234,150)	(6,741,283)	2,984,851	141,383	(6,741,283)
+/- Net Cash Flow	(2,843,468)	(517,133)	(1,069,136)	(652,845)	(924,333)	(512,133)	(810,333)	(621,289)	(1,268,333)	(507,133)	(1,720,219)	(2,843,468)	(6,882,665)	(1,720,219)
Ending Cash	141,383	(375,750)	(1,444,886)	(2,097,731)	(3,022,063)	(3,534,196)	(4,344,528)	(4,965,817)	(6,234,150)	(6,741,283)	(8,461,501)	141,383	(6,741,283)	(8,461,501)
<u>Incremental Employee/Other Obligations</u>														
Accrued Vacation/ Accrued bonuses	-	-	-	-	-	-	-	-	-	-	200,000	-	-	200,000
Tax Claims (SC, NC S&U; NC Business Pers. Prop.)	-	-	-	-	-	-	-	-	-	-	134,347	-	-	134,347
Severance/Retention Consideration (KEIP/KERP)	-	-	-	-	-	-	-	-	-	-	1,100,000	-	-	1,100,000
Winddown Consideration	-	-	-	-	-	-	-	-	-	-	400,000	-	-	400,000
Critical Vendor/Potential Cure Payments	-	-	-	-	-	-	1,641,340	-	-	-	-	-	1,641,340	-
Utility Deposit	-	25,000	-	-	-	-	-	-	-	-	-	-	25,000	-
Subtotal - working draft	-	25,000	-	-	-	-	1,641,340	-	-	-	1,834,347	-	1,666,340	1,834,347
<i>cumulative</i>	-	25,000	25,000	25,000	25,000	25,000	1,666,340	1,666,340	1,666,340	1,666,340	3,500,687	-	1,666,340	3,500,687
Ending Cash after additional Items	141,383	(400,750)	(1,469,886)	(2,122,731)	(3,047,063)	(3,559,196)	(6,010,868)	(6,632,157)	(7,900,490)	(8,407,622)	(11,962,188)	141,383	(8,407,622)	(11,962,188)
<u>DIP Financing</u>														
Beginning Book Balance	2,984,851	3,141,383	3,599,250	2,530,114	1,877,269	2,452,937	4,440,804	1,989,132	1,367,843	4,099,510	3,592,378	2,984,851	3,141,383	3,592,378
Net Cash Flow	(2,843,468)	(542,133)	(1,069,136)	(652,845)	(924,333)	(512,133)	(2,451,672)	(621,289)	(1,268,333)	(507,133)	(3,554,566)	(2,843,468)	(8,549,005)	(3,554,566)
DIP Financing (incl. Roll-up of Bridge)	3,000,000	1,000,000	-	-	1,500,000	2,500,000	-	-	4,000,000	-	-	3,000,000	9,000,000	-
Ending Book Balance after DIP Financing	3,141,383	3,599,250	2,530,114	1,877,269	2,452,937	4,440,804	1,989,132	1,367,843	4,099,510	3,592,378	37,812	3,141,383	3,592,378	37,812
<u>DIP Rollforward</u>														
Beginning DIP Balance	-	3,000,000	4,000,000	4,000,000	4,000,000	5,500,000	8,000,000	8,000,000	8,000,000	12,000,000	12,000,000	-	-	-
Draw(s)	3,000,000	1,000,000	-	-	1,500,000	2,500,000	-	-	4,000,000	-	-	-	-	-
Ending DIP Balance	3,000,000	4,000,000	4,000,000	4,000,000	5,500,000	8,000,000	8,000,000	8,000,000	12,000,000	12,000,000	12,000,000	-	-	-
Remaining Availability	12,000,000	11,000,000	11,000,000	11,000,000	9,500,000	7,000,000	7,000,000	7,000,000	3,000,000	3,000,000	3,000,000	-	-	-
		15,000,000												

¹ The timing and amount of the Raymond James' Transaction Fee depends on the closing date of the transaction as well as the amount of the transaction.

Novan
DRAFT - CONFIDENTIAL - SUBJECT TO CHANGE - PRELIMINARY AND FOR DISCUSSION PURPOSES ONLY
 Cash Flow Forecast
Cash payments may lag this schedule; Estimated professional fees timing of payments dependent on terms and court approval of retention apps (as needed)

Week Ending	7/14/2023 Pre-Pet. Fcst	ACCRUED									Tail DIP FCST Post DIP	Funding Build-Up			Total
		7/21/2023 DIP FCST	7/28/2023 DIP FCST	8/4/2023 DIP FCST	8/11/2023 DIP FCST	8/18/2023 DIP FCST	8/25/2023 DIP FCST	9/1/2023 DIP FCST	9/8/2023 DIP FCST	9/15/2023 DIP FCST		Pre-Petition	DIP	Tail/Flow of Funds	
Professional Fees															
Debtor Counsel (MN also local) - retainers below	100,000	150,000	100,000	100,000	100,000	100,000	100,000	100,000	100,000	100,000	100,000	100,000	100,000	100,000	1,150,000
Debtor Financial Advisor (SCP) - retainers below	59,625	75,000	60,000	60,000	60,000	60,000	60,000	60,000	60,000	60,000	60,000	60,000	59,625	555,000	674,625
Debtor 1 Banker (RJ) - Monthly Fee	-	-	-	75,000	-	-	-	-	-	50,000	-	-	-	125,000	125,000
Debtor 1 Banker (RJ) - DIP Fee	750,000	-	-	-	-	-	-	-	-	-	-	-	750,000	-	750,000
Debtor 1 Banker (RJ) - Transaction Fee ¹	-	-	-	-	-	-	-	-	-	-	-	-	-	-	1,000,000
Liquidator/Appraiser (TBD)	-	-	-	-	-	-	-	-	-	-	-	-	-	-	1,000,000
Board of Directors Fees	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Retainers															
Debtor Counsel (MN also local), refunded or netted in last payment	150,000	-	-	-	-	-	-	-	-	-	-	-	(150,000)	150,000	(150,000)
Debtor Financial Advisor (SCP), refunded or netted in last payment	75,000	-	-	-	-	-	-	-	-	-	-	-	(75,000)	75,000	(75,000)
UCC Counsel	-	-	-	50,000	50,000	50,000	50,000	50,000	50,000	50,000	50,000	50,000	-	350,000	400,000
UCC Advisor	-	-	-	25,000	25,000	25,000	25,000	25,000	25,000	25,000	25,000	25,000	-	175,000	200,000
Lender(s) Counsel/Local Counsel - Reflected in DIP counsel line below	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Debtor Non Restructuring Counsel (Smith Law)	582,092	-	-	-	-	150,000	-	-	-	-	-	-	150,000	582,092	882,092
Claims Agent - Solicitations and mailings - (156c)	-	-	-	-	100,000	-	-	-	-	-	100,000	-	100,000	200,000	300,000
Claims Agent - Claims agent (Fee App) -(327a)	20,000	-	-	25,000	-	-	-	-	-	25,000	-	20,000	20,000	50,000	95,000
DIP Lender Counsel/Local Counsel - TBD	135,000	-	-	-	90,000	-	-	-	-	-	-	225,000	225,000	315,000	675,000
DIP Fee - TBD	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
BK Professional Fees	1,871,717	225,000	160,000	335,000	425,000	385,000	235,000	285,000	360,000	460,000	1,510,000	1,871,717	2,870,000	1,510,000	6,251,717
Ordinary Course Professionals															
Tax	-	-	-	20,000	-	-	-	-	-	20,000	-	50,000	-	40,000	90,000
Audit	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
TBD	-	-	-	20,000	-	-	-	-	-	20,000	-	20,000	-	40,000	60,000
Other	-	-	-	10,000	-	-	-	-	-	10,000	-	10,000	-	20,000	30,000
OCP Fees	-	-	-	50,000	-	-	-	-	50,000	-	80,000	-	100,000	80,000	180,000
Total Professional fees	1,871,717	225,000	160,000	385,000	425,000	385,000	235,000	285,000	410,000	460,000	1,590,000	1,871,717	2,970,000	1,590,000	6,431,717
<i>Trustee Fee Calculation (0.8% up to \$31.2M / 1% over capped at \$250K, calculated quarterly)</i>															
Disbursement Estimate - pending final DIP	-	-	-	n/a	-	-	-	-	-	-	-	250,000	-	-	250,000
Q3 Estimated	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Q4 Estimated	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
US Trustee Fees	-	-	-	-	-	-	-	-	-	-	-	250,000	-	-	250,000
Debt Payment and Fees (FOR DISCUSSION)															
Monthly Interest	-	-	-	20,712	-	-	-	-	64,156	-	-	63,626	-	84,869	148,494
Monthly Fees	-	-	-	-	-	-	-	-	-	-	-	-	-	-	
Commitment Fee	60,000	-	-	-	-	-	-	-	-	-	-	240,000	60,000	240,000	
Exit Fee	-	-	-	-	-	-	-	-	-	-	-	300,000	-	300,000	
Debt Payment and Fees	60,000	-	-	20,712	-	-	-	64,156	-	-	603,626	60,000	84,869	603,626	748,494

¹ The timing and amount of the Raymond James' Transaction Fee depends on the closing date of the transaction as well as the amount of the transaction.

Week Ending	7/14/2023 Pre-Pet. Fcst	CASH									Tail DIP FCST	Funding Build-Up			Total	
		7/21/2023 DIP FCST	7/28/2023 DIP FCST	8/4/2023 DIP FCST	8/11/2023 DIP FCST	8/18/2023 DIP FCST	8/25/2023 DIP FCST	9/1/2023 DIP FCST	9/8/2023 DIP FCST	9/15/2023 DIP FCST		Pre-Petition	DIP	Tail/Flow of Funds		
Professional Fees																
Debtor Counsel (MN also local) - retainers below	FEE APP 100,000	-	-	-	-	-	-	-	-	200,000	-	850,000	100,000	200,000	850,000	
Debtor Financial Advisor (SCP) - retainers below	FEE APP 59,625	-	-	-	-	-	-	-	-	108,000	-	507,000	59,625	108,000	507,000	
Debtor 1 Banker (RJ) - Monthly Fee	Same -	-	-	75,000	-	-	-	-	-	-	-	-	-	125,000	125,000	
Debtor 1 Banker (RJ) - DIP Fee	Same 750,000	-	-	-	-	-	-	-	-	-	-	-	750,000	-	750,000	
Debtor 1 Banker (RJ) - Transaction Fee ¹	Same -	-	-	-	-	-	-	-	-	-	-	-	-	-	1,000,000	
Liquidator/Appraiser (TBD)	N/A -	-	-	-	-	-	-	-	-	-	-	-	-	-	1,000,000	
Board of Directors Fees	Same -	-	-	-	-	-	-	-	-	-	-	-	-	-	-	
Retainers																
Debtor Counsel (MN also local), refunded or netted in last payment	Same 150,000	-	-	-	-	-	-	-	-	-	-	-	(150,000)	150,000	(150,000)	
Debtor Financial Advisor (SCP), refunded or netted in last payment	Same 75,000	-	-	-	-	-	-	-	-	-	-	-	(75,000)	75,000	(75,000)	
UCC Counsel	FEE APP -	-	-	-	-	-	-	-	-	-	-	-	400,000	-	400,000	
UCC Advisor	FEE APP -	-	-	-	-	-	-	-	-	-	-	-	200,000	-	200,000	
Lender(s) Counsel/Local Counsel - Reflected in DIP counsel line below	FEE APP -	-	-	-	-	-	-	-	-	-	-	-	-	-	-	
Debtor Non Restructuring Counsel (Smith Law)	FEE APP 582,092	-	-	-	-	-	-	-	-	-	-	-	300,000	582,092	882,092	
Claims Agent - Solicitations and mailings - (156c)	Same -	-	-	-	100,000	-	-	-	-	-	100,000	-	200,000	100,000	300,000	
Claims Agent - Claims agent (Fee App) -(327a)	Fee App 20,000	-	-	-	-	-	-	-	-	-	-	75,000	20,000	75,000		
DIP Lender Counsel/Local Counsel - TBD	FEE APP 135,000	-	-	-	-	-	-	-	-	-	-	540,000	135,000	540,000		
DIP Fee - TBD	Same -	-	-	-	-	-	-	-	-	-	-	-	-	-		
BK Professional Fees	1,871,717	-	-	75,000	100,000	-	-	-	50,000	408,000	-	3,747,000	1,871,717	633,000	3,747,000	6,251,717

¹ The timing and amount of the Raymond James' Transaction Fee depends on the closing date of the transaction as well as the amount of the transaction.

Novan DIP Budget (13 Weeks) - Working Draft

DRAFT - CONFIDENTIAL - SUBJECT TO CHANGE - PRELIMINARY AND FOR DISCUSSION PURPOSES ONLY

Work in Progress

Line Item	June	July	Aug	Sept	Oct	Nov	Dec														
SB206 R&D, Regulatory	26,667	29,667	30,667	27,667	30,162	30666.6667	27666.66667														
SB206 Base Commercial & Medical	258,038	112,500	112,500	112,500	118,222	118222	118222														
SB206 Manufacturing Operations	1,159,062	879,650	600,142	965,917	1,072,697	366749.905	633462.2381														
Novan Legacy Personnel					632,124	632124.234	632124.2341														
Novan OpEx / G&A, Net of Public Co. Costs	141,090	113,819	115,369	157,640	122,257	146357.276	141428.2761														
ERP Licensing & Implementation	114,000	204,000	114,000	114,000	204,000	114000	204000														
Novan Legacy Public Co. Costs	147,333	152,333	192,333	162,333	167,333	207333.333	162333.3333														
	1,846,190	1,491,969	1,165,011	1,540,057	2,346,795	1,615,453	1,919,237														
	461,547.56	372,992.22	291,252.72	385,014.20	586,698.85	403,863.35	479,809.19	425,882.59													
	June	July	July	July	July	Aug	Aug	Aug	Aug	Aug	Sept	Sept	Sept	Sept	Oct	Oct	Oct				
	Pre-Petition									DIP								Tail			
	0	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15		Post Close			
	6/30/2023	7/7/2023	7/14/2023	7/21/2023	7/28/2023	8/4/2023	8/11/2023	8/18/2023	8/25/2023	9/1/2023	9/8/2023	9/15/2023	9/22/2023	9/29/2023	10/6/2023	10/13/2023					
Payroll			436,034	-	312,004	-	317,200	-	303,200	-	303,200	-	372,420	-	372,420	-	372,420				
EPIH Payables			170,581	31,250	31,250	31,250	31,250	31,250	31,250	31,250	31,250	31,250	31,250	31,250	31,250	31,250	31,250				
EPIH othe			38,079	-	250,000																

Commitment Fee	2.0%	3,000,000	60,000.0	at funding (est. 7/14)
Exit Fee	2.0%	12,000,000	240,000.0	at close (est. 9/18)
	2.0%	15,000,000	300,000.0	at close (est. 9/18)

DRAFT - CONFIDENTIAL - SUBJECT TO CHANGE - PRELIMINARY AND FOR DISCUSSION PURPOSES ONLY

PIK Interest - Draft Calculation

close	9/18/2023	Days at DIP balar	31	31	30	31
	12.0%	6/30/2023	7/31/2023	8/31/2023	9/30/2023	10/31/2023
365 days	0.000328767	June	July	August	Sept	
^^ section 2.06			14			
			5			
			12			
				9		
				7		
				15		
					6	
					12	

DIP	15,000,000	
Deposit	1,500,000	10%
Draw Schedule		
Draw Schedule	Amount	Date
1	3,000,000	7/14/2023
2	1,000,000	7/19/2023
3	1,500,000	8/9/2023
4	2,500,000	8/16/2023
5	4,000,000	9/6/2023
6	-	9/20/2023
	<u>12,000,000</u>	

-	20,712.33	64,156.30	63,625.52	148,494.15
-	483,871	1,167,304	1,616,974	-
-	1,548,387	1,246,612	4,833,947	-
-		3,880,990	-	-
-	2,032,258	6,294,906	6,450,921	-
-	20,712.33	64,156.30	63,625.52	-
-	-	-	-	-

EXHIBIT C

INTERIM DIP ORDER

[To be Attached]

EXHIBIT D

FORM OF REQUEST FOR LOAN

EXHIBIT D

FORM OF REQUEST FOR LOAN

Date: [_____]

Ligand Pharmaceuticals, Incorporated
3911 Sorrento Valley Blvd., Suite 110
San Diego, California 92121

RE: Superpriority Debtor In Possession Loan and Security Agreement dated as of July 17, 2023 (as amended, supplemented or otherwise modified from time to time, the "Agreement"), among Novan, Inc., a Delaware corporation ("Novan"), EPI Health, LLC, a South Carolina limited liability company ("EPI" and, together with Novan, each, a "Borrower" and collectively, the "Borrowers") and Ligand Pharmaceuticals, Incorporated, a Delaware corporation (together with its successors and assigns, "Lender"). (Undefined terms used herein shall have the same meaning as in the Agreement).

Borrowers hereby request the Loan pursuant to Section 2.3(1) of the Agreement as follows:

1. Date of Borrowing (which shall be a Business Day): [_____]
2. Principal amount of the Loan: \$[_____]¹
3. Wire instructions of the account(s) of the Borrower to which funds are to be disbursed:
[_____]
4. The proceeds of the Loan shall be made available to the undersigned in accordance with the funds-flow memorandum set forth on Annex I attached hereto, all of which are in accordance with the DIP Budget.²

Borrowers hereby certify as follows that on the date hereof:

1. The representations and warranties contained in the Agreement and in all other Loan Documents are true and correct on and as of the [date of the Interim Order] [Final Order]

¹ Each Borrowing shall be in a principal amount of \$1,000,000 or a whole multiple of \$100,000 in excess thereof.

² To attach a funds-flow memorandum setting forth the sources and uses of such proceeds, which funds-flow memorandum shall be in form and substance satisfactory to Lender in its sole discretion and shall contain the details of how funds from each source are to be transferred to particular uses and the wire transfer instructions for the particular uses of such funds.

Effective Order Date] in all material respects, except to the extent that any such representation or warranty is qualified by materiality, “Material Adverse Effect” or other similar qualification, such representation or warranty shall be true and correct in all respects.

2. No Default or Event of Default has occurred or is continuing.
3. No event shall have occurred or failed to occur since [July 14, 2023] [the Effective Date], which occurrence or failure could be expected to have a Material Adverse Effect.
4. All of the other conditions set forth in [3.1][3.2] have been satisfied in full.

[Signature page follow]

EXECUTED as of the date first written above.

NOVAN, INC. a Delaware corporation, as a Borrower

By: _____
Name:
Title:

EPI HEALTH, LLC, a South Carolina limited liability company, as a Borrower

By: _____
Name:
Title:

Annex I

Funds-Flow Memorandum

[See Attached]

SCHEDULE 1.1(94)

PERMITTED DEBT

1. Debt pursuant to that certain Factoring Agreement, dated as of December 1, 2022, by and between CSNK Working Capital Finance Corp. d/b/a Bay View Funding and EPI Health, LLC.
2. Debt pursuant to that certain Continuing Guaranty Agreement, dated as of December 1, 2022, by and between CSNK Working Capital Finance Corp. d/b/a Bay View Funding and Novan, Inc.
3. Debt pursuant to that certain Royalty and Milestone Payments Purchase Agreement, dated as of April 29, 2019, by and between Novan, Inc. and Reedy Creek Investments LLC.
4. Debt pursuant to certain extensions of credit for the purpose of purchasing equipment, as extended by Webbank to Novan, Inc. under a revolving credit account dated October 13, 2021, with the account number 687945020500064xxxx.
5. Debt pursuant to that certain Development Funding and Royalties Agreement, dated as of May 4, 2019, by and between Novan, Inc. and Ligand Pharmaceuticals Incorporated.
6. Unsecured debt to trade creditors incurred in the ordinary course of business consistent with best practice.
7. Debt incurred in respect of netting services, overdraft protection, and other like services, in each case incurred in the ordinary course of business consistent with best practice, so long as such liabilities are paid in the ordinary course of business consistent with best practice after the incurrence thereof.
8. Customary reimbursement or indemnification obligations owed to any person providing worker's compensation, health, disability or other employee benefits, or property, casualty or liability insurance to any Borrower or any Subsidiary of Borrower, in each case incurred in connection with such person providing such benefits or insurance.
9. The endorsement of instruments or other payment items for deposit, or similar debt arising in the ordinary course of business consistent with best practice in favor of financial institutions.
10. Guaranties of any Borrower of the debt of another Borrower to the extent that such debt constitutes Permitted Indebtedness.

SCHEDULE 1.1(95)

OTHER PERMITTED LIENS

1. Liens securing the claims of materialmen, mechanics, carriers, warehousemen, processors or landlords for labor, materials, supplies or rentals incurred in the ordinary course of business consistent with best practice, which (i) are not delinquent or which remain payable without penalty or which are being contested in good faith and by appropriate proceedings which proceedings have the effect of preventing the forfeiture or sale of the property subject thereto, and (ii) do not, individually or in the aggregate, materially impair the use thereof in the operation of the business of the Loan Parties.
2. Liens arising out of any deposits or pledges made in the ordinary course of business consistent with best practice in connection with, or to secure payment of, obligations under workers' compensation, unemployment insurance and other types of social security or similar legislation (excluding any Liens imposed by ERISA), statutory obligations, surety bonds (other than bonds related to judgments or litigation), performance bonds and other obligations of a like nature incurred in the ordinary course of business consistent with best practice.
3. Liens for taxes, fees, assessments, or other governmental charges or levies (excluding any Liens imposed by ERISA), either not delinquent or being contested in good faith by appropriate proceedings and for which the Borrowers maintain adequate reserves.
4. Encumbrances in the nature of zoning restrictions, easements and rights or restrictions of record on the use of real property, which in the aggregate are not substantial in amount and which do not, in any case, detract from the value of such property or impair the use thereof in the ordinary conduct of business.
5. Non-exclusive licenses or sublicenses of Intellectual Property granted by any Borrower or its Subsidiaries in the ordinary course of business consistent with best practice.
6. Any interest or title of a licensor, sublicensor, lessor or sublessor with respect to any assets under any license or lease agreement entered into in the ordinary course of business consistent with best practice, to the extent permitted by this Agreement, which do not (i) interfere in any material respect with the business of the Borrowers or materially detract from the value of the relevant assets of the Borrowers or (ii) secure any Debt.
7. Liens of a collecting bank arising in the ordinary course of business consistent with best practice as described in Section 4-210 of the Uniform Commercial Code, and (ii) Liens of any depository bank in connection with statutory, common law and contractual rights of setoff and recoupment with respect to any deposit account of any Borrower or any Subsidiary thereof.
8. Liens pursuant to that certain Factoring Agreement, dated as of December 1, 2022, by and between CSNK Working Capital Finance Corp. d/b/a Bay View Funding and EPI Health, LLC, as evidenced by UCC#221202-1903437, filed on December 2, 2022, against EPI Health, LLC in favor of CT Corporation System, as representative.
9. UCC# 2020 4394781, filed on June 25, 2020, against Novan, Inc. in favor of Reedy Creek Investments LLC.
10. UCC# 2021 8313729, filed on October 18, 2021, against Novan, Inc. in favor of Webbank.

11. UCC# 2023 4522685, filed on June 27, 2023, against Novan, Inc. in favor of Ligand Pharmaceuticals, Incorporated.

SCHEDULE 4.6

LOCATIONS

Borrower	Principal Place of Business and Chief Executive Office
Novan, Inc.	4020 Stirrup Creek Drive, Suite 110 Durham, NC 27703
EPI Health, LLC	4020 Stirrup Creek Drive, Suite 110 Durham, NC 27703

SCHEDULE 4.16**LEGAL NAMES; JURISDICTION OF ORGANIZATION; TYPE OF ORGANIZATION;
ORGANIZATIONAL IDENTIFICATION NUMBER**

Legal Name	Jurisdiction of Organization	Type of Organization	Organizational Identification Number
Novan, Inc.	Delaware	Corporation	4101202
EPI Health, LLC	South Carolina	Limited Liability Company	00854044

SCHEDULE 4.17(5)**DEPOSIT ACCOUNTS, SECURITIES ACCOUNTS AND COMMODITIES ACCOUNTS**

Borrower	Name of Institution Maintaining Account	Account Number	Purpose of Account
Novan, Inc.	Stone Castle 152 W 57th St, New York, NY 10019	104791571607	Investment Account
Novan, Inc	Silicon Valley Bank 3003 Tasman Dr. Santa Clara, CA 95054	3301059620	Investment Account
Novan, Inc	Silicon Valley Bank 3003 Tasman Dr. Santa Clara, CA 95054	6600001484	Sweep
Novan, Inc	Silicon Valley Bank 3003 Tasman Dr. Santa Clara, CA 95054	3301047949	Operating Account
Novan, Inc	Silicon Valley Bank 3003 Tasman Dr. Santa Clara, CA 95054	3302699086	Operating Account
Novan, Inc	Silicon Valley Bank 3003 Tasman Dr. Santa Clara, CA 95054	3301059616	Payroll Account
Novan, Inc	PNC Bank 300 Fifth Avenue. Pittsburgh, PA 15222	5303710299	PNC Core Commercial Checking
Novan, Inc	PNC Bank 300 Fifth Avenue. Pittsburgh, PA 15222	5303763374	PNC MMA
Novan, Inc	PNC Bank 300 Fifth Avenue. Pittsburgh, PA 15222	5303733407	PNC Core Commercial Operations
Novan, Inc	PNC Bank 300 Fifth Avenue. Pittsburgh, PA 15222	5303733423	PNC Payroll
Novan, Inc	Bank of America 100 North Tryon Street Charlotte, NC 28255	223015410048	ARMINDA PHARMACEUTICALS LLC (lockbox)
Novan, Inc	Bank of America 100 North Tryon Street Charlotte, NC 28255	223015341379	EPI Health, LLC (lockbox)

SCHEDULE 4.17(6)**EQUITY INTERESTS**

Borrower	Pledged Issuer	Percentage of Shares/Membership Interest	Class	Certificated
Novan, Inc.	EPI Health, LLC	100%	Sole class of units	No
Novan, Inc.	Novan Therapeutics, LLC	100%	Sole class of units	No
Novan, Inc.	Novan Therapeutics Limited	100%	Ordinary shares	No
EPI Health, LLC	Armina Pharmaceuticals, LLC	100%	Sole class of units	No

SCHEDULE 10.2

INVENTORY

1. 420 International Blvd, Suite 500, Brooks, KY 40109
2. 4020 Stirrup Creek Drive, Suite 110 Durham, NC 27703
3. 276 East Bay Street, Charleston, SC 29401-2600

Exhibit 2

Initial DIP Budget

Novan DIP Budget (9 Weeks)

	DIP										
	1	2	3	4	5	6	7	8	9	Tail	Total
	7/21/2023	7/28/2023	8/4/2023	8/11/2023	8/18/2023	8/25/2023	9/1/2023	9/8/2023	9/15/2023		
(+) Factoring Recovery	-	-	-	-	-	-	-	-	-	3,384,827	3,384,827
Total Inflows	-	-	-	-	-	-	-	-	-	3,384,827	3,384,827
Payroll, Benefits & Taxes	-	312,004	-	317,200	-	303,200	-	303,200	-	372,420	1,608,024
Credit Card	-	-	-	-	5,000	-	-	-	-	2,000	7,000
Vendor Payments - EPI	31,250	281,250	31,250	31,250	31,250	31,250	31,250	31,250	31,250	-	531,250
Vendor Payments - Novan	425,883	425,883	425,883	425,883	425,883	425,883	425,883	425,883	425,883	-	3,832,943
Insurance	60,000	-	-	-	-	-	-	-	-	-	60,000
Professional Fees - BK Restructuring	-	-	75,000	100,000	-	-	50,000	408,000	-	3,747,000	4,380,000
Professional Fees - OCPs	-	-	50,000	-	-	-	-	50,000	-	80,000	180,000
Professional Fees - Trustee Fees (est.)	-	-	-	-	-	-	-	-	-	250,000	250,000
PIK Interest/Origination Fee/Exit Fee	-	-	20,712	-	-	-	64,156	-	-	603,626	688,494
Other/Contingency	-	50,000	50,000	50,000	50,000	50,000	50,000	50,000	50,000	50,000	450,000
Total Outflows	517,133	1,069,136	652,845	924,333	512,133	810,333	621,289	1,268,333	507,133	5,105,046	11,987,711
Net Cash Flow	(517,133)	(1,069,136)	(652,845)	(924,333)	(512,133)	(810,333)	(621,289)	(1,268,333)	(507,133)	(1,720,219)	(8,602,884)
Beginning Cash	141,383	(375,750)	(1,444,886)	(2,097,731)	(3,022,063)	(3,534,196)	(4,344,528)	(4,965,817)	(6,234,150)	(6,741,283)	141,383
+/- Net Cash Flow	(517,133)	(1,069,136)	(652,845)	(924,333)	(512,133)	(810,333)	(621,289)	(1,268,333)	(507,133)	(1,720,219)	(8,602,884)
Ending Cash	(375,750)	(1,444,886)	(2,097,731)	(3,022,063)	(3,534,196)	(4,344,528)	(4,965,817)	(6,234,150)	(6,741,283)	(8,461,501)	(8,461,501)
Incremental Employee/Other Obligations	25,000	-	-	-	-	-	-	-	-	1,834,347	1,859,347
Critical Vendor Payments	500,000	-	-	-	-	1,141,340	-	-	-	-	1,641,340
Subtotal - working draft	525,000	-	-	-	-	1,141,340	-	-	-	1,834,347	3,500,687
<i>cumulative</i>	525,000	525,000	525,000	525,000	525,000	1,666,340	1,666,340	1,666,340	1,666,340	3,500,687	3,500,687
Ending Cash after additional Items	(900,750)	(1,969,886)	(2,622,731)	(3,547,063)	(4,059,196)	(6,010,868)	(6,632,157)	(7,900,490)	(8,407,622)	(11,962,188)	(11,962,188)
<u>DIP Financing</u>											
Beginning Book Balance	3,141,383	3,099,250	2,030,114	1,377,269	1,952,937	3,940,804	1,989,132	1,367,843	4,099,510	3,592,378	3,141,383
Net Cash Flow	(1,042,133)	(1,069,136)	(652,845)	(924,333)	(512,133)	(1,951,672)	(621,289)	(1,268,333)	(507,133)	(3,554,566)	(12,103,571)
DIP Financing (incl. Roll-up of Bridge)	<u>1,000,000</u>	-	-	<u>1,500,000</u>	<u>2,500,000</u>	-	-	<u>4,000,000</u>	-	-	<u>9,000,000</u>
Ending Book Balance after DIP Financing	3,099,250	2,030,114	1,377,269	1,952,937	3,940,804	1,989,132	1,367,843	4,099,510	3,592,378	37,812	37,812
	-	-	-	-	-	-	-	-	-	-	-
<u>DIP Rollforward</u>											
Beginning DIP Balance	3,000,000	4,000,000	4,000,000	4,000,000	5,500,000	8,000,000	8,000,000	8,000,000	12,000,000	12,000,000	
Draw(s)	<u>1,000,000</u>	-	-	<u>1,500,000</u>	<u>2,500,000</u>	-	-	<u>4,000,000</u>	-	-	
Ending DIP Balance	4,000,000	4,000,000	4,000,000	5,500,000	8,000,000	8,000,000	8,000,000	12,000,000	12,000,000	12,000,000	
Remaining Availability	<u>11,000,000</u>	<u>11,000,000</u>	<u>11,000,000</u>	<u>9,500,000</u>	<u>7,000,000</u>	<u>7,000,000</u>	<u>7,000,000</u>	<u>3,000,000</u>	<u>3,000,000</u>	<u>3,000,000</u>	

¹ The timing and amount of the Raymond James' Transaction Fee depends on the closing date of the transaction as well as the amount of the transaction.