

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

In re: )  
 ) Chapter 11  
NOVAN, INC., *et al.*,<sup>1</sup> )  
 ) Case No. 23-10937 (LSS)  
 Debtors. )  
 ) (Joint Administration Requested)  
 )  
 ) **Re: D.I 9 & 44**  
 )

---

**INTERIM ORDER (I) APPROVING DEBTORS’ PROPOSED FORM OF  
ADEQUATE ASSURANCE OF PAYMENT, (II) ESTABLISHING PROCEDURES  
FOR RESOLVING OBJECTIONS AND REQUESTS FOR ADDITIONAL  
ASSURANCE FROM UTILITY COMPANIES, (III) PROHIBITING UTILITY  
COMPANIES FROM ALTERING, REFUSING, OR DISCONTINUING  
SERVICE, AND (IV) GRANTING RELATED RELIEF**

Upon the *Motion of Debtors for Entry of Interim and Final Orders (I) Approving Debtors’ Proposed Form of Adequate Assurance of Payment, (II) Establishing Procedures for Resolving Objections and Requests for Additional Assurance From Utility Companies, (III) Prohibiting Utility Companies from Altering, Refusing, or Discontinuing Service, and (IV) Granting Related Relief* (the “Motion”),<sup>2</sup> filed by the above-captioned debtors and debtors in possession (collectively, the “Debtors”), for entry an interim order (this “Interim Order”), (i) approving the Debtors’ proposed form of adequate assurance of postpetition payment to the Utility Companies, (ii) establishing procedures for resolving any objections by the Utility Companies relating to the Proposed Adequate Assurance, and (iii) prohibiting the Utility Companies from altering, refusing, or discontinuing service to, or discriminating against, the

---

<sup>1</sup> 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.

<sup>2</sup> Capitalized terms used but not otherwise defined in this Interim Order shall have the meanings ascribed to them in the Motion.



Debtors solely on the basis of the commencement of these cases, a debt that is owed by the Debtors for services rendered prior to the Petition Date, or on account of any perceived inadequacy of the Debtors' Proposed Adequate Assurance, all as further described in the Motion; and upon consideration of the First Day Declaration and the record of these Chapter 11 Cases; and this Court having found that (i) this Court has jurisdiction over the Debtors, their estates, property of their estates and to consider the Motion and the relief requested therein under 28 U.S.C. §§ 157 and 1334 and the *Amended Standing Order of Reference* from the United States District Court for the District of Delaware, dated February 29, 2012, (ii) this Court may enter a final order consistent with Article III of the United States Constitution, (iii) this is a core proceeding under 28 U.S.C. § 157(b)(2)(A), (iv) venue of this Motion in this District is proper under 28 U.S.C. §§ 1408 and 1409, and (v) no further or other notice of the Motion is required under the circumstances; and this Court having reviewed the Motion and having heard the statements in support of the relief requested in the Motion at a hearing before this Court; and having determined that the legal and factual bases set forth in the Motion and the First Day Declaration establish just cause for the relief granted in this Interim Order; and this Court having found and determined that the relief sought in the Motion is in the best interests of the Debtors' estates, their creditors and other parties in interest; and after due deliberation and sufficient cause appearing therefor,

**IT IS HEREBY ORDERED THAT:**

1. The Motion is GRANTED, on an interim basis, as set forth herein.
2. The final hearing (the "Final Hearing") on the Motion shall be held on **August 21, 2023, at 10:00 a.m. (EST)**. Any objections or responses to entry of a final order on the Motion (each, an "Objection") shall be filed on or before **4:00 p.m. (EST) on August 3, 2023**, and served on the following parties: (i) proposed counsel to the Debtors, Morris, Nichols, Arsht & Tunnell LLP, 1201 Market Street, 16<sup>th</sup> Floor, Wilmington, Delaware 19801 (Attn: Derek C. Abbott, Esq.

(dabbott@morrisnichols.com)); (ii) the Office of the United States Trustee, J. Caleb Boggs Federal Building, 844 King St., Lockbox 35, Wilmington, DE 19801 (Attn: Linda J. Casey, Esq. (linda.casey@usdoj.gov)); (iii) counsel to Ligand Pharmaceutical, Incorporated (the “DIP Lender”), Morgan Lewis and Bockius LLP, 101 Park Ave. New York, NY 10174 (Attn: Craig A. Wolfe, Esq. (craig.wolfe@morganlewis.com) Jason A. Alderson (Jason.alderson@morganlewis.com), and David K. Shim (David.shim@morganlewis.com)); and (iv) counsel to any statutory committee appointed in these Chapter 11 Cases. In the event no Objections to entry of a final order on the Motion are timely received, this Court may enter such final order without need for the Final Hearing.

3. Subject to the procedures described below, each Utility Company shall not (a) alter, refuse, terminate, and/or discontinue utility services to or discriminate against the Debtors on the basis of the commencement of these Chapter 11 Cases or on account of outstanding prepetition invoices or (b) require additional assurance of payment, other than the Adequate Assurance Deposit, as a condition to the Debtors receiving such utility services.

4. Subject to the terms of this Interim Order, as adequate assurance for the payment of Utility Services, the Debtors shall make a cash deposit in an amount of \$15,065.00, which satisfies, on an aggregate basis, the estimated costs for Utility Services provided by each Utility Company on the Utility Company List for 50% of one month, calculated based on the Debtors’ estimated average payments over the twelve month period prior to the Petition Date (the “Adequate Assurance Deposit”), into a newly created, segregated account of the Debtors (the “Utility Deposit Account”) under the Debtors’ control for the benefit of Utility Companies, except those Utility Companies that agree in writing to a lesser amount, or are paid in advance for Utility Services.

5. Notwithstanding anything to the contrary in any other order of this Court, including any debtor in possession financing order, no creditor, including the debtor in possession financing lender, shall have any interest in or lien on the Adequate Assurance Deposit or the Utility Deposit Account.

6. The Adequate Assurance Deposit attributable to each Utility Company shall be maintained until the earlier of (a) entry of an order of this Court authorizing or directing the return of the Adequate Assurance Deposit to the Debtors; (b) subject to the requirements of paragraph 7(vi) below, entry of an order authorizing the rejection of a lease for a location closing (only if the Debtors maintain their only account with the relevant utility at such closing location); or (c) the effective date of any chapter 11 plan filed in the Debtors' Chapter 11 Cases.

7. Subject to the entry of the Final Order and the Adequate Assurance Procedures set forth below, the Adequate Assurance Deposit attributable to each Utility Company constitutes sufficient adequate assurance of future payment to the Utility Companies to satisfy the requirements of section 366 of the Bankruptcy Code (the "Proposed Adequate Assurance") and no Utility Company shall discontinue Utility Services without complying with the following Adequate Assurance Procedures:

- i. Any Utility Company that objects to the Adequate Assurance must serve a request (an "Adequate Assurance Request") on: (i) the Debtors, Novan, Inc., 4020 Stirrup Creek Drive, Suite 110, Durham, NC 27703 (Attn: John M. Gay (jgay@novan.com)); (ii) proposed counsel to the Debtors, Morris, Nichols, Arsht & Tunnell LLP, 1201 Market Street, 16<sup>th</sup> Floor, Wilmington, Delaware 19801 (Attn: Derek C. Abbott, Esq. (dabbott@morrisnichols.com)); (iii) counsel to the DIP Lender, Morgan Lewis and Bockius LLP, 101 Park Ave. New York, NY 10174 (Attn: Attn: Craig A. Wolfe, Esq. (craig.wolfe@morganlewis.com), Jason R. Alderson (jason.alderson@morganlewis.com), and David K. Shim (david.shim@morganlewis.com)); (iv) the Office of the

United States Trustee, J. Caleb Boggs Federal Building, 844 King St., Lockbox 35, Wilmington, DE 19801 (Attn: Linda J. Casey, Esq. (linda.casey@usdoj.gov)); and (v) counsel to any official committee of unsecured creditors appointed in the Chapter 11 Cases (collectively, the “Notice Parties”).

- ii. Any Adequate Assurance Request must be served on the Notice Parties and must: (a) be made in writing; (b) identify the location for which Utility Services are provided and relevant account number(s); and (c) explain why the Utility Company believes the Adequate Assurance is not sufficient adequate assurance of future payment.
- iii. Upon the Debtors’ receipt of any Adequate Assurance Request, the Debtors shall promptly negotiate with the requesting Utility Company to resolve its Adequate Assurance Request.
- iv. The Debtors are authorized to resolve any Adequate Assurance Request by mutual agreement with a Utility Company in consultation with the DIP Lender and without further order of the Court and, in connection with any such agreement, provide a Utility Company with alternative adequate assurance of payment, including cash deposits, prepayments, or other forms of security, without further order of the Court, if the Debtors believe such alternative assurance is reasonable.
- v. If the Debtors determine that a timely received Adequate Assurance Request is not reasonable and are unable to reach an alternative resolution with the applicable Utility Company, the Debtors shall request a hearing before the Court to determine the adequacy of assurance of payment pursuant to section 366(c)(3) of the Bankruptcy Code (the “Determination Hearing”). Pending resolution of such Adequate Assurance Request at the Determination Hearing, the Utility Company shall be prohibited from altering, refusing, or discontinuing services to the Debtors on account of unpaid charges for prepetition services or on account of any objections to the Adequate Assurance.
- vi. Upon the termination of Utility Services independent thereof, including on account of a Closed Account, the Debtors may, without further order of the Court, reduce the Adequate Assurance Deposit by an amount not exceeding, for each of the Utility Services being discontinued, the amount of the Adequate Assurance Deposit then attributable

to the applicable terminated Utility Services; *provided* that for any Utility Company for which the Adequate Assurance Deposit is reduced, the Debtors shall provide the affected Utility Company fourteen (14) days' notice of their intent to reduce the Adequate Assurance Deposit and shall have paid such Utility Company in full for any outstanding post-petition Utility Services before reducing the Adequate Assurance Deposit.

8. The Debtors shall, as necessary, provide a copy of this Interim Order, and any final order approving the relief requested in the Motion (when and if entered) (such order, the "Final Order") to any Utility Company not listed on the Utility Service List (each, an "Additional Utility Company" and, collectively, the "Additional Utility Companies"), as such Utility Companies are identified. Promptly upon their discovery of an Additional Utility Company, the Debtors shall increase the Adequate Assurance Deposit by an amount equal to approximately 50% of the Estimated Utility Expense for each Additional Utility Company, unless such Additional Utility Company agrees in writing to a lesser amount or is paid in advance for Utility Services. The Additional Utility Companies that have been served with a copy of this Interim Order shall be subject to the terms of this Interim Order, including the Adequate Assurance Procedures.

9. The Debtors are authorized to reduce the Adequate Assurance Deposit to the extent that it includes an amount on account of a Utility Company that the Debtors subsequently determine should be removed from the Utility Company List upon either: (a) obtaining the affected Utility Company's consent to reduce the Adequate Assurance Deposit or (b) providing such affected Utility Company with fourteen (14) days' notice of their intent to reduce the Adequate Assurance Deposit and receiving no response thereto.

10. Nothing in this Interim Order constitutes a finding that any entity is or is not a Utility Company hereunder or under section 366 of the Bankruptcy Code, whether or not such entity is listed on the Utility Company List.

11. The Debtors' service of the Motion or this Interim Order upon the Utility Companies shall not constitute an admission or concession that any such entity is a utility company within the meaning of section 366 of the Bankruptcy Code, and all rights and defenses of the Debtors are reserved with respect thereto.

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

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

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

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

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

Dated: July 21st, 2023  
Wilmington, Delaware

  
LAURIE SELBER SILVERSTEIN  
UNITED STATES BANKRUPTCY JUDGE