

**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.)
) (Jointly Administered)
)
) **Re: D.I. 8**
)

CERTIFICATION OF COUNSEL REGARDING DEBTORS' MOTION FOR ENTRY OF INTERIM AND FINAL ORDERS (I) AUTHORIZING DEBTORS TO (A) PAY CERTAIN PREPETITION EMPLOYMENT OBLIGATIONS AND (B) MAINTAIN EMPLOYEE BENEFITS PROGRAMS AND (II) GRANTING RELATED RELIEF

The undersigned counsel to the above-captioned debtors and debtors in possession (the "Debtors") hereby certifies as follows:

1. On July 17, 2023, the Debtors each filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code.
2. On July 17, 2023, the Debtors filed the *Debtors' Motion for Entry of Interim and Final Orders (I) Authorizing Debtors to (A) Pay Certain Prepetition Employment Obligations and (B) Maintain Employee Benefits Programs and (II) Granting Related Relief* (the "Motion") [D.I. 8]. Attached to the Motion as Exhibit A was a proposed form of interim order. Attached to the Motion as Exhibit B was a proposed form of final order (the "Proposed Final Order").
3. On July 20, 2023, the Debtors filed the *Certification of Counsel Regarding (I) Authorizing Debtors to (A) Pay Certain Prepetition Employment Obligations and (B) Maintain*

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.



Employee Benefits Programs and (II) Granting Related Relief (the “Certification of Counsel”) [D.I. 42]. Attached to the Certification of Counsel as Exhibit A was a proposed form of interim order (the “Proposed Interim Order”).

4. On July 21, 2023, the Court entered the Proposed Interim Order [D.I. 50]. The Proposed Interim Order established a deadline to file objections or responses to the final relief requested in the Motion as August 4, 2023, at 4:00 p.m. (ET), extended for the Office of the United States Trustee (the “U.S. Trustee”) and extended to August 16, 2023, at 4:00 p.m. (ET) (the “Objection Deadline”) only as to the Official Committee of Unsecured Creditors (the “Committee”).

5. Prior to the Objection Deadline, the Debtors received informal comments from counsel to the Committee. The Debtors did not receive any other objections or informal comments to the Motion.

6. The Debtors have resolved the informal comments from the Committee by revisions to the Proposed Final Order. A copy of the revised proposed final form of order (the “Revised Proposed Final Order”) is attached hereto as **Exhibit A**. For the convenience of the Court and all parties in interest, a blackline comparing the Revised Proposed Final Order to the Proposed Final Order is attached hereto as **Exhibit B**.

7. Counsel to the Committee has reviewed the Revised Proposed Final Order and does not object to its entry.

WHEREFORE, the Debtors respectfully request that the Revised Proposed Final Order attached to the Motion be entered at the earliest convenience of the Court.

Dated: August 17, 2023
Wilmington, Delaware

Respectfully submitted,

/s/ Scott D. Jones

MORRIS, NICHOLS, ARSHT & TUNNELL LLP

Derek C. Abbott (No. 3376)

Daniel B. Butz (No. 4227)

Tamara K. Mann (No. 5643)

Scott D. Jones (No. 6672)

1201 Market Street, 16th Floor

Wilmington, Delaware 19801

Telephone: (302) 658-9200

Facsimile: (302) 658-3989

Email: dabbott@morrisnichols.com

dbutz@morrisnichols.com

tmann@morrisnichols.com

sjones@morrisnichols.com

Proposed Counsel to the Debtors and Debtors in Possession

Exhibit A

(Revised Proposed Final Order)

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

In re:)	
)	Chapter 11
NOVAN, INC., <i>et al.</i> , ¹)	
)	Case No. 23-10937 (LSS)
Debtors.)	
)	(Jointly Administered)
)	
)	Re: D.I. 8, 50
)	

**FINAL ORDER (I) AUTHORIZING DEBTORS TO (A) PAY CERTAIN
PREPETITION EMPLOYMENT OBLIGATIONS AND (B) MAINTAIN
EMPLOYEE BENEFITS PROGRAMS AND (II) GRANTING RELATED RELIEF**

Upon consideration of the motion (the “Motion”)² of the above-captioned debtors and debtors in possession (the “Debtors”) for the entry of interim and final orders, pursuant to sections 105(a), 363(b), 507(a) and 541 of the Bankruptcy Code, Bankruptcy Rules 6003 and 6004, and Local Rule 9013-1, (i) authorizing the Debtors, but not directing, to (a) pay all Prepetition Employee Obligations and (b) honor and continue the Debtors’ prepetition programs, policies and practices as described in the Motion in the ordinary course of business; and (ii) granting certain related relief, all as more fully set forth in the Motion; and upon consideration of the Motion and all pleadings related thereto, including the First Day Declaration; and due and proper notice of the Motion having been given; and having determined that no other or further notice of the Motion is required; and having determined that this Court has jurisdiction to consider the Motion in accordance with 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; and

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

² Capitalized terms used but not defined in this Final Order are defined in the Motion.

having determined that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2); and having determined that venue of this proceeding and the Motion is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and after due deliberation and sufficient cause appearing therefor,

IT IS HEREBY ORDERED THAT

1. The Motion is GRANTED on a final basis as set forth herein.
2. The Debtors are authorized, but not directed, to (i) pay or otherwise honor all Prepetition Employee Obligations in an amount not to exceed \$225,000.00, in the aggregate, on a final basis; (ii) pay postpetition Compensation Obligations and honor and continue their programs, policies and practices described in the Motion that were in effect as of the Petition Date, in the ordinary course of business; and (iii) withhold and remit all federal, state and local taxes relating to the Compensation Obligations as required by applicable law; provided that in no event shall the Debtors pay any Prepetition Employee Obligations before such amounts are due and payable, and this Final Order shall not be deemed to allow the Debtors to accelerate any payment of any amounts of Prepetition Employee Obligations that may be due and owing by the Debtors.
3. Notwithstanding any other provision of this Final Order and absent further order of the Court, (i) payments to Employees on account of Prepetition Employee Obligations shall be limited by sections 507(a)(4) and (a)(5) of the Bankruptcy Code and capped at the amount afforded priority by those statutory subsections; and (ii) the Debtors are not authorized to “cash out” unpaid vacation days upon termination/resignation of an employee in excess of the caps provided by section 507(a)(4) or (a)(5) of the Bankruptcy Code unless applicable state law requires such payment.
4. The Debtors may only make material changes or modifications to their Compensation and Benefits Programs or introduce any new employee compensation or benefit

plans or programs in prior consultation with the DIP Lender and the Official Committee of Unsecured Creditors (the "Committee").

5. The Debtors shall maintain a matrix or schedule of amounts paid pursuant to the Non-Insider Severance Program, the Insider Severance Program, and the Insider Severance Packages, subject to the terms and conditions of this Final Order, including the following information: (a) the title of the claimant paid; (b) the amount and date of the payment to such claimant; and (c) the total amount paid to the claimant to date. The Debtors shall provide a copy of such matrix or schedule to the U.S. Trustee, counsel to the DIP Lender, and the Committee every 30 days beginning upon entry of this Final Order. Notwithstanding anything to the contrary set forth herein, the Debtors shall be required to receive written consent of the Committee of any such payments paid pursuant to the Insider Severance Packages after providing five (5) days' advance notice of any proposed such payments, including (a) the title of the claimant paid; (b) the amount and date of the payment to such claimant; and (c) the total amount paid to the claimant to date.

6. Pursuant to section 362(d) of the Bankruptcy Code, Employees are authorized to proceed with their Workers' Compensation Claims (if any) in the appropriate judicial or administrative forum, and the Debtors are authorized to continue the Workers' Compensation Policies and pay the Workers' Compensation Claims. This modification of the automatic stay pertains solely to pursuing Workers' Compensation Claims.

7. The Debtors are authorized to reissue payment for the Prepetition Employee Obligations and to replace any inadvertently dishonored or rejected payments. Further, the Debtors are authorized to reimburse any bank-related expenses that Employees may incur as a result of any bank's failure to honor a prepetition check.

8. The Banks are authorized, when requested by the Debtors, in the Debtors' discretion, to honor and process checks or electronic fund transfers drawn on the Debtors' bank accounts to pay Prepetition Employee Obligations authorized to be paid hereunder, whether such checks or other requests were submitted prior to, or after, the Petition Date, provided that sufficient funds are available in the applicable bank accounts to make such payments. The Banks may rely on the representations of the Debtors with respect to whether any check or other transfer drawn or issued by the Debtors prior to the Petition Date should be honored pursuant to this Final Order, and any such Bank shall not have any liability to any party for relying on such representations by the Debtors, as provided for in this Final Order.

9. The Banks are hereby authorized to continue to service and administer the Bank Accounts as accounts of the Debtors as debtors in possession without interruption and in the usual and ordinary course, and to receive, process, honor and pay any and all checks and drafts drawn on, or electronic transfer requests made on, the Bank Accounts after the Petition Date by the holders or makers thereof, as the case may be; provided, however, that any check drawn or issued by the Debtors before the Petition Date may be honored by a Bank if specifically authorized by order of this Court.

10. Nothing in this Final Order (i) is intended or shall be deemed to constitute an assumption of any agreement pursuant to section 365 of the Bankruptcy Code or an admission as to the validity of any claim against the Debtors; (ii) shall impair, prejudice, waive or otherwise affect the rights of the Debtors or their estates with respect to the validity, priority or amount of any claim against the Debtors and their estates; (iii) shall impair, prejudice, waive, or otherwise affect the rights of the Debtors and their estates with respect to any and all claims or causes of action; or (iv) shall be construed as a promise to pay a claim.

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

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

13. This Court shall retain jurisdiction with respect to all matters arising from or related to the implementation of this Final Order.

Exhibit B

(Blackline)

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

In re:)	
)	Chapter 11
NOVAN, INC., <i>et al.</i> , ¹)	
)	Case No. 23-10937 (LSS)
Debtors.)	
)	(Jointly Administered)
)	
)	Re: D.I. 8, 50
)	

**FINAL ORDER (I) AUTHORIZING DEBTORS TO (A) PAY CERTAIN
PREPETITION EMPLOYMENT OBLIGATIONS AND (B) MAINTAIN
EMPLOYEE BENEFITS PROGRAMS AND (II) GRANTING RELATED RELIEF**

Upon consideration of the motion (the “Motion”)² of the above-captioned debtors and debtors in possession (the “Debtors”) for the entry of interim and final orders, pursuant to sections 105(a), 363(b), 507(a) and 541 of the Bankruptcy Code, Bankruptcy Rules 6003 and 6004, and Local Rule 9013-1, (i) authorizing the Debtors, but not directing, to (a) pay all Prepetition Employee Obligations and (b) honor and continue the Debtors’ prepetition programs, policies and practices as described in the Motion in the ordinary course of business; and (ii) granting certain related relief, all as more fully set forth in the Motion; and upon consideration of the Motion and all pleadings related thereto, including the First Day Declaration; and due and proper notice of the Motion having been given; and having determined that no other or further notice of the Motion is required; and having determined that this Court has jurisdiction to consider the Motion in accordance with 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

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 in this Final Order are defined in the Motion.

February 29, 2012; and having determined that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2); and having determined that venue of this proceeding and the Motion is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and after due deliberation and sufficient cause appearing therefor,

IT IS HEREBY ORDERED THAT

1. The Motion is GRANTED on a final basis as set forth herein.
2. The Debtors are authorized, but not directed, to (i) pay or otherwise honor all Prepetition Employee Obligations in an amount not to exceed \$225,000.00, in the aggregate, on a final basis; (ii) pay postpetition Compensation Obligations and honor and continue their programs, policies and practices described in the Motion that were in effect as of the Petition Date, in the ordinary course of business; and (iii) withhold and remit all federal, state and local taxes relating to the Compensation Obligations as required by applicable law; provided that in no event shall the Debtors pay any Prepetition Employee Obligations before such amounts are due and payable, and this Final Order shall not be deemed to allow the Debtors to accelerate any payment of any amounts of Prepetition Employee Obligations that may be due and owing by the Debtors.
3. Notwithstanding any other provision of this Final Order and absent further order of the Court, (i) payments to Employees on account of Prepetition Employee Obligations shall be limited by sections 507(a)(4) and (a)(5) of the Bankruptcy Code and capped at the amount afforded priority by those statutory subsections; and (ii) the Debtors are not authorized to “cash out” unpaid vacation days upon termination/resignation of an employee in excess of the caps provided by section 507(a)(4) or (a)(5) of the Bankruptcy Code unless applicable state law requires such payment.

4. The Debtors may only make material changes or modifications to their Compensation and Benefits Programs or introduce any new employee compensation or benefit plans or programs in prior consultation with the DIP Lender and the Official Committee of Unsecured Creditors (the “Committee”).

5. The Debtors shall maintain a matrix or schedule of amounts paid pursuant to the Non-Insider Severance Program, the Insider Severance Program, and the Insider Severance Packages, subject to the terms and conditions of this Final Order, including the following information: (a) the title of the claimant paid; (b) the amount and date of the payment to such claimant; and (c) the total amount paid to the claimant to date. The Debtors shall provide a copy of such matrix or schedule to the U.S. Trustee, counsel to the DIP Lender, and ~~any statutory committee appointed in these Chapter 11 Cases~~ the Committee every 30 days beginning upon entry of this Final Order. Notwithstanding anything to the contrary set forth herein, the Debtors shall be required to receive written consent of the Committee of any such payments paid pursuant to the Insider Severance Packages after providing five (5) days’ advance notice of any proposed such payments, including (a) the title of the claimant paid; (b) the amount and date of the payment to such claimant; and (c) the total amount paid to the claimant to date.

6. Pursuant to section 362(d) of the Bankruptcy Code, Employees are authorized to proceed with their Workers’ Compensation Claims (if any) in the appropriate judicial or administrative forum, and the Debtors are authorized to continue the Workers’ Compensation Policies and pay the Workers’ Compensation Claims. This modification of the automatic stay pertains solely to pursuing Workers’ Compensation Claims.

7. The Debtors are authorized to reissue payment for the Prepetition Employee Obligations and to replace any inadvertently dishonored or rejected payments. Further, the

Debtors are authorized to reimburse any bank-related expenses that Employees may incur as a result of any bank's failure to honor a prepetition check.

8. The Banks are authorized, when requested by the Debtors, in the Debtors' discretion, to honor and process checks or electronic fund transfers drawn on the Debtors' bank accounts to pay Prepetition Employee Obligations authorized to be paid hereunder, whether such checks or other requests were submitted prior to, or after, the Petition Date, provided that sufficient funds are available in the applicable bank accounts to make such payments. The Banks may rely on the representations of the Debtors with respect to whether any check or other transfer drawn or issued by the Debtors prior to the Petition Date should be honored pursuant to this Final Order, and any such Bank shall not have any liability to any party for relying on such representations by the Debtors, as provided for in this Final Order.

9. The Banks are hereby authorized to continue to service and administer the Bank Accounts as accounts of the Debtors as debtors in possession without interruption and in the usual and ordinary course, and to receive, process, honor and pay any and all checks and drafts drawn on, or electronic transfer requests made on, the Bank Accounts after the Petition Date by the holders or makers thereof, as the case may be; provided, however, that any check drawn or issued by the Debtors before the Petition Date may be honored by a Bank if specifically authorized by order of this Court.

10. Nothing in this Final Order (i) is intended or shall be deemed to constitute an assumption of any agreement pursuant to section 365 of the Bankruptcy Code or an admission as to the validity of any claim against the Debtors; (ii) shall impair, prejudice, waive or otherwise affect the rights of the Debtors or their estates with respect to the validity, priority or amount of any claim against the Debtors and their estates; (iii) shall impair, prejudice, waive, or otherwise

affect the rights of the Debtors and their estates with respect to any and all claims or causes of action; or (iv) shall be construed as a promise to pay a claim.

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

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

13. This Court shall retain jurisdiction with respect to all matters arising from or related to the implementation of this Final Order.