

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

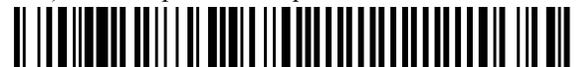
In re: )  
 ) Chapter 11  
NOVAN, INC., *et al.*,<sup>1</sup> )  
 )  
 Debtors. ) Case No. 23-10937 (LSS)  
 ) (Joint Administration Requested)  
 )  
 ) **Hearing Date:** TBD  
 ) **Bid Procedures Objection Deadline:** TBD  
 ) **Private Sale Objection Deadline:** TBD  
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**MOTION OF DEBTORS FOR ENTRY OF ORDERS (I)(A) APPROVING BIDDING PROCEDURES FOR SALE OF SUBSTANTIALLY ALL OF DEBTORS’ ASSETS FREE AND CLEAR OF LIENS, CLAIMS, INTERESTS, AND ENCUMBRANCES AND DESIGNATING LIGAND PHARMACEUTICALS AS A STALKING HORSE BIDDER, (B) SCHEDULING AN AUCTION AND APPROVING THE FORM AND MANNER OF NOTICE THEREOF, (C) APPROVING ASSUMPTION AND ASSIGNMENT PROCEDURES AND (D) SCHEDULING A SALE HEARING AND APPROVING THE FORM AND MANNER OF NOTICE THEREOF; (II)(A) APPROVING THE SALE OF THE DEBTORS’ ASSETS FREE AND CLEAR OF LIENS, CLAIMS, INTERESTS, AND ENCUMBRANCES AFTER THE AUCTION AND (B) APPROVING THE ASSUMPTION AND ASSIGNMENT OF EXECUTORY CONTRACTS AND UNEXPIRED LEASES; AND (III) IN THE ALTERNATIVE, APPROVING THE SALE OF THE DEBTORS’ ASSETS FREE AND CLEAR OF LIENS, CLAIMS, INTERESTS, AND ENCUMBRANCES TO LIGAND PHARMACEUTICALS IF NOT APPROVED AS THE STALKING HORSE BIDDER**

The above-captioned debtors and debtors in possession (collectively, the “Debtors”) hereby submit this motion (the “Motion”), pursuant to sections 105, 363, 365, 503, and 507 of title 11 of the United States Code (the “Bankruptcy Code”), Rules 2002, 6004, and 6006 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), and Rule 6004-1 of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware (the “Local Rules”), for entry of:

- (a) an order, substantially in the form attached hereto as Exhibit A (the “Bidding Procedures Order”): (i) approving bidding procedures, substantially in the form attached to the Bidding Procedures Order as Exhibit 1 (the “Bidding Procedures”), to be used in connection with one or more sales (each a “Sale”) of

<sup>1</sup> 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



the Debtors' development and commercialization rights to their research and development portfolio (the "R&D Assets") and to the rights to commercialize the Debtors' commercial portfolio (the "Commercial Assets" and together with the R&D Assets, the "Assets," as more fully defined in the Bidding Procedures) free and clear of all liens, claims, interests, and encumbrances; (ii) authorizing the Debtors to designate one or more affiliates of Ligand Pharmaceuticals, Incorporated or its designee ("Ligand") as the Stalking Horse Bidder (as defined herein) for all of the Assets in connection with considering the entry of the Bidding Procedures Order; (iii) scheduling one or more auctions (each, an "Auction"), if necessary, and schedule one or more hearings to approve a sale of the Debtors' Assets (a "Sale Hearing"); (iv) approving the form and manner of notice of the proposed Bidding Procedures, the Auction, and the Sale Hearing, substantially in the form attached to the Bidding Procedures Order as Exhibit 2 (the "Auction Notice"); (v) authorizing procedures governing the assumption and assignment of certain executory contracts and unexpired leases (the "Assumed Contracts") in connection with any Sale (the "Assumption and Assignment Procedures"); (vi) approving the form and manner of notice to each relevant non-debtor counterparty to an Assumed Contract (each a "Counterparty"), of (A) the Debtors' calculation of the amount necessary to cure any default under the applicable Assumed Contract (the "Cure Amounts"); and (B) certain other information regarding the potential assumption and assignment of Assumed Contracts in connection with a Sale, substantially in the form attached to the Bidding Procedures Order as Exhibit 3 (the "Assumption and Assignment Notice"); and (vii) granting related relief; and

- (b) one or more orders of the Court (collectively, the "Sale Orders");<sup>2</sup> (i) authorizing the sale of the Debtors' Assets free and clear of all liens, claims, interests, and encumbrances, except as provided in the Sale Order; (ii) authorizing the assumption and assignment of certain Assumed Contracts in connection with the Sale(s); and (iii) granting related relief; or
- (c) in the event that Ligand is not designated as the Stalking Horse Bidder, a Sale Order, in the form attached hereto as Exhibit B (the "Private Sale Order") (i) authorizing the sale to Ligand of the Debtors' Assets free and clear of all liens, claims, interests, and encumbrances in accordance with the Stalking Horse Agreement (as defined below) attached to the Private Sale Order as Exhibit 1; (ii) authorizing the assumption and assignment of certain Assumed Contracts in connection with the Sale; and (iii) granting related relief.

In support of this Motion, the Debtors rely on and incorporate by reference *Declaration of Paula Brown Stafford in Support of Chapter 11 Petitions and First Day Motions* (the "First

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<sup>2</sup> A copy of the proposed form of Sale Order(s) will be filed in advance of the Sale Hearing.

Day Declaration”),<sup>3</sup> filed on the Petition Date. In further support of this Motion, the Debtors state as follows:

### **PRELIMINARY STATEMENT**

1. Novan is 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, 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.

2. As detailed in the First Day Declaration, the Debtors have incurred losses each year since their inception in 2006. Despite the revenues generated from the commercial sales and management’s best efforts to stabilize operations, the Debtors’ business prospects have significantly declined in recent months. With their operating cash running low, the Debtors retained the following advisors to assist the Debtors pursue various strategic alternatives: Morris, Nichols, Arsht & Tunnell LLP (“Morris Nichols”), as restructuring counsel; Raymond James Financial, Inc. (“Raymond James”), as investment banker; and SierraConstellation Partners (“SCP”), as financial advisor; all in connection with the Debtors’ restructuring efforts.

3. Prior to filing these Chapter 11 Cases, the Debtors entered into a new secured prepetition bridge financing (the “Bridge Financing”) and senior secured superpriority debtor-in-possession term loan (the “DIP Facility”) with the prospective Stalking Horse Bidder to fund these cases and permit a sale of the Debtors’ assets to the highest and best bidder. In addition, regardless of the form of any Sale, given the targeted prepetition marketing efforts, the Debtors submit there is less of a need for a lengthy post-petition sale process. The Debtors and their advisors believe the sale process proposed herein will reduce administrative costs and provide at

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<sup>3</sup> Capitalized terms used but not defined herein shall have the meaning ascribed to them in the First Day Declaration.

least a small recovery to creditors, while not impacting the amount or quality of bids they expect to receive.

4. Accordingly, by this Motion, the Debtors seek approval of the Bidding Procedures Order, which provides the time required to run a successful chapter 11 sale process with a guaranteed floor for the value of the Debtors' Assets provided by the Stalking Horse Bidder, while affording all interested parties with notice and opportunity to object. However, in the event that the Court does not approve the Bidding Procedures Order or approve Ligand as the Stalking Horse Bidder, the Debtors will request that the Court enter the Private Sale Order selling the Debtors' assets to Ligand without a public auction.

#### **JURISDICTION AND VENUE**

5. The United States Bankruptcy Court for the District of Delaware (the "Court") has jurisdiction over these Chapter 11 Cases, the Debtors and their estates, and this matter under 28 U.S.C. §§ 157 and 1334 and the *Amended Standing Order of Reference* from the United States District Court for the District of Delaware, dated February 29, 2012. This is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2).

6. Pursuant to Local Rule 9013-1(f), the Debtors consent to the entry of a final order with respect to this Motion if it is determined that this Court, absent consent of the parties, cannot enter final orders or judgments consistent with Article III of the United States Constitution.

7. Venue of these Chapter 11 Cases in this District is proper under 28 U.S.C. §§ 1408 and 1409.

8. The statutory bases for the relief requested in this Motion are 105, 363, 365, 503, and 507 of title 11 of the Bankruptcy Code, Rules 2002, 6004, and 6006 of the Bankruptcy Rules, and Local Rule 6004-1.

## **BACKGROUND**

9. 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.

10. The Debtors are authorized to continue operating their businesses and managing 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.

### **Pre-Petition Marketing and Sale Process**

11. As described in the First Day Declaration, while the Debtors have been seeking a strategic partner for some time now, Raymond James, upon its retention in early June 2023, led a prepetition marketing process seeking potential financing or strategic buyers. The Debtors and their professionals have worked over the last four weeks evaluating the Debtors’ options and exploring paths to address the difficulties facing the company. Concurrently with the Debtors’ prepetition marketing process, the Debtors and their advisors began seeking financing to bridge the company’s cash requirements until it could reach definitive agreements on potential partnership and/or sale transactions and potentially to a further point when the Debtors may have greater clarity from the FDA on the potential to receive approval for SB206 in January 2024.

12. During this prepetition process leading up to the Petition Date, the Debtors (and more recently, with the assistance of Raymond James) contacted approximately 30 potential strategic buyers in the Debtors’ industry. Of those potential strategic partners, 14 executed non-disclosure agreements. The Debtors and their advisors explored both in- and out-of-court financing or purchase options with these potential strategic partners. Raymond James and the Debtors also reached out to approximately 10 potential financing parties that regularly lend in Chapter 11 cases. Due to the nature of the Debtors’ assets, none of the potential parties were

willing to provide post-petition financing.

13. In the weeks leading up to the Petition Date, the Debtors (with the assistance of their advisors) had determined that an out-of-court sale or restructuring was not practical and pivoted towards preparing for a bankruptcy-facilitated transaction. During this time, the Debtors engaged in negotiations with five (5) potential strategic partners for the financing of the Debtors and/or purchase of the Debtors' assets in bankruptcy. By late June/early July, several of the potential strategic partners had dropped out.

14. For the last two weeks, the Debtors engaged in negotiations with Ligand and a couple of other potential partners concerning a potential Stalking Horse Bid and DIP Facility. On July 14, 2023, the Debtors, in the reasoned exercise of their business judgment, determined that the combined DIP Financing and Stalking Horse Bid submitted by Ligand was the highest and best offer received to date. The results are the proposed Stalking Horse Bid, the proposed DIP Facility and the Chapter 11 process being presented to the Court in connection with the hearing on first day relief. The Debtors and their advisors are prepared to launch a broad outreach process after the Petition Date to achieve the milestones set forth in the proposed DIP Facility and proposed bidding procedures.

**Need for an Expedited Sale Process**

15. The Debtors and their advisors remain engaged with several groups of potential purchasers and believe that a sale under Section 363 of the Bankruptcy Code as described herein and in the Bidding Procedures is the best path towards facilitating one or more value-maximizing Sales. In addition, the terms of the DIP Facility afford the Debtors limited funds and short milestones with which to conduct their sale process. Regardless, given the length and scope of the prepetition marketing process and the Company's severe liquidity position, the Debtors believe that that maximizing value of the Debtors' estates requires a sale process on a

compressed timeframe.

16. Therefore, the Debtors believe that an Auction process culminating in one or more Sales, closing on or before September 25, 2023 (or no later than 70 days from the Petition Date), will maximize value and allow the Debtors to comply with their obligations under the proposed DIP Facility. To meet that deadline, the Debtors will be requesting that the Court consider entry of the Bidding Procedures Order no later than August 11, 2023. In this context, the Debtors will propose the following key dates and deadlines for the Sale process, certain of which dates and deadlines may be subject to extension in accordance with the Bidding Procedures:<sup>4</sup>

<b>DATE</b>	<b>DEADLINE/EVENT</b>
Three (3) business days after the filing of this Motion	Deadline to serve the Initial Assumption and Assignment Notice
Three (3) business days prior to the Bidding Procedures Hearing	Deadline to file Initial Contract Objections and Objections to the Private Sale Order
On or before August 11, 2023 (No later than 25 days after the Petition Date)	Bidding Procedures Hearing
Three (3) business days after entry of the Bidding Procedures Order	Deadline to serve Notice of Auction
On or before August 28, 2023 (no later than 42 days after the Petition Date)	Deadline for the submission of Qualified Bids (i.e., the Bid Deadline)
August 28, 2023, at 4:00 p.m. (ET)	Deadline to file Initial Sale Objections
One (1) business day prior to the Auction	Deadline for Debtors to designate Qualified Bid(s) and Baseline Bid(s)
August 31, 2023 (no later than 45 days after the Petition Date)	Auction

<sup>4</sup> The Debtors reserve the right to modify, in consultation with the Notice Parties, the proposed sale-related dates and deadlines.

As soon as practicable and not later than one (1) business day after cancellation or completion of the Auction	Deadline to file and serve Notice of Winning Bid(s)
One (1) business day after selection of Winning Bid	Deadline to file and serve an Additional Assumption and Assignment Notice (if applicable)
Two (2) business days prior to the Sale Hearing	Deadline to file Winning Bid Objection or Additional Contract Objections
One (1) business day prior to the Sale Hearing	Deadline to file reply to any Initial Sale Objection or Winning Bid Objection
September 8, 2023 (No later than 55 days after the Petition Date)	Sale Hearing and Entry of Sale Order
On or before September 25, 2023 (no later than 70 days after the Petition Date)	Deadline for Winning Bidder(s) to close the transaction contemplated by its Winning Bid

### **Bidding Procedures**

#### **1. Overview**

17. The Bidding Procedures are designed to promote a competitive, fair, and efficient Sale process that will maximize the value of the Debtors' estates. The Bidding Procedures will allow the Debtors to solicit and identify bids from potential buyers that constitute the highest or otherwise best offer for the Assets, whether as a going concern or as part of a liquidation sale, on a schedule consistent with the Debtors' chapter 11 objectives.

18. As the Bidding Procedures are attached to the Bidding Procedures Order, they are not restated in their entirety herein. Pursuant to Local Rule 6004-1, certain of the key terms of the Bidding Procedures are highlighted in the chart below.<sup>5</sup>

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<sup>5</sup> To the extent that there is any inconsistency between the terms of the Bidding Procedures and the summary of such terms in this Motion, the terms of the Bidding Procedures shall control. Capitalized terms used but not otherwise defined in this summary shall have the meanings ascribed to such terms in the Bidding Procedures.

<b>MATERIAL TERMS OF THE BIDDING PROCEDURES AND ORDER</b>	
<p><b>Qualification of Bidders</b> Local Rule 6004-1(c)(i)(A)</p>	<p><i>Section 2 of the Bidding Procedures:</i> To become a Qualified Bidder, an Interested Party must submit to the Debtors and their advisors:</p> <p>(a) a written disclosure of each entity that will be bidding or otherwise participating in connection with such bid (including each equity holder or other financial backer of the Interested Party, including if such Interested Party is an entity formed for the purpose of consummating the proposed transactions to be set forth in a Proposed APA (as defined below) contemplated by such Interested Party), and the complete terms of any such participation. Under no circumstances shall any undisclosed principals, equity holders, or financial backers be associated with any Qualified Bid. Each Interested Party must also include the contact information for the specific person(s) and counsel whom the Debtors or their advisors should contact regarding such Qualified Bid;</p> <p>(b) a statement and other factual support demonstrating to the Debtors’ satisfaction, in consultation with the Notice Parties, in the exercise of their reasonable business judgment that the Interested Party has a bona fide interest in purchasing some or all of the Assets;</p> <p>(c) preliminary proof by the Interested Party of its financial capacity to close the Interested Party’s proposed transaction(s) to be set forth in a Proposed APA, which may include financial statements of, or verified financial commitments obtained by, the Interested Party (or, if the Interested Party is an entity formed for the purpose of acquiring the desired Assets, the party that will bear liability for a breach), the adequacy of which will be assessed by the Debtors in consultation with their advisors and the Notice Parties; and</p> <p>(d) an executed confidentiality agreement (to be delivered prior to the distribution of any confidential information by the Debtors to an Interested Party) in form and substance satisfactory to the Debtors (without limiting the foregoing, each confidentiality agreement executed by an Interested Party shall contain standard non-solicitation provisions) (each, a “<u>Confidentiality Agreement</u>”).</p> <p>For the avoidance of doubt Ligand, as the Stalking Horse Bidder, shall be deemed a Qualified Bidder for all purposes.</p>
<p><b>Qualified Bids</b> Local Rule 6004-1(c)(i)(B)</p>	<p><i>Section 7 of the Bidding Procedures:</i> Other than in the case of a Stalking Horse Bid, which shall be considered a Qualified Bid, to be deemed a “<u>Qualified Bid</u>,” a bid must be received from a Qualified Bidder on or the Bid Deadline and satisfy each of the following Bid Requirements:</p>

**MATERIAL TERMS OF THE BIDDING PROCEDURES AND ORDER**

(a) be in writing and received by the Notice Parties prior to the Bid Deadline;

(b) fully discloses the identity of the Qualified Bidder (and to the extent that the Qualified Bidder is a newly formed acquisition entity or the like, the identity of the Qualified Bidder's parent company or sponsor), and provide the contact information of the specific person(s) whom the Debtors or their advisors should contact in the event that the Debtors have any questions or wish to discuss the bid submitted by the Qualified Bidder;

(c) states that the applicable Qualified Bidder offers to (a) purchase, in cash, all of the Assets upon the same terms and conditions, and pursuant to the same form and substance of the Stalking Horse APA modified only by scope of purchased assets, purchase price, and identity of the purchaser, that the Debtors, in consultation with the Notice Parties, reasonably determine are higher than those set forth in the Stalking Horse APA (which determination with respect to the Commercial Assets and the R&D Assets may be made by considering bids submitted by more than one Qualified Bidder in combination); and (b) take assignment of all Assumed Contracts under Stalking Horse APA with details of the Qualified Bidder's proposal for the treatment of related Cure Amounts and the provision of adequate assurance of future performance to the counterparties to such Assumed Contracts; provided, however, that if the Stalking Horse Bidder withdraws from the bidding process, any bid made subsequent to such withdrawal will be considered a Qualified Bid only if the bid is submitted by a Qualified Bidder and if the Debtors determine, in consultation with the Notice Parties, such bid complies with these Bidding Procedures as applicable; provided further, however, that under no circumstances may any bid of any bidder other than the Stalking Horse Bid be deemed a Qualified Bid if it does not provide for the unaltered assumption and assignment (the "Royalty Assumption") to the bidder of that certain Development Funding and Royalties Agreement, dated as of May 4, 2019 (as amended from time to time), to which the Stalking Horse Bidder and Novan, Inc. are each a party (the "Royalty Agreement");

(d) includes a signed writing stating that the Qualified Bidder's offer is irrevocable until the selection of the Winning Bidder; provided, however, that if such bidder is selected as the Winning Bidder or the Back-Up Bidder, its offer shall remain irrevocable until the closing of the Sale to the Winning Bidder or the Back-Up Bidder;

(e) does not contain any contingencies of any kind including,

**MATERIAL TERMS OF THE BIDDING PROCEDURES AND ORDER**

without limitation, contingencies related to financial, due diligence, or internal or shareholder approvals in connection with the submission of a Qualified Bid, and there is no condition precedent to the Qualified Bidder's ability to enter into a definitive Sale agreement;

(f) provides the date by which the Qualified Bidder intends to close the Sale; provided, however, that the proposed closing date is on or before September 25, 2023;

(g) contains no due diligence or financing contingencies of any kind;

(h) includes a duly authorized and executed copy of an asset purchase agreement, which includes the purchase price for the Assets, as allocated for each asset category and in the aggregate, expressed in U.S. Dollars that are greater the \$15 million Purchase Price in the Stalking Horse APA, plus the Stalking Horse Protections plus the Minimum Continuing Bid of \$100,000, together with all exhibits and schedules thereto, together with a blackline copy to show any modifications to the Stalking Horse APA (a "Proposed APA");

(i) includes a proposed sale order (each, a "Proposed Sale Order") based on the Debtors' proposed sale order, and a Qualified Bid must also include a blackline copy of the Proposed Sale Order to show any proposed modifications to the Debtors' proposed sale order;

(j) specifies the liabilities proposed to be paid or assumed by such Qualified Bid;

(k) includes financial statements or other written evidence, including (if applicable) a firm, irrevocable commitment for financing, establishing the ability of the Qualified Bidder to consummate the proposed Sale and pay the purchase price in cash, such as will allow the Debtors, in consultation with the Notice Parties, to make a reasonable determination as to the Qualified Bidder's financial and other capabilities to consummate the transaction contemplated by the Proposed APA;

(l) states or otherwise estimates the types of transition services, if any, the Qualified Bidder would require of and/or provide to the Debtors, including an estimate of the time any such transition services would be required of and/or provided to the Debtors, if the Qualified Bidder's bid were selected as the Winning Bid for the applicable Assets;

**MATERIAL TERMS OF THE BIDDING PROCEDURES AND ORDER**

(m) includes an acknowledgement and representation that the bidder: (a) has had an opportunity to conduct any and all required due diligence regarding the Assets prior to making its offer; (b) has relied solely upon its own independent review, investigation and/or inspection of any documents and/or the Assets in making its bid; (c) did not rely upon any written or oral statements, representations, promises, warranties or guaranties whatsoever, whether express or implied (by operation of law or otherwise), regarding the Assets or the completeness of any information provided in connection therewith or with the Auction, except as expressly stated in the Proposed APA; and (d) is not entitled to any expense reimbursement, break-up fee, or similar type of bid-protections or payments in connection with its bid;

(n) includes evidence, in form and substance reasonably satisfactory to the Debtors and the Notice Parties, of authorization and approval from the Qualified Bidder’s board of directors (or comparable governing body) with respect to the submission, execution, delivery and closing of the Proposed APA;

(o) is accompanied by a good faith deposit in the form of a wire transfer (to a bank account specified by the Debtors), or such other form acceptable to the Debtors, payable to the order of the Debtors (or such other party as the Debtors may determine) in an amount equal to 10% of the cash portion of the purchase price provided for in the bid (a “Deposit”);

(p) acknowledges in writing (a) that it has not engaged in any collusion with respect to any Qualified Bid, specifying that it did not agree with any other party, including, but not limited to, any other Interested Parties or interested third parties, to control price or exert undue influence over the process; and (b) agree not to engage in any such collusion or undue influence with respect to any Qualified Bids, the Auction, or the Sale process;

(q) states that the Qualified Bidder consents to the jurisdiction of the Bankruptcy Court;

(r) contains such financial and other information to allow the Debtors to make a reasonable determination as to the Qualified Bidder’s financial and other capabilities to close the transactions contemplated by the Proposed APA, including, without limitation, such financial and other information supporting the Qualified Bidder’s ability to comply with the requirements of adequate assurance of future performance under section 365(f)(2)(B) and, if applicable, section 365(b)(3) of the Bankruptcy Code, including the Qualified Bidder’s financial wherewithal and willingness to perform

**MATERIAL TERMS OF THE BIDDING PROCEDURES AND ORDER**

under any Assumed Contracts (“Adequate Assurance Information”). By submitting a Bid, the Qualified Bidders agree that the Debtors may disseminate their Adequate Assurance Information to any official committee of unsecured creditors appointed in the Chapter 11 Cases (the “Creditors’ Committee”) and, upon request, to Counterparties;

(s) contains such other information as may be reasonably requested by the Debtors, in consultation with the Notice Parties;

(t) sets forth (i) a statement or evidence that the Qualified Bidder has made or will make in a timely manner all necessary filings under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended, if applicable, and pay the fees associated with such filings, and (ii) any regulatory and third-party approvals required for the Qualified Bidder to close the transactions contemplated by the Proposed APA, and the time period within which the Qualified Bidder expects to receive such regulatory and third-party approvals (and in the case that receipt of any such regulatory or third-party approval is expected to take more than five (5) days following execution and delivery of such Qualified Bidder’s Proposed APA, those actions the bidder will take to ensure receipt of such approval(s) as promptly as possible); provided that a Qualified Bidder agrees that its legal counsel will coordinate in good faith with the Debtors’ legal counsel to discuss and explain Qualified Bidder’s regulatory analysis, strategy, and timeline for securing all such approvals as soon as reasonably practicable, and in no event later than the time period contemplated in the Proposed APA; provided, further that the offer contains a covenant to cooperate with the Debtors to provide pertinent factual information regarding the bidder’s operations reasonably required to analyze issues arising with respect to any applicable antitrust laws and other applicable regulatory requirements;

(u) provides for the Qualified Bidder to serve as the Back-Up Bidder (as defined below) if the Qualified Bidder’s bid is the Back-Up Bid (as defined below), in accordance with the terms of the Proposed APA as submitted or modified at the Auction; and

(v) provides that in the event of the Qualified Bidder’s breach of, or failure to perform under, the Proposed APA, the Qualified Bidder shall forfeit its Deposit to the Debtors, and the Debtors shall be entitled to pursue all available legal and equitable remedies, including, without limitation, additional damages and/or specific performance.

A bid from a Qualified Bidder satisfying all of the above

<b>MATERIAL TERMS OF THE BIDDING PROCEDURES AND ORDER</b>	
	<p>requirements, as determined by the Debtors, in consultation with the Notice Parties, shall constitute a Qualified Bid. The Debtors reserve the right to work with any Qualified Bidder in advance of the Auction to cure any deficiencies in a bid that is not initially deemed a Qualified Bid. The Debtors, in consultation with the Notice Parties, may determine that separate bids for less than all of the Assets constitute a single Qualified Bid for all, substantially all, or any portion of the Assets; <u>provided</u> that such bids must satisfy the Bid Requirements. Each Qualified Bidder submitting a bid shall be deemed to: (a) acknowledge and represent that it is bound by all of the terms and conditions of the Bidding Procedures; and (b) have waived the right to pursue a substantial contribution claim under section 503 of the Bankruptcy Code related in any way to the submission of its bid, the Bidding Procedures, and the Sale.</p>
<p><b>Provisions Providing Bid Protections to “Stalking Horse” or Initial Bidder</b> Local Rule 6004-1(c)(i)(C)</p>	<p><i>Section 3 of the Bidding Procedures:</i> The Stalking Horse Bidder will be entitled to a break-up fee of 3% of its \$15 million Purchase Price (the “<u>Break Up Fee</u>” or the “<u>Stalking Horse Protections</u>”). The Stalking Horse Bidder shall be considered a Qualified Bidder, and a Stalking Horse Bid shall be considered a Qualified Bid without regard to any of the requirements or conditions set forth in the Bidding Procedures and without any other or further action by the Stalking Horse Bidder.</p> <p>No other bidder or any other party shall be entitled to any termination or “break-up” fee, expense reimbursement, or any other bid protections in connection with the submission of a bid for any Assets, or for otherwise participating in the Auction or the sale process.</p>
<p><b>Modification of Bidding and Auction Procedures</b> Local Rule 6004-1(c)(i)(D)</p>	<p><i>Section 17 of the Bidding Procedures:</i> Without prejudice to the rights of the DIP Lender under the DIP Facility or the rights of the Stalking Horse Bidder under the Stalking Horse APA, and except as otherwise provided in these Bidding Procedures, the Bidding Procedures Order or the Debtors’ proposed form of Sale Order, the Debtors further reserve the right as they may reasonably determine to be in the best interest of their estates (in consultation with the Notice Parties), to: (a) determine which bidders are Qualified Bidders; (b) determine which bids are Qualified Bids; (c) determine which Qualified Bid is the highest and best proposal and which is the next highest and best proposal; (d) reject any bid that is (i) inadequate or insufficient, (ii) not in conformity with the requirements of these Bidding Procedures or the requirements of the Bankruptcy Code or (iii) contrary to the best interests of the Debtors and their estates; (e) impose additional terms and conditions with respect to all potential bidders other than the Stalking Horse Bidder; (f) modify these Bidding Procedures and/or implement additional</p>

<b>MATERIAL TERMS OF THE BIDDING PROCEDURES AND ORDER</b>	
	<p>procedural rules that the Debtors determine will better promote the goals of the bidding process; (f) extend the deadlines set forth herein; and (g) continue or cancel the Auction and/or Sale Hearing in open court without further notice or by filing a notice on the docket. Before extending any deadline, the Debtor shall consult with the Notice Parties and the DIP Lender.</p>
<p><b>Closing with Alternative Back-Up Bidders</b> Local Rule 6004-1(c)(i)(E)</p>	<p><i>Section 14 of the Bidding Procedures:</i> In the event that a Winning Bidder fails to close a Sale on or before [•], 2023, or such date as may be extended by the Debtors in consultation with the Notice Parties, and a Back-Up Bidder has been previously identified, the Debtors shall file a Back-Up Bid Auction Notice and serve such notice on the U.S. Trustee, the Notice Parties, and those parties who filed a request to receive notice under Bankruptcy Rule 2002. Three (3) business days following the filing of any Back-Up Bid Auction Notice, the Back-Up Bid subject to such Back-Up Bid Auction Notice will be deemed to be the Winning Bid, the Back-Up Bidder will be deemed to be the Winning Bidder, and the Debtors shall be authorized, but not directed, to close the Sale to the Back-Up Bidder subject to the terms of the Back-Up Bid without the need for further order of the Court and without the need for further notice to any other parties.</p>
<p><b>Selection of the Winning Bidder</b></p>	<p><i>Section 12(o) of the Bidding Procedures:</i>  a “<u>Winning Bid</u>” shall: (i) if the Auction for the Assets is cancelled because only the Stalking Horse Bid is submitted on or before the Bid Deadline, be the Stalking Horse Bid; or (ii) if the Auction is conducted, be the Qualified Bid that the Debtors determine at the conclusion of the Auction, in consultation with the Notice Parties, and subject to Court approval, is or are the offer or offers for the relevant Assets that is or are the highest or otherwise best from among the Qualified Bids submitted at the Auction; <u>provided, however,</u> that if the Stalking Horse Bidder withdraws from the bidding process, the Debtors’ selection of the Winning Bid(s) for the Assets from among the other Qualified Bidders at the conclusion of the Auction shall each require the consent of Ligand. In the case of (ii), in making this decision, the Debtors shall consider, in consultation with the Notice Parties (and with the consent of Ligand if the Stalking Horse Bidder withdraws from the bidding process), the amount of the purchase price, the assumption of liabilities, the transaction structure, and execution risk, including, without limitation, the likelihood of the bidder’s ability to close a transaction and the timing thereof, the number, type, and nature of any changes to the Stalking Horse APA submitted with the Winning Bid, as applicable, requested by each bidder, the total consideration to the Debtors’ estates, and any other factors the Debtors may deem</p>

<b>MATERIAL TERMS OF THE BIDDING PROCEDURES AND ORDER</b>	
	<p>relevant. The bidder submitting the Winning Bid shall become the “<u>Winning Bidder</u>,” and shall have such rights and responsibilities of the purchaser as set forth in such Winning Bid, with all modifications made at the Auction. The Debtors may, in their business judgment and in consultation with the Notice Parties, designate the Back-Up Bid (and the corresponding Back-Up Bidder) to purchase the applicable Assets in the event that the applicable Winning Bidder does not close the Sale; <u>provided, however</u>, that if the Stalking Horse Bidder withdraws from the bidding process, the Debtors’ selection of the Back-Up Bidder from the other Qualified Bidders at the conclusion of the Auction shall require the consent of Ligand.</p>

**2. Noticing and Objection Procedures**

19. The chart below sets forth the proposed noticing and objection procedures and requirements established by the Bidding Procedures (collectively, the “Sale Noticing and Objection Procedures”):

<b>SALE NOTICING AND OBJECTION PROCEDURES</b>	
<b>Auction Notice</b>	<p>Within three (3) business days after the entry of the Bidding Procedures Order, the Debtors shall to serve the Auction Notice, substantially in the form attached to the Bidding Procedures Order, on: (a) the U.S. Trustee; (b) counsel to the Stalking Horse Bidder; (c) counsel to any Creditors’ Committee; (d) all parties known by the Debtors to assert a lien or encumbrance on any of the Assets; (e) all persons known or reasonably believed to have asserted an interest in or claim to any of the Assets; (f) all persons known or reasonably believed to have expressed an interest in acquiring all or a substantial portion of the Assets within the one (1) year prior to the Petition Date; (g) the Office of the United States Attorney for the District of Delaware; (h) the Office of the Attorney General in each state in which the Debtors have operated; (i) the Office of the Secretary of State in each state in which the Debtors have operated; (j) the Internal Revenue Service and all state and local taxing authorities in the states in which the Debtors have or may have any tax liability; (k) the Securities and Exchange Commission; (l) the Federal Trade Commission; (m) all of the Debtors’ other known creditors and equity security holders; and (n) all other parties that have filed a notice of appearance and demand for service of papers in the Chapter 11 Cases as of the service date.</p> <p>The Debtors shall post the Auction Notice and the Bidding Procedures Order on the website of the Debtors’ claims and</p>

	<p>noticing agent.</p> <p>No later than seven (7) calendar days of the entry of the Bidding Procedures Order, the Debtors shall cause the Auction Notice to be published once in the national edition of USA Today or another nationally circulated newspaper.</p>
<b>Initial Sale Objections</b>	<p>All objections to the sale of the Assets, including any objection to the sale of any Assets free and clear of liens, claims, interests, and encumbrances pursuant to section 363(f) of the Bankruptcy Code to the Stalking Horse Bidder, a Successful Bidder and/or a Backup Bidder (each, an “<u>Initial Sale Objection</u>”), shall be filed by no later than <b>August 28, 2023, at 4:00 p.m. (ET)</b>; <i><b>provided, however, that if the Debtors are required to seek approval of the Stalking Horse APA via the Private Sale Order, objections to the entry of that order shall be due prior to the Bidding Procedures Hearing.</b></i></p>
<b>Notice of Qualified Bid(s) and Baseline Bid(s)</b>	<p>No later than one (1) business day prior to the Action, the Debtors shall: (a) notify all Qualified Bidders whether their bids have been determined to be a Qualified Bid; and (b) determine, in consultation with the Notice Parties, which of the Qualified Bids are Baseline Bids, and shall promptly notify all Qualified Bidders with Qualified Bids of the Baseline Bid.</p>
<b>Auction Results</b>	<p>On or before one (1) business day after the selection of any Winning Bid(s), the Debtors shall file a notice with the Court that sets forth: (i) the identity of the Winning Bidder(s) and any Back-Up Bidder; (ii) the amount of the Winning Bid and any Back-Up Bid; (iii) a summary of the Assets subject to the Winning Bid; and (iv) whether the Winning Bidder or the Back-Up Bidder have any connections to the Debtors other than those arising from their respective bids</p>
<b>Winning Sale Objections</b>	<p>Any objection solely with respect to the conduct of the Auction, the Auction results, the selection of the Winning Bid and/or Back-Up Bid, or the terms of any Sale to the Winning Bidder or the Back-Up Bidder shall be filed no later than <b>two (2) business days prior to the Sale Hearing.</b></p> <p>The Debtors and any other entity shall have until one (1) business day prior to the Sale Hearing, at 12:00 p.m. (ET), to file and serve a reply to any Initial Sale Objection or Winning Bid Objection.</p>

20. The Debtors submit that the Sale Noticing and Objection Procedures, coupled with the Bidding Procedures and Assumption and Assignment Procedures described below, constitute adequate and reasonable notice of the key dates and deadlines and other important information regarding the Sale process, including the objection deadlines, the Bid Deadline, and

the time and location of the Auction and Sale Hearing. Accordingly, the Debtors request that the Court approve the form of Auction Notice, substantially in the form attached to the Bidding Procedures Order as Exhibit 2, and find that the Sale Noticing and Objection Procedures comply with the requirements of Bankruptcy Rule 2002 and Local Rule 2002-1.

**3. Assumption and Assignment Procedures**

21. In connection with a Sale transaction, the Debtors may seek to assume and assign to a Winning Bidder (including the Stalking Horse, if it is the Winning Bidder) one or more Assumed Contracts. The Assumption and Assignment Procedures are designed to, among other things, govern the Debtors’ provision of Adequate Assurance Information and notice of Cure Amounts to applicable Counterparties. The chart below sets forth the Assumption and Assignment Procedures:

<b>ASSUMPTION AND ASSIGNMENT PROCEDURES</b>	
<b>Initial Assumption and Assignment Notice</b>	<p>On or before three (3) business days after the Petition Date, the Debtors shall serve the Initial Assumption and Assignment Notice, substantially in the form attached to the Bidding Procedures Order, via overnight delivery, on any Counterparty to the Debtors’ universe of executory contracts and unexpired commercial real property leases. This notice shall include: (a) notice that such Counterparty’s contract may be designated an Assumed Contract as part of the relevant Stalking Horse Bid; (b) the Cure Amount if any, that the Debtors believe is required to be paid to the Counterparty under section 365(b)(1)(A) and (B) of the Bankruptcy Code for such Assumed Contract; and (c) the Adequate Assurance Information of the Stalking Horse Bidder.</p> <p>The inclusion of any executory contract or unexpired commercial real property lease on the Initial Assumption and Assignment Notice shall not constitute an admission that a particular contract is an executory contract or unexpired lease or require or guarantee that such contract will be an Assumed Contract.</p>
<b>Additional Assumption and Assignment Notice</b>	<p>On or before one (1) business day after the selection of a Winning Bid or a Back-Up Bid, the Debtors shall serve the Additional Assumption and Assignment Notice, substantially in the form attached to the Bidding Procedures Order, via overnight delivery, on any Counterparty to the Debtors’ executory contracts and unexpired</p>

	<p>commercial real property leases that the relevant Winning Bidder or Back-Up Bidder desires to assume as part of its Winning Bid <i>that was not already listed on the Initial Assumption and Assignment Notice</i>. This additional notice shall include: (a) notice that such Counterparty’s contract is an Assumed Contract as part of the relevant Winning Bid; (b) the Cure Amount if any, that the Debtors believe is required to be paid to the Counterparty under section 365(b)(1)(A) and (B) of the Bankruptcy Code for such Assumed Contract; and (c) the Adequate Assurance Information of the relevant Winning Bidder and Back-Up Bidder.</p> <p>The inclusion of any executory contract or unexpired commercial real property lease on the Additional Assumption and Assignment Notice shall not constitute an admission that a particular contract is an executory contract or unexpired lease or require or guarantee that such contract will be an Assumed Contract.</p>
<p><b>Contract Objections</b></p>	<p>If a Counterparty objects to (a) the proposed assumption and assignment of its Assumed Contract set forth in the Initial Assumption and Assignment Notice (including, without limitation, on the basis (i) that the Stalking Horse Bidder cannot provide adequate assurance of future performance; (ii) of the transfer of any related rights or benefits thereunder; or (iii) that Counterparty consent is allegedly required for the assumption, assignment, and transfer of the Assumed Contract), or (b) the Cure Amount set forth in the Initial Assumption and Assignment Notice, the Counterparty must file a Contract Objection <b>on or before three (3) business days prior to the Bidding Procedures Hearing</b>.</p> <p>If a Counterparty objects to (a) the proposed assumption and assignment of its Assumed Contract set forth in the Additional Assumption and Assignment Notice (including, without limitation, on the basis (i) that the Stalking Horse Bidder cannot provide adequate assurance of future performance; (ii) of the transfer of any related rights or benefits thereunder; or (iii) that Counterparty consent is allegedly required for the assumption, assignment, and transfer of the Assumed Contract), or (b) the Cure Amount set forth in the Additional Assumption and Assignment Notice, the Counterparty must file a Contract Objection <b>on or before two (2) business days prior to the Sale Hearing</b>.</p>

<b>Resolution of Contract Objections</b>	<p>The Debtors, the Stalking Horse Bidder or relevant Winning Bidder, and the objecting Counterparty shall first confer in a good faith attempt to resolve the Contract Objection without Court intervention. If the parties are unable to consensually resolve the Contract Objection, the Debtors may request an emergency hearing for the Court to resolve the Contract Objection.</p> <p>A Contract Objection may be resolved after the closing date of the applicable Sale, subject to the terms of the asset purchase agreement approved in connection with the Sale.</p>
<b>Failure to Timely Object</b>	<p>If no Contract Objection is timely received with respect to an Assumed Contract: (a) the Counterparty to such Assumed Contract shall be deemed to have consented to the assumption by the Debtors and assignment or transfer (including the transfer of any related rights and benefits thereunder) to the Stalking Horse Bidder or Winning Bidder, as applicable, of the Assumed Contract, and be forever barred and estopped from asserting or claiming against the Debtors or the Stalking Horse Bidder or the Winning Bidder, as applicable, that any additional defaults exist or that conditions to assumption, assignment, and transfer must be satisfied under the Assumed Contract (including, without limitation, with respect to adequate assurance of future performance by the Stalking Horse Bidder or Winning Bidder, as applicable), or that any related right or benefit under such Contract cannot and will not be available to the Stalking Horse Bidder or the Winning Bidder, as applicable; (b) any and all defaults under the Assumed Contract and any and all pecuniary losses related thereto shall be deemed cured and compensated pursuant to section 365(b)(1)(A) and (B) of the Bankruptcy Code upon payment of the applicable Cure Amount; and (c) the Cure Amount for such Assumed Contract shall be controlling, notwithstanding anything to the contrary in such Assumed Contract, or any other related document, and the Counterparty shall be deemed to have consented to the Cure Amount and shall be forever barred from asserting any other claims related to such Assumed Contract against the Debtors and their estates or the Stalking Horse Bidder or Winning Bidder, as applicable, or the property of any of them, that existed prior to the entry of the Sale Order.</p>
<b>Reservation of Rights</b>	<p>In the event a Contract Objection is resolved in a manner unfavorably, then the Debtors may withdraw (or the Stalking Horse Bidder or the Winning Bidder, as applicable, may cause the Debtors to withdraw), their request to assume and assign such Assumed Contract as part of any bid.</p>

**The Stalking Horse APA**

<b>MATERIAL TERMS OF THE PROPOSED ASSET PURCHASE AGREEMENT</b>	
<b>The Form APA is the Stalking Horse APA</b>	<u>Section 2 of the Bidding Procedures:</u> The asset purchase agreement by and between the Debtors and Ligand (the “ <u>Stalking Horse APA</u> ”), attached to <u>Exhibit B</u> hereto as <u>Exhibit 1</u> , which includes, among other things, a description of the Assets, customary representations, warranties, and covenants by and from the Debtors and Ligand. A copy of the Stalking Horse APA will be posted in the Data Room, and may also be obtained by Interested Parties upon request to the Debtors’ advisors.
<b>Releases</b> Local Rule 6004-1(b)(iv)(C)	<u>Section 5.8 of the Stalking Horse APA:</u> The Stalking Horse APA includes a full release of Ligand by the Debtors.
<b>Private Sale/No Competitive Bidding</b> Local Rule 6004-1(b)(iv)(D)	<u>Section 5.2 of the Stalking Horse APA:</u> The Stalking Horse APA requires the Debtors to sell the Debtors’ Assets to Ligand by a private sale without bidding or an auction if the Court does not enter the (i) Bidding Procedures Order on or before 25 calendar days after the Petition Date, or (ii) DIP Order on or before 25 calendar days after the Petition Date.
<b>Closing Date</b> Local Rule 6004-1(b)(iv)(E)	<u>Article 1 of the Stalking Horse APA:</u> The Stalking Horse APA provides for an “Outside Date” no later than seventy (70) days after the Petition Date.
<b>Record Retention</b> Local Rule 6004-1(b)(iv)(J)	<u>Section 6.3 of the Stalking Horse APA:</u> The Stalking Horse APA provides the Debtors with access to all sold Records until the latest of (i) three years after the Closing Date, (ii) the required retention period for all government contact information, records or documents, (iii) the conclusion of all bankruptcy proceedings relating to the Chapter 11 Cases or (iv) in the case of Records related to Taxes, the expiration of the statute of limitation applicable to such Taxes.
<b>Sale of Avoidance Actions</b> Local Rule 6004-1(b)(iv)(K)	<u>Section 2.1(l) of the Stalking Horse APA:</u> The Stalking Horse APA provides for the sale of all causes of action, lawsuits, claims, rights of recovery and other similar rights of any Seller, including avoidance claims or causes of action under Chapter 5 of the Bankruptcy Code relating to the business of the Sellers or the Purchased Assets.
<b>Requested Findings as to Successor Liability</b> Local Rule 6004-	<u>Section 6.8 of the Stalking Horse APA:</u> The Stalking Horse APA provides that the Parties intend that, to the fullest extent permitted by applicable Law (including under Section 363 of the Bankruptcy Code), upon the closing, Buyer shall not be

<b>MATERIAL TERMS OF THE PROPOSED ASSET PURCHASE AGREEMENT</b>	
1(b)(iv)(L)	deemed to: (a) be the successor of any Seller, (b) have, de facto or otherwise, merged with or into any Seller, (c) be a mere continuation or substantial continuation of any Seller or the enterprise(s) of Sellers or (d) be liable or have any Liability for any acts or omissions of Sellers in the conduct of their businesses or arising under or related to the Purchased Assets other than as expressly set forth and agreed in this Agreement.
<b>Credit Bidding</b> Local Rule 6004-1(b)(iv)(N)	<i>Section 4 of the Bidding Procedures:</i> Ligand shall be entitled to pay the Purchase Price under the Stalking Horse APA, and fund Overbids during the Auction if there is competitive bidding, with (i) an offset, on a dollar-for-dollar basis, against the Debtors' Obligations (as defined in the DIP Facility) under the DIP Facility; and/or (ii) cash.
<b>Relief from Bankruptcy Rule 6004(h)</b> Local Rule 6004-1(b)(iv)(O)	As set forth below, the Debtors believe that the Sale should be consummated as soon as practicable to preserve and maximize value for creditors.

**Private Sale (in the Alternative)**

22. As noted above, pursuant to the DIP Facility and Section 5.2(i) in the Stalking Horse APA, in the event the Bankruptcy Court does not enter the (i) Bidding Procedures Order on or before 25 calendar days after the Petition Date; or (ii) DIP Order (as defined in the Stalking Horse APA) on or before 25 calendar dates after the Petition Date (either such event, a "Conversion Trigger Event"), then the Debtors are required to sell the Debtors' Assets to Ligand free and clear of all liens, claims, interests, and encumbrances by private sale in accordance with the Private Sale Order attached hereto as Exhibit B. More specifically, in accordance with the Bidding Procedures Order, upon a Conversion Trigger Event the Parties shall use their respective reasonable best efforts to obtain an order of the Bankruptcy Court to enter an order approving the Stalking Horse APA as a "private sale" no longer subject to overbids.

23. To enable the Debtors to timely pivot to a private sale if necessary, the Debtors are setting three (3) business days prior to the Bidding Procedures Hearing as the deadline to

object to the entry of the Private Sale Order.

**RELIEF REQUESTED**

24. By this Motion, pursuant to sections 105(a), 363, 365, 503, and 507 of the Bankruptcy Code, Bankruptcy Rules 2002, 6004, and 6006, and Local Rule 6004-1, the Debtors request entry of the following:

- A. the Bidding Procedures Order, substantially in the form attached hereto as Exhibit A, granting the following relief:
  - 1. approving the Bidding Procedures, substantially in the form attached to the Bidding Procedures Order as Exhibit 1, to be used in connection with one or more Sales of the Debtors' Assets;
  - 2. authorizing the Debtors to designate Ligand as the Stalking Horse Bidder;
  - 3. scheduling (A) one or more Auctions for the Assets; and (B) one or more Sale Hearings to consider approval of a proposed Sale(s), subject to the availability of the Court;
  - 4. approving the Auction Notice, substantially in the form attached to the Bidding Procedures Order as Exhibit 2;
  - 5. approving the Assumption and Assignment Procedures;
  - 6. approving the Assumption and Assignment Notice, to be used for both the Initial Assumption and Assignment Notice and the Additional Assumption and Assignment Notice, substantially in the form attached to the Bidding Procedures Order as Exhibit 3; and
  - 7. granting related relief; and
- B. one or more Sale Order(s), granting the following relief:
  - 1. authorizing the Sale or Sales of Assets free and clear of all liens, claims, interests, and encumbrances, except certain permitted encumbrances and assumed liabilities as determined by the Debtors and the Winning Bidder(s), with liens to attach to the proceeds of the applicable Sale;
  - 2. authorizing the assumption and assignment of Assumed Contracts in connection with a Sale; and
  - 3. granting related relief; or

- C. in the alternative, the Private Sale Order, granting the following relief:
1. authorizing the Sale of Assets to Ligand free and clear of all liens, claims, interests, and encumbrances, except certain permitted encumbrances and assumed liabilities as determined by the Debtors and Ligand, with liens to attach to the proceeds of the Sale;
  2. authorizing the assumption and assignment of Assumed Contracts in connection with this Sale; and
  3. granting related relief.

**BASIS FOR RELIEF**

**1. The Bidding Procedures Are Fair, Appropriate, and In the Best Interests of the Debtors and Their Stakeholders**

25. The Bidding Procedures are specifically designed to promote what courts have deemed to be the paramount goal of any proposed sale of property of a debtor's estate: maximizing the value of sale proceeds received by the estate. *See Burtch v. Ganz (In re Mushroom Co.)*, 382 F.3d 325, 339 (3d Cir. 2004) (finding that a debtor "had a fiduciary duty to protect and maximize the estate's assets"); *In re Food Barn Stores, Inc.*, 107 F.3d 558, 564-65 (8th Cir. 1997) (recognizing that main goal of any proposed sale of property of a debtor's estate is to maximize value). Courts uniformly recognize that procedures established for the purpose of enhancing competitive bidding are consistent with the fundamental goal of maximizing the value of a debtor's estate. *See Calpine Corp. v. O'Brien Envtl. Energy, Inc. (In re O'Brien Envtl. Energy, Inc.)*, 181 F.3d 527, 537 (3d Cir. 1999) (noting that bidding procedures that promote competitive bidding provide a benefit to a debtor's estate); *Official Comm. of Subordinated Bondholders v. Integrated Res. Inc. (In re Integrated Res. Inc.)*, 147 B.R. 650, 659 (S.D.N.Y. 1992) (observing that sale procedures "encourage bidding and . . . maximize the value of the debtor's assets").

26. The Bidding Procedures provide for an orderly, uniform, and appropriately competitive process through which interested parties may submit offers to purchase the Assets. Given the case timeline negotiated with Ligand, and taking into consideration the prepetition

marketing process, the Debtors, with the assistance of their advisors, have structured the Bidding Procedures to promote active bidding by interested parties for the R&D Assets, the Commercial Assets, or all of the Assets, and to confirm the highest or otherwise best officer reasonably available for the Assets. The Bidding Procedures will allow the Debtors to conduct any Auction in a fair and transparent manner that will encourage participation by financial capable bidders with demonstrated ability to consummate a timely sale or sales.

27. Accordingly, the Bidding Procedures should be approved because they are aligned with the circumstances of these Chapter 11 Cases and are reasonable, appropriate, and in the best interests of the Debtors, their estates, and all parties in interest.

**2. Approval of One or More Sales Is Warranted Under Section 363 of the Bankruptcy Code**

28. Section 363 of the Bankruptcy Code provides, in relevant part, that “[t]he trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate.” 11 U.S.C. § 363(b)(1). Although section 363 of the Bankruptcy Code does not specify a standard for determining when it is appropriate for a court to authorize the use, sale, or lease of property of a debtor’s estate, courts have approved the authorization of a sale of a debtor’s assets if such sale is based upon the sound business judgment of the debtor. *See, e.g., Meyers v. Martin (In re Martin)*, 91 F.3d 389, 395 (3d Cir. 1996) (citing *In re Schipper*, 933 F.2d 513 (7th Cir. 1991)); *In re Chateaugay Corp.*, 973 F.2d 141, 143 (2d Cir. 1992); *Stephen Indus., Inc. v. McClung*, 789 F.2d 386 (6th Cir. 1986); *Committee of Equity Security Holders v. Lionel Corp. (In re Lionel Corp.)*, 722 F.2d 1063, 1071 (2d Cir. 1983).

29. Courts typically consider the following factors in determining whether a proposed sale satisfies this standard: (a) whether a sound business justification exists for the sale; (b) whether adequate and reasonable notice of the sale was provided to interested parties; (c) whether the sale will produce a fair and reasonable price for the property; and (d) whether the

parties have acted in good faith. *See In re Decora Indus., Inc.*, No. 00-4459 (JJF), 2002 WL 32332749, at \*2 (D. Del. May 20, 2002) (citing *In re Del. & Hudson Ry. Co.*, 124 B.R. 169, 176 (D. Del. 1991)). Where a debtor demonstrates a valid business justification for a decision, it is presumed that “in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company.” *In re Integrated Res., Inc.*, 147 B.R. at 656. At any Sale Hearing, the Debtors intend on showing that any sale satisfies the sound business judgment standard.

**(i) The Debtors Have Demonstrated a Sound Business Justification for the Sale(s) of Assets**

30. A sound business purpose for the sale of a debtor’s assets outside the ordinary course of business exists where such sale is necessary to preserve the value of the estate for the benefit of creditors and interest holders. *See, e.g., Cumberland Farms Dairy, Inc. v. Abbotts Dairies of Penn., Inc. (In re Abbotts Dairies of Penn., Inc.)*, 788 F.2d 143 (3d Cir. 1986); *Lionel Corp.*, 722 F.2d at 1063; *Food Barn Stores*, 107 F.3d at 564-65 (recognizing the paramount goal of any proposed sale of property of estate is to maximize value).

31. As set forth above and in the First Day Declaration, a strong business justification exists for the sale of the Assets as described herein. In light of the Debtors’ financial condition, an orderly and expeditious sale or sales of the Assets is critical to maximizing the value of the Debtors’ estates and recoveries for the Debtors’ economic stakeholders. Moreover, the proposed Sale process timeline is appropriate it is required under the DIP Facility, without which, the Debtors would not be able to fund the Sale process. In addition, the compressed timeline is appropriate in light of the nature of the Assets and the targeted prepetition marketing process.

**(ii) The Sale Noticing and Objection Procedures Are Appropriate and Comply With Bankruptcy Rules 2002 and 6004**

32. Bankruptcy Rules 2002 and 6004 require the Debtors to notify creditors of a

proposed sale, provide a description of the assets being sold, and disclose the time and place of the Auction, the terms and conditions of any proposed Sale transaction and any objection deadlines. *See* Fed. R. Bankr. P. 2002(a), 2002(c), and 6004(a). The Sale Noticing and Objection Procedures set forth above are reasonably calculated to provide all of the Debtors' known creditors and other parties in interest with adequate and timely notice of all of the key dates, deadlines, and other material information related to the Sale process. Accordingly, the Debtors request that the Court approve the Sale Noticing and Objection Procedures, including the Auction Notice, substantially in the form attached to the Bidding Procedures as Exhibit 2, and find that no other or further notice of the Bidding Procedures, the Auction (excluding the Auction results), or the Sale Hearing is necessary or required.

**(iii) The Proposed Sale Will Yield a Fair and Reasonable Purchase Price for the Assets**

33. The Debtors believe that any Sale transaction governed by the Bidding Procedures will yield a fair and reasonable purchase price for the relevant Assets. Given the targeted prepetition marketing process, the Debtors submit that the Bidding Procedures are well tuned to facilitate a competitive bidding process in light of the Debtors' financial situation.

34. The Debtors constructed the Bidding Procedures to promote transparency, good faith, and fairness throughout the Sale Process. The Bidding Procedures provide an appropriate framework for the Debtors to review, analyze, and compare bids for the Assets, and to engage with bidders on an arm's-length basis to work to improve the quality of their bids for the benefit of all parties in interest. Any Sale governed by the Bidding Procedures will serve the important objectives of obtaining not only a fair and reasonable purchase price, but also the highest and best value for the Assets.

**(iv) The Bidding Procedures Ensure that the Sale Process Is Conducted in Good Faith and that the Winning Bidder(s) Is Entitled to the Protections Afforded by Section 363(m) of the Bankruptcy Code**

35. Section 363(m) of the Bankruptcy Code is designed to protect the sale of a debtor's assets to a good-faith purchaser. Specifically, section 363(m) provides the following:

The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale . . . were stayed pending appeal.

11 U.S.C. § 363(m). Section 363(m) embodies “[the] policy of not only affording finality to the judgment of the bankruptcy court, but particularly to give finality to those orders and judgments upon which third parties rely.” *Abbotts Dairies*, 788 F.2d 143, 147 (3d Cir. 1986)); *see also Reloeb Co. v. LTV Corp. (In re Chateaugay Corp.)*, No. 92 Civ. 7054 (PKL), 1993 U.S. Dist. LEXIS 6130, at \*9 (S.D.N.Y. May 10, 1993); *Allstate Ins. Co. v. Hughes*, 174 B.R. 884, 888 (S.D.N.Y. 1994) (“Section 363(m) . . . provides that good faith transfers of property will not be affected by the reversal or modification on appeal of an unstayed order, whether or not the transferee knew of the pendency of the appeal.”).

36. While the Bankruptcy Code does not define “good faith,” the Third Circuit has held that “the phrase encompasses one who purchases in ‘good faith’ and for ‘value.’” *Abbotts Dairies*, 788 F.2d at 147 (to constitute lack of good faith, a party’s conduct in connection with the sale must usually amount to fraud, collusion between the purchaser and other bidders or the trustee or an attempt to take grossly unfair advantage of other bidders); *see also In re Bedford Springs Hotel, Inc.*, 99 B.R. 302, 305 (Bankr. W.D. Pa. 1989); *In re Perona Bros., Inc.*, 186 B.R. 833, 839 (D.N.J. 1995).

37. In other words, a party would have to show fraud or collusion between the Debtors and bidders to demonstrate a lack of good faith. *See Kabro Assocs. of West Islip, LLC v.*

*Colony Hill Assocs. (In re Colony Hill Assocs.)*, 111 F.3d 269, 276 (2d Cir. 1997) (“[t]ypically, the misconduct that would destroy a [buyer]’s good faith status at a judicial sale involves fraud, collusion between the [buyer] and other bidders or the trustee, or an attempt to take grossly unfair advantage of other bidders”). Due to the absence of a bright-line test for good faith, the determination is based on the facts of each case, with a focus on the “integrity of [a bidder]’s conduct in the course of the sale proceedings.” *In re Pisces Leasing Corp.*, 66 B.R. 671, 673 (E.D.N.Y. 1986) (quoting *In re Rock Indus. Mach. Corp.*, 572 F.2d 1195, 1998 (7th Cir. 1978)).

38. As set forth above, the Bidding Procedures are designed to produce a fair and transparent competitive bidding process that will yield the highest or otherwise best value for the Assets. Any asset purchase agreement with a Winning Bidder, including the Stalking Horse APA, executed by the Debtors will be (or was) negotiated at arm’s-length and in good faith at each stage of the negotiations.

39. The Debtors submit that, regarding Ligand as the Stalking Horse Bidder, the Debtors will seek a finding that such Stalking Horse Bidder is a “good faith purchaser” within the meaning of section 363(b) of the Bankruptcy Code. Further, each Auction Bidder must confirm that it has not engaged in any collusion with respect to the Bidding Procedures, the Auction, or any Sale. Any purchase agreement with a Winning Bidder executed by the Debtors will be negotiated at arm’s length and in good faith. As such, the Debtors will request a finding that any Winning Bidder is a good-faith purchaser and is entitled to the full protections afforded under section 363(m) of the Bankruptcy Code.

40. Based on the foregoing, the Debtors submit that they have demonstrated that any proposed Sale is a sound exercise of the Debtors’ business judgment and should be approved as a good faith transaction.

**3. A Sale Free and Clear of Liens, Claims, Interests, and Encumbrances Is Appropriate Under Section 363(f) of the Bankruptcy Code**

41. In the interest of attracting the best offers, the Court should authorize the Debtors to sell the Assets free and clear of any and all liens, claims, interests, and other encumbrances (other than permitted encumbrances or assumed liabilities in any relevant purchase agreement), in accordance with section 363(f) of the Bankruptcy Code, with any such liens, claims, interests, and encumbrances attaching to the proceeds of the applicable Sale. Section 363(f) of the Bankruptcy Code authorizes a debtor to sell assets free and clear of liens, claims, interests, and encumbrances if any one of the following conditions is satisfied:

- a. applicable non-bankruptcy law permits sale of such property free and clear of such interest;
- b. such entity consents;
- c. such interest is a lien and the price at which such property is to be sold is greater than the value of all liens on such property;
- d. such interest is in bona fide dispute; or
- e. such entity could be compelled, in legal or equitable proceeding, to accept a money satisfaction of such interest.

11 U.S.C. § 363(f); *see also In re Kellstrom Indus., Inc.*, 282 B.R. 787, 793 (Bankr. D. Del. 2002) (“Section 363(f) is written in the disjunctive, not the conjunctive, and if any of the five conditions are met, the debtor has the authority to conduct the sale free and clear of all liens.”); *Citicorp Homeowners Servs., Inc. v. Elliot (In re Elliot)*, 94 B.R. 343, 345 (E.D. Pa. 1988) (same).

42. Section 363(f) of the Bankruptcy Code is supplemented by section 105(a) of the Bankruptcy Code, which provides that “[t]he Court may issue any order, process or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code].”

11 U.S.C. § 105(a); *see also Volvo White Truck Corp. v. Chambersburg Beverage, Inc. (In re White Motor Credit Corp.)*, 75 B.R. 944, 948 (Bankr. N.D. Ohio 1987) (“Authority to conduct

such sales [free and clear of claims] is within the court's equitable powers when necessary to carry out the provisions of [the Bankruptcy Code].").

43. The Debtors anticipate that any Sale transaction(s) they elect to pursue will satisfy one or more of the requirements under section 363(f) of the Bankruptcy Code to permit a "free and clear" sale of the applicable Assets. Here, the Assets are subject to the prepetition liens of Ligand, who the Debtors expect will consent to any Sale, but also would likely be adequately protected by such liens attaching to the proceeds of the applicable Sale in the order of their respective priority. Additionally, any parties with junior liens on the assets can be compelled to accept a money satisfaction of their interests, but also would likely be adequately protected by such liens attaching to the proceeds of the applicable Sale. Moreover, the Bidding Procedures require the Debtors to send the Auction Notice to all purported lienholders. If such lienholders do not object to the proposed Sale, then their consent should be presumed. Accordingly, the Debtors request that, unless a party asserting a prepetition lien, claim, or encumbrance on any of the Assets timely objects, such party shall be deemed to have consented to any Sale approved at the Sale Hearing. *See Hargave v. Twp. of Pemberton*, 175 B.R. 855, 858 (Bankr. D.N.J. 1994) (by not objecting to a sale motion, a creditor is deemed to consent to the relief requested therein).

44. Accordingly, the Debtors request that the Court authorize the sale of the Assets free and clear of any liens, claims, interests, and encumbrances, in accordance with section 363(f) of the Bankruptcy Code, subject to such liens, claims, interests, and encumbrances (other than permitted encumbrances or assumed liabilities in any relevant purchase agreement), to the fullest extent permitted by section 363(f) of the Bankruptcy Code.

**4. The Debtors' Assumption and Assignment of Executed Contracts and Unexpired Leases Is Appropriate Under Section 365 of the Bankruptcy Code**

45. To the extent Ligand or a Winning Bidder purchases the Debtors' business as a going concern, the Debtors request relief under section 365 of the Bankruptcy Code. Section

365(a) of the Bankruptcy Code provides that a debtor in possession “subject to the court’s approval, may assume or reject any executory contract or unexpired lease of the debtor.” 11 U.S.C. § 365(a). Courts employ the business judgment standard in determining whether to approve a debtor’s decision to assume or reject an executory contract or unexpired lease. *See, e.g., In re Market Square Inn, Inc.*, 978 F.2d 116, 121 (3d Cir. 1992) (assumption or rejection of lease “will be a matter of business judgment by the bankruptcy court”); *In re HQ Global Holdings, Inc.*, 290 B.R. 507, 511 (Bankr. D. Del. 2003) (finding that a debtor’s decision to assume or reject executory contract is governed by business judgment standard and may only be overturned if decision is product of bad faith, whim, or caprice). The “business judgment” test in this context only requires that a debtor demonstrate that assumption or rejection of an executory contract or unexpired lease benefits the estate. *See Sharon Steel Corp. v. Nat’l Fuel Gas Distrib. Corp.*, 872 F.2d 36, 40 (3d Cir. 1989).

46. Assumption of any Assumed Contract is an exercise of the Debtors’ sound business judgment because the transfer of such Purchased Contracts in connection with a Sale is necessary to the Debtors’ ability to obtain the best value for the Assets. Given that consummation of the Sale is critical to the Debtors’ efforts to maximize value for their estates and stakeholders, the Debtors’ assumption of Assumed Contracts is an exercise of sound business judgment and, therefore, should be approved.

47. The consummation of any Sale involving the assignment of Assumed Contracts will be contingent upon the Debtors’ compliance with the applicable requirements of section 365 of the Bankruptcy Code. Section 365(b)(1) of the Bankruptcy Code requires that any outstanding defaults under the Assumed Contracts be cured or that the Debtors provide adequate assurance that such defaults will be promptly cured. *See* 11 U.S.C. § 365(b)(1). The Debtors’ assumption and assignment of Assumed Contracts will be contingent upon payment of the Cure

Amounts and effective only upon the closing of the applicable Sale. As set forth above, the Debtors propose to file with the Court and serve on each Counterparty to the Debtors' universe of executory contracts and unexpired leases an Assumption and Assignment Notice, which will set forth the Debtors' good faith calculations of Cure Amounts with respect any such contracts or unexpired leases listed on such Assumption and Assignment Notice, and the procedures by which such Counterparty may object to the assumption and assignment of its contract or unexpired lease at the Sale Hearing or at a separate hearing scheduled prior to closing.

48. Pursuant to section 365(f)(2) of the Bankruptcy Code, a debtor may assign an executory contract or unexpired lease if "adequate assurance of future performance by the assignee of such contract or lease is provided." 11 U.S.C. § 365(f)(2). The meaning of "adequate assurance of future performance" depends on the facts and circumstances of each case, but should be given "practical, pragmatic construction." See *Carlisle Homes, Inc. v. Azzari (In re Carlisle Homes, Inc.)*, 103 B.R. 524, 538 (Bankr. D.N.J. 1988) (citation omitted); see also *In re Natco Indus., Inc.*, 54 B.R. 436, 440 (Bankr. S.D.N.Y. 1985) (adequate assurance of future performance does not mean an absolute assurance that debtor will thrive and pay rent); *In re Bon Ton Rest. & Pastry Shop, Inc.*, 53 B.R. 789, 803 (Bankr. N.D. Ill. 1985) (finding that, "[a]lthough no single solution will satisfy every case, the required assurance will fall considerably short of an absolute guarantee of performance"). Among other things, adequate assurance may be provided by evidencing the assignee's financial health and experience in managing the type of enterprise or property assigned. See *In re Bygaph, Inc.*, 56 B.R. 596, 605-06 (Bankr. S.D.N.Y. 1986) (adequate assurance of future performance is present when the prospective assignee of a lease has financial resources and has expressed willingness to devote sufficient funding to the business to give it a strong likelihood of succeeding).

49. The Bidding Procedures expressly specify that any Qualifying Bid that includes

the assumption and assignment of any Assumed Contracts must include with information regarding the bidder's ability to perform any Assumed Contracts that it wishes for the Debtors to assume and assign. The Assumption and Assignment Procedures require the Debtors to furnish all available Adequate Assurance Information to the relevant Counterparties to provide such Counterparties ample opportunity to review such information and object if they so choose. To the extent necessary, the Debtors will present facts at the Sale Hearing to show the financial wherewithal, willingness and ability of the Stalking Horse Bidder or Winning Bidder to perform under any Assumed Contracts that it wishes for the Debtors to assume and assign. In light of the foregoing, the Debtors' assumption and assignment of any Assumed Contracts in accordance with the Assumption and Assignment Procedures would satisfy the requirements of section 365 of the Bankruptcy Code and should be approved.

**5. The Stalking Horse Protections Should Be Approved**

50. The Stalking Horse APA provides for the Stalking Horse Protections, consisting of a Break-Up Fee of \$450,000 (3% of the proposed purchase price). Additionally, the Stalking Horse APA requires the Debtors to assume and assign the Royalty Agreement (the "Royalty Assumption") to a purchaser in connection with any Sale of Assets related to the R&D Assets.

51. The Debtors believe that the Stalking Horse Protections, along with the Royalty Assumption, are an essential prerequisite for the Stalking Horse Bidder to enter into the Stalking Horse APA. In addition, the Debtors believe that the presence of the Stalking Horse Bidder will set a floor for the value of the Assets and attract other potential buyers to bid for such assets, thereby maximizing the realizable value of the Assets for the benefit of the Debtors' estates, their creditors, and all other parties in interest.

52. Approval of the Stalking Horse Protections is governed by standards for determining the appropriateness of bid protections in the bankruptcy context. Courts have

identified at least two instances in which bid protections may benefit the estate. First, a break-up or expense reimbursement fee may be necessary to preserve the value of a debtor's estate if assurance of the fee "promote[s] more competitive bidding, such as by inducing a bid that otherwise would not have been made and without which bidding would have been limited." *In re O'Brien Env'tl. Energy, Inc.*, 181 F.3d at 533. Second, if the availability of a break-up fee or expense reimbursement was to induce a bidder to research the value of the debtor and convert the value to a dollar figure on which other bidders can rely, the bidder may have provided a benefit to the estate by increasing the likelihood that the price at which the debtor is sold will reflect its true worth. *See id.*; *see also In re Reliant Energy Channel View LP*, 594 F.3d 200, 206–08 (3d Cir. 2010) (reasoning that a break-up fee should be approved if it is necessary to entice a party to make the first bid or if it would induce a stalking horse purchaser to remain committed to a purchase).

53. In *O'Brien*, the Third Circuit reviewed the following nine factors set forth by the lower court as relevant in deciding whether to award a break-up fee or expense reimbursement:

- a. the presence of self-dealing or manipulation in negotiating the break-up fee;
- b. whether the fee harms, rather than encourages, bidding;
- c. the reasonableness of the break-up fee relative to the purchase price;
- d. whether the unsuccessful bidder placed the estate property in a "sale configuration mode" to attract other bidders to the auction;
- e. the ability of the request for a break-up fee to serve to attract or retain a potentially successful bid, establish a bid standard or minimum for other bidders or attract additional bidders;
- f. the correlation of the fee to a maximum value of the debtor's estate;
- g. the support of the principal secured creditors and creditors' committees of the break-up fee;

- h. the benefits of the safeguards to the debtor's estate; and
- i. the substantial adverse impact of the break-up fee on unsecured creditors, where such creditors are in opposition to the break-up fee.

*See In re O'Brien Envtl. Energy, Inc.*, 181 F.3d at 536.

54. Although none of the factors is dispositive, an application of the facts to several of such factors supports the approval of the Stalking Horse Protections in this case. In particular, the Stalking Horse Protections are necessary to preserve the value of the Debtors' estates because they will enable the Debtors to secure an adequate floor for the Assets—a clear benefit to the Debtors' estates.

55. Moreover, there has been no showing of any self-dealing or manipulation of any kind in the negotiation of the Stalking Horse Protections. Rather, the Stalking Horse Protections are the result of good faith, arm's-length negotiations between the Debtors and Ligand. The Debtors believe that the agreement to pay the Stalking Horse Protections and along with the Royalty Assumption requirement is reasonable and necessary to induce the Stalking Horse Bidder to enter into the transactions encompassed by the Stalking Horse APA.

56. Further, Ligand would not have agreed to act as a stalking horse without the Stalking Horse Protections and the Royalty Assumption, given the substantial time and expense that it incurred in connection with entering into definitive documentation and the risk that it will be outbid at the Auction. Without the Stalking Horse Protections and the Royalty Assumption, the Debtors might lose the opportunity to obtain the highest or otherwise best offer for the Assets, may have lost the financing for these Chapter 11 Cases, and would certainly lose the downside protection that will be afforded by the existence of the Stalking Horse Bidder. *See, e.g., In re Enjoy Technology, Inc.*, Case No. 22-10580 (Bankr. D. Del. July 26, 2022) [D.I. 199] (approving break-up fee and expense reimbursement). Additionally, without the floor

established by the Stalking Horse Bidder, the bids received at Auction for the Assets could be substantially lower than the bid offered by the Stalking Horse Purchaser.

57. Pursuant to the Bidding Procedures, any bidder that wishes to participate in the Auction must submit an offer that is higher or otherwise better than the bid of the Stalking Horse Bidder, which would be used to fund the Stalking Horse Protections. The bid of the Stalking Horse Bidder attracts additional bidders because, among other things, additional bidders will be able to save considerable time and expense because they can use many of the documents that the Stalking Horse Bidder heavily negotiated, including the Stalking Horse APA and the schedules thereto, in making their bid. In sum, if the Assets are sold to a Winning Bidder other than the Stalking Horse Bidder, the Sale likely will be the result of the Stalking Horse Bidder's crucial role as an initial bidder generating interest in the Assets and establishing a minimum acceptable price and offer against which other parties can bid.

58. Finally, the Debtors believe that the amount of the Stalking Horse Protections is appropriate when compared to bid protections approved in other cases in this District.<sup>6</sup> Accordingly, the Debtors submit that the Stalking Horse Protections are reasonable under the circumstances of these Chapter 11 Cases and should be approved.

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<sup>6</sup> See, e.g., *In re Am. Eagle Del. Holding Co., LLC*, No. 22-10028 (JKS) [D.I. 146] (approving a breakup fee of 3% of the cash consideration of the stalking horse bid plus expense reimbursements equal to a maximum of 1.25% of the cash consideration of the stalking horse bid capped at \$50,000); *In re Ector Cnty. Energy Ctr., LLC*, No. 22-10320 (JTD) (Bankr. D. Del. May 6, 2022) [D.I. 136] (approving breakup fee of 3% of cash consideration of the stalking horse bid plus expense reimbursements equal to a maximum of 0.5% of the cash consideration of the stalking horse bid); *In re BHCosmetics Holdings, LLC*, No. 22-10050 (CS) (Bankr. D. Del. Jan. 28, 2022) [D.I. 90] (approving breakup fee equal to 4% of the cash consideration of the stalking horse bid plus expense reimbursements equal to a maximum of approximately 3.5% of the cash consideration of the stalking horse bid); *In re Gorham Paper & Tissue, LLC*, No. 20-12814 (KBO) (Bankr. D. Del. Nov. 19, 2020) [D.I. 112] (approving break-up fee in an amount equal to approximately 3.4% of cash purchase price and expense reimbursement up to an amount equal to approximately 1.1% of cash purchase price); *In re Brooks Bros. Grp., Inc.*, Case No. 20-11785 (CSS) Bankr. D. Del. Aug. 3, 2020) [D.I. 285] (authorizing a break-up fee of 3% and an expense reimbursement capped at \$1 million, for total bid protections of up to 3.3%); *In re Lucky Brand Dungarees, LLC*, Case No. 20-11768 (CSS) (Bankr. D. Del. July 30, 2020) [D.I. 251] (authorizing an expense reimbursement capped at \$1 million and a break-up fee of 3% of the sum of the purchase price, credit bid, value of standby letters of credit, and \$7 million of assumed liabilities, for total bid protections of approximately 3.5%); *In re Templar Energy LLC*, Case No. 20-11441 (BLS) (Bankr. D. Del. June 29, 2020) [D.I. 130] (authorizing break-up fee of 3% of the cash component of the stalking horse purchase price and expense reimbursement up to \$350,000, for total bid protections of approximately 3.5%).

**6. In the Alternative, the Private Sale to Ligand Should Be Approved**

59. In the event of a Conversion Trigger Event, the Stalking Horse APA and the DIP Facility require the Debtors to sell the Debtors' Assets to Ligand free and clear of all liens, claims, interests, and encumbrances by private sale.

60. As illustrated by the terms of the Stalking Horse APA, the Sale will provide value for the Debtors' creditors that would not exist otherwise. Moreover, the Sale will preserve valuable research and treatments. Therefore, the Debtors believe that the Stalking Horse APA presents the best opportunity for the Debtors to preserve and maximize the value of its Assets for the benefit of the Debtors, their estate and their creditors.

61. The Court's general equitable powers are codified in section 105(a) of the Bankruptcy Code. Section 105(a) empowers the Court to "issue any order, process, or judgment that is necessary to carry out the provisions of this title." 11 U.S.C. § 105(a). Section 363(b)(1) of the Bankruptcy Code provides that "[t]he trustee, after notice and a hearing, may use, sell or lease, other than in the ordinary course of business, property of the estate." 11 U.S.C. § 363(b)(1). In pertinent part, Bankruptcy Rule 6004 states that, "[a]ll sales not in the ordinary course of business may be by private sale or by public auction." Fed. R. Bankr. P. 6004(f)(1).

62. Although section 363 of the Bankruptcy Code does not specify a standard for determining when it is appropriate for a court to authorize the use, sale or lease of property of the estate, bankruptcy courts routinely authorize sales of a debtor's assets if such sale is based upon the sound business judgment of the debtor. *See, e.g., Meyers v. Martin (In re Martin)*, 91 F.3d 389, 395 (3d Cir. 1996); *In re Montgomery Ward Holding Corp.*, 242 B.R. 147, 153 (D. Del. 1999); *In re Delaware & Hudson Ry. Co.*, 124 B.R. 169, 176 (D. Del. 1991); *In re Trans World Airlines, Inc.*, No. 01-00056, 2001 Bankr. LEXIS 980, at \*29 (Bankr. D. Del. Apr. 2, 2001); *In re Phoenix Steel Corp.*, 82 B.R. 334, 335-36 (Bankr. D. Del. 1987) (stating that judicial approval

of a section 363 sale requires a showing that the proposed sale is fair and equitable, a good business reason exists for completing the sale and that the transaction is in good faith).

63. The proposed Sale pursuant to the Stalking Horse APA, even without an auction, fits squarely within the parameters of the sound business judgment test. The Stalking Horse APA is the product of arm's length negotiations and brings value to the Debtors' bankruptcy estate and creditors that would not otherwise be available. The proposed Sale further preserves important pharmaceutical research and development. Although the Debtors made the Assets available for purchase prior to the Petition Date as part of the Auction, no party other than Ligand was able to agree to a \$15 million purchase price and provide the prepetition funding necessary to file these Chapter 11 cases. Under the circumstances, the consideration to be paid under the Stalking Horse APA is both fair and reasonable. Therefore, the Debtors believe that the Sale should be approved as a sound exercise of the Debtors' business judgment.

**WAIVER OF BANKRUPTCY RULES 6004(A), 6004(H) AND 6006(D)**

64. Bankruptcy Rule 6004(h) provides that an "order authorizing the use, sale, or lease of property . . . is stayed until the expiration of 14 days after entry of the order, unless the court orders otherwise." Fed. R. Bankr. P. 6004(h). Bankruptcy Rule 6006(d) further provides that an "order authorizing the trustee to assign an executory contract or unexpired lease under § 365(f) is stayed until the expiration of 14 days after the entry of the order, unless the court orders otherwise." Fed. R. Bankr. P. 6006(d).

65. The Debtors believe that any Sale should be consummated as soon as practicable to preserve and maximize value. Accordingly, the Debtors request that any Sale Order approving the sale of the Assets and the assumption and assignment of the Assumed Contracts be effective immediately upon entry of such order and that the fourteen-day stay under Bankruptcy Rules 6004(h) and 6006(d) be waived.

**NOTICE**

66. Notice of this Motion will be provided to: (a) the U.S. Trustee; (b) counsel to the Stalking Horse Bidder; (c) the parties included on the Debtors' consolidated list of their 30 largest unsecured creditors; (d) all parties known by the Debtors to assert a lien or encumbrance on any of the Assets; (e) all persons known or reasonably believed to have asserted an interest in or claim to any of the Assets; (f) all persons known or reasonably believed to have expressed an interest in acquiring all or a substantial portion of the Assets within the one (1) year prior to the Petition Date; (g) the Office of the United States Attorney for the District of Delaware; (h) the Office of the Attorney General in each state in which the Debtors have operated; (i) the Office of the Secretary of State in each state in which the Debtors have operated; (j) the Internal Revenue Service and all state and local taxing authorities in the states in which the Debtors have or may have any tax liability; (k) the Securities and Exchange Commission; (l) the Federal Trade Commission; and (m) all other parties that have filed a notice of appearance and demand for service of papers in the Chapter 11 Cases as of the service date. The Debtors respectfully submit that no further notice of this Motion is required under the circumstances.

**CONCLUSION**

**WHEREFORE**, the Debtors respectfully request that the Court (i) enter the Bidding Procedures Order, substantially in the form attached hereto as Exhibit A and grant such other and further relief as the Court may deem just and proper; and (ii) after a Sale Hearing has taken place, enter a Sale Order(s) and grant such other and further relief as the Court may deem just and proper; or (iii) enter the Private Sale Order, substantially in the form attached hereto as Exhibit B and grant such other and further relief as the Court may deem just and proper.

*[Remainder of page intentionally left blank.]*

Dated: July 17, 2023  
Wilmington, Delaware

Respectfully submitted,

/s/ Daniel B. Butz

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*Proposed Counsel to the Debtors and  
Debtors in Possession*

**Exhibit A**

**Bidding Procedures Order**

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

In re:	)	
	)	Chapter 11
NOVAN, INC., <i>et al.</i> , <sup>1</sup>	)	
	)	Case No. 23-10937 (LSS)
Debtors.	)	
	)	(Joint Administration Requested)
	)	

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**ORDER (I)(A) APPROVING BIDDING PROCEDURES FOR SALE OF  
SUBSTANTIALLY ALL OF DEBTORS’ ASSETS FREE AND CLEAR OF LIENS,  
CLAIMS, INTERESTS, AND ENCUMBRANCES AND DESIGNATING LIGAND  
PHARMACEUTICALS AS A STALKING HORSE BIDDER, (B) SCHEDULING AN  
AUCTION AND APPROVING THE FORM AND MANNER OF NOTICE THEREOF,  
(C) APPROVING ASSUMPTION AND ASSIGNMENT PROCEDURES AND (D)  
SCHEDULING A SALE HEARING AND APPROVING THE FORM AND MANNER OF  
NOTICE THEREOF, AND (II) GRANTING RELATED RELIEF**

Upon consideration of the motion (the “Motion”)<sup>2</sup> of the above-captioned debtors and debtors in possession (collectively, the “Debtors”) for the entry of an order: (i) approving bidding procedures, substantially in the form attached hereto as **Exhibit 1** (the “Bidding Procedures”), to be used in connection with one or more sales (each a “Sale”) of the Debtors’ development and commercialization rights to their research and development portfolio (the “R&D Assets”) and to the rights to commercialize the Debtors’ commercial portfolio (the “Commercial Assets,” and together with the R&D Assets, the “Assets,” as more fully defined in the Bidding Procedures) free and clear of all liens, claims, interests, and encumbrances; (ii) authorizing the Debtors to designate one or more affiliates of Ligand Pharmaceuticals, Incorporated or its designee (“Ligand”) as the Stalking Horse Bidder for all of the Assets in

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<sup>1</sup> 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

<sup>2</sup> Capitalized terms used but not defined herein shall have the meanings given them in the Bidding Procedures (as defined below), or to the extent not defined therein, the Motion or the Stalking Horse APA.

connection with considering the entry of the Bidding Procedures Order; (iii) scheduling one more auctions (each, an “Auction”), if necessary, and schedule one or more hearings to approve a sale of the Debtors’ Assets (a “Sale Hearing”); (iv) approving the form and manner of notice of the proposed Bidding Procedures, the Auction, and the Sale Hearing, substantially in the form attached hereto as **Exhibit 2** (the “Auction Notice”); (v) authorizing procedures governing the assumption and assignment of certain executory contracts and unexpired leases (the “Assumed Contracts”) in connection with any Sale (the “Assumption and Assignment Procedures”); (vi) approving the form and manner of notice to each relevant non-debtor counterparty to an Assumed Contract (each a “Counterparty”) of (A) the Debtors’ calculation of the amount necessary to cure any default under the applicable Assumed Contract (the “Cure Amounts”); and (B) certain other information regarding the potential assumption and assignment of Assumed Contracts in connection with a Sale, substantially in the form attached hereto as **Exhibit 3** (the “Assumption and Assignment Notice”); and (vii) granting related relief; and due and proper notice of the Motion having been given; and it appearing that no other or further notice of the Motion is required; and it appearing that this Court has jurisdiction to consider the Motion in accordance with 28 U.S.C. §§ 157 and 1334 and the Amended Standing Order; and it appearing that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2); and it appearing that venue of this proceeding and the Motion is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and this Court having reviewed the Motion; and the Bidding Procedures Hearing (as defined herein) having been held; and this Court having found and determined that the relief set forth herein is in the best interests of the Debtors, their estates and creditors, and all parties in interest, and that the legal and factual bases set forth in the Motion and at the Bidding Procedures Hearing, as

applicable, establish just cause for the relief granted herein; and after due deliberation and sufficient cause appearing therefor, it is hereby

**FOUND AND DETERMINED THAT:**<sup>3</sup>

A. This Court has jurisdiction to consider the Motion in accordance with 28 U.S.C. §§ 157 and 1334 and the Amended Standing Order.

B. Venue of this proceeding and the Motion is proper pursuant to 28 U.S.C. §§ 1408 and 1409. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2).

C. The statutory and legal predicates for the relief requested in the Motion and provided for herein are sections 105, 363, 365, 503 and 507 of title 11 of the United States Code, 11 U.S.C. §§ 101-1532 (the “Bankruptcy Code”), Rules 2002, 6004, 6006, and 9014 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), and Rule 2002-1 and 6004-1 of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware (the “Local Rules”).

D. In the Motion and at the hearing on the relief set forth herein (the “Bidding Procedures Hearing”), the Debtors demonstrated that good and sufficient notice of the relief granted by this Order has been given and no further notice is required. A reasonable opportunity to object or be heard regarding the relief granted by this Order (including, without limitation, with respect to the Bidding Procedures) has been afforded to those parties entitled to notice pursuant to Bankruptcy Rule 2002 and all other interested parties.

E. The Bidding Procedures attached hereto as **Exhibit 1** are fair, reasonable, and appropriate and are designed to maximize the value of the proceeds of Sale of the Debtors’

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<sup>3</sup> 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.

Assets. The Bidding Procedures comply with the requirements of Local Rule 6004-1(c), and are reasonably designed to promote active bidding and participation in the Auction to ensure that the highest or otherwise best value is generated for the Assets.

F. The Assumption and Assignment Procedures are fair, reasonable, and appropriate and comply with the provisions of section 365 of the Bankruptcy Code and Bankruptcy Rule 6006.

G. The Debtors have articulated good and sufficient business reasons for the Court to approve (i) the Bidding Procedures, (ii) the form and manner of Auction Notice; (iii) designation of Ligand as the Stalking Horse Bidder; (iv) the form and manner of the Assumption and Assignment Notice; and (v) the Assumption and Assignment Procedures.

H. The Auction Notice, the Assumption and Assignment Notice, and the Notice of Winning Bidder, are appropriate and reasonably calculated to provide all interested parties with timely and proper notice of the Auction, the Sale Hearing, the Bidding Procedures, the Assumption and Assignment Procedures, the Debtors' proposed Cure Amounts, any proposed assumption of an Assumed Contract in connection with a sale of the Assets, and all relevant and important dates and deadlines with respect to the foregoing, and no other or further notice of the Auction, the sale of the Assets, or the assumption and assignment of Assumed Contracts in connection therewith shall be required.

I. Good and sufficient notice of the relief sought in the Motion has been provided under the circumstances, and no other or further notice is required except as set forth in the Bidding Procedures and the Assumption and Assignment Procedures. A reasonable opportunity to object and be heard regarding the relief granted herein has been afforded to all parties in interest.

J. Entry of this Order is in the best interests of the Debtors, their estates and creditors, and all other interested parties.

**NOW, THEREFORE, IT IS HEREBY ORDERED THAT:**

1. The Motion is GRANTED as set forth herein. All objections to the relief granted in this Order that have not been withdrawn, waived, or settled, and all reservations of rights included therein, are hereby overruled and denied on the merits with prejudice.

2. The Bidding Procedures attached hereto as **Exhibit 1** are hereby approved and are incorporated herein by reference. The failure to specifically include or reference any particular provision of the Bidding Procedures in this Order shall not diminish or otherwise impair the effectiveness of such procedures, it being this Court's intent that the Bidding Procedures are approved in their entirety, as if fully set forth in this Order. The Debtors are authorized to take all actions necessary or appropriate to implement the Bidding Procedures.

3. Within three (3) business days after the entry of the Bidding Procedures Order, the Debtors shall to serve the Auction Notice, substantially in the form attached to the Bidding Procedures Order, on: (a) the U.S. Trustee; (b) counsel to the Stalking Horse Bidder; (c) counsel to any Creditors' Committee; (d) all parties known by the Debtors to assert a lien or encumbrance on any of the Assets; (e) all persons known or reasonably believed to have asserted an interest in or claim to any of the Assets; (f) all persons known or reasonably believed to have expressed an interest in acquiring all or a substantial portion of the Assets within the one (1) year prior to the Petition Date; (g) the Office of the United States Attorney for the District of Delaware; (h) the Office of the Attorney General in each state in which the Debtors have operated; (i) the Office of the Secretary of State in each state in which the Debtors have operated; (j) the Internal Revenue Service and all state and local taxing authorities in the states in

which the Debtors have or may have any tax liability; (k) the Securities and Exchange Commission; (l) the Federal Trade Commission; (m) all of the Debtors' other known creditors and equity security holders; and (n) all other parties that have filed a notice of appearance and demand for service of papers in the Chapter 11 Cases as of the service date.

4. The Debtors shall post the Auction Notice and this Order on the Debtors' claims and noticing agent's website. Within seven (7) calendar days of the entry of this Order, the Debtors shall cause the Auction Notice to be published once in the national edition of USA Today or another nationally circulated newspaper, with any modifications necessary for ease of publication. Publication of the Auction Notice as described in this Order conforms to the requirements of Bankruptcy Rules 2002(l) and 9008 and is reasonably calculated to provide notice to any affected party, including, without limitation, any potential bidders, and afford the affected party the opportunity to exercise any rights affected by the Motion and the relief granted by this Order.

5. Except objections relating to the conduct of the Auction, the Auction results, the selection of any Winning Bid and/or Back-Up Bid, or the terms of any Sale to a Winning Bidder and/or Back-Up Bidder, which may be filed as part of a Winning Bid Objection (as defined below), all objections to the sale of the Assets (each, an "Initial Sale Objection"), including any objection to the sale of any Assets free and clear of liens, claims, interests, and encumbrances pursuant to section 363(f) of the Bankruptcy Code to a Successful Bidder and/or a Backup Bidder (as applicable), shall be (i) be in writing; (ii) state with specificity the grounds for such objection; (iii) comply with the Bankruptcy Rules and the Local Rules; (iv) be filed with the Court by no later than **August 28, 2023, at 4:00 p.m. (ET)** (the "Initial Sale Objection Deadline"); and (v) served on the Notice Parties.

6. Subject to this Order and the Bidding Procedures, the Debtors, in the exercise of their reasonable business judgment and in a manner consistent with their fiduciary duties and applicable law, shall have the right, in consultation with the Notice Parties, to: (a) determine which bidders qualify as Qualified Bidders, and which bids qualify as Qualified Bids; (b) make final determinations as to whether the Debtors will conduct an Auction; (c) select Baseline Bid(s); (d) determine the amount of each minimum overbid; (e) determine which Qualified Bid is the highest or otherwise best bid for the Assets, and therefore the Winning Bid, and which Qualified Bid is the next highest and next best bid after the Winning Bid for the Assets, and therefore the Back-Up Bid; (f) reject any bid that is (i) inadequate or insufficient; (ii) not in conformity with the requirements of this Order or any other applicable order of the Court, the Bidding Procedures, the Bankruptcy Code, or other applicable law; or (iii) contrary to the best interests of the Debtors and their estates; and (g) adjourn or cancel the Auction or the Sale Hearing in accordance with the Bidding Procedures; provided, however, that under no circumstance may a bid, other than the Stalking Horse Bid, qualify as a Qualified Bidder if it does not provide for the unaltered assumption and assignment of the Royalty Agreement.

7. The Debtors shall have the right, in their reasonable discretion and in consultation with the Notice Parties, to withhold or limit access to any due diligence information that the Debtors determine is business-sensitive or otherwise not appropriate for disclosure to a Qualified Bidder. Notwithstanding any prepetition limitations, including, without limitation, any non-disclosure, confidentiality, or similar provisions relating to any due diligence information, the Debtors and their estates shall be authorized to provide due diligence information to Qualified Bidders, *provided* that such Qualified Bidders have delivered an executed confidentiality agreement in form and substance acceptable to the Debtors. The Debtors and their estates are

not responsible for, and shall have no liability with respect to, any information obtained by, or provided to, any Qualified Bidders in connection with the Bidding Procedures or the Sale.

8. In accordance with and subject to the Bidding Procedures and this Bidding Procedures Order, and without prejudice to the rights of the DIP Lender under the DIP Facility or the Stalking Horse Bidder under the Stalking Horse APA, the Debtors, in the exercise of their reasonable business judgment and in a manner consistent with their fiduciary duties and applicable law, in consultation with the Notice Parties, shall have the right to modify the Bidding Procedures, including to (a) extend, modify, adjourn, or waive dates, deadlines or other terms and conditions set forth herein or in the Bidding Procedures; (b) adopt new rules and procedures for conducting the bidding and Auction process so long as any such modifications are reasonably disclosed to Qualified Bidders; and (c) promote competitive bidding for and maximizing the value of the Assets; provided, however, that under no circumstance may a bid, other than the Stalking Horse Bid, qualify as a Qualified Bidder if it does not provide for the unaltered assumption and assignment of the Royalty Agreement.

9. The Stalking Horse Protections are hereby approved. Ligand, as the Stalking Horse Bidder, is entitled to a Break-Up Fee of 3% of its \$15 million Purchase Price. The Stalking Horse Bidder shall be considered a Qualified Bidder, and a Stalking Horse Bid shall be considered a Qualified Bid without regard to any of the requirements or conditions set forth in the Bidding Procedures and without any other or further action by the Stalking Horse Bidder. As part of its Stalking Horse Bid, Ligand shall be entitled to pay the Purchase Price under the Stalking Horse APA, and fund Overbids during the Auction if there is competitive bidding, with (i) an offset, on a dollar-for-dollar basis, against the Debtors' Obligations (as defined in the DIP Facility) under the DIP Facility; and/or (ii) cash.

10. A Qualified Bidder, other than a Stalking Horse Bidder, that desires to make a bid shall deliver an electronic copy of its bid in both PDF and MS-WORD format so as to be received via email on or before **August 28, 2023, at 5:00 p.m. (ET)** (the “Bid Deadline”), by: (a) the Debtors’ proposed investment banker, Raymond James; and (b) proposed counsel to the Debtors, Morris, Nichols, Arsht & Tunnell LLP. The Debtors may extend the Bid Deadline without further order of the Court. Any party that does not submit a bid by the Bid Deadline will not be allowed to (i) submit any offer after the Bid Deadline or (ii) participate in the Auction.

11. Within one (1) business day after receipt thereof, the Debtors will deliver copies of all bids from Qualifying Bidders to the Notice Parties. The Debtors, in consultation with the Notice Parties, shall make a determination regarding whether a timely submitted bid from a Qualified Bidder is a Qualified Bid. No later than one (1) business day prior to the Auction, the Debtors shall: (a) notify all Qualified Bidders whether their bids have been determined to be a Qualified Bid; and (b) determine, in consultation with the Notice Parties, which of the Qualified Bids, at such time, is the highest or otherwise best bid for purposes of constituting the opening bid of the Auction (a “Baseline Bid” and the Qualifying Bidder submitting such Baseline Bid, a “Baseline Bidder”), and shall promptly notify all Qualified Bidders with Qualified Bids of the Baseline Bid.

12. If the Debtors do not receive a Qualified Bid other than a Stalking Horse Bid, the Stalking Horse Bid shall be deemed the Winning Bid for the Assets, and the Debtors shall request at the Sale Hearing that the Court approve such Winning Bid and the transactions contemplated thereunder for the Assets.

13. The Auction Procedures are hereby approved. If the Debtors timely receive one or more Qualified Bids for any Assets, then the Debtors shall conduct one or more auctions





pursuant to section 363(f) of the Bankruptcy Code, and shall be deemed to consent to such sale for purposes of section 363(f) of the Bankruptcy Code.

18. The Auction Notice, substantially in the form attached hereto as **Exhibit 2**, is approved, and no other or further notice of the proposed Sale of Assets, the Auction, the Sale Hearing, the Initial Sale Objection Deadline, or the Winning Bid Objection Deadline shall be required if the Debtors serve the Auction Notice in the manner provided in the Bidding Procedures and this Order.

19. The following assumption and assignment procedures (the “Assumption and Assignment Procedures”) are hereby approved:

1. On July \_\_, 2023, the Debtors served the Initial Assumption and Assignment Notice, substantially in the form attached hereto as **Exhibit 3**, via overnight delivery, on any counterparty (a “Counterparty”) to the Debtors’ universe of executory contracts and unexpired leases that may be designated Assumed Contracts. This notice included: (a) notice that such Counterparty’s contract may be subject to assumption and assignment in the Sale and thus designed an Assumed Contract; (b) the Cure Amount if any, that the Debtors believe is required to be paid to the Counterparty under section 365(b)(1)(A) and (B) of the Bankruptcy Code for such Assumed Contract; and (c) the Adequate Assurance Information of the Stalking Horse Bidder. The inclusion of any executory contract or unexpired commercial real property lease on the Initial Assumption and Assignment Notice shall not constitute an admission that a particular contract is an executory contract or unexpired lease or require or guarantee that such contract will be an Assumed Contract.
2. On or before one (1) business day after the selection of a Winning Bid or a Back-Up Bid, the Debtors shall file with this Court and serve the Additional Assumption and Assignment Notice, substantially in the form attached hereto as **Exhibit 3**, via overnight delivery, on any Counterparty to the Debtors’ universe of executory contracts and unexpired leases that may be designated as an Assumed Contract that the relevant Winning Bidder or Back-Up Bidder desires to assume as part of its Winning Bid ***that was not already listed on the Initial Assumption and Assignment Notice***. This notice shall include: (a) notice that such Counterparty’s contract may be subject to assumption and assignment in the Sale and thus designed an Assumed Contract as part of the relevant Winning Bid; (b) the cure amount if any, that the Debtors believe is required to be paid to the Counterparty under section 365(b)(1)(A) and (B) of the Bankruptcy Code



Bidder or the Winning Bidder, as applicable, that any additional defaults exist or that conditions to assumption, assignment, and transfer must be satisfied under the Assumed Contract (including, without limitation, with respect to adequate assurance of future performance by the Stalking Horse Bidder or Winning Bidder, as applicable), or that any related right or benefit under such Contract cannot and will not be available to the Stalking Horse Bidder or the Winning Bidder, as applicable; (b) any and all defaults under the Assumed Contract and any and all pecuniary losses related thereto shall be deemed cured and compensated pursuant to section 365(b)(1)(A) and (B) of the Bankruptcy Code upon payment of the applicable Cure Amount; and (c) the Cure Amount for such Assumed Contract shall be controlling, notwithstanding anything to the contrary in such Assumed Contract, or any other related document, and the Counterparty shall be deemed to have consented to the Cure Amount and shall be forever barred from asserting any other claims related to such Assumed Contract against the Debtors and their estates or the Stalking Horse Bidder or Winning Bidder, as applicable, or the property of any of them, that existed prior to the entry of the Sale Order.

6. The Debtors' decision to assume and assign any Assumed Contract to the Stalking Horse Bidder or a Winning Bidder, as applicable, is subject to this Court's approval and the closing of the Sale. Accordingly, absent this Court's approval and the closing of such Sale, the Assumed Contracts shall not be deemed assumed or assumed and assigned and shall in all respects be subject to further administration by the Debtors and their estates under the Bankruptcy Code in connection with the Chapter 11 Cases.

20. The Debtors shall use reasonable best efforts to timely implement the above Assumption and Assignment Procedures, and shall not otherwise hinder or delay the assumption and assignment of executory contracts and/or unexpired leases that the Stalking Horse Bidder or such other Qualified Bidder, as applicable, designate as Assumed Contracts as part of the Stalking Horse Bid or Qualified Bid, respectively.

21. In the event that a Winning Bidder fails to close a Sale on or before [\_\_\_\_\_], 2023, or such date as may be extended by the Debtors in consultation with the Notice Parties, and a Back-Up Bidder has been previously identified, the Debtors shall file a notice (the "Back-Up Bid Auction Notice") and serve such Back-Up Bid Auction Notice on the U.S. Trustee, the Notice Parties, and those parties who filed a request to receive

notice under Bankruptcy Rule 2002. Three (3) business days following the filing of any Back-Up Bid Auction Notice, the Back-Up Bid subject to such Back-Up Bid Auction Notice will be deemed to be the Winning Bid, the Back-Up Bidder will be deemed to be the Winning Bidder, and the Debtors shall be authorized, but not directed, to close the Sale to the Back-Up Bidder subject to the terms of the Back-Up Bid without the need for further order of the Court and without the need for further notice to any interested parties.

22. Any consultation rights provided to the Notice Parties pursuant to the Bidding Procedures shall not limit the Debtors' discretion in any way and shall not include the right to veto any decision made by the Debtors in the exercise of their business judgment. In the event that a member of a Creditors' Committee submits a bid that is a Qualified Bid, any obligation of the Debtors to consult with the bidding party, or their legal counsel, established under the Bidding Procedures will be waived without further action; *provided* that the bidding party will have the same rights as any other Qualified Bidder under the Bidding Procedures. Any failure to specifically identify consultation rights in any section of these Bidding Procedures shall not limit or otherwise impair the rights of the Notice Parties to consult with the Debtors. In the event that the Notice Parties disagree with matters for which the Debtors are required to consult with the Notice Parties, then the Notice Party shall have the right to seek relief from the Court on an expedited basis to resolve the dispute.

23. In the event that there is a conflict between this Order or the Bidding Procedures, on the one hand, and the Motion or a Qualified Bidder's Proposed APA, on the other hand, this Order and the Bidding Procedures shall control and govern. If there is a conflict between this Order and the Bidding Procedures, this Order shall control and govern. If there is a conflict between this Order or the Bidding Procedures, on the one hand, and any notice served in

connection with the Motion or this Order, on the other hand, this Order and the Bidding Procedures shall control and govern.

24. Prior to mailing any of the notices approved hereby, the Debtors may fill in, or cause to be filled in, any missing dates and other information, correct any typographical errors, conform the provisions thereof to the provisions of this Order, and make such other, non-material changes as the Debtors deem necessary or appropriate.

25. Nothing in this Order, or any of the Exhibits hereto, shall prevent the Debtors from exercising their fiduciary duties in consummating or otherwise pursuing alternative transactions.

26. This Order shall be effective immediately upon entry, and any stay of orders provided for in Bankruptcy Rules 6004(h) or 6006(d) or any other provision of the Bankruptcy Code, the Bankruptcy Rules or the Local Rules is expressly waived. The Debtors are not subject to any stay in the implementation, enforcement or realization of the relief granted in this Order, and may, in their sole discretion and without further delay, take any action and perform any act authorized or approved under this Order.

27. The requirements set forth in Local Rules 6004-1, 9006-1, and 9013-1 are hereby satisfied or waived.

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

**Exhibit 1**

**Bidding Procedures**

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

In re:	)	
	)	Chapter 11
NOVAN, INC., <i>et al.</i> , <sup>1</sup>	)	
	)	Case No. 23-10937 (LSS)
Debtors.	)	
	)	(Joint Administration Requested)
	)	

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**BIDDING PROCEDURES**

On [•], 2023, the above-captioned debtors and debtors in possession (collectively, the “Debtors”) each filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code, 11 U.S.C. §§ 101-1532 (the “Bankruptcy Code”). The Debtors are maintaining their business and managing their property as debtors in possession pursuant to section 1107(a) and 1108 of the Bankruptcy Code.

On [•], 2023, the Debtors entered into an asset purchase agreement (the “Stalking Horse APA”) with Ligand Pharmaceuticals, Incorporated (“Ligand” or the “Stalking Horse Bidder”) pursuant to which Ligand proposes to, among other things, purchase, acquire, and take assignment and delivery of the Assets (as defined below) under the Stalking Horse APA (the “Stalking Horse Bid”). The Stalking Horse Bidder, or an affiliate thereof, has provided the Debtors with postpetition financing as the DIP Lender (the “DIP Facility”), pursuant to the *Debtors’ Motion for Entry of Interim and Final Orders (I) Authorizing the 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* [D.I. [•]] (“DIP Financing Motion”).

On [•], 2023, the United States Bankruptcy Court for the District of Delaware (the “Court”) entered an order [D.I. [•]] (the “Bidding Procedures Order”), granting certain relief requested in the related motion [D.I. [•]] (the “Bidding Procedures Motion”),<sup>2</sup> including authorizing the Debtors to solicit bids in accordance with the bidding procedures set forth herein (collectively, the “Bidding Procedures”) to be employed by the Debtors in connection with a proposed sale (the “Sale”) of substantially all of the Debtors’ assets (the “Assets”), free and clear of all liens (as defined in section 101(37) of the Bankruptcy Code), encumbrances, claims (as defined in section 101(5) of the Bankruptcy Code), charges, mortgages, deeds of trust, options, pledges, security interests or similar interests, title defects, hypothecations, easements, rights of way, rights of use, encroachments, judgments, rights of setoff, conditional sale or other title retention agreements and other similar impositions, imperfections or defects of title or

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<sup>1</sup> 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.

<sup>2</sup> Capitalized terms used but not yet defined herein shall have the meaning ascribed to such terms in the Bidding Procedures Motion or the DIP Financing Motion, as applicable.

restrictions on transfer or use other than any assumed liabilities or permitted liens referenced in a Winning Bid (as defined below).

These Bidding Procedures set forth the process by which the Debtors are authorized to conduct the Sale of the Assets described more specifically below.

**ANY PARTY INTERESTED IN BIDDING ON THE ASSETS SHOULD CONTACT:**

Raymond James Securities LLC

or Morris, Nichols, Arsht & Tunnell LLP

Derek C. Abbott (No. 3376)

1201 Market Street, 16th Floor

Wilmington, Delaware 19801

Telephone: (302) 658-9200

Facsimile: (302) 658-3989

Email: [dabbott@morrisnichols.com](mailto:dabbott@morrisnichols.com)

*Proposed Investment Banker for the Debtors*

*Proposed Counsel for the Debtors*

**Summary of Key Dates Established by Bidding Procedures**

DATE	DEADLINE/EVENT
Three (3) business days after the filing of this Motion	Deadline to serve the Initial Assumption and Assignment Notice
Three (3) business days prior to the Bidding Procedures Hearing	Deadline to file Initial Contract Objections and Objections to the Private Sale Order
On or before August 11, 2023 (No later than 25 days after the Petition Date)	Bidding Procedures Hearing
Three (3) business days after entry of the Bidding Procedures Order	Deadline to serve Notice of Auction
On or before August 28, 2023 (no later than 42 days after the Petition Date)	Deadline for the submission of Qualified Bids (i.e., the Bid Deadline)
[September 8], 2023, at 4:00 p.m. (ET)	Deadline to file Initial Sale Objections
One (1) business day prior to the Auction	Deadline for Debtors to designate Qualified Bid(s) and Baseline Bid(s)
August 31, 2023 (no later than 45 days after the Petition Date)	Auction
As soon as practicable and not later than one (1) business day after cancellation or completion of the Auction	Deadline to file and serve Notice of Winning Bid(s)

One (1) business day after selection of Winning Bid	Deadline to file and serve an Additional Assumption and Assignment Notice (if applicable)
Two (2) business days prior to the Sale Hearing	Deadline to file Winning Bid Objection or Additional Contract Objections
One (1) business day prior to the Sale Hearing	Deadline to file reply to any Initial Sale Objection or Winning Bid Objection
September 8, 2023 (No later than 55 days after the Petition Date)	Sale Hearing and Entry of Sale Order
On or before September 25, 2023 (no later than 70 days after the Petition Date)	Deadline for Winning Bidder(s) to close the transaction contemplated by its Winning Bid

### 1. Assets to Be Sold

The Debtors seek to sell to the Stalking Horse Bidder—subject to the highest and best Qualified Bids of one or more Qualified Bidders other than the Stalking Horse Bidder, subject to Court approval—substantially all of the tangible and intangible Assets of the Debtors as set forth in [●] of the Stalking Horse APA and the assumption of (i) the specific liabilities of the Debtors that the Stalking Horse Bidder has listed in [●] of the Stalking Horse APA, subject to the specific limits set forth therein (the “Assumed Liabilities”), and (ii) the Cure Amounts owing under the Assumed Contracts; provided, however, that the Assets will not include:

(i) any cash, cash equivalents, accounts receivable, or other assets the Stalking Horse Bidder has identified on one or more schedules to the Stalking Horse APA of excluded assets (the “Excluded Assets”) or any liabilities the Stalking Horse Bidder has listed on one or more schedules to the Stalking Horse APA of liabilities (the “Excluded Liabilities”), or

(ii) any accounts payable or any debt or debt-like liabilities (with the understanding that, if there are any debt-like liabilities that cannot be retained by the Debtors, such as a capital lease or deferred revenue obligations, such liabilities will be assumed by the Stalking Horse Bidder, but the cash payment to be made by the Stalking Horse Bidder at the closing will be reduced by the amount thereof).

The Assets will be organized in the following two categories for the purpose of determining whether one or more Qualified Bidders have submitted one or more higher Qualified Bids for the Assets after taking into consideration the initial overbid, bid increments, and other requirements in these Bidding Procedures:

Commercial Assets, including, but not limited to, RHOFADÉ, MINOLIRA, and CLODERM, and all related patents and patent rights, other intellectual property, equipment, supplies and materials, regulatory authorizations (including new drug

applications), files and records (including clinical and pre-clinical data), and know-how (the “Commercial Assets”); and

R&D Assets, including, but not limited to, Berdazimer gel, Molluscum Contagiosum, including and all related patents and patent rights, other intellectual property, equipment, supplies and materials, regulatory authorizations (including new drug applications), files and records (including clinical and pre-clinical data), and know-how, including the manufacturing assets and leases related to same, and all other Assets that are not included in Commercial Assets (the “R&D Assets”). The purchaser of the R&D Assets must assume the Royalty Agreement (as defined below).

The sale of the Assets is on an “as is, where is” and “with all faults” basis and without representations, warranties or guarantees, express, implied or statutory, written or oral, of any kind, nature or description, by the Debtors, its affiliates or their respective representatives, except to the extent set forth in the Stalking Horse APA or the purchase agreement of such other Winning Bidder (as defined below) and as approved by the Court. Except as otherwise provided in such approved purchase agreement, all of the Debtors’ right, title and interest in and to each Asset to be acquired shall be sold free and clear of all liens, claims, interests and encumbrances (other than permitted liens), with such liens, claims, interests and encumbrances to attach to the proceeds of the Sale.

**Any general objections to the Sale, including objections to the sale of any Assets free and clear of all liens, claims, interests, and encumbrances pursuant to section 363(f) of the Bankruptcy Code to a Winning Bidder or a Back-Up Bidder (an “Initial Sale Objection”), shall be (a) be in writing, (b) comply with the Bankruptcy Code, Bankruptcy Rules, and Local Rules, (c) state with specificity the grounds for such objection, and (d) be filed with the Court and served on the Notice Parties (as defined below) no later than August 28, 2023, at 4:00 p.m. (ET).** For the avoidance of doubt, Initial Sale Objections do not include objections to the conduct at any Auction, the selection of a Winning Bid and/or Back-Up Bid, or the terms of any Sale to a Winning Bidder or the Back-Up Bidder, or the assignment of any Assumed Contracts, which need not be filed until after the filing of a Notice of Winning Bid (each term as defined below).

The Stalking Horse APA, which includes, among other things, a description of the Assets, customary representations, warranties, and covenants by and from the Debtors and Ligand, is posted in the Data Room (as defined below), and may also be obtained by Interested Parties upon request to the Debtors’ advisors.

## **2. Participation Requirements**

A person or entity (an “Interested Party”) that wishes to conduct diligence about the Debtors may request access to the Debtors’ confidential electronic data room concerning the Assets (the “Data Room”). To gain access to the Data Room, and thus be able to conduct due diligence on the Debtors and participate in the bidding process, an Interested Party must first become a “Qualified Bidder.” To become a Qualified Bidder, an Interested Party must submit to the Debtors and their advisors:

- (a) a written disclosure of each entity that will be bidding or otherwise participating in connection with such bid (including each equity holder or other financial backer of the Interested Party, including if such Interested Party is an entity formed for the purpose of consummating the proposed transactions to be set forth in a Proposed APA (as defined below) contemplated by such Interested Party), and the complete terms of any such participation. Under no circumstances shall any undisclosed principals, equity holders, or financial backers be associated with any Qualified Bid. Each Interested Party must also include the contact information for the specific person(s) and counsel whom the Debtors or their advisors should contact regarding such Qualified Bid;
- (b) a statement and other factual support demonstrating to the Debtors' satisfaction, in consultation with the Notice Parties, in the exercise of their reasonable business judgment that the Interested Party has a *bona fide* interest in purchasing some or all of the Assets;
- (c) preliminary proof by the Interested Party of its financial capacity to close the Interested Party's proposed transaction(s) to be set forth in a Proposed APA, which may include financial statements of, or verified financial commitments obtained by, the Interested Party (or, if the Interested Party is an entity formed for the purpose of acquiring the desired Assets, the party that will bear liability for a breach), the adequacy of which will be assessed by the Debtors in consultation with their advisors and the Notice Parties; and
- (d) an executed confidentiality agreement (to be delivered prior to the distribution of any confidential information by the Debtors to an Interested Party) in form and substance satisfactory to the Debtors (without limiting the foregoing, each confidentiality agreement executed by an Interested Party shall contain standard non-solicitation provisions) (each, a "Confidentiality Agreement");

An Interested Party that delivers the documents and information described above or that the Debtors determine, subject to the limitations in these Bidding Procedures, in consultation with the Notice Parties, is able to consummate the Sale, and whose Qualified Bid is received by the Debtors no later than the Bid Deadline (as defined below) is deemed qualified (a "Qualified Bidder").

For all purposes under these Bidding Procedures, the Stalking Horse Bidder will be considered a Qualified Bidder, and the Stalking Horse Bid shall be considered a Qualified Bid without regard to any of the requirements or conditions set forth herein and without any other or further action by the Stalking Horse Bidder.

**3. Procedures to Designate Stalking Horse Bidder**

The Stalking Horse Bidder will be entitled to a break-up fee of 3% of its \$15 million Purchase Price (the “Break Up Fee” or the “Stalking Horse Protections”).<sup>3</sup> The Stalking Horse Bidder shall be considered a Qualified Bidder, and a Stalking Horse Bid shall be considered a Qualified Bid without regard to any of the requirements or conditions set forth in the Bidding Procedures and without any other or further action by the Stalking Horse Bidder.

No other bidder or any other party shall be entitled to any termination or “break-up” fee, expense reimbursement, or any other bid protections in connection with the submission of a bid for any Assets, or for otherwise participating in the Auction or the sale process.

**4. Notice Parties.**

The term “Notice Parties” as used in these Bidding Procedures shall mean: (i) the Debtors; (ii) proposed counsel to the Debtors; (iii) Ligand; (iv) counsel to Ligand; and (v) proposed counsel to any official committee of unsecured creditors appointed in these Chapter 11 Cases.

**5. Bankruptcy Court Jurisdiction**

Each Qualified Bidder and any other Interested Party that seeks to become a Qualified Bidder in accordance with Section 2 above, shall: (a) be deemed to have waived any right to a jury trial in connection with, and consented and submitted to the exclusive jurisdiction of the Court over, any actions or proceedings arising from or relating the Bidding Procedures, the Sale, the Auction, and the construction and enforcement of the contemplated transaction documents of such parties; (b) bring any such action or proceeding in the Court; and (c) be deemed to have consented to the Court entering a final judgment determining any such action or proceeding and that such final judgment in any such action or proceeding, including, without limitation, all appeals, shall be conclusive and may be enforced in other jurisdictions (including, without limitation, any foreign jurisdictions) by suit on the judgment or in any other manner provided by applicable law.

**6. Due Diligence**

The Debtors will provide, in consultation with the Notice Parties, a Qualified Bidder with reasonable access to the Data Room and any other additional information that the Debtors believe to be reasonable and appropriate under the circumstances. All additional due diligence requests shall be directed to: (a) the Debtors’ proposed investment banker, Raymond James Securities LLC; and (b) the Notice Parties. The due diligence period shall extend through and

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<sup>3</sup> The Debtors shall pay the Break-Up Fee out of the proceeds of an Alternate Transaction (as defined in the Stalking Horse APA) to the Stalking Horse Bidder by wire transfer of immediately available funds to the account specified by the Stalking Horse Bidder to the Debtors in writing. No Lien of any third party (other than the DIP Lender’s) shall attach to the portion of the sale proceeds representing the Break-Up Fee. The Break-Up Fee shall be paid three (3) Business Days following the closing of an Alternate Transaction. The Break-Up Fee shall constitute an allowed superpriority administrative expense claim against the Debtors’ estates, with priority over any and all administrative expenses of any kind, including as provided in sections 363, 364, 365, 503(b), and 507(a)(2) of the Bankruptcy Code.

include the Bid Deadline (as defined below). Additional due diligence will not be provided after the Bid Deadline, unless otherwise deemed reasonably appropriate by the Debtors in consultation with the Notice Parties. The Debtors reserve the right, in consultation with the Notice Parties, to withhold or limit access to any due diligence information that the Debtors determine is business-sensitive or otherwise not appropriate for disclosure to a Qualified Bidder. Notwithstanding any prepetition limitations, including, without limitation, any non-disclosure, confidentiality, or similar provisions relating to any due diligence information, the Debtors and their estates shall be authorized, in consultation with the Notice Parties, to provide due diligence information to Qualified Bidders, *provided* that such Qualified Bidders have delivered an executed Confidentiality Agreement in form and substance acceptable to the Notice Parties. The Debtors and their estates and the Notice Parties are not responsible for, and shall have no liability with respect to, any information obtained by, or provided to, any Qualified Bidders in connection with the Bidding Procedures and the Sale.

Each Interested Party other than the Stalking Horse Bidder will comply with all reasonable requests for additional information and due diligence access by the Debtors or their advisors regarding such Interested Party and its contemplated transaction. If the Debtors, after consultation with the Notice Parties, determine at any time in their reasonable discretion that an Interested Party is not reasonably likely to be a Qualified Bidder, then the Debtors' obligation to provide due diligence information to such Interested Party will terminate, and all information provided by the Debtors prior to such time shall be returned to the Debtors in accordance with the terms of the applicable Confidentiality Agreement.

## 7. **Bid Requirements**

Other than in the case of a Stalking Horse Bid, which shall be considered a Qualified Bid, to be deemed a "Qualified Bid," a bid must be received from a Qualified Bidder on or the Bid Deadline and satisfies each of the following requirements (each, a "Bid Requirement"):

- (a) be in writing and received by the Notice Parties prior to the Bid Deadline;
- (b) fully discloses the identity of the Qualified Bidder (and to the extent that the Qualified Bidder is a newly formed acquisition entity or the like, the identity of the Qualified Bidder's parent company or sponsor), and provide the contact information of the specific person(s) whom the Debtors or their advisors should contact in the event that the Debtors have any questions or wish to discuss the bid submitted by the Qualified Bidder;
- (c) states that the applicable Qualified Bidder offers to (a) purchase, in cash, all of the Assets upon the same terms and conditions, and pursuant to the same form and substance of the Stalking Horse APA modified only by scope of purchased assets, purchase price, and identity of the purchaser, that the Debtors, in consultation with the Notice Parties, reasonably determine are higher than those set forth in the Stalking Horse APA (which determination with respect to the Commercial Assets and the R&D Assets may be made by considering bids submitted by more than one Qualified Bidder in combination); and (b) take assignment of all Assumed Contracts under Stalking Horse APA with details of the Qualified Bidder's

proposal for the treatment of related Cure Amounts and the provision of adequate assurance of future performance to the counterparties to such Assumed Contracts; provided, however, that if the Stalking Horse Bidder withdraws from the bidding process, any bid made subsequent to such withdrawal will be considered a Qualified Bid only if the bid is submitted by a Qualified Bidder and if the Debtors determine, in consultation with the Notice Parties, such bid complies with these Bidding Procedures as applicable; provided further, however, that under no circumstances may any bid of any bidder other than the Stalking Horse Bid be deemed a Qualified Bid if it does not provide for the unaltered assumption and assignment (the “Royalty Assumption”) to the bidder of that certain Development Funding and Royalties Agreement, dated as of May 4, 2019 (as amended from time to time), to which the Stalking Horse Bidder and Novan, Inc. are each a party (the “Royalty Agreement”);

- (d) includes a signed writing stating that the Qualified Bidder’s offer is irrevocable until the selection of the Winning Bidder; provided, however, that if such bidder is selected as the Winning Bidder or the Back-Up Bidder, its offer shall remain irrevocable until the closing of the Sale to the Winning Bidder or the Back-Up Bidder;
- (e) does not contain any contingencies of any kind including, without limitation, contingencies related to financial, due diligence, or internal or shareholder approvals in connection with the submission of a Qualified Bid, and there is no condition precedent to the Qualified Bidder’s ability to enter into a definitive Sale agreement;
- (f) provides the date by which the Qualified Bidder intends to close the Sale; provided, however, that the proposed closing date is on or before September 15, 2023;
- (g) contains no due diligence or financing contingencies of any kind;
- (h) includes a duly authorized and executed copy of an asset purchase agreement, which includes the purchase price for the Assets, as allocated for each asset category and in the aggregate, expressed in U.S. Dollars that are greater the \$15 million Purchase Price in the Stalking Horse APA, plus the Stalking Horse Protections plus the Minimum Continuing Bid of \$100,000, together with all exhibits and schedules thereto, together with a blackline copy to show any modifications to the Stalking Horse APA (a “Proposed APA”);
- (i) includes a proposed sale order (each, a “Proposed Sale Order”) based on the Debtors’ proposed sale order, and a Qualified Bid must also include a blackline copy of the Proposed Sale Order to show any proposed modifications to the Debtors’ proposed sale order;
- (j) specifies the liabilities proposed to be paid or assumed by such Qualified Bid;

- (k) includes financial statements or other written evidence, including (if applicable) a firm, irrevocable commitment for financing, establishing the ability of the Qualified Bidder to consummate the proposed Sale and pay the purchase price in cash, such as will allow the Debtors, in consultation with the Notice Parties, to make a reasonable determination as to the Qualified Bidder's financial and other capabilities to consummate the transaction contemplated by the Proposed APA;
- (l) states or otherwise estimates the types of transition services, if any, the Qualified Bidder would require of and/or provide to the Debtors, including an estimate of the time any such transition services would be required of and/or provided to the Debtors, if the Qualified Bidder's bid were selected as the Winning Bid for the applicable Assets;
- (m) includes an acknowledgement and representation that the bidder: (a) has had an opportunity to conduct any and all required due diligence regarding the Assets prior to making its offer; (b) has relied solely upon its own independent review, investigation and/or inspection of any documents and/or the Assets in making its bid; (c) did not rely upon any written or oral statements, representations, promises, warranties or guaranties whatsoever, whether express or implied (by operation of law or otherwise), regarding the Assets or the completeness of any information provided in connection therewith or with the Auction, except as expressly stated in the Proposed APA; and (d) is not entitled to any expense reimbursement, break-up fee, or similar type of bid-protections or payments in connection with its bid;
- (n) includes evidence, in form and substance reasonably satisfactory to the Debtors and the Notice Parties, of authorization and approval from the Qualified Bidder's board of directors (or comparable governing body) with respect to the submission, execution, delivery and closing of the Proposed APA;
- (o) is accompanied by a good faith deposit in the form of a wire transfer (to a bank account specified by the Debtors), or such other form acceptable to the Debtors, payable to the order of the Debtors (or such other party as the Debtors may determine) in an amount equal to 10% of the cash portion of the purchase price provided for in the bid (a "Deposit");
- (p) acknowledges in writing (a) that it has not engaged in any collusion with respect to any Qualified Bid, specifying that it did not agree with any other party, including, but not limited to, any other Interested Parties or interested third parties, to control price or exert undue influence over the process; and (b) agree not to engage in any such collusion or undue influence with respect to any Qualified Bids, the Auction, or the Sale process;
- (q) states that the Qualified Bidder consents to the jurisdiction of the Bankruptcy Court;

- (r) contains such financial and other information to allow the Debtors to make a reasonable determination as to the Qualified Bidder's financial and other capabilities to close the transactions contemplated by the Proposed APA, including, without limitation, such financial and other information supporting the Qualified Bidder's ability to comply with the requirements of adequate assurance of future performance under section 365(f)(2)(B) and, if applicable, section 365(b)(3) of the Bankruptcy Code, including the Qualified Bidder's financial wherewithal and willingness to perform under any Assumed Contracts ("Adequate Assurance Information"). By submitting a Bid, the Qualified Bidders agree that the Debtors may disseminate their Adequate Assurance Information to any official committee of unsecured creditors appointed in the Chapter 11 Cases (the "Creditors' Committee") and, upon request, to Counterparties;
- (s) contains such other information as may be reasonably requested by the Debtors, in consultation with the Notice Parties;
- (t) sets forth (i) a statement or evidence that the Qualified Bidder has made or will make in a timely manner all necessary filings under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended, if applicable, and pay the fees associated with such filings, and (ii) any regulatory and third-party approvals required for the Qualified Bidder to close the transactions contemplated by the Proposed APA, and the time period within which the Qualified Bidder expects to receive such regulatory and third-party approvals (and in the case that receipt of any such regulatory or third-party approval is expected to take more than five (5) days following execution and delivery of such Qualified Bidder's Proposed APA, those actions the bidder will take to ensure receipt of such approval(s) as promptly as possible); provided that a Qualified Bidder agrees that its legal counsel will coordinate in good faith with the Debtors' legal counsel to discuss and explain Qualified Bidder's regulatory analysis, strategy, and timeline for securing all such approvals as soon as reasonably practicable, and in no event later than the time period contemplated in the Proposed APA; provided, further that the offer contains a covenant to cooperate with the Debtors to provide pertinent factual information regarding the bidder's operations reasonably required to analyze issues arising with respect to any applicable antitrust laws and other applicable regulatory requirements;
- (u) provides for the Qualified Bidder to serve as the Back-Up Bidder (as defined below) if the Qualified Bidder's bid is the Back-Up Bid (as defined below), in accordance with the terms of the Proposed APA as submitted or modified at the Auction; and
- (v) provides that in the event of the Qualified Bidder's breach of, or failure to perform under, the Proposed APA, the Qualified Bidder shall forfeit its Deposit to the Debtors, and the Debtors shall be entitled to pursue all available legal and equitable remedies, including, without limitation, additional damages and/or specific performance.

A bid from a Qualified Bidder satisfying all of the above requirements, as determined by the Debtors, in consultation with the Notice Parties, shall constitute a Qualified Bid. The Debtors reserve the right to work with any Qualified Bidder in advance of the Auction to cure any deficiencies in a bid that is not initially deemed a Qualified Bid. The Debtors, in consultation with the Notice Parties, may determine that separate bids for less than all of the Assets constitute a single Qualified Bid for all, substantially all, or any portion of the Assets; *provided* that such bids must satisfy the Bid Requirements. Each Qualified Bidder submitting a bid shall be deemed to: (a) acknowledge and represent that it is bound by all of the terms and conditions of the Bidding Procedures; and (b) have waived the right to pursue a substantial contribution claim under section 503 of the Bankruptcy Code related in any way to the submission of its bid, the Bidding Procedures, and the Sale.

#### **8. Stalking Horse Bidding**

The Stalking Horse Bidder may increase its bid with cash or credit against obligations owed by the Debtors under the DIP Facility **and/or under the Prepetition Credit Agreement**. The Stalking Horse Bidder may pay the Purchase Price under the Stalking Horse APA, and fund Overbids during the Auction if there is competitive bidding, with (i) an offset, on a dollar-for-dollar basis, against the Debtors' Obligations (as defined in the DIP Facility) under the DIP Facility; and/or (ii) cash.

Notwithstanding anything to the contrary set forth in these Bidding Procedures, the Stalking Horse Bidder shall be deemed to be a Qualified Bidder and shall not be required to provide any due diligence materials (or any other materials), a Deposit, or satisfy any other Qualified Bidder requirements as a condition to its participation at the Auction and may participate in the Auction with respect to all or any portion of the Assets.

The Stalking Horse Bidder shall have the right to designate any person or entity in its sole and absolute discretion that shall take title to the Assets or a portion of the Assets.

#### **9. Bid Deadline**

A Qualified Bidder, other than a Stalking Horse Bidder, that desires to make a bid shall deliver an electronic copy of its bid in both PDF and MS-WORD format so as to be received via email on or before **August 28, 2023 at 5:00 p.m. (ET)** (the "**Bid Deadline**"), by (a) the Debtors' proposed investment banker, Raymond James Securities LLC; (b) the Debtors' proposed counsel, Morris, Nichols, Arsht & Tunnell LLP; (c) counsel to Ligand, Morgan, Lewis & Bockius LLP, 101 Park Avenue, New York, NY 10178-0060 (Attn: Craig A. Wolfe, Jason R. Alderson and David K. Shim, email: craig.wolfe@morganlewis.com, jason.alderson@morganlewis.com and david.shim@morganlewis.com); and (d) if a Committee has been appointed in these Chapter 11 Cases, counsel to the Committee. The Debtors, in consultation with the Notice Parties, may extend the Bid Deadline without further order of the Court. **Any party that does not submit a bid by the Bid Deadline will not be allowed to (x) submit any offer after the Bid Deadline or (y) participate in the Auction.**

## **10. Evaluation of Qualified Bids**

The Debtors will deliver, within one (1) business day after receipt thereof, copies of all bids from Qualifying Bidders to the Notice Parties. The Debtors, in consultation with the Notice Parties, shall make a determination regarding whether a timely submitted bid from a Qualified Bidder is a Qualified Bid.

A Qualified Bid, other than the Stalking Horse Bid, will be valued by the Debtors, in consultation with the Consultation Parties, based upon several factors including, without limitation, (1) the amount of the Purchase Price provided by such bid, (2) the nature of the consideration provided by such bid, (3) the risks and timing associated with consummating such bid, (4) any proposed revisions to the Stalking Horse APA and/or the Debtors' form of proposed Sale Order, (5) whether any Qualified Bid contains a sufficient cash component to ensure that the Debtors' estates is not rendered administratively insolvent, and (6) any other factors deemed relevant by the Debtors, in consultation with the Notice Parties.

Notwithstanding the foregoing, the only way a Qualified Bid by itself or in combination with one or more other Qualified Bids (other than of the Stalking Horse Bid) can be determined to be higher or otherwise better than the value of the Stalking Horse Bid before the commencement of competitive bidding, it must be equal to or higher than the \$15 million Purchase Price in the Stalking Horse APA, plus the Stalking Horse Protections plus the Minimum Continuing Bid of \$100,000, and provide for the assumption and assignment of the Royalty Agreement.

No later than one (1) business day prior to the Auction, the Debtors shall: (i) notify all Qualified Bidders whether their bids have been determined to be a Qualified Bid; and (ii) determine, in consultation with the Notice Parties, which of the Qualified Bids for the Assets for which a Qualified Bid has been submitted, at such time, is the highest or otherwise best bid for purposes of constituting the opening bid(s) for the applicable Assets at the Auction (each, a "Baseline Bid," and the Qualifying Bidder submitting such Baseline Bid, a "Baseline Bidder"), and promptly notify all Qualified Bidders with Qualified Bids of the Baseline Bids. For any Qualified Bid of a Qualified Bidder other than the Stalking Horse to be the Baseline Bid, it must (a) contemplate assumption and assignment of Royalty Agreement, (b) have a purchase price that it is equal to or greater than the \$15 million Purchase Price in the Stalking Horse APA, plus the Stalking Horse Protections plus the Minimum Continuing Bid of \$100,000.

## **11. No Qualified Bids**

If the Debtors do not receive any Qualified Bids other than the Stalking Horse Bid, the Debtors will not conduct the Auction for the Assets, will file with the Court within twenty-four hours after the Bid Deadline, a notice indicating that the Auction for the Assets has been canceled. In such event, the Stalking Horse Bidder will be deemed the Winning Bidder, the Stalking Horse APA will be the Winning Bid, and the Debtors will as expeditiously as possible seek final Court approval of the sale of the Assets to the Stalking Horse Bidder as contemplated by the Stalking Horse APA.

## 12. Auction

If the Debtors receive one or more Qualified Bids, the Debtors will conduct the Auction, which shall take place at 10:00 a.m. prevailing Eastern Time on \_\_\_\_\_, 2023, or such other date and time as shall be timely communicated to all entities entitled to attend the Auction. The Auction, which shall be recorded or transcribed, shall run in accordance with the following procedures (the "Auction Procedures"):

- (a) the Auction shall commence, after consulting with the Notice Parties, at the offices of proposed counsel for the Debtors, Morris, Nichols, Arsht & Tunnell LLP, 1201 North Market Street, Wilmington, Delaware 19899, or virtually via telephone or video conference pursuant to information to be timely provided by the Debtors to the Auction Participants (as defined below). The Debtors shall file notice of any change in the date, time, or location of the Auction.
- (b) only Qualified Bidders with Qualified Bids, including the Stalking Horse Bidder (collectively, the "Auction Bidders, and each, an "Auction Bidder") shall be entitled to make any subsequent bids at the Auction;
- (c) the Auction Bidders shall appear at the Auction, or through a duly authorized representative;
- (d) only (i) the Debtors, (ii) the Auction Bidders, (iii) the Notice Parties, (iv) any other creditor of the Debtors who desires to attend the Auction and provides no less than three (3) days' advance written notice, together with the advisors to each of the foregoing parties, may attend the Auction (collectively, the "Auction Participants"). Each Auction Participant shall provide counsel for the Debtors written notice of their intent to attend the Auction no later than 5:00 p.m. (ET), three (3) days prior to the Auction, to proposed counsel for the Debtors, Morris Nichols, Arsht & Tunnell LLP; provided, however, that in the event an Auction Bidder elects not to attend the Auction, such Auction Bidder's Qualified Bid shall nevertheless remain fully enforceable against such Auction Bidder until the selection of the Winning Bidder and Back-Up Bidder at the conclusion of the Auction; provided further, however, that if such bidder is selected as the Winning Bidder or the Back-Up Bidder, its offer shall remain irrevocable until the closing of the Sale to the Winning Bidder or the Back-Up Bidder. Prior to the time scheduled for the commencement of the Auction (as provided in these Bidding Procedures), the Debtors may provide to all Auction Bidders (including the Stalking Horse Bidder) copies of each Qualified Bid and identify to them the Qualified Bid that the Debtors believe, after consultation with the Notice Parties, is the Baseline Bid;
- (e) the Debtors and their advisors shall direct and preside over the Auction, which shall be transcribed;

- (f) prior to start of the Auction, each Auction Bidder shall confirm that it has not engaged in any collusion, within the meaning of Section 363(n) of the Bankruptcy Code, with respect to the Bidding Procedures, the Auction, or the Sale;
- (g) bidding at the Auction will begin with the Baseline Bid and continue in bidding increments (each, a “Subsequent Bid”) providing a value to the Debtors’ estates of at least \$100,000 in additional cash (the “Minimum Continuing Bid”), or such other amount determined by the Debtors in consultation with the Notice Parties, above the prior bid or collection of bids (each, an “Overbid”); provided, however, that the such cash requirement for Overbids shall not apply to Stalking Horse Bidder, which may fund Overbids via offsets against the Debtors’ obligations under the DIP Facility as provided in Paragraph 8 above. After each round of bidding, the Debtors, after consultation with the Notice Parties, shall announce the bid (and the value of such bid) that they believe to be the highest or otherwise bid (each, the “Leading Bid”);
- (h) Any Overbid made from time to time by a Qualified Bidder must remain open and binding on the Qualified Bidder until and unless (i) the Debtors accept a bid submitted by another Qualified Bidder during the Auction as an Overbid and (ii) such prior Overbid is not selected as the Back-Up Bid. To the extent not previously provided (which will be determined by the Debtors in consultation with the Notice Parties), a Qualified Bidder submitting an Overbid must submit at the Debtors’ request (in consultation with the Notice Parties), as part of its Overbid, written evidence (in the form of financial disclosure or credit-quality support information or enhancement reasonably acceptable to the Debtors in consultation with the Notice Parties) demonstrating such Qualified Bidder’s ability to close the transaction at the purchase price contemplated by such Overbid;
- (i) a round of bidding will conclude after each participating Qualified Bidder has had the opportunity to submit a Subsequent Bid with full knowledge of the Leading Bid from the previous round, which must include the Overbid;
- (j) except as specifically set forth herein, for the purpose of evaluating the value of the Purchase Price provided by each Subsequent Bid (including any Subsequent Bid by the Stalking Horse Bidder), the Debtors may give effect to the Break-Up Fee as well as any additional liabilities to be assumed by a Qualified Bidder, and any additional costs which may be imposed on the Debtors;
- (k) the Auction may include individual negotiations with any of the Auction Bidders, but all bids shall be made on the record;
- (l) all material terms of the bid that is deemed to be the highest or otherwise best bid for each round of bidding shall be fully disclosed to the Auction Bidders, and the Debtors shall use reasonable efforts to clarify any questions that the Auction Bidders may have regarding the Debtors’ announcement of the then-current highest or otherwise best bid;

- (m) the Debtors and their advisors, in consultation with the Notice Parties, may employ and announce at the Auction additional or amended procedural rules that are reasonable under the circumstances for conducting the Auction, *provided* that such rules (i) are not inconsistent with the Bankruptcy Code, the Bankruptcy Rules, the Local Rules, or any order of the Court entered in connection with the Chapter 11 Cases; and (ii) are disclosed to the Auction Bidders;
- (n) the Auction Bidders shall (i) be deemed to have waived any right to a jury trial in connection with, and consented and submitted to the exclusive jurisdiction of the Court over, any actions or proceedings arising from or relating the Bidding Procedures, the Sale, the Auction, and the construction and enforcement of the contemplated transaction documents of the Auction Bidders, (ii) bring any such action or proceeding in the Court, and (iii) be deemed to have consented to the Court entering a final judgment determining any such action or proceeding and that such final judgment in any such action or proceeding, including, without limitation, all appeals, shall be conclusive and may be enforced in other jurisdictions (including any foreign jurisdictions) by suit on the judgment or in any other manner provided by applicable law;
- (o) a “Winning Bid” shall: (i) if the Auction for the Assets is cancelled because only the Stalking Horse Bid is submitted on or before the Bid Deadline, be the Stalking Horse Bid; or (ii) if the Auction is conducted, be the Qualified Bid that the Debtors determine at the conclusion of the Auction, in consultation with the Notice Parties, and subject to Court approval, is or are the offer or offers for the relevant Assets that is or are the highest or otherwise best from among the Qualified Bids submitted at the Auction; provided, however, that if the Stalking Horse Bidder withdraws from the bidding process, the Debtors’ selection of the Winning Bid(s) for the Assets from among the other Qualified Bidders at the conclusion of the Auction shall each require the consent of Ligand. In the case of (ii), in making this decision, the Debtors shall consider, in consultation with the Notice Parties (and with the consent of Ligand if the Stalking Horse Bidder withdraws from the bidding process), the amount of the purchase price, the assumption of liabilities, the transaction structure, and execution risk, including, without limitation, the likelihood of the bidder’s ability to close a transaction and the timing thereof, the number, type, and nature of any changes to the Stalking Horse APA submitted with the Winning Bid, as applicable, requested by each bidder, the total consideration to the Debtors’ estates, and any other factors the Debtors may deem relevant. The bidder submitting the Winning Bid shall become the “Winning Bidder,” and shall have such rights and responsibilities of the purchaser as set forth in such Winning Bid, with all modifications made at the Auction. The Debtors may, in their business judgment and in consultation with the Notice Parties, designate the Back-Up Bid (and the corresponding Back-Up Bidder) to purchase the applicable Assets in the event that the applicable Winning Bidder does not close the Sale; provided, however, that if the Stalking Horse Bidder withdraws from the bidding process, the Debtors’ selection of the Back-Up Bidder from the other Qualified Bidders at the conclusion of the Auction shall require the consent of Ligand;

- (p) The Qualified Bidder(s) with the next highest or otherwise best Qualified Bid or collection of Qualified Bids (each, a “Back-Up Bid”), as determined by the Debtors in consultation with the Notice Parties will be required to serve as a back-up bidder (each, a “Back-Up Bidder”) and keep its bid open and irrevocable until the earlier to occur of (i) sixty (60) days after the Sale Hearing and (ii) closing on the Winning Bid with the Winning Bidder. The Stalking Horse Bidder shall not be required to serve as the Back-Up Bidder unless the Stalking Horse Bidder submits a Subsequent Bid at the Auction;
- (q) within one (1) business day of the selection of any Winning Bid(s), the Debtors shall file a notice with the Court (a “Notice of Winning Bid”) that sets forth: (i) the identity of the Winning Bidder(s) and any Back-Up Bidder; (ii) the amount of the Winning Bid and any Back-Up Bid; (iii) a summary of the Assets subject to the Winning Bid; and (iv) whether the Winning Bidder or the Back-Up Bidder have any connections to the Debtors other than those arising from their respective bids;
- (r) in the event a Winning Bid or Back-Up Bid requires the assumption and assignment of any Assumed Contracts, then the Debtors shall comply with the Assumption and Assignment Procedures (as defined below);
- (s) within one (1) business day of the close of the Auction, any Winning Bidder and any Back-Up Bidder, except if the Winning Bidder or Back-Up Bidder is the Stalking Horse Bidder, shall supplement their respective Deposit, if necessary, such that the Deposit shall be equal to an amount that is ten (10%) percent of the purchase price set forth in the applicable Winning Bid and Back-Up Bid; and
- (t) prior to the Sale Hearing, any Winning Bidder shall complete and execute all agreements, contracts, instruments and other documents evidencing and containing the terms and conditions upon which the Winning Bid was made.

**EACH QUALIFIED BID THAT IS NOT A WINNING BID OR BACK-UP BID SHALL BE DEEMED WITHDRAWN AND TERMINATED AT THE CONCLUSION OF THE SALE HEARING.**

### **13. Sale Hearing and Winning Bid Objections**

The Debtors will seek entry of an order from the Court at a hearing (the “Sale Hearing”) to begin on or before \_\_\_\_\_, 2023 at :00 a./p.m (prevailing Eastern Time), subject to the availability of the Court, to approve and authorize the Sale to the Winning Bidder (the “Sale Order”) and approval of the Back-Up Bid. Subject to the terms of the DIP Facility and the Stalking Horse APA, the Debtors reserve the right to change the date and/or time of the Sale Hearing (or any other dates related to the Sale) to achieve the maximum value for the Purchased Assets.

**Any objection relating solely to the conduct of the Auction, the Auction results, the selection of any Winning Bid or Back-Up Bid, or the terms of any Sale to a Winning Bidder or a Back-Up Bidder (each, a “Winning Bid Objection”), must be (a) be in writing,**

**(b) comply with the Bankruptcy Code, Bankruptcy Rules, and Local Rules, (c) state with specificity the grounds for such objection, and (d) be filed with the Court and served on the Notice Parties on or before [•], 2023, at 4:00 p.m. (ET).**

Any party who fails to file and serve a timely Initial Sale Objection or Winning Bid Objection shall be forever barred from asserting, at the Sale Hearing or thereafter, any Initial Sale Objection or Winning Bid Objection, including any such objection to the Bidding Procedures or to the consummation or performance of the sale of the Assets, including the transfer of Assets to the applicable Winning Bidder free and clear of liens, claims, interests, and encumbrances pursuant to section 363(f) of the Bankruptcy Code, and shall be deemed to consent to such sale for purposes of section 363(f) of the Bankruptcy Code.

**14. Back-Up Bidder**

Notwithstanding any of the foregoing, in the event that a Winning Bidder fails to close a Sale on or before [•], 2023, or such date as may be extended by the Debtors in consultation with the Notice Parties, and a Back-Up Bidder has been previously identified, the Debtors shall file a notice (the “Back-Up Bid Auction Notice”) and serve such Back-Up Bid Auction Notice on the U.S. Trustee, the Notice Parties, any Counterparties to Assumed Contracts subject to the Back-Up Bid, and those parties who filed a request to receive notice under Bankruptcy Rule 2002. Three (3) business days following the filing of any Back-Up Bid Auction Notice, the Back-Up Bid subject to such Back-Up Bid Auction Notice will be deemed to be the Winning Bid, the Back-Up Bidder will be deemed to be the Winning Bidder, and the Debtors shall be authorized, but not directed, to close the Sale to the Back-Up Bidder subject to the terms of the Back-Up Bid without the need for further order of the Court and without the need for further notice to any other parties.

**15. Assumption and Assignment Procedures**

In the event a Winning Bid or Back-Up Bid provides for the assumption and assignment of Assumed Contracts, the Debtors shall follow following assumption and assignment procedures (the “Assumption and Assignment Procedures”) set forth in paragraph 19 of the Bidding Procedures Order.

**16. Return of Deposits**

All Deposits not used as part of the consummation of a Sale or not retained by the Debtors as part of damages shall be returned to each bidder not selected as a Winning Bidder no later than five (5) business days following the closing of the Sale. The Deposit of a Winning Bidder shall be applied to the purchase price for the Sale. If the Winning Bidder for a Sale fails to consummate the Sale because of a breach or failure to perform on the part of such bidder, then, subject to the terms of the Proposed APA, the Debtors and their estates shall be entitled to retain the Deposit of the Winning Bidder as part of the damages resulting to the Debtors and their estates for such breach or failure to perform. For the avoidance of doubt, the Debtors’ retention of a Deposit shall not constitute a waiver of any of the Debtors’ legal or equitable rights relating to a Winning Bidder’s breach or failure to perform, and all such rights and remedies are preserved.

**17. Consultation Rights**

Any consultation rights provided to the Notice Parties by these Bidding Procedures shall not limit the Debtors' discretion in any way and shall not include the right to veto any decision made by the Debtors in the exercise of their business judgment. In the event that a member of the Creditors' Committee submits a bid that is a Qualified Bid, any obligation of the Debtors to consult with the bidding party, or their legal counsel, established under these Bidding Procedures will be waived without further action; *provided* that the bidding party will have the same rights as any other Qualified Bidder set forth herein.

Any failure to specifically identify consultation rights in any section of these Bidding Procedures shall not limit or otherwise impair the rights of the Notice Parties to consult with the Debtors. In the event that the Notice Parties disagree with matters for which the Debtors are required to consult with the Notice Parties, then the Notice Party shall have the right to seek relief from the Court on an expedited basis to resolve the dispute.

**18. Reservation of Rights**

Without prejudice to the rights of the DIP Lender under the DIP Facility or the rights of the Stalking Horse Bidder under the Stalking Horse APA, and except as otherwise provided in these Bidding Procedures, the Bidding Procedures Order or the Debtors' proposed form of Sale Order, the Debtors further reserve the right as they may reasonably determine to be in the best interest of their estates (in consultation with the Notice Parties), to: (a) determine which bidders are Qualified Bidders; (b) determine which bids are Qualified Bids; (c) determine which Qualified Bid is the highest and best proposal and which is the next highest and best proposal; (d) reject any bid that is (i) inadequate or insufficient, (ii) not in conformity with the requirements of these Bidding Procedures or the requirements of the Bankruptcy Code or (iii) contrary to the best interests of the Debtors and their estates; (e) impose additional terms and conditions with respect to all potential bidders other than the Stalking Horse Bidder; (f) modify these Bidding Procedures and/or implement additional procedural rules that the Debtors determine will better promote the goals of the bidding process; (g) extend the deadlines set forth herein; and (h) continue or cancel the Auction and/or Sale Hearing in open court without further notice or by filing a notice on the docket. Before extending any deadline, the Debtor shall consult with the Notice Parties and the DIP Lender.

**Exhibit 2**

**Form of Auction Notice**

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

In re:	)	
	)	Chapter 11
NOVAN, INC., <i>et al.</i> , <sup>1</sup>	)	
	)	Case No. 23-10937 (LSS)
Debtors.	)	
	)	(Joint Administration Requested)
	)	

---

**NOTICE OF SALE, BIDDING PROCEDURES, AUCTION,  
SALE HEARING, AND OTHER DEADLINES RELATED HERETO**

**PLEASE TAKE NOTICE OF THE FOLLOWING:**

On [•], 2023, the above-captioned debtors and debtors in possession (collectively, the “Debtors”) in the above-captioned chapter 11 cases (the “Chapter 11 Cases”), filed with the United States Bankruptcy Court for the District of Delaware (the “Court”) a motion [D.I. [•]] (the “Bidding Procedures Motion”),<sup>2</sup> seeking entry of (a) an order (the “Bidding Procedures Order”): (i) approving bidding procedures (the “Bidding Procedures”) to be used in connection with one or more sales (each a “Sale”) of the Debtors’ assets (the “Assets”) free and clear of all liens, claims, interests, and encumbrances, (ii) authorizing the Debtors to designate Ligand Pharmaceuticals, Incorporated (“Ligand”) as the Stalking Horse Bidder for all of the Assets in connection with considering the entry of the Bidding Procedures Order, (iii) scheduling an auction of the Assets (the “Auction”); (iv) approving the form and manner of service of this Notice of Sale; (v) approving procedures for the assumption and assignment of executory contracts and unexpired leases (collectively, “Assumed Contracts”) in connection with any Sale; (vi) approving the form and manner of service of notice to each relevant non-debtor counterparty to an Assumed Contract (each a “Counterparty”) of the proposed assumption and assignment of such Counterparty’s Assumed Contract; (vii) scheduling a final hearing to consider approval of the proposed Sale(s) (the “Sale Hearing”); and (vi) granting related relief; and (b) one or more orders (each, a “Sale Order”) (i) authorizing a Sale of the Assets free and clear of all liens, claims, interests, and encumbrances; (ii) authorizing the assumption and assignment of certain Assumed Contracts in connection with the approved Sale; and (iii) granting related relief.

On [•], 2023, the Court entered the Bidding Procedures Order [D.I. [•]].

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<sup>1</sup> 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.

<sup>2</sup> Capitalized terms used but not defined herein shall have the respective meanings given to them in the Motion or the Bidding Procedures, as applicable. Any summary of the Bidding Procedures or the Bidding Procedures Order (or any provision thereof) contained herein is qualified in its entirety by the actual terms and conditions thereof. To the extent that there is any inconsistency between any summary in this Notice of Sale and the terms and conditions of either of the Bidding Procedures or the Bidding Procedures Order, the actual terms and conditions in those documents shall control.

## ASSETS FOR SALE

The Debtors intend to sell all, substantially all, or a portion of the Assets.

Any Qualified Bidder may submit a bid for the R&D Assets, the Commercial Assets, or all of the Assets, subject to the conditions set forth herein. The ability to undertake and consummate a Sale shall be subject to competitive bidding, as set forth herein and in the Bidding Procedures Order, and approval by the Court.

Any party interested in submitting a bid for any of the Debtors' Assets should contact (a) the Debtors' proposed investment banker, Raymond James Securities LLC; and (b) the Debtors' proposed counsel, Morris, Nichols, Arsht & Tunnell LLP.

## KEY DATES AND DEADLINES

### **A. Bid Deadline**

Any Qualified Bidder that intends to participate in the Auction must submit a Qualified Bid in accordance with Section 8 of the Bidding Procedures, on or before **[•], 2023, at 5:00 p.m. (ET)** (the "Bid Deadline").

### **B. Auction**

If the Debtors timely receive one or more Qualified Bids other than the Stalking Horse Bid for any Assets, then the Debtors shall conduct one or more Auctions. If the Debtors do not receive more than one Qualified Bid other than the Stalking Horse Bid, the Debtors shall cancel the Auction(s) for the Assets, deem the Stalking Horse Bid as the Winning Bid for the Assets, and shall request at the Sale Hearing that the Court approve the Stalking Horse Bid and the transactions contemplated thereunder for the Assets.

The Auction, if required, will commence on **[•], 2023, at [•] (ET)**, at the offices of proposed counsel for the Debtors, Morris, Nichols, Arsht & Tunnell LLP, 1201 North Market Street, 16th Floor, Wilmington, Delaware 19899, or virtually via telephone or video conference pursuant to information to be timely provided by the Debtors to the Auction Participants. If the Debtors conduct the Auction virtually, the Debtors will provide instructions setting forth how to attend the Auction to the Auction Participants via electronic mail. The Debtors will provide notice (via electronic mail or otherwise) of any change in the date, time, or location of any Auction to the relevant Qualified Bidders, and will cause publication of such change to occur on the website of the Debtors' claims and noticing agent, Kurtzman Carson Consultants LLC.

Within one (1) business day of the selection of any Winning Bid(s), the Debtors shall file a Notice of Winning Bid with the Court that sets forth: (i) the identity of the Winning Bidder(s) and any Back-Up Bidder; (ii) the amount of the Winning Bid and any Back-Up Bid; (iii) a summary of the Assets subject to the Winning Bid; and (iv) whether the Winning Bidder or the Back-Up Bidder have any connections to the Debtors other than those arising from their respective bids.

**C. Sale Objection Deadlines**

- i. Initial Sale Objection Deadline. Objections to a Sale of the Assets, including any general objections to the Sale and objections to the Sale of any Assets free and clear of all liens, claims, interests, and encumbrances pursuant to section 363(f) of the Bankruptcy Code to the Stalking Horse Bidder, a Winning Bidder or a Back-Up Bidder, must (a) be in writing, (b) comply with the Bankruptcy Code, Bankruptcy Rules, and Local Rules, (c) state with specificity the grounds for such objection, and (d) be filed with the Court and served on (i) the Debtors; (ii) proposed counsel to the Debtors; (iii) counsel to Ligand; and (iv) proposed counsel to any official committee of unsecured creditors appointed in these Chapter 11 Cases (the “Objection Notice Parties”) on or before **[•], 2023, at 4:00 p.m. (ET)**.
- ii. Winning Bid Objection Deadline. Any objection relating solely to the conduct of the Auction, the Auction results, the selection of any Winning Bid or Back-Up Bid, or the terms of any Sale to a Winning Bidder or a Back-Up Bidder, which could not have been raised by the Initial Sale Objection Deadline, must (a) be in writing, (b) comply with the Bankruptcy Code, Bankruptcy Rules, and Local Rules, (c) state with specificity the grounds for such objection, and (d) be filed with the Court and served on the Objection Notice Parties on or before **[•], 2023, at 4:00 p.m. (ET)**.

**D. Sale Hearing**

The Sale Hearing shall take place on **[•], 2023, at \_\_:\_\_ .m. (ET)**, before The Honorable **[•]**, United States Bankruptcy Judge, in the United States Bankruptcy Court for the District of Delaware, located at 824 N. Market Street, Wilmington, Delaware 19801.

**RESERVATION OF RIGHTS TO MODIFY BIDDING PROCEDURES**

In accordance with and subject to the Bidding Procedures and the Bidding Procedures Order, and without prejudice to the rights of the DIP Lender under the DIP Facility or the Stalking Horse Bidder under the Stalking Horse APA, the Debtors, in the exercise of their reasonable business judgment and in a manner consistent with their fiduciary duties and applicable law, in consultation with the Notice Parties, shall have the right to modify the Bidding Procedures, including to (a) extend, modify, adjourn, or waive dates, deadlines or other terms and conditions set forth herein or in the Bidding Procedures; (b) adopt new rules and procedures for conducting the bidding and Auction process so long as any such modifications are reasonably disclosed to Qualified Bidders; and (c) promote competitive bidding for and maximizing the value of the Assets; provided, however, that under no circumstance may a bid, other than the Stalking Horse Bid, qualify as a Qualified Bidder if it does not provide for the unaltered assumption and assignment of the Royalty Agreement.

**ADDITIONAL INFORMATION**

Copies of the Bidding Procedures Motion, the Bidding Procedures, the Bidding Procedures Order, and all other documents filed with the Court may be obtained free of charge by visiting the Kurtzman Carson Consultants LLC Website, or can be requested by calling Kurtzman Carson Consultants LLC at: [ ] (Domestic) or [ ] (International).

**FAILURE TO ABIDE BY THE BIDDING PROCEDURES, THE BIDDING PROCEDURES ORDER, OR ANY OTHER APPLICABLE ORDER OF THE COURT ENTERED IN THESE CHAPTER 11 CASES MAY RESULT IN THE REJECTION OF YOUR BID AND YOUR DISQUALIFICATION FROM PARTICIPATING IN THE BIDDING FOR AND AUCTION OF ANY OF THE ASSETS.**

**THE FAILURE OF ANY PERSON OR ENTITY TO TIMELY FILE AND SERVE AN OBJECTION IN ACCORDANCE WITH THE BIDDING PROCEDURES ORDER, INCLUDING THE FAILURE TO FILE ANY SUCH OBJECTION BY THE APPLICABLE OBJECTION DEADLINE, SHALL FOREVER BAR SUCH PERSON OR ENTITY FROM ASSERTING, AT THE SALE HEARING OR THEREAFTER, ANY SUCH OBJECTION TO THE RELIEF REQUESTED IN THE MOTION, THE CONSUMMATION OF ANY APPLICABLE SALE, INCLUDING THE SALE OF ANY ASSETS TO A SUCCESSFUL BIDDER FREE AND CLEAR OF LIENS, CLAIMS, INTERESTS, AND ENCUMBRANCES, PURSUANT TO SECTION 363(f) OF THE BANKRUPTCY CODE OR THE TERMS OF ANY STALKING HORSE AGREEMENT OR OTHER ASSET PURCHASE AGREEMENT EXECUTED BY THE DEBTORS.**

Dated:  
Wilmington, Delaware

Respectfully submitted,

*/s/ DRAFT*

---

**MORRIS, NICHOLS, ARSHT & TUNNELL LLP**

Derek C. Abbott (No. 3376)

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[sjones@morrisnichols.com](mailto:sjones@morrisnichols.com)

*Proposed Counsel to the Debtors and  
Debtors in Possession*

**Exhibit 3**

**Form of Assumption and Assignment Notice**

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

In re:	)	
	)	Chapter 11
NOVAN, INC., <i>et al.</i> , <sup>1</sup>	)	
	)	Ca Case No. 23-10937 (LSS)
Debtors.	)	
	)	(Joint Administration Requested)
	)	<b>Objection Deadline:</b> _____, 2023

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**NOTICE OF POSSIBLE ASSUMPTION AND ASSIGNMENT OF  
CERTAIN EXECUTORY CONTRACTS AND UNEXPIRED LEASES**

PLEASE TAKE NOTICE that, on [•], 2023 (the “Petition Date”), the above-captioned debtors and debtors in possession (collectively, the “Debtors”) each filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”) in the United States Bankruptcy Court for the District of Delaware (the “Court”), commencing these chapter 11 cases (the “Chapter 11 Cases”).

PLEASE TAKE FURTHER NOTICE that, on [•], 2023, the Debtors filed a motion [D.I. [•]] (the “Bidding Procedures Motion”) seeking entry of (a) an order (the “Bidding Procedures Order”), (i) approving bidding procedures (the “Bidding Procedures”) to be used in connection with one or more sales (each a “Sale”) of the Debtors’ assets (the “Assets”) free and clear of all liens, claims, interests, and encumbrances, (ii) authorizing the Debtors to designate one or more affiliates of Ligand Pharmaceuticals, Incorporated or its designee (“Ligand”) as the Stalking Horse Bidder for all of the Assets in connection with considering the entry of the Bidding Procedures Order, (iii) scheduling an auction of the Assets (the “Auction”); (iv) approving the form and manner of service of this Notice of Sale; (v) approving procedures for the assumption and assignment of executory contracts and unexpired leases (collectively, “Assumed Contracts”) in connection with any Sale; (vi) approving the form and manner of service of notice to each relevant non-debtor counterparty to an Assumed Contract (each a “Counterparty”) of the proposed assumption and assignment of such Counterparty’s Assumed Contract; (vii) scheduling a final hearing to consider approval of the proposed Sale(s) (the “Sale Hearing”); and (vi) granting related relief; and (b) one or more orders (each, a “Sale Order”) (i) authorizing a Sale of the Assets free and clear of all liens, claims, interests, and encumbrances; (ii) authorizing the assumption and assignment of certain Assumed Contracts in connection with the approved Sale; and (iii) granting related relief; and (b) one or more orders of the Court (collectively, the “Sale Orders”):<sup>2</sup> (i) authorizing the sale of the Debtors’ Assets free and clear of all liens, claims, interests, and encumbrances, except as provided in the Sale Order; (ii) authorizing the assumption and assignment of certain Assumed Contracts in connection with

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<sup>1</sup> 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.

<sup>2</sup> A copy of the proposed form of Sale Order(s) will be filed in advance of the Sale Hearing.

the Sale(s); and (iii) granting related relief; or (c) in the event the Bankruptcy Court does not enter the Bidding Procedures Order or the DIP Order on or before 25 calendar days after the Petition Date, a Sale Order, in the form attached hereto as Exhibit B (the “Private Sale Order”) (i) authorizing the sale to Ligand of the Debtors’ Assets free and clear of all liens, claims, interests, and encumbrances in accordance with the Stalking Horse Agreement (as defined below) attached to the Private Sale Order as Exhibit 1; (ii) authorizing the assumption and assignment of certain Assumed Contracts in connection with the Sale; and (iii) granting related relief.

**PLEASE TAKE FURTHER NOTICE** that, on [●], 2023, the Court entered the Bidding Procedures Order [D.I. [●]], approving, among other things, the Bidding Procedures, which establish key dates and times relating to the Sale and the Auction. All interested bidders should carefully read the Bidding Procedures Order and the Bidding Procedures in their entirety.

**PLEASE TAKE FURTHER NOTICE** that, upon the closing of the Sale, including a potential Sale to Ligand pursuant to the proposed Private Sale Order, the Debtors intend to assume and assign to such purchaser (the “Purchaser”) certain executory contracts and unexpired leases (the “Assumed Contracts”). A schedule listing the contracts and leases that may potentially be assumed and assigned as part of the Sale is attached hereto as **Exhibit 1** (the “Contracts Schedule”) and may also be viewed free of charge on the Debtors’ case information website, located at [https://\[●\]](https://[●]), or can be requested by calling the Debtors’ claims and noticing agent, Kurtzman Carson Consultants LLC.

**PLEASE TAKE FURTHER NOTICE** that Cure Amounts, if any, for the assumption and assignment of such contracts and leases are also set forth on the Contracts Schedule. Each Cure Amount listed on the Contracts Schedule represents all liabilities of any nature of the Debtors arising under a contract or lease prior to the closing of the Sale or other applicable effective date of the assumption and assignment of such contract or lease, whether known or unknown, whether due or to become due, whether accrued, absolute, contingent or otherwise, so long as such liabilities arise out of or relate to events occurring prior to the closing of the Sale or other applicable effective date of the assumption and assignment of such contract or lease.

**YOU ARE RECEIVING THIS NOTICE BECAUSE YOU HAVE BEEN IDENTIFIED AS A COUNTERPARTY TO A CONTRACT OR LEASE THAT MAY BE ASSUMED AND ASSIGNED AS PART OF THE SALE.** *The presence of a contract or lease listed on Exhibit 1 attached hereto does not constitute an admission that such contract or lease is an executory contract or unexpired lease or that such contract or lease will be assumed and assigned as part of the Sale. The Debtors reserve all their rights, claims and causes of action with respect to the contracts and leases listed on Exhibit 1 attached hereto.*

### **Filing Objections**

Pursuant to the Assumption and Assignment Procedures, objections to the proposed assumption and assignment of a contract or lease on any basis (other than objections related solely to adequate assurance of future performance by a Successful Bidder other than the Stalking Horse Bidder, if any), including, without limitation, on the basis (i) of adequate

assurance of the Stalking Horse Bidder's future ability to perform; (ii) of the transfer of any related rights or benefits thereunder; (iii) that consent is allegedly required from any Counterparty for the assumption, assignment, and transfer of the Assumed Contract; (iv) relating to Cure Amounts, must (1)(a) be in writing; (b) state the basis for such objection; and (c) if such objection is to the Cure Amount, state with specificity what Cure Amount the counterparty believes is required (in all cases, with appropriate documentation in support thereof) and (2) be filed with the Court and served no later than [•], **2023 at 4:00 p.m. (ET)** on the following parties (collectively, the "Objection Notice Parties"): (a) counsel to the Debtors: [•]; (b) counsel to Ligand [•]; (c) counsel to the Committee, [•]; (d) the Office of the U.S. Trustee for Region 3, 844 King Street, Suite 2207, Wilmington, Delaware 19801, Attn: [•]; [and (e) any Successful Bidders.]

If not the Stalking Horse Bidder, the Debtors shall file a notice identifying the Successful Bidder(s) and Backup Bidder(s) (if selected) (the "Notice of Successful Bidder") and shall serve the Notice of Successful Bidder on each counterparty to a potential Assumed Contract as soon as reasonably practicable after closing the Auction, if any. Each counterparty to a potential Assumed Contract will then have an opportunity to object to the identity of the Successful Bidder(s) (other than the Stalking Horse Bidder, if any) or adequate assurance of future performance with respect to such counterparty's contract or lease provided by the Successful Bidder(s), which must (i) be in writing, (ii) comply with the Bankruptcy Code, Bankruptcy Rules and Local Rules, (iii) state, with specificity, the legal and factual bases thereof, (iv) be filed with the Court by [•], **2023 at 4:00 p.m. (ET)** (the "Adequate Assurance Objection Deadline"), and (v) be served on the Objection Notice Parties.

The Court will hear and determine any objections to the assumption and assignment of the Assumed Contracts to the Purchaser at the Sale Hearing or at a later hearing, as determined by the Debtors. The Sale Hearing to consider the proposed Sale shall be held before the Honorable [•] on [•] (**prevailing Eastern Time**), or such other date as determined by the Court, at the United States Bankruptcy Court for the District of Delaware, 824 North Market Street, [•] Floor, Courtroom No. [•], Wilmington, Delaware 19801.

### **Consequences of Failing to Timely Assert an Objection**

**UNLESS YOU FILE AN OBJECTION TO THE CURE AMOUNT AND/OR THE ASSUMPTION OR ASSIGNMENT OF YOUR CONTRACT OR LEASE IN ACCORDANCE WITH THE INSTRUCTIONS AND DEADLINES SET FORTH HEREIN, YOU SHALL BE (A) BARRED FROM OBJECTING TO THE CURE AMOUNT SET FORTH ON EXHIBIT 1, (B) ESTOPPED FROM ASSERTING OR CLAIMING ANY CURE AMOUNT AGAINST THE DEBTORS, THE STALKING HORSE BIDDER, IF ANY, OR OTHERWISE SUCCESSFUL BIDDER(S) THAT IS GREATER THAN THE CURE AMOUNT SET FORTH ON EXHIBIT 1 AND (C) DEEMED TO HAVE CONSENTED TO THE ASSUMPTION BY THE DEBTORS AND ASSIGNMENT OR TRANSFER (INCLUDING THE TRANSFER OF ANY RELATED RIGHTS AND BENEFITS THEREUNDER) TO THE STALKING HORSE BIDDER OR SUCCESSFUL BIDDER, AS APPLICABLE, OF THE YOUR CONTRACT OR LEASE AND THE ADEQUACY OF ASSURANCE OF FUTURE PERFORMANCE**

**THEREUNDER, AND BE FOREVER BARRED AND ESTOPPED FROM ASSERTING OR CLAIMING AGAINST THE DEBTORS OR THE STALKING HORSE BIDDER OR THE SUCCESSFUL BIDDER, AS APPLICABLE, THAT ANY ADDITIONAL DEFAULTS EXIST OR THAT CONDITIONS TO ASSUMPTION, ASSIGNMENT, AND TRANSFER MUST BE SATISFIED UNDER YOUR CONTRACT OR LEASE (INCLUDING, WITHOUT LIMITATION, WITH RESPECT TO ADEQUATE ASSURANCE OF FUTURE PERFORMANCE BY THE STALKING HORSE BIDDER OR WINNING BIDDER, AS APPLICABLE), OR THAT ANY RELATED RIGHT OR BENEFIT UNDER SUCH CONTRACT OR LEASE CANNOT AND WILL NOT BE AVAILABLE TO THE STALKING HORSE BIDDER OR THE SUCCESSFUL BIDDER, AS APPLICABLE.**

**Obtaining Additional Information**

Copies of the Bidding Procedures Motion, the Bidding Procedures, the Bidding Procedures Order, the Stalking Horse Agreement, if any, and all other documents filed with the Court, are available free of charge on the Debtors' case information website, located at [https:// \[•\]](https://[•]), or can be requested by calling the Debtors' claims and noticing agent, [•].

Adequate assurance of future performance information for the Stalking Horse Bidder is available by contacting counsel to Ligand.

Dated:  
Wilmington, Delaware

Respectfully submitted,

*/s/ DRAFT*

---

**MORRIS, NICHOLS, ARSHT & TUNNELL LLP**

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*Proposed Counsel to the Debtors and  
Debtors in Possession*

**Exhibit B**

**Private Sale Order**

**[TO BE FILED]**

**Exhibit 1**

**Stalking Horse APA**

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**ASSET PURCHASE AGREEMENT**

**by and among**

**NOVAN, INC.,**

**EPI HEALTH, LLC**

**and**

**LIGAND PHARMACEUTICALS INCORPORATED**

**July 17, 2023**

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## ASSET PURCHASE AGREEMENT

This ASSET PURCHASE AGREEMENT (this “Agreement”) is entered into as of July 17, 2023, by and among Novan, Inc., a Delaware corporation (“Novan”), EPI Health, LLC, a South Carolina limited liability company (“EPI Health” and, together with Novan, “Sellers” or the “Debtors”), and Ligand Pharmaceuticals Incorporated, a Delaware corporation (together with its permitted successors, designees and assigns, “Buyer”). Sellers and Buyer are referred to collectively herein as the “Parties.” Capitalized terms used but not otherwise defined herein shall have the meanings assigned to them in Article I.

WHEREAS, on the date hereof, Sellers intend to file voluntary petitions for relief (the “Chapter 11 Cases”) pursuant to Chapter 11 of Title 11 of the United States Code, 11 U.S.C. §§ 101 *et seq.* (the “Bankruptcy Code”);

WHEREAS, the Parties entered into a debtor-in-possession credit facility, pursuant to which certain lenders agreed to provide a secured super-priority debtor-in-possession loan facility to the Debtors pursuant to the DIP Order (as defined below) and the DIP Loan Documents (as defined below) (such credit facility, the “DIP Facility”);

WHEREAS, Sellers desire to sell, transfer and assign to Buyer, and Buyer desires to acquire and assume from Sellers, pursuant to Sections 363 and 365 of the Bankruptcy Code, the Purchased Assets and the Assumed Liabilities upon the terms and subject to the conditions set forth herein;

WHEREAS, Sellers intend to seek entry of Sale Procedures Order by the United States Bankruptcy Court for the District of Delaware (the “Bankruptcy Court”) upon the terms and subject to the conditions set forth herein and in the Sale Procedures Order;

WHEREAS, Sellers intend to seek the entry of the Sale Order by the Bankruptcy Court approving this Agreement and authorizing Sellers to consummate the Contemplated Transactions upon the terms and subject to the conditions set forth herein and in the Sale Order;

WHEREAS, the board of directors, board of managers or other applicable governing body of each Seller has determined that it is advisable and in the best interests of such Seller’s creditors, equity holders and estate and the beneficiaries of such estate to consummate the Contemplated Transactions provided for herein pursuant to the Sale Procedures Order and the Sale Order and has approved this Agreement, subject to higher and better offers as contemplated by the Sale Procedures Order; and

WHEREAS, the Contemplated Transactions are subject to the approval of the Bankruptcy Court, subject to higher and better offers as contemplated by the Sale Procedures Order, and will be consummated only pursuant to the Sale Order to be entered by the Bankruptcy Court.

NOW, THEREFORE, in consideration of the mutual promises herein made, and in consideration of the representations, warranties and covenants herein contained, and other good

and valuable consideration, the receipt and sufficiency of which is hereby acknowledged by the Parties, intending to be legally bound, the Parties agree as follows:

## **ARTICLE I DEFINITIONS**

“Accounts Receivable” means (a) all accounts, accounts receivable, contractual rights to payment, notes, notes receivable, negotiable instruments, chattel paper, and vendor and supplier rebates of Sellers as conducted by the Sellers and (b) any security interest, claim, remedy or other right related to any of the foregoing.

“Affiliate” means, with respect to any Person, any other Person that, directly or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, such Person, and the term “control” (including the terms “controlled by” and “under common control with”) means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of such Person, whether through ownership of voting securities, by Contract or otherwise.

“Agreement” has the meaning set forth in the preamble.

“Alternate Transaction” means a transaction or series of related transactions pursuant to which Sellers, pursuant to the Sale Procedures Order, (a) accept one or more Qualified Bids, other than that of Buyer, as the highest and best offer, or (b) sell, transfer, lease or otherwise dispose of, directly or indirectly, including through an asset sale, stock sale, merger, reorganization or other similar transaction (by Sellers or otherwise), including pursuant to a Plan or refinancing, all or substantially all of the Purchased Assets (or agrees to do any of the foregoing) in a transaction or series of transactions to a Person or Persons other than Buyer, but does not mean the sale of assets to customers conducted in the Ordinary Course of Business; provided that with respect to any series of related transactions described herein, the first such transaction in such series constitutes an “Alternate Transaction” for purposes of Section 8.1 and Section 8.3.

“Applicable Deadline” means August 11, 2023.

“Assumed Contract List” means Schedule 2.6(a) hereto (as such schedule may be updated pursuant to Section 2.6(a)).

“Assumed Contracts” means those Leases and Contracts that have been assumed by Sellers and assigned to Buyer pursuant to Section 2.6 and Section 365 of the Bankruptcy Code, which, for the avoidance of doubt shall not include any Non-Real Property Contract or Lease that is excluded and rejected pursuant to Section 2.6.

“Assumed Liabilities” has the meaning set forth in Section 2.3.

“Assumed Permits” means all Permits that are transferable in accordance with their terms and under applicable Law, but excluding all Permits to the extent related primarily to any Excluded Asset (including any Lease that is not an Assumed Contract).

“Auction” means the auction for the sale and assignment of the Purchased Assets as specified in the Sale Procedures Order.

“Bankruptcy Code” has the meaning set forth in the recitals.

“Bankruptcy Court” has the meaning set forth in the recitals.

“Bid” means a bid by the Buyer equal to \$15,000,000, which is subject to payment (a) by offset, on a dollar-for-dollar basis, against all outstanding Obligations (as defined in the DIP Facility) under the DIP Facility, and (b) cash in the amount of the difference between \$15,000,000 and all outstanding Obligations (as defined in the DIP Facility) under the DIP Facility.

“Bid And Release” has the meaning set forth in Section 2.5(b)(i).

“Bill of Sale and Assignment and Assumption Agreement” means a bill of sale and assignment and assumption agreement, substantially in the form attached as Exhibit A hereto.

“Breakup Fee” means a breakup fee equal to three percent (3%) of the amount of the Bid.

“Business Authorizations” has the meaning set forth in Section 3.20(a).

“Business Day” means any day other than a Saturday, a Sunday or a day on which banks located in Wilmington, Delaware shall be authorized or required by Law to close.

“Buyer” has the meaning set forth in the preamble.

“Buyer Released Parties” has the meaning set forth in Section 5.8.

“Chapter 11 Cases” has the meaning set forth in the recitals.

“Claim” means a “claim” as defined in section 101(5) of the Bankruptcy Code, whether arising before or after the Petition Date.

“Closing” means the closing of the transactions contemplated by this Agreement, which shall be deemed to have occurred at 12:01 a.m. (Eastern Time) on the Closing Date.

“Closing Date” means the second Business Day after the date on which all conditions to the obligations of Sellers and Buyer to consummate the Contemplated Transactions set forth in Article VII (other than conditions with respect to actions Sellers and/or Buyer will take at the Closing itself, but subject to the satisfaction or waiver of those conditions) have been satisfied or waived by the Party entitled to waive that condition, or at such other time or on such other date as shall be mutually agreed upon by Sellers and Buyer prior thereto.

“Commercial Business Assets” has the meaning set forth in Section 2.1(b).

“Committee” means the official committee of unsecured creditors appointed in the Chapter 11 Cases.

“Company SEC Documents” has the meaning set forth in Section 3.16(b).

“Consent” means any approval, consent, ratification, permission, clearance, designation, qualification, waiver or authorization, or an order of the Bankruptcy Court that deems or renders any of the foregoing unnecessary.

“Contemplated Transactions” means the sale by Sellers to Buyer, and the purchase by Buyer from Sellers, of the Purchased Assets and the assumption by Buyer of the Assumed Liabilities.

“Contract” means any written or oral agreement, contract, lease, sublease, indenture, mortgage, instrument, guaranty, loan or credit agreement, note, bond, customer order, purchase order, sales order, sales agent agreement, supply agreement, development agreement, joint venture agreement, promotion agreement, license agreement, contribution agreement, partnership agreement or other arrangement, understanding, permission or commitment that, in each case, is legally-binding.

“Conversion Trigger Event” has the meaning set forth in Section 5.2(i).

“Cure Amounts” has the meaning set forth in Section 2.6(b).

“Current Employees” means all individuals employed by Sellers as of the day before the Closing Date, whether active or not (including those on short-term disability, leave of absence, paid or unpaid, or long-term disability).

“Data” has the meaning set forth in Section 3.20(h).

“Debtors” has the meaning set forth in the preamble.

“Development Assets” has the meaning set forth in Section 2.1(a).

“DIP Budget” shall have the same meaning as the term “Approved Budget” as defined in the DIP Order.

“DIP Facility” has the meaning set forth in the recitals.

“DIP Indebtedness” means all “DIP Obligations” as defined in the DIP Order.

“DIP Lender” shall have the same meaning given such term in the DIP Order.

“DIP Loan Agreement” shall have the same meaning as the term “DIP Credit Agreement” as defined in the DIP Order.

“DIP Loan Documents” shall have the meaning given such term in the DIP Order, and for the avoidance of doubt shall include all guarantees, all other security agreements, pledge agreements, notes, mortgages, certificates, Uniform Commercial Code financing

statements and all other related agreements, instruments and other documents, in each case relating to the DIP Indebtedness, and executed and/or delivered in connection therewith by the Sellers.

“DIP Order” means as of any date of determination (i) the *Interim Order (I) Authorizing Debtors to (A) Obtain Postpetition Financing and (B) Use Cash Collateral, (II) Granting Adequate Protection to Prepetition Secured Lender(III) Scheduling a Final Hearing, and (IV) Granting Related Relief* that is anticipated to be entered by the Bankruptcy Court on or about July 21, 2023 (the “Interim Order”) or (ii) the Final Order (as defined in the Interim Order), whichever such Order is then in effect.

“DIP Secured Parties” shall have the same meaning given such term in the DIP Order.

“Disclosure Schedule” has the meaning set forth in Article III.

“Employee Benefit Plan” means (a) any “employee benefit plan” (as such term is defined in Section 3(3) of ERISA), (b) employment, consulting, severance, termination protection, change in control, transaction bonus, retention or similar plan, program, policy, agreement or arrangement and (c) any other benefit or compensation plan, program, agreement or arrangement of any kind, providing for compensation, bonuses, profit-sharing, or other forms of incentive or deferred compensation, vacation benefits, insurance, medical, dental, vision, prescription or fringe benefits, life insurance, disability or sick leave benefits or post-employment or retirement benefits, in each case, maintained or contributed to by any Seller or in which any Seller participates or participated and that provides benefits to any Current Employee or Former Employee.

“Employee Roster” has the meaning set forth in Section 3.9(a).

“Environmental Laws” all applicable Laws concerning pollution or protection of the environment, human health and safety, and natural resources.

“EPI Health” has the meaning set forth in the preamble.

“Equipment” means any and all equipment, computers, machinery, furniture, spare parts, furnishings, fixtures, office supplies, supply inventory, vehicles and all other fixed assets.

“ERISA” means the United States Employee Retirement Income Security Act of 1974.

“Exchange Act” means the Securities Exchange Act of 1934, as amended, and the rules and regulations promulgated thereunder.

“Excluded Assets” has the meaning set forth in Section 2.2.

“Excluded Claims” means all rights (including rights of set-off and rights of recoupment), refunds, claims, counterclaims, demands, causes of action and rights to collect damages of Sellers against third parties to the extent related primarily to any Excluded Asset or Excluded Liability.

“Excluded Employee” has the meaning set forth in Section 6.4(b).

“Excluded Liabilities” has the meaning set forth in Section 2.4.

“FDA” means the United States Food and Drug Administration.

“Final Order” means: (a) an order or judgment of the Bankruptcy Court, as entered on the docket in any Chapter 11 Cases (or any related adversary proceeding or contested matter) or the docket of any other court of competent jurisdiction; or (b) an order or judgment of any other court having jurisdiction over any appeal from (or petition seeking certiorari or other review of) any order or judgment entered by the Bankruptcy Court (or any other court of competent jurisdiction, including in an appeal taken) in the Chapter 11 Cases (or in any related adversary proceeding or contested matter), in each case that has not been reversed, stayed, modified, or amended, and as to which the time to appeal, or seek certiorari or move for a new trial, reargument, or rehearing has expired according to applicable law and no appeal or petition for certiorari or other proceedings for a new trial, reargument, or rehearing has been timely taken, or as to which any appeal that has been taken or any petition for certiorari that has been or may be timely Filed has been withdrawn or resolved by the highest court to which the order or judgment was appealed or from which certiorari was sought or the new trial, reargument, or rehearing shall have been denied, resulted in no modification of such order, or has otherwise been dismissed with prejudice; provided that the possibility a motion under Rule 60 of the Federal Rules of Civil Procedure, or any analogous rule under the bankruptcy rules or the local bankruptcy rules of the Bankruptcy Court, may be filed relating to such order shall not prevent such order from being a Final Order.

“Former Employees” means all individuals who have been employed by the Sellers (or any of their predecessors) who are not Current Employees.

“Fraud” means, with respect to any party to this Agreement, Delaware common law fraud with a specific intent to deceive (and not a constructive fraud, equitable fraud, negligent misrepresentation or omission, or any form of fraud premised on recklessness or negligence) with respect to the making of any of the representations and warranties by Sellers contained in Article III, the officer’s certificate required to be delivered pursuant to Section 7.1(g) or any Related Agreement, and not with respect to any other matters; provided that, notwithstanding anything herein to the contrary, solely for purposes of Section 7.1(e) and Section 8.1(i), “Fraud” means, with respect to any party to the DIP Loan Agreement, Delaware common law fraud with a specific intent to deceive (and not a constructive fraud, equitable fraud, negligent misrepresentation or omission, or any form of fraud premised on recklessness or negligence) with respect to the making of any of the representations and warranties by Sellers contained in the DIP Loan Agreement or in any officer’s certificate required to be delivered pursuant thereto, and not with respect to any other matters.

“GAAP” means United States generally accepted accounting principles as in effect from time to time.

“Governmental Entity” means any United States federal, state or local or non-United States governmental or regulatory authority, agency, commission, court, body or other governmental entity.

“Hazardous Substance” means any toxic or hazardous material, substance or waste as to which Liability or standards of conduct may be imposed under any Environmental Laws.

“Health Care Laws” means, to the extent applicable to the Sellers or the Purchased Assets (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.

“HIPAA” means the Health Insurance Portability and Accountability Act of 1996, as the same may be amended, modified or supplemented from time to time, any successor statute thereto, any and all rules or regulations promulgated from time to time thereunder, and any comparable state laws.

“Indebtedness” has the meaning set forth in Section 5.3(b)(iii).

“Insurance Policy” means each primary, excess and umbrella insurance policy, bond and other forms of insurance owned or held by or on behalf of Sellers and their operations, properties and assets, including, without limitation, all stop-loss insurance policies with respect to Sellers’ self-insured medical and/or dental insurance programs.

“Intellectual Property” means any and all rights, title and interest in or relating to intellectual property of any type, which may exist or be created under the Laws of any jurisdiction throughout the world, including: (a) patents and patent applications, together with all reissues, continuations, continuations-in-part, divisionals, extensions and reexaminations in connection therewith; (b) trademarks, service marks, trade dress, logos, slogans, trade names, service names, brand names, Internet domain names and all other source or business identifiers and general intangibles of a like nature, along with all applications, registrations and renewals in connection therewith, and all goodwill associated with any of the foregoing; (c) rights associated with works of authorship, including exclusive exploitation rights, mask work rights, copyrights, database and design rights, whether or not Registered or published, all registrations and recordations thereof and applications in connection therewith, along with all extensions and renewals thereof; (d) trade secrets; and (e) all other intellectual property rights related to the business of the Sellers.

“Intellectual Property Assignments” means the Patent Assignment and the Trademark Assignment.

“Interim Order” has the meaning set forth in this Article I under the definition of “DIP Order.”

“Inventory” means all inventory (including finished goods, supplies, raw materials, work in progress, spare, replacement and component parts) maintained or held by, stored by or on behalf of, or in transit to, any Seller, whether for sale or non-commercial use (e.g., validation) or otherwise, together with any interests therein, including (x) being held by customers pursuant to consignment arrangements or (y) being held by suppliers or vendors under tolling or similar arrangements.

“IRB” has the meaning set forth in Section 3.20(i).

“IRC” means the United States Internal Revenue Code of 1986, as amended.

“IT Assets” means computers, software, firmware, middleware, servers, workstations, routers, hubs, switches, telecommunication hardware, audio/video hardware, security system hardware, data communications lines, and all other information technology Equipment, and all associated documentation.

“Law” means any federal, state, provincial, local, municipal, foreign or international, multinational or other law, statute, legislation, constitution, principle of common law, resolution, ordinance, code, edict, Order, proclamation, treaty, convention, rule, regulation, ruling, directive, pronouncement, determination, decision, opinion, guidance or requirement issued, enacted, adopted, promulgated, implemented or otherwise put into effect by or under the authority of any Governmental Entity, or court of competent jurisdiction, or other legal requirement or rule of law, including applicable building, zoning, subdivision, health and safety and other land use Laws.

“Lease Assignment” means a lease assignment agreement, substantially in the form attached as Exhibit B hereto.

“Leased Real Property” means all (i) leasehold or sub-leasehold estates and other rights to use or occupy any land, buildings, structures, improvements, fixtures or other interest in real property which is used in or otherwise related to the business of the Sellers, including the right to all security deposits and other amounts and instruments deposited by or on behalf of Sellers thereunder, and (ii) any buildings, structures, improvements and fixtures located on any Leased Real Property which are owned by Seller, regardless of whether title to such buildings, structures, improvements or fixtures are subject to reversion to the landlord or other third party upon the expiration or termination of the Lease for such Leased Real Property (“Leasehold Improvements”).

“Leasehold Improvements” has the meaning set forth in this Article I in the definition of “Leased Real Property”.

“Leases” means all leases, subleases, licenses, concessions and other Contracts, including all amendments, extensions, renewals, guaranties and other agreements with respect thereto, in each case pursuant to which any Seller holds any Leased Real Property.

“Liability” means, as to any Person, any debt, Claim, liability (including any liability that results from, relates to or arises out of tort or any other product liability claim), duty, responsibility, obligation, commitment, assessment, cost, expense, loss, expenditure, charge, fee, penalty, fine, contribution, or premium of any kind or nature whatsoever, whether known or unknown, asserted or unasserted, absolute or contingent, direct or indirect, accrued or unaccrued, liquidated or unliquidated, or due or to become due, and regardless of when sustained, incurred, or asserted or when the relevant events occurred or circumstances existed.

“Lien” means any lien (as defined in Section 101(37) of the Bankruptcy Code), encumbrance, right, demand, charge, mortgage, deed of trust, option, pledge, security interest or similar interests, title defects, hypothecations, easements, rights of way, encroachments, judgments, conditional sale or other title retention agreements and other similar impositions, imperfections or defects of title or restrictions on transfer or use (whether known or unknown, secured or unsecured or in the nature of setoff or recoupment, choate or inchoate, filed or unfiled, scheduled or unscheduled, noticed or unnoticed, recorded or unrecorded, perfected or unperfected, allowed or disallowed, contingent or non-contingent, liquidated or unliquidated, matured or unmatured, material or nonmaterial, disputed or undisputed, whether arising prior to or subsequent to the commencement of the Chapter 11 Cases, and whether imposed by agreement, understanding, Law, equity, or otherwise, including claims otherwise arising under doctrines of successor liability).

“Material Adverse Effect” means any change, event, effect, development, condition, circumstance or occurrence (when taken together with all other changes, events, effects, developments, conditions, circumstances or occurrences), that (a) is, or could reasonably be expected to become, individually or in the aggregate, materially adverse to the condition (financial or otherwise), value or results of operations of the Purchased Assets (taken as a whole); provided, however, that no change, event, effect, development, condition, circumstance or occurrence related to any of the following shall be deemed to constitute, and none of the following shall be taken into account in determining whether there has been a Material Adverse Effect: (i) the filing of a voluntary petition under Chapter 11 of the Bankruptcy Code or the effect, directly or indirectly, of such filing, including (A) any objections in the Bankruptcy Court to (1) this Agreement or any of the transactions contemplated hereby or thereby, (2) the reorganization of the Sellers, (3) the Sale Procedures Order or (4) the assumption or rejection of any Assumed Contract and (B) any Order of the Bankruptcy Court or any actions or omissions of the Sellers or their Subsidiaries in compliance therewith; (ii) acts of war, armed hostilities, sabotage or terrorism, or any escalation or worsening of any such acts of war, armed hostilities, sabotage or terrorism threatened or underway as of the date of this Agreements, except to the extent that such change has a materially disproportionate adverse effect on the business of the Sellers relative to the adverse effect that such changes have on other companies in the industry in which the business of the Sellers operates; (iii) changes in conditions in the U.S. or global economy or capital or financial markets generally, including changes in interest or exchange rates, except to the extent that such change has a

materially disproportionate adverse effect on the business of the Sellers relative to the adverse effect that such changes have on other companies in the industry in which the business of the Sellers operates; (iv) resulting from any act of God or other force majeure event (including natural disasters) (but, and notwithstanding anything contained in this paragraph to the contrary, excluding, for the avoidance of doubt, any global or national epidemic, pandemic (whether or not declared as such by any Governmental Body) or viral outbreak (including the “Coronavirus” or “COVID-19” pandemic), except to the extent that such change has a materially disproportionate adverse effect on the business of the Sellers relative to the adverse effect that such changes have on other companies in the industry in which the business of the Sellers operates); or (v) changes in Law or in GAAP or interpretations thereof; or (b) would reasonably be expected to prevent, materially delay or materially impair to the ability of any Seller to consummate the transactions contemplated by this Agreement or the Related Agreements on the terms set forth herein and therein.

“Material Contract” has the meaning set forth in Section 3.6.

“Non-Real Property Contracts” means the Contracts to which any Seller is a party other than the Leases.

“Novan” has the meaning set forth in the preamble.

“Offeree” has the meaning set forth in Section 6.4(a).

“Order” means any judgment, decree, ruling, decision, opinion, injunction, assessment, attachment, undertaking, award, charge, writ, executive order, judicial order, administrative order or any other order of any Governmental Entity.

“Ordinary Course of Business” means the ordinary and usual course of business of Sellers taken as a whole consistent with past custom and practice and taking into account the commencement of the Chapter 11 Cases.

“Outside Date” means September 26, 2023 (subject to Section 5.2(i)).

“Owned Intellectual Property” has the meaning set forth in Section 3.7(a).

“Parties” has the meaning set forth in the preamble.

“Patent Assignment” means a patent assignment agreement, substantially in the form attached as Exhibit C hereto.

“Permit” means any and all franchise, approval, permit (including environmental, construction and operation permits), license, order, registration, certificate, variance, Consent, exemption, clearance, exemption, classification, tariff, rate schedule or other authorization issued, granted, given or otherwise obtained or required to be obtained, from or by any Governmental Entity, under the authority thereof or pursuant to any applicable Law, including all Business Authorizations and Product Registrations.

“Permitted Liens” means (a) Liens for Taxes which are (i) being contested in good faith by appropriate proceedings or (ii) not due and payable as of the Closing Date and which shall be prorated or released at Closing, and, in each case of clauses (i) and (ii), for which adequate reserves have been made on the Financial Statements in accordance with GAAP and which shall be prorated or otherwise released at Closing; (b) mechanics liens and similar liens for labor, materials or supplies provided with respect to real property incurred in the Ordinary Course of Business which are being contested in good faith by appropriate proceedings for which adequate reserves have been made on the Financial Statements in accordance with GAAP and which shall be prorated or otherwise released at Closing; (c) with respect to real property, zoning, building codes and other land use Laws regulating the use or occupancy of such real property or the activities conducted thereon which are imposed by any Governmental Entity having jurisdiction over such real property which are not violated by the current use or occupancy of such real property or the operation of the business of the Sellers, except where any such violation would not, individually or in the aggregate, materially impair the use, operation or transfer of the affected property or the conduct of the business of the Sellers thereon as it is currently being conducted; (d) easements, covenants, conditions, restrictions and other similar matters affecting title to real property and other encroachments and title and survey defects that do not or would not materially impair value or the use or occupancy of such real property or materially interfere with the operation of the business of the Sellers at such real property; (e) with respect to Leasehold Improvements, any reversion or similar rights to the landlord or other third party upon expiration or termination of the applicable Lease; (f) any Liens held by Buyer pursuant to the Royalty Agreement and (g) any Liens associated with or arising in connection with any Assumed Liabilities.

“Person” means an individual, a partnership, a corporation, a limited liability company, an association, a joint stock company, a trust, a joint venture, an unincorporated organization or any other entity, including any Governmental Entity or any group or syndicate of any of the foregoing.

“Personal Property Leases” means all leases of personal property relating to personal property used by Sellers or to which any Seller is a party or by which the properties or assets of any Seller are bound.

“Petition Date” means the date of the filing of the Chapter 11 Cases.

“Plan” means a Chapter 11 plan of reorganization or liquidation proposed by the Sellers and/or the Committee in the Chapter 11 Cases.

“Proceeding” means any action, cause of action, suit, claim, investigation, mediation, audit, grievance, demand, hearing or proceeding, whether civil, criminal, administrative or arbitral, whether at law or in equity and whether before any Governmental Entity or arbitrator.

“Products” means, collectively, the Commercial Business Assets and the Development Assets.

“Product Registrations” has the meaning set forth in Section 3.20(a).

“Professional Services” means any legal services, accounting services, financial advisory services, investment banking services or any other professional services provided by the Sellers’ advisers obtained pursuant to any order of the Bankruptcy Court.

“Purchase Price” has the meaning set forth in Section 2.5(a).

“Purchased Assets” has the meaning set forth in Section 2.1

“Purchased Avoidance Actions” means all causes of action, lawsuits, claims, rights of recovery and other similar rights of any Seller, including avoidance claims or causes of action under Chapter 5 of the Bankruptcy Code relating to the business of the Sellers or the Purchased Assets.

“Purchased Inventory” means Inventory that is part of the Purchased Assets as set forth in Section 2.1.

“Qualified Bid” means competing bids qualified for the Auction in accordance with the Sale Procedures Order. For the avoidance of doubt, any bid that does not include an express assignment and assumption of the Royalty Agreement, without modification, shall not be deemed a Qualified Bid.

“Recall” has the meaning set forth in Section 3.14(b).

“Records” means the books, records, information, ledgers, files, invoices, documents, work papers, correspondence, lists (including customer lists, supplier lists and mailing lists), plans (whether written, electronic or in any other medium), drawings, designs, specifications, creative materials, advertising and promotional materials, marketing plans, studies, reports, data and similar materials related to the business of the Sellers.

“Registered” means issued by, registered with, renewed by or the subject of a pending application before any Governmental Entity or domain name registrar.

“Related Agreements” means the Bill of Sale and Assignment and Assumption Agreement, the Intellectual Property Assignments, the Lease Assignment, the Transition Services Agreement (if applicable) and any other instruments of transfer and conveyance as may be required under applicable Law to convey valid title of the Purchased Assets to Buyer.

“Remaining SB206 Critical Vendor Cure Payment Amount” means the remaining portion available for payment of the Budgeted SB206 Critical Vendor Cure Payments in the aggregate at the Closing.

“Reports” has the meaning set forth in Section 3.20(d).

“Representative” means a Person’s officers, directors, managers, employees, advisors, representatives (including its legal counsel and its accountants) and agents.

“Restricted Period” has the meaning set forth in Section 6.9.

“Royalty Agreement” means that certain Development Funding and Royalties Agreement, dated as of May 4, 2019 (as amended from time to time), to which Buyer and Novan are each a party.

“Sale Hearing” means the hearing conducted in the Bankruptcy Court seeking entry of the Sale Order.

“Sale Motion” means a motion filed by the Sellers, in form and substance reasonably satisfactory to the Sellers and the Buyer, with the Bankruptcy Court styled as the *Motion of Debtors for Entry of Orders (I)(A) Approving Bidding Procedures for Sale of Substantially All of Debtors’ Assets Free and Clear of Liens, Claims, Interests, and Encumbrances and Designating Ligand Pharmaceuticals as a Stalking Horse Bidder, (B) Scheduling an Auction and Approving the Form and Manner of Notice Thereof, (C) Approving Assumption and Assignment Procedures and (D) Scheduling a Sale Hearing and Approving the Forms and Manner of Notice Thereof; (II)(A) Approving the Sale of the Debtors’ Assets Free and Clear of Liens, Claims, Interests, and Encumbrances After the Auction and (B) Approving the Assumption and Assignment of Executory Contracts and Unexpired Leases; and (III) In the Alternative, Approving the Sale of the Debtors’ Assets Free and Clear of Liens, Claims, Interests, and Encumbrances to Ligand Pharmaceuticals If Not Approved as the Stalking Horse Bidder*, which Sale Motion requests, among other things, authority to sell all or substantially all of the Debtors’ assets, entry of the Sale Procedures Order, authority for the Debtors to enter into this Agreement and Related Agreements, and entry of the Sale Order approving this Agreement and Related Agreements.

“Sale Order” means an Order of the Bankruptcy Court: (a) approving (i) this Agreement and the other Related Agreements and the execution, delivery, and performance by Sellers of this Agreement, the other Related Agreements and the other instruments and agreements contemplated hereby and thereby, (ii) the sale of the Purchased Assets to Buyer free and clear of all Liens, other than Permitted Liens and any Liens included in the Assumed Liabilities, (iii) the assumption of the Assumed Liabilities by Buyer on the terms set forth herein and in the other Related Agreements and (iv) the assumption and assignment to Buyer of the Assumed Contracts on the terms set forth herein and in the other Related Agreements; (b) determining that Buyer is a good faith purchaser; and (c) providing that the Closing will occur in accordance with the terms and conditions hereof.

“Sale Order Deadline” means September 11, 2023, unless extended by the Seller.

“Sale Procedures Order” means an order of the Bankruptcy Court approving the sale procedures relief requested in the Sale Motion in substantially the form attached as Exhibit E hereto.

“Sarbanes-Oxley Act” means the Sarbanes-Oxley Act of 2002, as amended, and the rules and regulations promulgated thereunder.

“SB206” means berdazimer gel, 10.3%.

“SEC” means the U.S. Securities and Exchange Commission.

“Securities Act” means the Securities Act of 1933, as amended, and the rules and regulations promulgated thereunder.

“Seller” or “Sellers” has the meaning set forth in the preamble.

“Sellers’ Knowledge” (or words of similar import) means the actual or constructive knowledge, after due inquiry, of Paula Brown Stafford, John Donofrio, John M. Gay, Carri Geer and Tomoko Maeda-Chubachi.

“Studies” has the meaning set forth in Section 3.20(h).

“Subsidiary” means, with respect to any Person, any corporation, limited liability company, partnership, association or other business entity of which (a) if a corporation, a majority of the total voting power of shares of stock entitled (without regard to the occurrence of any contingency) to vote in the election of directors, managers or trustees thereof (or other persons performing similar functions with respect to such corporation) is at the time owned or controlled, directly or indirectly, by that Person or one or more of the other Subsidiaries of that Person or a combination thereof, or (b) if a limited liability company, partnership, association or other business entity (other than a corporation), a majority of partnership or other similar ownership interest thereof is at the time owned or controlled, directly or indirectly, by that Person or one or more Subsidiaries of that Person or a combination thereof and for this purpose, a Person or Persons owns a majority ownership interest in such a business entity (other than a corporation) if such Person or Persons shall be allocated a majority of such business entity’s gains or losses or shall be or control any managing director, managing member, or general partner of such business entity (other than a corporation). The term “Subsidiary” shall include all Subsidiaries of such Subsidiary.

“Tax” or “Taxes” means any United States federal, state or local or non-United States income, gross receipts, license, payroll, employment, excise, severance, stamp, occupation, premium, windfall profits, environmental (including taxes under Section 59A of the IRC), customs duties, capital stock, franchise, profits, withholding, social security (or similar), unemployment, real property, personal property, ad valorem, escheat, sales, use, transfer, value added, alternative or add-on minimum, estimated or other tax of any kind whatsoever (however denominated), whether computed on a separate or consolidated, unitary or combined basis or in any other manner, including any interest, penalty or addition thereto, whether or not disputed.

“Tax Return” means any return, declaration, report, claim for refund or information return or statement relating to Taxes, including any schedule or attachment thereto, and including any amendment thereof.

“Termination Event” has the meaning set forth in Section 8.1.

“Trademark Assignment” means a trademark assignment agreement, substantially in the form attached as Exhibit D hereto.

“Transfer Tax” means any stamp, documentary, registration, transfer, added-value or similar Tax imposed under any applicable Law in connection with the transactions contemplated by this Agreement.

“Transferred Employees” has the meaning set forth in Section 6.4(b).

“Transferring Party” has the meaning set forth in Section 5.1(c).

“Transition Services Agreement” has the meaning set forth in Section 5.9.

“Willful Breach” has the meaning set forth in Section 8.4.

## ARTICLE II PURCHASE AND SALE

**Section 2.1 Purchase and Sale of Purchased Assets.** Pursuant to sections 105, 363 and 365 of the Bankruptcy Code, on the terms and subject to the conditions set forth in this Agreement (including, without limitation, Section 4.7 below), at the Closing, Buyer shall purchase, acquire and accept from Sellers, and Sellers shall sell, transfer, assign, convey and deliver to Buyer, all of the Sellers’ right, title and interest in, to and under the Purchased Assets, free and clear of all Liens (other than Permitted Liens and any Liens included in the Assumed Liabilities), for the consideration specified in Section 2.5. “Purchased Assets” shall mean all of the, direct or indirect, right, title and interest of Sellers in, to and under the tangible and intangible assets (including goodwill), properties, rights, going concern value, claims and Contracts used, useful, or held for use in, or related to, the business of the Sellers (but excluding Excluded Assets) wherever situated and of whatever kind and nature, real or personal, as of the Closing, including:

(a) all of the Sellers’ right, title and interest in and to SB206 and all related Intellectual Property, Equipment, supplies and materials, Business Authorizations and Product Registrations (including new drug applications), files, records (including clinical and pre-clinical data), know-how, manufacturing assets and leases related to the same (collectively, the “Development Assets”);

(b) all of the Sellers’ right, title and interest in and to the products listed on Schedule 2.1(b) and all of the other Products of Sellers (other than those included in the Development Assets) and all related Intellectual Property, Equipment, supplies and materials, Business Authorizations and Product Registrations (including new drug applications), files, records (including clinical and pre-clinical data), know-how, manufacturing assets and leases related to the same (collectively, the “Commercial Business Assets”);

(c) all Inventory of Sellers as of the Closing, including all rights of Sellers to receive such Inventory, supplies and materials which are on order as of the Closing, whether or not obsolete or carried on Sellers’ books of account, in each case, with any transferable warranty and service rights related thereto;

(d) all Assumed Contracts that have been assumed by and assigned to Buyer pursuant to Section 2.6;

(e) all Intellectual Property owned by Sellers (to the extent not included in Section 2.1(a));

(f) all tangible assets (including Equipment, accessories, materials and all other similar items of tangible personal property or capital assets) of Sellers, including any tangible assets of Sellers located at any Leased Real Property and any other tangible assets on order to be delivered to any Seller, regardless of where located;

(g) all Records, including Records related to Taxes paid or payable by any Seller related to the business of the Sellers;

(h) the Leased Real Property to the extent associated with an Assumed Contract, including any Leasehold Improvements and all permanent fixtures, improvements, and appurtenances thereto and including any security deposits or other deposits delivered in connection therewith, and all rights under any undrawn letters of credit associated with any such security deposits;

(i) all goodwill of Sellers as a going concern or related to the Purchased Assets, including all goodwill associated with the Intellectual Property owned by Sellers and all rights under any confidentiality agreements executed by any third party for the benefit of any of Sellers to the extent relating to the Purchased Assets and/or the Assumed Liabilities (or any portion thereof);

(j) all of the Assumed Permits and all rights, interests, and benefits accruing under all Assumed Permits, and all pending applications therefor;

(k) all insurance benefits and policies relating to or insuring any of the Purchased Assets or Assumed Liabilities (including returns, recoveries and refunds of any premiums paid, or other amounts due back to Sellers);

(l) all other rights of Sellers against third parties (including suppliers, vendors, merchants, distributors, manufacturers and counterparties to leases, licensees, licensors or of any Seller arising under or related to any Assumed Contract, other Purchased Asset or Assumed Liability), including causes of action, claims, counterclaims, defenses, credits, rebates (including any vendor or supplier rebates), demands, allowances, refunds, rebates, credits, allowances, Proceedings, rights of set off, rights of recovery, rights of subrogation, rights of recoupment, rights under or with respect to express or implied guarantees, warranties, representations, covenants or indemnities made by such third parties or other similar rights, in each case at any time or in any manner arising or existing, whether choate or inchoate, known or unknown, now existing or hereafter acquired, contingent or noncontingent, including the Purchased Avoidance Actions;

(m) all credits, prepaid expenses, deferred charges, advance payments, refunds, rights of set-off, rights of recovery, deposits (including customer deposits and security deposits for rent, electricity, telephone, or otherwise), prepaid or deferred charges, expenses and duties (including any of the foregoing related to Assumed Contracts) arising under or relating to the Purchased Assets or the Assumed Liabilities;

(n) all rights under or pursuant to all warranties, representations and guarantees made by suppliers, manufacturers, contractors and any other Person to the extent relating to Equipment purchased by, products sold by, or services provided to Sellers or to the extent affecting any Purchased Assets and/or Assumed Liabilities;

(o) all rights and obligations under non-disclosure, confidentiality, non-compete, non-interference, non-solicitation, and similar arrangements or Contracts with any current or former employees and/or agents of Sellers or with third parties;

(p) all of the Sellers' telephone numbers, fax numbers, e-mail addresses, websites, URLs and internet domain names;

(q) all rights arising from any refunds, overpayments, credits or rebates due from federal, state and/or local Governmental Entities with respect to Taxes related to the Purchased Assets or Assumed Liabilities;

(r) all IT Assets; and

(s) all other assets that are related to or used in connection with the Purchased Assets or the business of the Sellers (but excluding all of the Excluded Assets).

**Section 2.2 Excluded Assets.** Notwithstanding Section 2.1, Buyer expressly understands and agrees that Buyer is not purchasing or acquiring, and the Sellers are not selling or assigning, any of the following assets, properties and rights of Sellers (the "Excluded Assets"):

(a) all Accounts Receivable of Sellers as of the Closing;

(b) all cash, cash equivalents, bank deposits and similar cash items of Sellers, and all bank accounts of Sellers (other than as described in Section 2.1(h));

(c) all Leases (and related Leased Real Property, if any) and Contracts, in each case, other than Assumed Contracts;

(d) all Permits other than the Assumed Permits;

(e) all of Sellers' certificates of incorporation, certificates of formation, bylaws, limited liability company operating agreements and other organizational documents, qualifications to conduct business as a foreign entity, arrangements with registered agents relating to foreign qualifications, taxpayer and other identification numbers, seals, minute books, stock transfer books, unit certificates and other documents relating to the

organization, maintenance and existence of any Seller as a corporation, limited liability company or other entity;

(f) all shares of capital stock, limited liability company interests or other equity securities of any Seller or any of their respective Subsidiaries or securities convertible into, exchangeable, or exercisable for any such shares of capital stock, limited liability company interests or other equity securities of any Seller or any of their respective Subsidiaries;

(g) all net operating losses of any Seller;

(h) the Excluded Claims;

(i) any loans or notes payable to any Seller or any of its Affiliates from any employee of any Seller or any of its Affiliates (other than Ordinary Course of Business employee advances and other than loans or notes from any Transferred Employees);

(j) any (1) Records containing confidential personal private information including confidential personnel and medical Records pertaining to any Current Employees or Former Employees to the extent the disclosure of such information is prohibited by applicable Law, (2) other Records that Sellers are required by Law to retain, (3) any materials primarily related to any Excluded Assets or Excluded Liabilities, (4) all taxpayer and other identification numbers of each Seller, and (5) any Records or other documents relating to the Chapter 11 Cases that are protected by the attorney-client privilege; provided that Buyer shall have the right to make copies of any portions of such retained Records (other than the Records referenced in subsection (5)) to the extent that such portions relate to the business of the Sellers or any Purchased Asset;

(k) all Permits other than the Assumed Permits;

(l) (i) all directors' and officers' liability insurance policies, including any tail insurance policies, including the rights of the directors and officers thereunder for coverage (i.e., advancement of expenses and liability coverage with respect to claims made against such officers and directors), and (ii) all insurance benefits and policies primarily relating to or insuring any of the Excluded Assets or Excluded Liabilities, including in the case of (i) and (ii), all insurance recoveries thereunder and rights to assert claims with respect to any such insurance recoveries under such insurance policies;

(m) all Employee Benefit Plans, including all assets held with respect to such Employee Benefit Plans and any insurance contracts, administrative services agreements or funding arrangements related thereto;

(n) all estate claims of the Sellers (other than the Purchased Avoidance Actions);

(o) any warranties, representations, and guarantees to the extent primarily relating to any Excluded Asset, or rights and defenses primarily pertaining to any Excluded Liability; and

(p) the rights of Sellers under this Agreement and the Related Agreements and all non-cash consideration payable or deliverable to Sellers under this Agreement.

**Section 2.3 Assumption of Assumed Liabilities.** On the terms and subject to the conditions of this Agreement and the Sale Order, at the Closing (or, with respect to Assumed Liabilities under Assumed Contracts or Assumed Permits that are assumed by Buyer after the Closing, such later date of assumption as provided in Section 2.6 and Section 2.7), Buyer shall assume from Sellers (and from and after the Closing pay, perform, discharge, or otherwise satisfy in accordance with their respective terms), and Sellers shall irrevocably convey, transfer, and assign to Buyer, the following Liabilities, without duplication and only to the extent not paid prior to the Closing and no other Liabilities (collectively, the “Assumed Liabilities”):

(a) all Cure Amounts under any and all Assumed Contracts in accordance with and subject to the limitations set forth in Section 2.6;

(b) Liabilities under the Assumed Contracts and Assumed Permits solely to the extent arising from periods occurring on or after the Closing Date that relate (and only to the extent so relating) to facts, circumstances, or occurrences first arising after the Closing, and that do not arise from or relate to, and are not in connection with, any event, circumstance, or condition occurring or existing at or prior to Closing that, with or without notice or lapse of time, would constitute or result in a breach, violation, or default of such Assumed Contract by any Seller or any of their respective Affiliates;

(c) Liabilities primarily arising out of the ownership or operation of the Purchased Assets, in each case, by Buyer solely to the extent arising from periods occurring on or after the Closing Date; and

(d) all Liabilities for Taxes relating to the Purchased Assets or the Assumed Liabilities to the extent that such Taxes are imposed with respect to or attributable to any taxable period (or portion thereof) beginning on or after the Closing Date.

Notwithstanding the foregoing, Assumed Liabilities shall not include any post-petition Liabilities of the Sellers that were incurred in violation of the DIP Order or the DIP Loan Documents.

**Section 2.4 Excluded Liabilities.** Notwithstanding anything herein to the contrary, the Parties expressly acknowledge and agree that Buyer shall not assume, be obligated to pay, perform or otherwise discharge or in any other manner be liable or responsible for any Liabilities of Sellers, whether existing on the Closing Date or arising thereafter, other than the Assumed Liabilities (all such Liabilities that Buyer is not assuming being referred to collectively as the “Excluded Liabilities”), and Seller shall be solely and exclusively liable for all such Excluded Liabilities. The Excluded Liabilities shall include:

(a) the sponsorship of, and all Liabilities at any time arising under, pursuant to or in connection with, all Employee Benefit Plans and all Liabilities related to any Current Employee or Former Employee, contractor or other service provider of any Seller or any Subsidiary thereof;

(b) all Liabilities relating to or otherwise arising, whether before, on or after the Closing Date, out of, or in connection with, any of the Excluded Assets;

(c) any and all Liabilities of Sellers for Indebtedness;

(d) all Liabilities arising from or related to any Proceeding against Sellers or any of their respective Affiliates (including, for the avoidance of doubt, any Proceeding related to fraud, breach of fiduciary duty, misfeasance or under any other theory relating to conduct, performance or non-performance of Sellers, or any of their respective directors, managers, officers, employees or other Representatives), or related to the Purchased Assets or the Assumed Liabilities, pending or threatened or having any other status or with respect to facts, actions, omissions, circumstances or conditions existing, occurring or accruing prior to the Closing Date (including any breach, default, failure to perform, torts related to performance, violations of Law, infringements or indemnities, guaranties and overcharges, underpayments, or penalties, whether or not in respect of any Contract), including any successor liability claims or that may be owed to or assessed by, any Governmental Entity or other Person, and whether commenced, filed, initiated, or threatened prior to, on, or following the Closing;

(e) all costs and expenses incurred or to be incurred by Sellers in connection with this Agreement and the consummation of the transactions contemplated hereby or in connection with the Chapter 11 Cases, including those owing for Professional Services;

(f) all Liabilities for any Taxes (including Taxes payable by reason of contract, assumption, transferee or successor Liability, operation of Law, pursuant to Treasury Regulation Section 1.1502-6 (or any similar provision of any state or local law) or otherwise), except to the extent expressly included in the Assumed Liabilities, including Liabilities: (i) of any Seller arising or relating to any taxable period (or portion thereof) prior to the Closing Date, (ii) owed by any of Sellers or any of their direct or indirect beneficial owners or Affiliates (whether or not relating to any taxable period (or portion thereof) prior to the Closing Date), including pursuant to any Tax sharing, Tax indemnity or similar agreement or arrangement to which any Seller (or any Affiliate thereof) is obligated under or a party to, (iii) of any Seller arising in connection with the consummation of the transactions contemplated by this Agreement, (iv) for Taxes or other Liabilities with respect to the Purchased Assets or the business of Sellers with respect to which “responsible person” or similar claims may be made against any of Sellers’ or any of their Affiliates’ employees, managers, officers, directors or similar persons, including pursuant to any wage payment statute, and (v) for Taxes arising from or in connection with an Excluded Asset;

(g) any Liability for any intercompany accounts payable by any Seller or any of their respective Affiliates;

(h) all Liabilities of Sellers arising prior to the Closing under or pursuant to Environmental Laws, including with respect to any real property owned, operated, leased, or otherwise used by Sellers, whether or not used in the Ordinary Course of Business;

(i) all current accrued trade payables to the extent (i) existing on the Closing Date, (ii) incurred after the Petition Date in the Ordinary Course of Business and otherwise in compliance with this Agreement (including Section 5.3) and (iii) not arising under or otherwise relating to any Assumed Liability; and

(j) drafts or checks outstanding as of the Closing (except to the extent expressly stated as an Assumed Liability).

**Section 2.5 Consideration.**

(a) In aggregate consideration for the sale and transfer of the Purchased Assets (the "Purchase Price") shall be composed of the following:

- i. the Bid; and
- ii. the assumption by Buyer of the Assumed Liabilities.

(b) The Purchase Price shall be satisfied at the Closing as to:

- i. the Bid, by causing the DIP Lender to (A) acknowledge satisfaction of the portion of the DIP Indebtedness covered by the Bid and (B) to the extent the Bid covers all DIP Indebtedness, release all security interests and liens securing the DIP Indebtedness (collectively, (i)(A) and (i)(B) above, the "Bid And Release"); and
- ii. the amount of the Assumed Liabilities described in Section 2.3, by assuming such Assumed Liabilities through one or more Related Agreements.

**Section 2.6 Assumption and Assignment of Contracts.**

(a) The Assumed Contract List sets forth a list of all Contracts and Leases to which a Seller is a party or by which any of their properties or assets are bound and which Buyer has designated to be included as an Assumed Contract, together with estimated Cure Amounts for each Assumed Contract, with such Cure Amounts as agreed to among the various counterparties, Sellers and Buyer, or as determined by the Sale Order or such other Order of the Bankruptcy Court. From time to time prior to the Auction, and as reasonably

requested by Buyer in the manner requested by Buyer, Sellers shall update the Assumed Contract List.

(b) In connection with the assumption and assignment to Buyer of any Assumed Contract pursuant to this Section 2.6:

i. the cure amounts, if any, necessary to cure all defaults, if any, and to pay all actual pecuniary losses, if any, that have resulted from such defaults under the Assumed Contracts (such amounts, the “Cure Amounts”), in each case as of the Petition Date and to the extent required by Section 365(b) of the Bankruptcy Code and the Sale Order or any other Order of the Bankruptcy Court (or as agreed by the applicable counterparties and the Sellers and Buyer) shall be paid as follows:

- (A) Sellers shall be financially responsible for all Cure Amounts in connection with any Assumed Liabilities with respect to the Development Assets but only to the extent that such Cure Amounts are funded under the DIP Facility, and
- (B) Buyer shall be financially responsible for all Cure Amounts in connection with any Assumed Liabilities with respect to (1) all Commercial Business Assets and (2) all Development Assets but only with respect to Cure Amounts in excess of Sellers’ payment obligations in respect of Cure Amounts;

provided that neither the Cure Amounts paid by Buyer nor any other expense or obligation set forth in this Section 2.6(b) shall reduce, directly or indirectly, any consideration payable to Sellers hereunder; and

ii. Buyer shall provide sufficient adequate assurance of future performance as of the Sale Hearing necessary to satisfy the conditions contained in Sections 365(b)(1)(C) and 365(f) of the Bankruptcy Code with respect to Assumed Contracts.

(c) Sellers shall use their respective reasonable best efforts to assign the Assumed Contracts to Buyer on the terms set forth in this Section 2.6 pursuant to the Sale Order or such other Order of the Bankruptcy Court. In the event Sellers are unable to assign any such Assumed Contract to Buyer pursuant to the Sale Order or such other Order of the Bankruptcy Court or by agreement among the applicable counterparties and the Sellers and the Buyer, then the Parties shall use their reasonable best efforts to obtain, and to cooperate in obtaining, all Consents from Governmental Entities and third parties necessary to assume and assign such Assumed Contracts to Buyer, including payment of Cure Amounts in accordance with Section 2.6(b).

(d) Notwithstanding the foregoing, but subject to Section 2.7 and Section 5.1, a Contract shall not be an Assumed Contract hereunder and shall not be assigned to, or

assumed by, Buyer to the extent that such Contract (i) is rejected by a Seller or terminated by a Seller in accordance with the terms hereof or by the other party thereto, or terminates or expires by its terms, on or prior to the Closing and is not continued or otherwise extended upon assumption; provided, however, that the foregoing shall be subject to the terms of the DIP Facility; or (ii) was not listed on the Assumed Contract List and not provided by Buyer to Sellers at least 14 calendar days prior to the Auction and requires a Consent of any Governmental Entity or other third party (except as permitted by the Bankruptcy Code) in order to permit the sale or transfer to Buyer of Sellers' rights under such Contract, and no such Consent has been obtained prior to the Closing. In addition, a Permit shall not be assigned to, or assumed by, Buyer to the extent that such Permit requires a Consent of any Governmental Entity or other third party (other than, and in addition to, that of the Bankruptcy Court) in order to permit the sale or transfer to Buyer of Sellers' rights under such Permit, and no such Consent has been obtained prior to the Closing.

**Section 2.7 Schedule Updates.**

(a) Notwithstanding anything to the contrary in this Agreement, and without any increase or decrease in the Purchase Price (other than any resulting increase or decrease in Cure Amounts that are the responsibility of Buyer in accordance with Section 2.6), the Buyer may, in its sole discretion, revise, amend or modify this Agreement and any schedule setting forth the Purchased Assets and the Excluded Assets up to two (2) Business Days prior to the Closing to (i) include in the definition of Purchased Assets (pursuant to the applicable schedule) and to exclude from the definition of Excluded Assets, any Contract or other asset of the Sellers not previously included in the Purchased Assets and require (A) the Sellers to file a notice of assumption and assignment with the Bankruptcy Court, and fix the Cure Amount either by the Sale Order or such other Order of the Bankruptcy Court or as agreed by the applicable counterparty and the Sellers and the Buyer; and (B) the Sellers to provide any necessary notice to the Parties to any such Contract and (ii) to exclude from the definition of Purchased Assets (pursuant to the applicable schedule) and to include in the definition of Excluded Assets, any Assumed Contract or other asset of the Sellers previously included in the Purchased Assets and not otherwise included in the definition of Excluded Assets; provided that no such change of a schedule, the definition of the Purchased Assets or the definition of the Excluded Assets shall reduce the amount of the Purchase Price below the amount of the Bid.

(b) If any Contract is added to (or removed from) the Assumed Contract List and thereby added to (or removed from) the Purchased Assets as permitted by this Section 2.7, the Sellers shall promptly take such steps as are reasonably necessary, including, if applicable, making any necessary or appropriate updates to the Assumed Contract List (provided that the Parties shall be obligated to pay Cure Amounts in accordance with Section 2.6) and prompt delivery of notice to the non-debtor counterparty, to cause such Contracts to be assumed by the Sellers, and assigned to the Buyer, on the Closing Date (other than as excluded under the Sale Order and this Agreement).

(c) If any Contract is removed from the Purchased Assets as permitted by this Section 2.7, all Liabilities to third parties arising under such Contract shall be Excluded

Liabilities. Without limiting any of the Buyer's rights pursuant to this Section 2.7, in the event that the Sale Order does not approve the assignment or transfer of one or more of the Assumed Contracts to the Buyer as Purchased Assets, the Buyer may, in its sole discretion and at any time prior to the Auction, exclude any or all of the Assumed Contracts from the Purchased Assets but may not reduce the amount of the Purchase Price.

(d) For all purposes of this Agreement (including all representations and warranties of the Sellers contained herein), the Sellers shall be deemed to have obtained all required consents in respect of the assignment of any Assumed Contract and to have cured all defaults thereunder if, and to the extent that, pursuant to the Sale Order or other order of the Bankruptcy Court, the Sellers are authorized and directed to assume and assign the Assigned Contracts to Buyer pursuant to Section 365 of the Bankruptcy Code. For the avoidance of doubt, each Contract that is not an Assumed Contract may be rejected by the Sellers in their sole and absolute discretion, subject to approval by the Bankruptcy Court. Without limiting the foregoing, the failure by the Sellers to disclose any matter related to any Assumed Contract added to the Assumed Contract List after the date hereof shall not be considered a breach of any representations and warranties of the Sellers.

**Section 2.8 Closing.** The Closing shall take place remotely by electronic exchange of counterpart signature pages commencing at 10:00 a.m. Eastern time on the Closing Date.

**Section 2.9 Deliveries at Closing.**

(a) At the Closing, Sellers shall deliver or cause to be delivered to Buyer the following documents and other items:

- i. a counterpart signature page to the Bill of Sale and Assignment and Assumption Agreement, duly executed by each Seller;
- ii. a counterpart signature page to each of the Intellectual Property Assignments, duly executed by each Seller, as applicable;
- iii. a counterpart signature page to the Lease Assignment, duly executed by the applicable Seller;
- iv. a properly completed and duly executed IRS Form W-9 from each Seller;
- v. the officer's certificate required to be delivered pursuant to Section 7.1(g), in each case duly executed by each applicable signatory thereto; and
- vi. a counterpart signature page to the Transition Services Agreement (if applicable), duly executed by each Seller.

(b) At the Closing, Buyer shall deliver to Sellers the following documents and other items:

- i. a counterpart signature page to the Bill of Sale and Assignment and Assumption Agreement, duly executed by Buyer;
- ii. a counterpart signature page to each of the Intellectual Property Assignments, duly executed by Buyer;
- iii. a counterpart signature page to the Lease Assignment, duly executed by Buyer;
- iv. the Purchase Price, in the form of the Bid And Release, in form reasonably satisfactory to the Sellers (including documentation reasonably acceptable to the Sellers evidencing satisfaction of the DIP Indebtedness);
- v. the officer's certificate required to be delivered pursuant to Section 7.2(e), duly executed by the applicable signatory thereto; and
- vi. a counterpart signature page to the Transition Services Agreement (if applicable), duly executed by Buyer.

**Section 2.10 Allocation.** Within 90 calendar days after the Closing Date, Buyer shall in good faith prepare an allocation of the Purchase Price (and all capitalized costs and other amounts treated as purchase price for U.S. federal income Tax purposes) among the Purchased Assets in accordance with Section 1060 of the IRC and the Treasury Regulations thereunder (and any similar provision of United States state or local or non-United States Law, as appropriate). Sellers shall have 30 calendar days following receipt of Buyer's proposed allocation to review and comment on such proposed allocation and Buyer shall consider such comments in good faith. Thereafter, Buyer shall provide Sellers with Buyer's final allocation schedule, and Buyer and Sellers shall report, act and file Tax Returns (including Internal Revenue Service Form 8594) in all respects and for all purposes consistent with such allocation. Neither Buyer nor Sellers shall take any position (whether in audits, Tax Returns or otherwise) which is inconsistent with such allocation; provided that nothing contained herein shall prevent Buyer or Sellers from settling any proposed deficiency or adjustment by any Governmental Entity based upon or arising out of such allocation, and neither Buyer nor Sellers shall be required to litigate before any court any proposed deficiency or adjustment by any Governmental Entity challenging the allocation.

### **ARTICLE III SELLERS' REPRESENTATIONS AND WARRANTIES**

Sellers hereby represent and warrant to Buyer as of the date hereof and as of the Closing Date that, except as set forth in (i) the Company SEC Documents filed on or after January 1, 2022 and publicly available prior to the date hereof (other than any disclosures contained under the captions "Risk Factors" or "Forward-Looking Statements," and any other disclosures that are predictive, cautionary or forward-looking in nature but, for the purpose of clarification, including and giving effect to any factual or historical statements included in any such statements), and (ii) the disclosure schedule accompanying this Agreement (the "Disclosure Schedule"), the statements contained in this Article III are true and correct.

**Section 3.1 Organization of Sellers; Good Standing.**

(a) Each Seller is duly incorporated or organized, as applicable, validly existing and in good standing under the Laws of its state of incorporation or formation, as applicable, and has all requisite corporate, limited liability company or similar power and authority, as applicable, to own, lease and operate its properties and assets and to carry on and conduct the business of the Sellers as currently conducted.

(b) Except as a result of the commencement of the Chapter 11 Cases, each Seller is duly authorized to do business and is in good standing as a foreign corporation or limited liability company, respectively, in each jurisdiction where the ownership or operation of the Purchased Assets or the conduct of the business of the Sellers requires such qualification, and each Seller does not engage in any activity, or own, lease or operate any properties such as to require it to qualify to do business in any other jurisdiction, in each case except for failures to be so authorized or be in such good standing, as would not, individually or in the aggregate, have a Material Adverse Effect.

(c) Schedule 3.1(c) of the Disclosure Schedule sets forth a true, complete and correct list of each jurisdiction in which each Seller or any of their Subsidiaries is organized, and in which each is duly licensed or qualified to do business.

(d) Each of the Subsidiaries of each of the Sellers are set forth on Schedule 3.1(c) of the Disclosure Schedule. Except as set forth on Schedule 3.1(c) of the Disclosure Schedule, none of the Sellers owns any Subsidiaries or shares of capital stock or other equity interests in any other Person.

**Section 3.2 Authorization of Transaction.**

(a) Each Seller has all requisite corporate or limited liability company power and authority, as applicable, to execute and deliver this Agreement and all Related Agreements to which it is a party and to perform its obligations hereunder and thereunder. The execution, delivery and performance of this Agreement and all Related Agreements to which a Seller is a party have been duly authorized by such Seller and no other corporate or limited liability company action on the part of any Seller is necessary to authorize this Agreement or the Related Agreements to which it is party or to consummate the Contemplated Transactions.

(b) This Agreement has been duly and validly executed and delivered by each Seller, and, upon their execution and delivery in accordance with the terms of this Agreement, each of the Related Agreements to which any Seller is a party will have been duly and validly executed and delivered by each such Seller, as applicable. Assuming that this Agreement constitutes a valid and legally binding obligation of Buyer, this Agreement constitutes the valid and legally-binding obligations of Sellers, enforceable against Sellers in accordance with its terms and conditions, subject to applicable bankruptcy, insolvency, moratorium or other similar Laws relating to creditors' rights and general principles of equity. Assuming, to the extent that it is a party thereto, that each Related Agreement

constitutes a valid and legally binding obligation of Buyer, each Related Agreement to which any Seller is a party, when executed and delivered, constituted or will constitute the valid and legally-binding obligations of such Seller, as applicable, enforceable against Sellers, as applicable, in accordance with their respective terms and conditions, subject to applicable bankruptcy, insolvency, moratorium or other similar Laws relating to creditors' rights and general principles of equity.

**Section 3.3 Noncontravention; Consents and Approvals.**

(a) Neither the execution and delivery of this Agreement, nor the consummation of the Contemplated Transactions (including the Related Agreements), (i) will conflict with or result in a breach of the certificate of incorporation, certificate of formation, bylaws, operating agreement or other organizational documents of any Seller, (ii) will result in the material violation of any Law to which any Seller is, or its respective assets or properties are, subject, (iii) subject to the entry of the Sale Order, will conflict in any material respect with any Assumed Contract or Assumed Permit, or (iv) subject to and assuming entry of the Sale Order, will conflict in any material respect with, or result in any material violation of or constitute a material breach or default under, any Order of any Governmental Entity applicable to the Sellers or any of the Purchased Assets.

(b) No Consent, notice or filing is required to be obtained by any Seller from, or to be given by any Seller to, or made by any Seller with, any Governmental Entity in connection with the execution, delivery and performance by any Seller of this Agreement or any Related Agreement. After giving effect to the Sale Order and any applicable order of the Bankruptcy Court authorizing the assignment and assumption of any Contract that is an Assumed Contract hereunder, no Consent, notice or filing is required to be obtained by any Seller from, or to be given by any Seller to, or made by any Seller with, any Person that is not a Governmental Entity in connection with the execution, delivery and performance by any Seller of this Agreement or any Related Agreement, except where the failure to give notice, file or obtain such authorization, consent or approval would not, individually or in the aggregate, have a Material Adverse Effect.

**Section 3.4 Compliance with Laws.** Sellers and all of the Purchased Assets are in compliance with all Laws applicable to the business of the Sellers or the Purchased Assets in all material respects. Sellers have not received any written notice of violation of any Law with respect to any Seller, the business of the Sellers or the Purchased Assets.

**Section 3.5 Title to Purchased Assets.** Sellers, as of immediately prior to the Closing, have good and valid title to, or, in the case of leased assets, have valid and enforceable leasehold interests in (subject to the effect on enforceability of (a) any applicable Law relating to bankruptcy, reorganization, insolvency, moratorium, fraudulent conveyance or preferential transfers, or similar Laws relating to or affecting creditors' rights generally and (b) general principles of equity (regardless of whether enforceability is considered in a proceeding in equity or at law)), the Purchased Assets, free and clear of all Liens (except for Permitted Liens), subject to entry of the Sale Order. At the Closing or such time as title is conveyed under Section 2.6, Sellers will convey, subject to the Sale Order having been entered and still being in effect and not subject to any stay

pending appeal at the time of Closing, good and valid title to, or valid leasehold interests in, all of the Purchased Assets, free and clear of all Liens (except for Permitted Liens), to the fullest extent permissible under section 363(f) of the Bankruptcy Code and subject to the rights of licensees under section 365(n) of the Bankruptcy Code. Except for the services and rights to be provided or granted to Buyer and its Affiliates pursuant to the Transition Services Agreement, if applicable, the Purchased Assets constitute substantially all of the properties, assets and rights used by the Sellers to conduct and operate the business of the Sellers in all material respects as currently conducted and operated by the Sellers. All of the Purchased Assets are in good working condition, order and repair (ordinary wear and tear excepted) for assets of comparable age and past use and are suitable for use in the Ordinary Course of Business to operate the business of the Sellers substantially as currently conducted and operated by the Sellers. Except as set forth on Schedule 3.5, no Subsidiaries of any Seller hold any assets, properties or rights, and no other Person is engaged in the operation of, or hold rights, title and interest in (except for Permitted Liens) the Purchased Assets.

**Section 3.6 Contracts.** For purposes of this Agreement, “Material Contract” means any Contract to which any Seller is a party or by which any Seller or any of their respective properties or assets is bound (in each case, excluding any Employee Benefit Plan) that is required to be disclosed and filed as an exhibit to the Company SEC Documents pursuant to the Exchange Act. All Material Contracts have been filed with the Company SEC Documents. No Seller has assigned, delegated or otherwise transferred to any third party any of its rights or obligations with respect to any Material Contract. Each Assumed Contract is valid and binding on Sellers to the extent such Person is a party thereto, as applicable, and to Sellers’ Knowledge, each other party thereto, and is in full force and effect, assuming entry of the Sale Order. Each Seller and, to Sellers’ Knowledge, any other party thereto have performed all material obligations required to be performed by it under each Assumed Contract except to the extent such default or violation will be cured as a result of the payment of the applicable Cure Amounts, assuming entry of the Sale Order. The Assumed Contracts include all Contracts material to the ownership and/or operation of the business of Sellers. Sellers have not, and, to Sellers’ Knowledge, no other party to any Assumed Contract has, commenced any action against any of the Parties to any Assumed Contract or given or received any written notice of any default or violation under any Assumed Contract that has not been withdrawn or dismissed except to the extent such default or violation will be cured as a result of the payment of the applicable Cure Amounts, assuming entry of the Sale Order. To Sellers’ Knowledge, there are no events or conditions which constitute, or, after notice or lapse of time or both, will constitute a default on the part of any Seller, or to Sellers’ Knowledge, any counterparty under such Assumed Contract. To Sellers’ Knowledge, no Seller has received any notice from any Person that such Person intends to terminate, or not renew, any Assumed Contract. Each Assumed Contract is, or will be upon the Closing, valid, binding and in full force and effect in accordance with its terms.

**Section 3.7 Intellectual Property.**

(a) Schedule 3.7(a) of the Disclosure Schedule sets forth the following: (i) a complete list of all Intellectual Property owned by the Sellers and for which a registration has been issued or application for such issuance and registration has been filed (“Owned

Intellectual Property”), specifying, where applicable, the name of the record owner, the application, registration or serial or other similar identification number, assignment status (if applicable), the jurisdictions in which a registration has been issued or in which an application for such issuance and registration has been filed, including the respective registration or application numbers and the names of the Registered owner or applicant, as applicable, the date of filing or issuance and solely with respect to Internet domain names, the applicable registrar; (ii) all licenses, sublicenses and other agreements pursuant to which any Seller is authorized to use any Intellectual Property owned or controlled by a third party including the identity of all Parties thereto and the type and date thereof, provided, however, that the Sellers need not list object code end-user licenses granted to end-users in the Ordinary Course of Business that permit use of software products without a right to modify, distribute or sublicense the same; and (iii) all licenses, sublicenses and other agreements (other than end-user licenses in the Ordinary Course of Business) pursuant to which any Seller has granted or promised to grant to any third party any right to use any Intellectual Property, including the identity of all Parties thereto, a description of the nature and subject matter thereof, the applicable royalty and the term thereof.

(b) Title, Etc. Each Seller has good and valid right, title and interest in and to and is the sole and exclusive owner of (free and clear of any Liens) Owned Intellectual Property or has a license to use Intellectual Property owned by any third party that is required by such Seller to conduct its business as currently conducted. All Intellectual Property included in the Owned Intellectual Property is unexpired and subsisting and properly recorded with the appropriate Governmental Entity, and no Owned Intellectual Property is subject to any outstanding order, judgment, determination, decree or agreement issued by or with any Governmental Entity adversely affecting such Seller’s use of, or its rights, to such Owned Intellectual Property, and such Seller has not received any written notice of any of the foregoing. There are no Proceedings outstanding or, to the Sellers’ Knowledge, threatened that seeks to challenge or limit such Seller’s ownership of, or right to use or enforce any Owned Intellectual Property.

(c) Infringement. The conduct of the Sellers’ business, including the design, development, use, import, export, branding, advertising, promotion, marketing, manufacture, offer for sale, and sale of the Products, does not infringe, misappropriate, or conflict with any Intellectual Property of any Person or constitute unfair competition or trade practices under the laws of any jurisdiction. There are no Proceedings outstanding or, to the Sellers’ Knowledge, threatened, and no Seller has received any written notice or claim during the three years prior to Closing, alleging that the conduct of its business infringes the Intellectual Property rights of any Person. There is, and there has been, no unauthorized use, infringement or misappropriation of any Owned Intellectual Property by any Person, including any Current Employee or Former Employee, and no Seller has issued any written notice or claim asserting that any such unauthorized use, infringement or misappropriation is occurring or has occurred.

(d) Invention Assignments and Confidentiality. All Current Employees and Former Employees, as well as consultants or other independent contractors, of the Sellers

who have been engaged in the past or are presently engaged in any research, development, design or similar services that involve the creation of any Owned Intellectual Property have irrevocably assigned that Person's rights in such Owned Intellectual Property pursuant to invention assignment agreements and have entered into customary confidentiality agreements with the applicable Seller, in each case substantially in the form or forms that have been delivered to Buyer.

(e) IT Assets. No Person has gained unauthorized access to any of the IT Assets owned, controlled or used by any Seller that has resulted in material Liability to the operation or control of the Purchased Assets. The IT Assets used by the Sellers in the conduct of the business of the Sellers (i) operate and perform in all material respects in accordance with their documentation and functional specifications and otherwise as required by its business as presently conducted, (ii) have not malfunctioned or failed in a manner to materially adversely affect the conduct of its business within the past three years and (iii) are free from material bugs or other material defects.

(f) Privacy and Security Policies. Each Seller has established and implemented written policies regarding privacy, cyber security and data security that are commercially reasonable, and consistent in all material respects with (i) reasonable practices in the industry of the Sellers and (ii) the written commitments of the Sellers. Each Seller has complied in all material respects with (x) all Laws, rules and regulations regarding data protection and the privacy and security of personal information applicable to the Sellers in the operation of the business of the Sellers, and (y) its privacy policies or commitments to customers and consumers regarding data protection and the privacy and security of personal information. No Person has gained unauthorized access to or misused any personal information in a manner that, individually or in the aggregate, has resulted in a material Liability to the operation or control of the Purchased Assets or an obligation of the Sellers to notify a Governmental Entity.

**Section 3.8 Proceedings**. Other than the Chapter 11 Cases, Schedule 3.8 of the Disclosure Schedule sets forth all unresolved Proceedings brought by or against any Seller, and to Sellers' Knowledge, there are no other Proceedings threatened in writing against any Seller which is reasonably likely to adversely affect the ability of any Seller to enter into this Agreement or to consummate the Contemplated Transactions.

**Section 3.9 Employees and Employment Matters**.

(a) No Seller is a party to or bound by any collective bargaining agreement covering the Current Employees (as determined as of the date of this Agreement), nor is any Seller aware of any ongoing strike, walkout, work stoppage, or other material collective dispute affecting any Seller with respect to the business of the Sellers. Schedule 3.9(a) of the Disclosure Schedule sets forth a complete and correct list of all Current Employees by: name; title or position; status (part-time, full-time, exempt, non-exempt, etc.); whether paid on a salaried, hourly or other basis; current base salary or wage rate; current target bonus; start date; service reference date (if different from the start date); work

location; accrued paid time off; and an indication of whether or not such employee is on leave of absence (the “Employee Roster”).

(b) There are no grievances or unfair labor practice complaints pending against the Sellers or any of their Subsidiaries before the National Labor Relations Board or any other Governmental Entity with respect to any employees of Sellers.

(c) Sellers are not liable for any arrears of wages, other compensation or benefits (other than such Liabilities that have been incurred in the Ordinary Course of Business), or any Taxes or penalties for failure to comply with any employment Laws.

(d) No individual who has performed services for Sellers with respect to the business of the Sellers has been improperly excluded from participation in any Employee Benefit Plan, and none of the Sellers has any direct or indirect Liability, whether absolute or contingent, with respect to any misclassification of any Person as an independent contractor or on any other non-employee basis for such Seller rather than as an employee, with respect to any individual employed, engaged, or leased by the Seller from another employer, or with respect to any misclassification of any employee as exempt versus non-exempt under the Fair Labor Standards Act.

(e) There is no material employment or labor-related claim pending against any Seller brought by or on behalf of any employee or any Governmental Entity and, to Sellers’ Knowledge, no such claim is threatened. Except as disclosed to Buyer confidentially, in the last three years, to Sellers’ Knowledge, there have been no allegations of sexual or other unlawful harassment or discrimination made on more than one occasion against (i) any officer of any Seller or (ii) any managerial employee of a Seller.

(f) All employees of Sellers are authorized to work in the United States.

(g) Except as set forth on Schedule 3.9(g) of the Disclosure Schedule, During the 90-day period prior to the date hereof, there have been no involuntary terminations of employment of any employees of Sellers.

**Section 3.10 Employee Benefit Plans.** With respect to each Employee Benefit Plan, the Sellers have made available to Buyer true and complete copies (to the extent applicable) of (i) the current plan document (or, if such Employee Benefit Plan is unwritten, a written description of the material terms thereof), including any amendments thereto other than any document that Sellers are prohibited from making available to Buyer as the result of applicable Law relating to the safeguarding of data privacy, (ii) the most recent annual report on Form 5500 filed with the Department of Labor, (iii) the most recent IRS determination or opinion letter received by the Sellers, (iv) the most recent summary plan description, (v) each current material related insurance Contract or trust agreement, (vi) the most recent actuarial report, financial statement and trustee report, and (vii) all non-routine correspondence with the IRS or United States Department of Labor since January 1, 2020.

**Section 3.11 Real Property.**

(a) Sellers do not own any real property.

(b) Schedule 3.11(b) of the Disclosure Schedule sets forth the address of each Leased Real Property, and a true and complete list of all Leases that are Assumed Contracts (including the date and name of the Parties to such Lease document). Sellers have made available to Buyer a true and complete copy of all Leases that are Assumed Contracts (including all amendments, extensions, renewals, guaranties and other agreements with respect thereto) for such Leased Real Property, as amended through the date hereof. With respect to each of the Leases that are Assumed Contracts: (i) Sellers' possession and quiet enjoyment of the Leased Real Property under such Lease has not been disturbed in any material respect, and there are no pending disputes with respect to Sellers' obligations under such Lease that will not be satisfied by the Sale Order; (ii) no security deposit or portion thereof deposited with respect such Lease has been applied in respect of a breach or default under such Lease which has not been redeposited in full; (iii) the other party to such Lease is not an affiliate of Sellers; and (iv) the Sellers have not subleased, licensed or otherwise granted any Person the right to use or occupy such Leased Real Property or any portion thereof.

(c) The Leased Real Property and the Leasehold Improvements included in the Purchased Assets comprise all of the real property used in or otherwise related to the operation by Sellers of, the business of the Sellers.

(d) Sellers have received no written notice of any condemnation, expropriation or other proceeding in eminent domain pending or, to Sellers' Knowledge, which is threatened, affecting any real property underlying the Leased Real Property or any portion thereof or interest therein.

**Section 3.12 Tangible Personal Property.** Schedule 3.12 of the Disclosure Schedule sets forth all material Personal Property Leases, and each such material Personal Property Lease is valid and enforceable.

**Section 3.13 Permits; Certifications.**

(a) Schedule 3.13(a) of the Disclosure Schedule contains a list of all material Permits (other than any Business Authorizations and Product Registrations) that Sellers hold as of the date hereof in connection with the operations of the business of the Sellers. All such Permits are valid and are in full force and effect and will continue to be so upon Closing. As of the date hereof, there are no Proceedings pending or, to Sellers' Knowledge, threatened in writing that seeks the revocation, cancellation, suspension, failure to renew or adverse modification of any Assumed Permits, except where a failure of this representation and warranty to be so true and correct would not have a Material Adverse Effect on the ownership and operation of the business of Sellers. All required filings and maintenance obligations with respect to the Assumed Permits have been made or met, all fees and charges with respect to the Assumed Permits have been paid in full, and all required applications for renewal thereof have been filed, except where a failure of this

representation and warranty to be so true and correct would not have a Material Adverse Effect on the ownership and operation of the business of Sellers.

(b) All Products, including the Inventory, have been manufactured, packaged, labeled, tested, stored, shipped, handled, warehoused, and distributed in compliance in all material respects with all Laws, Permits, and Product Registrations.

**Section 3.14 Purchased Inventory.**

(a) No Inventory that is Purchased Inventory is materially damaged in any significant way, except for any such damage which would not be material to the Purchased Inventory taken as a whole.

(b) No Product has been or has been requested by a Governmental Entity to be recalled, withdrawn, removed, suspended, seized, the subject of a corrective action, or discontinued (whether voluntarily or otherwise) (collectively "Recall"). Neither the Sellers, nor, to the Sellers' Knowledge, any Governmental Entity or other Person, has sought, is seeking, or, to the Sellers' Knowledge, has or is currently threatening or contemplating any Recall of a Product. No Product has been subject to any safety alerts, field notifications, or other written notification of misbranding or adulteration, and neither the Sellers, nor, to the Sellers' Knowledge, any Governmental Entity or other Person, has sought, is seeking, or, to the Sellers' Knowledge, has threatened any such alert or notice.

(c) The Purchased Inventory is free and clear of all Liens (other than Permitted Liens) and is in material compliance with United States federal and applicable state Laws for such products as of the date hereof, except for any such noncompliance which would not be material to the Purchased Inventory taken as a whole.

(d) The Purchased Inventory is (i) in good, usable and currently marketable condition in the Ordinary Course of Business, and (ii) salable in the Ordinary Course of Business at the carrying value of such Inventory, as shown in the books and records of the Sellers in the Ordinary Course of Business, in accordance in all material respects with all applicable Laws, as the case may be.

**Section 3.15 Environmental Matters.**

(a) Each Seller is, and has been during the prior three years, in compliance in all material respects with all applicable Environmental Laws, which compliance has included obtaining and maintaining all permits, licenses and authorizations required under applicable Environmental Laws.

(b) No Seller has received during the prior three years written notice from any Governmental Entity or third party regarding any actual or alleged violation of or Liability under Environmental Laws.

(c) No Hazardous Substance has been released at any current or former Leased Real Property, or other real property, by Sellers in material violation of any Environmental Law.

**Section 3.16 Financial Statements; SEC Filings.**

(a) The consolidated financial statements of Novan (including all related notes or schedules) included or incorporated by reference in the Company SEC Documents, as of their respective dates of filing with the SEC (or, if such Company SEC Documents were amended prior to the date hereof, the date of the filing of such amendment, with respect to the consolidated financial statements that are amended or restated therein), (i) have been prepared in all material respects in accordance with GAAP (except, in the case of unaudited quarterly statements, as permitted by Form 10-Q of the SEC or other rules and regulations of the SEC) applied on a consistent basis during the periods involved (except as may be indicated in the notes thereto or as permitted by Regulation S-X), and (ii) fairly present the consolidated financial position of Novan and its consolidated Subsidiaries as of the dates thereof and the consolidated results of their operations and cash flows for the periods shown).

(b) Since January 1, 2022, Novan has, in all material respects, timely filed with or otherwise furnished (as applicable) to the SEC all registration statements, prospectuses, forms, reports, certifications, proxy statements, schedules, statements and documents required to be filed or furnished by it with the SEC under the Securities Act or the Exchange Act, as the case may be (such documents and any other documents filed or furnished by Novan with the SEC since January 1, 2022 as have been supplemented, modified or amended since the time of filing, collectively, the “Company SEC Documents”). None of Novan’s Subsidiaries is required to file periodic reports with the SEC. To Sellers’ Knowledge, as of the date hereof, none of the Company SEC Documents is the subject of ongoing SEC review or outstanding SEC investigation.

**Section 3.17 Brokers’ Fees.** Except for amounts due to Raymond James Securities LLC (which amounts are to be paid by the Seller), no Seller has entered into any Contract to pay any fees or commissions to any broker, finder or agent with respect to the transactions contemplated by this Agreement for which Buyer could become liable or obligated to pay.

**Section 3.18 No Other Agreements to Purchase.** Sellers have not entered into any agreement with any other Person (written or oral) which grants such third party the right or option purchase or acquire from Sellers any Purchased Asset, other than purchase orders for Inventory accepted by Sellers in the Ordinary Course of Business.

**Section 3.19 Taxes.**

(a) All income and other material Tax Returns (including any IRS Forms W-2 or Forms 1099) required to be filed by or on behalf of Sellers and all Tax Returns required to be filed in respect of the Purchased Assets have been timely filed, and all such Tax Returns are true, correct and complete in all material respects. All income and other

material Taxes of Sellers, whether or not shown on any Tax Return, have been timely paid. Sellers have complied in all material respects with all applicable withholding obligations for Taxes required to have been withheld in connection with amounts paid to any employee, independent contractor, creditor, stockholder or other third party.

(b) There are no pending, proposed in writing or threatened in writing audits or other proceedings with respect to any Taxes payable by or asserted against Sellers. All deficiencies for Taxes asserted or assessed in writing against Sellers have been fully and timely (within any applicable extension periods) paid, or settled.

(c) There are no Liens for Taxes on the Purchased Assets other than Permitted Liens.

(d) There are currently no Proceedings with regard to a material amount of Taxes of Sellers, and Sellers have not received written notice or announcement of any audits or other Actions with respect to a material amount of Taxes.

(e) Neither Seller has been a party to a “listed transaction” within the meaning of Treasury Regulations Section 1.6011-4(b)(2) (or similar provisions of state, local or non-U.S. Law) with respect to the Purchased Assets.

(f) No claim in writing has been made by any Governmental Entity in a jurisdiction where a Seller does not file Tax Returns that it is or may be subject to taxation by that jurisdiction with respect to the Purchased Assets.

**Section 3.20 Business Authorizations; Product Safety and Liability.**

(a) Each Seller owns, holds or lawfully uses (either directly or through its distributors) all authorizations and Permits which are necessary for the ownership, operation or use of the Purchased Assets or the conduct of the business of Sellers, except as would not be material (the “Business Authorizations”), including all Business Authorizations required for the manufacturing, packaging, marketing, promotion, commercialization, testing, clinical investigation, distribution, or sale of the Products (collectively, the “Product Registrations”). Schedule 3.20(a) of the Disclosure Schedule sets forth all Business Authorizations and Product Registrations held by each Seller (organized by Product and country). Each Business Authorization and Product Registration is valid and subsisting and in full force and effect and, subject to satisfaction of applicable consent, notice, transfer, change of ownership or similar requirements under applicable Laws, will continue to be so upon Closing, and each Seller is in compliance in all material respects with the respective terms, conditions and obligations of each such Business Authorization and Product Registration. All fees and charges with respect to such Business Authorizations and Product Registrations, as of the date hereof, have been paid in full and all filing, reporting, and maintenance obligations have been completely and timely satisfied, except, in each case, where failure would be not be material. There are no Proceedings pending or, to the Sellers’ Knowledge, threatened, that would result in the termination, revocation, suspension or the imposition of a restriction or other materially

adverse action on any such Business Authorization or Product Registration or the imposition of any fine, penalty or other sanction for violation of any such Business Authorization or Product Registration.

(b) Each Seller is, and has been, in material compliance with all applicable Laws, Business Authorizations and Product Registrations, including all applicable Laws, Business Authorizations and Product Registrations administered or issued by the FDA or any other Governmental Entity. In the five years prior to the date hereof, no Seller has received any written notice to the effect that such Seller, the business of the Sellers or the Purchased Assets are or may not be in compliance in all material respects with any Law, Business Authorization or Product Registration.

(c) In the five years prior to the date hereof, no Seller has received any written notice of inspectional observations or other noncompliance, including on a Form FDA 483, warning letters, untitled letters, cyber letters, reprimand, regulatory letter, Establishment Inspection Report, notice of an integrity review, notice of an investigation, request for corrective of remedial action, notice of other adverse finding, notice of deficiency or violation, inspection or audit reports, or similar written communications from any Governmental Entity indicating a failure to comply with applicable Laws that has not been resolved.

(d) As required under applicable Law or pursuant to a Permit, Business Authorization, or Product Registration, in the five years prior to the date hereof Sellers have maintained, filed, or furnished to the applicable Governmental Entity or Person all material filings, documents, claims, reports, notices, and other submissions (collectively "Reports"), required to be maintained, filed, or furnished on a timely basis, and, at the time of maintenance, filing, or furnishing all such Reports were complete and accurate in all material respects, or were subsequently updated, changed, corrected, or modified, except, in each case, where failure would not be material.

(e) In the five years prior to the date hereof, neither Sellers nor any officer or, to the Sellers' Knowledge, agent or employee of any Seller has made any untrue or misleading statement of material fact or fraudulent statement to the FDA or any other Governmental Entity, failed to disclose a material fact required to be disclosed to the FDA or any other Governmental Entity, or committed an act, made a statement, or failed to make a statement that would reasonably be expected to provide a basis, if such failure was known to the FDA, for the FDA or any other Governmental Entity to invoke its policy respecting "Fraud, Untrue Statements of Material Facts, Bribery, and Illegal Gratuities," as set forth in 56 Fed. Reg. 46191 (September 10, 1991) (and any amendments thereto), in each case relating to the business of the Sellers or the Purchased Assets. Neither Sellers nor any Person providing services to Sellers has ever been investigated by the FDA or other Governmental Entity for data or healthcare program fraud. In the five years prior to the date hereof, neither Sellers nor, to the Sellers' Knowledge, any Person providing services to Sellers is the subject of any pending or, to the Sellers' Knowledge, threatened investigation pursuant to the FDA Ethics Policy, or resulting from any other untrue or false statement or omission.

(f) Neither Sellers, nor, to the Sellers' Knowledge, any Person providing services to Sellers, nor, to the Sellers' Knowledge, their respective officers, directors, partners, employees, or agents have been:

- i. debarred or suspended pursuant to 21 U.S.C. § 335a;
- ii. excluded under 42 U.S.C. § 1320a-7 or any similar Law of any Governmental Entity;
- iii. excluded, debarred, suspended or deemed ineligible to participate in federal procurement and non-procurement programs, including those produced by the U.S. General Services Administration;
- iv. charged, named in a complaint, convicted, or otherwise found liable in any Proceeding that falls within the ambit of 21 U.S.C. § 331, 21 U.S.C. § 333, 21 U.S.C. § 334, 21 U.S.C. § 335a, 21 U.S.C. § 335b, 42 U.S.C. § 1320a - 7, 31 U.S.C. §§ 3729 – 3733, 42 U.S.C. § 1320a-7a, or any other applicable Law;
- v. disqualified or deemed ineligible pursuant to 21 C.F.R. Parts 312, 511, or 812, or otherwise restricted, in whole or in part, or subject to an assurance pursuant to 21 C.F.R. Parts 312, 511, or 812; or
- vi. had a pending Proceeding, or otherwise received any written notice or other written communication from any Governmental Entity or any Person threatening, investigating, or pursuing (i)-(v) above.

(g) In the five years prior to the date hereof, each Product is, and has been, fit for the ordinary purposes for which it is intended to be used and conforms in all material respects to any promises or affirmations of fact made in all regulatory filings pertaining thereto and made on the container or label for such Product or in connection with its sale. There is no design or manufacturing defect with respect to any Product. In the five years prior to the date hereof, no Seller has received any written notice that such Seller has, and to the Sellers' Knowledge there is no reasonable basis for any Proceedings against such Seller for, any Liability arising out of any injury to any Person or property as a result of a Product or component thereof manufactured, sold or shipped by, or service provided by, the Sellers.

(h) For all pre-clinical studies, animal studies, and clinical trials concerning a Product, (collectively "Studies"), the study reports, protocols, and statistical analysis plans (collectively, the "Data") accurately, completely, and fairly reflects the results from and plans for the Studies in all material respects. The Sellers have no Knowledge of any other studies, the results of which are inconsistent with, or otherwise call into question, the Study results. The Sellers are not aware of any material facts or circumstances related to the safety or efficacy of any Product that would materially and adversely affect the ability to receive or maintain a Permit, Business Authorization, or Product Registration or that would otherwise delay the receipt of the same.

(i) In the five years prior to the date hereof, neither the Sellers nor, to the Sellers' Knowledge, any Person providing services to the Sellers has received any written notice from the FDA, any other Governmental Entity, any Institutional Review Board ("IRB"), or other Person or board responsible for the oversight or conduct of any Study, requiring or threatening the termination, suspension, material modification or material restriction, delay, or clinical hold of, or otherwise rejecting any Study that was, is planned to be, or is being conducted. In the five years prior to the date hereof, all Studies were and, if still pending, are being conducted in all material respects in accordance with all applicable Laws, good clinical practices, good laboratory practices, the protocols, procedures and controls designed and approved for such Studies, professional medical and scientific standards, and in accordance with any requirement of an IRB responsible for review of such Studies.

**Section 3.21 Health Care Laws; HIPAA Compliance.** Each Seller is and, in the five years prior to the date hereof, 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 Seller 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. In the five years prior to the date hereof, neither the Sellers nor any Subsidiary thereof has made an untrue statement of a material fact or fraudulent statement to any Governmental Entity, or, to the Sellers' Knowledge, failed to disclose a material fact required to any Governmental Entity, 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 Seller nor any Subsidiary thereof, or any of their respective affiliates, employees or Representatives, has made any untrue statement of fact to any Governmental Entity regarding material claims incurred but not reported, in the five years prior to the Closing Date.

**Section 3.22 No Other Representations or Warranties.** Except for the representations and warranties expressly contained in this Article III (as qualified by the Disclosure Schedule and in accordance with the express terms and conditions (including limitations and exclusions) of this Agreement) or in the officer's certificate required to be delivered pursuant to Section 7.1(g), none of Sellers or any other Person on behalf of any Seller makes any express or implied representation or warranty with respect to the Purchased Assets or the Assumed Liabilities or with respect to any information, statements, disclosures, documents, projections, forecasts or other material of any nature made available or provided by the Sellers in that certain datasite administered by Datasite on behalf of Sellers or elsewhere to Buyer or any of its Affiliates or Representatives on behalf of Sellers or any of their respective Affiliates or Representatives. Except for the representations and warranties expressly contained in this Article III (as qualified by the Disclosure Schedule and in accordance with the express terms and conditions (including limitations and exclusions) of this Agreement) or in the officer's certificate required to be delivered pursuant to Section 7.1(g), all other representations and warranties, whether express or implied, are hereby expressly disclaimed by Sellers. Nothing in this Section 3.22 shall limit any rights or remedies of Buyer with respect to a claim arising out of related to Fraud.

**ARTICLE IV  
BUYER'S REPRESENTATIONS AND WARRANTIES**

Buyer represents and warrants to Sellers as follows as of the date hereof and as of the Closing Date:

**Section 4.1 Organization of Buyer.** Buyer is a corporation duly incorporated, validly existing and in good standing under the Laws of the State of Delaware and has all requisite corporate power and authority to own, lease and operate its assets and to carry on its business as now being conducted.

**Section 4.2 Authorization of Transaction.**

(a) Buyer has full corporate power and authority to execute and deliver this Agreement and all Related Agreements to which it is a party and to perform its obligations hereunder and thereunder.

(b) The execution, delivery and performance of this Agreement and all other Related Agreements to which Buyer is a party have been duly authorized by Buyer, and no other corporate action on the part of Buyer is necessary to authorize this Agreement or the Related Agreements to which it is a party or to consummate the Contemplated Transactions.

(c) This Agreement has been duly and validly executed and delivered by Buyer, and, upon their execution and delivery in accordance with the terms of this Agreement, each of the Related Agreements to which Buyer is a party will have been duly and validly executed and delivered by Buyer. To the extent this Agreement constitutes a valid and legally-binding obligation of Sellers, this Agreement constitutes a valid and legally-binding obligation of Buyer, enforceable against Buyer in accordance with its terms and conditions, subject to applicable bankruptcy, insolvency, moratorium or other similar Laws relating to creditors' rights and general principles of equity. To the extent each Related Agreement constitutes a valid and legally-binding obligation of each Seller party thereto, each Related Agreement to which Buyer is a party, when executed and delivered, constituted or will constitute the valid and legally-binding obligations of Buyer, enforceable against Buyer in accordance with their respective terms and conditions, subject to applicable bankruptcy, insolvency, moratorium or other similar Laws relating to creditors' rights and general principles of equity.

**Section 4.3 Noncontravention.** Neither the execution and delivery of this Agreement, nor the consummation of the Contemplated Transactions (including the assignments and assumptions referred to in Section 2.6) will (i) conflict with or result in a breach of the certificate of incorporation, bylaws, or other organizational documents, of Buyer, (ii) subject to any consents required to be obtained from any Governmental Entity, violate any Law to which Buyer is, or its assets or properties are subject, or (iii) conflict with, result in a breach of, constitute a default under, result in the acceleration of, create in any party the right to accelerate, terminate, modify or cancel any Contract to which Buyer is a party or by which it is bound, except, in the case of either clause

(ii) or (iii), for such conflicts, breaches, defaults, accelerations or rights as would not, individually or in the aggregate, reasonably be expected to prevent, materially delay or materially impair to the ability of Buyer to consummate the transactions contemplated by this Agreement or by the Related Agreements. Buyer is not required to give any notice to, make any filing with, or obtain any authorization, consent or approval of any Governmental Entity in order for the Parties to consummate the transactions contemplated by this Agreement or any of the Related Agreement, except where the failure to give notice, file or obtain such authorization, consent or approval would not, individually or in the aggregate, reasonably be expected to prevent, materially delay or materially impair to the ability of Buyer to consummate the transactions contemplated by this Agreement or by the Related Agreements.

**Section 4.4 Proceedings.** There are no Proceedings pending or, to Buyer's knowledge, threatened against or affecting Buyer that will adversely affect Buyer's performance under this Agreement or the consummation of the transactions contemplated by this Agreement.

**Section 4.5 Adequate Assurances Regarding Executory Contracts.** Buyer will be capable of satisfying as of the Sale Hearing the conditions contained in Sections 365(b)(1)(C) and 365(f) of the Bankruptcy Code with respect to the Assumed Contracts.

**Section 4.6 Sufficiency of Funds.** Buyer has, and will have at the Closing, sufficient funds in an aggregate amount necessary to pay the cash portion of the Purchase Price at the Closing.

**Section 4.7 Brokers' Fees.** Neither Buyer nor any of its Affiliates has entered into any Contract to pay any fees or commissions to any broker, finder or agent with respect to the transactions contemplated by this Agreement for which any Seller could become liable or obligated to pay.

**Section 4.8 No Other Representations and Warranties.** Except for the representations and warranties expressly contained in this Article IV or in the officer's certificate required to be delivered pursuant to Section 7.1(g), each Seller, on behalf of itself and each of its Affiliates, acknowledges and agrees that neither Buyer nor any other Person on behalf of Buyer makes, and no Seller has relied on the accuracy or completeness of any express or implied representation or warranty with respect to Buyer or with respect to any other information provided by or on behalf of Buyer.

## ARTICLE V PRE-CLOSING COVENANTS

The Parties agree as follows with respect to the period between the execution of this Agreement and the Closing (except as otherwise expressly stated to apply to a different period):

### **Section 5.1 Notices and Consents.**

(a) To the extent required by the Bankruptcy Code or the Bankruptcy Court, Sellers shall give any notices to third parties, and each Seller shall use its commercially

reasonable efforts to obtain any third party Consents or sublicenses; provided, however, that neither Sellers nor Buyer shall be required to incur any Liabilities or provide any financial accommodation, in order to obtain any such third party Consent with respect to the transfer or assignment of any Purchased Asset.

(b) Sellers and Buyer shall cooperate with one another (a) in promptly determining whether any filings are required to be or should be made or consents, approvals, permits or authorizations are required to be or should be obtained under any applicable Law in connection with this Agreement and the Contemplated Transactions and (b) in promptly making any such filings, furnishing information required in connection therewith and seeking to obtain timely any such consents, permits, authorizations, approvals or waivers; provided, however, that Sellers' obligations hereunder shall only continue until the Chapter 11 Cases are closed or dismissed.

(c) To the extent permitted by applicable Law and the terms of the Purchased Assets, in the event any third party Consent has not been obtained by the Closing, at the Buyer's request, the Party contemplated to be transferring such Purchased Asset under this Agreement (the "Transferring Party") shall hold in trust for the Buyer, as applicable, the relevant Purchased Asset until the earlier of such time as (i) the third party Consent is obtained, (ii) the Chapter 11 Cases are closed or dismissed or (iii) Buyer elects not to assume or otherwise receive or accept assignment or other transfer of such Purchased Asset. During such time period (and subject to the availability of funds for such purpose), Buyer shall comply with all applicable covenants and obligations under the Purchased Assets, including the payment of any costs or expenses in connection therewith. Buyer shall be entitled to receive all of the benefits of the Transferring Party under the Purchased Asset. Buyer shall satisfy all Liabilities with respect to such Purchased Assets until the earlier of such time as (i) the third party Consent is obtained, (ii) the Chapter 11 Cases are closed or dismissed or (iii) Buyer elects not to assume such Purchased Asset, and shall indemnify and hold Sellers harmless with respect to any such reasonable out-of-pocket expenses arising in the Ordinary Course of Business pursuant to a budget to be reasonably agreed to by the Parties in good faith arising or otherwise relating to such period; provided that each Seller covenants and agrees that in the event of clause (iii), it will wind down such Purchased Asset as soon as commercially reasonable and shall take all commercially reasonable measures to avoid or mitigate any losses, expenses and Liabilities.

(d) Subject to the terms and conditions set forth in this Agreement and applicable Law, Buyer and Sellers shall (A) promptly notify the other Party of any communication to that Party from any Governmental Entity in respect of any filing, investigation or inquiry concerning this Agreement or the Contemplated Transactions, (B) if practicable, permit the other Party the opportunity to review in advance all the information relating to Sellers and their respective Subsidiaries or Buyer and its Affiliates, as the case may be, that appears in any filing made with, or written materials submitted to, any third party and/or any Governmental Entity in connection with the Agreement and the transactions contemplated by this Agreement and consider in good faith the other Party's reasonable comments, (C) not participate in any substantive meeting or discussion with

any Governmental Entity in respect of any filing, investigation, or inquiry concerning this Agreement and the transactions contemplated by this Agreement unless it consults with the other Party in advance, and, to the extent permitted by such Governmental Entity, gives the other Party the opportunity to attend, and (D) furnish the other Party with copies of all correspondences, filings, and written communications between them and their Subsidiaries and Representatives, on the one hand, and any Governmental Entity or its respective staff, on the other hand, with respect to this Agreement and the transactions contemplated by this Agreement, provided, however, that any materials or information provided pursuant to any provision of this Section 5.1(d) may be redacted before being provided to the other Party (i) to remove references concerning the valuation of Buyer, Sellers, or any of their Subsidiaries, (ii) financing arrangements, (iii) as necessary to comply with contractual arrangements, and (iv) as necessary to address reasonable privilege or confidentiality issues. Sellers and Buyer may, as each deems advisable and necessary, reasonably designate any commercially or competitively sensitive material provided to the other under this Section 5.1(d) as “outside counsel only.” Such materials and the information contained therein shall be given only to the outside legal counsel and any retained consultants or experts of the recipient and shall not be disclosed by such outside counsel to employees, officers or directors of the recipient, unless express written permission is obtained in advance from the source of the materials (Sellers or Buyer, as the case may be). Each of Sellers and Buyer shall promptly notify the other Party if such Party becomes aware that any third party has any objection to the Agreement on antitrust or anti-competitive grounds.

**Section 5.2 Bankruptcy Actions.**

(a) Sellers shall have commenced the Chapter 11 Cases no later than July 18, 2023.

(b) On the Petition Date, the Sellers shall file the Sale Motion, which motion shall seek the Bankruptcy Court’s (i) entry of the Sale Procedures Order and (ii) entry of the Sale Order by no later than the Sale Order Deadline that provides the Parties, inter alia, consummate the Closing as soon as practicable after the entry of the Sale Order and no later than three days following the entry of the Sale Order, subject to the satisfaction of all conditions to the obligations of Sellers and Buyer as set forth in Article VII (other than conditions with respect to actions Sellers and/or Buyer will take at the Closing itself, but subject to the satisfaction or waiver of those conditions). The Sellers and Buyer agree, and the Sale Procedures Order shall reflect the fact that, the provisions of this Agreement are reasonable, were a material inducement to the Buyer to enter into this Agreement and are designed to achieve the highest or best offer for the Purchased Assets.

(c) Sellers shall provide Buyer with a reasonable opportunity to review and comment upon all motions, applications, and supporting papers relating to the transactions contemplated by this Agreement prepared by Sellers or any Affiliates (including forms of orders and notices to interested Parties) prior to the Petition Date. All motions, applications, and supporting papers prepared by Sellers and relating to the transactions contemplated by this Agreement to be filed on behalf of Sellers after the date hereof shall be approved in form and substance by Buyer.

(d) Each of Buyer and Sellers shall continue to act in good faith and without any improper conduct, including collusion or fraud of any kind.

(e) Each of Buyer and Sellers shall promptly take such actions as are reasonably requested by the other party to assist in obtaining entry of the Sale Order and the Sale Procedures Order, including furnishing affidavits or other documents or information for filing with the Bankruptcy Court for purposes, among others, of providing necessary assurances of performance by Sellers of their obligations under this Agreement and the Related Agreements and demonstrating that Buyer is a good faith buyer under Section 363(m) of the Bankruptcy Code.

(f) Unless the Bankruptcy Court enters an order approving a private sale of the Purchased Assets to Buyer without a requirement to complete a public sale after competitive bidding, pursuant to the terms of the proposed Sale Procedures Order, Sellers shall, among other things, solicit bids from other prospective purchasers for the sale of all or substantially all of the Purchased Assets on terms and conditions substantially the same in all respects to this Agreement (or more favorable terms to Sellers) and in accordance with the procedures set forth in the proposed Sale Procedures Order, and Sellers shall adhere to those procedures.

(g) Sellers shall use commercially reasonable efforts to provide appropriate notice of the hearings on the Sale Motion to all Persons entitled to notice, including, but not limited to, all Persons that have asserted Liens in the Purchased Assets, all Parties to the Assumed Contracts and all Taxing authorities in jurisdictions applicable to Sellers and as otherwise required by the Bankruptcy Code and bankruptcy rules.

(h) Sellers shall serve a cure notice by first class mail on all non-debtor counterparties to all Non-Real Property Contracts and Leases as required by the Sale Procedures Order and provide a copy of the same to Buyer.

(i) In the event that the Bankruptcy Court has not (a) entered the Sale Procedures Order by the Applicable Deadline or (b) entered the DIP Order by the Applicable Deadline (either such event, a “Conversion Trigger Event”) in accordance with the Sale Procedures Order, the Parties shall use their respective reasonable best efforts to obtain an order of the Bankruptcy Court to enter an order approving this Agreement as a “private sale” no longer subject to overbids. Following a Conversion Trigger Event, (x) Sections 5.2(f), Section 7.1(f) and 8.1(k) of this Agreement shall be deemed to have become null and void, (y) the Outside Date as defined in this Agreement shall be amended to be the date that is 30 days following the Petition Date (or, in the event the conditions to the obligations of Sellers and Buyer as set forth in Article VII (other than conditions with respect to actions Sellers and/or Buyer will take at the Closing itself) have been satisfied as of the Conversion Trigger Event and the Conversion Trigger Event occurs on a date that is less than two Business Days prior to the Outside Date (as so amended), the date that is two Business Days after the Conversion Trigger Event) and (z) the Parties shall take such further action as necessary to make any other applicable amendments or modifications to this Agreement such that this Agreement no longer contemplates a “public sale” subject to

overbids as contemplated by Section 5.2(f). In the event of a conflict between the provisions of this Section 5.2(i) and the terms of the proposed Sale Procedures Order, the terms of the proposed Sale Procedures Order shall control.

**Section 5.3 Conduct of Business.**

(a) Except as (i) required by applicable Law, (ii) required by order of the Bankruptcy Court or restricted pursuant to the Bankruptcy Code, the DIP Order or the DIP Loan Documents, as the case may be, or (iii) expressly required by this Agreement, during the period from the date of this Agreement until the Closing (or such earlier date and time on which this Agreement is terminated pursuant to Article VIII), unless Buyer otherwise consents in writing (such consent shall not be unreasonably withheld, conditioned or delayed), the Sellers shall (i) continue to operate their businesses and the Purchased Assets in compliance with all Laws and pay all of their respective post-petition obligations in the Ordinary Course of Business in compliance with and as contemplated by the DIP Budget, (ii) use its and their commercially reasonable efforts to preserve substantially intact their goodwill and relationships with employees, suppliers, vendors, licensors, licensees, distributors, consultants, customers, and other Persons, in each case, having material relationships with Sellers (other than making any payment of any pre-petition claim except as approved by the Bankruptcy Court and as contemplated in the DIP Budget), (iii) use commercially reasonable efforts not to take, or agree to or commit to assist any other Person in taking, any action (x) that would reasonably be expected to result in a failure of any of the conditions to the Closing or (y) that would reasonably be expected to impair the ability of Sellers or Buyer to consummate the Closing in accordance with the terms hereof or to materially delay such consummation, and (iv) shall make all post-petition payments related to Assumed Contracts (other than Cure Amounts) that become or became due or payable pursuant to the terms thereof to the extent provided in the DIP Budget.

(b) Except as (i) required by applicable Law, (ii) required by order of the Bankruptcy Court or restricted pursuant to the Bankruptcy Code, the DIP Order or the DIP Loan Documents, as the case may be, (iii) expressly required by this Agreement, or (iv) expressly set forth in Schedule 5.3(b) of the Disclosure Schedule, and without limiting the generality of the restrictions set forth in Section 5.3(a), during the period from the date of this Agreement until the Closing (or such earlier date and time on which this Agreement is terminated pursuant to Article VIII), unless Buyer otherwise consents in writing (such consent shall not be unreasonably withheld, conditioned or delayed), the Sellers shall not do or take any of the following actions (whether by merger, operation of law or otherwise):

i. use any proceeds borrowed under the DIP Loan Agreement except as set forth in the DIP Budget (as the same may be updated from time to time in accordance with the DIP Loan Documents and subject to permitted variances under the DIP Loan Documents);

ii. (A) issue, sell, encumber or grant any shares of the capital stock or other equity or voting interests of any Seller, or any securities or rights convertible into, exchangeable or exercisable for, or evidencing the right to subscribe for any

shares of such capital stock or other equity or voting interests, or any rights, warrants or options to purchase any shares of such capital stock or other equity or voting interests; (B) redeem, purchase or otherwise acquire any of the outstanding shares of capital stock or other equity or voting interests of any Seller, or any rights, warrants or options to acquire any shares of such capital stock or other equity or voting interests, (C) establish a record date for, declare, set aside for payment or pay any dividend on, or make any other distribution in respect of, any shares of the capital stock or other equity or voting interests of any Seller, or (D) split, combine, subdivide or reclassify any shares of the capital stock or other equity or voting interests of any Seller;

iii. issue, incur, assume or otherwise become liable for (i) any indebtedness for borrowed money, (ii) any notes, mortgages, bonds, debentures or other debt securities or warrants or other rights to acquire any notes, mortgages, bonds, debentures or other debt securities of any Seller, (iii) any letters of credit, security or performance bonds or similar credit support instruments or overdraft facilities or cash management programs of any Person, (iv) any amounts owing as deferred purchase price for property or services, including any capital leases, seller notes and “earn out” payments, or other contingent payment obligations, or (v) any guarantee of any of the foregoing obligations of another Person, or any “keep well” or other agreement to maintain any financial statement condition of another Person (collectively, “Indebtedness”);

iv. sell, divest, distribute, assign, license, mortgage, pledge, encumber, transfer, lease or sublease to any Person, or otherwise dispose of, in a single transaction or series of related transactions, any of the Purchased Assets, except dispositions of Inventory in exchange for fair value in cash in the Ordinary Course of Business or to the extent permitted by the DIP Loan Documents;

v. enter into any commitment for, make or authorize capital expenditures in excess of \$25,000 for any individual commitment and \$100,000 for all commitments in the aggregate, including for property, plant and equipment, except for those, if any, that are expressly contemplated by the DIP Budget;

vi. make any acquisition of, or investment in, or otherwise acquire, any properties, assets, securities, or business (including by merger, asset acquisition, equity purchase, or other transaction), except for any acquisition of Inventory in the Ordinary Course of Business;

vii. other than as required by applicable Law, as contemplated by the DIP Budget or as set forth on Schedule 5.3(b)(vii) of the Disclosure Schedule, (1) grant to any current or former director, officer, employee, contractor or other service provider of any Seller any increase in compensation or benefits, (2) grant to any current or former director, officer, employee, contractor or other service provider of any Seller any severance, retention, change in control, termination or similar compensation or benefits, (3) grant or amend any equity, equity-based or

other incentive or similar awards, (4) other than as required by any Contract or Employee Benefit Plan as in effect as of the date of this Agreement and made available to Buyer, pay any amount to any current or former director, officer, employee, contractor or other service provider of any Seller, (5) establish, adopt, enter into, materially amend or voluntarily terminate any Employee Benefit Plan or (6) take any action to accelerate or modify the vesting of, or payment of, any compensation or benefit, including under any Employee Benefit Plan;

viii. make any changes in financial accounting methods, principles, practices, procedures, or policies, except insofar as may be required by changes, after the date of this Agreement (A) in GAAP or (B) or any applicable Law, including Regulation S-X under the Securities Act;

ix. sell, lease, transfer, license, abandon, or otherwise dispose of, or grant any Lien (other than Permitted Liens), on any assets, other than sales of Inventory in the Ordinary Course of Business in exchange for fair value in cash or except to the extent permitted by the DIP Loan Documents;

x. waive, release, assign, institute, compromise, settle, or offer to do any of the foregoing, with respect to any pending or threatened Proceedings related to any Seller, their respective businesses, the Purchased Assets or the Assumed Liabilities, other than (i) as required by order of the Bankruptcy Court or restricted pursuant to the Bankruptcy Code, the DIP Order or the DIP Loan Documents, as the case may be or (ii) involving solely money damages not in excess of \$75,000 individually, or \$150,000 in the aggregate (which damages, for further clarity, will constitute Excluded Liabilities);

xi. (A) terminate, amend, supplement, modify or waive any provision of, fail to timely exercise any reserved right under, or accelerate any rights, benefits or obligations under, any Assumed Contract, except the expiration in accordance with its terms, (B) enter into any Contract that would have been a Material Contract if executed prior to the date of this Agreement; or (C) assume, reject or assign any (i) Contract that may become an Assumed Contract other than through the assumption and assignment of the Assumed Contracts, as contemplated by this Agreement, to Buyer, or (ii) Lease;

xii. (A) abandon, cancel, fail to renew, permit to lapse (1) any Owned Intellectual Property that is used in the conduct of the business of Sellers or is otherwise material or (2) any Intellectual Property licensed by the Sellers to the extent that a Seller has the right to take or cause to be taken such action pursuant to the terms of the applicable Contract under which such Intellectual Property is licensed to the applicable Seller Party, (B) sell, transfer, license, lease, sublease, pledge or otherwise encumber any Owned Intellectual Property or Intellectual Property that is licensed by any Seller, other than non-exclusive licenses of Owned Intellectual Property granted to customers or vendors in the Ordinary Course of

Business, or (C) disclose any trade secrets or confidential information other than pursuant to a written non-disclosure agreement in the Ordinary Course of Business;

xiii. fail to use commercially reasonable efforts to renew and maintain the validity of their respective rights in, to or under any material Intellectual Property;

xiv. amend in any material respect, cancel or permit to terminate any material insurance policy naming any Seller or a Subsidiary of any Seller as an insured, a beneficiary or a loss payable payee without first obtaining comparable substitute insurance coverage with no lapse in coverage;

xv. grant any material waiver under or materially amend or modify, or surrender, revoke, permit to lapse or otherwise terminate any Permit or Business Authorization;

xvi. (1) make, revoke or change any material Tax election or method of accounting with respect to Taxes, (2) file any Tax Return (other than in the Ordinary Course of Business and consistent with past practice and applicable Law) or amend any Tax Return, (3) enter into any closing agreement related to Taxes, or (4) enter into any Tax allocation, sharing, indemnity or similar agreement or arrangement; and

xvii. authorize any of, or commit, agree or promise, in writing or otherwise, to take any of, the foregoing actions.

It is understood and agreed that certain actions may be contemplated by one or more provisions of this Section 5.3, and, in such event, such action may only be taken (or omitted to be taken) if so permitted by each such provision of this Section 5.3. Nothing contained in this Agreement is intended to give Buyer or its Affiliates, directly or indirectly, the right to control or direct any of the Sellers' or their Subsidiaries' operations or business prior to the Closing, and nothing contained in this Agreement is intended to give any Seller, directly or indirectly, the right to control or direct Buyer's or its Subsidiaries' operations. Prior to the Closing, each of Buyer and the Sellers shall exercise, consistent with the terms and conditions of this Agreement, complete control and supervision over its and its Subsidiaries' respective operations.

**Section 5.4 Notice of Developments.** From the date hereof until the Closing Date, each of the Sellers (with respect to itself), as the case may be, shall promptly disclose to Buyer, on the one hand, and Buyer shall promptly disclose to Sellers, on the other hand, in writing (in the form of an updated Disclosure Schedule, if applicable) after attaining knowledge (as applicable to each of Sellers and Buyer) of any real or alleged failure of any of Sellers or Buyer to comply with or satisfy any of their respective covenants, conditions or agreements to be complied with or satisfied by it under this Agreement in any material respect; provided, however, that the delivery of any notice pursuant to this Section 5.4 shall not limit or otherwise affect the remedies available to the party receiving such notice under this Agreement if such party objects to the disclosures contained in such notice within five days of receipt of such notice.

**Section 5.5 Access.** Upon reasonable advance written request by Buyer, Sellers shall permit Buyer and its Representatives to have reasonable access to, and make reasonable investigation of, during normal business hours, subject to the terms of Leases and in a manner so as not to interfere unreasonably with the normal business operations of Sellers, to all of the books and records, premises, properties, personnel, Records, Contracts, businesses, assets, accountants, auditors, counsel and operations of the Sellers related to the business of the Sellers; provided, however, that, for the avoidance of doubt, the foregoing shall not require any Party to waive, or take any action with the effect of waiving, its attorney-client privilege or any confidentiality obligation to which it is bound with respect thereto or take any action in violation of applicable Law. Sellers shall cause their respective officers, employees, consultants, agents, accountants, attorneys and other representatives to cooperate with Buyer and Buyer's Representatives in connection with such investigation and examination, and Buyer and its Representatives shall cooperate with Sellers and their respective Representatives and shall use their reasonable efforts to minimize any disruption to the business of the Sellers.

**Section 5.6 Press Releases and Public Announcements.** After notice to and consultation with Buyer, after the Petition Date (but not before), Sellers shall be entitled to disclose, only to the extent required by applicable Law or by order of the Bankruptcy Court, this Agreement and all information provided by Buyer in connection herewith to the Bankruptcy Court, the United States Trustee, the Committee, parties in interest in the Chapter 11 Cases. Other than statements made in the Bankruptcy Court (or in pleadings filed therein), no Party shall issue (prior to, on or after the Closing) any press release or make any public statement or public communication without the prior written consent of the other Parties, which shall not be unreasonably withheld or delayed; provided, however, that (i) Sellers, without the prior consent of Buyer, may (A) make any such public announcement in connection with the Auction after having provided Buyer at least one Business Day to review and comment on such release or announcement (which comments shall be reasonably considered by the Seller) and (B) communicate with its and its Affiliates' investors and potential investors relating to the transactions contemplated by this Agreement. Notwithstanding anything to the contrary in this Section 5.6, nothing shall preclude and claims or noticing agent engaged in the Chapter 11 Cases from posting this Agreement for access to the Sellers' creditors and other stakeholders or as required by applicable Law to be filed by Novan with, or otherwise furnished by Novan to (as applicable), the SEC.

**Section 5.7 Bulk Transfer Laws.** Buyer acknowledges that Sellers will not comply with the provisions of any bulk transfer Laws of any jurisdiction in connection with the transactions contemplated by this Agreement, and hereby waives all claims related to the non-compliance therewith. The Parties intend that pursuant to section 363(f) of the Bankruptcy Code, the transfer of the Purchased Assets shall be free and clear of any Liens on the Purchased Assets (other than Permitted Liens), including any Liens arising out of the bulk transfer Laws, and the Parties shall take such steps as may be necessary or appropriate to so provide in the Sale Order.

**Section 5.8 Release of Claims.** Notwithstanding anything contained herein to the contrary (including any restriction contained in Section 5.3) not later than the Closing, the Sellers shall deliver to Buyer a full, irrevocable and unconditional release of any and all claims, actions, refunds, causes of action, choses in action, actions, suits or proceedings, rights of recovery, rights

of setoff, rights of recoupment, rights of indemnity or contribution and other similar rights (known and unknown, matured and unmatured, accrued or contingent, regardless of whether such rights are currently exercisable) against Buyer and its respective current and former officers, directors, stockholders, employees, agents, representatives, attorneys, investors, parents, predecessors, subsidiaries, successors, assigns, and affiliates, each of the foregoing in their capacity as such (individually and collectively, the “Buyer Released Parties”), from all actions, causes of action, damages, claims, and demands whatsoever, in law or in equity, known or unknown, contingent or liquidated, whether direct claims or for indemnification or contribution, that the Sellers ever had, now has, or may have against the Buyer Released Parties in connection with any event, conduct or circumstance occurring prior to the Closing, except, in each case, with respect to (i) any rights of the Sellers under this Agreement, any of the Related Agreements, any of the DIP Loan Documents or any other agreement between the Parties entered after the date hereof and (ii) fraud, gross negligence or willful misconduct of the Buyer Released Parties. The foregoing release shall be effective upon approval by a Final Order of the Bankruptcy Court.

**Section 5.9 Transition Services Agreement.** Upon the request by Buyer following the date of this Agreement and prior to the date that is five Business Days prior to the Closing Date, the Parties shall negotiate in good faith a customary transition services agreement by and between Sellers, on the one hand, and Buyer, on the other hand (the “Transition Services Agreement”), in a form reasonably satisfactory to the Parties, pursuant to which the Parties shall provide reasonable assistance in transitioning the Purchased Assets from Sellers to Buyer for a period mutually agreed, with each of the Parties bearing their own respective costs in connection with such Transition Services Agreement (unless otherwise agreed in the Transition Services Agreement).

## ARTICLE VI OTHER COVENANTS

The Parties agree as follows with respect to the period from and after the Closing:

**Section 6.1 Cooperation.** Each of the Parties shall cooperate with each other, and shall use their commercially reasonable efforts to cause their respective Representatives to cooperate with each other, to provide an orderly transition of the Purchased Assets and Assumed Liabilities from Sellers to Buyer and to minimize the disruption to the business of the Sellers resulting from the Contemplated Transactions.

**Section 6.2 Further Assurances.** In case at any time from and after the Closing any further action is necessary or reasonably required to carry out the purposes of this Agreement, subject to the terms and conditions of this Agreement and the terms and conditions of the Sale Order, at any Party’s request and sole cost and expense, each Party shall take such further action (including the execution and delivery to any other Party of such other reasonable instruments of sale, transfer, conveyance, assignment, assumption and confirmation and providing materials and information) as another Party may reasonably request as shall be necessary to transfer, convey and assign to Buyer all of the Purchased Assets, to confirm Buyer’s assumption of the Assumed Liabilities and to confirm Sellers’ retention of the Excluded Assets and Excluded Liabilities. Without limiting the generality of this Section 6.2, to the extent that either Buyer or Sellers discovers any additional assets or properties which the Parties mutually agree should have been

transferred or assigned to Buyer as Purchased Assets but were not so transferred or assigned, Buyer and Sellers shall cooperate and execute and deliver any instruments of transfer or assignment necessary to transfer and assign such asset or property to Buyer.

**Section 6.3 Availability of Business Records.** From and after the Closing, Buyer shall provide to Sellers and their respective Representatives (after reasonable notice and during normal business hours and without charge to Sellers) reasonable access to all Records included in the Purchased Assets for periods prior to the Closing and reasonable access to Transferred Employees to the extent such access is necessary in order for Sellers (as applicable) to comply with applicable Law or any contract to which it is a party, for liquidation, winding up, Tax reporting or other proper purposes and so long as such access is subject to an obligation of confidentiality, and shall preserve such Records until the latest of (i) three years after the Closing Date, (ii) the required retention period for all government contact information, records or documents, (iii) the conclusion of all bankruptcy proceedings relating to the Chapter 11 Cases or (iv) in the case of Records related to Taxes, the expiration of the statute of limitation applicable to such Taxes. Such access shall include access to any information in electronic form to the extent reasonably available.

**Section 6.4 Employee Matters.**

(a) Within 10 days prior to Closing (or on such other timeline as agreement by the Parties) Sellers will update the Employee Roster. At least five days prior to the Closing, Buyer will identify the employees (or corresponding positions) on the Employee Roster to whom Buyer intends make an offer of employment. Prior to Closing, Buyer shall offer employment to the employees listed on such schedule (an “Offeree”) to the extent such employee is an employee of a Seller and remains employed by such Seller immediately prior to the Closing on employment terms as Buyer may determine in its sole discretion.

(b) Each Offeree of Sellers who accept offers for employment with Buyer prior to the Closing shall be referred to herein as a “Transferred Employee.” Effective as of the Closing, each Transferred Employee shall cease to be an employee of any Seller or their Affiliates. Each Offeree of Sellers who is not a Transferred Employee shall be referred to herein as an “Excluded Employee.”

(c) Following the date of this Agreement:

i. Sellers will allow Buyer or any of its Representatives reasonable access upon reasonable advance notice to meet with and interview the individuals listed on the Employee Roster during normal business hours;

ii. Sellers shall not, nor shall any Seller authorize or direct or give express permission to any Affiliate, officer, director or employee of any Seller or any Affiliate, to (A) interfere with Buyer’s or its Representatives’ rights under Section 6.4(a) to make offers of employment to any Offeree, or (B) solicit or encourage any Offeree not to accept, or to reject, any such offer of employment;

iii. Sellers shall provide reasonable cooperation and information to Buyer or the relevant Representative as reasonably requested by Buyer or such Representative with respect to its determination of terms and conditions of employment for any Offeree;

iv. Sellers shall process the payroll for and pay, or cause to be paid, the base wages, base salary and benefits that are due and payable prior to the Closing Date with respect to all employees of Sellers. Sellers shall withhold and remit all applicable payroll taxes as required by Law prior to the Closing Date with respect to all employees of Sellers as of such date; and

v. For the sake of clarity Buyer does not assume any Liability with respect to Excluded Employees, including for paying any accrued wages, paid time off or other accrued compensation obligations of Excluded Employees.

(d) Nothing in this Section 6.4 shall be construed as requiring, and neither Sellers nor any of their Affiliates shall take any affirmative action that would have the effect of requiring Buyer to continue any specific employee benefit plan or to continue the employment of any specific person. Nothing in this Agreement is intended to establish, create or amend, nor shall anything in this Agreement be construed as establishing, creating or amending, any employee benefit plan, practice or program of Buyer, any of its Affiliates or any of Sellers' Employee Benefit Plans, nor shall anything in this Agreement create or be construed as creating any contract of employment or as conferring upon any Current Employee, Transferred Employee or upon any other person, other than the Parties to this Agreement in accordance with its terms, any rights to enforce any provisions of this Agreement under ERISA or otherwise.

**Section 6.5 Transfer Taxes.** To the extent not exempt under Section 1146 of the Bankruptcy Code, Buyer shall pay all Transfer Taxes. Sellers and Buyer shall cooperate to prepare and timely file any Tax Returns required to be filed in connection with Transfer Taxes described in the immediately preceding sentence.

**Section 6.6 Insurance Policies.** From and after the Closing, Buyer shall have the right to make claims and the right to any proceeds with respect to any matter related to the Assumed Liabilities under any insurance policies for occurrence-based claims pertaining to, arising out of, and inuring to the benefit of any Seller for all periods prior to the Closing, and Sellers shall use commercially reasonable efforts to seek recovery or allow Buyer to seek recovery (including by executing or delivering any document, agreement, instrument or other information as Buyer may request to seek such recovery) under such insurance policies, and each Seller shall cooperate with all of Buyer's reasonable requests if it seeks recovery, with respect to such matters and shall remit (or, at Buyer's request, direct any such insurer to pay directly to Buyer) any insurance proceeds actually obtained therefrom (net of such Seller's reasonable and documented out-of-pocket costs and expenses of seeking such recovery, to the extent not otherwise paid or reimbursed by Buyer) to Buyer or its designee.

**Section 6.7 Receipt of Misdirected Assets.** From and after the Closing, if any Seller or any Affiliate thereof receives, or becomes aware that it holds, any right, property or asset that is a Purchased Asset, the applicable Seller shall promptly transfer or cause such of its Affiliates to transfer (without cost to Buyer) such right, property or asset (and shall promptly endorse and deliver any such asset that is received in the form of cash, checks or other documents) to Buyer or its designee, and such asset will be deemed the property of Buyer or its designee held in trust by such Seller for Buyer until so transferred. From and after the Closing, if Buyer or any of its Affiliates receives, or becomes aware that it holds, any right, property or asset that is an Excluded Asset, Buyer shall promptly transfer or cause such of its Affiliates to transfer (without cost to Sellers) such asset (and shall promptly endorse and deliver any such right, property or asset that is received in the form of cash, checks or other documents) to Sellers, and such asset will be deemed the property of Sellers or its designee held in trust by Buyer for Sellers until so transferred.

**Section 6.8 No Successor Liability.** The Parties intend that, to the fullest extent permitted by applicable Law (including under Section 363 of the Bankruptcy Code), upon the Closing, Buyer shall not be deemed to: (a) be the successor of any Seller, (b) have, *de facto* or otherwise, merged with or into any Seller, (c) be a mere continuation or substantial continuation of any Seller or the enterprise(s) of Sellers or (d) be liable or have any Liability for any acts or omissions of Sellers in the conduct of their businesses or arising under or related to the Purchased Assets other than as expressly set forth and agreed in this Agreement. Without limiting the generality of the foregoing, and except as otherwise expressly provided in this Agreement, the Parties intend that Buyer shall have no Liability for any Lien (other than the Assumed Liabilities and Permitted Liens on the Purchased Assets) against Sellers or any of Sellers predecessors or Affiliates, and Buyer shall have no successor or vicarious liability of any kind or character whether known or unknown as of the Closing Date or in connection with the transactions contemplated to occur on the Closing, whether now existing or hereafter arising, or whether fixed or contingent, with respect to the businesses of Sellers, the Purchased Assets or any Liability of Sellers arising prior to, or relating to any period occurring prior to, the Closing Date. The Parties agree that the Sale Order shall contain provisions substantially in the form set forth in this Section 6.8.

**Section 6.9 Covenant Not to Compete; Non-Solicitation.**

(a) For a period commencing on the Closing Date and ending on the three-year anniversary of the Closing Date (the “Restricted Period”), each Seller shall not, directly or indirectly, establish, finance, own, manage, operate, engage in or otherwise participate in the conduct of any business that is the same or substantially similar to and directly or indirectly competes in any respect with the business of the Sellers as conducted in the 12 months prior to the Closing Date.

(b) During the Restricted Period, each Seller shall not (i) directly or indirectly solicit, encourage or attempt to solicit or encourage any of the employees, agents, independent contractors, consultants or representatives of Buyer to terminate his, her or its relationship with Buyer; (ii) directly or indirectly solicit, encourage or attempt to solicit or encourage any of the employees, agents, independent contractors, consultants or representatives of Buyer to become employees, agents, representatives, consultants or independent contractors of any other Person; (iii) directly or indirectly solicit or attempt to

solicit any customer, vendor or distributor of Buyer with respect to any product or service being furnished, made, sold or leased by Buyer; or (iv) persuade or seek to persuade any customer of Buyer to cease to do business or to reduce the amount of business that such customer has customarily done prior to the Closing Date with the Sellers.

(c) The Parties expressly acknowledge that it would be difficult to measure the damages that might result from any breach of this Section 6.9, and that any such breach will result in immediate, substantial and irreparable injury to Buyer for which it will have no adequate remedy at law. Buyer shall be entitled to, without the posting of any bond, seek an injunction or other equitable relief issued by a court of competent jurisdiction enjoining and restraining any violation or threatened violation of this Section 6.9 by any Seller. Each Seller acknowledges and agrees that this Section 6.9 is (i) a material inducement for Buyer to enter into this Agreement and consummate the transactions contemplated hereby, and (ii) reasonable under the circumstances to protect the Purchased Assets and goodwill acquired by Buyer under this Agreement. Rights and remedies provided for in this Section 6.9 are cumulative and shall be in addition to rights and remedies otherwise available to the Parties hereunder or under any other agreement or applicable law.

(d) If any provision contained in this Section 6.9 is for any reason held invalid, illegal or unenforceable in any respect, such invalidity, illegality or unenforceability will not affect any other provisions of this Section 6.9, but this Section 6.9 will be construed as if such invalid, illegal or unenforceable provision had never been contained herein. The Parties intend that if any of the restrictions or covenants contained herein is held to cover a geographic area or to be for a length of time which is not permitted by applicable law, or in any way construed to be too broad or to any extent invalid, such provision will not be construed to be null, void and of no effect, but to the extent such provision would be valid or enforceable under applicable law, a court of competent jurisdiction will construe and interpret or reform this Section 6.9 to provide for a covenant having the maximum enforceable geographic area, time period and other provisions (not greater than those contained herein) as will be valid and enforceable under such applicable law.

(e) It is expressly agreed by Buyer that in no event will the restrictions set forth in this Section 6.9 apply or be deemed or interpreted to apply to any other Person other than Seller itself.

## ARTICLE VII CONDITIONS TO CLOSING

### **Section 7.1 Conditions to Buyer's Obligations.**

Subject to Section 7.3, Buyer's obligation to consummate the Contemplated Transactions in connection with the Closing is subject to satisfaction or written waiver of the following

conditions (any or all of which may be waived in writing by the Sellers and the Buyer in whole or in part to the extent permitted by applicable Law):

(a) as of the date hereof and as of the Closing (in each case, except for any representation or warranty that is expressly made as of a specified date, in which case as of such specified date), (i) each representation or warranty contained in Section 3.1, Section 3.2 or Section 3.3 shall be true and correct in all respects other than *de minimis* exceptions, and (ii) each other representation or warranty set forth in Article III shall be true and correct in all respects, except where the failure of such representations and warranties referred to in this clause (ii) to be true and correct, individually or in the aggregate with other such failures, has not had, and would not reasonably be expected to have, a Material Adverse Effect; provided, however, that for purposes of determining the accuracy of representations and warranties referred to in clause (ii) for purposes of this condition, all qualifications as to “materiality” and “Material Adverse Effect” contained in such representations and warranties shall be disregarded;

(b) Sellers shall have performed and complied with their covenants and agreements hereunder to the extent required to be performed prior to the Closing in all material respects, and Sellers shall have caused the documents and instruments required by Section 2.9(a) to be delivered to Buyer (or tendered subject only to Closing);

(c) no Governmental Entity of competent jurisdiction shall have enacted, issued, promulgated, enforced or entered any Order that is in effect and that has the effect of making the Closing illegal or otherwise prohibiting the consummation of the Closing;

(d) the Sale Order shall have been entered by the Bankruptcy Court and shall have become a Final Order;

(e) (i) no Default or Event of Default (in each case as such term is defined in the DIP Loan Agreement) shall have occurred and be continuing under the DIP Loan Agreement arising from the appointment of an examiner with expanded powers pursuant to Section 1104(c) of the Bankruptcy Code or a trustee or any of the Chapter 11 Cases being dismissed or converted to a case under Chapter 7 under the Bankruptcy Code; and (ii) no other Default or Event of Default shall have occurred and be continuing under the DIP Loan Agreement under circumstances where, on or prior to the date of such other Default or Event of Default, there shall have been Fraud or a Willful Breach committed by either Seller under or in respect of the DIP Loan Agreement;

(f) the DIP Order and DIP Loan Documents shall have been approved and shall not have been terminated; and

(g) Sellers shall have delivered a certificate from an authorized officer of each Seller to the effect that each of the conditions specified in Section 7.1(a) and Section 7.1(b) have been satisfied.

**Section 7.2 Conditions to Sellers' Obligations.** Subject to Section 7.3, Sellers' obligation to consummate the Contemplated Transactions in connection with the Closing are subject to satisfaction or written waiver of the following conditions (any or all of which may be waived in writing by the Sellers and the Buyer in whole or in part to the extent permitted by applicable Law):

(a) as of the date hereof and as of the Closing (in each case, except for any representation or warranty that is expressly made as of a specified date, in which case as of such specified date), (i) each representation or warranty contained in Section 4.1, Section 4.2 or Section 4.3 shall be true and correct in all respects other than *de minimis* exceptions, and (ii) each other representation or warranty set forth in Article IV shall be true and correct in all material respects, except where the failure of such representations and warranties referred to in this clause (ii) to be true and correct, individually or in the aggregate with other such failures, would not reasonably be expected to materially prevent, restrict or delay the consummation of the Contemplated Transactions or by any Related Agreement; provided, however, that for purposes of determining the accuracy of representations and warranties referred to in clause (ii) for purposes of this condition, all qualifications as to "materiality" and "Material Adverse Effect" contained in such representations and warranties shall be disregarded;

(b) Buyer shall have performed and complied with its covenants and agreements hereunder to the extent required to be performed prior to the Closing in all material respects, and Buyer shall have caused the documents, instruments and payments required by Section 2.9(b) to be delivered to Sellers (or tendered subject only to Closing);

(c) no Governmental Entity of competent jurisdiction shall have enacted, issued, promulgated, enforced or entered any Order that is in effect and that has the effect of making the Closing illegal or otherwise prohibiting the consummation of the Closing;

(d) the Sale Order shall have been entered by the Bankruptcy Court and shall have become a Final Order; and

(e) Buyer shall have delivered a certificate from an authorized officer of Buyer to the effect that each of the conditions specified in Section 7.2(a) and Section 7.2(b) have been satisfied.

**Section 7.3 No Frustration of Closing Conditions.** Neither Buyer nor Sellers may rely on the failure of any condition to its obligation to consummate the Contemplated Transactions set forth in Section 7.1 or Section 7.2, as the case may be, to be satisfied if such failure was caused by such Party's failure to use its commercially reasonable efforts with respect to those matters contemplated by the applicable Sections of this Agreement to satisfy the conditions to the consummation of the Contemplated Transactions or other breach of a representation, warranty or covenant hereunder.

**Section 7.4 Closing Efforts.** Subject to, and in accordance with, (i) the terms and conditions of this Agreement, (ii) applicable Law and (iii) any requirements, conditions or other

Proceedings of the Bankruptcy Court, each of the Parties shall use its reasonable best efforts to take promptly all actions and to do all things necessary, proper or advisable to satisfy the conditions to the other Party's obligations set forth herein and to consummate the Contemplated Transactions.

**Section 7.5 Waiver of Conditions.** Upon the occurrence of the Closing, any condition set forth in this Article VII that was not satisfied as of the Closing will be deemed to have been waived for all purposes by the Party having the benefit of such condition as of and after the Closing.

## **ARTICLE VIII TERMINATION**

**Section 8.1 Termination of Agreement.** This Agreement may be terminated in accordance with this Article VIII and the Contemplated Transactions abandoned at any time prior to the Closing (each a "Termination Event"):

(a) by the mutual written consent of Buyer, on the one hand, and Sellers, on the other hand;

(b) by written notice of either Buyer or Sellers, if there shall be any Law that makes consummation of the Contemplated Transactions illegal or otherwise prohibited, or upon the issuance by any Governmental Entity of an Order restraining, enjoining, or otherwise prohibiting the consummation of the Contemplated Transactions or declaring unlawful the Contemplated Transactions, and such Order having become final, binding and non-appealable; provided that no termination may be made by a Party under this Section 8.1(b) if the issuance of such Order was caused by the breach or action or inaction of such Party;

(c) by written notice of either Buyer or Sellers, if the Closing shall not have occurred on or before the Outside Date;

(d) by written notice of either Buyer or Sellers, if any of the Chapter 11 Cases is dismissed or converted to a case under Chapter 7 of the Bankruptcy Code, or if a trustee or examiner with expanded powers to operate or manage the financial affairs or reorganization of the Sellers is appointed in the Chapter 11 Cases;

(e) by Buyer, if (i) the Sale Procedures Order shall not have been entered by the Bankruptcy Court on or before the Applicable Deadline, (ii) the Auction has not concluded on or before the 45th calendar day after the earliest Petition Date of Sellers, (iii) the Sale Order shall not have been entered by the Bankruptcy Court on or before the 55th calendar day after the earliest Petition Date of Sellers, (iv) at any time after entry of the Sale Procedures Order, such Sale Procedures Order (including, without limitation, the provisions therein relating to the bid protections) is reversed, stayed, vacated or otherwise modified by the Bankruptcy Court, or (v) at any time after entry of the Sale Order, such Sale Order is reversed, stayed, vacated or otherwise modified;

(f) by Buyer by giving written notice to Sellers at any time prior to Closing in the event Sellers have breached any representation, warranty, covenant or agreement contained in this Agreement and as a result of such breach the conditions set forth in Sections 7.1(a) and 7.1(b) hereof, as the case may be, would not then be satisfied at the time of such breach, Buyer has notified Sellers of the breach, and the breach has continued without cure for the earlier of 10 days following the proposed Closing Date;

(g) by Sellers by giving written notice to Buyer at any time prior to Closing in the event Buyer has breached any representation, warranty, covenant or agreement contained in this Agreement and as a result of such breach the conditions set forth in Sections 7.2(a) and 7.2(b) hereof, as the case may be, would not then be satisfied at the time of such breach, Sellers have notified Buyer of the breach, and the breach has continued without cure for the earlier of 10 days following the proposed Closing Date;

(h) by written notice from Sellers to Buyer, if all of the conditions set forth in Section 7.1 have been satisfied (other than conditions that by their nature are to be satisfied at the Closing, but subject to the satisfaction or waiver of such conditions at the Closing) or waived and Buyer fails to complete the Closing at the time required by Section 2.8;

(i) by written notice from Buyer to Sellers upon (i) the occurrence of any Event of Default (as defined in the DIP Order or any DIP Loan Documents) arising from Fraud, Willful Breach by either of the Sellers, appointment of an examiner with expanded powers pursuant to Section 1104(c) of the Bankruptcy Code or a trustee or any of the Chapter 11 Cases being dismissed or converted to a case under Chapter 7 under the Bankruptcy Code or (ii) the occurrence of any other Default or Event of Default under the DIP Loan Agreement if, on or prior to the date of such other Default or Event of Default, there shall have been Fraud or a Willful Breach committed by either Seller under or in respect of the DIP Loan Agreement;

(j) by Buyer if any secured creditor of any Seller obtains relief from the stay to foreclose on a material portion of the Purchased Assets; or

(k) automatically and without any action or notice by Sellers to Buyer, or Buyer to Sellers, immediately upon:

i. approval by the Bankruptcy Court of an Alternate Transaction, unless Buyer has agreed to be a “back-up bidder” under the Sale Procedures Order; or

ii. the consummation of an Alternate Transaction.

Notwithstanding anything to the contrary contained herein, (i) in no event may Buyer terminate this Agreement under Section 8.1(f) on account of Buyer’s failure to satisfy the conditions contained in Sections 365(b)(1)(C) and 365(f)(2)(B) of the Bankruptcy Code with respect to any proposed Assumed Contract, and (ii) a Party shall not be permitted to terminate this Agreement pursuant to this Article VIII if the applicable Termination Event was caused by the breach of such

Party or such Party's gross negligence, willful misconduct, or bad faith or such Party is in material breach of any covenant, representation or warranty hereunder such that the conditions in Section 7.1(a)-(b) or Section 7.2(a)-(b), as applicable, would fail to be satisfied at the Closing.

**Section 8.2 Procedure Upon Termination.** In the event of termination and abandonment by Buyer, on the one hand, or Sellers, on the other hand, or both, pursuant to Section 8.1, written notice thereof shall forthwith be given to the other Party or Parties, and this Agreement shall terminate and the Contemplated Transactions shall be abandoned, without further action by Buyer or Sellers.

**Section 8.3 Breakup Fee.**

(a) Upon the closing of an Alternate Transaction, Sellers shall immediately pay to Buyer the Breakup Fee.

(b) Sellers' obligation to pay the Breakup Fee pursuant to this Section 8.3 shall be subject to Bankruptcy Court approval and shall survive termination of this Agreement and shall constitute an administrative expense of Sellers under section 503(b) of the Bankruptcy Code.

(c) The Sellers acknowledge and agree that (A) the payment of the Breakup Fee is an integral part of the transactions contemplated by this Agreement, (B) in the absence of the Sellers' obligations to make this payment, the Buyer would not have entered into this Agreement, (C) time is of the essence with respect to the payment of the Breakup Fee and (D) the Breakup Fee shall constitute part of the DIP Indebtedness and shall be secured by the DIP Lien (as defined in the DIP Order) on the Collateral (as defined in the DIP Order) and be entitled to the other DIP Protections (as defined in the DIP Order). If the Sellers fail to take any action necessary to cause the delivery of the Breakup Fee under circumstances where the Buyer is entitled to the Breakup Fee and, in order to obtain such Breakup Fee the Buyer commences a suit which results in a judgment in favor of the Buyer, the Sellers shall pay to the Buyer, in addition to the Breakup Fee, an amount in cash equal to the costs and expenses (including reasonable attorney's fees) incurred by the Buyer in connection with such suit.

(d) The Parties further acknowledge that the damages resulting from termination of this Agreement under circumstances where Buyer is entitled to the Breakup Fee are uncertain and incapable of accurate calculation and that the delivery of the Breakup Fee to the Buyer is not a penalty but rather shall constitute liquidated damages in a reasonable amount that will compensate the Buyer in the circumstances where the Buyer is entitled to the Breakup Fee for the efforts and resources expended and opportunities foregone while negotiating this Agreement and in reliance on this Agreement and on the expectation of the consummation of the Contemplated Transactions, and that, without these agreements, the Buyer would not enter into this Agreement.

(e) Notwithstanding anything to the contrary in this Agreement, but subject to Section 8.4, and except in the event of Willful Breach of this Agreement by Sellers, the

Breakup Fee shall be the sole and exclusive remedy of Buyer upon a termination of this Agreement under circumstances where Buyer is entitled to the Breakup Fee.

**Section 8.4 Effect of Termination.** In the event that this Agreement is validly terminated pursuant to a right of termination as provided herein, then each of the Parties shall be relieved of its duties and obligations arising under this Agreement effective as of the date of such termination and such termination shall be without Liability to Buyer or the Sellers; provided, however, that Section 8.1, Section 8.2, Section 8.3, this Section 8.4, Article IX and the Sale Procedures Order (if entered) shall survive any such termination and shall be enforceable hereunder. In no event shall any termination relieve any Party from any Liability from any Willful Breach of this Agreement prior to the date of such termination or from any Proceeding by Buyer or its Affiliates related to or arising out of Fraud. “Willful Breach” means a material breach of this Agreement or the DIP Loan Agreement, as applicable, that is a consequence of an intentional act or intentional failure to act with the actual knowledge that the taking of the act or failure to act would result in a material breach of this Agreement or the DIP Loan Agreement, respectively.

## ARTICLE IX MISCELLANEOUS

**Section 9.1 Remedies.** The Parties recognize that if a Party breaches or refuses to perform any of their covenants set forth in this Agreement, monetary damages alone would not be adequate to compensate the non-breaching Party for their injuries. The non-breaching Party shall therefore be entitled, in addition to any other remedies that may be available, to obtain specific performance of, or to enjoin the violation of, the terms of such covenants. If any Proceedings are brought by the non-breaching Party to enforce such covenants, the breaching Party shall waive the defense that there is an adequate remedy at Law. The Parties agree to waive any requirement for the security or posting of any bond in connection with any Proceeding seeking specific performance of, or to enjoin the violation of, such covenants. The Parties agree that the only permitted objection that they may raise in response to any action for specific performance of such covenants is that it contests the existence of a breach or threatened breach of such covenants.

**Section 9.2 Expenses.** Except as otherwise provided in this Agreement, the DIP Order, the DIP Loan Documents or a Related Agreement, Sellers and Buyer shall bear their own expenses, including attorneys’ fees, incurred in connection with the negotiation and execution of this Agreement, the Related Agreements and each other agreement, document and instrument contemplated by this Agreement and the consummation of the Contemplated Transactions.

**Section 9.3 Entire Agreement.** This Agreement (including the schedules and exhibits hereto and other documents specifically referred to herein) and the Related Agreements constitute the entire agreement among the Parties and supersede any prior understandings, agreements or representations (whether written or oral) by or among the Parties, written or oral, with respect to the subject matter hereof.

**Section 9.4 Incorporation of Schedules, Exhibits and Disclosure Schedule.** The schedules, appendices and exhibits to this Agreement, the documents and other information made available in the Disclosure Schedule are incorporated herein by reference and made a part hereof.

**Section 9.5 Amendments and Waivers.** No amendment of any provision of this Agreement shall be valid unless the same shall be in writing and signed by each Party except as expressly provided herein. No waiver of any breach of this Agreement shall be construed as an implied amendment or agreement to amend or modify any provision of this Agreement. No waiver by any Party of any default, misrepresentation or breach of warranty or covenant hereunder, whether intentional or not, shall be valid unless the same shall be in writing and signed by the Party making such waiver, nor shall such waiver be deemed to extend to any prior or subsequent default, misrepresentation or breach of warranty or covenant hereunder or affect in any way any rights arising by virtue of any prior or subsequent default, misrepresentation or breach of warranty or covenant. No conditions, course of dealing or performance, understanding or agreement purporting to modify, vary, explain or supplement the terms or conditions of this Agreement shall be binding unless this Agreement is amended or modified in writing pursuant to the first sentence of this Section 9.5 except as expressly provided herein. Except where a specific period for action or inaction is provided herein, no delay on the part of any Party in exercising any right, power or privilege hereunder shall operate as a waiver thereof.

**Section 9.6 Succession and Assignment.** This Agreement shall be binding upon and inure to the benefit of the Parties and their respective successors and permitted assigns. None of the Parties may assign either this Agreement or any of its rights, interests or obligations hereunder without the prior written approval of all Parties; provided, however, that (i) Buyer shall be permitted to assign any of its rights hereunder to one or more of its Affiliates, as designated by Buyer in writing to Sellers; (ii) Buyer shall remain liable for all of its obligations under this Agreement after any such assignment; and (iii) Sellers shall be permitted to assign any of their rights hereunder pursuant to a confirmed plan under Chapter 11 of the Bankruptcy Code or pursuant to an order of the Bankruptcy Court.

**Section 9.7 Notices.** All notices, requests, demands, claims and other communications hereunder shall be in writing except as expressly provided herein. Any notice, request, demand, claim or other communication hereunder shall be deemed duly given (i) when delivered personally to the recipient; (ii) one Business Day after being sent to the recipient by reputable overnight courier service (charges prepaid); (iii) when sent by email (with written confirmation of transmission); or (iv) three Business Days after being mailed to the recipient by certified or registered mail, return receipt requested and postage prepaid, and addressed to the intended recipient as set forth below:

If to any Sellers, then to:

Novan, Inc.  
4020 Stirrup Creek Drive, Suite 110  
Durham, North Carolina 27703  
Attention: Paula Brown Stafford; John M. Gay  
Email: ; 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: ;  
;  
jjolley@smithlaw.com

and

Morris, Nichols, Arsht & Tunnell LLP  
1201 N Market St # 1600, Wilmington, DE 19801  
Wilmington, DE 19801  
Attention: Derek Abbot  
Email: dabbot@morrisnichols.com

If to Buyer, then to:

Ligand Pharmaceuticals Incorporated  
3911 Sorrento Valley Boulevard, Suite 110  
San Diego, CA 92121  
Attention: Chief Financial Officer  
Email: mkorenberg@ligand.com

with copies (which shall not constitute notice) to:

Ligand Pharmaceuticals Incorporated  
3911 Sorrento Valley Boulevard, Suite 110  
San Diego, CA 92121  
Attention: General Counsel  
Email: areardon@ligand.com

and

Morgan, Lewis & Bockius LLP  
101 Park Avenue  
New York, NY 10178  
Attention: Craig Wolfe  
Email: craig.wolfe@morganlewis.com

Any Party may change the mailing address or email address to which notices, requests, demands, claims and other communications hereunder are to be delivered by giving the other Party notice in the manner set forth in this Section 9.7.

**Section 9.8 Governing Law; Jurisdiction.** This Agreement shall in all aspects be governed by and construed in accordance with the internal Laws of the State of Delaware without giving effect to any choice or conflict of law provision or rule (whether of the State of Delaware or any other jurisdiction) that would cause the application of the Laws of any jurisdiction other than the State of Delaware, and the obligations, rights and remedies of the Parties shall be determined in accordance with such Laws. The Parties agree that any Proceeding one Party commences against any other Party pursuant to this Agreement shall be brought exclusively in the Bankruptcy Court and each of the Parties hereby irrevocably consents to the jurisdiction of the Bankruptcy Court (and of the appropriate appellate courts therefrom) in any such suit, action or proceeding and irrevocably waives, to the fullest extent permitted by Law, any objection that it may now or hereafter have to the laying of the venue of any such suit, action or proceeding in the Bankruptcy Court or that any such suit, action or proceeding which is brought in the Bankruptcy Court has been brought in an inconvenient forum; provided that if the Bankruptcy Court is unwilling or unable to hear any such Proceeding, then the courts of the State of Delaware, sitting in New Castle County, Delaware, and the federal courts of the United States of America sitting in New Castle County, Delaware, shall have exclusive jurisdiction over such Proceeding.

**Section 9.9 Consent to Service of Process.** Each of the Parties hereby consents to process being served by any Party, respectively, in any suit, action or proceeding by delivery of a copy thereof in accordance with the provisions of Section 9.7.

**Section 9.10 WAIVERS OF JURY TRIAL.** EACH OF THE PARTIES IRREVOCABLY AND UNCONDITIONALLY WAIVES ANY RIGHT IT MAY HAVE TO A TRIAL BY JURY IN RESPECT OF ANY LITIGATION ARISING OUT OF, UNDER OR IN CONNECTION WITH THIS AGREEMENT OR THE CONTEMPLATED TRANSACTIONS.

**Section 9.11 Severability.** The provisions of this Agreement shall be deemed severable, and the invalidity or unenforceability of any provision of this Agreement shall not affect the validity or enforceability of any other provisions of this Agreement so long as the economic or legal substance of the Contemplated Transactions is not affected in a manner adverse to any Party. If any provision of this Agreement, or the application thereof to any Person or any circumstance, is invalid or unenforceable, (a) the Parties shall negotiate in good faith to find a suitable and equitable provision that shall be substituted therefor in order to carry out, so far as may be valid and enforceable, the intent and purpose of such invalid or unenforceable provision, and (b) the remainder of this Agreement and the application of such provision to other Persons or circumstances shall not be affected by such invalidity or unenforceability, nor shall such invalidity or unenforceability in any one jurisdiction affect the validity or enforceability of such provision, or the application thereof, in any other jurisdiction.

**Section 9.12 No Third-Party Beneficiaries.** This Agreement shall not confer any rights or remedies upon any Person other than the Parties and their respective successors and permitted assigns.

**Section 9.13 No Survival of Representations, Warranties and Agreements.** Each of the representations and warranties and the covenants and agreements (to the extent such covenant or agreement contemplates or requires performance by such party prior to the Closing) of the

Parties set forth in this Agreement or in any other Related Agreement, or in any certificate delivered hereunder or thereunder, will terminate effective immediately as of the Closing such that no claim for breach of any such representation, warranty, covenant or agreement, detrimental reliance or other right or remedy (whether in contract, in tort or at law or in equity) may be brought with respect thereto after the Closing. Each covenant and agreement that explicitly contemplates performance after the Closing, will, in each case and to such extent, expressly survive the Closing in accordance with its terms, and if no term is specified, then for six years following the Closing Date, and nothing in this Section 9.13 will be deemed to limit any rights or remedies of any Person for breach of any such surviving covenant or agreement. Buyer and Sellers acknowledge and agree, on their own behalf and, with respect to Buyer that the agreements contained in this Section 9.13 (a) require performance after the Closing to the maximum extent permitted by applicable Law and will survive the Closing for six years; and (b) are an integral part of the Contemplated Transactions and that, without the agreements set forth in this Section 9.13, none of the Parties would enter into this Agreement.

**Section 9.14 Non-Recourse.** This Agreement may only be enforced against, and any Proceeding based upon, arising out of or related to this Agreement may only be brought against, the Persons that are expressly named as parties to this Agreement. Except to the extent named as a party to this Agreement, and then only to the extent of the specific obligations of such parties set forth in this Agreement, no past, present or future shareholder, member, partner, manager, director, officer, employee, Affiliate, agent or representative of any party to this Agreement will have any Liability (whether in contract, tort, equity or otherwise) for any of the representations, warranties, covenants, agreements or other obligations or Liabilities of any of the parties to this Agreement or for any Proceeding based upon, arising out of or related to this Agreement.

**Section 9.15 Construction.** The definitions contained in this Agreement are applicable to the singular as well as the plural forms of such terms. Whenever the context may require, any pronouns used herein shall include the corresponding masculine, feminine or neuter forms, and the singular form of names and pronouns shall include the plural and vice versa. The word “including” and “include” and other words of similar import shall be deemed to be followed by the phrase “without limitation.” The words “herein,” “hereto” and “hereby,” and other words of similar import refer to this Agreement as a whole and not to any particular Article, Section or other subdivision of this Agreement. Unless expressly stated in connection therewith or the context otherwise requires, the phrase “relating to the business” and other words of similar import shall be deemed to mean “relating to the operation of the business of the Sellers as conducted as of the date hereof.” Except as otherwise provided herein, references to Articles, Sections, clauses, subclauses, subparagraphs, Schedules, Exhibits, Appendices and the Disclosure Schedule herein are references to Articles, Sections, clauses, subclauses, subparagraphs, Schedules, Appendices, Exhibits and the Disclosure Schedule of this Agreement. Any reference herein to any Law (or any provision thereof) shall include such Law (or any provision thereof) and any rule or regulation promulgated thereunder, in each case, including any successor thereto, and as it may be amended, modified or supplemented from time to time. Any reference herein to “dollars” or “\$” means United States dollars.

**Section 9.16 Computation of Time.** In computing any period of time prescribed by or allowed with respect to any provision of this Agreement that relates to Sellers or the Chapter 11 Cases, the provisions of rule 9006(a) of the Federal Rules of Bankruptcy Procedure shall apply.

**Section 9.17 Mutual Drafting.** Each of the Parties has participated jointly in the negotiation and drafting of this Agreement. In the event an ambiguity or question of intent or interpretation arises, this Agreement shall be construed as if drafted jointly by the Parties and no presumption or burden of proof shall arise favoring or disfavoring any Party by virtue of the authorship of any of the provisions of this Agreement.

**Section 9.18 Disclosure Schedule.** The Disclosure Schedule has been arranged for purposes of convenience in separately numbered sections corresponding to the sections of this Agreement; provided, however, that each section of the Disclosure Schedule will be deemed to incorporate by reference all information disclosed in any other section of the Schedules, and any disclosure in the Disclosure Schedule will be deemed a disclosure against any representation or warranty set forth in this Agreement if the purpose for disclosure in such other section of the Schedules or again any other representation or warranty is reasonably apparent on its face. Capitalized terms used in the Disclosure Schedule and not otherwise defined therein have the meanings given to them in this Agreement. The specification of any dollar amount or the inclusion of any item in the representations and warranties contained in this Agreement, the Disclosure Schedule or the attached exhibits is not intended to imply that the amounts, or higher or lower amounts, or the items so included, or other items, are or are not required to be disclosed (including whether such amounts or items are required to be disclosed as material or threatened) or are within or outside of the Ordinary Course of Business or consistent with past practice, and no party will use the fact of the setting of the amounts or the fact of the inclusion of any item in this Agreement, the Disclosure Schedule or exhibits in any dispute or controversy between the Parties as to whether any obligation, item or matter not set forth or included in this Agreement, the Disclosure Schedule or exhibits is or is not required to be disclosed (including whether the amount or items are required to be disclosed as material or threatened) or are within or outside of the Ordinary Course of Business. In addition, matters reflected in the Disclosure Schedule are not necessarily limited to matters required by this Agreement to be reflected in the Disclosure Schedule. Such additional matters are set forth for informational purposes only and do not necessarily include other matters of a similar nature. No information set forth in the Disclosure Schedule will be deemed to broaden in any way the scope of the Parties' representations and warranties. Any description of any agreement, document, instrument, plan, arrangement or other item set forth on any Disclosure Schedule is a summary only and is qualified in its entirety by the terms of such agreement, document, instrument, plan or arrangement which terms will be deemed disclosed for all purposes of this Agreement. The information contained in this Agreement, in the Disclosure Schedule and exhibits hereto is disclosed solely for purposes of this Agreement, and no information contained herein or therein will be deemed to be an admission by any Party to any third party of any matter whatsoever, including any violation of Law or breach of contract.

**Section 9.19 No Waiver or Release.** Notwithstanding anything herein to the contrary, all terms, conditions, covenants, representations and warranties contained in the DIP Order and the DIP Loan Documents, and all rights, powers and remedies of the DIP Secured Parties and all

of the obligations of the Sellers thereunder (including, without limitation, the obligation to reimburse the DIP Secured Parties for fees and expenses incurred in connection with preparation and negotiation of this Agreement to the extent set forth therein), are reserved and are not amended, modified, limited or otherwise affected by the terms and conditions of this Agreement.

**Section 9.20 Headings; Table of Contents.** The section headings and the table of contents contained in this Agreement and the Disclosure Schedule are inserted for convenience only and shall not affect in any way the meaning or interpretation of this Agreement.

**Section 9.21 Counterparts; Facsimile and Email Signatures.** This Agreement may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument. Counterparts may be delivered via facsimile, electronic mail (including pdf or any electronic signature complying with the U.S. federal E-SIGN Act of 2000, e.g., [www.docusign.com](http://www.docusign.com)) or other transmission method and any counterpart so delivered shall be deemed to have been duly and validly delivered and be valid and effective for all purposes.

**Section 9.22 Time of Essence.** Time is of the essence of this Agreement.

**SIGNATURE PAGE TO  
ASSET PURCHASE AGREEMENT**

IN WITNESS WHEREOF, the Parties hereto have executed this Agreement as of the date first above written.

**SELLERS:**

**NOVAN, INC.**

DocuSigned by:

By: Paula Brown Stafford

Name: Paula Brown Stafford

Title: President, Chief Executive Officer, and Chairman

**EPI HEALTH, LLC**

DocuSigned by:

By: Paula Brown Stafford

Name: Paula Brown Stafford

Title: Chief Executive Officer

**SIGNATURE PAGE TO  
ASSET PURCHASE AGREEMENT**

IN WITNESS WHEREOF, the Parties hereto have executed this Agreement as of the date first above written.

**SELLERS:**

**NOVAN, INC.**

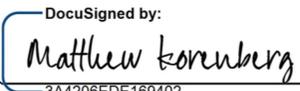
By \_\_\_\_\_  
Name:  
Title:

**EPI HEALTH, LLC**

By \_\_\_\_\_  
Name:  
Title:

**BUYER:**

**LIGAND PHARMACEUTICALS  
INCORPORATED**

By  \_\_\_\_\_  
Name: Matthew Korenberg  
Title: President and Chief Operating  
Officer

**Schedule 2.1(b)**

**Commercial Business Assets**

1. RHOFADE (oxymetazoline hydrochloride 1% cream)
2. MINOLIRA (biphasic minocycline hydrochloride immediate release/extended release 105 mg and 135 mg tablets)
3. CLODERM (clocortolone pivalate cream 0.1%)
4. SITAVIG (acyclovir 50mg buccal tablets)

**Schedule 2.6(a)**

**Assumed Contract List**

The Contracts that Buyer directs to be assumed by Sellers, and assigned to Buyer, under the Bankruptcy Code in accordance with the Agreement.

**EXHIBIT A**

**Form of Bill of Sale and Assignment and Assumption Agreement**

*See attached.*

**FORM OF BILL OF SALE, ASSIGNMENT AND ASSUMPTION AGREEMENT**

This BILL OF SALE, ASSIGNMENT AND ASSUMPTION AGREEMENT, dated as of [•], 2023 (this “Agreement”), by and among Novan, Inc., a Delaware corporation (“Novan”), EPI Health, LLC a South Carolina limited liability company and wholly-owned subsidiary of Novan (collectively with Novan, “Sellers”) and Ligand Pharmaceuticals Incorporated, a Delaware corporation (“Buyer”).

**W I T N E S S E T H**

**WHEREAS**, Buyer and Sellers have entered into an Asset Purchase Agreement dated as of July [•], 2023 (the “Purchase Agreement”);

**WHEREAS**, capitalized terms used but not otherwise defined herein shall have the meaning ascribed to such terms in the Purchase Agreement;

**WHEREAS**, pursuant to the Purchase Agreement, Sellers have agreed to sell, assign, convey, transfer and deliver the Purchased Assets to Buyer and Buyer has agreed to purchase and acquire the Purchased Assets upon the terms and subject to the conditions of the Purchase Agreement;

**WHEREAS**, pursuant to the Purchase Agreement, Buyer has agreed to assume from Sellers the Assumed Liabilities upon the terms and subject to the conditions of the Purchase Agreement;

**WHEREAS**, the parties desire to carry out the intent and purpose of the Purchase Agreement by Sellers’ execution and delivery to Buyer of this instrument evidencing the vesting in Buyer of certain Purchased Assets, subject to the provisions of the Purchase Agreement; and

**WHEREAS**, Sellers shall execute and deliver as of the date hereof (i) the Patent Assignment by and between Sellers and Buyer, (ii) the Trademark Assignment by and between Sellers and Buyer, and (iii) the Lease Assignment between Sellers and Buyer (collectively, the “Other Transfer Documents”).

**NOW, THEREFORE**, in consideration of the premises and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto agree as follows:

Section 1. As of the date hereof, Sellers, pursuant to the Purchase Agreement and on the same terms and conditions as stated therein, hereby convey, grant, sell, transfer, assign, and confirm unto Buyer and its respective successors and permitted assigns forever all of Sellers’ right, title and interest, as of the date hereof, in and to the Purchased Assets (other than those Purchased Assets sold, conveyed, transferred, assigned and delivered pursuant to the Other Transfer Documents) (the “Bill of Sale Purchased Assets”), free and clear of all Liens (other than Permitted Liens), subject to the provisions of the Purchase Agreement.

Section 2. Sellers hereby irrevocably designate, make, constitute and appoint Buyer, its successors and assigns, as Sellers' true and lawful attorney (and agent-in-fact), with full power of substitution, in Sellers' name and stead, on behalf of and for the benefit of Buyer, its successors and assigns, to, among other things,: (a) demand and receive any and all of the Bill of Sale Purchased Assets and to give receipts and releases for and in respect of the Bill of Sale Purchased Assets, or any part thereof, (b) from time to time institute and prosecute in Sellers' name, at the sole expense and for the benefit of Buyer, its successors and assigns, any and all proceedings at law, in equity or otherwise, which Buyer, its successors and assigns, may deem proper in order to collect, assert or enforce any claim, right or title of any kind in or to any item of the Bill of Sale Purchased Assets, to defend or compromise any and all actions, suits or proceedings in respect of any item of the Bill of Sale Purchased Assets, and to do all such acts and things in relation thereto as Buyer shall deem advisable, including, without limitation, for the collection or reduction to possession of any of the Bill of Sale Purchased Assets, (c) endorse Sellers' name on any payment, instrument, notice, or other similar document or agreement relating to the Bill of Sale Purchased Assets for the period commencing with the date hereof that may come in to the possession of Buyer or under Buyer control with respect to the Bill of Sale Purchased Assets and (d) to collect the moneys which become due and payable at any time on or after the date hereof under every Bill of Sale Purchased Asset. Sellers acknowledge that the foregoing powers are coupled with an interest and shall be irrevocable by Sellers.

Section 3. As of the date hereof, Buyer, pursuant to, in the manner and to the extent set forth in Section 2.3 of the Purchase Agreement, hereby assumes and shall hereafter pay, perform and discharge when due the Assumed Liabilities, subject to the provisions of the Purchase Agreement and on the same terms and conditions as stated therein. For the avoidance of doubt, other than Assumed Liabilities, Buyer will not and does not assume any Liability of any nature or kind whatsoever of Sellers.

Section 4. This Agreement (including the schedules and exhibits hereto and other documents specifically referred to herein), together with the Purchase Agreement and the Related Agreements (including the Other Transfer Documents), constitute the entire agreement among the parties and supersede any prior understandings, agreements or representations (whether written or oral) by or among the parties, written or oral, with respect to the subject matter hereof.

Section 5. No amendment of any provision of this Agreement shall be valid unless the same shall be in writing and signed by each party except as expressly provided herein. No waiver of any breach of this Agreement shall be construed as an implied amendment or agreement to amend or modify any provision of this Agreement.

Section 6. This Agreement shall be binding upon and inure to the benefit of the parties and their respective successors and permitted assigns. None of the parties may assign either this Agreement or any of its rights, interests or obligations hereunder without the prior written approval of all parties; provided, however, that (i) Buyer shall be permitted to assign any of its rights hereunder to one or more of its affiliates, as designated by Buyer in writing to Sellers; (ii) Buyer shall remain liable for all of its obligations under this Agreement after any such assignment; and (iii) Sellers shall be permitted to assign any of their rights hereunder pursuant

to a confirmed plan under Chapter 11 of the Bankruptcy Code or pursuant to an order of the Bankruptcy Court.

Section 7. This Agreement shall in all aspects be governed by and construed in accordance with the internal Laws of the State of Delaware without giving effect to any choice or conflict of law provision or rule (whether of the State of Delaware or any other jurisdiction) that would cause the application of the Laws of any jurisdiction other than the State of Delaware, and the obligations, rights and remedies of the parties shall be determined in accordance with such Laws. The parties agree that any Proceeding one party commences against any other party pursuant to this Agreement shall be brought exclusively in the Bankruptcy Court and each of the parties hereby irrevocably consents to the jurisdiction of the Bankruptcy Court (and of the appropriate appellate courts therefrom) in any such Proceeding and irrevocably waives, to the fullest extent permitted by Law, any objection that it may now or hereafter have to the laying of the venue of any such suit, action or proceeding in the Bankruptcy Court or that any such Proceeding which is brought in the Bankruptcy Court has been brought in an inconvenient forum; provided that if the Bankruptcy Court is unwilling or unable to hear any such Proceeding, then the courts of the State of Delaware, sitting in New Castle County, Delaware, and the federal courts of the United States of America sitting in New Castle County, Delaware, shall have exclusive jurisdiction over such Proceeding.

Section 8. Each of the parties hereby consents to process being served by any party, respectively, in any suit, action or proceeding by delivery of a copy thereof in accordance with the provisions of Section 9.7 of the Purchase Agreement.

Section 9. EACH OF THE PARTIES IRREVOCABLY AND UNCONDITIONALLY WAIVES ANY RIGHT IT MAY HAVE TO A TRIAL BY JURY IN RESPECT OF ANY LITIGATION ARISING OUT OF, UNDER OR IN CONNECTION WITH THIS AGREEMENT.

Section 10. The provisions of this Agreement shall be deemed severable, and the invalidity or unenforceability of any provision of this Agreement shall not affect the validity or enforceability of any other provisions of this Agreement so long as the economic or legal substance of the transactions contemplated hereby is not affected in a manner adverse to any party. If any provision of this Agreement, or the application thereof to any person or any circumstance, is invalid or unenforceable, (a) the parties shall negotiate in good faith to find a suitable and equitable provision that shall be substituted therefor in order to carry out, so far as may be valid and enforceable, the intent and purpose of such invalid or unenforceable provision, and (b) the remainder of this Agreement and the application of such provision to other persons or circumstances shall not be affected by such invalidity or unenforceability, nor shall such invalidity or unenforceability in any one jurisdiction affect the validity or enforceability of such provision, or the application thereof, in any other jurisdiction.

Section 11. This Agreement may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument. Counterparts may be delivered via facsimile, electronic mail (including pdf or any electronic signature complying with the U.S. federal E-SIGN Act of 2000, *e.g.*,

www.docusign.com) or other transmission method and any counterpart so delivered shall be deemed to have been duly and validly delivered and be valid and effective for all purposes.

*[Signature Page Follows]*

IN WITNESS WHEREOF, the undersigned has caused this Agreement to be executed by the signature of its duly authorized officer as of the date above first written.

**BUYER:**

**LIGAND PHARMACEUTICALS  
INCORPORATED**

By: \_\_\_\_\_  
Name:  
Title:

**SELLERS:**

**NOVAN, INC.**

By: \_\_\_\_\_  
Name:  
Title:

**EPI HEALTH, LLC**

By: \_\_\_\_\_  
Name:  
Title:

**EXHIBIT B**

**Form of Lease Assignment**

*See attached.*

**FORM OF LEASE ASSIGNMENT<sup>1</sup>**

THIS LEASE ASSIGNMENT dated as of [•], 2023 (this “Assignment”), by and among Novan, Inc., a Delaware corporation (“Novan”), EPI Health, LLC a South Carolina limited liability company and wholly-owned subsidiary of Novan (collectively with Novan, “Assignors”) and Ligand Pharmaceuticals Incorporated, a Delaware corporation (“Assignee”).

**WITNESSETH**

**WHEREAS**, Assignors and Assignee have entered into an Asset Purchase Agreement dated as of July [•], 2023 (the “Purchase Agreement”);

**WHEREAS**, capitalized terms used but not otherwise defined herein shall have the meaning ascribed to such terms in the Purchase Agreement;

**WHEREAS**, Assignors is the owners and holders of the tenant’s interest in and to those certain lease agreements, as affected by all amendments, modifications and supplements thereto, as described on Exhibit A attached hereto (each a “Lease” and collectively, the “Leases”) for certain premises described on Exhibit B attached hereto;

**WHEREAS**, pursuant to the Purchase Agreement Assignors have agreed to assign, transfer, convey and deliver to Assignee all of Assignors’ right, title and interest in and to the Leases and related leasehold improvements and fixtures (the “Leasehold Improvements”) located at the premises demised by each of the Leases;

**WHEREAS**, subject to the terms of this Assignment, Assignors desire to assign, transfer, convey and deliver all of its right, title and interest in the Leases and Leasehold Improvements to Assignee, and Assignee desires to purchase and accept such assignment and assume all rights, duties and obligations of the Assignors under the Leases and Leasehold Improvements arising on and after the date hereof.

**NOW, THEREFORE**, in consideration of the premises and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties hereto agree as follows:

Section 1. Assignors do hereby assign, transfer, convey and deliver unto Assignee, all of the Assignors’ right, title and interest in and to the Leases and the leasehold estates created thereby, together with all of Assignors’ right, title and interest in and to the premises demised under each of the Leases, and together with all of the appurtenant rights and easements thereby demised, and all of Assignors’ right, title and interest in and to the Leasehold Improvements located at such premises, and Assignee hereby accepts such assignment, transfer and conveyance and agrees to assume, perform and discharge all obligations and liabilities of Assignors under and related to the Leases and the Leasehold

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<sup>1</sup> The Parties agree to modify this document as necessary in the event any leases are required to be assigned separately or any such assignments are required to be recorded in the public land records.

Improvements which arise on or after the date hereof and relate to the period on or after the date hereof.

Section 2. This Assignment (including the schedules and exhibits hereto and other documents specifically referred to herein), together with the Purchase Agreement and the Related Agreements, constitute the entire agreement among the parties and supersede any prior understandings, agreements or representations (whether written or oral) by or among the parties, written or oral, with respect to the subject matter hereof.

Section 3. No amendment of any provision of this Assignment shall be valid unless the same shall be in writing and signed by each party except as expressly provided herein. No waiver of any breach of this Assignment shall be construed as an implied amendment or agreement to amend or modify any provision of this Assignment.

Section 4. This Assignment shall be binding upon and inure to the benefit of the parties and their respective successors and permitted assigns. None of the parties may assign either this Assignment or any of its rights, interests or obligations hereunder without the prior written approval of all parties; provided, however, that (i) Assignee shall be permitted to assign any of its rights hereunder to one or more of its affiliates, as designated by Assignee in writing to Assignors; (ii) Assignee shall remain liable for all of its obligations under this Assignment after any such assignment; and (iii) Assignors shall be permitted to assign any of their rights hereunder pursuant to a confirmed plan under Chapter 11 of the Bankruptcy Code or pursuant to an order of the Bankruptcy Court.

Section 5. This Assignment shall in all aspects be governed by and construed in accordance with the internal Laws of the State of Delaware without giving effect to any choice or conflict of law provision or rule (whether of the State of Delaware or any other jurisdiction) that would cause the application of the Laws of any jurisdiction other than the State of Delaware, and the obligations, rights and remedies of the parties shall be determined in accordance with such Laws. The parties agree that any Proceeding one party commences against any other party pursuant to this Assignment shall be brought exclusively in the Bankruptcy Court and each of the parties hereby irrevocably consents to the jurisdiction of the Bankruptcy Court (and of the appropriate appellate courts therefrom) in any such Proceeding and irrevocably waives, to the fullest extent permitted by Law, any objection that it may now or hereafter have to the laying of the venue of any such Proceeding in the Bankruptcy Court or that any such Proceeding which is brought in the Bankruptcy Court has been brought in an inconvenient forum; provided that if the Bankruptcy Court is unwilling or unable to hear any such Proceeding, then the courts of the State of Delaware, sitting in New Castle County, Delaware, and the federal courts of the United States of America sitting in New Castle County, Delaware, shall have exclusive jurisdiction over such Proceeding.

Section 6. Each of the parties hereby consents to process being served by any party, respectively, in any suit, action or proceeding by delivery of a copy thereof in accordance with the provisions of Section 9.7 of the Purchase Agreement.

Section 7. EACH OF THE PARTIES IRREVOCABLY AND UNCONDITIONALLY WAIVES ANY RIGHT IT MAY HAVE TO A TRIAL BY JURY IN RESPECT OF ANY LITIGATION ARISING OUT OF, UNDER OR IN CONNECTION WITH THIS ASSIGNMENT.

Section 8. The provisions of this Assignment shall be deemed severable, and the invalidity or unenforceability of any provision of this Assignment shall not affect the validity or enforceability of any other provisions of this Assignment so long as the economic or legal substance of the transactions contemplated hereby is not affected in a manner adverse to any party. If any provision of this Assignment, or the application thereof to any person or any circumstance, is invalid or unenforceable, (a) the parties shall negotiate in good faith to find a suitable and equitable provision that shall be substituted therefor in order to carry out, so far as may be valid and enforceable, the intent and purpose of such invalid or unenforceable provision, and (b) the remainder of this Assignment and the application of such provision to other persons or circumstances shall not be affected by such invalidity or unenforceability, nor shall such invalidity or unenforceability in any one jurisdiction affect the validity or enforceability of such provision, or the application thereof, in any other jurisdiction.

Section 9. This Assignment may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument. Counterparts may be delivered via facsimile, electronic mail (including pdf or any electronic signature complying with the U.S. federal ESIGN Act of 2000, *e.g.*, [www.docusign.com](http://www.docusign.com)) or other transmission method and any counterpart so delivered shall be deemed to have been duly and validly delivered and be valid and effective for all purposes.

\* \* \* \* \*

*[Signature Page Follows]*

IN WITNESS WHEREOF, the undersigned has caused this Assignment to be executed by the signature of its duly authorized officer as of the date above first written.

**ASSIGNEE:**

**LIGAND PHARMACEUTICALS,  
INCORPORATED**

By: \_\_\_\_\_  
Name:  
Title:

**ASSIGNORS:**

**NOVAN, INC.**

By: \_\_\_\_\_  
Name:  
Title:

**EPI HEALTH, LLC**

By: \_\_\_\_\_  
Name:  
Title:

EXHIBIT A

**Description of Lease Documents**

**[TO BE INSERTED]**

EXHIBIT B

**Legal Description**

**(See Attached)**

**[TO BE INSERTED]**

**EXHIBIT C**

**Form of Patent Assignment**

*See attached.*

**FORM OF PATENT ASSIGNMENT**

This PATENT ASSIGNMENT (this “Assignment”), dated as of [•], 2023, by and among Novan, Inc., a Delaware corporation (“Novan”), EPI Health, LLC, a South Carolina limited liability company and wholly-owned subsidiary of Novan (collectively with Novan, “Assignors”) and Ligand Pharmaceuticals Incorporated, a Delaware corporation (“Assignee”).

**WHEREAS**, Assignors and Assignee have entered into an Asset Purchase Agreement dated as of July [•], 2023, (the “Purchase Agreement”);

**WHEREAS**, capitalized terms used but not otherwise defined herein shall have the meaning ascribed to such terms in the Purchase Agreement;

**WHEREAS**, pursuant to the Purchase Agreement, Assignors have agreed to sell, assign, convey, transfer and deliver the Purchased Assets to Assignee, and Assignee has agreed to purchase and acquire the Purchased Assets upon the terms and subject to the conditions of the Purchase Agreement; and

**WHEREAS**, in accordance with the above and pursuant to the Purchase Agreement, Assignors wish to sell, transfer, assign, convey and deliver to Assignee, and Assignee wishes to purchase and acquire from Assignors, all of Assignors’ right, title and interest in, to or under the patent applications set forth on Schedule A attached hereto (collectively, the “Patents”).

**NOW, THEREFORE**, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Assignors hereby sell, transfer, assign, convey and deliver to Assignee, its successors, assigns, and legal representatives their entire right, title and interest in and to the Patents, for the United States and for all foreign countries, including, without limitation, any issued patents and applications therefor, any inventions disclosed and claimed therein, all reissues, divisions, continuations, continuations-in-part, or extensions of the Patents, and all other corresponding rights that are or may be secured under the laws of the United States or any foreign country, now or hereafter in effect, for Assignee’s own use and enjoyment, and for the use and enjoyment of Assignee’s successors, assigns or other legal representatives, as fully and entirely as the same would have been held and enjoyed by Assignors if this Assignment had not been made, together with all income, royalties, damages, claims, and payments with respect thereto due or payable as of the Closing Date or thereafter, and in and to all causes of action, including, without limitation, all causes of action (either in law or equity) and claims for damages by reason of past, present or future infringement, dilution or other unauthorized use of the Patents, with the right to sue for, and collect the same for Assignee’s own use and enjoyment and for the use and enjoyment of its successors, assigns or other legal representatives. In consideration of the premises and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto agree as follows:

Section 1. This Assignment (including the schedules and exhibits hereto and other documents specifically referred to herein), together with the Purchase Agreement and the

Related Agreements constitute the entire agreement among the parties and supersede any prior understandings, agreements or representations (whether written or oral) by or among the parties, written or oral, with respect to the subject matter hereof.

Section 2. No amendment of any provision of this Assignment shall be valid unless the same shall be in writing and signed by each party except as expressly provided herein. No waiver of any breach of this Assignment shall be construed as an implied amendment or agreement to amend or modify any provision of this Assignment.

Section 3. This Assignment shall be binding upon and inure to the benefit of the parties and their respective successors and permitted assigns. None of the parties may assign either this Assignment or any of its rights, interests or obligations hereunder without the prior written approval of all parties; provided, however, that (i) Assignee shall be permitted to assign any of its rights hereunder to one or more of its affiliates, as designated by Assignee in writing to Assignors; (ii) Assignee shall remain liable for all of its obligations under this Assignment after any such assignment; and (iii) Assignors shall be permitted to assign any of their rights hereunder pursuant to a confirmed plan under Chapter 11 of the Bankruptcy Code or pursuant to an order of the Bankruptcy Court.

Section 4. This Assignment shall in all aspects be governed by and construed in accordance with the internal Laws of the State of Delaware without giving effect to any choice or conflict of law provision or rule (whether of the State of Delaware or any other jurisdiction) that would cause the application of the Laws of any jurisdiction other than the State of Delaware, and the obligations, rights and remedies of the parties shall be determined in accordance with such Laws. The parties agree that any Proceeding one party commences against any other party pursuant to this Assignment shall be brought exclusively in the Bankruptcy Court and each of the parties hereby irrevocably consents to the jurisdiction of the Bankruptcy Court (and of the appropriate appellate courts therefrom) in any such Proceeding and irrevocably waives, to the fullest extent permitted by Law, any objection that it may now or hereafter have to the laying of the venue of any such Proceeding in the Bankruptcy Court or that any such Proceeding which is brought in the Bankruptcy Court has been brought in an inconvenient forum; provided that if the Bankruptcy Court is unwilling or unable to hear any such Proceeding, then the courts of the State of Delaware, sitting in New Castle County, Delaware, and the federal courts of the United States of America sitting in New Castle County, Delaware, shall have exclusive jurisdiction over such Proceeding.

Section 5. Each of the parties hereby consents to process being served by any party, respectively, in any suit, action or proceeding by delivery of a copy thereof in accordance with the provisions of Section 9.7 of the Purchase Agreement.

Section 6. EACH OF THE PARTIES IRREVOCABLY AND UNCONDITIONALLY WAIVES ANY RIGHT IT MAY HAVE TO A TRIAL BY JURY IN RESPECT OF ANY LITIGATION ARISING OUT OF, UNDER OR IN CONNECTION WITH THIS ASSIGNMENT.

Section 7. The provisions of this Assignment shall be deemed severable, and the invalidity or unenforceability of any provision of this Assignment shall not affect the validity

or enforceability of any other provisions of this Assignment so long as the economic or legal substance of the transactions contemplated hereby is not affected in a manner adverse to any party. If any provision of this Assignment, or the application thereof to any person or any circumstance, is invalid or unenforceable, (a) the parties shall negotiate in good faith to find a suitable and equitable provision that shall be substituted therefor in order to carry out, so far as may be valid and enforceable, the intent and purpose of such invalid or unenforceable provision, and (b) the remainder of this Assignment and the application of such provision to other persons or circumstances shall not be affected by such invalidity or unenforceability, nor shall such invalidity or unenforceability in any one jurisdiction affect the validity or enforceability of such provision, or the application thereof, in any other jurisdiction.

Section 8. This Assignment may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument. Counterparts may be delivered via facsimile, electronic mail (including pdf or any electronic signature complying with the U.S. federal ESIGN Act of 2000, e.g., www.docusign.com) or other transmission method and any counterpart so delivered shall be deemed to have been duly and validly delivered and be valid and effective for all purposes.

Assignors hereby authorize and request the Commissioner of Patents and Trademarks, and the corresponding entities or agencies in any applicable foreign countries, to record Assignee as the assignee and owner of the entire right, title and interest in and to the Patents, including any reissues, divisions, continuations, continuations-in-part and extensions thereof.

[Signature Page Follows]

**IN WITNESS WHEREOF**, Assignors and Assignee have caused this Assignment to be executed by their duly authorized representatives effective as of the Closing Date.

**ASSIGNORS:**

**NOVAN, INC.**

By: \_\_\_\_\_  
Name:  
Title:

**EPI HEALTH, LLC**

By: \_\_\_\_\_  
Name:  
Title:

**ASSIGNEE:**

**LIGAND PHARMACEUTICALS,  
INCORPORATED**

By: \_\_\_\_\_  
Name:  
Title:

STATE OF )  
 ) SS.  
COUNTY OF )

On this \_\_\_ day of \_\_\_\_\_, there appeared before me \_\_\_\_\_, personally known to me, who acknowledged that he signed the foregoing Assignment as his voluntary act and deed on behalf and with full authority of Assignors.

\_\_\_\_\_  
Notary Public

STATE OF )  
 ) SS.  
COUNTY OF )

On this \_\_\_ day of \_\_\_\_\_, there appeared before me \_\_\_\_\_, personally known to me, who acknowledged that he signed the foregoing Assignment as his voluntary act and deed on behalf and with full authority of Assignee.

\_\_\_\_\_  
Notary Public



**EXHIBIT D**

**Form of Trademark Assignment**

*See attached.*

**FORM OF TRADEMARK ASSIGNMENT**

This TRADEMARK ASSIGNMENT (this “Assignment”), dated as of [•], 2023, by and among Novan, Inc., a Delaware corporation (“Novan”), EPI Health, LLC, a South Carolina limited liability company and wholly-owned subsidiary of Novan (collectively with Novan, “Assignors”) and Ligand Pharmaceuticals Incorporated, a Delaware corporation (“Assignee”).

**WHEREAS, WHEREAS**, Assignors and Assignees have entered into an Asset Purchase Agreement dated as of July [•], 2023 (the “Purchase Agreement”);

**WHEREAS**, capitalized terms used but not otherwise defined herein shall have the meaning ascribed to such terms in the Purchase Agreement;

**WHEREAS**, pursuant to the Purchase Agreement, Assignors have agreed to sell, assign, convey, transfer and deliver the Purchased Assets to Assignee, and Assignee has agreed to purchase and acquire the Purchased Assets upon the terms and subject to the conditions of the Purchase Agreement; and

**WHEREAS**, in accordance with the above and pursuant to the Purchase Agreement, Assignors wish to sell, transfer, assign, convey and deliver to Assignee, and Assignee wishes to purchase and acquire from Assignors, all of Assignors’ right, title and interest in, to or under the trademark applications set forth on Schedule A attached hereto, in each case, together with the goodwill of the business associated therewith and the business to which such marks pertain, (collectively, the “Marks”).

**NOW, THEREFORE**, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Assignors hereby sell, transfer, assign, convey and deliver to Assignee, its successors, assigns, and legal representatives their entire right, title and interest in and to the Marks, for the United States and for all foreign countries, including, without limitation, any registrations and applications therefor, any renewals and extensions of the registrations, all goodwill associated therewith and the business to which such Marks pertain, and all other corresponding rights that are or may be secured under the laws of the United States or any foreign country, now or hereafter in effect, for Assignee’s own use and enjoyment, and for the use and enjoyment of Assignee’s successors, assigns or other legal representatives, as fully and entirely as the same would have been held and enjoyed by Assignors if this Assignment had not been made, together with all income, royalties, damages, claims, and payments with respect thereto due or payable as of the Closing Date or thereafter, and in and to all causes of action, including, without limitation, all causes of action (either in law or equity) and claims for damages by reason of past, present or future infringement, dilution or other unauthorized use of the Marks, with the right to sue for, and collect the same for Assignee’s own use and enjoyment and for the use and enjoyment of its successors, assigns or other legal representatives. In consideration of the premises and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto agree as follows:

Section 1. This Assignment (including the schedules and exhibits hereto and other documents specifically referred to herein), together with the Purchase Agreement and the Related Agreements, constitute the entire agreement among the parties and supersede any prior understandings, agreements or representations (whether written or oral) by or among the parties, written or oral, with respect to the subject matter hereof.

Section 2. No amendment of any provision of this Assignment shall be valid unless the same shall be in writing and signed by each party except as expressly provided herein. No waiver of any breach of this Assignment shall be construed as an implied amendment or agreement to amend or modify any provision of this Assignment.

Section 3. This Assignment shall be binding upon and inure to the benefit of the parties and their respective successors and permitted assigns. None of the parties may assign either this Assignment or any of its rights, interests or obligations hereunder without the prior written approval of all parties; provided, however, that (i) Assignee shall be permitted to assign any of its rights hereunder to one or more of its affiliates, as designated by Assignee in writing to Assignors; (ii) Assignee shall remain liable for all of its obligations under this Assignment after any such assignment; and (iii) Assignors shall be permitted to assign any of their rights hereunder pursuant to a confirmed plan under Chapter 11 of the Bankruptcy Code or pursuant to an order of the Bankruptcy Court.

Section 4. This Assignment shall in all aspects be governed by and construed in accordance with the internal Laws of the State of Delaware without giving effect to any choice or conflict of law provision or rule (whether of the State of Delaware or any other jurisdiction) that would cause the application of the Laws of any jurisdiction other than the State of Delaware, and the obligations, rights and remedies of the parties shall be determined in accordance with such Laws. The parties agree that any Proceeding one party commences against any other party pursuant to this Assignment shall be brought exclusively in the Bankruptcy Court and each of the parties hereby irrevocably consents to the jurisdiction of the Bankruptcy Court (and of the appropriate appellate courts therefrom) in any such Proceeding and irrevocably waives, to the fullest extent permitted by Law, any objection that it may now or hereafter have to the laying of the venue of any such Proceeding in the Bankruptcy Court or that any such Proceeding which is brought in the Bankruptcy Court has been brought in an inconvenient forum; provided that if the Bankruptcy Court is unwilling or unable to hear any such Proceeding, then the courts of the State of Delaware, sitting in New Castle County, Delaware, and the federal courts of the United States of America sitting in New Castle County, Delaware, shall have exclusive jurisdiction over such Proceeding.

Section 5. Each of the parties hereby consents to process being served by any party, respectively, in any suit, action or proceeding by delivery of a copy thereof in accordance with the provisions of Section 9.7 of the Purchase Agreement.

Section 6. EACH OF THE PARTIES IRREVOCABLY AND UNCONDITIONALLY WAIVES ANY RIGHT IT MAY HAVE TO A TRIAL BY JURY IN RESPECT OF ANY LITIGATION ARISING OUT OF, UNDER OR IN CONNECTION WITH THIS ASSIGNMENT.

Section 7. The provisions of this Assignment shall be deemed severable, and the invalidity or unenforceability of any provision of this Assignment shall not affect the validity or enforceability of any other provisions of this Assignment so long as the economic or legal substance of the transactions contemplated hereby is not affected in a manner adverse to any party. If any provision of this Assignment, or the application thereof to any person or any circumstance, is invalid or unenforceable, (a) the parties shall negotiate in good faith to find a suitable and equitable provision that shall be substituted therefor in order to carry out, so far as may be valid and enforceable, the intent and purpose of such invalid or unenforceable provision, and (b) the remainder of this Assignment and the application of such provision to other persons or circumstances shall not be affected by such invalidity or unenforceability, nor shall such invalidity or unenforceability in any one jurisdiction affect the validity or enforceability of such provision, or the application thereof, in any other jurisdiction.

Section 8. This Assignment may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument. Counterparts may be delivered via facsimile, electronic mail (including pdf or any electronic signature complying with the U.S. federal E-SIGN Act of 2000, *e.g.*, [www.docusign.com](http://www.docusign.com)) or other transmission method and any counterpart so delivered shall be deemed to have been duly and validly delivered and be valid and effective for all purposes.

Assignors hereby authorize and request the Commissioner of Patents and Trademarks, and the corresponding entities or agencies in any applicable foreign countries, to record Assignee as the assignee and owner of the entire right, title and interest in and to the Marks.

[Signature Page Follows]

**IN WITNESS WHEREOF**, Assignors and Assignee have caused this Assignment to be executed by their duly authorized representatives effective as of the Closing Date.

**ASSIGNORS:**

**NOVAN, INC.**

By: \_\_\_\_\_  
Name:  
Title:

**EPI HEALTH, LLC**

By: \_\_\_\_\_  
Name:  
Title:

**ASSIGNEE:**

**LIGAND PHARMACEUTICALS,  
INCORPORATED**

By: \_\_\_\_\_  
Name:  
Title:

STATE OF )  
 ) SS.  
COUNTY OF )

On this \_\_\_ day of \_\_\_\_\_, there appeared before me \_\_\_\_\_, personally known to me, who acknowledged that he signed the foregoing Assignment as his voluntary act and deed on behalf and with full authority of Assignors.

\_\_\_\_\_  
Notary Public

STATE OF )  
 ) SS.  
COUNTY OF )

On this \_\_\_ day of \_\_\_\_\_, there appeared before me \_\_\_\_\_, personally known to me, who acknowledged that he signed the foregoing Assignment as his voluntary act and deed on behalf and with full authority of Assignee.

\_\_\_\_\_  
Notary Public



**EXHIBIT E**

**Form of Sale Procedures Order**

*See attached.*

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

In re:	)	
	)	Chapter 11
NOVAN, INC., <i>et al.</i> , <sup>1</sup>	)	
	)	Case No. 23- ____ ( ____ )
Debtors.	)	
	)	(Joint Administration Requested)
	)	

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**ORDER (I)(A) APPROVING BIDDING PROCEDURES FOR SALE OF  
SUBSTANTIALLY ALL OF DEBTORS’ ASSETS FREE AND CLEAR OF LIENS,  
CLAIMS, INTERESTS, AND ENCUMBRANCES AND DESIGNATING LIGAND  
PHARMACEUTICALS AS A STALKING HORSE BIDDER, (B) SCHEDULING AN  
AUCTION AND APPROVING THE FORM AND MANNER OF NOTICE THEREOF,  
(C) APPROVING ASSUMPTION AND ASSIGNMENT PROCEDURES AND (D)  
SCHEDULING A SALE HEARING AND APPROVING THE FORM AND MANNER OF  
NOTICE THEREOF, AND (II) GRANTING RELATED RELIEF**

Upon consideration of the motion (the “Motion”)<sup>2</sup> of the above-captioned debtors and debtors in possession (collectively, the “Debtors”) for the entry of an order: (i) approving bidding procedures, substantially in the form attached hereto as **Exhibit 1** (the “Bidding Procedures”), to be used in connection with one or more sales (each a “Sale”) of the Debtors’ development and commercialization rights to their research and development portfolio (the “R&D Assets”) and to the rights to commercialize the Debtors’ commercial portfolio (the “Commercial Assets,” and together with the R&D Assets, the “Assets,” as more fully defined in the Bidding Procedures) free and clear of all liens, claims, interests, and encumbrances; (ii) authorizing the Debtors to designate one or more affiliates of Ligand Pharmaceuticals, Incorporated or its designee (“Ligand”) as the Stalking Horse Bidder for all of the Assets in connection with considering the entry of the Bidding

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<sup>1</sup> 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

<sup>2</sup> Capitalized terms used but not defined herein shall have the meanings given them in the Bidding Procedures (as defined below), or to the extent not defined therein, the Motion or the Stalking Horse APA.

Procedures Order; (iii) scheduling one more auctions (each, an “Auction”), if necessary, and schedule one or more hearings to approve a sale of the Debtors’ Assets (a “Sale Hearing”); (iv) approving the form and manner of notice of the proposed Bidding Procedures, the Auction, and the Sale Hearing, substantially in the form attached hereto as **Exhibit 2** (the “Auction Notice”); (v) authorizing procedures governing the assumption and assignment of certain executory contracts and unexpired leases (the “Assumed Contracts”) in connection with any Sale (the “Assumption and Assignment Procedures”); (vi) approving the form and manner of notice to each relevant non-debtor counterparty to an Assumed Contract (each a “Counterparty”) of (A) the Debtors’ calculation of the amount necessary to cure any default under the applicable Assumed Contract (the “Cure Amounts”); and (B) certain other information regarding the potential assumption and assignment of Assumed Contracts in connection with a Sale, substantially in the form attached hereto as **Exhibit 3** (the “Assumption and Assignment Notice”); and (vii) granting related relief; and due and proper notice of the Motion having been given; and it appearing that no other or further notice of the Motion is required; and it appearing that this Court has jurisdiction to consider the Motion in accordance with 28 U.S.C. §§ 157 and 1334 and the Amended Standing Order; and it appearing that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2); and it appearing that venue of this proceeding and the Motion is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and this Court having reviewed the Motion; and the Bidding Procedures Hearing (as defined herein) having been held; and this Court having found and determined that the relief set forth herein is in the best interests of the Debtors, their estates and creditors, and all parties in interest, and that the legal and factual bases set forth in the Motion and at the Bidding Procedures Hearing, as applicable, establish just cause for the relief granted herein; and after due deliberation and sufficient cause appearing therefor, it is hereby

**FOUND AND DETERMINED THAT:**<sup>3</sup>

A. This Court has jurisdiction to consider the Motion in accordance with 28 U.S.C. §§ 157 and 1334 and the Amended Standing Order.

B. Venue of this proceeding and the Motion is proper pursuant to 28 U.S.C. §§ 1408 and 1409. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2).

C. The statutory and legal predicates for the relief requested in the Motion and provided for herein are sections 105, 363, 365, 503 and 507 of title 11 of the United States Code, 11 U.S.C. §§ 101-1532 (the “Bankruptcy Code”), Rules 2002, 6004, 6006, and 9014 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), and Rule 2002-1 and 6004-1 of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware (the “Local Rules”).

D. In the Motion and at the hearing on the relief set forth herein (the “Bidding Procedures Hearing”), the Debtors demonstrated that good and sufficient notice of the relief granted by this Order has been given and no further notice is required. A reasonable opportunity to object or be heard regarding the relief granted by this Order (including, without limitation, with respect to the Bidding Procedures) has been afforded to those parties entitled to notice pursuant to Bankruptcy Rule 2002 and all other interested parties.

E. The Bidding Procedures attached hereto as **Exhibit 1** are fair, reasonable, and appropriate and are designed to maximize the value of the proceeds of Sale of the Debtors’ Assets. The Bidding Procedures comply with the requirements of Local Rule 6004-1(c), and are

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<sup>3</sup> 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.

reasonably designed to promote active bidding and participation in the Auction to ensure that the highest or otherwise best value is generated for the Assets.

F. The Assumption and Assignment Procedures are fair, reasonable, and appropriate and comply with the provisions of section 365 of the Bankruptcy Code and Bankruptcy Rule 6006.

G. The Debtors have articulated good and sufficient business reasons for the Court to approve (i) the Bidding Procedures, (ii) the form and manner of Auction Notice; (iii) designation of Ligand as the Stalking Horse Bidder; (iv) the form and manner of the Assumption and Assignment Notice; and (v) the Assumption and Assignment Procedures.

H. The Auction Notice, the Assumption and Assignment Notice, and the Notice of Winning Bidder, are appropriate and reasonably calculated to provide all interested parties with timely and proper notice of the Auction, the Sale Hearing, the Bidding Procedures, the Assumption and Assignment Procedures, the Debtors' proposed Cure Amounts, any proposed assumption of an Assumed Contract in connection with a sale of the Assets, and all relevant and important dates and deadlines with respect to the foregoing, and no other or further notice of the Auction, the sale of the Assets, or the assumption and assignment of Assumed Contracts in connection therewith shall be required.

I. Good and sufficient notice of the relief sought in the Motion has been provided under the circumstances, and no other or further notice is required except as set forth in the Bidding Procedures and the Assumption and Assignment Procedures. A reasonable opportunity to object and be heard regarding the relief granted herein has been afforded to all parties in interest.

J. Entry of this Order is in the best interests of the Debtors, their estates and creditors, and all other interested parties.

**NOW, THEREFORE, IT IS HEREBY ORDERED THAT:**

1. The Motion is GRANTED as set forth herein. All objections to the relief granted in this Order that have not been withdrawn, waived, or settled, and all reservations of rights included therein, are hereby overruled and denied on the merits with prejudice.

2. The Bidding Procedures attached hereto as **Exhibit 1** are hereby approved and are incorporated herein by reference. The failure to specifically include or reference any particular provision of the Bidding Procedures in this Order shall not diminish or otherwise impair the effectiveness of such procedures, it being this Court's intent that the Bidding Procedures are approved in their entirety, as if fully set forth in this Order. The Debtors are authorized to take all actions necessary or appropriate to implement the Bidding Procedures.

3. Within three (3) business days after the entry of the Bidding Procedures Order, the Debtors shall to serve the Auction Notice, substantially in the form attached to the Bidding Procedures Order, on: (a) the U.S. Trustee; (b) counsel to the Stalking Horse Bidder; (c) counsel to any Creditors' Committee; (d) all parties known by the Debtors to assert a lien or encumbrance on any of the Assets; (e) all persons known or reasonably believed to have asserted an interest in or claim to any of the Assets; (f) all persons known or reasonably believed to have expressed an interest in acquiring all or a substantial portion of the Assets within the one (1) year prior to the Petition Date; (g) the Office of the United States Attorney for the District of Delaware; (h) the Office of the Attorney General in each state in which the Debtors have operated; (i) the Office of the Secretary of State in each state in which the Debtors have operated; (j) the Internal Revenue Service and all state and local taxing authorities in the states in which the Debtors have or may have any tax liability; (k) the Securities and Exchange Commission; (l) the Federal Trade Commission; (m) all of the Debtors' other known creditors and equity security holders; and (n) all

other parties that have filed a notice of appearance and demand for service of papers in the Chapter 11 Cases as of the service date.

4. The Debtors shall post the Auction Notice and this Order on the Debtors' claims and noticing agent's website. Within seven (7) calendar days of the entry of this Order, the Debtors shall cause the Auction Notice to be published once in the national edition of USA Today or another nationally circulated newspaper, with any modifications necessary for ease of publication. Publication of the Auction Notice as described in this Order conforms to the requirements of Bankruptcy Rules 2002(l) and 9008 and is reasonably calculated to provide notice to any affected party, including, without limitation, any potential bidders, and afford the affected party the opportunity to exercise any rights affected by the Motion and the relief granted by this Order.

5. Except objections relating to the conduct of the Auction, the Auction results, the selection of any Winning Bid and/or Back-Up Bid, or the terms of any Sale to a Winning Bidder and/or Back-Up Bidder, which may be filed as part of a Winning Bid Objection (as defined below), all objections to the sale of the Assets (each, an "Initial Sale Objection"), including any objection to the sale of any Assets free and clear of liens, claims, interests, and encumbrances pursuant to section 363(f) of the Bankruptcy Code to a Successful Bidder and/or a Backup Bidder (as applicable), shall be (i) be in writing; (ii) state with specificity the grounds for such objection; (iii) comply with the Bankruptcy Rules and the Local Rules; (iv) be filed with the Court by no later than **September 8, 2023, at 4:00 p.m. (ET)** (the "Initial Sale Objection Deadline"); and (v) served on the Notice Parties.

6. Subject to this Order and the Bidding Procedures, the Debtors, in the exercise of their reasonable business judgment and in a manner consistent with their fiduciary duties and applicable law, shall have the right, in consultation with the Notice Parties, to: (a) determine which

bidders qualify as Qualified Bidders, and which bids qualify as Qualified Bids; (b) make final determinations as to whether the Debtors will conduct an Auction; (c) select Baseline Bid(s); (d) determine the amount of each minimum overbid; (e) determine which Qualified Bid is the highest or otherwise best bid for the Assets, and therefore the Winning Bid, and which Qualified Bid is the next highest and next best bid after the Winning Bid for the Assets, and therefore the Back-Up Bid; (f) reject any bid that is (i) inadequate or insufficient; (ii) not in conformity with the requirements of this Order or any other applicable order of the Court, the Bidding Procedures, the Bankruptcy Code, or other applicable law; or (iii) contrary to the best interests of the Debtors and their estates; and (g) adjourn or cancel the Auction or the Sale Hearing in accordance with the Bidding Procedures; provided, however, that under no circumstance may a bid, other than the Stalking Horse Bid, qualify as a Qualified Bidder if it does not provide for the unaltered assumption and assignment of the Royalty Agreement.

7. The Debtors shall have the right, in their reasonable discretion and in consultation with the Notice Parties, to withhold or limit access to any due diligence information that the Debtors determine is business-sensitive or otherwise not appropriate for disclosure to a Qualified Bidder. Notwithstanding any prepetition limitations, including, without limitation, any non-disclosure, confidentiality, or similar provisions relating to any due diligence information, the Debtors and their estates shall be authorized to provide due diligence information to Qualified Bidders, *provided* that such Qualified Bidders have delivered an executed confidentiality agreement in form and substance acceptable to the Debtors. The Debtors and their estates are not responsible for, and shall have no liability with respect to, any information obtained by, or provided to, any Qualified Bidders in connection with the Bidding Procedures or the Sale.

8. In accordance with and subject to the Bidding Procedures and this Bidding Procedures Order, and without prejudice to the rights of the DIP Lender under the DIP Facility or the Stalking Horse Bidder under the Stalking Horse APA, the Debtors, in the exercise of their reasonable business judgment and in a manner consistent with their fiduciary duties and applicable law, in consultation with the Notice Parties, shall have the right to modify the Bidding Procedures, including to (a) extend, modify, adjourn, or waive dates, deadlines or other terms and conditions set forth herein or in the Bidding Procedures; (b) adopt new rules and procedures for conducting the bidding and Auction process so long as any such modifications are reasonably disclosed to Qualified Bidders; and (c) promote competitive bidding for and maximizing the value of the Assets; provided, however, that under no circumstance may a bid, other than the Stalking Horse Bid, qualify as a Qualified Bidder if it does not provide for the unaltered assumption and assignment of the Royalty Agreement.

9. The Stalking Horse Protections are hereby approved. Ligand, as the Stalking Horse Bidder, is entitled to a Break-Up Fee of 3% of its \$15 million Purchase Price. The Stalking Horse Bidder shall be considered a Qualified Bidder, and a Stalking Horse Bid shall be considered a Qualified Bid without regard to any of the requirements or conditions set forth in the Bidding Procedures and without any other or further action by the Stalking Horse Bidder. As part of its Stalking Horse Bid, Ligand shall be entitled to pay the Purchase Price under the Stalking Horse APA, and fund Overbids during the Auction if there is competitive bidding, with (i) an offset, on a dollar-for-dollar basis, against the Debtors' Obligations (as defined in the DIP Facility) under the DIP Facility; and/or (ii) cash.

10. A Qualified Bidder, other than a Stalking Horse Bidder, that desires to make a bid shall deliver an electronic copy of its bid in both PDF and MS-WORD format so as to be received

via email on or before **July 1, 2023, at 5:00 p.m. (ET)** (the “Bid Deadline”), by: (a) the Debtors’ proposed investment banker, Raymond James; and (b) proposed counsel to the Debtors, Morris, Nichols, Arsht & Tunnell LLP. The Debtors may extend the Bid Deadline without further order of the Court. Any party that does not submit a bid by the Bid Deadline will not be allowed to (i) submit any offer after the Bid Deadline or (ii) participate in the Auction.

11. Within one (1) business day after receipt thereof, the Debtors will deliver copies of all bids from Qualifying Bidders to the Notice Parties. The Debtors, in consultation with the Notice Parties, shall make a determination regarding whether a timely submitted bid from a Qualified Bidder is a Qualified Bid. No later than one (1) business day prior to the Auction, the Debtors shall: (a) notify all Qualified Bidders whether their bids have been determined to be a Qualified Bid; and (b) determine, in consultation with the Notice Parties, which of the Qualified Bids, at such time, is the highest or otherwise best bid for purposes of constituting the opening bid of the Auction (a “Baseline Bid” and the Qualifying Bidder submitting such Baseline Bid, a “Baseline Bidder”), and shall promptly notify all Qualified Bidders with Qualified Bids of the Baseline Bid.

12. If the Debtors do not receive a Qualified Bid other than a Stalking Horse Bid, the Stalking Horse Bid shall be deemed the Winning Bid for the Assets, and the Debtors shall request at the Sale Hearing that the Court approve such Winning Bid and the transactions contemplated thereunder for the Assets.

13. The Auction Procedures are hereby approved. If the Debtors timely receive one or more Qualified Bids for any Assets, then the Debtors shall conduct one or more auctions (each, an “Auction”) commencing on **July 1, 2023, at 10:00 a.m. (ET)**, at the offices of proposed counsel for the Debtors, Morris, Nichols, Arsht & Tunnell LLP, 1201 North Market Street, Wilmington, Delaware 19899, or virtually via telephone or video conference pursuant to information to be

timely provided by the Debtors to the Auction Participants. If held, the Auction proceedings shall be transcribed or video recorded.

14. Following the Auction, the Debtors will determine, in consultation with the Notice Parties, which Qualified Bid is the highest or otherwise best bid for the Assets, in whole or in part, which will be determined by considering, among other things, the following non-binding factors: (a) the number, type, and nature of any changes to the Stalking Horse APA requested by each bidder; (b) the extent to which such modifications are likely to delay closing of the Sale and the cost to the Debtors and their estates of such modifications or delay; (c) the total consideration to be received by the Debtors and their estates; (d) the transaction structure and execution risk, including, without limitation, conditions to, timing of and certainty of closing, termination provisions, availability of financing and financial wherewithal to meet all commitments, and required governmental or other approval; (e) the net benefit to the Debtors' estates; and (f) any other factors the Debtors may reasonably deem relevant.

15. On or before one (1) business day after the selection of any Winning Bid(s), the Debtors shall file a notice with the Court (the "Notice of Winning Bid") that sets forth: (i) the identity of the Winning Bidder(s) and any Back-Up Bidder; (ii) the amount of the Winning Bid and any Back-Up Bid; (iii) a summary of the Assets subject to the Winning Bid; and (iv) whether the Winning Bidder or the Back-Up Bidder have any connections to the Debtors other than those arising from their respective bids.

16. The Sale Hearing shall be held in this Court on **[•], 2023 at [ ]:[ ] [l.m. (ET)**, unless otherwise determined by this Court. Subject to the DIP Facility and the Stalking Horse APA, the Sale Hearing may be adjourned by the Debtors, in consultation with the Notice Parties and the Winning Bidder(s), from time to time without further notice to creditors or other parties in

interest other than by announcement of the adjournment in open court on the date scheduled for the Sale Hearing, or by filing a hearing agenda or notice on the docket of the Chapter 11 Cases.

17. Following service of the Notice of Winning Bid, parties may file an objection solely with respect to the conduct of the Auction, the Auction results, the selection of the Winning Bid and/or Back-Up Bid, or the terms of any Sale to the Winning Bidder or the Back-Up Bidder (each, a “Winning Bid Objection”). Any Winning Bid Objection shall be (i) be in writing; (ii) state with specificity the grounds for such objection; (iii) comply with the Bankruptcy Rules and the Local Rules; (iv) be filed with the Court by no later than **July 17, 2023, at 4:00 p.m. (ET)** (the “Winning Bid Objection Deadline”); and (v) served on the Notice Parties. The Debtors and any other entity shall have until **one (1) business day prior to the Sale Hearing, at 12:00 p.m. (ET)**, to file and serve a reply to any Initial Sale Objection or Winning Bid Objection. Any party who fails to file and serve a timely Initial Sale Objection or Winning Bid Objection in accordance with the terms of this Order shall be forever barred from asserting, at the Sale Hearing or thereafter, any Initial Sale Objection or Winning Bid Objection including any such objection to the relief requested in the Motion or to the consummation or performance of the sale of the Assets, including the transfer of Assets to the applicable Winning Bidder free and clear of liens, claims, interests, and encumbrances pursuant to section 363(f) of the Bankruptcy Code, and shall be deemed to consent to such sale for purposes of section 363(f) of the Bankruptcy Code.

18. The Auction Notice, substantially in the form attached hereto as **Exhibit 2**, is approved, and no other or further notice of the proposed Sale of Assets, the Auction, the Sale Hearing, the Initial Sale Objection Deadline, or the Winning Bid Objection Deadline shall be required if the Debtors serve the Auction Notice in the manner provided in the Bidding Procedures and this Order.

19. The following assumption and assignment procedures (the “Assumption and Assignment Procedures”) are hereby approved:

1. On [July \_\_, 2023], the Debtors served the Initial Assumption and Assignment Notice, substantially in the form attached hereto as **Exhibit 3**, via overnight delivery, on any counterparty (a “Counterparty”) to the Debtors’ universe of executory contracts and unexpired leases that may be designated Assumed Contracts. This notice included: (a) notice that such Counterparty’s contract may be subject to assumption and assignment in the Sale and thus designed an Assumed Contract; (b) the Cure Amount if any, that the Debtors believe is required to be paid to the Counterparty under section 365(b)(1)(A) and (B) of the Bankruptcy Code for such Assumed Contract; and (c) the Adequate Assurance Information of the Stalking Horse Bidder. The inclusion of any executory contract or unexpired commercial real property lease on the Initial Assumption and Assignment Notice shall not constitute an admission that a particular contract is an executory contract or unexpired lease or require or guarantee that such contract will be an Assumed Contract.
2. On or before one (1) business day after the selection of a Winning Bid or a Back-Up Bid, the Debtors shall file with this Court and serve the Additional Assumption and Assignment Notice, substantially in the form attached hereto as **Exhibit 3**, via overnight delivery, on any Counterparty to the Debtors’ universe of executory contracts and unexpired leases that may be designated as an Assumed Contract that the relevant Winning Bidder or Back-Up Bidder desires to assume as part of its Winning Bid *that was not already listed on the Initial Assumption and Assignment Notice*. This notice shall include: (a) notice that such Counterparty’s contract may be subject to assumption and assignment in the Sale and thus designed an Assumed Contract as part of the relevant Winning Bid; (b) the cure amount if any, that the Debtors believe is required to be paid to the Counterparty under section 365(b)(1)(A) and (B) of the Bankruptcy Code for such Assumed Contract (each, a “Cure Amount”) in the event such Assumed Contract is assumed and assigned by the Debtors; and (c) the Adequate Assurance Information of the relevant Winning Bidder and Back-Up Bidder. The inclusion of any executory contract or unexpired commercial real property lease on the Additional Assumption and Assignment Notice shall not constitute an admission that a particular contract is an executory contract or unexpired lease or require or guarantee that such contract will be an Assumed Contract.
3. ***Objections to the Initial Assumption and Assignment Notice served in accordance with subparagraph 1 hereof were due prior to the entry of this Order.*** If a Counterparty objects to (a) the proposed assumption and assignment of its Assumed Contract set forth in the Initial Assumption and Assignment Notice (including, without limitation, on the basis (i) that the

Stalking Horse Bidder cannot provide adequate assurance of future performance; (ii) of the transfer of any related rights or benefits thereunder; or (iii) that Counterparty consent is allegedly required for the assumption, assignment, and transfer of the Assumed Contract), or (b) the Cure Amount set forth in the Initial Assumption and Assignment Notice, the Counterparty must file with the Court and serve on the Notice Parties a written objection (a “Contract Objection”). Any Contract Objection shall: (i) be in writing; (ii) state with specificity the grounds for such objection; (iii) comply with the Bankruptcy Rules and the Local Rules; (iv) be filed with the Court **on or before [•], at 12:00 p.m. (ET)** (the “Contract Objection Deadline”); and (v) served on the Notice Parties.

4. With respect to any Contract Objection that is (or was) timely received, the Debtors, the Stalking Horse Bidder or relevant Winning Bidder, and the objecting Counterparty shall first confer in a good faith attempt to resolve the Contract Objection without Court intervention. If the parties are unable to consensually resolve the Contract Objection, the Debtors may request a hearing for the Court to resolve the Contract Objection. In the event a Contract Objection is resolved in a manner unfavorably, the Debtors may withdraw (or the Winning Bidder may cause the Debtor to withdraw) their request to assume and assign such Assumed Contract as part of any Winning Bid. A Contract Objection may be resolved after the closing date of the applicable Sale, subject to the terms of the asset purchase agreement approved in connection with the Sale.
5. If no Contract Objection is timely received with respect to an Assumed Contract: (a) the Counterparty to such Assumed Contract shall be deemed to have consented to the assumption by the Debtors and assignment or transfer (including the transfer of any related rights and benefits thereunder) to the Stalking Horse Bidder or Winning Bidder, as applicable, of the Assumed Contract, and be forever barred and estopped from asserting or claiming against the Debtors or the Stalking Horse Bidder or the Winning Bidder, as applicable, that any additional defaults exist or that conditions to assumption, assignment, and transfer must be satisfied under the Assumed Contract (including, without limitation, with respect to adequate assurance of future performance by the Stalking Horse Bidder or Winning Bidder, as applicable), or that any related right or benefit under such Contract cannot and will not be available to the Stalking Horse Bidder or the Winning Bidder, as applicable; (b) any and all defaults under the Assumed Contract and any and all pecuniary losses related thereto shall be deemed cured and compensated pursuant to section 365(b)(1)(A) and (B) of the Bankruptcy Code upon payment of the applicable Cure Amount; and (c) the Cure Amount for such Assumed Contract shall be controlling, notwithstanding anything to the contrary in such Assumed Contract, or any other related document, and the Counterparty shall be deemed to have consented to the Cure Amount and shall be forever barred from asserting any other claims related to such Assumed Contract against the Debtors and their estates or

the Stalking Horse Bidder or Winning Bidder, as applicable, or the property of any of them, that existed prior to the entry of the Sale Order.

6. The Debtors' decision to assume and assign any Assumed Contract to the Stalking Horse Bidder or a Winning Bidder, as applicable, is subject to this Court's approval and the closing of the Sale. Accordingly, absent this Court's approval and the closing of such Sale, the Assumed Contracts shall not be deemed assumed or assumed and assigned and shall in all respects be subject to further administration by the Debtors and their estates under the Bankruptcy Code in connection with the Chapter 11 Cases.

20. The Debtors shall use reasonable best efforts to timely implement the above Assumption and Assignment Procedures, and shall not otherwise hinder or delay the assumption and assignment of executory contracts and/or unexpired leases that the Stalking Horse Bidder or such other Qualified Bidder, as applicable, designate as Assumed Contracts as part of the Stalking Horse Bid or Qualified Bid, respectively.

21. In the event that a Winning Bidder fails to close a Sale on or before [●], 2023, or such date as may be extended by the Debtors in consultation with the Notice Parties, and a Back-Up Bidder has been previously identified, the Debtors shall file a notice (the "Back-Up Bid Auction Notice") and serve such Back-Up Bid Auction Notice on the U.S. Trustee, the Notice Parties, and those parties who filed a request to receive notice under Bankruptcy Rule 2002. Three (3) business days following the filing of any Back-Up Bid Auction Notice, the Back-Up Bid subject to such Back-Up Bid Auction Notice will be deemed to be the Winning Bid, the Back-Up Bidder will be deemed to be the Winning Bidder, and the Debtors shall be authorized, but not directed, to close the Sale to the Back-Up Bidder subject to the terms of the Back-Up Bid without the need for further order of the Court and without the need for further notice to any interested parties.

22. Any consultation rights provided to the Notice Parties pursuant to the Bidding Procedures shall not limit the Debtors' discretion in any way and shall not include the right to veto

any decision made by the Debtors in the exercise of their business judgment. In the event that a member of a Creditors' Committee submits a bid that is a Qualified Bid, any obligation of the Debtors to consult with the bidding party, or their legal counsel, established under the Bidding Procedures will be waived without further action; *provided* that the bidding party will have the same rights as any other Qualified Bidder under the Bidding Procedures. Any failure to specifically identify consultation rights in any section of these Bidding Procedures shall not limit or otherwise impair the rights of the Notice Parties to consult with the Debtors. In the event that the Notice Parties disagree with matters for which the Debtors are required to consult with the Notice Parties, then the Notice Party shall have the right to seek relief from the Court on an expedited basis to resolve the dispute.

23. In the event that there is a conflict between this Order or the Bidding Procedures, on the one hand, and the Motion or a Qualified Bidder's Proposed APA, on the other hand, this Order and the Bidding Procedures shall control and govern. If there is a conflict between this Order and the Bidding Procedures, this Order shall control and govern. If there is a conflict between this Order or the Bidding Procedures, on the one hand, and any notice served in connection with the Motion or this Order, on the other hand, this Order and the Bidding Procedures shall control and govern.

24. Prior to mailing any of the notices approved hereby, the Debtors may fill in, or cause to be filled in, any missing dates and other information, correct any typographical errors, conform the provisions thereof to the provisions of this Order, and make such other, non-material changes as the Debtors deem necessary or appropriate.

25. Nothing in this Order, or any of the Exhibits hereto, shall prevent the Debtors from exercising their fiduciary duties in consummating or otherwise pursuing alternative transactions.

26. This Order shall be effective immediately upon entry, and any stay of orders provided for in Bankruptcy Rules 6004(h) or 6006(d) or any other provision of the Bankruptcy Code, the Bankruptcy Rules or the Local Rules is expressly waived. The Debtors are not subject to any stay in the implementation, enforcement or realization of the relief granted in this Order, and may, in their sole discretion and without further delay, take any action and perform any act authorized or approved under this Order.

27. The requirements set forth in Local Rules 6004-1, 9006-1, and 9013-1 are hereby satisfied or waived.

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