Docket #0255 Date Filed: 09/06/2023

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
Novan, Inc., *et al.*,[1]	Case No. 23-10937 (LSS)
Debtors.	(Jointly Administered)
	Related D.I.: 16 & 60

LIMITED OBJECTION OF ACLARIS THERAPEUTICS, INC. TO THE SALE OF THE DEBTORS' ASSETS FREE AND CLEAR OF LIENS, CLAIMS, INTERESTS, AND ENCUMBRANCES

Aclaris Therapeutics, Inc. ("Aclaris"), by and through its counsel, DLA Piper LLP (US), hereby files this limited objection to the sale motion [D.I. 16] (the "Sale Motion") filed by Novan, Inc. and its affiliated debtor (collectively, the "Debtors") for, among other things, approval of the sale of RHOFADE® (the "Sale") to Mayne Pharma LLC ("Mayne"). In support of this Objection, Aclaris respectfully states as follows:

PRELIMINARY STATEMENT[2]

1. The Debtors own the right to manufacture and sell RHOFADE® subject to a royalty obligation payable to Aclaris under the Aclaris Agreement, an arrangement common in the pharmaceutical industry and one necessary for the continued and uninterrupted financing and development of pharmacological products.

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

[2] Capitalized terms used but not otherwise defined in this Preliminary Statement have the meanings ascribed to such terms elsewhere in this Objection.

2. Notwithstanding significant efforts on the part of both the Debtors and Aclaris to reach agreement on a correct cure amount, the Debtors have now engaged in an eleventh-hour about-face. The Debtors' current position is apparently that Mayne, as the successful bidder for RHOFADE®, can exploit the Debtors' rights under the Aclaris Agreement without performing any of the obligations thereunder—a divorce of the RHOFADE® asset from the royalties that flow with it.

3. The Debtors' new position is unfounded and contravenes established Third Circuit precedent. Instead, if the Debtors are authorized to sell their rights to RHOFADE®, such sale must include the entire bundle of rights related to that product, including the royalty and related obligations owed to Aclaris.

BACKGROUND

4. On October 10, 2019, Aclaris and EPI Health, LLC ("EPI Health") entered into that certain Asset Purchase Agreement (the "Aclaris Agreement"). Through the Aclaris Agreement, among other things, Aclaris conveyed to EPI Health its rights and interests in a number of Transferred Assets (as such term is defined in the Aclaris Agreement). These Transferred Assets included, without limitation, certain assigned contracts, patents, trademarks, domain names, and inventory.

5. Under the Aclaris Agreement, EPI Health acquired the right to manufacture and sell RHOFADE®, subject to certain sales milestones and a seven percent (7%) royalty on Net Sales of the Earnout Products (as defined therein), subject to certain conditions.

6. On July 17, 2023 (the "Petition Date"), the Debtors each filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code. On July 17, 2023, the Debtors filed the Sale Motion.

7. Shortly thereafter, on July 25, 2023, the Debtors filed the *Initial Notice of Possible Assumption and Assignment of Certain Executory Contracts and Unexpired Leases* [D.I. 60], which included the Aclaris Agreement and an initial proposed cure amount. Since then, Aclaris has engaged the Debtors in good faith in an effort to reach agreement on the correct cure amount necessary to assume and assign the Aclaris Agreement to a buyer in these chapter 11 cases.

8. On August 31, 2023, the Debtors filed the *Notice of Debtors' Designation of Mayne Pharma LLC as Winning Bidder and the Mayne APA as the Winning Bid for Certain of the Debtors' Assets* [D.I. 242], which noted that the Debtors had designated Mayne as the winning bidder for certain of the Debtors' Commercial Assets related to RHOFADE®. The notice attached a copy of the executed Amended and Restated Asset Purchase Agreement, dated as of August 31, 2023, by and among Novan, Inc., EPI Health, LLC, and Mayne Pharma LLC (the "Mayne APA").

9. Schedule 3.6 of the Disclosure Schedules to the Mayne APA lists the Aclaris Agreement as a "Material Contract", but Schedule 2.6(a) does not list the Aclaris Agreement as an "Assumed Contract".

OBJECTION

10. Aclaris objects to the Sale Motion and any attempted sale, assignment, conveyance, or other transfer of the Aclaris Agreement or any rights transferred thereunder to Mayne or any other purchaser of the Debtors' assets to the extent such sale would impermissibly separate RHOFADE® from the royalty and other related obligations associated with it.

11. Bankruptcy does not afford participants in the chapter 11 process with greater property rights than they had outside of bankruptcy. *See, e.g.*, *Claybrook v. Consol. Foods, Inc.* (*In re Bake-Line Grp., LLC*), 359 B.R. 566, 570 (Bankr. D. Del. 2007). Immediately prior to the Petition Date, the Debtors' rights to exploit RHOFADE® were subject to the royalty obligations

set forth in a myriad of agreements, including, without limitation, the Aclaris Agreement. Nothing changed as of the Petition Date—the Debtors had no greater ability to divorce the RHOFADE® asset from the Aclaris Agreement royalty obligations on July 18, 2023, than they did the day prior. To the contrary, the two are indivisible.

12. The same holds true in the context of a proposed sale under section 363 of the Bankruptcy Code. A buyer cannot take ownership and title to the rights and interests under the Aclaris Agreement and exploit the RHOFADE® asset without honoring all milestone and royalty obligations thereunder post-closing.

13. The Third Circuit in *Spyglass Media Group, LLC f/k/a Lantern Entertainment LLC v. Bruce Cohen Productions* (*In re Weinstein Co. Holdings LLC*), 997 F.3d 497 (3d Cir. 2001) made this point clear, explaining that an asset of the estate, a non-executory contract "can be sold under § 363 to a buyer," but only if the purchaser is prepared to "satisfy post-closing obligations." *Weinstein*, 997 F.3d at 501.

14. While the Debtors' and Mayne's true intentions here are not yet clear—especially in light of their inconsistent positions over the course of the case—Aclaris files this limited objection, out of an abundance of caution, to ensure that any sale order authorizing and approving the Sale of the RHOFADE® asset or any rights or interests under the Aclaris Agreement is conditioned on a requirement that Mayne pay all post-closing obligations that will come due under the Aclaris Agreement.

RESERVATION OF RIGHTS

15. Aclaris expressly reserves any and all rights it may have with respect to the Aclaris Agreement, the treatment thereof, or the Sale itself, including, without limitation, the right to assert that the Aclaris Agreement is executory and that the transfer of the Aclaris Agreement requires

that defaults be cured and that adequate assurance of future performance be provided. Aclaris further reserves the rights to supplement, amend, or otherwise modify this limited objection or seek leave of the Court to reply to any pleading filed by the Debtors or any other party in interest to this limited objection. Nothing herein is intended to, nor shall be deemed to, waive any rights or defenses Aclaris has, may have, or may in the future have in connection herewith.

WHEREFORE, Aclaris respectfully requests that the Court deny the Sale Motion and grant such other and further relief as the Court deems just and proper.

Dated: September 6, 2023
Wilmington, Delaware

DLA PIPER LLP (US)

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