Docket #0275 Date Filed: 09/08/2023

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, 255, 272

MOTION OF ACLARIS THERAPEUTICS, INC. FOR ENTRY OF AN ORDER GRANTING LEAVE TO FILE A SUR-REPLY

Aclaris Therapeutics, Inc. ("Aclaris"), by and through its counsel, DLA Piper LLP (US), hereby files this motion (the "Motion"),[2] for entry of an order, substantially in the form attached to this Motion as **Exhibit B** (the "Proposed Order"), for leave under section 105(a) of title 11 of the United States Code (the "Bankruptcy Code") and rule 7007-2(b)(ii) of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware (the "Local Rules") to file a sur-reply ("Sur-Reply")[3] to the *Debtors' Reply to the Limited Objection of Aclaris Therapeutics, Inc. to the Sale of the Debtors' Assets Free and Clear of Liens, Claims, Interests, and Encumbrances* [D.I. 272-2] (the "Reply"). In support of this Motion, Aclaris respectfully states as follows:

[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] Any terms not defined in the Motion shall have the meanings ascribed to them in the Aclaris Objection (defined below).

[3] A copy of the Sur-Reply is attached to this Motion as **Exhibit A**.

JURISDICTION AND VENUE

1. The Court has jurisdiction over 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 as of February 29, 2012. This is a core proceeding under 28 U.S.C. § 157 (b).

2. Venue is proper in this district under 28 U.S.C. § 1408 and 1409.

3. Aclaris consents to entry of a final order on this Motion if it is determined that the Court, absent consent of the parties, cannot enter final orders or judgments consistent with Article III of the United States Constitution.

RELEVANT BACKGROUND

4. On July 17, 2023, Novan, Inc. and its affiliated debtor (collectively, the "Debtors") filed a sale motion [D.I. 16] (the "Sale Motion") to sell substantially all of their assets.

5. On September 6, 2023, Aclaris timely filed the *Limited Objection of Aclaris Therapeutics, Inc. to the Sale of the Debtors' Assets Free and Clear of Liens, Claims, Interests, and Encumbrances* [D.I. 255] (the "Aclaris Objection").

6. On September 8, 2023, Debtors filed the Reply, which contains significant arguments not addressed previously.

7. There is a hearing on this matter scheduled for September 11, 2023 at 10:00 a.m. (ET).

RELIEF REQUESTED

8. By this Motion, Aclaris seeks entry of an order, under section 105(a) of the Bankruptcy Code and Local Rule 7007-2(b)(ii), granting Aclaris leave to file the Sur-Reply to the Reply filed by the Debtors.

BASIS FOR RELIEF REQUESTED

9. Local Rule 7007-2(b)(ii) provides that "[t]he party filing the opening brief shall not reserve material for the reply brief which should have been included in a full and fair opening brief." Recognizing the potential for "impermissible 'sandbagging'" when movants reserve "crucial arguments for a reply brief to which an opponent cannot respond," the Delaware District Court has found that the appropriate remedy for violations of this rule is to allow leave to file a sur-reply. *Fifth Mkt., Inc. v. CME Grp., Inc*., No. CIV.A. 08-520-GMS, 2013 WL 3063461, at *1 n.2 (D. Del. June 19, 2013). "[P]ermission for leave to file a sur-reply is a matter 'committed to the District Court's sound discretion.'" *Levey v. Brownstone Inv. Grp., LLC*, 590 F. App'x 132, 137 (3d Cir. 2014); *see also Walsh v. Irvin Stern's Costumes*, No. CIV.A. 05-2515, 2006 WL 166509, at *12 (E.D. Pa. Jan. 19, 2006) (granting leave to file sur-reply when "brief was only four pages long and responded to new arguments posited in [adversary's] Reply brief").

10. Moreover, the equitable powers of the Court allow it to issue any order that "is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a).

11. At approximately 3:30 p.m. on the date hereof—more than three hours after the deadline set forth in the Bidding Procedures Order—the Debtors filed the Reply to the Aclaris Objection, in which it sets forth significant new arguments not yet briefed before this Court. Given that the hearing on the Sale Motion is scheduled for Monday morning, Aclaris will not have another opportunity to brief its own arguments.

12. In light of the foregoing, Aclaris should be afforded an opportunity to respond to the Reply. Aclaris believes that its brief Sur-Reply will aid the Court in its consideration of the relevant issues. Aclaris submits that no party will be prejudiced by the filing of the Sur-Reply.

13. For the reasons set forth above, Aclaris respectfully requests that the Court grant Aclaris leave to file a Sur-Reply.

Dated: September 8, 2023
Wilmington, Delaware

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EXHIBIT A

Sur-Reply

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, 255 & 272

SUR-REPLY IN SUPPORT OF 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 sur-reply in support of its 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 hereof, Aclaris respectfully states as follows:

1. Aclaris files this sur-reply to more fully address the issues that it raised in the sale objection filed on September 6, 2023 [Docket No. 255] (the "Initial Aclaris Objection") and to respond to the Debtors' proposed reply filed on September 8, 2023 (the "Proposed Reply") [Docket No. 272].[2]

[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] In their motion for leave to file a late reply [Docket No. 272], the Debtors wrongly assert that the Initial Aclaris Objection was not timely filed. The Court's bidding procedures order provides that parties may file objections related to the "terms of any Sale to the Winning Bidder" by no later than September 6, 2023, at 4:00 p.m. (ET). The Initial Aclaris Objection was limited to new terms in the Mayne asset purchase agreement ("Mayne APA") and proposed sale order ("Mayne Proposed Order") (each filed at Docket No. 242) that relate to Aclaris, and was thus timely filed. The bidding procedures order also provided that the Debtors would have until 12:00 p.m. (ET) on September 8, 2023, to file replies to any objections filed by September 6, 2023, which the Debtors do not address in their motion.

2. The issues raised in the Initial Aclaris Objection related to an apparent effort by Mayne, with the cooperation of the Debtors, to acquire RHOFADE free and clear of any obligation to make the future royalty payments contemplated by the asset purchase agreement under which the Debtors had acquired RHOFADE from Aclaris (the "Aclaris APA"). More specifically, the Mayne APA designates "all Liabilities arising under that certain Asset Purchase Agreement, dated October 10, 2019, by and between EPI Health and Aclaris Therapeutics, Inc." as an Excluded Liability. (Mayne APA, section 2.4(k)].) Further, the Mayne Proposed Order provides that "[f]or the avoidance of doubt, the Buyer shall obtain the Purchased Assets free and clear of any pre-petition *or post-petition Claim for royalties* or any other payments or obligations of any kind whatsoever, unless such Claim is expressly assumed by the Buyer as Assumed Liabilities, or Cure Amounts arising under the Assumed Contracts." (Mayne Proposed Order ¶ T.)

3. Since reviewing the Mayne APA and filing the Initial Aclaris Objection, counsel for Aclaris engaged with counsel for the Debtors and Mayne to ascertain the basis for their position, and, from those discussions, as well as the Proposed Reply, now understands that the Debtors contend that any royalty obligations owed under the Aclaris APA should be governed by a decision rendered in the *Mallinckrodt* bankruptcy case on November 4, 2022 ("*Mallinckrodt*"), which decision is currently on appeal to the Third Circuit.[3] In light of this position, Aclaris respectfully submits this sur-reply to address the Debtors' and Mayne's contentions on this issue.

[3] A copy of the *Mallinckrodt* hearing transcript setting forth Judge Dorsey's ruling is attached hereto as Exhibit A. The decision is currently pending appeal to the United States Court of Appeals for the Third Circuit, at Case No. 23-1111 (3d Cir. 2023).

A. Debtors' Reliance on Mallinckrodt Ruling Is Misplaced

4. The Debtors argue that they can sell the RHOFADE asset to Mayne, and that Mayne should not be required to either cure existing defaults under the Aclaris APA or pay future royalties that will arise as Mayne manufactures and sells RHOFADE, based on the novel rationale and conclusions set forth in the Mallinckrodt Decision.

5. The bases for the Mallinckrodt Decision are entirely distinguishable from any that would apply to the proposed sale to Mayne, including on the grounds that (i) the Bankruptcy Court in *Mallinckrodt* was addressing the scope of discharge under section 1141 of the Bankruptcy Code and not a sale under section 363; (ii) the Bankruptcy Court found that the royalty agreement in *Mallinckrodt* did not afford the counterparty a property interest; and (iii) the Bankruptcy Court found that the royalty agreement in *Mallinckrodt* was not an executory contract.

1. Mallinckrodt Ruling Only Addresses Scope of Discharge Under Section 1141

6. In *Mallinckrodt*, Judge Dorsey ruled on a motion filed in anticipation of confirmation proceedings on a proposed plan of reorganization. In that case, the debtors, in their plan supplement, had listed an agreement giving rise to a royalty as a contract that the debtors proposed to reject under the plan.

7. The counterparty filed a motion for a determination that the agreement was not executory, and thus could not be rejected, or that if it was rejected, then the debtors could not continue to manufacture and sell the product.

8. In his ruling, Judge Dorsey agreed that the agreement was not executory and thus could not be rejected. He also ruled, however, that in the context of a chapter 11 plan of reorganization, future claims for damages for anticipated non-payment of royalties would be

discharged by the chapter 11 plan. While this decision is presently pending on appeal to the Third Circuit, it is not applicable to the situation in this case.[4]

9. Regardless of how the Third Circuit ultimately rules on the *Mallinckrodt* appeal, this case does not involve the scope of a chapter 11 discharge under section 1141 of the Bankruptcy Code. No chapter 11 plan has been filed, and the Debtors are selling substantially all of their assets and so are not reorganizing and will thus not be entitled to a discharge in any event.

10. Instead, in this case, the Debtors seek to significantly expand the breadth of the *Mallinckrodt* ruling to provide that a non-reorganizing debtor may sell assets that are subject to a royalty obligation, but without the buyer being required to honor that royalty in connection with the buyer's own post-closing actions.

11. As noted in the Initial Aclaris Objection, the circumstances of this case are more closely aligned with the facts before the Third Circuit in the *Weinstein* case, where a buyer purchased assets that were subject to a royalty. The buyer acquired the non-executory contract that gave rise to the royalties, and it was undisputed and acknowledged by the Third Circuit that the buyer would necessarily be required to honor *post-closing* royalties. *Weinstein*, 997 F.3d 497, 501 (3d Cir. 2021) ("[a] non-executory contract . . . can be sold under § 363 to a buyer, *who must satisfy post-closing obligations* . . ."") (emphasis added); *see also In re Monument Record Corp.*, 61 B.R. 866 (Bankr. M.D. Tenn. 1986) ("If continued use [of recordings acquired subject to a royalty] is economically advantageous, then the debtor can market and use the recordings . . . subject to the obligation to pay royalties.").

[4] Even if the Court does find the situation here to be analogous, Aclaris notes that neither Judge Dorsey's bench ruling nor the District Court's affirmance are binding precedent on this Court. Unless and until the Third Circuit Court of Appeals rules in *Mallinckrodt*, those decisions constitute persuasive authority only.

12. There is no basis to extend the *Mallinckrodt* ruling beyond the chapter 11 plan context to sales under section 363 of the Bankruptcy Code, which instead should be governed by existing Third Circuit precedent including *Weinstein*, that makes clear that post-closing obligations, including royalties, pass to the buyer along with the underlying assets.

2. Unlike in Mallinckrodt, the Aclaris APA Must Be Acquired By Mayne in Order to Deliver Title to RHOFADE

13. The Debtors contend that they can sell the RHOFADE asset to Mayne without Mayne also acquiring the Aclaris APA, either as a sale of a non-executory contract or through assumption and assignment under section 363 of the Bankruptcy Code. Both arguments fail, because the Aclaris APA is an integral and indispensable element in the overall chain of title that Mayne must acquire in order to acquire the RHOFADE asset.

14. A key issue in *Mallinckrodt*, which was addressed by both the bankruptcy court and district court, was whether the relevant counterparty had retained a property interest in the relevant asset, including with respect to the royalty, or whether the royalty constituted only a claim that could be discharged under section 1141.

15. Unlike the agreement at issue in *Mallinckrodt*, however, the Aclaris APA is part of an integrated set of documents and agreements that reflect the Debtors' ownership of RHOFADE, such that Mayne's acquisition of the Aclaris APA is a necessary element of its ability to obtain clear title to the assets being purchased under the Mayne APA.

16. In this connection, it should be noted that section 3.6 of the Mayne APA addresses "Material Contracts," which include (i) contracts related to the acquisition of disposition of Purchased Assets (§ 3.6(a)(ii)); (ii) contracts relating to the payment of royalties with respect to the Purchased Assets (§ 3.6(a)(iii)); and (iii) all other contracts that are material to the Purchased Assets (§ 3.6(a)(x)).

17. Section 3.6(b) of the Mayne APA, in particular, expressly states that "Material Contracts include all Contracts material to or otherwise necessary for the ownership and/or operation of the Purchased Assets and/or the business of Sellers relating thereto." (Mayne APA, §3.6(b)).

18. Section 3.6 of the Disclosure Schedules filed with the Mayne APA contains a list of Material Contracts, which includes the Aclaris APA (Schedule 3.6(a)(ii)(3)), thus acknowledging, under the section 3.6(b), that the Aclaris APA is material or necessary for the ownership and/or operation of the Purchased Assets and/or the business of the Sellers related thereto. It also includes the following additional agreements relating to Aclaris or otherwise part of the chain of title for RHOFADE:

Disclosure Schedule	**Material Contract**
3.6(a)(i)(3)	Master Services Agreement by and between Aclaris Therapeutics, inc. (assigned to EPI Health) and NDI ADRL Inc., dba Dietba, dated January 2, 2019
3.6(a)(i)(4)	Master Services Agreement by and between Aclaris Therapeutics, Inc. (assigned to EPI Health) and SGS North America, Inc., effective January 9, 2019
3.6(a)(ii)(4)	Asset Purchase Agreement by and between Aclaris Therapeutics, Inc. (assigned to EPI Health) and Allergan Sales, LLC, dated October 15, 2018
3.6(a)(ii)(5)	Assignment and License Agreement by and between Aspect Pharmaceuticals, LLC and Vicept Therapeutics, Inc. (assigned to EPI Health), dated August 3, 2009
3.6(a)(iv)(1)	Patent Sublicense Agreement by and between Aclaris Therapeutics, Inc. (assigned to EPI Health) and Allergan Sales, LLC, dated November 30, 2018
3.6(a)(iv)(2)	Exclusive Patent License Agreement by and between Aclaris Therapeutics, Inc. (assigned to EPI Health) and Allergan, Inc., dated November 30, 2018

19. As is made clear by these Disclosure Schedules, there are a number of contracts and agreements that were and remain part and parcel of the bundle of rights that reflect EPI Health's ownership of RHOFADE, all of which are Material Contracts and all of which need to be either assumed and assigned to, or purchased by, Mayne to preserve the full chain of title.

20. By excluding the Aclaris APA, Mayne has elected to neither assume nor acquire all the requisite chain-of-title documents. Instead, the Debtors and Mayne seek to have it both ways. They acknowledge that the Aclaris APA is a Material Contract, and yet seek to acquire it and the corresponding rights to RHOFADE while divorcing those rights from the royalty that flows with them. Section 363 of the Bankruptcy Code does not permit such an end-run-around, and endorsing such an outcome would run directly counter to the result embraced by the Third Circuit in *Weinstein*.

3. Aclaris APA Is Executory Contract

21. Finally, the Debtors' reliance on the ruling in *Mallinckrodt* is misplaced because the agreement there was a non-executory contract, whereas the Aclaris APA remains executory.

22. Under Third Circuit law, "[a]n executory contract is a contract under which the obligation of both the bankrupt and the other party to the contract are so far underperformed that the failure of either to complete performance would constitute a material breach excusing the performance of the other." *Sharon Steel Corp. v. Nat'l Fuel Gas Distrib. Corp.*, 872 F.2d 36, 39 (3d Cir. 1989) (quoting Countryman, *Executory Contracts in Bankruptcy, Part 1*, 57 Minn. L. Rev. 439, 460 (1973)).

23. Indisputably, the Debtors' obligation to pay royalties with respect to sales of RHOFADE constitutes a material unperformed obligation. But unlike the agreement in *Mallinckrodt*, the Aclaris APA also includes several continuing performance obligations that run

the other way and must be performed by Aclaris, thus rendering the Aclaris APA an executory contract. These obligations include, without limitation:

a. requirement that Aclaris provide support and assistance as requested by EPI Health in connection with the purchased assets after the closing date (Aclaris APA §7.1);

b. ongoing obligations to effect the transaction and the provision of access, at buyer's request, to access to books and records and other materials, used in the RHOFADE business or related to the RHOFADE product generally (Aclaris APA §7.3);

c. post-closing cooperation in notifying and continuing to notify customers that all future orders of RHOFADE are to be placed with the buyer (Aclaris APA §7.5);

d. continuing and ongoing confidentiality requirements (Aclaris APA §7.6);

e. requirement that Aclaris assist EPI Health in handling quality control and quality assurance activities existing and open prior to closing (Aclaris APA §7.13.1);

f. post-closing cooperation in addressing any allegations of non-compliance by a governmental authority (Aclaris APA §7.13.2);

g. 7-year prohibition limiting Aclaris' right to research, develop, manufacture, commercialize, sell or otherwise exploit competing products (Aclaris APA §7.16); and

h. broad indemnification of EPI Health by Aclaris (Aclaris APA, §8.2).

24. As an executory contract, the Debtors' options are either to assume/assign, or reject, it under section 365 of the Bankruptcy Code. Neither the Bankruptcy Code nor applicable law permit the Debtors to reject the burdens of a contract, while assuming or retaining the benefits. *See, e.g.*, *Sharon Steel Corp. v. National Fuel Gas Distribution Corp.*, 872 F.2d 36, 40 (3d Cir. 1989) ("[W]e acknowledge the general principle that a debtor may not reject a contract but maintain its benefits"); *In re Heafitz,* 85 B.R. 274, 283 (Bankr. S.D.N.Y. 1988) (trustee must either reject contract in full or assume contract in full, which includes both benefits and burdens); *In re Holland Enterprises, Inc.*, 25 B.R. 301, 303 (Bankr. E.D.N.C. 1982) ("Debtor cannot have its cake and eat it too. . . a debtor may not retreat to [section 365], derived from the inherent equitable

powers of the bankruptcy courts, to avoid an obligation while it enjoys a benefit which arises in conjunction with that obligation").

25. Accordingly, because the Aclaris APA is an executory contract, the Debtors cannot reject it while also transferring the rights associated with it (*i.e.*, the right to manufacture and sell RHOFADE) to Mayne. The Debtors cannot use rejection under section 365 as a sword to selectively reject only the royalty obligation, while keeping and transferring to Mayne the right to sell RHOFADE without any obligation to pay future royalties.

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 8, 2023
Wilmington, Delaware

DLA PIPER LLP (US)

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EXHIBIT A

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

	.	Chapter 11
IN RE:	.	
	.	Case No. 20-12522 (JTD)
MALLINCKRODT PLC, *et al.*,	.	
	.	
	.	Courtroom No. 5
	.	824 North Market Street
	.	Wilmington, Delaware 19801
	.	
Debtors.	.	Thursday, November 4, 2021
. . . . .	.	1:00 P.M.

TRANSCRIPT OF HEARING
BEFORE THE HONORABLE JOHN T. DORSEY
UNITED STATES BANKRUPTCY JUDGE

CONFIRMATION HEARING (DAY 3)

APPEARANCES:

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CONTINUATION OF CONFIRMATION HEARING:

1. First Amended Joint Plan of Reorganization of Mallinckrodt PLC and its Debtor Affiliates under Chapter 11 of the Bankruptcy Code [Docket No. 4508; Filed 9/29/21]

Court's Ruling: Matter Continued

ADDITIONAL MATTER GOING FORWARD:

2. [Sealed] Expedited Motion for Pre-Confirmation Determination that Debtors Cannot Reject or Discharge Post-Confirmation Royalty Obligations Related to Sale of Acthar Gel [Docket No. 4675 – filed October 12, 2021]

Court's Ruling: 4

DEBTORS' WITNESS(s):

JAMES DALOIA

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(Proceedings commence at 1:00 p.m.)

THE COURT: Good afternoon. This is Judge Dorsey. We're on the record in Mallinckrodt PLC; Case No. 20-12522. It is a continuation of the confirmation hearing.

Other than my rulings that I indicated I was going to give is there anything else on the agenda other than the confirmation hearing, Mr. Merchant?

MR. MERCHANT: No, Your Honor. We did -- well for the record Michael Merchant of Richards, Layton & Finger on behalf of the debtors.

Your Honor, there was a Sanofi standing motion on the agenda, but the parties agreed to continue that till the 12th. So it's just your ruling. And then I understand there will be one witness going forward today. And before we get to that I think Mr. Harris has a statement for the court regarding the other witness that was potentially going to testify today.

THE COURT: What are we doing first, my ruling or are we going right to the witness?

MR. MERCHANT: I think we can defer to Your Honor's preference on that.

THE COURT: Why don't we do the ruling first and get that out of the way.

Sanofi-aventis U.S. LLC filed a motion for expedited pre-confirmation determination that the debtors

cannot reject or discharge post-confirmation royalty payments related to Acthar, one of the debtors most profitable products. The contract at issue is an APA or asset purchase agreement pursuant to which Sanofi's predecessor in interest, Aventis Pharmaceuticals Products, Inc., sold all of its rights, titles and interest in Acthar to debtor's predecessor in interest, Questcor Pharmaceuticals, Inc., 20 years ago.

Under the APA the purchaser was required to make two payments based upon certain events in addition to what is referred to as a royalty payment based upon sales of Acthar for as long as the purchaser, under the APA, sold Acthar.

The purchaser granted a security interest to the seller only with regard to the first two payment obligations, but not with regard to the royalty payments. It is important to note that although the third type of payment is referred to as a royalty the APA is not a licensing agreement. It was an outright sale of assets.

The debtors proposed plan of reorganization proposes to reject the APA, relieving itself of the obligation to make any further royalty payments to Sanofi while continuing to sell Acthar post-confirmation. Sanofi filed a motion seeking pre-confirmation determination that the debtors cannot reject because the contract is non-executory of discharged post-confirmation royalty payments.

The debtors countered that there are still

material obligations on both sides under the APA and, therefore, it is executory. And even if it is non-executory the debtor's breach of the agreement by non-payment of royalties, as defined in the APA, are merely prepetition general unsecured claims -- hold on.

Debtors -- let me go back just to make sure we have it on the record. Debtor counters that there are still material obligations on both sides under the APA and, therefore, it is executory and even if it is non-executory debtors breach of the agreement by non-payment of royalties as defined in the APA are merely prepetition general unsecured claims subject to discharge.

Having reviewed the pleadings and considered the parties positions of oral argument I conclude that while the APA is not an executory contract subject to rejection the debtors breach of the APA only results in a prepetition unsecured claim for damages subject to discharge upon confirmation of a plan of reorganization.

The Third Circuit has adopted the countryman definition of what constitutes an executory contract, that is where the obligations of the bankrupt and the other party are so under-performed that the failure of either to complete performance would constitute a material breach excusing the others' performance. That is Sharon Steel Corp., v. National Fuel Distribution Corp., 872 F.2d 36 at 39, Third Circuit

1989.

In an attempt to establish the existence of material under-performed obligations on the part of Sanofi debtors point only to the existence of an indemnification provision in the APA. The indemnification provision provides that Sanofi will indemnify the debtors for (1) seller's retained liabilities; (2) misrepresentations or breach of representations and warranties; (3) claims or liabilities relating to the assets or product prior to the effective date of the APA; use, storage or transportation of the products before the effective date of the APA; and testing performed by seller relating only to finished products manufactured before the date of the APA.

As previously noted, the APA was entered into 20 years ago. The debtors did not make any attempt to establish that there were any even remotely possible claims that could potentially arise after all that time other than vague references to unspecified environmental claims.

I am unconvinced, therefore, that there are any real material indemnification claims that would support a finding that the APA is executory; see In Re Weinstein Company Holdings, LLC, 997 F.3d 497 at 507, Third Circuit 2021 where the court found that a statute of limitations has likely -- where a statute of limitations has likely run on most, if not all, potential claims and an indemnification

provision is immaterial.

Having concluded that the indemnification provision is not a material ongoing obligation of Sanofi ad the only remaining material obligation is debtor's payment of money due under the contract, the APA is a non-executory contract and, therefore, cannot be rejected; In Re Roth American, Inc., 107 B.R. 44 at 46, Bankruptcy Middle District of Pennsylvania 1989.

The remaining question then is whether the debtor's post-petition breach of the APA by refusing to make the royalty payments constitutes a prepetition claim subject to discharge. The Third Circuit addressed this issue in In Re Columbia Gas, 50 F.3d 233 at 239, Third Circuit 1995 as follows:

"In cases where the non-bankrupt party as fully performed it makes no sense to talk about assumption or rejection. At that point a liability exists for the debtor, a simple claim held by the non-bankrupt against the estate, and the estate has whatever benefit it can obtain from the other parties performance, and the trustee's rejection would neither add to nor detract from the creditor's claim or the estate's liability. Rejection is meaningless in this context and assumption would be of no benefit to the estate serving only to convert the non-bankrupt's claim into a first priority expense of the estate to the detriment of the other

creditors."

Sanofi argues that because the royalty payments under the APA arose only after the debtors sell Acthar and those sales continued post-petition and will also continue post-confirmation that obligation cannot be discharged in bankruptcy. Judge Walrath addressed this similar argument in Waste Systems International, Inc., 280 B.R. 824, Bankruptcy District of Delaware 2002.

In Waste Systems the creditor argued that post-petition payments that came due under a prepetition consulting agreement were administrative expenses because they only arose when the debtor delivered waste to a specific facility and those deliveries occurred post-petition. Judge Walsh rejected that argument concluding that,

"The obligation to make royalty payments arose when the consulting agreement was executed prepetition."

In that case, as here, there are no post-petition transactions between the debtor and Sanofi. The only transaction between those two parties, or more accurately their predecessors in interest, occurred prepetition. While a right to payment under the APA may accrue post-petition, any claims arising from the APA are prepetition general unsecured claims.

As previously noted, the royalty payments are not subject to a security interest and the contract at issue is

not a license, but rather was an outright sale of Acthar and all related assets that was consummated prepetition. Sanofi did not retain any type of ownership interest in Acthar; therefore, the prepetition claims are subject to discharge under the debtor's proposed plan. Therefore, Sanofi's motion is denied.

Turning to the second motion filed by Glenridge Principals motion; Glenridge Principals, which was actually a joinder to Sanofi's motion. Three individuals who identify themselves as "Glenridge Principals" filed a joinder to the Sanofi motion for a pre-confirmation determination that the debtors cannot reject their agreement with the debtors.

The Glenridge Principals describe themselves as the "original source of the vision for Acthar gel." They claim that they devised a successful and complicated manufacturing, regulatory and pricing strategy for Acthar before reaching an agreement in principal to acquire Acthar from Sanofi's predecessor Aventis Pharmaceuticals.

One can assume from this description that the sale to the Glenridge Principals had not been consummated at the time the debtor's predecessor, Questcor, purchased Acthar from Aventis which is the APA at issue in my previous ruling.

In January 2002 Glenridge entered into a separate agreement with Questcor, which is identified as a royalty agreement and release. In that agreement Glenridge assigned

EXHIBIT B

Proposed Order

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, 255, 272, ___

ORDER GRANTING ACLARIS THERAPEUTICS, INC.
LEAVE TO FILE A SUR-REPLY

Upon the Motion (the "Motion"),[2] of Aclaris for entry of an order granting leave to file a sur-reply ("Sur-Reply") to the Debtors' Reply; and the Court having reviewed the Motion, the Aclaris Objection, and the Reply; and the Court having found that (i) the Court has jurisdiction over 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, (ii) venue is proper in this District under 28 U.S.C. §§ 1408 and 1409, (iii) this is a core proceeding under 28 U.S.C. § 157(b), (iv) service and notice of the Motion was sufficient under the circumstances, and (v) good and sufficient cause having been shown; and after due deliberation and sufficient cause appearing therefor,

IT IS HEREBY ORDERED THAT:

1. The Motion is GRANTED, as set forth below.

2. Aclaris is authorized to file a Sur-Reply.

[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] Any terms used but not defined shall have the meaning ascribed to them in the Motion.

3. This Court shall retain jurisdiction over any and all matters arising from the interpretation or implementation of this Order.