Docket #0010 Date Filed: 10/25/2023

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

In re: NVN Liquidation, Inc., et al., f/k/a NOVAN, INC., Debtors.	Chapter 11 Bankruptcy Case No. 23-10937 (LSS) (Jointly Administered)
Aclaris Therapeutics, Inc., Appellant, v. Novan, Inc., et al., Appellees.	Civil Action No. 23-cv-01039 (CFC) Bankruptcy BAP No. 23-53

UNOPPOSED MOTION TO INTERVENE IN
THE APPEAL OF ACLARIS THERAPEUTICS, INC.

Mayne Pharma LLC ("Mayne Pharma"), by and through its undersigned counsel, files this Motion to Intervene (the "Motion") pursuant to Federal Rule of Bankruptcy Procedure 8013(g) and District of Delaware Local Rule 7.1.2, to participate in the above-captioned appeal brought by appellant Aclaris Therapeutics, Inc. ("Aclaris") regarding the entry of the *Order (I) Approving Asset Purchase Agreement, (II) Authorizing the Sale of the Debtor's Assets Free and Clear of All Encumbrances to Mayne Pharma LLC, (III) Authorizing the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases,*

and (IV) Granting Related Relief [Dkt. No. 292][1], entered September 12, 2023 (the "Sale Order") as requested by appellees Novan, Inc. and EPI Health, LLC ("Debtors").

PROCEDURAL BACKGROUND

1. On July 17, 2023 (the "Petition Date") the Debtors filed 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 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* [Dkt. No. 16] (the "Bid Procedures Motion").

[1] Dkt. No. refers to items filed on the docket in the bankruptcy case *In re Novan, Inc. et al.*, Case No. 23-10937 (Bankr. D. Del.). D.I. refers to item filed on the docket in the Delaware District Court, per Local Rule 7.1.3(a)(6)).

2. On August 1, 2023, Mayne Pharma entered its notice of appearance and filed a limited objection ("Objection") to the Bid Procedures Motion, *see* Dkt. No. 100.

3. On August 16, 2023, the Bankruptcy Court for the District of Delaware (the "Bankruptcy Court") entered the *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* [Dkt. No. 166] (the "Bid Procedures Order").

4. On August 16, 2023, the Debtor filed a *Notice of Sale, Bidding Procedures, Auction, Sale Hearing, And Other Deadlines Related Hereto* [Dkt. No. 168] ("Notice") setting forth the following schedule (excepting the deadlines set by the various 'Notices of Possible Assumption and Assignment of Certain Executory Contracts and Unexpired Leases'):

a. Objections to the assignment and assumption of certain executory contracts and unexpired leases, as set forth in the *Initial Notice of Possible Assumption and Assignment of Certain Executory Contracts*

and Unexpired Leases [Dkt. No. 201] due by August 8, 2023, at 4:00 p.m. (ET) ("Initial Cure Objection Deadline");

b. Objections to any sale of the assets ("Sale"), including general objections, were due by August 28, 2023, at 4:00 p.m. (ET) (the "Sale Objection Deadline");

c. Qualified bids due by August 28, 2023, at 5:00 p.m. (ET) (the "Bid Deadline");

d. Auction to be commenced on August 31, 2023, at 10:00 a.m. (ET) (the "Auction");

e. Objections to the assignment and assumption of certain executory contracts and unexpired leases, as set forth in the *Supplemental Initial Notice of Possible Assumption and Assignment of Certain Executory Contracts and Unexpired Leases* [Dkt. No. 201] due by September 1, 2023, at 4:00 p.m. (ET) ("Second Cure Objection Deadline");

f. Objections to the assignment and assumption of certain executory contracts and unexpired leases, as set forth in the *Second Additional Notice of Possible Assumption and Assignment of Certain Executory Contracts and Unexpired Leases* [Dkt. No. 245] due by September 6, 2023, at 4:00 p.m. (ET) ("Third Cure Objection Deadline");

g. Objections relating to the conduct of the Auction, the Auction results, the selecting of any winning bid or back-up bid, or the terms of any of the following, due by September 6, 2023, at 4:00 p.m. (ET) ("Auction Objections");

h. The hearing on the Sale would take place on September 11, 2023, at 10:00 a.m. (ET) (the "Sale Hearing").

5. The Notice further provided that within one (1) business day of the selection of a winning bid, the Debtors would file a "Notice of Winning Bid."

6. On August 28, 2023, Mayne Pharma timely submitted a qualified bid for a portion of the Commercial Assets ("RHOFADE®").

7. The Debtors identified Mayne Pharma as the winning bidder for RHOFADE® in its *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* entered August 31, 2023 [Dkt. No. 242].

8. On September 6, 2023, Aclaris filed its *Limited Objection Of Aclaris Therapeutics, Inc. To The Sale Of The Debtors' Assets Free And Clear Of Liens, Claims, Interests, And Encumbrances* [Dkt. No. 255] (the "Aclaris Sale Objection"). In the Aclaris Sale Objection, Aclaris asserted that the Debtors could not sell RHOFADE® to Mayne Pharma requiring the Debtors to assume and assign that

certain Asset Purchase Agreement between Aclaris and EPI Health, LLC, dated as of October 10, 2019 (the "Aclaris Contract") to Mayne Pharma.

9. On September 8, 2023, the Debtors filed *Debtors' Motion For Leave To File A Late Reply Regarding The Limited Objection Of Aclaris Therapeutics, Inc. To The Sale Of The Debtor's Assets Free And Clear Of Liens, Claims, Interests, And Encumbrances* [Dkt. No. 272].

10. On September 8, 2023, Aclaris filed its *Motion Of Aclaris Therapeutics, Inc. For Entry Of An Order Granting Leave To File A Sur-Reply* [Dkt. No. 275].

11. On September 10, 2023, the Debtors filed *Debtors' Objection To Motion Of Aclaris Therapeutics, Inc. For Entry Of An Order Granting Leave To File A Sur-Reply And Request For The Court To Consider A Response Thereto* [Dkt. No. 279].

12. On September 11, 2023, the Bankruptcy Court conducted the Sale Hearing. The Court considered the Aclaris Objection at the Sale Hearing and overruled the Aclaris Objection at the Sale Hearing. Mayne Pharma appeared at the hearing and argued against the relief sought by Aclaris, though it never submitted any pleadings relating to the Aclaris Objection. *See Transcript Regarding Hearing Held on 9/11/2023* at 47-49, 50, 59 [Dkt. No. 300].

13. On September 12, 2023, the Bankruptcy Court entered the Sale Order, authorizing the sale of RHOFADE® to Mayne Pharma free and clear of, among

other things, the Aclaris Contract.

14. On September 22, 2023, Aclaris filed its *Notice of Appeal* [Dkt. No. 312] appealing the Sale Order to this Court.

15. The Aclaris appeal was docketed on September 25, 2023. *See Notice of Docketing* [D.I. 2].

16. On October 6, 2023, Aclaris filed its *Aclaris Therapeutics, Inc.'s Statement Of The Issues on Appeal And Designation Of Items To Be Included In The Record On Appeal* [Dkt. No. 344] (the "Statement of Issues"). In the Statement of Issues, Aclaris identified the following questions to the Court:

a. *Whether the Bankruptcy Court erred* in ruling that section 363 of the Bankruptcy Code empowers the Debtors to sell the Assets free and clear of future royalty obligations that will only arise, if at all, upon and as a result of the post-closing conduct of Mayne related to its operation, manufacture and sale of the Assets;

b. *Whether the Bankruptcy Court erred* in ruling that the Debtors may sell the Assets without also selling and transferring the Debtors' rights and obligations under the Aclaris APA to Mayne under section 363 of the Bankruptcy Code, or, alternatively, assuming and assigning the Aclaris APA to Mayne under section 363 of the Bankruptcy Code.

BASIS FOR MAYNE PHARMA'S MOTION TO INTERVENE

17. Pursuant to Federal Rule of Bankruptcy Procedure 8013(g), a party may move to intervene in an appeal. Mayne Pharma should be permitted to intervene in this appeal because it has a direct interest in the sale of Assets pursuant to the Sale Order, which is on appeal.

18. Mayne Pharma submitted a timely qualified bid that, after negotiation with the Debtor and the Committee, of which Aclaris was a member, resulted in the selection of Mayne Pharma as the winning bidder for RHOFADE®.

19. Since Mayne Pharma was selected as the winning bidder, it had no reason to object to the Bid Procedures Motion. However, because Aclaris objected to the Bid Procedures Motion, Mayne Pharma appeared and presented argument to the Bankruptcy Court at the Sale Hearing in favor of entry of the Sale Order and in opposition to the Aclaris Objection.

20. Mayne Pharma's rights in the assets it purchased under the Sale Order could be directly and adversely affected if Aclaris prevails in its appeal of the Sale Order.

REQUESTED RELIEF

21. For these reasons, Mayne Pharma seeks to intervene in the appeal.

22. Mayne Pharma further states that participation as amicus curiae would not be adequate given the circumstances. Amici curiae generally have no direct interest in the outcome of an appeal, as Mayne Pharma does here.

23. Counsel to both the Debtors and Aclaris have consented to the relief requested in this Motion.

CONCLUSION

For the following reasons, Mayne Pharma respectfully requests that the Court grant its Motion allowing it to intervene in the appeal as a party.

Dated: October 25, 2023

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[PROPOSED] ORDER GRANTING MAYNE PHARMA LLC'S
MOTION TO INTERVENE IN THE APPEAL OF ACLARIS THERAPEUTICS, INC.

Upon consideration of Mayne Pharma LLC's Motion to Intervene In the Appeal Of Aclaris Therapeutics, Inc.,

IT IS, on this _____ day of _____, 2023,

1. **ORDERED** that the Motion is granted and Mayne Pharma LLC is permitted to intervene in the above-captioned appeal brought by Aclaris Therapeutics, Inc.

SO ORDERED.

_____
U.S. District Court Judge Colm F. Connolly

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing brief complies with this Court's November 10, 2022 Standing Order Regarding Briefing in All Cases. The brief is prepared in Times New Roman font, and the word-processing system used to prepare the filing indicates that the body of the brief (excluding the Case Caption, Signature Block, and Certificate of Compliance) consists of 1,619 words.

Dated: October 25, 2023

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