

**UNITED STATES
SECURITIES AND EXCHANGE COMMISSION**
WASHINGTON, DC 20549

FORM S-8

**REGISTRATION STATEMENT
UNDER THE SECURITIES ACT OF 1933**

WINDTREE THERAPEUTICS, INC.

(Exact name of registrant as specified in its charter)

Delaware
(State or other jurisdiction of
incorporation or organization)

94-3171943
(IRS Employer
Identification No.)

2600 Kelly Road, Suite 100
Warrington, Pennsylvania 18976
(215) 488-9300
(Address, including zip code, of Principal Executive Offices)

Windtree Therapeutics, Inc. 2020 Equity Incentive Plan
(Full title of the plan)

Craig E. Fraser
President & Chief Executive Officer
Windtree Therapeutics, Inc.
2600 Kelly Road, Suite 100
Warrington, Pennsylvania 18976
(Name and Address of agent for service)

(215) 488-9300
(Telephone number, including area code, of agent for service)

With copies to:

Diane Carman
Senior Vice President, General Counsel
Windtree Therapeutics, Inc.
2600 Kelly Road, Suite 100
Warrington, Pennsylvania 18976
(215) 488-9300

Rachael M. Bushey
Jennifer L. Porter
Goodwin Procter LLP
2929 Arch Street Suite #1700
Philadelphia, Pennsylvania 19104
(445) 207-7800

Indicate by check mark whether the registrant is a large accelerated filer, an accelerated filer, a non-accelerated filer, smaller reporting company, or an emerging growth company. See the definitions of “large accelerated filer,” “accelerated filer,” “smaller reporting company,” and “emerging growth company” in Rule 12b-2 of the Exchange Act.

Large accelerated filer
Non-accelerated filer

Accelerated filer
 Smaller reporting company
Emerging growth company

If an emerging growth company, indicate by check mark if the registrant has elected not to use the extended transition period for complying with any new or revised financial accounting standards provided pursuant to Section 7(a)(2)(B) of the Securities Act.

EXPLANATORY NOTE

This Registration Statement on Form S-8 (this “Registration Statement”) is being filed for the purpose of registering an additional 30,888 shares of common stock, par value \$0.001 per share (“Common Stock”), of Windtree Therapeutics, Inc. (the “Company”) that were added to the number of shares authorized for issuance under the Windtree Therapeutics, Inc. 2020 Equity Incentive Plan (the “2020 Plan”) for which a Registration Statement on Form S-8 relating to the same employee benefit plan is effective.

The Company previously filed Registration Statements on Form S-8 (File No. 333-265053 and File No. 333-253065) (the “Prior Registration Statements”) with the Securities and Exchange Commission (the “Commission”) on May 18, 2022 and February 12, 2021 to register 22,615 and 30,710 shares of Common Stock, respectively, that were authorized for issuance under the 2020 Plan. Upon the effectiveness of this Registration Statement, an aggregate of 84,213 shares of Common Stock will be registered for issuance from time to time under the 2020 Plan. Pursuant to General Instruction E to Form S-8, the contents of the Prior Registration Statement are incorporated herein by reference except to the extent supplemented, amended or superseded by the information set forth herein. Only those items of Form S-8 containing new information not contained in the Prior Registration Statement are presented herein.

PART I
INFORMATION REQUIRED IN THE SECTION 10(a) PROSPECTUS

Item 1. Plan Information.

The documents constituting Part I of this Registration Statement will be delivered to participants in the 2020 Plan as specified by Rule 428(b)(1) under the Securities Act. Such documents are not required to be, and are not, filed with the Commission either as part of this Registration Statement or as a prospectus or prospectus supplement pursuant to Rule 424 under the Securities Act. These documents and the documents incorporated by reference in this Registration Statement pursuant to Item 3 of Part II of Form S-8, taken together, constitute a prospectus that meets the requirements of Section 10(a) of the Securities Act.

Item 2. Registrant Information and Employee Plan Annual Information.

Upon written or oral request, the Company will provide, without charge, the documents incorporated by reference in Item 3 of Part II of this Registration Statement. The documents are incorporated by reference in the Section 10(a) prospectus. The Company will also provide, without charge, upon written or oral request, other documents required to be delivered to employees pursuant to Rule 428(b). Requests for the information described above should be directed to Investor Relations at ir@windtreetx.com or Jamie McAndrew, the Company's Corporate Controller, at the address and telephone number on the cover of this Registration Statement.

PART II
INFORMATION REQUIRED IN THE REGISTRATION STATEMENT

Item 3. Incorporation of Documents by Reference.

The following documents, which have been filed by the Company with the Commission are incorporated by reference in, and shall be deemed to be a part of, this Registration Statement:

- the Company's Annual Report on Form 10-K for the year ended December 31, 2022 filed with the Commission on [March 31, 2023](#), as amended by the Company's Annual Report on Form 10-K/A filed with the Commission on [May 1, 2023](#);
- the Company's Quarterly Report on Form 10-Q for the quarter ended March 31, 2023 filed with the Commission on [May 15, 2023](#);
- the Company's Definitive Proxy Statement on Form DEF 14A filed with the Commission on [January 10, 2023](#);
- the Company's Current Reports on Form 8-K (other than Current Reports furnished under Item 2.02 or Item 7.01 of Form 8-K and exhibits filed on such form that are related to such items) filed with the Commission on [January 19, 2023](#), [January 26, 2023](#), [February 8, 2023](#), [February 22, 2023](#), [February 23, 2023](#), [April 19, 2023](#) and [April 24, 2023](#); and
- the description of the Common Stock included in [Exhibit 4.16](#) of the Company's Annual Report on Form 10-K for the fiscal year ended December 31, 2020, including any amendments or reports filed for the purpose of updating such description.

All reports and other documents the Company subsequently files (other than Current Reports furnished under Item 2.02 or Item 7.01 of Form 8-K and exhibits filed on such form that are related to such items unless such Form 8-K expressly provides to the contrary) pursuant to Section 13(a), 13(c), 14, or 15(d) of the Securities Exchange Act of 1934, as amended (the "Exchange Act") including all such documents the Company may file with the Commission after the date of this Registration Statement and prior to the effectiveness of this Registration Statement, but excluding any information furnished to, rather than filed with, the Commission, will also be incorporated by reference into this Registration Statement and deemed to be part of this Registration Statement from the date of the filing of such reports and documents.

For purposes of this Registration Statement, any document or any statement contained in a document incorporated or deemed to be incorporated herein by reference shall be deemed to be modified or superseded to the extent that a subsequently filed document or a statement contained therein, or in any other subsequently filed document which also is or is deemed to be incorporated by reference, modifies or supersedes such document or such statement in such document. Any statement so modified or superseded shall not be deemed, except as so modified or superseded, to constitute a part of this Registration Statement.

You may request a copy, without charge, of any of the documents incorporated by reference in this prospectus (other than exhibits, unless they are specifically incorporated by reference in the documents) by writing or telephoning us at the address and telephone number on the cover of this Registration Statement.

Item 4. Description of Securities.

Not applicable.

Item 5. Interests of Named Experts and Counsel.

Not applicable.

Item 6. Indemnification of Directors and Officers.

Not applicable.

Item 7. Exemption from Registration Claimed.

Not applicable.

Item 8. Exhibits.

The following documents are filed as exhibits to this Registration Statement:

EXHIBIT INDEX

Exhibit Number	Description of Exhibit
4.1	<u>Amended and Restated Certificate of Incorporation (incorporated by reference to Exhibit 3.1 to the Company's Annual Report on Form 10-K, as filed with the Commission on March 31, 2023).</u>
4.2	<u>Amended and Restated By-Laws, as amended (incorporated by reference to Exhibit 3.1 to the Company's Quarterly Report on Form 10-Q, as filed with the Commission on August 11, 2022).</u>
5.1*	<u>Opinion of Goodwin Procter LLP.</u>
23.1*	<u>Consent of Goodwin Procter LLP (included in Exhibit 5.1).</u>
23.2*	<u>Consent of EisnerAmper LLP, Independent Registered Public Accounting Firm.</u>
23.3*	<u>Consent of Ernst & Young LLP, Independent Registered Public Accounting Firm.</u>
24.1*	<u>Power of Attorney (included on the signature page of the Registration Statement).</u>
99.1	<u>Windtree Therapeutics, Inc. 2020 Equity Incentive Plan (incorporated by reference to Exhibit 10.1 to the Company's Form 8-K, as filed with the Commission on December 31, 2020).</u>
99.2	<u>Form of Restricted Stock Unit Award Agreement (incorporated by reference to Exhibit 4.5 to the Company's Form S-8, as filed with the Commission on February 12, 2021).</u>
99.3	<u>Form of Stock Option Award Agreement (incorporated by reference to Exhibit 4.6 to the Company's Form S-8, as filed with the Commission on February 12, 2021).</u>
107*	<u>Filing Fee Table.</u>

* Filed herewith

Item 9. Undertakings.

Not applicable.

SIGNATURES

Pursuant to the requirements of the Securities Act of 1933, the Registrant certifies that it has reasonable grounds to believe that it meets all of the requirements for filing on Form S-8 and has duly caused this Registration Statement to be signed on its behalf by the undersigned, thereunto duly authorized, in the City of Warrington, Commonwealth of Pennsylvania, on May 19, 2023.

Windtree Therapeutics, Inc.

By: /s/ Craig E. Fraser

Name: Craig E. Fraser

Title: President and Chief Executive Officer

POWER OF ATTORNEY

KNOW ALL PERSONS BY THESE PRESENTS, that each person whose signature appears below hereby constitutes and appoints Craig E. Fraser as his or her true and lawful attorney-in-fact and agent with full power of substitution, for him or her in any and all capacities, to sign any and all amendments to this Registration Statement (including post-effective amendments), and to file the same, with all exhibits thereto and other documents in connection therewith, with the Commission, granting unto said attorney-in-fact, proxy, and agent full power and authority to do and perform each and every act and thing requisite and necessary to be done in connection therewith, as fully for all intents and purposes as he or she might or could do in person, hereby ratifying and confirming all that said attorney-in-fact, proxy and agent, or his substitute, may lawfully do or cause to be done by virtue hereof.

Pursuant to the requirements of the Securities Act, this Registration Statement has been signed by the following persons in the capacities and on the dates indicated.

<u>Signature</u>	<u>Title</u>	<u>Date</u>
<u>/s/ Craig E. Fraser</u> Craig E. Fraser	Director, President, and Chief Executive Officer (Principal Executive Officer)	May 19, 2023
<u>/s/ John Tattory</u> John Tattory	Interim Chief Financial Officer (Principal Financial and Accounting Officer)	May 19, 2023
<u>/s/ Daniel Geffken</u> Daniel Geffken	Director	May 19, 2023
<u>/s/ Robert Scott, M.D.</u> Robert Scott, M.D.	Director	May 19, 2023
<u>/s/ Leslie J. Williams</u> Leslie J. Williams	Director	May 19, 2023



Goodwin Procter LLP
2929 Arch Street, Suite #1700
Philadelphia, PA 19104

goodwinlaw.com
+1 445 207 7800

May 19, 2023

Windtree Therapeutics, Inc.
2600 Kelly Road, Suite 100
Warrington, Pennsylvania 18976

Re: Securities Being Registered under Registration Statement on Form S-8

We have acted as counsel to you in connection with your filing of a Registration Statement on Form S-8 (the "Registration Statement") pursuant to the Securities Act of 1933, as amended (the "Securities Act"), on or about the date hereof relating to an aggregate of 30,888 shares (the "Shares") of Common Stock, \$0.001 par value per share ("Common Stock"), of Windtree Therapeutics, Inc., a Delaware corporation (the "Company"), that may be issued pursuant to the Company's 2020 Equity Incentive Plan (the "Plan").

We have reviewed such documents and made such examination of law as we have deemed appropriate to give the opinions set forth below. We have relied, without independent verification, on certificates of public officials and, as to matters of fact material to the opinion set forth below, on certificates of officers of the Company.

The opinion set forth below is limited to the Delaware General Corporation Law.

For purposes of the opinion set forth below, we have assumed that no event occurs that causes the number of authorized shares of Common Stock available for issuance by the Company to be less than the number of then unissued Shares.

Based on the foregoing, we are of the opinion that the Shares have been duly authorized and, upon issuance and delivery against payment therefor in accordance with the terms of the Plan, will be validly issued, fully paid and nonassessable.

This opinion letter and the opinion it contains shall be interpreted in accordance with the Core Opinion Principles as published in 74 *Business Lawyer* 815 (Summer 2019).

We hereby consent to the inclusion of this opinion as Exhibit 5.1 to the Registration Statement. In giving our consent, we do not admit that we are in the category of persons whose consent is required under Section 7 of the Securities Act or the rules and regulations thereunder.

Very truly yours,

/s/ GOODWIN PROCTER LLP

GOODWIN PROCTER LLP

We consent to the incorporation by reference in this Registration Statement of Windtree Therapeutics, Inc. on Form S-8 to be filed on or about May 19, 2023 of our report dated March 31, 2023, on our audit of the financial statements as of December 31, 2022 and for the year then ended, which report was included in the Annual Report on Form 10-K filed March 31, 2023. Our report includes an explanatory paragraph about the existence of substantial doubt concerning the Company's ability to continue as a going concern.

/s/ EisnerAmper LLP

EISNERAMPER LLP
Philadelphia, Pennsylvania
May 19, 2023

Consent of Independent Registered Public Accounting Firm

We consent to the incorporation by reference in the Registration Statement (Form S-8) pertaining to the 2020 Equity Incentive Plan of Windtree Therapeutics, Inc. of our report dated March 31, 2022 (except for the second paragraph of Note 2, as to which the date is March 31, 2023), with respect to the consolidated financial statements of Windtree Therapeutics, Inc. and subsidiaries included in its Annual Report (Form 10-K) for the year ended December 31, 2022, filed with the Securities and Exchange Commission.

/s/ Ernst & Young LLP

Philadelphia, Pennsylvania

May 19, 2023

Calculation of Filing Fee Tables
Form S-8
(Form Type)

Windtree Therapeutics, Inc.
(Exact Name of Registrant as Specified in its Charter)

Table 1: Newly Registered Securities

Security Type	Security Class Title	Fee Calculation Rule	Amount Registered(1)(2)	Proposed Maximum Offering Price Per Unit(3)	Maximum Aggregate Offering Price(3)	Fee Rate	Amount of Registration Fee
Equity	Common Stock, par value \$0.001	457(c) and 457(h)	30,888	\$1.44	\$44,478.72	0.0001102	\$4.91
Total Offering Amount					\$44,478.72		4.91
Total Fee Offsets (4)							—
Net Fee Due							\$4.91

- (1) Pursuant to Rule 416(a) promulgated under the Securities Act of 1933, as amended (the “Securities Act”), this Registration Statement covers an indeterminate number of additional shares of common stock, par value \$0.001 (the “Common Stock”), of Windtree Therapeutics, Inc. (the “Registrant”) issuable under the Windtree Therapeutics, Inc. 2020 Equity Incentive Plan (the “Plan”) in the event the number of outstanding shares of the Registrant is increased by reason of any stock dividend, stock split, recapitalization, merger, consolidation or reorganization or similar transaction.
- (2) Represents 30,888 shares of Common Stock that were added to the shares authorized for issuance under the Plan on January 1, 2023 pursuant to an “evergreen” provision contained in the Plan. Pursuant to such provision in the Plan, on January 1 of each year, the Registrant’s board of directors may approve an increase to the number of shares authorized for issuance under the Plan of up to four percent (4%) of the issued and outstanding Common Stock of the Registrant.
- (3) Estimated in accordance with Rule 457(c) and (h) under the Securities Act solely for the purpose of calculating the registration fee based upon the average of the high and low prices of the Registrant’s Common Stock on the Nasdaq Capital Market on May 16, 2023.
- (4) The Registrant does not have any fee offsets.