

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

In re INSYS THERAPEUTICS, INC., <i>et al.</i> Debtors	Chapter 11 Case No. 19-11292 (KG) Hearing Date: August 22, 2019, at 2:00 p.m. Objection Deadline: July 23, 2019, at 4:00 p.m. Related Docket No. 263
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**OBJECTION AND RESERVATION OF RIGHTS OF APTARGROUP, INC. TO
THE DEBTORS' NOTICE OF CURE COSTS AND POTENTIAL ASSUMPTION
AND ASSIGNMENT OF EXECUTORY CONTRACTS AND UNEXPIRED
LEASES IN CONNECTION WITH SALE**

AptarGroup, Inc. ("*Aptar*"), by and through its undersigned counsel, hereby objects and reserves rights with respect to the proposed cure amounts for and the potential assumption and assignment of Aptar's contracts with the Debtors as set forth in the *Notice of Cure Costs and Potential Assumption and Assignment of Executory Contracts and Unexpired Leases in Connection with Sale* (the "*Cure Amounts Notice*"). In support thereof, Aptar respectfully states as follows:

Background

1. Aptar and its affiliates are parties with certain of the Debtors to contracts by which, among other things, Aptar manufactures the spray devices for the Debtors' product SUBSYS®, Aptar has granted the Debtors a license to its intellectual property, including patents and trade secrets, in connection with the Debtors' use and sale of SUBSYS® (and potentially other marketed products), and the Debtors retained rights to have Aptar exclusively manufacture for them spray devices for certain other potential drug products. These contracts include the following:

- (a) Amended and Restated Supply, Development & Exclusive Licensing Agreement, effective as of October 30, 2015, by and between Insys Therapeutics, Inc. and AptarGroup, Inc. (the "*October 30, 2015 Contract*");
- (b) Amendment Number One to the Amended and Restated Supply, Development & Exclusive Licensing Agreement, entered into as of April 6, 2017 and effective as

of January 1, 2017, by and between AptarGroup, Inc. and Insys Manufacturing, LLC (“**Amendment No. 1**”);

- (c) Amendment Number Two to the Amended and Restated Supply, Development & Exclusive Licensing Agreement, entered into as of January 9, 2018, by and between AptarGroup, Inc. and Insys Manufacturing, LLC (“**Amendment No. 2**”);
- (d) Amendment Number Three to the Amended and Restated Supply, Development & Exclusive Licensing Agreement, entered into as of December 11, 2018, by and between AptarGroup, Inc. and Insys Manufacturing, LLC (“**Amendment No. 3**”); and
- (e) Amendment Number Four to the Amended and Restated Supply, Development & Exclusive Licensing Agreement, entered into as of May 17, 2019, by and between AptarGroup, Inc. and Insys Manufacturing, LLC (“**Amendment No. 4**” and collectively with the October 30, 2015 Contract, Amendment No. 1, Amendment No. 2, and Amendment No. 3, the “**Supply, Development & Exclusive Licensing Agreement**”).¹

2. On June 10, 2019, the Debtors filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code with this Court. Also on June 10, 2019, the Debtors filed the *Motion of Debtors for Entry of Orders (I)(A) Approving Bidding Procedures for Sale of Debtors’ Assets, (B) Scheduling Auction for and Hearing to Approve Sale of Debtors’ Assets, (C) Approving Form and Manner of Notice of Sale, Auction, and Sale Hearing, (D) Approving Assumption and Assignment Procedures, and (E) Granting Related Relief; and (II)(A) Approving Sale of Debtors’ Assets Free and Clear of Liens, Claims, Interests, and Encumbrances, (B) Authorizing Assumption and Assignment of Executory Contracts and Unexpired Leases, and (C) Granting Related Relief* [D.I. 32] (the “**Bidding Procedures Motion**”). The Bidding Procedures Motion was approved on July 2. See *Order (A) Approving Bidding Procedures for Sale of Debtors’ Assets, (B) Scheduling Auction for and Hearing to Approve Sale of Debtors’ Assets, (C) Approving Form and Manner of Notice of Sale, Auction, and Sale Hearing, (D) Approving Assumption and Assignment Procedures, and (E) Granting Related Relief* [D.I. 210] (the “**Bidding Procedures Order**”).

¹ Given that Amendment No. 4 was not listed in the Cure Amounts Notice, Aptar will provide a reminder copy thereof to the Debtors’ counsel under separate cover.

3. Pursuant to the Bidding Procedures Motion, on July 9, 2019, the Debtors filed the Cure Amounts Notice which lists several contracts between Aptar and its affiliates and the Debtors, including the Supply, Development & Exclusive Licensing Agreement (with the exception of Amendment No. 4). With respect to a contract described as the “Supply Agreement,” the Debtors listed a cure amount of \$108,495. With respect to all the other contracts, including the Supply, Development & Exclusive Licensing Agreement, the Debtors listed a cure amount of \$0.

Objection

4. Aptar objects to the Cure Amounts Notice to the extent that it lists the Supply, Development & Exclusive Licensing Agreement as having a cure amount of \$0. In fact, Insys currently owes royalties relating to the first quarter of 2019 in the amount of \$108,495 under this contract, and royalties for the second quarter of 2019 will also soon become due. On the other hand, the Supply Agreement for which the Debtors list a cure amount of \$108,495 is no longer in effect and does not have any cure costs.

5. The Debtors pay Aptar royalties in consideration for the exclusive right to sell the spray device for SUBSYS® (and potentially other products) on a quarterly basis. *See* Supply, Development & Exclusive Licensing Agreement, § 3.4. Aptar earns royalties on the sale of SUBSYS® in the amount of 1.5% on the first \$400,000,000 in Net Sales Revenue (and in slightly lesser percentages for higher sales). *See* Amendment No. 1. “Net Sales Revenue” is defined in the Supply, Development & Exclusive Licensing Agreement and is based on the Debtors’ publically filed quarterly financial statements. Following such publication, Aptar invoices Insys for the amount of royalties due. As noted, the royalties due for the first quarter of 2019 are \$108,495. Aptar has not yet invoiced the royalties due for the second quarter of 2019 because the quarterly financial statements have not yet been published.

6. The Debtors erred when they listed a cure amount of \$108,495 under a Supply Agreement between Aptar Pharma and Insys Therapeutics, Inc. *See* Cure Amounts Notice p. 7, row 106. The Supply Agreement is the contract that was amended and restated by the Supply, Development & Exclusive Licensing Agreement. There are no amounts due under that contract. Instead, the Debtors are required to provide a cure in the amount of \$108,495 plus royalties for the second quarter of 2019 prior to the assumption and assignment of the Supply, Development & Exclusive Licensing Agreement.

7. Aptar further reserves the right to amend and/or supplement this objection, including, without limitation, to include additional amounts, including post-petition amounts, that arise or become known to Aptar prior to any assumption and assignment of its contracts with the Debtors.

8. Finally, Aptar notes that the Debtors did not list Amendment No. 4 in the Cure Amounts Notice. Amendment No. 4 cannot be severed from the other agreements constituting the Supply, Development & Exclusive Licensing Agreement and, to the extent the Supply, Development & Exclusive Licensing Agreement is assumed and assigned, it must be assumed and assigned with Amendment No. 4. *See* Supply, Development & Exclusive Licensing Agreement § 13.5.

Reservation of Rights

9. Aptar reserves its rights to make an objection regarding the assumption and assignment of the Supply, Development & Exclusive Licensing Agreement, and any other contract between Aptar and its affiliates and the Debtors, at the time that it makes any Adequate Assurance Objection (as defined in the Bidding Procedures Order). Without limiting any of Aptar's other potential objections, the primary basis for such objection would be that such contract(s) may not

be assumed or assigned because applicable non-bankruptcy law excuses Aptar from accepting performance from a party other than the Debtors. *See* 11 U.S.C. § 365(c).

10. Any objection regarding the assumption and assignment of the Supply, Development & Exclusive Licensing Agreement (or any other contract between Aptar and its affiliates and the Debtors) at this juncture is premature and otherwise not required according to the terms of the Bidding Procedures Order and Cure Amounts Notice. Such objection would be premature because Aptar does not yet know whether any of its contracts, or which contracts, will be selected to be assumed and assigned pursuant to the Debtors' auction process, let alone the identity of any successful bidder that would seek to assume the Debtors' rights under any of its contracts with the Debtors.

11. The Cure Amounts Notice, which was approved by the Bidding Procedures Order, provides only that “[a]ny objection to the proposed assumption, assignment, or potential designation of a Contract or Lease ..., ***the subject to which objection is the Debtors’ proposed Cure Costs,***” must be filed and served no later than July 23, 2019 at 4:00 p.m. *See* Cure Amounts Notice, p. 2. Further, the Cure Amounts Notice only bars a counterparty “from asserting any objection with respect to the amount to cure any default under the applicable contract or lease” following the cure objection deadline. *Id.*

12. To the extent necessary, Aptar, of course, will also make any objection regarding a successful bidder's ability to provide adequate assurance of future performance at the time it makes an Adequate Assurance Objection. At this juncture, Aptar simply notes that such a possible objection necessarily might not be limited to questions regarding the proposed assignee's financial wherewithal. Among other things, a successful bidder must be able to comply with the Purchaser's obligation under the Supply, Development & Exclusive Licensing Agreement to comply with all applicable regulatory requirements relating to the use, promotion, sale and resale of Finished

Products (as defined in the Supply, Development & Exclusive Licensing Agreement). *See* Supply, Development & Exclusive Licensing Agreement § 6.1.

WHEREFORE, Aptar respectfully requests that the Court require the Debtors to pay Aptar the cure amounts described herein as a condition to assumption and assignment of the Supply, Development & Exclusive Licensing Agreement if Aptar otherwise does not object to such assumption and assignment, and grant Aptar such other and further relief as the Court deems just and proper.

Dated: July 23, 2019
Wilmington, Delaware

CHIPMAN BROWN CICERO & COLE, LLP

/s/ William E. Chipman, Jr.

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