UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In re:

BODY CONTOUR VENTURES, LLC,[1]

Debtor.
_____/

Case No. 19-42510-pjs
Chapter 11
Hon. Phillip J. Shefferly

OBJECTION TO SALE MOTION AND CURE NOTICE

Cynosure, Inc. ("Cynosure"), by its undersigned counsel, states as follows for its objection to the *Debtors' Motion for Entry of (A) An Order (I) Establishing Bidding Procedures, (II) Scheduling an Auction and a Sale of Substantially All of Debtors' Assets, (III) Setting Certain Dates and Deadlines in Connection Therewith, (IV) Approving the Form of the Asset Purchase Agreement, Including the Termination Fee, and (V) Granting Related Relief; and (B) An Order (I) Authorizing*

[1] Debtors cases are being jointly administered for procedural purposes only and include Debtors Body Contour Ventures, LLC, Case No. 19-42510, BCA Acquisitions, LLC, Case No. 19-42511, American Aesthetic Equipment, LLC, Case No. 19-42512, Knoxville Laser Spa LLC, Case No. 19-42513, LRX Alexandria, LLC, Case No. 19-42514, LRX Birmingham, LLC, Case No. 19-42515, LRX Charlotte, LLC, Case No. 19-42516, LRX Chicago, LLC, Case No. 19-42517, LRX Colorado Springs, LLC, Case No. 19-42518, LRX Dearborn, LLC, Case No. 19-42519, LRX East Lansing, LLC, 19-42520, LRX Grand Blanc, LLC, Case No. 19-42833, LRX Hoffman Estates, LLC, Case No. 19-42521, LRX Las Vegas Summerlin, LLC, Case No. 19-42522, LRX Mesa, LLC, Case No. 19-42523, LRX Naperville, LLC, Case No. 19-42524, LRX Novi, LLC, Case No. 19-42525, LRX Orland Park, LLC, Case No. 19-42526, LRX Plymouth-Canton, LLC, Case No. 42527, LRX Stone Oak, LLC, Case No. 19-42528, LRX Towson, LLC, Case No. 19-42530, LRX Troy, LLC, Case No. 19-42531, Premier Laser Spa of Greenville LLC, Case No. 19-42532, Premier Laser Spa of Indianapolis LLC, Case No. 19-42533, Premier Laser Spa of Louisville LLC, Case No. 19-42534, Premier Laser Spa of Pittsburgh LLC, Case No. 19-42535, Premier Laser Spa of St. Louis LLC, Case No. 19-42536, and Premier Laser Spa of Virginia LLC, Case No. 19-42537.

the Sale of Substantially All of Debtors' Assets Free and Clear of Liens, Claims, Encumbrances, and Interests, (II) Approving the Assumption and Assignment of Certain Executory Contracts and Unexpired Lease, and (III) Granting Related Relief [Doc. No. 158] (the "Sale Motion") and the *Notice to Counterparties to Executory Contracts and Unexpired Leases* [Doc. No. 318] (the "Cure Notice"):

Introduction

1. Cynosure is a secured creditor in these cases with a first priority, properly perfected purchase money security interest in 38 non-invasive body contouring systems (the "SculpSure Systems") that are owned by debtor American Aesthetic Equipment, LLC ("AAE") and used in the operations of the above-captioned debtors (collectively, the "Debtors"). The indebtedness owed by AAE with respect to the SculpSure Systems exceeds $6 million. The fair market value of the SculpSure Systems exceeds $2.5 million.

2. Prior to the filing of these chapter 11 cases on February 22, 2019 (the "Petition Date"), Cynosure entered into certain agreements with AAE whereby Cynosure agreed, among other things, to sell, maintain and provide support with respect to the SculpSure Systems. The Debtors may seek to sell some or all of the SculpSure Systems in one or more asset sales pursuant to the Sale Motion.

3. Cynosure is engaged in ongoing discussions with the Debtors and the stalking horse bidder, RVB Investment Group, LLC ("RVB") regarding, among

other things, a future business relationship. Nevertheless, because an agreement has not yet been finalized or documented, Cynosure objects to the Sale Motion on the following grounds:

(i) the SculpSure Systems cannot be sold free and clear of Cynosure's security interest under section 363(f) of title 11 of the United States Code (the "Bankruptcy Code") absent Cynosure's consent, which has not been obtained;

(ii) the Cure Amount is significantly understated and RVB has failed to provide adequate assurance of its ability to perform going forward;

(iii) the Bankruptcy Code does not permit the Debtors to assume and assign, as they apparently seek to do, portions of their contracts with Cynosure without assuming the entirety of such contracts and curing all defaults related to such contracts; and

(iv) absent Cynosure's consent, section 365(c)(1) precludes the assignment of the Purchase Agreement, because such agreement contains a non-exclusive, non-transferable license of Cynosure's intellectual property.

Background

I. The Cynosure Agreements

4. Cynosure and AAE entered into that certain *Purchase Agreement* dated on or about November 17, 2016, as amended by that certain *First Amendment to*

Purchase Agreement dated on or about May 22, 2017, that certain *Second Amendment to Purchase Agreement* dated on or about January 3, 2018 and that certain *Third Amendment to Purchase Agreement* dated on or about April 12, 2018 (collectively, the "Purchase Agreement").

5. Pursuant to the Purchase Agreement, AAE purchased a total of 66 SculpSure Systems from Cynosure. Cynosure designs, manufactures and sells the SculpSure Systems and related accessories, including separate patented applicator for contouring keys (the "PAC Keys"). The purchase price for each SculpSure System was approximately $150,000, with payments to be made by AAE to Cynosure over a period of two years. *See* Purchase Agreement, ¶ 3.2. The Purchase Agreement also required the Debtors to purchase a set number of PAC Keys and pay for a comprehensive service plan with respect to the equipment. *Id.* at 3.3.

6. To secure payment of the amounts owed thereunder, the Purchase Agreement granted to Cynosure a purchase money security interest in all equipment purchased by the Debtors from Cynosure and all proceeds therefrom. *Id.* at ¶ 3.5. Cynosure timely filed UCC-1 financing statements thereby perfecting its security interest in the SculpSure Systems.

7. Article 10 of the Purchase Agreement provided the Debtors with a non-exclusive, non-transferrable right to use Cynosure's intellectual property related to the SculpSure Systems:

Intellectual Property

10.1 All patents, trademarks, trade names, copyrights and designs in relation to the SculpSure systems and the literature supplied in connection therewith shall be and remain the property of the [Cynosure] and no rights to duplicate such property shall accrue to the [Debtors] as a result of this Agreement unless expressly provided herein or unless written permission is granted by the [Cynosure].

10.2 During the term of this Agreement, [the Debtors] shall have the non-exclusive, non-transferable right to use the logos, trade names, trademarks, and model nomenclatures (collectively, "Trademarks"), but only in connection with the [Debtors'] promotion of the SculpSure systems in accordance with the instructions and guidelines from [Cynosure]. [The Debtors] shall acquire no rights in or to the Trademarks except as specifically set forth herein. All rights to use Trademarks shall terminate upon the expiration or earlier termination of this Agreement. [The Debtors] will not publish or cause to publish any statement nor approve or encourage any advertising or practice which might mislead or deceive any parties or might be detrimental to the good name, Trademarks, goodwill or reputation of [Cynosure]. Within ten (10) days of receiving notification from [Cynosure], [the Debtors] agrees to withdraw any statement and discontinue any advertising or practice which uses any Trademarks….

8. On or about February 12, 2019, AAE and Cynosure entered into the *Agreement Between Cynosure, Inc. and American Aesthetic Equipment, LLC (dba LightRx)* (the "Global Agreement") wherein the parties agreed, among other things, that AAE would surrender certain SculpSure Systems to Cynosure in exchange for a reduction of the indebtedness ($55,000 for each SculpSure System, $75,000 for each upgraded SculpSure System) owing to Cynosure pursuant to section 9-620 and 9-624 of the Uniform Commercial Code.

9. Contemporaneously, AAE and Cynosure entered into the *Surrender Agreement* (the "Surrender Agreement"), the purpose of which was to effectuate and memorialize the partial strict foreclosure contemplated in the Global Agreement. In the Surrender Agreement, AAE acknowledged that:

(i) as of the date of that agreement, the outstanding balance of the Purchase Price was $8,852,947,

(ii) the Debtors had been, and continued to be, in default to Cynosure under the Purchase Agreement, and

(iii) Cynosure's security interests and liens in the SculpSure Systems were valid, properly perfected, unavoidable and indefeasible.

See Surrender Agreement, p. 1.

II. The Debtors' Sale Process

10. On the Petition Date, AAE retained title to 38 SculpSure Systems. Twenty-two of the SculpSure Systems are upgraded systems and, thus, have a fair market value of approximately $75,000 each. The remaining 16 SculpSure Systems do not have the submental upgrade and have a fair market value of $55,000 each.

11. On March 18, 2019, the Debtors filed the Sale Motion seeking to sell substantially all of their assets, including the SculpSure Systems. Attached to the Sale Motion was the *Asset Purchase Agreement* ("APA") entered into with RVB. In apparent recognition of the fact that Cynosure must consent to any sale of its

collateral, the APA contains two provisions that expressly address Cynosure. First, Article 2.1(a) discusses the consideration to be paid by RVB, providing:

> (a) Consideration. The aggregate consideration (the "Purchase Price") for the Acquired Assets is an amount that shall be equal to … (i) the DIP Loan Balance…, (ii) ***the purchase price for Cynosure, Inc.-related equipment at the Locations as negotiated between the Buyer and Cynosure, Inc.;*** (iii) the Cure Costs, and (iv) assumption of prepaid customer liabilities for unperformed services….

See APA, § 2.1(a) (emphasis added). Second, Article 7.1 sets forth certain conditions precedent to RVB's obligation to close on any sale transaction. Included in the list of conditions precedent is the requirement for an agreement between Cynosure and RVB regarding the purchase of the SculpSure Systems:

> (f) Cynosure Financing. Buyer shall have received a firm financing commitment acceptable to it, in its sole discretion, from Cynosure, Inc. in an amount sufficient to pay that portion of the Purchase Price allocable to the equipment included in Section 1.1(a) that is subject to the prepetition security interest and lien of Cynosure, Inc. and consummate the transaction contemplated by this Agreement.

Id. at § 7.1 (f).

12. On April 4, 2019, the Debtors filed the Cure Notice. The Cure Notice identifies two executory contracts with Cynosure to be assumed and assigned pursuant to the Sale Motion. First, contract 3a is identified as an "Operating and servicing" agreement between Body Contour Ventures, LLC and Cynosure, and lists a cure amount of $191,111. Contract 3b is identified as a "Maintenance" agreement between BCA Acquisitions, LLC and Cynosure, with a cure amount of $24,704.

Both alleged agreements are marked with a footnote, stating: "The cure amounts for equipment vendors do not include notes payable due to vendors for the purchase of equipment." The Purchase Agreement, the Global Agreement and the Surrender Agreement (collectively, the "Cynosure Agreements") are the only agreements between the parties and, contrary to the Cure Notice, the Debtor-party to each of the Cynosure Agreements was AAE.

13. The Debtors propose to sell 25 SculpSure Systems to RVB pursuant to the APA. Upon information and belief, no qualified bids were received for the remaining 13 SculpSure Systems.[2]

Objection

I. The SculpSure Systems Cannot be Sold Free and Clear of Cynosure's Security Interest Absent Cynosure's Consent

14. Section 363(b)(1) of the Bankruptcy Code authorizes a debtor in bankruptcy to sell assets outside the ordinary course of business subject to court approval. 11 U.S.C. § 363(b)(1). Subsection (f) of section 363 provides that a sale of property may be free and clear of any interest in such property only if one of five requirements identified in the statute is satisfied:

> The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if—

[2] Cynosure anticipates that the parties will stipulate to stay relief so that Cynosure can pick up the remaining 13 SculpSure Systems, with AAE receiving a corresponding reduction in its indebtedness to Cynosure.

> (1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;
> (2) such entity consents;
> (3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;
> (4) such interest is in bona fide dispute; or
> (5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

11 U.S.C. § 363(f).

15. The debtor or trustee bears the burden of proving that one or more elements of section 363(f) have been satisfied. *See e.g., In re Revel AC, Inc.,* 802 F.3d 558, 564 (3d Cir. 2015) ("§ 363(f) places the burden squarely on [the Debtor's] shoulders."); *In re Malavet,* 552 B.R. 24, 27 (Bankr. D. P.R. 2016) (noting that the trustee "failed to meet its burden of showing that … any of the enumerated conditions in Section 363(f) [are applicable] to the facts of this particular case."); *In re Flour City Bagels, LLC,* 557 B.R. 53, 88 (Bankr. W.D.N.Y. 2016) (denying debtor's motion to sell "because [debtor] has not carried its burden of proof under … [11 U.S.C. § 363(f)]").

16. Additionally, section 363(e) of the Bankruptcy Code provides:

> Notwithstanding any other provision of this section, at any time, on request of an entity that has an interest in property ... proposed to be used, sold, or leased, by the trustee, the court, with or without a hearing, **shall prohibit or conduction such use, sale, or lease as is necessary to provide adequate protection of such interest**….

11 U.S.C. § 363(e) (emphasis added).

17. As noted, Cynosure has engaged in good faith negotiations with the Debtors and RVB regarding a proposed term sheet that would memorialize a future relationship with RVB and may resolve Cynosure's objections to the proposed sale. However, no such agreement has yet been finalized.

18. Absent the consent of Cynosure pursuant to such an agreement, the Debtors cannot satisfy any of the requirements of section 363(f) of the Bankruptcy Code.[3] First, section 363(f)(1) does not apply because applicable nonbankruptcy law does not permit the sale of the SculpSure Systems free and clear of Cynosure's liens. That section typically applies to sales of inventory in the ordinary course of business, which sales are permitted under the Uniform Commercial Code. The Debtors have not asserted that subsection (1) is applicable here. Clearly, it is not.

19. Second, subsection (3) permits the free and clear sale of property if the interest is a lien and the price at which such property to be sold is greater than the aggregate value of all liens on such property. Cynosure's interest is a lien on the SculpSure Systems, and such equipment has a minimum value of $2.5 million. Such amount is greater than the purchase price which, upon information and belief, is approximately $1.9 million. Moreover, because RVB intends to credit bid for the

[3] In apparent recognition of the fact that the SculpSure Systems cannot be sold free and clear of Cynosure's liens and interests absent Cynosure's consent, the APA expressly contemplates that a separate deal must be negotiated between RVB and Cynosure and that, absent an agreement being reached, RVB is free to walk from the sale transaction. *See* ¶ 11, *supra.*

Debtors' assets, there apparently will not be any cash proceeds for Cynosure's liens to attach to. Accordingly, subsection (3) of section 363(f) likewise does not authorize the sale of the SculpSure Systems free and clear of Cynosure's liens.

20. Third, although over a dozen adversary proceedings have been commenced by the Debtors against nearly every other significant creditor in these cases, no such proceeding has been commenced against Cynosure because, in fact, there is no bona fide dispute as to the validity of Cynosure's claim or security interest. Indeed, the Debtors acknowledged that Cynosure's security interests and liens in the SculpSure Systems were valid, properly perfected, unavoidable and indefeasible in the Surrender Agreement, among other documents. *See* Surrender Agreement, p. 1. Thus, section 363(f)(4) cannot be satisfied.

21. Finally, even if there were cash sale proceeds for Cynosure's liens to attach to, Cynosure could not be compelled in a legal or equitable proceeding to accept a money satisfaction of its security interest. Therefore, section 363(f)(5) does not authorize the sale of the SculpSure Systems free and clear of Cynosure's liens.

22. Even if one of the requirements of section 363(f) could be satisfied by the Debtors, section 363(e) of the Bankruptcy Code requires that Cynosure's security interest be adequately protected as part of any sale transaction. Cynosure submits that it is impossible for the Debtors to adequately protect its liens and interests in a sale given the circumstances of these cases. For the avoidance of doubt, Cynosure

hereby demands, pursuant to section 363(e), that the Court condition any sale of Cynosure's collateral as is necessary to provide adequate protection of such interests.

23. In the event that an agreement is reached between Cynosure and RVB, Cynosure will consent to the sale of the SculpSure Systems in satisfaction of section 363(f)(2) of the Bankruptcy Code. However, absent such consent, no free and clear sale can be approved and, thus, the Sale Motion must be denied.

II. The Proposed Assumption and Assignment of the Purchase Agreement Does Not Comply with Provisions of the Bankruptcy Code

a. *The Purchase Agreement Is An Executory Contract*

24. The Bankruptcy Code does not define the term "executory contract." It is thus left to the courts to develop the definition. Under the *Countryman* definition, approved by the Sixth Circuit in *Terrell v. Albaugh (In re Terrell),* 892 F.2d 469, 471 n.2 (6th Cir. 1989), an executory contract is "a contract under which the obligation of both the bankrupt and the other party to the contract are so far unperformed that the failure of either to complete performance would constitute a material breach excusing the performance of the other." Another approach that has been utilized in this circuit is the "functional approach," set forth in *Chattanooga Mem. Park v. Still (In re Jolly),* 574 F.2d 349 (6th Cir. 1978). In determining whether a contract is executory under the functional approach, courts examine whether the estate would benefit from assumption or rejection of the contract at

issue. *Sipes v. Atlantic Gulf Communities Corp. (In re General Dev. Corp.),* 84 F.3d 1364, 1374 (11th Cir. 1996).

25. Under either approach, there can be little doubt that the Purchase Agreement is an executory contract. There are significant, material, ongoing obligations owed by both AAE (*e.g.,* payment of purchase price, requirement to purchase PAC Keys, reporting and indemnification obligations) and Cynosure (*e.g.,* maintenance and support obligations, license of intellectual property) under the Purchase Agreement. Moreover, because the SculpSure Systems are integral to the operations of the Debtors and any prospective going concern buyer, the estate would benefit from the assumption of the Purchase Agreement.

b. *The Cure Amount Is Understated and Adequate Assurance of Future Performance Has Not Been Provided*

26. Section 365(b)(1) sets forth the requirements for assumption of executory contracts and provides, in pertinent part:

> If there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee—
>
> (A) cures, or provides adequate assurance that the trustee will promptly cure, such default …;
>
> (B) compensates, or provides adequate assurance that the trustee will promptly compensate, a party other than the debtor to such contract or lease, for any actual pecuniary loss to such party resulting from such default; and

(C) provides adequate assurance of future performance under such contract or lease.

11 U.S.C. § 365(b)(1). Similarly, section 365(f)(1) conditions assignment of an executory contract or lease on the provision of "adequate assurance of future performance by the assignee of such contract…." 11 U.S.C. § 365(f)(1).

27. In this case, the Cure Notice is vague and ambiguous, and it is unclear which specific contracts the Debtors are seeking to assume and assign.[4] What is clear, however, is that AAE significantly defaulted under the Purchase Agreement prior to the Petition Date. Indeed, the Debtors expressly acknowledged in the Surrender Agreement that they had been, and continued to be, in default to Cynosure under the Purchase Agreement, and that Cynosure was owed $8,852,947 as of the date of the Surrender Agreement. *See* Surrender Agreement, p. 1.

28. Section 365 of the Bankruptcy Code makes clear that executory contracts and unexpired leases cannot be assumed and assigned by a debtor in bankruptcy without concurrent cure of all arrearages owed at the time of assumption. *See e.g., In re Liljeberg Enterprises., Inc.,* 304 F.3d 410, 438 (5th Cir. 2002) ("Section 365(b)(1) essentially 'allows a debtor to continue in a beneficial contract provided, however, that the other party is made whole at the time of the debtor's

[4] The Cure Notice references agreements entered into with Body Contour Ventures, LLC and BCA Acquisitions, LLC. To the contrary, the only agreements between Cynosure and the Debtors are the Cynosure Agreements, and such agreements were entered into with AAE.

assumption of said contract.'"); *In re Building Block Child Care Ctrs., Inc.,* 234 B.R. 762, 765 (9th Cir. BAP 1999) ("The language of § 365(b)(1) clearly and unambiguously requires the cure of all defaults before a lease may be assumed."); *In re Genuity, Inc.,* 323 B.R. 79, 84 (Bankr. S.D.N.Y. 1995) ("defaults" for purposes of cure under section 365 include both pre-petition and post-petition defaults).

29. In this case, the proposed cure amounts identified in the Cure Notice (collectively totaling $215,815) do not come remotely close to curing AAE's monetary and non-monetary defaults. While an exact cure amount has not yet been calculated, Cynosure submits that it is owed well in excess of $5 million under the Purchase Agreement.[5]

30. Even if the defaults under the Purchase Agreement could be cured, adequate assurance of future performance has not been provided. Cynosure is skeptical of RVB's ability to provide adequate assurance, as RVB is a new entity created for this transaction. Furthermore, its source of future financing is unclear. In any event, no evidence has been presented to suggest that the Debtors and RVB can satisfy their respective statutory requirements regarding adequate assurance.

[5] If necessary, Cynosure will supplement this Objection and provide a detailed Cure Amount prior to any hearing on the Sale Motion.

c. *The Purchase Agreement Must Be Assumed, If At All, In Its Entirety*

31. The Cure Notice suggests that Cynosure entered into service and maintenance contracts with Body Contour Ventures, LLC and BCA Acquisitions, LLC. Upon information and belief, the Cynosure Agreements, which do contain provisions providing for service and maintenance of the SculpSure Systems, are the only contracts that Cynosure entered into with the Debtors. Both of the alleged agreements identified on the Cure Notice are marked with a footnote, stating: "The cure amounts for equipment vendors do not include notes payable due to vendors for the purchase of equipment." For the avoidance of doubt, the Purchase Agreement must be assumed, if at all, in its entirety.

32. The law is clear that if a contract is to be assumed by a debtor or trustee in bankruptcy, the contract must be assumed in its entirety. *Collier on Bankruptcy* notes:

> An executory contract may not be assumed in part and rejected in part. The trustee must either assume the entire contract, *cum onere,* or reject the entire contract, shedding obligations as well as benefits.

3 COLLIER ON BANKRUPTCY (16th Ed. Rev.), ¶ 365.03[3], p. 365-29 (citing *NLRB v. Bildisco & Bildisco,* 465 U.S. 513, 531 (1984); *City of Covington v. Covington Landing Ltd. P'Ship,* 71 F.3d 1221 (6th Cir. 1995)); *see also In re Exide Techs.,* 340 B.R. 222, 228 (Bankr. D. Del. 2006) ("A contract will not be bifurcated into parts that will be rejected and those that will not").

33. In this case, there are no separate agreements governing maintenance and support. The "notes payable" obligations under the Purchase Agreement cannot be severed from the maintenance and support provisions therein. Therefore, to the extent that the Debtors seek to assume and assign the maintenance and support components of the Purchase Agreement, they must assume (and, importantly, cure) such agreement in its entirety or otherwise obtain Cynosure's consent.

d. *Absent Cynosure's Consent, § 365(c)(1) Precludes Assignment of the Purchase Agreement*

34. Finally, pursuant to section 365(c)(1) of the Bankruptcy Code, the Purchase Agreement cannot be assigned without Cynosure's consent because such agreement contains a license to use certain intellectual property associated with the SculpSure Systems.

35. As noted, the Purchase Agreement confirms that all intellectual property related to the SculpSure Systems "shall be and remain the property of [Cynosure] and no rights to duplicate such property shall accrue to [the Debtors]" as a result of the Purchase Agreement. *See* Purchase Agreement, § 10.1. The Purchase Agreement also provides that the Debtors shall have, during the term of the Purchase Agreement, "the ***non-exclusive, non-transferable*** right to use the logos, trade names, trademarks, and model nomenclatures" associated with the SculpSure Systems subject to certain specified limitations. *Id.* at § 10.2 (emphasis added).

36. Section 365(c)(1) is applicable to the assumption and assignment of executory contracts involving intellectual property. That section provides:

> The trustee may not assume or assign any executory contract or unexpired lease of the debtor, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, if—
>
> (1)(A) applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties; and
>
> (B) such party does not consent to such assumption or assignment;

11 U.S.C. § 365(c)(1).

37. A debtor's interest as the non-exclusive licensee of intellectual property is generally not assignable by the debtor under applicable federal law outside of bankruptcy. Accordingly, bankruptcy courts agree that section 365(c)(1) precludes the assignment of non-exclusive licenses of intellectual property in bankruptcy absent the consent of the licensor. *See e.g., In re XMH Corp.,* 647 F.3d 690, 695 (7th Cir. 2011) ("the universal rule is that trademark licenses are not assignable in the absence of a clause expressly authorizing assignment."); *Everex Systems, Inc. v. Cadtrack Corp. (In re CFLC, Inc.),* 89 F.3d 673, 679 (9th Cir. 1996) ("It is well settled that a non-exclusive licensee of a patent has only a personal and not a property interest in the patent and that this personal right cannot be assigned unless the patent owner authorizes the assignment or the license itself permits assignment."); *In re*

Golden Books Family Entm't, Inc., 269 B.R. 311, 314 (Bankr. D. Del. 2001) ("A non-exclusive license … cannot be assigned unless the [intellectual property] owner authorizes the assignment.").

38. In this case, the intellectual property licenses granted to the Debtors under the Purchase Agreement were expressly non-exclusive and non-transferable. Thus, absent the consent of Cynosure, the Purchase Agreement cannot be assigned to any third parties pursuant to section 365(c)(1) of the Bankruptcy Code.

Reservation of Rights

39. Cynosure hereby expressly reserves its rights to make such other and further objections as may be appropriate.

WHEREFORE, Cynosure respectfully requests that the Court enter an order: (i) denying the Sale Motion to the extent it seeks relief inconsistent with this Objection, and (ii) providing such other and further relief as is appropriate.

Respectfully submitted by,

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