

ATHERSYS, INC / NEW
Form 8-K
February 01, 2018

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549
FORM 8-K

CURRENT REPORT

Pursuant to Section 13 OR 15(d)
of the Securities Exchange Act of 1934

Date of report (Date of earliest event reported): February 1, 2018

Athersys, Inc.

(Exact name of registrant as specified in charter)

Delaware
(State or other jurisdiction

of incorporation)

001-33876
(Commission

File Number)

20-4864095
(IRS Employer

Identification No.)

3201 Carnegie Avenue,

Cleveland, Ohio
(Address of principal executive offices)

44115-2634
(Zip Code)

Registrant's telephone number, including area code: (216) 431-9900

(Former name or former address, if changed since last report)

Check the appropriate box below if the Form 8-K filing is intended to simultaneously satisfy the filing obligation of the registrant under any of the following provisions:

Written communications pursuant to Rule 425 under the Securities Act (17 CFR 230.425)

Soliciting material pursuant to Rule 14a-12 under the Exchange Act (17 CFR 240.14a-12)

Pre-commencement communications pursuant to Rule 14d-2(b) under the Exchange Act (17 CFR 240.14d-2(b))

Pre-commencement communications pursuant to Rule 13e-4(c) under the Exchange Act (17 CFR 240.13e-4(c))

Indicate by check mark whether the registrant is an emerging growth company as defined in Rule 405 of the Securities Act of 1933 (§230.405 of this chapter) or Rule 12b-2 of the Securities Exchange Act of 1934 (§240.12b-2 of this chapter).

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 13(a) of the Exchange Act.

Item 1.01. Entry into a Material Definitive Agreement.

After market close on February 1, 2018, Athersys, Inc. (the Company, we, us or our) entered into a common stock purchase agreement (the Purchase Agreement) with Aspire Capital Fund, LLC (Aspire Capital), which provides that, upon the terms and subject to the conditions and limitations set forth therein, Aspire Capital is committed to purchase up to an aggregate of \$100.0 million of shares of the Company s common stock over the 36-month term of the Purchase Agreement. In consideration for entering into the Purchase Agreement, concurrently with the execution of the Purchase Agreement, the Company issued to Aspire Capital 450,000 shares of the Company s common stock (the Commitment Shares), and Aspire Capital purchased 500,000 shares of the Company s common stock (the Initial Purchase Shares) for an aggregate purchase price of \$1,000,000.

Concurrently with entering into the Purchase Agreement, the Company also entered into a registration rights agreement with Aspire Capital (the Registration Rights Agreement), pursuant to which the Company agreed to file one or more registration statements, as permissible and necessary to register under the Securities Act of 1933, as amended (the Securities Act), the sale of the shares of the Company s common stock that have been and may be issued to Aspire Capital under the Purchase Agreement.

Pursuant to the Purchase Agreement and the Registration Rights Agreement, we intend to register under the Securities Act the sale of 24,700,000 shares of our common stock, which includes the Commitment Shares and the Initial Purchase Shares that have already been issued to Aspire Capital and an additional 23,750,000 shares of common stock that we may issue to Aspire Capital after the registration statement referred to above (the Registration Statement) is declared effective under the Securities Act.

After the U.S. Securities and Exchange Commission (the SEC) has declared the Registration Statement effective, on any business day on which the closing sale price of the Company s common stock equals or exceeds \$0.50 per share, we have the right, in our sole discretion, to present Aspire Capital with a purchase notice (each, a Purchase Notice), directing Aspire Capital (as principal) to purchase up to 200,000 shares of our common stock per trading day, provided that the aggregate price of such purchase shall not exceed \$500,000 per trading day, up to an additional \$99.0 million of our common stock in the aggregate. The purchase price per Purchase Share pursuant to such Purchase Notice (the Purchase Price) is the lower of (i) the lowest sale price for the Company s common stock on the date of sale or (ii) the arithmetic average of the three lowest closing sale prices for the Company s common stock during the ten (10) consecutive business days ending on the business day immediately preceding the purchase date of those securities. The applicable Purchase Price will be determined prior to delivery of any Purchase Notice.

The Purchase Agreement provides that the number of shares that may be sold pursuant to the Purchase Agreement shall be limited to 24,703,708 (the Exchange Cap), which represents 19.99% of our outstanding shares of common stock as of January 31, 2018, unless stockholder approval or an exception pursuant to the rules of the NASDAQ Capital Market is obtained to issue more than 19.99%. This limitation shall not apply if, at any time the Exchange Cap is reached and at all times thereafter, the average price paid for all shares issued under the Purchase Agreement is equal to or greater than \$1.76, which was the closing sale price of our common stock on February 1, 2018. We are not required or permitted to issue any shares of common stock under the Purchase Agreement if such issuance would breach our obligations under the rules or regulations of the NASDAQ Capital Market. If we elect to sell more than the Exchange Cap, we must first obtain the approval of our stockholders to do so, if necessary, and register under the Securities Act the sale of any additional shares we may elect to sell to Aspire Capital before we can put such additional shares to Aspire Capital under the Purchase Agreement.

In addition, on any date on which we submit a Purchase Notice to Aspire Capital in an amount of at least 100,000 shares, we also have the right, in our sole discretion, to present Aspire Capital with a volume-weighted average price purchase notice (each, a VWAP Purchase Notice) directing Aspire Capital to purchase an amount of the Company s common stock equal to a percentage (not to exceed 30%) of the aggregate shares of common stock traded on the NASDAQ Capital Market on the next business day (the VWAP Purchase Date), subject to a maximum number of

shares determined by the Company (the VWAP Purchase Share Volume Maximum). The purchase price per Purchase Share pursuant to such VWAP Purchase Notice (the VWAP Purchase Price) shall be the lower of (i) the closing sale price on the date of sale and (ii) 95% of the volume weighted average price for the Company s common stock traded on the NASDAQ Capital Market on (i) the VWAP Purchase Date if the aggregate shares to be purchased on that date does not exceeded the VWAP Purchase Share Volume Maximum, or (ii) the portion of such business day until such time as the aggregate shares to be purchased will equal the VWAP Purchase Share Volume Maximum. Further, if the sale price of our common stock falls on the VWAP Purchase Date below the greater of (i) 90% of the closing price of our common stock on the business day immediately preceding the VWAP Purchase Date or (ii) the price set by us in the VWAP Purchase Notice (the VWAP Minimum Price Threshold), the VWAP Purchase Price will be determined using the percentage in the VWAP Purchase Notice of the total

shares traded for such portion of the VWAP Purchase Date prior to the time that the sale price of our common stock fell below the VWAP Minimum Price Threshold and the volume weighted average price of our common stock sold during such portion of the VWAP Purchase Date prior to the time that the sale price of our common stock fell below the VWAP Minimum Price Threshold.

The Floor Price and the respective prices and share numbers in the preceding paragraphs shall be appropriately adjusted for any reorganization, recapitalization, stock dividend, stock split, reverse stock split or other similar transaction. Additionally, the Purchase Agreement provides that the Company and Aspire Capital shall not effect any sales under the Purchase Agreement if such shares proposed to be issued and sold, when aggregated with all other shares of the Company's common stock that Aspire Capital and its affiliates beneficially own, would result in Aspire Capital and its affiliates beneficially owning more than 19.99% of the Company's then issued and outstanding common stock.

There are no trading volume requirements or restrictions under the Purchase Agreement, and we will control the timing and amount of any sales of our common stock to Aspire Capital. Aspire Capital has no right to require any sales by us, but is obligated to make purchases from us as we direct in accordance with the Purchase Agreement. The Company may deliver multiple Purchase Notices and VWAP Purchase Notices to Aspire Capital from time to time during the term of the Purchase Agreement, so long as the most recent purchase has been completed. There are no limitations on use of proceeds, financial or business covenants, restrictions on future fundings, rights of first refusal, participation rights, penalties or liquidated damages in the Purchase Agreement. The Purchase Agreement may be terminated by us at any time, at our discretion, without any penalty or cost to us. Also, Aspire Capital has agreed that neither it nor any of its agents, representatives and affiliates shall engage in any direct or indirect short-selling or hedging, which establishes a net short position with respect to our common stock during any time prior to the termination of the Purchase Agreement.

The Purchase Agreement provides for customary events of default, upon the occurrence of which Aspire Capital may terminate the Purchase Agreement. Such events of default include, without limitation:

the lapse, or unavailability to Aspire Capital for the sale of shares of the Company's common stock, of any registration statement that is required to be maintained effective pursuant to the terms of the Registration Rights Agreement, subject to specified cure periods;

the suspension from trading or failure of the Company's common stock to be listed on a Principal Market (as defined in the Purchase Agreement) for a period of three consecutive business days;

the delisting of the Company's common stock from the Principal Market, provided the Company's common stock is not immediately thereafter trading on the New York Stock Exchange, the NYSE MKT, the NYSE Arca, the NASDAQ Global Select Market, the NASDAQ Global Market, the OTC Bulletin Board or the OTCQB or OTCQX market places of the OTC Markets;

the failure for any reason by the Company's transfer agent to issue Purchase Shares to Aspire Capital within five business days after the applicable Purchase Date that Aspire Capital is entitled to receive;

if any proceeding against the Company is commenced pursuant to or within the meaning of any Bankruptcy Law;

if at any time the number of shares sold pursuant to the Purchase Agreement exceeds the Exchange Cap, if applicable, unless and until stockholder approval is obtained; and

any breach by the Company of the representations, warranties, covenants or other term or condition contained in the Purchase Agreement or any related agreements that would reasonably be expected to have a material adverse effect except, in the case of a breach of a covenant which is reasonably curable, only if such breach continues for a period of at least five business days.

The foregoing is a summary description of certain terms of the Purchase Agreement and the Registration Rights Agreement. For a full description of all terms, please refer to copies of the Purchase Agreement and the Registration Rights Agreement that are filed herewith as Exhibits 10.1 and 10.2, respectively, to this Current Report on Form 8-K and are incorporated herein by reference. All readers are encouraged to read the entire text of the Purchase Agreement and the Registration Rights Agreement.

The issuance of the Commitment Shares and the Initial Purchase Shares and all other shares of common stock that may be issued from time to time to Aspire Capital under the Purchase Agreement is exempt from registration under the Securities Act, pursuant to the exemption for transactions by an issuer not involving any public offering under Section 4(2) of the Securities Act and Rule 506 of Regulation D promulgated thereunder.

Item 3.02. Unregistered Sales of Equity Securities.

The information contained above in Item 1.01 is hereby incorporated by reference into this Item 3.02.

Item 9.01. Financial Statements and Exhibits.

(d) Exhibits.

Exhibit

Number

Description

- | | |
|------|--|
| 10.1 | <u>Common Stock Purchase Agreement, dated as of February 1, 2018, by and between Athersys, Inc. and Aspire Capital Fund, LLC</u> |
| 10.2 | <u>Registration Rights Agreement, dated as of February 1, 2018, by and between Athersys, Inc. and Aspire Capital Fund, LLC</u> |

SIGNATURES

Pursuant to the requirements of the Securities Exchange Act of 1934, the registrant has duly caused this report to be signed on its behalf by the undersigned hereunto duly authorized.

ATHERYS, INC.

By: /s/ Laura K. Campbell
Name: Laura K. Campbell
Title: Senior Vice President of Finance

Date: February 1, 2018