

NovaBay Pharmaceuticals, Inc.
Form 10-K/A
April 12, 2019

UNITED STATES

SECURITIES AND EXCHANGE COMMISSION

Washington, D.C. 20549

FORM 10-K/A

Amendment No. 1

(Mark One)

ANNUAL REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934

For the fiscal year ended December 31, 2018

OR

TRANSITION REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934

For the transition period from _____ to _____

Commission file number 001-33678

NOVABAY PHARMACEUTICALS, INC.

(Exact name of registrant as specified in its charter)

Delaware **68-0454536**
(State or other jurisdiction of incorporation or
organization) **(I.R.S. Employer Identification No.)**

2000 Powell Street, Suite 1150, Emeryville, California 94608
(Address of principal executive offices) (Zip Code)

Registrant's Telephone Number, Including Area Code: (510) 899-8800

Securities registered pursuant to Section 12(b) of the Act:

| Title of each class | Name of each exchange on which registered |
|------------------------------------------|--------------------------------------------------|
| Common Stock, \$0.01 par value per share | NYSE American |

Securities registered pursuant to Section 12(g) of the Act:

None

Indicate by check mark if the registrant is a well-known seasoned issuer, as defined in Rule 405 of the Securities Act. Yes No

Indicate by check mark if the registrant is not required to file reports pursuant to Section 13 or Section 15(d) of the Act. Yes No

Indicate by check mark whether the registrant (1) has filed all reports required to be filed by Section 13 or 15(d) of the Securities Exchange Act of 1934 during the preceding 12 months (or for such shorter period that the registrant was required to file such reports), and (2) has been subject to such filing requirements for the past 90 days. Yes No

Indicate by check mark whether the registrant has submitted electronically every Interactive Data File required to be submitted pursuant to Rule 405 of Regulation S-T during the preceding 12 months (or for such shorter period that the registrant was required to submit such files). Yes No

Indicate by a check mark if disclosure of delinquent filers pursuant to Item 405 of Regulation S-K is not contained herein, and will not be contained, to the best of registrant's knowledge, in definitive proxy or information statements incorporated by reference in Part III of this Form 10-K or any amendment to this Form 10-K.

Indicate by check mark whether the registrant is a large accelerated filer, an accelerated filer, a non-accelerated filer, a 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. (Check one):

Large accelerated filer Accelerated filer Emerging growth company
Non-accelerated filer Smaller reporting 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.

Indicate by check mark whether the registrant is a shell company (as defined in Rule 12b-2 of the Exchange Act).
Yes No

As of June 30, 2018, the aggregate market value of the voting stock held by non-affiliates of the registrant, computed by reference to the last sale price of such stock as of such date on the NYSE American, was approximately \$12,878,993. This figure excludes an aggregate of 11,937,707 shares of common stock held by affiliates, including officers and directors, as of June 30, 2018. Exclusion of shares held by any of these persons should not be construed to indicate that such person possesses the power, direct or indirect, to direct or cause the direction of the management or policies of the registrant, or that such person is controlled by or under common control with the registrant.

As of March 24, 2019, there were 17,089,304 shares of the registrant's common stock outstanding.

DOCUMENTS INCORPORATED BY REFERENCE

None.

EXPLANATORY NOTE

This Amendment No. 1 on Form 10-K/A (this “Amendment”) amends the Annual Report on Form 10-K of NovaBay Pharmaceuticals, Inc. for the fiscal year ended December 31, 2018, as filed with the Securities and Exchange Commission on March 29, 2019 (the “Original Filing”). The Consent of Independent Registered Public Accounting Firm (the “Auditor Consent”) was inadvertently omitted in the Original Filing, although the Company had the executed Auditor Consent provided by OUM & Co. LLP at the time of the Original Filing.

This Amendment is being filed solely to file the Auditor Consent. No other changes were made to the Original Filing. Further, no attempt has been made in this Amendment to modify or update the other disclosures presented in the Original Filing. This Amendment does not reflect events occurring after the filing of the Form 10-K (i.e., occurring after March 29, 2019) or modify or update those disclosures that may be affected by subsequent events. Accordingly, this Amendment should be read in conjunction with the Form 10-K and the registrant’s other filings with the Securities and Exchange Commission.

In accordance with Rule 12b-15 of the Securities Exchange Act of 1934, as amended, this Amendment includes new certifications required by Sections 302 and 906 of the Sarbanes-Oxley Act of 2002, as amended, dated as of the filing date of this Amendment.

PART IV**ITEM 15. EXHIBITS, FINANCIAL STATEMENT SCHEDULES**

(a) Documents filed as part of this report:

(1) *Financial Statements*. The financial statements listed in the Index for Item 8 are filed as part of the Original Filing.

(2) *Financial Statement Schedules*. All schedules have been omitted because they are not required or the required information is included in our consolidated financial statements and notes thereto within the Original Filing.

(3) *Exhibits*. The following exhibits are filed as part of this Report:

| Exhibit Number | Exhibit Description | Form | Incorporation by Reference | | | Filed |
|-------------------|----------------------------------------------------------------------------------------------------------------------------|------|----------------------------|------------------------------|----------------|----------|
| | | | File Number | Exhibit/ Form 8-K Item | Filing Date | Herewith |
| 3.1 | <u>Amended and Restated Certificate of Incorporation of NovaBay Pharmaceuticals, Inc.</u> | 10-K | 001-33678 | 3.1 | 3/21/2018 | |
| 3.2 | <u>Amendment to the Amended and Restated Certificate of Incorporation</u> | 8-K | 001-33678 | 3.1 | 6/04/2018 | |
| 3.3 | <u>Bylaws</u> | 8-K | 001-33678 | 3.2 | 6/29/2010 | |
| 4.1 | <u>Form of 2011 Warrant, as amended (issued pursuant to the placement agent agreement dated June 29, 2011, as amended)</u> | 10-K | 001-33678 | 4.1 | 3/23/2017 | |
| 4.2 | <u>Form of Warrant issued in March 2015 Offering, as amended (issued with 15-month term)</u> | 10-K | 001-33678 | 4.2 | 3/23/2017 | |
| 4.3 | <u>Form of Warrant issued in March 2015 Offering, as amended (issued with 5-year term)</u> | 10-K | 001-33678 | 4.3 | 3/23/2017 | |
| 4.4 | <u>Form of Warrant issued in May 2015 offering</u> | 10-Q | 001-33678 | 4.7 | 8/13/2015 | |
| 4.5 | <u>Form of Warrant issued in October 2015 offering, as amended</u> | 10-K | 001-33678 | 4.5 | 3/23/2017 | |
| 4.6 | <u>Registration Rights Agreement (between the Company, Pioneer Pharma (Singapore) Pte. Ltd., and</u> | 8-K | 001-33678 | 10.2 | 3/09/2015 | |

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|-------|------------------------------------------------------------------------------------------------------------------|------------|------------|------|-----------|
| | <u>Anson Investments Master Fund LP, et al.)</u> | | | | |
| 4.7 | <u>Registration Rights Agreement (between the Company, China Kington Investment Co. Ltd. and Dr. Dean Rider)</u> | 10-Q | 001-33678 | 4.9 | 8/13/2015 |
| 4.8 | <u>Registration Rights Agreement (among the Company and each of the purchasers named therein)</u> | 8-K | 001-33678 | 4.2 | 4/05/2016 |
| 10.1+ | <u>Indemnity Agreement (Form of Indemnity Agreement between the Company and its Directors and Officers)</u> | 10-Q | 001-33678 | 10.1 | 8/12/2010 |
| 10.2+ | <u>NovaCal Pharmaceuticals, Inc. 2005 Stock Option Plan</u> | S-1 | 333-140714 | | |
| | | as amended | | 10.2 | 3/30/2007 |

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|--------|---------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------|----------------|-----------------|
| 10.3+ | <u>NovaBay Pharmaceuticals, Inc. 2007 Omnibus Incentive Plan (as amended and restated)</u> | S-8 | 333-21568099.1 | 1/24/2017 |
| 10.4+ | <u>NovaBay Pharmaceuticals, Inc. 2017 Omnibus Incentive Plan</u> | S-8 | 333-21846999.1 | 6/02/2017 |
| 10.5+ | <u>NovaBay Pharmaceuticals, Inc. 2017 Omnibus Incentive Plan (Form Agreements to the 2017 Omnibus Incentive Plan)</u> | S-8 | 333-21846999.2 | 6/02/2017 |
| 10.6+ | <u>Non-Employee Director Compensation Plan</u> | 8-K | 001-33678 | 10.1 10/11/2018 |
| 10.7+ | <u>Executive Employment Agreement (Employment Agreement of Mark M. Sieczkarek expired June 1, 2018)</u> | 8-K | 001-33678 | 10.1 6/06/2017 |
| 10.8+ | <u>Executive Employment Agreement (Employment Agreement of John J. McGovern)</u> | 8-K | 001-33678 | 10.1 7/10/2017 |
| 10.9+ | <u>Executive Employment Agreement (Employment Agreement of Lewis Stuart)</u> | 8-K | 001-33678 | 10.1 11/28/2017 |
| 10.10+ | <u>Executive Employment Agreement (Employment Agreement of Justin M. Hall)</u> | 8-K | 001-33678 | 10.1 12/20/2017 |
| 10.11 | <u>Office Lease between EmeryStation Associates II, LLC (Landlord) and NovaCal Pharmaceuticals, Inc. (Tenant), EmeryStation North</u> | S-1, as amended | 333-140714 | 10.10 3/30/2007 |
| 10.12 | <u>Fifth Amendment to Lease between EmeryStation Office II, LLC (Landlord) and NovaCal Pharmaceuticals, Inc. (Tenant), EmeryStation North Project</u> | 10-K | 001-33678 | 10.20 3/14/2008 |
| 10.13 | <u>Sixth Amendment to Lease between EmeryStation Office II, LLC (Landlord) and NovaCal Pharmaceuticals, Inc. (Tenant), EmeryStation North Project</u> | 10-Q, as amended | 001-33678 | 10.1 11/14/2008 |
| 10.14 | <u>Seventh Amendment to Lease between EmeryStation Office II, LLC (Landlord) and NovaCal Pharmaceuticals, Inc. (Tenant), EmeryStation North Project</u> | 10-Q | 001-33678 | 10.2 8/09/2012 |
| 10.15 | <u>Eighth Amendment to Lease between EmeryStation Office II, LLC (Landlord) and NovaCal Pharmaceuticals, Inc. (Tenant), EmeryStation North Project</u> | 10-K | 001-33678 | 10.19 3/04/2016 |
| 10.16 | <u>Office Lease (between the Company and KBSIII Towers at Emeryville, LLC)</u> | 8-K | 001-33678 | 10.1 8/26/2016 |
| 10.17 | <u>Sublease Agreement by and between NovaBay Pharmaceuticals, Inc. and Zymergen, Inc., dated July 11, 2016</u> | 8-K | 001-33678 | 10.1 7/15/2016 |
| 10.18† | <u>Collaboration and License Agreement by and between NovaBay Pharmaceuticals, Inc. and Galderma S.A.</u> | 10-Q, as amended | 001-33678 | 10.2 8/04/2009 |
| 10.19† | <u>Amendment No. 1 to the Collaboration and License Agreement</u> | 10-K | 001-33678 | 10.18 3/30/2010 |

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|--------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------|------------|---|
| 10.20 [†] | <u>Amendment No. 2 to the Collaboration and License Agreement</u> | 10-K001-33678 10.24 | 3/10/2011 | |
| 10.21 [†] | <u>International Distribution Agreement (by and between the Company and Pioneer Pharma Co. Ltd.)</u> | 10-K001-33678 10.18 | 3/27/2012 | |
| 10.22 | <u>Commission structure for warrant exercise</u> | 8-K 001-33678 Item 1.019 | 3/30/2016 | |
| 10.23 | <u>Share Purchase Agreement (by and between the Company and Ch-gemstone Capital (Beijing) Co., Ltd.) (terminated January 31, 2018)</u> | 10-Q001-33678 10.1 | 11/14/2017 | |
| 10.24 | <u>Amended and Restated Share Purchase Agreement (by and between the Company and Ch-gemstone Capital (Beijing) Co., Ltd.) (terminated January 31, 2018)</u> | 8-K 001-33678 10.1 | 11/21/2017 | |
| 10.25 | <u>Share Purchase Agreement (by and between the Company and OP Financial Investments Limited)</u> | 8-K 001-33678 10.1 | 2/06/2018 | |
| 10.26 | <u>Promissory Note Payable to Pioneer Pharma (Hong Kong) Company Limited, dated February 27, 2019</u> | 8-K 001-33678 10.1 | 3/01/2019 | |
| 10.27 | <u>Security Agreement with China Kington Asset Management Co. Ltd., dated February 27, 2019 (in connection with the Promissory Note of the same date)</u> | 8-K 001-33678 10.2 | 3/01/2019 | |
| 10.28 | <u>Securities Purchase Agreement between the Company and Iliad Research and Trading, L.P., dated March 26, 2019</u> | 8-K 001-33678 10.1 | 3/28/2019 | |
| 10.29 | <u>Secured Convertible Promissory Note from the Company to Iliad Research and Trading, L.P., dated March 26, 2019</u> | 8-K 001-33678 10.2 | 3/28/2019 | |
| 10.30 | <u>Security Agreement between the Company and Iliad Research and Trading, L.P., dated March 26, 2019</u> | 8-K 001-33678 10.3 | 3/28/2019 | |
| 10.31 | <u>Consulting Agreement between the Company and China Kington, dated March 1, 2019</u> | 10-K001-33678 10.31 | 3/29/2019 | |
| 23.1 | <u>Consent of OUM & Co. LLP</u> | | | X |
| 24.1 | <u>Power of Attorney (contained on signature page)</u> | 10-K001-33678 10.31 | 3/29/2019 | |
| 31.1 | <u>Certification of the Principal Executive Officer of NovaBay Pharmaceuticals, Inc., as required by Rule 13a-14(a) or Rule 15d-14(a)</u> | | | X |
| 31.2 | <u>Certification of the Principal Financial Officer of NovaBay Pharmaceuticals, Inc., as required by Rule 13a-14(a) or Rule 15d-14(a)</u> | | | X |
| 32.1 | <u>Certification by the Chief Executive Officer of NovaBay Pharmaceuticals, Inc., as required by Rule 13a-14(b) or 15d-14(b) and Section 1350 of Chapter 63 of Title 18 of the United States Code (18 U.S.C. 1350)</u> | | | X |
| 32.2 | <u>Certification by the Chief Financial Officer of NovaBay Pharmaceuticals, Inc., as required by Rule 13a-14(b) or 15d-14(b) and Section 1350 of Chapter 63 of Title 18 of the United States Code (18 U.S.C. 1350)</u> | | | X |
| 101.INS | XBRL Instance Document | 10-K001-33678 101.INS | 3/29/2019 | |
| 101.SCH | XBRL Taxonomy Extension Schema Document | 10-K001-33678 101.SCH | 3/29/2019 | |
| 101.CAL | XBRL Taxonomy Extension Calculation Linkbase Document | 10-K001-33678 101.CAL | 3/29/2019 | |
| 101.DEF | XBRL Taxonomy Extension Definition Linkbase | 10-K001-33678 101.DEF | 3/29/2019 | |
| 101.LAB | XBRL Taxonomy Extension Labels Linkbase Document | 10-K001-33678 101.LAB | 3/29/2019 | |
| 101.PRE | XBRL Taxonomy Extension Presentation Linkbase Document | 10-K001-33678 101.PRE | 3/29/2019 | |

+Indicates a management contract or compensatory plan or arrangement

† NovaBay Pharmaceuticals, Inc. has been granted confidential treatment with respect to certain portions of this exhibit (indicated by asterisks), which have been separately filed with the Securities and Exchange Commission.

SIGNATURES

Pursuant to the requirements of Section 13 or 15(d) of the Securities Exchange Act of 1934, the registrant has duly caused this Form 10-K/A to be signed on its behalf by the undersigned, thereunto duly authorized.

NovaBay Pharmaceuticals, Inc.

Date: April 12, 2019

By: /s/ Justin Hall
Justin Hall

Interim President & Chief Executive Officer and General Counsel