

NUPATHE INC.
Form SC 14D9/A
January 03, 2014

UNITED STATES SECURITIES AND EXCHANGE COMMISSION

Washington, D.C. 20549

SCHEDULE 14D-9

(Rule 14d-101)

Solicitation/Recommendation Statement under Section 14(d)(4) of the Securities Exchange Act of 1934

(Amendment No. 2)

NuPathe Inc.

(Name of Subject Company)

NuPathe Inc.

(Names of Persons Filing Statement)

Common Stock, par value \$0.001 per share
(Title of Class of Securities)

67059M100
(CUSIP Number of Class of Securities)

Michael F. Marino, Esq.
Senior Vice President, General Counsel and Secretary
NuPathe Inc.
7 Great Valley Parkway, Suite 300
Malvern, Pennsylvania 19355
(610) 232-0800

(Name, address and telephone numbers of person authorized to receive notices and communications on behalf of the persons filing statement)

With copies to:
Michael N. Peterson, Esq.
Morgan, Lewis & Bockius LLP
1701 Market Street
Philadelphia, Pennsylvania 19103
(215) 963-5000

- Check the box if the filing relates solely to preliminary communications made before the commencement of a tender offer.

Purpose of Amendment

This Amendment No. 2 (this Amendment) amends and supplements the Solicitation/Recommendation Statement on Schedule 14D-9 of NuPathe Inc. (the Company) filed with the Securities and Exchange Commission (the SEC) on December 23, 2013, as amended by Amendment No. 1, filed with the SEC on December 30, 2013 (collectively, the Schedule 14D-9). The Schedule 14D-9 relates to the tender offer by DM Merger Sub Inc., a Delaware corporation (Purchaser) and an indirect, wholly owned subsidiary of Endo Health Solutions Inc., a Delaware corporation (Parent), to purchase any and all of the issued and outstanding shares of the Company's common stock, par value \$0.001 per share (the Shares), at a price per Share of \$2.85 per Share, net to the seller in cash (less any required withholding taxes and without interest), plus contractual rights to receive up to an additional \$3.15 per Share in contingent cash consideration payments (less any required withholding taxes) payable in the future upon achievement of certain milestones related to ZECUITY, sumatriptan iontophoretic delivery system, the Company's primary product, upon the terms and subject to the conditions set forth in the Offer to Purchase, dated December 23, 2013 (as amended or supplemented from time to time, the Offer to Purchase) and in the related Letter of Transmittal (as amended or supplemented from time to time, the Letter of Transmittal) and, together with the Offer to Purchase, the Offer) filed by Parent and Purchaser with the SEC on December 23, 2013. The Offer is described in a Tender Offer Statement on Schedule TO-T (as amended or supplemented from time to time, the Schedule TO), filed by Parent and Purchaser with the SEC on December 23, 2013. The Offer to Purchase and Letter of Transmittal are filed as Exhibits (a)(1)(A) and (a)(1)(B), respectively, to the Schedule TO.

Except as otherwise set forth below, the information set forth in the Schedule 14D-9 remains unchanged and is incorporated by reference as relevant to the items in this Amendment. Capitalized terms used and not defined herein shall have the meanings assigned to such terms in the Schedule 14D-9. This Amendment is being filed to reflect certain updates as reflected below:

Item 8. *Additional Information*

Item 8 (*Additional Information*) of the Schedule 14D-9 is hereby amended and supplemented by adding the following information set forth below at the end of Item 8(e) under the heading *Litigation* with the following:

On January 2, 2014, a purported stockholder of the Company filed a class action lawsuit in the Court of Chancery of the State of Delaware, docketed as Timothy Furphy v. NuPathe Inc., et al., C.A. No. 9217 (Del. Ch.) (the Furphy Action) against the Company, Purchaser, Parent and each of the Company's directors. The Furphy Action purports to be brought individually and on behalf of all public stockholders of the Company. The Furphy Action purports to allege that the Company's directors breached their fiduciary duties to the Company's stockholders in connection with the Offer and that Parent and Purchaser aided and abetted such alleged breach of the Company's director defendants' fiduciary duties. Based on these allegations, the Furphy Action seeks, among other relief, an order declaring the action to be a class action, injunctive relief permanently enjoining defendants and all those acting in concert with them from taking any steps to consummate the Merger, rescinding, to the extent already implemented, the Offer and the Merger or any of the terms thereof or awarding rescissory damages, awarding plaintiff the costs of the Furphy Action including a reasonable allowance for the expenses of plaintiff's attorneys and experts and granting plaintiff and other members of the putative class such further relief as the court deems just and proper.

The complaint in the Furphy Action is incorporated by reference to Exhibit (a)(5)(I) to the Schedule TO, as amended, as filed on Schedule TO-T/A on January 3, 2014. The foregoing description of the Furphy Action is qualified in its entirety by reference to Exhibit (a)(5)(I) to the Schedule TO, as amended.

Item 9. *Exhibits*

Item 9 (*Exhibits*) of the Schedule 14D-9 is hereby amended and supplemented by adding the following exhibit:

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Exhibit No.	Description
(a)(5)(I)	Complaint filed by Timothy Furphy in the Court of Chancery of the State of Delaware on January 2, 2014 (incorporated by reference to Exhibit (a)(5)(I) to the Schedule TO, as amended, as filed on Schedule TO-T/A on January 3, 2014).

SIGNATURE

After due inquiry and to the best of my knowledge and belief, I certify that the information set forth in this statement is true, complete and correct.

NUPATHE INC.

Date: January 3, 2014

By:

/s/ ARMANDO ANIDO

Name: Armando Anido

Title: *Chief Executive Officer*