OSCIENT PHARMACEUTICALS CORP
Form 8-K/A
November 01, 2006

UNITED STATES

SECURITIES AND EXCHANGE COMMISSION

Washington, D.C. 20549

FORM 8-K/A

CURRENT REPORT

Pursuant to

Section 13 or 15(d) of

THE SECURITIES EXCHANGE ACT OF 1934

Date of Report (Date of Earliest Event Reported): August 18, 2006

OSCIENT PHARMACEUTICALS CORPORATION

(Exact name of registrant as specified in its charter)

Massachusetts	**0-10824**	**04-2297484**
(State or other jurisdiction of incorporation)	**(Commission File Number)**	**(I.R.S. Employer Identification Number)**

1000 Winter Street, Suite 2200

Waltham, Massachusetts 02451

(Address of principal executive offices, including zip code)

(781) 398-2300

(Registrant s telephone number, including area code)

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 (see General Instruction A.2. below):

¨ 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))

ITEM 9.01. FINANCIAL STATEMENTS AND EXHIBITS.

On August 21, 2006, Oscient Pharmaceuticals Corporation (Oscient) filed a current report on Form 8-K (the Original Report) regarding the completion on August 18, 2006 of its acquisition of the exclusive rights in the United States and its territories to the cardiovascular products ANTARA® 130mg and ANTARA® 43mg (fenofibrate) capsules from Reliant Pharmaceuticals, Inc. Oscient is filing this report to amend and supplement Item 9.01 of the Original Report to include certain financial information required by Items 9.01(a) and 9.01(b) of Form 8-K.

(a) Financial statements of businesses acquired.
Special Purpose Statements and Report of Independent Registered Public Accounting Firm of the ANTARA Product Line of Reliant Pharmaceuticals Inc.

1) Statement of Assets Sold for the period ended June 30, 2006 (unaudited) and the periods ended December 31, 2005 and 2004 (audited)

2) Statement of Direct Expenses in Excess of Net Sales for the Six Months Ended June 30, 2006 and 2005 (unaudited) and for the Years Ended December 31, 2005 and 2004 (audited)

(b) Pro forma financial information.
Unaudited Pro Forma Consolidated Balance Sheet as of June 30, 2006 of Oscient Pharmaceuticals Corporation

Unaudited Pro Forma Consolidated Statement of Operations for the Six Months Ended June 30, 2006 of Oscient Pharmaceuticals Corporation

Unaudited Pro Forma Consolidated Statement of Operations for the Year Ended December 31, 2005 of Oscient Pharmaceuticals Corporation

(d) Exhibits
2.1 Asset Purchase Agreement by and among Reliant Pharmaceuticals, Inc., Guardian II Acquisition Corporaiton and Oscient Pharmaceuticals Corporation dated as of July 21, 2006.* #

10.1 Amended and Restated Development, License and Supply Agreement dated of July 31, 2006 between Ethypharm, S.A. and Reliant Pharmaceuticals, Inc.* #

23.1 Consent of Rothstein, Kass & Company P.C.*

99.1 Press Release issued by Oscient Pharmaceuticals Corporation on August 21, 2006.**

* Filed herewith.
** Filed previously on a Current Report on Form 8-K on August 21, 2006.
# Confidential information has been omitted from this exhibit and filed separately with the Securities and Exchange Commission pursuant to a confidential treatment request.

Report of Independent Registered Public Accounting Firm

To the Board of Directors and Management of Reliant

Pharmaceuticals, Inc.

We have audited the accompanying special purpose statements of assets sold of the Antara Product Line of Reliant Pharmaceuticals, Inc. (Reliant) as of December 31, 2005 and 2004 and the related special purpose statements of direct expenses in excess of net sales for the years then ended. These special purpose statements are the responsibility of Reliant s management. Our responsibility is to express an opinion on these special purpose statements based on our audits.

We conducted our audits in accordance with standards of the Public Company Accounting Oversight Board (United States). Those standards require that we plan and perform the audit to obtain reasonable assurance about whether the special purpose statements are free of material misstatement. Reliant is not required to have, nor were we engaged to perform, an audit of its internal control over financial reporting. Our audits included consideration of internal control over financial reporting as a basis for designing audit procedures that are appropriate in the circumstances, but not for the purpose of expressing an opinion on the effectiveness of Reliant s internal control over financial reporting. Accordingly, we express no such opinion. An audit also includes examining, on a test basis, evidence supporting the amounts and disclosures in the special purpose statements, assessing the accounting principles used and significant estimates made by management, as well as evaluating the overall presentation of the special purpose statements. We believe that our audits provide a reasonable basis for our opinion.

The accompanying special purpose statements were prepared using the basis of presentation described in Note 1, and are not intended to be a complete presentation of the Antara Product Line s assets, liabilities, revenues and expenses.

In our opinion, the special purpose statements present fairly, in all material respects, the assets sold of the Antara Product Line of Reliant Pharmaceuticals, Inc. as of December 31, 2005 and 2004 and the direct expenses in excess of net sales for the years then ended, pursuant to the Asset Purchase Agreement referred to in Note 1, in conformity with accounting principles generally accepted in the United States of America.

/s/ Rothstein, Kass & Company, P.C.

Roseland, New Jersey

September 26, 2006

ANTARA PRODUCT LINE OF RELIANT PHARMACEUTICALS, INC.

STATEMENTS OF ASSETS SOLD

(***Dollars in thousands***)

	June 30,	December 31,	
	2006 (Unaudited)	**2005**	**2004**
Inventory, net of reserves of $115, $126 and $0 as of June 30, 2006 and December 31, 2005 and 2004, respectively	$ 3,866	$ 5,678	$ 1,010
Samples	836	1,003	
Intangible asset, net of accumulated amortization of $528, $361 and $28 as of June 30, 2006, and December 31, 2005 and 2004, respectively	472	639	972
Total Assets Sold	$ 5,174	$ 7,320	$ 1,982

ANTARA PRODUCT LINE OF RELIANT PHARMACEUTICALS, INC.

STATEMENTS OF DIRECT EXPENSES IN EXCESS OF NET SALES

(***Dollars in thousands***)

	Six-months ended June 30,		Year ended December 31,	
	2006	**2005**	**2005**	**2004**
	(Unaudited)			
Net Sales	$ 19,072	$ 7,860	$ 23,556	$
Cost of Sales	3,454	1,145	3,571	
Gross Margin	15,618	6,715	19,985	
Other Direct Expenses				
Sales and marketing	15,043	36,723	65,605	1,603
General and administrative	685	943	2,356	1,589
Amortization of intangible asset	167	167	333	28
Research and development	218	262	472	2,639
Direct expenses in excess of net sales	$ (495)	$ (31,380)	$ (48,781)	$ (5,859)

ANTARA PRODUCT LINE OF RELIANT PHARMACEUTICALS, INC.

NOTES TO SPECIAL PURPOSE STATEMENTS

(Dollars in thousands)

1. Basis of presentation

Reliant Pharmaceuticals, Inc. (Reliant), Guardian II Acquisition Corporation (Guardian) and Oscient Pharmaceuticals Corporation (collectively with Guardian Oscient) entered into an Asset Purchase Agreement (the Agreement) dated July 21, 2006. The Agreement transfers the ownership rights to certain assets related to the development, manufacture, marketing and sale of Reliant s Antara (fenofibrate) product line and operations in the United States of America (U.S.), its territories and possessions, and the Caribbean (the Product Line). The assets sold include inventory, samples, the product registrations and the intellectual property assets related to the Product Line. These assets were used as collateral for Reliant s outstanding indebtedness until they were released by Reliant s lenders on August 18, 2006 upon sale of the assets to Oscient.

The accompanying special purpose statements present the assets sold and the direct expenses in excess of net sales of the Product Line (the Antara Statements) in conformity with the Agreement. Management believes the assumptions used to prepare the Antara statements from the historical financial statements of Reliant, including methods used to allocate costs, are reasonable and appropriate under the circumstances. The financial information included herein may not necessarily reflect the financial position or operating results of the Product Line in the future or what they would have been had the Product Line been operated as a separate, stand-alone entity during the periods presented.

The Antara Statements set forth only net sales and direct expenses attributable to the Product Line and do not include all the costs and expenses associated with a stand-alone, separate company. Accordingly, the Antara Statements do not include interest income and expense, depreciation expense, income tax expense and various services provided by Reliant not directly associated with the assets sold or the generation of the net sales presented.

2. Description of business and significant accounting policies

Description of Business

Antara is a once a day formulation of fenofibrate approved for the treatment of elevated cholesterol and triglycerides. In May 2001, Reliant obtained an exclusive license from Ethypharm, SA (Ethypharm) to market, sell and distribute Antara in the U.S., the Caribbean, Canada and Mexico. Antara is a trademark of Reliant in the U.S. Under the Ethypharm agreement, Reliant is responsible for all clinical development and regulatory activities in the identified markets. The initial term of the agreement is fifteen years from the first commercial sale of the product in the U.S. with automatic two-year renewals if notice of termination is not received from either party. Product for use in clinical development programs, as well as commercial sales, is required to be purchased at predetermined prices from Ethypharm during the license term. Reliant was required to make certain payments to Ethypharm based on the achievement of predetermined milestones and is required to pay a royalty on all net sales of this product. Reliant received approval from the Food and Drug Administration (the FDA) to market Antara in November 2004 and began marketing and selling the product in the U.S. in February 2005.

Use of Estimates

The preparation of the Antara Statements in conformity with accounting principles generally accepted in the U.S. requires management to make estimates and assumptions that affect the amounts of assets sold at the date of the Antara Statements and the reported amounts of net sales and direct expenses during the reported periods. Actual results could differ from these estimates.

ANTARA PRODUCT LINE OF RELIANT PHARMACEUTICALS, INC.

NOTES TO SPECIAL PURPOSE STATEMENTS

(Dollars in thousands)

2. Description of business and significant accounting policies (continued)

Concentration of Supplier

Reliant currently purchases all of its fenofibrate from Ethypharm. In the event Ethypharm is unable to supply product, Reliant believes it could transfer the fenofibrate production to an alternative manufacturer. This alternative manufacturer will be required to obtain FDA approval, the receipt of which is not certain. In the event Reliant is unable to transfer the manufacturing to an alternative manufacturer, the Product Line s business and results of operations could be adversely affected.

Inventory

Inventory is valued at the lower of first-in, first-out (FIFO) cost or market. Management estimates the market value or net sales value based on current realization trends. If the projected net realizable value is less than cost, a provision is made to reflect the lower value of the inventory.

Reliant considers projected demand for Antara and Antara product expiry dates in calculating the amount of its inventory reserves. Product demand is projected by estimating future prescriptions based on current and historical trends, market conditions, competitive products and other relevant information.

Intangible Asset

The intangible asset consists of milestone payments made to Ethypharm for the rights needed to market, sell, and distribute Antara in the U.S., its territories and possessions, the Caribbean, Canada and Mexico. The intangible asset is based on amounts paid to Ethypharm subsequent to regulatory approval of the product less accumulated amortization of $528 as of June 30, 2006 (unaudited), and $361 and $28 as of December 31, 2005 and 2004, respectively.

In accordance with Statement of Financial Accounting Standard (SFAS) No. 144, *Accounting for the Impairment or Disposal of Long-Lived Assets*, Reliant first considers whether indicators of impairment of long-lived assets are present. If indicators of impairment are present, Reliant determines whether the sum of the expected undiscounted future cash flows is less than the assets carrying value. If the sum of the expected undiscounted future cash flows is less than the assets carrying value, an impairment loss would be recognized based on the excess of the carrying amount of the assets over their respective fair values. The intangible asset is reviewed for impairment on an annual basis or whenever indicators of impairment are present.

The intangible asset is amortized using the straight-line method over the estimated life of three years. The estimated annual amortization expense is $333 for 2006 and $305 for 2007.

Product Samples

Product samples held for distribution to third parties are capitalized and charged to sales and marketing expense upon distribution to a third party. Reliant records allowances for samples which are not expected to be utilized by the end user.

ANTARA PRODUCT LINE OF RELIANT PHARMACEUTICALS, INC.

NOTES TO SPECIAL PURPOSE STATEMENTS

(*Dollars in thousands)*

2. Description of business and significant accounting policies (continued)

Revenue Recognition

Reliant recognizes revenue in accordance with the U.S. Securities and Exchange Commission s Staff Accounting Bulletin No. 101, *Revenue Recognition in Financial Statements*, as amended by Staff Accounting Bulletin No. 104, *Revenue Recognition* (together, SAB 101) and SFAS No. 48, *Revenue Recognition When Right of Return Exists* (SFAS 48). SAB 101 provides that revenue should not be recognized until it is realized or realizable and earned. Revenue is realized or realizable and earned when all of the following criteria are met: (1) persuasive evidence of an arrangement exists; (2) delivery has occurred or services have been rendered; (3) the seller s price to the buyer is fixed and determinable; and (4) collectibility is reasonably assured. SFAS 48 provides that revenue from sales transactions where the buyer has the right to return the product shall be recognized at the time of sale only if (1) the seller s price to the buyer is substantially fixed or determinable at the date of sale, (2) the buyer has paid the seller, or the buyer is obligated to pay the seller and the obligation is not contingent on resale of the product, (3) the buyer s obligation to the seller would not be changed in the event of theft or physical destruction or damage of the product, (4) the buyer acquiring the product for resale has economic substance apart from that provided by the seller, (5) the seller does not have significant obligations for future performance to directly bring about resale of the product by the buyer and (6) the amount of future returns can be reasonably estimated. The Company generally recognizes revenue at the time products are shipped to the customer. In the case of shipments made to wholesalers that do not meet the revenue recognition criteria of SFAS 48 and SAB 101, Reliant does not recognize revenue upon shipment of product. For these product sales, the Company invoices the wholesaler and records deferred revenue at gross invoice sales price. Reliant recognizes the deferred revenue (net of discounts, rebates, sales allowances and accruals for returns) when the inventory is utilized by the end-user, as quantified using data from third-party information sources. Reliant continues to recognize revenue on these shipments on this basis until such time as all of the revenue recognition criteria of SFAS 48 and SAB 101 are met. As of June 30, 2006 (unaudited), and December 31, 2005 and 2004, deferred revenue related to Antara was zero.

Provisions for Rebates, Returns, Chargebacks, Coupons and Discounts

Reliant provides for rebates, returns and chargebacks in the same period the related sale is recognized and, in the case of coupons, when the coupons are issued. These provisions reduce revenues. Rebates include amounts due under Medicaid, managed care and other commercial contractual programs. Reliant provides for rebates based on a percentage of selling price determined from historical experience. With respect to provisions for estimated Medicaid and managed care rebates, Reliant evaluates its historical rebate payments by product as a percentage of historical sales, product pricing and current contracts. Medicaid pricing programs involve particularly difficult interpretations of relevant statutes and regulatory guidance, which are complex and, in certain respects, ambiguous. Moreover, prevailing interpretations of these statutes and guidance can change over time. Returns are provided for based on historical experience, projected future prescriptions of the products and the amount and expiry of inventory estimated to be in the distribution channel. Chargeback provisions are based on an estimate of claims not yet submitted by customers, using historical experience. Coupons are provided for based on historical redemption rates for similar programs. In all cases, judgment is required in estimating these provisions, and actual claims for rebates, returns and chargebacks could be materially different from the estimates.

ANTARA PRODUCT LINE OF RELIANT PHARMACEUTICALS, INC.

NOTES TO SPECIAL PURPOSE STATEMENTS

(Dollars in thousands)

2. Description of business and significant accounting policies (continued)

Cost of Sales

Cost of sales includes the costs to purchase bulk micronized fenofibrate from Ethypharm, Reliant s sole supplier of bulk product, as well as the cost to package the bulk product into finished form. Cost of sales also includes royalties payable under two royalty bearing licensing agreements on all net sales of the product.

Sales and Marketing Expenses

Sales and marketing expenses include direct promotion and marketing expenses attributable to the Product Line. In addition, an allocation of Reliant s indirect selling expenses has been made based on the level of selling effort provided for the Product Line. Management believes these allocations to be reasonable.

Research and Development Costs

Research and development costs are expensed as incurred. Upfront and milestone payments made to third parties in connection with research and development collaborations are expensed as incurred up to the point of regulatory product approval. Payments made to third-parties subsequent to regulatory product approval are capitalized and amortized over the remaining useful life of the asset. These amounts are included in intangible assets.

3. Inventory

Inventory consisted of the following:

	June 30,	December 31,	
	2006 (unaudited)	2005	2004
Work in process	$ 3,261	$ 5,081	$ 851
Finished goods	720	723	159
Gross inventory	3,981	5,804	1,010
Less: inventory reserves	(115)	(126)	
Inventory, net	$ 3,866	$ 5,678	$ 1,010

4. Related Party Transactions

Antara s costs and expenses include an allocation from Reliant for certain sales and marketing costs. This allocation has been determined on a basis that Reliant considered to be a reasonable reflection of the utilization of services provided or the benefit received by the Product Line. The allocation method includes a computation based upon the level of selling effort provided to the Product Line by Reliant s sales force. Allocated sales and marketing costs included in the statements of direct expenses in excess of net sales for the six-month periods ended June 30, 2006 and 2005 (unaudited) were $11,684 and $25,298, respectively, and $47,987 for the year ended December 31, 2005. There were no sales and marketing costs allocated for the year ended December 31, 2004.

ANTARA PRODUCT LINE OF RELIANT PHARMACEUTICALS, INC.

NOTES TO SPECIAL PURPOSE STATEMENTS

(Dollars in thousands)

5. Commitments and Contingencies

As part of separate royalty bearing licensing agreements with Ethypharm and a third-party, Reliant is required to pay royalties based on all net sales of the product. Royalty expenses are included in cost of sales in the accompanying statements of direct expenses in excess of net sales.

Also pursuant to its license and supply agreement with Ethypharm, in order to maintain exclusivity of the license, Reliant is required to achieve minimum annual sales of capsules in the United States and Canada during the first seven years subsequent to the first commercial sale of the product on February 1, 2005. Should Reliant fail to achieve such minimum annual capsule sales, Reliant could choose to pay Ethypharm the difference between what they would have received had such minimum capsule sales target been achieved and what Ethypharm actually received during the annual measurement period or Reliant could choose to relinquish its contractual exclusive licensing rights with respect to Antara in such territory. Reliant was in compliance with the minimum annual sales requirement for the initial measurement period from February 2, 2005 to February 1, 2006.

The Company will also be required to make an additional milestone payment of $400 to Ethypharm if and when cumulative net sales of Antara, as measured from the launch date, exceed $50,000. The cumulative net sales as of June 30, 2006 were $42,628.

OSCIENT PHARMACEUTICALS CORPORATION

PRO FORMA FINANCIAL INFORMATION (UNAUDITED)

On August 18, 2006 Oscient Pharmaceuticals Corporation (Oscient) and its wholly-owned subsidiary Guardian II Acquisition Corporation (Guardian II) acquired, for approximately $83.1 million (including inventory purchases), the exclusive rights in the United States and its territories (the Territory) to the cardiovascular products ANTARA® 30mg and ANTARA® 43mg (fenofibrate) capsules (Antara) from Reliant Pharmaceuticals, Inc. (Reliant). Oscient has performed a preliminary valuation study to determine the allocation of the estimated purchase price of the Antara acquisition among the tangible and intangible assets acquired as well as their estimated amortization period. The preliminary study was performed by a third party and is unaudited.

As part of the acquisition, Oscient along with Guardian II entered into several financing agreements including a Revenue Interest Assignment Agreement, a Note Purchase Agreement and a Common Stock and Warrant Purchase Agreement, for aggregate funds of $70 million.

The following unaudited pro forma condensed consolidated statements of operations for the six months ended June 30, 2006 and for the year ended December 31, 2005, give the effect to the acquisition of Antara by Oscient as if such acquisition had occurred at the beginning of the respective periods. The following unaudited pro forma condensed consolidated balance sheet as of June 30, 2006, gives effect to the Antara acquisition as if it had occurred on June 30, 2006.

The pro forma adjustments are based upon available information and certain assumptions that management believes are reasonable under the circumstances. The pro forma adjustments were applied to the respective historical financial statements to reflect and account for the acquisition using the purchase method of accounting. This transaction is being accounted for as an acquisition of a business. The pro forma financial information is not necessarily indicative of the operating result or financial position that would have been achieved had the acquisition been consummated on the dates indicated and should not be construed as representative of future operating results or financial position. Specifically, Oscient expects to incur additional selling expenses related to its promotional efforts in respect of Antara on an ongoing basis. The purchase price was allocated to intangible assets acquired based on their respective fair values as determined in a preliminary valuation study performed by a third party and management s evaluation of the assets and liabilities. The allocation of the purchase price among the intangibles assets acquired and the estimated useful lives of these intangible assets are preliminary and are subject to change based upon further evaluation, such changes could be material.

The unaudited pro forma condensed consolidated financial statements should be read in conjunction with Oscient s Consolidated Financial Statements and related Notes thereto, Management s Discussion and Analysis of Financial Condition and Results of Operations included in Oscient s Annual Report on Form 10-K for the year ended December 31, 2005 and the Quarterly Report on form 10-Q for the quarter ended June 30, 2006 and the special purpose statements of product of the Antara Product Line of Reliant Pharmaceuticals for the years ended December 31, 2005 and 2004.

Oscient Pharmaceuticals Corporation

Pro Forma Consolidated Balance Sheet

Unaudited

As of June 30, 2006

(in thousands, except per share data)

	Oscient Pharmaceuticals Corporation	Antara Product Line	Pro Forma Adjustment	Pro Forma
ASSETS				
Current Assets:				
Cash and cash equivalents	$ 71,582		$ (12,376)(a)	$ 59,206
Restricted cash	5,346			5,346
Interest receivable	403			403
Notes receivable	601			601
Accounts receivable	3,403			3,403
Inventories	12,375	3,866	904(b)	17,145
Prepaid expenses and other current assets	3,678	836	1,720(c)	6,234
Total current assets	97,388	4,702	(9,752)	92,338
Property and Equipment, at cost:				
Manufacturing and computer equipment	4,426			4,426
Equipment and furniture	1,160			1,160
Leasehold improvements	134			134
	5,720			5,720
Less Accumulated depreciation	4,165			4,165
	1,555			1,555
Restricted cash	3,763			3,763
Long-term notes receivable	1,602			1,602
Other assets	4,165		289(d)	4,454
Intangible assets, net	63,225	472	60,574(d)	123,799
			(472)(e)	
Goodwill	61,529		16,613(d)	78,142
	$ 233,227	$ 5,174	$ 67,252	$ 305,653
LIABILITIES AND SHAREHOLDERS EQUITY				
Current Liabilities:				
Accounts payable	5,445			5,445
Accrued expenses and other current liabilities	11,531		2,468(d)	13,999
Current portion of accrued facilities impairment charge	2,856			2,856
Current portion of accrued restructuring charge	499			499
Clinical trial expense accrual	1,291			1,291
Deferred revenue	234			234
Total current liabilities	21,856		2,468	24,324
Long-term liabilities:				
Long-term obligations, net of current maturities	175,060		60,000(f)	235,060

Noncurrent portion of accrued facilities impairment charge	12,346			12,346
Other long-term liabilities	2,812			2,812
Deferred Revenue	19			19
Shareholders Equity:				
Common stock, $0.10 par value - Authorized - 174,375 shares, Issued and Outstanding - 96,479 and 76,688 in 2006 and 2005, respectively	9,648		1,111(f)	10,759
Series B restricted common stock, $0.10 par value - Authorized - 625 shares, Issued and outstanding - none in 2006 and 2005				
Interest in Antara product line assets sold		5,174	(5,174)(g)	
Additional paid-in-capital	392,207		8,847(f)	401,054