

Assertio Therapeutics, Inc
Form 8-K12B
August 15, 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): **August 15, 2018 (August 10, 2018)**

ASSERTIO THERAPEUTICS, INC.

(Exact name of registrant as specified in its charter)

001-13111

(Commission File Number)

Delaware
(State or other jurisdiction of
incorporation)

94-3229046
(I.R.S. Employer Identification No.)

100 S. Saunders Road, Suite 300

Lake Forest, IL 60045

(Address of principal executive offices, with zip code)

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(224) 419-7106

(Registrant's telephone number, including area code)

Depomed, Inc.

7999 Gateway Blvd., Suite 300

Newark, California 94560

(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 (*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))

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.

Pursuant to an Agreement and Plan of Merger dated as of August 10, 2018 (the Reincorporation Merger Agreement and, as consummated, the Reincorporation Merger), on August 14, 2018 at 11:59 p.m. Eastern (the Effective Time), Depomed, Inc., a California corporation (Depomed-California), merged with and into Assertio Therapeutics, Inc., a Delaware corporation and wholly owned subsidiary of Depomed-California prior to the Effective Time (Assertio-Delaware), with Assertio-Delaware continuing as the surviving corporation (the Reincorporation and Name Change). The Reincorporation Merger was approved by Depomed-California's shareholders at the 2018 Annual Meeting of Shareholders on May 8, 2018, for which proxies were solicited pursuant to Section 14(a) of the Securities Exchange Act of 1934, as amended (the Exchange Act) and effectuated by a Certificate of Merger filed with the Delaware and California Secretaries of State (the Certificate of Merger). The use of the Company herein refers to Depomed-California any time prior to the Effective Time and to Assertio-Delaware any time after the Effective Time.

Pursuant to Rule 12g-3(a) under the Exchange Act and as of the Effective Time, Assertio-Delaware is deemed the successor issuer to Depomed-California and the shares of the Company's common stock, par value \$0.0001 per share (the Common Stock), are deemed to be registered under Section 12(b) of the Exchange Act. The Reincorporation Merger did not alter any Stockholders' percentage ownership interest or number of shares owned in the Company. As of market open on August 15, 2018, the Company's Common Stock trades on the Nasdaq Global Select Market under the ticker symbol ASRT and new CUSIP number 04545L 107.

Other than the change in the Company's name and state of incorporation, the Reincorporation and Name Change itself did not result in any change in the business, management, assets, liabilities or capitalization of the Company. The descriptions of the Reincorporation Merger Agreement and the Certificate of Merger contained herein do not purport to be complete and are qualified in their entirety by the full text of each, which are attached hereto as Exhibit 2.1 and Exhibit 3.1 respectively.

Corporate Governance and Stockholder Rights

Pursuant to the Reincorporation Merger Agreement, at the Effective Time, the board of directors and officers of Depomed-California immediately prior to the Reincorporation Merger became the board of directors and officers of Assertio-Delaware. Each continued their directorship or services with the Company on the same terms as their directorship or service immediately prior to the Effective Time. In addition, the standing committees of the Company's Board of Directors (the Audit Committee, the Compensation Committee, the Nominating and Corporate Governance Committee and the Opioid Matter Oversight Committee) and the members thereof remain unchanged following the Effective Time.

As a result of the Reincorporation and Name Change, the internal affairs of the Company ceased to be subject to the California Corporation Code or governed by Depomed-California's Articles of Incorporation (the California Articles) and its Bylaws (the California Bylaws). As of the Effective Time, the Company is subject to the Delaware General Corporation Law (DGCL) and governed by the Assertio-Delaware Certificate of Incorporation (the Delaware Certificate) and Bylaws (the Delaware Bylaws). While the Company sought to maintain the material rights of stockholders, and the Delaware Certificate and the Delaware Bylaws contain provisions that are similar to the provisions of the California Articles and California Bylaws, there are also key differences that may impact the rights of stockholders. A description of certain of these differences, as well as certain differences between the California Corporations Code and the DGCL, are included in the proxy statement filed by Depomed-California with the Securities and Exchange Commission on March 27, 2018 (the 2018 Proxy), under Proposal 3 and Proposal 4, both of which are incorporated herein by reference. The descriptions of the Delaware Certificate and the Delaware Bylaws contained herein, including those incorporated by reference to the 2018 Proxy, do not purport to be complete and are qualified in their entirety by the full text of the Delaware Certificate and the Delaware Bylaws filed as Exhibit 3.2 and Exhibit 3.3, respectively, to this Current Report on Form 8-K and incorporated herein by reference. A specimen copy of the Company's new form stock certificate is filed as Exhibit 3.4 to this Current Report on

Form 8-K.

Company Equity Plans

All outstanding Depomed-California equity awards, including stock options to purchase Depomed-California common stock and restricted stock units and performance stock units representing the right to receive Depomed-California common stock upon vesting, that were outstanding under Depomed-California's equity incentive plans, including its Second Amended and Restated 2004 Equity Incentive Plan, its Amended and Restated 2014 Omnibus Incentive Plan and its Amended and Restated 2004 Employee Stock Purchase Plan (the Equity Plans), or granted as inducement grants, as well as options, restricted stock units, performance stock units or other equity awards granted under the Equity Plans or granted as inducement grants in the future, have been assumed by Assertio-Delaware and will represent an option, restricted stock unit or performance stock unit, as applicable, to acquire or receive shares of Assertio-Delaware on a one-for-one basis and, in the case of stock options, at an exercise price equal to the exercise price of the Depomed-California option. Other than a change in the identity of the Company to which the awards granted under the Equity Plans are subject, the terms and conditions of these equity awards has not changed.

Entry into Second Supplemental Indenture

Concurrent with the Reincorporation Merger, Assertio-Delaware entered into a Second Supplemental Indenture dated August 14, 2018, with the Bank of New York Mellon Trust Company, N.A., as trustee (the Trustee), pursuant to which Assertio-Delaware assumed Depomed-California's obligations under the indenture dated as of September 9, 2014 (the Base Indenture), as supplemented by the First Supplemental Indenture dated as of September 9, 2014 (the Supplemental Indenture) among Depomed-California and the Trustee providing for the issuance of 2.50% Convertible Senior Notes due 2021. The foregoing description does not purport to be complete and is subject to and qualified in its entirety by the full text of each of the Base Indenture and the First Supplemental Indenture filed as Exhibits 4.1 and 4.2, respectively, to the Current Report on Form 8-K filed by Depomed-California on September 9, 2014, and the Second Supplemental Indenture filed as Exhibit 4.1 to this Current Report on Form 8-K, all of which are incorporated herein by reference.

Note Purchase Agreement Consent and Assumption Agreement

In connection with the Reincorporation and Name Change, on August 14, 2018, Assertio-Delaware and Depomed-California entered into a Consent to Note Purchase Agreement and Assumption Agreement (the Deerfield Consent) with certain purchasers, credit parties and Deerfield Private Design Fund III, L.P., as purchaser and collateral agent (Deerfield and together, the Purchasers) with respect to the Note Purchase Agreement, dated as of March 12, 2015, among the Company, the purchaser parties thereto and Deerfield (as supplemented or amended on December 29, 2015, December 4, 2017, and August 1, 2018, the Purchase Agreement). Pursuant to the Deerfield Consent, the Purchasers provided their consent to the Reincorporation Merger and Assertio-Delaware assumed Depomed-California's obligations under the Purchase Agreement. The foregoing description does not purport to be complete and is qualified in its entirety by the full text of the Deerfield Consent filed as Exhibit 10.1 to this Current Report on Form 8-K and incorporated herein by reference.

Director and Officer Indemnification Agreements

Also in connection with the Reincorporation Merger, the Company has entered into indemnification agreements with each of its officers and directors in which the Company agrees to hold harmless and indemnify the officer or director to the fullest extent permitted by the DGCL. The foregoing description does not purport to be complete and is qualified in its entirety by reference to the full text of the Form of Indemnification Agreement, a copy of which is filed as Exhibit 10.2 to this Current Report on Form 8-K and incorporated herein by reference.

Item 3.03. Material Modification to Rights of Security Holders.

The disclosures set forth in Item 1.01 of this Current Report on Form 8-K are incorporated by reference into this Item 3.03.

Item 5.02. Departure of Directors or Certain Officers; Election of Directors; Appointment of Certain Officers; Compensatory Arrangements of Certain Officers.

The disclosures set forth in Item 1.01 of this Current Report on Form 8-K are incorporated by reference into this Item 5.02.

Item 5.03. Amendments to Articles of Incorporation or By-Laws; Change in Fiscal Year.

The disclosures set forth in Item 1.01 of this Current Report on Form 8-K are incorporated by reference into this Item 5.03.

Item 8.01. Other Events.

On August 15, 2018, the Company issued a press release announcing the completion of the Reincorporation and Name Change. A copy of that press release is furnished as Exhibit 99.1 and is incorporated herein by reference.

Item 9.01. Financial Statements and Exhibits.

(d) Exhibits

| Exhibit No. | Description |
|--------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 2.1 | <u>Agreement and Plan of Merger, dated August 10, 2018, by and between Depomed Inc., a California corporation and Assertio Therapeutics, Inc., a Delaware corporation</u> |
| 3.1 | <u>Certificate of Merger effective August 14, 2018 at 11:59 p.m. Eastern</u> |
| 3.2 | <u>Certificate of Incorporation of Assertio Therapeutics, Inc., a Delaware corporation</u> |
| 3.3 | <u>Bylaws of Assertio Therapeutics, Inc., a Delaware corporation</u> |
| 3.4 | <u>Specimen Common Stock Certificate of Assertio Therapeutics, Inc., a Delaware corporation</u> |
| 4.1 | <u>Second Supplemental Indenture, dated August 14, 2018, by and between Assertio Therapeutics, Inc., a Delaware corporation, and the Bank of New York Mellon Trust Company, N.A. as Trustee</u> |
| 10.1 | <u>Consent to Note Purchase Agreement and Assumption Agreement dated August 14, 2018.</u> |
| 10.2 | <u>Form of Indemnification Agreement of Assertio Therapeutics, Inc., a Delaware corporation.</u> |

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10.3 Form of Amended and Restated Management Continuity Agreement of Assertio Therapeutics, Inc., a Delaware Corporation.
99.1 Press release dated August 15, 2018, announcing the Reincorporation and Name Change

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.

DEPOMED, INC.

Date: August 15, 2018

By:

/s/ Amar Murugan
Amar Murugan
Senior Vice President and General Counsel