

DUSA PHARMACEUTICALS INC  
Form 8-K  
November 08, 2012

**UNITED STATES**  
**SECURITIES AND EXCHANGE COMMISSION**

Washington, DC 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): November 8, 2012**

**DUSA PHARMACEUTICALS, INC.**

(Exact name of registrant as specified in its charter)

New Jersey  
(State or other jurisdiction

of incorporation)

001-31533  
(Commission

File Number)

22-3103129  
(IRS Employer

Identification Number)

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**25 Upton Drive**

**Wilmington, Massachusetts 01887**

**(Address of principal executive offices, including ZIP code)**

**(978) 657-7500**

**(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 Securities 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 1.01 Entry into a Material Definitive Agreement.**

On November 8, 2012, DUSA Pharmaceuticals, Inc. (the Company ) entered into an Agreement and Plan of Merger (the Merger Agreement ) by and among the Company, Sun Pharmaceutical Industries Limited ( Sun Pharma ), a corporation organized under the laws of India, and Caraco Acquisition Corporation ( Acquisition Sub ), a New Jersey corporation and indirect wholly-owned subsidiary of Sun Pharma.

Under the terms of the Merger Agreement, Acquisition Sub will commence a tender offer (the Offer ) to purchase all of the Company s outstanding shares of common stock, no par value per share ( Common Stock ), at a purchase price of \$8.00 per share, without interest, net to the seller in cash (the Offer Price ). The Merger Agreement provides that the Offer will expire 20 business days following the commencement of the Offer, subject to certain extension rights and obligations set forth in the Merger Agreement.

The Offer is conditioned upon, among other things, there being validly tendered in the Offer shares of Common Stock that, together with shares of Common Stock owned by Sun Pharma, Acquisition Sub or any of their respective affiliates (the Sun Group ), represent a majority of the outstanding Common Stock on a fully diluted basis (the Minimum Tender Condition ). The Offer is also subject to certain other conditions, including (i) the representations and warranties of the Company set forth in the Merger Agreement are true and correct or, in certain cases, except where the failure of such representations or warranties to be so true and correct (individually or in the aggregate) would not reasonably be likely to have a Company Material Adverse Effect (as defined in the Merger Agreement); (ii) the expiration or termination of the waiting period under the Hart-Scott-Rodino Antitrust Improvements Act of 1976; (iii) the Company s compliance, in all material respects, with its obligations under the Merger Agreement; and (iv) the absence of certain legal impediments and other customary conditions. The date of payment for shares of Common Stock accepted for payment pursuant to and subject to the Offer conditions is referred to as the Offer Closing. Neither the Offer nor the Merger is subject to a financing condition.

The Merger Agreement provides, among other provisions, that subject to certain terms and conditions set forth in the Merger Agreement, Acquisition Sub will merge with and into the Company (the Merger ) after the Offer. The date and time at which the Merger becomes effective is the Effective Time, which may occur at any time following the Offer Closing, subject to the right of the parties to terminate if the Offer Closing has not occurred by August 8, 2013. At and following the Effective Time, the separate corporate existence of Acquisition Sub will cease, and the Company will continue as the surviving corporation in the Merger. As a result of the Merger, each issued and outstanding share of Common Stock (other than shares of Common Stock held by the Sun Group or the Company, or held in the Company s treasury, that is not tendered pursuant to the Offer) will be converted into the right to receive, as merger consideration, an amount in cash equal to the Offer Price, without interest.

If after the purchase of the Common Stock pursuant to the Offer and giving effect to the Top-Up (described below), if applicable, the Sun Group owns at least 90% of the outstanding Common Stock on a fully-diluted basis, then, following the satisfaction or waiver of the other conditions to the closing of the Merger, Sun Pharma will effect a Merger pursuant to applicable New Jersey Business Corporation Law, which will not require the consent of the Company s

shareholders. The Merger is also conditioned upon the absence of certain legal restraints and the acceptance of payment by Acquisition Sub of all the shares of Common Stock validly tendered pursuant to the Offer. Pursuant to the Merger Agreement, if the Minimum Tender Condition is satisfied but Sun Pharma and Acquisition Sub do not own at least 90% of the Common Stock then outstanding, but would, after exercise of the Top-Up Option, own in the aggregate at least one share more than 90% of the Common Stock then outstanding, the Company will issue to Acquisition Sub, and Acquisition Sub will purchase (the Top-Up ), at a price per share equal to the Offer Price, up to a number of newly issued, fully paid and nonassessable shares of Common Stock (the Top-Up Shares ) that, when added to the number of shares of Common Stock directly or indirectly owned by Acquisition Sub at the time of the closing of the purchase of Top-Up Shares (after giving effect to the Offer Closing), will constitute one share more than 90% (determined on a fully diluted basis) of the shares of the Common Stock outstanding immediately after the issuance of the Top-Up Shares.

Pursuant to the Merger Agreement, if the 90% threshold referred to in the two preceding paragraphs is not satisfied and the Top-Up is not permitted under applicable law or the terms of the Merger Agreement, the Company will cause a special meeting of the Company's shareholders for the purpose of voting on the adoption of the Merger Agreement and the approval of the Merger.

The Company has made customary representations, warranties and covenants in the Merger Agreement, including among others, covenants not to solicit alternative transactions or to provide information or enter into discussions in connection with alternative transactions, except with respect to discussions or negotiations with persons related to certain bona fide, unsolicited written acquisition proposals, and subject to certain limited exceptions to permit the Company's board of directors to comply with its fiduciary duties.

Effective upon the Offer Closing, assuming the Minimum Tender Condition is met, Acquisition Sub will be entitled to certain rights to appoint board directors as will give the Acquisition Sub majority representation on the board.

The Merger Agreement contains certain termination rights for the Company and Sun Pharma, and further provides that, upon termination of the Merger Agreement under certain specified circumstances, the Company will be obliged to pay Sun Pharma a termination fee of \$9,000,000.

This summary of the principal terms of the Merger Agreement and the copy of the Merger Agreement filed as an exhibit to this Form 8-K are intended to provide information regarding the terms of the Merger Agreement and are not intended to modify or supplement any factual disclosures about the Company in its public reports filed with the Securities and Exchange Commission. In particular, the Merger Agreement and the related summary are not intended to be, and should not be relied upon as, disclosures regarding any facts and circumstances relating to the Company. The foregoing description of the Offer, Merger and the Merger Agreement does not purport to be complete and is qualified in its entirety by reference to the full text of the Merger Agreement, a copy of which is attached hereto as Exhibit 2.1 and is incorporated into this report by reference.

The consummation of the Offer will result in an acceleration of the vesting of all outstanding and previously unvested stock options and restricted stock awards issued pursuant to the Company's Amended and Restated 2011 Equity Compensation Plan and the 1996 Omnibus Plan, as amended.

A copy of the Merger Agreement is provided with this report solely to inform investors of its terms. The Merger Agreement contains representations and warranties by the Company, on the one hand, and by Sun Pharma and Acquisition Sub, on the other hand, made solely for the benefit of the other. The assertions embodied in those representations and warranties are qualified by certain disclosures, not contained in the Merger Agreement, that modify, qualify and create exceptions to the representations and warranties set forth in the Merger Agreement. Moreover, certain representations and warranties in the Merger Agreement were made as of a specified date, may be subject to a contractual standard of materiality different from what might be viewed as material to shareholders or may have been used for the purpose of allocating risk between the Company, on the one hand, and Sun Pharma and Acquisition Sub, on the other hand. Accordingly, investors should not rely on the representations and warranties in the Merger Agreement as characterizations of the actual state of facts about the Company, Sun Pharma or Acquisition Sub at the time they were made or otherwise.

**Item 3.01 Unregistered Sales of Equity Securities.**

In connection with the Company's entry into the Merger Agreement, the Company granted to Acquisition Sub the Top-Up option, which under certain circumstances would permit Acquisition Sub to purchase, at a price per share equal to the Offer Price, up to a number of newly issued, fully paid and nonassessable shares of Common Stock that, when added to the number of shares of Common Stock directly or indirectly owned by Sun Pharma and its subsidiaries at the time of the closing of the purchase of Top-Up Shares (after giving effect to the Offer Closing), will constitute one share more than 90% (determined on a fully diluted basis) of the shares of the Common Stock outstanding immediately after the issuance of the Top-Up Shares.

**Item 3.03 Material Modification to Rights of Security Holders.**

The consummation of the Offer will result in an acceleration of the vesting of all previously issued but unvested stock options and restricted stock awards issued pursuant to the Company's Amended and Restated 2011 Equity Compensation Plan and the 1996 Omnibus Plan, as amended.

**Item 8.01 Other Matters**

On November 8, 2012, the Company issued a press release announcing the execution of the Merger Agreement, a copy of which is attached as Exhibit 99.1 hereto and incorporated herein by reference.

*Important Additional Information Will Be Filed with the Securities and Exchange Commission*

This current report is not an offer to purchase or a solicitation of an offer to sell any securities of the Company. The Offer has not yet been commenced. Upon commencement of the Offer, Sun Pharma and Acquisition Sub will file a Tender Offer Statement on Schedule TO

containing an offer to purchase and related materials, and the Company will mail to the Company's shareholders a solicitation/recommendation statement with respect to the Offer on Schedule 14D-9. The Company's shareholders are urged to read these materials carefully when they become available since they will contain important information, including the terms and conditions of the Offer. The Company's shareholders may obtain a free copy of these materials (when available) and other documents filed by Sun Pharma, Acquisition Sub or the Company with the SEC at the website maintained by the SEC at [www.sec.gov](http://www.sec.gov). The offer to purchase and related materials, the solicitation/recommendation statement, the Schedule TO, and the Schedule 14D-9 may also be obtained (when available) for free by contacting the information agent for the Offer (when one is selected).

#### *Forward-Looking Statements*

Certain statements contained herein constitute forward-looking statements. These statements are not guarantees of future performance or assurances of an expected course of action, and therefore, readers should not put undue reliance upon them. Some of the statements that are forward-looking include statements of belief or intent predicated on the Company's expectations for strategic opportunities. There are a large number of factors that can cause the Company to deviate from plans or to fall short of expectations. As to the forward-looking matters contained in this report, factors that can cause such changes include our ability to respond timely and in accordance with the laws applicable to the Company and its board of directors. The Company's business as a whole is subject to a number of risks, and to the extent those risks are known to be material, they have been listed and discussed in the Company's annual report on Form 10-K for the fiscal year ended December 31, 2011, and quarterly reports on Form 10-Q. Please note that forward-looking statements are current as of today. The Company undertakes no obligation to update or revise any forward-looking statements, whether as a result of new information, future events or otherwise, except to the extent required by law.

#### **ITEM 9.01. Financial Statements and Exhibits (d) Exhibits**

- 2.1 Merger Agreement dated November 8, 2012.
- 99.1 Press Release dated November 8, 2012.

**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.

DUSA PHARMACEUTICALS, INC.

Dated: November 8, 2012

By: /s/ Robert F. Doman  
Robert F. Doman, President and  
Chief Executive Officer