

EMISPHERE TECHNOLOGIES INC  
Form 8-K  
August 21, 2014

**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): **August 20, 2014**

**EMISPHERE TECHNOLOGIES, INC.**

(Exact name of registrant as specified in its charter)

<b>DELAWARE</b> (State or other jurisdiction of incorporation)	<b>000-17758</b> (Commission File Number)	<b>13-3306985</b> (I.R.S. Employer Identification No.)
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<b>4 Becker Farm Road</b> <b>Roseland, NJ</b> (Address of principal executive offices)	<b>07068</b> (Zip Code)
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Registrant's telephone number, including area code: **973-532-8000**

**Not Applicable**

(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)

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- .. 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))

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**Item 1.01. Entry into a Material Definitive Agreement.**

On August 20, 2014, Emisphere Technologies, Inc. (the Company) entered into a series of agreements (the Transaction Documents) with MHR Capital Partners Master Account LP, a limited partnership organized in Anguilla, British West Indies (Master Account), MHR Capital Partners (100) LP, a Delaware limited partnership (Capital Partners (100)), MHR Institutional Partners II LP, a Delaware limited partnership (Institutional Partners II), and MHR Institutional Partners IIA LP, a Delaware limited partnership (Institutional Partners IIA) and, together with Master Account, Capital Partners (100) and Institutional Partners II, collectively, MHR or the Lenders), for a new loan facility, an extension of the Company's existing obligations under various promissory notes previously issued to the Lenders, and for payment by the Company of certain royalties to MHR.

On August 20, 2014, the Company entered into a Loan Agreement (the Loan Agreement) with the Lenders. The Loan Agreement provides for, among other things, a commitment (the Commitment) of the Lenders to loan the Company up to \$20 million to finance the development, manufacturing, marketing and sale of the Company's oral Eligible B12 Rx product (the B12 Product). Pursuant to the terms of the Loan Agreement, the Company may make five borrowings (each, a Borrowing, and collectively, the Loan). The first Borrowing under the Loan Agreement occurred on August 20, 2014 in an original principal amount of \$5 million. Subject to achieving certain operational milestones relating to the timely manufacture and commencement of sales of the B12 Product, of which there can be no assurance, the Company may request four additional Borrowings as follows: up to \$3,000,000 from September 1, 2014 through and including December 31, 2014, up to \$5,000,000 in the first quarter of 2015, up to \$5,000,000 in the second quarter of 2015, and up to \$2,000,000 in the third quarter of 2015.

In addition, as described below, under the Royalty Agreement, if the Company does not have sufficient cash in excess of the Minimum Cash Balance to pay any Royalties that become due under the Royalty Agreement in cash, such Royalties will be paid as an additional Loan under the Loan Agreement by increasing the principal amount outstanding under the Loan Agreement (any such Loan, Paid-In-Kind Royalties). The Minimum Cash Balance generally means cash on hand (plus certain cash expenditures during such fiscal year that are unrelated to the B12 Product or related products) of at least \$10 million (or \$15 million, under certain circumstances beginning as early as October 1, 2015), subject to certain permitted deductions.

Except with respect to Paid-In-Kind Royalties incurred under the Loan Agreement after all amounts of principal and interest have previously been paid in full, the Loan will mature on the earlier of (a) December 31, 2019 and (b) 30 days after the end of any fiscal year in which the Company's cash (plus certain cash expenditures during such fiscal year that are unrelated to the B12 Product or related products) as of the end of such fiscal year (subject to certain permitted deductions) is more than three times the principal amount of the Loan as of the end of such fiscal year. Paid-In-Kind Royalties incurred under the Loan Agreement after all amounts of principal and interest have previously been paid in full mature one year following the date of incurrence. The Loan bears interest at a rate of 13% per annum (the Interest Rate), compounded monthly, and will be payable in kind and in arrears on June 30 and December 31 of each year up to and including the maturity date by increasing the outstanding principal amount of Loan by the amount of each such interest payment. So long as an event of default under the Loan Agreement (an Event of Default) has occurred and is continuing, at the election of MHR, interest shall accrue on the Loan at a rate equal to 2% per annum above the Interest Rate (Default Rate). Interest at the Default Rate shall accrue from the initial date of such Event of Default until that Event of Default is cured or waived in writing and shall be payable upon demand and, if not paid when due, shall itself bear interest at the Default Rate. The Loan must be repaid from time to time prior to maturity pursuant to (a) a cash sweep of 50% of the Company's Adjusted Consolidated Free Cash Flow (as defined in the Loan Agreement), or 75% of the Company's Adjusted Consolidated Free Cash Flow in any year in which the Adjusted Consolidated Free Cash Flow exceeds \$50 million, to the extent such cash sweep does not cause the Company's cash as of the end of such year to be less than the Minimum Cash Balance, (b) a cash sweep of 50% of any cash proceeds received from any third party in connection with the license, distribution or sale of any of the Company's products other than the B12 Product or related products (the Non-B12 Products), subject to the priority described below, and

(c) a Royalty Match (as described below), to the extent such Royalty Match does not cause the Company's cash as of the end of such year to be less than the Minimum Cash Balance and subject to the priority described below. The Loan Agreement provides for certain representations and warranties, conditions precedent to the Lenders' obligation to lend, affirmative and negative covenants of the Company (including, but not limited to, certain milestones in the development of its B12 Products) and Events of Default.

In connection with the entry into the Loan Agreement, on August 20, 2014, the Lenders and the Company further amended and restated (i) the Amended and Restated 13% Senior Secured Convertible Notes issued by the Company to certain of the Lenders (as so amended and restated, the Convertible Notes ), (ii) the Second Amended and Restated Senior Secured Convertible Bridge Promissory Notes issued by the Company to certain of the Lenders (as so amended and restated, the Bridge Notes ), and (iii) the Second Amended and Restated Senior Secured Convertible Reimbursement Promissory Notes (as so amended and restated, the Reimbursement Notes ) and, together with the Convertible Notes and Bridge Notes, the MHR Notes ). Also, in connection with the entry into the Loan Agreement and the amendment and restatement of the MHR Notes, Institutional Partners IIA and the Company have amended the Pledge and Security Agreement, dated September 26, 2005, as amended, by and between the Company and Institutional Partners IIA (as so amended, the Security Agreement ) to, among other things, secure the Reimbursement Notes and payments due under the Loan Agreement with substantially all of the Company's assets, and secure the payments due under the

Royalty Agreement and Paid-In-Kind Royalties due under the Loan Agreement with the Company's intellectual property relating to the B12 Products and related products.

The Convertible Notes now provide for a new maturity date of March 31, 2022 (subject to acceleration upon the occurrence of certain specified events of default, including the failure to meet certain sales, performance, and manufacturing milestones specified in the Convertible Notes). The interest rate remains 13% per annum, compounded monthly, which interest will be payable in the form of additional Convertible Notes. The Convertible Notes remain collateralized by a first priority lien in favor of the Lenders on substantially all of the Company's assets. After all principal and interest under the Loan Agreement and Reimbursement Notes are repaid, the remaining Convertible Notes must be redeemed from time to time prior to maturity pursuant to a cash sweep of 50% of the Company's Adjusted Consolidated Free Cash Flow (75% of the Company's Adjusted Consolidated Free Cash Flow in any year in which Adjusted Consolidated Free Cash Flow exceeds \$50 million) to the extent such cash sweep does not cause the Company's cash as of the end of such year to be less than the Minimum Cash Balance. The Convertible Notes are convertible, at the option of the holders, at a conversion price of \$1.25 per share of common stock, which conversion price is subject to adjustment upon the occurrence of events specified in the Convertible Notes, including stock dividends, stock splits, certain fundamental corporate transactions, and certain issuances of common stock by the Company. The Convertible Notes must also be redeemed from time to time prior to maturity pursuant to (a) a cash sweep of 50% of any cash proceeds received from any third party in connection with the license, distribution or sale of any Non-B12 Product, subject to the priority described below and (b) a Royalty Match (as described below), to the extent such Royalty Match does not cause the Company's cash as of the end of such year to be less than the Minimum Cash Balance and subject to the priority described below.

The Reimbursement Notes provide for a new maturity date of the earlier of (a) March 31, 2022 and (b) immediately prior to the time that any amounts outstanding under the Loan Agreement are repaid (subject to acceleration upon the occurrence of certain events of default specified in the Reimbursement Notes), and bear interest at the rate of 10% per annum, compounded monthly, which interest is payable in the form of additional Reimbursement Notes. The Reimbursement Notes are collateralized by a first priority lien in favor of the Lenders on substantially all of the Company's assets. The Reimbursement Notes are convertible, at the option of the holders, at a conversion price of \$0.50 per share of common stock, which conversion price is subject to adjustment upon the occurrence of events specified in the Reimbursement Notes, including stock dividends, stock splits, certain fundamental corporate transactions, and certain issuances of common stock by the Company. The Reimbursement Notes must also be redeemed from time to time prior to maturity pursuant to a cash sweep of 50% of any cash proceeds received from any third party in connection with the license, distribution or sale of any Non-B12 Product, subject to the priority described below.

The Bridge Notes provide for a new maturity date of March 31, 2022 (subject to acceleration upon the occurrence of certain events of default specified in the Bridge Notes) and bear interest at 13% per year, compounded monthly and payable in the form of additional Bridge Notes. The Bridge Notes are collateralized by a first priority lien in favor of the Lenders on substantially all of the Company's assets. The Bridge Notes are convertible, at the option of the holders, at a conversion price of \$0.50 per share of common stock, which conversion price is subject to adjustment upon the occurrence of events specified in the Bridge Notes, including stock dividends, stock splits, certain fundamental corporate transactions, and certain issuances of common stock by the Company. The Bridge Notes must also be redeemed from time to time prior to maturity pursuant to (a) a cash sweep of 50% of any cash proceeds received from any third party in connection with the license, distribution or sale of any Non-B12 Product, subject to the priority described below and (b) a Royalty Match (as described below), to the extent such Royalty Match does not cause the Company's cash as of the end of such year to be less than the Minimum Cash Balance and subject to the priority described below.

The priority of the cash sweep for Non-B12 Products is as follows: (i) first, to redeem the Reimbursement Notes, (ii) second, to prepay principal and interest outstanding under the Loan Agreement; (ii) third, to reduce the

Commitment; (iv) fourth, to redeem the Convertible Notes; and (v) finally, to redeem the Bridge Notes.

As a condition to MHR entering into the Loan Agreement and amending and restating the MHR Notes, the Company and MHR entered into a Royalty Agreement (the Royalty Agreement ) on August 20, 2014 providing for the payment by the Company to MHR of certain royalties on the terms and conditions set forth therein.

Under the terms of the Royalty Agreement, the Company agreed to pay to MHR, subject to the terms and conditions of the Royalty Agreement, royalties in perpetuity (the Royalties ), commencing as of the date of the Royalty Agreement, in an amount equal to: twenty percent (20%) of all Net Product Sales (as defined in the Royalty Agreement) and any third party payments arising in connection with the sale of the B12 Product and related products, during any fiscal year; provided that, from and after October 1, 2015, if no amount of indebtedness is outstanding under the Loan Agreement (the Indebtedness Repayment Condition ), such amount shall be reduced to (i) five percent (5%) of all Net Sales and third party payments commencing with the first quarter immediately following the quarter in which the Indebtedness Repayment Condition is satisfied, or (ii) two and one half percent (2.5%) of all Net Sales commencing with the quarter immediately following the quarter in which the Indebtedness Repayment Condition is satisfied, but only with respect to the Net Sales made in any country in which there was not a Valid Patent Claim (as defined in the Royalty Agreement) and where generic entry of a competitive product not by the Company or its affiliates that does not

infringe a Valid Patent Claim in such country has occurred, in each case as of the last day of such Fiscal Quarter. Once the royalty rate has been reduced to 5%, the rate shall not be reinstated to 20% even if amounts become outstanding under the Loan Agreement as a result of Paid-In-Kind Royalties. Payments of Royalties shall be made in cash to the extent such Royalties do not cause the Company's cash as of the end of any year to be less than the Minimum Cash Balance, and otherwise shall be paid as Paid-In-Kind Royalties.

If any Royalties become due under the Royalty Agreement when the royalty rate is 5% or 2.5%, the Company is required to reduce the amount outstanding under the Loan Agreement, Convertible Notes and Bridge Notes in an amount equal to such royalty payment, to the extent such payment does not cause the Company's cash as of the end of such year to be less than the Minimum Cash Balance (the "Royalty Match"), in the following priority: (i) first, to prepay the Loan; (ii) second, to redeem the Convertible Notes; and (iii) finally, to redeem the Bridge Notes.

There is no assurance that the Company will be able to meet its obligations under the Loan Agreement, MHR Notes or Royalty Agreement, or to meet the required milestones under the Loan Agreement that are conditioned to future Borrowings thereunder. The failure to meet the foregoing could have severe consequences on the ability of the Company to continue its business.

The foregoing description of the Transaction Documents does not purport to be complete and is qualified in its entirety by reference to the full text of the Transaction Documents, each of which is attached hereto.

**Item 2.03. Creation of a Direct Financial Obligation or an Obligation under an Off-Balance Sheet Arrangement of a Registrant.**

(a) The information set forth in Item 1.01 of this Current Report on Form 8-K is incorporated by reference into this Item 2.03.

**Item 9.01. Financial Statements and Exhibits**

(d) Exhibits

<b>Exhibit No.</b>	<b>Description</b>
4.1	Loan Agreement, dated as of August 20, 2014, by and between Emisphere Technologies, Inc. and the Lenders named therein*
4.2	Form of Second Amended and Restated 13% Senior Secured Convertible Note*
4.3	Form of Second Amended and Restated Senior Secured Reimbursement Promissory Note*
4.4	Form of Second Amended and Restated Senior Secured Bridge Promissory Notes*
4.5	Amended and Restated Pledge and Security Agreement by and between Emisphere Technologies, Inc. and MHR Institutional Partners IIA LP*
10.1	Royalty Agreement, dated as of August 20, 2014, by and between Emisphere Technologies, Inc. and the other parties named therein*
99.1	Press Release of Emisphere Technologies, Inc., dated August 20, 2014

\*

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Exhibits to this document will be filed with the Company's Quarterly Report on Form 10-Q for the quarter ending September 30, 2014.



**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.

Emisphere Technologies, Inc.

August 21, 2014

By: /s/ Michael R. Garone

Name: Michael R. Garone

Title: Chief Financial Officer

**Exhibit Index**

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