NUPATHE INC.
Form 8-K
December 16, 2013

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): **December 15, 2013**

NuPathe Inc.

(Exact name of registrant as specified in its charter)

Delaware	**001-34836**	**20-2218246**
(State or other Jurisdiction of incorporation)	(Commission File Number)	(IRS Employer Identification No.)

7 Great Valley Parkway

Suite 300

Malvern, Pennsylvania	**19355**
(Address of Principal Executive Offices)	(Zip Code)

Registrant s telephone number, including area code: **(610) 232-0800**

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:

o Written communications pursuant to Rule 425 under the Securities Act (17 CFR 230.425)

o Soliciting material pursuant to Rule 14a-12 under the Exchange Act (17 CFR 240.14a-12)

o Pre-commencement communications pursuant to Rule 14d-2(b) under the Exchange Act (17 CFR 240.14d-2(b))

o 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.

Agreement and Plan of Merger

On December 15, 2013, NuPathe Inc., a Delaware corporation (the Company), entered into an Agreement and Plan of Merger (the Merger Agreement) with Endo Health Solutions Inc., a Delaware corporation (Parent), and DM Merger Sub Inc., a Delaware corporation and an indirect, wholly-owned subsidiary of Parent (Merger Sub).

Pursuant to the Merger Agreement, and upon the terms and subject to the conditions thereof, Merger Sub has agreed to commence a tender offer (the Offer) to acquire all of the shares of the Company s common stock (the Shares) for a purchase price of $2.85 per Share, net to the holder thereof in cash, without interest, plus the contractual right to receive up to an additional $3.15 per Share in contingent cash consideration payments (the Offer Price) payable upon certain sales milestones of the Company s ZECUITY product being achieved (as more fully described below).

The Offer will expire at midnight New York time on the 20th business day following the commencement date, unless extended in accordance with the terms of the Merger Agreement and the applicable rules and regulations of the Securities and Exchange Commission.

The Offer, if successful, will be followed by a merger (the Merger) of Merger Sub with and into the Company, with the Company as the surviving corporation and a wholly-owned subsidiary of Parent, unless Parent elects in accordance with the Merger Agreement to change the form of the Merger to provide that Merger Sub will instead be the surviving corporation, in either case pursuant to the procedure provided for under Section 251(h) of the Delaware General Corporation Law without any additional stockholder approvals. In the Merger, any Shares not tendered into the Offer, other than Shares held by the Company, Parent, Merger Sub or shareholders who have validly exercised their appraisal rights under the Delaware General Corporate Law, will be cancelled and automatically converted into the right to receive the same per share consideration paid to shareholders in the Offer.

At the effective time of the Merger (the Effective Time), each Company stock option will be canceled and the holder thereof will be entitled to receive, at the earliest Valuation Point (as defined in the Merger Agreement), if any, at which then applicable Per Share Paid Value (as defined in the Merger Agreement) exceeds the per-share exercise price, (i) an amount in cash equal to (A) the number of Shares subject to each such option (whether vested or unvested) held by such holder multiplied by the excess of (1) the then applicable Per Share Paid Value over (2) the per-share exercise price, and (ii) in respect of each Share subject to each such option (whether vested or unvested) held by such holder, each contingent cash consideration payment that, as of such Valuation Point, has not yet become payable. Additionally, at the Effective Time, vesting under each Other Equity Award (as defined in the Merger Agreement) will be accelerated and any restrictions with respect thereto shall lapse, and each outstanding Other Equity Award will be canceled and the holder thereof will be entitled to receive the Offer Price for each Share under such Other Equity Award.

The consummation of the Offer is subject to the satisfaction or waiver of certain conditions, including: (i) a minimum of the majority of outstanding Shares on a fully-diluted basis having been tendered into the Offer, (ii) the expiration or termination of the waiting period under the Hart Scott Rodino Antitrust Improvements Act, to the extent applicable, (iii) the absence of litigation or governmental action challenging or seeking to prohibit the Offer or the Merger, (iv) there not having been a Material Adverse Effect with respect to the Company, and (v) other customary conditions.

The Merger Agreement contains certain termination rights of Parent and the Company and provides that, upon the termination of the Merger Agreement under particular circumstances, the Company would be required to pay Parent a termination fee equal to $5 million.

Prior to the Effective Time the Company may borrow funds from Parent on the terms set forth on Exhibit C to the Merger Agreement, provided that if the parties are unable to agree on definitive documentation with respect to such borrowing, the Company may terminate the Merger Agreement so long as at such time a majority of the outstanding Shares on a fully-diluted basis have been tendered in the Offer.

The foregoing description of the Offer, the Merger and the Merger Agreement and the transactions contemplated thereby does not purport to be complete and is qualified in its entirety by reference to the full text of the Merger Agreement attached hereto as Exhibit 2.1, which is incorporated herein by reference.

The representations, warranties and covenants of the parties contained in the Merger Agreement have been made solely for the benefit of such parties. In addition, such representations, warranties and covenants (i) have been made only for purposes of the Merger Agreement, (ii) have been qualified by confidential disclosures made by the parties to each other in connection with the Merger Agreement, (iii) are subject to materiality qualifications contained in the Merger Agreement which may differ from what may be viewed as material by investors, (iv) were made only as of the date of the Merger Agreement or such other date as is specified in the Merger Agreement and (v) have been included in the Merger Agreement for the purpose of allocating risk between the contracting parties rather than establishing matters as facts. Accordingly, the Merger Agreement is included with this filing only to provide investors with information regarding the terms of the Merger Agreement, and not to provide investors with any other factual information regarding the parties or their respective businesses. Investors should not rely on the representations, warranties or covenants, or any descriptions thereof, as characterizations of the actual state of facts or condition of the parties or any of their respective subsidiaries or affiliates. Moreover, information concerning the subject matter of the representations and warranties may change after the date of the Merger Agreement, which subsequent information may or may not be fully reflected in the parties public disclosures.

Contingent Cash Consideration Agreement

Pursuant to the Merger Agreement, prior to the closing of the Merger, Merger Sub will enter into a Contingent Cash Consideration Agreement (the Contingent Cash Consideration Agreement) with Parent and American Stock Transfer & Trust Company (the Paying Agent), for the purpose of establishing the terms, policies and procedures by which the contingent cash consideration payments will be paid for (i) each Share, (ii) warrant to purchase Shares, (iii) Option that has an exercise price that is less than the Per Share Paid Value as of any Valuation Point and (iv) each Other Equity Award (each, a CCCP).

In the event that Net Sales (as defined below) during any four consecutive calendar quarters are at least $100,000,000, on or prior to the sixtieth day following the ninth anniversary of the date of the first commercial sale of ZECUITY (the Termination Date), then Merger Sub will pay (through the Paying Agent) to each CCCP holder $2.15 per CCCP. In addition, in the event that Net Sales during any four consecutive calendar quarters are at least $300,000,000, on or prior to the Termination Date, then Merger Sub will pay (through the Paying Agent) to each CCCP holder $1.00 per CCCP.

Net Sales means with respect to ZECUITY, the gross amount invoiced by or on behalf of Merger Sub or its affiliates, licensees or sublicensees for ZECUITYsold to third parties other than licensees or sublicensees in bona fide, arm s-length transactions, less the following deductions, without duplication, to the extent included in the gross invoiced sales price of the product or otherwise directly paid or incurred by Merger Sub, its affiliates, licensees or sublicensees acting on its behalf with respect to the sale of such product:

(1) normal and customary trade and quantity discounts actually allowed and properly taken directly with respect to sales of the product;

(2) amounts repaid or credited by reasons of defects, recalls, returns, rebates and allowances of goods or because of retroactive price reductions specifically identifiable to the product;

(3) chargebacks, rebates (or the equivalent thereof) and other amounts paid on sale or dispensing of the product;

(4) rebates (or the equivalent thereof) and administrative fees paid to medical healthcare organizations, to group purchasing organizations or to trade customers in line with approved contract terms or other normal and customary understandings and arrangements;

(5) amounts payable resulting from governmental (or agency thereof) mandated rebate programs or chargeback programs;

(6) tariffs, duties, excise, sales, value-added and other taxes (other than taxes based on income) and charges of Governmental Authorities (as defined in the Contingent Cash Consideration Agreement);

(7) cash discounts for timely payment;

(8) rebates paid to wholesalers for inventory management programs; and

(9) amounts repaid or credited or provisions made for uncollectible amounts on previously sold products; and

(10) required distribution commissions and fees (such as fees related to services provided pursuant to distribution service agreements with major wholesalers) payable to any third party providing distribution services to Merger Sub so long as such commissions and fees are consistent with the distribution commissions and fees payable in respect to other branded prescription products commercialized by Merger Sub;

all as determined in accordance with Merger Sub s usual and customary accounting methods, which will be in accordance with U.S. Generally Accepted Accounting Principles; or in accordance with International Financial Reporting Standards (IFRS), should Merger Sub be required to, or elect to maintain records and books of accounts in accordance with IFRS. Sales from Merger Sub to its affiliates, licensees or sublicensees will be disregarded for purposes of calculating Net Sales. Any of the items set forth above that would otherwise be deducted from the invoice price in the calculation of Net Sales but which are charged to third parties will not be deducted from the invoice price in the calculation of Net Sales. Further: (1) in the case of any sale or other disposal of a product between or among Merger Sub and its affiliates, licensees and sublicensees, for resale, Net Sales will be calculated as above only on the value charged or invoiced on the first arm s-length sale thereafter to a third party; (2) in the case of any sale which is not invoiced or is delivered before invoice, Net Sales will be calculated at the time of shipment or when the product is paid for, if paid for before shipment or invoice; and (3) in the case of any sale or other disposal for value, such as barter or counter-trade, of any product, or part thereof, other than in an arm s-length transaction exclusively for money and excluding any patient assistance programs, Net Sales will be calculated as above on the value of the non-cash consideration received or the fair market price (if higher) of the product in the country of sale or disposal.

Parent will absolutely and unconditionally guarantee the performance when due of all payment obligations of Merger Sub under the Contingent Cash Consideration Agreement.

The foregoing description of the Contingent Cash Consideration Agreement and the transactions contemplated thereby does not purport to be complete and is qualified in its entirety by reference to the full text of the form of Contingent Cash Consideration Agreement attached hereto as Exhibit 99.1, which is incorporated herein by reference.

Item 8.01. Other Events.

On December 16, 2013, the Company issued a joint press release announcing the Merger Agreement. A copy of the press release is attached hereto as Exhibit 99.2 and is incorporated herein by reference.

Additional Information and Where to Find It

THE TENDER OFFER DESCRIBED IN THIS DOCUMENT HAS NOT YET COMMENCED. THIS ANNOUNCEMENT IS NEITHER AN OFFER TO PURCHASE NOR A SOLICITATION OF AN OFFER TO SELL SHARES OF THE COMPANY.

At the time the offer is commenced, an affiliate of Parent will file a Tender Offer Statement on Schedule TO with the U.S. Securities and Exchange Commission, and the Company will file a Solicitation/Recommendation Statement on Schedule 14D-9 with respect to the tender offer.

The Offer to Purchase, the related Letter of Transmittal and certain other offer documents, as well as the Solicitation/Recommendation Statement, will be made available to all stockholders of the Company at no expense to

them. The Tender Offer Statement and the Solicitation/Recommendation Statement will be made available for free at the Commission s web site at www.sec.gov. Free copies of these materials and certain other offering documents will be made available by the information agent for the offer.

COMPANY STOCKHOLDERS AND OTHER INVESTORS ARE URGED TO READ THE TENDER OFFER MATERIALS (INCLUDING AN OFFER TO PURCHASE, A RELATED LETTER OF TRANSMITTAL AND CERTAIN OTHER OFFER DOCUMENTS) AND THE SOLICITATION/RECOMMENDATION STATEMENT BECAUSE THEY WILL CONTAIN IMPORTANT INFORMATION WHICH SHOULD BE READ CAREFULLY BEFORE ANY DECISION IS MADE WITH RESPECT TO THE TENDER OFFER.

Forward-Looking Statements

This filing contains information that includes or is based on forward-looking statements within the meaning of Section 27A of the Securities Act of 1933, as amended, or the Securities Act, and Section 21E of the Securities Exchange Act of 1934, as amended, or the Exchange Act. These statements are based on current expectations of future events. Also, statements including words such as believes, expects, anticipates, intends, estimates, plan, will, may or similar expressions are forward-looking statements. If underlying assumptions prove inaccurate or unknown risks or uncertainties materialize, actual results could vary materially from Parent s and the Company s expectations and projections. Risks and uncertainties include the degree to which, if any, that the transaction will be accretive to Parent, whether Parent will be able to launch ZECUITY on schedule, whether any of the net sales milestones for ZECUITY will be achieved, the satisfaction of closing conditions for the acquisition, including any required clearance under the Hart-Scott-Rodino Antitrust Improvements Act and receipt of certain other regulatory approvals for the transaction, the tender of a majority of the outstanding shares of common stock of the Company on a fully-diluted basis, and the possibility that the transaction will not be completed; general industry conditions and competition; economic conditions, such as interest rate and currency exchange rate fluctuations; technological advances and patents attained by competitors; challenges inherent in new product development, including obtaining regulatory approvals; domestic and foreign health care reforms and governmental laws and regulations; and trends toward health care cost containment. A further list and description of these risks, uncertainties and other factors can be found in Parent s Annual Report on Form 10-K for the fiscal year ended December 31, 2012, filed with the U.S. Securities and Exchange Commission (SEC) on March 1, 2013, and its Quarterly Report on Form 10-Q for the fiscal quarter ended September 30, 2013, filed with the SEC on November 5, 2013 and the Company s Annual Report on Form 10-K for the fiscal year ended December 31, 2012 as filed with the SEC on March 27, 2013 and its Quarterly Report on Form 10-Q for the fiscal quarter ended September 30, 2013, filed with the SEC on November 14, 2013, as well as the tender offer documents to be filed by Parent, and the Solicitation/Recommendation Statement to be filed by the Company. Copies of these filings, as well as subsequent filings, are available online at www.sec.gov, www.endo.com, www.nupathe.com or on request from Parent or the Company. Neither Parent nor the Company undertakes to update any forward-looking statements as a result of new information or future events or developments.

Item 9.01. Financial Statements and Exhibits.

(d) Exhibits.

The following exhibits are filed herewith:

Exhibit Number	**Description**
2.1*	

	Agreement and Plan of Merger, dated as of December 15, 2013, by and among Endo Health Solutions Inc., DM Merger Sub Inc. and NuPathe Inc.
99.1	Form of Contingent Cash Consideration Agreement by and among DM Merger Sub Inc., American Stock Transfer & Trust Company and Endo Health Solutions Inc.
99.2	Press release issued on December 16, 2013

* Schedules to the agreement have been omitted pursuant to Item 601(b)(2) of Regulation S-K. The Company undertakes to furnish supplementally copies of any of the omitted schedules upon request by the SEC.

Signature(s)

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.

NUPATHE INC.

Date: December 16, 2013

By: /s/ Keith A. Goldan
Keith A. Goldan
Senior Vice President and Chief Financial Officer

Exhibit Index

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