

Capnia, Inc.
Form 8-K
October 15, 2015

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): October 12, 2015

CAPNIA, INC.

(Exact name of registrant as specified in its charter)

Delaware
(State or other jurisdiction

of incorporation)

001-36593
(Commission

File No.)
1235 Radio Road, Suite 110

77-0523891
(IRS Employer

Identification Number)

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Redwood City, CA 94065

(Address of principal executive offices)

(650) 213-8444

(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:

- .. 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 1.01. Entry into a Material Definitive Agreement

On October 12, 2015, Capnia, Inc. (the **Company**) entered into a Securities Purchase Agreement (the **Purchase Agreement**) with funds managed by Sabby Management, LLC (**Sabby**), pursuant to which the Company agreed to sell to Sabby, in a private placement, an aggregate of up to 10,000 shares of Series A Convertible Preferred Stock (the **Series A Convertible Preferred**) at an aggregate purchase price of \$10,000,000, which is convertible into 5,405,405 shares of our common stock (**Common Stock**), based on a fixed conversion price of \$1.85 per share on an as-converted basis, and Series D Common Stock Warrants (the **Series D Warrants**) to purchase 2,702,704 shares of our Common Stock, based on a fixed per share exercise price of \$2.46. The transactions contemplated by the Purchase Agreement (collectively, the **Transactions**) are expected to be consummated at the First Closing (as defined in the Purchase Agreement) to be held on or about October 15, 2015. A copy of the Purchase Agreement is attached hereto as Exhibit 10.1. A description of the material terms of the Transactions is set forth below and is qualified in its entirety by reference to the documents attached hereto as Exhibits 3.1, 4.1, 10.1, and 10.2, which are incorporated herein by reference. On October 12, 2015, the Company also issued a press release announcing the pricing of the offering. A copy of the press release is attached as Exhibit 99.1. See Item 5.03 herein for a discussion of the terms of the Preferred Stock.

Aggregate Purchase Price

The aggregate purchase price to be paid by Sabby for the Series A Convertible Preferred and the Series D Warrants is expected to be approximately \$10,000,000 if fully subscribed. The foregoing description of the purchase price is not complete and is qualified in its entirety by reference to the full text of the Purchase Agreement, which is filed herewith as Exhibit 10.1 to this Current Report on Form 8-K and is incorporated by reference herein.

Closings

The First Closing Date (as defined in the Purchase Agreement) is subject to satisfaction of customary closing conditions set forth in the Purchase Agreement and is currently expected to occur on or about October 15, 2015. Upon the First Closing Date, the Company agrees to sell, and Sabby agrees to purchase up to an aggregate of \$4,554,999.60 worth of shares of Series A Convertible Preferred. The aggregate number of shares of Series A Convertible Preferred sold at the First Closing is anticipated to be 4,555 shares, which are convertible into 2,462,162 shares of Common Stock. Sabby will also receive Series D Warrants exercisable for the purchase 1,231,082 shares (based on the full \$4,554,999.60 investment) of Common Stock, at an exercise price of \$2.46 per share.

The Second Closing Date (as defined in the Purchase Agreement) is subject to stockholder approval to issue 20% or more of our Common Stock and effectiveness of the a registration statement covering the resale of the Series A Convertible Preferred and the shares underlying the Series D Warrants. Upon the Second Closing Date (as defined in the Purchase Agreement), the Company agrees to sell, and Sabby agrees to purchase up to an aggregate of \$5,444,999.50 of shares of Series A Convertible Preferred. The aggregate number of shares of Series A Convertible Preferred sold at the Second Closing shall be up to 5,445 shares, which are convertible into 2,943,243 shares of Common Stock. Sabby will also receive Series D Warrants exercisable for the purchase of up to 1,471,622 shares of Common Stock, at an exercise price of \$2.46 per share.

The foregoing description of the closings is not complete and is qualified in its entirety by reference to the full text of the Purchase Agreement, which is filed herewith as Exhibit 10.1 to this Current Report on Form 8-K and is incorporated by reference herein.

Participation in Future Financing.

The Company is obligated to, from the date of the Purchase Agreement until the date that is the 12-month anniversary of the Effective Date (as defined in the Purchase Agreement), and upon any issuance by the Company or any of its

subsidiaries of Common Stock or Common Stock equivalents for cash consideration, indebtedness or a combination of units thereof, to provide Sabby with the right to participate in such offering in an amount of up to 25% of the total offering, on the same terms, conditions and price provided for in the offering. The foregoing description of the participation in future financings is not complete and is qualified in its entirety by reference to the full text of the Purchase Agreement, which is filed herewith as Exhibit 10.1 to this Current Report on Form 8-K and is incorporated by reference herein.

Standstill.

The Company is obligated to, from the date of the Purchase Agreement until ninety (90) days after the Effective Date whereby all of the Registrable Securities (as defined in the Purchase Agreement) may be freely sold without restriction, refrain from the issuing, or entering into any agreement to issue, or announcing the issuance or proposed issuance of any shares of Common Stock

or Common Stock equivalents (subject to certain exclusions). The foregoing description of the standstill is not complete and is qualified in its entirety by reference to the full text of the Purchase Agreement, which is filed herewith as Exhibit 10.1 to this Current Report on Form 8-K and is incorporated by reference herein.

Placement Agent

Pursuant to the terms of the letter agreement between the Company and Maxim Group, LLC (**Maxim**) dated September 17, 2015 (the **Engagement Letter**), Maxim has no obligation to buy any of the securities or to arrange for the purchase or sale of any specific number or dollar amount of securities. The Company has agreed to pay Maxim a fee equal to seven percent (7.0%) of gross proceeds received by the Company at each closing. Maxim will also receive a Common Stock Warrant (the **Placement Agent Warrant**) to purchase 2.0% of the total number of shares of Common Stock underlying the Series A Convertible Preferred and the Series D Warrants being sold in the offering. The foregoing description of the Engagement Letter and the Placement Agent Warrant is not complete and is qualified in its entirety by reference to the full text of the Engagement Letter and the Placement Agent Warrant, which are filed herewith as Exhibits 1.1 and 4.4 to this Current Report on Form 8-K and are incorporated by reference herein.

Stockholder Approval and Voting Agreements

As discussed above, NASDAQ Marketplace Rule 4350(i)(1)(D)(ii) requires that, for the sale, issuance or potential issuance by the Company of Common Stock (or securities convertible into or exercisable for Common Stock) equal to 20% or more of the Common Stock outstanding before the issuance, for less than the greater of the book or market value of the Common Stock, the Company must obtain stockholder approval for the issuance. Accordingly, as set forth above, the sale of shares on the Second Closing Date and the exercise of the Series D Warrants into Common Stock by Sabby are each limited by and subject to obtaining stockholder approval.

Certain stockholders of the Company shall enter into a Voting Agreement to be dated on or about October 15, 2015 (the **Voting Agreement**), pursuant to which they will vote in favor of any resolution presented to the stockholders of the Company to approve the issuance, in the aggregate, of 20% or more of the Common Stock outstanding before the issuance, for less than the greater of the book or market value of the Common Stock.

The foregoing description of the Voting Agreement and the Company's obligation to solicit stockholder approval to increase the number of shares issuable by the Company is not complete and is qualified in its entirety by reference to the full text of the Voting Agreement and the Purchase Agreement, which are filed herewith as Exhibits 9.1 and 10.1 to this Current Report on Form 8-K and are incorporated by reference herein.

Lock-Up Agreement

In consideration of Sabby's agreement to enter into the Securities Purchase Agreement and to purchase the Series A Convertible Preferred and the Series D Warrants, Vivo Ventures and its affiliates will agree pursuant to a Lock-Up Agreement (the **Lock-Up Agreement**) that, without the prior written consent of Sabby, such stockholders will not, during the 90 day period (the **Lock-Up Period**) following the Effective Date, directly or indirectly, without the prior written consent of Sabby or unless otherwise provided in the Lock-up Agreement: (a) offer, sell, agree to offer or sell, solicit offers to purchase, grant any call option or purchase any put option with respect to, pledge, borrow or otherwise dispose of any security of the Company held by them, (b) establish or increase any put equivalent position or liquidate or decrease any call equivalent position with respect to any security of the Company held by them, or otherwise enter into any swap, derivative or other transaction or arrangement that transfers to another, in whole or in part, any economic consequence of ownership of any security of the Company held by them, or (c) publicly disclose the intention to make any such offer, sale, pledge or disposition, or to enter into any such transaction, swap, hedge or other arrangement. Notwithstanding anything herein to the contrary, the lock-up shall not apply to any sales made by such stockholders at or above a sales price of \$3.50 (subject to adjustment for reverse and forward stock splits and the

like). The foregoing description of the Lock-Up Agreement is not complete and is qualified in its entirety by reference to the full text of the Lock-Up Agreement, which is filed herewith as Exhibit 10.3 to this Current Report on Form 8-K and is incorporated by reference herein.

A description of the material terms of the Transactions set forth above is qualified in its entirety by reference to the documents attached hereto as Exhibits 1.1, 3.1, 4.1, 4.2, 9.1, 10.1, 10.2, and 10.3, to this Current Report on Form 8-K and is incorporated by reference herein.

ITEM 3.02. Unregistered Sales of Equity Securities.

The information contained in Item 1.01 is hereby incorporated by reference. The issuance of the Series A Convertible

Preferred and the Series D Warrants to Sabby will not be registered, and shall be made in reliance on an exemption from registration pursuant to Section 4(2) of the Securities Act of 1933, as amended and Rule 506 of Regulation D, because the Series A Convertible Preferred and the Series D Warrants are only being offered to accredited investors.

ITEM 3.03. Material Modification to Rights of Security Holders.

See Item 5.03 herein for a discussion of the terms of the Preferred Stock.

ITEM 5.03 Amendments to Articles of Incorporation or Bylaws; Change in Fiscal Year.

On or about October 13, 2015, the Company filed a Certificate of Designations of Preferences, Rights and Limitations of Series A Convertible Preferred with the Secretary of State of the State of Delaware. The number of shares of Preferred Stock designated is 10,000 and each share of Preferred Stock has a stated value equal to \$1,000. Under the terms of the Series A Convertible Preferred and the Series D Warrants, until shareholder approval has been obtained, the Company cannot issue any shares of Common Stock to Sabby, and Sabby cannot exercise the Series D Warrants into Common Stock, nor convert the Preferred Stock into Common Stock, to the extent it would result in ownership in excess of 4.99%.

Voting Rights.

Except as otherwise provided herein or as otherwise required by law, the Series A Convertible Preferred shall have no voting rights. However, as long as any shares of Series A Convertible Preferred are outstanding, the Company shall not, without the affirmative vote of the holders of a majority of the then outstanding shares of the Series A Convertible Preferred, (a) alter or change adversely the powers, preferences or rights given to the Series A Convertible Preferred or alter or amend the Certificate of Designation, (b) amend its certificate of incorporation or other charter documents in any manner that adversely affects any rights of the holders of Series A Convertible Preferred, (c) increase the number of authorized shares of Series A Convertible Preferred, or (d) enter into any agreement with respect to any of the foregoing.

Liquidation.

Upon any liquidation, dissolution or winding-up of the Company, whether voluntary or involuntary that is not a Fundamental Transaction (as defined in the Certificate of Designation), the holders of Series A Convertible Preferred shall be entitled to receive out of the assets, whether capital or surplus, of the Company the same amount that a holder of Common Stock would receive if the Series A Convertible Preferred were fully converted (disregarding for such purposes any conversion limitations hereunder) to Common Stock which amounts shall be paid on a pari passu basis with all holders of Common Stock.

Conversion Price.

The conversion price for the Preferred Stock shall equal \$1.85, subject to certain terms as described therein.

The foregoing description of the Preferred Stock is not complete and is qualified in its entirety by reference to the full text of the Certificate of Designations of Preferences, Rights and Limitations of Series A Convertible Preferred, which is filed herewith as Exhibit 3.1 to this Current Report on Form 8-K and is incorporated by reference herein.

ITEM 8.01. Other Events.

On October 12, 2015, the Company issued a press release announcing the Company's entry into the Purchase Agreement pursuant to which it will issue up to \$10 million of the Series A Convertible Preferred and the Series D

Warrants in a private placement to Sabby. A copy of the press release is attached as Exhibit 5.1.

ITEM 9.01 Financial Statements and Exhibits

(d) Exhibits. The following material is filed as an exhibit to this Current Report on Form 8-K:

Exhibit No.	Description
1.1	Engagement Letter dated September 17, 2015, between Capnia, Inc. and Maxim Group, LLC
3.1	Certificate of Designation of Preferences, Rights and Limitations of Series A Convertible Preferred Stock
4.1	Form of Series D Common Stock Purchase Warrant
4.2	Form of Placement Agent Warrant
4.3	Form of Series D Common Stock Warrant Certificate
4.4	Form of Series A Convertible Preferred Stock Certificate
9.1	Form of Voting Agreement
10.1	Securities Purchase Agreement dated October 12, 2015
10.2	Form of Registration Rights Agreement
10.3	Form of Lock-Up Agreement
99.1	Press Release dates October 12, 2015

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.

CAPNIA, INC.

Date: October 15, 2015

By: /s/ David D. O Toole
David D. O Toole
Chief Financial Officer

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