

ZOSANO PHARMA CORP

FORM S-8

(Securities Registration: Employee Benefit Plan)

Filed 06/05/17

| | |
|-------------|--|
| Address | 34790 Ardentech Court Fremont, CA 94555 |
| Telephone | (510) 745-1200 |
| CIK | 0001587221 |
| Symbol | ZSAN |
| SIC Code | 2834 - Pharmaceutical Preparations |
| Industry | Biotechnology & Medical Research |
| Sector | Healthcare |
| Fiscal Year | 12/31 |

**UNITED STATES
SECURITIES AND EXCHANGE COMMISSION**
Washington, D.C. 20549

FORM S-8
REGISTRATION STATEMENT
UNDER
THE SECURITIES ACT OF 1933

ZOSANO PHARMA CORPORATION

(Exact name of registrant as specified in its charter)

Delaware
(State or other jurisdiction of
incorporation or organization)

45-4488360
(I.R.S. Employer
Identification No.)

34790 Ardentech Court
Fremont, California 94555
(Address of Principal Executive Offices)
(Zip Code)

Zosano Pharma Corporation Amended and Restated 2014 Equity and Incentive Plan
Inducement Stock Option Awards
(Full title of the plan)

John Walker
Interim Chief Executive Officer
Zosano Pharma Corporation
34790 Ardentech Court
Fremont, California 94555
Telephone: (510) 745-1200
(Name and address of agent for service)
(Telephone number, including area code, of agent for service)

Copies to :

Stacie S. Aarestad, Esq.
Jeffrey L. Quillen, Esq.
Foley Hoag LLP
Seaport West
155 Seaport Boulevard
Boston, Massachusetts 02210
(617) 832-1000

Indicate by check mark whether the registrant is a large accelerated filer, an accelerated filer, a non-accelerated filer, a smaller reporting company or an emerging growth company. See the definitions of "large accelerated filer," "accelerated filer," "smaller reporting company," and "emerging growth company" in Rule 12b-2 of the Exchange Act.

Large accelerated filer

Accelerated filer

Non-accelerated filer (Do not check if a smaller reporting company)

Smaller reporting company

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 7(a)(2)(B) of the Securities Act.

CALCULATION OF REGISTRATION FEE

| Title of securities to be registered | Amount to be registered (1) | Proposed maximum offering price per share | Proposed maximum aggregate offering price | Amount of registration fee |
|--|-----------------------------|---|---|----------------------------|
| Common Stock, par value \$0.0001 per share | 580,000 (2) | \$0.57 (2) | \$330,600 (2) | \$38.32 |
| Common Stock, par value \$0.0001 per share | 479,008 (3) | \$1.355 (4) | \$649,056 (4) | \$75.23 |
| Common Stock, par value \$0.0001 per share | 252,000 (5) | \$0.77 (5) | \$194,040 (5) | \$22.49 |
| Common Stock, par value \$0.0001 per share | 35,000 (6) | \$1.14 (6) | \$39,900 (6) | \$4.62 |
| Total: | 1,346,008 | N/A | \$1,213,596 | \$140.66 |

1. Pursuant to Rule 416(a) under the Securities Act, this Registration Statement shall also cover any additional shares of the registrant's common stock that become issuable by reason of any stock dividend, stock split, recapitalization or other similar transaction effected without the receipt of consideration that increases the number of the registrant's outstanding shares of common stock.
2. Represents 580,000 shares of the registrant's common stock underlying stock options previously granted under the Zosano Pharma Corporation Amended and Restated 2014 Equity and Incentive Plan (the "2014 Plan") with an exercise price of \$0.57 per share, subject to approval of an amendment to the 2014 Plan (the "Plan Amendment"). The Plan Amendment was approved by the stockholders on May 31, 2017. Solely for the purpose of calculating the amount of the registration fee pursuant to Rule 457(h) under the Securities Act, the offering price per share and the aggregate offering price are based upon \$0.57, which is the per share exercise price of the option.
3. Represents 359,008 shares of the registrant's common stock issuable under the 2014 Plan as the result of an automatic annual increase on January 1, 2017 and an additional 120,000 shares of the registrant's common stock issuable under the 2014 Plan as the result of the Plan Amendment, which was approved by the stockholders on May 31, 2017.
4. The proposed maximum offering price per share has been estimated in accordance with Rule 457(c) and Rule 457(h) under the Securities Act solely for the purpose of calculating the registration fee with respect to shares reserved for future issuance based on the average of the high and low price of the registrant's common stock as quoted on the NASDAQ Capital Market on May 25, 2017.
5. Represents 252,000 shares of the registrant's common stock issuable upon exercise of a non-statutory stock option granted to Georgia Erbez on September 7, 2016 as an inducement material to her acceptance of employment with the registrant, in accordance with the inducement grant exception under NASDAQ Rule 5635(c)(4). Solely for the purpose of calculating the amount of the registration fee pursuant to Rule 457(h) under the Securities Act, the offering price per share and the aggregate offering price are based upon \$0.77, which is the per share exercise price of the option.
6. Represents 35,000 shares of the registrant's common stock issuable upon exercise of a non-statutory stock option granted to an employee on January 19, 2017 as an inducement material to their acceptance of employment with the registrant, in accordance with the inducement grant exception under NASDAQ Rule 5635(c)(4). Solely for the purpose of calculating the amount of the registration fee pursuant to Rule 457(h) under the Securities Act, the offering price per share and the aggregate offering price are based upon \$1.14, which is the per share exercise price of the option.

PART I
INFORMATION REQUIRED IN THE SECTION 10(a) PROSPECTUS

Explanatory Note Pursuant to General Instruction E of Form S-8

This Registration Statement registers additional securities of the same class as other securities for which a Registration Statement filed on Form S-8 relating to our Amended and Restated 2014 Equity and Incentive Plan (the "2014 Plan") is already effective. Pursuant to Instruction E to Form S-8, we incorporate by reference into this Registration Statement the contents of the Registration Statement we filed on Form S-8 (File No. 333-203039) with the Securities and Exchange Commission on March 26, 2015, in its entirety and including exhibits thereto, relating to the registration of 1,400,000 shares of our common stock, \$0.0001 par value per share, authorized for issuance under the 2014 Plan. This Registration Statement provides for the registration of an additional 700,000 shares of our common stock authorized for issuance under the 2014 Plan pursuant to an amendment to the 2014 Plan adopted by our board and approved by the stockholders on May 31, 2017.

The number of shares of our common stock available for issuance under the 2014 Plan is also subject to an automatic annual increase on each January 1st equal to the lesser of: (i) three percent (3%) of the number of shares of common stock issued and outstanding on the immediately preceding January 1st or (ii) such lesser number of shares of Stock as determined by the Compensation Committee. This Registration Statement also registers an additional 359,008 shares of our common stock resulting from the automatic annual increase effective as of January 1, 2017.

In addition, this Registration Statement is being filed for the purpose of registering an aggregate of 287,000 shares of common stock issuable upon the exercise of two non-statutory stock options granted to certain employees, as an inducement material to their employment with the Company, in accordance with NASDAQ Rule 5635(c)(4).

PART II
INFORMATION REQUIRED IN THE REGISTRATION STATEMENT

Item 8. Exhibits.

The exhibits to this Registration Statement are listed in the Exhibit Index attached hereto and incorporated herein by reference.

SIGNATURES

Pursuant to the requirements of the Securities Act of 1933, the registrant certifies that it has reasonable grounds to believe that it meets all of the requirements for filing on Form S-8 and has duly caused this Registration Statement to be signed on its behalf by the undersigned, thereunto duly authorized, in the City of Fremont, State of California, on June 5, 2017.

ZOSANO PHARMA CORPORATION

/s/ John Walker

Name: John Walker

Title: Interim Chief Executive Officer

POWER OF ATTORNEY

KNOW ALL BY THESE PRESENTS that each individual whose signature appears below constitutes and appoints each of John Walker and Georgia Erbez as such person's true and lawful attorney-in-fact and agent with full power of substitution and resubstitution, for such person in such person's name, place and stead, in any and all capacities, to sign any and all amendments (including post-effective amendments) to this Registration Statement, and to file the same, with all exhibits thereto, and all documents in connection therewith, with the SEC, granting unto each said attorney-in-fact and agent full power and authority to do and perform each and every act and thing requisite and necessary to be done in and about the premises, as fully to all intents and purposes as such person might or could do in person, hereby ratifying and confirming all that any said attorney-in-fact and agent, or any substitute or substitutes of any of them, may lawfully do or cause to be done by virtue hereof.

In accordance with the requirements of the Securities Act of 1933, this Registration Statement has been signed by the following persons in the capacities and on the dates indicated.

| <u>Signature</u> | <u>Title</u> | <u>Date</u> |
|---|--|--------------|
| <u>/s/ John Walker</u> John Walker | Interim Chief Executive Officer and Director <i>(Principal Executive Officer)</i> | June 5, 2017 |
| <u>/s/ Georgia Erbez</u> Georgia Erbez | Chief Business Officer and Chief Financial Officer <i>(Principal Financial and Accounting Officer)</i> | June 5, 2017 |
| <u>/s/ Joseph Hagan</u> Joseph Hagan | Director | June 5, 2017 |
| <u>/s/ Bruce Steel</u> Bruce Steel | Director | June 5, 2017 |
| <u>/s/ Troy Wilson</u> Troy Wilson | Director | June 5, 2017 |
| <u>/s/ Kleanthis G. Xanthopoulos</u> Kleanthis G. Xanthopoulos | Director | June 5, 2017 |

EXHIBIT INDEX

| Exhibit No. | Description |
|-------------|---|
| 3.1 | Amended and Restated Certificate of Incorporation of Zosano Pharma Corporation (incorporated by reference to Exhibit 3.1 to the registrant's Current Report on Form 8-K filed with the SEC on February 3, 2015 (File No. 001-36570)). |
| 3.2 | Amended and Restated Bylaws of Zosano Pharma Corporation (incorporated by reference to Exhibit 3.2 to the registrant's Current Report on Form 8-K filed with the SEC on February 3, 2015 (File No. 001-36570)). |
| 4.1 | Specimen certificate evidencing shares of common stock of Zosano Pharma Corporation (incorporated by reference to Exhibit 4.1 to the registrant's Amendment No. 3 to Registration Statement on Form S-1 filed with the SEC on July 25, 2014 (File No. 333-196983)). |
| 5.1 | Opinion of Foley Hoag LLP. Filed herewith. |
| 23.1 | Consent of Marcum LLP. Filed herewith. |
| 23.2 | Consent of Foley Hoag LLP (included in Exhibit 5.1). Filed herewith. |
| 24.1 | Power of attorney (included on signature page of this Registration Statement). Filed herewith. |
| 99.1 | Zosano Pharma Corporation Amended and Restated 2014 Equity and Incentive Plan (incorporated by reference to Exhibit 10.1 to the registrant's Current Report on Form 8-K filed with the SEC on June 5, 2017 (File No. 001-36570)). |
| 99.2 | Form of Zosano Pharma Corporation Nonstatutory Option Award Agreement for Inducement Option Awards. Filed herewith. |



Seaport West
155 Seaport Boulevard
Boston, MA 02210-2600

617 832 1000 *main*
617 832 7000 *fax*

June 5, 2017

Zosano Pharma Corporation
34790 Ardentech Court
Fremont, California 94555

Re: Registration Statement on Form S-8

Ladies and Gentlemen:

We are familiar with the Registration Statement on Form S-8 (the “**Registration Statement**”) being filed by Zosano Pharma Corporation, a Delaware corporation (the “**Company**”), with the Securities and Exchange Commission (the “**Commission**”) under the Securities Act of 1933, as amended (the “**Securities Act**”), on the date hereof. The Registration Statement relates to the offer and sale by the Company of up to 1,346,008 shares of its common stock, par value \$0.0001 per share, of which (i) up to 1,059,008 shares (the “**2014 Plan Shares**”) are issuable under the Company’s Amended and Restated 2014 Equity and Incentive Plan (the “**2014 Plan**”), and (ii) up to 287,000 shares (the “**Inducement Shares**”) and, together with the 2014 Plan Shares, the “**Shares**”) are issuable under Nonstatutory Stock Option Award Agreements between the Company and certain of its employees (the “**Inducement Award Agreements**”) as an inducement to such employee’s acceptance of employment with the Company.

In arriving at the opinions expressed below, we have examined and relied upon the Amended and Restated Certificate of Incorporation and the Amended and Restated Bylaws of the Company, the records of meetings and consents of the Company’s Board of Directors and of its stockholders, the 2014 Plan, and the Inducement Award Agreements, each as provided to us by the Company. In addition, we have examined and relied on the originals or copies certified or otherwise identified to our satisfaction of all such corporate records of the Company and such other documents and certificates of public officials, officers and representatives of the Company and such other persons, and we have made such investigations of law, as we have deemed appropriate as a basis for the opinions expressed below.

We have assumed that the purchase price or other consideration to be received by the Company for the Shares will be valid consideration equal to or in excess of the par value thereof.

In rendering the opinions expressed below, we express no opinion other than as to the federal laws of the United States and the Delaware General Corporation Law, including the statutory provisions contained therein, applicable provisions of the Delaware Constitution and the reported judicial decisions interpreting these provisions.

On the basis of the foregoing, it is our opinion that (i) the 2014 Plan Shares, when issued and delivered in accordance with the terms of the 2014 Plan and the awards thereunder against the Company's receipt of the purchase price or other consideration therefor, and (ii) the Inducement Shares, when issued and delivered in accordance with the Inducement Award Agreements and the awards thereunder against the Company's receipt of the purchase price or other consideration therefor, will be validly issued, fully paid and non-assessable.

This opinion is to be used only in connection with the offer and sale of the Shares while the Registration Statement is in effect.

This opinion is being delivered solely for the benefit of the Company and such other persons as are entitled to rely upon it pursuant to the applicable provisions of the Securities Act. This opinion may not be used, quoted, relied upon or referred to for any other purpose, nor may it be used, quoted, relied upon or referred to by any other person, for any purpose, without our prior written consent.

We consent to the filing of this opinion as an exhibit to the Registration Statement and to the reference to us under the heading "Item 5. Interests of Named Experts and Counsel" in the Registration Statement. In giving such consent, we do not admit that we are within the category of persons whose consent is required under Section 7 of the Securities Act or the rules and regulations of the Commission promulgated thereunder.

This opinion shall be interpreted in accordance with the Legal Opinion Principles issued by the Committee on Legal Opinions of the American Bar Association's Section of Business Law, as published in 53 Business Lawyer 831 (May 1998).

Very truly yours,

FOLEY HOAG LLP

By: /s/ Stacie S. Aarestad
a Partner

INDEPENDENT REGISTERED PUBLIC ACCOUNTING FIRM'S CONSENT

We consent to the incorporation by reference in this Registration Statement of Zosano Pharma Corporation on Form S-8 of our report, which includes an explanatory paragraph as to the Company's ability to continue as a going concern, dated February 28, 2017, with respect to our audits of the consolidated financial statements of Zosano Pharma Corporation as of December 31, 2016 and 2015 and for the years then ended appearing in the Annual Report on Form 10-K of Zosano Pharma Corporation for the year ended December 31, 2016.

/s/ Marcum LLP

Marcum LLP
San Francisco, CA
June 5, 2017

ZOSANO PHARMA CORPORATION
NONSTATUTORY STOCK OPTION AWARD AGREEMENT

Zosano Pharma Corporation (the “Company”), hereby grants to [*name*] (the “Holder”) an option (the “Option”) to purchase a total of [*number*] shares of the Company’s common stock, par value \$0.0001 per share (the “Common Stock”), at the price and on the terms set forth in this Zosano Pharma Corporation Nonstatutory Stock Option Award Agreement (the “Award Agreement”).

1. **Nature of the Option .**

(a) This Option is intended to be a non-statutory stock option and is not intended to be an Incentive Stock Option within the meaning of Section 422 of the Internal Revenue Code of 1986, as amended, or to otherwise qualify for any special tax benefits to the Holder.

(b) The Company maintains the 2014 Equity and Incentive Plan (the “Plan”), which provides the general terms and conditions for equity incentive awards to the Company’s employees, directors, consultants, and other individuals who provide services to the Company. This Option is not awarded pursuant to the Plan, but rather is intended to constitute a non-plan based “inducement grant,” as described in Nasdaq Listing Rule 5635(c)(4). Nonetheless, the terms and conditions of the Plan relating to stock options are hereby incorporated into this Award Agreement by this reference, as though fully set forth herein, as if the Option was granted pursuant to the Plan. Unless the context herein otherwise requires, the terms defined in the Plan shall have the same meanings herein.

2. **Date of Grant :**

3. **Option Exercise Price :**

4. **Vesting Start Date :**

5. **Vesting Schedule .** This Option shall become exercisable on [*vesting terms*]. All vesting shall cease upon the Termination Date. [*insert acceleration language as needed*]

6. **Method of Exercise .** This Option may be exercised by the delivery of written notice to the Company setting forth the number of shares with respect to which the Option is to be exercised, together with payment by (i) cash, or certified or bank check or other instrument acceptable to the Administrator for an amount equal to the aggregate exercise price of the shares being purchased; or (ii) any of the other methods set forth in the Plan.

7. **Termination of Services .** This Option shall terminate on the earliest to occur of:

(i) the date of expiration hereof;

(ii) [*three (3) months*] following the Termination Date upon any termination other than for Disability or death; or

-
- (iii) [*twelve (12) months*] following the Termination Date upon termination for Disability or death, or if the Holder dies within [*three (3) months*] after his or her Termination Date.
8. **Tax Withholding** . The Company's obligation to deliver shares shall be subject to the Holder's satisfaction of any federal, state and local income and employment tax withholding requirements.
9. **Investment Representations** . Unless the shares have been registered under the Securities Act of 1933, as amended, in connection with acquisition of this Option, the Holder represents and warrants as follows:
- (a) The Holder is acquiring this Option, and upon exercise of this Option, he or she will be acquiring the shares subject hereto for investment in his or her own account, not as nominee or agent, and not with a view to, or for resale in connection with any distribution thereof.
- (b) The Holder has a preexisting business or personal relationship with the Company or one of its directors, officers or controlling persons and by reason of his or her business or financial experience, has, and could be reasonably assumed to have, the capacity to protect his or her interest in connection with the acquisition of this Option and the shares subject hereto.
10. **Nontransferability of Option** . This Option shall not be transferable by the Holder otherwise than by will or by the laws of descent and distribution and this Option shall be exercisable, during the option Holder's lifetime, only by the Holder, or by the Holder's legal representative or guardian in the event of the Holder's incapacity. Subject to the foregoing and the terms of the Plan, the terms of this Option shall be binding upon the executors, administrators, heirs, successors and assigns of the Holder.
11. **Notice** . Any notice to be given to the Company hereunder shall be deemed sufficient if addressed to the Company and delivered to the office of the Company, Zosano Pharma Corporation, 34790 Ardentech Court, Fremont, CA 94555, attention of the President and CEO, or such other address as the Company may hereafter designate. Any notice to be given to the Holder hereunder shall be deemed sufficient if addressed to and delivered in person to the Holder at his or her address furnished to the Company or when deposited in the mail, postage prepaid, addressed to the Holder at such address.
12. **The Plan** . Although this Option is not granted under the Plan, the terms of the Plan have been incorporated herein by reference. Accordingly, the Holder agrees to be bound by all of the terms and conditions of the Plan. This Option will be administered by the Board or its designated Committee, who will have the same authority with respect to this Option as described in Section 3 of the Plan. A copy of the Plan is available for inspection during business hours by the Holder or the persons entitled to exercise this Option at the Company's principal office. All questions regarding the interpretation of the terms of this Option, including all questions regarding the application and interpretation of Plan provisions incorporated herein, will be determined by the Board or its designated Committee, whose determination will be final, binding and conclusive.

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13. **Entire Agreement** . This Award Agreement [*and the employee's employment agreement, if applicable*] represent[s] the entire agreement between the parties hereto relating to the subject matter hereof, and merges and supersedes all prior and contemporaneous discussions, agreements and understandings of every nature. [*In the event of a conflict between the terms of this Award Agreement and the terms of the employee's employment agreement, the terms of the employee's employment agreement shall control.*]
 14. **Governing Law** . This Award Agreement will be construed in accordance with the laws of the State of Delaware, without regard to the application of the principles of conflicts of laws.
 15. **Amendment** . This Award Agreement may only be amended by a writing signed by each of the parties hereto.
 16. **Execution** . This Award Agreement may be executed, including execution by facsimile signature, in one or more counterparts, each of which will be deemed an original, and all of which together shall be deemed to be one and the same instrument.

[Signature Page Follows]

IN WITNESS WHEREOF, the parties have executed this Option, or caused this Option to be executed, as of the Date of Grant.

ZOSANO PHARMA CORPORATION

By: _____

Name: _____

Title: _____

HOLDER

Name:

Address
