

**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): **September 30, 2019**

VIVUS, INC.

(Exact Name of Registrant as Specified in Charter)

Delaware
(State or Other Jurisdiction
of Incorporation)

001-33389
(Commission
File Number)

94-3136179
(I.R.S. Employer
Identification No.)

**900 E. Hamilton Avenue, Suite 550
Campbell, CA 95008**
(Address of Principal Executive Offices, and Zip Code)

(650) 934-5200
Registrant's Telephone Number, Including Area Code

N/A
(Former Name or Former Address, if Changed Since Last Report)

Securities registered pursuant to Section 12(b) of the Act:

Title of each class	Trading Symbol(s)	Name of each exchange on which registered
Common Stock	VVUS	The Nasdaq Global Select Market
Preferred Share Purchase Rights		

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 communication 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 communication pursuant to Rule 14d-2(b) under the Exchange Act (17 CFR 240.14d-2(b))
- ☐ Pre-commencement communication pursuant to Rule 13e-4(c) under the Exchange Act (17 CFR 240.13e-4(c))

Indicate by check mark whether the registrant is an emerging growth company as defined in Rule 405 of the Securities Act of 1933 (17 CFR §230.405) or Rule 12b-2 of the Securities Exchange Act of 1934 (17 CFR §240.12b-2).

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 13(a) of the Exchange Act. ☐

Item 1.01. Entry into a Material Definitive Agreement.

On September 30, 2019, VIVUS, Inc., a Delaware corporation (the “**Company**”), and U.S. Bank National Association, as trustee (the “**Trustee**”) and as collateral agent (the “**Collateral Agent**”), entered into a second supplemental indenture (the “**Second Supplemental Indenture**”) to that certain indenture (as amended, supplemented and/or modified from time to time, the “**Indenture**”) dated June 8, 2018 by and among the Company, the Trustee and the Collateral Agent pursuant to which the Company issued its outstanding senior secured notes due 2024 (the “**Secured Notes**”).

The Second Supplemental Indenture amended the Indenture to (i) revise the compliance dates for minimum quarterly Pancreaze net sales, (ii) reduce the minimum unrestricted cash equivalents, and (iii) effect the pledge of material intellectual property related to Qsymia® and Pancreaze®. The Second Supplemental Indenture was entered into in satisfaction of the conditions set forth in the previously disclosed waiver of default from consenting noteholders. The consenting noteholders represented greater than a majority of the outstanding Secured Notes and consented to the amendments contained in the Second Supplemental Indenture.

The foregoing description of the Indenture and the Second Supplemental Indenture do not purport to be complete and are qualified in their entirety by reference to Exhibits 4.1 and 4.2, which are incorporated herein by reference.

Item 5.02. Departure of Directors or Certain Officers; Election of Directors; Appointment of Certain Officers; Compensatory Arrangements of Certain Officers.

On October 2, 2019, the Company and Kenneth Suh agreed that Mr. Suh would depart from the role of President of the Company, effective October 31, 2019. Mr. Suh previously entered into the Third Amended and Restated Change of Control and Severance Agreement (the “**Severance Agreement**”) with the Company. Also, on October 2, 2019, the Company and M. Scott Oehrlein agreed that Mr. Oehrlein would depart from the role of Chief Operations Officer of the Company, effective October 31, 2019. Mr. Oehrlein also previously entered into the Severance Agreement with the Company.

Pursuant to the Severance Agreement, Messrs. Suh and Oehrlein are each entitled to receive, subject to signing a release of claims in favor of the Company: (i) monthly severance payments equal to the monthly salary he was receiving immediately prior to the termination date for twelve months, (ii) monthly severance payments equal to 1/12th of his target bonus for the fiscal year in which the termination occurs for twelve months, (iii) an additional pro rata portion of his target bonus for the fiscal year in which the termination occurs, (iv) up to twelve months of reimbursement for premiums paid for the employer’s portion of COBRA coverage, and (v) any then-outstanding and unvested equity awards held by him are subject to 50% accelerated vesting. In addition, the Company agreed to provide Mr. Suh with reimbursement of up to \$10,000 for immigration related legal fees and Mr. Oehrlein with an additional six months of reimbursement for premiums paid for the employer’s portion of COBRA coverage.

Item 8.01. Other Events.

As of September 30, 2019, the Company satisfied all conditions related to the previously disclosed waiver of default, including, entry into the Second Supplemental Indenture, the effective grant to the Collateral Agent of the security interest in the material intellectual property of Qsymia® and Pancreaze® in compliance with the Second Supplemental Indenture, and the payment of certain fees and expenses. In addition, the Company repurchased approximately \$48.6 million aggregate principal amount of Secured Notes outstanding from the consenting noteholders for an aggregate purchase price of approximately \$55 million (the “**Repurchase**”).

Following the Repurchase, the Company had approximately \$61.4 million aggregate principal amount of Secured Notes outstanding.

The information contained in Item 1.01 of this Current Report on Form 8-K is incorporated herein by reference.

On October 3, 2019, the Company issued a press release titled “VIVUS Initiates Pay Down of Secured Debt and Announces Management Changes.” A copy of the press release is attached hereto as Exhibit 99.1 and is incorporated herein by reference.

Item 9.01. Financial Statements and Exhibits.

(d) Exhibits.

Exhibit No.	Description
4.1	<u>Indenture, dated as of June 8, 2018, among VIVUS, Inc., as issuer, the other guarantors from time to time and U.S. Bank National Association, as trustee and collateral agent (incorporated by reference to Exhibit 4.1 to the Company’s Current Report on Form 8-K (File No. 001-33389) filed June 11, 2018).</u>
4.2	<u>Second Supplemental Indenture, dated as of September 30, 2019, among VIVUS, Inc., as issuer and U.S. Bank National Association, as trustee and collateral agent.</u>
99.1	<u>Press Release dated October 3, 2019.</u>

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.

VIVUS, INC.

/s/ John L. Slebir

John L. Slebir

Senior Vice President, Business Development and General Counsel

Date: October 3, 2019

SECOND SUPPLEMENTAL INDENTURE

This SECOND SUPPLEMENTAL INDENTURE (this “Second Supplemental Indenture”) dated as of September 30, 2019 is among VIVUS, Inc. (the “Issuer”) and U.S. Bank National Association, as trustee (the “Trustee”) and as collateral agent (the “Collateral Agent”) under the Indenture referred to below.

W I T N E S S E T H :

WHEREAS, the Issuer has heretofore executed and delivered to the Trustee and the Collateral Agent an indenture (as amended, supplemented or otherwise modified, including by that certain First Supplemental Indenture dated as of October 11, 2018, the “Indenture”) dated as of June 8, 2018, providing for the issuance of the Issuer’s 10.375% Senior Secured Notes due 2024 (the “Securities”);

WHEREAS, \$61,351,000 in aggregate principal amount of the Securities is currently outstanding;

WHEREAS, pursuant to Section 9.02(a) of the Indenture, the Issuer, the Collateral Agent, the Guarantors (if any) and the Trustee may amend or supplement the Indenture, the Securities and the Security Documents, and may waive any provision thereof, with the written consent of Holders of a majority in principal amount of the Securities then outstanding voting as a single class (including consents obtained in connection with a tender offer or exchange offer for the Securities);

WHEREAS, the Issuer has received, and has delivered to the Trustee evidence of, written consent of the Holders of a majority in principal amount of the Securities to certain amendments to the Indenture set forth herein; and

WHEREAS, in accordance with Section 9.05 of the Indenture, the Issuer has delivered to the Trustee, simultaneously with the execution and delivery of this Second Supplemental Indenture, an Officers’ Certificate and an Opinion of Counsel relating to this Second Supplemental Indenture.

NOW THEREFORE, in consideration of the foregoing and for other good and valuable consideration, the receipt of which is hereby acknowledged, the Issuer and the Trustee mutually covenant and agree for the equal and ratable benefit of the Holders as follows:

ARTICLE I

AMENDMENTS TO INDENTURE AND NOTES

Section 1.1 Amendment to Section 4.09 of the Indenture. Section 4.09 of the Indenture shall be amended to change “\$10,000,000” to “\$5,000,000”.

Section 1.2 Amendment to Section 4.10 of the Indenture. Section 4.10(a) of the Indenture shall be amended to change “March 31, 2019” to “March 31, 2020”, and Section 4.10(b) of the Indenture shall be amended to change “June 30, 2019” to “June 30, 2020”.

Section 1.3 Amendments to the Indenture to Effect Pledge of Material Intellectual Property.

- (i) the following:
- (a) Clause (i) of the definition of Excluded Assets in Section 1.01 of the Indenture shall be amended to insert at the end of such clause other than any Material Intellectual Property,
- (b) Clause (vii) of the definition of Excluded Assets in Section 1.01 of the Indenture shall be amended to insert after “any Intellectual Property” the following:
- (other than any Material Intellectual Property)
- (c) Section 1.01 shall be amended to insert after the definition of “Lien” the following new definition of “Material Intellectual Property”:
- “Material Intellectual Property” means Intellectual Property, including any Excluded Agreements, related to Pancreaze®, Qsymia® or a trademark for the name of the Issuer or any Guarantor, and any other material Intellectual Property acquired by the Issuer or any Guarantor after September 30, 2019.
- (d) The first sentence of Section 4.13 of the Indenture shall be amended to:
- (i) re-letter the existing clause (a) and clause (b) as new clause (b) and new clause (c), respectively;
- (ii) insert the following as a new clause (a):
- any Material Intellectual Property, except for Permitted Liens described in clause (1), (2), (3) or (18) of the definition of “Permitted Liens”;
- (iii) insert the word “other” in new clause (b) between “any” and “Intellectual Property”.

Section 1.4 Amendments to Notes. The Notes are hereby amended to delete any and all provisions inconsistent with the amendments to the Indenture effected by this Second Supplemental Indenture.

ARTICLE II

MISCELLANEOUS PROVISIONS

Section 2.1 Defined Terms. As used in this Second Supplemental Indenture, terms defined in the Indenture or in the preamble or recitals hereto are used herein as therein defined, except that the term “Holders” in this Supplemental Indenture shall refer to the term “Holders” as defined in the Indenture and the Trustee acting on behalf of and for the benefit of

such Holders. The words “herein”, “hereof” and “hereby” and other words of similar import used in this Supplemental Indenture refer to this Supplemental Indenture as a whole and not to any particular section hereof.

Section 2.2 Ratification of Indenture; Supplemental Indentures Part of Indenture. Except as expressly amended and supplemented hereby, the Indenture is in all respects ratified and confirmed and all the terms, conditions and provisions thereof shall remain in full force and effect. This Second Supplemental Indenture shall form a part of the Indenture for all purposes, and every Holder heretofore and hereafter existing shall be bound hereby.

Section 2.3 Governing Law. THIS SECOND SUPPLEMENTAL INDENTURE SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF NEW YORK (INCLUDING SECTIONS 5-1401 AND 5-1402 OF THE NEW YORK GENERAL OBLIGATIONS LAW AND ANY SUCCESSOR TO SUCH STATUTE), WITHOUT REGARD TO PRINCIPLES OF CONFLICTS OF LAW.

Section 2.4 Waiver of Jury Trial. EACH OF THE PARTIES HERETO HEREBY IRREVOCABLY WAIVES, TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, ANY AND ALL RIGHT TO TRIAL BY JURY IN ANY LEGAL PROCEEDING ARISING OUT OF OR RELATING TO THIS SECOND SUPPLEMENTAL INDENTURE OR THE TRANSACTIONS CONTEMPLATED HEREBY.

Section 2.5 No Recourse Against Others. No past, present or future director, officer, employee, manager, incorporator, agent or holder of any Equity Interests in the Issuer or of any Guarantors or any direct or indirect parent corporation, as such, shall have any liability for any obligations of the Issuer and such Guarantors (if any) under the Securities, any Guarantees, the Indenture or this Second Supplemental Indenture or for any claim based on, in respect of, or by reason of, such obligations or their creation.

Section 2.6 Successors. All agreements of the Issuer in this Second Supplemental Indenture shall bind its successors. All agreements of the Trustee and the Collateral Agent in this Second Supplemental Indenture shall bind their respective successors.

Section 2.7 The Trustee. The Trustee accepts the amendments of the Indenture effected by this Second Supplemental Indenture and agrees to perform its duties under the Indenture as hereby amended, but on the terms and conditions set forth in the Indenture, including the terms and provisions defining the rights and limiting the liabilities and responsibilities of the Trustee, which terms and provisions shall in like manner define its rights and limit its liabilities and responsibilities in the performance of its duties under the Indenture as hereby amended. All of the provisions contained in the Indenture in respect of the rights, privileges, immunities, powers and duties of the Trustee shall be applicable in respect of this Second Supplemental Indenture as fully and with like force and effect as though fully set forth in full herein. The Trustee makes no representation as to the validity or sufficiency of this Second Supplemental Indenture.

Section 2.8 Counterparts. The parties may sign any number of copies of this Second Supplemental Indenture. Each signed copy shall be an original, but all of them together

represent the same agreement. The exchange of copies of this Second Supplemental Indenture and of signature pages by facsimile or PDF transmission shall constitute effective execution and delivery of this Second Supplemental Indenture as to the parties hereto and may be used in lieu of the original Second Supplemental Indenture for all purposes. Signatures of the parties hereto transmitted by facsimile or PDF shall be deemed to be their original signatures for all purposes.

Section 2.9 Severability. In case any provision in this Second Supplemental Indenture shall be invalid, illegal or unenforceable, the validity, legality and enforceability of the remaining provisions shall not in any way be affected or impaired thereby.

Section 2.10 Effect of Headings. The Section headings herein are for convenience of reference only and shall not affect the construction thereof.

IN WITNESS WHEREOF, the parties hereto have caused this Second Supplemental Indenture to be duly executed as of the date first above written.

VIVUS, INC.

By: /s/ John Amos

Name: John Amos

Title: Chief Executive Officer

U.S. BANK NATIONAL ASSOCIATION,
as Trustee

By: /s/ Alison D.B. Nadeau

Name: Alison D.B. Nadeau

Title: Vice President

U.S. BANK NATIONAL ASSOCIATION,
as Collateral Agent

By: /s/ Alison D.B. Nadeau

Name: Alison D.B. Nadeau

Title: Vice President



VIVUS Initiates Pay Down of Secured Debt and Announces Management Changes

*-Reduction of \$48.6 million of Secured Debt will result in total interest savings of \$10.5 million-
-Organizational change streamlines commercial operations-*

CAMPBELL, Calif., October 3, 2019 (GLOBE NEWSWIRE) — VIVUS, Inc. (Nasdaq:VVUS) (the “Company”), a biopharmaceutical company, announced today that it has paid down \$48.6 million of its Senior Secured Notes due 2024. This debt reduction will result in savings of \$10.5 million due to a reduction in interest payments over the remaining term of the loan.

“As we are executing the ten-quarter turnaround plan of VIVUS, an essential component of such plan is to address our total debt,” said John Amos, Chief Executive Officer at VIVUS. “Accordingly, we intend to actively manage our capital structure, including retiring our outstanding debt to appropriate levels in a series of steps consistent with our ten-quarter turnaround plan. The \$48.6 million repayment announced today is the first of these steps and will result in a net savings of interest of \$10.5 million over the remaining term of the loan. This action is consistent with our longstanding goal of lowering our cost of capital and cash usage related to the interest on our debt. Based on the improvement of our operations and the underlying collateral, the expense of this debt is no longer warranted. We are pleased to have taken this important step toward improving our long-term financial health, and we intend to address our remaining debt obligations in ordinary course.”

The Company also announced the departure of Ken Suh, President, and Scott Oehrlein, Chief Operations Officer, effective October 31, 2019.

“I would like to thank both Ken and Scott for the important contributions they have made to VIVUS, each having improved the Company through the acquisition and transition of Pancreaze. We wish them well in their future endeavors,” said Mr. Amos. As of this time, the Company does not intend on hiring replacements for the positions of President and Chief Operations Officer.

About VIVUS

VIVUS is a biopharmaceutical company committed to the development and commercialization of innovative therapies that focus on advancing treatments for patients with serious unmet medical needs. For more information about the Company, please visit www.vivus.com.

Forward-Looking Statements

Certain statements in this press release are forward-looking within the meaning of the Private Securities Litigation Reform Act of 1995 and are subject to risks, uncertainties and other factors, including risks and uncertainties related to our ability to execute on our business strategy to enhance long-term stockholder value; risks and uncertainties related to our ability to address our outstanding balance of the convertible notes due in May 2020; risks and uncertainties related to our expected future revenues, operations and expenditures; risks and uncertainties related to our liquidity and capital resources; and risks and uncertainties related to the impact, if any, of changes to our Board of Directors and senior management team. The reader is cautioned not to rely on these forward-looking statements. Investors should read the risk factors set forth in VIVUS' Form 10-K for the year ended December 31, 2018 as filed on February 26, 2019, and periodic reports filed with the Securities and Exchange Commission. VIVUS does not undertake an obligation to update or revise any forward-looking statements.

VIVUS, Inc.

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