

# OPEXA THERAPEUTICS, INC.

## **FORM 8-K** (Current report filing)

Filed 03/05/14 for the Period Ending 02/28/14

|             |                                                         |
|-------------|---------------------------------------------------------|
| Address     | 2635 TECHNOLOGY FOREST BLVD.<br>THE WOODLANDS, TX 77381 |
| Telephone   | (281) 272-9331                                          |
| CIK         | 0001069308                                              |
| Symbol      | OPXA                                                    |
| SIC Code    | 2834 - Pharmaceutical Preparations                      |
| Industry    | Biotechnology & Drugs                                   |
| Sector      | Healthcare                                              |
| Fiscal Year | 12/31                                                   |

---

---

**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): February 28, 2014**

---

**OPEXA THERAPEUTICS, INC.**  
(Exact name of registrant as specified in its charter)

---

**Texas**  
(State or other jurisdiction  
of incorporation)

**001-33004**  
(Commission  
File Number)

**76-0333165**  
(IRS Employer  
Identification No.)

**2635 Technology Forest Blvd., The Woodlands, Texas**  
(Address of principal executive offices)

**77381**  
(Zip Code)

**Registrant's telephone number, including area code: (281) 272-9331**

**N/A**  
(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:

- ☐ 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 March 5, 2014, Opexa Therapeutics, Inc. (the “**Company**”), entered into a First Amendment to Sales Agreement (the “**First Amendment**”) with Meyers Associates, L.P. (doing business as Brinson Patrick, a division of Meyers Associates, L.P.) (the “**New Sales Manager**”) and Brinson Patrick Securities Corporation (the “**Original Sales Manager**”). Pursuant to the First Amendment, the Sales Agreement dated September 6, 2012 by and between the Company and the Original Sales Manager was assigned by the Original Sales Manager to the New Sales Manager. The Sales Agreement, as amended, is referred to herein as the “ATM Agreement.”

Under the ATM Agreement, the Company may offer and sell shares of its common stock from time to time depending upon market demand, with the New Sales Manager acting as an agent for the sale of shares in transactions deemed to be an “at the market” offering as defined in Rule 415 of the Securities Act of 1933.

The Company will pay the New Sales Manager a commission equal to 3% of the gross proceeds from the sale of shares of common stock by it as agent under the ATM Agreement. The ATM Agreement provides that the Company will provide customary indemnification rights to the New Sales Manager as well as the Original Sales Manager. The Company has no obligation to sell any shares of common stock pursuant to the ATM Agreement and may at any time suspend sales pursuant to the ATM Agreement. Either party may terminate the ATM Agreement at any time without liability of any party.

The shares of common stock will be sold pursuant to a shelf registration statement on Form S-3 (Registration No. 333-185001), declared effective by the Securities and Exchange Commission on December 5, 2012. A prospectus supplement relating to the offer and sale of up to 2,500,000 shares of common stock pursuant to the ATM Agreement will be filed with the Securities and Exchange Commission as part of the registration statement. Interested investors should read the registration statement and prospectus supplement and all documents incorporated therein by reference. This Current Report shall not constitute an offer to sell or the solicitation of an offer to buy nor shall there be any sale of these securities in any state in which such offer, solicitation or sale would be unlawful prior to registration or qualification under the securities laws of any such state.

The First Amendment is attached to this Current Report on Form 8-K as Exhibit 10.1 and incorporated herein by reference. The Sales Agreement was filed as Exhibit 10.1 to the Company’s Current Report on Form 8-K filed on September 7, 2012 and is incorporated herein by reference. The foregoing description of the First Amendment and ATM Agreement does not purport to be complete and is qualified in its entirety by reference to the First Amendment and ATM Agreement.

As a result of the foregoing, the continuous offering through the Original Sales Manager pursuant to a prospectus supplement dated January 18, 2013 is deemed terminated and no further shares will be offered or sold by the Company through the Original Sales Manager.

**Item 5.03. Departure of Directors or Certain Officers; Election of Directors; Appointment of Certain Officers; Compensatory Arrangements of Certain Officers.**

On February 28, 2014, the Board of Directors of the Company approved discretionary cash bonuses for fiscal year 2013 performance for the Company's executive officers. This resulted in cash bonuses payable in the amounts shown below for the Company's named executive officers.

| <u>Named Executive Officer</u>                                | <u>Bonus Paid in Cash</u> | <u>Total Compensation <sup>(1)</sup></u> |
|---------------------------------------------------------------|---------------------------|------------------------------------------|
| Neil K. Warma<br><i>President and Chief Executive Officer</i> | \$ 94,180                 | \$ 636,767                               |
| Karthik Radhakrishnan<br><i>Chief Financial Officer</i>       | \$ 30,319 <sup>(2)</sup>  | \$ 516,569                               |
| Donna R. Rill<br><i>Chief Development Officer</i>             | \$ 22,500                 | \$ 356,548                               |

(1) Updates total compensation for fiscal year ended December 31, 2013 as previously disclosed in the Summary Compensation Table included in the Company's Annual Report on Form 10-K filed on February 27, 2014.

(2) Mr. Radhakrishnan's bonus was pro-rated to reflect his March 2013 employment start date.

**Item 9.01. Financial Statements and Exhibits.**

(d) Exhibits

| <u>Exhibit No.</u> | <u>Description</u>                                                                                                                                                                                                                             |
|--------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 5.1                | Opinion of Pillsbury Winthrop Shaw Pittman LLP.                                                                                                                                                                                                |
| 10.1               | First Amendment to Sales Agreement, dated March 5, 2014, by and among Opexa Therapeutics, Inc., Meyers Associates, L.P. (doing business as Brinson Patrick, a division of Meyers Associates, L.P.) and Brinson Patrick Securities Corporation. |
| 10.2               | Sales Agreement, dated September 6, 2012, by and between Opexa Therapeutics, Inc. and Brinson Patrick Securities Corporation (incorporated by reference to Exhibit 10.1 to the Company's Form 8-K filed September 7, 2012).                    |
| 23.1               | Consent of Pillsbury Winthrop Shaw Pittman LLP (included in Exhibit 5.1).                                                                                                                                                                      |

---

## 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, thereunto duly authorized.

Dated: March 5, 2014

OPEXA THERAPEUTICS, INC.

By: /s/ Neil K. Warma  
Neil K. Warma  
President & Chief Executive Officer

---

## **EXHIBIT INDEX**

| <b><u>Exhibit No.</u></b> | <b><u>Description</u></b>                                                                                                                                                                                                                      |
|---------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 5.1                       | Opinion of Pillsbury Winthrop Shaw Pittman LLP.                                                                                                                                                                                                |
| 10.1                      | First Amendment to Sales Agreement, dated March 5, 2014, by and among Opexa Therapeutics, Inc., Meyers Associates, L.P. (doing business as Brinson Patrick, a division of Meyers Associates, L.P.) and Brinson Patrick Securities Corporation. |
| 10.2                      | Sales Agreement, dated September 6, 2012, by and between Opexa Therapeutics, Inc. and Brinson Patrick Securities Corporation (incorporated by reference to Exhibit 10.1 to the Company's Form 8-K filed September 7, 2012).                    |
| 23.1                      | Consent of Pillsbury Winthrop Shaw Pittman LLP (included in Exhibit 5.1).                                                                                                                                                                      |



Pillsbury Winthrop Shaw Pittman LLP  
12255 El Camino Real, Suite 300 | San Diego, CA 92130-4088 | tel 619.234.5000 | fax 858.509.4010

March 5, 2014

Opexa Therapeutics, Inc.  
2635 Technology Forest Blvd.  
The Woodlands, Texas 77381

Ladies and Gentlemen:

We are acting as counsel for Opexa Therapeutics, Inc., a Texas corporation (the “Company”), in connection with the issuance and sale of 2,500,000 shares (the “Shares”) of common stock, \$0.01 par value (the “Common Stock”), of the Company, all of which are authorized but heretofore unissued shares to be offered and sold by the Company pursuant to the Registration Statement on Form S-3 (Registration No. 333-185001) (the “Registration Statement”), filed by the Company with the Securities and Exchange Commission (the “Commission”) under the Securities Act of 1933 (the “Act”), and related prospectus dated December 5, 2012, as supplemented by the prospectus supplement dated March 5, 2014, relating to the offer and sale of the Shares (as so supplemented, the “Prospectus”).

We have reviewed and are familiar with such documents, corporate proceedings and other matters as we have considered relevant or necessary as a basis for the opinions in this letter. Based on the foregoing, we are of the opinion that the Shares have been duly authorized and, when issued and sold by the Company in the manner described in the Registration Statement and the Prospectus and in accordance with the resolutions adopted by the Board of Directors of the Company, will be validly issued, fully paid and nonassessable.

The opinions set forth in this letter are limited to the Texas Corporation Law of the State of Texas, as in effect on the date hereof .

We hereby consent to the filing of this opinion letter as Exhibit 5.1 to the Company’s Current Report on Form 8-K filed by the Company with the Commission on the date hereof and the incorporation thereof in the Registration Statement and to the use of our name under the caption “Legal Matters” in the Prospectus. In giving this consent, we do not thereby admit that we are within the category of persons whose consent is required under Section 7 of the Act or the rules and regulations of the Commission promulgated thereunder.

Very truly yours,

/s/ Pillsbury Winthrop Shaw Pittman LLP

**FIRST AMENDMENT TO SALES AGREEMENT**

THIS FIRST AMENDMENT TO SALES AGREEMENT (this “**Amendment**”) is entered into as of the 5 day of March, 2014, by and among OPEXA THERAPEUTICS, INC. (the “**Company**”), BRINSON PATRICK SECURITIES CORPORATION (“**Brinson Patrick**”), and MEYERS ASSOCIATES, L.P. (doing business as Brinson Patrick, a division of Meyers Associates, L.P.) (the “**New Sales Manager**”) as follows:

**RECITALS:**

WHEREAS, the Company and Brinson Patrick have entered into a Sales Agreement dated as of September 6, 2012 (the “**Agreement**”);

WHEREAS, Brinson Patrick desires to assign to New Sales Manager all of its rights and delegate to New Sales Manager all of its obligations under the Agreement;

WHEREAS, New Sales Manager desires to accept such assignment of rights and delegation of obligations under the Agreement; and

WHEREAS, the Company consents to such assignment of rights and delegation of obligations to the New Sales Manager and desires to release Brinson Patrick under the Agreement and substitute the New Sales Manager as a party to the Agreement in Brinson Patrick’s place.

NOW THEREFORE, in consideration of the premises and mutual agreements herein contained, intending to be legally bound, the Company, Brinson Patrick and the New Sales Manager agree as follows:

SECTION 1. Defined Terms. Capitalized terms not otherwise defined herein shall have the meaning attributed to them in the Agreement. For the avoidance of doubt, each reference to the “Sales Manager” in the Agreement shall mean the New Sales Manager.

SECTION 2. Assignment and Assumption. Brinson Patrick irrevocably (a) assigns to the New Sales Manager all of its rights under the Agreement and (b) delegates to the New Sales Manager all of its obligations under the Agreement, except that Brinson Patrick shall continue to be entitled to indemnification under Article V of the Agreement for claims and liabilities arising from events and other circumstances that occurred prior to the date of this Amendment. The New Sales Manager unconditionally accepts all of Brinson Patrick’s rights and obligations in, to and under the Agreement, and assumes and agrees to be bound by, fulfill, perform and discharge all of the liabilities, obligations, duties and covenants under or arising out of the Agreement from and after the date hereof.

SECTION 3. Release and Novation.

(a) Notwithstanding anything to the contrary in the Agreement, the Company releases and forever discharges Brinson Patrick, as well as its shareholders, directors, officers, employees, agents and representatives, from all further obligations arising under the Agreement, and from all manner of actions, causes of action, suits, debts, damages, expenses, claims and

---

demands whatsoever that the Company has or may have against any of the foregoing persons, arising out of or in any way connected to performance under the Agreement on and after the date hereof. For avoidance of doubt, nothing herein affects any rights, liabilities or obligations of the Company or the New Sales Manager due to be performed prior to the date hereof.

(b) Notwithstanding anything to the contrary in the Agreement, Brinson Patrick releases and forever discharges the Company, as well as its shareholders, directors, officers, employees, agents and representatives, from all further obligations arising under the Agreement, and from all manner of actions, causes of action, suits, debts, damages, expenses, claims and demands whatsoever that Brinson Patrick has or may have against any of the foregoing persons, arising out of or in any way connected to performance under the Agreement on and after the date hereof, except that Brinson Patrick shall continue to be entitled to indemnification under Article V of the Agreement for claims and liabilities arising from events and other circumstances that occurred prior to the date of this Amendment. For avoidance of doubt, nothing herein affects any rights, liabilities or obligations of the Company or the New Sales Manager due to be performed prior to the date hereof.

SECTION 4. Substitution. The Company recognizes the New Sales Manager as Brinson Patrick's successor-in-interest in and to the Agreement. The New Sales Manager by this Amendment becomes entitled to all right, title and interest of Brinson Patrick in and to the Agreement in as much as the New Sales Manager is the substituted party to the Agreement as of and after the date hereof, except that Brinson Patrick shall continue to be entitled to indemnification under Article V of the Agreement. The Company and the New Sales Manager shall be bound by the terms of the Agreement in every way as if the New Sales Manager is named in the novated Agreement in place of Brinson Patrick as a party thereto. The Company represents and warrants to Brinson Patrick and the New Sales Manager that there is no payment or other liability of the Company to Brinson Patrick which has accrued and remains outstanding as of the date hereof. The Company acknowledges that any payment or other liability of Brinson Patrick to the Company which has accrued and remains outstanding as of the date hereof, becomes the responsibility of the New Sales Manager and not of Brinson Patrick (whether or not such amounts were incurred before or after the date hereof).

SECTION 5. Counterparts. This Amendment may be executed in separate counterparts, each of which shall be deemed an original and both of which shall constitute a single agreement.

SECTION 6. Binding Effect. Except as expressly amended hereby, the Agreement shall continue to be and shall remain in full force and effect in accordance with its terms. Any reference to the "Agreement" or the "Sales Agreement" in the Agreement shall be deemed to be a reference to the Agreement as amended hereby.

SECTION 7. Governing Law. This Amendment shall be governed by, and construed in accordance with, the internal laws of the State of New York.

---

IN WITNESS WHEREOF, the undersigned have executed this First Amendment to Sales Agreement as of the day and year first written above.

OPEXA THERAPEUTICS, INC.

By: /s/ Neil K. Warma  
Name: Neil K. Warma  
Title: President and Chief Executive Officer

BRINSON PATRICK SECURITIES CORPORATION

By: /s/ Todd Wyche  
Name: Todd Wyche  
Title: CEO

MEYERS ASSOCIATES, L.P.

By: /s/ Todd Wyche  
Name: Todd Wyche  
Title: President of Brinson Patrick, a division of  
Meyers Associates, L.P.