

OPEXA THERAPEUTICS, INC.

FORM 10-K/A (Amended Annual Report)

Filed 05/18/09 for the Period Ending 12/31/08

Address	2635 TECHNOLOGY FOREST BLVD. 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 10-K/A

Amendment No. 1

☒ **ANNUAL REPORT PURSUANT TO SECTION 13 OR 15(D) OF THE SECURITIES EXCHANGE ACT OF 1934**

For the fiscal year ended December 31, 2008

☐ **TRANSITION REPORT PURSUANT TO SECTION 13 OR 15(D) OF THE SECURITIES EXCHANGE ACT OF 1934**

Commission File Number: 001-33004



Opexa Therapeutics, Inc.

(Exact Name of Registrant as Specified in Its Charter)

Texas

76-0333165

(State or Other Jurisdiction of
Incorporation or Organization)

(IRS Employer
Identification No.)

2635 N Crescent Ridge Drive, The Woodlands, Texas

77381

(Address of Principal Executive Offices)

(Zip Code)

Registrant's Telephone Number, Including Area Code: (281) 272-9331

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

Securities registered pursuant to Section 12(g) of the Act: Common Stock

Indicate by check mark if the registrant is a well-known seasoned issuer, as defined in Rule 405 of the Securities Act. Yes ☐ No ☒

Indicate by check mark if the registrant is not required to file reports pursuant to Section 13 or Section 15(d) of the Act. Yes ☐ No ☒

Indicate by check mark whether the registrant (1) has filed all reports required to be filed by Section 13 or 15(d) of the Securities Exchange Act of 1934 during the preceding 12 months (or for such shorter period that the registrant was required to file such reports) and (2) has been subject to such filing requirements for the past 90 days. Yes ☒ No ☐

Indicate by check mark if disclosure of delinquent filers pursuant to Item 405 of Regulation S-K (§229.405 of this chapter) is not contained herein, and will not be contained, to the best of registrant's knowledge, in definitive proxy or information statements incorporated by reference in Part III of this Form 10-K or any amendment to this Form 10-K. ☒

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

☐ Large accelerated
filer

☐ Accelerated
filer

☐ Non-accelerated filer

☒ Smaller reporting
company

(Do not check if a smaller reporting
company)

Indicate by check mark whether the registrant is a shell company (as defined in Rule 12b-2 of the Exchange Act). Yes ☐ No ☒

As of April 13, 2009, 12,245,858 shares of the registrant's common stock, par value \$0.50 per share, were outstanding. The aggregate market value of the voting and non-voting common equity held by non-affiliates of the registrant as of April 13, 2009 based upon the closing price as of such date was approximately \$4.4 million.

EXPLANATORY NOTE

This amendment to the Annual Report on Form 10-K for the year ended December 31, 2008, filed by Opexa Therapeutics, Inc., a Texas corporation (the “Registrant”), with the United States Securities and Exchange Commission (the “Commission”) on April 15, 2009 (the “Annual Report”), is filed for the purposes of including the auditor’s consent which was inadvertently omitted from the Annual Report filed with the Commission on April 15, 2009.

PART IV

ITEM 15. EXHIBITS FINANCIAL STATEMENT SCHEDULES.

3. List of Exhibits

Exhibit 2.1	Stock Purchase Agreement effective as of May 5, 2004 (incorporated by reference to Exhibit 2.1 to the Company's Current Report on Form 8-K filed June 4, 2004).
Exhibit 2.2	Agreement and Plan of Reorganization (incorporated by reference to Exhibit 2.1 to the Company's Current Report on 8-K filed October 8, 2004).
Exhibit 3.1	Articles of Amendment and Restatement of the Articles of Incorporation (incorporated by reference to Exhibit 3.1 to the Company's Current Report on Form 8-K filed on June 19, 2006).
Exhibit 3.3	Amended and Restated By-laws (incorporated by reference to Exhibit 2.2 to the Company's Registration Statement on Form 10-SB (File No. 000-25513), initially filed March 8, 1999).
Exhibit 4.1	Form of Common Stock Certificate (incorporated by reference to Exhibit 2.3 to the Company's Registration Statement on Form 10-SB (File No. 000-25513), initially filed March 8, 1999).
Exhibit 4.2	Form of Series E Warrant (incorporated by reference to Exhibit 4.3 to the Company's Current Report on Form 8-K filed December 20, 2007).
Exhibit 4.3	Warrant Agent Agreement for Series E Warrant (incorporated by reference to Exhibit 4.3 to the Company's Current Report on Form 8-K filed February 14, 2008).
Exhibit 4.4	Form of Underwriters' Warrant Agreement (incorporated by reference to Exhibit 4.4 to the Company's Current Report on Form 8-K filed February 14, 2008).
Exhibit 4.5	Form of Underwriters' Warrant to Acquire Warrants Agreement (incorporated by reference to Exhibit 4.5 to the Company's Current Report on Form 8-K filed February 14, 2008).
Exhibit 10.1	June 2004 Compensatory Stock Option Plan (incorporated by reference to Exhibit B to the Company's Definitive Information Statement filed on June 29, 2004).
Exhibit 10.2	Amended and Restated Employment Agreement dated June 15, 2006, between the Company and David McWilliams (incorporated by reference to Exhibit 10.1 to the Company's Quarterly Report on Form 10-QSB filed August 14, 2006).
Exhibit 10.3	Amendment to Employment Agreement dated May 9, 2008, between the Company and David McWilliams (incorporated by reference to Exhibit 10.1 to the Company's Quarterly Report on Form 10-Q filed May 13, 2008).
Exhibit 10.4	Employment Agreement dated May 9, 2008, between the Company and Lynne Hohlfeld (incorporated by reference to Exhibit 10.2 to the Company's Quarterly Report on Form 10-Q filed May 13, 2008).
Exhibit 10.5	Employment Agreement dated May 9, 2008, between the Company and Jim C. Williams, Ph.D (incorporated by reference to Exhibit 10.3 to the Company's Quarterly Report on Form 10-Q filed May 13, 2008).
Exhibit 10.6	Employment Agreement dated May 9, 2008, between the Company and Donna R. Rill (incorporated by reference to Exhibit 10.4 to the Company's Quarterly Report on Form 10-Q filed May 13, 2008).
Exhibit 10.7	Employment Agreement dated June 16, 2008, between the Company and Neil K. Warma (incorporated by reference to Exhibit 10.1 to the Company's Current Report on Form 8-K filed on June 18, 2008).
Exhibit 10.12	Form of Warrant Agreement (incorporated by reference to Exhibit 10.13 to the Company's Annual Report on Form 10-KSB filed April 15, 2005).
Exhibit 10.13	License Agreement dated September 5, 2001 between the Company and Baylor College of Medicine (incorporated by reference to Exhibit 10.14 to the Company's Annual Report on Form 10-KSB filed April 15, 2005).
Exhibit 10.14	Second Amended and Restated License Agreement with University of Chicago (incorporated by reference to Exhibit 10.1 to the Company's Current Report on Form 8-K filed August 3, 2007).
Exhibit 10.17	Form of Series C Common Stock Purchase Warrant (incorporated by reference to Exhibit 10.17 to Form SB-2 filed July 19, 2005).
Exhibit 10.18	Securities Purchase Agreement dated June 17, 2005 by and among the Company and the Investors named therein (incorporated by reference to Exhibit 10.18 to Form SB-2 filed July 19, 2005).
Exhibit 10.19	Registration Rights Agreement dated June 17, 2005 by and among the purchasers of common stock named therein (incorporated by reference to Exhibit 10.19 to Form SB-2 filed July 19, 2005).
Exhibit 10.20	Securities Purchase Agreement dated June 30, 2005 by and among the Company and the purchasers of common stock named therein (incorporated by reference to Exhibit 10.20 to Form SB-2 filed July 19, 2005).
Exhibit 10.21	Securities Purchase Agreement dated July 15, 2005 by and among the Company and the Investors named therein (incorporated by reference to Exhibit 10.21 to Form SB-2 filed July 19, 2005).
Exhibit 10.22	Registration Rights Agreement dated July 15, 2005 by and among the Company and the Investors named therein (incorporated by reference to Exhibit 10.22 to Form SB-2 filed July 19, 2005).

Exhibit 10.23	License Agreement dated January 13, 2006 by the Company and Shanghai Institute for Biological Services (incorporated by reference to Exhibit 10.23 to Amendment No. 1 to Form SB-2 filed February 9, 2006).
Exhibit 10.24	Lease dated August 19, 2005 by the Company and Dirk D. Laukien (incorporated by reference to Exhibit 10.13 to the Company's Annual Report on Form 10-KSB filed March 31, 2006).
Exhibit 10.25	Form of Warrant Agreement issued to brokers in connection with 2005 offerings (incorporated by reference to Exhibit 10.25 to Amendment No. 2 to Form SB-2 filed April 11, 2006).
Exhibit 10.26	Purchase Agreement dated April 11, 2006 by and among the Company and the Investors named herein (incorporated by reference to Exhibit 10.1 to the Company's Current Report on Form 8-K filed April 18, 2006).
Exhibit 10.28	Form of Warrant issued in connection with April 2006 financing (incorporated by reference to Exhibit 10.3 to the Company's Current Report on Form 8-K filed April 18, 2006).
Exhibit 10.29	Form of Broker Stock Purchase Warrant issued to MDB Capital Group LLC (incorporated by reference to Exhibit 10.5 of the Company's Current Report on Form 8-K filed April 18, 2006).
Exhibit 10.30	Second Amended and Restated License Agreement dated July 31, 2007 between the Company and the University of Chicago (incorporated by reference to Exhibit 10.1 of the Company's Report on Form 8-K filed August 3, 2007).
Exhibit 10.31	Unit Purchase Agreement dated August 8, 2008 (incorporated by reference to Exhibit 10.1 to the Company's Current Report on Form 8-K filed August 12, 2008).
Exhibit 10.32	Registration Rights Agreement dated August 8, 2008 (incorporated by reference to Exhibit 10.2 to the Company's Current Report on Form 8-K filed August 12, 2008).
Exhibit 10.33	Form of Warrant issued in connection with August 8, 2008 financing (incorporated by reference to Exhibit 10.3 to the Company's Current Report on Form 8-K filed August 12, 2008).
Exhibit 23.1*	Consent of Malone & Bailey, P.C.
Exhibit 31.1*	Certification of Chief Executive Officer and Chief Financial Officer pursuant to Section 302 of the Sarbanes-Oxley Act of 2002.
Exhibit 32.1*	Certification of Chief Executive Officer and Chief Financial Officer pursuant to Section 906 of the Sarbanes-Oxley Act of 2002.

* Filed herewith

Pursuant to the requirements of Section 13 or 15(d) 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.

SIGNATURES

OPEXA THERAPEUTICS, INC.

By: /s/ NEIL K. WARMA
Neil K. Warma
President and Chief Executive Officer
(Principal Executive Officer)
Acting Chief Financial Officer
(Principal Financial and Accounting Officer)

Date: May 14, 2009

Pursuant to the requirements of the Securities Act of 1934, this report has been signed below by the following persons on behalf of the Registrant and in the capacity and on the dates indicated.

Signature	Title	Date
<u>/S/ NEIL K. WARMA</u> Neil K. Warma	President and Chief Executive Officer <i>(Principal Executive Officer)</i> Acting Chief Financial Officer <i>(Principal Financial and Accounting Officer)</i>	May 14, 2009
<u>/S/ DAVID HUNG</u> David Hung	Director	May 14, 2009
<u>/S/ DAVID E. JORDEN</u> David E. Jorden	Director	May 14, 2009
<u>/S/ DAVID B. MCWILLIAMS</u> David B. McWilliams	Director	May 14, 2009
<u>/S/ MICHAEL S. RICHMAN</u> Michael S. Richman	Director	May 14, 2009
<u>/S/ SCOTT B. SEAMAN</u> Scott B. Seaman	Director	May 14, 2009

CONSENT OF INDEPENDENT REGISTERED PUBLIC ACCOUNTING FIRM

We hereby consent to the incorporation by reference in the Registration Statement on Form S-8 of our report dated April 14, 2009, relating to the financial statements of Opexa Therapeutics, Inc., which appear in this Annual Report on Form 10-K of Opexa Therapeutics, Inc. for the two years ended December 31, 2008 and 2007.

/s/ Malone & Bailey, PC
Malone & Bailey, PC
www.malone-bailey.com
Houston, Texas

May 14, 2009

**CERTIFICATION PURSUANT TO
SECTION 302 OF THE SARBANES-OXLEY ACT**

I, Neil K. Warma, certify that:

1. I have reviewed this Annual Report on Form 10-K/A of Opexa Therapeutics, Inc.;
2. Based on my knowledge, this report does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading with respect to the period covered by this report;
3. Based on my knowledge, the financial statements, and other financial information included in this report, fairly present in all material respects the financial condition, results of operations and cash flows of the registrant as of, and for, the periods presented in this report;
4. The registrant's other certifying officer(s) and I are responsible for establishing and maintaining disclosure controls and procedures (as defined in Exchange Act Rules 13a-15(e) and 15d-15(e)) and internal control over financial reporting (as defined in Exchange Act Rules 13a-15(f) and 15d-15(f)) for the registrant and have:
 - a. Designed such disclosure controls and procedures, or caused such disclosure controls and procedures to be designed under our supervision, to ensure that material information relating to the registrant, including its consolidated subsidiaries, is made known to us by others within those entities, particularly during the period in which this report is being prepared;
 - b. Designed such internal control over financial reporting, or caused such internal control over financial reporting to be designed under our supervision, to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles;
 - c. Evaluated the effectiveness of the registrant's disclosure controls and procedures and presented in this report our conclusions about the effectiveness of the disclosure controls and procedures, as of the end of the period covered by this report based on such evaluation; and
 - d. Disclosed in this report any change in the registrant's internal control over financial reporting that occurred during the registrant's fourth fiscal quarter that has materially affected, or is reasonably likely to materially affect, the registrant's internal control over financial reporting; and
5. The registrant's other certifying officer(s) and I have disclosed, based on our most recent evaluation of internal control over financial reporting, to the registrant's auditors and the audit committee of the registrant's board of directors (or persons performing the equivalent functions):
 - a. All significant deficiencies and material weaknesses in the design or operation of internal control over financial reporting which are reasonably likely to adversely affect the registrant's ability to record, process, summarize and report financial information; and
 - b. Any fraud, whether or not material, that involves management or other employees who have a significant role in the registrant's internal control over financial reporting.

Date: May 14, 2009

By: /s/ Neil K. Warma

Neil K. Warma
President and Chief Executive Officer
(Principal Executive Officer)
Acting Chief Financial Officer
(Principal Financial and Accounting Officer)

**CERTIFICATION PURSUANT TO
18 U.S.C. SECTION 1350,
AS ADOPTED PURSUANT TO SECTION 906
OF THE SARBANES-OXLEY ACT OF 2002**

In connection with the Annual Report of Opexa Therapeutics, Inc. (the "Company") on Form 10-K/A for the period ending December 31, 2008, (the "Report"), as filed with the Securities and Exchange Commission on the date hereof, I, Neil K. Warma, President and Chief Executive Officer of the Company, certify, pursuant to 18 U.S.C. §1350, as adopted pursuant to §906 of the Sarbanes-Oxley Act of 2002, to the best of my knowledge, that:

1. The Report fully complies with the requirements of section 13(a) or 15(d) of the Securities Exchange Act of 1934; and
2. The information contained in the Report fairly presents, in all material respects, the financial condition and results of operations of the Company.

Date: May 14, 2009

By: /s/ Neil K. Warma

Neil K. Warma
President and Chief Executive Officer
(Principal Executive Officer)
Acting Chief Financial Officer
(Principal Financial and Accounting Officer)