

SECURITIES & EXCHANGE COMMISSION EDGAR FILING

Apollo Endosurgery, Inc.

Form: 10-K/A

Date Filed: 2019-05-03

Corporate Issuer CIK: 1251769

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

FORM 10-K/A

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

For the fiscal year ended December 31, 2018
OR

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

For the transition period from _____ to _____

Commission file number: 001-35706

APOLLO ENDOSURGERY, INC.

(Exact name of registrant as specified in its charter)

Delaware
(State or other jurisdiction of
incorporation or organization)

16-1630142
(I.R.S. Employer
Identification No.)

1120 S. Capital of Texas Highway, Building 1, Suite #300, Austin, Texas
(Address of principal executive offices)

78746
(Zip Code)

Registrant's telephone number (512) 279-5100

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

Title of each class	Trading Symbol(s)	Name of Exchange on which registered
Common Stock, \$0.001 par value per share	APEN	The Nasdaq Global Market

Securities registered pursuant to Section 12(g) of the Act: None

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 15(d) of the Exchange Act. Yes No

Indicate by check mark whether the registrant (1) filed all reports required to be filed by Section 13 or 15(d) of the Exchange Act 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 whether the registrant has submitted electronically every Interactive Data File required to be submitted pursuant to Rule 405 of Regulation S-T (§ 232.405 of this chapter) during the preceding 12 months (or for such shorter period that the registrant was required to submit such files). Yes No

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. (Check one):

Large accelerated filer

Accelerated filer

Non-accelerated filer

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 13(a) of the Exchange Act.

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

The aggregate market value of the common stock held by non-affiliates of the registrant (assuming for these purposes, but without conceding, that all executive officers and directors of the registrant are affiliates of the registrant) was computed based on the adjusted close price of \$6.98 as reported on the Nasdaq Global Market on June 29, 2018 is \$98,996,893.

As of February 28, 2019, there were 21,913,243 shares of the issuer's \$0.001 par value common stock issued and outstanding.

DOCUMENTS INCORPORATED BY REFERENCE

Portions of the Definitive Proxy Statement for the registrant's 2019 Annual Meeting of Stockholders are incorporated by reference into Part III of this Form 10-K. The Definitive Proxy Statement will be filed no later than 120 days after the close of the registrant's fiscal year ended December 31, 2018.

EXPLANATORY NOTE

This Annual Report on Form 10-K/A amends our Annual Report on Form 10-K to refile an updated copy of Exhibit 23.1 - Consent of KPMG LLP, Independent Registered Public Accounting Firm to Apollo Endosurgery, Inc. for certain typographical and other errors included in the originally filed exhibit.

APOLLO ENDOSURGERY, INC. AND SUBSIDIARIES

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ITEM 15. EXHIBITS AND FINANCIAL STATEMENT SCHEDULES

(a) Exhibits

Exhibit Number	Description of Document	Schedule / Form	Incorporated by Reference		Filing Date
			File Number	Exhibit	
2.1 ⁺⁺	Agreement and Plan of Merger and Reorganization, dated as of September 8, 2016, by and among Lpath, Inc., Lpath Merger Sub, Inc., and Apollo Endosurgery, Inc.	8-K	001-35706	2.1	September 8, 2016
2.2 ⁺⁺	Asset Purchase Agreement, dated December 17, 2018, by and between Apollo Endosurgery, Inc. and ReShape Lifesciences Inc.	8-K	001-35706	2.1	December 19, 2018
3.1	Amended and Restated Certificate of Incorporation	8-K	001-35706	3.1	June 13, 2017
3.2	Amended and Restated Bylaws	8-K	001-35706	3.2	June 13, 2017
4.1	Form of Common Stock Certificate of the registrant	10-Q	001-35706	4.1	May 4, 2017
4.2	Form of Warrant Issued to Investors in the September 2014 Offering	8-K	001-35706	4.1	September 22, 2014
4.3	Form of Warrant issued to Torreya Capital	S-4	333-214059	4.7	October 11, 2016
4.4	Apollo Common Stock Purchase Warrant issued to Athyrium Opportunities II Acquisition LP dated February 27, 2015	S-4	333-214059	4.8	October 11, 2016
4.5	Third Amended and Restated Investors' Rights Agreement, dated as of September 8, 2016 by and among Apollo Endosurgery, Inc. and the investors listed on Exhibit A thereto	S-4	333-214059	4.9	October 11, 2016
10.1#	2019 Bonus Plan	8-K	001-35706	10.1	March 5, 2019
10.2#	Offer Letter, dated November 19, 2014, between Apollo Endosurgery, Inc. and Bret Schwartzhoff	S-4	333-214059	10.18	October 11, 2018
10.3#	Gostout offer letter, dated December 9, 2016	10-K	001-35706	10.11	March 1, 2018
10.4#	John Molesphini Offer Letter	10-Q	001-35706	10.2	May 3, 2018
10.5#	Form of Change in Control Agreement	8-K	001-35706	10.1	May 30, 2018
10.6#	Second Amendment to Employment Agreement dated June 1, 2014 by and between the Company and Todd Newton	8-K	001-35706	10.2	May 30, 2018
10.7#	First Amendment to Employment Agreement dated March 2, 2015 by and between the Company and Stefanie Cavanaugh	8-K	001-35706	10.3	May 30, 2018

10.8#	Non-Employee Director Compensation Policy May 2018 amendment	10-Q	001-35706	10.5	August 8, 2018
10.9#	Form of Indemnification Agreement	10-Q	001-35706	10.6	August 8, 2018
10.10	Loan and Security Agreement, dated March 15, 2019, by and among the Company, Solar Capital, Ltd, the guarantors party thereto, and the lenders.	10-K	001-35706	10.1	March 18, 2019
10.11	Credit Agreement, dated February 27, 2015, by and among the Company, Athyrium Opportunities II Acquisition LP, as administrative agent, the guarantors party thereto, and the other lenders from time to time party thereto, as amended or supplemented.	8-K	001-35706	10.1	March 8, 2017
10.12	First Amendment to Office Lease Agreement dated June 11, 2018, by and between the Company and DPF Cityview LP	10-Q	001-35706	10.4	August 8, 2018
10.13	Lease Agreement, dated August 7, 2014, between Apollo Endosurgery Costa Rica Sociedad de Responsabilidad Limitada and Zona Franca Coyoil, S.A.	S-4	331-214059	10.20	October 11, 2016
10.14	Intellectual Property Assignment Agreement, dated November 4, 2009, by and between Apollo Endosurgery, Inc., Olympus Corporation, the University of Texas Medical Branch, the Johns Hopkins University, the Mayo Foundation for Medical Education and Research, the Medical University of South Carolina Foundation for Research Development and the Chinese University of Hong Kong.	S-4	331-214059	10.21	November 14, 2016
10.15#	Apollo Endosurgery, Inc. 2017 Equity Incentive Plan	8-K	001-35706	10.1	June 13, 2017
10.16#	Forms of grant notice, stock option agreement and notice of exercise under the Apollo Endosurgery, Inc. 2017 Equity Incentive Plan	8-K	001-35706	10.2	June 13, 2017
10.17#	Form of restricted stock unit grant notice and award agreement under the Apollo Endosurgery, Inc. 2017 Equity Incentive Plan	8-K	001-35706	10.3	June 13, 2017
10.18#	Apollo Endosurgery, Inc. 2016 Equity Incentive Plan and forms of agreements relating thereto	S-4	333-214059	10.2	October 11, 2016
10.18#	Apollo Endosurgery, Inc. 2006 Stock Option Plan and forms of agreements relating thereto	S-4	333-214059	10.2	October 11, 2016
21.1	List of Subsidiaries	S-4	333-214059	21.1	October 11, 2016

23.1 *	Consent of KPMG LLP, Independent Registered Public Accounting Firm to Apollo Endosurgery, Inc.				
31.1 *	Certification of Chief Executive Officer pursuant to Exchange Act Rule, 13a-14(a) and 15d-14(a), as adopted pursuant to Section 302 of the Sarbanes-Oxley Act of 2002.				
31.2 *	Certification of Chief Financial Officer pursuant to Exchange Act Rule, 13a-14(a) and 15d-14(a), as adopted pursuant to Section 302 of the Sarbanes-Oxley Act of 2002.				
32.1	Certification of Chief Executive Officer pursuant to 18 U.S.C. Section 1350, as adopted pursuant to Section 906 of the Sarbanes-Oxley Act of 2002.	10-K	001-35706	32.1	March 18, 2019
32.2	Certification of Chief Financial Officer pursuant to 18 U.S.C. Section 1350, as adopted pursuant to Section 906 of the Sarbanes-Oxley Act of 2002.	10-K	001-35706	32.2	March 18, 2019

Management contract or compensation plan or arrangement

* Provided herewith.

+ + Pursuant to Item 601(b)(2) of Regulation S-K, the schedules to the Purchase Agreement (identified therein) have been omitted from this report and will be furnished supplementally to the SEC upon request.

In accordance with the requirements of Section 13 on 15(k) of the Securities Exchange Act of 1934, the registrant caused this report to be signed on its behalf on May 3, 2019 by the undersigned thereto.

APOLLO ENDOSURGERY, INC.

/s/ Todd Newton

Todd Newton

Chief Executive Officer

In accordance with the requirements of the Securities Exchange Act of 1934, the registrant caused this report to be signed on its behalf by the undersigned, thereunto duly authorized, on May 3, 2019.

Signature	Title	Date
/s/ Todd Newton Todd Newton	Chief Executive Officer and Director (Principal Executive Officer)	May 3, 2019
/s/ Stefanie Cavanaugh Stefanie Cavanaugh	Chief Financial Officer, Treasurer and Secretary (Principal Financial Officer)	May 3, 2019
* Chrissy Citzler-Carr	Controller (Principal Accounting Officer)	May 3, 2019
* Richard J. Meelia	Chairman of the Board	May 3, 2019
* Rick Anderson	Director	May 3, 2019
* Matthew S. Crawford	Director	May 3, 2019
* Julie Shimer	Director	May 3, 2019
* William D. McClellan, Jr.	Director	May 3, 2019

*

R. Kent McGaughey, Jr.

Director

May 3, 2019

*

David Pacitti

Director

May 3, 2019

*

Bruce Robertson, Ph.D.

Director

May 3, 2019

*By: /s/ Todd Newton

Todd Newton
Attorney-in-Fact

Consent of Independent Registered Public Accounting Firm

The Board of Directors
Apollo Endosurgery, Inc.:

We consent to the incorporation by reference in the registration statements (No. 333-215817) on Form S-8, (No. 333-218741) on Form S-8, (No. 333-221893) on Form S-3 and (No. 333-223461) on Form S-8 of Apollo Endosurgery, Inc. of our reports dated March 18, 2019, with respect to the consolidated balance sheets of Apollo Endosurgery, Inc. and subsidiaries as of December 31, 2018 and 2017, the related consolidated statements of operations and comprehensive loss, changes in stockholders' equity, and cash flows for each of the years then ended, and the related notes, and the effectiveness of internal control over financial reporting as of December 31, 2018, which reports appear in the December 31, 2018 annual report on Form 10-K of Apollo Endosurgery, Inc.

Our report dated March 18, 2019, on the effectiveness of internal control over financial reporting as of December 31, 2018, expresses our opinion that Apollo Endosurgery, Inc. did not maintain effective internal control over financial reporting as of December 31, 2018 because of the effect of a material weakness on the achievement of the objectives of the control criteria and contains an explanatory paragraph that states the material weakness related to the transition in-house of the sales order to cash process (which includes revenue and accounts receivable) from a third-party service provider, where the Company's risk assessment was not sufficient, and therefore ineffective, to ensure controls were designed and implemented to respond to the risks in the transition and sufficient resources were not available to implement the transition in the requisite timeframe. Additionally, the communication of objectives and responsibilities for internal controls related to the transition was insufficient, and therefore ineffective. As a result, we identified control deficiencies over the verification of sales orders including price change approvals, the approval of credit memos and the verification of the application of cash to individual customer account balances.

/s/ KPMG LLP

Austin, Texas
March 18, 2019

**CERTIFICATION OF PRINCIPAL EXECUTIVE OFFICER
PURSUANT TO RULE 13a-14(a) AND 15d-14(a) OF THE SECURITIES EXCHANGE ACT, AS ADOPTED PURSUANT TO SECTION 302 OF THE
SARBANES-OXLEY ACT OF 2002**

I, Todd Newton, certify that:

1. I have reviewed this Annual Report on Form 10-K /A of Apollo Endosurgery, Inc.; and
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 circumstances under which such statements were made, not misleading with respect to the period covered by this report.

Date: May 3, 2019

By: /s/ Todd Newton

Todd Newton

Chief Executive Officer

(Principal Executive Officer)

**CERTIFICATION OF PRINCIPAL FINANCIAL OFFICER
PURSUANT TO RULE 13a-14(a) AND 15d-14(a) OF THE SECURITIES EXCHANGE ACT, AS ADOPTED PURSUANT TO SECTION 302 OF THE
SARBANES-OXLEY ACT OF 2002**

I, Stefanie Cavanaugh, certify that:

1. I have reviewed this Annual Report on Form 10-K /A of Apollo Endosurgery, Inc.; and
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 circumstances under which such statements were made, not misleading with respect to the period covered by this report.

Date: May 3, 2019

By: /s/Stefanie Cavanaugh

Stefanie Cavanaugh

Chief Financial Officer

(Principal Financial Officer)