

Avinger Inc
Form 10-K/A
April 26, 2018
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**UNITED STATES
SECURITIES AND EXCHANGE COMMISSION**

WASHINGTON, D.C. 20549

FORM 10-K/A

(Amendment No. 1)

(Mark One)

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

For the Fiscal Year Ended December 31, 2017

or

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

Commission File Number: 001-36817

AVINGER, INC.

(Exact name of registrant as specified in its charter)

Delaware
(State or other jurisdiction of
incorporation or organization)

20-8873453
(I.R.S. Employer
Identification Number)

400 Chesapeake Drive

Redwood City, California 94063

(Address of principal executive offices and zip code)

(650) 241-7900

(Telephone number, including area code)

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

Title of Each Class:	Name of Each Exchange on which Registered
Common Stock, par value \$0.001 per share	The Nasdaq Capital 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 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

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Indicate by check mark whether the registrant has submitted electronically and posted on its corporate Web site, if any, every Interactive Data File required to be submitted and posted pursuant to Rule 405 of Regulation S-T during the preceding 12 months (or for such shorter period that the registrant was required to submit and post such files). Yes No

Indicate by check mark if disclosure of delinquent filers pursuant to Item 405 of Regulation S-K 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, a smaller reporting company, or an emerging growth company. See 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 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 Act). Yes No

The aggregate market value of the voting and non-voting common equity held by non-affiliates of the registrant, based on the closing price of a share of the registrant's common stock on June 30, 2017 as reported by the Nasdaq Global Market on such date, was approximately \$10.7 million. This calculation does not reflect a determination that certain persons are affiliates of the registrant for any other purpose.

As of March 28, 2018, the number of outstanding shares of the registrant's common stock, par value \$0.001 per share, was 4,384,224.

DOCUMENTS INCORPORATED BY REFERENCE

Portions of the information called for by Part III of this Form 10-K is hereby incorporated by reference to the definitive proxy statement for the registrant's 2018 Annual Meeting of Stockholders, to be filed with the Securities and Exchange Commission within 120 days of the registrant's fiscal year ended December 31, 2017.

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EXPLANATORY NOTE

This Amendment No. 1 on Form 10-K/A (this Amendment) to the Annual Report on Form 10-K of Avinger, Inc. (the Company) for the fiscal year ended December 31, 2017, initially filed with the Securities and Exchange Commission (the SEC) on March 30, 2018 (the Original Filing), is being filed to correct certain errors in the reports of the independent registered public accounting firms in the Original Filing.

This Amendment No. 1 is being filed solely to correct the reports of the independent registered public accounting firms as follows:

(a) with respect to the opinion of Ernst & Young LLP, to (i) change the reference to the Note discussing the Reverse Stock Split from Note 18 to Note 16 and (ii) change the date of the report with respect to the Reverse Stock Split from February 8, 2018 to February 9, 2018; and

(b) with respect to the opinion of Moss Adams LLP, to revise the reference to the financial statement schedule included in the Index at Item 15(a) and to move the going concern uncertainty explanatory paragraph after the opinion section.

In addition, pursuant to the rules of the SEC, Item 8. Financial Statements and Supplementary Data is being filed in its entirety in this Amendment, however, the only change in Item 8 from the Original Filing has been to correct the reports of the independent registered public accounting firms. Further, the exhibit list in Item 15 of Part IV of the Original Filing has been amended to contain current dated certifications from the Company's Chief Executive Officer and Chief Financial Officer, as required by Section 302 of the Sarbanes-Oxley Act of 2002. The certifications of the Company's Chief Executive Officer and Chief Financial Officer are attached as exhibits to this Amendment.

Except for the foregoing amended information, this Amendment does not alter or update any other information contained in the Original Filing. Therefore, this Amendment should be read together with other documents the Company has filed with the SEC subsequent to the Original Filing. Information in such reports and documents updates and supersedes certain information contained in the Original Filing.

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AVINGER, INC.
ANNUAL REPORT ON FORM 10-K
FOR THE FISCAL YEAR ENDED DECEMBER 31, 2017

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Avinger, Pantheris, and Lumivasular are trademarks of our company. Our logo and our other trade names, trademarks and service marks appearing in this Amended Annual Report on Form 10-K/A are our property. Other trade names, trademarks and service marks appearing in this Annual Report on Form 10-K are the property of their respective owners. Solely for convenience, our trademarks and trade names referred to in this Amended Annual Report on Form 10-K/A appear without the symbol, but those references are not intended to indicate, in any way, that we will not assert, to the fullest extent under applicable law, our rights, or the right of the applicable licensor to these trademarks and trade names.

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ITEM 8. FINANCIAL STATEMENTS AND SUPPLEMENTARY DATA

The information required by this item appears in a separate section of this Annual Report on Form 10-K immediately following Part IV and is incorporated herein by reference.

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PART IV

ITEM 15. EXHIBITS AND FINANCIAL STATEMENT SCHEDULES

(a)(1) Financial Statements

The following Financial Statements are filed as part of this Annual Report on Form 10-K:

<u>Reports of Independent Registered Public Accounting Firms</u>	10
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(a)(2) Financial Statement Schedules

All other schedules have been omitted because the information required to be set forth therein is not applicable or is shown in the financial statements or notes thereto. Financial statement schedules relating to the allowance for doubtful accounts receivable and for sales returns follows (in thousands):

Description	Balance at Beginning of Year	Charged to costs and expenses	Write offs	Balance at End of Year
Allowance for doubtful accounts receivable:				
Fiscal year ended 2016	\$ 20	\$ 3	\$ 2	\$ 21
Fiscal year ended 2017	\$ 21	\$ 125	\$	\$ 146

Description	Balance at Beginning of Year	Charged to costs and expenses	Write offs	Balance at End of Year
Allowance for sales returns:				
Fiscal year ended 2016	\$ 59	\$ 114	\$ 130	\$ 43
Fiscal year ended 2017	\$ 43	\$ 87	\$ 75	\$ 55

(a)(3) Exhibits

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The following exhibits are filed as part of, or incorporated by reference into, this Annual Report on Form 10-K.

Exhibit Number	Exhibit Title
3.1 (1)	<u>Amended and Restated Certificate of Incorporation of the registrant.</u>
3.2 (1)	<u>Bylaws of the registrant.</u>
3.3(2)	<u>Certificate of Amendment to the Amended and Restated Certificate of Incorporation.</u>
3.4(3)	<u>Avinger, Inc. Certificate of Designation of Preferences, Rights and Limitations of Series A Convertible Preferred Stock</u>
3.5(4)	<u>Avinger, Inc. Certificate of Designation of Preferences, Rights and Limitations of Series B Convertible Preferred Stock</u>
4.1 (5)	<u>Specimen Common Stock certificate of the registrant.</u>
4.2(4)	<u>Specimen Series 1/2 warrant of the registrant.</u>
10.1 (6)	<u>Form of Indemnification Agreement for directors and executive officers.</u>
10.2 (7)	<u>2009 Stock Plan and Form of Option Agreement thereunder.</u>

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10.3 (7)	<u>2014 Preferred Stock Plan.</u>
10.4 (6)	<u>2015 Equity Incentive Plan.</u>
10.5 (6)	<u>Form of Restricted Stock Unit Award Agreement.</u>
10.6 (6)	<u>Form of Stock Option Agreement.</u>
10.7 (6)	<u>2015 Employee Stock Purchase Plan.</u>
10.8 (6)	<u>Executive Incentive Compensation Plan.</u>
10.9 (7)	<u>Amended and Restated Investors Rights Agreement dated September 2, 2014 by and among the registrant and certain stockholders.</u>
10.10 (7)	<u>Lease Agreement, dated July 30, 2010, by and between the registrant and HCP LS Redwood City, LLC for office space located at 400 and 600 Chesapeake Drive, Redwood City, California.</u>
10.11 (7)	<u>First Amendment to Lease Agreement dated September 30, 2011 by and between registrant and HCP LS Redwood City, LLC.</u>
10.12 (8)	<u>Second Amendment to Lease Agreement dated March 4, 2016 by and between the registrant and HCP LS Redwood City, LLC.</u>
10.13 (7)	<u>Credit Agreement dated April 18, 2013 by and between the registrant and PDL Biopharma.</u>
10.14 (7)	<u>Security Agreement dated April 18, 2013 by and between the registrant and PDL BioPharma.</u>
10.15 (7)	<u>Employment Letter dated November 5, 2014 by and between the registrant and John B. Simpson.</u>
10.16 (7)	<u>Employment Letter dated April 2, 2014 by and between the registrant and John D. Simpson.</u>
10.17 (7)	<u>Employment Letter dated December 29, 2010 by and between the registrant and Matthew B. Ferguson.</u>
10.18 (7)	<u>Employment Letter dated December 17, 2014 by and between the registrant and Jeffrey M. Soinski.</u>
10.19 (7)	<u>Change of Control and Severance Agreement dated March 1, 2012 by and between the registrant and John B. Simpson.</u>
10.20 (7)	<u>Change of Control and Severance Agreement dated March 1, 2012 by and between the registrant and Matthew B. Ferguson.</u>
10.21 (14)	<u>Change of Control and Severance Agreement dated March 29, 2018 by and between the registrant and Jeffrey M. Soinski.</u>
10.22 (3)	<u>Registration Rights Agreement, dated as of February , 2018, by and among the registrant, CRG Partners III L.P. and certain of its affiliated funds, as purchasers.</u>
10.23 (7)	<u>Note and Warrant Purchase Agreement dated October 29, 2013 by and between the registrant and holders of convertible promissory notes.</u>
10.24 (7)	<u>Amendment No. 1 to the Note and Warrant Purchase Agreement dated May 6, 2014 by and between the registrant and holders of convertible promissory notes.</u>
10.25 (8)	<u>Term Loan Agreement, dated as of September 22, 2015, by and among the registrant, certain of its subsidiaries from time to time party thereto as guarantors and CRG Partners III L.P. and certain of its affiliated funds, as lenders.</u>
10.26 (8)	<u>Securities Purchase Agreement, dated as of September 22, 2015, by and among the registrant, CRG Partners III L.P. and certain of its affiliated funds, as purchasers.</u>
10.27(9)	<u>Sales Agreement dated as of February 3, 2016, between the Registrant and Cowen and Company, LLC.</u>
10.28(10)	<u>Purchase Agreement, dated as of November 3, 2017, by and between the registrant and Lincoln Park Capital Fund, LLC.</u>
10.29(10)	<u>Registration Rights Agreement, dated as of November 3, 2017, by and between the registrant and Lincoln Park Capital Fund, LLC.</u>
10.30(11)	<u>Separation Agreement and Release, dated as of December 6, 2017, by and between the registrant and John B. Simpson.</u>
10.31(12)	<u>Waiver and Consent, dated as of December 14, 2017, by and among the registrant and the lenders party thereto.</u>
10.32(13)	<u>Waiver and Consent, dated as of January 24, 2018, by and among the registrant and the lenders party thereto.</u>
10.33(3)	<u>Amendment No. 2 to Term Loan Agreement, dated as of February , 2018, by and among the registrant and the lenders party thereto.</u>

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10.34(3)	<u>Series A Preferred Stock Purchase Agreement, dated as of February , 2018, by and among the registrant, CRG Partners III L.P. and certain of its affiliated funds, as purchasers.</u>
23.1	<u>Consent of Independent Registered Public Accounting Firm.</u>
23.2	<u>Consent of Independent Registered Public Accounting Firm.</u>
24.1	<u>Power of Attorney (included on signature page).</u>
31.1	<u>Certification of the Chief Executive Officer pursuant to Securities Exchange Act Rules 13a-14(a) and 15d-14(a), as adopted pursuant to Section 302 of the Sarbanes-Oxley Act of 2002.</u>
31.2	<u>Certification of the Chief Financial Officer pursuant to Securities Exchange Act Rules 13a-14(a) and 15d-14(a), as adopted pursuant to Section 302 of the Sarbanes-Oxley Act of 2002.</u>
32.1	<u>Certifications of the Chief Executive Officer and Chief Financial Officer pursuant to 18 U.S.C. Section 1350, as adopted pursuant to Section 906 of the Sarbanes-Oxley Act of 2002.</u>
101.INS(14)	XBRL Instance Document
101.SCH(14)	XBRL Taxonomy Extension Schema Document
101.CAL(14)	XBRL Taxonomy Extension Calculation Linkbase Document
101.DEF(14)	XBRL Taxonomy Extension Definition Linkbase Document
101.LAB(14)	XBRL Taxonomy Extension Label Linkbase Document
101.PRE(14)	XBRL Taxonomy Extension Presentation Linkbase Document

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- (1) Previously filed as an Exhibit to the Current Report on Form 8-K filed with the Securities and Exchange Commission on February 6, 2015, and incorporated by reference herein.
 - (2) Previously filed as an Exhibit to the registrant's Current Report on Form 8-K filed with the Securities and Exchange Commission on February 2, 2018.
 - (3) Previously filed as an Exhibit to Amendment No. 2 to the registrant's Registration Statement on Form S-1 (File No. 333-222517) filed with the Securities and Exchange Commission on February 12, 2018, and incorporated by reference herein.
 - (4) Previously filed as an Exhibit to Amendment No. 3 to the registrant's Registration Statement on Form S-1 (File No. 333-222517) filed with the Securities and Exchange Commission on February 13, 2018, and incorporated by reference herein.
 - (5) Previously filed as an Exhibit to Amendment No. 2 to the registrant's Registration Statement on Form S-1 (File No. 333-201322) filed with the Securities and Exchange Commission on January 28, 2015, and incorporated by reference herein.
 - (6) Previously filed as an Exhibit to Amendment No. 1 to the registrant's Registration Statement on Form S-1 (File No. 333-201322) filed with the Securities and Exchange Commission on January 20, 2015, and incorporated by reference herein.
 - (7) Previously filed as an Exhibit to the registrant's Registration Statement on Form S-1 (File No. 333-201322), filed with the Securities and Exchange Commission on December 30, 2014, and incorporated by reference herein.

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- (8) Previously filed as an Exhibit to the registrant's Current Report on Form 8-K filed with the Securities and Exchange Commission on November 12, 2015, and incorporated by reference herein.