

Edgar Filing: ZIOPHARM ONCOLOGY INC - Form SC 13D

ZIOPHARM ONCOLOGY INC  
Form SC 13D  
September 27, 2005

SCHEDULE 13D

Under the Securities Exchange Act of 1934

ZIOPHARM, Oncology, Inc.  
-----

(Name of Issuer)

Common Stock, no par value  
(Title of Class of Securities)

98973P 10 1  
(CUSIP Number)

JONATHAN LEWIS  
-----

CHIEF EXECUTIVE OFFICER  
1180 Avenue of the Americas, Suite 1920  
New York, New York 10036

(Name, Address and Telephone Number of Person Authorized to Receive Notices and Communications)

September 20, 2005  
(Date of Event which Requires Filing of this Statement)

If the filing person has previously filed a statement on Schedule 13G to report the acquisition which is the subject of this Schedule 13D, and is filing this schedule because of Rule 13d-1(b)(3) or (4), check the following box .

CUSIP Number 98973P 10 1  
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- (1) Name of Reporting Persons: Robert Herskowitz  
S.S. or I.R.S. Identification Nos. of above persons:  
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- (2) Check the Appropriate Box if a Member of a Group (See Instructions)  
(a)  
(b)  
-----
- (3) SEC Use Only  
-----
- (4) Source of Funds (See Instructions) PF  
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- (5) Check if Disclosure of Legal Proceedings is required Pursuant to Items 2(d) or 2(e)  
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(6) Citizenship or Place of Organization: United States

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Number of Shares (7) Sole Voting Power: 1.26%<sup>1</sup>  
Beneficially Owned  
By Each Reporting (8) Shared Voting Power: 0.15%<sup>2</sup>  
Person With  
(9) Sole Dispositive Power: 1.26%  
(10) Shared Dispositive Power: 0.15%

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(11) Aggregate Amount Beneficially Owned by Each Reporting Person: 100,973

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(12) Check if the Aggregate Amount in Row (11) Excludes Certain Shares (see Instructions).

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(13) Percent of Class Represented by Amount in Row (11): 1.41%

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(14) Type of Reporting Person (See Instructions): IN

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(3) Name of Reporting Persons: Johanna Guttmann  
S.S. or I.R.S. Identification Nos. of above persons:

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(4) Check the Appropriate Box if a Member of a Group (See Instructions)  
(a)  
(b)

-----  
(3) SEC Use Only

-----  
(4) Source of Funds (See Instructions) PF

-----  
(5) Check if Disclosure of Legal Proceedings is required Pursuant to Items 2(d) or 2(e)

-----  
(6) Citizenship or Place of Organization: United States

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Number of Shares (7) Sole Voting Power: 0  
Beneficially Owned  
By Each Reporting (8) Shared Voting Power: 0.15%<sup>2</sup>  
Person With  
(9) Sole Dispositive Power: 0%  
(10) Shared Dispositive Power: 0.15%

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(11) Aggregate Amount Beneficially Owned by Each Reporting Person: 10,750

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(12) Check if the Aggregate Amount in Row (11) Excludes Certain Shares (see Instructions).

-----  
(13) Percent of Class Represented by Amount in Row (11): 0.15%

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(14) Type of Reporting Person (See Instructions): IN

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1 Includes 90,223 shares Mr. Herskowitz individually owns, including 83,348 shares underlying an option for Chase Financing Inc., to which Mr. Herskowitz is President. The option is currently exercisable and the aggregate exercise price for it is \$1,000. Since Mr. Herskowitz is the President of Chase, he may be deemed to be the beneficial owner of all such shares of common stock owned by

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Chase.

2 Includes 10,750 shares Mr. Herskowitz owns with Johanna Guttman as Tenants by the Entirety. Prior to the merger between Ziopharm Oncology, Inc. and EasyWeb, Inc., which took place on September 15, 2005, these shares represented 5.66% of EasyWeb, Inc. Although neither Mr. Herskowitz nor Ms. Guttman, individually or together now own 5% or more of Ziopharm Oncology, Inc., their 5.66% ownership was mistakenly not previously reported. Therefore, this is a late filing but reports information as of the filing date.

### ITEM 1. SECURITY AND ISSUER.

This statement relates to the common stock, no par value per share (the "Common Stock"), of ZIOPHARM, Oncology, Inc. a Delaware corporation (the "Company").

The Company's principal offices are located at business at 1180 Avenue of the Americas, Suite 1920, New York, New York 10036.

### Item 2. Identity and Background.

- (a) This statement is filed by Robert Herskowitz and Johanna Guttman, who are both natural persons.
- (b) Robert Herskowitz's business address is P.O. Box 403303 Miami Beach, Florida 33140. Johanna Guttman's business address is P.O. Box 755 New York, New York 10024.
- (c) Robert Herskowitz's principal occupation is as Business Executive. Johanna Guttman's principal occupation is as Business Executive.
- (d) During the past five years, neither filer has been convicted in a criminal proceeding (excluding traffic violations or similar misdemeanors).
- (e) During the past five years, neither filer has been a party to a civil proceeding of a judicial or administrative body of competent jurisdiction and as a result of such proceeding was the subject to a judgment, decree or final order enjoining future violations of, or prohibiting or mandating activities subject to, federal and state securities laws of findings any violation with respect to such laws.
- (f) Both filers are citizens of the United States.

### ITEM 3. SOURCE AND AMOUNT OF FUNDS OR OTHER CONSIDERATION.

### ITEM 4. PURPOSE OF TRANSACTION

### ITEM 5. INTEREST IN SECURITIES OF THE ISSUER

- (a) Robert Herskowitz controls 90,223 of the 7,157,865 of the outstanding shares of the Company. Robert Herskowitz and Johanna Guttman control 10,750 of the 7,157,865 of the outstanding shares of the Company.
- (b) Robert Herskowitz has sole power to vote or to direct the vote and sole power to dispose or direct the disposition of 90,223 shares. Robert Herskowitz and Johanna Guttman have shared power to vote or to direct the vote and shared power to dispose or direct the disposition of 10,750 shares.
- (b) No transactions in the class of securities reported were effected during the past sixty days or since the most recent filing of a Schedule 13(D).
- (c) No other person is known to Robert Herskowitz to have the right to receive or the power to direct the receipt of dividends from, or

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proceeds from the sale of, the 90,223 shares listed above. No person, other than the filers are known to have the right to receive or the power to direct the receipt of dividends from, or proceeds from the sale of, the 10,750 shares listed above.

(d) n/a

ITEM 6. CONTRACTS, ARRANGEMENTS, UNDERSTANDINGS OR RELATIONSHIPS WITH RESPECT TO SECURITIES OF THE ISSUER.

ITEM 7. MATERIAL TO BE FILED AS EXHIBITS.

SIGNATURE

After reasonable inquiry and to the best of my knowledge and belief, I certify that the information set forth in this statement is true, complete and correct.

Date: September 26, 2005

Signature: /s/ Robert Herskowitz  
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Name/Title: Robert Herskowitz

Signature: /s/ Johanna Guttmann  
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Name/Title: Johanna Guttmann

rch 1 and September 1 of each year, and are exchangeable, under specified circumstances, at the holder's option for shares of the Company's Class A common stock (the "Common Stock") or cash or a combination of common stock and cash, at Spansion LLC's election, subject to the exchange share cap described below. The Notes are exchangeable at the option of holders prior to June 1, 2020 only if specified conditions are met, and will be exchangeable on or after June 1, 2020 irrespective of these conditions. The Notes have an initial exchange rate of 72.0929 shares of common stock per \$1,000 principal amount of Notes (equivalent to an initial exchange price of approximately \$13.87 per share), subject to adjustment. The Notes will mature on September 1, 2020, unless earlier exchanged or repurchased.

Unless and until the Company obtains stockholder approval to issue more than 19.99% of the Common Stock outstanding on the closing date upon exchange of the Notes in accordance with the listing standards of The New York Stock Exchange, the number of shares of common stock holders will be eligible to receive upon exchange will be subject to an exchange share cap (equal to the pro rata portion of such 19.99% limit represented by the notes to be exchanged). As a result, unless and until such stockholder approval is obtained, Spansion LLC will be deemed to have elected combination settlement with a specified dollar amount per \$1,000 principal amount of notes of at least \$1,000 for all notes submitted for exchange, which means Spansion LLC will be obligated to settle its exchange obligation by paying up to the specified dollar amount with respect to such notes in cash and delivering shares of common stock for any exchange value in excess of such specified dollar amount.

The foregoing description of the Indenture (including the form of the Note) does not purport to be complete and is qualified in its entirety by reference to the full text of the Indenture (including the form of the Note), a copy of which is attached hereto as Exhibit 4.1 and is incorporated

into this report by reference.

*Capped Call Transactions*

In connection with the pricing of the Notes, on August 20, 2013, the Company and Spansion LLC entered into privately negotiated capped call transactions (the Capped Call

Transactions ) with certain of the initial purchasers of the Notes and their affiliates (the Option Counterparties ). The Capped Call Transactions cover, collectively, the number of shares of the Common Stock underlying the Notes, subject to anti-dilution adjustments substantially similar to those applicable to the Notes. The cost of the Capped Call Transactions was approximately \$15.4 million.

The Capped Call Transactions are expected generally to reduce potential dilution to the Common Stock upon exchange of the Notes and/or reduce Spansion LLC's exposure to potential cash payments Spansion LLC may be required to make upon exchange of the Notes in excess of the principal amount of exchanged Notes, except to the extent the market price of the Common Stock, as measured under the terms of the Capped Call Transactions, exceeds the cap price of the Capped Call Transactions. The cap price of the Capped Call Transactions will initially be \$18.14 per share, which represents a premium of approximately 70% over the last reported sale price of the Common Stock on August 20, 2013, and is subject to certain adjustments under the terms of the Capped Call Transactions.

The Capped Call Transactions are separate transactions, in each case, entered into by the Company and Spansion LLC with the Option Counterparties, and are not part of the terms of the Notes and will not affect any holder's rights under the Notes. Holders of the Notes will not have any rights with respect to the Capped Call Transactions.

The foregoing description of the Capped Call Transactions does not purport to be completed and is qualified in its entirety by reference to the copies of the letter agreements for the Capped Call Transactions, which are attached hereto as Exhibits 10.1 through 10.4 to this report and are incorporated into this report by reference.

**Item 2.03 Creation of a Direct Financial Obligation or an Obligation under an Off-Balance Sheet Arrangement of a Registrant.**

The information relating to the Notes and the Indenture in Item 1.01 above is incorporated herein by reference.

**Item 3.02 Unregistered Sales of Equity Securities.**

The information relating to the Notes and the Indenture in Item 1.01 above is incorporated herein by reference.

Spansion LLC offered and sold the Notes to the initial purchasers in reliance on the exemption from registration provided by Section 4(2) of the Securities Act of 1933, as amended (the Securities Act ), and for resale by the initial purchasers to qualified institutional buyers pursuant to the exemption from registration provided by Rule 144A under the Securities Act.

The Notes and the underlying Common Stock issuable upon exchange of the Notes have not been registered under the Securities Act and may not be offered or sold in the United States absent registration or an applicable exemption from registration requirements. This Current Report on Form 8-K does not constitute an offer to sell, or a solicitation of an offer to buy, any security and shall not constitute an offer, solicitation or sale in any jurisdiction in which such offering would be unlawful.

To the extent that any shares of Common Stock are issued upon exchange of the Notes, they will be issued in transactions anticipated to be exempt from registration under the Securities Act by virtue of Section 3(a)(9) thereof, because no commission or other remuneration is expected to be paid in connection with exchange of the Notes and any resulting issuance of shares of Common Stock.

**Item. 8.01. Other Events.**

As previously reported on the Company's Current Report on Form 8-K dated August 19, 2013, the Company intended to use a portion of the net proceeds from the issuance and sale of the Notes to repurchase a portion of Spansion LLC's 7.875% Senior Notes due 2017 (the 2017 Notes) pursuant to repurchase agreements that were privately negotiated with certain holders of the 2017 Notes. On August 26, 2013, the Company used approximately \$115.0 million of the net proceeds from the issuance and sale of the Notes to close these repurchase agreements. As a result, the Company repurchased and has canceled approximately \$105.9 million aggregate principal amount of its 2017 Notes. There remains approximately \$94.1 million aggregate principal amount of 2017 Notes outstanding after taking into account these repurchases.

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

(d) Exhibits.

**Exhibit**

Number	Description
4.1	Indenture, dated August 26, 2013, between Spansion LLC, the Guarantors and Wells Fargo Bank, National Association, as trustee, including the form of 2.00% Senior Exchangeable Notes due 2020
10.1	Letter Agreement, dated August 20, 2013, between Barclays Bank PLC, Spansion LLC and Spansion Inc., regarding the Capped Call Transaction
10.2	Letter Agreement, dated August 20, 2013, between Citibank, N.A., Spansion LLC and Spansion Inc., regarding the Capped Call Transaction
10.3	Letter Agreement, dated August 20, 2013, between Jefferies LLC, Spansion LLC and Spansion Inc., regarding the Capped Call Transaction
10.4	Letter Agreement, dated August 20, 2013, between Wells Fargo Securities, LLC, Spansion LLC and Spansion Inc., regarding the Capped Call Transaction

**SIGNATURES**

Pursuant to the requirements of the Securities Exchange Act of 1934, as amended, the registrant has duly caused this report to be signed on its behalf by the undersigned hereunto duly authorized.

Date: August 26, 2013

SPANSION INC.

By: /s/ Randy W. Furr

Name: Randy W. Furr

Title: Corporate Executive Vice President and Chief Financial  
Officer



**Exhibit Index**

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