

EMAGEON INC
Form SC TO-T/A
March 30, 2009

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

**SCHEDULE TO
Amendment No. 3
Tender Offer Statement Under Section 14(d)(1) or 13(e)(1)
of the Securities Exchange Act of 1934**

Emageon Inc.
(Name of Subject Company (Issuer))
AMICAS Acquisition Corp.
and
AMICAS, Inc.
(Name of Filing Person (Offeror))

Common Stock, \$0.001 Par Value Per Share
(Title of Class of Securities)

29076V 10 9
(CUSIP Number of Common Stock Underlying Class of Securities)

Stephen N. Kahane, M.D., M.S.
Chief Executive Officer
AMICAS, Inc.
20 Guest Street
Boston, Massachusetts 02135
(617) 779-7878
(Name, Address and Telephone Number of Person Authorized to
Receive Notices and Communications On Behalf of Filing Person)

Copy to:
John R. Pomerance, Esq.
Megan N. Gates, Esq.
Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.
One Financial Center
Boston, Massachusetts 02111
(617) 542-6000

CALCULATION OF REGISTRATION FEE

Transaction Valuation*
\$39,047,266.74

**Amount of Filing
Fee****
\$1,534.56

*

For purposes of calculating the filing fee pursuant to Rule 0-11(d) only, the transaction valuation was calculated by adding the sum of (a) the offer price of \$1.82 per share of common stock, \$0.001 par value per share, of Emageon Inc. (the Shares) multiplied by 21,449,718 shares of common stock issued and outstanding, and (b) the offer price of \$1.82 minus \$1.73, which is the weighted average exercise price of outstanding in-the-money options to acquire Shares multiplied by 79,818, the number of outstanding in-the-money options.

** The filing fee, calculated in accordance with Rule 0-11 of the Securities Exchange Act of 1934, is calculated by multiplying the

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Transaction
Valuation by
.00003930.

- ☒ Check the box if any part of the fee is offset as provided by Rule 0-11(a)(2) and identify the filing with which the offsetting fee was previously paid. Identify the previous filing by registration statement number, or the Form or Schedule and the date of its filing.

Amount Previously Paid: **\$1,534.56**

Filing Party: **AMICAS Acquisition Corp. and
AMICAS, Inc.**

Form or Registration No.: **Schedule TO**

Date Filed: **March 5, 2009**

- ☐ Check the box if the filing relates solely to preliminary communications made before the commencement of a tender offer.

Check the appropriate boxes below to designate any transactions to which the statement relates:

- ☒ third party tender offer subject to Rule 14d-1.
- ☐ issuer tender offer subject to Rule 13e-4.
- ☐ going-private transaction subject to Rule 13e-3.
- ☐ amendment to Schedule 13D under Rule 13d-2.

Check the following box if the filing is a final amendment reporting the results of the tender offer: ☐

This Amendment No. 3 to the Tender Offer Statement on Schedule TO (this Amendment), filed with the Securities and Exchange Commission on March 30, 2009, amends and supplements the Tender Offer Statement on Schedule TO filed on March 5, 2009, and amended on March 13, 2009 and March 17, 2009 (the Schedule TO), and relates to the offer by AMICAS Acquisition Corp., a Delaware corporation (Purchaser) and a wholly-owned subsidiary of AMICAS, Inc., a Delaware corporation (AMICAS), to purchase all outstanding shares of common stock, \$0.001 par value per share (the Shares), of Emageon Inc., a Delaware corporation (Emageon), at a price of \$1.82 per Share, net to the seller in cash, without interest thereon and less any required withholding taxes, upon the terms and subject to the conditions set forth in the Offer to Purchase dated March 5, 2009 (the Offer to Purchase) and in the related Letter of Transmittal (which, together with any amendments or supplements thereto, collectively constitute the Offer), which are annexed to and filed with the Schedule TO as Exhibits (a)(1)(A) and (a)(1)(B), respectively. This Amendment is being filed on behalf of Purchaser and AMICAS.

Item 11. Additional Information.

Item 11 of the Schedule TO is hereby amended and supplemented to include the following in the section titled Litigation Related to the Offer and Merger :

On March 13, 2009, a putative shareholder class action lawsuit was filed against Emageon and members of the Emageon Board of Directors in the Circuit Court of Jefferson County, Alabama (Case No. CV-2009-900927.00). The action, styled *Philip Fishman v. Emageon, Inc., et. al.*, alleged, among other things, that the members of the Emageon Board of Directors violated their fiduciary duties by failing to maximize value for Emageon's stockholders when negotiating and entering into the Merger Agreement. The complaint also alleged that Emageon aided and abetted those purported breaches. The plaintiff sought, among other things, to enjoin the acquisition of Emageon by AMICAS or, in the alternative, to rescind the acquisition should it occur before the lawsuit is resolved. The plaintiff had also made motions for expedited proceedings and discovery.

On March 26, 2009, Emageon entered into a memorandum of understanding with plaintiffs' counsel and the other named defendants to settle the putative shareholder class action lawsuit that was filed in the Circuit Court of Jefferson County, Alabama.

Under the terms of the memorandum, Emageon, the other named defendants and the plaintiffs have agreed to settle the lawsuit, subject to court approval. If the court approves the settlement contemplated in the memorandum, the lawsuit will be dismissed with prejudice.

Pursuant to the terms of the memorandum, Emageon agreed to make available certain additional information to its stockholders, which information is set forth in Amendment No. 3 to Emageon's Schedule 14D-9 filed on March 27, 2009. In return, the plaintiffs agreed under the memorandum to the dismissal of the action and to withdraw all motions filed in connection with such action. In addition, Emageon agreed to pay the legal fees and expenses of plaintiffs' counsel, subject to approval by the court. This payment will not affect the amount of consideration to be paid to stockholders of Emageon in connection with the Offer and Merger. The details of the settlement will be set forth in a notice to be sent to Emageon's stockholders prior to a hearing before the court to consider both the settlement and the plaintiffs' fee application.

Emageon and the other defendants maintain that the lawsuit is completely without merit. Nevertheless, in order to avoid costly litigation and eliminate the risk of any delay to the closing of the Offer and subsequent Merger, the defendants have agreed to the settlement contemplated in the memorandum.

SIGNATURE

After due 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.

AMICAS, INC.

By: /s/ Stephen N. Kahane
Name: Dr. Stephen N. Kahane
Title: President and Chief Executive
Officer

AMICAS ACQUISITION CORP.

By: /s/ Kevin C. Burns
Name: Kevin C. Burns
Title: Authorized Signatory