

LIGHTPATH TECHNOLOGIES INC

Form 10-K/A

January 26, 2009

## 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 June 30, 2008 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 000-27548

# LIGHTPATH TECHNOLOGIES, INC.

(Exact name of registrant as specified in its charter)

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DELAWARE  
(State or other jurisdiction of  
incorporation or organization)

86-0708398  
(I.R.S. Employer  
Identification No)

http://www.lightpath.com

2603 Challenger Tech Court, Suite 100

Orlando, Florida 32826  
(Address of principal executive offices, including zip code)

(407) 382-4003  
(Registrant's telephone number, including area code)

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

None  
(Title of each class)

None  
(Name of each exchange on which registered)

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

Class A Common Stock, \$.01 par value

Series D Participating Preferred Stock Purchase Rights

(Title of Class)

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 and 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 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, non-accelerated filer, or a smaller reporting company. As defined in Rule 12b-2 of the Exchange Act: See the definition of Large Accelerated Filer, Accelerated Filer, Non-accelerated Filer or Smaller Reporting Company in Rule 12b-2 of the Exchange Act (Check One):

Large Accelerated Filer

Accelerated Filer

Non-accelerated Filer

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

The aggregate market value of the registrant's voting stock held by non-affiliates (based on the closing sale price of the registrant's Common Stock on the NASDAQ Capital Market, and for the purpose of this computation only, on the assumption that all of the registrant's directors and officers are affiliates as well as one party filing on Form SC 13-G) was approximately \$7,903,312 as of December 31, 2007.

As of September 24, 2008, the number of shares of the registrant's Class A Common Stock outstanding was 5,331,664.

**DOCUMENTS INCORPORATED BY REFERENCE**

None.

### EXPLANATORY NOTE

On September 29, 2008, LightPath Technologies, Inc., filed its annual report on Form 10-K for the period ended June 30, 2008 (the "Original Filing"). The Company is filing this Amendment No. 1, its annual report on Form 10-K/A (the "Amendment") solely for the purpose of correcting the disclosure in Item 9A(T) Controls and Procedures of the Original Filing to include a clear definitive statement disclosing management's conclusion on the effectiveness of the Company's internal controls over financial reporting at the end of the fiscal year as required by Item 308T(a)(3) of Regulation S-K.

In addition, in connection with the filing of this Amendment and pursuant to SEC rules and regulations, we are including with this Amendment certain currently dated certifications. Accordingly, Item 15 of Part IV has also been amended to reflect the filing of these currently dated certifications.

This Form 10-K/A does not attempt to modify or update any other disclosures set forth in the Original Filing. Additionally, this Form 10-K/A speaks as of the filing date of the Original Filing and does not update or discuss any other Company developments subsequent to the date of the Original Filing.

#### **Item 9A(T). Controls and Procedures**

##### **Evaluation of Disclosure Controls and Procedures**

Our management conducted an evaluation, with the participation of its Chief Executive Officer (CEO) and its Chief Financial Officer (CFO), of the effectiveness of our disclosure controls and procedures (as defined in Rules 13a-15(e) and 15d-15(e) under the Securities Exchange Act of 1934 (the "Exchange Act")) as of the end of the period covered by this Annual Report on Form 10-K. Based upon that evaluation the CEO and CFO concluded that our disclosure controls and procedures were not effective in reporting, on a timely basis, information required to be disclosed by us in the reports we file or submit under the Exchange Act, because of material weaknesses in internal control over financial reporting as of June 30, 2008, as described below.

##### **Management's Annual Report on Internal Control over Financial Reporting**

Management conducted its evaluation of the effectiveness of the Company's internal controls over financial reporting based on the framework in Internal Control - Integrated Framework issued by the Committee of Sponsoring Organizations of the Treadway Commission. Based upon that evaluation, our principal executive officer and principal financial officer concluded that our internal control over financial reporting was not effective as of June 30, 2008 because of the existence of material weaknesses as described below. A material weakness in internal control over financial reporting is defined by Public Company Accounting Oversight Board (PCAOB) Auditing Standard No. 5 as a deficiency, or a combination of deficiencies, in internal control over financial reporting, such that there is a reasonable possibility that a material misstatement of the Company's annual or interim financial statements will not be prevented or detected on a timely basis.

We identified two material weaknesses relating to inventory:

##### *Reserve for Inventory Obsolesce*

Our management concluded that our procedures used to identify obsolete inventory items were not operating effectively during the 2008 fiscal year.

### *Inventory Costing*

Our management concluded that policies and procedures to set cost standards in the inventory system were not designed or operating effectively during the year. An audit determined that there were discrepancies in the standard cost of raw material, direct labor, overhead and subcontracted services. In addition, policies and procedures regarding inventory management were not designed or operating effectively during the year. In particular, inventory work orders for finished goods are not entered into the perpetual system timely to allow for adequate tracking and monitoring of inventory flow and costing. Monthly physical cycle counts of on-hand inventory and the annual full physical count are considered compensating controls, but they do not reduce the likelihood of potential error below the level of a significant error.

Management has made significant efforts to review its obsolete inventory throughout the year and has adjusted its reserve based on this updated analysis. Management intends to continue to remediate this weakness by determining how it can better enhance its ability to identify obsolete items to reduce human error and to create a more standardized method for determining obsolescence. Management plans to review the cost standards quarterly and adjust the standards as needed. However, these material weaknesses will not be considered remediated until new processes are fully implemented, operate for a sufficient period of time, and we are confident that they are operating effectively. Management anticipates that we will report in our Quarterly Report on Form 10-Q for the first quarter of 2009 that the material weakness in our internal control over inventory continues to exist. We are committed to finalizing our remediation action plan and implementing the necessary enhancements to our policies and procedures to fully remediate the material weaknesses discussed above.

The material weaknesses with the accrued liabilities previously noted in our past filings have been remediated and the results of management's current year assessment have confirmed that remediation efforts instituted by management have sufficiently reduced or eliminated the risk of misstatement associated with those former material weaknesses. We will continue to monitor the effectiveness of our internal controls and procedures on an ongoing basis and will take further actions, as appropriate.

Notwithstanding the above, management believes that the consolidated financial statements included in this Annual Report on Form 10-K, fairly present, in all material respects, our financial condition, results of operations and cash flows for the periods presented in accordance with generally accepted accounting principles.

This annual report does not include an attestation report of the Company's registered public accounting firm regarding internal control over financial reporting. Management's report was not subject to attestation by the Company's registered public accounting firm pursuant to temporary rules of the Securities and Exchange Commission that permit the Company to provide only management's report in this annual report.

### **Limitations on the Effectiveness of Controls**

A control system, no matter how well conceived and operated, can provide only reasonable, not absolute, assurance that the objectives of the control system are met. Further, the design of a control system must reflect the fact that there are resources constraints, and the benefits of controls must be considered relative to their costs. Because of the inherent limitations in all control systems, no evaluation of controls can provide absolute assurance that all control issues and instances of fraud, if any, within a company have been detected. These inherent limitations include the realities that judgments in decision-making can be faulty, and that breakdowns can occur because of simple error or mistake. Additionally, controls can be circumvented by the individual acts of some persons, by collusion of two or more people, or by management override of the control.

The design of any system of controls also is based in part upon certain assumptions about the likelihood of future events, and there can only be reasonable assurance that any design will succeed in achieving its stated goals under all potential future conditions. Over time, control may become inadequate because of changes in conditions, or the degree of compliance with the policies or procedures may deteriorate. Because of the inherent limitations in a cost-effective control system, misstatements due to error or fraud may occur and not be detected.

### **Changes in Internal Control over Financial Reporting.**

There were no changes in our internal control over financial reporting, known to the Chief Executive Officer and Chief Financial Officer that occurred during the period covered by this report that has materially affected, or is reasonably likely to materially affect, our internal control over financial reporting.

**Item 15 Exhibits, Financial Statement Schedules**

The following exhibits are included with this filing:

<b>Exhibit Number</b>	<b>Description</b>
31.3	Certification of Chief Executive Officer pursuant to Rule 13a-14(a) of the Securities Exchange Act of 1934
31.4	Certification of Chief Financial Officer pursuant to Rule 13a-14(a) of the Securities Exchange Act of 1934
32.3	Certification of Chief Executive Officer pursuant to 18 U.S.C. Section 1350 of Chapter 63 of Title 18 of the United States Code
32.4	Certification of Chief Financial Officer pursuant to 18 U.S.C. Section 1350 of Chapter 63 of Title 18 of the United States Code 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.

**LIGHTPATH TECHNOLOGIES, INC.**

Date: January 26, 2009

By: /s/ J. James Gaynor  
**J. James Gaynor**  
**President & Chief Executive Officer**

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

<p>/s/ J. JAMES GAYNOR <b>James Gaynor,</b></p> <p><b>President &amp; Chief Executive Officer</b> <b>(Principal Executive Officer)</b></p>	<p>January 26, 2009</p>	<p>/s/ DOROTHY M. CIPOLLA <b>Dorothy M. Cipolla,</b></p> <p><b>Chief Financial Officer</b> <b>(Principal Financial Officer)</b></p>	<p>January 26, 2009</p>
<p>/s/ ROBERT RIPP <b>Robert Ripp</b></p> <p><b>Director (Chairman of the Board)</b></p>	<p>January 26, 2009</p>	<p>/s/ SOHAIL KHAN <b>Sohail Khan</b></p> <p><b>Director</b></p>	<p>January 26, 2009</p>
<p>/s/ DR. STEVEN R. J. BRUECK <b>Dr. Steven R. J. Brueck</b></p> <p><b>Director</b></p>	<p>January 26, 2009</p>	<p>/s/ LOUIS LEEBURG <b>Louis Leeburg</b></p> <p><b>Director</b></p>	<p>January 26, 2009</p>
		<p>/s/ GARY SILVERMAN <b>Gary Silverman</b></p> <p><b>Director</b></p>	<p>January 26, 2009</p>