

# 2004 BCSECCOM 207

## **Headnote**

Mutual Reliance Review System for Exemptive Relief Applications - relief granted from the requirement to reconcile to Canadian GAAP certain financial statements included in an information circular that were prepared in accordance with U.S. GAAP

## **Applicable British Columbia Provisions**

*Securities Act*, R.S.B.C. 1996, c. 418, s. 119(2)(b)

**IN THE MATTER OF THE SECURITIES LEGISLATION OF ONTARIO,  
ALBERTA, BRITISH COLUMBIA, NEWFOUNDLAND AND  
LABRADOR, QUÉBEC AND SASKATCHEWAN**

**AND**

**IN THE MATTER OF THE MUTUAL RELIANCE REVIEW SYSTEM  
FOR EXEMPTIVE RELIEF APPLICATIONS**

**AND**

**IN THE MATTER OF NANOGEN, INC.**

**AND**

**SYNX PHARMA INC.**

## **MRRS DECISION DOCUMENT**

WHEREAS the local securities regulatory authority or regulator (the Decision Makers”) in each of Ontario, Alberta, British Columbia, Newfoundland and Labrador, Québec and Saskatchewan (the “Jurisdictions”) has received an application from Nanogen, Inc. (“Nanogen”) and SynX Pharma Inc. (“SynX”) (collectively the “Applicants”) for a decision (the “Decision”) under the securities legislation of the Jurisdictions (the “Legislation”) that the Applicants be exempt from the following requirements in the management information circular (the “Circular”) to be sent to SynX shareholders:

- (a) the requirement that historical and *pro forma* financial statements of Nanogen prepared in accordance with United States (“US”) generally accepted accounting principles (“US GAAP”) be accompanied by a note to explain and quantify the effect of material differences between Canadian generally accepted accounting principles (“Canadian GAAP”) and

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US GAAP that relate to measurements and provide a reconciliation of such financial statements to Canadian GAAP;

- (b) the requirement that the Nanogen auditor's report disclose any material differences in the form and content of its auditor's report as compared to a Canadian auditor's report and confirming that the auditing standards applied are substantially equivalent to Canadian generally accepted auditing standards; and
- (c) the requirement that Nanogen's management's discussion and analysis (the "Nanogen MD&A") provide a restatement of those parts of the Nanogen MD&A that would read differently if the Nanogen MD&A were based on statements prepared in accordance with Canadian GAAP and the requirement that the Nanogen MD&A provide a cross-reference to the notes in the financial statements that reconcile the differences between US GAAP and Canadian GAAP.

(collectively, the "GAAP Reconciliation Requirements")

AND WHEREAS under the Mutual Reliance Review System for Exemptive Relief Applications (the "System"), the Ontario Securities Commission is the principal regulator for this application;

AND WHEREAS, unless otherwise defined, the terms herein have the meaning set out in National Instrument 14-101 Definitions or in Québec Commission Notice 14-101;

AND WHEREAS the Applicants have represented to the Decision Makers that:

1. Pursuant to a combination agreement dated February 9, 2004 between Nanogen and SynX, Nanogen intends to acquire all of the outstanding common shares of SynX (the "SynX Common Shares") and all of the outstanding subordinated secured debentures (the "SynX Debentures") in a transaction (the "Transaction") to be effected pursuant to a plan of arrangement (the "Arrangement"). The Arrangement will be carried out under section 182 of the *Business Corporations Act* (Ontario) (the "OBCA").
2. SynX is a company incorporated under the OBCA and is a reporting issuer in Alberta, British Columbia and Ontario. The SynX Common Shares are listed on the Toronto Stock Exchange (the "TSX"), under the symbol "SYX". SynX is not in default of any of the requirements of the securities legislation in any of the Jurisdictions.

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3. Nanogen is a Delaware company based in California, the common stock of which is listed for trading on the Nasdaq National Market (“Nasdaq”), under the symbol “NGEN”. Nanogen is currently subject to the *United States Securities Exchange Act of 1934*, as amended.
4. SynX’s authorized share capital consists of an unlimited number of SynX Common Shares and unlimited number of non-voting preference shares, issuable in series. As of February 9, 2004, the issued and outstanding share capital of SynX consisted of 10,267,389 SynX Common Shares and no preference shares. As of February 9, 2004, 1,958,168 options to purchase SynX Common Shares (the “SynX Options”), 1,725,000 warrants to purchase SynX Common Shares (the “SynX Warrants”), SynX Debentures in the aggregate principal amount of \$3,450,000 and no other securities of SynX were issued and outstanding.
5. The effect of the Arrangement will be to provide holders of SynX Common Shares (except dissenting shareholders) and holders of SynX Debentures with shares of Nanogen common stock (“Nanogen Common Shares”). Upon completion of the Transaction, Nanogen will own all of the SynX Common Shares and the SynX Debentures.
6. The exchange ratio will be determined by dividing the United States dollar equivalent of \$16,287,500 by the product of Full Share Equivalents (as defined below) multiplied by the average closing price for a Nanogen Common Share on the Nasdaq Stock Market for the fifteen trading days ending on the trading day that is three days prior to the effective date of the Arrangement (the “Exchange Ratio”).
7. Under the Combination Agreement, Full Share Equivalents is defined to include SynX Common Shares and also takes into account the value of SynX Options and SynX Warrants that are in the money (i.e. with an exercise price of less than \$1.45). Full Share Equivalents is defined as the sum, without duplication, of (A) the aggregate number of SynX Common Shares that are issued and outstanding immediately prior to the effective time of the Arrangement (the “Effective Time”); (B) the aggregate number of SynX Common Shares that are issuable upon the exercise of the SynX Options with a per share exercise price less than \$1.45 that are issued and outstanding immediately prior to the Effective Time (whether or not then vested or exercisable) less the number of shares equal to the quotient determined by dividing (I) the sum of the products of (a) the number of shares exercisable under each SynX Option with a per share exercise price less than \$1.45 and (b) the corresponding exercise price applicable to each SynX Option with a per share exercise price less than \$1.45 by (II) \$1.45; and (C) the aggregate

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number of SynX Common Shares issuable upon the exercise of SynX Warrants or other direct or indirect rights to acquire SynX Common Shares that are issued and outstanding immediately prior to the Effective Time (whether or not then vested or exercisable) less the number of shares equal to the quotient determined by dividing (I) the product of (a) the number of shares exercisable under each SynX Warrant with a per share exercise price less than \$1.45 and (b) the corresponding exercise price applicable to each SynX Warrant with a per share exercise price less than \$1.45 by (II) \$1.45.

8. Subject to the terms of an interim order (the "Interim Order") to be sought from the Ontario Superior Court of Justice (the "Court"), it is anticipated that the required approval for the Arrangement will be (i) not less than 66 2/3% of the votes cast in person or by proxy by the SynX Shareholders, and (ii) SynX Debentureholders holding more than 80% of the unpaid principal amount of the then outstanding SynX Debentures, in each case, voting separately as a class at the joint meeting of SynX Shareholders and SynX Debentureholders (the "Meeting") called to consider the Arrangement.
9. Under the Arrangement, each SynX Option will represent an option to purchase the number of Nanogen Common Shares determined by multiplying the number of SynX Common Shares subject to such SynX Option by the Exchange Ratio, subject to rounding. The exercise price of the SynX Option will be determined by dividing the exercise price per SynX Common Share of the SynX Option immediately prior to the Effective Time by the Exchange Ratio, subject to rounding, expressed in US dollars.
10. Under the Arrangement, each SynX Warrant will represent a warrant to purchase the number of Nanogen Common Shares determined by multiplying the number of SynX Common Shares subject to such SynX Warrant by the Exchange Ratio, subject to rounding. The exercise price of the SynX Warrant will be determined by dividing the exercise price per SynX Common Share of the SynX Warrant immediately prior to the Effective Time by the Exchange Ratio, subject to rounding, expressed in US dollars.
11. In connection with the Meeting, SynX will mail to each holder of SynX Common Shares and to each holder of SynX Debentures (i) a notice of special meeting, (ii) a form of proxy, (iii) the Circular, and (iv) a letter of transmittal by which SynX Shareholders exchange their SynX Common Shares. It is anticipated that the Circular will be mailed in early March 2004. The Circular will be prepared in accordance with Rule 54-501, except with respect to any relief granted in this decision document, and will contain disclosure of the Transaction and the business and affairs of each of Nanogen and SynX.

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12. The Meeting is anticipated to be held on April 5, 2004, at which SynX will, among other things, seek the requisite SynX Shareholder and SynX Debentureholder approval of the Arrangement.
13. The Circular will contain the following financial statements:
  - (a) unaudited *pro forma* combined balance sheet of Nanogen as of September 30, 2003 and unaudited *pro forma* combined statements of operations for the year ended December 31, 2002 and for the nine months ended September 30, 2003 and the compilation reports thereon, all in accordance with US GAAP;
  - (b) audited annual financial statements of Nanogen for each of the three fiscal years ended December 31, 2000, December 31, 2001 and December 31, 2002, together with balance sheets as at the end of such periods and the auditor's reports thereon, and unaudited interim financial statements for the nine months ended September 30, 2003 all in accordance with US GAAP;
  - (c) audited annual financial statements of SynX for the fiscal years ended December 31, 2000 and December 31, 2001, and December 31, 2002, together with balance sheets as at the end of such periods and the auditor's reports thereon, and unaudited interim financial statements for the period ended September 30, 2003 all in accordance with Canadian GAAP and section 6.1(4) of National Instrument 52-107 *Acceptable Accounting Principles, Auditing Standards and Reporting Currency*, and with a reconciliation to US GAAP; and
  - (d) if the Circular is mailed after March 30, 2004, audited annual financial statements of Nanogen for the fiscal year ended December 31, 2003.
14. It is expected that the SynX Common Shares will be delisted from the TSX on or after the completion of the Arrangement.
15. Nanogen will apply to Nasdaq to list the Nanogen Common Shares to be issued pursuant to the Arrangement and issuable upon exercise of the SynX Options and SynX Warrants.

AND WHEREAS under the System, this MRRS Decision Document evidences the decision of the Decision Makers; (collectively, the "Decision");

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AND WHEREAS each of the Decision Makers is satisfied that the test contained in the Legislation that provides the Decision Makers with the jurisdiction to make the Decision has been met;

THE DECISION of the Decision Makers under the Legislation is that the GAAP Reconciliation Requirements shall not apply to the Applicants in connection with the disclosure relating to Nanogen in the Circular.

DATED March 26<sup>th</sup>, 2004.

John Hughes