

NANOGEN INC
Form S-8
December 21, 2004

As filed with the United States Securities and Exchange Commission on December 21, 2004

Registration No. 333- _____

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION

Washington, D.C. 20549

FORM S-8
REGISTRATION STATEMENT

Under

The Securities Act of 1933

NANOGEN, INC.

(Exact name of Registrant as specified in its charter)

Delaware
(State of incorporation)

10398 Pacific Center Court
San Diego, CA 92121

33-0489621
(I.R.S. Employer Identification Number)

(Address, including zip code, of Registrant's principal executive offices)

EPOCH BIOSCIENCES 2003 STOCK INCENTIVE PLAN
EPOCH PHARMACEUTICALS, INC. INCENTIVE STOCK OPTION, NON-QUALIFIED STOCK OPTION AND RESTRICTED
STOCK PURCHASE PLAN- 1991

EPOCH PHARMACEUTICALS, INC. INCENTIVE STOCK OPTION, NON-QUALIFIED STOCK OPTION AND RESTRICTED STOCK PURCHASE PLAN- 1993

(Full title of the plans)

David G. Ludvigson**Nanogen, Inc.****10398 Pacific Center Court****San Diego, CA 92121****(858) 410-4600**

(Name, address, including zip code, and telephone number, including area code, of agent for service)

CALCULATION OF REGISTRATION FEE

Title of Each Class of Securities to be Registered	Amount to be Registered (1)	Proposed Maximum Offering Price Per Share	Proposed	Amount of Registration Fee
			Maximum Aggregate Offering Price	
Epoch Biosciences 2003 Stock Incentive Plan.				
Common Stock, par value \$0.001, including related Series A Participating Preferred Stock Purchase Rights Epoch Pharmaceuticals, Inc. Incentive Stock Option, Nonqualified Stock Option and Restricted Stock Purchase Plan 1991.	906,922 shares	\$ 7.18(2)	\$ 6,511,700(2)	\$ 766.43
Common Stock, par value \$0.001, including related Series A Participating Preferred Stock Purchase Rights Epoch Pharmaceuticals, Inc. Incentive Stock Option, Nonqualified Stock Option and Restricted Stock Purchase Plan 1993.	209,507 shares	\$ 5.09(3)	\$ 1,066,391(3)	\$ 125.52
Common Stock, par value \$0.001, including related Series A Participating Preferred Stock Purchase Rights	477,467 shares	\$ 7.15(3)	\$ 3,413,889(3)	\$ 401.82
Total Amount to be Registered:	1,593,896 shares		Aggregate Registration Fee:	\$ 1,293.77

- (1) This Registration Statement shall also cover an indeterminate number of shares of Common Stock of the Registrant which may be issued under the Epoch Biosciences 2003 Stock Incentive Plan, the Epoch Pharmaceuticals, Inc. Incentive Stock Option, Nonqualified Stock Option and Restricted Stock Purchase Plan 1991 or the Epoch Pharmaceuticals, Inc. Incentive Stock Option, Nonqualified Stock Option

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and Restricted Stock Purchase Plan 1993 upon stock dividends, stock splits, recapitalizations or other similar transactions in accordance with Rule 416 of promulgated under the Securities Act of 1933, as amended (the Securities Act).

- (2) Calculated pursuant to Rule 457(h) under the Securities Act solely for the purpose of calculating the registration fee, on the basis of the average of the high and low selling prices per share of the Registrant's Common Stock on December 17, 2004, as reported by the Nasdaq National Market.
 - (3) Calculated pursuant to Rule 457(h) under the Securities Act solely for the purpose of calculating the registration fee, on the basis of the weighted average exercise price of the outstanding options.
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PART II

INFORMATION REQUIRED IN THE REGISTRATION STATEMENT

Item 3. Incorporation of Documents by Reference

There are hereby incorporated by reference into this Registration Statement and into the Prospectuses relating to this Registration Statement pursuant to Rule 428 the following documents and information previously filed with the Securities and Exchange Commission (the Commission):

- A The Registrant's Annual Report on Form 10-K for the year ended December 31, 2003, filed pursuant to Section 13(a) of the Securities Exchange Act of 1934, as amended (the Exchange Act);
- B The Registrant's Quarterly Reports on Form 10-Q for the Quarters ended March 31, 2004, June 30, 2004 and September 30, 2004 filed with the Commission on May 17, 2004, August 16, 2004 and November 15, 2004, respectively;
- C All other reports filed pursuant to Section 13(a) or 15(d) of the Exchange Act since the end of the fiscal year covered by the Registrant's Annual Report referred to in (a) above;
- D The description of Registrant's Common Stock contained in Registrant's Registration Statement on Form 8-A filed with the Commission on April 7, 1998, including any amendments or reports filed for the purpose of updating such description; and
- E The description of the Preferred Stock Purchase Rights for Series A Participating, par value \$.001 per share, of the Registrant contained in Registrant's Registration Statement on Form 8-A filed with the Commission on November 24, 1998.

All reports and definitive proxy or information statements filed pursuant to Section 13(a), 13(c), 14 or 15(d) of the Securities Exchange Act of 1934, as amended (the 1934 Act) after the date of this Registration Statement and prior to the filing of a post-effective amendment which indicates that all securities offered hereby have been sold or which de-registers all securities then remaining unsold shall be deemed to be incorporated by reference into this Registration Statement and to be a part hereof from the date of filing of such documents. Any statement contained in a document incorporated or deemed to be incorporated by reference herein shall be deemed to be modified or superseded for purposes of this Registration Statement to the extent that a statement contained herein or in any subsequently filed document which also is deemed to be incorporated by reference herein modifies or supersedes such statement. Any such statement so modified or superseded shall not be deemed, except as so modified or superseded, to constitute a part of this Registration Statement.

Item 4. Description of Securities

Not applicable.

Item 5. Interests of Named Experts and Counsel

Not applicable.

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Item 6. Indemnification of Directors and Officers

Section 145 of the Delaware General Corporation Law authorizes a court to award, or a corporation's board of directors to grant, indemnity to directors and officers in terms sufficiently broad to permit such indemnification under certain circumstances for liabilities (including reimbursement for expenses incurred) arising under the Securities Act of 1933. Our restated certificate of incorporation and our amended and restated bylaws provide for indemnification of our directors, officers, employees and other agents to the maximum extent permitted by Delaware law. In addition, we have entered into indemnification agreements with our officers and directors.

Item 7. Exemption from Registration Claimed

Not applicable.

Item 8. Exhibits

<u>Exhibit Number</u>	<u>Exhibit</u>
4	Instruments Defining the Rights of Stockholders. Reference is made to Registrant's Registration Statements No. 000-23541 on Form 8-A, together with any exhibits thereto, which are incorporated herein by reference pursuant to Item 3(D) and 3(E) to this Registration Statement.
5	Opinion and consent of Morgan, Lewis & Bockius LLP.
23.1	Consent of Ernst & Young LLP, independent registered public accounting firm.
23.2	Consent of KPMG LLP, independent registered accountants.
23.3	Consent of KPMG LLP, independent auditors.
23.4	Consent of Morgan, Lewis & Bockius LLP is contained in Exhibit 5.
24	Power of Attorney. Reference is made to page II-4 of this Registration Statement.
99.1	Epoch Biosciences 2003 Stock Incentive Plan.
99.2	Epoch Pharmaceuticals, Inc. Incentive Stock Option, Nonqualified Stock Option and Restricted Stock Purchase Plan 1991.
99.3	Epoch Pharmaceuticals, Inc. Incentive Stock Option, Nonqualified Stock Option and Restricted Stock Purchase Plan 1993.
99.4	Form of Stock Option Agreement Epoch Biosciences 2003 Stock Incentive Plan.
99.5	Form of Stock Option Agreement Epoch Pharmaceuticals, Inc. Incentive Stock Option, Nonqualified Stock Option and Restricted Stock Purchase Plan 1991.
99.6	Form of Stock Option Agreement Epoch Pharmaceuticals, Inc. Incentive Stock Option, Nonqualified Stock Option and Restricted Stock Purchase Plan 1993.
99.7	Form of Stock Option Assumption Agreement.

Item 9. Undertakings

A. The undersigned Registrant hereby undertakes: (1) to file, during any period in which offers or sales are being made, a post-effective amendment to this Registration Statement: (i) to include any prospectus required by Section 10(a)(3) of the 1933 Act, (ii) to reflect in the prospectus any facts or events arising after the effective date of this Registration Statement (or the most recent post-effective amendment thereof) which, individually or in the aggregate, represent a fundamental change in the information set forth in this Registration Statement and (iii) to include any material information with respect to the plan of distribution not previously disclosed in this Registration Statement or any

material change to

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such information in this Registration Statement; provided, however, that clauses (1)(i) and (1)(ii) shall not apply if the information required to be included in a post-effective amendment by those clauses is contained in periodic reports filed with or furnished to the Commission by the Registrant pursuant to Section 13 or Section 15(d) of the 1934 Act that are incorporated by reference into this Registration Statement; (2) that for the purpose of determining any liability under the 1933 Act each such post-effective amendment shall be deemed to be a new registration statement relating to the securities offered therein and the offering of such securities at that time shall be deemed to be the initial bona fide offering thereof; and (3) to remove from registration by means of a post-effective amendment any of the securities being registered which remain unsold at the termination of the Epoch Biosciences 2003 Stock Incentive Plan, the Epoch Pharmaceuticals, Inc. Incentive Stock Option, Nonqualified Stock Option and Restricted Stock Purchase Plan 1991 and the Epoch Pharmaceuticals, Inc. Incentive Stock Option, Nonqualified Stock Option and Restricted Stock Purchase Plan 1993.

B. The undersigned Registrant hereby undertakes that, for purposes of determining any liability under the 1933 Act, each filing of the Registrant's annual report pursuant to Section 13(a) or Section 15(d) of the 1934 Act that is incorporated by reference into this Registration Statement shall be deemed to be a new registration statement relating to the securities offered therein, and the offering of such securities at that time shall be deemed to be the initial bona fide offering thereof.

C. Insofar as indemnification for liabilities arising under the 1933 Act may be permitted to directors, officers or controlling persons of the Registrant pursuant to the indemnification provisions summarized in Item 6 or otherwise, the Registrant has been advised that, in the opinion of the Commission, such indemnification is against public policy as expressed in the 1933 Act and is, therefore, unenforceable. In the event that a claim for indemnification against such liabilities (other than the payment by the Registrant of expenses incurred or paid by a director, officer, or controlling person of the Registrant in the successful defense of any action, suit or proceeding) is asserted by such director, officer or controlling person in connection with the securities being registered, the Registrant will, unless in the opinion of its counsel the matter has been settled by controlling precedent, submit to a court of appropriate jurisdiction the question whether such indemnification by it is against public policy as expressed in the 1933 Act and will be governed by the final adjudication of such issue.

SIGNATURES

Pursuant to the requirements of the Securities Act of 1933, the Registrant, Nanogen, Inc., certifies that it has reasonable grounds to believe that it meets all of the requirements for filing on Form S-8 and has duly caused this Registration Statement on Form S-8 to be signed on its behalf by the undersigned, thereunto duly authorized, in the city of San Diego, State of California, on the 20th day of December 2004.

NANOGEN, INC.

By: /s/ Howard C. Birndorf

Howard C. Birndorf
Chairman of the Board and Chief Executive

Officer

POWER OF ATTORNEY

KNOW ALL PERSONS BY THESE PRESENTS, that each person whose signature appears below constitutes and appoints David G. Ludvigson and Nicholas J. Venuto and each of them, acting individually, as his attorney-in-fact, with full power of substitution and resubstitution, for him and in any and all capacities, to sign any and all amendments to this Registration Statement on Form S-8 (including post-effective amendments to the Registration Statement and related registration statements) and to file the same, with all exhibits thereto and other documents in connection therewith, with the Securities and Exchange Commission, hereby ratifying and confirming our signatures as they may be signed by our said attorney to any and all amendments to the Registration Statement on Form S-8.

Pursuant to the requirements of the Securities Act of 1933, this Registration Statement on Form S-8 has been signed by the following persons in the capacities and on the dates indicated.

Signature	Title	Date
/s/ Howard C. Birndorf	Chairman of the Board and Chief	December 20, 2004
Howard C. Birndorf	Executive Officer (Principal Executive Officer)	
/s/ David G. Ludvigson	President and Chief Operating Officer	December 20, 2004
David G. Ludvigson	(Principal Financial Officer)	
/s/ Nicholas J. Venuto	Senior Director, Finance (Principal Accounting Officer)	December 20, 2004
Nicholas J. Venuto	Director	
/s/ Val Buonaiuto		December 20, 2004
Val Buonaiuto		

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/s/ Stelios B. Papadopoulos

Director

December 20, 2004

Stelios B. Papadopoulos

/s/ David R. Schreiber

Director

December 20, 2004

David R. Schreiber

/s/ Robert E. Whalen

Director

December 20, 2004

Robert E. Whalen

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SECURITIES AND EXCHANGE COMMISSION

WASHINGTON, D.C.

EXHIBITS

TO

FORM S-8

UNDER

SECURITIES ACT OF 1933

NANOGEN, INC.

EXHIBIT INDEX

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