

**NYXOAH SA**

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Register of legal entities of Walloon Brabant

(hereinafter the "**Company**")

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**SPECIAL REPORT OF THE BOARD OF DIRECTORS IN ACCORDANCE WITH  
ARTICLES 7:179 §1 AND 7:191 OF THE CODE OF COMPANIES AND ASSOCIATIONS -  
CAPITAL INCREASE IN THE CONTEXT OF THE AUTHORISED CAPITAL**

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Dear shareholders,

This special report is drawn up by the board of directors (the "**Board**") in accordance with Articles 7:179 §1 and 7:191 of the Code of Companies and Associations (the "**CCA**") in respect of the proposed issuance of shares in the context of a so-called ATM ("at the market") offering of up to USD 50,000,000 and up to 6,000,000 new shares (the "**Offering**").

**1 CONTEXT**

**1.1 ATM Offering**

The Offering consists of the offer of ordinary shares that may be issued and sold from time to time in an "at the market offering" as defined in Rule 415(a)(4) promulgated under the Securities Act of 1933, as amended (the "**Securities Act Regulations**").

Cantor Fitzgerald & Co. has been appointed as sale agent in relation to the Offering (the "**Sale Agent**").

The Company intends to raise new funds through the Offering to support pipeline development, general corporate purposes and working capital. In particular, the Company intends to use the proceeds of the Offering (i) to advance the commercialization of the Genio system in its initial target markets outside the United States and for pre-commercialization and commercialization activities in the United States; (ii) to continue gathering clinical data and to support physician initiated clinical research projects related to obstructive sleep apnea ("**OSA**") patient treatments; (iii) to further finance research and development activities related to the next generation of the Genio system and to continue to build a pipeline of new technologies and explore potential collaboration opportunities in the field of monitoring and diagnostics for OSA; and (iv) for other general corporate purposes, including, but not limited to, working capital, capital expenditures, investments, acquisitions, should the Company choose to pursue any, and collaborations.

In the context of the envisaged Offering, the Board proposes to decide, within the framework of the authorised capital and subject to completion of the effective placement(s) and subscription(s) under the Offering (each, a "**Placement**"), on a conditional capital increase by way of contribution in cash (the "**Capital Increase**") with issuance of up to 6,000,000 new shares in aggregate (the "**Offered Shares**") for an aggregate amount (excluding issue premium) of up to EUR 1,030,800. The final amount of the Capital Increase and the number of Offered Shares that effectively will be issued in the framework of

the Offering will depend on the number of Offered Shares subscribed to in the various Placements and the final subscription price per Offered Share (the "**Offering Price**") for each Placement.

## **1.2 Cancellation of the preferential subscription rights**

The Board proposes to cancel the preferential subscription rights of each existing shareholder, and - as far as needed and applicable - of each holder of existing subscription rights issued by the Company, in relation to the Capital Increase and the Offering.

## **1.3 Available amount of the authorised capital**

As set out in article 7 of the articles of association of the Company, the extraordinary shareholders' meeting of 7 September 2020 has explicitly authorised the Board to increase the share capital in one or more times with an (aggregate) amount of EUR 3,680,297.39 in the framework of the authorised capital.

Article 7 of the articles of association of the Company provides, inter alia, the following:

*"Every capital increase decided upon by the board of directors in the context of authorised capital shall be effected in accordance with the modalities to be determined by the board of director, and may amongst others be achieved (i) by contributions in cash or in kind, or a combination of both, (ii) by capitalisation of reserves, whether available or unavailable for distribution, and capitalisation of issue premiums, (iii) with or without the issuance of new shares (at, above or below the par value and with or without issue premium), with or without voting rights, that will have the rights as will be determined by the board of directors, or (iv) with issuance of convertible bonds or warrants, bonds with warrants or other securities.*

*The board of directors is authorised, when exercising its powers within the framework of the authorised capital, to restrict or cancel, in the interest of the company, the preferential subscription rights of each shareholder, and - as far as needed and applicable - of each holder of subscription rights issued by the Company. This restriction or cancellation of the preferential subscription rights can also be done in favour of members of the personnel of the company or of its subsidiaries, or in favour of one or more persons other than members of the personnel of the company or of its subsidiaries."*

Since the authorization by the extraordinary shareholders' meeting on 7 September 2020, the Board has used the authorised capital (i) on 25 June 2021 in the framework of the capital increase by means of a contribution in cash through an initial public offering in the United States and the exercise of an over-allotment option, in the aggregate amount of EUR 560,110.95 (excluding issue premium) and (ii) on 8 September 2021 for the issuance of warrants under the 2021 Warrants Plan, in the aggregate amount of EUR 240,520.00. In addition, it is envisaged that the Board will use the authorised capital on or shortly after 20 December 2022 for the issuance of 700,000 warrants (the "**New Warrants**") under a new share-based incentive plan in an amount of up to EUR 120,260 (excluding issue premium).

On the date of this report, the available authorised capital therefore amounts to EUR 2,879,666.44 (excluding issue premium) which is more than sufficient for both the Capital Increase and the issue of the New Warrants (should that effectively take place).

## **1.4 Legal provisions**

Article 7:179 §1 CCA provides that in the event of a capital increase a special report on the transaction must be drawn up by the Board and the statutory auditor of the Company. Article 7:191 CCA provides that certain additional information needs to be provided in said report in case of a capital increase in cash with cancellation of the preferential subscription rights of the existing shareholders.

In accordance with Article 7:179 §1 and 7:191 CCA, the special report of the Board must justify the issue price and describe the consequences of the transaction for the patrimonial and membership rights of the existing shareholders.

## **2 OFFERING**

### **2.1 Structure of the Offering**

The Offering will take the form of an ATM offering program pursuant to which the Company may from time to time sell, until terminated in accordance with the terms of the Sales Agreement (as defined below), with a sale agent, up to 6,000,000 Offered Shares and for an aggregate amount of up to USD 50,000,000.

The actual number of Offered Shares to be issued will vary depending on the effective Placements and on the sales price for each Placement. However the number of Offered Shares shall not exceed 6,000,000 shares. The Offered Shares will be sold at a final subscription price per Offered Share (the "**Offering Price**") equal to the then current USD market prices on the Nasdaq Global Market at the time of the relevant Placement.

Each effective realisation of part of the Capital Increase and issuance of Offered Shares pursuant to a Placement will be set out in a separate notary deed in accordance with Article 7:186 of the CCA. For the purposes of determining the amount of the capital increase and of the issuance premium resulting from the issuance of the relevant number of Offered Shares under the Placement, the EUR countervalue of the relevant Offering Price per Offered Share will be determined for each Placement on the basis of the EUR/USD exchange rate as indicated in the relevant bank certificate to be issued under Article 7:195 of the CCA. If at the end of the Offering Period the maximum amount of the Offering is not fully subscribed under the Offering, the share capital of the Company will only be increased by an amount corresponding to the effective Placements, in accordance with Article 7:181 of the CCA.

Sales of Offered Shares in the Offering will only be conducted in the United States through the Nasdaq Stock Market or any other existing U.S. trading market for the Offered Shares. No sales of Offered Shares will be conducted in Belgium or through Euronext.

In order to implement the Offering, the Company envisages to enter into an "ATM Sales Agreement" with the the Sale Agent (the "**Sales Agreement**"). The Sales Agreement will provide that each time that the Company will wish to issue and sell Offered Shares thereunder, it will notify the Sale Agent of the number of Offered Shares to be issued, the time period during which sales are requested to be made, any limitation on the number of Offered Shares that may be sold in any one day and any minimum price below which sales may not be made. Once instructed, unless the Sale Agent declines to accept the terms of such notice, the Sale Agent will use its commercially reasonable efforts consistent with its normal trading and sales practices to sell such Offered Shares up to the amount specified on such terms. The

Agent will sell Offered Shares by any method permitted by law deemed to be an “at the market offering” as defined in Rule 415(a)(4) of the Securities Act Regulations, including sales made directly on or through the Nasdaq Stock Market or any other existing trading market for the Offered Shares, in negotiated transactions at market prices prevailing at the time of sale or at prices related to such prevailing market prices and/or any other method permitted by law.

## 2.2 Justification of the issue price of the Offered Shares

The Offering Price per Offered Share that will be effectively placed and issued in the context of the Offering will be determined by the USD sale price of the shares on the Nasdaq Global Market at the time of each Placement, in accordance with the terms and conditions of the Sales Agreement, but will not be lower than the current (rounded) par value of the existing shares, being EUR 0.1718 (converted in USD).

The Board is of the opinion that the aforementioned process to determine the Offering Price – which corresponds to the market value of the shares of the Company at the time of the relevant Placement – is justified.

The capital will be increased with an amount equal to EUR 0.1718 (being the current, rounded, par value of the existing shares) multiplied by the number of Offered Shares effectively issued in the framework of the Offering. The portion of the Offering Price exceeding EUR 0.1718 shall be recorded as issue premium on a separate unavailable account on the passive side of the balance sheet called "issue premiums".

## 2.3 Impact of the Capital Increase on the patrimonial and membership rights of the existing shareholders

On the date of this report, the registered capital of the Company amounts to EUR 4,440,069.16 and is represented by 25,846,279 shares, without nominal value.

In addition, on 30 November 2022 there were 1,801,780 subscription rights (*droits de souscription / inschrijvingsrechten*) outstanding (the "**Existing Warrants**") that have been issued by the Company under existing share-based incentive plans, entitling the warrant holders to subscribe to in aggregate 1,879,125 new shares in the Company upon exercise, in accordance with the conditions applicable to the relevant subscription rights. Of such Existing Warrants, (i) 1,339,520 warrants have been granted and accepted, entitling the warrant holders to subscribe to in aggregate 1,416,865 new shares in the Company upon exercise, (the "**Granted Existing Warrants**") and (ii) 462,260 warrants are still available for grant, entitling the warrant holders (if granted and accepted) to subscribe to in aggregate 462,260 new shares in the Company upon exercise (the "**Available Existing Warrants**").

Furthermore, it is envisaged that on or shortly after 20 December 2022, the Board will decide, within the framework of the authorised capital and subject to the grant, acceptance and exercise of the New Warrants, on a conditional capital increase to issue up to 700,000 new shares in aggregate (the "**New Warrant Shares**") for an aggregate amount (excluding issue premium) of up to EUR 120,260. The final amount of the capital increase and the number of New Warrant Shares to be issued in connection with the issue of the New Warrants will depend on the number of New Warrants effectively granted, accepted and exercised in accordance with their terms. No issue, grant, acceptance or exercise of New Warrants has occurred on or prior to the date of this report.

Effective placements and issuances under the Offering will result in the issuance of new shares in the Company. Those new shares will rank *pari passu* with all other shares in the Company and will be fully entitled to dividend over the entire financial year during which they are issued and over the subsequent financial years.

The issuance of the new shares in the context of the Offering will result in a dilution of the participations of the (then) existing shareholders in the Company. As is also the case for their voting power and their part in the capital and net equity, the pro rata right of the existing shareholders to share in the profits and, if applicable, the liquidation bonus of the Company will dilute.

The impact of the issuance(s) of the new shares in the context of the Offering on the patrimonial and membership rights of the existing shareholders will depend on the Offering Price of the Offered Shares and the number of Offered Shares that are actually issued under the Offering. However, it is impossible at this time to accurately calculate the dilution that the issuance of the Offered Shares will entail as the Offered Prices of the various issuances under the Offering and the total number of Offered Shares that will be issued under the Offering are currently unknown.

Therefore, the Board has made a number of simulations based on purely hypothetical assumptions in relation to the Offering Prices of the Offered Shares. The results of these simulations are attached as Annex 1 to this report. It should be noted that in these simulations the Available Existing Warrants and the New Warrants are disregarded and that it is assumed that (i) the maximum number of Offered Shares is placed in the Offering (ii) all Offered Shares have been subscribed at the same Offered Price and (iii) all Granted Existing Warrants are exercised.

#### **2.4 Justification of the issue of the Offered Shares with cancellation of the preferential subscription rights**

The Board intends to cancel the preferential subscription rights in relation to the issue of the Offered Shares. The cancellation of the subscription rights allows the Company to exclusively grant the Offered Shares to U.S. investors in the context of the Offering.

First, the Offering allows the Company to raise a significant amount of funds, each time through an accelerated process, in order to finance its further development and to strengthen its equity position.

Secondly, the Offering allows the Company to expand its shareholder structure internationally, which may enhance both the stability and diversity of the Company's shareholder structure and the liquidity of the Company's shares on the Nasdaq Global Market and the regulated market of Euronext Brussels. This is both in the interest of the existing shareholders and in the interest of the Company with a view to future transactions on the financial markets.

Thirdly, the Offering enables the Company to further strengthen its image with investors, both nationally and internationally. This is in the interest of the further development of the Company's business.

Fourthly, the Offering allows the Company, compared to a "one-off" public capital increase without cancellation of preferential subscription rights, to raise new financial resources faster, each time to the extent needed at that moment, and at lower cost, in line with the market value of the shares at the time of each Placement.

Based on the foregoing, the Board is of the opinion that the issuance of the Offered Shares with cancellation of the preferential subscription rights serves the interests of the Company and its existing shareholders.

## **2.5 Report of the statutory auditor**

The Board shall instruct the statutory auditor of the Company, Ernst & Young Réviseurs d'Entreprises (RLE 0446.334.711) represented by Mr. Carlo-Sébastien D'Addario, to draw up an auditor's report in accordance with Articles 7:179 §1 and 7:191 of the CCA.

This special report and the above-mentioned statutory auditor's report in accordance with Articles 7:179 §1 and 7:191 of the CCA shall be filed with the clerk's office of the Business Court of Brabant wallon in accordance with the CCA.

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Approved by the Board on 20 December 2022.

On behalf of the Board:

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Name: Olivier Taelman  
Capacity: Director

### **Annex:**

1. Simulations of the effect of the proposed transactions on the patrimonial and membership rights of the existing shareholders.

**Annex 1 – Simulations of the effect of the transactions on the patrimonial and membership rights of the existing shareholders**

	Total number of shares, on a <i>fully diluted basis</i> <sup>1</sup> , immediately before the ATM Offering		Total shares, on a <i>fully diluted basis</i> <sup>2</sup> , immediately after the issuance of the Offered Shares under the ATM Offering	
	Number	%	Number	%
Existing shares	25,846,279	94.80%	25,846,279	77.70%
Shares to be issued upon exercise of the Granted Existing Warrants	1,416,865	5.20%	1,416,865	4.26%
Shares to be issued in the Offering	-	-	6,000,000	18.04%
<b>TOTAL</b>	<b>27,263,144</b>	<b>100%</b>	<b>33.263.144</b>	<b>100%</b>
<b>Dilution of the existing shareholders (on a <i>fully diluted basis</i>)<sup>3</sup> compared to prior to the issuance of the Offered Shares under the ATM Offering</b>			18.04%	

	Capital <sup>4</sup> (EUR)	Net Equity <sup>5</sup> (EUR)
<b>A. Prior to the issuance of the Offered Shares – on an <i>undiluted</i><sup>6</sup> basis</b>		
Amount represented by each share	0.1718	5.2779
<b>Total</b>	<b>4,440,069.16</b>	<b>136,413,413.93</b>
<b>B. Prior to the issuance of the Offered Shares – on a <i>fully-diluted</i><sup>7</sup> basis</b>		
Amount represented by each share	0.1718	5.8555
<b>Total</b>	<b>4,683,486.57</b>	<b>159,638,611.12</b>
<b>C. Immediately after the issuance of all Offered Shares– on a <i>fully-diluted</i><sup>8</sup> basis</b>		
<b>Counter value in EUR of the Offering Price: EUR 3.00 per Offered Share</b>		
Amount represented by each share	0.1718	5.3404
<b>Total</b>	<b>5,714,286.57</b>	<b>177,638,611.12</b>
<b>D. Immediately after the issuance of all Offered Shares – on a <i>fully-diluted</i><sup>9</sup> basis</b>		
<b>Counter value in EUR of the Offering Price: EUR 5.00 per Offered Share</b>		
Amount represented by each share	0.1718	5.7012
<b>Total</b>	<b>5,714,286.57</b>	<b>189,638,611.12</b>

<sup>1</sup> I.e., assuming exercise of all Granted Existing Warrants and issuance of the corresponding shares but disregarding the Available Existing Warrants and the New Warrants.

<sup>2</sup> I.e., assuming exercise of all Granted Existing Warrants and of all Warrants and issuance of the corresponding shares but disregarding the Available Existing Warrants and the New Warrants.

<sup>3</sup> I.e., assuming exercise of all Granted Existing Warrants and of all Warrants and issuance of the corresponding shares but disregarding the Available Existing Warrants and the New Warrants.

<sup>4</sup> Calculated starting from the capital of Nyxoah SA as at the date of this report, being EUR 4,440,069.16.

<sup>5</sup> Calculated starting from the net equity of Nyxoah SA as at 30 September 2022, being EUR 136,413,413.93 (Belgian GAAP; non-consolidated).

<sup>6</sup> Disregarding the Existing Warrants and the potential issuance of the corresponding shares upon exercise of such warrants and disregarding the New Warrants.

<sup>7</sup> I.e., assuming exercise of all Granted Existing Warrants and issuance of the corresponding shares but disregarding the Available Existing Warrants and the New Warrants.

<sup>8</sup> I.e., assuming exercise of all Granted Existing Warrants and of all Warrants and issuance of the corresponding shares but disregarding the Available Existing Warrants and the New Warrants.

<sup>9</sup> I.e., assuming exercise of all Granted Existing Warrants and of all Warrants and issuance of the corresponding shares but disregarding the Available Existing Warrants and the New Warrants.

	Capital <sup>4</sup> (EUR)	Net Equity <sup>5</sup> (EUR)
<b>E.</b>	<b>Immediately after the issuance of all Offered Shares – on a <i>fully-diluted</i><sup>10</sup> basis</b>	
	<b>Counter value in EUR of the Offering Price: EUR 8.00 per Offered Share</b>	
Amount represented by each share	0.1718	6.2423
<b>Total</b>	<b>5,714,286.57</b>	<b>207,638,611.12</b>

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<sup>10</sup> I.e., assuming exercise of all Granted Existing Warrants and of all Warrants and issuance of the corresponding shares but disregarding the Available Existing Warrants and the New Warrants.