

HONG KONG / JUDGMENT

RE TA THERAPEUTICS LTD

COURT

Court of First Instance

DECIDED

25 October 2007

CASE / FILE NUMBER

HCMP1418/2007

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bjbj HCMP 1418/2007 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION COURT OF FIRST INSTANCE MISCELLANEOUS PROCEEDINGS NO. 1418 OF 2007

IN THE MATTER of TA THERAPEUTICS LIMITED and IN THE MATTER of Section 59 of the
Companies Ordinance, Chapter 32

Before: Hon Kwan J in Court Date of Hearing: 23 October 2007 Date of Judgment: 23 October 2007
Date of Handing Down of Reasons for Judgment: 25 October 2007

REASONS FOR JUDGMENT

This petition was presented by TA Therapeutics Limited (the Company) on 30 July 2007 pursuant to section 59 of the Companies Ordinance, Cap. 32. The application is for confirmation of a proposed reduction of share capital involving the diminution of liability in respect of unpaid share capital, which comes within section 59(3). The Company seeks confirmation of the reduction of the liability of Biotechnology Research Corporation Limited (), a member of the Company, to pay US\$5 million of the share premium payable on the one share in the capital of the Company registered in the name of BRC. The Company was incorporated on 2 March 2005 as a private company, with an original authorised share capital of US\$36,000.00 divided into 36,000 shares of US\$1.00 each. Its principal activities are to conduct research and development and to commercialise products that utilise telomerase activator drugs to restore the regenerative and functional capacity of cells in various organ systems that have been impacted by senescence, injury or chronic disease. It is jointly owned by Geron Corporation (Geron), a company incorporated in the State of Delaware of the United States, and BRC, a company incorporated in Hong Kong. By an ordinary resolution passed on 21 March 2005, the authorised share capital was classified into two classes consisting of 24,000 class A shares and 12,000 class B shares, all of

US\$1.00 each. By a special resolution passed on 15 June 2007, the authorised share capital of the Company was re-classified as one class of unclassified shares, all of US\$1.00 each. The present authorised capital is therefore US\$36,000.00 divided into 36,000 shares of US\$1.00 each, of which 24,000 shares have been issued. Of the 24,000 issued shares, 23,999 shares are fully paid up or credited as fully paid up. One issued share is paid up as to the nominal amount of US\$1.00 and as to US\$1 million of the premium thereon, and has not been paid up as to US\$5,999,999.00 of the share premium thereon. Article 48 of the articles of association provides that subject to article 102, the Company may, by special resolution, reduce its share capital or any capital, any capital redemption reserve fund or any share premium account in any manner prescribed by law. Article 102(A) provides that subject to any agreement in writing between the members of the Company, the Company and/or its directors shall not, without the prior written approval of each of the members of the Company effect any reduction of share capital. By a written resolution passed unanimously by all the members of the Company on 27 July 2007, it was resolved that the capital of the Company be reduced by reducing the liability in respect of the share premium payable on the one partly paid share now registered in the name of BRC from US\$6,999,999.00 to US\$1,999,999.00. The liability of BRC to pay a premium of US\$6,999,999.00 on the partly paid share registered in its name arose in this way. The share in question was allotted to BRC on 21 March 2005 as a class B share at an issue price of either US\$2 million or US\$7 million, of which US\$1.00 was paid up in respect of the nominal amount of the share on 21 March 2005. The aggregate amount of the issue price was to be determined in accordance with, and the balance of the issue price was to be payable upon, the occurrence of certain events as set out in a joint venture agreement dated 1 March 2005 between BRC and Geron. BRC and Geron are and at all material times have been the only members of the Company. Under article 24 of the articles of association, it is provided that any sum (whether on account of the nominal value of the share or by way of premium) which by the terms of issue of a share becomes payable upon allotment or at any fixed date or on dates determined in accordance with any agreement in writing between the members shall, for all purposes of the articles, be deemed to be a call duly made, notified and payable on the date on which by the terms of issue the same becomes payable. Under clause 3.1 of the joint venture agreement, BRC was required to make its capital contributions to the Company in accordance with a funding schedule, by which BRC was to contribute US\$2 million to the Company towards its partly paid B share. Further, BRC was required to notify Geron and the Company in writing within 30 days after completion of certain work to be undertaken by the Company known as Phase I whether it would make an additional capital contribution of US\$5 million to the Company (the BRC Phase II Contribution) and if Geron and the Company had not received written notification from BRC within such 30-day period stating that it would not make that contribution, then BRC would be deemed to have elected to make the BRC Phase II Contribution. At a meeting of the board of directors of the Company on 7 August 2006 attended by the representatives of Geron and BRC, the directors acknowledged that Phase I had been completed. Geron and the Company did not receive written notification from BRC within 30 days after that board meeting that it would not make the BRC Phase II Contribution. By a memorandum dated 28 August 2006 and sent by BRC to Geron on 29 August 2006, BRC confirmed that the board of directors of BRC had on 24 August 2006 resolved that it wished to proceed with

certain work to be undertaken by the Company known as Phase II , in respect of which the BRC Phase II Contribution was to be applied. Hence, at the latest on 7 September 2006, BRC became liable to pay an additional premium of US\$5 million on its partly paid B share, in addition to the premium of US\$1,999,999.00 mentioned earlier. BRC has paid up on its partly paid share US\$1.00 on 21 March 2005 as payment of the nominal amount of the share and US\$1 million on 29 June 2007 as payment of part of the premium payable on the share. By an agreement dated 15 June 2007 (the restructuring agreement) between BRC and Geron for the restructuring of their interests in the Company, the parties agreed, inter alia, that BRC should no longer have to make the BRC Phase II Contribution and that they would take such steps as necessary to procure that the share premium payable on the one partly paid share legally and beneficially owned by BRC shall be reduced from US\$6,999,999.00 to US\$1,999,999.00 by a lawful reduction of capital. The object of the proposed reduction is therefore to comply with the terms of the restructuring agreement. The proposed reduction of capital involves the diminution of the liability of a member of the Company in respect of unpaid share premium but does not otherwise involve the payment to any shareholder of any paid-up share capital or of any sum standing to the credit of the share premium account. Also pursuant to the restructuring agreement, the share ownership structure of the Company has been altered in that Geron and BRC hold 75% and 25% respectively in the shares of the Company. As a result of the restructuring, BRC paid its remaining obligation under the Phase I funding and Geron paid its Phase I and Phase II funding. BRC is to pay US\$999,999.00 being the balance of the share premium of its partly paid share by 31 December 2007. According to the unaudited balance sheet and income statement of the Company as at 30 September 2007, the Company had net assets of HK\$44,752,295.00 (approximately US\$5,730,127.38) as at that date. Total credit bank balances of the Company stood at HK\$49,191,601.00 (approximately US\$6,298,540.40). The amount of the projected liabilities owed to the creditors of the Company who would be entitled to prove in a notional winding up of the Company were one to have commenced on 16 October 2007 (being the effective date as referred to in the Company s undertaking as mentioned below) is US\$1,648,942.56 (approximately HK\$12,878,241.00). Of that amount, US\$1,260,006.81 (approximately HK\$9,840,653.00) is owed to the shareholders, leaving a balance of only US\$388,935.75 (approximately HK\$3,037,588.00) owed to independent third parties. Based on the bank balance as at 30 September 2007 and the projected liabilities aforesaid, the available cash resources as at that date are more than three times the amount of liabilities owed to all creditors and more than 16 times the amount of liabilities owed to independent third party creditors. For the protection of creditors, the Company has through counsel offered an undertaking in these terms:

- (1) the Company will, within seven days after the date of the order on the petition, deposit in a separate bank account with a first class bank in the name of the Company and designated the TA Therapeutics Limited Trust Account No. 1 the Trust Account) an amount (the Trust Amount) equal to the projected liabilities of the Company owed to those creditors who would be entitled to prove in a notional winding up of the Company were one to have been commenced on the date seven days before the date of the said order (the Effective Date) and who have not given their consent to the proposed reduction in the liability of BRC to pay

up US\$5 million in respect of the premium on its one partly paid share in the Company;

- (2) unless and until the Trust Amount shall have been paid or satisfied or otherwise extinguished, or such creditors shall subsequently give their consent, or any period of limitation shall have expired, the Company shall retain to the credit of the Trust Account a sum in cash equal to the Trust Amount due to such non-consenting creditors for the time being unpaid; and
- (3) the Company shall maintain the Trust Account for six years from the Effective Date or such other date as the court shall direct or until the Trust Amount shall have been paid or satisfied or otherwise extinguished, or such creditors shall have given their consent to the closure of the Trust Account. I am satisfied in the circumstances that the interests of creditors would not be prejudiced by the proposed reduction of the liability of BRC to pay US\$5 million of the share premium payable on its partly paid share. There is a reasonable margin of safety to cover the liabilities of the Company and there are special circumstances to dispense with the requirement under section 59(2). At the hearing of the summons for directions on 18 September 2007, I have directed that section 59(2) shall not apply and dispensed with the settlement of a list of the Company's creditors. Directions given for advertisement of a notice of the petition and the hearing have been complied with. There is no question that the court does have jurisdiction to confirm the proposed reduction of called but unpaid capital of the Company. The discretion would be exercised in favour of confirming the reduction if the court is satisfied that such reduction is for discernable purposes and that the position of creditors is well protected, as by registering the return of allotment with the Companies Registry, creditors of the Company would have an expectation that the share premium payable by BRC would be paid. I would apply similar principles as in an ordinary case of sanctioning a reduction of capital. The proposed reduction is equitable to the only two members of the Company, Geron and BRC, notwithstanding the reduction of the liability of BRC to pay the called but unpaid capital, as this is to give effect to the restructuring agreement, to which Geron is a party and pursuant to which Geron's shareholding in the Company was increased from 50% to 75%. Both Geron and BRC are well aware of the reason for the proposed reduction, which is to implement of restructuring agreement. I am satisfied that the position of creditors is sufficiently protected, and have accepted the undertaking offered by counsel at the hearing of the summons for directions. The Company has further undertaken by its counsel that so long as the aforesaid undertaking shall remain effective, it will be recorded by way of note or otherwise in a summary form in the audited financial statements of the Company or in any of its published accounts or prospectus. There is no objection to the petition from any creditor. The proposed reduction is for a discernable purpose. It is a key step to implement the restructuring agreement. It would be appropriate in the circumstances to make an order confirming the proposed reduction of capital. I have made an order in terms of the draft submitted and approved the draft minute. (S Kwan) Judge of the Court of First Instance High Court Mr William Wong, instructed by Messrs Cheng Wong Lam & Partners, for the Petitioner
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Prepared on 26 October 2026 · Esheria