

# CHAPMAN EASTWAY

23 December 2014

Mr P Comans  
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AVALON BEACH NSW 2107

Email: [gblom@aol.com](mailto:gblom@aol.com)

Dear Phillip

## **Capital Gains Tax Rollover - exchange of interests in Mariposa Health Limited ("Mariposa") for interests in a US shell**

We are writing in relation to your request for advice with respect to the reverse takeover of Mariposa Health Limited (ACN: 134 154 680), an Australian biotechnology company, by a United States shell company.

### **Executive Summary**

The following Executive Summary is subject to the detailed analysis below:

1. Current Mariposa share and option holders will be entitled to access a capital gains tax rollover such that they realise no assessable capital gain in relation to the proposed arrangement;<sup>1</sup>
2. In particular we note that most requirements for the rollover will be met in completing the proposed arrangement as described in the background facts below. However the following specific requirements (discussed in more detail in the detailed analysis) should be addressed:
  - a. All holders of interests of a particular type must receive the same offer; and
  - b. USCo and all exchanging members who are eligible for and wish to access the rollover will be required to jointly choose the rollover. Additionally, those exchanging members will be required to provide cost base details to USCo.

Legal documentation should be drafted to this effect – we will be pleased to review this once it is prepared by your legal advisors.

### **Background Facts & Assumptions**

We have relied on the following background facts and assumptions in the preparation of this advice:

1. Mariposa is an unlisted public Australian biotechnology company, incorporated in 2008.

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<sup>1</sup> Note that current Mariposa members may realise capital losses if the market value of replacement interests in USCo is less than the cost base of their Mariposa shares.

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2. In order to gain better access to US capital markets, it is proposed that Mariposa be acquired by a United States shell company (“USCo”) under a reverse takeover arrangement (the “proposed arrangement”);
3. Under the proposed arrangement, existing Mariposa shareholders will exchange all their interests in Mariposa for equivalent interests in USCo, such that Mariposa becomes a wholly owned subsidiary of USCo;
4. Appendix Two shows Mariposa’s current top 10 shareholder listing at 8 December 2014. Based on this, it appears that those shareholders control 72% of the ordinary shares in Mariposa;
5. Additionally, Mariposa has two option holders and one convertible note holder;
6. We are advised that USCo has not yet been identified, but will likely be a shell company with nominal capital and fewer than 10 members. Mariposa will represent close to 100% of its market value post-completion.
7. USCo will be managed and controlled, and therefore tax resident, in the United States.

## **Scope of Advice**

The only question considered herein is whether existing Australian Mariposa shareholders will be eligible to access CGT scrip for scrip rollover in relation to their participation in the proposed arrangement.

We have not sought to consider any other issues associated with the proposed arrangement, whether of a taxation nature or otherwise. In particular, consequences for Mariposa in jointly choosing the rollover have not been fully explored, nor have we considered any foreign tax consequences for any participants in the arrangement (we recommend that further advice be taken in this regard).

## **Detailed Analysis**

We have sought to minimise the technical analysis in the following, but would be happy to elaborate on any issue should it be required.

### ***Australian resident ordinary shareholders – CGT consequences***

Where specific requirements are met, Mariposa shareholders should be entitled to apply rollover relief under subdivision 124-M of the *Income Tax Assessment Act 1997*. This broadly allows those shareholders to defer the gain arising upon the transfer of their shares in Mariposa to USCo, until the eventual sale of their shares in USCo.

The requirements are as follows:

1. *An entity must exchange either:*
  - a. *a share (the entity’s original interest) in one company (the original entity) for a share (the replacement interest) in another company; or*
  - b. *an option, right or similar interest (also the holder’s original interest) issued by the original entity that gives the holder an entitlement to acquire a share in the original entity for a similar interest (also the holder’s replacement interest) in another company*

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This requirement broadly requires that like must be exchanged for like.

This will be satisfied for the Mariposa shares if shareholders will exchange ordinary shares in Mariposa for ordinary shares (or common stock) in USCo.

2. *The exchange is in consequence of a single arrangement (that satisfies further conditions as detailed below)*

This requirement should be satisfied as the exchange of original interests in Mariposa for replacement interests in USCo will occur as part of a single arrangement.

3. *The arrangement must result in a company (the acquiring entity) becoming the owner of 80% or more of the voting shares in the original entity*

This requirement will be satisfied as USCo will become the owner of 100% of the ordinary shares in Mariposa.

4. *The arrangement must be one in which at least all owners of voting shares in Mariposa (except the acquiring entity) could participate*

This requirement will be satisfied if the offer will be made to all Mariposa ordinary shareholders.

5. *The arrangement must be one in which participation was available on substantially the same terms for all owners of interests of a particular type in the original entity*

This requirement will be satisfied if all owners of interests of a particular type (ordinary shareholders, and any other interests e.g. option holders of each option series) receive the same offer in relation to those interests. This requirement should be addressed in drafting the transfer documentation.

6. *The original interest holder acquired its original interest on or after 20 September 1985*

This requirement should be satisfied. In the unlikely event this requirement is not satisfied for any original interest holders<sup>2</sup> this is of no consequence - no taxable gain would arise in relation to such pre-CGT interest in any case, and the presence of pre-CGT interests does not affect eligibility of other interest holders to access the rollover.

7. *Apart from the rollover, the original interest holder would make a capital gain from a CGT event happening in relation to its original interest*

It is possible that some original interest holders will not satisfy this requirement in relation to some or all of their interests in Mariposa, for example:

- if the cost bases of any of their original interests in Mariposa exceeds the market value of the replacement interests in USCo; or
- where the original interest holder is a foreign resident.

Regardless, no adverse tax consequences will arise – those holders will either realise capital losses or be exempt from any capital gain.

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<sup>2</sup> Although unlikely, we note that there is the potential for some original interest holders to be taken to have acquired their interests in Mariposa pre-CGT, for example, under the previous application of rollover provisions.

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Other interest holders will satisfy this requirement, as their eligibility to access the rollover does not depend on other interest holders accessing it.

8. *The replacement interest is in the acquiring entity*

This requirement will be satisfied as all replacement interests are in USCo, the acquiring entity.

9. *The original interest holder chooses to obtain the rollover, or, if it is a significant stakeholder or common stakeholder for the arrangement, it and the replacement entity jointly choose to obtain the roll-over*

Original interest holders are free to choose the rollover as it suits their individual circumstances – this will not affect other interest holders.

However, if original interest holders who wish to choose the rollover are *common stakeholders* for the arrangement, USCo must also choose to obtain the rollover.

We have considered the common stakeholder test at Appendix One, and have concluded that all original interest holders will be *common stakeholders* for the arrangement. As such USCo must jointly choose to obtain the rollover with the original interest holders in order for them to access rollover relief.

Appendix One also outlines some consequences for USCo in relation to the common stakeholder test.

10. *If it fails the common stakeholder test, the original interest holders inform USCo of the cost bases of their original interests*

This condition requires that USCo obtains cost base details from all original interest holders who access the rollover. The share transfer agreements should incorporate this condition as a term of the transfer, and cost base details should actually be obtained, in order for this requirement to be satisfied.

11. *Further conditions must be met if Mariposa and USCo have not dealt with each other at arm's length, and neither entity had at least 300 members just before the arrangement started or were members of the same linked group just before that time.*

No further conditions are required to be met as we consider that original interest holders and USCo will have dealt with each other at arm's length.

Alternatively, if this is not actually the case, the additional requirements broadly require that:

- The market value of the interests in USCo received by original interest holders be substantially the same as the market value of the original interests in Mariposa; and
- The replacement interests in USCo carry the same kind of rights and obligations as the original interests in Mariposa.

As each of these conditions should be satisfied in relation to the proposed arrangement regardless of whether the relevant dealing is at arm's length, this final requirement will be satisfied.

Given the above, Mariposa shareholders will be entitled to apply rollover relief in respect of the transfer of their shares to USCo (subject to any caveats noted).

### ***Other interest holders – CGT consequences***

Other interest holders, that is, the option holders and convertible note holder, will be entitled to access rollover relief where they also satisfy the conditions above. Note in particular that the fifth requirement may be relevant – all interest holders of a particular type must be eligible to participate on substantially the same terms.

### ***Foreign resident shareholders – CGT consequences***

For completeness, we note that as the Mariposa shares will not be TAP, foreign resident original interest holders will not realise any capital gains or losses on the transfer of their interests to USCo and Mariposa will not be required to jointly choose the rollover with those holders.

\* \* \* \* \*

In conclusion we note that:

1. Our advice does not discuss the general anti-avoidance (Part IVA) provisions. The Commissioner of Taxation may apply Part IVA against any transaction that he believes has been undertaken for the [dominant] purpose of obtaining a tax benefit. Whilst we don't believe this transaction would be subject to Part IVA it is important that you are aware of the operation of the provision and the associated risks of undertaking any transaction.
2. Our advice is based on judicial and administrative interpretations of relevant legislation as at the date of this advice. Whilst we have had regard to proposed changes to tax law to the extent possible in the preparation of this advice, we do not undertake to update our advice in respect of any future changes to the tax law unless specifically requested to do so.
3. Our advice is necessarily general in nature. Its application to any particular circumstances may be affected by features of those circumstances of which we are not aware.
4. It is important that you ask us to review any advice already given if a transaction is delayed, or is to be repeated, or if an apparently similar transaction is to be undertaken. Our original advice may not be applicable or appropriate in such circumstances.

Yours sincerely  
**Chapman Eastway**



Sean Cortis  
*Principal*

## **Appendix One – Common Stakeholder Test**

### ***Whether there are “common stakeholders” for the arrangement***

In broad terms, the original Mariposa shareholders will be common stakeholders for the arrangement if, together, they have at least an 80% interest in USCo just after the arrangement is completed, unless either Mariposa or USCo is widely held<sup>3</sup> just before the arrangement started.

As existing Mariposa shareholders will own more than 80% of USCo shares just after the arrangement is completed, and neither Mariposa nor USCo will be widely held just before the arrangement started, all original interest holders will be common stakeholders for the arrangement. In order for those interest holders to obtain the rollover, USCo must therefore jointly choose with them to access the rollover.

In doing so, USCo inherits those original interest holders cost bases in the Mariposa shares.

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<sup>3</sup> In this context, widely held requires more than 300 shareholders with the top 20 shareholders

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## **Appendix Two – Top 10 Shareholders**

**As at 8 December 2014**

<b>Shareholder</b>	<b>Ownership %</b>
Wigram Trading Pty Ltd	24%
AP & CH Ho	9%
Dr Phillip Comans	9%
Dr Yasuo Aoko	6%
Alison Coutts	6%
Strategy-Matters (Myanmo) Co Ltd	5%
Crafers Pty Ltd	5%
Chifley Portfolio Pty Ltd	4%
Bioxyne Limited	4%
Jeremy Comans	2%
<b>Top 10 Shareholders</b>	<hr/> 72%