

## TAKEOVERS AND MERGERS PANEL

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### Panel Decision

In relation to an application by

**Cobra Technologies Corp. ("Cobra")**

for a review of the Executive's ruling of 19 October 1999

that Cobra had triggered a mandatory general offer obligation under Rule 26 of the Code on Takeovers and Mergers (the "Code") as a result of Cobra's acquisition of (i) 10.25% of the shares of Tse Sui Luen Jewellery (International) Limited (the "Company") and (ii) the rights, title and interest of UBS AG ("UBS") in certain financing and security documents

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1. At the request of Cobra, the Panel met on 5 November 1999 to review the Executive's ruling of 19 October 1999 that Cobra had triggered a mandatory general offer obligation under Rule 26 of the Code on Takeovers and Mergers (the "Code") as a result of Cobra's acquisition of (i) 10.25% of the shares of Tse Sui Luen Jewellery (International) Limited (the "Company") and (ii) the rights, title and interest of UBS AG ("UBS") in certain financing and security documents.

### Salient Facts

#### Loan from UBS and the related Share Charges for 49.6% of the Company's shares

2. From July 1997 to July 1999, Mr. Tse Sui Luen ("Mr. Tse") acted as the sole shareholder of Cobra. Mr. Tse charged all his interest in 49.6% of the shares in the Company. This was effected by two share charges (the "Share Charges")<sup>1</sup> to UBS as security for a revolving credit facility of HK\$150 million (the "Facility"). The Facility had an expiry date in July 1999. In addition, the Labuan branch of UBS and two investment vehicles of UBS (the "UBS Vehicles") acquired 10.25% of the shares in the Company in July 1997 from three individuals.

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<sup>1</sup> 31.97% of the shares were held through Goldalu, a private company wholly-owned by Mr. Tse. The remaining 17.63% were held by Mr. Tse directly. The shares were charged to UBS under two separate charges (the "Goldalu Charge" and "Tse Charge", respectively) executed by Goldalu and Mr. Tse, respectively. Mr. Tse and Goldalu charged 137,280,400 shares in July 1997 but, due to various subsequent reorganisations and top-ups, and further deliveries of shares to UBS, by June 1999 the total number of shares charged was 194,667,874, constituting 49.6% of the present issued capital of the Company.

3. Since early 1999, Mr. Tse has been in financial difficulties. Apart from the debt [ , ǎ \* ǫ UBS, Mi. T•^q ~ } ] ǎǎ ǎ^ǎc[ ǎǎǎǎ } • ǎ^ ǎǎ^ǎcHK\$120 { ǎǎ } ] | • interest. It is understood that these debts remain outstanding.
4. In an announcement issued by the Company dated 24 March 1999, it was stated that five writs against Mr. Tse had been issued by Yuanta Securities Asia Financial S^!ǫǎ^• Lǎ ǎ^ǎ ǎǎ [ c@!• &ǎǎ ǎ \* • ] ^ǎǎǎ ] ^!ǫ | { ǎ & [ ~Mi. T•^q [ ǎǎǎǎ } • under five put option deeds which had been granted by Mr. Tse.
5. In the announcement dated 24 March 1999, it was also stated that a financial institution, being UBS, had also demanded that Mr. Tse repay monies due under the Facility. UBS first demanded repayment from Mr. Tse in March 1999 by way of a statutory demand, and it threatened to petition for his bankruptcy should Mr. Tse fail to repay the sum within 21 days. On 24 September 1999, UBS filed a petition for bankruptcy against Mr. Tse and the hearing for the petition has been scheduled for 5 January 2000.
6. On 6 September 1999, in the face of a forthcoming Annual General Meeting of the Company on 10 September 1999, UBS wrote a letter to Mr. Tse reminding him that pursuant to the Share Charges, UBS had the exclusive rights to vote at all general meetings of the Company, and that it reserved all such rights and might exercise or refrain from exercising such rights in its absolute discretion.
7. On 24 September 1999, the Executive issued a letter to the legal advisers to UBS stating that:
  - (i) UBS had acquired voting rights with respect to the 49.6% shares that were charged to it; and
  - (ii) in view of the spirit of Note 2 on Dispensations from Rule 26, the Executive did not conclude that a general offer was triggered by UBS.

**Acquisition of Loan and Share Charges and 10.25% of the Company's shares by Cobra**

8. On 14 October 1999, pursuant to an assignment entered into between Cobra (a &[ { ] ǎ^ @|ǎ ǎǎ ǫ 60% ǎ^ Mi. C.K. Lǎǎ (%Mi. Lǎǎ +) ǎǎ ǎ 40% ǎ^ Mi. Pǎǎ | C@ } ) and UBS, and a sale and purchase agreement entered into between Cobra and the

Labuan branch of UBS and the Funds, Cobra acquired:

- (i) the rights, title and interest of UBS under the Facility (the amount of outstanding indebtedness due from Mr. Tse to UBS was in the principal sum of HK\$91,903,430.52 and the interest accrued was HK\$4,451,686.92 (together the "Loan")) and the Share Charges in respect of the 49.6% shares in the Company at the consideration of HK\$62,142,400; and
  - (ii) a 10.25% interest in the Company from the Labuan branch of UBS and the Funds at the consideration of about HK\$12,857,600.
9. Cobra paid a total consideration of HK\$75 million (HK\$12,857,600 for the 10.25% shareholding interest and HK\$62,142,400 for the interest in the Loan and the 49.6% charged shares). This is equivalent to HK\$0.32 per share.
10. Also on 14 October 1999, Cobra and Mr. Tse entered into a supplemental agreement, whereby Cobra and Mr. Tse agreed that voting rights attaching to shares subject to the Share Charges would be exercised by Cobra in accordance with the provisions of the Share Charges wou~~g~~4(S)4(ha)3(r)-3(e Ch)3(ar)9.2 Gts subject to the



18. The Panel does not accept that the execution of the Supplemental Agreements  
immediate control over these voting rights. The provisions of the Share Charges, in  
particular Clauses 2.1 and 6.1 (b), (c), (d) and (e), taken together with Clause 17.7,  
are in no way fettered by the provisions of the Supplemental Agreements and which  
themselves confirm that the obligations of the borrower under the Facility remain in  
full force and effect other than as modified by the terms of the Supplemental  
Agreements (Clauses 4.1 and 4.2). While the Supplemental Agreements (Clause

provisions of Rule 26.1(a). In these circumstances, Cobra would only have the share capital.

21. The Panel is satisfied that all three elements of acting in concert are present, namely an agreement or understanding between Mr. Tse and Mr. Lau (representing Cobra), active co-operation between them, one of the purposes of which was to acquire control of the Company, and the acquisition voting rights attaching to the shares in the Company by Cobra. Ample evidence has been presented of active co-operation between Mr. Tse and Mr. Lau (representing Cobra) to obtain or consolidate control through the acquisition of voting rights of the Company. The Supplemental Agreements executed between Mr. Tse and Cobra evidenced in part the understanding or agreement that existed between Mr. Tse and Cobra in respect of acquiring control of the voting rights of the Company from UBS.

24. A• @ Pæ ^| @ ~ ] @|á @ Eç^& ç^ç |~ |ð \* @C[ àææ á Mi. T•^ , ^!^ æð \* ð & } &^!ç æã @ Pæ ^|ç |~ |ð \* @C@ æ~ ã æð } [ ~control over voting rights !^|!^•^}ð \* æ ]| çæ æ^ 28% [ ~@ C[ { ] æ^ ç ç[ ð \* |ã @ à^ C[ àææ æ^] ð \*^@! , æ@G[|áæ ç @|áð \* [ ~• @æ^ ð @ C[ { ] æ^ æ [ ~ }ð \* ð approximately 32% , gave rise to a mandatory general offer obligation under the provisions of Rule 26.1(b) on the part of Cobra and parties acting in concert with it. Rule 26.1(b) provides that a mandatory general offer is required when *persons are acting in concert, and they collectively hold less than 35% of the voting rights of a company, and any one or more of them acquires voting rights and such acquisition has the effect of increasing their collective holding of voting rights to 35%*
25. Finally, the Panel has considered the position that would result if it was wrong and it were held that Cobra did not acquire control of any voting rights by virtue of the assignment of rights, title and interest under the Facility and Share Charges because @ S~ ] ]|^ ^} æA\*|^|^ { ^} ç , ^!^ ^~^æç^ ð |^ { [ çð \* C[ àææ æðæ ð take immediate steps to exercise the voting rights attaching to the shares subject to one or both of the Share Charges.
26. As stated above, the Panel has upheld the ruling of the Executive that Mr. Tse and Cobra are acting in concert. The Panel has had regard to the public announcement issued by the Company, of which Mr. Tse is a director and for which he took formal responsibility, dated 31 May 1999. This announcement states, inter alia, that *total number of shares held by Mr. Tse and parties acting in concert with him is 194,667,874 (of which 189,713,724 shares have been pledged to a financial institution as set out in the announcement of the Company made on 24 March 1999). This represents 49.6% of the total issued share capital of the Company of 391,889,263 ordinary shares as at the date of this announcement.* The acquisition on 14 October 1999 by Cobra, acting in concert with Mr. Tse, of 10.25% of the issued share capital of the Company from UBS and the Funds gives rise to a mandatory general offer obligation under the provisions of Rule 26.1(d), which provides that a mandatory offer is required when *concert and they collectively own not less than 35% but not more than 50% of the voting rights of a company and any one or more of them acquires additional voting rights and such acquisition has the effect of increasing their collective holding of voting rights of the company by more than 5% from the lowest collective percentage holding of such persons in the 12 month period ending on and inclusive of the date*





**Provisions of agreements referred to in the Panel's decision**

(1) Relevant provisions of the Facility are as follows:

*Security/Support: Legal pledge of listed shares of Tse Sui Luen Jewellery*

*together with other security pledged in favour of UBS*

*of UBS. The initial market value of the Pledged Shares shall not be less (sic) 213% of the Facility Amount. The Pledged Shares are to be registered in the name of nominee and*

*Top-up Requirement: 90.02 reWB1 0 066o1(l)5(i t)-4i29 514.63oi nBT1 0 0e.*

*available to the Borrower, the Chargor irrevocably and unconditionally covenants to pay on demand the Secured Indebtedness and as sole beneficial owner hereby charges and agrees to charge in favour of the Bank, with the intent that it shall take effect by way of first fixed charge, and assigns and agrees to assign absolutely to the Bank all its present and future rights, title and interest in and to and pledges the Charged Assets, including without limitation, all Securities which are at any time and from time to time kept or maintained by the Chargor in the Designated Account maintained by the Chargor with the Depository Agent and/or in any of the sub-accounts maintained by the Bank with the Depository Agent or held by the Depository Agent to the order of the Chargor, whether as nominee or otherwise, as a continuing security for the due and punctual payment and discharge of the Secured Indebtedness.*

*6. Enforcement and power of sale*

*6.1 If:-*

- (a) the Borrower fails to pay the Secured Indebtedness (or any part thereof) when due or upon demand (as the case may be) or is in breach of any obligation of the Borrower to the Bank;*
- (b) the Chargor is in breach of any of the terms of this Charge;*
- (c) the Borrower or the Chargor is unable or admits inability to pay its debts as they become due;*
- (d) the Borrower or the Chargor is subject to any insolvency proceedings, or if legal process is commenced against any asset of the Borrower or the Chargor; or*
- (e) an event of default (howsoever described) occurs in respect of any of the Facilities made available to the Borrower,*

*the Bank shall be entitled to enforce this Charge and may, without prior notice to the Chargor retain, apply, realise, sell or otherwise dispose of all or any part of the Charged Assets and apply the proceeds thereof in or to(ne)3(,*

*the power of sale conferred by any relevant applicable statutory or other law, but any restrictions on such powers imposed by such statutory or other law shall not apply to the fullest extent permissible under such statutory or other law.*

17. Miscellaneous

17.7 *The Bank or any of its nominees, agents, representatives, correspondents or attorneys, may at the discretion of the Bank or, as the case may be, such person, exercise (in the name of the Chargor or otherwise at any time and without any further consent or authority on the part of the Chargor) in respect of any Charged Assets (a) all the powers given to trustees under any relevant applicable statutory or other law, in respect of securities or property subject to a trust and any other powers or rights which may be exercised under the terms thereof or otherwise by the bearer of any such Charged Assets or by the person or persons in whose name or names any of such Charged Assets are registered and (b) subject to the power of sale of the Bank having arisen, all related voting rights. Neither the Bank nor any of its nominees, agents, representatives, correspondents or attorneys shall be under any duty to take any action in connection with the Charged Assets other than to use reasonable care in the custody and preservation of the Charged Assets which are in the actual possession of the Bank or, as the case may be, such person.*

(3) Clauses

*Facility Letter shall remain in full force and effect.*

- 4.3 *For the avoidance of doubt, unless and until the Lender enforces for (sic) Tse Charge or the Goldalu Charge pursuant to the terms thereto, the Lender shall not be entitled to exercise the voting rights over the number of shares of TSLJ charged under the Tse Charge and the Goldalu Charge as set out in the Schedule hereto.*