

STEALTH BIOTHERAPEUTICS CORP

FORM S-8

(Securities Registration: Employee Benefit Plan)

Filed 03/22/19

Telephone	617-600-6888
CIK	0001696396
Symbol	MITO
SIC Code	2834 - Pharmaceutical Preparations
Industry	Biotechnology & Medical Research
Sector	Healthcare
Fiscal Year	12/31

**UNITED STATES
SECURITIES AND EXCHANGE COMMISSION**
Washington, D.C. 20549

FORM S-8
REGISTRATION STATEMENT
UNDER
THE SECURITIES ACT OF 1933

Stealth BioTherapeutics Corp
(Exact Name of Registrant as Specified in Its Charter)

Cayman Islands
(State or Other Jurisdiction of
Incorporation or Organization)

Not Applicable
(I.R.S. Employer
Identification No.)

Stealth BioTherapeutics Corp
c/o Intertrust Corporate Services
(Cayman) Limited
190 Elgin Avenue, George Town
Grand Cayman
KY1-9005 Cayman Islands
(Address of Principal Executive Offices)

Not Applicable
(Zip Code)

2006 Share Incentive Plan
2019 Share Incentive Plan
(Full Title of the Plan)

Stealth BioTherapeutics Inc.
275 Grove Street, Suite 3-107
Newton, MA 02466
(Name and Address of Agent For Service)

(617) 600-6888
(Telephone Number, Including Area Code, of Agent For Service)

Indicate by check mark whether the registrant is a large accelerated filer, an accelerated filer, a non-accelerated filer, smaller reporting company, or an emerging growth company. See the definitions of "large accelerated filer," "accelerated filer," "smaller reporting company," and "emerging growth company" in Rule 12b-2 of the Exchange Act.

Large accelerated filer
Non-accelerated filer

Accelerated filer
Smaller reporting company
Emerging growth company

If an emerging growth company, indicate by check mark if the registrant has elected not to use the extended transition period for complying with any new or revised financial accounting standards provided pursuant to Section 7(a)(2)(B) of the Securities Act.

CALCULATION OF REGISTRATION FEE

Title of Securities to be Registered(1)	Amount to be Registered(2)	Proposed Maximum Offering Price Per Share	Proposed Maximum Aggregate Offering Price	Amount of Registration Fee
Ordinary Shares, \$0.0003 par value per share	63,487,133(3)	\$1.10(4)	\$69,873,542.70(4)	\$8,468.67

- (1) These ordinary shares may be represented by the registrant's American Depositary Shares, or ADSs. Each ADS represents 12 ordinary shares. ADSs issuable upon deposit of ordinary shares registered hereby were registered pursuant to a registration statement on Form F-6 (File No. 333-229509), as amended.
- (2) In accordance with Rule 416 under the Securities Act of 1933, as amended, this registration statement shall be deemed to cover any additional securities that may from time to time be offered or issued to prevent dilution resulting from stock splits, stock dividends or similar transactions.
- (3) Consists of (i) 47,692,934 ordinary shares issuable under the 2019 Share Incentive Plan and (ii) up to 15,794,199 ordinary shares subject to outstanding options under the 2006 Share Incentive Plan, as amended.
- (4) Estimated solely for the purpose of calculating the registration fee in accordance with Rule 457(c) and Rule 457(h) of the Securities Act of 1933, as amended. The price per ordinary share and aggregate offering price are calculated on the basis of (a) \$1.05, the weighted average exercise price of the 15,794,199 ordinary shares subject to outstanding stock option grants under the 2006 Share Incentive Plan at prices ranging from \$0.39 to \$1.53, (b) \$1.02, the exercise price of 16,369,125 ordinary shares subject to outstanding option grants under the 2019 Share Incentive Plan and (c) the average of the high and low sale prices of the registrant's ADSs on the Nasdaq Global Market on March 18, 2019, in accordance with Rule 457(c) under the Securities Act of 1933, as amended for the 31,323,809 shares issuable under the 2019 Share Incentive Plan which are not subject to outstanding options.

PART I
INFORMATION REQUIRED IN THE SECTION 10(a) PROSPECTUS

Item 1. Plan Information.

The information required by Item 1 is included in documents sent or given to participants in the plans covered by this registration statement pursuant to Rule 428(b)(1) of the Securities Act of 1933, as amended (the “Securities Act”).

Item 2. Registrant Information and Employee Plan Annual Information.

The written statement required by Item 2 is included in documents sent or given to participants in the plans covered by this registration statement pursuant to Rule 428(b)(1) of the Securities Act.

PART II
INFORMATION REQUIRED IN THE REGISTRATION STATEMENT

Item 3. Incorporation of Documents by Reference.

The registrant is subject to the informational and reporting requirements of Sections 13(a), 14, and 15(d) of the Securities Exchange Act of 1934, as amended (the “Exchange Act”) applicable to foreign private issuers, and in accordance therewith files reports and other information with the Securities and Exchange Commission (the “Commission”). The following documents, which are on file with the Commission, are incorporated in this registration statement by reference:

(a) The prospectus filed by the registrant with the Commission pursuant to Rule 424(b) under the Securities Act, on February 15, 2019, relating to the Registration Statement on Form F-1, as amended (File No. 333-229097), which contains the registrant’s audited financial statements for the latest fiscal year for which such statements have been filed.

(b) The description of the securities contained in the registrant’s registration statement on Form 8-A (Registration No. 001-38810) filed with the Commission on February 12, 2019, under the Exchange Act, including any amendment or report filed for the purpose of updating such description.

(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 document referred to in (a) above.

All documents subsequently filed by the registrant pursuant to Sections 13(a), 13(c), 14 and 15(d) of the Exchange Act, prior to the filing of a post-effective amendment which indicates that all securities offered hereby have been sold or which deregisters all securities then remaining unsold, shall be deemed to be incorporated by reference in this registration statement and to be part hereof from the date of the 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 the purposes of this registration statement to the extent that a statement contained herein or in any other subsequently filed document which also is or is deemed to be incorporated by reference herein modifies or supersedes such statement. Any 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.

Item 6. Indemnification of Directors and Officers.

Every director and officer is indemnified and secured harmless out of the assets and funds of the Company against all actions, proceedings, costs, charges, expenses, losses, damages or liabilities incurred or sustained by such director or officer in or about the conduct of the Company's affairs or in the execution of such director or officer's duties, powers, authorities or discretions, including any costs, expenses, losses or liabilities incurred by such director or officer in defending (whether successfully or otherwise) any civil proceedings concerning the Company or its affairs in any court whether Cayman Islands or elsewhere.

Item 7. Exemption from Registration Claimed.

Not applicable.

Item 8. Exhibits.

<u>Number</u>	<u>Description</u>
4.1	<u>Memorandum and Articles of Association of the Registrant, as amended (incorporated herein by reference to Exhibit 99.2 to the registrant's Report of Foreign Private Issuer on Form 6-K, dated as of March 4, 2019)</u>
4.2	<u>Deposit Agreement among the Registrant, Citibank, N.A., as depositary, and all Owners and Holders of ADSs issued thereunder (incorporated herein by reference to Exhibit 99.3 to the registrant's Report of Foreign Private Issuer on Form 6-K, dated as of March 4, 2019)</u>
5.1	<u>Opinion of Walkers</u>
23.1	<u>Consent of Walkers (included in Exhibit 5.1)</u>
23.2	<u>Consent of Deloitte & Touche LLP</u>
24.1	<u>Power of attorney (included on the signature pages of this registration statement)</u>
99.1	<u>2006 Share Incentive Plan (incorporated herein by reference to Exhibit 10.1 to the registrant's Registration Statement on Form F-1, dated as of December 28, 2018 (Registration No. 333-229097))</u>
99.2	<u>2019 Share Incentive Plan (incorporated herein by reference to Exhibit 10.4 to the registrant's Registration Statement on Form F-1, dated as of January 29, 2019 (Registration No. 333-229097))</u>

Item 9. Undertakings.

1. Item 512(a) of Regulation S-K. 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 Securities Act;

(ii) To reflect in the prospectus any facts or events arising after the effective date of the 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 the registration statement; and

(iii) To include any material information with respect to the plan of distribution not previously disclosed in the registration statement or any material change to such information in the registration statement;

provided, however, that paragraphs (i) and (ii) do not apply if the information required to be included in a post-effective amendment by those paragraphs is contained in reports filed with or furnished to the Commission by the registrant pursuant to Section 13 or Section 15(d) of the Exchange Act that are incorporated by reference in the registration statement.

(2) That, for the purpose of determining any liability under the Securities 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.

(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 offering.

2. Item 512(b) of Regulation S-K. The undersigned registrant hereby undertakes that, for purposes of determining any liability under the Securities Act, each filing of the registrant's annual report pursuant to Section 13(a) or Section 15(d) of the Exchange Act (and, where applicable, each filing of an employee benefit plan's annual report pursuant to section 15(d) of the Securities Exchange Act of 1934) that is incorporated by reference in the 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.

3. Item 512(h) of Regulation S-K. Insofar as indemnification for liabilities arising under the Securities Act may be permitted to directors, officers and controlling persons of the registrant pursuant to the foregoing provisions, or otherwise, the registrant has been advised that in the opinion of the Securities and Exchange Commission such indemnification is against public policy as expressed in the Securities

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 Securities 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 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 to be signed on its behalf by the undersigned, thereunto duly authorized, in the City of Newton, Massachusetts, on this 22 day of March, 2019.

Stealth BioTherapeutics Corp

By: /s/ Irene P. McCarthy

Irene P. McCarthy
Chief Executive Officer

POWER OF ATTORNEY AND SIGNATURES

We, the undersigned officers and directors of Stealth BioTherapeutics Corp, hereby severally constitute and appoint Irene P. McCarthy and Henry Hess, and each of them singly, our true and lawful attorneys with full power to them, and each of them singly, to sign for us and in our names in the capacities indicated below, the registration statement on Form S-8 filed herewith and any and all subsequent amendments to said registration statement, and generally to do all such things in our names and on our behalf in our capacities as officers and directors to enable Stealth BioTherapeutics Corp to comply with the provisions of the Securities Act of 1933, as amended, and all requirements of the Securities and Exchange Commission, hereby ratifying and confirming our signatures as they may be signed by our said attorneys, or any of them, to said registration statement and any and all amendments thereto.

Pursuant to the requirements of the Securities Act of 1933, this registration statement has been signed by the following persons in the capacities and on the dates indicated.

<u>Signature</u>	<u>Title</u>	<u>Date</u>
<u>/s/ Irene P. McCarthy</u> Irene P. McCarthy	Chief Executive Officer and Director (principal executive officer, principal financial officer and principal accounting officer)	March 22, 2019
<u>/s/ Francis W. Chen</u> Francis W. Chen, Ph.D.	Director	March 22, 2019
<u>/s/ Gerald L. Chan</u> Gerald L. Chan, Sc.D.	Director	March 22, 2019
<u>/s/ Kevin F. McLaughlin</u> Kevin F. McLaughlin	Director	March 22, 2019

<u>/s/ Vincent Sai Sing Cheung</u> Vincent Sai Sing Cheung	Director	March 22, 2019
<u>/s/ Lu Huang</u> Lu Huang	Director	March 22, 2019
<u>/s/ Cheuk Kin Stephen Law</u> Cheuk Kin Stephen Law	Director	March 22, 2019
<u>/s/ Edward P. Owens</u> Edward P. Owens	Director	March 22, 2019

STEALTH BIOTHERAPEUTICS INC.
Authorized Representative in the United States

By: /s/ Irene P. McCarthy
Name: Irene P. McCarthy
Title: Chief Executive Officer

22 March 2019

Our Ref: JSH/CB/S7050-154362

Stealth BioTherapeutics Corp
c/o Intertrust Corporate Services (Cayman) Limited,
190 Elgin Avenue,
Grand Cayman KY1-9005,
Cayman Islands

Dear Sirs

STEALTH BIOTHERAPEUTICS CORP

We have been asked to provide this legal opinion to you with regard to the laws of the Cayman Islands in connection with the registration by Stealth BioTherapeutics Corp (the “**Company**”), of 63,487,133 ordinary shares with a nominal or par value of \$0.0003 per share in the capital of the Company (the “**Shares**”) for issuance under the Stealth BioTherapeutics Corp 2019 Share Incentive Plan (the “**2019 Incentive Award Plan**”) and the Stealth BioTherapeutics Corp 2006 Share Incentive Plan, as amended (the “**2006 Share Incentive Plan**”) and together with the 2019 Incentive Award Plan, each a “**Plan**” and together the “**Plans**”), under the United States Securities Act of 1933, as amended (the “**Securities Act**”) and pursuant to the terms of the Registration Statement (as defined in Schedule 1).

For the purposes of giving this opinion, we have examined and relied upon the originals or copies of the documents listed in Schedule 1.

We are Cayman Islands Attorneys at Law and express no opinion as to any laws other than the laws of the Cayman Islands in force and as interpreted at the date of this opinion.

Based upon the foregoing examinations and the assumptions and qualifications set out below and having regard to legal considerations which we consider relevant, and under the laws of the Cayman Islands, we give the following opinion in relation to the matters set out below.

1. The Company is an exempted company duly incorporated with limited liability, validly existing under the laws of the Cayman Islands and in good standing with the Registrar of Companies in the Cayman Islands (the “**Registrar**”).
2. The Shares have been duly authorised by all necessary corporate action of the Company and upon the issue of the Shares (by the entry of the name of the registered owner thereof in the Register of Members of the Company confirming that such Shares have been issued credited as fully paid), delivery and payment therefore by the purchaser in accordance with the Memorandum and Articles of Association (as defined in Schedule 1) and the Plans and in the manner contemplated by the Registration Statement and the Prospectus (as each term is defined in Schedule 1), the Shares will be validly created, legally issued, fully paid and non-assessable (meaning that no additional sums may be levied on the holder thereof by the Company).

Walkers

190 Elgin Avenue, George Town
Grand Cayman KY1-9001, Cayman Islands

T +1 345 949 0100 F +1 345 949 7886 www.walkersglobal.com

The foregoing opinion is given based on the following assumptions.

1. The originals of all documents examined in connection with this opinion are authentic. The signatures, initials and seals on the Documents are genuine and are those of a person or persons given power to execute the Documents under the Resolutions (as defined in Schedule 1). All documents purporting to be sealed have been so sealed. All copies are complete and conform to their originals. The Documents conform in every material respect to the latest drafts of the same produced to us and, where provided in successive drafts, have been marked up to indicate all changes to such Documents.
2. We have relied upon the statements and representations of directors, officers and other representatives of the Company as to factual matters.
3. The Company will receive consideration in money or money's worth for each Share when issued, such price in any event not being less than the stated par or nominal value of each Share.
4. The Resolutions (as applicable) were adopted at duly convened meetings of the Board of Directors and such meetings were held and conducted in accordance with the Memorandum and Articles.
5. The Board Resolutions (as defined in Schedule 1) have been duly executed by or on behalf of each Director and the signatures and initials thereon are those of a person or persons in whose name the Board Resolutions have been expressed to be signed.
6. The Committee Resolutions (as defined in Schedule 1) have been duly executed by or on behalf of each member of the special committee of Directors of the Company and the signatures and initials thereon are those of a person or persons in whose name the Committee Resolutions have been expressed to be signed.
7. The Resolutions are and shall remain in full force and effect and have not been and will not be rescinded or amended.
8. Each of the Registration Statement and the Plans (including each grant notice issued pursuant thereto) will be duly authorised, executed and delivered by or on behalf of all relevant parties prior to the issue of the Shares and will be legal, valid, binding and enforceable against all relevant parties in accordance with their terms under all relevant laws (other than the laws of the Cayman Islands).
9. All preconditions to the issue of the Shares under the terms of the Plans will be satisfied or duly waived prior to the issue of the Shares and there will be no breach of the terms of the Plans.
10. There is nothing under any law (other than the laws of the Cayman Islands) which would or might affect any of the opinions set forth above.

Our opinion as to good standing is based solely upon receipt of the Certificate of Good Standing issued by the Registrar. The Company shall be deemed to be in good standing under section 200A of the Companies Law on the date of issue of the certificate if all fees and penalties under the Companies Law have been paid and the Registrar has no knowledge that the Company is in default under the Companies Law.

This opinion is limited to the matters referred to herein and shall not be construed as extending to any other matter or document not referred to herein. This opinion is given solely for your benefit and the benefit of your legal advisers acting in that capacity in relation to this transaction and may not be relied upon by any other person, other than persons entitled to rely upon it pursuant to the provisions of the Securities Act, without our prior written consent.

This opinion shall be construed in accordance with the laws of the Cayman Islands.

We hereby consent to the filing of this opinion as an exhibit to the Registration Statement. We also hereby consent to the reference to this firm in the Prospectus.

Yours faithfully

/s/ WALKERS

WALKERS

SCHEDULE 1

LIST OF DOCUMENTS EXAMINED

1. The Certificate of Incorporation dated 3 April 2006 and the Fifth Amended and Restated Memorandum and Articles of Association of the Company adopted on 25 January 2019 (the “**Memorandum and Articles of Association**”).
2. The Cayman Online Registry Information System (CORIS), the Cayman Islands’ General Registry’s online database, searched on 21 March 2019.
3. A Certificate of Good Standing dated 20 March 2019 in respect of the Company issued by the Registrar (the “**Certificate of Good Standing**”).
4. Copies of (i) the executed written resolutions of the Directors of the Company dated 20 April 2006, 14 December 2012 and 9 January 2017 and 28 February 2019 approving the Plans (the “**Board Resolutions**”), (ii) the executed minutes of the meeting of the Board of Directors of the Company held on 11 January 2019 setting out the resolutions adopted as such meeting (the “**Board Minutes**”) and (iii) the executed written resolutions of the special committee of the Directors of the Company dated 1 March 2019 approving the 2019 Incentive Award Plan (the “**Committee Resolutions**”, together with the Board Resolutions and the Board Minutes, the “**Resolutions**”) and the corporate records of the Company maintained at its registered office in the Cayman Islands.
5. Copies of the following documents (the “**Documents**”):
 - (a) the prospectus of the Company dated 6 February 2019 (the “**Prospectus**”), in connection with the registration statement on Form F-1, as amended (Registration No. 333-229097) filed by the Company with the United States Securities and Exchange Commission (“**SEC**”);
 - (b) the Registration Statement on Form S-8 filed on 22 March 2019 by the Company with the SEC registering the Shares under the Securities Act (as filed, the “**Registration Statement**”);
 - (c) 2019 Incentive Award Plan;
 - (d) 2006 Share Incentive Plan; and
 - (e) such other documents as we have deemed necessary to render the opinions set forth herein.

CONSENT OF INDEPENDENT REGISTERED PUBLIC ACCOUNTING FIRM

We consent to the incorporation by reference in this Registration Statement on Form S-8 of our report dated October 25, 2018, (December 28, 2018 as to the effects of the reverse stock split described in Note 18) relating to the consolidated financial statements of Stealth BioTherapeutics Corp and its subsidiaries (the "Company") as of and for the years ended December 31, 2016 and 2017 (which report expresses an unqualified opinion on the consolidated financial statements and includes an explanatory paragraph referring to the Company's ability to continue as a going concern), appearing in Amendment No. 2 to Registration Statement No. 333-229097 of the Company on Form F-1.

/s/ Deloitte & Touche LLP

Boston, Massachusetts

March 22, 2019