

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

In re

Achaogen, Inc.,

Debtor.<sup>1</sup>

Chapter 11

Case No. 19-10844 (BLS)

Re: D.I. 6

**SUPPLEMENT TO MOTION OF THE DEBTOR FOR INTERIM AND FINAL  
ORDERS (I) AUTHORIZING THE DEBTOR TO (A) PAY PREPETITION  
WAGES, SALARIES, AND OTHER COMPENSATION AND (B) PAY  
PREPETITION PAYROLL TAXES AND BENEFITS AND CONTINUE BENEFIT  
PROGRAMS IN THE ORDINARY COURSE, (II) DIRECTING BANKS TO  
HONOR CHECKS FOR PAYMENT OF PREPETITION EMPLOYEE PAYMENT  
AND PROGRAM OBLIGATIONS, AND (III) GRANTING RELATED RELIEF**

The above-captioned debtor and debtor in possession (the “Debtor”), by and through its proposed undersigned counsel, hereby files this supplement (the “Supplement”) to the *Motion of the Debtor for Interim and Final Orders (I) Authorizing the Debtor to (a) Pay Prepetition Wages, Salaries, and other Compensation and (b) Pay Prepetition Payroll Taxes and Benefits and Continue Benefit Programs in the Ordinary Course, (II) Directing Banks to Honor Checks for Payment of Prepetition Employee Payment and Program Obligations, and (III) Granting Related Relief [D.I. 6]* (“the Motion”).<sup>2</sup> In support of this Supplement, the Debtor respectfully states as follows:

**JURISDICTION**

1. The United States Bankruptcy Court for the District of Delaware (the “Court”) has jurisdiction over this matter under 28 U.S.C. § 1334 and the *Amended Standing*

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<sup>1</sup> The last four digits of the Debtor’s federal tax identification number are 3693. The Debtor’s mailing address for purposes of this Chapter 11 Case is 1 Tower Place, Suite 400, South San Francisco, CA 94080.

<sup>2</sup> Capitalized terms used but not defined herein shall have the meanings ascribed to them in the Motion.



*Order of Reference* from the United States District Court for the District of Delaware, dated February 29, 2012. This is a core proceeding under 28 U.S.C. § 157(b)(2)(A), and the Debtor confirms its consent pursuant to Rule 9013-1(f) of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware (the “Local Rules”) to the entry of a final order by the Court in connection with the Motion and this Supplement to the extent that it is later determined that the Court, absent consent of the parties, cannot enter final orders or judgments in connection herewith consistent with Article III of the United States Constitution.

2. Venue is proper in this district under 28 U.S.C. §§ 1408 and 1409.

#### **SUPPLEMENT**

3. On April 16, 2019, the Court entered the *Interim Order Granting Debtor’s Motion (I) Authorizing the Debtor to (a) Pay Prepetition Wages, Salaries, and Other Compensation and (b) Pay Prepetition Payroll Taxes and Benefits and Continue Benefit Programs in the Ordinary Course, (II) Directing Banks to Honor Checks for Payment of Prepetition Employee Payment and Program Obligations, and (III) Granting Related Relief* [D.I. 46] (the “Interim Order”),<sup>3</sup> approving the Motion on an interim basis and granting the Debtor authority to, among other things, continue certain of the Employee programs and practices in the ordinary course to the extent such Employee programs and practices were in effect immediately prior to the filing of this Chapter 11 Case.

4. The Interim Order also granted the Debtor authority to pay any and all prepetition amounts relating to their ordinary course Employee-related obligations and programs

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<sup>3</sup> The Interim Order applies to Employees, defined in the Motion as the Debtor’s approximately 36 employees as of the Petition Date, all located in the U.S., that conduct its business operations, including executive, management, finance and accounting, commercial and marketing, information technology, regulatory, research and development, and legal services.

and the Contractor-related obligations, provided, however, that, (a) the Debtor is not permitted to make payments on account of Sale Force Commissions or Severance Obligations prior to entry of a Final Order and (b) payments of prepetition amounts to Employees or Contractors under the Interim Order may not exceed \$13,650 per individual Employee or Contractor in accordance with the priority cap provided in section 507(a)(4)–(5) of the Bankruptcy Code, and shall not in the aggregate exceed \$640,000.

5. The Interim Order further authorizes the Debtor to reissue checks, wire transfers, automated clearing house payments, electronic payments, or other similar methods of payment for prepetition payments, including the Payroll Tax Payment, where such method of payment has been dishonored postpetition.

**I. Dishonored Prepetition Wages and Salaries**

6. Before the Petition Date, and to ensure there was no disruption to employee paychecks as a result of this Chapter 11 Case, the Debtor pre-funded ADP, LLP (“ADP”) with the amounts necessary to satisfy the Employee-related payroll obligations that would come due on April 15, 2019. All Employees whose paychecks were funded in this way received timely payments from ADP on or about April 15, 2019.

7. Two non-insider employees, however—the Vice President of Finance and the Director of Human Resources—resigned on April 12, 2019, prior to both the Petition Date and the regularly scheduled payroll on April 15, 2019. Because of their resignations, the Debtor issued final payments to these two employees on April 12, 2019 (their last day of employment) via check, instead of the typical ACH transfers through ADP. Both checks were ultimately dishonored postpetition.

8. On account of his dishonored check, the Debtor owes the former Vice President of Finance \$10,384.22 for prepetition wages and \$22,487.49 for accrued PTO, totaling \$32,871.71. By this Supplement, the Debtor seeks the authority, but not direction, to reissue the bounced check to this former employee in the amount of \$13,650 in accordance with the priority cap provided in section 507(a)(4)–(5) of the Bankruptcy Code (the “VP Priority Payment”). The Debtor proposes that the remainder of this employee’s dishonored check be treated as an unsecured claim in these proceedings.

9. Also on account of a dishonored check, the Debtor owes the other former employee, the former Director of Human Resources, \$6,457.06 for prepetition wages and \$18,352.88 for accrued PTO, totaling \$24,809.94. The Debtor seeks authority, but not direction, to reissue the bounced check to this former employee in the amount of \$13,650 in accordance with the priority cap provided in section 507(a)(4)–(5) of the Bankruptcy Code (the “Director Priority Payment”). The Debtor proposes that, similar to the treatment of the former Vice President of Finance, the remainder of this employee’s dishonored check be treated as an unsecured claim in this Chapter 11 Case.

## **II. Prepetition Bonus Payments and Return Obligations**

10. Additionally, should certain of the Debtor’s employees voluntarily resign or be terminated with cause, they may be obligated to repay to the Debtor certain prepetition bonus payments they received, which bonus payments were conditioned upon continued employment with the company through a date certain (the “Return Obligation”). In such cases, the Debtor seeks the authority, but not direction, to offset the Return Obligation against any prepetition wages, salaries, or other compensation owed to the employee (the “Bonus Setoff”) at the time of his or her departure from the company. The Debtor contemplates that its exercise of

a Bonus Setoff would be applied only to payments an employee might otherwise be entitled to receive under the Revised Final Order (defined below) and/or section 507(a)(4)-(5) of the Bankruptcy Code. The Revised Final Order shall not be deemed to authorize the Debtor to exercise the Bonus Setoff against any remaining general unsecured claim the employee may have against the estate. Any Bonus Setoff will be without prejudice to the Debtor's ability to enforce and collect any Return Obligation which remains outstanding after setoff from any applicable employee. The Debtor requests that this relief apply to both current and former employees.

### III. Termination of the Employee Stock Purchase Plan

11. The Debtor believes it may be appropriate to terminate its 2014 Employee Stock Purchase Plan ("ESPP" or the "Plan") due to both the significant decrease in the value of the company's common stock since the Plan was initiated, and the bankruptcy filing's impact on future trading, especially in light of the delisting of its shares from the NASDAQ Global Select Market. Pursuant to the terms of the ESPP, the Board of Directors of Achaogen, Inc. (the "Board") may, in its sole discretion, amend, suspend or terminate the Plan at any time.<sup>4</sup> The Debtor believes any decision to terminate the ESPP under the circumstances would be a valid exercise of its reasonable business judgment, and requests the Court's authority, but not direction, to terminate the ESPP. *See In re Landsource Cmtys. Dev. LLC*, 2009 WL 4874670, ¶ 15 (Bankr. D. Del. Nov. 25, 2009) ("Where valid business justification exists, a presumption

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<sup>4</sup> Section 7.5 ("Amendment and Termination of the Plan") provides:

(a) The Board may, in its sole discretion, amend, suspend or terminate the Plan at any time and from time to time; *provided, however*, that without approval of the Company's stockholders given within twelve (12) months before or after action by the Board, the Plan may not be amended to increase the maximum number of shares of Common Stock subject to the Plan or change the designation or class of Eligible Employees; and *provided, further* that without approval of the Company's stockholders, the Plan may not be amended in any manner that would cause the Plan to no longer be an "employee stock purchase plan" within the meaning of Section 423(b) of the Code.

exists ‘that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action was in the best interests of the company.’”) (quoting *In re Integrated Res., Inc.*, 147 B.R. 650, 656 (S.D.N.Y. 1990)).

#### **IV. Prepetition Payments to Board Members**

12. Further, after the Petition Date, two of the Debtor’s Board members attempted to deposit checks they received prior to the Petition Date on account of prepetition Board fees (in the amounts of \$11,125 and \$13,375), but those checks were dishonored by the applicable bank. Additionally, due to an invoicing error, the Debtor owes one other Board member prepetition Board fees in the amount of \$16,000. On account of these unpaid fee obligations, the Debtor owes these three Board members \$40,500 in the aggregate. By this Supplement, the Debtor seeks the authority, but not direction, to reissue the outstanding checks for prepetition Board fees in an amount not to exceed the priority cap provided in section 507(a)(4)–(5) of the Bankruptcy Code for each applicable Board member (the “Board Priority Payment”).

#### **RELIEF REQUESTED**

13. By this Supplement, the Debtor respectfully requests the Court enter an order, substantially in the form attached hereto as **Exhibit A** (the “Revised Final Order”), approving the Motion on a final basis as modified herein, including (i) authorizing, but not directing, the Debtor to reissue the bounced checks issued to the former Vice President of Finance and the former Director of Human Resources up to the priority cap of \$13,650 each; (ii) authorizing, but not directing, the Debtor to make the Board Priority Payment up to the priority cap of \$13,650 for each applicable Board Member; (iii) authorizing, but not directing, the Debtor to terminate the ESPP; and (iv) granting such other and further relief as is appropriate under the circumstances. A redline comparison of the changes to the Revised Final Order from the Interim Order is attached hereto as **Exhibit B**.

**RESERVATION OF RIGHTS**

14. Nothing contained in this Supplement or any actions taken by the Debtor pursuant to relief granted in the order is intended or should be construed as: (a) an admission as to the validity of any particular claim against the Debtor; (b) a waiver of the Debtor's rights to dispute any particular claim on any grounds; (c) a promise or requirement to pay any particular claim; (d) an implication or admission that any particular claim is of a type specified or defined in this Supplement; (e) a request or authorization to assume any agreement, contract, or lease pursuant to section 365 of the Bankruptcy Code; (f) a waiver or limitation of the Debtor's rights under the Bankruptcy Code or any other applicable law; or (g) a concession by the Debtor that any liens (contractual, common law, statutory, or otherwise) satisfied pursuant to this Supplement are valid, and the Debtor expressly reserved its rights to contest the extent, validity, or perfection or seek avoidance of all such liens. If the Court grants the relief sought herein, any payment made pursuant to the Court's order is not intended and should not be construed as an admission as to the validity of any particular claim or a waiver of the Debtor's rights to subsequently dispute such claim.

**NOTICE**

15. Notice of this Supplement is being provided to: (i) the United States Trustee; (ii) counsel to the Committee; (iii) current and former employees of the Debtor; (iv) counsel to SVB in its capacity as Prepetition Lender and DIP Lender (each as defined in the First Day Declaration); (v) Anthem Blue Cross, Kaiser Permanente, VSP, Delta, Unum, ADP, and Empower Retirement Services; (vi) the Delaware Secretary of State; (vii) the Delaware State Treasury; (viii) the Internal Revenue Service; (ix) the Securities and Exchange Commission; (x) any party that has requested notice pursuant to Bankruptcy Rule 2002; and (xi) any other

party required to be provided notice under Local Rule 9013-1(m). The Debtor submits that, in light of the nature of the relief requested, no other or further notice need be given.

**CONCLUSION**

WHEREFORE, the Debtor respectfully requests entry of the Revised Final Order, in the form attached hereto as **Exhibit A**, granting the relief requested herein and such other relief as is just and proper under the circumstances.

*[Remainder of page intentionally left blank]*

May 7, 2019  
Wilmington, Delaware

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*Proposed Counsel for Debtor and Debtor in Possession*

**Exhibit A**

**Revised Final Order**

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE**

In re

**Achaogen, Inc.,**

Debtor.<sup>1</sup>

Chapter 11

Case No. 19-10844 (BLS)

**Re: D.I. 6**

**FINAL ORDER AUTHORIZING THE DEBTOR TO (A) PAY  
PREPETITION WAGES, SALARIES, AND OTHER COMPENSATION  
AND (B) PAY PREPETITION PAYROLL TAXES AND BENEFITS AND CONTINUE  
BENEFIT PROGRAMS IN THE ORDINARY COURSE, (II) DIRECTING BANKS TO  
HONOR CHECKS FOR PAYMENT OF PREPETITION EMPLOYEE PAYMENT AND  
PROGRAM OBLIGATIONS, AND (III) GRANTING RELATED RELIEF**

Upon the motion and the supplemental motion (together, the “Motions”)<sup>2</sup> of the above-captioned debtor and debtor in possession (the “Debtor”), for an order authorizing the Debtor to (a) pay prepetition wages, salaries, and other compensation and (b) pay prepetition payroll taxes and benefits and continue benefit programs in the ordinary course, (II) directing banks to honor checks for payment of prepetition employee payment and program obligations, and (III) granting related relief, all as more fully set forth in the Motions; and upon the *Declaration of Blake Wise in Support of First Day Relief* (the “First Day Declaration”); and the Court having jurisdiction to consider the Motions and the relief requested therein pursuant to 28 U.S.C. §§ 157 and 1334 and the *Amended Standing Order of Reference* from the United States District Court for the District of Delaware, dated February 29, 2012; and this Court having found that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2); and that this Court may enter a final order consistent with Article III of the United States Constitution; and this Court having

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<sup>1</sup> The last four digits of the Debtor’s federal tax identification number are 3693. The Debtor’s mailing address for purposes of this Chapter 11 Case is 1 Tower Place, Suite 400, South San Francisco, CA 94080.

<sup>2</sup> Capitalized terms not defined in this Order are defined in the Motions.

found that venue of this proceeding and the Motions in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and due and proper notice of the Motions having been provided; and the relief requested being in the best interests of the Debtor and its estate and creditors; and this Court having reviewed the Motions and having heard the statements in support of the relief requested therein at a hearing before this Court (the “Hearing”); and the Court having determined that the legal and factual bases set forth in the Motions and at the Hearing establish just cause for the relief granted herein; and upon all of the proceedings had before the Court and after due deliberation and sufficient cause appearing therefor, **IT IS HEREBY ORDERED THAT:**

1. The Motions are GRANTED on a final basis.
2. The Debtor is authorized, but not directed, in its sole discretion, (i) to pay any and all prepetition amounts relating to its ordinary course Employee-related obligations and programs and the Contractor-related obligations, including, but not limited to, the VP Priority Payment, the Director Priority Payment, the Board Priority Payment, the Sales Force Commissions and the Severance Obligations; provided, however, that, aggregate payments of prepetition amounts under this Order shall not exceed \$13,650 per individual Employee or Contractor in accordance with the priority cap provided in section 507(a)(4)–(5) of the Bankruptcy Code; (ii) to reimburse Employees and Contractors for Reimbursable Expenses; (iii) to continue the Employee programs and practices in the ordinary course to the extent such Employee programs and practices were in effect immediately prior to the filing of this Chapter 11 Case; (iv) to terminate its 2014 Employee Stock Purchase Plan; and (v) to continue making payments postpetition for Employee-related programs and Contractors as they become due.
3. Nothing in this Order authorizes the Debtor to cash out unpaid PTO upon termination of an Employee, unless applicable state law requires such payment, and in no event

shall such payments exceed \$13,650 per individual Employee or Contractor in accordance with the priority cap provided in section 507(a)(4)–(5) of the Bankruptcy Code.

4. The Debtor is further authorized, but not directed, in its sole discretion, to pay all prepetition processing fees associated with, and all costs incident to, payment of the foregoing obligations.

5. The Debtor is further authorized to reissue checks, wire transfers, automated clearing house payments, electronic payments, or other similar methods of payment for prepetition payments approved by the Court in this Order where such method of payment has been dishonored postpetition.

6. The Debtor is further authorized, but not directed, to setoff any prepetition Employee-related obligations authorized by this Order against any applicable Return Obligation of the applicable employee. Any exercise of such a setoff shall only be applied to payments an employee might otherwise be entitled to receive under this Order and/or section 507(a)(4)-(5) of the Bankruptcy Code. The Order does not, and shall not be deemed to, authorize the exercise of the Bonus Setoff to any remaining general unsecured claim the employee may have against the estate. Any such Bonus Setoff will be without prejudice to the Debtor's ability to enforce and collect any Return Obligation which remains owing to the Debtor after application of the aforementioned setoff. The discretion afforded to the Debtor in this paragraph shall apply to its treatment of claims by and against both current and former employees.

7. All banks and other financial institutions on which checks were drawn or electronic payment requests made in connection with the payment of the prepetition obligations approved herein are authorized and directed to (i) receive, process, honor, and pay all such checks and electronic payment requests when presented for payment (assuming that sufficient

funds are then available in the Debtor's bank accounts to cover such payments) and (ii) rely on the Debtor's designation of any particular check or electronic payment request as approved by this Order.

8. Nothing contained in the Motions or this Order, or any actions taken by the Debtor pursuant to relief granted in the Order, shall be: (a) an admission as to the validity of any particular claim against the Debtor; (b) a waiver of the Debtor's rights to dispute any particular claim on any grounds; (c) a promise or requirement to pay any particular claim; (d) an implication or admission that any particular claim is of a type specified or defined in the Motions; (e) a request or authorization to assume any agreement, contract, or lease pursuant to section 365 of the Bankruptcy Code; (f) a waiver or limitation of the Debtor's rights under the Bankruptcy Code or any other applicable law; or (g) a concession by the Debtor that any liens (contractual, common law, statutory, or otherwise) satisfied pursuant to the Motions are valid, and the Debtor expressly reserved its rights to contest the extent, validity, or perfection or seek avoidance of all such liens. Any payment made pursuant to this Order shall not be an admission as to the validity of any particular claim or a waiver of the Debtor's rights to subsequently dispute such claim.

9. The Debtor is authorized and empowered to take all actions necessary to implement the relief granted in this Order.

10. For the avoidance of doubt, and notwithstanding anything to the contrary herein, to the extent there is any conflict between this Order and the order approving the *Debtor's Motion for Entry of an Order (I) Authorizing Implementation of a Key Employee Incentive Plan and a Key Employee Retention Plan, (II) Approving the Terms of the Debtors Key Employee*

*Incentive Plan and Key Employee Retention Plan, and (III) Granting Related Relief* [D.I. 27] (the “KEIP/KERP Motion”), the order approving the KEIP/KERP Motion shall prevail.

11. Notwithstanding any applicability of any of the Bankruptcy Rules, the terms and conditions of this Order shall be immediately effective and enforceable upon its entry.

12. Nothing in this Order authorizes or approves any payment subject to section 503(c) of the Bankruptcy Code.

13. Notwithstanding anything contained in the Motions or this Order, any payment authorized to be made by the Debtor herein shall be subject to the terms and conditions contained in any interim or final order authorizing the Debtor to obtain postpetition financing and to use cash collateral, including any budgets in connection therewith.

14. This Court shall retain jurisdiction to hear and determine all matters arising from or related to the implementation, enforcement and/or interpretation of this Order.

\_\_\_\_\_, 2019  
Wilmington, Delaware

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THE HONORABLE BRENDAN L. SHANNON  
UNITED STATES BANKRUPTCY JUDGE

**Exhibit B**

**Redline Comparison**

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

In re

Achaogen, Inc.,

Debtor.<sup>1</sup>

Chapter 11

Case No. 19-~~10844~~ (~~BLS~~)

Re: D.I. ~~6~~

~~INTERIM~~FINAL ORDER ~~GRANTING DEBTOR'S MOTION (I)~~ AUTHORIZING THE  
DEBTOR TO (A) PAY  
PREPETITION WAGES, SALARIES, AND OTHER COMPENSATION  
AND (B) PAY PREPETITION PAYROLL TAXES AND BENEFITS AND CONTINUE  
BENEFIT PROGRAMS IN THE ORDINARY COURSE, (II) DIRECTING BANKS TO  
HONOR CHECKS FOR PAYMENT OF PREPETITION EMPLOYEE PAYMENT AND  
PROGRAM OBLIGATIONS, AND (III) GRANTING RELATED RELIEF

Upon the motion ~~(the “Motion~~ and the supplemental motion (together, the  
“Motions”)<sup>2</sup> of the above-captioned debtor and debtor in possession (the “Debtor”), ~~styled~~  
~~*Motion of the Debtor for Interim and Final Orders (I)*~~ for an order authorizing the Debtor to (a)  
pay prepetition wages, salaries, and other compensation and (b) pay prepetition payroll taxes and  
benefits and continue benefit programs in the ordinary course,<sub>2</sub> (II) directing banks to honor  
checks for payment of prepetition employee payment and program obligations, and (III) granting  
related relief, all as more fully set forth in the Motions; and upon the *Declaration of Blake Wise in*  
*Support of First Day Relief* (the “First Day Declaration”); and the Court having jurisdiction to  
consider the ~~Motion~~Motions and the relief requested therein pursuant to 28 U.S.C. §§ 157 and  
1334 and the *Amended Standing Order of Reference* from the United States District Court for the

<sup>1</sup> The last four digits of the Debtor's federal tax identification number are 3693. The Debtor's mailing address for purposes of this Chapter 11 Case is 1 Tower Place, Suite 400, South San Francisco, CA 94080.

<sup>2</sup> Capitalized terms not defined in this Order are defined in the ~~Motion~~Motions.

District of Delaware, dated February 29, 2012; and this Court having found that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2); and that this Court may enter a final order consistent with Article III of the United States Constitution; and this Court having found that venue of this proceeding and the ~~Motion~~Motions in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and due and proper notice of the ~~Motion~~Motions having been provided; and the relief requested being in the best interests of the Debtor and its estate and creditors; and this Court having reviewed the ~~Motion~~Motions and having heard the statements in support of the relief requested therein at a hearing before this Court (the “Hearing”); and the Court having determined that the legal and factual bases set forth in the ~~Motion~~Motions and at the Hearing establish just cause for the relief granted herein; and upon all of the proceedings had before the Court and after due deliberation and sufficient cause appearing therefor, **IT IS HEREBY ORDERED THAT:**

1. The ~~Motion is~~Motions are GRANTED on ~~an interim a~~ final basis ~~as set forth herein.~~
2. ~~Until such time as the Final Order is entered, the~~The Debtor is authorized, but not directed, in its sole discretion, (i) to pay any and all prepetition amounts relating to ~~their~~its ordinary course Employee-related obligations and programs and the Contractor-related obligations, including, but not limited to, the VP Priority Payment, the Director Priority Payment, the Board Priority Payment, the Sales Force Commissions and the Severance Obligations; provided, however, that, ~~(a) the Debtor shall not make payments on account of Sale Force Commissions or Severance Obligations prior to entry of a Final Order and (b)~~aggregate payments of prepetition amounts under this Order shall not exceed \$13,650 per individual Employee or Contractor in accordance with the priority cap provided in section 507(a)(4)–(5) of the

Bankruptcy Code ~~and shall not in the aggregate exceed \$640,000~~; (ii) to reimburse Employees and Contractors for Reimbursable Expenses ~~in an aggregate amount not to exceed \$10,000~~; (iii) to continue the Employee programs and practices in the ordinary course to the extent such Employee programs and practices were in effect immediately prior to the filing of this Chapter 11 Case; ~~and~~ (iv) to terminate its 2014 Employee Stock Purchase Plan; and (v) to continue making payments postpetition for Employee-related programs and Contractors as they become due.

3. Nothing in this Order authorizes the Debtor to cash out unpaid PTO upon termination of an Employee, unless applicable state law requires such payment, and in no event shall such payments exceed \$13,650 per individual Employee or Contractor in accordance with the priority cap provided in section 507(a)(4)–(5) of the Bankruptcy Code.

4. The Debtor is further authorized, but not directed, in its sole discretion, to pay all prepetition processing fees associated with, and all costs incident to, payment of the foregoing obligations.

5. The Debtor is further authorized to reissue checks, wire transfers, automated clearing house payments, electronic payments, or other similar methods of payment for prepetition payments, ~~including the Payroll Tax Payment~~, approved by the Court in this Order where such method of payment has been dishonored postpetition.

6. The Debtor is further authorized, but not directed, to setoff any prepetition Employee-related obligations authorized by this Order against any applicable Return Obligation of the applicable employee. Any exercise of such a setoff shall only be applied to payments an employee might otherwise be entitled to receive under this Order and/or section 507(a)(4)-(5) of the Bankruptcy Code. The Order does not, and shall not be deemed to, authorize the exercise of the Bonus Setoff to any remaining general unsecured claim the employee may have against the

estate. Any such Bonus Setoff will be without prejudice to the Debtor's ability to enforce and collect any Return Obligation which remains owing to the Debtor after application of the aforementioned setoff. The discretion afforded to the Debtor in this paragraph shall apply to its treatment of claims by and against both current and former employees.

7. ~~6.~~ All banks and other financial institutions on which checks were drawn or electronic payment requests made in connection with the payment of the prepetition obligations approved herein are authorized and directed to (i) receive, process, honor, and pay all such checks and electronic payment requests, ~~including, if necessary, the Payroll Tax Payment,~~ when presented for payment (assuming that sufficient funds are then available in the Debtor's bank accounts to cover such payments) and (ii) rely on the Debtor's designation of any particular check or electronic payment request as approved by this Order.

~~7. Notwithstanding the relief granted in this Order and any actions taken pursuant to such relief, nothing in this Order shall be deemed: (i) an admission as to the validity of any claim against the Debtor; (ii) a waiver of the Debtor's right to dispute any claim on any grounds; (iii) a promise or requirement to pay any claim; (iv) an implication or admission that any particular claim is of a type specified or defined in this Order or the Motion; (v) a request or authorization to assume any agreement, contract, or lease pursuant to section 365 of the Bankruptcy Code; or (vi) a waiver of the Debtor's rights under the Bankruptcy Code or any other applicable law.~~

8. Nothing contained in the ~~Motion~~Motions or this Order, or any actions taken by the Debtor pursuant to relief granted in the Order, shall be: (a) an admission as to the validity of any particular claim against the Debtor; (b) a waiver of the Debtor's rights to dispute any particular claim on any grounds; (c) a promise or requirement to pay any particular claim; (d) an implication or admission that any particular claim is of a type specified or defined in ~~this~~

~~Motion~~the Motions; (e) a request or authorization to assume any agreement, contract, or lease pursuant to section 365 of the Bankruptcy Code; (f) a waiver or limitation of the Debtor's rights under the Bankruptcy Code or any other applicable law; or (g) a concession by the Debtor that any liens (contractual, common law, statutory, or otherwise) satisfied pursuant to the ~~Motion~~Motions are valid, and the Debtor expressly reserved its rights to contest the extent, validity, or perfection or seek avoidance of all such liens. Any payment made pursuant to this Order shall not be an admission as to the validity of any particular claim or a waiver of the Debtor's rights to subsequently dispute such claim.

~~9. Notice of the Motion as provided therein shall be deemed good and sufficient notice of such Motion and the requirements of Bankruptcy Rule 6004(a) are waived.~~

~~10. The relief granted in this Order is necessary to avoid immediate and irreparable harm to the Debtor and (i) the requirements of Bankruptcy Rule 6003 are deemed satisfied and (ii) the requirements of Bankruptcy Rule 6004(h) are waived.~~

9. ~~11.~~ The Debtor is authorized and empowered to take all actions necessary to implement the relief granted in this Order.

10. For the avoidance of doubt, and notwithstanding anything to the contrary herein, to the extent there is any conflict between this Order and the order approving the *Debtor's Motion for Entry of an Order (I) Authorizing Implementation of a Key Employee Incentive Plan and a Key Employee Retention Plan, (II) Approving the Terms of the Debtors Key Employee Incentive Plan and Key Employee Retention Plan, and (III) Granting Related Relief [D.I. 27]* (the "KEIP/KERP Motion"), the order approving the KEIP/KERP Motion shall prevail.

11. ~~12.~~ Notwithstanding any applicability of any of the Bankruptcy Rules, the terms and conditions of this Order shall be immediately effective and enforceable upon its entry.

12. ~~13.~~ Nothing in this Order authorizes or approves any payment subject to section 503(c) of the Bankruptcy Code.

~~14. The hearing to consider entry of an order granting the relief requested in the Motion on a final basis shall be held on \_\_\_\_\_, 2019 at \_\_\_\_\_ (Eastern Time); and any objections to entry of such order shall be in writing, filed with the Court, and served upon (i) counsel to the Debtor, (ii) the United States Trustee, (iii) counsel to the DIP Lender, Morrison & Foerster LLP, 200 Clarendon Street, Boston, MA 02116, Attn: Alexander Rheaume, Morrison & Foerster LLP, 250 West 55th Street, New York, NY 10019-9601, Attn: Todd Goren and Benjamin Butterfield, and Ashby & Geddes, 500 Delaware Avenue, P.O. Box 1150, Wilmington, DE 19899, Attn: Gregory Taylor, and (iv) counsel for any statutory committee appointed in this case so as to be received no later than 4:00 p.m. (Eastern Time) on \_\_\_\_\_, 2019.~~

13. ~~15.~~ Notwithstanding anything contained in the ~~Motion~~Motions or this Order, any payment authorized to be made by the Debtor herein shall be subject to the terms and conditions contained in any interim or final order authorizing the Debtor to obtain postpetition financing and to use cash collateral, including any budgets in connection therewith.

14. ~~16.~~ This Court shall retain jurisdiction to hear and determine all matters arising from or related to the implementation, enforcement and/or interpretation of this Order.

\_\_\_\_\_, 2019  
Wilmington, Delaware

\_\_\_\_\_  
THE HONORABLE BRENDAN L. SHANNON  
UNITED STATES BANKRUPTCY JUDGE



<b>Summary report:</b>	
<b>Litéra® Change-Pro 10.1.0.200 Document comparison done on 5/7/2019 9:49:01 PM</b>	
<b>Style name:</b> Default Style	
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<b>Original filename:</b> Achaogen - Employee Interim Order.DOCX	
<b>Modified filename:</b> Achaogen - Revised Employee Final Order.DOCX	
<b>Changes:</b>	
Add	40
Delete	42
<del>Move From</del>	0
Move To	0
Table Insert	0
<del>Table Delete</del>	0
Table moves to	0
<del>Table moves from</del>	0
Embedded Graphics (Visio, ChemDraw, Images etc.)	0
Embedded Excel	0
Format changes	0
<b>Total Changes:</b>	<b>82</b>