

**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. 550**

**DECLARATION OF JAMES S. CASSEL, CHAIRMAN  
OF CASSEL SALPETER & CO., LLC, IN SUPPORT OF  
THE (I) SALE OF THE CHINA PURCHASED ASSETS TO XUANZHU (HK)  
BIOPHARMACEUTICAL LIMITED AND (II) ENTRY OF THE SALE ORDER**

I, James S. Cassel, hereby declare and state:

1. I am Chairman of the investment banking firm Cassel Salpeter & Co., LLC (“Cassel”), which has its principal office at 801 Brickell Avenue, Suite 1900, Miami, FL 33131. I am authorized to execute this declaration on behalf of Cassel. Unless otherwise stated, all matters set forth in this declaration are based on my personal knowledge, my review of relevant documents, information supplied to me by counsel to the Debtor, the Debtor, or other professionals at Cassel, or my views, including as based upon my experience and knowledge of the Debtor’s business and financial condition.

2. Cassel is an independent investment banking firm that assists middle-market and emerging growth companies across a broad spectrum of industries. Cassel’s professionals provide or have provided investment banking and other services in connection with the restructuring or sale of the following companies: Avadel Specialty Pharmaceuticals, LLC; 1 Global Capital LLC; Sancilio Pharmaceuticals Company, Inc.; NephroGenex, Inc. (Nasdaq:NRX); Dynavox, Inc. (OTCPK:DVOX.Q); Gulfstream International Airlines;

<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 548 Market Street, #70987, San Francisco, CA 94104-5401. Unless otherwise indicated, capitalized terms used, but not defined herein, have the meanings ascribed to them in the Sale Motion, the Stipulation, or Xuanzhu Sale Agreement (as such terms are defined herein), as applicable.



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Electrolytic Technologies Corporation; Brijot Millimeter Wave Technologies, Corp.; HeathStar Communications, Inc.; HC Innovations, Inc.; Stant Corp.; AFP Imaging Corp.; Nailite International, Inc.; OMI Medical Imaging; Nitram, Inc.; and uniDigital, Inc. Cassel's professionals are also providing or have provided mergers and acquisitions advisory services in connection with whole or partial company sale transactions involving companies across a wide range of industries, including pharmaceuticals.

3. On April 7, 2019, the Debtor engaged Cassel as the Debtor's investment banker to assist in bringing about a sale of all or substantially all of the Debtor's assets to maximize value for the Debtor's bankruptcy estate and its constituents. The Bankruptcy Court entered the *Order Authorizing Debtor to Employ and Retain Cassel Salpeter & Co., LLC as Investment Banker Nunc Pro Tunc as of the Petition Date* ("Cassel Retention Order") [D.I. 165] on May 8, 2019.

4. I submit this declaration in support of the entry of an order (the "Sale Order") approving the sale of the China Purchased Assets (as defined in the Stipulation) to Xuanzhu (HK) Biopharmaceutical Limited ("Xuanzhu").

#### **Robust Marketing Process**

5. Since being hired to serve as the Debtor's investment banker, our firm has worked persistently with the Debtor to run an extensive marketing process with the goal of maximizing value for the Debtor's estate. Throughout April and May of 2019 (the "Initial Marketing Process"), we ran a fulsome marketing process for substantially all of the Debtor's assets. In total, we identified and reached out to 192 potential buyers, including 154 strategic buyers and 38 financial buyers. Of the parties we contacted, 102 parties requested and received non-confidential overviews, and 72 parties executed non-disclosure agreements. There were 64 parties active in the data room, which contained more than 1,000 documents. Additionally, we

worked with the Debtor's executive team to setup management presentations and telephone conversations with interested bidders.

6. Throughout the Initial Marketing Process, our firm and the Debtor's management spent a voluminous number of hours (i) answering diligence questions from potential bidders (including through the aforementioned management presentations and telephone conversations), (ii) assisting potential bidders with understanding the bidding and auction procedures, and (iii) encouraging potential bidders to submit bids prior to the court-approved bid deadline.

### **The Prior Sale Process**

7. While the Debtor's strong preference was to sell substantially all of its assets in a single transaction to a single buyer, the Debtor and its professionals recognized that such a strategy may not afford the Debtor the best opportunity to maximize the value of its assets for the benefit of its estate and creditors. As such, the Debtor offered parties in interest the opportunity to purchase discrete components of the Debtor's business, making clear that it was open to bids for less than all of its assets and encouraging parties to submit bids for those portions of the business in which they were interested.

8. The Initial Marketing Process culminated with a May 29, 2019 bid deadline, at which point the Debtor received nine (9) bids. Among these bids were a bid for substantially all of the Debtor's assets from Cipla USA Inc. ("Cipla") and a bid for the Debtor's rights in greater China from Qilu Antibiotics Pharmaceutical Co. ("Qilu").

9. At the conclusion of the ensuing Auction, the Debtor designated (i) Cipla as the Successful Bidder for the global rights to ZEMDRI (Plazomicin) and the Debtor's assets related thereto, subject to a license of the China Assets (as defined in the Stipulation) (the "Global Rights") and (ii) Qilu as the Successful Bidder for a license to the China Assets. Additionally,

the Debtor designated Cipla as the Back-up Bidder for the China Assets. *See Notice of Completion of Auction and Selection of Successful Bidder* [D.I. 266] (the “Notice of Auction Results”).

10. Thereafter, on or about June 20, 2019, the Debtor entered into an asset purchase agreement with Cipla (the “Cipla Plazomicin Sale Agreement”) for the Global Rights (including the China Assets), subject to the Debtor’s right to license the China Assets.<sup>2</sup> In order to effectuate the Debtor’s license of the China Assets to Qilu, the Cipla Plazomicin Sale Agreement provided that the Debtor, as licensor, would enter into a license agreement with Qilu—or, if requested by the Debtor, another third party—for the China Assets (the “License Agreement”), and that upon the payment by Qilu of a one-time licensing fee to the Debtor and the effectiveness of the License Agreement, the Debtor would immediately assign to Cipla, and Cipla would immediately assume, the rights and only those obligations of the Debtor, as licensor, under the License Agreement. When Cipla and the Debtor executed the Cipla Plazomicin Sale Agreement, the Debtor was still negotiating a license agreement with Qilu for the China Assets.

11. On or about July 1, 2019, the Debtor ceased most of its operations, dismissing all but a few of its remaining employees.

12. On July 23, 2019, the Court entered an order (the “Cipla Sale Order” and with the Cipla Plazomicin Sale Agreement, the “Cipla Sale Documents”) approving the Cipla Plazomicin Sale Agreement [D.I. 371]. The Debtor and Cipla consummated the transaction the same day.

13. Qilu, as the Successful Bidder for the China Assets, and Cipla, as the Back-up Bidder for the China Assets, thereafter failed to close their respective transactions for the China Assets.

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<sup>2</sup> The Debtor also entered into a number of other asset purchase agreements for certain of its assets, including entering into an asset purchase agreement with Cipla dated June 20, 2019 for the C-Scape program assets.

### **The Xuanzhu Proposal**

14. Since learning in late July 2019 that Qilu and Cipla failed to consummate their respective transactions for the China Assets, our firm began a second marketing effort for the China Assets (the “Second Round Marketing Effort”). This Second Round Marketing Effort lasted approximately ten (10) weeks. Within that time frame, we had conversations with approximately ten (10) potential parties, approximately half of which showed genuine interest in the opportunity to acquire the China Assets.

15. As part of this effort, in or about August 2019, our firm contacted Xuanzhu, advising that the transaction for the China Assets had not closed and that the Debtor was seeking to identify a party that would be interested in acquiring the China Assets if the relevant parts of the Cipla transaction could be reversed. Xuanzhu had first become aware of the China Assets in or about November 2018, and aggressively pursued the opportunity through April 2019 when Achaogen filed the Chapter 11 Case, but had declined to proceed with a purchase of the assets. After weeks of discussions, Xuanzhu ultimately presented a written proposal to the Debtor to purchase (as opposed to licensing) the China Purchased Assets (as defined below). Xuanzhu’s proposal (i) contemplated that Xuanzhu would pay consideration of \$4.5 million to acquire the China Purchased Assets (without assuming any executory contracts) and (ii) requested certain bid protections.

16. Despite our firm’s extensive efforts both during the Initial Marketing Process and the Second Round Marketing, Xuanzhu’s proposal—which provided significantly less consideration than the offers the Debtor had previously accepted from Cipla and Qilu—was the only acceptable offer the Debtor received during the renewed marketing period. Thus, the Debtor, in consultation with the DIP Lender and the Committee, determined that the Xuanzhu

proposal was the highest and best viable offer for the China Purchased Assets, and decided to move forward with Xuanzhu's proposal.

17. On October 15, 2019, the Debtor entered into a letter of intent ("LOI") with Xuanzhu, which among other things, provided Xuanzhu with certain bid protections including a \$200,000 expense reimbursement and \$225,000 break-up fee. The Court approved the Debtor's entry into the LOI on October 31, 2019 [D.I. 516], and entered orders extending the LOI's protections in subsequent orders entered on November 26, 2019 [D.I. 531] and December 19, 2019 [D.I. 545].

18. On December 29, 2019, the Debtor entered into an asset purchase agreement with Xuanzhu memorializing the terms and conditions for the purchase and sale of the China Purchased Assets (the "Xuanzhu Sale Agreement"). A copy of the Xuanzhu Sale Agreement is attached to the Sale Order as Exhibit A.

#### **The Cipla Stipulation**

19. Xuanzhu's proposal contemplates that it will purchase—as opposed to license—the "China Purchased Assets," which consist of (i) the "China Intellectual Property" (including, without limitation, the "Company China IP Registrations", the "Company Owned China Intellectual Property" and the "Company Used China Intellectual Property") (as such terms are defined in the Xuanzhu Sale Agreement), and (ii) all other Purchased Assets relating only to the "China Plazomicin Business," other than the Excluded IP (each as defined in the Xuanzhu Sale Agreement). As such, and because the Cipla Sale Order effectuated the transfer of the China Plazomicin Business to Cipla, it became necessary to rescind the transfer of these assets to Cipla. The Debtor, Cipla and Xuanzhu thus negotiated that certain *Stipulation Amending the Cipla Sale Documents*, dated December 29, 2019 (the "Stipulation"). A copy of the Stipulation is attached

to the Sale Order as Exhibit B. The Stipulation provides that so long as (i) the Court approves the Xuanzhu Sale Agreement (as defined below) and the Stipulation and (ii) the transactions under the Xuanzhu Sale Agreement (as defined below) close (the “Xuanzhu Closing”), then immediately prior to the Xuanzhu Closing, the sale and transfer of the portion of the China Purchased Assets that occurred under the Cipla Plazomicin Sale Agreement shall be automatically rescinded in their entirety and shall have no further force or effect (the “China Purchased Assets Rescission”).<sup>3</sup> As a result of the China Purchased Assets Rescission, the Debtor will be able to transfer the China Purchased Assets to Xuanzhu. Absent approval of the Stipulation, I do not believe the Debtor can effectively monetize the China Purchased Assets.

20. The Debtor is now asking this Court for approval of the Xuanzhu Sale Agreement and Stipulation. Approval of the foregoing will allow the Debtor to mitigate its damages and maximize the value of the China Assets for itself, its estate and its creditors.

#### **Benefits to Estate of Sale to the Successful Bidders**

21. Given the circumstances, I believe the China Asset Sale undoubtedly represents the Debtor’s best opportunity to maximize value for the China Purchased Assets for its estate and creditors. Based on our firm’s extensive discussions with potential purchasers both during the Initial Marketing Process and the Second Round Marketing Effort, I believe that Xuanzhu’s offer is the highest and best offer for these assets. I do not believe that an another auction for the China Purchased Assets would have yielded higher value for the Debtor or its estate, and based on my firm’s discussions with Xuanzhu’s representatives, I do not believe that Xuanzhu would

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<sup>3</sup> I understand that notwithstanding anything in the Stipulation to the contrary, each of the Debtor, Cipla and Xuanzhu expressly reserves all of their respective claims, rights at law or equity, entitlements, remedies, causes of action and defenses (each, a “Legal Right”) that each has or may have with respect to the Auction, the Cipla Sale Documents, the License Agreement, and actions or inactions that any of the other Parties have taken, may take or will seek to take in the future with respect to the Debtor or its assets during the course of this Chapter 11 Case.

have been willing to participate in an auction in any event. I similarly do not believe the Debtor has the liquidity to run an auction at this point.

**Conclusion**

22. In conclusion, I believe that the sale of the China Purchased Assets to Xuanzhu is in the best interests of the Debtor, its estate and its creditors because it currently constitutes the highest and best offer available for such assets and will maximize recoveries for the Debtor's creditors.

23. Therefore, I believe that the Court should enter the Sale Order and approve the sale of the China Purchased Assets to Xuanzhu.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Dated: December 29, 2019

/s/ James S. Cassel  
James S. Cassel, Chairman  
Cassel Salpeter & Co., LLC