

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

In re

Achaogen, Inc.,

Debtor.¹

Chapter 11

Case No. 19-10844 (BLS)

Re: D.I. 550

**DECLARATION OF NICHOLAS K. CAMPBELL,
CHIEF RESTRUCTURING OFFICER OF THE
DEBTOR, IN SUPPORT OF THE (I) SALE OF THE
CHINA PURCHASED ASSETS OF THE DEBTOR TO XUANZHU (HK)
BIOPHARMACEUTICAL LIMITED AND (II) ENTRY OF THE SALE ORDER**

I, Nicholas K. Campbell, hereby declare and state:

1. I am the Chief Restructuring Officer (“CRO”) of the Debtor (the “Debtor”) and have served in such capacity since April 2019. Moreover, I am also a Managing Partner at Meru, LLC (“Meru”) and have held such position since 2017. In my role as CRO, I am familiar with the Debtor’s assets, liabilities, day-to-day operations, business, employees, and Chapter 11 Case. I hold a Bachelor’s Degree in Business Administration from Columbus State University and a Master of Business Administration from the University of Georgia – Terry College of Business.
2. 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 below) of the Debtor to Xuanzhu (HK) Biopharmaceutical Limited (“Xuanzhu”)² that are the subject of the Sale Order.
3. Unless otherwise stated in this declaration, I have personal knowledge of the facts herein and, if called as a witness at the Sale Hearing, I would testify competently thereto.

¹ 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.

² Unless otherwise indicated, capitalized terms used, but not defined herein, have the meanings ascribed to them in the Bidding Procedures, the Bidding Procedures Order, the Stipulation, or Xuanzhu Sale Agreement (as such terms are defined herein), as applicable.



Prepetition Restructuring Efforts

4. Prior to the Petition Date, the Debtor and its professionals undertook an exhaustive process to explore potential strategic alternatives for maximizing the value of the Debtor's business. In parallel with its cost-reducing efforts detailed in the *Declaration of Blake Wise in Support of First Day Relief* (the "First Day Declaration") [D.I. 3], prior to the chapter 11 filing, the Debtor explored potential strategic alternatives for maximizing the value of its business. On November 5, 2018, the Debtor announced a review of strategic alternatives to maximize stockholder value, including but not limited to the potential sale or merger of the company or its assets. This strategic review process continued alongside the Debtor's continued focus on the commercialization of ZEMDRI (Plazomicin) and other corporate initiatives.

A. The Marketing and Sale Process

5. The Debtor retained Evercore Group LLP ("Evercore") as its investment banker to assist it with exploring potential strategic alternatives, including assisting the Debtor in any potential restructuring, sale transaction or financing transaction. Following public announcement of the engagement, the Debtor and Evercore identified and then met with numerous potential parties for such a transaction beginning in November 2018. A team of senior executives worked together on this process with Evercore on a daily basis by reaching out to various potential parties and providing detailed management presentations. A virtual data room was made available containing extensive information about the Debtor, including documents describing the Debtor's business and financial results in considerable detail, and potential purchasers had the opportunity to conduct due diligence via the virtual data room, as well as through meetings with the Debtor's management team.

6. The Debtor and Evercore ran a marketing process that targeted strategic partners, merger-of-equal candidates and peripheral candidates (ex-U.S. buyers, parties without direct

complementary assets, lagging parties, etc.). In total, Evercore contacted 75 potential buyers, including financial buyers, privately-held specialty pharmaceutical companies, small publicly-traded infectious disease companies and a number of publicly-traded pharmaceutical companies. One of these parties was Xuanzhu. Approximately 21 of the parties Evercore contacted received process letters, and 19 executed NDAs. Of the 19 parties that executed NDAs, all parties received management presentations and 15 received access to the virtual data room.

7. Unfortunately, despite the Debtor's significant efforts, the marketing process did not yield an acceptable proposal. Although the Debtor remained positive about its longer-term prospects and its ability to ultimately reach profitability and maximize value, it continued to be concerned with its inability to generate positive free cash flow in the near-term.

B. Fundraising and Structuring Efforts

8. The Debtor recognized that maintaining liquidity would be key to achieving a strategic transaction that would bridge the company to profitability, thereby maximizing value for all stakeholders, including the holders of its equity. Thus, to complement the marketing and cost-cutting efforts described above, in December 2018, the Debtor engaged restructuring professionals at Meru to assist it in further refining its business strategy and examining the possibility of further cost reductions.

9. At the same time, and throughout this period, the Debtor pursued various funding and financing options, including selling equity and pursuing licensing opportunities outside of the United States. These efforts were all intended to bridge the company to the point of free positive cash flow or consummation of a strategic transaction.

10. The Debtor also pursued discussions with multiple companies to exclusively license the rights to develop and commercialize Plazomicin in China and Europe. Several small

private companies and large pharmaceutical companies reviewed the opportunity to license Plazomicin and five non-binding term sheets were received for Chinese or European rights. Unfortunately, notwithstanding the promising market interest in licensing the drug, the Debtor ultimately concluded that the collective upfront payments that would be provided under these licensing agreements would be insufficient to bridge the Debtor to a strategic transaction.

C. The Decision to File Chapter 11

11. The Debtor ultimately concluded that given the significant challenges in achieving positive free cash flows in the near term, the business likely would not be viable on a stand-alone basis absent a strategic transaction or a restructuring of its debt. And given the results of its recent marketing process, the Debtor had low-confidence that it could consummate any strategic transaction out of court given its limited available liquidity.

12. After extensive deliberation, the Debtor decided to prepare for a potential sale process that could be implemented through the filing of a chapter 11 case to maximize the value of the company and its assets. After significant negotiations with its prepetition lender, Silicon Valley Bank, N.A. (“SVB” or the “DIP Lender”), the DIP Lender agreed to provide the Debtor with DIP Financing in a chapter 11 case under certain terms and conditions. On April 7, 2019, the Debtor engaged Cassel Salpeter & Co., LLC (“Cassel”) as the Debtor’s investment banker to market the assets as part of a 363 sale. The Debtor filed this case on April 15, 2019 (the “Petition Date”).

Robust Marketing Process

13. Following its chapter 11 filing, the Debtor and its professionals put forth extensive efforts to market the Debtor's assets. From day one, Cassel actively reached out to new potential buyers while simultaneously reengaging parties who had participated in the Debtor's prepetition marketing process. The Debtor and its professionals identified and connected with a total of 173 potential buyers, including 143 strategic buyers and 30 financial buyers.

14. Throughout the post-petition marketing and sale process, the Debtor, with support from the DIP Lender and the Official Committee of Unsecured Creditors (the "Committee"), has been committed to achieving a successful sale of its business and maximizing value and recoveries for creditors. Its management and employees have worked tirelessly to obtain the best possible result for its stakeholders.

The Prior Sale and Auction Process

15. To maximize the value of its assets, the Debtor implemented a competitive bidding process pursuant to its Court-approved Bidding Procedures. The Bidding Procedures and the auction process were designed to realize the highest and best available recovery for the Debtor's creditors by encouraging all interested entities to put their best bids forward. The bidding procedures provided for a fair, open and competitive process.

16. Consistent with the terms of the Debtor's Bidding Procedures, the following deadlines were set: (i) submission of bids for all or substantially all of the Debtor's assets by May 29, 2019 (the "Bid Deadline")³ and (ii) an auction for all or substantially all of the Debtor's assets by no later than June 3, 2019.

³ The bid deadline was ultimately extended to May 30, 2019 with the consent of the Debtor, the Committee and the DIP Lender.

17. Prior to the Bid Deadline, the Debtor learned that certain parties were interested in purchasing the Debtor's rights to ZEMDRI (Plazomicin) in different territories. In order to allow for a competitive bidding process where multiple parties could bid on different aspects of ZEMDRI (Plazomicin), the Debtor provided potential bidders with the option to (i) acquire the Debtor's global rights to ZEMDRI (Plazomicin) (the "Global Rights") or (ii) obtain an exclusive, perpetual, royalty-free license for the rights to ZEMDRI (Plazomicin) in specific territories. As such, the Debtor drafted a form asset purchase agreement and form license agreement (collectively, the "Auction Agreements") for interested bidders to review and comment on with the submission of their bids.

18. As of the Bid Deadline, the Debtor received nine (9) bids, some of which were for substantially all of its assets, and others for only certain assets. 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").

19. At the conclusion of the ensuing Auction, the Debtor designated (i) Cipla as the Successful Bidder for the Global Rights, subject to a license of the China Assets (as defined in the Stipulation (as defined below)), and (ii) Qilu Antibiotics Pharmaceutical Co., Ltd. ("Qilu") as the Successful Bidder for a license of the rights to ZEMDRI (Plazomicin) in the China Territory (as defined in the Cipla Plazomicin Sale Agreement) and certain of the Debtor's assets related thereto (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").

20. 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 Purchased Assets (as defined below)), subject to the Debtor's right to license the China Assets.⁴ 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.

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

22. 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.

23. 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.

The Xuanzhu Proposal

24. In light of the failure of Qilu and Cipla to close their respective transactions, the Debtor had no choice but to immediately seek out an alternative buyer for the China Purchased Assets—both to mitigate its damages and to maximize the value of such assets. Critically, the

⁴ 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.

Debtor was left with extremely limited liquidity with which to fund its chapter 11 case and a renewed sale process therein. Cassel thus engaged in a targeted marketing process. Cassel contacted ten potential buyers, five of which expressed an interest in acquiring the China Purchased Assets. This effort continued for nearly ten weeks.

25. As part of this effort, in or about August 2019, the Debtor 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. As noted above, 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. Upon further consideration and review of the opportunity, Xuanzhu then presented a written proposal to the Debtor to purchase (as opposed to licensing) the China Purchased Assets. 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.

26. 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.

27. 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].

28. 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 proposed Sale Order as Exhibit A.

The Cipla Stipulation

29. Xuanzhu's proposal contemplates that it will purchase—as opposed to license—the Chinese 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”).⁵ As a result of the China Purchased Assets Rescission, the Debtor will be able to transfer the China Purchased Assets to Xuanzhu.

30. The Debtor is now asking the Court for approval of the Xuanzhu Sale Agreement and Stipulation in order to 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 Xuanzhu

31. While conducting a rigorous marketing and sale process, the Debtor has faced multiple obstacles in selling its assets while working with limited liquidity since the inception of this Chapter 11 Case. Such obstacles include, but are not limited to, (i) government concerns about the Debtor’s sales of assets to foreign buyers and (ii) multiple bidders’ unwillingness to consummate certain transactions to the detriment of the Debtor’s bankruptcy estate. Even in the face of these impediments, however, the Debtor now has an opportunity to monetize a valuable asset, mitigate its damages caused by certain parties and maximize its value for its bankruptcy estate and creditors.

32. The Debtor’s professionals have engaged in good faith, arm’s length negotiations with Xuanzhu and spent countless hours negotiating the terms of the Xuanzhu Sale Agreement, Stipulation and related documents with various parties, including Xuanzhu, Cipla, the DIP Lender and the Committee. While facing both time and liquidity constraints, the parties were

⁵ 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.

able to work together and reach a deal that would allow value to come into the Debtor's bankruptcy estate immediately that may not otherwise exist. Based on my experience with the Debtor and the China Purchased Assets, including in both the prepetition marketing process and postpetition marketing processes, I do not believe conducting an auction for the assets would yield a higher or better offer, and I understand that Xuanzhu would likely not participate in an auction process. Moreover, the Debtor's estate lacked the funds necessary to fund a formal auction process.

33. In light of the foregoing, I believe the work of the Debtor, its professionals, and all parties-in-interest has maximized the value of the China Purchased Assets for the Debtor's bankruptcy estate and creditors, and is undoubtedly a sound exercise of the Debtor's business judgment.

Conclusion

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

35. Therefore, I believe that the Court should enter the Sale Order and approve the Xuanzhu Sale Agreement and Stipulation.

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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/ Nicholas K. Campbell
Nicholas K. Campbell
Chief Restructuring Officer
Achaogen, Inc.