

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 (\_\_\_)

**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”) hereby moves this Court for entry of interim and final orders (the “Motion”), substantially in the forms attached hereto as **Exhibit A** (the “Proposed Interim Order”) and **Exhibit B** (the “Proposed Final Order”), (i) authorizing but not directing 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 payment and program obligations; and (iii) granting related relief. In support of this Motion, the Debtor incorporates by reference the *Declaration of Blake Wise in Support of First Day Relief* (the “First Day Declaration”),<sup>2</sup> filed contemporaneously herewith, and respectfully states as follows:

<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 First Day Declaration.



## **JURISDICTION**

1. The United States Bankruptcy Court for the District of Delaware (the “Court”) has jurisdiction over this Motion under 28 U.S.C. § 1334 and the *Amended Standing Order of Reference* from the United States District Court for the District of Delaware, dated February 29, 2012. This Motion 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 this Motion 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.

3. The statutory bases for the relief requested in this Motion are sections 105(a), 362, 363, and 507(a)(4)–(5) of title 11 of the United States Code (the “Bankruptcy Code”), as supplemented by Rules 6003 and 6004 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), and Local Rule 9013-1(m).

## **GENERAL BACKGROUND**

4. On the date hereof (the “Petition Date”), the Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code (this “Chapter 11 Case”). The Debtor continues to operate its business as debtor in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No party has requested the appointment of a trustee or examiner and no committee has been appointed in this Chapter 11 Case.

5. The Debtor is a biopharmaceutical company focused on the development and commercialization of innovative antibiotic treatments against multi-drug resistant gram-negative infections. Additional details regarding the Debtor's business and the facts and circumstances supporting the relief requested herein are set forth in the First Day Declaration, which was filed contemporaneously with this Motion and is incorporated by reference.

### **DEBTOR'S EMPLOYEE OBLIGATIONS AND PROGRAMS**

#### **A. Employee Salary and Expense Obligations**

##### **(i) *Employee Headcount and Expected Departures***

6. As of the Petition Date, the Debtor has approximately 36 employees, all located in the U.S. (the "Employees"), that conduct its business operations, including executive, management, finance and accounting, commercial and marketing, information technology, regulatory, research and development, and legal services.

7. The Debtor has experienced a significant reduction in its employee headcount over the past 10 months, with its overall headcount down approximately 88% since June 2018. The reduction is fueled both by reductions of force and significant employee attrition. To that end, since July 26, 2018 the Debtor has implemented three reductions of force, with the third and final reduction in force taking place on February 28, 2019. And the Debtor has further suffered the departures of many key employees, including the Head of Technical Operations, the Senior Director of Clinical Development and the Vice President of Clinical Pharmacology.<sup>3</sup> In fact, since its third reduction in force, on February 28, 2019, 14 employees have given notice or have left, including its Chief Financial Officer and its Vice President of Finance. Four employees will leave during the first two weeks of this Chapter 11 Case.

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<sup>3</sup> The Debtor believes that the buyer of its assets will likely seek to fill these key positions.

**(ii) Payroll**

8. All Employees are paid twice monthly, on the 15<sup>th</sup> and last day of each month. If either of these days falls on a weekend or holiday, employees are paid the day before the weekend or holiday. All required tax deductions and voluntary deductions are withheld automatically from paychecks. The Debtor's semi-monthly Employee-related payroll obligations equal approximately \$400,000.

9. The Debtor pre-funded ADP, LLP ("ADP") on April 11, 2019 with the amounts necessary to satisfy the Employee-related payroll obligations due on April 15, 2019 to ensure that payroll would be processed on time. Although the Debtor does not anticipate owing any money on account of prepetition wages and salaries, out of an abundance of caution, the Debtor is seeking authority, but not direction, to pay prepetition Employee-related payroll obligations in an aggregate amount not to exceed \$100,000 during the interim period.

**(iii) Sales Force Commissions**

10. In addition to their base salary, the Debtor's sales force Employees receive commission based compensation determined by the sale of the Debtor's drug product (the "Sales Force Commissions"). Beginning in March 2019, if vial sales are at 50% of target number of vials, the Debtor will pay a commission payment of 50% of the monthly target pay in each of the first two months of every three month period. On the third month, the Debtor processes a true up payment based on total vials sales for that three month period. All payments are made on the 15<sup>th</sup> of each month. A monthly payment of \$12,500 will be due on May 15, 2019 on account of post-petition sales. Additionally, the Debtor estimates that approximately \$90,000 will be due on June 15, 2019, approximately \$30,000 of which is on account of commissions earned on prepetition sales. The Debtor is seeking authority, but not direction, to continue to pay Sales Force Commissions in the ordinary course, including those Sales Force Commissions incurred

prior to the Petition Date in an aggregate amount not to exceed \$42,500 during the interim period.

**(iv) *Payroll Servicers***

11. As noted, the Debtor utilizes ADP as payroll service provider for Employees. ADP performs all services related to the Debtor's Employee payroll, including payroll deductions and tax withholdings. Each payroll period, the Debtor pre-funds ADP with the amounts necessary to satisfy the Debtor's payroll obligations two (2) business days in advance of the pay date. ADP then processes direct deposit transfers or checks. The services that ADP provides are critical to the smooth functioning of the Debtor's payroll system. ADP is responsible for ensuring that (i) Employees are paid on time, (ii) appropriate deductions are made, (iii) payroll reporting is accurate, and (iv) appropriate amounts are remitted to the applicable taxing authorities and other payees. The Debtor pays ADP approximately \$8,000 per month for the aforementioned services (the "Payroll Maintenance Fees"). As of the Petition Date, the Debtor estimates that it owes ADP approximately \$4,000 on account of prepetition Payroll Maintenance Fees. The Debtor seeks authority to pay all Payroll Maintenance Fees in the ordinary course, including all prepetition fees.

**(v) *Payroll Deductions and Tax Withholdings***

12. ADP deducts certain amounts from Employees' paychecks, including, without limitation: (i) pre-tax, optional contributions to health and dependent care, as described in detail below; (ii) other pre-tax and after-tax deductions payable pursuant to certain of the Employee benefit plans discussed below; (iii) certain amounts related to federal, state, and local income taxes, social security taxes, Medicare taxes, and taxes imposed by the law; (iv) matching payments on account of social security and Medicare taxes and, subject to certain limitations, additional amounts based upon a percentage of gross payroll for, among other things, state and

federal unemployment insurance and (v) other miscellaneous deductions (collectively, the “Payroll Deductions”). The Debtor estimates that ADP withholds, collectively, approximately 42% of each payroll in Payroll Deductions. The Debtor’s average liabilities for Payroll Deductions (as opposed to Employees’ personal liabilities) total approximately \$100,000 for each payroll period.<sup>4</sup> The Debtor estimates that, as of the Petition Date, its liability for Payroll Deductions is approximately \$100,000. The Debtor is seeking authority, but not direction, to remit prepetition Payroll Deductions in an aggregate amount not to exceed \$125,000 in the interim period.

13. Additionally, on April 12, 2019, the Debtor initiated a funds transfer of nearly \$1 million to satisfy certain payroll taxes (the “Payroll Tax Payment”). As of the time of filing, the Debtor has been unable to confirm that the transfer was successfully consummated. To the extent that the transfer was not consummated before the time of the filing, the Debtor requests the Court authorize SVB and the recipient bank to process such electronic transfer.

**(vi) *Expense Reimbursement***

14. In the ordinary course of business, the Debtor reimburses Employees monthly for certain expenses incurred while performing their duties. Reimbursable expenses include payments for travel, lodging, reimbursable meals, business meals and entertainment, phone and internet allowance, and other business-related activities. Employees, consultants, and contractors are entitled to expense reasonable and necessary business-related expenses while traveling on authorized company business (the “Reimbursable Expenses”). Employees submit

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<sup>4</sup> In the ordinary course of processing payroll for the Employees, the Debtor may also be required by law, in certain circumstances, to withhold from certain Employees’ wages amounts for various garnishments, such as tax levies, child support, and other court-ordered garnishments. In recent years, the Debtor has withheld such amounts from applicable Employees’ paychecks and remitted them to the appropriate authorities or entities on a monthly basis. However, since February 1, 2019, the Debtor has not been required to garnish any of its Employees’ wages and salaries and currently does not hold any amount in prepetition garnishments that have not yet been remitted.

expense reports via Concur when needed. Expense reports must be approved by the Employee's manager or delegate. The approving manager is responsible for reviewing expenses to ensure (i) appropriate business purpose, necessity, and reasonableness, (ii) compliance with reimbursement policies, and (iii) attachment of proper receipts. Once approved, the expense report is routed to Accounts Payable for review. Accounts Payable reviews and processes the report for payment. Payment files are processed weekly on Thursdays and the funds are transferred by ACH to the Employee approximately three (3) to four (4) business days after the payment file is processed (e.g., if a payment file is processed on a Thursday, a corresponding ACH payment is made to the Employee on Tuesday or Wednesday of the following week).

15. The Debtor estimates that, on average, it incurs approximately \$10,000 in Reimbursable Expenses. As of the Petition Date, the Debtor believes it is liable for approximately \$10,000 in outstanding prepetition expense reimbursements, and seeks authority to reimburse these amounts in the ordinary course of business.

#### **B. Employee Benefits**

16. The Debtor also provides Employees with access to health and other benefit plans. For Employees, benefit plans include the following (along with a notation as to whether the Debtor or the Employee pays the applicable premium or cost):

<b>Benefit Plan</b>	<b>Paid By</b>
Medical	Achaogen Pays 90% (80% for dependents)
Dental	Achaogen Pays 90% (80% for dependents)
Vision	Achaogen Pays 90% (80% for dependents)
Basic Life Insurance	Achaogen Pays 100%
Basic Accidental Death & Dismemberment	Achaogen Pays 100%
Supplemental Accidental Death & Dismemberment	Employee (Voluntary)
Supplemental Life Insurance	Employee (Voluntary)

Long-Term Disability	Achaogen Pays 100%
Short-Term Disability	Achaogen Pays 100%
Unum Group Accident	Employee (Voluntary)
Unum Critical Illness	Employee (Voluntary)
Achaogen 401(k) Plan	Employee (with Achaogen matching)
Achaogen Roth 401(k) Plan	Employee (with Achaogen matching)

17. The Debtor is the primary contract party with the applicable coverage provider on the foregoing U.S. benefit programs, and is also the sponsor of the Achaogen 401(k) Plan.

**(i) *Medical, Dental and Vision Plans***

18. The Debtor offers coverage to eligible Employees, their spouses, and their dependents for medical, dental, vision, and other related benefits. All full-time Employees are eligible for these benefits (subject to the terms, conditions, and limitations of each program). Part-time employees may be eligible for the benefits package at the sole discretion of the Debtor (subject to the terms, conditions, and limitations of each program).

19. The Debtor offers eligible Employees medical insurance plans through Anthem Blue Cross and Kaiser Permanente, dental insurance through Delta Dental (“Delta”), and vision insurance through VSP Global (“VSP”). The Debtor offers all PPO, Classic HMO, HDHP, and HMO 10 medical plans. The Debtor pays 90% of the monthly premiums under the medical, dental and vision plans for each eligible U.S. Employee and 80% of the monthly premiums for each eligible dependent.

20. In an average month, the Debtor prepays at the beginning of the month approximately \$75,000 in premiums under the medical, dental and vision plans, payable monthly in advance. As of the Petition Date, the Debtor does not owe any prepetition premiums under these plans.



**(ii) *Life and Accidental Death and Dismemberment & Long-Term and Short-Term Disability Insurance***

21. All of the Debtor's full-time Employees and their eligible dependents receive basic life insurance and accidental death and dismemberment coverage ("AD&D"),<sup>5</sup> plus long-term ("LTD")<sup>6</sup> and short-term disability ("STD")<sup>7</sup> insurance through Anthem Life Insurance. The Debtor funds 100% of the premiums under these plans for Employees. In an average month, the Debtor prepays at the beginning of the month approximately \$3,000 in premiums under these plans, payable monthly in advance. As of the Petition Date, the Debtor does not owe any prepetition premiums under these plans.

22. Eligible Employees and their dependents may purchase supplemental personal insurance coverage through Unum Insurance Company ("Unum"). Employees may purchase additional life and AD&D insurance in \$10,000 increments, not to exceed \$500,000. Spouses and children of employees may also purchase additional life and AD&D insurance in \$5,000 and \$2,000 increments not to exceed \$50,000 and \$10,000, respectively. The Debtor is not responsible for the payment of any premiums related to personal insurance policies.

**(iii) *Group Accident and Critical Illness***

23. All of the Debtor's full-time Employees and their eligible dependents have the opportunity to receive Group Accident and Group Critical Illness insurance through Unum. The Employees can voluntarily elect and pay for the premiums under these plans. For Group Accident, the benefit amount for accidental death and other covered losses is \$50,000 per Employee, \$20,000 per spouse, and \$10,000 per child. The Group Critical Illness benefit is

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<sup>5</sup> The AD&D benefit is equivalent to 200% of an Employee's salary up to a maximum of \$500,000.

<sup>6</sup> LTD includes a waiting period of 90 days. The LTD benefit pays 60% of an Employee's monthly earnings, not to exceed \$12,000 per month.

<sup>7</sup> STD includes a waiting period of 7 days. The benefit pays 60% of an Employee's weekly earnings, up to a maximum of \$2,769 per week.

between \$5,000 to \$50,000 for Employees and children, and \$5,000 to \$30,000 for spouses. The Debtor is not responsible for the payment of any premiums related to Group Accident and Group Critical Illness insurance plans.

**(iv) COBRA Medical, Dental and Vision Coverage**

24. Former Employees are entitled to continue to participate in the Debtor's healthcare, dental and vision insurance coverage pursuant to the Consolidated Omnibus Budget Reconciliation Act of 1986 (as amended, "COBRA") for up to 18 months following the end of their employment (such coverage, the "COBRA Coverage"). Former Employees who elect to participate in the COBRA Coverage must pay a set amount, dependent on which type of plan they elect (*i.e.*, family or individual) to the Debtor's healthcare insurance provider. The Debtor currently has 28 employees terminated prepetition that are currently entitled to participate in COBRA Coverage at the Debtor's cost for up to 3 to 9 months past the Petition Date at a total cost of approximately \$1,500 per month/employee including fees to IGOE Administrative Services ("IGOE Fees"). The COBRA Coverage amounts billed to and paid by the Debtor for the three months prior to the Petition Date averaged approximately \$1,500 per month.

**(v) Workers' Compensation Insurance**

25. Debtor maintains a workers' compensation insurance policy that covers all Employees. The Debtor requests authority to continue the workers' compensation insurance policy in the ordinary course of business by its separate motion to maintain insurance programs, filed contemporaneously with this Motion.

**(vi) Paid Time-Off Benefits**

26. Employees accrue days of paid time off ("PTO Days") based on hours worked per year. Employees in the part-time category (less than 30 hours a week) may accrue

PTO Days on a pro-rata basis with written approval of the Debtor. Temporary employees do not accrue PTO Days, nor do Employees on unpaid leave.

27. Each calendar year, eligible Employees accrue 7.33 hours of paid time off for every 2 weeks of work up to 22 PTO Days. Employees are able to carry over no more than 11 PTO Days where they will still be paid for accrued PTO. Any other remaining PTO Days do not carry over from year-to-year and will not be paid out at any time, including upon termination of employment. Employees begin to accrue PTO Days on their start date, and are eligible to utilize the benefit as work schedules permit. Once the maximum accrual cap of 33 PTO Days is reached, PTO will no longer be accrued until the accrued vacation drops below the cap. No Employee is permitted to use vacation time prior to actual accrual without the written approval of his or her manager. The Debtor, from time to time, may require Employees to use vacation on specified days, with advanced written notice.

28. The Debtor does not “cash out” Employees for unused accrued vacation time at the end of the calendar year or at any other time while Employees remain employed by the Debtor. Upon termination, Employees are paid for accrued and unused vacation time that has been earned through the last day of work. As of the Petition Date, the Debtor’s liability for accrued PTO is estimated at approximately \$675,000. Under sections 507(a)(4) and 507(a)(5) of the Bankruptcy Code, certain obligations related to wages, salaries, commissions, vacation, severance, sick leave, and employee benefit plans are accorded priority in payment in an amount not to exceed \$13,650<sup>8</sup> for each employee to the extent such amounts accrued within 180 days of the petition date. As of the Petition Date, the Debtor estimates that approximately 23 Employees had accrued vacation time that exceeded the priority cap by approximately \$200,000 in the

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<sup>8</sup> On April 1, 2019, the employee compensation and employee benefit plan contribution priorities under Sections 507(a)(4) and 507(a)(5) both increased to \$13,650 from \$12,850.

aggregate. The Debtor seeks the authority to continue to pay PTO in the ordinary course and to pay out prepetition PTO amounts upon termination to the extent that the payments do not exceed the priority cap in section 507(a)(4) and 507(a)(5) of the Bankruptcy Code.

29. Eligible Employees are also afforded paid time off each year of up to five (5) days for bereavement and up to three (3) days for jury duty. Employees are not disciplined for taking time off to perform their duties as volunteer firefighters, peace officers, or emergency rescue personnel. Employees may use any accrued vacation for these community service activities; otherwise, this time is unpaid. Employees are paid for official holidays. Employees are also eligible for unpaid leaves of absence consistent with the Uniformed Services Employment and Reemployment Rights Act and other applicable federal and state laws. Other paid or unpaid leaves of absence may be granted upon prior approval of the Debtor's chief executive officer.

**(vii) *Employee Wellness and Development Programs***

30. The Debtor provides employees with a Wellness Program to encourage Employees to strive for good health both as individuals and collectively as a team. The Wellness Program includes a variety of volunteer benefits, without limitation, access to gyms, Eat Club Account, PurpleTie Cleaners, Discount Programs, Additional Life Insurance, Critical Illness, Accident, Commuter Benefits, and Travel Assistance. This plan does not include direct payment from the Debtor. As of the Petition Date, the percentage of Employees that opt-in to the Wellness Program is nearly 100%.

**(viii) *Retirement Plans***

31. Debtor sponsors a 401(k) retirement savings plan for the benefit of eligible Employees and former Employees. All such Employees who are over the age of 21 are eligible to participate in the 401(k) plan immediately after hire. Employees may enter the plan on the first

of the month after eligibility. Employees may choose either a traditional 401(k) account or a Roth 401(k) account. Employees who elect to participate in the traditional 401(k) plan may defer up to 100% of their compensation on a pre-tax basis up to the statutory contribution limit. As of 2019, the contribution limit is \$19,000 in one calendar year for participants under the age of 50 and, if the employee is 50 years or older, they may elect to defer an additional \$6,000 for the calendar year, for a maximum of \$25,000.

32. Employees who elect to participate in the Roth 401(k) program may elect to defer up to 100% of their compensation on a post-tax basis Up to the statutory contribution limit. As of 2019, the contribution limit is \$19,000 in one calendar year for participants under the age of 50. If the employee is 50 years or older, they may elect to defer an additional \$6,000 for the calendar year, for a maximum of \$25,000. Adjusted gross income limits as set forth for Roth IRA accounts do not apply for the Roth 401(k).

33. For both plans, the Debtor can, in the discretion of its Board of Directors, make a matching contribution of 50% of the amount contributed by an Employee up to the first 8.0% of an Employee's contribution. For example, if an Employee contributes \$100, the Debtor will make a contribution of \$4 (50% of the first 8%).

34. Employee contributions to the 401(k) plans are vested immediately at 100%. Debtor contributions, however, are subject to the following vesting schedule (vesting starts from the date of hire): 0% before one (1) year of service; 50% after one (1) year of service; and 100% after two (2) years or more of service.

35. The plan is administered by Empower Retirement Services, and fees are automatically deducted from the 401(k) Plan, which the Debtor pays a quarterly fee to Empower Retirement Services of approximately \$5,000. The Debtor remits payment for the plan to

Empower Retirement Services on a twice-monthly basis in line with the Debtor's pay cycle. The Debtor's average twice-monthly payment for the plan—representing its matching contributions—is approximately \$35,000. Additional fees for investment management services, investment advisory services, and contract administration on a quarterly basis cost the Debtor approximately \$7,400. Great West Insurance Services assists the Debtor with compliance and 401(k) plan audits. As of the Petition Date, the Debtor owes approximately \$75,000 on account of all fees and matching contributions relating to the 401(k) program.

### **C. Severance Obligations**

#### **(i) Contractual Severance Payments**

36. All Employees have a contractual right to severance of at least two months of their salary, with some of the Employees having contractual rights to severance of up to 9 months of their salary. In order to maintain the stability of its operations during the marketing and sale process, and to promote Employee morale and goodwill, the Debtor seeks the discretion to continue to make severance payments, where appropriate, and in the best interests of the Debtor's estate, in the event that the Debtor terminates Employees after the Petition Date (the "Contractual Severance Payments").

37. By this Motion, the Debtor does not seek to pay Contractual Severance Payments (i) to insiders (as that term is defined under section 101(31) of the Bankruptcy Code), (ii) to any Employees that are not contractually entitled to such severance, (iii) prior to entry of a Final Order, or (iv) in excess of the priority cap in section 507 of the Bankruptcy Code.

#### **(ii) Acceleration of Restricted Stock Units**

38. The Debtor provides newly hired Employees a "new hire" equity grant (generally a mix of Restricted Stock Units ("RSUs") and options). All Employees are eligible for a "refresh" grant of equity each year around February, generally in conjunction with the

Debtor issuing annual bonuses. The Debtor has also issued special RSU grants in late 2018 for certain personnel in an effort to retain Employees. As of the Petition Date, there were 2,169,454 unvested RSUs. The majority of these unvested RSUs vest within a year; however, some of the RSUs vest annually over a four-year service period. The Debtor has historically automatically accelerated the vesting of outstanding and unvested RSUs for Employees leaving the Debtor's employment. The automatic vesting on the termination date was irrespective of the duration of service with the Company. This program is important to Employee morale and has no effect on the Debtor's business or potential return to creditors. Therefore, the Debtor seeks the discretion to continue to accelerate vesting of RSUs upon an Employee's termination.

**(iii) Laptop Program**

39. The Debtor has historically permitted Employees leaving the Debtor's employment to retain their laptop computer provided by the Debtor during their employment after the appropriate scanning and removal of proprietary or confidential company information. As of the Petition Date, each of the laptop computers held by the remaining Employees is worth less than \$500 and no more than \$15,000 in the aggregate. The Debtor believes this program is important to Employee morale and that the laptop computers have little value to the Debtor.

40. By this Motion, the Debtor seeks the discretion to continue to permit, where appropriate and in the best interests of the Debtor's estate, terminated Employees to retain their laptop computers.

**DEBTOR'S CONTRACTOR OBLIGATIONS**

41. In addition to its Employees, the Debtor relies on services from approximately 50 to 75 additional people that are either independent contractors (the "Independent Contractors") or agency contractors (the "Agency Contractors") obtained through

specialty consulting companies (the “Agencies” and together with the Independent Contractors, the “Contractors”).

42. The Independent Contractors are individual service providers that, for the most part, receive a 1099 and have a SSN for their tax ID. They are also known as temporary employees or “temps” and provide usual and customary business service in support of the Debtor for a limited period of time (no longer than twelve (12) months). The Independent Contractors perform work in absence of an Employee (such as covering a leave of absence), during a temporary period of vacancy, and/or during period of increased work volume or other similar business necessity. They may work onsite or offsite and may be converted to an Employee at the Debtor’s discretion.

43. The Debtor retains the Agency Contractors through the Agencies to provide temporary support as needed. The Agencies are specialty consulting firms with areas of expertise such as information technology, finance and accounting. The Agencies bill the Debtor for work provided by the Agency Contractor and charges fees as an addition to each worker’s applicable hourly rate. The Debtor remits compensation to the Agencies on account of the Agency Contractor’s services upon services rendered.

44. As of the Petition Date, the Debtor estimates it may owe the Independent Contractors \$85,000 in the aggregate for prepetition services provided. As of the Petition Date, the Debtor estimates it owes the Agencies approximately \$225,000 in the aggregate for prepetition services provided by the Agency Contractors and associated fees. The Debtor therefore seeks the authority, but not the direction, to pay \$310,000 on account of prepetition Contractor-related Obligations in the interim period. The Debtor believes it is necessary to pay



the obligations owed to the Contractors so that they will continue to assist with the Debtor's staffing needs as needed.

**RELIEF REQUESTED**

45. To maintain the morale of the Debtor's workforce during this Case, thereby enhancing the Debtor's ability to preserve the value of its business and to maximize its value for all stakeholders, the Debtor requests entry of an interim order, attached hereto as **Exhibit A**, and a final order, attached hereto as **Exhibit B** (i) authorizing, but not directing, the Debtor to (a) pay all prepetition Employee-related claims and obligations and all prepetition Contractor-related claims and obligations in an aggregate amount not to exceed \$640,000 on an interim basis, (b) pay all prepetition Employee and Contractor expense reimbursement claims in aggregate an amount not to exceed \$10,000 and (c) continue to offer, honor, and facilitate all Employee obligations and programs in the ordinary course of business during the pendency of this Chapter 11 Case; (ii) authorizing, but not directing, the Debtor to reissue checks, wire transfers, automated clearing house payments, electronic payments, or other similar methods of payment for such payments where such method of payment has been dishonored postpetition; (iii) directing all banks to honor the Debtor's prepetition and postpetition checks, wire transfers, automated clearing house payments, electronic payments, or other similar methods of payment for payment of the Employee-related obligations and Contractor-related obligations, including the Payroll Tax Payment; and (iv) granting related relief.<sup>9</sup>

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<sup>9</sup> By this Motion, the Debtor does not seek to modify the terms of any Employee program and does not seek to assume or reject such program to the extent that such program is determined to be an executory contract within the meaning of Section 365 of the Bankruptcy Code. Similarly, nothing in this Motion should be construed as a request for authorization to assume or reject any executory contract between the Debtor and any party. Furthermore, this Motion shall not be construed to limit, or in any way affect, the Debtor's right to contest on any grounds the amount claimed to be due as an Employee-related obligation. The Debtor does not waive the right to modify or terminate any Employee program to the extent that such

**BASIS FOR RELIEF**

46. It is essential that the Debtor continues to honor all Employee-related and Contractor-related obligations to ensure the continued operation of its business and maintain continuity and morale of its workforce—particularly in this case, where the Debtor has suffered significant attrition in the weeks leading up to the filing of this Case. The Debtor’s operations may be severely impaired if the Debtor is not immediately granted authority to continue to honor obligations to its Employees and Contractors.

**A. Honoring Prepetition Employee Obligations is Appropriate Under Section 507 of the Bankruptcy Code.**

47. Under sections 507(a)(4) and 507(a)(5) of the Bankruptcy Code, certain obligations related to wages, salaries, commissions, vacation, severance, sick leave, and employee benefit plans are accorded priority in payment in an amount not to exceed \$13,650 for each employee to the extent such amounts accrued within 180 days of the Petition Date. 11 U.S.C. §§ 507(a)(4)–(5). Administrative and processing costs relating to employee obligations are entitled to priority treatment as well. *See, e.g., In re Integrated Health Servs., Inc.*, 291 B.R. 611, 612 (Bankr. D. Del. 2003) (MFW) (allowing third-party, nondebtor insurance company a priority claim in the amount of \$3.9 million for premiums paid by insurance company for workers’ compensation coverage; payments were “contributions to an employee benefit plan” under section 507(a)(5)); *In re Corcoran*, 2010 WL 5207589, at \*1 (Bankr. D. Haw. Dec. 16, 2010) (“The plain language of [section 507(a)(4)] does not restrict priority to the claims of employees.”); *Allegheny Int’l, Inc. v. Metro. Life Ins. Co.*, 145 B.R. 820, 822-23 (W.D. Pa. 1992) (prepetition claims of a medical benefits plan administrator for administrative, actuarial, and claims services in connection with the medical benefits plans of a chapter 11 debtor were entitled

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right exists under the terms governing such program or as may be permitted or required by applicable law or further order of the Bankruptcy Court.

to priority under section 507(a)(5) because “[i]t would be useless to prioritize expenses for contributions to an employee benefit plan and not prioritize the expenses necessary to administer those plans.”); *In re Garden Ridge Corp.*, No. 04-10324 (KJC), 2006 Bankr. Lexis 278, at \*6 (Bankr. D. Del. Mar. 2, 2006) (noting that “[w]age priority has been a feature of the bankruptcy laws since 1898 [and that] [i]ts purpose is to alleviate hardship on workers . . . who may have no other source of income and ‘to encourage employees to stand by an employer in financial difficulty.’”) (citing 4 Alan N. Resnick & Henry J. Sommer, *Collier on Bankruptcy* ¶ 507.05[1] (15th ed. 2005)).

48. The Debtor believes that its prepetition payroll-and-benefit-related obligations to certain of its Employees exceed the statutory priority cap of sections 507(a)(4) and 507(a)(5). However, the Debtor proposes to pay the Employees only up to the statutorily imposed limit for priority status of their claims, ensuring that granting the relief requested herein is consistent with the purpose of the Bankruptcy Code.

**B. Honoring Prepetition Employee and Contractor Obligations is Also Appropriate under Section 363 of the Bankruptcy Code.**

49. Section 363 of the Bankruptcy Code empowers the bankruptcy court to authorize a chapter 11 debtor to expend funds in the bankruptcy court’s discretion outside the ordinary course of business. 11 U.S.C. § 363. Section 363(b)(1) provides that “[t]he trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate.” 11 U.S.C. § 363(b)(1). To obtain approval for the use of estate assets outside the ordinary course of business, a debtor must articulate a valid business justification for the requested use. *See In re Filene’s Basement*, 2014 WL 1713416, \*12 (Bankr. D. Del. Apr. 29, 2014) (noting that under Section 363(b), “[w]here the debtor articulates a reasonable basis for its business decisions . . . courts will generally not entertain objections to the debtor’s conduct”)

(quoting *In re Johns-Manville Corp.*, 60 B.R. 612, 616 (Bankr. S.D.N.Y. 1986)); *In re Landsource Cmty. Dev. LLC*, 2009 WL 4874670, ¶ 15 (Bankr. D. Del. Nov. 25, 2009) (“Where valid business justification exists, a presumption 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)); *U.S. Trustee v. Bethlehem Steel Corp. (In re Bethlehem Steel Corp.)*, 2003 WL 21738964, at \*12 (S.D.N.Y. July 28, 2003) (“To approve a transaction under § 363(b), the Bankruptcy Court must find that there is a good business reason to allow the transaction”); *In re Global Crossing Ltd.*, 295 B.R. 726, 743 (Bankr. S.D.N.Y. 2003) (“[A] § 363 application requires a showing that there is a ‘good business reason to grant such an application.’”) (quoting *Comm. of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.)*, 722 F.2d 1063, 1071 (2d Cir. 1983)).

50. Honoring the prepetition Employee and Contractor obligations described herein serves the sound business purpose of maintaining the Debtor’s business operations, maximizing the value of the Debtor’s estate, and preserving the value of the Debtor while it seeks to restructure and sell its businesses. Accordingly, the Court should grant the requested relief under Section 363 of the Bankruptcy Code.

**C. Honoring Prepetition Employee and Contractor Obligations is Also Appropriate under the “Doctrine of Necessity.”**

51. Honoring prepetition Employee-related and Contractor-related obligations should also be authorized under section 105 of the Bankruptcy Code and the “doctrine of necessity.” Section 105 empowers the Court to “issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.” 11 U.S.C. § 105(a). Section 105(a) operates “to facilitate the implementation of other Bankruptcy Code provisions,” and in

so doing it provides a “bankruptcy court with broad authority to exercise its equitable powers.” *Ameriquest Mortgage Co. v. Nosek (In re Nosek)*, 544 F.3d 34, 43 (1st Cir. 2008) (internal citations omitted). These equitable powers are granted to effectuate the policies and goals of chapter 11, which include preserving the going concern value of a debtor, *In re Ionosphere Clubs, Inc.*, 98 B.R. 174, 176-77 (Bankr. S.D.N.Y. 1989), and to “create a flexible mechanism that will permit the greatest likelihood of survival of the debtor and payment of creditors in full or at least proportionately.” *Mich. Bureau of Workers’ Disability Comp. v. Chateaugay Corp. (In re Chateaugay Corp.)*, 80 B.R. 279, 287 (S.D.N.Y. 1987); *see also In re Structurlite Plastics Corp.*, 86 B.R. 922, 932 (Bankr. S.D. Ohio 1988) (rejecting a bright line rule prohibiting payment of prepetition debts because it “may well be too inflexible to permit the effectuation of the rehabilitative purposes of the Code”).

52. Under the “doctrine of necessity” or “necessity of payment” rule, first articulated in *Miltenberger v. Logansport C. & S.W. R. Co.*, 106 U.S. 286 (1882), bankruptcy courts can exercise these equitable powers “to authorize a debtor in a reorganization case to pay pre-petition claims where such payment is essential to the continued operation of the debtor.” *Ionosphere Clubs*, 98 B.R. at 176; *see, e.g., In re Lehigh & N. Eng. Ry. Co.*, 657 F.2d 570, 581 (3d Cir. 1981) (“[T]he ‘necessity of payment’ doctrine, as it has developed since its original enunciation in *Miltenberger*, teaches no more than, if payment of a claim which arose prior to reorganization is essential to the continued operation of the [debtor] during reorganization, payment may be authorized even if it is made out of its corpus.”) (citation omitted); *In re LCI Holding Co., Inc.*, 2013 WL 1101111, \*2 (Bankr. D. Del. Mar. 15, 2013) (“The [d]octrine of [n]ecessity does justify the [p]lans. In a liquidating case such as this, the eligible employees’ efforts are necessary to preserve the [d]ebtor’s businesses.”); *In re Just For Feet, Inc.*, 242 B.R.

821, 825-26 (D. Del. 1999) (“The necessity of payment doctrine recognizes that paying certain pre-petition claims may be necessary to realize the goal of chapter 11—a successful reorganization.”).

53. The Third Circuit has recognized that a debtor may pay prepetition claims under the doctrine of necessity when doing so furthers the continued operation and reorganization of the debtor. *In re Lehigh & N. Eng. Ry. Co.*, 657 F.2d at 581 (stating a court may authorize the payment of prepetition claims if such payment was essential to the continued operation of the debtor); *In re Penn Cent. Transp. Co.*, 467 F.2d 100, 102 n.1 (3d Cir. 1972) (holding that necessity of payment doctrine permits “immediate payment of claims of creditors where those creditors will not supply services or material essential to the conduct of the business until their pre-organization claims shall have been paid.”); *see also In re Motor Coach Indus. Int’l, Inc.*, 2009 WL 330993, at \*3 (D. Del. Feb. 10, 2009) (denying stay of appeal on grounds that “the viability of the ‘doctrine of necessity’ has not been brought into serious question by the courts in the Third Circuit”); *In re Just for Feet, Inc.*, 242 B.R. at 824-26 (noting that the Third Circuit permits debtors to pay prepetition claims that are essential to the continued operation of business).

54. As honoring the prepetition Employee-related and Contractor obligations is essential to the continued value and operation of the Debtor’s business—particularly given the significant attrition the Debtor has experienced in recent months—application of this Court’s section 105(a) powers and the doctrine of necessity is appropriate in this case.

**D. Honoring Checks Issued and Other Transfers Made in Respect of the Payment and Program Obligations**

55. To the extent any check or electronic transfer related to the Employee or Contractor obligations has not cleared as of the Petition Date, the Debtor requests that the Court

authorize all banks, in the Debtor's sole discretion, to receive, process, honor, and pay such checks or electronic transfers, including but not limited to (if and as necessary) the Payroll Tax Payment. The Debtor requests the Court authorize SVB and the recipient bank to process the Payroll Tax Payment. Further, if any party has not received payment for amounts owed on account of the Employee or Contractor obligations, the Debtor seeks authority to issue replacement checks, re-issue electronic transfers, or otherwise make payments on account of Employee or Contractor obligations. The Debtor represents that each of the checks and electronic transfers can be readily identified as relating directly to the authorized payment of amounts owed on account of such obligations. Accordingly, if the requested relief is granted, checks and electronic transfers other than those relating to authorized payments will not be honored inadvertently.

**SATISFACTION OF BANKRUPTCY RULE 6003**

56. Bankruptcy Rule 6003 provides that to the extent relief is necessary to avoid immediate and irreparable harm, a bankruptcy court may approve a motion to "pay all or part of a claim that arose before the filing of the petition" prior to 21 days after the Petition Date. Fed. R. Bankr. P. 6003. As described above, the Debtor cannot operate its business absent continued services of the Employees and Contractors. The Debtor submits that the relief requested in this Motion is necessary to avoid immediate and irreparable harm to the Debtor, as described herein, and that Bankruptcy Rule 6003 has been satisfied.

**WAIVER OF BANKRUPTCY RULE 6004(a) AND (h) REQUIREMENTS**

57. Because the relief requested herein is necessary to avoid immediate and irreparable harm, to the extent required for the immediate implementation of the relief requested herein, the Debtor seeks a waiver of (i) the notice requirements under Bankruptcy Rule 6004(a);

and (ii) the stay of the order authorizing the use, sale, or lease of property under Bankruptcy Rule 6004(h).

**RESERVATION OF RIGHTS**

58. Nothing contained in this Motion 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 Motion; (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 Motion 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**

59. Notice of this Motion is being provided to: (i) the United States Trustee; (ii) the parties included on the Debtor's list of twenty (20) unsecured creditors; (iii) counsel to SVB in its capacity as Prepetition Lender and DIP Lender (each as defined in the First Day Declaration); (iv) Anthem Blue Cross, Kaiser Permanente, VSP, Delta, Unum, ADP, and Empower Retirement Services; (v) the Delaware Secretary of State; (vi) the Delaware State Treasury; (vii) the Internal Revenue Service; (viii) the Securities and Exchange Commission;



(ix) any party that has requested notice pursuant to Bankruptcy Rule 2002; and (x) any other party required to be provided notice under Local Rule 9013-1(m). As this Motion is seeking “first day” relief, within two business days after entry of an order on this Motion, the Debtor will serve copies of this Motion and any order entered in respect to this Motion as required by 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 Proposed Interim and Final Orders substantially in the form attached hereto as **Exhibit A** and **Exhibit B** granting the relief requested herein and such other relief as is just and proper under the circumstances.

*[Remainder of page intentionally left blank]*

April 15, 2019  
Wilmington, Delaware

**MORRIS, NICHOLS, ARSHT & TUNNELL LLP**

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*Proposed Counsel for Debtor and Debtor in Possession*

**Exhibit A**

**Proposed Interim 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 (\_\_\_)

**Re: D.I. \_\_\_**

**INTERIM ORDER GRANTING DEBTOR'S MOTION (I) AUTHORIZING THE DEBTOR TO (A) PAY PREPETITION WAGES, SALARIES, AND OTHER COMPENSATION (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")<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) Authorizing the Debtor to (a) Pay Prepetition Wages, Salaries, and other Compensation (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*, 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 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 found that venue of this

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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 Motion.

proceeding and the Motion in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and due and proper notice of the Motion 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 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 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 GRANTED on an interim basis as set forth herein.
2. Until such time as the Final Order is entered, the Debtor is authorized, but not directed, in its sole discretion, (i) to pay any and all prepetition amounts relating to their ordinary course Employee-related obligations and programs and the Contractor-related 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) 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 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. 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 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; (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 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.

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

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.

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**.

15. Notwithstanding anything contained in the Motion 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.

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

\_\_\_\_\_  
UNITED STATES BANKRUPTCY JUDGE



**Exhibit B**

**Proposed 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 (\_\_\_)

**Re: D.I. \_\_\_**

**FINAL ORDER GRANTING DEBTOR'S MOTION (I) AUTHORIZING THE DEBTOR TO (A) PAY PREPETITION WAGES, SALARIES, AND OTHER COMPENSATION (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")<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) Authorizing the Debtor to (a) Pay Prepetition Wages, Salaries, and other Compensation (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*, 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 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 found that venue of this

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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 Motion.

proceeding and the Motion in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and due and proper notice of the Motion 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 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 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 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 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 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; and (iv) to continue making payments postpetition for Employee-related programs as they become due.
3. Nothing in this Order authorizes the Debtor to cash out unpaid vacation/leave time 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. 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.

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 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; (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 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. 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.

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

12. Notwithstanding anything contained in the Motion 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 post-petition financing and to use cash collateral, including any budgets in connection therewith.

13. 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

\_\_\_\_\_  
UNITED STATES BANKRUPTCY JUDGE