Docket #0011 Date Filed: 4/15/2019

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re **Achaogen, Inc.**, Debtor.[1]	Chapter 11 Case No. 19-10844 (BLS)

MOTION FOR ENTRY OF INTERIM AND FINAL ORDERS (I) ESTABLISHING NOTICE AND OBJECTION PROCEDURES FOR TRANSFERS OF EQUITY SECURITIES AND (II) ESTABLISHING A RECORD DATE FOR NOTICE AND SELL-DOWN PROCEDURES FOR TRADING IN CLAIMS AGAINST THE DEBTOR'S ESTATE

The debtor and debtor-in-possession in the above-captioned case (the "Debtor") hereby moves the Court (the "Motion") for the entry of interim and final orders pursuant to sections 105, 362 and 541 of title 11 of the United States Code (the "Bankruptcy Code") and Rule 3001 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"): (i) establishing notice and objection procedures regarding certain transfers of beneficial interests in equity securities of the Debtor (collectively, the "Equity Securities"); (ii) establishing a record date (the "Record Date") for notice and potential sell-down procedures for trading in claims against the Debtor ("Claims"); and (iii) granting certain related relief. In support of this motion, the Debtor incorporates the statements contained in the *Declaration of Blake Wise in Support of First Day Relief* (the "First Day Declaration"),[2] filed contemporaneously herewith, and respectfully submits as follows:

[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 1 Tower Place, Suite 400, South San Francisco, CA 94080.

[2] Capitalized terms used but not defined herein shall have the meanings ascribed to them in the First Day Declaration.

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Jurisdiction

1. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334(b) and 157, and the *Amended Standing Order of Reference* from the United States District Court for the District of Delaware dated as of February 29, 2012. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). Venue is proper in this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

2. The statutory and legal predicates for the relief requested herein are sections 105, 362 and 541 of the Bankruptcy Code and Rules 3001 and 6003(b) of the Bankruptcy Rules.

Background

3. 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.

4. 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.

5. Achaogen was a publicly traded company with its shares listed on the NASDAQ Stock Market under the ticker symbol "AKAO". It is expected that upon the filing of this Chapter 11 Case, NASDAQ will issue a notice of delisting the Debtor's securities that will

become effective after nine (9) days. Trading can continue on the exchange during this period, but NASDAQ will add a notation to the company's trading symbol indicating that it is non-compliant with the listing rules. Even after NASDAQ delists the Debtor's securities, such securities may still be traded in the over-the-counter market. As of the Petition Date, there were 290,000,000 shares of Achaogen common stock authorized and 64,452,763 issued and outstanding.[3] 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.

The Debtor's Net Operating Losses

6. As described in more detail in the First Day Declaration, the Debtor has experienced losses from the operation of its business, having failed to post positive net earnings since its inception. As a result, the Debtor, while its analysis is ongoing, estimates that its utilizable federal income tax net operating losses may be approximately $438 million ("NOLs"), consisting of approximately $302 million of NOLs through 2017 and $136 million of NOLs generated during 2018, and it expects to have incurred additional NOLs since then through the Petition Date, which amounts could be even higher when the Debtor emerges from chapter 11. Assuming utilizable NOLs of $450 million, for example, this would translate into future reductions of the Debtor's federal income tax liabilities of approximately $94,500,000 based on a corporate federal income tax rate of 21%. These tax savings, as estimated, could substantially enhance the Debtor's cash position for the benefit of parties in interest and contribute to the Debtor's efforts to maximize value for the benefit of creditors.

7. As described more fully below, the Debtor may lose the ability to use its NOLs if it experiences another "ownership change" for federal income tax purposes. To prevent

[3] The Debtor has also authorized 10 million of preferred shares, but no preferred shares are currently outstanding.

this potential loss of property of the Debtor's estate, the Debtor requests Court approval of the procedures detailed herein to govern the transfers of Equity Securities during the pendency of this Chapter 11 Case. In addition, the Debtor may ultimately seek an order with respect to trading in Claims (a "Sell-Down Order") to protect and preserve the value of the NOLs in connection with a chapter 11 plan of reorganization or other qualifying transaction, and this Motion is designed to give advance notice of such possibility.[4]

Potential Limitations on the Use of the Debtor's NOLs

8. Section 172 of the Internal Revenue Code of 1986 (as amended, the "IRC") permits corporate taxpayers to carry forward NOLs generated through December 31, 2017 for up to 20 subsequent tax years to offset future income in years following the years in which they were incurred, thereby reducing their federal income tax liability on such future income and significantly improving their cash position. For NOLs generated subsequent to January 1, 2018, the carryforward period is unlimited.

A. Limitations on the Debtor's Ability to Use Its NOLs

9. However, the Debtor's ability to use its NOLs and certain other losses, which will be referred to collectively herein as NOLs, is subject to certain statutory limitations. Section 382 of the IRC limits the ability of a corporation to use its NOLs after an "ownership change" occurs. Generally, an "ownership change" occurs if the percentage (by value) of the stock of the corporation owned by one or more 5% shareholders has increased by more than 50 percentage points over the lowest percentage of stock owned by such shareholders at any time during the relevant testing period, which is usually the three-year period ending on the date of

[4] To the extent the Debtor seeks entry of a Sell-Down Order, the Debtor will provide notice and the opportunity for a hearing.

the ownership change.[5] For example, an ownership change would occur in the following situation:

> Three individuals ("A," "B" and "C") each own 20% of the stock of corporation X ("X"). Each sells 15% to another individual ("D"), who has recently acquired 7%. Under section 382 of the IRC, an ownership change has occurred because D both became a 5% shareholder and increased his ownership in X by more than 50 percentage points (from 0% to 52%) during the testing period.

10. When an ownership change occurs, the normally applicable rules of section 382 of the IRC limit a corporation's use of its "pre-change" NOLs against future taxable income in any taxable year (or a portion thereof) to an annual amount equal to (a) the value of its stock prior to the ownership change, multiplied by (b) the long-term, tax-exempt interest rate. *See* IRC § 382(b). For a distressed company especially, this limitation could severely restrict the use of NOLs because the value of its stock may be quite low. For example, if a hypothetical distressed corporation underwent an ownership change when its equity value was at a depressed value of $10 million, the annual limitation on the corporation's use of its NOLs resulting from that ownership change would be $274,000 (based on a 2.74% long-term, tax-exempt rate that would apply under section 382 of the IRC for an ownership change). In other words, the company would be able to utilize only $274,000 of its NOLs in each post-change tax year. Taxable income in excess of this amount would be taxable to the company at the federal rate of 21%.

[5] In general, under section 382(g)(4)(A) of the IRC, all shareholders who individually hold less than 5% of the stock of a company are deemed to be a single 5% shareholder throughout the three-year testing period, and transfers between such shareholders are disregarded for purposes of determining whether an ownership change has occurred. Accordingly, the Debtor does not seek to impose the requested notice and objection procedures on Transfers among shareholders holding less than 4.5% of the Equity Securities, provided that such shareholders do not have an intent to accumulate a 5% or greater block of stock or add or sell shares to or from such block. To allow for a prudent margin of error and in a good faith effort to avoid underestimating the threshold, the Debtor has calculated the threshold using 4.5% instead of 5%.

11. If left unrestricted, transfers of Equity Securities during the pendency of this Chapter 11 Case could severely limit the Debtor's ability to use its NOLs, and could have significant negative consequences for the Debtor, its estate and its efforts to maximize value for creditors. Specifically, transfers of Equity Securities could adversely affect the Debtor's NOLs if (a) too many 5% or greater blocks of Equity Securities are created, or (b) too many Equity Securities are added to or sold from such blocks, such that, together with previous transfers by or to 5% shareholders during the preceding three year period (or shorter period where there has been a more recent ownership change), an ownership change within the meaning of section 382 of the IRC has occurred prior to consummation and outside the context of a confirmed chapter 11 plan.

12. Thus, to preserve to the fullest extent possible the flexibility to pursue consummation of a plan of reorganization that maximizes the use of its NOLs, the Debtor seeks limited relief that will enable it to closely monitor certain Transfers (as defined in paragraph 19(i) below) of Equity Securities, and thereby put the Debtor in a position to act expeditiously to prevent or to limit such Transfers if necessary to preserve its NOLs.

B. Ownership Change in the Context of a Qualifying Bankruptcy Event

13. The limitations imposed by section 382 of the IRC are significantly relaxed if an ownership change occurs pursuant to a confirmed chapter 11 plan or a qualifying asset sale. Under section 382(l)(5) of the IRC, a debtor corporation is not subject to the limitations imposed by section 382 of the IRC if (a) the ownership change resulted from consummation of a chapter 11 plan or a qualifying asset sale and (b) pursuant to the plan or a qualifying asset sale, the debtor's pre-change-in-ownership equity holders (i.e., persons or entities who owned the debtor's equity immediately before the relevant ownership change)

and/or "Qualified Creditors" emerge from the reorganization owning at least 50% of the total value and voting power of the debtor's stock immediately after the ownership change (the "Section 382(l)(5) Safe Harbor").

14. Under section 382(l)(5)(E) of the IRC and the regulations promulgated thereunder, a creditor whose claim is exchanged for stock of a debtor corporation under a plan of reorganization or pursuant to a qualifying sale is a "Qualified Creditor" for section 382 purposes if such claim either (a) has been owned by such creditor for 18 or more months prior to the date of filing of the bankruptcy petition, or (b) arose in the ordinary course of the debtor's business and was at all times beneficially owned by such creditor. Creditors may also be "qualified," despite not satisfying the continuous ownership requirements under either (a) or (b) of the preceding sentence, if they meet the criteria set forth in the De Minimis Rule described below.

15. For purposes of the Section 382(l)(5) Safe Harbor, under Treasury Regulation § 1.382-9(d)(3) (the "De Minimis Rule"), a debtor generally may "treat indebtedness as always having been owned by the beneficial owner of the indebtedness immediately before the ownership change if the beneficial owner is not, immediately after the ownership change, either a 5% shareholder or an entity through which a 5% shareholder owns an indirect ownership interest" in the debtor. Such a claimholder will generally be a Qualified Creditor under the Section 382(l)(5) Safe Harbor unless the particular claim(s) that it holds both (a) did not arise in the ordinary course of the issuing debtor's business and (b) was not in existence 18 months prior to the filing of the bankruptcy petition.

16. Alternatively, where an ownership change results from the consummation of a chapter 11 plan or qualifying asset sale but the requirements for the Section 382(l)(5) Safe

Harbor are *not* met, section 382(b) of the IRC would limit the amount of taxable income that the debtor could offset with an NOL.

17. Under the scenario where the requirements for the Section 382(l)(5) Safe Harbor are not met (or the debtor elects out of that provision), the annual section 382 limitation is calculated using the special rule of section 382(l)(6) of the IRC. That rule provides that the value of the debtor, for purposes of calculating the section 382 limitation, generally must reflect any increase in value resulting from any surrender or cancellation of creditors' claims, as well as any new investments, pursuant to the plan. As a result, assuming the debtor's value increases as a result of its chapter 11 plan or qualifying asset sale, the amount of taxable income that can be offset will still be limited—although not by as much as if the ownership change occurred outside the context of a confirmed chapter 11 plan or a qualifying asset sale (as described in paragraph 9 above).

18. Therefore, to protect the Debtor's ability to maximize the use of its NOLs, pursuant to a confirmed chapter 11 plan or an approved asset sale, the Debtor may need to seek entry of a Sell-Down Order with respect to Claims allowing them to (a) determine whether the reorganized Debtor will qualify for and benefit from the Section 382(l)(5) Safe Harbor, and (b) require certain persons or entities that have acquired Claims during this Chapter 11 Case in an amount that would entitle such claimholders to receive more than 4.5% of the equity of the reorganized Debtor (collectively, the "Substantial Claimholders") to sell down its Claims to the extent necessary to allow the reorganized Debtor to qualify for the Section 382(l)(5) Safe Harbor (the "Sell-Down Procedures").[6] This is in addition to the procedures governing Transfers of Equity Securities.

[6] A summary of the potential Sell-Down Procedures is provided in paragraphs 24 through 29 below.

The Proposed Equity Transfer Procedures

19. By establishing procedures for monitoring the transfer of Equity Securities, the Debtor can preserve its ability to seek the necessary relief at the appropriate time if it appears that transfers of Equity Securities may jeopardize the Debtor's use of its NOLs. Therefore, the Debtor proposes the following notice and objection procedures for holding and transferring Equity Securities (the "Equity Transfer Procedures"):

i. Certain Defined Terms. For purposes of this motion and the interim order and the final order sought hereunder: (A) a "Substantial Equityholder" is any person or entity that beneficially owns at least 2,900,374 shares (representing approximately 4.5% of the 64,452,763 issued and outstanding shares) of Achaogen, Inc. (B) "beneficial ownership" of Equity Securities shall be determined in accordance with applicable rules under section 382 of the IRC and the regulations promulgated thereunder and shall include (i) direct and indirect ownership (*e.g.*, a holding company would be considered to beneficially own all equity owned or acquired by its subsidiaries), (ii) ownership by such holder's family members and persons acting in concert with such holder to make a coordinated acquisition of stock and (iii) ownership of options to acquire stock; (C) an "option" to acquire stock includes any contingent purchase, warrant, convertible debt, exchangeable shares, put, stock subject to risk of forfeiture, contract to acquire stock or similar interest, regardless of whether it is contingent or otherwise not currently exercisable; and (D) a "Transfer" means any transfer of Equity Securities to the extent described in paragraph 19(iii) below (Equity Security Acquisition Notice) and/or paragraph 19(iv) below (Equity Security Disposition Notice).

ii. Notice of Substantial Equityholder Status. Any person or entity who currently is or becomes a Substantial Equityholder shall (a) file with the Court and (b) serve upon (i) the Debtor, care of Achaogen, Inc., 1 Tower Place, Suite 400, South San Francisco, CA 94080, Attn: Gary Loeb, (ii) proposed counsel to the Debtor, Hogan Lovells US LLP, 1999 Avenue of the Stars, Suite 1400, Los Angeles, California 90067, Attn: Richard L. Wynne and Erin N. Brady, and Hogan Lovells US LLP, 875 Third Avenue, New York, New York 10022, Attn.: John D. Beck, and Morris, Nichols, Arsht & Tunnell LLP, 1201 N. Market Street, 16th Floor, Wilmington, DE 19899-1347, Attn: Derek C. Abbott and Andrew R. Remming; and (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, a notice of such status, in the form attached as Exhibit 2 to the interim order (a "Notice of Substantial Equityholder Status"), on or before the later of (A) 14 days after entry of the interim order or (B) 14 days after becoming a Substantial Equityholder.

iii. Equity Security Acquisition Notice. At least 14 days prior to any transfer of Equity Securities (including any transfer of options to acquire equity or any exercise thereof) that would result in an increase in the amount of Equity Securities beneficially owned by a Substantial Equityholder or would result in a person or entity becoming a Substantial Equityholder, such Substantial Equityholder or potential Substantial Equityholder shall (a) file with the Court and (b) serve on the Debtor, counsel to the Debtor, and counsel to the DIP Lender (at the addresses set forth in paragraph 19(ii) above), advance written notice of the intended transfer of Equity Securities, in the form attached as Exhibit 3 to the interim order (an "Equity Security Acquisition Notice").

iv. Equity Security Disposition Notice. Prior to any transfer of Equity Securities (including options) that would result in a decrease in the amount of Equity Securities beneficially owned by a Substantial Equityholder or would result in a person or entity ceasing to be a Substantial Equityholder, such Substantial Equityholder shall (a) file with the Court and (b) serve on the Debtor, counsel to the Debtor, and counsel to the DIP Lender (at the addresses set forth in paragraph 19(ii) above), advance written notice of the intended transfer of Equity Securities, in the form attached as Exhibit 4 to the interim order (an "Equity Security Disposition Notice").

v. Objection Procedures. The Debtor shall have 7 days after receipt of an Equity Security Acquisition Notice or an Equity Security Disposition Notice (each, a "Transfer Notice") to file with the Court and serve on the party filing the Transfer Notice an objection to the proposed Transfer on the grounds that such Transfer may adversely affect the Debtor's ability to utilize its NOLs. If the Debtor files an objection, the proposed Transfer will not be effective unless and until approved by a final and nonappealable order of this Court. If the Debtor does not object within such 7-day period, the Transfer may proceed solely as set forth in the Transfer Notice. Further Transfers within the scope of this paragraph must comply with the Equity Transfer Procedures set forth in this paragraph 19(v).

vi. Unauthorized Transfers of Equity Securities. Effective as of the Petition Date and until further order of this Court to the contrary, any acquisition or disposition of Equity Securities (including options) in violation of the Equity Transfer Procedures shall be null and void *ab initio* as an act in violation of the automatic stay under section 362 of the Bankruptcy Code.

20. With respect to the Equity Transfer Procedures, the Debtor may waive, in writing, in its sole and absolute discretion, any and all restrictions, stays and notification procedures contained in this Motion or in any order entered with respect hereto.

21. Within five (5) business days after the entry of the interim order, the Debtor proposes to provide a notice in substantially the form attached as **Exhibit 1** to the interim order (the "Equity Transfer Procedures Notice") to (a) the Office of the United States Trustee for the District of Delaware (the "U.S. Trustee"), (b) the United States Securities and Exchange Commission, (c) the Internal Revenue Service, (d) the Debtor's 20 largest unsecured creditors as identified in its chapter 11 petition, (e) counsel to the DIP Lender (as defined in the First Day Declaration), and (f) all known holders of the outstanding Equity Securities, describing the authorized transfer restrictions and notification requirements with respect to Equity Securities.

22. Upon receipt of such Equity Transfer Procedures Notice, any broker, bank, dealer or other agent or nominee of a beneficial holder (each a "Nominee") of Equity Securities will be required, within five (5) business days of receipt of such notice and on at least a quarterly basis thereafter, to send the Equity Transfer Procedures Notice to all beneficial holders of Equity Securities on whose behalf such Nominee holds Equity Securities. To the extent such beneficial holder is also a Nominee, such Nominee must, in turn, promptly provide the Equity Transfer Procedures Notice to any holder for whose account such holder holds Equity Securities, and so on down the chain of ownership. Additionally, any person, entity, broker or agent acting on behalf of any holder who sells at least 2,900,374 shares (representing approximately 4.5% of the 64,452,763 issued and outstanding shares) of the Debtor to another person or entity must provide a copy of the Equity Transfer Procedures Notice to such purchaser or any broker or agent acting on such purchaser's behalf.

23. The Equity Transfer Procedures Notice will provide the date and time (the "Objection Deadline") by which parties must file an objection to the motion ("Objection"). If an Objection is timely filed and served, a final hearing will be held at the date and time set forth in the interim order (the "Final Hearing"). If no Objection is timely filed and served, the interim order shall be deemed a final order without further notice or hearing upon expiration of the Objection Deadline. If a Final Hearing is necessary, the Debtor shall submit to the Court a final order substantially in the form attached hereto as **Exhibit B**.

Record Date Notice and Summary of Potential Sell-Down Procedures

24. At this stage, it is too early to determine whether it will be necessary for the Debtor to seek entry of a Sell-Down Order. The Debtor's determination of whether to seek entry of a Sell-Down Order will most likely occur once the Debtor has determined whether it may qualify for and benefit from the Section 382(l)(5) Safe Harbor such that it is necessary to require Substantial Claimholders to comply with the Sell-Down Procedures summarized below. Accordingly, this Motion does not seek entry of a Sell-Down Order, but seeks to establish the Record Date through entry of the interim and final orders. The Debtor proposes to set the Record Date as the date of entry of the interim order.

25. Following entry of the interim order, the Debtor proposes to provide a notice of the Record Date in substantially the form attached as **Exhibit 5** to the interim order (the "Record Date Notice") to (a) the U.S. Trustee, (b) the United States Securities and Exchange Commission, (c) the Internal Revenue Service, (d) the Debtor's twenty (20) largest unsecured creditors as identified in its chapter 11 petition, (e) counsel to the DIP Lender (as each is defined in the First Day Declaration), (f) all known holders of the outstanding Equity Securities, (g) any

party that has requested notice pursuant to Bankruptcy Rule 2002, and (h) all parties entitled to notice pursuant to Local Rule 9013-1(m).

26. Upon receipt of such Record Date Notice, any Nominee will be required, within five (5) days of receipt of such notice and on at least a quarterly basis thereafter, to send the Record Date Notice to all beneficial holders of the Debtor's Notes on whose behalf such Nominee holds the Debtor's Notes. To the extent such beneficial holder is also a Nominee, such Nominee must, in turn, promptly provide the Record Date Notice to any holder for whose account such holder holds the Debtor's Notes, and so on down the chain of ownership.

27. Like the Equity Transfer Procedures Notice, the Record Date Notice will also provide the Objection Deadline for parties to file an Objection to the motion, and explain that if no Objection is timely filed and served, the interim order shall be deemed a final order without further notice or hearing upon expiration of the Objection Deadline. If an Objection is timely filed and served, a Final Hearing will be held and the Debtor shall submit to the Court a final order substantially in the form attached hereto as **Exhibit B.**

28. In the event the Debtor seeks entry of a Sell-Down Order, the Debtor anticipates that the Sell-Down Procedures would require a person or entity that has acquired an amount of Claims after the Record Date entitling that claimholder to receive more than 4.5% of the equity of the reorganized Debtor (the "Threshold Amount") to provide the Debtor with limited information such as the size of its Claim and the date(s) such Claim was acquired. The amount of Claims held by a claimholder as of the Record Date would constitute the "Protected Amount." Substantial Claimholders would never be required to sell down their Claims below the Threshold Amount or the Protected Amount, whichever is greater. In other words, the Sell-Down Order would apply only to persons or entities that acquire Claims in

excess of the Threshold Amount after the Record Date and with full notice of the possibility that the Claims they acquire could be subject to sell-down if the Debtor later determines that the Sell-Down Procedures are necessary.

29. If the Sell-Down Procedures prove to be necessary, the Debtor would seek to require Substantial Claimholders to provide updated holdings information shortly after the date on which the Court approves a disclosure statement for a plan of reorganization or approves a qualifying asset sale that proposes to utilize the Section 382(l)(5) Safe Harbor. Based on the updated holdings information, the Debtor would then determine whether it would be necessary to require Substantial Claimholders to sell down a portion of their holdings so that the Debtor may qualify for the Section 382(l)(5) Safe Harbor and to preserve the value of the Debtor's NOLs.

30. In the event that the Debtor seeks entry of a Sell-Down Order, the Debtor would provide adequate notice and opportunity for claimholders to sell down their Claims without triggering an unreasonably adverse impact on the value of such Claims. Moreover, establishment of the Record Date at this early stage of this Chapter 11 Case will provide claimholders with sufficient notice in advance of any trading opportunity that any Claims purchased after the Record Date may ultimately be subject to the Sell-Down Procedures as set forth in a Sell-Down Order.

Legal Basis for Relief Requested

A. The NOLs Are Property of the Debtor's Estate and Are Entitled to Protection.

31. Courts have uniformly held that a debtor's NOLs constitute property of the estate under section 541 of the Bankruptcy Code and, therefore, courts have the authority to impose measures intended to protect and preserve such NOLs. The seminal case articulating this rule is *In re Prudential Lines, Inc.*, 107 B.R. 832 (Bankr. S.D.N.Y. 1989), *aff'd*, 119 B.R. 430

(S.D.N.Y. 1990), *aff'd*, 928 F.2d 565 (2d Cir. 1991); *see also Nisselson v. Drew Indus., Inc. (In re White Metal Rolling & Stamping Corp.)*, 222 B.R. 417, 424 (Bankr. S.D.N.Y. 1998) ("It is beyond peradventure that NOL carrybacks and carryovers are property of the estate of the loss corporation that generated them."); *In re Cumberland Farms, Inc.*, 162 B.R. 62, 67 (Bankr. D. Mass. 1993) (finding that the Second Circuit's *Prudential Lines* ruling on NOLs was analogous and persuasive in holding that pass-through losses were property of the estate and were protected by the automatic stay); *In re Phar-Mor, Inc.*, 152 B.R. 924, 927 (Bankr. N.D. Ohio 1993) (carryforward NOLs held to be property of the estate and protected by both the automatic stay and an injunction against the sale of stock causing a reduction of the NOLs).

32. In *Prudential Lines*, the court enjoined a parent corporation from taking a worthless stock deduction with respect to its wholly-owned subsidiary, which was in bankruptcy, on the grounds that allowing the parent to take such a deduction would destroy its debtor subsidiary's NOLs. In issuing the injunction, the court held that the debtor subsidiary's potential ability to utilize NOLs was property of its estate. 107 B.R. at 838. Further, the court held that, because of the effect that it would have on the debtor subsidiary's ability to use its NOLs, the taking of a worthless stock deduction by the parent was an exercise of control over the debtor subsidiary's NOLs and thus over property of the debtor subsidiary's estate. *Id.* at 842. Therefore, such action was properly subject to the automatic stay under section 362 of the Bankruptcy Code. *Id.* at 843; *see also In re Southeast Banking Corp.*, No. 91-14561, 1994 Bankr. LEXIS 2389, at *2 (Bankr. S.D. Fla. Jul. 21, 1994) (debtor's interest in its NOLs "constitutes property of the estate within the scope of 11 U.S.C. § 541(a)(1) and is entitled to the protection of the automatic stay imposed pursuant to 11 U.S.C. § 362(a)(3)").

33. Because the Debtor's NOLs are property of its estate, this Court has the authority under section 362 of the Bankruptcy Code to enforce the automatic stay by restricting any Transfer of Equity Securities that could adversely impact the Debtor's ability to use this valuable asset. Courts ordering such relief generally have done so by imposing notice and objection requirements regarding any proposed transfer of shares on a person whose holdings of such shares exceed (or would exceed as a result of the proposed transfer), a certain threshold amount. *See, e.g., In re Orexigen Therapeutics, Inc.*, No. 18-10518 (KG) (Bankr. D. Del. April 10, 2018); *In re Molycorp, Inc.*, No. 15-11357 (CSS) (Bankr. D. Del. June 26, 2015); *In re RadioShack Corporation*, No. 15-10197 (KJC) (Bankr. D. Del. Feb. 9, 2015); *In re Dendreon Corporation*, No. 14-12515 (PJW) (Bankr. D. Del. Nov. 12, 2014; *In re Overseas Shipholding Group, Inc.*, No. 12-20000 (Bankr. D. Del. Dec. 7, 2012); *In re VeraSun Energy Corp.*, No. 08-12606 (Bankr. D. Del. Dec. 3, 2008); *In re NII Holdings, Inc.*, No 14-12611 (SCC) (Bankr. S.D.N.Y. Oct. 22, 2014); *In re Legend Parent, Inc.*, No. 14-10701 (REG) (Bankr. S.D.N.Y. May 9, 2014); *In re Hawker Beechcraft, Inc.*, No. 12-11873 (Bankr. S.D.N.Y. June 27, 2012); *In re AMR Corp.*, No. 11-15463 (SHL) (Bankr. S.D.N.Y. Jan. 27, 2012); *In re Eastman Kodak Co.*, No. 12-10202 (ALG) (Bankr. S.D.N.Y. Feb. 15, 2012); *In re Hostess Brands, Inc.*, No. 12-22052 (RDD) (Bankr. S.D.N.Y. Jan. 27, 2012).

34. The Equity Transfer Procedures are designed to protect the Debtor from losing the benefit of all or any portion of its NOLs in connection with Transfers of Equity Securities that may (a) trigger an ownership change not within the scope of sections 382(l)(5) or 382(l)(6) of the IRC, (b) preclude the Debtor from taking advantage of the more favorable NOL utilization rules under sections 382(l)(5) or 382(l)(6) of the IRC or (c) severely limit the Debtor's ability to use its NOLs to shelter any taxable income or gain resulting from any sale of assets in

the course of this Chapter 11 Case or to reduce federal income taxes on post-reorganization income. The Debtor requires a mechanism to monitor and possibly object to ownership changes resulting from Transfers of Equity Securities or loss of eligibility for the Section 382(l)(5) Safe Harbor resulting from trading in Claims so it can maintain the ability to pursue a plan of reorganization that permits the Debtor to use its NOLs to the fullest extent possible.

35. Moreover, it is in the best interests of the Debtor, its estate and its stakeholders to restrict Transfers of Equity Securities that could result in an ownership change and to establish the Record Date with respect to trading in Claims. Transfers of Equity Securities are limited only for parties who are or might become 4.5% shareholders. Because Transfers of Equity Securities by or into the hands of 5% shareholders could trigger an ownership change that would impose a severe limitation on the Debtor's use of its NOLs on an annual basis, such Transfers also pose a threat to the value of its NOLs even if the Debtor later satisfied the requirements of sections 382(l)(5) or 382(l)(6) of the IRC.

36. Additionally, bankruptcy courts in this District and elsewhere have granted relief similar to that requested herein with respect to the establishment of a record date for notice and sell-down procedures for trading in claims. *See, e.g.*, *In re Orexigen Therapeutics, Inc.*, No. 18-10518 (KG) (Bankr. D. Del. April 10, 2018); *In re Molycorp. Inc.*, No. 15-11357 (Bankr. D. Del. June 26, 2015); *In re RS Legacy Corp.*, No. 15-10197 (Bankr. D. Del. February 9, 2015); *In re Overseas Shipholding Group, Inc.*, No. 12-20000 (Bankr. D. Del. November 15, 2012); *In re Borders Grp, Inc.*, No. 11-10614 (Bankr. S.D.N.Y. Mar. 16, 2011); *In re Dana Corp.*, No. 06-10354 (BRL) (Bankr. S.D.N.Y. Aug. 9, 2006) (approving notification and sell-down procedures). The Debtor submits that the present circumstances warrant similar relief in this Chapter 11 Case.

B. The Equity Transfer Procedures and Record Date Notice Are Narrowly Tailored.

37. The establishment of the Equity Transfer Procedures will not bar all Transfers of Equity Securities, only those types of Transfers that pose a serious risk to the Debtor's NOLs under the section 382 ownership change test. Further, the procedures will only be in effect during the pendency of this Chapter 11 Case. As such, the requested relief is narrowly tailored to allow the Debtor to preserve its ability to seek substantive relief if it appears that a proposed Transfer will jeopardize the use of its NOLs. The Equity Transfer Procedures would otherwise permit Transfers of Equity Securities to continue unaffected, subject to applicable law.

38. As discussed above, the Equity Transfer Procedures are necessary to preserve the value of the Debtor's NOLs. But those procedures may not be sufficient if, pursuant to a confirmed chapter 11 plan or a qualifying asset sale, (a) creditors receive sufficient equity to trigger an "ownership change" under section 382 of the IRC and (b) the Debtor is unable to utilize the Section 382(l)(5) Safe Harbor.

39. To avoid that scenario, the Debtor may need to seek the entry of a Sell-Down Order. In the meantime, the Debtor needs to be able to set and provide notice of the Record Date to give all creditors who may be subject to Sell-Down Procedures advance notice and ensure that the value of the Debtor's NOLs will be preserved.

40. Approval of the proposed Record Date does not constitute approval of the Sell-Down Procedures and does not restrict trading in Claims. Importantly, the interim order will not impose a burden on any person or entity since the interim order is designed to provide notice to claimholders and claims traders (a) of the Record Date, (b) that the Threshold Amounts will be measured as of the Record Date and (c) that their Claims may ultimately be subject to

sell-down if the Debtor determines that a Sell-Down Order is necessary to preserve the value of its NOLs. If the Debtor does later determine that a Sell-Down Order is necessary, the Debtor will file a separate motion requesting entry of a Sell-Down Order applicable to certain Claims traded on or after the Record Date.

C. Interim Relief Is Necessary to Avoid Irreparable Harm to the Debtor.

41. Once an NOL is limited under section 382 of the IRC, its use is limited forever, and once an equity interest is transferred, it cannot be undone. The relief sought herein is necessary to avoid an irrevocable loss of the Debtor's NOLs and the irreparable harm that could be caused by unfettered Transfers of Equity Securities, which, unmonitored, could jeopardize the Debtor's ability to offset taxable income with its NOLs, thereby risking the Debtor's ability to increase liquidity.

42. Absent establishing the Record Date at this time, it is unlikely that the Debtor would be able to implement the Sell-Down Procedures in any effective fashion to enable it to maximize the value of its NOLs. Whether or not the Debtor seeks and the Court ultimately enters a Sell-Down Order, setting the Record Date at this time is essential to adequately protect the Debtor's option to choose to preserve the value of its NOLs without affecting any parties in interest.

43. Accordingly, the Debtor submits that, absent the interim relief granted in the interim order, the Debtor and its estate could suffer immediate and irreparable harm. If the Court does not grant the relief sought in this motion on an interim basis, holders of Equity Securities could transfer such securities before the protective restrictions herein are implemented by the Court, and the Record Date would not be established for purposes of trading in Claims, risking the Debtor's ability to use its NOLs to maximize value and benefit its estate. Therefore,

the Debtor requests that the procedures described herein be approved immediately on an interim basis.

NOTICE

44. Notice of this Motion has been given to: (a) the U.S. Trustee, (b) the parties included on the Debtor's list of twenty (20) largest unsecured creditors, (c) the Internal Revenue Service, (d) counsel to SVB in its capacity as Prepetition Lender and DIP Lender (each as defined in the First Day Declaration), (e) the Securities and Exchange Commission (f) all known holders of the outstanding Equity Securities, (g) any party that has requested notice pursuant to Bankruptcy Rule 2002, and (h) all parties entitled to notice pursuant to Local Rule 9013-1(m). In light of the nature of the relief requested, the Debtor submits that no further notice is necessary.

CONCLUSION

WHEREFORE, the Debtor respectfully requests that the Court enter an order substantially in the form attached hereto as **Exhibit A**: (i) granting the relief sought herein; and (ii) granting to the Debtor such other and further relief as the Court may deem proper.

[*Remainder of page left intentionally blank*]

April 15, 2019
Wilmington, Delaware

MORRIS, NICHOLS, ARSHT & TUNNELL LLP

<u>/s/ Derek C. Abbott</u>

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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.[1]	Chapter 11 Case No. 19-10844 (BLS)

INTERIM ORDER (I) ESTABLISHING NOTICE AND OBJECTION PROCEDURES FOR TRANSFERS OF EQUITY SECURITIES, (II) ESTABLISHING A RECORD DATE FOR NOTICE AND SELL-DOWN PROCEDURES FOR TRADING IN CLAIMS AGAINST THE DEBTOR'S ESTATE AND (III) SCHEDULING A FINAL HEARING

Upon consideration of the *Motion For Entry of Interim and Final Orders (I) Establishing Notice and Objection Procedures for Transfers of Equity Securities and (II) Establishing a Record Date for Notice and Sell-Down Procedures for Trading in Claims Against the Debtor's Estate* (the "Motion")[2] pursuant to sections 105, 362 and 541 of the Bankruptcy Code and Rule 3001 of the Bankruptcy Rules, filed by the debtor in the above-captioned case (the "Debtor"); and the Court having jurisdiction to consider the Motion 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 as of February 29, 2012; and venue of the Chapter 11 Case and the Motion in this district being proper pursuant to 28 U.S.C. §§ 1408 and 1409; and this matter being a core proceeding pursuant to 28 U.S.C. § 157(b); and proper and adequate notice of the Motion, the hearing thereon, and opportunity for objection having been given; and the relief requested in the Motion being in the best interests of the Debtor and its estate and creditors; and

[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 1 Tower Place, Suite 400, South San Francisco, CA 94080.

[2] Capitalized terms not otherwise defined herein shall have the meanings given to them in the Motion.

the Court having heard evidence and statements of counsel regarding the Motion and having determined that the legal and factual bases set forth in the Motion and attested to in the First Day Declaration establish just cause for the relief granted herein; and the Court having determined that immediate relief is necessary to avoid irreparable harm; 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. The Equity Transfer Procedures set forth herein are approved on an interim basis.

3. Effective as of the Petition Date and until further order of this Court to the contrary, any purchase, sale, trade or other transfer of Equity Securities in violation of the Equity Transfer Procedures set forth herein (including the notice requirements set forth in paragraph 4 below) shall be null and void *ab initio* as an act in violation of the automatic stay under section 362 of the Bankruptcy Code and shall confer no rights on the transferee.

4. The following notice and objection procedures for holding and transferring Equity Securities ("Equity Transfer Procedures") shall apply in the Debtor's Chapter 11 Case:

i. Certain Defined Terms. For purposes of this interim order: (A) a "Substantial Equityholder" is any person or entity that beneficially owns at least 2,900,374 shares (representing approximately 4.5% of the 64,452,763 issued and outstanding shares) of Debtor; (B) "beneficial ownership" of Equity Securities shall be determined in accordance with applicable rules under section 382 of the Internal Revenue Code of 1986 (as amended, the "IRC") and regulations promulgated thereunder and shall include (i) direct and indirect ownership (e.g., a holding company would be considered to beneficially own all equity owned or acquired by its subsidiaries), (ii) ownership by such holder's family members and persons acting in concert with such holder to make a coordinated acquisition of equity and (iii) ownership of options to acquire equity; (C) an "option" to acquire equity includes any

contingent purchase, warrant, convertible debt, exchangeable shares, put, stock subject to risk of forfeiture, contract to acquire stock or similar interest, regardless of whether it is contingent or otherwise not currently exercisable; and (D) a "Transfer" means any transfer of Equity Securities to the extent described in paragraph 4(iii) below (Equity Security Acquisition Notice) and/or paragraph 4(iv) below (Equity Security Disposition Notice).

ii. Notice of Substantial Equityholder Status. Any person or entity who currently is or becomes a Substantial Equityholder shall (a) file with the Court and (b) serve upon (i) the Debtor, care of Achaogen, Inc., 1 Tower Place, Suite 400, South San Francisco, CA 94080, Attn: Gary Loeb, (ii) proposed counsel to the Debtor, Hogan Lovells US LLP, 1999 Avenue of the Stars, Suite 1400, Los Angeles, California 90067, Attn: Richard L. Wynne and Erin N. Brady, and Hogan Lovells US LLP, 875 Third Avenue, New York, New York 10022, Attn.: John D. Beck, and Morris, Nichols, Arsht & Tunnell LLP, 1201 N. Market Street, 16th Floor, Wilmington, DE 19899-1347, Attn: Derek C. Abbott and Andrew R. Remming, and (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, a notice of such status, in the form attached hereto as Exhibit 2 (a "Notice of Substantial Equityholder Status"), on or before the later of (A) 14 days after entry of the interim order or (B) 14 days after becoming a Substantial Equityholder.

iii. Equity Security Acquisition Notice. At least 14 days prior to any transfer of Equity Securities (including any transfer of options to acquire equity or any exercise thereof) that would result in an increase in the amount of Equity Securities beneficially owned by a Substantial Equityholder or would result in a person or entity becoming a Substantial Equityholder, such Substantial Equityholder or potential Substantial Equityholder shall (a) file with the Court and (b) serve on the Debtor, proposed counsel to the Debtor, and counsel to the DIP Lender (at the addresses set forth in paragraph 4(ii) above), advance written notice of the intended transfer of Equity Securities or worthless stock deduction, in the form attached hereto as Exhibit 3 (an "Equity Security Acquisition Notice").

iv. Equity Security Disposition Notice. Prior to any transfer of Equity Securities (including options) that would result in a decrease in the amount of Equity Securities beneficially owned by a Substantial

Equityholder or would result in a person or entity ceasing to be a Substantial Equityholder, such Substantial Equityholder shall (a) file with the Court and (b) serve on the Debtor, proposed counsel to the Debtor, and counsel to the DIP Lender (at the addresses set forth in paragraph 4(ii) above), advance written notice of the intended transfer of Equity Securities, in the form attached hereto as Exhibit 4 (an "Equity Security Disposition Notice").

v. Objection Procedures. The Debtor shall have 7 days after receipt of an Equity Security Acquisition Notice or Equity Security Disposition Notice (each, a "Transfer Notice") to file with the Court and serve on the party filing the Transfer Notice an objection to the proposed Transfer on the grounds that such Transfer may adversely affect the Debtor's ability to utilize its NOLs. If the Debtor files an objection, the proposed Transfer will not be effective unless and until approved by a final and nonappealable order of this Court. If the Debtor does not object within such 7-day period, the Transfer may proceed solely as set forth in the Transfer Notice. Further Transfers within the scope of this paragraph must comply with the Equity Transfer Procedures set forth in this paragraph 4.

5. Within five (5) business days after the entry of this interim order, the Debtor shall provide notice in substantially the form attached hereto as **Exhibit 1** (the "Equity Transfer Procedures Notice") to: (a) the U.S. Trustee, (b) the United States Securities and Exchange Commission, (c) the Internal Revenue Service, (d) the Debtor's twenty (20) largest unsecured creditors as identified in its chapter 11 petition, (e) counsel to the DIP Lender (as defined in the First Day Declaration), (f) all known holders of the outstanding Equity Securities, (g) any party that has requested notice pursuant to Bankruptcy Rule 2002, and (h) all parties entitled to notice pursuant to Local Rule 9013-1(m).

6. Upon receipt of such Equity Transfer Procedures Notice, any broker, bank, dealer or other agent or nominee of a beneficial holder of Equity Securities (each a "Nominee") will be required, within five (5) business days of receipt of such notice and on at least a quarterly basis thereafter, to send the Equity Transfer Procedures Notice to all beneficial

holders of Equity Securities on whose behalf such Nominee holds Equity Securities. To the extent such beneficial holder is also a Nominee, such Nominee must, in turn, promptly provide the Equity Transfer Procedures Notice to any holder for whose account such holder holds Equity Securities, and so on down the chain of ownership. In addition, any person, entity, broker or agent acting on behalf of any holder of Equity Securities who sells at least 2,900,374 shares (representing approximately 4.5% of the 64,452,763 issued and outstanding shares) of Debtor to another person or entity must provide a copy of the Equity Transfer Procedures Notice to such purchaser or any broker or agent acting on such purchaser's behalf.

7. Claimholders and potential purchasers of Claims against the Debtor are hereby deemed notified that, if the Debtor ultimately seeks and the Court approves a Sell-Down Order, claimholders that acquire Claims after the date of this interim order (the "Record Date") in an amount that would entitle them to receive more than 4.5% of the stock of the Debtor may be subject to a required sell-down of any Claims acquired after the Record Date in accordance with the Sell-Down Procedures.

8. Within five (5) business days after the entry of this interim order, the Debtor shall provide notice in substantially the form attached hereto as **Exhibit 5** (the "Record Date Notice") to: (a) the U.S. Trustee, (b) the United States Securities and Exchange Commission, (c) the Internal Revenue Service, (d) the Debtor's twenty (20) largest unsecured creditors as identified in its chapter 11 petition, (e) counsel to the DIP Lender (as defined in the First Day Declaration), (f) all known holders of the outstanding Equity Securities, and (g) any party that has requested notice pursuant to Bankruptcy Rule 2002.

9. Upon receipt of the Record Date Notice, any Nominee will be required, within five (5) days of receipt of the Record Date Notice, and on at least a quarterly basis

thereafter, to send such Record Date Notice to all beneficial holders of the Debtor's Notes for whose account such Nominee holds the Debtor's Notes. To the extent such beneficial holder is also a Nominee, such Nominee must, in turn, promptly provide the Record Date Notice to any holder for whose account such beneficial holder holds the Debtor's Notes, and so on down the chain of ownership.

10. Entry of this interim order shall in no way be deemed a determination of any kind that entry of a Sell-Down Order is necessary or warranted in this Chapter 11 Case and this Court's review of any request for the entry of a Sell-Down Order shall be without regard to entry of this interim order.

11. The entry of this interim order shall in no way prejudice the rights of any party to oppose the entry of a Sell-Down Order, on any grounds, and all parties' rights are expressly preserved hereby.

12. The notices substantially in the form attached hereto as **Exhibit 1**, **Exhibit 2**, **Exhibit 3**, **Exhibit 4**, and **Exhibit 5** are approved.

13. The Debtor may waive in writing, and in its sole and absolute discretion, any and all restrictions, stays and notice procedures contained in this interim order.

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. If no objections to the Motion are timely filed, served and received in accordance with the Motion and this interim order, the interim order shall be deemed a final order upon expiration of the Objection Deadline without further notice or hearing, and the Motion shall be granted on a final and permanent basis.

16. If objections are timely filed and served as set forth herein, the Debtor shall, on or after the Objection Deadline, submit to the Court a final order substantially in the form of the final order attached to the Motion as **Exhibit B**.

17. The requirements set forth in this interim order are in addition to the requirements of Bankruptcy Rule 3001(e) and applicable law, and do not excuse compliance therewith.

18. Notice of the Motion as provided therein shall be deemed good and sufficient notice of the Motion.

19. This Order shall be immediately effective and enforceable upon its entry.

20. The Debtor is authorized to take all actions necessary to effectuate the relief granted pursuant to this interim order in accordance with the Motion.

21. The Court shall retain jurisdiction to hear and determine all matters arising from or related to this interim order.

22. Nothing in the Motion or this Order shall be deemed or construed as: (i) an admission as to the validity of any claim against the Debtor; (ii) a waiver of the Debtor's rights to dispute any claim on any grounds; (iii) a promise to pay any claim; or (iv) an

implication or admission that any particular claim is a claim for payments authorized pursuant to the Motion.

Dated: ___________________, 2019
Wilmington, Delaware

____
THE HONORABLE BRENDAN L. SHANNON
UNITED STATES BANKRUPTCY JUDGE

EXHIBIT 1 TO INTERIM ORDER

Equity Transfer Procedures Notice

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re	Chapter 11
Achaogen, Inc.,	Case No. 19-10844 (BLS)
Debtor.[1]	Re: D.I. __

NOTICE OF (I) EQUITY TRANSFER PROCEDURES AND (II) A FINAL HEARING

TO ALL PERSONS OR ENTITIES WITH EQUITY INTERESTS IN THE DEBTOR:

PLEASE TAKE NOTICE OF THE FOLLOWING:

1. On April 15, 2019 (the "Petition Date"), the above-captioned debtor (the "Debtor") commenced this case under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") in the United States Bankruptcy Court for the District of Delaware. You are receiving this notice because you have been identified as a potential equity holder in the Debtor. No bar date for filing proofs of interest has been established in the Debtor's bankruptcy case. For additional information regarding the Debtor's chapter 11 case, please go to www.kccllc.net/achaogen.

2. On the Petition Date, the Debtor filed the Motion For Entry of Interim and Final Orders (I) Establishing Notice and Objection Procedures for Transfers of Equity Securities and (II) Establishing a Record Date for Notice and Sell-Down Procedures for Trading in Claims Against the Debtor's Estate [D.I. __] (the "Motion").

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[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 1 Tower Place, Suite 400, South San Francisco, CA 94080.

3. On ____________, 2019, the United States Bankruptcy Court for the District of Delaware (the "Court") entered an interim order (the "Interim Order"), approving the procedures set forth below with respect to transfers of certain Equity Securities of the Debtor (the "Equity Transfer Procedures") and setting the Record Date with respect to trading in claims against the Debtor, in order to assist the Debtor in preserving its net operating losses ("NOLs"). **Any purchase, sale, trade or other transfer of equity securities (including options) of the Debtor, in violation of the procedures set forth below shall be null and void *ab initio* as an act in violation of the automatic stay under section 362 of the Bankruptcy Code, and shall confer no rights on the transferee.**

4. 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.

5. Objections to the Motion must be filed with the Court and served so as to be received by 4 p.m. (ET) on ____________, 2019, on (a) the office of the United States Trustee for the District of Delaware, (b) (i) the Debtor, care of Achaogen, Inc., 1 Tower Place, Suite 400, South San Francisco, CA 94080, Attn: Gary Loeb, and (ii) proposed counsel to the

Debtor, Hogan Lovells US LLP, 1999 Avenue of the Stars, Suite 1400, Los Angeles, California 90067, Attn: Richard L. Wynne and Erin N. Brady, and Hogan Lovells US LLP, 875 Third Avenue, New York, New York 10022, Attn.: John D. Beck, and Morris, Nichols, Arsht & Tunnell LLP, 1201 N. Market Street, 16th Floor, Wilmington, DE 19899-1347, Attn: Derek C. Abbott and Andrew R. Remming, and (c) 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.

6. If no objections to the Motion are timely filed, served and received in accordance with the Interim Order, the Interim Order shall be deemed a Final Order without further notice or hearing, and the Motion shall be granted on a final and permanent basis.

7. Pursuant to the Interim Order, the following Equity Transfer Procedures shall apply to holding and transferring beneficial interests in Equity Securities:

i. Certain Defined Terms. For purposes of the Interim Order and this Notice: (A) a "Substantial Equityholder" is any person or entity that beneficially owns at least 2,900,374 shares (representing approximately 4.5% of the 64,452,763 issued and outstanding shares) of Debtor; (B) "beneficial ownership" of Equity Securities shall be determined in accordance with applicable rules under section 382 of the Internal Revenue Code of 1986 (as amended, the "IRC") and regulations promulgated thereunder and shall include (i) direct and indirect ownership (e.g., a holding company would be considered to beneficially own all equity owned or acquired by its subsidiaries), (ii) ownership by such holder's family members and persons acting in concert with such holder to make a coordinated acquisition of equity and (iii) ownership of options to acquire equity; (C) an "option" to acquire equity includes any contingent purchase, warrant, convertible debt, exchangeable shares, put, stock subject to risk of forfeiture, contract to acquire stock or similar interest, regardless of whether it is contingent or otherwise not currently exercisable; and (D) a "Transfer" means

any transfer of Equity Securities to the extent described in paragraph 7(iii) below (Equity Security Acquisition Notice) and/or paragraph 7(iv) below (Equity Security Disposition Notice).

ii. Notice of Substantial Equityholder Status. Any person or entity who currently is or becomes a Substantial Equityholder shall (a) file with the Court and (b) serve upon (i) the Debtor, care of Achaogen, Inc., 1 Tower Place, Suite 400, South San Francisco, CA 94080, Attn: Gary Loeb, (ii) proposed counsel to the Debtor, Hogan Lovells US LLP, 1999 Avenue of the Stars, Suite 1400, Los Angeles, California 90067, Attn: Richard L. Wynne and Erin N. Brady, and Hogan Lovells US LLP, 875 Third Avenue, New York, New York 10022, Attn.: John D. Beck, and Morris, Nichols, Arsht & Tunnell LLP, 1201 N. Market Street, 16th Floor, Wilmington, DE 19899-1347, Attn: Derek C. Abbott and Andrew R. Remming, and (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, a notice of such status, in the form attached hereto as Exhibit 2 (a "Notice of Substantial Equityholder Status"), on or before the later of (A) 14 days after entry of the Interim Order or (B) 14 days after becoming a Substantial Equityholder.

iii. Equity Security Acquisition Notice. At least 14 days prior to any transfer of Equity Securities (including any transfer of options to acquire equity or any exercise thereof) that would result in an increase in the amount of Equity Securities beneficially owned by a Substantial Equityholder or would result in a person or entity becoming a Substantial Equityholder, such Substantial Equityholder or potential Substantial Equityholder shall (a) file with the Court and (b) serve on the Debtor, proposed counsel to the Debtor, and the DIP Lender (at the addresses set forth in paragraph 7(ii) above), advance written notice of the intended transfer of Equity Securities, in the form attached hereto as Exhibit 3 (an "Equity Security Acquisition Notice").

iv. Equity Security Disposition Notice. Prior to any transfer of Equity Securities (including options) that would result in a decrease in the amount of Equity Securities beneficially owned by a Substantial Equityholder or would result in a person or entity ceasing to be a Substantial Equityholder, such Substantial Equityholder shall file with the Court and serve on the Debtor, proposed counsel to the Debtor, and the DIP Lender (at the addresses set forth in paragraph 7(ii) above), advance written notice of the intended

transfer of Equity Securities in the form attached hereto as Exhibit 4 (an "Equity Security Disposition Notice").

v. Objection Procedures. The Debtor shall have 7 days after receipt of an Equity Security Acquisition Notice or Equity Security Disposition Notice (each, a "Transfer Notice") to file with the Court and serve on the party filing the Transfer Notice an objection to the proposed Transfer on the grounds that such Transfer may adversely affect the Debtor's ability to utilize its NOLs. If the Debtor files an objection, the proposed Transfer will not be effective unless and until approved by a final and nonappealable order of this Court. If the Debtor does not object within such 7-day period, the Transfer may proceed solely as set forth in the Transfer Notice. Further Transfers within the scope of this paragraph must comply with the Equity Transfer Procedures set forth in this paragraph 7.

vi. Unauthorized Transfers of Equity Securities. Effective as of the Petition Date and until further order of this Court to the contrary, any acquisition or disposition of Equity Securities (including options) in violation of the Equity Transfer Procedures shall be null and void ab initio as an act in violation of the automatic stay under section 362 of the Bankruptcy Code.

FAILURE TO FOLLOW THE PROCEDURES SET FORTH IN THIS NOTICE AND IN THE INTERIM ORDER SHALL CONSTITUTE A VIOLATION OF THE AUTOMATIC STAY UNDER SECTION 362 OF THE BANKRUPTCY CODE. ANY PROHIBITED PURCHASE, SALE, TRADE OR OTHER TRANSFER OF EQUITY SECURITIES (INCLUDING OPTIONS) IN ACHAOGEN, INC. IN VIOLATION OF THE INTERIM ORDER WILL BE NULL AND VOID AB INITIO.

8. The Debtor may waive in writing, and in its sole and absolute discretion, any and all restrictions, stays and notice procedures contained in the Interim Order.

9. Complete copies of the Motion and the Interim Order are available via PACER via the Court's website at https://ecf.deb.uscourts.gov for a fee, or through the Debtor's Notice, Claims and Solicitation Agent, KCC, at www.kccllc.net/achaogen. If a hearing is held and a Final Order is entered, such Final Order will also be available as described in the preceding sentence.

10. The requirements set forth in this Notice are in addition to the requirements of Rule 3001(e) of the Federal Rules of Bankruptcy Procedure and applicable law, and do not excuse compliance therewith.

[*Remainder of page left intentionally blank*]

April___, 2019
Wilmington, Delaware

MORRIS, NICHOLS, ARSHT & TUNNELL LLP

*/s/*________________________________

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Telephone: (310) 785-4600
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- and -

Christopher R. Bryant (NY 3934973)
Pro hac vice admission pending
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HOGAN LOVELLS US LLP
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Proposed Counsel for Debtor and Debtor in Possession

EXHIBIT 2 TO INTERIM ORDER

Notice of Substantial Equityholder Status

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re	Chapter 11
Achaogen, Inc.,	Case No. 19-10844 (BLS)
Debtor.[1]	

NOTICE OF SUBSTANTIAL EQUITYHOLDER STATUS

PLEASE TAKE NOTICE OF THE FOLLOWING:

1. **[Name of Equityholder]** is/has become a Substantial Equityholder[2] with respect to the shares (the "Shares") of the above-captioned debtor (the "Debtor"). Achaogen, Inc. is the Debtor in Case No. 19-**[ ]**, pending in the United States Bankruptcy Court for the District of Delaware (the "Court").

2. As of ____________, 20__, **[Name of Equityholder]** beneficially owns ____________ Shares of Debtor and/or options with respect to ____________ Shares of Debtor.

3. The following table sets forth the date(s) on which **[Name of Equityholder]** acquired or otherwise became the beneficial owner of such Equity Securities:

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[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 1 Tower Place, Suite 400, South San Francisco, CA 94080.

[2] For purposes of this Notice: (A) a "Substantial Equityholder" is any person or entity that beneficially owns at least 2,900,374 shares (representing approximately 4.5% of the 64,452,763 issued and outstanding shares) of Achaogen, Inc.; (B) "beneficial ownership" of equity securities shall be determined in accordance with applicable rules under section 382 of the Internal Revenue Code of 1986 (as amended, the "IRC") and the regulations promulgated thereunder and shall include (i) direct and indirect ownership (e.g., a holding company would be considered to beneficially own all equity owned or acquired by its subsidiaries), (ii) ownership by such holder's family members and persons acting in concert with such holder to make a coordinated acquisition of equity and (iii) ownership of options to acquire equity; and (C) an "option" to acquire equity includes any contingent purchase, warrant, convertible debt, exchangeable shares, put, stock subject to risk of forfeiture, contract to acquire stock or similar interest, regardless of whether it is contingent or otherwise not currently exercisable.

Number of Shares of Debtor	**Date Acquired**

(Attach additional page if necessary)

4. The last four digits of the taxpayer identification number of **[Name of Equityholder]** are ____________.

5. Under penalty of perjury, **[Name of Equityholder]** hereby declares that it has examined this Notice and accompanying attachments (if any) and, to the best of its knowledge and belief, this Notice and any attachments that purport to be part of this Notice are true, correct and complete.

6. Pursuant to the **[Interim/Final]** Order establishing the Equity Transfer Procedures (as defined in the **[Interim/Final]** Order), this Notice is being (a) filed with the Court and (b) served upon (i) the Debtor, care of Achaogen, Inc., 1 Tower Place, Suite 400, South San Francisco, CA 94080, Attn: Gary Loeb, (ii) proposed counsel to the Debtor, Hogan Lovells US LLP, 1999 Avenue of the Stars, Suite 1400, Los Angeles, California 90067, Attn: Richard L. Wynne and Erin N. Brady, and Hogan Lovells US LLP, 875 Third Avenue, New York, New York 10022, Attn.: John D. Beck, and Morris, Nichols, Arsht & Tunnell LLP, 1201 N. Market Street, 16th Floor, Wilmington, DE 19899-1347, Attn: Derek C. Abbott and Andrew R. Remming, and (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.

Respectfully submitted,

____
(Name of Equityholder)

By: ____________________________

Name: ____________________________

Title: ____________________________

Address: ____________________________

____

____

Telephone: ____________________________

Facsimile: ____________________________

Date: ____________________________

EXHIBIT 3 TO INTERIM ORDER

Equity Security Acquisition Notice

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re	Chapter 11
Achaogen, Inc.,	Case No. 19-10844 (BLS)
Debtor.[1]	

EQUITY SECURITY ACQUISITION NOTICE

PLEASE TAKE NOTICE OF THE FOLLOWING:

1. **[Name of Prospective Acquirer]** hereby provides notice of its intention to purchase, acquire or otherwise accumulate (the "Proposed Transfer") shares (the "Shares") of Achaogen, Inc. (the "Debtor"). Achaogen is the Debtor in Case No. 19- **[ ]** pending in the United States Bankruptcy Court for the District of Delaware (the "Court").

2. If applicable, on **[Prior Date(s)]**, **[Name of Prospective Acquirer]** filed a Notice of Substantial Equityholder Status[2] with the Court and served copies thereof on the above-captioned debtor (collectively, the "Debtor") and the Debtor's counsel.

3. **[Name of Equityholder]** currently beneficially owns ____________ Shares of Debtor and/or options with respect to ____________ Shares of Debtor.

[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 1 Tower Place, Suite 400, South San Francisco, CA 94080.

[2] For purposes of this Notice: (A) a "Substantial Equityholder" is any person or entity that beneficially owns at least 2,900,374 shares (representing approximately 4.5% of the 64,452,763 issued and outstanding shares) of Achaogen, Inc.; (B) "beneficial ownership" of equity securities shall be determined in accordance with applicable rules under section 382 of the Internal Revenue Code of 1986 (as amended, the "IRC") and the regulations promulgated thereunder and shall include (i) direct and indirect ownership (e.g., a holding company would be considered to beneficially own all equity owned or acquired by its subsidiaries), (ii) ownership by such holder's family members and persons acting in concert with such holder to make a coordinated acquisition of equity and (iii) ownership of options to acquire equity; and (C) an "option" to acquire equity includes any contingent purchase, warrant, convertible debt, exchangeable shares, put, stock subject to risk of forfeiture, contract to acquire stock or similar interest, regardless of whether it is contingent or otherwise not currently exercisable.

4. Pursuant to the Proposed Transfer, **[Name of Prospective Acquirer]** proposes, as applicable, to purchase, acquire or otherwise accumulate ____________ Shares or an option (or to exercise such an option) with respect to __________ Shares. If the Proposed Transfer is permitted to occur, **[Name of Prospective Acquirer]** will beneficially own ______________ Shares after the transfer becomes effective.

5. The last four digits of the taxpayer identification number of **[Name of Prospective Acquirer]** are ___________________.

6. Under penalty of perjury, **[Name of Prospective Acquirer]** hereby declares that it has examined this Notice and accompanying attachments (if any) and, to the best of its knowledge and belief, this Notice and any attachments which purport to be part of this Notice are true, correct and complete.

7. Pursuant to that certain **[Interim/Final]** Order establishing the Equity Transfer Procedures (as defined in the **[Interim/Final]** Order), this Notice is being (a) filed with the Court and (b) served upon (i) the Debtor, care of Achaogen, Inc., 1 Tower Place, Suite 400, South San Francisco, CA 94080, Attn: Gary Loeb, (ii) proposed counsel to the Debtor, Hogan Lovells US LLP, 1999 Avenue of the Stars, Suite 1400, Los Angeles, California 90067, Attn: Richard L. Wynne and Erin N. Brady, and Hogan Lovells US LLP, 875 Third Avenue, New York, New York 10022, Attn: John D. Beck, and Morris, Nichols, Arsht & Tunnell LLP, 1201 N. Market Street, 16th Floor, Wilmington, DE 19899-1347, Attn: Derek C. Abbott and Andrew R. Remming, and (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.

8. The Debtor has 7 calendar days after receipt of this Notice to object to the Proposed Transfer described herein. If the Debtor files an objection, such Proposed Transfer will not be effective unless approved by a final and nonappealable order of the Court. If the Debtor does not object within such 7-day period, then after expiration of such period the Proposed Transfer may proceed solely as set forth in this Notice.

9. The undersigned Prospective Acquirer understands that any further transactions that may result in **[Name of Prospective Acquirer]** purchasing, acquiring or otherwise accumulating Equity Securities (or an option with respect thereto) will each require an additional notice to be filed with the Court and served in the same manner as this Notice.

Respectfully submitted,

____
(Name of Prospective Acquirer)

By: ______________________________

Name:__________________________

Title:___________________________

Address: ___________________________

____

____

Telephone: ___________________________

Facsimile: ___________________________

Date: ___________________________

EXHIBIT 4 TO INTERIM ORDER

Equity Security Disposition Notice

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re **Achaogen, Inc.**, Debtor.[1]	Chapter 11 Case No. 19-10844 (BLS)

EQUITY SECURITY DISPOSITION NOTICE

PLEASE TAKE NOTICE OF THE FOLLOWING:

1. **[Name of Prospective Seller]**, a Substantial Equityholder,[2] hereby provides notice of its intention to sell, trade or otherwise transfer (the "Proposed Transfer") shares (the "Shares") of Achaogen Inc. ("Debtor"), or options with respect thereto. Achaogen, Inc. is the Debtor in Case No. 19-**[ ]** pending in the United States Bankruptcy Court for the District of Delaware (the "Court").

2. If applicable, on **[Prior Date(s)]**, **[Name of Prospective Seller]** filed a Notice of Substantial Equityholder Status with the Court and served copies thereof on the above-captioned debtor (collectively, the "Debtor") and the Debtor's counsel.

---

[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 1 Tower Place, Suite 400, South San Francisco, CA 94080.

[2] For purposes of this Notice: (A) a "Substantial Equityholder" is any person or entity that beneficially owns at least 2,900,374 shares (representing approximately 4.5% of the 64,452,763 issued and outstanding shares) of Achaogen, Inc.; (B) "beneficial ownership" of equity securities shall be determined in accordance with applicable rules under section 382 of the Internal Revenue Code of 1986 (as amended, the "IRC") and the regulations promulgated thereunder and shall include (i) direct and indirect ownership (e.g., a holding company would be considered to beneficially own all equity owned or acquired by its subsidiaries), (ii) ownership by such holder's family members and persons acting in concert with such holder to make a coordinated acquisition of equity and (iii) ownership of options to acquire equity; and (C) an "option" to acquire equity includes any contingent purchase, warrant, convertible debt, exchangeable shares, put, stock subject to risk of forfeiture, contract to acquire stock or similar interest, regardless of whether it is contingent or otherwise not currently exercisable.

3. **[Name of Prospective Seller]** currently beneficially owns ____________ Shares of Debtor and/or options with respect to ____________ Shares of Debtor.

4. Pursuant to the Proposed Transfer, **[Name of Prospective Seller]** proposes to sell, trade or otherwise transfer __________ Shares or an option with respect to ______________ Shares. If the Proposed Transfer is permitted to occur, **[Name of Prospective Seller]** will beneficially own ______________ Shares after the transfer becomes effective.

5. The last four digits of the taxpayer identification number of **[Name of Prospective Seller]** are _________________________________.

6. Under penalty of perjury, **[Name of Prospective Seller]** hereby declares that it has examined this Notice and accompanying attachments (if any) and, to the best of its knowledge and belief, this Notice and any attachments that purport to be part of this Notice are true, correct and complete.

7. Pursuant to that certain **[Interim/Final]** Order establishing the Equity Transfer Procedures (as defined in the **[Interim/Final]** Order), this Notice is being (a) filed with the Court and (b) served upon (i) the Debtor, care of Achaogen, Inc., 1 Tower Place, Suite 400, South San Francisco, CA 94080, Attn: Gary Loeb, (ii) proposed counsel to the Debtor, Hogan Lovells US LLP, 1999 Avenue of the Stars, Suite 1400, Los Angeles, California 90067, Attn: Richard L. Wynne and Erin N. Brady, and Hogan Lovells US LLP, 875 Third Avenue, New York, New York 10022, Attn.: John D. Beck, and Morris, Nichols, Arsht & Tunnell LLP, 1201 N. Market Street, 16th Floor, Wilmington, DE 19899-1347, Attn: Derek C. Abbott and Andrew R. Remming, and (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.

8. The Debtor has 7 calendar days after receipt of this Notice to object to the Proposed Transfer described herein. If the Debtor files an objection, such Proposed Transfer will not be effective unless approved by a final and nonappealable order of the Court. If the Debtor does not object within such 7-day period, then after expiration of such period the Proposed Transfer may proceed solely as set forth in this Notice.

9. The undersigned Prospective Seller understands that any further transactions that may result in **[Name of Prospective Seller]** selling, trading or otherwise transferring Equity Securities (or an option with respect thereto) will each require an additional notice to be filed with the Court and served in the same manner as this Notice.

Respectfully submitted,

____
(Name of Prospective Seller)

By: ______________________________

Name:_________________________

Title:__________________________

Address: __________________________

____

____

Telephone: __________________________

Facsimile: __________________________

Date: __________________________

EXHIBIT 5 TO INTERIM ORDER

Record Date Notice

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re	Chapter 11
Achaogen, Inc.,	Case No. 19-10844 (BLS)
Debtor.[1]	Re: D.I. __

NOTICE OF (I) RECORD DATE FOR NOTICE AND SELL-DOWN PROCEDURES FOR TRADING IN CLAIMS AGAINST THE DEBTOR'S ESTATE AND (II) A FINAL HEARING

TO ALL PERSONS OR ENTITIES WITH CLAIMS AGAINST THE DEBTOR:

PLEASE TAKE NOTICE OF THE FOLLOWING:

1. On April 15, 2019 (the "Petition Date"), the above-captioned debtor (the "Debtor") commenced this case under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code").

2. On the Petition Date, the Debtor filed the Motion For Entry of Interim and Final Orders (I) Establishing Notice and Objection Procedures for Transfers of Equity Securities and (II) Establishing a Record Date for Notice and Sell-Down Procedures for Trading in Claims Against the Debtor's Estate [D.I. __] (the "Motion").

3. On __________, 2019, the United States Bankruptcy Court for the District of Delaware (the "Court") entered an interim order (the "Interim Order") setting the Record Date with respect to trading in claims against the Debtor, in order to assist the Debtor in preserving its net operating losses ("NOLs").

[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 1 Tower Place, Suite 400, South San Francisco, CA 94080.

4. Pursuant to the Interim Order, the Record Date is established as __________, 2019.

5. Pursuant to the Interim Order, claimholders and potential purchasers of claims against the Debtor ("Claims") are hereby notified that, if the Court ultimately approves a Sell-Down Order, claimholders that acquire Claims after the Record Date in an amount that would entitle them to receive more than 4.5% of the equity of the reorganized Debtor under a plan of reorganization may be subject to a required sell-down of any Claims purchased after the Record Date in accordance with the Sell-Down Procedures.

6. All persons or entities that acquired and hold Claims after the Record Date in an amount entitling such person or entity to receive more than 4.5% of the equity of the reorganized Debtor may be required to identify themselves to the Debtor after the Court's approval of the disclosure statement which identifies potential recoveries for creditors.

7. 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.

8. Objections to the Motion must be filed with the Court and served so as to be received by 4 p.m. (ET) on **[______]**, 2019, on (a) the office of the United States Trustee for the District of Delaware and (b) (i) the Debtor, care of Achaogen, Inc., 1 Tower Place, Suite 400, South San Francisco, CA 94080, Attn: Gary Loeb, (ii) proposed counsel to the Debtor, Hogan Lovells US LLP, 1999 Avenue of the Stars, Suite 1400, Los Angeles, California 90067, Attn: Richard L. Wynne and Erin N. Brady, and Hogan Lovells US LLP, 875 Third Avenue, New York, New York 10022, Attn.: John D. Beck, and Morris, Nichols, Arsht & Tunnell LLP, 1201 N. Market Street, 16th Floor, Wilmington, DE 19899-1347, Attn: Derek C. Abbott and Andrew R. Remming, and (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.

9. If no objections to the Motion are timely filed, served and received in accordance with the Interim Order, the Interim Order shall be deemed a Final Order without further notice or hearing, and the Motion shall be granted on a final and permanent basis.

10. Complete copies of the Motion and the Interim Order are available via PACER via the Court's website at https://ecf.deb.uscourts.gov for a fee, or through the Debtor's Notice, Claims and Solicitation Agent, KCC, by accessing its website at www.kccllc.net/achaogen. If a hearing is held and a Final Order is entered, such Final Order will also be available as described in the preceding sentence.

11. The entry of the Interim and Final Orders shall in no way prejudice the rights of any party to oppose the entry of a Sell-Down Order, on any grounds, and all parties' rights are expressly preserved by the Interim and Final Orders.

12. The requirements set forth in this Notice are in addition to the requirements of Rule 3001(e) of the Federal Rules of Bankruptcy Procedure and applicable law, and do not excuse compliance therewith.

[*Remainder of page left intentionally blank*]

April__, 2019
Wilmington, Delaware

MORRIS, NICHOLS, ARSHT & TUNNELL LLP

/s/ ______________________________

Derek C. Abbott (No. 3376)
Andrew R. Remming (No. 5120)
Matthew O. Talmo (No. 6333)
Paige N. Topper (No. 6470)
1201 North Market Street, 16th Floor
P.O. Box 1347
Wilmington, Delaware 19899-1347
Tel.: (302) 658-9200
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dabbott@mnat.com
aremming@mnat.com
mtalmo@mnat.com
ptopper@mnat.com

- and -

Richard L. Wynne (CA 120349)
Pro hac vice admission pending
Erin N. Brady (CA 215038)
Pro hac vice admission pending
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- and -

Christopher R. Bryant (NY 3934973)
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Pro hac vice admission pending
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875 Third Avenue
New York, NY 10022
Telephone: (212) 918-3000
Facsimile: (212) 918-3100
chris.bryant@hoganlovells.com
john.beck@hoganlovells.com

Proposed Counsel for Debtor and Debtor in Possession

EXHIBIT B
Proposed Final Order

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re **Achaogen, Inc.**, Debtor.[1]	Chapter 11 Case No. 19-10844 (BLS)

FINAL ORDER (I) ESTABLISHING NOTICE AND OBJECTION PROCEDURES FOR TRANSFERS OF EQUITY SECURITIES, (II) ESTABLISHING A RECORD DATE FOR NOTICE AND SELL-DOWN PROCEDURES FOR TRADING IN CLAIMS AGAINST THE DEBTOR'S ESTATE AND (III) GRANTING RELATED RELIEF

Upon consideration of the *Motion For Entry of Interim and Final Orders (I) Establishing Notice and Objection Procedures for Transfers of Equity Securities and (II) Establishing a Record Date for Notice and Sell-Down Procedures for Trading in Claims Against the Debtor's Estate* (the "Motion")[2] pursuant to sections 105, 362 and 541 of the Bankruptcy Code and Rule 3001 of the Bankruptcy Rules, filed by the debtor in the above-captioned cases (the "Debtor"); and the Court having jurisdiction to consider the Motion 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 as of February 29, 2012; and venue of the Chapter 11 Case and the Motion in this district being proper pursuant to 28 U.S.C. §§ 1408 and 1409; and this matter being a core proceeding pursuant to 28 U.S.C. § 157(b); and proper and adequate notice of the Motion, the hearing thereon, and opportunity for objection having been given; and the relief requested in the Motion being in the best interests of the Debtor and its estate and creditors; and the Court having heard evidence and statements of counsel regarding the Motion and having

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[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 1 Tower Place, Suite 400, South San Francisco, CA 94080.

[2] Capitalized terms not otherwise defined herein shall have the meanings given to them in the Motion.

determined that the legal and factual bases set forth in the Motion and attested to in the First Day Declaration establish just cause for the relief granted herein; and the Court having determined that immediate relief is necessary to avoid irreparable harm; and after due deliberation and sufficient cause appearing therefor,

IT IS HEREBY ORDERED THAT:

1. The Motion is GRANTED as set forth herein on a final basis. All objections to the Motion not previously withdrawn are overruled.

2. The Equity Transfer Procedures are approved on a final basis.

3. Effective as of the Petition Date, any purchase, sale, trade or other transfer of Equity Securities in violation of the Equity Transfer Procedures set forth herein (including the notice requirements set forth in paragraph 4 below) shall be null and void *ab initio* as an act in violation of the automatic stay under section 362 of the Bankruptcy Code and shall confer no rights on the transferee.

4. The following notice and objection procedures for holding and transferring Equity Securities ("Equity Transfer Procedures") shall apply in the Debtor's Chapter 11 Case:

i. Certain Defined Terms For purposes of the Interim Order and this Notice: (A) a "Substantial Equityholder" is any person or entity that beneficially owns at least 2,900,374 shares (representing approximately 4.5% of the 64,452,763 issued and outstanding shares) of Debtor ("Equity Securities"); (B) "beneficial ownership" of Equity Securities shall be determined in accordance with applicable rules under section 382 of the Internal Revenue Code of 1986 (as amended, the "IRC") and regulations promulgated thereunder and shall include (i) direct and indirect ownership (e.g., a holding company would be considered to beneficially own all equity owned or acquired by its subsidiaries), (ii) ownership by such holder's family members and persons acting in concert with such holder to make a coordinated acquisition of equity and (iii) ownership of options to acquire equity; (C) an "option" to acquire equity includes any contingent purchase, warrant, convertible debt, exchangeable shares, put, stock subject to

risk of forfeiture, contract to acquire stock or similar interest, regardless of whether it is contingent or otherwise not currently exercisable; and (D) a "Transfer" means any transfer of Equity Securities to the extent described in paragraph 4(iii) below (Equity Security Acquisition Notice) and/or paragraph 4(iv) below (Equity Security Disposition Notice).

ii. Notice of Substantial Equityholder Status. Any person or entity who currently is or becomes a Substantial Equityholder shall (a) file with the Court and (b) serve upon (i) the Debtor, care of Achaogen, Inc., 1 Tower Place, Suite 400, South San Francisco, CA 94080, Attn: Gary Loeb, (ii) proposed counsel to the Debtor, Hogan Lovells US LLP, 1999 Avenue of the Stars, Suite 1400, Los Angeles, California 90067, Attn: Richard L. Wynne and Erin N. Brady, and Hogan Lovells US LLP, 875 Third Avenue, New York, New York 10022, Attn.: John D. Beck, and Morris, Nichols, Arsht & Tunnell LLP, 1201 N. Market Street, 16th Floor, Wilmington, DE 19899-1347, Attn: Derek C. Abbott and Andrew R. Remming, and (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, a notice of such status, in the form attached hereto as Exhibit 2 (a "Notice of Substantial Equityholder Status"), on or before the later of (A) 14 days after entry of the interim order or (B) 14 days after becoming a Substantial Equityholder.

iii. Equity Security Acquisition Notice. At least 14 days prior to any transfer of Equity Securities (including any transfer of options to acquire equity or any exercise thereof) that would result in an increase in the amount of Equity Securities beneficially owned by a Substantial Equityholder or would result in a person or entity becoming a Substantial Equityholder, such Substantial Equityholder or potential Substantial Equityholder shall (a) file with the Court and (b) serve on the Debtor, proposed counsel to the Debtor, and counsel to the DIP Lender (at the addresses set forth in paragraph 4(ii) above), advance written notice of the intended transfer of Equity Securities or worthless stock deduction, in the form attached hereto as Exhibit 3 (an "Equity Security Acquisition Notice").

iv. Equity Security Disposition Notice. Prior to any transfer of Equity Securities (including options) that would result in a decrease in the amount of Equity Securities beneficially owned by a Substantial Equityholder or would result in a person or entity ceasing to be a Substantial Equityholder, such Substantial Equityholder shall (a) file with the Court and (b) serve on the Debtor, proposed counsel to the

Debtor, and counsel to the DIP Lender (at the addresses set forth in paragraph 4(ii) above), advance written notice of the intended transfer of Equity Securities, in the form attached hereto as Exhibit 4 (an "Equity Security Disposition Notice").

v. Objection Procedures. The Debtor shall have 7 days after receipt of an Equity Security Acquisition Notice or Equity Security Disposition Notice (each, a "Transfer Notice") to file with the Court and serve on the party filing the Transfer Notice an objection to the proposed Transfer on the grounds that such Transfer may adversely affect the Debtor's ability to utilize its NOLs. If the Debtor files an objection, the proposed Transfer will not be effective unless and until approved by a final and nonappealable order of this Court. If the Debtor does not object within such 7-day period, the Transfer may proceed solely as set forth in the Transfer Notice. Further Transfers within the scope of this paragraph must comply with the Equity Transfer Procedures set forth in this paragraph 4.

5. The Debtor may waive in writing, in its sole and absolute discretion, any and all restrictions, stays and notice procedures contained in this Order.

6. The notices substantially in the form attached hereto as **Exhibit 1**, **Exhibit 2** and **Exhibit 3** are approved.

7. Within five (5) business days after the entry of this final order, the Debtor shall provide a copy of this final order to: (a) the U.S. Trustee, (b) the United States Securities and Exchange Commission, (c) the Internal Revenue Service, (d) the Debtor's twenty (20) largest unsecured creditors as identified in its chapter 11 petition, (e) counsel to the DIP Lender (as defined in the First Day Declaration), (f) all known holders of the outstanding Equity Securities, and (g) any party that has requested notice pursuant to Bankruptcy Rule 2002.

8. Claimholders and potential purchasers of claims against the Debtor are hereby deemed notified that, if the Court ultimately approves a Sell-Down Order, claimholders that acquire Claims after _____________, 2019 (the "Record Date") in an amount that would entitle them to receive more than 4.5% of the equity of the reorganized Debtor may be subject to

a required sell-down of any Claims acquired after the Record Date in accordance with the Sell-Down Procedures.

9. Entry of this Order shall in no way be deemed a determination of any kind that entry of a Sell-Down Order is necessary or warranted in this case and this Court's review of any request for entry of a Sell-Down Order shall be without regard to entry of this Order.

10. The entry of this Order shall in no way prejudice the rights of any party to oppose the entry of a Sell-Down Order, on any grounds, and all parties' rights are expressly preserved hereby.

11. Notice of the Motion as provided therein shall be deemed good and sufficient notice of the Motion.

12. The requirements set forth in this final order are in addition to the requirements of Bankruptcy Rule 3001(e) and applicable law and do not excuse compliance therewith.

13. This Order shall be immediately effective and enforceable upon its entry.

14. The Debtor is authorized to take all actions necessary to effectuate the relief granted pursuant to this final order in accordance with the Motion.

15. The Court shall retain jurisdiction to hear and determine all matters arising from or related to this Order.

16. Nothing in the Motion or this Order shall be deemed or construed as: (i) an admission as to the validity of any claim against the Debtor; (ii) a waiver of the Debtor's rights to dispute any claim on any grounds; (iii) a promise to pay any claim; or (iv) an implication or admission that any particular claim is a claim for payments authorized pursuant to the Motion.

Dated: ___________________, 2019
Wilmington, Delaware

____
THE HONORABLE BRENDAN L. SHANNON
UNITED STATES BANKRUPTCY JUDGE

EXHIBIT 1 TO FINAL ORDER

Notice of Substantial Equityholder Status

EXHIBIT 2 TO FINAL ORDER

Equity Security Acquisition Notice

EXHIBIT 3 TO FINAL ORDER

Equity Security Disposition Notice