IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

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

DEBTOR'S MOTION FOR ENTRY OF AN ORDER (I) AUTHORIZING IMPLEMENTATION OF A KEY EMPLOYEE INCENTIVE PLAN AND A KEY EMPLOYEE RETENTION PLAN, (II) APPROVING THE TERMS OF THE DEBTOR'S KEY EMPLOYEE INCENTIVE PLAN AND KEY EMPLOYEE RETENTION PLAN, AND (III) GRANTING RELATED RELIEF

The debtor and debtor in possession in the above-captioned case (the "Debtor"), hereby moves (this "Motion") this Court for entry of an order, under sections 105, 363(b) and, to the extent applicable, 503(c)(3) of title 11 of the United States Code (the "Bankruptcy Code") and Rule 6004 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), authorizing, but not directing, the Debtor to implement a proposed key employee incentive plan (the "KEIP"), substantially in the form attached hereto as **Exhibit A**, and a key employee retention plan (the "KERP" and with the KEIP, the "Employee Compensation Plans"), substantially in the form attached hereto as **Exhibit B**. In support of this Motion, the Debtor relies upon and incorporates by reference the *Declaration of Brian Cumberland in Support of Debtor's Motion for Entry of an Order (i) Authorizing Implementation of a Key Employee Incentive Plan and a Key Employee Retention Plan, (ii) Approving the Terms of the Debtor's Key Employee Incentive Plan and Key Employee Retention Plan, and (iii) Granting Related Relief* (the "Cumberland Declaration").

[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.

PRELIMINARY STATEMENT

1. In the ten months leading up to its bankruptcy filing, the Debtor has lost approximately 88% of its employee workforce. Some of this loss was by necessity, with reduced liquidity requiring the Debtor to implement reductions-in-force. The rest—fueled by months of employee uncertainty and a healthy biotech labor market—resulted from significant employee attrition. Since June 2018, 266 employees have left or given notice of their intent to leave, fourteen of whom—including both the Chief Financial Officer and its Vice President of Finance—provided notice since the Debtor's last reduction in force on February 28, 2019. And the Debtor has further suffered the departures of many key employees, including the Head of Technical Operations, the Senior Director of Clinical Development and the Vice President of Clinical Pharmacology.[2]

2. These involuntary losses have come notwithstanding the Debtor's valiant efforts to incentivize employees to stay over the last year. In years past, the Debtor provided annual bonuses paid out in February based on a percentage of base salary if the employee hit their bonus target, which was then multiplied by a company performance factor and a personal performance factor to determine an employee's total bonus. However, in 2018, the Debtor, in an effort to retain personnel, offered certain key employees a bonus of half their annual base salary if they were willing to stay with the Debtor for an additional 6 months. The Debtor also paid employees half of their annual bonus two months ahead of schedule to keep its employees with the company. Despite these incentives, 3 key employees still resigned. Moreover, in 2019, the Debtor agreed to pay mid-year bonuses, at the 100% rate in July, effectively offering employees half of their annual 100% bonus target in July as a retention tool. In the San

[2] The Debtor believes that the buyer of its assets will likely seek to fill these key positions.

Francisco Bay biotech market, however, these incentives were insufficient to deter employees from seeking out and accepting other employment. In fact, emblematic of the retention problems the Debtor has faced and the robust nature of the Bay Area biotech market, one employee recently gave notice and will depart three weeks before receiving a bonus that would have accounted for 50% of their annual salary and another gave notice after seeing the payments that they would have received under the proposed KEIP and KERP.

3. Today, the Debtor has only 36 employees; two weeks from now, it will be just 32. The Debtor cannot afford to lose more employees. Each employee is already filling multiple roles, and is critically necessary to run a successful bankruptcy process. To incentivize its remaining employees to stay, particularly in light of the filing of this Chapter 11 Case, the Debtor engaged Alvarez & Marsal ("A&M") to develop and benchmark Employee Compensation Plans tailored to the Debtor's business, the San Francisco Bay labor market and the demands of this Chapter 11 Case. Thereafter, the Debtor consulted extensively with Silicon Valley Bank, N.A. ("SVB"), its Prepetition Secured Lender and proposed DIP Lender, regarding its need to implement Employee Compensation Plans to encourage employees to remain through the sale process. In addition to the Debtor's Board approving the Debtor's Employee Compensation Plans on April 5, 2019, SVB ultimately provided its consent to fund the Employee Compensation Plans out of sale proceeds ahead of repayment of the DIP Facility, as reflected in Section 2.1.1(c) of the DIP Credit and Security Agreement. SVB's support of these programs and its agreement to permit the KEIP/KERP payments to come first out of sale proceeds is a testament to their necessity.

4. To be sure, the proposed KERP is necessary and essential to minimizing further employee departures and stabilizing the Debtor's operations through the contemplated

sale (the "Sale") of all or substantially all of the Debtor's assets (the "Assets"). The Debtor's proposed KEIP is equally, if not more, essential to properly incentivize senior management to achieve the highest possible value for the Assets by continuing to work with the Debtor's investment banker to market the Assets.

5. As described more fully in the First Day Declaration, the Debtor filed this Chapter 11 Case to maximize the value of its Assets through a Sale. In the time leading up to the Debtor's bankruptcy filing, the Debtor's depleted workforce has been instrumental in maintaining the ongoing business of the Debtor, and thereby maximizing value with respect to the Assets. This process has required a substantial commitment of time and effort on the part of the Debtor's remaining employees and a willingness to continue to work for the Debtor in the face of the uncertainty inherent in chapter 11 proceedings and the sale process. Despite the Debtor's and its employees' efforts to date, further efforts will be necessary to maximize value for all of the Debtor's creditors. The Debtor's employees and management will need to invest substantial time and energy interacting with potential bidders, responding to information requests, and working to increase value.

6. Without approval of the Debtor's proposed Employee Compensation Plans, there is a very real concern that senior executives and key employees will resign. It is therefore critical to the success of the Sale that the Debtor's employees have the incentive to continue their extraordinary efforts, to remain in the Debtor's employ through the Sale, and to work enthusiastically to increase the value of the Assets. Accordingly, the Debtor is seeking approval of the KERP for non-insider employees and the KEIP for identified members of the Debtor's executive management team. The Employee Compensation Plans should be approved.

JURISDICTION AND VENUE

7. This Court has jurisdiction to consider this Motion under 28 U.S.C. §§ 157 and 1334. This is a core proceeding under 28 U.S.C. § 157(b). Venue of this Case and this Motion in this District is proper under 28 U.S.C. §§ 1408 and 1409.

8. The statutory predicates for the relief requested herein are sections 105(a) and 363 of the Bankruptcy Code. The relief is further warranted under Bankruptcy Rule 6004.

9. Pursuant to Rule 9013-1(f) of the Local Rules for the United States Bankruptcy Court for the District of Delaware (the "Local Bankruptcy Rules"), the Debtor consents to the entry of a final judgment or order with respect to this Motion if it is determined that this Court would lack Article III jurisdiction to enter such final order or judgment absent the consent of the parties.

BACKGROUND

10. On April 15, 2019 (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.

11. The Debtor is a biopharmaceutical company focused on the development and commercialization of innovative antibiotic treatments against multi-drug resistant gram-negative infections. It has commenced this Chapter 11 Case to pursue a sale of substantially all of its Assets pursuant to Section 363 of the Bankruptcy Code. Additional details regarding the Debtor's business and the facts and circumstances supporting the relief requested herein are set

forth in *the Declaration of Blake Wise in Support of First Day Relief* [D.I. 3] (the "First Day Declaration") and incorporated herein by reference.[3]

RELIEF REQUESTED

12. By this Motion, the Debtor seeks entry of an order under Bankruptcy Code sections 105, 363(b) and, to the extent applicable, section 503(c)(3): (i) authorizing the implementation of the Debtor's proposed KEIP with respect to payments to certain key insider employees and KERP with respect to retention payments to certain key employees who are not included in the KEIP; (ii) approving the terms of the Employee Compensation Plans; and (iii) granting related relief, including allowing all payments under the Employee Compensation Plans as administrative expenses of the estate.

FACTUAL BASIS FOR RELIEF

A. The Debtor's Historical Bonus and Retention Plans

13. The Debtor has historically provided its employees with bonuses and equity grants on an annual basis. Each employee's bonus was predicated upon a percentage of the employee's base salary, which was then multiplied by a variety of factors including company and personal performance. Additionally, before this year, the Debtor's employees were each provided with equity grants on a yearly basis, which consisted of restricted stock units ("RSUs") and other stock options.

14. As the Debtor began to struggle financially, and was forced to implement reductions in its workforce, it restructured its typical bonuses and equity grants to serve more as "retention tools." For instance, in 2018, the Debtor (i) offered 10 key employees a 6 month salary bonus if they were willing to stay with the Debtor an additional 6 months and (ii) paid

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

employees half of their annual bonus months earlier than scheduled. Despite these incentives which included paying 10 employees "double salary," 3 employees still resigned. The Debtor also agreed to pay employees mid-year bonuses in full in 2019, so that each employee would receive half of their full target annual bonus in July.[4]

15. Further, the Debtor stopped providing its employees with stock options due to the volatility of its stock and stock options generally, choosing instead to issue equity grants in the form of RSUs. The Debtor also provided certain employees with a special RSU grant in the fall of 2018 aimed at increasing retention after a significant reduction in force.

16. Despite adopting these "retention tools" to ensure the Debtor's invaluable employees remained in its employee, resignations continued. The Debtor, hoping to stabilize attrition as it considered a bankruptcy process, hired A&M to develop an employee compensation plan to help stave off further employee departures during a period when every employee is absolutely essential to the success of the Debtor's Chapter 11 Case. By this Motion, the Debtor requests the Court approve those vitally important Employee Compensation Programs.

B. Overview of the A&M Plan

17. As the Debtor prepared to file this Chapter 11 Case, it recognized that to successfully implement a sale process, it needed to develop a plan to retain its remaining employees. The Debtor turned to A&M to help it design a comprehensive plan to motivate and incentivize its employees to remain with and work to maximize value for the Debtor, its estate, its creditors and other parties in interest through the sale process.

---

[4] Because of the chapter 11 filing, the KERP Payments (as defined below) will effectively replace the mid-year bonus.

18. In developing a comprehensive plan for the Debtor, A&M consulted extensively with the Debtor's management, in addition to performing a vigorous benchmarking analysis. A&M gave special consideration to the active and competitive nature of the current biotech labor market in the San Francisco Bay Area, where employment opportunities are abundant and signing bonuses alone can exceed $200,000 for senior executives, $100,000 for mid-level executives and $50,000 for non-executives. In light of the unique circumstances the Debtor faced, A&M recommended the Debtor adopt a two pronged plan that contained: (1) payment of prepetition retention bonuses for certain individuals,[5] and (2) a postpetition KEIP and KERP that, if approved by the Court, would be available to all employees upon consummation of a Sale. A&M suggested, and the Debtor's management agreed, that adopting such a plan would maximize the Debtor's ability to retain employees through the anticipated 60 day sales process. The Debtor's management then worked extensively with A&M to identify those employees who should be included in the plan, and to structure proposed payments to them in a way that would fit within the Debtor's budget. The Debtor's Board of Directors adopted the plan at a meeting held on April 5, 2019. The specifics of the plans are detailed below.

C. Prepetition Retention Payments

19. The A&M plan provided for three categories of prepetition retention bonuses, a follows:

20. **Executive Team Retention Payments:** With respect to executive employees, A&M's retention plan called for prepetition retention bonus payments ranging from 50% to 60% of the executive employees' base salary, totaling in the aggregate $909,160 (the "Executive Team Prepaid Retention Payments"). These payments were made on April 12,

[5] The Debtor describes herein the prepetition retention payments—and its rationale for making them—for purposes of disclosure, but is not herein requesting Court approval or ratification of the same.

2019. Under the prepetition plan, the Executive Team Prepaid Retention Payments are subject to clawback if such executive employee voluntarily resigns or is terminated for cause prior to the earlier of the consummation of the Sale or one year from receiving the Executive Team Prepaid Retention Payments. The Executive Team Prepaid Retention Payments are not subject to clawback if the executive employee leaves due to an involuntary termination other than for cause (i.e., a layoff) (a "Permitted Departure").

21. **Contractual Retention Payment**s: A&M's retention plan also contemplated prepetition retention bonuses for five non-executive employees (the "Contractual Non-Executive Participants") who, in addition to their retention being critical to the continued operations of the Debtor, are entitled to retention payments equal to 50% of their base salary payable on June 1, 2019 pursuant to their employment agreements (the "Contractual Retention Obligations"). In order to incentivize the Contractual Non-Executive Participants to remain in the Debtor's employ through the Sale, the Debtor paid the Contractual Non-Executive Participants a pro rata portion of the Contractual Retention Obligations (the "Contractual Retention Payments") prior to the filing of the Chapter 11 Case, which amounted to $374,495 in the aggregate. If a Contractual Non-Executive Participant voluntarily terminates their employment or is terminated by the Debtor prior to the consummation of the Sale, they will forfeit any right to a KERP Payment (as defined below) but shall retain their Contractual Retention Payments.

22. **Discretionary Non-Executive Retention Payments:** Finally, A&M's retention plan contemplated prepetition retention bonuses for other non-executive employees whose participation in the chapter 11 process was critical. The Debtor identified four non-executive employees as immediately critical to the Debtor in preparing the filing of its Chapter

11 Case and assisting the Debtor to navigate the many challenges it will face in the first few weeks of the Chapter 11 Case (the "Immediately Necessary Non-Executive Participants"). Therefore, the Debtor provided the Immediately Necessary Non-Executive Participants with retention payments prior to the Chapter 11 Case (the "Immediately Necessary Retention Payments") in the amount of $160,000 in the aggregate to ensure they would stay with the Debtor through its bankruptcy filing and the consummation of the Sale of the Debtor's assets.

23. If an Immediately Necessary Non-Executive Participant voluntarily terminates their employment prior to the earlier to occur of the consummation of the Sale of the Debtor's assets or one (1) year from receiving the Immediately Necessary Retention Payment, the Immediately Necessary Non-Executive Participant will forfeit and must return its respective Immediately Necessary Retention Payment and shall not be entitled to a KERP Payment (as defined below).

D. The Key Employee Incentive Plan

i. Overview of the KEIP

24. A&M's plan further contemplated implementation of a Key Employee Incentive Plan for the Debtor's insider employees to be implement during the Chapter 11 Case, as described more fully below.

ii. The KEIP Participants

25. The KEIP is designed to provide incentives to four insider employees (the "KEIP Participants")—the Chief Executive Officer, the General Counsel, the Chief Commercial Officer, and the Chief Business Officer—to achieve a successful Sale for the benefit of all of the Debtor's stakeholders.

26. Each of the KEIP Participants is playing a central role in the chapter 11 process and, in particular, the Debtor's ongoing marketing and sale efforts. Incentivizing the KEIP Participants is critical to ensure that they remain focused on their efforts to successfully guide the Debtor through the bankruptcy process and maximize value for the benefit of all of the Debtor's stakeholders.

iii. The KEIP

27. As the Debtor continues its marketing efforts to solicit the highest and best offer from interested market participants, it is imperative that the Debtor's key personnel is appropriately incentivized to maximize the Sale price to ensure optimum recovery for all stakeholders. Not only have the KEIP Participants continued to fulfill the normal tasks and projects required by the ordinary demands of their employment, but they have been, and will continue to be, required to expend substantial additional time and resources on tasks relating to the implementation of the proposed restructuring, the day-to-day reporting and operational requirements of this Chapter 11 Case, and the ongoing marketing and sales process. This is particularly true given the significant attrition of employees the Debtor has faced in recent months.

28. Awards under the KEIP will be paid out in accordance with the KEIP term sheet (the "KEIP Term Sheet") attached hereto as **Exhibit A**. All of the KEIP Participants will be entitled to incentive payments (the "KEIP Payments"); provided, however, KEIP Payments will only be distributed to the KEIP Participants if the Debtor consummates a Sale that amounts to proceeds (i.e., after bid protection (break-up fee and expense reimbursements) amounts have been deducted) greater than $25 million ("Asset Sale Proceeds").

29. Upon Asset Sale Proceeds amounting to more than $25 million, the amount of each individual's KEIP Payment will be based on (i) the amount of Asset Sale Proceeds above $25 million and (ii) the KEIP Participants' base salaries. Each KEIP Participant will receive a one-time KEIP Payment equal to a percentage of their base salaries for Asset Sale Proceeds amounting to more than $25 million. For Asset Sale Proceeds between $25 million and $30 million, the KEIP Participants will receive a KEIP Payment equal to 1% to 10% of their base salaries to be interpolated linearly from $25 million to $30 million. For every $5 million realized over $30 million for a Sale of the Assets, the KEIP Participants will receive an additional 10% of their base salaries; provided, however, KEIP Payments will be capped at 300% of the KEIP Participants' individual base salaries. For example, the payments to the KEIP Participants upon hypothetical Asset Sale Proceeds of $40 million would total in the aggregate $512,580.

30. The KEIP Payments will be distributed upon the consummation of a Sale of the Assets. Even if the Debtor's assets are sold on a piecemeal basis rather than in a single transaction, KEIP Payments will still be determined and distributed based on the total aggregate value of the Assets.

31. In order to participate in the KEIP, the KEIP Participants are not required to waive or release any prepetition claims against the Debtor nor waive their rights to receive any severance, stock or any other similar compensation upon their exit from the company; provided, however, in the event a KEIP Participant voluntarily resigns or is terminated by the Debtor for cause prior to the consummation of the Sale, they will forfeit any right to a KEIP Payment.

32. It is important to note that the KEIP is not a "pay to stay" retention plan. Instead, the KEIP incentivizes KEIP Participants by tying payments directly to the Asset Sale Proceeds. The KEIP is similarly not a "layup," as evidenced by the fact that the Debtor received no acceptable offers for its assets in its out of court process, and have not secured a stalking horse bidder as of the Petition Date. Accordingly, the KEIP is a true incentive plan that successfully aligns the interests of the Debtor, its employees, and its stakeholders, in that it motivates the KEIP Participants to achieve the highest sale price, which in turn will improve recoveries for the Debtor's creditors.

iv. The KEIP Design is Consistent with the Bankruptcy Market

33. As a general matter, the use of key employee incentive plans is common practice in chapter 11 cases. The structure of the plans varies based on the unique circumstances of each case but the general terms and conditions are consistent with the KEIP proposed by the Debtor, including the metrics and proposed payment amounts set forth therein. To ensure that the KEIP was commensurate with incentive plans developed by similarly–situated companies, A&M analyzed a set of chapter 11 cases that filed for bankruptcy protection, underwent a sale of their assets, implemented key employee incentive plans linked to the results of the sale process while in bankruptcy, and were approved by bankruptcy courts in 2013 or later. A&M identified 20 such cases (the "All Companies Set") involving similarly–situated debtors where proceeds were of a comparable size range to the proceeds that may be realized in this Chapter 11 Case (the "Comparative Set").

34. In evaluating the proposed KEIP, A&M compared the compensation contained in the KEIP to the plans used by the companies in the All Companies Set to assess the Debtor's cost and structure of the KEIP relative to those plans to test the relevant market.

Further, A&M compared the proposed KEIP payments to other incentive plans approved by bankruptcy courts since the enactment of Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 while evaluating incentive plans of companies where (i) the companies were selling their assets, (ii) KEIP Payments were connected to the sale of the companies' assets, and (iii) the incentive plans were approved by bankruptcy courts in 2013 or later. To evaluate the Debtor's proposed KEIP, A&M assumed Asset Sale Proceeds of $40 million, as such proceeds would satisfy the claims of all lenders and creditors.

35. A&M calculated the percentage of Asset Sale Proceeds designated for the KEIP Participants (assuming a sale of $40 million for the Assets) and compared it to the percentage of sale proceeds set aside for incentive plans of similarly-situated companies in bankruptcy at the 25th, 50th, and 75th percentile of the market. The KEIP Payments, at a total cost of $512,580, were found to be 1.28% of the Asset Sale Proceeds, which was lower than the 75th percentile (1.37%) of the market target percentage. Based on the Debtor's KEIP Payments falling below the 75th percentile of the market reference companies, the Debtor's KEIP aggregate costs were found to be reasonable in comparison.

36. In addition, in evaluating the Debtor's executives' potential target total direct compensation ("TDC") opportunity, A&M compared such compensation to that of 18 similarly-situated companies to assess the current market levels of TDC for executives. Further, A&M compared each of the KEIP Participants' TDC, which included the proposed KEIP Payments and KERP Payments (defined below), to the competitive benchmark total TDC for each position at target total compensation levels. A&M then calculated the Debtor's executives' aggregate variance from the 25th, 50th, and 75th percentiles of the market. Compared to the

market, the Debtor's executives' TDC, with retention payments included, was well below the market 25th percentile for each KEIP Participant.

37. Because the proposed payments under the Debtor's KEIP fall within appropriate ranges when compared to other plans designed for similarly-situated companies, the Debtor's KEIP is reasonable and in line with the relevant standard.

E. The Key Employee Retention Plan

i. Overview of the KERP

38. Finally, the A&M plan contemplated implementation of a Key Employee Retention Plan. The Debtor thus seeks to implement the KERP for non-management personnel who are not KEIP Participants, in order to ensure that the Debtor does not suffer significant and costly turnover of essential employees during the chapter 11 process. To develop the KERP, the Debtor's management analyzed its workforce to determine which non-insiders were necessary to a successful restructuring and sale process. Given the depleted state of its workforce and the fact that it would be difficult if not impossible to replace any departing employee, the Debtor determined all non-insiders are critical.

39. The proposed KERP consists of twenty-eight (28) employees (the "KERP Participants" and, together with the KEIP Participants, the "Participants"). None of the KERP Participants are insiders, as that term is defined in section 101(a)(31) of the Bankruptcy Code. Many of the KERP Participants have developed valuable institutional knowledge regarding the Debtor's ongoing business operations, and keeping such employees in their current roles over the near term will be crucial to the successful completion of the Debtor's sale process as well as the efficient administration of this Chapter 11 Case and the Debtor's estate.

40. Awards under the KERP will be paid out in accordance with the KERP term sheet (the "KERP Term Sheet") attached hereto as **Exhibit B**. The collective funds reserved for the KERP Participants will not exceed $1,427,255 (the "Collective Funds"). Of the Collective Funds, each KERP Participant's respective allocation (the "KERP Payment") will be solely based on a percentage of the KERP Participants' base salaries and their continued employment with the Debtor through the earlier of a Permitted Departure or (2) the consummation of the Sale of the Debtor's assets. No other performance metrics will be included to determine the amount of the KERP Payments. Upon the consummation of the Sale of the Debtor's assets, each KERP Participant either remaining employed with the Debtor or subject to a Permitted Departure will receive a retention payment ranging from 20 to 42% of their base salary. In order to participate in the KERP, the KERP Participants are not required to waive or release any prepetition claims against the Debtor nor waive their rights to receive any severance, stock or any other similar compensation upon their exit from the company; provided, however, in the event a KERP Participant voluntarily resigns or is terminated by the Debtor for cause prior to the consummation of the Sale, they will forfeit any right to a KERP Payment.

ii. The KERP Design is Consistent with the Bankruptcy Market

41. Generally, the use of key employee retention plans is common practice in chapter 11 cases. The structure of the plans varies based on the unique circumstances of each case, but the general terms and conditions are consistent with the KERP proposed by the Debtor, including the proposed KERP Payments set forth therein.

42. The KERP covers twenty-eight (28) non-insiders with award amounts equal to 20-42% of each KERP Participant's base salary. The total cost of the program is $1,427,255. To evaluate the KERP, A&M compared such compensation to that of 40 similarly-

situated companies to assess the Debtor's cost and structure of the KERP. A&M compared the proposed KERP payments taken in the aggregate to other retention plans (i) approved by bankruptcy courts in 2013 or later and (ii) containing no more than one hundred (100) participants.

43. A&M calculated the aggregate cost of the KERP in isolation and compared it to the aggregate costs of KERP Payments at the 25th, 50th, and 75th percentile of the market for KERPs with less than one hundred (100) participants that were approved by bankruptcy courts in 2013 or later. In comparing the KERP against other similarly-situated companies, the KERP Payments fell within the 66th percentile of the market. Given that (i) KERP programs for non-insiders are common and (ii) the KERP Payments fell below the 75th percentile of the market reference companies, the KERP design is reasonable.

44. Critically, the KERP Participants are not insiders. Instead, the Key Employees were selected for participation in the KERP because they are *not* members of senior management and are *not* insiders for purposes of the Bankruptcy Code, but are nonetheless critical and practically impossible to replace. They hold titles such as "director," "vice president," or "manager," but, despite their seniority, do not serve on any Debtor's board of directors, take part in the management of the Debtor, nor have sufficient control over corporate policy to be deemed an insider; rather, they hold such titles in name only. The KERP Participants generally do not attend senior management meetings or participate in board meetings or corporate governance, and many of their duties are limited to particular divisions. Further, although the KERP Participants are vital to the Debtor's business, they do not have the ability to influence the direction of the Debtor's business operations. No KERP Participant is a bona fide officer or director of the Debtor, is appointed by the Debtor's board of directors, or is

named executive officer. Each KERP Participant is required to report to a more senior corporate official for approval before taking any significant action with respect to the Debtor's corporate policies or the disposition of significant assets.

45. Thus, none of the KERP Participants may be properly considered "officers" of the Debtor; rather, the KERP Participants are critical employees who have the knowledge and experience to carry out the decisions of management in an efficient and effective manner. The KERP Participants have, in addition to performing their normal job duties, undertaken significant additional tasks and responsibilities, including providing financial and operational information to fulfill the Debtor's reporting requirements, assisting with marketing efforts and responding to diligence requests in connection with the ongoing sale process, and other tasks related to the Chapter 11 Case and ongoing sale process. The KERP Participants will continue to perform these additional tasks during the pendency of this Chapter 11 Case.

46. The sale process that the Debtor has undertaken to maximize value for its stakeholders has a necessary byproduct of creating a great deal of uncertainty for the very company personnel charged with maximizing that value. As a result, it is entirely appropriate to provide benefits to key personnel in order to counterbalance the employment uncertainty and distraction that such a process necessarily engenders. The structure of other key employee retention plans previously approved by this and other courts varies based on the unique circumstances of each case but the general terms and conditions are consistent with the KERP proposed by the Debtor, including the conditions and proposed payment amounts set forth therein. While all remaining employees of the Debtor are receiving a payment under the KEIP and/or KERP, the continued attrition of employees over the last year makes each of these KEIP Participants and KERP Participants vital to the Debtor successfully emerging out of bankruptcy.

LEGAL BASIS FOR RELIEF

A. Authorization of the Employee Compensation Plans are Appropriate Pursuant to Bankruptcy Code Section 363(b)(1).

47. Bankruptcy Code section 363(b) provides, in relevant part, that "[t]he trustee, after notice and a hearing, may use, sell or lease, other than in the ordinary course of business, property of the estate." 11 U.S.C. § 363(b)(1). Under Bankruptcy Code section 363, this Court may approve a debtor's request for relief when the debtor demonstrates a sound business justification for seeking such relief. *See In re Orexigen Therapeutics Inc.*, Case No. 18-10518 (KG) (Bankr. D. Del. Apr. 23, 2018) (approving the Debtor's employee compensation plans based on the Debtor's sound business judgment); *see also Dai-Ichi Kangyo Bank Ltd. v. Montgomery Ward Holding Corp. (In re Montgomery Ward Holding Corp.)*, 242 B.R. 147, 153 (D. Del. 1999) ("In determining whether to authorize the use, sale or lease of property of the estate under [section 363(b)], courts require the debtor to show that a sound business purpose justifies such actions").

48. As set forth above, the Debtor has articulated valid business reasons for the implementation of the Employee Compensation Plans. The Debtor has determined in its reasonable business judgment that implementation of the Employee Compensation Plans will enhance the value of the Debtor's estate and accordingly, is in the best interests of the Debtor's estate and the stakeholders in the Chapter 11 Case. In addition to its normal day-to-day responsibilities managing the Debtor's business and maintaining relationships with its employees, key customers, and key suppliers, the Participants serve as the driving force to bring the Chapter 11 Case to its ultimate resolution. The Participants are being asked to take on considerable additional responsibilities and expend significantly more hours during this Chapter 11 Case.

49. Additionally, as set forth above and more fully in the Cumberland Declaration, payment levels under the KEIP and the KERP are reasonable and were determined based on a thorough analysis of the Debtor's needs and benchmarks performed by A&M. Moreover, the overall costs of the Employee Compensation Plans are reasonable in light of the size of the Debtor's estate, the nature of the Debtor's industry, the competitive biotech labor market and the benefit from a successful sale process resulting from the Participants' efforts. Accordingly, the Debtor believes that valid business reasons exist for the implementation of the Employee Compensation Plans and, thus, that their implementation should be approved.

50. Once a debtor articulates a valid business justification for a particular form of relief, the Court reviews the debtor's request under the "business judgment rule." The business judgment rule has vitality in chapter 11 cases and shields a debtor's management from judicial second-guessing. *Official Comm. of Subordinated Bondholders v. Integrated Res., Inc. (In re Integrated Res., Inc.)*, 147 B.R. 650, 656 (S.D.N.Y. 1992). "The business judgment rule 'is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company.'" *See id.* (quoting *Smith v. Van Gorkom*, 488 A.2d 858, 872 (Del. 1985)).

51. In that regard, courts have found that a debtor's use of reasonable performance bonuses and other incentives for employees is a valid exercise of a debtor's business judgment. *See, e.g.*, *In re Glob. Home Prod., LLC*, 369 B.R. 778, 787 (Bankr. D. Del. 2007) (approving incentive plan as proper exercise of the debtors' business judgment); *In re Am. W. Airlines, Inc.*, 171 B.R. 674, 678 (Bankr. D. Ariz. 1994) (noting that it is the proper use of a debtor's business judgment to propose bonuses for employees who helped propel the debtor

successfully through the bankruptcy process); *In re Interco Inc.*, 128 B.R. 229, 234 (Bankr. E.D. Mo. 1991) (stating that a debtor's business judgment was controlling in the approval of a "performance/retention program").

52. This and other courts have approved similar employee incentive and retention programs as valid exercises of business judgment. *See, e.g.*, *In re Orexigen*, Case No. 18-10518 (KG) (Bankr. D. Del. Apr. 23, 2018) (approving incentive plan tied to sale proceeds); *In re NJOY, Inc.*, No. 16-12076 (CSS) (Bankr. D. Del. Jan. 12, 2017) (approving incentive plan tied to sale process milestones); *In re Hipcricket, Inc.*, No. 15-10104 (LSS) (Bankr. D. Del. Feb. 18, 2015) (approving incentive plan tied to sale proceeds); *In re RadioShack Corp.*, No. 15-10197 (KJC) (Bankr. D. Del. Mar. 4, 2015) (approving key employee incentive plan tied to success of sale process and key employee retention program); *In re Dendreon Corp.*, No. 14-12515 (PJW) (Bankr. D. Del. Dec. 17, 2014) (approving key employee incentive plan with payments based on achieving certain transaction value thresholds); *In re Brookstone Holdings Corp.*, No. 14-10752 (BLS) (Bankr. D. Del. May 12, 2014) (approving key employee retention plan and key employee incentive plan); *In re Synagro Techs., Inc.*, No. 13-11041 (BLS) (Bankr. D. Del. May 13, 2013) (approving key employee incentive plan with payments based on achieving certain valuation thresholds); *In re KaloBios Pharmaceuticals, Inc.*, No. 15-12628 (LSS) (Bankr. D. Del. Feb. 17, 2016) (approving key employee retention plan).

53. In the present case, authorizing the Debtor to provide the Employee Compensation Plans to the Participants will accomplish a similarly sound business purpose. The Debtor has determined that the costs associated with additional postpetition compensation payments pursuant to the Employee Compensation Plans are more than justified by the benefits that the Debtor will realize (and has already realized) by creating appropriate incentives for the

Participants, whose experience, skills and diligent efforts are critical for the Debtor to maximize the value of its business during the sale process—and by the inevitable expense and disruption to the chapter 11 process if Participants were to terminate their employment. Incentivizing the KEIP Participants is particularly crucial to this Debtor given (1) the Debtor's limited liquidity and the necessarily expedited nature of the sale process and (2) that the Debtor will be unable to replace its executive team given the current labor market and Debtor's operational/financial restrictions while in bankruptcy.

B. The KEIP is Incentivizing and Thus Not Governed by Bankruptcy Code Sections 503(c)(1) and 503(c)(2).

54. Bankruptcy Code section 503(c) governs retention, severance and other payments to insiders. By its plain language, section 503(c)(1) of the Bankruptcy Code pertains solely to retention payments to insiders, and section 503(c)(2) of the Bankruptcy Code pertains solely to severance payments to insiders. Neither of these sections apply to performance-based incentive plans such as the KEIP, which only allots payments based on the successful achievement of certain metrics in connection with the sale of the Debtor's assets and does not provide benefits to KEIP Participants simply upon termination of their employment. *See In re Velo Holdings Inc.*, 472 B.R. 201, 208 n.6 (Bankr. S.D.N.Y. 2012) (noting inapplicability of section 503(c)(1) to incentivizing plans); *In re Dana Corp.*, 358 B.R. 567, 576 (Bankr. S.D.N.Y. 2006) (applying section 503(c)(3) of the Bankruptcy Code to evaluate management incentive plan in absence of applicability of sections 503(c)(1) or 501(c)(2) of the Bankruptcy Code).

55. The KEIP is not intended to provide bonuses for retention. In particular, the KEIP comprises only targeted incentive payments to the Debtor's employees who are the most critical to maximizing the value of the Debtor's business as aligned with the restructuring and sale process, which payments require a far higher threshold than merely remaining

employed by the Debtor. Although certain KEIP Participants are "insiders" within the meaning of the Bankruptcy Code, the KEIP has been crafted with great care to ensure the metrics directly incentivize and motivate participants to meet the objectives set forth therein.

56. Moreover, while the KEIP was not crafted with the goal of retaining the KEIP Participants, the fact that the KEIP may encourage the KEIP Participants to remain with the Debtor throughout the Chapter 11 Case should not bar implementation of the KEIP. Indeed, all successful incentive programs have the indirect benefit of incentivizing an employee to remain with the company. *See In re Global Home Prods., LLC*, 369 B.R. 778, 786 (Bankr. D. Del. 2007). The primary purpose of the KEIP is to maximize value for the benefit of the Debtor's estate.

57. Accordingly, the Debtor respectfully submits that sections 503(c)(1) and 503(c)(2) of the Bankruptcy Code do not apply to the KEIP.

C. The KERP Does Not Provide for Payments to Insiders and Thus Is Not Governed by Bankruptcy Code Sections 503(c)(1) and 503(c)(2).

58. As noted above, sections 503(c)(1) and (c)(2) of the Bankruptcy Code mandate restrictions upon retention and severance plans for "insiders." The Bankruptcy Code elsewhere defines "insider" as a "(i) director of the debtor; (ii) officer of the debtor; (iii) person in control of the debtor; (iv) partnership in which the debtor is a general partner; (v) general partner of the debtor; or (vi) relative of a general partner, director, officer, or person in control of the debtor." 11 U.S.C. § 101(31)(B). While a person holding an officer's title is presumptively an officer and thus an insider, that presumption may be rebutted with "evidence sufficient to establish that the person holds the title of an officer in name only and, in fact, does not meet the substantive definition of the same, *i.e.*, he or she is not taking part in the

management of the debtor." *In re Foothills Tex., Inc.*, 408 B.R. 573, 574-75 (Bankr. D. Del. 2009).

59. Certain of the KERP Participants hold titles such as "director," "vice president," or "manager," but they do not take part in the management of the Debtor and they hold such titles in name only, rebutting the presumption that such participants are "insiders" within the meaning of the Bankruptcy Code. The KERP Participants generally do not attend senior management meetings or participate in board meetings or corporate governance, and many of their duties are limited to particular divisions. Their respective scopes of authority are limited, and while their titles reflect their individual roles and functions, the same titles do not confer officer or director status upon the KERP Participants. As a consequence, the KERP Participants are not "insiders" as defined in the Bankruptcy Code, and the Debtor thus maintains that sections 501(c)(1) and (c)(2) do not apply here.

D. The Employee Compensation Plans are Justified by the Facts and Circumstances and Satisfy Bankruptcy Code Section 503(c)(3).

60. Finally, the Employee Compensation Plans components of the Employee Compensation Plans each also satisfy the standard set forth in Bankruptcy Code section 503(c)(3), which provides:

> Notwithstanding subsection (b), there shall neither be allowed, nor paid (3) other transfers or obligations that are outside the ordinary course of business and not justified by the facts and circumstances of the case, including transfers made to, or obligations incurred for the benefit of, officers, managers, or consultants hired after the date of the filing of the petition.

11 U.S.C. § 503(c)(3).

61. Courts have held that the requirement that transfers or obligations be "justified by the facts and circumstances of the case" is a reiteration of the reasonable exercise

of business judgment (or the "business judgment rule") incorporated into Bankruptcy Code section 363(b) (and as set forth above) and under which courts traditionally evaluated executive compensation programs prior to recent amendments to the Bankruptcy Code. *See In re Dana Corp.*, 358 B.R. at 576; *In re Nobex Corp.*, No. 05-20050 (MFW) (Bankr. D. Del. Jan. 12, 2006) (D.I. 194) ("So I do read (c)(3) to be the catch-all and the standard under (c)(3) for any transfers or obligations made outside the ordinary course of business are those that are justified by the facts and circumstances of the case. Nothing more — no further guidance being provided to the Court by Congress, I find it quite frankly nothing more than a reiteration of the standard under 363 . . . under which courts had previously authorized transfers outside the ordinary course of business and that is, based on the business judgment of the debtor, the court always considered the facts and circumstances of the case to determine whether it was justified."); 4 *Collier on Bankruptcy* ¶ 503.17[1] (16th rev. ed. 2017) (noting that non-insider "plans are reviewed under the much easier business judgment test in section 503(c)(3)").

62. In assessing a debtor's business judgment regarding the implementation of incentive programs, courts, including this one, have looked to the factors laid out by Judge Lifland in *Dana* for guidance to evaluate a proposed incentive or retention program under Bankruptcy Code section 503(c)(3). *See, e.g.*, *In re Glob. Home Prod., LLC*, 369 B.R. 778, 785 (Bankr. D. Del. 2007) (applying the *Dana* factors). The *Dana* factors include: (a) whether a reasonable relationship existed between the proposed plan and the desired results; (b) whether the cost of the plan was reasonable in light of the overall facts of the case; (c) whether the scope of the plan was fair and reasonable; (d) whether the plan was consistent with industry standards; (e) whether the debtor had put forth sufficient due diligence efforts in formulating the plan; and

(f) whether the debtor received sufficient independent counsel in performing any due diligence and formulating the plan. *In re Dana Corp.*, 358 B.R. at 576-77.

63. The Employee Compensation Plans satisfy these factors. First, there is a reasonable relationship between the plans' designs and their desired results. In consultation with A&M, after an extensive analysis of the programs implemented in other similarly–situated companies, the Debtor designed and refined the Employee Compensation Plans to motivate and reward Participants for their significant efforts, to ensure that key management personnel continue to manage the Debtor's day to day operations and affairs, and to compensate non-management Participants for the increased demands placed upon them in connection with the chapter 11 process. Specifically, the Employee Compensation Plans will ensure that the Participants are motivated and that the Debtor has the appropriate staff on hand to facilitate an expedited sale of the Debtor's assets, thereby maximizing value for the Debtor's estate and stakeholders.

64. Second, the cost is reasonable in light of the overall facts of this case. A&M engaged in an extensive benchmarking analysis in assisting the Debtor with the design of the KEIP and the KERP. The cost is reasonable and well-justified given the size of the Debtor's business, the competitive nature of the San Francisco Bay biotech labor market, the nature of the Debtor's business and the value that maximization of a Sale process will bring to the estate. SVB's support of the Employee Compensation Plans—and in particular its willingness to permit payment under the plans ahead of repayment of the DIP Facility—is further evidence of the plans' reasonableness.

65. Third, as described in A&M's benchmarking analysis, the Employee Compensation Plans are consistent with industry standards with respect to eligibility, total cost, metrics, and payout timing.

66. Finally, consistent with past practice, the Debtor received independent counsel when designing the Employee Compensation Plans. The plans were formulated in consultation with A&M to ensure the KEIP meets the Debtor's goal of incentivizing the Debtor's key employees and the KERP meets the Debtor's goal of retaining critical non-insider employees. The Employee Compensation Plans were then approved by the Debtor's Board.

67. Accordingly, the Debtor respectfully submits that the Employee Compensation Plans are in the best interests of the Debtor, its creditors, and all parties-in-interest in the Chapter 11 Case.

RESERVATION OF RIGHTS

68. Nothing contained in this Motion or any actions taken by the Debtor pursuant to relief granted in the Order is intended or should be construed as: (a) an admission as to the validity of any particular claim against the Debtor; (b) a waiver of the Debtor's rights to dispute any particular claim on any grounds; (c) a promise or requirement to pay any particular claim; (d) an implication or admission that any particular claim is of a type specified or defined in this Motion; (e) a request or authorization to assume any agreement, contract, or lease pursuant to section 365 of the Bankruptcy Code; (f) a waiver or limitation of the Debtor's rights under the Bankruptcy Code or any other applicable law; or (g) a concession by the Debtor that any liens (contractual, common law, statutory, or otherwise) satisfied pursuant to this Motion are valid, and the Debtor expressly reserved its rights to contest the extent, validity, or perfection or seek avoidance of all such liens. If the Court grants the relief sought herein, any

payment made pursuant to the Court's order is not intended and should not be construed as an admission as to the validity of any particular claim or a waiver of the Debtor's rights to subsequently dispute such claim.

NOTICE

69. The Debtor will provide notice of this Motion to: (i) the Office of the United States Trustee for the District of Delaware; (ii) each of the Debtor's creditors holding the twenty (20) largest unsecured claims as set forth in the list filed with the Debtor's petition; (iii) counsel to SVB in its capacity as Prepetition Lender and DIP Lender (each as defined in the First Day Declaration); and (iv) any party that has requested notice pursuant to Bankruptcy Rule 2002. In light of the fact that no trustee, examiner or creditors' committee has been appointed in this case, the Debtor submits that no further notice need be given.

NO PRIOR REQUEST

70. No previous request for the relief sought herein has been made to this Court or any other court.

CONCLUSION

WHEREFORE, the Debtor respectfully requests that the Court enter an order, substantially in the form annexed hereto as **Exhibit C**, granting the relief set forth herein and such other and further relief as may be just and proper.

[*Remainder of page intentionally left blank*]

April 15, 2019
Wilmington, Delaware

MORRIS, NICHOLS, ARSHT & TUNNELL LLP

/s/ Derek C. Abbott

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
Fax: (302) 658-3989
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
HOGAN LOVELLS US LLP
1999 Avenue of the Stars, Suite 1400
Los Angeles, California 90067
Telephone: (310) 785-4600
Facsimile: (310) 785-4601
richard.wynne@hoganlovells.com
erin.brady@hoganlovells.com

- and -

Christopher R. Bryant (NY 3934973)
Pro hac vice admission pending
John D. Beck (NY 4956280)
Pro hac vice admission pending
HOGAN LOVELLS US LLP
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 A

KEIP Term Sheet

KEY EMPLOYEE INCENTIVE PLAN TERM SHEET

KEIP Objective	The Achaogen, Inc. Key Employee Incentive Plan (the "**KEIP**") is designed to provide incentive payments ("**KEIP Payments**") to certain employees ("**KEIP Participants**") of Achaogen, Inc. (the "**Debtor**") to encourage the achievement of certain performance targets, and to maximize the value of the estate.
Participating Employees	The KEIP Participants are: • Blake Wise, Chief Executive Officer • Gary Loeb, General Counsel • Janet Dorling, Chief Commercial Officer • Liz Bhatt, Acting Chief Business Officer
KEIP Payments	The KEIP Payments will be paid in connection with the Sale of the Debtor's assets.
Structure of Payment	KEIP Payments will only be distributed if the Debtor consummates a Sale that amounts to proceeds to the Debtor (i.e., after bid protection (break-up fee and expense reimbursements) amounts, as applicable, have been deducted) greater than $25 million ("**Asset Sale Proceeds**"). Upon Asset Sale Proceeds amounting to more than $25 million, the amount of each individual's KEIP Payment will be based on (i) the amount of Asset Sale Proceeds above $25 million and (ii) the KEIP Participants' base salaries. Each KEIP Participant will receive a one-time KEIP Payment equal to a percentage of their base salaries if the Asset Sale Proceeds amount to more than $25 million. For Asset Sale Proceeds between $25 million and $30 million, the KEIP Participants will receive a KEIP Payment equal to 1% to 10% of their base salaries to be interpolated linearly from $25 million to $30 million. For every $5 million realized over $30 million for a sale of the Debtor's assets, the KEIP Participants will each receive an additional 10% of their base salaries; provided, however, KEIP Payments will be capped at 300% of the KEIP Participants' individual base salaries. For example, the payments to the KEIP Participants upon hypothetical Asset Sale Proceeds of $40 million would total in the aggregate $512,580. KEIP Payments will be distributed upon the consummation of a sale of the Debtor's assets. Even if the Debtor's assets are sold

	on a piecemeal basis rather than in a single transaction, KEIP Payments will still be determined and distributed based on the total aggregate value of the Debtor's assets.
Effect of Termination of Employment	In the event a KEIP Participant voluntarily resigns or is terminated by the Debtor for cause prior to the consummation of a sale of the Debtor's assets, the KEIP Participant will forfeit any right to a KEIP Payment.
Performance Measurement Period	Covers asset sale for period up to the consummation of the sale of the Debtor's assets.
Payment Period	KEIP Payments are paid out on close of the asset sale.

Exhibit B

KERP Term Sheet

KEY EMPLOYEE RETENTION PLAN TERM SHEET

KERP Objective	The Achaogen, Inc. Key Employee Retention Plan (the "**KERP**") is designed to retain key employees (the "**KERP Participants**") of Achaogen, Inc. (the "**Debtor**") in their current roles over the near term while providing them with financial stability.
Participating Employees	KERP Participants will include twenty-eight (28) employees of the Debtor to be determined by the Debtor's management team, in consultation with its employee compensation financial advisor, and approved by its Board of Directors.
Timing of Payments	Payments under the KERP (the "**KERP Payments**") will be distributed to KERP Participants upon the consummation of the Debtor's assets being sold, as long as they remain employees of the Debtor through the consummation of the Sale.
Payments	The KERP awards key non-insider personnel with payments equal to 20% to 42% of their base salary not to exceed $1,427,255 in the aggregate.
Structure of Payment	The amount of payment received by each of the KERP Participants will be based on their base salaries and continued employment with the Debtor through the earlier of (1) their involuntary termination other than for cause (i.e., a layoff) or (2) the consummation of a sale of the Debtor's assets. No other performance metrics will be included.
Effect of Termination of Employment	In the event a KERP Participant voluntarily resigns or is terminated by the Debtor for cause prior to the consummation of a sale of the Debtor's assets, the KERP Participant will forfeit any right to a KERP Payment.

Exhibit C

Proposed Order

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

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

ORDER (I) AUTHORIZING IMPLEMENTATION OF A KEY EMPLOYEE INCENTIVE PLAN AND A KEY EMPLOYEE RETENTION PLAN, (II) APPROVING THE TERMS OF THE DEBTOR'S KEY EMPLOYEE INCENTIVE PLAN AND KEY EMPLOYEE RETENTION PLAN, AND (III) GRANTING RELATED RELIEF

Upon consideration of the Debtor's motion (the "Motion")[2] for an order (this "Order"), under Bankruptcy Code sections 105(a), 363(b), and 503(c)(3) of title 11 of the United States Code (the "Bankruptcy Code"), authorizing, but not directing, the implementation of the Debtor's proposed key employee incentive plan and key employee retention plan (as described in the Motion, the "Employee Compensation Plans"), filed by Achaogen, Inc., debtor and debtor-in-possession (the "Debtor"), and upon the arguments of counsel and the entire record of this Chapter 11 Case and other matters of which this Court may properly take judicial notice; and upon the Cumberland Declaration and due and sufficient notice of the Motion having been given under the particular circumstances; and it appearing that no other or further notice need be provided; and the Court having jurisdiction to consider the Motion and the relief requested therein in accordance with 28 U.S.C. sections 157 and 1334; and consideration of the Motion and the relief requested therein being a core proceeding in accordance with 28 U.S.C. sections 1408

[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 ascribed to them in the Motion.

and 1409; and a hearing having been held to consider the relief requested in the Motion; and upon the record of the hearing and all proceedings had before the Court; and the Court having found and determined that the relief sought in this Motion is in the best interests of the Debtor, its estate, its creditors and other parties in interest and that the legal and factual bases set forth in the Motion establish just cause for the relief granted herein; and after due deliberation thereon and good and sufficient cause appearing therefor, it is hereby,

ORDERED, ADJUDGED AND DECREED that:

1. The Motion is GRANTED as set forth herein.

2. Implementation of the Employee Compensation Plans is based on the Debtor's sound business judgment and is justified by the facts and circumstances of the Debtor's Chapter 11 Case.

3. Pursuant to Bankruptcy Code sections 105(a), 363(b), and 503(c)(3), the Debtor is authorized to take all necessary actions to implement the Employee Compensation Plans and to make all payments pursuant thereto.

4. The Debtor is hereby authorized to offer and pay eligible employees in accordance with the Employee Compensation Plans.

5. The Debtor is hereby authorized to implement and fund the Employee Compensation Plans in their entirety, and make payments thereunder.

6. The claims of the Participants under the Employee Compensation Plans are entitled to and shall be accorded administrative expense status and priority under Bankruptcy Code sections 503(b)(1)(A) and 507(a)(2).

7. Pursuant to Section 2.1.1(c) of the DIP Credit and Security Agreement and the terms of the Employee Compensation Plans, obligations under the Employee Compensation

Plans shall be paid solely from proceeds of the Sale and ahead of any payments to the DIP Lender on account of the DIP Obligations under the DIP and Security Agreement.

8. The terms and conditions of this Order shall be immediately effective and enforceable upon its entry.

9. The Debtor is authorized to take all actions necessary to effectuate the relief granted pursuant to this Order.

10. The Court shall retain jurisdiction to hear and determine all matters arising from the implementation of this Order.

_________________________, 2019
Wilmington, Delaware

____
UNITED STATES BANKRUPTCY JUDGE