

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re

Achaogen, Inc.,

Debtor.¹

Chapter 11

Case No. 19-10844 (BLS)

**DEBTOR’S MOTION TO SHORTEN NOTICE 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 above-captioned debtor and debtor in possession (the “Debtor”) hereby moves (this “Motion to Shorten”)² pursuant to sections 102 and 105 of title 11 of the United States Code, 11 U.S.C. §§ 101-1532 (as amended, the “Bankruptcy Code”), Rules 2002 and 9006(c) of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), and Rules 6004-1(c) and 9006-1(e) of the Local Rules for the United States Bankruptcy Court for the District of Delaware (the “Local Rules”), for an order, substantially in the form attached hereto as **Exhibit A**, shortening the notice and objection periods 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 “Motion”), and respectfully states 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 Motion.



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 of both key executives and non-executive employees.

2. These involuntary losses have come notwithstanding the Debtor's valiant efforts to incentivize employees to stay. In years past, the Debtor provided bonuses on a yearly basis, but out of fear of losing more employees, the Debtor has taken several measures over the last year to retain its employees. Such measures have included offering additional bonuses (in some cases up to half of employees' annual salary) and paying bonuses ahead of schedule to promote employee morale and retention during this period of financial turmoil. In the San 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; therefore, quickly implementing its KEIP and KERP is essential. Each employee is already filling multiple roles, and is critically necessary to run a successful bankruptcy process. To be sure, the proposed Employee Compensation Plans are not only necessary and essential to minimizing further employee

departures and stabilizing the Debtor's operations through the contemplated sale (the "Sale") of the Debtor's assets (the "Assets"), but are needed on an expedited basis.

4. Without the quick approval of the Debtor's proposed Employee Compensation Plans, there is a very real concern that senior executives and key employees will resign in the first few weeks of the Chapter 11 Case due to the uncertainty inherent in a chapter 11 process and the competitive biotech market in the San Francisco Bay area. It is therefore critical to the success of the Sale that the Debtor's employees understand as soon as possible what compensation they will be entitled to receive during this Chapter 11 Case. 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 on an expedited basis. This Motion to Shorten should be approved to give the Debtor every chance at retaining its employees in the face of a quickly depleting workforce and healthy biotech market. Such relief is essential to the Debtor running a robust sale process that maximizes value for all stakeholders.

JURISDICTION

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

6. Pursuant to Local Rule 9013-1(f), the Debtor consents to the entry of a final order by the Court in connection with this Motion to Shorten to the extent that it is later determined that the Court, absent consent of the parties, cannot enter final orders or judgments consistent with Article III of the United States Constitution.

7. The statutory predicates for the relief sought herein are §§ 102(1) and 105(a) of the Bankruptcy Code, as supplemented by Bankruptcy Rule 9006 and Local Rule 9006-1(e).

BACKGROUND

8. 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.

9. 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.

10. Contemporaneously with this Motion to Shorten, the Debtor filed a Motion to incentivize and retain employees during the uncertainty of the chapter 11 process. By the Motion, the Debtor seeks entry of an order (i) authorizing the implementation of the Debtor’s proposed (a) KEIP to provide certain key insider employees monetary incentives and (b) KERP to provide certain key employees who are not included in the KEIP with payments in an effort to retain its employees; (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.

11. The relevant factual and procedural background is set forth in the Motion, as well as 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"), filed contemporaneously herewith. The facts contained in the Motion and the Cumberland Declaration are incorporated herein by reference as if set forth herein.

RELIEF REQUESTED

12. By this Motion to Shorten, the Debtor requests entry of an order scheduling a hearing on April 30, 2019, or as soon thereafter as the Court is available to consider the Motion. The Debtor further requests that the Court set April 23, 2019 at 4:00 p.m. (ET) as the deadline to object to such relief requested in the Motion.

AVERMENT PURSUANT TO LOCAL RULE 9006-1(e)

13. Pursuant to Local Rule 9006-1(e), the Debtor hereby states that it has contacted the U.S. Trustee prior to filing this Motion to Shorten and the Motion. The U.S. Trustee has not yet expressed a position with respect to the entry of the order approving this Motion to Shorten, but the Debtor intends to speak with the U.S. Trustee again prior to the First Day Hearing in the hopes of resolving any objection or concern the U.S. Trustee may have.

BASIS FOR RELIEF REQUESTED

14. Bankruptcy Code § 102(1) provides that the phrase "after notice and a hearing" requires only such notice and opportunity for a hearing as may be appropriate under the

circumstances. 11 U.S.C. § 102(1). Bankruptcy Code § 105(a) provides that the Court “may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions” of the Bankruptcy Code. 11 U.S.C. § 105(a).

15. Pursuant to Bankruptcy Rule 9006(c), “the court for cause shown may in its discretion with or without motion or notice order the period reduced.” Fed. R. Bankr. P. 9006(c)(1). In exercising such discretion, the court should “consider the prejudice to parties entitled to notice and weigh this against the reasons for hearing the motion on an expedited basis.” *In re Philadelphia Newspapers, LLC*, 690 F.3d 161, 172 (3d Cir. 2012) (noting the commonality of such motions “given the accelerated time frame of bankruptcy proceedings”). Local Rule 9006-1(e) likewise provides for shortened notice “by order of the Court, on written motion . . . specifying the exigencies justifying shortened notice.” Del. Bankr. L.R. 9006-1(e).

16. Local Rule 9006-1(c), as recently amended, provides that unless the Bankruptcy Rules or the Local Rules state otherwise “all motion papers shall be filed and served in accordance with Local Rule 2002-1(b) at least fourteen (14) days prior to the hearing date.” Del. Bankr. L.R. 9006-1(c)(i). Bankruptcy Rule 2002(a)(2) provides that the Debtor must provide at least 21 days’ notice of motions requesting the “proposed use, sale, or lease of property of the estate other than in the ordinary course of business, unless the court for cause shown shortens the time or directs another method of giving notice.” Accordingly, as the Motion seeks to use property of the estate to fund the KEIP and KERP, the Debtor is filing this Motion to Shorten.

17. The Debtor respectfully submits that good cause exists to warrant expedited consideration of the Motion, and that a prompt hearing is in the best interests of the Debtor, its estate and its creditors. Without approval of the Debtor’s proposed Employee

Compensation Plans, there is a very real concern that senior executives and key employees will continue to resign. As described above and in the Motion, the Debtor has lost approximately 88% of its employee workforce in the ten months leading up to its bankruptcy filing. 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.³

18. As a result of these losses, the Debtor now has only 36 employees and has already received notice of four additional employees resigning within the next two weeks. Thus, the Debtor cannot afford to lose more employees. Each employee is already filling multiple roles, and is critically necessary for the Debtor to successfully emerge out of the bankruptcy process. Even if the proposed Employee Compensation Plans are approved, a delayed result may cause additional employees to resign; a result that could be fatal to the Debtor’s restructuring efforts.

19. Moreover, it is critical to the success of the Sale, the process for which the Debtor is also seeking expedited consideration by a separate motion, 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 Debtor’s assets. Specifically, the proposed KERP is necessary and essential to counterbalancing the Debtor’s depleting workforce and stabilizing the Debtor’s operations in the midst of such employee attrition through the contemplated Sale. In the San Francisco Bay biotech market, where large

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

signing bonuses and other incentives are available, retaining key employees and incentivizing senior management by way of the KERP and KEIP is of the utmost importance.

20. For the foregoing reasons, the Debtor respectfully submits that good cause exists for the Court to consider the Motion on an expedited basis.

NOTICE

21. The Debtor has provided notice of this Motion to Shorten to: (a) the Office of the United States Trustee for the District of Delaware; (b) 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; (c) counsel to SVB in its capacity as Prepetition Lender and DIP Lender (each as defined in the First Day Declaration); (d) the Securities and Exchange Commission; (e) the Internal Revenue Service; (f) the United States Department of Justice; (g) all entities known to have expressed a bona fide interest in a transaction with respect to the Assets at any time; (h) all federal, state and local environmental, regulatory or taxing authorities or recording offices which have a reasonably known interest in the relief requested by the Motion; and (i) all parties who have requested notice in this Chapter 11 Case pursuant to Bankruptcy Rule 2002. In light of the nature of the relief requested in this Motion, the Debtor respectfully submits that no further notice is necessary.

WHEREFORE, the Debtor requests entry of an order, substantially in the form annexed hereto as **Exhibit A**, granting the relief requested herein and such other and further relief as is appropriate under the circumstances.

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April 15, 2019
Wilmington, Delaware

MORRIS, NICHOLS, ARSHT & TUNNELL LLP

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Proposed Counsel for Debtor and Debtor in Possession

Exhibit A

Proposed 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)

**ORDER SHORTENING NOTICE OF DEBTOR'S MOTION TO SHORTEN NOTICE
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**

Upon the motion (the "Motion to Shorten")² of the above-captioned debtor and debtor in possession (the "Debtor") for entry of an order shortening notice 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 "Motion"); the Court having reviewed the Motion to Shorten and the Motion, and found that the relief requested in the Motion to Shorten is justified under the circumstances, it is hereby ORDERED that:

1. The Motion to Shorten is GRANTED.
2. The Motion will be considered at a hearing scheduled for April 30, 2019, at 10 a.m. (ET).
3. Objections, if any, to the relief requested in the Motion must be filed and served so as to be received by the Debtor by no later than April 23, 2019, at 4 p.m. (ET).

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 defined herein are used as defined in the Motion to Shorten.

4. This Court retains jurisdiction to construe and enforce the terms of this order.

_____, 2019
Wilmington, Delaware

UNITED STATES BANKRUPTCY JUDGE