

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

In re

Achaogen, Inc.,

Debtor.<sup>1</sup>

Chapter 11

Case No. 19-10844 (BLS)

**DEBTOR’S MOTION TO SHORTEN NOTICE OF DEBTOR’S MOTION FOR (I) AN ORDER PURSUANT TO SECTIONS 105, 363, 364, 365 AND 541 OF THE BANKRUPTCY CODE, BANKRUPTCY RULES 2002, 6004, 6006 AND 9007 AND DEL. BANKR. L.R. 2002-1 AND 6004-1 (A) APPROVING BIDDING PROCEDURES FOR THE SALE OF SUBSTANTIALLY ALL ASSETS OF THE DEBTOR; (B) APPROVING PROCEDURES FOR THE ASSUMPTION AND ASSIGNMENT OR REJECTION OF DESIGNATED EXECUTORY CONTRACTS AND UNEXPIRED LEASES; (C) SCHEDULING THE AUCTION AND SALE HEARING; (D) APPROVING FORMS AND MANNER OF NOTICE OF RESPECTIVE DATES, TIMES, AND PLACES IN CONNECTION THEREWITH; AND (E) GRANTING RELATED RELIEF; (II) AN ORDER (A) APPROVING THE SALE OF THE DEBTOR’S ASSETS FREE AND CLEAR OF CLAIMS, LIENS, AND ENCUMBRANCES; AND (B) APPROVING THE ASSUMPTION AND ASSIGNMENT OR REJECTION OF EXECUTORY CONTRACTS AND UNEXPIRED LEASES; AND (III) CERTAIN RELATED RELIEF**

The above-captioned debtor and debtor in possession (the “Debtor”) hereby moves (this “Motion to Shorten”) 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 (I) An Order Pursuant to Sections 105, 363, 364, 365 and 541 of the Bankruptcy Code, Bankruptcy Rules*

<sup>1</sup> The last four digits of the Debtor’s federal tax identification number are 3693. The Debtor’s mailing address for purposes of this Chapter 11 Case is 1 Tower Place, Suite 400, South San Francisco, CA 94080.



2002, 6004, 6006 and 9007 and Del. Bankr. L.R. 2002-1 and 6004-1 (A) Approving Bidding Procedures for the Sale of Substantially All Assets of the Debtor; (B) Approving Procedures for the Assumption and Assignment or Rejection of Designated Executory Contracts and Unexpired Leases; (C) Scheduling of Notice of Respective Dates, Times, and Places in Connection Therewith; and (E) Granting Related Relief; (II) An Order (A) Approving the Sale of the Debtor's Assets Free and Clear of Claims, Liens, and Encumbrances; and (B) Approving the Assumption and Assignment or Rejection of Executory Contracts and Unexpired Leases; and (III) Certain Related Relief (the "Bidding Procedures Motion"),<sup>2</sup> and respectfully states as follows:

**PRELIMINARY STATEMENT**

1. Achaogen is committed to fighting what are commonly referred to as "superbugs" – bacterial infections that have developed ways to resist treatment by even the most potent available antibiotics. Achaogen designed its lead product, ZEMDRI® (plazomicin), to fight what the Center for Disease Control calls a "nightmare bacteria" and has it listed as the highest category threat of "urgent." Additionally, Achaogen is in the process of developing C-Scape, an orally administered antibiotic for treatment of patients suffering from cUTI caused by MDR bacteria. However, despite Achaogen's belief that these drugs can save lives for patients who may literally have no alternative, Achaogen is continuing to face an immediate liquidity crisis and needs to consummate a quick sale process so that its drug products can continue to be administered to patients in need.

2. Since 2007, Achaogen has invested significant efforts and financial resources into the development of ZEMDRI, which was only made available for order on July

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<sup>2</sup> Terms used, but not defined herein, shall have the meanings ascribed to them in the Bidding Procedures Motion or Bidding Procedures, as applicable.

20, 2018. Due to the cost of ZEMDRI's clinical development and research, Achaogen (as is typical for biotech companies) has experienced losses since its inception. As of December 31, 2018, Achaogen had an accumulated deficit of \$559.4 million. Achaogen continues to incur losses, and its ability to successfully transition to profitability is dependent upon obtaining financial infusions to drive the commercialization of ZEMDRI to profitability, as well as to develop additional products, such as C-Scape.

3. In the past year, there has been a dramatic downturn in the availability of financing from both the debt and equity markets for companies in the anti-infective field, based in part on the withdrawal from the space by certain large pharmaceutical companies. This has resulted in a "big pharma flight" whereby continued anti-infective research, development and commercialization has created significant challenges for early-stage biotech companies seeking to develop and commercialize novel and much needed drugs in this sector, as opportunities for partnerships, joint R&D relationships, and merger/acquisition transactions have diminished. This sector-wide trend has negatively affected Achaogen in particular because it has reached the point in its life cycle where it needs substantial capital infusion to drive commercialization of its recently FDA approved drug, ZEMDRI.

4. Faced with these market hurdles, and despite its considerable efforts, Achaogen has been unable to raise sufficient additional capital to allow it to continue to commercialize ZEMDRI, obtain regulatory approval for plazomicin in Europe, develop C-Scape and other new products and, ultimately, avoid defaulting under the Prepetition Term Loan. Challenged with a budget deficit and low cash reserves, Achaogen began to focus on reducing operating costs, which unfortunately has led to Achaogen's work force being reduced to its bare essential employees – those necessary to operate its business plan, and maximize the value of the

ongoing business operations. Achaogen has only 36 full-time employees as of the Petition Date, down from 298 in June 2018, with another 4 employees scheduled to leave within the next two weeks. The Debtor cannot afford to lose more employees. The reduction in personnel has further exacerbated Achaogen's liquidity crisis, as it may not be able to effectively support, develop, manufacture and commercialize ZEMDRI to generate meaningful revenue with such a team of employees that is quickly depleting.

5. Achaogen, in addition to implementing cost-cutting efforts, engaged an investment banker, Evercore Group LLP ("Evercore"), and restructuring professionals, Meru, LLC, in hopes of maintaining liquidity while bridging the company to profitability. Achaogen and Evercore identified, and then met with, numerous potential parties for such a transaction beginning in November 2018. A virtual data room was made available containing extensive information about Achaogen, including documents describing Achaogen's business and financial results in considerable detail, and potential purchasers had the opportunity to conduct due diligence via the virtual data room, as well as through meetings with Achaogen management.

6. Achaogen and Evercore ran a marketing process that targeted strategic partners, merger-of-equal candidates and peripheral candidates (ex-U.S. buyers, parties without direct complementary assets, lagging parties, etc.). In total, Evercore contacted 75 potential buyers, including financial buyers, privately-held specialty pharmaceutical companies, small publicly-traded infectious disease companies and a number of publicly-traded pharmaceutical companies. Approximately 21 of the parties Evercore contacted received process letters, and 19 executed NDAs. Of the 19 parties that executed NDAs, all parties received management presentations and 15 received access to the virtual data room.

7. However, despite the Debtor's and Evercore's valiant effort to run a successful marketing process outside of bankruptcy, Achaogen was unable to find a suitable out-of-court buyer or a party willing to set a floor as a stalking horse bidder. In the meantime, its liquidity continued to decline at a rapid rate.

8. Achaogen ultimately concluded that given the significant challenges in achieving positive free cash flows in the near term, the business likely would not be viable on a stand-alone basis absent a strategic transaction or a restructuring of its debt. And given the results of its recent marketing process, Achaogen had low-confidence that it could consummate any strategic transaction out of court given its limited available liquidity. After extensive discussions with its prepetition secured lender, Silicon Valley Bank, and among its board of directors, Achaogen determined that a chapter 11 filing with the goal of selling substantially all of the Debtor's assets as a going concern offered the best path forward to maximize value for the benefit of its stakeholders.

9. The Debtor has secured a debtor-in-possession facility from Silicon Valley Bank that will provide liquidity to run an 8.5 week process in this Chapter 11 Case. With the Debtor's employment of Cassel Salpeter & Co., LLC, as Evercore's replacement following the failed prepetition marketing process, the Debtor is hopeful that their combined efforts will result in securing a purchaser of the Debtor's assets and possibly a stalking horse bidder. However, speed is critical and of the utmost importance in pursuing a sale of the Debtor's assets for two reasons. First, despite Silicon Valley Bank's provision of DIP financing in this Chapter 11 Case, the Debtor's liquidity is significantly limited, requiring the Debtor to close a sale within 8.5 weeks of the filing. The Debtor thus believes it is important to provide potential bidders with clarity of to the process as soon as possible. Second, there is a very real concern that additional

employees could resign in the immediate future even if the proposed Employee Compensation Plans (as defined therein) are eventually approved. Accordingly, the sale process must commence so the Debtor can effectuate its proposed Employee Compensation Plans while its knowledgeable, effective and irreplaceable workforce, who are essential to the sale process, remains with the Debtor.

10. Therefore, this Motion to Shorten should be approved in order to offset the Debtor's liquidity crisis while preserving the value of the Debtor's assets to the benefit of the Debtor, its estate, and its creditors.

### **JURISDICTION**

11. 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.

12. Pursuant to Local Rule 9013-1(f), the Debtor consents to the entry of a final order by the Court 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.

13. 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**

14. On April 15, 2019 (the "Petition Date"), the Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code thereby commencing this case (the

“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 (“Committee”) has been appointed in this Chapter 11 Case.

15. 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 *Declaration of Blake Wise in Support of First Day Relief* [D.I. 3] (the “First Day Declaration”) and the Bidding Procedures Motion, both of which are incorporated herein by reference.

16. By the Bidding Procedures Motion, the Debtor seeks, in part, the entry of the Bidding Procedures Order, thereby (a) approving the Bidding Procedures in connection with the sale of all or substantially all of the Debtor’s assets, by which the Debtor will solicit and select the highest or otherwise best offer for the purchase of the Purchased Assets and assumption of the Assumed Liabilities; (b) approving various forms and the manner of notice of respective dates, times and places in connection therewith; (c) approving the Assignment and Rejection Procedures; (d) scheduling the Auction and the date and time of the Sale Hearing; (e) authorizing the Debtor to (i) potentially designate a Stalking Horse Bidder in the Debtor’s business judgment (upon consultation with Silicon Valley Bank and the Committee, as applicable) and, upon such designation, the ability to seek Bankruptcy Court approval of any Bid Protections on an emergency basis; and (f) granting related relief.

**RELIEF REQUESTED**

17. By this Motion to Shorten, filed out of an abundance of caution, the Debtor requests entry of an order scheduling a hearing on April 30, 2019 at 10:00 a.m. (ET), or as soon thereafter as the Court is available to consider the Bidding Procedures Order proposed by the Bidding Procedures 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 Bidding Procedures Motion.

**AVERMENT PURSUANT TO LOCAL RULE 9006-1(e)**

18. 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 Bidding Procedures Motion. The U.S. Trustee has not yet expressed a position with respect to 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 hopes of resolving any objection or concern the U.S. Trustee may have.

**BASIS FOR RELIEF REQUESTED**

19. 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).

20. Pursuant to Federal Rule of Bankruptcy Procedure 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).

21. 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). With respect to the Bidding Procedures Order, the Debtors submit that the Bankruptcy Rules and the Local Rules do not “state otherwise” and the default 14-day notice period applies.

22. Additionally, with respect to motions seeking approval of bidding and sale procedures, Local Rule 6004-1(c) provides that: “[t]he Court will only schedule a hearing to consider approval of bidding and sale procedures in accordance with the notice procedures set forth in Del. Bankr. L.R. 9006-1, unless the requesting party files a motion to shorten notice which may be heard at the first hearing in the case and presents evidence at that hearing of compelling circumstances.” Del. Bankr. L.R. 6004-1(c).

23. The Debtor respectfully submits that because the requested hearing date for the Court to consider the Bidding Procedures Order will be at least fourteen days following service of the Bidding Procedures Motion, shortened notice is not required. Although a longer notice period is contemplated by Bankruptcy Rule 2002(a)(2) for the sale portion of the Motion, the Debtor respectfully submits that Bankruptcy Rule 2002(a) does not apply to the relief

requested in the Bidding Procedures Order. Indeed, the Bidding Procedures Order does not seek approval of “a proposed use, sale, or lease of property of the estate other than in the ordinary course of business.” Rather, the Bidding Procedures Order would establish the procedural framework under which a sale would take place.

24. Nonetheless, the Debtor files this Motion to Shorten out of an abundance of caution and respectfully submits that, to the extent an order shortening notice is required for the Bidding Procedures Order to be heard on April 30, 2019 or as soon thereafter as the Court is available, good cause and compelling circumstances exist warranting expedited consideration of the Bidding Procedures Order and that a prompt hearing is in the best interests of the Debtor, its estate and its creditors.

25. As described in the Bidding Procedures Motion and First Day Declaration, although Achaogen’s out-of-court sale process did not yield any acceptable bids, many parties have expressed interest in bidding at any potential 363 auction sale, whereby Achaogen could pursue a sale of its assets free and clear of existing liabilities. Accordingly, Achaogen determined that the best course of action to maximize the value of the company and its assets is to pursue a sale process in this Chapter 11 Case.

26. Speed is critical, however, in pursuing the sale of the Debtor’s assets because, as outlined in the First Day Declaration, the Debtor is facing an immediate liquidity crisis. Despite Silicon Valley Bank’s provision of DIP financing in this Chapter 11 Case, the Debtor’s liquidity is severely limited. The Debtor only has enough cash available to run a 60 day sale process, as a sale of the Debtor’s assets needs to close within 8.5 weeks of the Petition Date; therefore, providing potential bidders with clarity regarding the sale process needs to be done on

an expedited basis. Thus, it is imperative that the sale process is commenced as quickly as possible to maximize value for the Debtor's deteriorating estate.

27. Moreover, as described in the *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 Debtors' Key Employee Incentive Plan and Key Employee Retention Plan, and (III) Granting Related Relief*, filed contemporaneously herewith, 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.<sup>3</sup> There is a very real concern that additional employees could resign in the immediate future even if the proposed Employee Compensation Plans (as defined therein) are eventually approved. Accordingly, the sale process must commence so the Debtor can effectuate its proposed Employee Compensation Plans while its knowledgeable, effective and irreplaceable workforce, who are essential to the sale process, remains with the Debtor.

28. Moreover, the Debtor, Silicon Valley Bank and Cassel believe that an expedited consideration of the Bidding Procedures Order is crucial to maximizing value for the estate as the more the sale process is delayed, the more likely the Purchased Assets will deteriorate in value. Should the sale process become significantly delayed, it is possible the Debtor would have no choice but to abandon the pursuit of a going concern sale of the Purchased

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

Assets and instead immediately pivot to a full liquidation of the Debtor's estate. Such an outcome for this Chapter 11 Case would harm the estate and the Debtor's creditors. Accordingly, an extended sale timeline will not benefit the estate, and thus, the Debtor respectfully submits that it is important to move forward with the entry of the Bidding Procedures Order as expeditiously as possible. Therefore, compelling business reasons justify expedited consideration.

**NOTICE**

29. 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 Silicon Valley Bank 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 Purchased 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 to Shorten, 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.

April 15, 2019  
Wilmington, Delaware

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

*/s/ Derek C. Abbott*

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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.<sup>1</sup>

Chapter 11

Case No. 19-10844 (BLS)

**ORDER SHORTENING NOTICE OF DEBTOR'S MOTION FOR (I) AN ORDER PURSUANT TO SECTIONS 105, 363, 364, 365 AND 541 OF THE BANKRUPTCY CODE, BANKRUPTCY RULES 2002, 6004, 6006 AND 9007 AND DEL. BANKR. L.R. 2002-1 AND 6004-1 (A) APPROVING BIDDING PROCEDURES FOR THE SALE OF SUBSTANTIALLY ALL ASSETS OF THE DEBTOR; (B) APPROVING PROCEDURES FOR THE ASSUMPTION AND ASSIGNMENT OR REJECTION OF DESIGNATED EXECUTORY CONTRACTS AND UNEXPIRED LEASES; (C) SCHEDULING THE AUCTION AND SALE HEARING; (D) APPROVING FORMS AND MANNER OF NOTICE OF RESPECTIVE DATES, TIMES, AND PLACES IN CONNECTION THEREWITH; AND (E) GRANTING RELATED RELIEF; (II) AN ORDER (A) APPROVING THE SALE OF THE DEBTOR'S ASSETS FREE AND CLEAR OF CLAIMS, LIENS, AND ENCUMBRANCES; AND (B) APPROVING THE ASSUMPTION AND ASSIGNMENT OR REJECTION OF EXECUTORY CONTRACTS AND UNEXPIRED LEASES; AND (III) CERTAIN RELATED RELIEF**

Upon the motion (the "Motion to Shorten") of the above-captioned debtor and debtor in possession (the "Debtor") for entry of an order shortening notice of *Debtor's Motion for (I) An Order Pursuant to Sections 105, 363, 364, 365 and 541 of the Bankruptcy Code, Bankruptcy Rules 2002, 6004, 6006 and 9007 and Del. Bankr. L.R. 2002-1 and 6004-1 (A) Approving Bidding Procedures for the Sale of Substantially All Assets of the Debtor; (B) Approving Procedures for the Assumption and Assignment or Rejection of Designated Executory Contracts and Unexpired Leases; (C) Scheduling of Notice of Respective Dates, Times, and Places in Connection Therewith; and (E) Granting Related Relief; (II) An Order (A) Approving*

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<sup>1</sup> The last four digits of the Debtor's federal tax identification number are 3693. The Debtor's mailing address for purposes of this Chapter 11 Case is 1 Tower Place, Suite 400, South San Francisco, CA 94080.

*the Sale of the Debtor's Assets Free and Clear of Claims, Liens, and Encumbrances; and (B) Approving the Assumption and Assignment or Rejection of Executory Contracts and Unexpired Leases; and (III) Certain Related Relief* (the "Bidding Procedures Motion"); the Court having reviewed the Motion to Shorten and the Bidding Procedures 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 Bidding Procedures Order 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 Bidding Procedures Motion regarding the Bidding Procedures Order 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).
4. This Court retains jurisdiction to construe and enforce the terms of this order.

\_\_\_\_\_, 2019  
Wilmington, Delaware

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UNITED STATES BANKRUPTCY JUDGE