

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re

Chapter 11

Achaogen, Inc.

Case No. 19-10844 (BLS)

Debtor.¹

Re: D.I. 550

MOTION TO SHORTEN NOTICE OF DEBTOR’S MOTION FOR ENTRY OF AN ORDER (I) APPROVING THE SALE OF THE CHINA PURCHASED ASSETS OF THE DEBTOR TO XUANZHU (HK) BIOPHARMACEUTICAL LIMITED FREE AND CLEAR OF LIENS, ENCUMBRANCES, CLAIMS AND INTERESTS AND (II) GRANTING RELATED RELIEF

Achaogen, Inc., as debtor and debtor in possession (the “Debtor”) in the above-captioned chapter 11 case (the “Chapter 11 Case”), respectfully submits this motion (the “Motion to Shorten”) for entry of an order, substantially in the form attached hereto as **Exhibit A** (the “Proposed Order”), shortening notice of the *Debtor’s Motion for Entry of an Order (I) Approving the Sale of the China Purchased Assets of the Debtor to Xuanzhu (HK) Biopharmaceutical Limited Free and Clear of Liens, Encumbrances, Claims and Interests and (II) Granting Related Relief* (the “Sale Motion”)². In support of this Motion to Shorten, the Debtor represents 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 548 Market Street, #70987, San Francisco, California 94104-5401.

² Capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Sale Motion.



JURISDICTION

1. This Court has jurisdiction over this Motion to Shorten pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

2. Pursuant to Rule 9013-1(f) of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware (the “Local Rules”), 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.

3. The statutory predicates for the relief sought herein are sections 102(1) and 105(a) of title 11 of the United States Code (the “Bankruptcy Code”), as supplemented by Rule 9006 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”) and Local Rule 9006-1(e).

BACKGROUND

4. 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 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. An official committee of unsecured creditors (the “Committee”) was appointed in this Chapter 11 Case on April 23, 2019. No trustee or examiner has been appointed in this Chapter 11 Case.

5. A description of the Debtor’s business and the facts and circumstances leading to this Chapter 11 Case are set forth in the *Declaration of Blake Wise in Support of First Day Relief* [D.I. 3] (the “First Day Declaration”) and are incorporated herein by reference.

6. Following the Debtor's extensive postpetition marketing process, the Debtor filed the *Notice of Completion of Auction and Selection of Successful Bidder* [D.I. 266] (the "Notice of Auction Results"), which, among other things, designated Qilu Antibiotics Pharmaceutical Co., Ltd. ("Qilu") as the Successful Bidder for the Debtor's China License Rights (as defined in the Cipla Plazomicin Sale Agreement) and Cipla USA Inc. ("Cipla") as the Back-up Bidder.

7. On or about June 20, 2019, the Debtor entered into an asset purchase agreement with Cipla (the "Cipla Plazomicin Sale Agreement") for the global rights to ZEMDRI (Plazomicin) and the Debtor's assets related thereto, subject to a license of the China Assets (as defined in the Stipulation) to Qilu. In order to effectuate the Debtor's license of the China Assets to Qilu, the Cipla Plazomicin Sale Agreement provided that the Debtor, as licensor, would enter into a license agreement with Qilu—or, if requested by the Debtor, another third party—for the China Assets (the "License Agreement"), and that upon the payment by Qilu of a one-time licensing fee to the Debtor and the effectiveness of the License Agreement, the Debtor would immediately assign to Cipla, and Cipla would immediately assume, the rights and only those obligations of the Debtor, as licensor, under the License Agreement.

8. On July 23, 2019, the Court entered an order (the "Cipla Sale Order" and with the Cipla Plazomicin Sale Agreement, the "Cipla Sale Documents") approving the Cipla Plazomicin Sale Agreement [D.I. 371]. The Debtor and Cipla consummated the transaction the same day.

9. Although the Debtor worked diligently to negotiate a license agreement with Qilu for the China Assets, Qilu ultimately refused to consummate the transaction. Cipla also failed to close its respective transaction for the China Assets. As a result, the Debtor has spent the last few months seeking out a potential third party purchaser in an effort to monetize the China Assets.

10. In its effort to consummate an alternative transaction of the China Assets, the Debtor has engaged in good faith negotiations with Xuanzhu (HK) Biopharmaceutical Limited (“Xuanzhu”) for the sale of the China Assets. As a result of the negotiations, Xuanzhu presented a written proposal to the Debtor to purchase (rather than license) the assets, which consist of certain of the Debtor’s intellectual property and technical rights (the “Licensed IP”) for the Plazomicin, including synthesis, formulations and intermediates thereof and any products incorporating the Plazomicin, within the Territory of PRC, Hong Kong, Macau and Taiwan (the “China Purchased Assets”).

11. On December 29, 2019, the Debtor entered into an asset purchase agreement with Xuanzhu memorializing the terms and conditions for the purchase and sale of the China Purchased Assets (the “Xuanzhu Sale Agreement”).

12. In connection with the Xuanzhu Sale Agreement, the Debtor, Cipla and Xuanzhu negotiated that certain *Stipulation Amending the Cipla Sale Documents* (the “Stipulation”) in order to rescind the transfer of the China Assets that took place under the Cipla Sale Documents and allow the Debtor to transfer the assets to Xuanzhu. Specifically, the Stipulation provides that so long as (i) the Court approves the Xuanzhu Sale Agreement and the Stipulation and (ii) the transactions under the Xuanzhu Sale Agreement close (the “Xuanzhu Closing”), then immediately prior to the Xuanzhu Closing, the sale and transfer of the portion of the China Assets that occurred under the Cipla Plazomicin Sale Agreement shall be automatically rescinded in their entirety and shall have no further force or effect (the “China Purchased Assets Rescission”). As a result of the China Purchased Assets Rescission, the Debtor will be able to transfer the China Purchased Assets to Xuanzhu.

13. The Debtor believes the Xuanzhu Sale Agreement and the Stipulation will maximize value for the estate and is in the best interests of the Debtor, its creditors, and other parties in interest.

RELIEF REQUESTED

14. By this Motion to Shorten, the Debtor respectfully requests that the Court enter the Proposed Order (a) shortening notice with respect to the Sale Motion; (b) scheduling a hearing on the Sale Motion for **January 9, 2020 at 10:30 a.m. (ET)**; (c) requiring written objections to the Sale Motion to be filed on or before **January 7, 2020 at 12:00 p.m. (ET)**; and (d) granting such other relief as may be just and proper.

AVERTMENT PURSUANT TO LOCAL RULE 9006-1(e)

15. In accordance with Local Rule 9006-1(e), prior to filing this Motion to Shorten and the Sale Motion, the Debtor notified the Office of the United States Trustee for the District of Delaware (the “U.S. Trustee”), the Committee, Silicon Valley Bank, N.A. (the “DIP Lender”), the Department of Health and Human Services (“HHS”), and Cipla. It is the Debtor’s understanding that the Committee, DIP Lender, and Cipla do not object to having the Sale Motion heard on shortened notice. As of the time of filing, the U.S. Trustee and HHS had not yet responded to the Motion to Shorten or Sale Motion.

BASIS FOR RELIEF REQUESTED

16. 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).

17. Under Bankruptcy Rule 9006, the Court may order time periods set by the Bankruptcy Rules to be reduced “for cause shown.” Fed. R. Bankr. P. 9006.

18. Bankruptcy Rule 2002(a)(2) requires twenty-one days’ notice of “a 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.” Fed. R. Bankr. P. 2002(a)(2).

19. 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 Phila. 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).

20. The Debtor respectfully submits that cause exists to shorten notice of the Sale Motion. Court approval of the Sale Motion on an expedited basis will allow the Debtor to acquire crucial funds for, among other things, the payment of its creditors, professionals, and administrative expenses. The Debtor has conducted three marketing processes in connection with the China Purchased Assets—one prepetition and two postpetition. The latest marketing process, following Qilu’s and Cipla’s failure to consummate their respective sale transactions, resulted in interest from only five parties, with Xuanzhu being the sole party to provide an acceptable bid in terms of purchase price and closing timeframe. In light of the Debtor’s exhaustive marketing process of the China Purchased Assets and the Debtor’s current state of

affairs, the Debtor believes that the Xuanzhu Sale Agreement and related Stipulation present the best opportunity for the Debtor to monetize the China Purchased Assets and maximize value for the Debtor's estate and its creditors. The relief requested in this Motion to Shorten will permit the Debtor to capitalize on such value quickly and move forward with pursuing a plan of liquidation to the benefit of the Debtor's stakeholders.

21. For the foregoing reasons, the Debtor respectfully submits that allowing the Sale Motion to be considered on shortened notice is reasonable and appropriate under the circumstances.

NOTICE

22. Copies of this Motion to Shorten have been served upon the following by overnight delivery, hand delivery and/or email: (a) the U.S. Trustee; (b) Xuanzhu; (c) the Committee; (d) the DIP Lender; (e) Cipla; (f) Qilu; (g) HHS; and (h) any other party that has requested notice pursuant to Local Rule 2002-1(b). The Debtor respectfully submits that no further notice of this Motion to Shorten is required under the circumstances.

CONCLUSION

WHEREFORE, the Debtor requests entry of the Proposed Order granting the relief requested herein and such other and further relief as is appropriate under the circumstances.

Dated: December 29, 2019
Wilmington, Delaware

MORRIS, NICHOLS, ARSHT & TUNNELL LLP

/s/ Paige N. Topper

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Counsel for Debtor and Debtor in Possession

Exhibit A

Proposed Order

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FOR THE DISTRICT OF DELAWARE**

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Debtor.¹

Chapter 11

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Re: D.I. ____

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ORDER (I) APPROVING THE SALE OF THE CHINA PURCHASED
ASSETS OF THE DEBTOR TO XUANZHU (HK) BIOPHARMACEUTICAL
LIMITED FREE AND CLEAR OF LIENS, ENCUMBRANCES,
CLAIMS AND INTERESTS AND (II) GRANTING RELATED RELIEF**

Upon the motion (the "Motion to Shorten")² of the Debtor for entry of an order shortening notice of the *Debtor's Motion for Entry of an Order (I) Approving the Sale of the China Purchased Assets of the Debtor to Xuanzhu (HK) Biopharmaceutical Limited Free and Clear of Liens, Encumbrances, Claims and Interests and (II) Granting Related Relief* (the "Sale Motion"); and the Court having reviewed the Motion to Shorten and the Sale Motion; this Court having jurisdiction to consider the Motion to Shorten and the relief requested therein in accordance with 28 U.S.C. §§ 157 and 1334; and having 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 as set forth herein.

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 548 Market Street, #70987, San Francisco, California 94104-5401.

² Capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Motion to Shorten.

2. The Sale Motion will be considered at a hearing scheduled for **January 9, 2020 at 10:30 a.m. (ET)**.

3. Objections, if any, to the relief requested in the Sale Motion must be filed and served so as to be received by no later than **January 7, 2020 at 12:00 p.m. (ET)**.

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

Dated: _____
Wilmington, Delaware

THE HONORABLE BRENDAN L. SHANNON
UNITED STATES BANKRUPTCY JUDGE

Exhibit A

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