

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

In re:

ATHENEX, INC., et al.,

Debtors.¹

Chapter 11

Case No. 23-90295 (DRJ)

(Jointly Administered)

**DECLARATION OF NICHOLAS K. CAMPBELL IN SUPPORT
OF DEBTORS' EMERGENCY MOTION FOR ENTRY OF AN ORDER (I)
APPROVING DISPOSITION OF CERTAIN ESTATE INTERCOMPANY
CLAIMS AND EQUITY INTERESTS IN CONNECTION WITH WIND DOWN OF
FOREIGN OPERATIONS; (II) AUTHORIZING THE DEBTORS TO TAKE CERTAIN
ACTIONS OUTSIDE THE ORDINARY COURSE OF BUSINESS TO EFFECT
FOREIGN COMPANY WIND DOWNS; AND (III) GRANTING RELATED RELIEF**

I, Nicholas K. Campbell, pursuant to section 1726 of title 28 of the United States Code, hereby declare that the following is true to the best of my knowledge, information, and belief:

1. I am the Chief Restructuring Officer (the "CRO") of Athenex, Inc. ("Athenex") and its affiliated debtors and debtors in possession (collectively, the "Debtors" and, together with each Debtor's direct and indirect non-Debtor subsidiaries, the "Company"), having been appointed on April 19, 2023.

2. I am also the Managing Partner and co-founder of Meru, LLC ("MERU"), a restructuring advisory firm. I have over 15 years of experience transforming underperforming and distressed companies through operational and financial restructurings, including chapter 11 and out-of-court restructurings. On or about March 6, 2023, the Debtors retained MERU as its financial advisor. As MERU's lead professional on the engagement and CRO of the Debtors, I

¹ A complete list of each of the Debtors in these chapter 11 cases may be obtained on the website of the Debtors' claims and noticing agent at <https://dm.epiq11.com/athenex>. The location of Athenex, Inc.'s principal place of business and the Debtors' service address in these chapter 11 cases is 1001 Main Street, Suite 600, Buffalo, NY 14203.

have gained an extensive understanding of the Debtors and their non-Debtor affiliates' day-to-day operations, businesses, and financial affairs.

3. On May 14, 2023 (the "Petition Date"), the Debtors each commenced a voluntary case under chapter 11 of Title 11 of the United States Code (the "Bankruptcy Code") in the United States Bankruptcy Court for the Southern District of Texas (the "Court"), and continue to operate their business and manage their properties as debtors in possession.

4. I make this declaration (this "Declaration") in support of the *Debtors' Emergency Motion for Entry of an Order (i) Approving Disposition of Certain Estate Intercompany Claims and Equity Interests in Connection with Wind Down of Foreign Operations; (ii) Authorizing the Debtors to Take Certain Actions Outside the Ordinary Course of Business to Effect Foreign Company Wind Downs; and (iii) Granting Related Relief* (the "Motion") filed concurrently herewith. Capitalized terms used but not defined herein shall have the meanings ascribed to them in the Motion. Except as may otherwise be noted, I could and would testify to the following based upon my personal knowledge.

THE DEBTORS AND THE FOREIGN AFFILIATES WIND DOWN PLAN

A. General Background

5. On May 14, 2023 (the "Petition Date"), the Debtors each commenced with this Court a voluntary case under chapter 11 of the Bankruptcy Code. The Debtors are authorized to continue to operate their business and manage their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No trustee or examiner has been appointed in these Chapter 11 Cases.

6. On May 25, 2023, the Office of the United States Trustee (the "U.S. Trustee") appointed the Official Committee of Unsecured Creditors (the "Committee"), consisting of the

following four members: (i) Ingenus Pharmaceuticals, LLC; (ii) GenScript Probio USA, Inc.; (iii) Istituto Biochimico Italiano Giovanni Lorenzini S.p.A.; and (iv) Praxgen Pharmaceuticals LLC. *See* Docket No. 135.

7. The Debtors are a global oncology focused biopharmaceutical company dedicated to the discovery, development and commercialization of novel therapies for the treatment of cancer, aiming to develop safer and more efficacious cancer medication. The Debtors' mission is to improve the lives of cancer patients by creating more effective, safer and tolerable treatments.

8. Additional information regarding the Debtors' business and capital structure and the circumstances leading to the commencement of these chapter 11 cases is set forth in the First Day Declaration and fully incorporated herein by this reference.

9. On the Petition Date, the Debtors filed a motion [Docket No. 17] for the approval of certain bidding/auction and sale procedures and authority to sell substantially all of their assets, other than the assets of Debtor Athenex Pharma Solutions, LLC ("APS") which were not being marketed for sale at the time (discussed further below)). As discussed in the motion, the Debtors were willing to entertain all viable proposals for the entire company, certain segments or divisions, or lot bids on assets (including inventory) held by the Debtors (excluding any APS assets). On May 22, 2023, the Court entered an order [Docket No. 113], *inter alia*, approving the Debtors' Bid Procedures (as such term is defined therein).

10. In accordance with approved Bid Procedures, the Debtors proceeded with their marketing and sale process, designated a stalking horse for their Orascovery assets and conducted an auction after qualified bids were received for the sale of their Athenex Pharmaceutical Division (APD). The Debtors' and their advisors' efforts culminated with:

- (1) approval of the sale of the Debtors' Orascovery business to Health Hope Pharma Limited (the "Orascovery Buyer") [Docket No. 316], free and clear

of liens, claims and encumbrances, for \$2,500,000 subject to the provisions of the parties' Stalking Horse Agreement, provided further that the Debtors will receive a \$5 million milestone payment if Net Sales of Oraxol (as these capitalized terms are defined in the motion) reach \$10,000,000 (the "Orascovery Sale");

- (2) approval of the sale of substantially all of the assets of Debtor Athenex Pharmaceutical Division, LLC ("APD") (other than the Oaktree Purchased Assets) to Sagent Pharmaceuticals [Docket No. 351], free and clear of liens, claims and encumbrances, for \$14,000,000, subject to adjustment pursuant to the parties' Asset Purchase Agreement with respect to inventory, plus assumption of not less than \$7,000,000 of cure liabilities, with a commitment to cure \$1,540,705 of section 503(b)(9) liabilities arising under certain specified contracts (the "Sagent Sale"); and
- (3) approval of the sale of certain APD assets –all of APD's accounts and notes receivable and all causes of action specifically pertaining to the collection of the foregoing, and all credits, claims for refunds, deposits for the benefit of third parties, prepaid expenses, and rights of setoff, recoupment, reimbursement, indemnity and contribution relating to the purchased assets (the "Oaktree Purchased Assets") [Docket No. 352]– for a credit bid of \$20,000,000 subject to adjustment pursuant to the parties' Asset Purchase Agreement (the "Oaktree Sale").

11. The Sagent sale closed on June 30, 2023. The Orascovery Sale closed on July 7, 2023. The Oaktree Sale is pending and has not yet closed.

B. The Intercompany Claim Cancellations.

12. Prepetition, the Debtors periodically made transfers to certain of their Foreign Subsidiaries to fund employee obligations as well as overhead costs for research and development and related operations primarily in Asia. The outstanding amount of these transfers fluctuate over time and have been recorded as intercompany claims in favor of the Debtors. As of the Petition Date, the intercompany claims owing by three of the Foreign Subsidiaries, Athenex

Pharmaceuticals (China) Limited, Athenex API Limited, and Comprehensive Drug Enterprises Limited,² total approximately \$54.9 million³ in the aggregate face amount.

13. The Foreign Subsidiaries do not have the financial wherewithal to repay the intercompany claims. Under these circumstances, unless the intercompany claims are forgiven by the Debtors, the Foreign Subsidiaries cannot be wound down in an efficient manner and without the incurrance of significant administrative expenses of a formal in-court process under Hong Kong insolvency laws. Absent the intercompany claims, the Foreign Subsidiaries could undertake an informal process that would enable the repayment of unaffiliated creditors in full outside of court, the Foreign Subsidiaries can be wound down in an organized manner that minimizes costs and delay.

C. The Shareholder Repurchase Agreement.

1. The Axis Joint Venture

14. Debtor Athenex, Inc. (“Athenex”) is party to a Share Subscription Agreement (the “SSA”) for Axis Therapeutics Limited (“Axis”), a subsidiary jointly owned by Athenex and Xiangxue Life Sciences Limited (“XLifeSc”). Under the SSA, Athenex initially contributed \$30 million cash for a 55% ownership interest in Axis and XLifeSc contributed certain intellectual property rights for a 45% ownership interest in Axis, including the right and license to use its proprietary TCR-T therapy to develop and commercialize products for oncology applications (“TCR-T License”).

² The intercompany claims owed by two additional Asian affiliates are not subject to this Motion. Specifically, the receivables owing by Foreign Subsidiaries Athenex HK Innovative Limited and Athenex Therapeutics Limited, will be waived pursuant to the Asset Purchase Agreement entered into by Debtors Athenex R&D LLC and Athenex, Inc. in connection with the sale of the Orascovery related assets.

³ Exchange rate of 0.13 HKD = 1.00 USD.

15. Additionally, Athenex is party to a sponsorship agreement whereby Athenex sponsors and files all Investigation New Drug applications with the U.S. Food and Drug Administration arising from the TCR-T platform. Axis pays a fee to Athenex for these services and reimburses Athenex for costs incurred in connection with the work performed.

16. As of the Petition Date, the Debtors owe a receivable (the “Receivable”) to Axis in the approximate amount of \$18.7 million on account of Athenex’s outstanding obligations under the SSA. The Receivable arises from the reversal of the unfunded portion of the Debtors’ prior capital commitment that was withdrawn once it became clear that the joint venture was not going to be able to proceed as contemplated.

17. In connection with the sale of Orascovery assets approved on June 22, 2023 (the “Orascovery Sale Order”), pursuant to section 6.9 of the asset purchase agreement, the Debtors agreed to transfer their interests in Axis to another Person prior to the Closing. *See* Purchase Agreement at § 6.9 (Ex. 1 to Sale Order at Docket No. 316). The relief requested with respect to the Shareholder Repurchase Agreement is in furtherance of the Orascovery Sale Order and brought in an abundance of caution.

2. The Terms of the Shareholder Repurchase Agreement⁴

18. The Debtors propose to dispose of their interests in Axis and to settle the parties’ respective rights and obligations related to the Debtors’ investment in Axis under the SSA and ancillary agreements as follows:

- *Share Repurchase* – Axis shall repurchase all Axis shares currently held by Athenex, and such repurchased shares will be cancelled.
- *Purchase Price* – \$18.7 million.

⁴ The terms described herein are solely intended to be a summary. The full terms and conditions are set forth in the Shareholder Repurchase Agreement and related documents, which control over any such summary.

- *Setoff* – The Receivable will be fully set-off against the purchase price. The transaction will be cashless by way of Receivable and sale consideration set-off.
- *Release* – The mutual release of any and all other existing and future claims and obligations.

19. The terms of the Share Repurchase Agreement and related agreements are designed to enable a complete resolution of the parties' respective rights and obligations with respect to the Debtors' equity interest and related agreements with Axis, including the release of the \$18.7 million receivable against the Debtors.

D. Small Subsidiaries Transfer

20. The Debtors propose to sell, assign and transfer all of their direct and indirect interests in certain non-debtor foreign subsidiaries (the "Small Subsidiaries Transfer") to the Orascovery Buyer. The Small Subsidiaries Transfer will be composed of the assignment of the Debtors' 100% direct and indirect interests in the following entities: Athenex Euro Limited and its wholly owned subsidiary, Athenex Belgium; Comprehensive Drug Enterprises Limited and its wholly-owned direct and indirect subsidiaries; and Debtor Athenex, Inc.'s 10% interest in Nuwagen Limited (the "Small Subsidiaries"), together with all of the assets of the Small Subsidiaries excluding any cash on hand (collectively, the "Small Subsidiaries Assets"). The consideration for the transfer will be \$25,000 cash and a cancellation of any intercompany claims owing between the Debtors and the Small Subsidiaries.

21. The Small Subsidiaries relate either directly or indirectly to the Orascovery business that has been purchased by the Orascovery Buyer, and the Debtors do not believe that they have value as stand-alone assets. By transferring the Small Subsidiaries to the Orascovery Buyer, the estates avoid the considerable costs that would be incurred winding down the related operations, estimated to be in the range of \$20,000 to \$50,000. Thus, consummating the Small

Subsidiaries Transfer will enable the Debtors to maximize the value of the Debtors' interests in the Small Subsidiaries.

22. I believe that the implementation of the proposed Foreign Affiliates Wind Down Plan is a sound exercise of the Debtors' business judgment. Based upon a review of the Debtors' claims against and obligations to the Foreign Affiliates and the options for winding down the Foreign Subsidiaries, the Debtors and their advisors have concluded that the Foreign Affiliates Wind Down Plan described herein may be the best method to maximize recoveries to the estates. Asset value maximization and avoidance of potential indemnification claims are sound business purposes warranting authorization of the Foreign Affiliates Wind Down Plan, including the Intercompany Claim Releases, Shareholder Repurchase Agreement, and the Small Subsidiaries Purchase. For the reasons discussed herein, I believe that the disposition of the Debtors' interests in the Foreign Affiliates as set forth herein may be the best way to maximize value for the benefit of creditors and stem any potential indemnification claims or other liabilities stemming from these operations. Absent such relief, the Foreign Subsidiaries would be unable to wind down without additional funding from the Debtors. Additionally, the Debtors could be subject to indemnification claims as majority shareholder in the Axis joint venture.

23. The Foreign Affiliate Wind Down Plan will also efficiently reduce the pool of general unsecured claims which will assist in maximizing recoveries for general unsecured creditors as well as eliminate potential indemnity claims, which would be costly and time consuming to litigate and which elimination will aid in the prompt distribution to creditors under an anticipate chapter 11 plan.

Executed this 7th day of July, 2023 at Atlanta, Georgia.

/s/ Nicholas K. Campbell
Nicholas K. Campbell