

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re

ZYMERGEN INC., et al.,¹

Debtors.

Chapter 11

Case No. 23-11661 (____)

(Joint Administration Requested)

**DEBTORS' MOTION FOR ENTRY OF INTERIM AND FINAL ORDERS
(I) AUTHORIZING THE DEBTORS TO PAY CERTAIN PREPETITION WAGES,
BENEFITS AND OTHER COMPENSATION OBLIGATIONS
AND (II) GRANTING RELATED RELIEF**

The above-captioned debtors and debtors in possession (the “Debtors”), by and through their undersigned counsel, respectfully move (the “Motion”) as follows:

RELIEF REQUESTED

1. The Debtors seek entry of interim and final orders, substantially in the forms attached as **Exhibit A** (the “Interim Order”) and **Exhibit B** (the “Final Order” and, together with the Interim Order, the “Proposed Orders”): (i) authorizing the Debtors to pay and honor certain prepetition wages, benefits and other compensation obligations; and (ii) granting related relief.

2. Specifically, the Debtors request authority to pay prepetition Employee Obligations (as defined below) (a) upon entry of the proposed Interim Order, in an amount not to exceed \$1,000,000, and (b) upon entry of the proposed Final Order, in an amount not to exceed \$1,050,000, in each case, as they become due in the ordinary course of business. The prepetition amounts sought to be paid by this Motion are discussed in greater detail below and are summarized in the following chart:

¹ The Debtors in these chapter 11 cases, along with the Debtors’ federal tax identification numbers, are Zymergen Inc. (2439), Lodo Therapeutics Corporation (8730), enEvolv, Inc. (2402), and Genesis Acquisition Sub, LLC (3640). The corporate headquarters and the mailing address for the Debtors is 1440 Stanford Ave., Emeryville, California 94608.

Prepetition Obligations	Interim Cap Amount	Final Cap Amount
Compensation Obligations	\$200,000	\$200,000
Vacation Obligations	\$5,000	\$5,000
Payroll Deduction Obligations	\$5,000	\$5,000
Restricted Stock Program Obligations	\$400,000	\$400,000
Payroll Deferral	\$60,000	\$60,000
Benefit Plans Obligations	\$215,000	\$215,000
Disability Insurance Obligations	\$10,500	\$10,500
Unemployment Insurance Obligations	\$5,000	\$5,000
COBRA Obligations	\$25,000	\$55,000
401(k) Processing Obligations	\$0	\$40,000
Expense Reimbursement Obligations	\$15,000	\$15,000
Corporate Credit Card Obligations	\$35,000	\$45,000
Payroll Processing Obligations	\$0	\$6,000
Miscellaneous Benefits	\$14,000	\$14,000
Total	\$989,500	\$1,075,500

JURISDICTION

3. The United States Bankruptcy Court for the District of Delaware (the “Court”) has jurisdiction over these chapter 11 cases and this Motion pursuant to 28 U.S.C. §§ 157 and 1334 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 pursuant to 28 U.S.C. § 157(b)(2). Venue of these cases and the Motion is proper before the Court pursuant to 28 U.S.C. §§ 1408 and 1409.

4. 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 Debtors consent to the entry of a final order with respect to this Motion if 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.

5. The statutory bases for the relief requested herein are sections 105(a), 363, 507 and 541 of title 11 of the United States Code (the “Bankruptcy Code”), as supplemented by

Rules 6003 and 6004(h) of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”) and Local Rule 9013-1(m).

GENERAL BACKGROUND

6. On October 3, 2023 (the “Petition Date”), the Debtors each filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code in this Court. The Debtors continue to manage their assets as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No trustee, examiner, or official committee has been appointed in these cases.

7. Additional detail regarding the Debtors, their business, the events leading to the commencement of these cases, and the facts and circumstances supporting the relief requested herein is set forth in the *Declaration of Claire Smith in Support of Chapter 11 Petitions and First Day Relief* (the “First Day Declaration”), filed concurrently herewith and incorporated herein by reference.

EMPLOYEE COMPENSATION AND BENEFIT OBLIGATIONS

I. The Employees

8. As of the Petition Date, the Debtors employ approximately 101 people, all of whom are located in the United States, employed full-time, and paid a salary. Additionally, in the ordinary course of business, the Debtors augment their staff needs using independent contractors (the “Independent Contractors”), the majority of whom are provided by staffing agencies or similar contract vendors. The number of Independent Contracts varies from month to month depending on the needs of the business. None of the Debtors’ employees are represented by labor unions. The majority of the Debtors’ employees work at the Debtors’ headquarters and facilities in Emeryville, California, in addition to remote and home-based employees across the U.S.

9. The employees mostly consist of scientists, computer scientists, and engineers, many of whom hold doctorate or other advanced degrees relevant to their work for the Debtors. The employees have expertise in a variety of specialized scientific fields and have extensive, specialized knowledge about the industry and the Debtors' projects. As such, the employees possess skill sets unique to the Debtors' business. The employees also perform a variety of critical functions throughout the Debtors' business, including, among other things, human relations services, administrative functions, and operations and financial management. In addition to their employees, the Debtors rely significantly on their Independent Contractors, who have expertise related to the Debtors' operations and provide services in specific areas, including product development and engineering, accounting, legal contract review, and payroll and benefits support, among others.

10. In addition, many of the Debtors' employees perform services for the benefit of the Debtors' parent company, Ginkgo Bioworks Holdings, Inc. ("Ginkgo"), pursuant to an employee leasing agreement between debtor Zymergen Inc. ("Zymergen") and Ginkgo (the "Employee Leasing Agreement"). In return, Ginkgo reimburses the Debtors for any Employee Obligations incurred on account of such employees, solely with respect to the work performed for Ginkgo. As of the Petition Date, approximately 90 employees are performing work for Ginkgo. In addition, certain employees of Ginkgo perform services for the Debtors under the Employee Leasing Agreement, and the Debtors reimburse Ginkgo for the costs related thereto. Thus, any disruption of the Debtor's workforce would hinder the Debtors' ability to perform under the Employee Leasing Agreement. These employees also perform critical tasks for Zymergen relating to the maintenance and preservation of Zymergen's perishable assets, premises, automation processes, and equipment.

11. In addition to the employees' compensation, the Debtors also incur other obligations for employee programs, such as bonuses, vacation, federal and state withholding taxes and other withheld amounts, health and welfare benefits, access to corporate credit cards and programs that the Debtors historically have provided in the ordinary course of business (all as more fully described below, the "Employee Programs"). In the ordinary course of business, the Debtors incur obligations on account of the Employee Programs and the Employee Leasing Agreement, as well as compensation owed to employees and Independent Contractors, and payroll processing fees owed to the Debtors' payroll processor (collectively, and all as described more fully in the Motion, the "Employee Obligations").

II. Employee Programs and Employee Obligations

A. Employee Wages

12. The employees are paid semi-monthly, and the staffing agencies which supply the Independent Contractors are paid as part of the Debtors' standard accounting practices and according to the terms of the staffing agencies' contract(s) with the Debtors (such payments, together with the salary and wages paid to the Debtors' employees, the "Wages"). In addition, the Debtors reimburse Ginkgo for the compensation obligations incurred on behalf of Ginkgo employees who perform work for the Debtors pursuant to the Employee Leasing Agreement. Ginkgo typically invoices the Debtors on a monthly basis (such amounts, the "Invoiced Wages" and together with the Wages, the "Wage Compensation"). The Debtors estimate that as of the Petition Date, the total amount of outstanding prepetition Wage Compensation on account of employees, Independent Contractors, and Employee Leasing Agreement invoices is approximately \$200,000, all of which will come due during the first twenty-one (21) days of these cases (the "Interim Period").

B. Accrued Vacation

13. The Debtors maintain several paid leave benefit programs for their employees, providing paid leave for personal time off (“PTO”) to certain employees, holidays, and other paid leave. The Debtors estimate that as of the Petition Date, the total amount of outstanding prepetition PTO obligations equals approximately \$5,000, all of which will come due in the Interim Period. The other forms of paid leave do not involve incremental cash outlays beyond the standard payroll obligations.

C. Payroll Taxes and Deduction Obligations

14. In the ordinary course of business, the Debtors are required by law to withhold salaries, wages, and other compensation amounts related to the federal, state, and local income taxes, as well as Social Security and Medicare taxes (collectively, the “Payroll Taxes”). The Debtors are obligated to remit such Payroll Taxes to the appropriate taxing authorities. The Debtors also are required to make payments from their own funds on account of Social Security and Medicare taxes and to pay, based on a percentage of gross payroll (and subject to state-imposed limits), additional amounts to the taxing authorities for, among other things, state and federal unemployment insurance (collectively, the “Employer Payroll Taxes” and, together with the Payroll Taxes, the “Payroll Deduction Obligations”). The Debtors estimate that, as of the Petition Date, approximately \$5,000 is owed on account of Payroll Deduction Obligations, all of which will become due and owing during the Interim Period.

15. Zymergen also historically awarded restricted stock units (the “Zymergen-Issued RSUs”) of Zymergen stock to Zymergen employees, which were subject to a determined vesting schedule. These awards were converted into awards for Ginkgo stock in connection with Ginkgo’s acquisition of Zymergen. Zymergen is responsible for selling the Zymergen-Issued RSU

shares upon their vesting on behalf of and in an agent capacity for the employees. The employees incur tax obligations on account of the vesting of such Zymergen-Issued RSUs, which Zymergen satisfies by selling sufficient shares of the employee's Zymergen-Issued RSUs in corresponding amounts to cover the employee's tax liability. Moreover, in the ordinary course of business, Zymergen incurs and pays employer tax obligations with respect to the sale of these RSU shares.

16. Ginkgo has also issued restricted stock units to certain Zymergen employees (the "Ginkgo-Issued RSUs"). When the employee's Ginkgo-Issued RSUs vest, Ginkgo sells the shares on the employee's behalf, and Zymergen pays the associated employee taxes as part of its regular payroll withholding remissions on behalf of the employee. Ginkgo then reimburses Zymergen for the full amount of employee taxes associated with these stock sales.

17. The Debtors estimate that as of the Petition Date, the total amount of outstanding tax obligations in relation to the Zymergen-Issued RSUs and the Ginkgo-Issued RSUs equals approximately \$400,000, all of which will come due in the Interim Period. The Debtors also seek authority to continue to honor their historic obligations related to both of the restricted stock programs described herein in the ordinary course of business.

18. The Debtors also have an outstanding state payroll tax deferral amount stemming from a deferral election made by Lodo Therapeutics Corporation (the "Payroll Deferral"). The Debtors estimate that as of the Petition Date the total Payroll Deferral amount outstanding is approximately \$60,000, all of which will come due during the Interim Period. The Debtors request authority to pay the Payroll Deferral.

D. Health and Wellness Benefits

19. The Debtors offer all eligible employees and their dependents fully insured medical coverage, administered by Cigna and Kaiser Permanente (the "Medical Benefit Plans").

Monthly premiums paid for Medical Benefit Plans total approximately \$200,000. The Debtors estimate that, as of the Petition Date, approximately \$200,000 is owed on account of the Medical Benefit Plans. Additionally, the Debtors provide eligible employees with access to dental and vision coverage through Delta Dental and Guardian (VSP), respectively (“Additional Benefit Plans” collectively with the Medical Benefit Plans, the “Benefit Plans”). The Additional Benefit Plans are a self-insured programs. The Debtors estimate that, as of the Petition Date, approximately \$15,000 is owed on account of the Additional Benefit Plans. Accordingly, the Debtors are seeking authority to pay all amounts owed on account of the Benefit Plans and the authority, but not direction, to continue the existing Benefit Plans in the ordinary course of business.

20. The Debtors also provide basic disability and basic accidental death and dismemberment insurance coverage (“Disability Insurance”) through Unum. The Debtors’ average total monthly cost in connection with Disability Insurance is approximately \$13,000. The Debtors estimate that, as of the Petition Date, approximately \$10,500 is owed on account of the Disability Insurance obligations.

21. The Debtors also pay amounts directly to their payroll processor on account of unemployment insurance benefits for the employees. Eligibility for unemployment benefits is determined by the applicable state unemployment agency. The Debtors average total monthly obligations on account of such benefits is approximately \$5,000. As of the Petition Date, the Debtors believe that approximately \$5,000 remains outstanding on account of their unemployment insurance obligations, all of which will become due and owing during the Interim Period.

22. The Debtors also pay COBRA benefits for terminated employees (“COBRA Benefits”). The Debtors are obligated to provide COBRA Benefits to employees if

they are terminated. Failing to provide such benefits in the ordinary course of business could be detrimental to the morale of the Debtors current employees, and continuing to honor the COBRA Benefits program will enhance the stability of the workforce. As of the Petition Date, the Debtors believe that approximately \$55,000 remains outstanding on account of COBRA Benefits, approximately \$25,000 of which will come due and owing during the Interim Period. Accordingly, the Debtors are seeking authority to pay all amounts owed on account of the COBRA Benefits and the authority, but not direction, to continue the existing COBRA Benefits in the ordinary course of business.

E. Expense Reimbursement Corporate Credit Cards

23. The Debtors, in the ordinary course of business, reimburse employees for a variety of ordinary, necessary, and reasonable business-related expenses that the employees incur on behalf of the Debtors in the scope of their employment. Most employees initially incur and pay such expenses by using personal funds or credit cards, and are subsequently reimbursed by the Debtors. Such expenses must be approved by the Debtors' management before the Debtors issue a reimbursement. The Debtors estimate that, as of the Petition Date, approximately \$15,000 is owed on account of prepetition reimbursable expenses, all of which will become due and owing during the Interim Period.

24. In addition, the Debtors currently have corporate credit cards issued by Silicon Valley Bank, N.A. (the "Corporate Credit Cards") that certain employees use for business expenses such as travel, hotels and meals. The Corporate Credit Cards ensure that the employees are able to fulfill financial obligations of the Debtors that arise in the ordinary course of business. In the ordinary course, obligations arising from the use of the Corporate Credit Card are paid directly by the Debtors. On average, the Debtors accrue up to \$50,000 of charges each month.

The Debtors estimate that, as of the Petition Date, approximately \$45,000 is owed on account of the Corporate Credit Cards, approximately \$35,000 of which will become due and owing during the Interim Period.

F. Miscellaneous Benefits

25. The Debtors also offer several other miscellaneous benefits to certain eligible employees. These miscellaneous benefits include, but are not limited to flexible spending accounts, health savings accounts, legal aid benefits, commuter benefits, identity theft insurance, and pet insurance. The Debtors believe that honoring these miscellaneous benefits will help boost employee morale and confidence in Debtors, and maintain the current workforce. The Debtors estimate that, as of the Petition Date, approximately \$14,000 is owed on account of prepetition amounts related to certain of these miscellaneous benefits, all of which will become due and owing during the Interim Period. In addition, the Debtors are currently holding approximately \$90,000 for the benefit of the employees' flexible savings accounts and commuter benefits. The Debtors seek authority to continue honoring their obligations on account of the health savings accounts in the ordinary course of business.

II. Payroll Processing and Other Services

26. The Debtors use One Source Virtual ("OSV") to administer their payroll, which includes issuing payroll payments to the appropriate funds transfer networks, generating pay statements, and coordinating the payment of any deductions or other applicable withholdings. The ongoing services of OSV are imperative to the smooth functioning of the Debtors' payroll processing. The Debtors pay OSV approximately \$6,000 per month for its services. The Debtors estimate that, as of the Petition Date, approximately \$6,000 is owed to OSV in accrued but unpaid fees related to such services, all of which will become due and owing after the Interim Period.

27. In addition, the Debtors maintain a 401(k) savings plan, a qualified defined contribution plan pursuant to section 401(k) of the Internal Revenue Code, for all employees (the “401(k) Plans”). The Debtors do not make contributions directly to employees’ 401(k) accounts, but the Debtors pay regular service fees to a payroll administrator. The ongoing services of the payroll administrator are imperative to the Debtors’ ability to provide the 401(k) Plans to their employees. As of the Petition Date, the Debtors estimate that the aggregate amount of accrued but unpaid service fee obligations owed by the Debtors to the 401(k) administrator is approximately \$40,000, all of which will come due and owing after the Interim Period.

RELIEF REQUESTED

28. By this Motion, the Debtors request entry of interim and final orders, substantially in the forms attached hereto as **Exhibit A** and **Exhibit B**: (i) authorizing the Debtors to pay and honor Employee Obligations and (ii) granting related relief.

BASIS FOR RELIEF

I. Payment of the Employee Obligations is a sound exercise of the Debtors’ business judgment and is appropriate under sections 363 and 105(a) of the Bankruptcy Code.

29. Section 363 of the Bankruptcy Code provides, in relevant part, that “[t]he [debtors], 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 section 363(b) of the Bankruptcy Code, courts require only that the debtors “show that a sound business purpose justifies such actions.” *Dai-Ichi Kangyo Bank, Ltd. v. Montgomery Ward Holding Corp. (In re Montgomery Ward Holding Corp.)*, 242 B.R. 147, 153 (D. Del. 1999); *see also In re Phoenix Steel Corp.*, 82 B.R. 334, 335–36 (Bankr. D. Del. 1987); *see also, e.g., In re Adelphia Commc’ns Corp.*, No. 02-41729 (REG), 2003 WL 22316543, at *31 (Bankr. S.D.N.Y. Mar. 4, 2003); *Comm. of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.)*, 722 F.2d 1063, 1071 (2d Cir. 1983). Moreover,

“[w]here the debtor articulates a reasonable basis for its business decisions (as distinct from a decision made arbitrarily or capriciously), courts will generally not entertain objections to the debtor’s conduct.” *Comm. of Asbestos-Related Litigants v. Johns-Manville Corp. (In re Johns-Manville Corp.)*, 60 B.R. 612, 616 (Bankr. S.D.N.Y. 1986); *In re Global Home Prods., LLC*, 369 B.R. 778, 783-84 (Bankr. D. Del. 2007); *In re Dana Corp.*, 358 B.R. 567, 584 (Bankr. S.D.N.Y. 2006).

30. In addition to being justified under section 363(b)(1) of the Bankruptcy Code, payment of the Employee Obligations is warranted under the doctrine of necessity. Section 105(a) of the Bankruptcy Code, which codifies the inherent equitable powers of the bankruptcy court, empowers the bankruptcy court to “issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.” 11 U.S.C. § 105(a). Under section 105(a) and the “doctrine of necessity,” the Court may exercise its broad grant of equitable powers to permit the payment of Employee Obligations when such payment is essential to the continued operation of the debtors’ business and orderly administration of the bankruptcy case. *See, e.g., In re Just for Feet, Inc.*, 242 B.R. 821, 824–25 (D. Del. 1999) (holding that section 105(a) of the Bankruptcy Code provides a statutory basis for the payment of prepetition claims under the doctrine of necessity and noting that “[t]he Supreme Court, the Third Circuit and the District of Delaware all recognize the court’s power to authorize payment of pre-petition claims when such payment is necessary for the debtors’ survival during chapter 11”); *In re Columbia Gas Sys., Inc.*, 171 B.R. 189, 191–92 (Bankr. D. Del. 1994) (confirming that the doctrine of necessity is the standard in the Third Circuit for enabling a court to authorize the payment of prepetition claims prior to the confirmation of a reorganization plan).

31. The necessity of payment doctrine is designed to foster a debtor's rehabilitation, which courts have recognized is "the paramount policy of Chapter 11." *In re Ionosphere Clubs, Inc.*, 98 B.R. 174, 176 (Bankr. S.D.N.Y. 1989); *see also In re Chateaugay Corp.*, 80 B.R. 279, 287 (S.D.N.Y. 1987) (authorizing payment of prepetition workers' compensation claims on grounds that the fundamental purpose of reorganization and equity powers of bankruptcy courts "is to create a flexible mechanism that will permit the greatest likelihood of survival of the debtor and payment of creditors in full or at least proportionately"); *In re Just for Feet*, 242 B.R. at 826 (finding that payment of prepetition claims to certain trade vendors was "essential to the survival of the debtor during the chapter 11 reorganization"); *In re Quality Interiors, Inc.*, 127 B.R. 391, 396 (Bankr. N.D. Ohio 1991) ("A general practice has developed . . . where bankruptcy courts permit the payment of certain pre-petition claims, pursuant to 11 U.S.C. § 105, where the debtor will be unable to reorganize without such payment."); *In re Eagle-Picher Indus., Inc.*, 124 B.R. 1021, 1023 (Bankr. S.D. Ohio 1991) (approving payment of prepetition unsecured claims of tool makers as "necessary to avert a serious threat to the Chapter 11 process"). Moreover, Bankruptcy Rule 6003 itself implies that the payment of Employee Obligations may be permissible within the first twenty-one (21) days of a case where doing so is "necessary to avoid immediate and irreparable harm." Fed. R. Bankr. P. 6003.

32. It is a sound exercise of the Debtors' business judgment to pay the Employee Obligations because doing so is necessary for the Debtors to operate their business and maximize the value of their assets for the benefit of their estates and stakeholders. For the reasons discussed herein, payment of the Employee Obligations enhances value for the benefit of all interested parties. The Debtors' ability to maximize value and continue operations depends, in large part, on the retention, motivation and productivity of their workforce, whose efforts will be

critical to the ability of the Debtors to conduct a successful value-maximizing sale process. The Debtors' employees rely on the Employee Obligations to satisfy their daily living expenses. If amounts owed are not received or other benefits are delayed, the employees may be exposed to significant financial hardship and, in some cases, will be unable to meet their basic needs, which may make continuing to work for the Debtors impossible. If the Debtors are unable to satisfy their various compensation and benefits obligations, the employees will suffer at a time when their support is critical to the Debtors. Therefore, in order to provide certainty to the Debtors' employees, maintain morale and productivity, and minimize the adverse effect of the commencement of these chapter 11 cases, it is necessary to continue providing ordinary course compensation and benefits. Moreover, for the avoidance of doubt, no Employee will receive payment under this Motion in excess of the statutory cap of \$15,150 on account of any existing and outstanding prepetition Employee Obligations

33. Indeed, courts in this district have recognized the importance of satisfying employee obligations in cases requesting relief similar to that requested here. *See, e.g., In re Town Sports Int'l, LLC*, No. 20-12168 (CSS) (Bankr. D. Del. Sept. 16, 2020) (authorizing debtors to continue employee compensation and benefit programs and pay certain prepetition obligations related thereto on a postpetition basis); *In re Extraction Oil and Gas, Inc.*, No. 20-10548 (Bankr. D. Del. July 13, 2020) (same); *In re APC Auto. Techs. Intermediate Holdings, LLC*, No. 20-11466 (CSS) (Bankr. D. Del. June 4, 2020) (same); *In re Akorn, Inc.*, No. 20-11177 (KBO) (Bankr. D. Del. May 22, 2020) (same); *In re Bluestem Brands, Inc.*, No. 20-10566 (MFW) (Bankr. D. Del. Mar. 30, 2020) (same). Accordingly, the Debtors respectfully request that the Court authorize the Debtors to pay the Employee Obligations and continue the Employee Programs in the ordinary course of business and consistent with past practice.

A. Certain of the Employee Obligations are entitled to priority treatment under section 507 of the Bankruptcy Code.

34. The Debtors believe that the majority of the Employee Obligations constitute priority claims under sections 507(a)(4), (a)(5) and (a)(8) of the Bankruptcy Code, which must be satisfied before any general unsecured claims against the Debtors' estate. *See* 11 U.S.C. §§ 507(a)(4), 507(a)(5), 507(a)(8), 726. Specifically, under section 507(a)(4)(A) of the Bankruptcy Code, claims of employees for "wages, salaries, or commissions, including vacation, severance, and sick leave pay" earned within 180 days before the Petition Date are afforded priority unsecured status up to \$15,150 per individual. *See* 11 U.S.C. § 507(a)(4)(A).

35. Similarly, under section 507(a)(5) of the Bankruptcy Code, employees' claims for contributions to certain employee benefit plans are also afforded priority unsecured status up to \$15,150 per employee covered by such plan, less any amount paid under section 507(a)(4). *See* 11 U.S.C. § 507(a)(5)(A). The same holds true for the payment of the Payroll Taxes, as the relevant taxing authorities generally would hold priority claims under section 507(a)(8) of the Bankruptcy Code for such obligations and their payment will not prejudice other creditors of the Debtors. *See* 11 U.S.C. § 507(a)(8).²

36. The Debtors believe that no employee is owed accrued and unpaid wages in excess of the statutory cap and no amounts are accrued and owing under any benefits plan in excess of the cap. Thus, all the Employee Obligations are priority claims that, in any event, will have to be paid in full, and payment of the prepetition Employee Obligations merely expedites the treatment afforded to such claims and is consistent with the priority scheme of the Bankruptcy

² Section 507(a)(8) of the Bankruptcy Code affords priority to, among other things, unsecured claims of governmental units for (i) taxes required to be collected or withheld and for which the debtor is liable in whatever capacity (§ 507(a)(8)(C)) and (ii) under certain circumstances, employment taxes on wages, salaries, or commissions (§ 507(a)(8)(D)).

Code. Accordingly, the Debtors request entry of the proposed Interim Order authorizing the Debtors to pay the prepetition Employee Obligations in an aggregate amount not to exceed the Interim Amount subject to the \$15,150 per employee cap, and authorizing the Debtors to continue paying Employee Obligations in the ordinary course.

B. Payment of certain Employee Obligations is required by law under section 541 of the Bankruptcy Code.

37. The Debtors also seek authority to pay Withholding Obligations to the appropriate entities. These amounts principally represent amounts that employees, governments and judicial authorities have designated for withholding from employees' paychecks. These withholdings include child support and alimony payments, which are not considered property of the Debtors' estates because the Debtors have withheld such amounts from employees' paychecks on another party's behalf. *See* 11 U.S.C. §§ 541(b)(7) and (d).

38. Similarly, applicable U.S. federal and state laws require the Debtors to withhold federal, state and local income taxes from employees' paychecks and to pay such amounts to the appropriate taxing authority. *See* 26 U.S.C. §§ 6672 and 7501(a); *City of Farrell v. Sharon Steel Corp.*, 41 F.3d 92, 95–96 (3d Cir. 1994) (finding that state law requiring a corporate debtor to withhold city income tax from its employees' wages created a trust relationship between debtor and the city for payment of withheld income taxes). These unremitted Payroll Deduction Obligations are also not property of the Debtors' estates and, accordingly, the Debtors request that the Court authorize them to transmit the unremitted Payroll Deduction Obligations to the proper parties in the ordinary course of business.

39. Many federal, state and local statutes also impose personal liability on officers and directors of companies for certain Payroll Taxes and other Payroll Deduction Obligations. To the extent that the relevant Payroll Taxes and other Payroll Deduction Obligations

remain unpaid by the Debtors, the Debtors' directors, officers and executives may be subject to lawsuits or criminal prosecution during the pendency of these chapter 11 cases. Any such lawsuit or criminal prosecution (and the ensuing potential liability) would distract the Debtors and their directors, officers and executives from devoting their full attention to the Debtors' businesses and the orderly administration of these chapter 11 cases. The Debtors believe that these distractions would materially undermine their ability to operate in the ordinary course of business and to administer these chapter 11 cases, with resulting detriment to any parties in interest.

II. Processing of checks and electronic funds transfers should be authorized.

40. The Debtors further request that the Court authorize their banking institutions and all other applicable banks and other financial institutions to receive, process, honor and pay any and all checks drawn or electronic funds relating to the Prepetition Workforce Obligations, whether such checks were presented before or after the Petition Date; provided that sufficient funds are on deposit in the applicable bank accounts to cover such payments. The Debtors have sufficient funds to pay any amounts described in this Motion in the ordinary course of business. In addition, under the Debtors' existing cash management system, the Debtors can readily identify checks or wire transfer requests as relating to an authorized payment to be made hereunder. For that reason, the Debtors believe that checks or wire transfer requests, other than those relating to authorized payments, will not be honored inadvertently. The Debtors also seek authority to issue new postpetition checks or effect new electronic fund transfers, on account of the Employee Obligations to replace any prepetition checks or electronic fund transfer requests

that may be dishonored or rejected as a result of the commencement of the Debtors' chapter 11 cases.

SATISFACTION OF BANKRUPTCY RULE 6003

41. Bankruptcy Rule 6003 empowers the Court to issue an order, within 21 days after the Petition Date, granting a motion to “use . . . property of the estate, including a motion to pay all or part of a claim that arose before the filing of the petition” if such requested relief “is necessary to avoid immediate and irreparable harm.” Fed. R. Bankr. P. 6003(b). For the reasons discussed above, entry of an interim order granting this Motion is integral to the Debtors' ability to successfully transition into chapter 11. As described above, any lapse in payment of Employee Obligations could negatively affect the Debtors' ability to conduct a value-maximizing sale process and hinder the value of their assets, thereby causing immediate and irreparable harm to the Debtors' estates and, consequently, other interested parties. Accordingly, the Debtors submit that they have satisfied the “immediate and irreparable harm” standard of Bankruptcy Rule 6003 to support granting the relief requested herein.

WAIVER OF BANKRUPTCY RULE 6004(a) AND 6004(h)

42. The Debtors also request that the Court waive the stay imposed by Bankruptcy Rule 6004(h), which provides that “[a]n order authorizing the use, sale, or lease of property other than cash collateral is stayed until the expiration of 14 days after entry of the order, unless the court orders otherwise.” Fed. R. Bankr. P. 6004(h). As described above, the relief that the Debtors seek in this Motion is necessary for the Debtors to preserve value for the estate. Accordingly, the Debtors respectfully request that the Court waive the 14-day stay imposed by Bankruptcy Rule 6004(h), as the exigent nature of the relief sought herein justifies immediate relief.

43. To implement the foregoing immediately, the Debtors respectfully request a waiver of the notice requirements of Bankruptcy Rule 6004(a) to the extent they are deemed to apply.

RESERVATION OF RIGHTS

44. Nothing contained herein or in the Proposed Orders is intended or shall be construed as: (i) an admission as to the validity, amount or priority of any claim against the Debtors; (ii) a waiver of the Debtors' rights to dispute any claim; (iii) a promise or requirement to pay any claim; (iv) a waiver of any claim or cause of action of the Debtors that exists against any entity; (v) a ratification or assumption of any agreement, contract or lease under section 365 of the Bankruptcy Code; (vi) a waiver of limitation of the Debtors' rights under the Bankruptcy Code, any other applicable law, or any agreement; or (vii) an admission or concession by the Debtors that any lien acknowledged or satisfied under this Motion is valid, and the Debtors expressly reserve and preserve their rights to contest the extent, validity, or perfection, or seek avoidance of, any such lien.

NOTICE

45. Notice of this Motion will be provided to: (i) the Office of the United States Trustee; (ii) the Internal Revenue Service; (iii) the Securities and Exchange Commission; (iv) the Delaware Secretary of State; (v) the parties included on the Debtors' consolidated list of their thirty (30) largest unsecured creditors; (vi) the Debtors' banks and financial institutions; (vii) the United States Attorney's Office for the District of Delaware; and (viii) any party that has requested notice pursuant to Bankruptcy Rule 2002. As this Motion is seeking first-day relief, the Debtors will serve copies of this Motion and any order entered in respect of this Motion as required by Local

Rule 9013-1(m). The Debtors respectfully submit that no further notice of this Motion is required under the circumstances.

CONCLUSION

WHEREFORE, the Debtors request that the Court enter the Proposed Orders, granting the relief requested herein and such other and further relief as is just and proper.

Dated: October 3, 2023
Wilmington, Delaware

Respectfully submitted,

/s/ Curtis S. Miller

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*Proposed Counsel to the Debtors and
Debtors in Possession*

Exhibit A

Proposed Interim Order

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re

ZYMERGEN INC., et al.,¹

Debtors.

Chapter 11

Case No. 23-11661 (____)

(Joint Administration Requested)

**INTERIM ORDER (I) AUTHORIZING THE DEBTORS TO PAY CERTAIN
PREPETITION WAGES, BENEFITS AND OTHER COMPENSATION
OBLIGATIONS AND (II) GRANTING RELATED RELIEF**

Upon the motion (the “Motion”)² of the above-captioned debtors and debtors in possession (collectively, the “Debtors”) for entry of an interim order (this “Interim Order”) and final order pursuant to sections 105(a), 363, 507 and 541 of the Bankruptcy Code, Bankruptcy Rules 6003(b) and 6004 and Local Rule 9013-1(m): (i) authorizing the Debtors to pay and honor certain prepetition wages, benefits and other compensation obligations and (ii) granting related relief, all as more fully described in the Motion; and upon consideration of the First Day Declaration; and this Court having found that (i) this Court has jurisdiction to consider the Motion and the relief requested therein under 28 U.S.C. §§ 157 and 1334 and the Amended Standing Order of Reference from the United States District Court for the District of Delaware, dated February 29, 2012, (ii) this Court may enter a final order consistent with Article III of the United States Constitution, (iii) this is a core proceeding under 28 U.S.C. § 157(b)(2)(A), and (iv) venue of this proceeding and the Motion in this District is proper under 28 U.S.C. §§ 1408 and 1409; and due and sufficient notice of the Motion having been given under the circumstances; and it appearing

¹ The Debtors in these chapter 11 cases, along with the Debtors’ federal tax identification numbers, are Zymergen Inc. (2439), Lodo Therapeutics Corporation (8730), enEvolv, Inc. (2402), and Genesis Acquisition Sub, LLC (3640). The corporate headquarters and the mailing address for the Debtors is 1440 Stanford Ave., Emeryville, California 94608

² Capitalized terms not defined herein are used as defined in the Motion.

that the relief requested by the Motion is in the best interests of the Debtors, their estates, their creditors and other parties in interest; and after due deliberation and sufficient cause appearing therefor;

IT IS HEREBY ORDERED THAT:

1. The Motion is GRANTED on an interim basis as set forth herein.

2. **A final hearing on the relief sought in the Motion shall be conducted on _____, 2023 at _____ (ET) (the “Final Hearing”).** Any party in interest objecting to the relief sought at the Final Hearing or entry of the proposed Final Order shall file and serve a written objection, which objection shall be served upon (i) the Debtors, Zymergen Inc., 1440 Stanford Ave., Emeryville, California 94608, Attn: Celeste Ferber; and (ii) proposed counsel to the Debtors, Morris, Nichols, Arsht & Tunnell LLP, 1201 N. Market Street, 16th Floor, Wilmington, Delaware, 19801, Attn: Derek C. Abbott (dabbott@morrisnichols.com), Curtis S. Miller (cmiller@morrisnichols.com), Matthew O. Talmo (mtalmo@morrisnichols.com) and Sophie Rogers Churchill (srchurchill@morrisnichols.com); (iii) counsel to any official committee appointed in these chapter 11 cases; and (iv) the Office of the United States Trustee for the District of Delaware, J. Caleb Boggs Federal Building, 844 King Street, Room 2207, Wilmington, DE 19801, Attn: Benjamin A. Hackman (benjamin.a.hackman@usdoj.gov), in each case no later than **_____], 2023 at 4:00 p.m. (ET).** If no objections to the entry of the proposed Final Order are timely filed, this Court may enter the proposed Final Order without further notice or a hearing.

3. The Debtors are authorized, but not directed, in a reasonable exercise of their business judgment, to: (i) pay or otherwise honor the Employee Obligations; (ii) honor and continue the Employee Programs that were in effect as of the Petition Date; and (iii) make all

Payroll Deduction Obligation payments relating to the Employee Obligations, whether arising pre- or postposition, each in the ordinary course consistent with the Debtors' practices as of the Petition Date; provided, however, that aggregate payments on account of prepetition Employee Obligations will not exceed \$1,000,000 pursuant to this Interim Order.

4. Notwithstanding any other provision of this Interim Order and absent further order of the Court, (i) payments to Employees on account of prepetition Employee Obligations in the interim period shall be limited by sections 507(a)(4) and (a)(5) of the Bankruptcy Code and capped at the amount afforded priority by those statutory subsections; and (ii) the Debtors are not authorized to "cash out" unpaid vacation days upon termination/resignation of an employee unless applicable state law requires such payment.

5. All banks and other financial institutions are hereby authorized to receive, process, honor, and pay any and all checks presented for payment and electronic transfer requests made by the Debtors related to the payment of the obligations described in the Motion and approved herein, whether such checks were presented or such electronic transfer requests were submitted before, or are presented or submitted after, the Petition Date. All such banks and financial institutions are further authorized to rely on the Debtors' designation of any particular check or electronic payment request as approved pursuant to this Interim Order.

6. Subject to the requirements of this Interim Order, the Debtors are authorized, but not directed, to modify, change and/or discontinue any of the Employee Obligations or implement new Employee Obligations in the ordinary course of business during the pendency of these chapter 11 cases in their discretion without the need for further Court approval. Notwithstanding the foregoing, nothing in this Interim Order authorizes or approves any payments or transfers subject to section 503(c) of the Bankruptcy Code.

7. Nothing in the Motion or this Interim Order (i) is intended or shall be deemed to constitute an assumption of any agreement pursuant to section 365 of the Bankruptcy Code or an admission as to the validity of any claim against the Debtors; (ii) shall impair, prejudice, waive or otherwise affect the rights of the Debtors or their estates with respect to the validity, priority or amount of any claim against the Debtors and their estates; (iii) shall impair, prejudice, waive, or otherwise affect the rights of the Debtors and their estates with respect to any and all claims or causes of action; or (iv) shall be construed as a promise to pay a claim.

8. The Debtors are authorized to take any and all actions necessary to effectuate the relief granted herein.

9. The requirements of Bankruptcy Rule 6003(b) have been satisfied because the relief set forth in this Interim Order is necessary to avoid immediate and irreparable harm.

10. Notwithstanding Bankruptcy Rule 6004(h), this Interim Order shall be effective and enforceable immediately upon its entry.

11. This Court shall retain jurisdiction with respect to all matters arising from or related to the implementation of this Interim Order.

Exhibit B

Proposed Final Order

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re

ZYMERGEN INC., et al.,¹

Debtors.

Chapter 11

Case No. 23-11661 (____)

(Joint Administration Requested)

**FINAL ORDER (I) AUTHORIZING THE DEBTORS TO PAY CERTAIN
PREPETITION WAGES, BENEFITS AND OTHER COMPENSATION
OBLIGATIONS, AND (III) GRANTING RELATED RELIEF**

Upon the motion (the “Motion”)² of the above-captioned debtors and debtors in possession (collectively, the “Debtors”) for entry of an interim order (the “Interim Order”) and a final order (this “Final Order”) pursuant to sections 105(a), 363, 507 and 541 of the Bankruptcy Code, Bankruptcy Rules 6003(b) and 6004 and Local Rule 9013-1(m): (i) authorizing the Debtors to pay and honor certain prepetition wages, benefits and other compensation obligations and (ii) granting related relief, all as more fully described in the Motion; and the Court having previously entered the Interim Order; and upon consideration of the First Day Declaration; and this Court having found that (i) this Court has jurisdiction to consider the Motion and the relief requested therein under 28 U.S.C. §§ 157 and 1334 and the Amended Standing Order of Reference from the United States District Court for the District of Delaware, dated February 29, 2012, (ii) this Court may enter a final order consistent with Article III of the United States Constitution, (iii) this is a core proceeding under 28 U.S.C. § 157(b)(2)(A), and (iv) venue of this proceeding and the Motion in this District is proper under 28 U.S.C. §§ 1408 and 1409; and due and sufficient notice of the

¹ The Debtors in these chapter 11 cases, along with the Debtors’ federal tax identification numbers, are Zymergen Inc. (2439), Lodo Therapeutics Corporation (8730), enEvolv, Inc. (2402), and Genesis Acquisition Sub, LLC (3640). The corporate headquarters and the mailing address for the Debtors is 1440 Stanford Ave., Emeryville, California 94608.

² Capitalized terms not defined herein are used as defined in the Motion.

Motion having been given; and it appearing that the relief requested by the Motion is in the best interests of the Debtors, their estates, their creditors, and other parties in interest; and after due deliberation and sufficient cause appearing therefor;

IT IS HEREBY ORDERED THAT:

1. The Motion is GRANTED on a final basis as set forth herein.
2. The Debtors are authorized, but not directed, in a reasonable exercise of their business judgment, to: (i) pay or otherwise honor the Employee Obligations; (ii) honor and continue the Employee Programs that were in effect as of the Petition Date; and (iii) make all Payroll Deduction Obligation payments relating to the Employee Obligations, whether arising pre- or postposition, each in the ordinary course consistent with the Debtors' practices as of the Petition Date; provided, however, that aggregate payments on account of prepetition Employee Obligations will not exceed \$1,100,000 pursuant to this Final Order.
3. All banks and other financial institutions are hereby authorized and directed to receive, process, honor, and pay any and all checks presented for payment and electronic transfer requests made by the Debtors related to the payment of the obligations described in the Motion and approved herein, whether such checks were presented or such electronic transfer requests were submitted before, or are presented or submitted after, the Petition Date. All such banks and financial institutions are further authorized and directed to rely on the Debtors' designation of any particular check or electronic payment request as approved pursuant to this Final Order.
4. Subject to the requirements of this Final Order, the Debtors are authorized, but not directed, to modify, change and/or discontinue any of the Employee Obligations or implement new Employee Obligations during the pendency of these chapter 11 cases in their discretion without the need for further Court approval. Notwithstanding the foregoing, nothing in

this Final Order authorizes or approves any payments or transfers subject to section 503(c) of the Bankruptcy Code.

5. Nothing in the Motion or in this Final Order (i) is intended or shall be deemed to constitute an assumption of any agreement pursuant to section 365 of the Bankruptcy Code or an admission as to the validity of any claim against the Debtors; (ii) shall impair, prejudice, waive or otherwise affect the rights of the Debtors or their estates with respect to the validity, priority or amount of any claim against the Debtors and their estates; (iii) shall impair, prejudice, waive, or otherwise affect the rights of the Debtors and their estates with respect to any and all claims or causes of action; or (iv) shall be construed as a promise to pay a claim.

6. The Debtors are authorized to take any and all actions necessary to effectuate the relief granted herein.

7. The requirements of Bankruptcy Rule 6003(b) have been satisfied because the relief set forth in this Final Order is necessary to avoid immediate and irreparable harm.

8. Notwithstanding Bankruptcy Rule 6004(h), this Final Order shall be effective and enforceable immediately upon its entry.

9. This Court shall retain jurisdiction with respect to all matters arising from or related to the implementation of this Final Order.