

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

In re:	:	Chapter 11
	:	
ACHAOGEN, INC.,	:	
	:	Case No. 19-10844 (BLS)
	:	
	:	Sale Hearing Date: June 19, 2019
Debtor.	:	Objections Due: June 17, 2019, at noon
	:	Related to Docket No. 30
	:	

**OBJECTION BY THE UNITED STATES TO
THE DEBTOR’S SALE MOTION**

The United States, by and through the undersigned attorneys, objects to the 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 (“Sale Motion”). [Docket No. 30]. In support of its objection, the United States avers as follows:



BACKGROUND

1. On March 15, 2019, the Debtor filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code. [Docket No. 1].

2. As part of the sale process, the Debtor filed a Notice of Proposed Assumption and Assignment of Executory Contracts and Unexpired Leases (“Notice”). [Docket No. 194]. The Debtor designated in the Notice certain agreements that are subject to transfer to one or more purchasers. The Notice includes several agreements with federal agencies (collectively, “Federal Agreements”). All of the Federal Agreements were listed in the Notice as having a zero cure amount owed by the Debtor.

3. On June 11, 2019, the Debtor filed a proposed order approving the Sale Motion (“Order”). [Docket No. 260].

4. Paragraph 28 of the Order provides:

Anti-Assignment Provisions Unenforceable. No sections or provisions of the Transferred Contracts that purport to (a) prohibit, restrict, or condition the Debtor’s assignment of the Transferred Contracts, including, but not limited to, the conditioning of such assignment on the consent of the Contract Counterparties; (b) authorize the termination, cancellation, or modification of the Transferred Contracts based on the filing of a bankruptcy case, the financial condition of the Debtor or similar circumstances; (c) declare a breach or default as a result of a change in control in respect of the Debtor; or (d) provide for additional payments, penalties, conditions, renewals, extensions, charges, other financial accommodations in favor of the non-Debtor third party to the Transferred Contracts, or modification of any term or condition upon the assignment of a Transferred Contract or the occurrence of the conditions set forth in subsection (b) above, shall have any force and effect, and such provisions constitute unenforceable anti-assignment provisions under 11 U.S.C. § 365(f) and/or are otherwise unenforceable under 11 U.S.C. § 365(e). The entry of this Sale Order constitutes the consent of the Contract Counterparties to the assumption and assignment of such Sale Agreements without the necessity of obtaining such party’s consent, written or otherwise, to such assumption or assignment. All Transferred Contracts shall remain in full force and effect, without existing default(s), subject only to payment of the applicable Cure Amounts, and to any amendments or modifications agreed to between a Contract

Counterparty and the respective Buyers, excluding [X], in accordance with their respective Sale Agreements.

5. Paragraphs 12, 13, 20, and 21 of the Order provide that the purchasers will have no liability with respect to any liabilities or obligations of the Debtor including specifically under environmental law. Paragraph 22 of the Order seeks to enjoin governmental units from enforcing such liabilities including it would appear with respect to public health and safety matters.

OBJECTION

6. Generally, the Anti-Assignment Act applies to federal government contracts. The Anti-Assignment Act, 41 U.S.C. § 15, provides in pertinent part that no contract or order, or any interest therein, shall be transferred by the party to whom such contract or order is given to any other party, and any such transfer shall cause the annulment of the contract or order transferred, so far as the United States is concerned. Moreover, all rights of action for any breach of such contract by the contracting parties are reserved to the United States.

The United States does not consent to the assumption and assignment of the Federal Agreements. The United States objects to any assumption and assignment of the Federal Agreements, or any other federal interest, unless and until the Debtor and any purchaser complies with both the terms of the Federal Agreement and all applicable non-bankruptcy law. Section 363 of the Bankruptcy Code, upon which the Debtor's sale process primarily relies, does not preempt non-bankruptcy law. Under 11 U.S.C. § 363(c)(1) the Debtor "may not assume or assign any executory contract or unexpired lease of the debtor...if applicable law excuses such a party, other than the debtor, to such a contract or lease from accepting performance from or rendering performance to any entity other than the debtor or the debtor in possession." The

Third Circuit has confirmed that under the Anti-Assignment Act, the Debtor may not assign or assume any executory contract with the United States without first obtaining its consent. In re West Electronics, Inc., 852 F.2d 79, 83 (3d Cir. 1988). It is imperative to preserve the Government's ability to determine with whom to contract.

7. The United States objects to the setting of a zero cure amount with respect to the Federal Agreements because the government has not had an adequate amount of time to determine the cure amount, if any.

8. The United States objects to the language in the Order purporting to preclude and enjoin police or regulatory liability of the Purchaser for the property it is purchasing. The United States has proposed fixing language. It is important that the purchasers of contaminated property from the Debtors understand that their purchase under Section 363 of the Bankruptcy Code is not free and clear of the obligation to comply with environmental law as the owner of any contaminated property. No one is free to maintain a nuisance or endanger visitors to or neighbors of contaminated property just because the contamination originated prior to the purchase. See, e.g., Ohio v. Kovacs, 469 U.S. 274, 285 (1985) (“[A]nyone in possession of [a] site . . . must comply with . . . environmental laws . . . Plainly that person . . . may not maintain a nuisance, pollute the waters . . . [,] or refuse to remove the source of such conditions.”); In re General Motors Corp., 407 B.R. 463, 508 (S.D.N.Y. 2009) (a free and clear purchaser “would have to comply with its environmental responsibilities starting with the day it got the property, and if the property required remediation as of that time, any such remediation would be the buyer’s responsibility”).

9. The purchasers are subject to the same compliance obligations as all other owners of property. The law does not put the purchaser in a privileged position, by freeing it from obligations with which all other owners must comply. If the purchaser could contend that it is somehow exempt from obligations that apply to all other owners, the public would be placed at risk. The purchaser cannot evade its environmental obligations, including with respect to hazards that exist even at the outset of its ownership. See *General Motors*, 407 B.R. at 508.

10. Section 363(f) of the Bankruptcy Code, 11 U.S.C. § 363(f), does not allow purchasers to acquire a debtor's property free and clear of the obligation to comply with environmental law. Rather, section 363(f) provides in pertinent part that property is permitted to be sold free and clear of an entity's "interest in such property" only if at least one of the following five conditions is satisfied:

- (1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;
- (2) such entity consents;
- (3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;
- (4) such interest is in bona fide dispute; or
- (5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

None of these conditions is satisfied with respect to compliance obligations of an owner under environmental law. The Government does not consent to a transfer free and clear of such obligations (condition 2), the obligations are not a lien (condition 3), and the obligations of owners under environmental law are not in dispute (condition 4). Similarly, "applicable nonbankruptcy law" (condition 1) does not permit a sale free and clear of an owner's obligations under environmental law. Finally, the Government cannot be "compelled . . . to accept a money satisfaction" (condition 5) in lieu of the purchaser's compliance with environmental law. No

provision of environmental law allows an owner to force the Government to accept money instead of action to protect the public.

11. The United States objects to the proposed relief sought in paragraph 79 of the Sale Motion. The Debtor requests that the Bankruptcy Court waive the fourteen-day stay periods under Federal Rules of Bankruptcy Procedure 6004(h) and 6006(d). By including the waiver of the stays imposed by Bankruptcy Rules 6004(h) and 6006(d), the Debtor is attempting to circumvent the appeal rights of the United States. Pursuant to Rules 6004(h) and 6006(d) of the Federal Rules of Bankruptcy Procedure, unless otherwise ordered by the Court, there is an automatic fourteen-day stay imposed from the date of the entry of the order. Under the Debtor's proposed scheme, if the United States is unable to immediately obtain a hearing before the appropriate Court to seek a stay, its appeal may be contended to be moot. Particularly in light of the fact that the appellant in this case would be a government agency, with a chain of command to be consulted, this unilateral ability of the Debtor and any purchaser to truncate the stay period would be unfair and prejudicial to the United States.

CONCLUSION

WHEREFORE, the United States respectfully requests that the Court deny the Sale Motion without the fixing language requested and grant such other and further relief as the Court deems necessary and just.

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Dated: June 17, 2019

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AFFIDAVIT OF SERVICE

I HEREBY CERTIFY that on June 17, 2019, a copy of the Objection by the United States to the Debtors' Sale Motion was served on the following in the manner indicated below:

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