

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

<p>In re Achaogen, Inc. Debtor.</p>	<p>Chapter 11 Case No. 19-10844 (BLS)</p>
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AP3-SF2 CT SOUTH, LLC'S LIMITED OBJECTION TO DEBTOR'S MOTION FOR AN ORDER (A) APPROVING SALE OF THE DEBTOR'S ASSETS FREE AND CLEAR OF CLAIMS, LIENS, AND ENCUMBRANCES; (B) APPROVING THE ASSUMPTION AND ASSIGNMENT OR REJECTION OF EXECUTORY CONTRACTS AND UNEXPIRED LEASES; AND (C) CERTAIN RELATED RELIEF [DOCKET NO. 30]

AP3-SF2 CT South, LLC ("Landlord"), landlord to debtor and debtor in possession Achaogen, Inc.' ("Debtor"), hereby submits its limited objection to Debtor's Motion for an Order (A) Approving Sale of the Debtor's Assets Free and Clear of Claims, Liens, and Encumbrances; (B) Approving the Assumption and Assignment or Rejection of Executory Contracts and Unexpired Leases; and (C) Certain Related Relief [Docket No. 30] (the "Sale Motion"); as follows:

I. INTRODUCTION

1. Landlord is not opposed to the Debtor's attempt to sell substantially all of its assets, but has several limited objections to the Debtor's proposed sale as it affects Landlord's Premises (as defined below).¹ Specifically, Landlord is informed and believes that in connection with its proposed sale of property the Debtor seeks to grant at least one (and potentially more) of the proposed buyers access to the Premises for the purpose of removing certain lab equipment purchased by such buyer.² Although the process of removing lab equipment raises the risk of

¹ Landlord is presently discussing with the Debtor potential resolutions of Landlord's objections which may resolve Landlord's limited objections to the Sale Motion. In addition, the Debtor has informed Landlord that the Debtor is not seeking to assume, assign, sell, or otherwise reject Landlord's Lease (as defined below) or related subleases as part of the Sale Motion and accompanying assignment notice, and thus Landlord is not raising objections to the assumption, assignment, sale, or rejection of the Lease and related subleases at this time and reserves all rights related thereto. The Debtor has agreed to include clarifying language in the proposed Sale Order confirming that the Lease and related subleases are not being assumed, assigned, sold, or rejected in connection with the Sale Motion.

² The Debtor has not filed copies each of the underlying sale :



damages to the Premises and potential claims by third parties, Landlord is a stranger to the proposed buyer and has no protection against the harm it may cause. Accordingly, in accordance with section 363(e) of the Bankruptcy Code, Landlord demands adequate protection in the form of a requirement that any buyer accessing the Premises: (i) provide Landlord with adequate insurance coverage to cover any damages to the Premises or any claims arising out of any of such buyer's activities on the Premises; and (ii) agree to indemnify and defend Landlord for any damage to the Premises and claims related to such buyer's activities on the Premises.

2. Additionally, in connection with Landlord's consent to the Sana Sublease (defined below), the Debtor assigned all of its rights under the Sana Sublease to Landlord. As part of the Sana Sublease, the Debtor assigned and transferred to Sana certain Included Furniture and agreed to conditionally assign certain Optional Furniture. Given such assignment, Landlord further objects to the proposed sale to the extent the Debtor is seeking to sell any of the Included Furniture and Optional Furniture or any other property that was assigned to Landlord in connection with the consent or other constitutes Landlord's property under the Lease and California law.

3. Finally, according to the Debtor's Form 10-K filed with the Securities and Exchange Commission for the year ended December 31, 2018, the Debtor's business involves the use of hazardous materials. As part of its adequate protection, the Debtor and any buyer removing property should be required to fully comply with the terms of the Lease and applicable law that are in any way implicated by the removal of any property which may still contain or be contaminated with any hazardous materials.

II. FACTUAL AND PROCEDURAL BACKGROUND

4. The Debtor filed its voluntary petition under chapter 11 of the Bankruptcy Code on April 15, 2019. The Debtor continues to operate its business and manage its properties as debtor in possession pursuant to Bankruptcy Code sections 1107(a) and 1108.

5. Landlord and the Debtor are parties to that certain Lease dated August 12, 2016 (as amended by that certain First Amendment to Lease dated as of April 7, 2017, Second Amendment

is not familiar with the sale terms to each of the proposed buyers. Landlord reserves its right to object to any other issues raised by the underlying purchase agreements.

to Lease dated as of July 20, 2017, Third Amendment to Lease dated as of August 17, 2017, and that certain Fourth Amendment to Lease dated as of November 29, 2018, collectively, as amended, the "Lease"), whereby Landlord leases to the Debtor and the Debtor leases from Landlord certain space (the "Premises") in the building located at One Tower Place, South San Francisco, California 94080. The Premises consist of approximately 99,000 square feet of space.

6. On or about October 25, 2018, the Debtor subleased (the "Sana Sublease") a portion of the Premises consisting of the entire fifth (5th) floor to Sana Biotechnology, Inc. ("Sana"). In connection with the Sana Sublease, the Debtor transferred to Sana the Included Furniture (as such term is defined in the Sana Sublease). *See* Sana Sublease, ¶ 18. In addition, in connection with the Sana Sublease, the Debtor conditionally agreed to transfer the Optional Furniture (as such term is defined in the Sana Sublease) to Sana. *Id.*

7. On or about January 25, 2019, the Debtor also subleased (the "Atreca Sublease") and together with the Sana Sublease, the "Subleases") a portion of the Premises consisting of the entire third (3rd) floor to Atreca, Inc. ("Atreca", and together with Sana, the "Subtenants"). In connection with both of the Subleases, the Debtor, among other things, assigned to Landlord all the Debtor's interests in the respective Subleases and all rentals and income arising therefrom.

8. On April 15, 2019, the Debtor filed the Sale Motion seeking approval of, among other things, the proposed sale of substantially all its assets at an auction. Landlord is informed and believes that at the auction the Debtor accepted bids from, among others, Heritage Global Partners, Inc. to purchase the Debtor's lab equipment located in the Premises.

III. LIMITED SALE OBJECTIONS

A. Landlord is Entitled to Adequate Protection

9. Bankruptcy Code section 363(e) provides, in pertinent part, that "... [A]t any time, on request of an entity that has an interest in property used, sold or leased, or proposed to be used, sold or leased, by the trustee, the court, with or without a hearing, shall prohibit or condition such use, sale or lease as is necessary to provide adequate protection of such interest." Real property lessors are entitled to seek adequate protection. *See, e.g., In re P.J. Clarke's Restaurant Corp.*, 265 B.R. 392, 404 (Bankr. S.D.N.Y. 2001) (noting that a "landlord's right to adequate protection

seems to follow clearly from the language of §363(e)..."); *In re Ernst Home Center, Inc.*, 209 B.R. 955, 965-966 (Bankr. W.D. Wash. 1997); *In re MS Freight Distribution, Inc.*, supra, 172 B.R. at 980 fn. 4 ("Section 363(e) by its express terms authorizes an entity whose property is to be leased by the debtor to seek adequate protection.")

10. In connection with its proposed sale of assets to its buyers, the Debtor is proposing to grant at least one of the buyers access to the Premises for the purpose of removing certain personal property that such buyer is purchasing.³ These buyers are effectively strangers to Landlord and could damage the Premises or otherwise expose Landlord to substantial liabilities in connection with their activities on the Premises. As a result, because the Debtor is proposing to grant these strangers limited access to the Premises, the Debtor will be using the Premises in connection with the sale and Landlord is entitled to adequate protection under section 363(e) as a matter of law.

11. In order to avoid any potential harm to Landlord, adequate protection should be crafted to fully protect Landlord's interests in the Premises. Adequate protection should therefore include a requirement that any buyer that is granted access to the Premises provide Landlord with evidence of adequate insurance coverage, naming Landlord as an additional insured, to cover any damage to the Premises or the building or claims by others before any access is permitted to the Premises or such buyer is allowed to remove any purchased property. Such insurance should be consistent with the standards developed by Landlord for third party contractors and vendors who access the Premises. In addition, such buyer should be required to fully indemnify and defend Landlord from all claims by third parties and damage to the Premises and the building relating to such buyer's activities on the Premises and removal of any items of purchased property.

12. The foregoing forms of adequate protection are particularly relevant here given that the Debtor's announced sale of assets raises the specter of the Debtor's administrative insolvency. As a result, there is no assurance that any claim against the Debtor will be paid. In any event, the

³ Because the Debtor has not filed copies of the underlying purchase agreements yet, Landlord reserves all additional objections that it may have to the terms of any of the purchase agreements.

allowance of an administrative priority claim for any damages to the Premises caused by removal of any of purchased property from the Premises or the activities of any buyer on the Premises is not adequate protection, *In re Attorneys Office Management, Inc.*, 29 B.R. 96, 99 (Bankr. C.D. Cal. 1983) ("In §361(3) it is made clear that an administrative claim under §503(b)(1) in itself will not constitute adequate protection."), particularly here where the estate may lack unencumbered funds sufficient to satisfy any substantial administrative claims. Accordingly, the Sale Order should be modified to protect Landlord's bargained for expectations and protections with respect to the use and occupancy of the Premises. Landlord should not be made to bear any risk of loss or liability to facilitate Debtor's sale of assets.

B. The Debtor Should Not be Authorized to Sell Any Assets Subject to the Sana Sublease or Which Constitute Landlord's Property under the Lease and California Law

13. The Debtor has no right to sell any property which it does not own. In connection with Landlord's consent to the Subleases, the Debtor assigned to Landlord all the Debtor's interests in the respective Subleases and all rentals and income arising therefrom. Given the Debtor's broad assignment to Landlord of all interests in the Subleases, the Debtor's rights as the lessor of any personal property subject to the Sana Sublease was also assigned to Landlord. Moreover, certain property that is installed in the Premises could constitute a fixture and may be Landlord's property under the Lease and California law. Landlord objects to the Sale Motion to the extent the Debtor seeks to sell any personal property that is the subject of the Sana Sublease or which constitutes Landlord's property under the Lease and California law. Unfortunately, because the Debtor has not yet filed its executed purchase and sale agreements, Landlord cannot definitively determine whether any such property is included in any of the proposed sales at this time. Landlord reserves all of its objections that may arise out of the terms of any of the underlying purchase agreements.

C. The Debtor and Any Buyer Must Fully Comply With All Applicable Laws and Regulations

14. As stated in the Debtor's 10-k or the year ended December 31, 2018, the Debtor's activities "involve the controlled storage, use and disposal of hazardous materials, including the

components of [the Debtor's] pharmaceutical products and product candidates, test samples and reagents, biological materials and other hazardous compounds." The Debtor has not, however, disclosed to Landlord or this Court whether any of the equipment or other personal property it seeks to sell contains or may be contaminated by any such hazardous materials which would require removal, decontamination or cleanup under applicable law in connection with its removal from the Premises. Under 28 U.S.C. 959(b) a debtor in possession must generally comply with all applicable laws. Given the Debtor's admitted use or prior use of hazardous materials, the Sale Order should expressly require that the Debtor and any applicable buyer accessing the Premises fully comply with all applicable laws and regulations and the requirements of the Lease in connection with the removal of any personal property, particularly with respect to issues relating to hazardous materials.

IV. RESERVATION OF RIGHTS

15. Landlord reserves the right to make such other and further objections to the Debtor's Sale Motion as may be appropriate based upon any new information provided by the Debtor or upon any different relief requested by the Debtor. Landlord further reserves its rights to object to: (i) any specific request to assume and assign its lease on any grounds, including cure and adequate assurance information provided by the Debtor; and (ii) any proposed form of purchase agreement submitted by any proposed buyer.

V. JOINDER

16. To the extent not inconsistent with the foregoing, Landlord joins in the objections to Sale Motion filed by the Official Committee of Unsecured Creditors and the Debtor's other landlords if any.

VI. CONCLUSION

17. Accordingly, objects to the Sale Motion for the limited reasons set forth herein.

Dated: June 18, 2019

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