

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re

Achaogen, Inc.,

Debtor.¹

Chapter 11

Case No. 19-10844 (___)

**DEBTOR'S MOTION FOR ENTRY OF INTERIM AND FINAL ORDERS
(A) AUTHORIZING THE DEBTOR TO (I) CONTINUE ITS CASH
MANAGEMENT SYSTEM, (II) HONOR CERTAIN RELATED PREPETITION
OBLIGATIONS, AND (III) MAINTAIN EXISTING BUSINESS FORMS,
(B) AUTHORIZING AND DIRECTING THE DEBTOR'S BANK TO HONOR
ALL RELATED PAYMENT REQUESTS, (C) SCHEDULING A FINAL
HEARING, AND (D) GRANTING RELATED RELIEF**

The above-captioned debtor and debtor in possession (the “Debtor”) hereby moves the Court (the “Motion”) for entry of interim and final orders, substantially in the forms attached hereto as **Exhibit A** (the “Interim Order”) and **Exhibit B** (the “Final Order”), (a) authorizing the Debtor to (i) continue the Cash Management System (as defined below), (ii) honor certain related prepetition obligations, (iii) and maintain its existing Business Forms (as defined below) in the ordinary course of business, (b) authorizing and directing the Debtor’s Bank to honor all related payment requests, (c) scheduling a final hearing to consider entry of the proposed Final Order, and (d) granting related relief. In support of this Motion, the Debtor incorporates by reference the *Declaration of Blake Wise in Support of First Day Relief* (the “First Day Declaration”),² which was filed contemporaneously with this Motion, and respectfully states 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 1 Tower Place, Suite 400, South San Francisco, CA 94080.

² Capitalized terms used but not defined herein shall have the meanings ascribed to them in the First Day Declaration.



JURISDICTION

1. This Court has jurisdiction over this Motion under 28 U.S.C. § 1334 and the *Amended Standing Order of Reference* from the United States District Court for the District of Delaware, dated February 29, 2012. This motion is a core proceeding under 28 U.S.C. § 157(b)(2)(A), and the Debtor confirms its consent 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”) to the entry of a final order by the Court in connection with this Motion to the extent that it is later determined that the Court, absent consent of the parties, cannot enter final orders or judgments in connection herewith consistent with Article III of the United States Constitution.

2. Venue is proper in this district under 28 U.S.C. §§ 1408 and 1409.

3. The statutory bases for the relief requested herein are sections 105, 345, and 363 of title 11 of the United States Code (the “Bankruptcy Code”), as supplemented by Rules 2015, 6003 and 6004 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), and Local Rule 2015-2.

GENERAL BACKGROUND

4. On the date hereof (the “Petition Date”), the Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code (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. No party has requested the appointment of a trustee or examiner and no committee has been appointed in this Chapter 11 Case.

5. The Debtor is a biopharmaceutical company focused on the development and commercialization of innovative antibiotic treatments against multi-drug resistant gram-

negative infections. Additional details regarding the Debtor’s business and the facts and circumstances supporting the relief requested herein are set forth in the First Day Declaration, which was filed contemporaneously with this Motion and is incorporated by reference.

THE CASH MANAGEMENT SYSTEM

Overview

6. The Debtor maintains an integrated cash management system (as described herein, the “Cash Management System”), comprising six accounts (the “Bank Accounts”) all located at or affiliated with Silicon Valley Bank (the “Bank”). The Bank is both the Debtor’s Prepetition Secured Lender and its proposed DIP Lender (as both are defined in the First Day Declaration). The following table identifies the Bank Accounts and the last four digits of each Bank Account number:

| Account Holder | Bank Name | Account Description | Last 4 Digits of Account No. |
|-----------------------|---------------------|--------------------------------|-------------------------------------|
| Achaogen, Inc. | Silicon Valley Bank | AR Account | 5720 |
| Achaogen, Inc. | Silicon Valley Bank | Operating Account | 4224 |
| Achaogen, Inc. | Silicon Valley Bank | Sweep Account | 3256 |
| Achaogen, Inc. | Silicon Valley Bank | Investment Account | 3753 |
| Achaogen, Inc. | Silicon Valley Bank | Lender Cash Collateral Account | 4403 |
| Achaogen, Inc. | Silicon Valley Bank | Lease Collateral Account | 6905 |

7. The Cash Management System is centrally managed for the Debtor out of the Debtor’s offices in South San Francisco, California, and all funds in the Bank Accounts are denominated and held in U.S. Dollars. The Debtor uses the Cash Management System in the ordinary course of business to collect, transfer, and disburse funds generated from its operations and to facilitate cash monitoring, forecasting, and reporting. The Debtor’s treasury department maintains daily oversight of the Cash Management System and implements cash management controls for entering, processing, and releasing funds. Additionally, the Debtor regularly reconciles books and records to ensure that all transfers are accounted for properly.

The Flow of Funds Through Bank Accounts

8. As illustrated above, the Debtor maintains six bank accounts with or at affiliates of the Bank. The AR Account is the account into which customer payments are deposited. Funds from the AR Account are transferred into the Operating Account, as necessary. The Operating Account is swept daily into the Sweep Account, which holds excess cash and investments in short-term government securities. Funds are then again transferred back from the Sweep Account to the Operating Account as necessary for disbursements to fund payroll and operations.

9. In addition, the Debtor also maintains an investment account at the Bank (the "Investment Account") for investments in money-market and short-term overnight repurchase agreements. The Investment Account is managed by SVB Asset Management, a non-bank affiliate of the Bank. The Debtor transfers funds, as necessary, from the Operating Account into the Investment Account. Funds from the Investment Account can also be transferred into the Operating Account, as necessary.

10. Finally, the Debtor maintains two collateral money market accounts at the Bank. As further explained in the First Day Declaration, the Bank was also the Debtor's Prepetition Secured Lender and held \$25 million in cash collateral securing the Prepetition Term Loan in the Lender Cash Collateral Account. In connection with the Prepetition Loan Amendment, the Debtor agreed to permit the Bank to sweep the entirety of the \$25 million in the Lender Cash Collateral Account and to apply the swept funds to the principal and interest due under the Prepetition Loan Agreement. The second collateral money market account, the Lease Collateral Account, holds \$530,000 as security for the Debtor's obligations under its office lease.

11. A diagram illustrating the foregoing Cash Management System is attached as Exhibit C.

Bank and Investment Fees

12. The Debtor pays on average approximately \$7,000 per month in bank and investment fees incurred in connection with the Bank Accounts (the "Bank Fees"). The Debtor pays the Bank Fees as they come due on a rolling basis over the course of each month, typically by direct debit. The Debtor estimates that it is required to remit approximately \$3,500 in outstanding Bank Fees as of the Petition Date. The Debtor seeks authority to pay the prepetition Bank Fees and to pay any ordinary course Bank Fees incurred in connection with the Debtor's existing Bank Accounts.

Credit Cards

13. As part of the Cash Management System, the Debtor utilizes (and provides to certain employees) credit cards (collectively, the "Credit Cards") issued by the Bank with an aggregate credit limit of \$200,000. Certain authorized employees utilize the Credit Cards for approved travel and business related expenses. Costs incurred through use of the Credit Cards are paid from the Operating Account.

14. On average in the preceding six months prior to the Petition Date, approximately \$250,000 per month in the aggregate was charged to the Credit Cards.³ As of the Petition Date, the Credit Cards had an aggregate outstanding balance of approximately \$125,000. The Debtor seeks authority to continue use of the Credit Cards in the ordinary course

³ The Debtor previously had a higher aggregate credit limit to support a larger workforce. Since the aggregate credit limit has been reduced, the Debtor's average monthly credit card charges have been approximately \$200,000 per month.

of business, subject to any terms and conditions thereof, on a postpetition basis consistent with past practice, and to pay any prepetition amounts related to the Credit Cards.

Business Forms

15. As part of the Cash Management System, the Debtor utilizes numerous preprinted business forms, including, without limitation, letterhead, purchase orders, invoices, and preprinted checks (the "Business Forms"), in the ordinary course of its business. The Debtor also maintains books and records to document, among other things, receipts and expenses. To minimize expenses to its estate and avoid confusion on the part of employees, customers, vendors, and suppliers during the pendency of this Chapter 11 Case, the Debtor requests that the Court authorize the continued use of its Business Forms and other correspondence and documents related to the Bank Accounts, as such forms were in existence immediately before the Petition Date and thereafter, without reference to the Debtor's status as debtor in possession, rather than requiring the Debtor to incur the expense and delay of ordering entirely new business forms as required under the U.S. Trustee Guidelines.

RELIEF REQUESTED

16. The Debtor seeks entry of an Interim Order, pending the entry of a final order or the Interim Order becoming a final order (the "Final Order"), authorizing, but not directing, the Debtor to continue to operate the Cash Management System in the day-to-day operation of its business, and to honor certain prepetition obligations in accordance with the operation of the Cash Management System. Specifically, the Debtor requests authority to: (a) continue to use, with the same account numbers, each of the Bank Accounts; (b) treat the Bank Accounts for all purposes as accounts of the Debtor as debtor in possession; and (c) conduct banking transactions by all usual means and debit the Bank Accounts on account of all usual items and payment instructions.

17. Additionally, the Debtor seeks authority to use, in its present form, its Business Forms and other correspondence and documents related to the Bank Accounts, without reference to the Debtor's status as debtor in possession.

18. The Debtor further requests authority for the Bank to: (i) continue to maintain, service, and administer the Bank Accounts; and (ii) debit the Bank Accounts in the ordinary course of business on account of (a) all checks drawn on the Bank Accounts that are cashed at the Bank or exchanged for cashier's checks by the payees thereof prior to the Petition Date, (b) all checks or other items deposited in one of the Bank Accounts at the Bank prior to the Petition Date that have been dishonored or unpaid for any reason, together with any fees and costs in connection therewith, to the same extent the Debtor was responsible for such items prior to the Petition Date, and (c) all undisputed prepetition amounts outstanding as of the date hereof, if any, owed to any Bank as fees or service charges for the maintenance of any aspect of the applicable Cash Management System.

19. The Debtor also requests that, upon entry of the Interim Order, the Court schedule a final hearing (the "Final Hearing") on the Motion to consider the relief requested herein on a final basis.

BASIS FOR RELIEF

I. Maintaining the Existing Cash Management System Is Essential to the Debtor's Ongoing Operations and Restructuring Efforts.

20. The Operating Guidelines and Reporting Requirements of the United States Trustee for Chapter 11 Debtors in Possession and Chapter 11 Trustees, dated February 5, 2015 (the "U.S. Trustee Guidelines"), require debtors in possession to, among other things:

- a. establish one debtor in possession bank account for all estate monies required for the payment of taxes, including payroll taxes;

- b. close all existing bank accounts and open new debtor in possession accounts;
- c. maintain a separate debtor in possession account for cash collateral; and
- d. obtain checks that bear the designation “debtor in possession” and reference the bankruptcy case number and type of account on such checks.

21. These requirements are designed to provide a clear line of demarcation between prepetition and postpetition claims and payments and help protect against the inadvertent payment of prepetition claims by preventing banks from honoring checks drawn before the Petition Date. Considering, however, that the Debtor’s business and financial affairs are complex and require the collection, disbursement, and movement of funds through its Bank Accounts, enforcement of the provisions of the U.S. Trustee Guidelines during this Chapter 11 Case would severely disrupt the Debtor’s operations. Accordingly, the Debtor respectfully requests that the Court allow it to operate each of its Bank Accounts listed on **Exhibit C** attached hereto as they were maintained in the ordinary course of business before the Petition Date.

22. Continuation of the Cash Management System is permitted pursuant to section 363(c)(1) of the Bankruptcy Code, which authorizes the debtor in possession to “use property of the estate in the ordinary course of business without notice or a hearing.” Additionally, courts in this and other districts have recognized that an integrated cash management system “allows efficient utilization of cash resources and recognizes the impracticalities of maintaining separate cash accounts for the many different purposes that require cash.” *In re Columbia Gas Sys., Inc.*, 136 B.R. 930, 934 (Bankr. D. Del. 1992), *aff’d in part and rev’d in part*, 997 F.2d 1039 (3d Cir. 1993). The United States Court of Appeals for the Third Circuit emphasized that requiring a debtor to maintain separate accounts “would be a

huge administrative burden and economically inefficient.” *Columbia Gas*, 997 F.2d at 1061; *see also In re Southmark Corp.*, 49 F.3d 1111, 1114 (5th Cir. 1995) (finding cash management systems allow a debtor “to administer more efficiently and effectively its financial operations and assets”).

23. Bankruptcy courts treat requests for authority to continue utilizing existing cash management systems as a relatively “simple matter.” *In re Baldwin-United Corp.*, 79 B.R. 321, 327 (Bankr. S.D. Ohio 1987). In *In re Charter Co.*, 778 F.2d 617 (11th Cir. 1985), for example, the bankruptcy court entered an order authorizing the debtor and forty-three (43) of its subsidiaries “to continue to consolidate the management of their cash as has been usual and customary in the past, and to transfer monies from affiliated entity to entity, including operating entities that are not debtors.” *Id.* at 620. The Eleventh Circuit Court of Appeals then affirmed a subsequent district court decision denying a creditor’s motion for leave to appeal the bankruptcy court’s cash management order, holding that authorizing the debtors to utilize their prepetition “routine cash management system” was “entirely consistent” with applicable provisions of the Bankruptcy Code. *Id.* at 621.

24. Indeed, in large chapter 11 cases, bankruptcy courts in this district routinely grant chapter 11 debtors similar authority to continue using existing cash management systems. *In re Orexigen Therapeutics, Inc.*, No. 18-10518 (KG) (Bankr. D. Del. Apr. 4, 2018) (authorizing debtors’ continued use of cash management system and bank accounts); *In re Cubic Energy, Inc.*, No 15-12500 (CSS) (Bankr. D. Del. Jan. 12, 2016) (same); *In re Offshore Group Investment Limited*, No. 15-12422 (BLS) (Bankr. D. Del. Jan. 5, 2016) (same); *In re Hercules Offshore, Inc.*, No. 15-11685 (BLS) (Bankr. D. Del. Sept. 8, 2015) (same); *In re Brookstone Holdings Corp.*, No. 14-10752 (BLS) (Bankr. D. Del. Apr. 4, 2014) (same); *In re*

Dolan Co., No. 14-10614 (BLS) (Bankr. D. Del. Mar. 25, 2014) (same); *In re F & H Acquisition Corp.*, No. 13-13220 (KG) (Bankr. D. Del. Dec. 17, 2013) (same); *In re Overseas Shipholding Group, Inc.*, No. 12-20000 (PJW) (Bankr. D. Del. Jan. 24, 2013) (same).⁴

25. Here, the Debtor has utilized the Cash Management System in its current form as part of its ordinary and usual business practices, and as such, the Debtor believes the continued use of the Cash Management System falls within the purview of ordinary course transactions permitted under section 363(c)(1) of the Bankruptcy Code. Moreover, appropriate circumstances exist for the Court to authorize the Debtor's continued use of the Cash Management System under sections 363(b)(1) and 105(a) of the Bankruptcy Code.

26. The relief requested in this Motion will help minimize any disruption in the Debtor's business operations during its restructuring, and preserve the value of the Debtor's estate. Indeed, any disruptions in the Cash Management System could lead to delays in satisfying the Debtor's obligations to its vendors and suppliers and meeting the demands of its various customers. In order to avoid the potential erosion of value that could ensue from any such interruptions in the Debtor's ordinary course business operations, the Debtor believes it is imperative that it be authorized to continue the Cash Management System consistent with its historical practice.

27. Moreover, strict adherence to the U.S. Trustee Guidelines would prove to be exceedingly burdensome to the Debtor and its management, reduce efficiencies, and cause unnecessary expense. The delays that would result from opening the new accounts and revising cash management procedures—particularly where, as here, the Debtors' financial and accounting staff is severely depleted—would disrupt the Debtor's business operations at this

⁴ Because of the voluminous nature of the orders cited herein, such orders have not been attached to this Motion. Copies of these orders are available upon reasonable request to the Debtor's proposed counsel.

critical time, divert the financial staff's much needed attention from the sale process to administrative matters, have little or no benefit to the Debtor's estates, and erode the value of the Debtor's enterprise to the detriment of all stakeholders. Accordingly, the Debtor should be allowed to continue using the Cash Management System consistent with its historical practice.

II. Authorizing the Debtor to Continue Using Debit, Wire, Credit Card, and ACH Payments Is Warranted.

28. The Debtor requests that the Court grant further relief from the U.S. Trustee Guidelines to the extent they require the Debtor to make all disbursements by check. In particular, the U.S. Trustee Guidelines require that all receipts and all disbursements of estate funds must be made by check with a notation representing the reason for the disbursement. In the ordinary course of business, the Debtor conducts transactions through ACH transfers and other similar methods. The Debtor also utilizes the Credit Cards to pay for certain miscellaneous travel and other business expenses of its employees. If the Debtor's ability to conduct transactions by debit, wire, ACH transfer, credit card or other similar methods is impaired, the Debtor may be unable to perform under certain contracts, its business operations may be unnecessarily disrupted, and its estate may incur additional costs.

III. Authorizing the Bank to Continue to Maintain, Service, and Administer the Bank Accounts in the Ordinary Course of Business Is Warranted.

29. The Debtor respectfully requests that the Court authorize the Bank to continue to maintain, service, and administer its Bank Accounts as accounts of the Debtor as debtor in possession, without interruption and in the ordinary course of business. In this regard, the Bank should be authorized to receive, process, honor, and pay any and all checks, ACH transfers and other instructions, and drafts payable through, drawn, or directed on such Bank Accounts after the Petition Date by holders, makers, or other parties entitled to issue instructions with respect thereto; *provided, however*, any check, draft, or other notification that

the Debtor advises the Bank to have been drawn, issued, or otherwise presented before the Petition Date may be honored by the Bank only to the extent authorized by order of the Court.

30. The Debtor further requests that the Court authorize the Bank to accept and honor all representations from the Debtor as to which checks, drafts, wires, or ACH transfers should be honored or dishonored consistent with any order of the Court and governing law, whether such checks, drafts, wires, or ACH transfers are dated before or subsequent to the Petition Date. The Debtor also requests that, to the extent the Bank honors a prepetition check or other item drawn on any account either: (a) at the direction of the Debtor; or (b) in a good-faith belief that the Court has authorized such prepetition check or item to be honored, the Bank will not be deemed to be liable to the Debtor or to its estate on account of such prepetition check or other item honored postpetition. The Debtor respectfully submits that such relief is reasonable and appropriate because the Bank is not in a position to independently verify or audit whether a particular item may be paid in accordance with a Court order or otherwise. Moreover, the Debtor requests that the Court authorize the Bank to (a) continue to charge the Debtor regular and ordinary course Bank Fees, as applicable, and (b) charge-back returned items to the Bank Accounts, whether such items are dated before, on, or subsequent to the Petition Date, in the ordinary course of business.

31. Courts in this district, in similar large chapter 11 cases, have regularly waived the U.S. Trustee Guidelines on the grounds that they are impractical and potentially detrimental to a debtor's postpetition business operations and restructuring efforts. *See, e.g., In re Orexigen Therapeutics, Inc.*, No. 18-10518 (KG) (Bankr. D. Del. Apr. 4, 2018) (authorizing continued use of pre-petition bank accounts during bankruptcy cases); *In re Cubic Energy, Inc.*, No 15-12500 (CSS) (Bankr. D. Del. Jan. 12, 2016) (same); *In re Offshore Group Investment*

Limited, No. 15-12422 (BLS) (Bankr. D. Del. Jan. 5, 2016) (same); *In re Hercules Offshore, Inc.*, No. 15-11685 (BLS) (Bankr. D. Del. Sept. 8, 2015) (same); *In re GSE Envtl., Inc.*, No. 14-11126 (Bankr. D. Del. May 6, 2014) (same); *In re Dolan Co.*, No. 14-10614 (BLS) (Bankr. D. Del. Mar. 25, 2014) (same); *In re FAH Liquidating Corp. f/k/a Fisker Auto Holdings, Inc.*, No. 13-13087 (KG) (Bankr. D. Del. Dec. 13, 2013) (same); *In re Physiotherapy Holdings, Inc.*, No. 13-12965 (KG) (Bankr. D. Del. Nov. 14, 2013) (same) *In re Dex One Corp.*, No. 13-10533 (KG) (Bankr. D. Del. Mar. 19, 2013) (same).

IV. The Court Should Authorize the Debtor to Continue Using Its Existing Business Forms.

32. To avoid disruption of the Cash Management System and unnecessary expense, pursuant to Local Rule 2015-2(a), the Debtor requests that it be authorized to continue to use its Business Forms substantially in the form existing immediately before the Petition Date, without reference to its status as debtor in possession. The Debtor submits that parties in interest will not be prejudiced if the Debtor is authorized to continue to use its Business Forms substantially in the forms existing immediately before the Petition Date. Parties doing business with the Debtor will be aware of its status as debtor in possession and, thus, changing the Business Forms is unnecessary and would be unduly burdensome.

33. In similar chapter 11 cases, courts in this district have allowed debtors to use their prepetition business forms without the “debtor in possession” label. *See, e.g., In re Orexigen Therapeutics, Inc.*, No. 18-10518 (KG) (Bankr. D. Del. Apr. 4, 2018) (authorizing debtors’ to continue to use prepetition business forms without “debtor-in-possession” label); *In re Offshore Group Investment Limited*, No. 15-12422 (BLS) (Bankr. D. Del. Jan. 5, 2016) (same); *In re Hercules Offshore, Inc.*, No. 15-11685 (BLS) (Bankr. D. Del. Sept. 8, 2015) (same); *In re GSE Envtl., Inc.*, No. 14-11126 (Bankr. D. Del. May 6, 2014) (same); *In re Dolan*

Co., No. 14-10614 (BLS) (Bankr. D. Del. Mar. 25, 2014) (same); *In re Sorenson Commc'ns, Inc.*, No. 14-10454 (BLS) (Bankr. D. Del. Mar. 4, 2014) (same); *In re FAH Liquidating Corp. f/k/a Fisker Auto. Holdings, Inc.*, No. 13-13087 (KG) (Bankr. D. Del. Dec. 13, 2013) (same); *In re Physiotherapy Holdings, Inc.*, No. 13-12965 (KG) (Bankr. D. Del. Nov. 14, 2013) (same).

THE REQUIREMENTS OF BANKRUPTCY RULE 6003 ARE SATISFIED

34. Pursuant to Bankruptcy Rule 6003, the Court may grant relief regarding a motion to pay all or part of a prepetition claim within 21 days after the Petition Date if the relief is necessary to avoid immediate and irreparable harm. Immediate and irreparable harm exists where the absence of relief would impair a debtor's ability to reorganize or threaten the debtor's future as a going concern. *See In re Ames Dep't Stores, Inc.*, 115 B.R. 34, 36 n.2 (Bankr. S.D.N.Y. 1990) (discussing the elements of "immediate and irreparable harm" in relation to Bankruptcy Rule 4001).

35. The relief requested in this Motion is necessary to avoid immediate and irreparable harm to the Debtor and all parties in interest. The Cash Management System is vital to reducing risk and preserving the value of the Debtor's assets. Failure to continue the Cash Management System in the ordinary course of business could result in increased cost and risk of loss to the Debtor and its estate and could impede the Debtor's efforts to implement a comprehensive restructuring transaction. Accordingly, the Debtor submits that it has satisfied the requirements of Bankruptcy Rule 6003 to support the relief set forth in the Interim Order on the terms described herein.

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

36. To implement the foregoing successfully, the Debtor seeks a waiver of the notice requirements under Bankruptcy Rule 6004(a) and the 14-day stay of an order authorizing the use, sale, or lease of property under Bankruptcy Rule 6004(h).

RESERVATION OF RIGHTS

37. Nothing contained in this Motion or any actions taken by the Debtor pursuant to relief granted in the Order is intended or should be construed as: (a) an admission as to the validity of any particular claim against the Debtor; (b) a waiver of the Debtor's rights to dispute any particular claim on any grounds; (c) a promise or requirement to pay any particular claim; (d) an implication or admission that any particular claim is of a type specified or defined in this Motion; (e) a request or authorization to assume any agreement, contract, or lease pursuant to section 365 of the Bankruptcy Code; (f) a waiver or limitation of the Debtor's rights under the Bankruptcy Code or any other applicable law; or (g) a concession by the Debtor that any liens (contractual, common law, statutory, or otherwise) satisfied pursuant to this Motion are valid, and the Debtor expressly reserved its rights to contest the extent, validity, or perfection or seek avoidance of all such liens. If the Court grants the relief sought herein, any payment made pursuant to the Court's order is not intended and should not be construed as an admission as to the validity of any particular claim or a waiver of the Debtor's rights to subsequently dispute such claim.

NOTICE

38. Notice of this Motion is being provided to: (i) the U.S. Trustee; (ii) the parties included on the Debtor's list of twenty (20) largest unsecured creditors; (iii) counsel to SVB in its capacity as Prepetition Lender and DIP Lender (each as defined in the First Day Declaration); (iv) the Bank; (v) the Delaware Secretary of State; (vi) the Delaware State Treasury; (vii) the Internal Revenue Service; (viii) the Securities and Exchange Commission; (ix) any party that has requested notice pursuant to Bankruptcy Rule 2002; and (x) any other party required to be provided notice under Local Rule 9013-1(m). As this Motion is seeking "first day" relief, within two business days after entry of an order on this Motion, the Debtor

will serve copies of this Motion and any order entered in respect to this Motion as required by Local Rule 9013-l(m). The Debtor submits that, in light of the nature of the relief requested, no other or further notice need be given.

CONCLUSION

WHEREFORE, the Debtor respectfully requests that the Court enter an order in substantially the form attached as **Exhibit A** granting the relief requested herein on an interim basis and such other relief as is just and proper under the circumstances.

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April 15, 2019
Wilmington, Delaware

MORRIS, NICHOLS, ARSHT & TUNNELL LLP

/s/ Derek C. Abbott

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Proposed Counsel for Debtor and Debtor in Possession

EXHIBIT A

Proposed Interim Order

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

In re

Achaogen, Inc.,

Debtor.¹

Chapter 11

Case No. 19-10844 (___)

Re: D.I. ___

**INTERIM ORDER GRANTING DEBTOR'S MOTION FOR ENTRY OF
INTERIM AND FINAL ORDERS (A) AUTHORIZING THE DEBTOR TO
(I) CONTINUE ITS CASH MANAGEMENT SYSTEM, (II) HONOR CERTAIN
RELATED PREPETITION OBLIGATIONS, AND (III) MAINTAIN EXISTING
BUSINESS FORMS, (B) AUTHORIZING AND DIRECTING THE DEBTOR'S
BANK TO HONOR ALL RELATED PAYMENT REQUESTS, (C) SCHEDULING
A FINAL HEARING, AND (D) GRANTING RELATED RELIEF**

Upon the motion (the "Motion")² of the above-captioned debtor and debtor in possession (the "Debtor") for entry of interim (this "Interim Order") and final orders, (a) authorizing the Debtor to (i) continue its Cash Management System, (ii) honor certain related prepetition obligations, and (iii) maintain its existing Business Forms in the ordinary course of business, (b) authorizing and directing the Debtor's Bank to honor all related payment requests, (c) scheduling a final hearing (the "Final Hearing") to consider entry of the proposed final order granting the Motion and (d) granting related relief, all as more fully set forth in the Motion; and upon the First Day Declaration; and this Court having jurisdiction over this matter 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; and this Court having found that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2); and that this Court may enter a final order consistent with Article III of the United States Constitution; and this Court having

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 1 Tower Place, Suite 400, South San Francisco, CA 94080.

² Capitalized terms not defined in this Order are defined in the Motion.

found that venue of this proceeding and the Motion in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and this Court having found that the relief requested in the Motion is in the best interests of the Debtor's estate, its creditors, and other parties in interest; and this Court having found that the Debtor's notice of the Motion was appropriate under the circumstances and no other notice need be provided; and this Court having reviewed the Motion and having heard the statements in support of the relief requested therein at a hearing before this Court (the "Hearing"); and this Court having determined that the legal and factual bases set forth in the Motion and at the Hearing establish just cause for the relief granted herein; and upon all of the proceedings had before this Court; 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. The hearing to consider entry of an order granting the relief requested in the Motion on a final basis shall be held on _____, 2019 at _____ (**Eastern Time**); and any objections to entry of such order shall be in writing, filed with the Court, and served upon (i) counsel to the Debtor, (ii) the United States Trustee, (iii) counsel to the DIP Lender, Morrison & Foerster LLP, 200 Clarendon Street, Boston, MA 02116, Attn: Alexander Rheaume, Morrison & Foerster LLP, 250 West 55th Street, New York, NY 10019-9601, Attn: Todd Goren and Benjamin Butterfield, and Ashby & Geddes, 500 Delaware Avenue, P.O. Box 1150, Wilmington, DE 19899, Attn: Gregory Taylor, and (iv) counsel for any statutory committee appointed in these cases so as to be received no later than **4:00 p.m. (Eastern Time)** on _____, 2019.
3. The Debtor is authorized, but not directed, to: (a) continue operating the Cash Management System, as described in the Motion; (b) honor its prepetition obligations

related thereto; (c) continue to utilize and honor the Credit Cards, including any prepetition amounts incurred thereunder; and (d) maintain its existing Business Forms, in each case subject to this Interim Order.

4. The Debtor is further authorized, in its sole discretion, to: (a) continue to use, with the same account numbers, the Bank Accounts in existence as of the Petition Date, including those accounts identified in the Motion; (b) use, in their present form, the Business Forms, as well as correspondence, checks and other documents related to the Bank Accounts existing immediately before the Petition Date and thereafter, without reference to the Debtor's status as debtor in possession; provided that once the Debtor's preprinted correspondence, Business Forms (including letterhead) and existing checks have been used, the Debtor shall, when reordering, require the designation "Debtor in Possession" and the corresponding bankruptcy case number on all such documents; provided further that, with respect to checks and letterhead which the Debtor or its agents print themselves, the Debtor shall begin printing the "Debtor in Possession" legend and the bankruptcy case number on such items within ten (10) days of the date of entry of this Order; (c) treat the Debtor's existing Bank Accounts for all purposes as accounts of the Debtor as debtor in possession; (d) deposit funds in and withdraw funds from the Bank Accounts by all usual means, including checks, wire transfers, and other debits; (e) pay the prepetition Bank Fees; and (f) pay any ordinary course Bank Fees incurred in connection with the Debtor's existing Bank Accounts, and to otherwise perform its obligations under the documents governing the Debtor's existing Bank Accounts. Any requirements by the United States Trustee or otherwise to open separate debtor-in-possession accounts are waived, unless otherwise specified herein.

5. The Bank is authorized to debit the Debtor's accounts in the ordinary course of business without need for further order of this Court for: (a) all checks drawn on the Bank Accounts that are cashed at the Bank or exchanged for cashier's checks by the payees thereof prior to the Petition Date, (b) all checks or other items deposited in one of the Bank Accounts at the Bank prior to the Petition Date that have been dishonored or returned unpaid for any reason, together with any fees and costs in connection therewith, to the same extent the Debtor was responsible for such items prior to the Petition Date, and (c) all undisputed prepetition amounts outstanding as of the date hereof, if any, owed to any Bank as fees or service charges for the maintenance of any aspect of the applicable Cash Management System.

6. The Bank is authorized to continue to maintain, service, and administer the Debtor's existing Bank Accounts as accounts of the Debtor as debtor in possession, without interruption and in the ordinary course, and to receive, process, honor, and pay, to the extent of available funds, any and all checks, drafts, wires, credit card payments, and ACH transfers issued and drawn on the Debtor's existing Bank Accounts after the Petition Date by the holders or makers thereof, as the case may be. Within fifteen (15) days of the date of entry of this Order the Debtor shall (a) contact the Bank, (b) provide the Bank with the Debtor's employer identification number and (c) identify each of its Bank Accounts held at the Bank as being held by a debtor in possession in a bankruptcy case, and provide the case number.

7. The Bank shall not honor or pay any bank payments drawn on the listed Bank Accounts or otherwise issued before the Petition Date for which the Debtor specifically issues stop payment orders in accordance with the documents governing such Bank Accounts.

8. In the course of providing cash management services to the Debtor, the Bank is authorized, without further order of this Court, to deduct the applicable fees from the

appropriate accounts of the Debtor, and further, to charge back to the appropriate accounts of the Debtor any amounts resulting from returned checks or other returned items, including returned items that result from ACH transactions, wire transfers, or other electronic transfers of any kind, regardless of whether such items were deposited or transferred prepetition or postpetition and regardless of whether the returned items relate to prepetition or postpetition items or transfers.

9. Notwithstanding any other provision of this Interim Order, should the Bank honor a prepetition check or other item drawn on any account that is the subject of this Interim Order (a) at the direction of the Debtor to honor such prepetition check or item, (b) in a good faith belief that the Court has authorized such prepetition check or item to be honored, or (c) as the result of an innocent mistake made despite implementation of customary item handling procedures, the Bank shall not be deemed to be nor shall be liable to the Debtor or its estate or otherwise be in violation of this Interim Order.

10. The Bank is further authorized to (a) honor the Debtor's directions with respect to the opening and closing of any Bank Account and (b) accept and hold, or invest, the Debtor's funds in accordance with the Debtor's instructions; provided, however, that the Debtor's Bank shall not have any liability to any party for relying on such representations to the extent such reliance otherwise complies with applicable law.

11. The Debtor is authorized to open any new Bank Accounts or close any existing Bank Accounts as it may deem necessary and appropriate in its sole discretion; provided, however, that the Debtor gives notice within fifteen (15) days to the Office of the United States Trustee for the District of Delaware, counsel to the DIP Lender, and any statutory committees appointed in the chapter 11 case, except that the Debtor shall not be required to provide notice that it has opened a new Bank Account in connection with establishing utility

deposits as provided in the Utility Motion (each as defined in the First Day Declaration); provided, further, however, that the Debtor shall open any such new Bank Account at banks that have executed a Uniform Depository Agreement with the Office of the United States Trustee for the District of Delaware, or at such banks that are willing to immediately execute such an agreement.

12. Notwithstanding anything contained in the Motion or this Interim Order, any payment or acts authorized to be made or taken by the Debtor herein shall be subject to the terms and conditions contained in any interim and/or final orders approving the DIP Facility and the use of cash collateral (each, a “DIP Order”), including any budgets in connection therewith, and to the extent there is any inconsistency between the DIP Order and any action taken or proposed to be taken hereunder, the terms of the DIP Order shall control.

13. Those certain existing deposit agreements between the Debtor and the Bank shall continue to govern the postpetition cash management relationship between the Debtor and such Bank, and all of the provisions of such agreements, including, without limitation, the termination and fee provisions, shall remain in full force and effect.

14. Either the Debtor or the Bank may, without further Order of this Court, implement changes to the cash management systems and procedures in the ordinary course of business pursuant to terms of those certain existing deposit agreements, including, without limitation, the opening and closing of bank accounts.

15. Notwithstanding the relief granted in this Interim Order and any actions taken pursuant to such relief, nothing in this Interim Order shall be deemed: (a) an admission as to the validity of any prepetition claim against a Debtor entity; (b) a waiver of the Debtor’s right to dispute any prepetition claim on any grounds; (c) a promise or requirement to pay any

prepetition claim; (d) an implication or admission that any particular claim is of a type specified or defined in this Interim Order or the Motion; (e) a request or authorization to assume any prepetition agreement, contract, or lease pursuant to section 365 of the Bankruptcy Code; or (f) a waiver of the Debtor's rights under the Bankruptcy Code or any other applicable law.

16. The contents of the Motion satisfy the requirements of Bankruptcy Rule 6003(b).

17. Notice of the Motion as provided therein shall be deemed good and sufficient notice of such Motion and the requirements of Bankruptcy Rule 6004(a) and the Local Rules are satisfied by such notice.

18. Notwithstanding Bankruptcy Rule 6004(h), the terms and conditions of this Interim Order are immediately effective and enforceable upon its entry.

19. The Debtor is authorized to take all actions necessary to effectuate the relief granted in this Interim Order in accordance with the Motion.

20. This Court retains exclusive jurisdiction with respect to all matters arising from or related to the implementation, interpretation, and enforcement of this Interim Order.

_____, 2019
Wilmington, Delaware

UNITED STATES BANKRUPTCY JUDGE

EXHIBIT B

Proposed Final Order

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

In re

Achaogen, Inc.,

Debtor.¹

Chapter 11

Case No. 19-10844 (___)

Re: D.I. ___

FINAL ORDER GRANTING DEBTOR'S MOTION FOR ENTRY OF INTERIM AND FINAL ORDERS (A) AUTHORIZING THE DEBTOR TO (I) CONTINUE ITS CASH MANAGEMENT SYSTEM, (II) HONOR CERTAIN RELATED PREPETITION OBLIGATIONS, AND (III) MAINTAIN EXISTING BUSINESS FORMS, (B) AUTHORIZING AND DIRECTING THE DEBTOR'S BANK TO HONOR ALL RELATED PAYMENT REQUESTS, (C) SCHEDULING A FINAL HEARING, AND (D) GRANTING RELATED RELIEF

Upon the motion (the "Motion")² of the above-captioned debtor and debtor in possession (the "Debtor") for entry of interim and final orders (this "Final Order"), (a) authorizing the Debtor to (i) continue its Cash Management System, (ii) honor certain related prepetition obligations, and (iii) maintain its existing Business Forms in the ordinary course of business, (b) authorizing and directing the Debtor's Bank to honor all related payment requests, (c) scheduling the Final Hearing and (d) granting related relief, all as more fully set forth in the Motion; and upon the First Day Declaration; and this Court having jurisdiction over this matter 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; and this Court having found that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2); and that this Court may enter a final order consistent with Article III of the United States Constitution; and this Court having found that venue of this proceeding and the Motion in this district is proper

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 1 Tower Place, Suite 400, South San Francisco, CA 94080.

² Capitalized terms not defined in this Final Order are defined in the Motion.

pursuant to 28 U.S.C. §§ 1408 and 1409; and this Court having found that the relief requested in the Motion is in the best interests of the Debtor's estate, its creditors, and other parties in interest; and this Court having found that the Debtor's notice of the Motion was appropriate under the circumstances and no other notice need be provided; and this Court having reviewed the Motion and having heard the statements in support of the relief requested therein at a hearing before this Court (the "Hearing"); and this Court having determined that the legal and factual bases set forth in the Motion and at the Hearing establish just cause for the relief granted herein; and upon all of the proceedings had before this Court; 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. All relief granted in the Interim Order is hereby granted on a final basis.
3. The Debtor is authorized, but not directed, to: (a) continue operating the Cash Management System, as described in the Motion; (b) honor its prepetition obligations related thereto; (c) continue to utilize and honor the Credit Cards, including any prepetition amounts incurred thereunder; and (d) maintain its existing Business Forms, in each case subject to the limitations described in the Motion, the Interim Order, this Final Order.
4. The Debtor is further authorized, in its sole discretion, to: (a) continue to use, with the same account numbers, the Bank Accounts in existence as of the Petition Date, including those accounts identified in the Motion; (b) use, in its present form, the Business Forms, as well as correspondence, checks and other documents related to the Bank Accounts existing immediately before the Petition Date and thereafter, without reference to the Debtor's status as debtor in possession; provided that once the Debtor's preprinted correspondence, Business Forms (including letterhead) and existing checks have been used, the Debtor shall,

when reordering, require the designation “Debtor in Possession” and the corresponding bankruptcy case number on all such documents; provided further that, with respect to checks and letterhead which the Debtor or its agents print themselves, the Debtor shall begin printing the “Debtor in Possession” legend and the bankruptcy case number on such items within ten (10) days of the date of entry of this Order; (c) treat the Debtor’s existing Bank Accounts for all purposes as accounts of the Debtor as debtor in possession; (d) deposit funds in and withdraw funds from the Bank Accounts by all usual means, including checks, wire transfers, and other debits; (e) pay the prepetition Bank Fees; and (f) pay any ordinary course Bank Fees incurred in connection with the Debtor’s existing Bank Accounts, and to otherwise perform its obligations under the documents governing the Debtor’s existing Bank Accounts. Any requirements by the United States Trustee or otherwise to open separate debtor-in-possession accounts are waived, unless otherwise specified herein.

5. The Bank is authorized to debit the Debtor’s accounts in the ordinary course of business without need for further order of this Court for: (a) all checks drawn on the Bank Accounts that are cashed at the Bank or exchanged for cashier’s checks by the payees thereof prior to the Petition Date, (b) all checks or other items deposited in one of the Bank Accounts at the Bank prior to the Petition Date that have been dishonored or returned unpaid for any reason, together with any fees and costs in connection therewith, to the same extent the Debtor was responsible for such items prior to the Petition Date, and (c) all undisputed prepetition amounts outstanding as of the date hereof, if any, owed to any Bank as fees or service charges for the maintenance of any aspect of the applicable Cash Management System.

6. The Bank is authorized to continue to maintain, service, and administer the Debtor’s existing Bank Accounts as accounts of the Debtor as debtor in possession, without

interruption and in the ordinary course, and to receive, process, honor, and pay, to the extent of available funds, any and all checks, drafts, wires, credit card payments, and ACH transfers issued and drawn on the Debtor's existing Bank Accounts after the Petition Date by the holders or makers thereof, as the case may be.

7. The Bank shall not honor or pay any bank payments drawn on the listed Bank Accounts or otherwise issued before the Petition Date for which the Debtor specifically issues stop payment orders in accordance with the documents governing such Bank Accounts.

8. In the course of providing cash management services to the Debtor, the Bank is authorized, without further order of this Court, to deduct the applicable fees from the appropriate accounts of the Debtor, and further, to charge back to the appropriate accounts of the Debtor any amounts resulting from returned checks or other returned items, including returned items that result from ACH transactions, wire transfers, or other electronic transfers of any kind, regardless of whether such items were deposited or transferred prepetition or postpetition and regardless of whether the returned items relate to prepetition or postpetition items or transfers.

9. Notwithstanding any other provision of this Final Order, should the Bank honor a prepetition check or other item drawn on any account that is the subject of this Final Order (a) at the direction of the Debtor to honor such prepetition check or item, (b) in a good faith belief that the Court has authorized such prepetition check or item to be honored, or (c) as the result of an innocent mistake made despite implementation of customary item handling procedures, the Bank shall not be deemed to be nor shall be liable to the Debtor or its estate or otherwise be in violation of this Final Order.

10. The Bank is further authorized to (a) honor the Debtor's directions with respect to the opening and closing of any Bank Account and (b) accept and hold, or invest, the

Debtor's funds in accordance with the Debtor's instructions; provided, however, that the Bank shall not have any liability to any party for relying on such representations to the extent such reliance otherwise complies with applicable law.

11. The Debtor is authorized to (a) open any new Bank Accounts or close any existing Bank Accounts, and (b) enter into any ancillary agreements, related to the foregoing, as it may deem necessary and appropriate; provided, however, that in the event that the Debtor opens or closes any Bank Accounts, such opening or closing shall be timely indicated on the Debtor's monthly operating reports and notice of such opening or closing shall be provided to the Office of the United States Trustee for the District of Delaware and counsel to the DIP Lender within 15 days, except that the Debtor shall not be required to provide notice that it has opened a new Bank Account in connection with establishing utility deposits as provided in the Utility Motion (each as defined in the First Day Declaration).

12. Notwithstanding anything contained in the Motion or this Final Order, any payment or acts authorized to be made or taken by the Debtor herein shall be subject to the terms and conditions contained in any interim and/or final orders approving the DIP Facility and the use of cash collateral (each, a "DIP Order"), including any budgets in connection therewith, and to the extent there is any inconsistency between the DIP Order and any action taken or proposed to be taken hereunder, the terms of the DIP Order shall control.

13. Those certain existing deposit agreements between the Debtor and the Bank shall continue to govern the postpetition cash management relationship between the Debtor and such Bank, and all of the provisions of such agreements, including, without limitation, the termination and fee provisions, shall remain in full force and effect.

14. Either the Debtor or the Bank may, without further Order of this Court, implement changes to the cash management systems and procedures in the ordinary course of business pursuant to terms of those certain existing deposit agreements, including, without limitation, the opening and closing of bank accounts.

15. Notwithstanding the relief granted in this Final Order and any actions taken pursuant to such relief, nothing in this Final Order shall be deemed: (a) an admission as to the validity of any prepetition claim against the Debtor; (b) a waiver of the Debtor's right to dispute any prepetition claim on any grounds; (c) a promise or requirement to pay any prepetition claim; (d) an implication or admission that any particular claim is of a type specified or defined in this Final Order or the Motion; (e) a request or authorization to assume any prepetition agreement, contract, or lease pursuant to section 365 of the Bankruptcy Code; or (f) a waiver of the Debtor's rights under the Bankruptcy Code or any other applicable law.

16. Notwithstanding any applicability of any of the Bankruptcy Rules, the terms and conditions of this Order shall be immediately effective and enforceable upon its entry.

17. The Debtor is authorized to take all actions necessary to effectuate the relief granted in this Final Order in accordance with the Motion.

18. This Court retains exclusive jurisdiction with respect to all matters arising from or related to the implementation, interpretation, and enforcement of this Final Order.

_____, 2019
Wilmington, Delaware

UNITED STATES BANKRUPTCY JUDGE

EXHIBIT C

Cash Management System Diagram

