

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 INTERIM AND FINAL ORDERS PURSUANT TO
11 U.S.C. §§ 105(a), 363, 1107, AND 1108 AND FED. R. BANKR. P. 6003 AND 6004
AUTHORIZING DEBTOR TO (I) HONOR CERTAIN PREPETITION OBLIGATIONS
TO CUSTOMERS AND TO CONTINUE CUSTOMER PROGRAMS AND (II) PAY
MEDICAID, MEDICARE AND OTHER OBLIGATIONS**

The debtor and debtor in possession in the above-captioned case (the "Debtor") hereby moves (the "Motion") this Court for entry of an interim order substantially in the form attached hereto as **Exhibit A** (the "Proposed Interim Order") and a final order substantially in the form attached hereto as **Exhibit B** (the "Proposed Final Order"), pursuant to sections 105(a), 363, 1107 and 1108 of title 11 of the United States Code (the "Bankruptcy Code") and Rule 6003 and 6004 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), authorizing the Debtor to continue to (i) honor prepetition obligations owed to customers and otherwise continue its prepetition customer programs and practices in the ordinary course of business and (ii) pay Medicaid, Medicare and other government program obligations. In support of this Motion, the Debtor relies upon and incorporates by reference the *Declaration of Blake Wise in Support of First Day Relief* (the "First Day Declaration"),² filed with the Court concurrently herewith. In further support of this Motion, the Debtor 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 AND VENUE

1. The Court has 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 as of February 29, 2012 (the “Amended Standing Order”).

2. This is a core proceeding under 28 U.S.C. § 157(b). Venue of these cases and this Motion in this District is proper under 28 U.S.C. §§ 1408 and 1409.

3. The legal predicates for the relief requested herein are Bankruptcy Code sections 105(a), 363, 1107, and 1108, and Bankruptcy Rules 6003 and 6004.

4. Pursuant to Rule 9013-1(f) of the Local Rules of Bankruptcy Practice and Procedure for the United States Bankruptcy Court for the District of Delaware (the “Local Bankruptcy Rules”), the Debtor consents to the entry of a final judgment or order with respect to this Motion if it is determined that this Court would lack Article III jurisdiction to enter such final order or judgment absent the consent of the parties.

BACKGROUND

5. On the date hereof (the “Petition Date”), the Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code. 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 (the “Chapter 11 Case”).

6. 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.

OVERVIEW OF THE CUSTOMER PROGRAMS³

7. Prior to the Petition Date and in the ordinary course of its business, the Debtor implemented and participated in various customer programs (the “Customer Programs”) to further the commercialization of its product ZEMDRI and maximize the sales of the product. The Debtor seeks authority to honor and continue, in the Debtor’s sole discretion, the Customer Programs that it deems to be beneficial and cost-effective to its business. Such relief is necessary to the preservation of the Debtor’s critical customer relationships, the success and viability of the Debtor’s business, ability to maintain access to the current and potential market for the Debtor’s product, and ultimately the Debtor’s ability to preserve and maximize the value of its estate for the benefit of its creditors. For these and the other reasons set forth herein, it is in the best interests of the Debtor, its estate and its creditors that the Debtor be permitted to honor its prepetition and postpetition obligations in connection with the Customer Programs and to continue or implement customer practices in the ordinary course of the Debtor’s business as the Debtor deems necessary.

8. A graphical depiction of the Debtor’s Customers (as defined below) is attached hereto as **Exhibit C**. The Debtor sells its drug product to two types of customers: specialty distributors (“Specialty Distributors”) and physician owned infusion centers (“POICs”) at a wholesale acquisition price (“WAC”). All sales will either move through a specialty distributor channel to an end customer of a hospital, smaller physician center or home health set-

³ Certain Customer Programs described herein assist government-related customers, such as Medicaid and Medicare recipients, the U.S. Department of Veteran Affairs, the U.S. Department of Defense, the Coast Guard, the Public Health Service and 340B Covered Entities (as defined below). These are not Customer Programs implemented by the Debtor, but are those that are required when participating in certain federal programs. Continuing to participate in these government-related programs is critical to the Debtor’s efforts to market and sell its products and continue the business as a going concern. Therefore, the Debtor requests authorization to continue to provide the benefits afforded to customers in the ordinary course of business as part of its Customer Programs.

up or will be shipped directly to a POIC. The Debtor's financial support programs are each designed to help offset the costs of ZEMDRI. Further, the Debtor's products are currently covered under Medicaid and Medicare and are available to authorized users of the General Services Administration's Federal Supply Schedule ("Federal Supply Schedule"), including the Department of Veterans Affairs ("DVA") and the Department of Defense ("DOD") (collectively, the "Governmental Entities" and together with the Specialty Distributors and POICs, the "Customers").

9. Through the Customer Programs, the Debtor provides, among other things, (a) discounted rates on the Debtor's product for purchases made by patients from POICs; and (b) discounted rates on the Debtor's product related to patients eligible for certain federal and State government programs. The Debtor's Customer Programs are common and typical of those in the pharmaceutical industry, critical to the Debtor's ability to serve its Customers and important to the Debtor's future business and revenue growth. During fiscal year 2018, 100% of the Debtor's unit sales ultimately went to patients who received the Debtor's product pursuant to a Customer Program.

10. Therefore, the success and viability of the Debtor's ongoing business, and ultimately the Debtor's ability to preserve and maximize value for creditors through this Chapter 11 Case, including the sale process, are fundamentally dependent upon the continuation of the Customer Programs and honoring the Debtor's obligations thereunder. Maintaining ordinary course relationships with Customers is integral to preserving the value of the business. The Debtor submits that any value-maximizing outcome to this Chapter 11 Case will, of necessity, involve the Debtor being able to continue its ordinary course operations and, thus, the Customer Programs.

11. Accordingly, the Debtor seeks authority, but not direction, to continue the Customer Programs, including authority to honor prepetition claims arising therefrom, in its sole discretion.

DESCRIPTION OF THE CUSTOMER PROGRAMS

12. Prior to the Petition Date, the Debtor offered its Customers certain benefits in the form of the Customer Programs. Through the Customer Programs, the Debtor provides, among other things, (a) discounts on the products for the DVA, the DOD, 340B Covered Entities (defined below), Specialty Distributors, and POICs; (b) Medicaid Rebates and Medicare Part D Rebates; and (c) a return policy on purchases of the product. The Debtor's Customer Programs are common and typical of those in the pharmaceutical industry. Therefore, if the Debtor is to stay competitive, it is critical that the Debtor be authorized to continue the Customer Programs and honor prepetition obligations associated with the Customer Programs. The following are general descriptions of the Debtor's principal Customer Programs.

A. Customer Discounts via Specialty Distributors and POICs

13. **Specialty Distributors.** The contracts with the Specialty Distributors provide for industry-standard discounts, such as the "prompt pay" discount, which affords a 2% discount to the Customers for paying their invoice within the payment terms of the contract. Further, the Specialty Distributors charge the Debtor fees for management, distribution, logistics and data services (the "Specialty Distributor Fees"). The Specialty Distributor Fees are calculated based on gross sales and range from 2% to 3% of gross sales.

14. Certain contracts with Specialty Distributors include consignment fees (the "Consignment Fees") of 2%, which are calculated based on net sales of the product used on a consignment basis to customers with installed refrigerators. The Consignment Fee terms in these contracts note that the Specialty Distributor maintains the title and risk for loss for product

purchased on a consignment basis.

15. **POICs.** The contracts with the POICs also provide for the “prompt pay” discount of 2% for paying within the payment terms of the contract. The POIC contracts also include an additional discount (the “POIC Discount”) that ranges from 2% to 15%. The POIC Discount is meant to encourage POICs to adopt ZEMDRI, and is calculated into the WAC. Further, the POICs charge the Debtor data fees for management, distribution, logistics and data services (the “POIC Fees”), similar to the Specialty Distributor Fees. The POIC Fees also relate to monthly reporting of information on the dispensing clinic, ship date, and number of vials dispensed. The POIC Fees are calculated based on gross sales and amount to 2% of gross sales.

16. **Co-Pay Assistance Program.** The Debtor instituted a copay assistance program in December 2018. The copay assistance program is designed to help patients with the high cost of their medications when infused at an infusion center, hospital outpatient department or home infusion service. The program is available to U.S. residents 18 years or older with commercial insurance. It is not available for patients under government funded insurance. Under the program, the patient is responsible for the first \$15 per infusion and then the Debtor will assist with the remaining copay amount up to a maximum of \$1,000 over a 12-month period. The program is administered by CareMetx, LLC, who determines eligibility and provides financial reimbursement from a prepaid joint account with the Debtor.

17. **Chargebacks.** As described in more detail below, if the Debtor has contracted with certain Customers that acquire the product, or subsidized the price to the patient, for a lower agreed upon contract price than the WAC, then the Specialty Distributor will receive payment for the product from particular Government Entities at the lower contracted price and the Specialty Distributor will chargeback the Debtor for the price difference to the WAC price

originally paid (“Chargebacks”). These price differences are resolved through (i) credits for Chargebacks attributed to such Specialty Distributor in the Debtor’s accounts receivable system and are applied against subsequent payments for product made by the Customer (the “Discount Program”).

18. Given that Customers continue to owe the Debtor for subsequent product purchases, they will simply reduce their next payment to the Debtor for the Chargebacks they’ve incurred. Further, because purchases and Chargebacks happen through the accounts receivable system on a daily basis, it is difficult for the Debtor to determine with precision the actual amount of outstanding Chargebacks at any particular time. These Chargebacks generally do not result in an actual payment of cash to the Specialty Distributor except for in rare circumstances, such as where the Debtor is ending its relationship with a particular Specialty Distributor and the amount of the Chargeback has not yet been fully applied against subsequent orders. This same mechanism of setoff applies for Returns (discussed below).

19. By offering customary prompt pay discounts and Specialty Distributor Fees to Specialty Distributors, the Debtor is able to incentivize the Specialty Distributors to enter into contracts with the Debtor. In addition, allowing Specialty Distributors to set off prompt pay discounts, Chargebacks, and Returns against amounts owing to the Debtor is a customary practice in the pharmaceutical industry. The Debtor believes that the failure to continue to allow the Specialty Distributors to purchase the product with the customary prompt pay discounts and Specialty Distributor Fees, or to allow for continued set off of prompt pay discounts, Chargebacks, and Returns against amounts owing to the Debtor, will result in such Customers ceasing to (a) enter into purchase agreements with the Debtor or (b) purchase the Debtor’s product. Any interruption in purchases by Specialty Distributors will likely have a devastating

impact on the Debtor's ability to continue to sell its product and be detrimental to its revenue stream.

20. In sum, the Debtor seeks authority to continue the Discount Programs in the ordinary course of business. The Debtor's average monthly liabilities for the Discount Program are as follows: (i) Specialty Distributor Fees of approximately \$2,000, (ii) Chargebacks to Specialty Distributors of approximately \$1,000 and (iii) POIC Fees of approximately \$300. The Debtor estimates that as of the Petition Date, (i) approximately \$11,000 is outstanding for prepetition Specialty Distributor Fees, (ii) \$3,000 is outstanding for prepetition Chargeback claims, and (iii) approximately \$3,000 in outstanding prepetition POIC Fees.

21. The Debtor seeks the authority, but not the direction, to allow Specialty Distributors to continue to setoff Chargebacks against the Debtor's accounts receivable in the ordinary course and pursuant to prepetition customary terms between the Debtor and Specialty Distributors, even if such Chargebacks constitute prepetition claims, and to pay POIC Fees when they become due in the ordinary course of business.

B. Government Programs

22. The Medicaid Drug Rebate Program ("MDRP") is a health program that includes the Centers for Medicare & Medicaid Services ("CMS"), State Medicaid Agencies, and participating drug manufacturers to help offset the Federal and State costs of most outpatient prescription drugs dispensed to Medicaid patients. In order to participate in MDRP, the Debtor is required to enter into agreements with two other Federal programs in order to have their drugs covered under Medicaid: A pricing agreement for the 340B Drug Pricing Program (the "340B Program") and a master agreement with the Secretary of Veterans Affairs for the Federal Supply Schedule. Each of these programs requires the Debtor to sell ZEMDRI at a substantial discount to WAC to the applicable Customers.

23. **Federal Supply Schedule.** The Federal Supply Schedule collectively includes the Governmental Entities, and provides the maximum amount that can be charged to these Governmental Entities for pharmaceuticals based on a specific mandated formula set annually. The Debtor was awarded a Federal Supply Schedule contract (the “FSS Contract”) in exchange for the Debtor providing federally mandated pricing to the Governmental Entities. Participants under the Federal Supply Schedule place orders for the product through Specialty Distributors who purchase the product from the Debtor and then ship the product directly to the participating hospitals and clinics. In accordance with the Federal Supply Schedule, the Debtor will charge member patients \$2,357.91 per carton of ZEMDRI, a discount of approximately 25.2% to the Debtor’s current WAC price of \$3,150 per carton.⁴ If the price of the product offered through the FSS Contract is lower than the WAC price, the Specialty Distributor will Chargeback the Debtor for the difference on its next purchase.⁵ The Debtor expects that the ZEMDRI discount will remain the same through November 30, 2023.

24. The Debtor seeks authority to continue operating pursuant to the FSS Contract in the ordinary course of business. The Debtor’s average monthly liability for Chargebacks related to the FSS Contract is approximately \$1,000, though Chargebacks and purchases are reconciled through the Debtor’s accounts receivable and do not generally result in cash payment. The Debtor also seeks authority to allow Specialty Distributors to continue to setoff Chargebacks related to the FSS Contract against the Debtor’s accounts receivable in the

⁴ The 2018 Federal Supply Schedule price includes The Industrial Funding Fee (“IFF”), a fee that is required to be added to a Federal Supply Schedule price to reimburse the VA National Acquisition Center for the costs incurred in operating the Federal Supply Schedule program. The IFF applicable to the VA FSS contract is 0.5% of total sales related to the Federal Supply Schedule program. The IFF payment is due 60 days following the end of each reporting quarter.

⁵ The contract with McKesson SD includes an additional discount if the total volume of sales to a government is greater than 10% of McKesson’s total sales. This servicing discount is an additional 4% discount which is calculated on VA only sales.

ordinary course of business.

25. **340B Covered Entities.** Certain hospitals and health care facilities (the “340B Covered Entities”) provide the majority of their services to low income patients and receive payments from CMS to cover the costs of providing care to uninsured patients. Pursuant to the 340B Program, the Debtor provides its product to 340B Covered Entities at a discounted price set by statute, which is calculated on a quarterly basis. The 340B price, as of March 2019, is \$2,408.08 per carton of ZEMDRI, a discount of approximately 24% to the Debtor’s current WAC price of \$3,150 per carton. 340B Covered Entities submit a request for the product to one of the Debtor’s Specialty Distributors and the Specialty Distributor fulfills that request and then submits a Chargeback to the Debtor for the difference between the price that the Specialty Distributor paid and the discounted price that the 340B Covered Entities paid for the product.

26. The Debtor’s average monthly liability for Chargebacks related to the 340B Program is approximately \$1,000, but Chargebacks and purchases are reconciled through the Debtor’s accounts receivable and do not generally result in a cash payment. By this Motion, the Debtor seeks authority to continue the 340B Program in the ordinary course of business and to apply any prepetition Chargebacks that may be outstanding against prepetition accounts receivable and, if necessary, against subsequent orders of the Debtor’s products in the ordinary course of business.

27. **Medicaid Rebates.** MDRP covers certain outpatient drugs, including the Debtor’s product, and requires the Debtor to enter into a national rebate agreement with the Secretary of the Department of Health and Human Services in exchange for Medicaid coverage of its product. The Debtor’s Specialty Distributors or the POICs provide the product to a hospital or clinic to be utilized by a Medicaid patient. Individual states collect product

utilization data on the use of the product and send the Debtor a report and invoice. The Debtor is then responsible for paying a rebate (“Medicaid Rebate”) on the product for each time that the product was dispensed to Medicaid patients. The amount of the Medicaid Rebate due for each unit of the individual product is based on a statutory formula. The Debtor pays the Medicaid Rebates to each State MDRP on a quarterly basis, and the amount is shared between the states and the federal government to offset the overall cost of the prescription drugs under the Medicaid program. As of the Petition Date, the Debtor estimates that approximately \$5,000 has been accrued but has not been invoiced for Medicaid Rebates. While this amount is not yet due and payable, it may become due and payable over the course of this Chapter 11 Case.

28. The Debtor seeks the authority, but not the direction, to pay Medicaid Rebates in the ordinary course, even if such Medicaid Rebates constitute prepetition claims.

29. **Medicare Rebates.** The Debtor has also signed the Medicaid Part D Coverage Gap Discount Agreement, whereby the Debtor pays certain rebates related to the Medicare Part D program (the “Medicare Part D Rebates”). The Department of Health and Human Services administers Medicare, a federal health insurance program for people with disabilities and people over the age of sixty-five (65). Medicare Part D is the prescription drug program in which seniors choose from a wide variety of privately run drug plans that negotiate individually with drug makers. The Debtor participates in the Medicare Coverage Gap Discount Program, which provides a 70% discount on drugs to beneficiaries that have reached the coverage gap. In 2018, the coverage gap occurred when the participant had spent between \$3,750-5,000 on covered drugs. The Medicare Part D Rebates work in a similar fashion as the Medicaid Rebates described above. As of the Petition Date, the Debtor estimates that approximately \$10,000 has been accrued but has not been invoiced for Medicare Part D Rebates. While this amount is not

yet due and payable, it may become due and payable over the course of this Chapter 11 Case. The Debtor seeks the authority, but not the direction, to pay Medicare Part D Rebates in the ordinary course, even if such Medicare Part D Rebates constitute prepetition claims.

30. The Debtor's participation in the FSS Contract and the 340B Program requires the Debtor to participate in the MDRP and pay Medicaid Rebates and Medicare Part D Rebates. As a result, if the Debtor fails to fulfill its obligations under the MDRP, including payment of the Medicaid Rebates and Medicare Part D Rebates as they become due, it risks becoming excluded from all federal programs. As such, honoring Medicaid Rebates and Medicare Part D Rebates is integral to the Debtor's business, and the Debtor cannot risk the harm that could arise from the failure to pay the Medicaid Rebates and Medicare Part D Rebates, including denial of coverage and damage to the Debtor's relationship with its Customers. Such a result would irreparably impair the Debtor's efforts to conduct its business during this Chapter 11 Case and maximize value. Consequently, the Debtor requests authorization to continue to make Medicaid Rebates and Medicare Part D Rebates pursuant to the MDRP during this Chapter 11 Case as related to both prepetition and postpetition sales of its products.

31. In addition, as noted above, the Debtor offers mandated price discounts as part of the FSS Contract and the 340B Program. These price discounts are honored by Specialty Distributors who, in turn, Chargeback the price difference between the discounted price and the WAC back to the Debtor. These Chargebacks are normally taken as credits against future payments by the Specialty Distributors to the Debtor. Thus, there will be prepetition amounts for these Chargebacks, which are going to be setoff against payments of prepetition receivables. The Debtor estimates there is approximately \$5,000 accrued in prepetition Chargebacks, which would be entirely setoff against the Debtor's prepetition accounts receivables.

C. Sales Return Program

32. In the ordinary course of business, the Debtor allows its Customers to return damaged products or products under a shipping error (a “Return”) in exchange for credit when reported within fifteen (15) days of receipt (the “Sales Return Program”). Certain Customers have additional Return policy terms stated in their contracts, which allow for returns within three (3) months prior to and three (3) months after the expiration date.

33. As of the Petition Date, the Debtor estimates that there is approximately \$5,000 in potential Returns of the Debtor’s product, which would be setoff against the Debtor’s prepetition accounts receivable. To maintain its Customers’ goodwill and continued business, the Debtor seeks authorization to honor any Return requests and obligations under the Sales Return Program that occur postpetition in the ordinary course of business, even if such Return requests constitute prepetition claims.

34. The ability of the Debtor to maximize the value of its business and its inventory is dependent on continuing the Customer Programs. Any delay in honoring the Debtor’s obligations thereunder could severely disrupt the Debtor’s efforts to maximize its value. Any failure to honor prepetition Customer obligations, even for a brief period of time, may drive away valuable Customers, thereby harming the Debtor’s efforts to maximize the value of its inventory. Accordingly, the Debtor seeks authorization to continue the Customer Programs.

D. Managed Services Operations

35. The Debtor utilizes KPMG to provide managed services operations that include government price calculations and Medicaid claim validation and processing. Once Medicaid Rebates have been validated and processed, KPMG makes a funding request to the Debtor sufficient to fund payments to Medicaid, as applicable, in accordance with their terms of

payment. KPMG provides these ongoing services daily and such services are an integral part of the Debtor's management of access to an important segment of its target market. As of the Petition Date, there is approximately \$29,000 accrued and outstanding from KPMG pertaining to its services. Any interruption in KPMG's services will likely have a devastating impact on the Debtor's ability to continue to sell its product and be detrimental to its revenue stream. Therefore, the Debtor seeks permission to continue paying KPMG its service fees in the ordinary course, including any service fees that may have arose prepetition.

RELIEF REQUESTED

36. By this Motion, the Debtor requests entry of interim and final orders authorizing, but not directing, the Debtor to continue, in the ordinary course of business, to (i) honor prepetition obligations owed to Customers and otherwise continue its prepetition customer discounts, fees and related practices; (ii) honor prepetition obligations owed to its managed services provider, KPMG, and otherwise continue its prepetition practices with respect to its managed services operations, including claim validation and processing; and (iii) pay Medicaid Rebates, Medicare Part D Rebates and other related obligations. Additionally, the Debtor is seeking interim and final authority, but not direction, to pay or permit setoff against prepetition amounts owing to the Debtor, as applicable based on its prepetition practices, of Chargebacks, Returns and Specialty Distributor Fees in the ordinary course as an integral part of the Customer Programs. The Debtor seeks the authority to pay in the aggregate, on account of the relief sought in this Motion, up to \$150,000 on a final basis and \$50,000 on an interim basis, both inclusive of the Debtor's Customers setting off prepetition amounts, where applicable, against the Debtor's accounts receivable in the ordinary course and pursuant to customary terms between the Debtor and the Customers. The continuation of the Customer Programs is necessary to sustain the Debtor's business during the course of this Chapter 11 Case and maximize the value of the

Debtor's estate.

37. The Debtor also requests that the interim and final orders (a) authorize and direct all applicable banks and other financial institutions to receive, process, honor, and pay any and all checks, drafts and other forms of payment, including to fund transfers and other bank accounts used by the Debtor with respect to the Customer Programs, provided that sufficient funds are on deposit in the applicable accounts to cover such payments, (b) authorize banks to rely on the representations of the Debtor as to which checks are subject to this Motion, (c) prohibit the Debtor's banks from placing any holds on, or attempting to reverse, any automatic transfers to any account of the Customer Programs, and (d) authorize the Debtor to issue new postpetition checks to replace any checks, drafts, or other forms of payment, or effect new postpetition fund transfers, which may be inadvertently dishonored or rejected and to reimburse any expenses that may be incurred as a result of any bank's failure to honor a prepetition check.

38. For the reasons set forth herein, the Debtor submits that the relief requested is in the best interests of the Debtor, its estate, creditors and other parties in interest, and therefore, should be granted.

BASIS FOR RELIEF

39. The Debtor submits that an order authorizing it to (i) continue the Customer Programs as it determines to be appropriate; (ii) renew, modify, terminate or replace such Customer Programs or agreements that, in its discretion, is necessary and in the best interest of the Debtor's estate, creditors and other parties in interest; and (iii) make payments owing on account of prepetition product sales, regardless of when the obligations were incurred, is in the best interests of the Debtor's estate, its creditors, and all other parties in interest

A. The Debtor should be Authorized to Continue the Customer Programs in Its Discretion.

40. The Debtor, operating its business as debtor in possession under Bankruptcy Code sections 1107(a) and 1108, is a fiduciary “holding the bankruptcy estate and operating the business for the benefit of [its] creditors and (if the value justifies) equity owners.” *In re CoServ, L.L.C.*, 273 B.R. 487, 497 (Bankr. N.D. Tex. 2002). Implicit in the duties of a chapter 11 debtor in possession is the duty “to protect and preserve the estate, including an operating business’s going-concern value.” *Id.*

41. Courts have noted that there are instances in which a debtor in possession can fulfill its fiduciary duty “only . . . by the preplan satisfaction of a prepetition claim.” *Id.*; *see also In re Mirant Corp.*, 296 B.R. 427, 429-30 (Bankr. N.D. Tex. 2003) (allowing debtors to pay claims “reasonably believe[d]” to be authorized under the *CoServ* test or whose payment was necessary “in the exercise of their business judgment . . . in order for [the d]ebtors to continue their respective businesses”). The *CoServ* court specifically noted that preplan satisfaction of prepetition claims would be a valid exercise of a debtor’s fiduciary duty when the payment “is the only means to effect a substantial enhancement of the estate.” *CoServ*, 273 B.R. at 497. The court provided a three-pronged test for determining whether a preplan payment on account of a prepetition claim was a valid exercise of a debtor’s fiduciary duty:

First, it must be critical that the debtor deal with the claimant. Second, unless it deals with the claimant, the debtor risks the probability of harm, or, alternatively, loss of economic advantage to the estate or the debtor’s going concern value, which is disproportionate to the amount of the claimant’s prepetition claim. Third, there is no practical or legal alternative by which the debtor can deal with the claimant other than by payment of the claim.

Id. at 498.

42. Honoring the Customer Obligations and maintaining the Customer

Programs meets each element of the *CoServ* court's standard. As described above, preserving the value of the Debtor's business is contingent, in large part, upon continuing to operate in the ordinary course and the value of the Debtor's business can only be enhanced by continued customer loyalty and patronage. During the fiscal year 2018, 100% of the Debtor's unit sales ultimately went to patients who received the Debtor's product pursuant to a Customer Program. Therefore, in the Debtor's business judgment, the uninterrupted maintenance of its Customer Programs is important to maintaining such customer relations. Any disruption and adverse publicity that would necessarily result from discontinuing the Debtor's Customer Programs would threaten its customer base and ultimately, its ability to maximize the value of its business. Accordingly, continuing the Customer Programs and honoring customer obligations is a valid exercise of the Debtor's fiduciary duties.

43. Motions seeking nearly identical relief for debtors in the biotech and pharmaceutical industry have been routinely granted in this District. *See In re Pernix Sleep, Inc., et al.*, Case No. 19-10323 (CSS) (Bankr. D. Del. Feb. 21, 2019 and Mar. 22, 2019) (granting interim and final relief); *In re Orexigen Therapeutics, Inc.*, Case No. 18-10518 (KG) (Bankr. D. Del. Mar. 13, 2018 and Apr. 11, 2018) (same); *In re Dendreon Corporation*, Case No. 14-12515 (LSS) (Bankr. D. Del. Nov. 12, 2014 and Dec. 9, 2014) (same); *In re Savient Pharmaceuticals, Inc.*, Case No. 13-12680 (MFW) (Bankr. D. Del. Oct. 16, 2013 and Nov. 19, 2013) (same); *see also In re Synergy Pharmaceuticals Inc., et al.*, Case No. 18-14010 (JLG) (Bankr. S.D.N.Y. Dec. 14, 2018 and Jan. 23, 2019) (same).

B. The Proposed Payments Are Appropriate Under Bankruptcy Code Section 363(b).

44. Under Bankruptcy Code section 363(b), a bankruptcy court is empowered to authorize a chapter 11 debtor to expend funds in the court's discretion outside the ordinary course of business. *See* 11 U.S.C. § 363(b)(1). In order to obtain approval for the use of estate

assets outside the ordinary course of business, the debtor must articulate a valid business justification for the requested use. *See In re Ionosphere Clubs, Inc.*, 98 B.R. 174, 175 (Bankr. S.D.N.Y. 1989).

45. Once a debtor has articulated a valid business justification, “[t]he business judgment rule ‘is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company.’” *Official Comm. of Subordinated Bondholders v. Integrated Res., Inc. (In re Integrated Res., Inc.)*, 147 B.R. 650, 656 (S.D.N.Y. 1992) (quoting *Smith v. Van Gorkom*, 488 A.2d 858, 872 (Del. 1985)).

46. The business judgment rule applies in chapter 11 cases. *See Integrated Res.*, 147 B.R. at 656 (noting that “Delaware business judgment rule principles have ‘vitality by analogy’ in Chapter 11” (citation omitted)); *see also Comm. of Asbestos-Related Litigants and/or Creditors v. Johns-Manville Corp. (In re Johns-Manville Corp.)*, 60 B.R. 612, 615-16 (Bankr. S.D.N.Y. 1986) (“[T]he Code favors the continued operation of a business by a debtor and a presumption of reasonableness attaches to a Debtor’s management decisions.”).

47. As discussed above, the Debtor has determined, in the sound exercise of its business judgment, that maintaining the Customer Programs in the ordinary course of business is critical to ensure that the Debtor maintains its customer base. The failure to honor these obligations could have a material adverse impact on the Debtor’s continued operation and, by extension, its efforts to maximize the value for its stakeholders. Accordingly, the preservation and protection of the Debtor’s business through ongoing relationships with the Debtor’s Customers provides a sufficient business justification for satisfying obligations to Customers, even if such payment were deemed to be outside the ordinary course of business.

See Ionosphere Clubs, Inc., 98 B.R. at 175.

48. The Debtor therefore seeks authorization under Bankruptcy Code section 363(b) to honor prepetition obligations to Customers and continue the Customer Programs.

C. Maintenance of the Customer Programs Is also Appropriate Under Section 105 of the Bankruptcy Code and the Doctrine of Necessity.

49. Maintenance of the Customer Programs should be authorized under Bankruptcy Code section 105(a) and under the “doctrine of necessity.” The Court’s power to utilize the doctrine of necessity in chapter 11 cases derives from the Court’s inherent equity powers and its statutory authority 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). The United States Supreme Court first articulated the doctrine of necessity over a century ago, in *Miltenberger v. Logansport C. & S.W. Ry. Co.*, 106 U.S. 286 (1882), in affirming the authorization by the lower court of the use of receivership funds to pay pre-receivership debts owed to employees, vendors and suppliers, among others, when such payments were necessary to preserve the receivership property and the integrity of the business in receivership. *See id.* at 309-12. The modern application of the doctrine of necessity is largely unchanged from the Court’s reasoning in *Miltenberger*. *See In re Lehigh & New Eng. Ry. Co.*, 657 F.2d 570, 581-82 (3d Cir. 1981) (“[I]n order to justify payment under the ‘necessity of payment’ rule, a real and immediate threat must exist that failure to pay will place the [debtor’s] continued operation . . . in serious jeopardy.”).

50. The doctrine of necessity “recognizes the existence of the judicial power to authorize a debtor in a reorganization case to pay pre-petition claims where such payment is essential to the continued operation of the debtor.” *In re Ionosphere Clubs, Inc.*, 98 B.R. at 176; *see also In re Just for Feet, Inc.*, 242 B.R. 821, 826 (D. Del. 1999) (stating that where the debtor “cannot survive” absent payment of certain prepetition claims, the doctrine of necessity should

be invoked to permit payment); *In re NVR L.P.*, 147 B.R. 126, 127 (Bankr. E.D. Va. 1992) (“[T]he court can permit pre-plan payment of a pre-petition obligation when essential to the continued operation of the debtor.”); *In re Eagle-Picher Indus., Inc.*, 124 B.R. 1021, 1023 (Bankr. S.D. Ohio 1991) (“[T]o justify payment of a pre-petition unsecured creditor, a debtor must show that the payment is necessary to avert a serious threat to the Chapter 11 process.”).

51. The doctrine of necessity is an accepted component of modern bankruptcy jurisprudence. *See Just For Feet*, 242 B.R. at 826 (approving payment of key inventory suppliers’ prepetition claims when such suppliers could destroy debtor’s business by refusing to deliver new inventory on eve of debtor’s key sales season); *In re Payless Cashways, Inc.*, 268 B.R. 543, 546-47 (Bankr. W.D. Mo. 2001) (authorizing payment of critical prepetition suppliers’ claims when such suppliers agree to provide postpetition trade credit); *see also In re Columbia Gas Sys., Inc.*, 171 B.R. 189, 191-92 (Bankr. D. Del. 1994); *In re Ionosphere Clubs, Inc.*, 98 B.R. at 175.

52. Maintaining the Customer Programs, and satisfying any related prepetition obligations or fees, as needed in the Debtor’s business judgment, is consistent with the doctrine of necessity. As noted above, the Customer Programs are vital to the Debtor’s efforts to maximize the value of its estate. The potential harm and economic disadvantage that would stem from an inability to honor customer obligations is grossly disproportionate to the costs associated with the Customer Programs.

53. The relief requested herein is commonly granted in this District. *See, e.g., In re Pernix Sleep, Inc., et al.*, Case No. 19-10323 (CSS) (Bankr. D. Del. Feb. 21, 2019 and Mar. 22, 2019) (granting interim and final relief); *In re Orexigen Therapeutics, Inc.*, Case No. 18-10518 (KG) (Bankr. D. Del. Mar. 13, 2018 and Apr. 11, 2018) (granting interim and final relief);

In re Dendreon Corporation, Case No. 14-12515 (LSS) (Bankr. D. Del. Nov. 12, 2014 and Dec. 9, 2014) (granting interim and final relief); *In re Savient Pharmaceuticals, Inc.*, Case No. 13-12680 (MFW) (Bankr. D. Del. Oct. 16, 2013 and Nov. 19, 2013) (granting interim and final relief); *In re Energy Future Holdings Corp.*, Case No. 14-10979 (CSS) (Bankr. D. Del. May 2, 2014); *In re Exide Technologies*, Case No. 13-11482 (KJC) (Bankr. D. Del. June 11, 2013 and July 11, 2013) (granting interim and final relief); *In re B456 Sys., Inc.*, Case No. 12-12859 (KJC) (Bankr. D. Del. Nov. 7, 2012); *In re Blitz U.S.A., Inc.*, Case No. 11-13603 (PJW) (Bankr. D. Del. Dec. 5, 2011); *In re Graceway Pharms.*, Case No. 11-13036 (PJW) (Bankr. D. Del. Oct. 17, 2011); *see also In re Synergy Pharmaceuticals Inc., et al.*, Case No. 18-14010 (JLG) (Bankr. S.D.N.Y. Dec. 14, 2018 and Jan. 23, 2019) (granting interim and final relief).⁶

D. Immediate Relief Is Necessary to Avoid Immediate and Irreparable Harm.

54. Bankruptcy Rule 6003 provides that the relief requested in this Motion may be granted if the “relief is necessary to avoid immediate and irreparable harm.” Fed. R. Bankr. P. 6003; *see also In re First NLC Fin. Servs., LLC*, 382 B.R. 547, 549 (Bankr. S.D. Fla. 2008) (holding that Rule 6003 permits entry of retention orders on an interim basis to avoid irreparable harm). The Third Circuit has interpreted the language “immediate and irreparable harm” in the context of preliminary injunctions. In that context, the court has instructed that irreparable harm is a continuing harm which cannot be adequately redressed by final relief on the merits and for which money damages cannot provide adequate compensation. *See, e.g., Norfolk S. Ry. Co. v. City of Pittsburgh*, 235 F. App’x 907, 910 (3d Cir. 2007) (citing *Glasco v. Hills*, 558 F.2d 179, 181 (3d Cir. 1977)). Furthermore, the harm must be shown to be actual and imminent, not speculative or unsubstantiated. *See, e.g., Acierno v. New Castle Cnty.*, 40 F.3d 645, 653-55

⁶ Because of the voluminous nature of the orders cited herein, they are not attached to this Motion. Copies of these orders, however, are available on request.

(3d Cir. 1994). The Debtor submits that for the reasons already set forth herein, the relief requested in this Motion is necessary to avoid immediate and irreparable harm to the Debtor.

WAIVER OF STAY UNDER BANKRUPTCY RULE 6004(h)

55. The Debtor also requests 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 Debtor seeks in this Motion is necessary for the Debtor to operate its business without interruption and to preserve value for its estate. Accordingly, the Debtor respectfully requests that the Court waive the fourteen-day stay imposed by Bankruptcy Rule 6004(h), as the exigent nature of the relief sought herein justifies immediate relief.

RESERVATION OF RIGHTS

56. 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

57. Notice of this Motion shall be given 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) all customers participating in the Customer Programs; (v) the Internal Revenue Service; (vi) the Office of the United States Attorney for the District of Delaware; and (vii) all parties entitled to notice pursuant to Local Bankruptcy 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 9013-1(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 the Proposed Interim and Final Orders, substantially in the forms annexed hereto, granting the relief requested in this Motion and such other and further relief as may be just and proper.

[Remainder of page intentionally left blank]

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 (___)

INTERIM ORDER PURSUANT TO 11 U.S.C. §§ 105(a), 363, 1107, AND 1108 AND FED. R. BANKR. P. 6003 AND 6004 AUTHORIZING DEBTOR TO (I) HONOR CERTAIN PREPETITION OBLIGATIONS TO CUSTOMERS AND TO CONTINUE CUSTOMER PROGRAMS AND (II) PAY MEDICAID, MEDICARE AND OTHER OBLIGATIONS

Upon the motion (the “Motion”)² of the Debtor for an interim order (the “Interim Order”), pursuant to sections 105(a), 363, 1107, and 1108 of the Bankruptcy Code, and Bankruptcy Rule 6003 and 6004, authorizing the Debtor to continue to (i) honor prepetition obligations owed to Customers and otherwise continue its prepetition Customer Programs and practices in the ordinary course of business and (ii) pay Medicaid, Medicare and other obligations; and upon the First Day Declaration; and due and sufficient notice of the Motion having been given under the particular circumstances; and it appearing that no other or further notice need be provided; and it appearing that the relief requested by the Motion is in the best interests of the Debtor, its estate, its creditors and other parties in interest; and after due deliberation thereon and good and sufficient cause appearing therefor, it is hereby,

ORDERED, ADJUDGED, AND DECREED that:

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

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 otherwise defined herein shall have the meanings ascribed to such terms in the Motion.

2. Until such time as the Final Order is entered, the Debtor is authorized, but not directed, to continue the Customer Programs in the ordinary course of business, including the payment of prepetition amounts not to exceed \$50,000 inclusive of the Debtor's Customers setting off prepetition amounts, where applicable, against the Debtor's accounts receivable in the ordinary course and pursuant to prepetition customary terms between the Debtor and the Customers.

3. All applicable banks and financial institutions are (a) authorized and directed to receive, process, honor and pay any and all checks drawn on the payroll, drafts and other forms of payment, including fund transfers, used by the Debtor on account of the Customer Programs, whether presented before, on or after the Petition Date, provided that sufficient funds are on deposit in the applicable accounts to cover such payments, (b) authorized to rely on the representations of the Debtor as to which checks are subject to this Motion, and (c) prohibited from placing any holds on, or attempting to reverse, any automatic transfers on account of the Customer Programs; provided that the Debtor is authorized to issue new postpetition checks to replace any checks, drafts and other forms of payment, or effect new postpetition fund transfers, which may be inadvertently dishonored or rejected and to reimburse any expenses that may be incurred as a result of any bank's failure to honor a prepetition check.

4. The Debtor is authorized, but not directed, to continue, renew, replace, modify and/or terminate such of its Customer Programs as it deems appropriate, in its discretion, and in the ordinary course of business, without further application to the Court.

5. The provisions contained herein shall not be construed to limit, or in any way affect, the Debtor's ability to contest any claims, on any ground permitted by applicable law, and neither the provisions contained herein, nor any actions or payment made by the Debtor

pursuant to the Interim Order, shall be deemed an admission as to the validity of the underlying obligation or a waiver of any rights the Debtor may have to subsequently dispute such obligation on any ground that applicable law permits.

6. Nothing in the Interim Order or the Motion shall be deemed to constitute postpetition assumption, reaffirmation or adoption of any agreement under Bankruptcy Code section 365. Notwithstanding the relief granted herein and any actions taken hereunder, nothing herein shall create, nor is intended to create, any rights in favor of, or enhance the status of any claim held by, any person.

7. The Court finds and determines that the requirements of Bankruptcy Rule 6003 are satisfied and that the relief requested is necessary to avoid immediate and irreparable harm.

8. Notwithstanding Bankruptcy Rule 6004(h), the Interim Order shall be effective and enforceable immediately upon entry hereof.

9. The final hearing on this Motion is set for _____, **2019 at _: _ p.m. (Eastern Time)**. Any objections or responses to entry of the proposed Final Order shall be filed and served, so as to be received by 4:00 p.m. (prevailing Eastern Time) no later than seven (7) days prior to the final hearing, upon: (i) the Debtor, care of Achaogen, Inc., 1 Tower Place, Suite 400, South San Francisco, CA 94080, Attention: Gary Loeb, and (ii) proposed counsel to the Debtor, Hogan Lovells US LLP, 1999 Avenue of the Stars, Suite 1400, Los Angeles, California 90067, Attn: Richard L. Wynne and Erin N. Brady, and Hogan Lovells US LLP, 875 Third Avenue, New York, New York 10022, Attn.: John D. Beck, and Morris, Nichols, Arsht & Tunnel LLP, 1201 North Market Street, 16th Floor, Wilmington, Delaware 19899-1347, Attn: Derek C. Abbott and Andrew R. Remming.

10. The requirements set forth in Local Bankruptcy Rule 9013-1(b) are satisfied by the contents of the Motion.

11. The Debtor is authorized and empowered to take all actions necessary to implement the relief granted in the Interim Order.

12. This Court shall retain jurisdiction with respect to all matters arising from or related to the implementation or interpretation 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 (___)

FINAL ORDER PURSUANT TO 11 U.S.C. §§ 105(a), 363, 1107, AND 1108 AND FED. R. BANKR. P. 6003 AND 6004 AUTHORIZING DEBTOR TO (I) HONOR CERTAIN PREPETITION OBLIGATIONS TO CUSTOMERS AND TO CONTINUE CUSTOMER PROGRAMS AND (II) PAY MEDICAID, MEDICARE AND OTHER OBLIGATIONS

Upon the motion (the “Motion”)² of the Debtor for a final order (the “Final Order”), pursuant to sections 105(a), 363, 1107, and 1108 of the Bankruptcy Code, and Bankruptcy Rule 6003 and 6004, authorizing the Debtor to continue to (i) honor prepetition obligations owed to Customers and otherwise continue its prepetition Customer Programs and practices in the ordinary course of business and (ii) pay Medicaid, Medicare and other obligations; and upon the First Day Declaration; and due and sufficient notice of the Motion having been given under the particular circumstances; and it appearing that no other or further notice need be provided; and it appearing that the relief requested by the Motion is in the best interests of the Debtor, its estate, its creditors and other parties in interest; and after due deliberation thereon and good and sufficient cause appearing therefor, it is hereby,

ORDERED, ADJUDGED, AND DECREED that:

1. The Motion is GRANTED on a final basis as set forth herein.

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 otherwise defined herein shall have the meanings ascribed to such terms in the Motion.

2. The Debtor is authorized, but not directed, to continue the Customer Programs in the ordinary course of business, including the payment of prepetition amounts not to exceed \$150,000 inclusive of the Debtor's Customers setting off prepetition amounts, where applicable, against the Debtor's accounts receivable in the ordinary course and pursuant to prepetition customary terms between the Debtor and the Customers.

3. All applicable banks and financial institutions are (a) authorized and directed to receive, process, honor and pay any and all checks drawn on the payroll, drafts and other forms of payment, including fund transfers, used by the Debtor on account of the Customer Programs, whether presented before, on or after the Petition Date, provided that sufficient funds are on deposit in the applicable accounts to cover such payments, (b) authorized to rely on the representations of the Debtor as to which checks are subject to this Motion, and (c) prohibited from placing any holds on, or attempting to reverse, any automatic transfers on account of the Customer Programs; provided that the Debtor is authorized to issue new postpetition checks to replace any checks, drafts and other forms of payment, or effect new postpetition fund transfers, which may be inadvertently dishonored or rejected and to reimburse any expenses that may be incurred as a result of any bank's failure to honor a prepetition check.

4. The Debtor is authorized, but not directed, to continue, renew, replace, modify and/or terminate such of its Customer Programs as it deems appropriate, in its discretion, and in the ordinary course of business, without further application to the Court.

5. The provisions contained herein shall not be construed to limit, or in any way affect, the Debtor's ability to contest any claims, on any ground permitted by applicable law, and neither the provisions contained herein, nor any actions or payment made by the Debtor pursuant to the Final Order, shall be deemed an admission as to the validity of the underlying

obligation or a waiver of any rights the Debtor may have to subsequently dispute such obligation on any ground that applicable law permits.

6. Nothing in the Final Order or the Motion shall be deemed to constitute postpetition assumption, reaffirmation or adoption of any agreement under Bankruptcy Code section 365. Notwithstanding the relief granted herein and any actions taken hereunder, nothing herein shall create, nor is intended to create, any rights in favor of, or enhance the status of any claim held by, any person.

8. 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.

9. The requirements set forth in Local Bankruptcy Rule 9013-1(b) are satisfied by the contents of the Motion.

10. The Debtor is authorized and empowered to take all actions necessary to implement the relief granted in the Final Order.

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

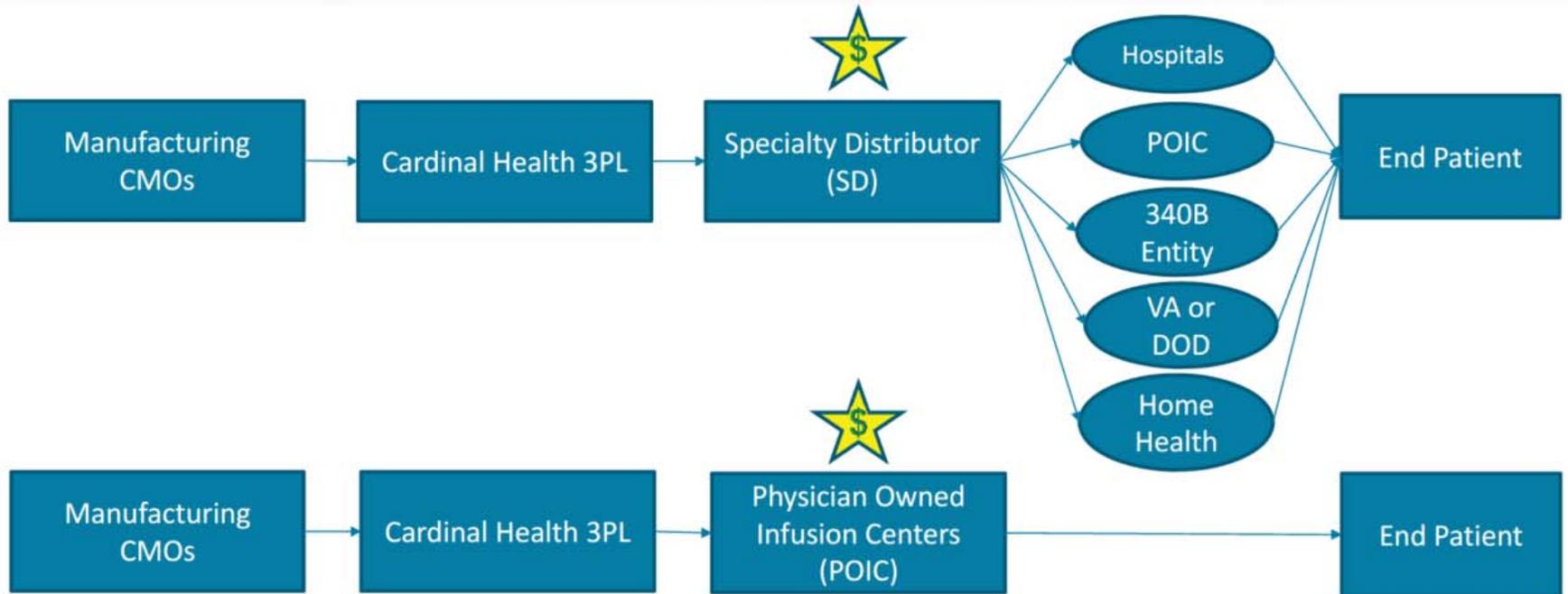
_____, 2019
Wilmington, Delaware

UNITED STATES BANKRUPTCY JUDGE

EXHIBIT C

Chart of Customer Programs

Revenue Flow by Customer



= record revenue