

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 AUTHORIZING
PAYMENT OF PREPETITION CLAIMS OF CERTAIN CRITICAL VENDORS
PURSUANT TO 11 U.S.C. §§ 105(a), 363(b), 364, 1107(a) AND 1108 AND FED. R.
BANKR. P. 6003 AND 6004**

The debtor and debtor in possession in the above-captioned case (the “Debtor”), hereby moves this Court for entry of interim and final orders (the “Motion”), substantially in the forms attached hereto as **Exhibit A** (the “Proposed Interim Order”) and **Exhibit B** (the “Proposed Final Order”), under sections 105(a), 363(b), 364, 1107(a) and 1108 of title 11 of the United States Code (the “Bankruptcy Code”) and Rules 6003 and 6004 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), authorizing, but not directing, the Debtor to make payments toward the prepetition fixed, liquidated and undisputed claims of certain critical vendors, subject to the conditions described herein. 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 contemporaneously herewith. In further support of this Motion, the Debtor, by and through its undersigned proposed counsel, respectfully represents:

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. This Court has jurisdiction to consider this Motion pursuant to 28 U.S.C. §§ 157 and 1334 and the *Amended Standing Order of Reference* from the United States District Court for the District of Delaware, dated as of February 29, 2012 (the “Amended Standing Order”). This is a core proceeding under 28 U.S.C. § 157(b). Venue of this Chapter 11 Case and this Motion in this district is proper under 28 U.S.C. §§ 1408 and 1409.

2. The legal predicates for the relief requested herein are Bankruptcy Code sections 105(a), 363(b), 364, 1107(a), and 1108, and Bankruptcy Rules 6003 and 6004.

3. Pursuant to Rule 9013-1(f) of the Local Rules 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

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.

RELIEF REQUESTED

6. The Debtor's business depends on, among other things, the Debtor's ability to retain its vendors and service providers and to maintain its reputation and customer loyalty within the pharmaceutical industry. The Debtor continues to do business with vendors whose goods and services are essential to the Debtor's operations (the "Critical Vendors"). The Debtor has categorized its Critical Vendors into three subsets for purposes of this Motion. First, the Debtor has Critical Vendors on account of manufacturing, supply and service provider arrangements with the Debtor (the "Critical Supply and Service Vendors"). Second, the Debtor has Critical Vendors on account of certain warehousing and freight arrangements with the Debtor (the "Critical Warehouse and Freight Vendors"). Third, the Debtor has Critical Vendors that are foreign suppliers of goods and services (the "Critical Foreign Vendors"). By this Motion, the Debtor seeks entry of an order granting it authority to make payments on account of the prepetition claims of all Critical Vendors (the "Critical Vendor Claims"), not to exceed an aggregate amount of \$250,000 on an interim basis and \$500,000 on a final basis (for both interim and final periods, the "Critical Vendor Claims Cap"), without prejudice to the Debtor's ability to seek additional amounts pursuant to this Motion at the final hearing if the Debtor determines it is necessary.

7. The Debtor seeks the authority to pay, in its sole discretion and business judgment, all or a portion of the Critical Vendor Claims. The Debtor estimates the maximum amount needed to pay the Critical Vendor Claims is the amount of the Critical Vendor Claims Cap. Of this amount, the Debtor estimates the maximum amount needed to pay Critical Vendor Claims before the final hearing is \$250,000. The Critical Vendor Claims Cap represents the Debtor's best estimate as to how much must be paid to such creditors to continue an uninterrupted supply of critical goods and services. The Debtor may pay less than the requested

amount. The Debtor further requests that the Court grant the Debtor the authority to allocate the forgoing amounts at the Debtor's discretion without prejudice to the Debtor's ability to seek additional amounts pursuant to this Motion at the final hearing if the Debtor determines it is necessary or to seek additional relief on an emergency basis, and subject to an agreement to receive terms consistent with Customary Trade Terms (as defined herein) from the Critical Vendors.

8. In an exercise of business judgment, the Debtor has determined that continuing to receive specialized goods and services from the Critical Vendors is necessary to operate and restructure its business as a going concern and to maximize value. If granted discretion to satisfy Critical Vendor Claims, as requested in this Motion, the Debtor will assess, case by case and in real time the benefits to the estate of paying Critical Vendor Claims, and pay any such claims only to the extent the estate will benefit. Without this relief, the Debtor believes that the Critical Vendors would cease providing goods and services to the Debtor or otherwise take action to impede the Debtor's restructuring – a dire result for the Debtor and its stakeholders.

9. 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

10. The Debtor believes that most of its vendors will continue to do business with the Debtor after commencement of this Chapter 11 Case because doing so simply makes good business sense. The Debtor, however, anticipates that certain Critical Vendors that supply goods or services that are necessary to its business will: (a) refuse to deliver goods and services without payment of its prepetition claims; (b) refuse to deliver goods and services on reasonable credit terms absent payment of prepetition claims, thereby requiring the Debtor to use even

greater liquidity and increase its operating costs; or (c) suffer significant financial hardship, such that the Debtor's non-payment of its prepetition claims could have a significant negative impact on a Critical Vendor's business and therefore its ability to supply the Debtor with needed goods and services. Accordingly, the Debtor respectfully requests the Court's entry of the Proposed Interim and Final Orders substantially in the forms attached hereto as **Exhibit A** and **Exhibit B**, authorizing, but not directing, the Debtor to pay the prepetition Critical Vendor Claims because payment of such claims is necessary to an effective reorganization.

A. Payment of the Critical Vendor Claims is Essential to the Debtor's Continued Operations during this Chapter 11 Case.

11. The Debtor is engaged in the development of pharmaceutical products focused on antibacterial treatments against multi-drug resistant gram-negative infections. The Debtor's first commercial product, ZEMDRI (plazomicin), was approved in the United States in June 2018. The U.S. Food and Drug Administration ("FDA") approved ZEMDRI for the treatment of complicated urinary tract infections, including pyelonephritis, caused by certain Enterobacteriaceae. The Debtor designed ZEMDRI to fight what the Center for Disease Control ("CDC") calls a "nightmare bacteria" and has listed as the highest category threat of "urgent." ZEMDRI can be used to treat patients who have limited or no alternative treatment options from infections with these nightmare bacteria. Even with its current financial situation, the Debtor continues to commercialize ZEMDRI, in part because the Debtor believes that ZEMDRI can save lives for patients who may literally have no alternative.

12. Although the Debtor desires to resume normal business relationships with all vendors, and all vendors and their goods and services are important to the Debtor's business and operations, the immediate need to continue to provide uninterrupted service so that patients can continue to have access to its intravenous infusion drug is the Debtor's foremost concern.

Thus, the Debtor requests authority to pay, in part or in full and in its discretion, the Critical Vendors for goods and services that are in short supply or of the utmost importance to ensuring delivery of treatments to patients.

13. **Criteria for Selecting Critical Vendors.** To ensure that the Debtor identifies only those vendors/providers that are actually critical to the Debtor's businesses, employees and professionals of the Debtor, who are familiar with the Debtor's vendor relationships, have and will continue to extensively analyze and review the Debtor's immediate service needs and supplier base. In order to determine which of the Debtor's vendors are critical to the Debtor's business, the Debtor will use the following criteria: (a) whether the vendor in question is a "sole source" provider; (b) whether quality requirements or other specifications prevent the Debtor from obtaining a vendor's products or services from alternative sources within a reasonable timeframe; (c) whether a vendor meeting the standards of (a) or (b) is likely to refuse to ship product to the Debtor postpetition if its prepetition balances are not paid; (d) whether a vendor would suffer significant financial hardship absent the Debtor's payment of prepetition claims; (e) the degree to which replacement costs (including, pricing, transition expenses, professional fees and lost sales of future revenue) exceed the amount of a vendor's prepetition claim; (f) whether an agreement exists by which the Debtor could compel a vendor to continue performing on prepetition terms; and (g) for foreign vendors specifically, whether the vendor lacks minimum contacts with the United States such that the vendor may not be subject to the jurisdiction of this Court or the provisions of the Bankruptcy Code that otherwise protect the Debtor's assets and business operations, or may simply be confused by the chapter 11 process. The Debtor is confident that this process will appropriately identify only those vendors that meet some or all of the foregoing stringent guidelines and that, if the Debtor failed to pay for the vital

goods and services it has provided prepetition, would likely cease to provide them in the future.

14. **The Critical Supply and Service Vendors.** To conduct its business, the Debtor relies on manufacturers, suppliers and service providers for components used in the manufacture and distribution of its commercial product, ZEMDRI. Problems with any of these manufacturers and suppliers could result in the failure to produce, or a delay in production, of adequate supplies of the components necessary to manufacture the intravenous infusion drug. This could delay or reduce commercial sales and materially harm the Debtor's business as well as negatively impact patients relying on this life-saving treatment.

15. Further, in order to ensure the quality of drug products, the FDA carefully monitors drug manufacturer's compliance with its Current Good Manufacturing Practice ("CGMP") regulations. For the Debtor to remain in compliance with the CGMP regulations, each of its manufacturers and suppliers must also be in compliance. The Debtor's current manufacturers and suppliers have each passed the CGMP audit and certification. To replace any of these vendors would require the Debtor to undertake an exhaustive review process to ensure the manufacturing facilities and processes of the new prospective vendor were also in compliance with the CGMP regulations. Such process would take anywhere from six to twelve months to complete. The Debtor does business with certain of its Critical Supply and Service Vendors without the benefit of contracts and, therefore, these vendors generally are not obligated to do business with the Debtor or to honor particular trade terms for future orders. Absent some payment of the prepetition Critical Vendor Claims, these Critical Supply and Service Vendors may cease doing business with the Debtor.

16. **The Critical Warehouse and Freight Vendors.** As part of its business operations, the Debtor relies on a variety of service providers, including outsourced contract

manufacturers, common carriers, shippers, customs brokers, third party logistics providers and storage facilities (collectively "Critical Warehouse and Freight Vendors"). The services provided by the Critical Warehouse and Freight Vendors, including the timely, reliable delivery of goods for the Debtor is an absolute necessity to the Debtor's ability to conduct business. The Debtor has a reputation for reliability and dependability amongst its customers. Many of the Debtor's pricing policies and marketing strategies revolve around its reliability and dependability. This reputation depends in substantial part on the timely delivery of product to the Debtor's customers. In turn, the Debtor's ability to make timely deliveries depends on a successful and efficient system for receipt of the products that the Debtor sells. This supply and delivery system involves the use of reputable service providers.

17. **The Critical Foreign Vendors.** Although the Debtor believes that many of its foreign suppliers of goods and services (collectively, the "Foreign Vendors") may continue to do business with the Debtor after commencement of this Chapter 11 Case, certain Foreign Vendors may not. Importantly, the Debtor only seeks to pay the Critical Vendor Claims of the Foreign Vendors that to the best of the Debtor's knowledge lack minimum contacts with the United States and, thus, may not be subject to the jurisdiction of this Court or the provisions of the Bankruptcy Code that otherwise protect the Debtor's assets and business operations—particularly the automatic stay. The Debtor believes that there is material risk that the Foreign Vendors holding Critical Vendor Claims against the Debtor may consider themselves to be beyond the jurisdiction of this Court, disregard the automatic stay and engage in conduct that disrupts the Debtor's operations, or may simply be confused by the chapter 11 process, particularly those in countries with liquidation-oriented insolvency procedures. Notably, Foreign Vendors that believe the automatic stay does not govern their actions may exercise self-help (if

permitted under local law), which could include shutting down the Debtor's access to essential goods and services.

18. Foreign Vendors may also sue the Debtor in a foreign court to recover prepetition amounts owed to them. If they are successful in obtaining a judgment against the Debtor, the Foreign Vendors may seek to exercise post-judgment remedies including seeking to attach the Debtor's foreign assets or withhold vital supplies and services from the Debtor. Since the Debtor would have limited, if any, effective and timely recourse and no practical ability to remedy this situation (absent payment of amounts sought), its business could be irreparably harmed by any such action to the detriment of the Debtor's estate and creditors.

B. Proposed Terms and Conditions of Payment of the Critical Vendor Claims.

19. To preserve liquidity during the Chapter 11 Case and ensure that it continues to receive vital goods and services, the Debtor proposes to condition any payment on account of Critical Vendor Claims on entry into an agreement between the Debtor and the individual Critical Vendor, under which such Critical Vendor shall continue supplying goods and services to the Debtor on terms that are consistent with the historical trade terms between the parties (including, but not limited to, credit limits, pricing, cash discounts, timing of payments, allowances, rebates, normal product mix and availability and other applicable terms and programs), which were most favorable to the Debtor and in effect between such Critical Vendor and the Debtor on a historical basis for the period within one hundred eighty (180) days of the Petition Date (the "Customary Trade Terms"). The Debtor, however, reserves the right to negotiate different trade terms with any Critical Vendor, as a condition to payment of any Critical Vendor Claim, whether or not memorialized by a Trade Agreement (as defined herein), to the extent the Debtor determines that such trade terms are necessary to procure essential goods or services or are otherwise in the best interests of the Debtor's estate.

20. The Debtor further proposes that in the event the Debtor is making a payment pursuant to this Motion, the Debtor will send a letter, substantially in the form attached hereto as Exhibit C, to each of the Critical Vendors to which it is making such payment, along with a copy of the order granting this Motion (the “Order”), including, without limitation the following terms:

- (a) The amount of such Critical Vendor’s estimated claim, after accounting for any setoffs, other credits and discounts thereto, shall be as mutually determined in good faith by the Critical Vendor and the Debtor (but such amount shall be used only for purposes of the Order and shall not be deemed a claim allowed by the Court, and the rights of all parties in interest to object to such claim shall be fully preserved until further order of the Court);
- (b) The amount of payment toward the Critical Vendor’s estimated claim;
- (c) The Critical Vendor’s agreement to be bound by the Customary Trade Terms, or such other trade terms as mutually agreed to by the Debtor and such Critical Vendor;
- (d) The Critical Vendor’s agreement to provide goods and services to the Debtor based upon Customary Trade Terms, and the Debtor’s agreement to pay the Critical Vendor postpetition in accordance with such terms;
- (e) The Critical Vendor’s agreement not to file or otherwise assert against the Debtor, its estate or its respective assets or property (real or personal) any lien (a “Lien”) regardless of the statute or other legal authority upon which such Lien is asserted related in any way to any remaining prepetition amounts allegedly owed to the Critical Vendor by the Debtor arising from goods or services provided to the Debtor prior to the Petition Date, and that, to the extent that the Critical Vendor has previously obtained such a Lien, the Critical Vendor shall immediately take all necessary action to release such Lien;
- (f) The Critical Vendor’s acknowledgement that it has reviewed the terms and provisions of the Order and consents to be bound thereby;

- (g) The Critical Vendor's agreement that it will not separately assert or otherwise seek payment of any reclamation or Bankruptcy Code section 503(b)(9) claims; and
- (h) If a Critical Vendor who has received payment toward a Critical Vendor Claim subsequently refuses to supply goods or services to the Debtor on Customary Trade Terms, any payments received by the Critical Vendor on account of its Critical Vendor Claim will be deemed to have been in payment of then outstanding postpetition obligations owed to such Critical Vendor, and that such Critical Vendor shall immediately repay to the Debtor any payments received on account of its Critical Vendor Claim to the extent that the aggregate amount of such payments exceed the postpetition obligations then outstanding, without the right of setoff or reclamation.

21. Such a letter, once agreed to and accepted by a Critical Vendor, shall be the agreement between the parties that governs their postpetition trade relationship, whether on Customary Trade Terms or on terms different from their Customary Trade Terms (the "Trade Agreement").³ The Debtor hereby seeks authority to enter into Trade Agreements with the Critical Vendors if the Debtor determines, in its discretion, that such an agreement is necessary to its postpetition operations.

22. If a Critical Vendor refuses to supply goods or services to the Debtor on Customary Trade Terms following any postpetition payment toward its Critical Vendor Claim, or fails to comply with any Trade Agreement it entered into with the Debtor, the Debtor hereby seeks authority, in its discretion and without further order of the Court but with notice to the affected Critical Vendor (i) to declare such Trade Agreement immediately terminated (if applicable) and (ii) to declare any payments made to such Critical Vendor on account of its Critical Vendor Claim to have been in payment of then outstanding postpetition obligations owed to such Critical Vendor without further order of the Court.

³ The Debtor's entry into a Trade Agreement shall not change the nature or priority of the underlying Critical Vendor Claims and shall not constitute an assumption or rejection of any executory contract or prepetition or postpetition agreement between the Debtor and a Critical Vendor.

23. In the event that the Debtor exercises either of the rights set forth in the preceding paragraph, the Debtor requests that the Critical Vendor against which the Debtor exercises such rights be required to immediately return to the Debtor any payments made on account of its Critical Vendor Claim to the extent that such payments exceed the postpetition amounts then owed to such Critical Vendor, without giving effect to any rights of setoff or reclamation. In essence, the Debtor seeks to return the parties to their respective positions immediately prior to entry of the Order in the event a Trade Agreement is terminated or a Critical Vendor refuses to supply goods or services to the Debtor on Customary Trade Terms following any payment toward its Critical Vendor Claim.

APPLICABLE AUTHORITY

A. Section 105 of the Bankruptcy Code and the Doctrine of Necessity Supports Payment of the Critical Vendor Claims.

24. The proposed payments of Critical Vendor Claims should be authorized pursuant to section 105 of the Bankruptcy Code 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 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 311. 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 continued operation of the [debtor] in serious jeopardy.>").

25. 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. 174, 176 (Bankr. S.D.N.Y. 1989); *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.>").

26. 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 175-76.

27. As stated above, payment of the Critical Vendor Claims is essential to the

continued operation of the Debtor's business. In turn, the maintenance of the Debtor's business during this Chapter 11 Case is crucial to the Debtor's ability to pursue restructuring alternatives and preserve going concern value for the benefit of the Debtor's stakeholders. Accordingly, this Court should allow the payment of the Critical Vendor Claims as requested herein.

B. Payment of the Critical Vendor Claims Is Authorized Under Sections 363 and 364 of the Bankruptcy Code.

28. The relief requested in this Motion is appropriate under Bankruptcy Code sections 363 and 364. *See In re UAL Corp.*, Case No. 02-48191 (Bankr. N.D. Ill. Dec. 11, 2002) (essential trade motion relying upon Bankruptcy Code section 363 is "completely consistent with the Bankruptcy Code;" payments to critical trade vendors have further support when debtor seeks "the extension of credit under section 364 on different than usual terms, terms that might include the payment of a prepetition obligation"); *Armstrong World Indus., Inc. v. James A. Phillips, Inc.*, 29 B.R. 391, 397 (S.D.N.Y. 1983) (under section 363, court authorized contractor to pay prepetition claims of some suppliers who were potential lien claimants, because payments were necessary for general contractors to release funds owed to debtors, thus benefiting estate); *In re Hancock Fabrics, Inc.*, Case No. 07-10353 (BLS) (Bankr. D. Del. Mar. 22, 2007) (pursuant to section 363, authorizing payment of prepetition claims to certain vendors deemed critical by debtors).

29. Certain of the relief requested in this Motion contemplates payments to be made to the Critical Vendors who agree to provide materials, goods or services on Customary Trade Terms resulting in a benefit to the estate. As a result, the payment of such Critical Vendor Claims is consistent with and appropriate under Bankruptcy Code sections 363 and 364. As detailed above, the goods and services provided by the Critical Vendors are vital to the continued operations of the Debtor's business.

30. In addition, as noted above, the Debtor has determined that the Critical Foreign Vendors may take drastic action if their Critical Vendor Claims are not paid. Indeed, non-U.S. entities have occasionally asserted that they are not subject to the jurisdiction of a United States bankruptcy court and, as such, not subject to the automatic stay provisions of 11 U.S.C. § 362(a). Although the Debtor would vigorously dispute any such contention, the Critical Foreign Vendors could stop shipping goods or providing services to the Debtor on a timely basis, and foreign governmental and other entities may take action to seize assets of the Debtor or refuse to release shipments of goods to the Debtor, on the basis of such assertions. Irrespective of the accuracy of any Critical Foreign Vendor's belief that the automatic stay does not apply to these actions, the consequences of such actions would be severe and irreparable. Simply put, absent the goods and services of the Critical Foreign Vendors, the operations of the Debtor would be thrown into disarray. Therefore, even if the Critical Foreign Vendors' legal arguments are completely without merit, it is unlikely that the Debtor could seek and obtain orders from all the appropriate foreign courts forcing such Critical Foreign Vendors to discontinue the offending activities within the time frame necessary to avoid irreparable harm to the Debtor's business particularly since injunctive relief may not be available in all jurisdictions. Indeed, the impact on the Debtor's business would be disproportionate to the amount of the Critical Vendor Claims paid to Critical Foreign Vendors.

31. In light of these factors, payment of the Critical Vendor Claims to Critical Foreign Vendors is plainly in the best interests of the Debtor's estate and its creditors. Accordingly, even if payment of the Critical Vendor Claims to Critical Foreign Vendors is deemed to be outside the ordinary course of business, there is a sufficient business justification for such payments. Thus, the Debtor respectfully submits that this Court should grant the

requested relief under section 363 of the Bankruptcy Code.

C. Payment of the Critical Vendor Claims Is Authorized Under Sections 1107(a) and 1108 of the Bankruptcy Code.

32. The Debtor, operating its businesses as debtor in possession under Bankruptcy Code sections 1107(a) and 1108, are fiduciaries “holding the bankruptcy estate[s] and operating the business[es] 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.*

33. 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.* 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,” and also when the payment was to “sole suppliers of a given product.” *Id.* at 498. 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.

34. Payment of the Critical Vendor Claims meets each element of the *CoServ* court’s standard. As described above, the Debtor has narrowly tailored the Critical Vendor Claims to encompass only those suppliers that are the sole source of a particular good or service without which the Debtor’s operations would be severely impacted or those suppliers or service

providers who are critical because the time and expense that would be involved in transitioning to a new supplier would be prohibitive and would significantly disrupt the Debtor's business. The potential harm and economic disadvantage that would stem from the failure of any of the Critical Vendors to perform is grossly disproportionate to the amount of any prepetition claim that may be paid. Finally, with respect to each Critical Vendor, the Debtor has examined other options short of payment of Critical Vendor Claims and has determined that to avoid significant disruption of the Debtor's operations there exists no practical or legal alternative to payment of the Critical Vendor Claims. Therefore, the Debtor can only meet its fiduciary duties as debtor in possession under Bankruptcy Code sections 1107(a) and 1108 by payment of the Critical Vendor Claims.

35. This Court has granted similar critical vendor relief in other cases. *See, e.g., In re Orexigen Therapeutics, Inc.*, No. 18-10518 (KG) (Bankr. D. Del. Apr. 11, 2018); *In re Exide Techs.*, Case No. 13-11482 (KJC) (Bankr. D. Del. June 11, 2013); *In re AI23 Sys., Inc.*, No. 12-12859 (KJC) (Bankr. D. Del. Nov. 8, 2012); *In re WP Steel Venture LLC*, Case No. 12-11661 (KJC) (Bankr. D. Del. June 1, 2012); *In re Trident Microsystems, Inc.*, Case No. 12-10069 (CSS) (Bankr. D. Del. Jan. 5, 2012).⁴

RESERVATION OF RIGHTS

36. 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

⁴ Because of the voluminous nature of the orders cited herein, they are not attached to the Motion. Copies of these orders, however, are available on request.

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.

**IMMEDIATE RELIEF IS NECESSARY TO AVOID IMMEDIATE AND
IRREPARABLE HARM**

37. 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, 549-50 (Bankr. S.D. Fla. 2008) (holding that Bankruptcy 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 County*, 40 F.3d 645, 653-55 (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)

38. 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 (14) day stay imposed by Bankruptcy Rule 6004(h), as the exigent nature of the relief sought herein justifies immediate relief.

NOTICE

39. 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 Internal Revenue Service; (v) the Securities and Exchange Commission; (vi) the Delaware Secretary of State; (vii) the Delaware Secretary of the Treasury; (viii) any party that has requested notice pursuant to Bankruptcy Rule 2002; and (ix) 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 9013-1(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 an order, substantially in the form annexed hereto, granting the relief requested in the 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 (___)

Re: D.I. ___

**INTERIM ORDER AUTHORIZING PAYMENT OF PREPETITION CLAIMS OF
CERTAIN CRITICAL VENDORS PURSUANT TO 11 U.S.C. §§ 105(a), 363(b), 364,
1107(a), AND 1108 AND FED. R. BANKR. P. 6003 AND 6004**

Upon the motion (the “Motion”)² of the Debtor for an order, styled *Debtor’s Motion for Interim and Final Orders Authorizing Payment of Prepetition Claims of Certain Critical Vendors Pursuant to 11 U.S.C. §§ 105(a), 363(b), 364, 1107(a) and 1108 and Fed. R. Bankr. P. 6003 and 6004*, authorizing, but not directing, the Debtor to make payments toward the prepetition fixed, liquidated and undisputed claims of certain critical vendors; and upon the First Day Declaration; and the Court having jurisdiction to consider the Motion and the relief requested therein 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 pursuant to 28 U.S.C. §§ 1408 and 1409; and due and proper notice of the Motion having been provided; and the relief requested being in the best interests of the Debtor, its estates and creditors; and this Court having reviewed the Motion and having heard the

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.

statements in support of the relief requested therein at a hearing before this Court (the “Hearing”); and the 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 the Court and after due deliberation and sufficient cause appearing therefor, **IT IS HEREBY ORDERED THAT:**

1. The Motion is GRANTED as set forth herein.
2. Until such time as the Final Order is entered, the Debtor is authorized, but not directed, in its sole discretion to make payments toward prepetition Critical Vendor Claims in amounts not to exceed \$250,000 in the aggregate, to be allocated at the Debtor’s discretion without prejudice to the Debtor’s ability to seek additional amounts at the final hearing if the Debtor determines it is necessary or to seek additional relief on an emergency basis.
3. The Debtor shall provide weekly reports to counsel for the DIP Lender regarding payments made to Critical Vendors.
4. The Debtor is further authorized, but not directed, to undertake appropriate efforts to enter into Trade Agreements with the Critical Vendors if the Debtor determines, in its discretion, that such an agreement is necessary to its postpetition operations, including, without limitation on the following terms:
 - (a) The amount of such Critical Vendor’s estimated claim, after accounting for any setoffs, other credits and discounts thereto, shall be as mutually determined in good faith by the Critical Vendor and the Debtor (but such amount shall be used only for purposes of the Order and shall not be deemed a claim allowed by the Court, and the rights of all parties in interest to object to such claim shall be fully preserved until further order of the Court);
 - (b) The amount of payment toward the Critical Vendor’s estimated claim;

- (c) The Critical Vendor's agreement to be bound by the Customary Trade Terms, or such other trade terms as mutually agreed to by the Debtor and such Critical Vendor;
- (d) The Critical Vendor's agreement to provide goods and services to the Debtor based upon Customary Trade Terms, and the Debtor's agreement to pay the Critical Vendor postpetition in accordance with such terms;
- (e) The Critical Vendor's agreement not to file or otherwise assert against the Debtor, its estate or its respective assets or property (real or personal) any lien (a "Lien") regardless of the statute or other legal authority upon which such Lien is asserted) related in any way to any remaining prepetition amounts allegedly owed to the Critical Vendor by the Debtor arising from goods or services provided to the Debtor prior to the Petition Date, and that, to the extent that the Critical Vendor has previously obtained such a Lien, the Critical Vendor shall immediately take all necessary action to release such Lien;
- (f) The Critical Vendor's acknowledgement that it has reviewed the terms and provisions of the Order and consents to be bound thereby;
- (g) The Critical Vendor's agreement that it will not separately assert or otherwise seek payment of any reclamation or Bankruptcy Code section 503(b)(9) claims; and
- (h) If a Critical Vendor who has received payment toward a Critical Vendor Claim subsequently refuses to supply goods or services to the Debtor on Customary Trade Terms, any payments received by the Critical Vendor on account of its Critical Vendor Claim shall be treated by the Debtor to have been in payment of then outstanding postpetition obligations owed to such Critical Vendor, and that such Critical Vendor shall repay to the Debtor any payments received on account of its Critical Vendor Claim to the extent that the aggregate amount of such payments exceed the postpetition obligations then outstanding, without the right of setoff or reclamation.

5. Notwithstanding the foregoing, the Debtor may, in its sole discretion, reinstate a Trade Agreement if the underlying default under the Trade Agreement is fully cured by the Critical Vendor not later than five (5) business days following the Debtor's notification to the Critical Vendor of such default, or the Debtor, in its discretion, reaches a favorable

alternative agreement with the Critical Vendor.

6. The Debtor's banks shall be and hereby are authorized and directed to receive, process, honor and pay all prepetition and postpetition checks and fund transfers on account of the Critical Vendor Claims that had not been honored and paid as of the Petition Date, provided that sufficient funds are on deposit in the applicable accounts to cover such payments. The Debtor shall be and hereby is authorized to issue new postpetition checks or effect new postpetition fund transfers on account of the Critical Vendor Claims to replace any prepetition checks or fund transfer requests that may be dishonored or rejected.

7. Nothing herein shall be construed to limit, or in any way affect, the Debtor's ability to dispute any Critical Vendor Claim.

8. Nothing contained in this Order shall be deemed to constitute an assumption or rejection of any executory contract or prepetition or postpetition agreement between the Debtor and a Critical Vendor or to require the Debtor to make any of the payments authorized herein.

9. The authorization granted hereby to pay Critical Vendor Claims shall not create any obligation on the part of the Debtor or its officers, directors, attorneys or agents to pay the Critical Vendor Claims, none of the foregoing persons shall have any liability on account of any decision by the Debtor not to pay a Critical Vendor Claim, and nothing contained in this order shall be deemed to increase, reclassify, elevate to an administrative expense status or otherwise affect the Critical Vendor Claims to the extent they are not paid.

10. Notwithstanding the relief granted herein and any actions taken hereunder, nothing contained herein shall create, nor is it intended to create, any rights in favor of, or enhance the status of any claim held by, any person.

11. Notwithstanding Bankruptcy Rule 6004(h), this Order shall be effective and enforceable immediately upon entry hereof.

12. 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.

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

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

15. 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 __:__ p.m. (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 Rheame, 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 __:__ p.m. (Eastern Time) on _____, 2019.

16. Notwithstanding anything contained in the Motion or this Order, any payment authorized to be made by the Debtor herein shall be subject to the terms and conditions contained in any interim or final order authorizing the Debtor to obtain postpetition financing and to use cash collateral, including any budgets in connection therewith.

17. The Court shall retain jurisdiction to hear and determine all matters arising from or related to the implementation or interpretation of this 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 AUTHORIZING PAYMENT OF PREPETITION CLAIMS OF
CERTAIN CRITICAL VENDORS PURSUANT TO 11 U.S.C. §§ 105(a), 363(b), 364,
1107(a), AND 1108 AND FED. R. BANKR. P. 6003 AND 6004**

Upon the motion (the "Motion")² of the Debtor for an order, styled *Debtor's Motion for Interim and Final Orders Authorizing Payment of Prepetition Claims of Certain Critical Vendors Pursuant to 11 U.S.C. §§ 105(a), 363(b), 364, 1107(a) and 1108 and Fed. R. Bankr. P. 6003 and 6004*, authorizing, but not directing, the Debtor to make payments toward the prepetition fixed, liquidated and undisputed claims of certain critical vendors; and upon the First Day Declaration; and the Court having jurisdiction to consider the Motion and the relief requested therein 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 pursuant to 28 U.S.C. §§ 1408 and 1409; and due and proper notice of the Motion having been provided; and the relief requested being in the best interests of the Debtor, its estate and creditors; and this Court having reviewed the Motion and having heard the

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.

statements in support of the relief requested therein at a hearing before this Court (the “Hearing”); and the 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 the Court and after due deliberation and sufficient cause appearing therefor, **IT IS HEREBY ORDERED THAT:**

1. The Motion is GRANTED as set forth herein on a final basis.
2. The Debtor is authorized, but not directed, in its sole discretion to make payments toward prepetition Critical Vendor Claims in amounts not to exceed \$500,000 in the aggregate, to be allocated at the Debtor’s discretion without prejudice to seek additional relief on an emergency basis.
3. The Debtor shall provide weekly reports to counsel for the DIP Lender regarding payments made to Critical Vendors.
4. The Debtor is further authorized, but not directed, to undertake appropriate efforts to enter into Trade Agreements with the Critical Vendors if the Debtor determines, in its discretion, that such an agreement is necessary to its postpetition operations, including, without limitation on the following terms:
 - (a) The amount of such Critical Vendor’s estimated claim, after accounting for any setoffs, other credits and discounts thereto, shall be as mutually determined in good faith by the Critical Vendor and the Debtor (but such amount shall be used only for purposes of the Order and shall not be deemed a claim allowed by the Court, and the rights of all parties in interest to object to such claim shall be fully preserved until further order of the Court);
 - (b) The amount of payment toward the Critical Vendor’s estimated claim;
 - (c) The Critical Vendor’s agreement to be bound by the Customary Trade Terms, or such other trade terms as mutually agreed to by the Debtor and such Critical Vendor;

- (d) The Critical Vendor's agreement to provide goods and services to the Debtor based upon Customary Trade Terms, and the Debtor's agreement to pay the Critical Vendor postpetition in accordance with such terms;
- (e) The Critical Vendor's agreement not to file or otherwise assert against the Debtor, its estate or its respective assets or property (real or personal) any lien (a "Lien") regardless of the statute or other legal authority upon which such Lien is asserted) related in any way to any remaining prepetition amounts allegedly owed to the Critical Vendor by the Debtor arising from goods or services provided to the Debtor prior to the Petition Date, and that, to the extent that the Critical Vendor has previously obtained such a Lien, the Critical Vendor shall immediately take all necessary action to release such Lien;
- (f) The Critical Vendor's acknowledgement that it has reviewed the terms and provisions of the Order and consents to be bound thereby;
- (g) The Critical Vendor's agreement that it will not separately assert or otherwise seek payment of any reclamation or Bankruptcy Code section 503(b)(9) claims; and
- (h) If a Critical Vendor who has received payment toward a Critical Vendor Claim subsequently refuses to supply goods or services to the Debtor on Customary Trade Terms, any payments received by the Critical Vendor on account of its Critical Vendor Claim shall be treated by the Debtor to have been in payment of then outstanding postpetition obligations owed to such Critical Vendor, and that such Critical Vendor shall repay to the Debtor any payments received on account of its Critical Vendor Claim to the extent that the aggregate amount of such payments exceed the postpetition obligations then outstanding, without the right of setoff or reclamation.

5. Notwithstanding the foregoing, the Debtor may, in its sole discretion, reinstate a Trade Agreement if the underlying default under the Trade Agreement is fully cured by the Critical Vendor not later than five (5) business days following the Debtor's notification to the Critical Vendor of such default, or the Debtor, in its discretion, reaches a favorable alternative agreement with the Critical Vendor.

6. The Debtor's banks shall be and hereby are authorized and directed to

receive, process, honor and pay all prepetition and postpetition checks and fund transfers on account of the Critical Vendor Claims that had not been honored and paid as of the Petition Date, provided that sufficient funds are on deposit in the applicable accounts to cover such payments. The Debtor shall be and hereby are authorized to issue new postpetition checks or effect new postpetition fund transfers on account of the Critical Vendor Claims to replace any prepetition checks or fund transfer requests that may be dishonored or rejected.

7. Nothing herein shall be construed to limit, or in any way affect, the Debtor's ability to dispute any Critical Vendor Claim.

8. Nothing contained in this Order shall be deemed to constitute an assumption or rejection of any executory contract or prepetition or postpetition agreement between the Debtor and a Critical Vendor or to require the Debtor to make any of the payments authorized herein.

9. The authorization granted hereby to pay Critical Vendor Claims shall not create any obligation on the part of the Debtor or its officers, directors, attorneys or agents to pay the Critical Vendor Claims, none of the foregoing persons shall have any liability on account of any decision by the Debtor not to pay a Critical Vendor Claim, and nothing contained in this order shall be deemed to increase, reclassify, elevate to an administrative expense status or otherwise affect the Critical Vendor Claims to the extent they are not paid.

10. Notwithstanding the relief granted herein and any actions taken hereunder, nothing contained herein shall create, nor is it intended to create, any rights in favor of, or enhance the status of any claim held by, any person.

11. Notwithstanding any provision in the Bankruptcy Rules to the contrary, this Order shall be immediately effective and enforceable upon its entry.

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

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

14. Notwithstanding anything contained in the Motion or this Order, any payment authorized to be made by the Debtor herein shall be subject to the terms and conditions contained in any interim or final order authorizing the Debtor to obtain postpetition financing and to use cash collateral, including any budgets in connection therewith.

15. The Court shall retain jurisdiction to hear and determine all matters arising from or related to the implementation or interpretation of this Order.

_____, 2019
Wilmington, Delaware

UNITED STATES BANKRUPTCY JUDGE

EXHIBIT C

Proposed Letter

_____, 2019

TO: [Critical Vendor/Service Provider]
 [Name]
 [Address]

Dear Valued Supplier/Service Provider:

As you are aware, Achaogen, Inc. (the "Company") filed a voluntary petition (the "Bankruptcy Case") for relief under chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware ("Bankruptcy Court") on April 15, 2019 (the "Petition Date"). On the Petition Date, in recognition of the importance of its relationship with such vendors and suppliers and its desire that the Bankruptcy Case have as little effect on such parties as possible, the Company requested the Bankruptcy Court's approval to pay the prepetition claims of certain critical vendors and suppliers, and/or to otherwise allow such critical vendors and suppliers to apply postpetition payments made by the Company (for postpetition deliveries of goods and/or services) against the oldest outstanding prepetition invoices of such critical vendors and suppliers. On [], 2019, the Bankruptcy Court entered an order (the "Order") authorizing the Company, under certain conditions, to pay the prepetition claims, in accordance with the terms of the Order, of certain trade creditors that agree to the terms set forth below and agree to be bound by the terms of the Order. A copy of the Order is enclosed for your reference.

Under the Order, in order to receive payment of its prepetition claim, each selected trade creditor must agree to continue to supply goods and/or services to the Company based on "Customary Trade Terms." In the Order, Customary Trade Terms are defined as the normal and customary trade terms, practices and programs (including, but not limited to, credit limits, pricing, cash discounts, timing of payments, allowances, rebates, normal product mix and availability and other applicable terms and programs), which were most favorable to the Company and in effect between such trade creditor and the Company on a historical basis for the period within one-hundred eighty (180) days of the Petition Date, or such other trade terms as mutually agreed to by the Company and such trade creditor.

For purposes of administering this trade program, as authorized by the Bankruptcy Court and in accordance with the terms of the Order, the Company and [Name of Trade Vendor] agree as follows (the "Agreement"):

- (i) The estimated balance of the prepetition trade claim (net of any setoffs, credits or discounts) (the "Trade Claim") that the Company will pay to [Name of Trade Vendor] is \$ _____. Your Trade Claim does not constitute a claim allowed by the Bankruptcy Court in the Bankruptcy Case, and signing this Trade Agreement does not excuse you from any requirement of filing a proof of claim in the Bankruptcy Case.
- (j) The Company shall pay \$[] towards the Trade Claim (the "Payment").

- (k) **[Name of Trade Vendor]** agrees to supply goods/services to the Company in accordance with the Customary Trade Terms, and the Company agrees to pay **[Name of Trade Vendor]** in accordance with such terms, provided that following the Payment, **[Name of Trade Vendor]** will supply postpetition goods/services to the Company on net thirty (30) day terms.

For purposes of this paragraph (c), the term “net thirty (30) day terms,” as the case may be, shall refer to the number of days from the date that the particular goods/services are received by the Company.

- (l) In consideration for the Payment, you agree not to file or otherwise assert against the Company, its estate or any other person or entity or any of its respective assets or property (real or personal) any lien (a “Lien”) or claim for reclamation (“Reclamation Claim”) or claim under Bankruptcy Code section 503(b)(9) (a “503(b)(9) Claim”), regardless of the statute or other legal authority upon which such Lien or Reclamation Claim may be asserted, related in any way to any remaining prepetition amounts allegedly owed to you by the Company arising from agreements or other arrangements entered into prior to the Petition Date and, to the extent you have already obtained or otherwise asserted such a Lien, Reclamation Claim or 503(b)(9) Claim, you shall take (at your own expense) whatever actions are necessary to remove such Lien or withdraw such Reclamation Claim or 503(b)(9) Claim unless your participation in the trade payment program authorized by the Order (the “Trade Payment Program”) is terminated.

Your execution of this Agreement and return of the same to the Company constitutes an agreement by **[Name of Trade Vendor]** and the Company:

1. to be bound by the Customary Trade Terms (as modified herein) and, subject to the reservations set forth in the Order, to the amount of the Trade Claim set forth above;

2. that **[Name of Trade Vendor]** will continue to supply the Company with goods and/or services pursuant to the Customary Trade Terms (as modified herein) and that the Company will pay for such goods and/or services in accordance with the Customary Trade Terms (as modified herein);

3. that **[Name of Trade Vendor]** has reviewed the terms and provisions of the Order and that it consents to the bound by such terms, except as modified herein;

4. that **[Name of Trade Vendor]** will not separately seek payment for Reclamation Claims, 503(b)(9) Claims and similar claims outside of the terms of the Order unless its participation in the trade payment program authorized by the Order (the “Trade

Payment Program”) is terminated;

5. that if either the Trade Payment Program or your participation therein terminates as provided in the Order, any payments received by you on account of your Trade Claim will be deemed to have been in payment of postpetition obligations owed to you and you will immediately repay to the Company any payments made to you on account of your Trade Claim to the extent that the aggregate amount of such payments exceed the postpetition obligations, without the right of any setoffs, claims, provision for payment of reclamation or trust fund claims, or other defense;

6. that the Company will agree to pay **[Name of Trade Vendor]** on net thirty (30) day terms in accordance with paragraph (c), hereinabove; and

7. that if the Company shall be in default under this Agreement, **[Name of Trade Vendor]** shall have no obligation to supply goods and/or services to the Company on Customary Trade Terms (as modified herein) until the Company cures such default and **[Name of Trade Vendor]** shall have the right to terminate this Agreement upon written notice to the Company detailing the Company’s defaults hereunder (which the Company shall have the right to dispute) and the Company’s failure to cure such default within five (5) business days of such notice, in which event **[Name of Trade Vendor]** may retain all sums paid to it hereunder on account of its Trade Claim.

The Company and **[Name of Trade Vendor]** also hereby agree that any dispute with respect to this Agreement, the Order and/or **[Name of Trade Vendor]**’s participation in the Trade Payment Program shall be determined by the Bankruptcy Court.

If you have any questions about this Agreement or our financial restructuring, please do not hesitate to call **[Contact Person]** at (____) ____ - ____.

Very truly yours,

Achaogen, Inc.

By: _____

Name: **[Name]**

Title: **[Title]**

Agreed and Accepted by:

[Name of Trade Vendor]

By: _____

Name: **[Name]**

Title: **[Title]**

Dated: _____, 2019