

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re

Achaogen, Inc.,

Debtor.¹

Chapter 11

Case No. 19-10844 (BLS)

MOTION OF THE DEBTOR FOR INTERIM AND FINAL ORDERS UNDER SECTION 366 OF THE BANKRUPTCY CODE (A) PROHIBITING UTILITY PROVIDERS FROM ALTERING, REFUSING OR DISCONTINUING SERVICE, (B) DEEMING UTILITIES ADEQUATELY ASSURED OF FUTURE PERFORMANCE, AND (C) ESTABLISHING PROCEDURES FOR DETERMINING ADEQUATE ASSURANCE OF PAYMENT

The above captioned debtor and debtor in possession (the “Debtor”), by and through its undersigned proposed counsel, hereby moves (the “Motion”) this Court pursuant to section 366 of title 11 of the United States Code (the “Bankruptcy Code”) for entry of interim and final orders, substantially in the form attached hereto as **Exhibit B** and **Exhibit C** (the “Proposed Interim Order” and “Proposed Final Order,” respectively): (a) prohibiting Utility Providers, as that term is defined herein, from altering, refusing or discontinuing service, (b) deeming Utility Providers adequately assured of future performance, and (c) establishing procedures for determining adequate assurance of payment. In support of this Motion, the Debtor incorporates by reference the *Declaration of Blake Wise in Support of First Day Relief* (the “First Day Declaration”),² filed contemporaneously herewith, and respectfully states as follows:

¹ The last four digits of the Debtor’s federal tax identification number are 3693. The Debtor’s mailing address for purposes of this Chapter 11 Case is 1 Tower Place, Suite 400, South San Francisco, CA 94080.

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



JURISDICTION 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”).

2. This is a core proceeding within the meaning of 28 U.S.C. § 157(b). Venue is appropriate in this district pursuant to 28 U.S.C. §§ 1408 and 1409.

3. Pursuant to Local Rule 9013-1(f), the Debtor consents to the entry of final orders or judgments by the Court if it is determined that the Court, absent consent of the parties, cannot enter final orders or judgments consistent with Article III of the United States Constitution.

4. The statutory predicates for the relief requested herein are sections 105(a) and 366 of the Bankruptcy Code and Rules 6003 and 6004 of the Federal Rules of Bankruptcy Procedure.

BACKGROUND

5. 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.

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.

THE DEBTOR'S UTILITIES

7. In connection with its business operations, the Debtor obtains electricity, water, telephone and telecommunication services, and other similar services (collectively, the "Utility Services") through approximately eight accounts that it has with various utility companies and other providers (each a "Utility Provider" and, collectively, the "Utility Providers"). A list of the names, addresses and average monthly bill for each respective Utility Provider is attached hereto as **Exhibit A**.³ The Debtor generally pays each of the Utility Providers following receipt of a monthly invoice for services provided during the immediately preceding month.

8. If utility services to the Debtor's headquarters facility were interrupted, the Debtor would no longer be able to operate its business and could suffer irreparable harm. Such an interruption would undoubtedly impede the Debtor's efforts to maximize the value of its business.

THE PROPOSED ADEQUATE ASSURANCE DEPOSIT AND PROCEDURES

9. The Debtor fully intends to pay all post-Petition Date obligations owed to the Utility Providers in a timely manner and expects that it will have sufficient funds to do so.

10. However, in order to provide adequate assurance of payment for future services to its Utility Providers under section 366(c) of the Bankruptcy Code, the Debtor proposes to make a deposit, in a segregated account to be established by the Debtor, equal to 50% of the Debtor's average monthly utility charges over the twelve month period preceding the

³ The relief requested herein is for all Utility Providers providing Utility Services to the Debtor and is not limited to those listed on **Exhibit A**.

Petition Date for each Utility Provider, which amount totals approximately (in the aggregate) \$15,000 (the “Utility Deposits”). The amount proposed to be deposited for each Utility Provider is set forth on Exhibit A. Notwithstanding the foregoing, the Debtor reserves the right, at its discretion, to not pay the proposed Utility Deposit and to instead permit the Utility Provider to shut off service.⁴

11. The Debtor proposes to make Utility Deposits within 20 calendar days after the entry of the Interim Order granting this Motion for the purpose of providing each Utility Provider with adequate assurance of payment of its postpetition services to the Debtor.

12. In addition, the Debtor seeks to establish the following reasonable procedures (the “Procedures”) by which a Utility Provider may request additional adequate assurance of future payment, in the event that such Utility Provider believes that its Utility Deposit does not provide it with satisfactory adequate assurances:

- a. If a Utility Provider is not satisfied with the Utility Deposit provided by the Debtor as adequate assurance, the Utility Provider must serve a written request (the “Request”) upon the Debtor within seven (7) days of the date of service of the Final Order upon such Utility (the “Request Deadline”) setting forth the location(s) for which Utility Service is provided, the account number(s) for such location(s), the outstanding balance for each account, and an explanation of why the Utility Deposit does not provide it adequate assurance of payment;
- b. The Request must be sent to (a) proposed counsel to the Debtor, (i) 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 (ii) Morris, Nichols, Arsht & Tunnel LLP, 1201 North Market Street, 16th Floor, Wilmington, Delaware 19899-1347, Attn: Derek C. Abbott and Andrew R. Remming; and (b) counsel to the DIP Lender, (i) Morrison & Foerster LLP, 200 Clarendon Street, Boston, MA 02116,

⁴ The Debtor does not admit by virtue of this Motion that any of those parties designated as a Utility Provider herein or on Exhibit A is, indeed, a “utility” as that term is used under Section 366 of the Bankruptcy Code, and reserves all rights with the respect to the same.

Attn: Todd Goren and Benjamin Butterfield; and (ii) Ashby & Geddes, 500 Delaware Avenue, P.O. Box 1150, Wilmington, DE 19899, Attn: Gregory Taylor;

- c. Without further order of the Court, but with advance notice to the DIP Lender, the Debtor may enter into agreements granting additional adequate assurance to a Utility Provider serving a timely Request if the Debtor, in its discretion, determines that the Request or the additional amount agreed upon is reasonable;
- d. If the Debtor believes that a Request is unreasonable, then it shall, within fourteen (14) days after the Request Deadline date, file a motion pursuant to section 366(c)(2) of the Bankruptcy Code (a “Determination Motion”), seeking a determination from the Court that the Utility Deposit, plus any additional consideration offered by the Debtor, constitutes adequate assurance of payment. Pending a Court ruling on the Determination Motion, the Utility Provider that is the subject of the unresolved Request may not alter, refuse, or discontinue services to the Debtor nor recover or setoff against a pre-Petition Date deposit; and
- e. Absent compliance with the procedures set forth in the Motion and this Order, the Debtor’s Utility Providers are prohibited from altering, refusing, or discontinuing service on account of any unpaid prepetition charges and are deemed to have received adequate assurance of payment in compliance with section 366 of the Bankruptcy Code.

13. In addition, the proposed orders also allow the Debtor to supplement the list of Utility Providers with advance notice to the DIP Lender. The Debtor reserves the right, without further order of the Court, to supplement the list if any Utility Provider has been inadvertently omitted. If the Debtor supplements the list subsequent to the filing of this Motion, the Debtor will serve a copy of this Motion, and the signed order granting the relief requested in this Motion (the “Order”), on any Utility Provider that is added to the list by such a supplement (the “Supplemental Service”). In addition, the Debtor will increase the Utility Deposit in the amount to reflect 50% of the average cost of monthly utility consumption for the Utility Provider

that was supplemented on the Debtor's list of Utility Providers.⁵ Concurrently with the Supplemental Service, the Debtor will file with the Court a supplement to **Exhibit A** adding the name of the Utility Provider so served.

14. Finally, the Debtor requests the ability to release the Utility Deposit upon (a) the Debtor's termination of the services of any Utility Provider that has been fully paid for all postpetition services or (b) the effective date of a chapter 11 plan or the closing of a sale of all or substantially all of the Debtor's assets where the Utility Provider has been fully paid for all services. The Debtor believes that the release of a Utility Deposit after a Utility Provider's services are terminated or after the Debtor successfully emerges from bankruptcy or sells substantially all of its assets and where such Utility Provider has been paid in full for all postpetition services is fair and appropriate under the circumstances, because the Utility Provider would no longer require adequate assurance of future performance by the Debtor.

15. The Debtor requests a final hearing on this Motion to be held within twenty five (25) days of the Petition Date to ensure that, if a Utility argues that it can unilaterally refuse service to the Debtor on the thirty-first (31) day after the Petition Date, they will have the opportunity, to the extent necessary, to request that the Court make such modifications to these procedures in time to avoid any potential termination of Utility Services.

RELIEF REQUESTED

16. Because uninterrupted Utility Services are critical to the Debtor's ongoing operations, the Debtor, by this Motion and pursuant to sections 105(a) and 366 of the Bankruptcy Code, seeks the entry of the Proposed Interim Order, attached hereto as **Exhibit B** and the

⁵ The average cost of the Debtor's monthly utility consumption shall be determined based on invoices from twelve months preceding the Petition Date, or the most similar time period practicable, if invoices for that specific time period do not exist or circumstances justify otherwise.

Proposed Final Order, attached hereto as **Exhibit C**: (a) prohibiting its Utility Providers from altering, refusing or discontinuing services; (b) deeming Utility Providers adequately assured of future performance; and (c) establishing procedures for determining adequate assurance of future payment.

BASIS FOR RELIEF

17. Section 366 of the Bankruptcy Code provides that utility companies may not alter, refuse or discontinue service to a debtor during the first twenty days of a bankruptcy case. Section 366 provides, further, that after that initial twenty-day period, a utility may alter, refuse or discontinue service if the debtor has not, within that initial time period “furnishe[d] adequate assurance of payment, in the form of a deposit or other security.” 11 U.S.C. § 366(b).

18. Section 366(c)(2) of the Bankruptcy Code provides that a utility may alter, refuse or discontinue service, if within 30 days following the petition date, such utility has not received adequate assurance of payment that is satisfactory to the utility. 11 U.S.C. § 366(c)(2). Section 366 is therefore designed to not only provide utility companies with adequate assurance that debtors will be able to pay for post-petition services, but also to protect debtors from utility service cutoffs. *See* H.R. Rep No. 95-595, at 350 (1978), as reprinted in 1978 U.S.C.C.A.N. 5963, 6306.

19. Section 366(c)(1)(A) of the Bankruptcy Code provides that “adequate assurance of payment” means (i) a cash deposit; (ii) a letter of credit; (iii) a certificate of deposit; (iv) a surety bond; (v) a prepayment of utility; or (vi) another form of security that is mutually agreed on between the utility and the debtor or the trustee. Accordingly, while the statute specifies the form of assurance that will be deemed to be adequate, it leaves the question of the amount of assurance that must be provided to the discretion of the bankruptcy courts.

20. As with the Bankruptcy Code prior to the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”), the amount of assurance necessary to adequately protect a utility provider is a matter left to the discretion of the courts. The pre-BAPCPA jurisprudence on the matter is, therefore, apposite. Under those cases, courts generally looked to the facts and circumstances of each case to ensure that utility companies were not subjected to an unreasonable risk of nonpayment for post-petition services. *See, e.g., In re Keydata Corp.*, 12 B.R. 156, 158 (B.A.P. 1st Cir. 1981). Courts construing section 366(b) of the Bankruptcy Code have long recognized that adequate assurance of payment does not constitute an absolute guaranty of the debtor’s ability to pay. *See, e.g., In re Caldor, Inc.-NY*, 199 B.R. 1, 3 (S.D.N.Y. 1996) (“Section 366(b) requires [a] [b]ankruptcy [c]ourt to determine whether the circumstances are sufficient to provide a utility with ‘adequate assurance’ of payment. The statute does not require an ‘absolute guaranty of payment.’”) (internal citation omitted); *In re Penn Jersey Corp.*, 72 B.R. 981, 982 (Bankr. E.D. Pa. 1987) (stating that section 366(b) “contemplates that a utility receive only such assurance of payment as is sufficient to protect its interests given the facts of the Debtor’s financial circumstances . . .”). In other words, the statute requires only that “the utility be protected from unreasonable risk of nonpayment.” *Keydata*, 12 B.R. at 158.

21. Further, courts have recognized that, in determining what constitutes adequate assurance, a bankruptcy court must “focus upon the need of the utility for assurance, and . . . require that the debtor supply no more than that, since the debtor almost perforce has a conflicting need to conserve scarce financial resources.” *Virginia Elec. & Power Co. v. Caldor, Inc.-NY*, 117 F.3d 646, 650 (2d. Cir. 1997) (quoting *Penn Jersey*, 72 B.R. at 985).

22. As set forth above, Bankruptcy Code section 366(c)(1) now provides that a cash deposit, which is what the Debtor proposes in this case, constitutes an acceptable form of adequate assurance of payment. The Debtor proposes to make a Utility Deposit equal to 50% of the Debtor's average cost of its monthly utility consumption from each Utility Provider listed on **Exhibit A** hereto. Courts that have required a debtor to post the cash deposit for postpetition utility services have often demanded no more than the debtor's average monthly bill as a deposit and have approved deposits equal to one-half of one month's worth of service. *In re Best Prods. Co.*, 203 B.R. 51, 54 (Bankr. E.D. Va. 1996) (debtor required to provide "adequate assurance in the form of a deposit equal to one-half of the average monthly bill for each of the debtor's facilities serviced by the objecting utilities, as calculated from the monthly bills received by that facility over the last twelve months"); *In re Coastal Dry Dock & Repair Corp.*, 62 B.R. 879, 883-84 (Bankr. E.D.N.Y. 1986) (despite debtor's substantial prepetition default, the court concluded the amount of the security deposit should bear a reasonable relationship to expected or anticipated utility consumption by a debtor and stated "[h]ere, we believe that a deposit in an amount equal to Coastal's estimated electric power consumption over the ensuing one month . . . provides BNYDC with adequate assurance of payment within the intent and meaning of 11 U.S.C. § 366(b)").

23. Moreover, the Debtor proposes to protect the Utility Providers further by establishing the Procedures provided for herein, whereby any Utility Provider can request additional adequate assurance in the event that it believes there are facts and circumstances with respect to its providing postpetition services to the Debtor that would merit greater protection.

24. As set forth above, if any of the Utility Providers alter, refuse or discontinue service, even for a brief period, the Debtor may no longer be able to operate its

business. Any loss of utility service could result in the immediate disruption of the Debtor's business, damage to the Debtor's relationship with its customers and vendors, and loss of good will in the marketplace. Such an interruption would significantly interfere with the Debtor's efforts to sustain its business and satisfy its obligations to its creditors. It is therefore critical that the Debtor's utility services continue uninterrupted.

25. In contrast, granting of the relief requested herein will not prejudice the Utility Providers. They will be adequately protected by cash deposits on account of postpetition services and be paid postpetition, and have the ability, under the proposed procedures, to move promptly for additional relief if they believe there is a basis therefor.

26. This Court has the authority to grant the relief requested herein pursuant to section 105(a) of the Bankruptcy Code which provides that the Court "may 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). Because the proposed Procedures protect the Debtor without materially prejudicing the Utility Providers, they are consistent with section 366 and are an appropriate exercise of this Court's authority under section 105(a) of the Bankruptcy Code.

27. Finally, the relief requested in this Motion, including the Procedures proposed herein, is similar to the relief granted in this district in recent chapter 11 cases. *See, e.g., In re Pernix Sleep, Inc.*, Case No. 19-10323 (CSS) (Bankr. D. Del. Feb. 21, 2019); *In re TerraVia Holdings, Inc.*, Case No. 17-11655 (CCS) (Bankr. D. Del. Aug. 3, 2017); *In re Bonanza Creek Energy, Inc.*, Case No. 17-10015 (KJC) (Bankr. D. Del. Jan. 5, 2017); *In re Basic Energy Servs., Inc.*, Case No. 16-12320 (KJC) (Bankr. D. Del. Nov. 17, 2016); *In re Halcón Res. Corp.*, Case No. 16-11724 (BLS) (Bankr. D. Del. Aug. 19, 2016); *In re Dex Media, Inc.*, Case No. 16-11200 (KG) (Bankr. D. Del. June 8, 2016); *In re Venoco, Inc.*, Case No. 16-

10655 (KG) (Bankr. D. Del. Apr. 21, 2016); *In re Magnum Hunter Res. Corp.*, Case No. 15-12533 (KG) (Bankr. D. Del. Jan. 11, 2016); *In re Offshore Grp. Inv. Ltd.*, Case No. 15-12422 (BLS) (Bankr. D. Del. Jan. 5, 2016); *In re Endeavour Operating Corp.*, Case No. 14-12308 (KJC) (Bankr. D. Del. Nov. 6, 2014).

28. Based on the foregoing, the Debtor submits that the relief requested herein is necessary to avoid immediate and irreparable harm, is in the best interests of the Debtor's estate and creditors, is in keeping with the spirit and intent of section 366 of the Bankruptcy Code, and is not prejudicial to the rights of any Utility Provider.

FEDERAL RULES OF BANKRUPTCY PROCEDURE 6003 & 6004

29. Bankruptcy Rule 6003 provides that “[e]xcept to the extent that relief is necessary to avoid immediate and irreparable harm, the court shall not, within 21 days after the filing of the petition, issue an order granting ...(b) a motion to use, sell, lease, or otherwise incur an obligation regarding property of the estate, including a motion to pay all or part of a claim that arose before the filing of the petition” Fed. R. Bankr. P. 6003. As described above, it is imperative that the Utility Providers continue to provide services to the Debtor in the ordinary course of business. Failure to do so would likely result in immediate, irreparable harm to the Debtor's operations and financial welfare, putting the Debtor's bankruptcy estate at risk. Accordingly, the Debtor submits that it has satisfied the requirements of Bankruptcy Rule 6003 to support the relief sought herein being granted within 21 days of the Petition Date.

30. In order to effectively implement the foregoing, the Debtor seeks a waiver of the notice requirements and the stay of the order authorizing the use, sale or lease of property of the estate under Bankruptcy Rules 6004(a) and 6004(h), to the extent such provisions are applicable.

RESERVATION OF RIGHTS

31. 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

32. Copies of this Motion were served on the following parties: (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 of the Utility Providers identified on **Exhibit A**; (iv) any party that has requested notice pursuant to Bankruptcy Rule 2002; (v) the Securities and Exchange Commission; (vi) the Internal Revenue Service; (vii) the United States Attorney's Office for the District of Delaware; and (viii) all parties entitled to notice pursuant to 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 this Court enter the Interim Order and Final Order, substantially in the form attached hereto, granting the relief requested herein and such other and further relief as this Court deems appropriate.

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April 15, 2019
Wilmington, Delaware

MORRIS, NICHOLS, ARSHT & TUNNELL LLP

/s/ Derek C. Abbott

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Proposed Counsel for Debtor and Debtor in Possession

EXHIBIT A**ACHAOGEN, INC. – UTILITIES**

| Utility | Address | Account # | Service Provided | Average Monthly Cost | Adequate Assurance Payment |
|-----------------------|--|------------------|-------------------------|-----------------------------|-----------------------------------|
| AP3-SF2 CT South, LLC | Dept LA 24484 Pasadena, CA 91185-4484 | 42040.1 | Electric | \$15,000 | \$7,500 |
| AP3-SF2 CT South, LLC | Dept LA 24484 Pasadena, CA 91185-4484 | 42040.3 | Water | \$1,000 | \$500 |
| ACC Business | P.O. Box 105306 Atlanta, GA 30348 | 50000000100 | Internet | \$4,400 | \$2,200 |
| AT&T Corporation | P.O. Box 5019 Carol Stream, IL 60197 | 831-000-7391 244 | Internet | \$4,100 | \$2,050 |
| AT&T Corporation | P.O. Box 5019 Carol Stream, IL 60197 | 831-000-6818 973 | Internet | \$2,000 | \$1,000 |
| AT&T Corporation | P.O. Box 5019 Carol Stream, IL 60197 | 650 244-9487 319 | Internet | \$650 | \$325 |
| AT&T Corporation | P.O. Box 5019 Carol Stream, IL 60197 | 650 244-9487 484 | Internet | \$450 | \$225 |
| AT&T Corporation | P.O. Box 5019 Carol Stream, IL 60197 | 831-000-4351 960 | Internet | \$2,400 | \$1,200 |
| Totals: | | | | \$30,000 | \$15,000 |

EXHIBIT B

Proposed Interim Order

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

In re

Achaogen, Inc., et al.,

Debtor.¹

Chapter 11

Case No. 19-10844 (BLS)

RE: D.I. _____

**INTERIM ORDER UNDER SECTION 366 OF
THE BANKRUPTCY CODE (A) PROHIBITING UTILITY PROVIDERS FROM
ALTERING, REFUSING OR DISCONTINUING SERVICE, (B) DEEMING UTILITIES
ADEQUATELY ASSURED OF FUTURE PERFORMANCE, AND (C) ESTABLISHING
PROCEDURES FOR DETERMINING ADEQUATE ASSURANCE OF PAYMENT**

Upon consideration of the motion (the “Motion”)² of Achaogen, Inc. (the “Debtor”) styled *Motion of the Debtor for an Order Under Section 366 of the Bankruptcy Code (A) Prohibiting Utility Providers From Altering, Refusing or Discontinuing Service, (B) Deeming Utilities Adequately Assured of Future Performance, and (C) Establishing Procedures for Determining Adequate Assurance of Payment* (the “Motion”) and adequate and sufficient notice of the Motion having been given under the circumstances; and the Court having reviewed and considered the Motion, all pleadings related thereto and the arguments of counsel made, and the evidence proffered or adduced, at the interim hearing, it is hereby:

ORDERED, ADJUDGED AND DECREED THAT:

1. The Motion is GRANTED on an interim 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 defined herein are defined in the Motion.

2. Within three (3) business days after entry of this Order, the Debtor shall serve a copy of this Order by way of first class mail on each of the Utility Providers set forth on **Exhibit A** to the Motion.

3. Until such time as the Final Order is entered, each Utility Provider is prohibited from: (a) altering, refusing or discontinuing service to, or discriminating against the Debtor solely on the basis of the commencement of this case or on account of any unpaid invoice for services provided before the commencement of this Chapter 11 Case; and (b) requiring the payment of any additional deposit or other security in connection with the Utility Providers' continued provision of utility services, including the furnishing of gas, electricity, water, sewer, sanitation or telecommunication services, or any other utility service of similar kind to the Debtor.

4. Within 20 days after the date of entry of this Order, the Debtor shall establish a segregated account funded with deposit(s) (the "Utility Deposits") in the amounts set forth on **Exhibit A** to the Motion for the purpose of providing such Utility Provider with adequate assurance of payment of its postpetition services to the Debtor.

5. The following procedures (the "Procedures") by which a Utility Provider may request additional adequate assurance of future payment, in the event that such Utility Provider believes that its Utility Deposit does not provide it with satisfactory adequate assurances are approved on an interim basis:

- a. If a Utility Provider is not satisfied with the Utility Deposit provided by the Debtor as adequate assurance, the Utility Provider must serve a written request (the "Request") upon the Debtor within seven (7) days of the date of service of the Final Order upon such Utility (the "Request Deadline") setting forth the location(s) for which Utility Service is provided, the account number(s) for such location(s), the outstanding balance for each account, and an explanation of why the Utility Deposit does not provide it adequate assurance of payment;

- b. The Request must be sent to (a) proposed counsel to the Debtor, (i) 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 (ii) Morris, Nichols, Arsht & Tunnel LLP, 1201 North Market Street, 16th Floor, Wilmington, Delaware 19899-1347, Attn: Derek C. Abbott and Andrew R. Remming; and (b) counsel to the DIP Lender, (i) Morrison & Foerster LLP, 200 Clarendon Street, Boston, MA 02116, Attn: Alexander Rheaume, and Morrison & Foerster LLP, 250 West 55th Street, New York, NY 10019-9601, Attn: Todd Goren and Benjamin Butterfield; and (ii) Ashby & Geddes, 500 Delaware Avenue, P.O. Box 1150, Wilmington, DE 19899, Attn: Gregory Taylor;
 - c. Without further order of the Court, but with advance notice to the DIP Lender, the Debtor may enter into agreements granting additional adequate assurance to a Utility Provider serving a timely Request, if the Debtor, in its discretion, determines that the Request or the additional amount agreed upon is reasonable;
 - d. If the Debtor believes that a Request is unreasonable, then it shall, within fourteen (14) days after the Request Deadline date, file a motion pursuant to section 366(c)(2) of the Bankruptcy Code (a “Determination Motion”) seeking a determination from the Court that the Utility Deposit, plus any additional consideration offered by the Debtor, constitutes adequate assurance of payment. Pending a Court ruling on the Determination Motion, the Utility Provider that is the subject of the unresolved Request may not alter, refuse, or discontinue services to the Debtor nor recover or setoff against a pre-Petition Date deposit; and
 - e. Any Utility that does not timely serve a Request shall not discontinue service to the Debtor.
6. The Debtor may supplement the list of Utility Providers on **Exhibit A** to the Motion with advance notice to the DIP Lender. If the Debtor supplements the list subsequent to the filing of the Motion, the Debtor will serve a copy of the Motion and this Order on any Utility Provider that is added to the list by such a supplement (the “Supplemental Service”). In addition, the Debtor will deposit 50% of the Debtor’s average monthly utility charges over the preceding twelve months, as estimated by the Debtor, as a Utility Deposit for the added Utility Provider at each applicable location. Any subsequently added Utility Provider set forth on a

supplement to Exhibit A to the Motion will fall within the scope of this Order from the date of the filing of the supplemental Exhibit A.

7. The Debtor may terminate the services of any Utility Provider by providing written notice (a "Termination Notice"). After receipt of a Termination Notice by a Utility Provider and an opportunity for a hearing as to the affected Utility Provider, the Debtor may release any Utility Deposit, provided that the Utility Provider has been paid for all charges that accrued after the commencement of this Chapter 11 Case, without giving effect to any rights of setoff or any prepetition claims the Utility Provider may assert against the Debtor.

8. Nothing in this Order shall be deemed to vacate or modify any other restrictions on the termination of service by a Utility Provider as provided by sections 362 and 366 of the Bankruptcy Code or other applicable law and nothing herein or in the Motion shall constitute postpetition assumption or adoption of any agreement pursuant to section 365 of the Bankruptcy Code, nor shall anything herein be deemed a waiver by the Debtor or any other party of any rights with respect to the assumption or rejection of an executory contract.

9. Subject only to the Utility Providers' right to payment hereunder, the DIP Lender shall have a first-priority security interest and lien upon the Utility Deposit account and all proceeds thereof.

10. The hearing to consider entry of an order granting the relief requested in the Motion on a final basis shall be held on _____, 2019 at _____ (**Eastern Time**); and any objections to entry of such order shall be in writing, filed with the Court, and served upon (i) counsel to the Debtor, (ii) the United States Trustee, and (iii) (iii) counsel to the DIP Lender, Morrison & Foerster LLP, 200 Clarendon Street, Boston, MA 02116, Attn: Alexander Rheume, 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 this case so as to be received no later than **4:00 p.m. (Eastern Time) on _____, 2019.**

11. The requirements of Bankruptcy Rule 6003 are satisfied by the contents of the Motion.

12. Any Bankruptcy Rule (including, but not limited to, Bankruptcy Rule 6004(h)) or Local Rule that might otherwise delay the effectiveness of this Order is hereby waived, and the terms and conditions of this Order shall be effective and enforceable immediately upon its entry.

13. The Debtor is authorized to take all such actions as are necessary or appropriate to implement the terms of 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. This Court shall retain jurisdiction to hear and determine all matters arising from or related to the implementation, interpretation or enforcement of this Order.

_____, 2019
Wilmington, Delaware

THE HONORABLE BRENDAN L. SHANNON
UNITED STATES BANKRUPTCY JUDGE

EXHIBIT C
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 (BLS)

RE: D.I. _____

**FINAL ORDER UNDER SECTION 366 OF
THE BANKRUPTCY CODE (A) PROHIBITING UTILITY PROVIDERS FROM
ALTERING, REFUSING OR DISCONTINUING SERVICE, (B) DEEMING UTILITIES
ADEQUATELY ASSURED OF FUTURE PERFORMANCE, AND (C) ESTABLISHING
PROCEDURES FOR DETERMINING ADEQUATE ASSURANCE OF PAYMENT**

Upon consideration of the motion (the “Motion”)² of the above captioned debtor (the “Debtor”) styled *Motion of the Debtor for an Order Under Section 366 of the Bankruptcy Code (A) Prohibiting Utility Providers From Altering, Refusing or Discontinuing Service, (B) Deeming Utilities Adequately Assured of Future Performance, and (C) Establishing Procedures for Determining Adequate Assurance of Payment* (the “Motion”) and adequate and sufficient notice of the Motion having been given; and the Court having reviewed and considered the Motion, all pleadings related thereto and the arguments of counsel made, and the evidence proffered or adduced, at the interim hearing and the final hearing, 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 defined herein are defined in the Motion.

2. Within three (3) business days after entry of this Order, the Debtor shall serve a copy of this Order by first class mail on each of the Utility Providers set forth on **Exhibit A** to the Motion.

3. Each Utility Provider is prohibited from: (a) altering, refusing or discontinuing service to, or discriminating against the Debtor solely on the basis of the commencement of this Case or on account of any unpaid invoice for services provided before the commencement of this Case; and (b) requiring the payment of any additional deposit or other security in connection with the Utility Providers' continued provision of utility services, including the furnishing of gas, electricity, water, sewer, sanitation or telecommunication services, or any other utility service of similar kind to the Debtor other than as provided in this Order.

4. The Debtor shall maintain a segregated account funded with deposit(s) (a "Utility Deposits") in the amounts set forth on **Exhibit A** to the Motion for the purpose of providing such Utility Provider with adequate assurance of payment of its postpetition services to the Debtor.

5. The following procedures (the "Procedures") by which a Utility Provider may request additional adequate assurance of future payment, in the event that such Utility Provider believes that its Utility Deposit does not provide it with satisfactory adequate assurances are approved on a final basis:

- a. If a Utility Provider is not satisfied with the Utility Deposit provided by the Debtor as adequate assurance, the Utility Provider must serve a written request (the "Request") upon the Debtor within seven (7) days of the date of service of this Final Order upon such Utility (the "Request Deadline") setting forth the location(s) for which Utility Service is provided, the account number(s) for such location(s), the outstanding balance for each

account, and an explanation of why the Utility Deposit does not provide it adequate assurance of payment;

- b. The Request must be sent to (a) proposed counsel to the Debtor, (i) 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 (ii) Morris, Nichols, Arsht & Tunnel LLP, 1201 North Market Street, 16th Floor, Wilmington, Delaware 19899-1347, Attn: Derek C. Abbott and Andrew R. Remming; and (b) counsel to the DIP Lender, (i) Morrison & Foerster LLP, 200 Clarendon Street, Boston, MA 02116, Attn: Alexander Rheaume, and Morrison & Foerster LLP, 250 West 55th Street, New York, NY 10019-9601, Attn: Todd Goren and Benjamin Butterfield, and (ii) Ashby & Geddes, 500 Delaware Avenue, P.O. Box 1150, Wilmington, DE 19899, Attn: Gregory Taylor;
- c. Without further order of the Court, but with advance notice to the DIP Lender, the Debtor may enter into agreements granting additional adequate assurance to a Utility Provider serving a timely Request, if the Debtor, in its discretion, determines that the Request or the additional amount agreed upon is reasonable;
- d. If the Debtor believes that a Request is unreasonable, then it shall, within fourteen (14) days after the Request Deadline date, file a motion pursuant to section 366(c)(2) of the Bankruptcy Code (a "Determination Motion"), seeking a determination from the Court that the Utility Deposit, plus any additional consideration offered by the Debtor, constitutes adequate assurance of payment. Pending a Court ruling on the Determination Motion, the Utility Provider that is the subject of the unresolved Request may not alter, refuse, or discontinue services to the Debtor nor recover or setoff against a pre-Petition Date deposit; and
- e. Any Utility that does not timely serve a Request shall not discontinue service to the Debtor.

6. The Debtor may supplement the list of Utility Providers on **Exhibit A** to the Motion with advance notice to the DIP Lender. If the Debtor supplements the list subsequent to the filing of the Motion, the Debtor will serve a copy of the Motion and this Order on any Utility Provider that is added to the list by such a supplement (the "Supplemental Service"). In addition, the Debtor will deposit 50% of the Debtor's average monthly utility charges over the preceding twelve months, as estimated by the Debtor, as a Utility Deposit for the added Utility

Provider at each applicable location. Any subsequently added Utility Provider set forth on a supplement to **Exhibit A** to the Motion will fall within the scope of this Order from the date of the filing of the supplemental **Exhibit A**.

7. The Debtor may terminate the services of any Utility Provider by providing written notice (a "Termination Notice"). After receipt of a Termination Notice by a Utility Provider and an opportunity for a hearing as to the affected Utility Provider, the Debtor shall release any Utility Deposit, provided that the Utility Provider has been paid for all charges that accrued after the commencement of the case, without giving effect to any rights of setoff or any prepetition claims the Utility Provider may assert against the Debtor.

8. Nothing in this Order shall be deemed to vacate or modify any other restrictions on the termination of service by a Utility Provider as provided by sections 362 and 366 of the Bankruptcy Code or other applicable law and nothing herein or in the Motion shall constitute post-petition assumption or adoption of any agreement pursuant to section 365 of the Bankruptcy Code, nor shall anything herein be deemed a waiver by the Debtor or any other party of any rights with respect to the assumption or rejection of an executory contract.

9. Subject only to the Utility Providers' right to payment hereunder, the DIP Lender shall have a first-priority security interest and lien upon the Utility Deposit account and all proceeds thereof.

10. Any Bankruptcy Rule (including, but not limited to, Bankruptcy Rule 6004(h)) or Local Rule that might otherwise delay the effectiveness of this Order is hereby waived, and the terms and conditions of this Order shall be effective and enforceable immediately upon its entry.

11. The Debtor is authorized to take all such actions as are necessary or appropriate to implement the terms of this Order.

12. Proper, timely, adequate, and sufficient notice of the Motion has been provided in accordance with the Bankruptcy Code, the Bankruptcy Rules, and the Local Rules, and no other or further notice of the Motion or the entry of this Order shall be required.

13. 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.

14. This Court shall retain jurisdiction to hear and determine all matters arising from or related to the implementation, interpretation or enforcement of this Order.

_____, 2019
Wilmington, Delaware

THE HONORABLE BRENDAN L. SHANNON
UNITED STATES BANKRUPTCY JUDGE