

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

In re

Achaogen, Inc.,

Debtor.¹

Chapter 11

Case No. 19-10844 (BLS)

Hearing Date: TBD

**Objection Deadline:
April 22, 2019 at 4:00 p.m. (ET)**

**DEBTOR'S MOTION TO FILE UNDER SEAL PORTIONS OF ITS CREDITOR
MATRIX CONTAINING CERTAIN INDIVIDUAL CREDITOR INFORMATION**

The above-captioned debtor and debtor in possession (the "Debtor") hereby files its motion (this "Motion") for the entry of an order (the "Order"), substantially in the form attached hereto as **Exhibit A**, pursuant to sections 105(a) and 107(c) of title 11 of the United States Code (the "Bankruptcy Code"), Rule 9018 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), and Rule 9018-1(d) of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware (the "Local Rules") authorizing the Debtor to file under seal portions of its creditors matrix (the "Matrix") to protect disclosure of personally identifiable information. In support of this Motion, the Debtor respectfully represents 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



Jurisdiction

1. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2). Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

2. Pursuant to Local Rule 9013-1(f), the Debtor consents to the entry of a final order by the Court in connection with this Motion to the extent it is later determined that the Court, absent consent of the parties, cannot enter final orders or judgments in connection herewith consistent with Article III of the United States Constitution.

3. The statutory bases for the relief requested herein are sections 105(a) and 107(c) of the Bankruptcy Code, as supplemented by Bankruptcy Rule 9018 and Local Rule 9018-1(d).

Background

4. On April 15, 2019 (the "Petition Date"), the Debtor filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code. The Debtor continues to operate its business as debtor in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

5. The Debtor is a biopharmaceutical company focused on discovery, development, and commercialization of innovative antibiotic treatments of 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 *Declaration of Blake Wise in Support of First Day Relief* (D.I. 3) (the "First Day Declaration") and are incorporated herein by reference.

Relief Requested

6. By this Motion, the Debtor seeks entry of an order, substantially in the form attached hereto as **Exhibit A** (the "Proposed Order"), pursuant to sections 105(a) and 107(c) of the Bankruptcy Code, Bankruptcy Rule 9018, and Local Rule 9018-1(d), authorizing the Debtor:

- a. to file the Matrix containing the Debtor's employees' home addresses under seal;

- b. to file a redacted version of the Matrix with the Debtor's corporate mailing address in place of each current employees' home address;
- c. to provide the proposed claims and noticing agent, Kurtzman Carson Consultants LLC ("KCC"), with the employees' home addresses and instruct KCC to serve the employees at their home addresses;
- d. to provide the sealed Matrix to the U.S. Trustee and any other party upon Court order.

Basis for Relief

7. Section 105(a) of the Bankruptcy Code provides that "[t]he 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).

8. Local Rule 9018-1 requires any party who seeks to file documents under seal to file a motion to that effect. Del. Bankr. L.R. 9018-1(d).

9. Section 107(c) of the Bankruptcy Code enables the court to issue orders that protect parties from the potential harm that could result from disclosing personally identifiable information:

(c)(1) The bankruptcy court, for cause, may protect an individual, with respect to the following types of information to the extent the court finds that disclosure of such information would create undue risk of identity theft or other unlawful injury to the individual or the individual's property:

(A) Any means of identification (as defined in section 1028(d) of title 18) contained in a paper filed, or to be filed, in a case under this title

(B) Other information contained in a paper described in subparagraph (A).

11 U.S.C. § 107(c)(1). The Bankruptcy Code defines "means of identification" as:

any name or number that may be used, alone or in conjunction with any other information, to identify a specific individual, *including any—*

(A) name, social security number, date of birth, official State or government issued driver's license or identification number, alien registration number, government passport number, employer or taxpayer identification number...

18 U.S.C. § 1028(d)(7) (emphasis added).

10. The proper interpretation of these two statutes is two-fold. While transparency is important to the bankruptcy process, through the enactment of 11 U.S.C. 107(c)(1), Congress provided an exception to transparency and intended to protect innocent individuals from foreseeable injury. Moreover, the language of both statutes, dictates that Congress intended for each statute to keep open channels for protecting additional information not enumerated. Specifically, section 107(c)(1)(B) allows for "other information" apart from "means of identification," as defined in section 1028(d)(7). Further, under such definition, Congress specifically included the phrase "including any" to illustrate the non-exhaustive nature of the list of items that follows. Accordingly, while an individual employee's home address is not explicitly listed in the definition of "means of identification," it is covered by the expansive language of both 11 U.S.C. § 107(c)(1)(B) and 18 U.S.C. § 1028(d)(7).

11. Bankruptcy judges in this district have ordered the relief requested herein. Recently, in *In re Promise Healthcare Group, LLC*, Case No. 18-12491 (CSS) (Bankr. D. Del. Dec. 4, 2018) [D.I. 221], the Court authorized the debtors to seal their employees' home addresses, noting:

The issue is not one of morale; it is one of protection and protecting the identity of the employees.... [I]t becomes a balancing act: what are we trying to protect versus what are we trying to preserve. And certainly, preserving the transparency of a bankruptcy and the identity of the creditors being revealed is part of that.... [T]he other side of that, the risk to those employees, is

quite high.

Transcript of Dec. 4, 2018 Hearing [D.I. 228]² at 18:5–7, 19:7–10, 19:14–15. Separately, in *In re L.K. Bennett U.S.A., Inc.*, Case No. 19-10760 (KG) (Bankr. D. Del. Apr. 9, 2019) [D.I. 46], the Court reiterated the balancing act noted in *Promise Healthcare*, finding that “privacy concerns win out in this particular circumstance” and authorizing the debtor to redact employee addresses from its creditor matrix. *Transcript of Apr. 9, 2019 Hearing*, at 17:2–6.³

12. Further, in *In re Searchmetrics, Inc.*, the Court authorized the debtor to seal its employees’ home addresses under section 107 of the Bankruptcy Code. Case No. 17-11032(CSS) (Bankr. D. Del. May 9, 2017); *see also Keystone Tube Company, LLC*, Case No. 17-11330 (LSS) (Bankr. D. Del. June 20, 2017) (ordering that debtors were not required to publicly file addresses of current employees on creditor matrix); *In re Model Reorg Acquisition, LLC*, Case. No. 17-11794 (CSS) (Bankr. D. Del. Aug. 29, 2017) (same); *In re Triangle USA Petroleum Corporation, et al.*, Case No. 16-11566 (MFW) (Bankr. D. Del. July 5, 2016) (same); *In re Delivery Agent, Inc.*, Case No. 16-12051 (LSS) (Bankr. D. Del. Sept. 16, 2016) (authorizing the redaction of address information of the debtors’ current and former employees).

13. In this case, the risk of identity theft or injury to innocent individual employees outweighs the presumption in favor of public access to judicial records and papers. *See In re Continental Airlines*, 150 B.R. 334, 341 (D. Del. 1993). There is minimal, if any, benefit to the public disclosure of the Debtor’s employees’ personal home addresses in this chapter 11 case.

² The *Transcript of Dec. 4, 2018 Hearing* [D.I. 228] is attached, in relevant part, hereto at **Exhibit B**.

³ The *Transcript of Apr. 9, 2019 Hearing* is attached, in relevant part, hereto at **Exhibit C**.

To publicly disclose each individual employee's home address would create an undue risk of identity theft for the individual employees as well as other potential risks to the employees' welfare. Moreover, the Debtor will instruct KCC, as its noticing agent, to serve the employees at their personal home addresses, so employees will receive the same notice in this chapter 11 case without the unnecessary public disclosure of their personal home address. Thus, despite the presumption in favor of public access, the privacy concerns at issue here support an order authorizing the Debtor to seal its current and former employees' home addresses from the Matrix.

14. In view of the foregoing, the Debtor respectfully requests that the Court permit the Debtor to seal the Matrix, with unsealed copies provided only to this Court and the Office of the United States Trustee for the District of Delaware (the "U.S. Trustee").

Notice

15. Notice of the Motion has been given to the (i) U.S. Trustee; (ii) counsel to Silicon Valley Bank, N.A., as the Prepetition Lender and DIP Lender (both as defined in the First Day Declaration); (iii) the United States Attorney for the District of Delaware; (iv) the parties included on the Debtor's list of twenty (20) largest creditors; (v) the Internal Revenue Service; and (vi) any party that has requested notice pursuant to Bankruptcy Rule 2002. The Debtor submits that under the circumstances no other or further notice is necessary.

WHEREFORE, the Debtor respectfully requests that this Court (i) grant this Motion and the relief requested herein; (ii) enter the proposed order attached hereto; and (iii) grant such other and further relief as it deems just and proper.

April 15, 2019
Wilmington, Delaware

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Proposed Counsel for Debtor and Debtor in Possession

Exhibit A
[Proposed Form of 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. ____

**ORDER AUTHORIZING DEBTOR TO FILE UNDER SEAL PORTIONS
OF ITS CREDITOR MATRIX CONTAINING CERTAIN INDIVIDUAL
CREDITOR INFORMATION**

Upon the motion (the “Motion”)² of the Debtor for entry of an order, as more fully described in the Motion, pursuant to sections 105(a) and 107(c) of title 11 of the United States Code (the “Bankruptcy Code”), Rule 9018 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), and Rule 9018-1(d) of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware (the “Local Rules”) authorizing the Debtor to file under seal portions of its creditor matrix (the “Matrix”); and adequate notice of the Motion having been given as set forth in the Motion; and it appearing that no other or further notice is necessary; 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 Court having determined that consideration of the Motion is a core proceeding pursuant to 28 U.S.C. § 157(b)(2); and the Court having determined that the legal and factual bases set forth in 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 used but not defined herein shall have the meaning ascribed to them in the Motion.

Motion establish just cause for the relief requested in the Motion, and that such relief is in the best interests of the Debtor, its estate, its creditors and the parties in interest; and upon the record in these proceedings; and after due deliberation;

IT IS HEREBY ORDERED THAT:

1. The Motion is GRANTED.
2. Pursuant to sections 105(a) and 107(c) of the Bankruptcy Code and Local Rule 9018-1(d), the Debtor is authorized to seal portions of the Matrix.
3. The Matrix shall remain under seal and not made available to anyone, except that unredacted copies shall be provided to this Court, the U.S. Trustee and others upon further Court order. Each party receiving an unredacted copy of the Matrix shall keep such information confidential.
4. To the extent any party provided with an unredacted copy of the Matrix files any responsive pleading or other pleadings relating to the Motion, such party shall redact from its pleadings any confidential or identifying information.
5. The Debtor is authorized to take all actions necessary to effectuate the relief granted pursuant to this Order in accordance with the Motion.
6. The terms and conditions of this Order shall be immediately effective and enforceable upon its entry.
7. The Court retains jurisdiction with respect to all matters arising from or related to the implementation of this Order.

_____, 2019
Wilmington, Delaware

THE HONORABLE BRENDAN L. SHANNON
UNITED STATES BANKRUPTCY JUDGE

Exhibit B

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UNITED STATES BANKRUPTCY COURT

DISTRICT OF DELAWARE

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In the Matter of:

PROMISE HEALTHCARE GROUP, LLC, et al., Case No.

Debtors. 18-12491(CSS)

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United States Bankruptcy Court
824 North Market Street
Wilmington, Delaware

December 4, 2018

11:19 AM

B E F O R E:

HON. CHRISTOPHER S. SONTCHI

CHIEF U.S. BANKRUPTCY JUDGE

ECR OPERATOR: LESLIE MURIN

1 MS. KEILSON: Thank you.

2 THE COURT: Response?

3 MR. BROWN: Your Honor, the appeal-to-Congress
4 argument -- it has already been done. 107 specifically
5 provides for this Court to permit the sealing of information
6 that could give rise to personal-identity theft. Whether any
7 employee of the thousands of the debtors' employees becomes
8 victim to personal-identity theft, we won't know for some time.
9 We're here trying to prevent a harm to individuals, which we
10 would hope the Court would view as paramount to disclosure of
11 information to the public. Any party who wants to serve the
12 employees can certainly obtain the information to get the
13 employees' addresses or can serve them at the debtor care of
14 the employees. There're other means for the government and
15 creditors and parties-in-interest in these cases to be
16 fulfilled without exposing the employees to the risk of
17 identity theft.

18 Once their theft (sic) is stolen, it's too late.
19 We're trying to prevent harm to the individuals that have no
20 power. No employee is here to speak their mind about whether
21 they'd prefer to have this information sealed. The debtors
22 believe that each, if they had a voice in this case and had the
23 means to appear, would argue similar to the debtors and seek to
24 have their identities sealed to the extent possible. Thank
25 you, Your Honor.

1 THE COURT: All right, thank you. All right, I'm
2 going to overrule the objection of the Office of the U.S.
3 Trustee and grant the motion. I think that, first of all, the
4 issue is not whether this promulgates or promotes a
5 reorganization of the debtors. The issue is not one of morale;
6 it is one of protection and protecting the identity of the
7 employees.

8 And I think that it's different from just picking up a
9 phone book, if those even exist anymore, and being able to go
10 through and find someone's name and address in the phone book.
11 I think the linking to an employment as well -- it's not just
12 John Smith at 100 Bridge Road; it's John Smith at 100 Bridge
13 Road who works for Providence (sic) Healthcare. And I think
14 that's a -- Promise Healthcare; excuse me. I think that's a
15 big difference.

16 And with responding -- Congress failing to act or
17 would have acted, I think there're two things there. I
18 think -- one, I think Mr. Brown's correct that they have acted;
19 they've provided an ability for the Court to protect people
20 when necessary. And two, maybe they haven't reacted, but the
21 reality is that the world continues to change. Identity theft
22 is a very real threat -- my family -- my wife was victim of it
23 a couple years ago -- no matter how careful you are, and it can
24 have a -- it can have a real adverse effect on someone. And we
25 don't know until it's -- we don't know what we don't know; half

1 of us who probably already have our information in hands of bad
2 guys and nothing has happened yet. But I think it's -- I think
3 the world is different. And to the extent Congress hasn't
4 acted specifically to deal with this, I think it should. But
5 again, they already have, because there's a mechanism for
6 protecting this information.

7 And to me, it becomes a balancing act: what are we
8 trying to protect versus what are we trying to preserve. And
9 certainly, preserving the transparency of a bankruptcy and the
10 identity of the creditors being revealed is part of that. But
11 especially we're talking about employees who are creditors
12 only -- really only in name only, once the wage order is
13 signed. And having them available to be reached is a very
14 small priority for protection of the mechanism. And the other
15 side of that, the risk to those employees, is quite high.

16 So I will -- my thinking on this has evolved, frankly,
17 over the last two years; may be a result of my personal
18 experience. But I will overrule the objection and sign the
19 motion -- or sign the order.

20 MR. BROWN: Thank you, Your Honor. Your Honor,
21 proceeding now through the rest of the agenda --

22 THE COURT: Do you have an order?

23 MR. BROWN: I'm sorry?

24 THE COURT: Order?

25 MR. BROWN: Oh.

1 (Pause)

2 MR. BROWN: Your Honor, we'll hand it up in a little
3 bit so as not to delay the rest of the hearing, if that's okay.

4 THE COURT: All right.

5 MR. BROWN: Thank you, Your Honor.

6 Your Honor, the rest of the agenda -- we have various
7 members of the debtors' team handling them. Item number 14 is
8 the utility motion. Mr. Tishler will handle the utility
9 motion. And his colleague, Mr. Layne, will handle the next
10 two: cash management and the critical vendors, Your Honor.

11 Correction; Mr. Layne will handle those three items,
12 Your Honor.

13 MR. LAYNE: Good morning, Your Honor. Tyler Layne on
14 behalf of the debtors. The first item -- item number 14 on the
15 docket is the -- or on the agenda, rather, is the debtors'
16 motion for a final order authorizing the debtors' proposed
17 adequate assurance to utility companies, establishing
18 procedures for resolving objections by those utility companies,
19 and prohibiting utility companies from altering, refusing, or
20 discontinuing service.

21 An objection by a number of utility companies was
22 filed at docket 142 and ultimately withdrawn at docket 204.
23 The debtors have entered into a settlement agreement with those
24 utility companies, and those utility companies are not subject
25 to the final order. The order has not changed from what was

Exhibit C

In Re:

L.K. BENNETT U.S.A., INC.

Case No. 19-10760 (KG)

April 9, 2019

eScribers, LLC

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UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

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In the Matter of:

L.K. BENNETT U.S.A., INC., Case No.
Debtor. 19-10760 (KG)

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United States Bankruptcy Court
824 North Market Street
Wilmington, Delaware

April 9, 2019
11:46 AM

B E F O R E:
HON. KEVIN GROSS
U.S. BANKRUPTCY JUDGE

ECR OPERATOR: GINGER MACE

1 believe -- and service issues -- but we believe that under the
2 strategies or structure that we propose, that Omni has the home
3 addresses, and it is available to serve papers for any creditor
4 who wants to serve the employees, that all the purposes and
5 policies of the Bankruptcy Code are met.

6 Thank you, Your Honor.

7 THE COURT: Thank you. Thank you.

8 Yes, Mr. Buchbinder? Yes.

9 MR. BUCHBINDER: Yes, Your Honor. First of all, no
10 application to retain Omni has been filed. Second, I reviewed
11 the creditor matrix that was filed, and nothing was filed in a
12 redacted manner. So there hasn't been any sealed document
13 filed yet that would disclose this other information.

14 And so to that extent, this motion is premature.

15 THE COURT: All right. Thank you, Mr. Buchbinder.

16 I would say this. And look, I appreciate Mr.
17 Buchbinder's objection. It's well written. It's well argued.
18 It's forceful. But I have to overrule it here.

19 You know, Judge Sontchi, in the Promise Healthcare
20 case, addressed this issue, and he found, and he's obviously --
21 he's no pushover, and he's very learned -- and he found that
22 this was information to be protected. And I have to agree that
23 given the name, the address, home address, and the workplace,
24 it does make a search more plausible and more forceful. And
25 I'm well aware of the world we live in with all the theft of

1 identities.

2 And there's a balancing test, I think, here, the
3 information against the danger from making the address public.
4 Or the need for the information, I should say. And I just find
5 that the privacy concerns win out in this particular
6 circumstance.

7 So I'm going to grant the motion. Debtor will provide
8 the actual information to the Office of the United States
9 Trustee. I think that's what the order provides.

10 MR. BROWN: Yes, Your Honor.

11 THE COURT: And presumably there will be a motion to
12 retain Omni in the near future, and we will there have the home
13 addresses. So I'm going to overrule the objection.

14 Mr. Buchbinder, I do appreciate your argument, but I
15 do think that the list of matters to be considered personally
16 identifiable is not exclusive, and therefore I will overrule
17 the objection. All right.

18 And I'll enter that order. I don't know if I have the
19 form -- do I have the actual order at this point?

20 MS. WILLIS: Your Honor.

21 THE COURT: You can hand them right now --

22 MS. WILLIS: Yes.

23 THE COURT: -- or later, Ms. Willis --

24 MS. WILLIS: Wonderful.

25 THE COURT: -- whatever you prefer.

L.K. BENNETT U.S.A., INC.

18

1 MS. WILLIS: I will hand them up right now. Can I
2 approach?

3 THE COURT: Okay. Yes, you sure may. Thank you.
4 Thank you, ma'am. Good to see you.
5 Okay. Good. Thank you.

6 THE COURT: I'll also note, by the way, in a previous
7 motion that other judges in this court have addressed that
8 issue besides Judge Sontchi and have held in the same way.

9 All right. Here we are.

10 MS. WILLIS: Here we are.

11 THE COURT: And I'm going to sign the order
12 authorizing the filing under seal.

13 Ms. Willis, you may proceed.

14 MS. WILLIS: Good morning, Your Honor.

15 THE COURT: Good morning.

16 MS. WILLIS: For the record, Jamila Justine Willis of
17 DLA Piper, proposed counsel to the debtor and debtor-in-
18 possession, L.K. Bennett U.S.A., Inc.

19 THE COURT: Yes.

20 MS. WILLIS: Again, Your Honor, we appreciate your
21 time this morning. We also appreciate the time and attention
22 of Mr. Buchbinder, all of the debtor's landlords, and the
23 secured lender, in particular, for their patience --

24 THE COURT: Yes.

25 MS. WILLIS: -- and their help in trying to make the