

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.9

**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 May 8, 2019 at 11:00 a.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, and (iii) (iii) counsel to the DIP Lender, Morrison & Foerster LLP, 200 Clarendon Street, Boston, MA 02116, Attn: Alexander Rheaume, Morrison & Foerster LLP, 250 West 55th Street, New York, NY 10019-

9601, Attn: Todd Goren and Benjamin Butterfield, and Ashby & Geddes, 500 Delaware Avenue, P.O. Box 1150, Wilmington, DE 19899, Attn: Gregory Taylor, and (iv) counsel for any statutory committee appointed in this case so as to be received no later than **4:00 p.m. (Eastern Time) on May 1, 2019.**

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

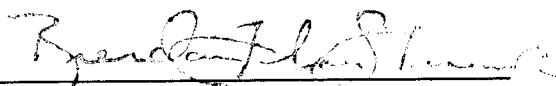
12. Any Bankruptcy Rule (including, but not limited to, Bankruptcy Rule 6004(h)) or Local Rule that might otherwise delay the effectiveness of this Order is hereby waived, and the terms and conditions of this Order shall be effective and enforceable immediately upon its entry.

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.

April 16, 2019
Wilmington, Delaware



THE HONORABLE BRENDAN L. SHANNON
UNITED STATES BANKRUPTCY JUDGE