

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

	:	Case No. 19-10844-BLS
In re:	:	
	:	Chapter 11
ACHAOGEN, INC.,	:	
	:	
Debtor.	:	
	:	Re: D.I. #30, 194, 260

**OBJECTION TO THE SALE OF SUBSTANTIALLY ALL OF THE DEBTOR’S ASSETS
FREE AND CLEAR OF ALL CLAIMS, LIENS, AND ENCUMBRANCES**

Microgenics Corporation (“Microgenics”), by and through its attorneys, McCarter & English, LLP and Kreis Enderle Hudgins & Borsos, P.C., hereby objects to the proposed sale of substantially all of the Debtor’s assets free and clear of all claims, liens, and encumbrances (the “Sale Objection”) as follows:

FACTUAL BACKGROUND

1. Microgenics and Achaogen, Inc. (the “Debtor”) are parties to a series of related contracts, by which Microgenics agreed to assist with certain efficacy testing related to a drug named ZEMDRI (Plazomicin).

2. Microgenics assisted with certain testing related to the Debtor’s development of ZEMDRI (Plazomicin). The testing is critical to the Food and Drug Administration’s approval of ZEMDRI (Plazomicin) for sale to the public. Despite Microgenics’ performance, the Debtor failed to remit payment for services rendered.

3. On April 15, 2019 (the “Petition Date”), the Debtor filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware.



4. That same day, the Debtor filed that certain *Motion to Approve Debtor's Motion For (I) An Order Pursuant To Sections 105, 363, 364, 365 And 541 Of The Bankruptcy Code, Bankruptcy Rules 2002, 6004, 6006, And 9007 And Del. Bankr. L.R. 2002-1 And 6004-1 (A) Approving Bidding Procedures For The Sale Of Substantially All Assets Of The Debtor; (B) Approving Procedures For The Assumption And Assignment Or Rejection Of Designated Executory Contracts And Unexpired Leases; (C) Scheduling The Auction And Sale Hearing; (D) Approving The Form And Manner Of Notice Of Respective Dates, Times, And Places In Connection Therewith; and (E) Granting Related Relief; (II) An Order (A) Approving The Sale Of The Debtor's Assets Free And Clear Of Claims, Liens, And Encumbrances; And (B) Approving The Assumption And Assignment Or Rejection Of Executory Contracts And Unexpired Leases; And (III) Certain Related Relief* [D.I. #30] (the "Sale Motion").

5. On May 1, 2019, the Court entered an order approving the bid procedures for the sale of substantially all of the Debtor's assets (the "Bid Procedures Order") [D.I. #123]. The Bid Procedures Order indicates that the Debtor would hold an auction on June 3, 2019 [D.I. #123 at ¶ 8].

6. In furtherance of the proposed sale, the Debtor filed that certain *Notice of Proposed Assumption and Assignment of Executory Contracts and Unexpired Leases* [D.I. #194] (the "Assumption Notice"). The Assumption Notice expresses the Debtor's intent to assume and assign the following agreements with Microgenics:

Entry	Contract/Lease Title	Contract Date	Proposed Cure Amount
4	Microgenics Corporation, Safety Data Exchange Agreement	9/7/2018	\$589,000.00
438	Microgenics Corporation, Safety Data Exchange Agreement	9/7/2018	\$0.00
439	Microgenics – CDCA Amendment 2	7/22/2018	\$0.00
440	CDCA Amendment 1	11/29/2017	\$0.00
441	Quality Agreement	10/18/2016	\$0.00
442	Microgenics, MTA Amendment 1	8/29/2016	\$0.00
443	Quality Agreement Memo	7/22/2016	\$0.00
444	Material Transfer Agreement	6/14/2016	\$0.00
445	Collaborative Development and Commercialization Agreement	4/26/2016	\$0.00

(collectively, the “Microgenics Contracts”).

7. The Debtor is in material breach of its obligations under the Microgenics Contracts based on its failure to remit payment for services rendered. As of the filing of the Sale Objection, the Debtor is indebted to Microgenics in an amount no less than \$831,000.00.

8. On May 29, 2019, Microgenics filed an objection to the Assumption Notice (the “Cure Objection”) [D.I. #226]. Microgenics objected to the Debtor’s proposed assumption and assignment of the Microgenics Contracts based on the Debtor’s monetary default, the incorrect cure amount listed on the Assumption Notice, the timing of the cure payment, and absence of adequate assurance [*Id.*].

9. Thereafter, the Debtor held an auction concerning the sale of its assets, including the Microgenics Contracts.

10. On June 10, 2019, the Debtor filed that certain *Notice of Filing of Proposed Order (I) Approving the Sale or Licensing of Substantially All Assets of the Debtor Free and Clear of Liens, Encumbrances, Claims and Interests, (II) Approving the Assumption and Assignment of Designated Executory Contracts and Unexpired Leases, and (III) Granting Related Relief* (the

“Proposed Sale Order”) [D.I. #260]. The Proposed Sale Order suggests that the Debtor will sell its assets through no less than five (5) separate transactions [D.I. #260 at Introduction]. Microgenics, however, is in the dark as to the details of these proposed transactions, because the Debtor neither identified the buyer nor attached the transactional documents to the Proposed Sale Order [D.I. #260 at Exh. A-E]. The Debtors’ efforts to withhold information is troubling, particularly since the Proposed Sale Order utilizes material terms, like ‘Assumed Liabilities’ and ‘Excluded Liabilities,’ which are defined in the transactional documents.

11. On June 13, 2019, one day before the objection deadline, the Debtors filed that certain *Notice of Completion of Auction and Selection of Successful Bidders* (the “Auction Notice”) [D.I. #266]. The Auction Notice fails to specify which entities purchased which assets. Further, the Auction Notice admits that the Debtors have not yet finalized the terms of the respective transactions.

12. The Debtors have not otherwise made any substantive filings concerning the sale process.

LEGAL ARGUMENT

I. MICROGENICS OBJECTS TO THE PROPOSED ASSUMPTION OF THE MICROGENICS CONTRACTS BASED ON (A) THE BUYER’S FAILURE TO PAY THE CURE AMOUNT; AND (B) THE DEBTOR’S FAILURE TO PROVIDE EVIDENCE OF ADEQUATE ASSURANCE.

13. Microgenics objects to the proposed assumption of the Microgenics Contracts for the reasons set forth in the Cure Objection.¹ *See In re Rickel Home Ctr.*, 209 F.3d 291, 298 (3d Cir. 2000) (“If there has been a default in an executory contract or unexpired lease, the [debtor] may not assume it until the [debtor]: (1) cures or provides adequate assurance that it will

¹ Microgenics incorporates, by reference, the arguments set forth in the Cure Objection as though set forth in fully herein.

promptly cure the default; (2) compensates or provides adequate assurance of prompt future compensation for actual pecuniary loss resulting from the default; and (3) provides adequate assurance of future performance under the contract or lease.”). In this instance, the Debtor has committed various monetary defaults under the Microgenics Contracts. Section 365(b) of the Bankruptcy Code does not differentiate between pre- and post-petition defaults. *See* 11 U.S.C. § 365(b). Rather, the Bankruptcy Code obligates the Debtor to cure all defaults under an executory contract. *See In re Network Access Solutions Corp.*, 330 B.R. 67, 76 (Bankr. D. Del. 2005). While the Cure Objection lists the correct amount of the Debtor’s indebtedness, neither the Debtor nor the potential buyer have committed to the payment of the cure amount in full.² *See* 11 U.S.C. § 365(b)(1)(A, B). Their failure to commit to payment of the pre- and post-petition monetary defaults is significant in light of the exculpatory, injunctive, and release language in the Proposed Sale Order, which purports to excuse both the Debtor and the potential buyer from having to pay post-petition debts [D.I. #260 at ¶¶ 20, 25, 29, 30]. Absent payment of the full amount of the debt, the Microgenics Contracts may not be assumed. *See* 3 COLLIER ON BANKRUPTCY § 365-06[2] (Alan N. Resnick & Henry J. Sommer eds., 16th ed.) (“[The non-debtor party] is entitled to insist that any defaults, whenever they may have occurred, be cured ...”).

14. Microgenics objects to the proposed assumption of the Microgenics Contracts based on the Debtor’s failure to provide adequate assurance of the potential buyer’s future performance. *See* 11 U.S.C. § 365(b)(1)(C); *In re Fleming Co., Inc.*, 499 F.3d 300, 305 (3d Cir. 2007) (“The statutory requirement of ‘adequate assurance of future performance by the assignee’ affords needed protection to the non-debtor party because the assignment relieves the trustee and

² For these reasons, Microgenics also objects to the acquisition of the Microgenics Contracts free and clear of Microgenics’s claim to payment of the monetary defaults [D.I. #260 at ¶ 12].

the bankruptcy estate from liability for breaches arising after the assignment.”). The Debtor has not identified the potential buyer, let alone provided evidence of the potential buyer’s ability to satisfy its future monetary obligations under the Microgenics Corporation. This shortcoming is significant in light of the requirements of Section 365 of the Bankruptcy Code and the legal findings sought to be included in the Proposed Sale Order [D.I. #260 at ¶¶ 27, 31]; there simply is no evidence in the record to support the relief sought [*Id.*]. The Debtor’s failure to provide proof of adequate assurance is a material violation of the Bankruptcy Code, particularly since neither the Debtor nor the potential buyer have committed to remitting payment for the pre- and post-petition monetary defaults. *See* 11 U.S.C. 365(b)(1)(C).

15. Similarly, Microgenics objects to the proposed assumption of the Microgenics Contracts to the extent that the cure amount is not paid in full by or before the closing of the sale. The Proposed Sale Order seeks to release the Debtor and the potential buyer from any liability related to the Debtor’s monetary defaults [D.I. #160 at ¶¶ 20, 25, 30]. If Microgenics fails to recover its monetary damages related to the Debtor’s pre- and post-petition defaults prior to the closing of the sale, the Proposed Sale Order would bar Microgenics from obtaining the full amount owed. This scenario runs afoul of the fundamental principles concerning an assignment of a contract, in which the assignor steps into the shoes of the assignee and accepts the benefits and burdens of the assigned contract. The legal act of an assignment confers no greater rights on the assignee than those possessed by the assignor. *See Aetna Cas. & Sur. Co. v. Gamel*, 45 B.R. 345, 347 (N.D.N.Y. 1984) (“[W]hatever rights a debtor has in property at the commencement of the case continue in bankruptcy—no more, no less.”) (quoting *Moody’s v. Amoco Oil Co.*, 734 F.2d 1200, 1208 (7th Cir. 1984)). Thus, it is imperative that either the Debtor or the potential buyer make Microgenics whole at or prior to the closing of the sale.

16. Further, Microgenics objects to the proposed assumption of the Microgenics Contracts to the extent that the potential buyer seeks to avoid its future obligations under the Microgenics Contracts. The Proposed Sale Order contains broad, general language to the exclusive benefit of the Debtor and the potential buyer, which either party could conceivably use to try to avoid, limit, or otherwise alter their contractual obligations. It is axiomatic that the assumption of the Microgenics Contracts entitles Microgenics to be made whole (including the payment of all pre- and post-petition debts) and that the potential buyer or assignee will be required to fully perform its duties under the relevant contracts once the sale has closed. To the extent that the potential buyer or assignee fails to honor its obligations, Microgenics reserves the right to enforce its rights under the Microgenics Contracts or otherwise available at law.

II. MICROGENICS OBJECTS TO THE PROPOSED SALE.

17. Microgenics objects to the proposed sale of the Debtor's assets, because the Debtor has failed to provide any information concerning the sale, including, but not limited to the identity of the potential buyer/assignee of the Microgenics Contracts, the assets to be included in the sale, and the transactional documents. The Debtor's efforts to cloak the sale in secrecy have effectively deprived parties from asserting a meaningful challenge, as only the Debtor and the potential buyer know the transactional details. More importantly, the absence of an evidentiary record prevents the Debtor from satisfying the business judgment standard necessary to support the sale.

18. Microgenics objects to the entry of the Proposed Sale Order based on a lack of evidence to support certain factual findings and legal conclusions set forth therein [D.I. #260], for example:

- i. Non-debtor counterparties to the Transferred Contracts have had a reasonable opportunity to object to the Proposed Assignment [¶¶ G, K]. The Debtor's failure to identify the assignee, let alone disclose the details of the proposed sale prevent non-debtor contractual counterparties from participating in these proceedings in a meaningful manner.
- ii. The Debtor possesses business justification for its decisions and its decisions are in the best interests of creditors [¶¶ M, N, O, BB]. The Debtor has not provided meaningful information concerning the transactions.
- iii. The buyers are good faith purchasers [¶¶ P, Q, 6]. The Debtor has cloaked the proposed sales in secrecy, thereby preventing the Court and any interested party from concluding that the potential buyer acted in good faith.
- iv. The Debtor has satisfied Section 365(b) of the Bankruptcy Code [¶¶ W, 22, 27, 30]. For the reasons set forth herein, Microgenics disputes these findings of fact and legal conclusions as to the Microgenics Contracts.
- v. The buyer has provided adequate assurance of future performance [¶ 27]. Neither the Debtor nor the potential buyer have provided any information concerning the potential buyer's ability to satisfy its future financial obligations.
- vi. The identity of the buyer has been disclosed [¶ 31]. The Debtor has not disclosed the identity of the potential buyer/assignee relative to the Microgenics Contracts.

- vii. The failure to attach the transactional documents to the Proposed Sale Order shall not impair the effectiveness of such contracts [¶ 41]. The Debtor's failure to produce a copy of the transactional documents prevents the Court and any interested party from understanding the terms of the proposed sale, and thus, the Debtor is not worthy of this legal protection.

19. Finally, Microgenics objects to the entry of the Proposed Sale Order to the extent that the Court does not retain exclusive jurisdiction over the interpretation, implementation, and enforcement of the Assumption Notice. While the Proposed Sale Order specifies that the Court shall retain jurisdiction over certain portions of the sale, the Proposed Sale Order does not expressly reference the assumption and assignment of executory contracts and unexpired leases [D.I. #260 at ¶ 50]. In light of Microgenics's concerns, the potential buyer should submit to and the Court should retain exclusive jurisdiction over the assumption of the Microgenics Contracts.

20. In closing, Microgenics does not wish to obstruct the sale, but rather, ensure that the assumption and assignment of the Microgenics Contracts comply with the Bankruptcy Code. The Sale Objection identifies several factual and legal deficiencies, which the Debtor can easily address, and Microgenics hopes that an asset sale in the best interests of all parties can be consummated in short order.

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WHEREFORE, Microgenics Corporation respectfully requests that this Honorable Court sustain its objections; and grant such other relief as this Court deems fair and just.

Dated: June 13, 2019
Wilmington, Delaware

McCARTER & ENGLISH, LLP

By: /s/ Kate Roggio Buck
Kate R. Buck (DE# 5140)
Matthew J. Rifino (DE# 4749)
Renaissance Centre
405 North King Street, Suite 800
Wilmington, Delaware 19801
(T) 302.984.6300
(F) 302.984.6399
Kbuck@mccarter.com
Mrifino@mccarter.com

And

Lisa Bonsall, Esquire
McCarter & English, LLP
Four Gateway Plaza
100 Mulberry Street
Newark, New Jersey 07102
(T) 973.622.4444
(F) 973.624.7070
Lbonsall@mccarter.com

And

Thomas King, Esquire
Kreis Enderle Hudgins & Borsos, P.C.
8225 Moorsbridge Road
Portage, Michigan 49024
(T) 269.324.3000
(F) 269.324.3010
Tking@kehb.com

Attorneys for Microgenics Corporation

CERTIFICATE OF SERVICE

I, Kate Roggio Buck, hereby certify that on June 13, 2019, I caused a true and correct copy of the foregoing *Objection to Notice of Proposed Assumption and Assignment of Executory Contracts and Unexpired Leases* to be served upon the below listed parties by first-class mail, postage prepaid, or in the manner so indicated.

By: /s/ Kate Roggio Buck
Kate Roggio Buck (DE# 5140)

Derek C. Abbott
Andrew R. Remming
Morris, Nichols, Arsht & Tunnell
1201 N. Market Street
Wilmington, DE 19899

Erin N. Brady
Richard L. Wynne
Hogan Lovells US LLP
1999 Avenue of the Stars
Suite 1400
Los Angeles, CA 90067

Timothy Jay Fox, Jr.
Office of the United States Trustee
U. S. Department of Justice
844 King Street, Suite 2207
Lockbox #35
Wilmington, DE 19801

Arik Preis
Allison Miller
Akin Gump Strauss Hauer & Feld LLP
One Bryant Park
Bank of America Tower
New York, NY 10036-6745

Domenic E. Pacitti
Klehr Harrison Harvey Branzburg LLP
919 Market Street
Suite 1000
Wilmington, DE 19801

Morton R. Branzburg
Klehr Harrison Harvey Branzburg LLP
1835 Market Street, Suite 1400
Philadelphia, PA 19103

Alexander Rheaume
Morrison & Foerster LLP
200 Clarendon Street
Boston, MA 02116

Todd M. Goren
Benjamin W. Butterfield
Morrison & Foerster LLP
250 West 55th St.
New York, NY 10019

Gregory A. Taylor
Ashby & Geddes, P.A.
500 Delaware Ave., 8th Floor
Wilmington, DE 19801