Docket #0147 Date Filed: 05/03/2019

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re	Chapter 11
Achaogen, Inc.	Case No. 19-10844 (BLS)
Debtor.[1]	RE: D.I. 9

CERTIFICATE OF COUNSEL REGARDING 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 undersigned counsel to the above-captioned debtor and debtor in possession (the "**Debtor**") hereby certifies as follows:

1. On April 15, 2019, the Debtor filed the *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* (D.I. 9) (the "**Motion**").

2. Pursuant to the Notice of Motion, the deadline to file objections or responses to the relief requested in the Motion was May 1, 2019, at 4:00 p.m. (Prevailing Eastern Time).

3. The Debtor received informal comments to the Motion from the Official Committee of Unsecured Creditors (the "**Committee**"). Besides the informal comments from

[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.

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the Committee, the Debtor has received no other objection or informal comments, and no objection or other responsive pleading to the Motion appears on the Court's docket.

4. The Debtor has resolved the informal comments of the Committee through revisions to the proposed order granting the relief requested in the Motion (the "**Proposed Order**"). The Proposed Order is attached hereto as Exhibit A.

5. For the convenience of the Court and all parties in interest, a blackline comparing the Proposed Order against the version filed with the Motion is attached hereto as Exhibit B.

6. The U.S. Trustee and the Committee have reviewed the Proposed Order and do not object to its entry.

WHEREFORE, the Debtor respectfully requests that the Court enter the Proposed Order substantially in the form attached hereto as Exhibit A at its earliest convenience.

Dated: May 3, 2019
Wilmington, Delaware

MORRIS, NICHOLS, ARSHT & TUNNELL LLP

/s/ Paige N. Topper

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Proposed Counsel for Debtor and Debtor in Possession

Exhibit A

Revised Proposed Order

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re	Chapter 11
Achaogen, Inc.,	Case No. 19-10844 (BLS)
Debtor.[1]	**Re: D.I. 9 & 53**

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, 390 Madison Avenue, New York, New York 1001, 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; (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; and (c) proposed counsel to the Official Committee of Unsecured Creditors (the "Committee"), (i) Akin Gump Strauss Hauer & Feld LLP, One Bryant Park, New York, New York 10024, Attn: Arik Preis and (ii) Klerh Harrison Harvey Branzburg LLP, 919 N. Market Street, Wilmington, DE 19801, Attn: Domenic Pacitti and Morton Branzburg.

c. Without further order of the Court, but with advance notice to the DIP Lender and the Committee, 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 and the Committee. 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

Exhibit B

Blackline

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re	Chapter 11
Achaogen, Inc.,	Case No. 19-10844 (BLS)
Debtor.[1]	**Re: D.I. 9**

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.

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.

[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.

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, 390 Madison Avenue, New York, New York 1001, 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; and (c) proposed counsel to the Official Committee of Unsecured Creditors (the "Committee"), (i) Akin Gump Strauss Hauer & Feld LLP, One Bryant Park, New York, New York 10024, Attn: Arik Preis and (ii) Klerh Harrison Harvey Branzburg LLP, 919 N. Market Street, Wilmington, DE 19801, Attn: Domenic Pacitti and Morton Branzburg.

c. Without further order of the Court, but with advance notice to the DIP Lender and the Committee, 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.

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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**.

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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

_____
UNITED STATES BANKRUPTCY JUDGE

Summary report: **Litéra® Change-Pro 10.1.0.200 Document comparison done on 5/2/2019 12:29:49 PM**	
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Intelligent Table Comparison: Active	
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Modified filename: Achaogen - Utility Revised Final Order.docx	
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Embedded Excel	0
Format changes	0
Total Changes:	4