Docket #0149 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. 8

CERTIFICATE OF COUNSEL REGARDING DEBTOR'S MOTION FOR INTERIM AND FINAL ORDERS AUTHORIZING PAYMENT OF PREPETITION CLAIMS OF CERTAIN CRITICAL VENDORS PURSUANT TO 11 U.S.C. §§ 105(A), 363(B), 364, 1107(A) AND 1108 AND FED. R. BANKR. P. 6003 AND 6004

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 *Debtor's Motion for Interim and Final Orders Authorizing Payment of Prepetition Claims of Certain Critical Vendors Pursuant to 11 U.S.C. §§ 105(a), 363(b), 364, 1107(a) and 1108 and Fed. R. Bankr. P. 6003 and 6004* (D.I. 8) (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 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.

[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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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

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/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. 8 & 51**

FINAL ORDER AUTHORIZING PAYMENT OF PREPETITION CLAIMS OF CERTAIN CRITICAL VENDORS PURSUANT TO 11 U.S.C. §§ 105(a), 363(b), 364, 1107(a), AND 1108 AND FED. R. BANKR. P. 6003 AND 6004

Upon the motion (the "Motion")[2] of the Debtor for an order, styled *Debtor's Motion for Interim and Final Orders Authorizing Payment of Prepetition Claims of Certain Critical Vendors Pursuant to 11 U.S.C. §§ 105(a), 363(b), 364, 1107(a) and 1108 and Fed. R. Bankr. P. 6003 and 6004*, authorizing, but not directing, the Debtor to make payments toward the prepetition fixed, liquidated and undisputed claims of certain critical vendors; and upon the First Day Declaration; 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 *Amended Standing Order of Reference* from the United States District Court for the District of Delaware, dated February 29, 2012; and this Court having found that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2); and that this Court may enter a final order consistent with Article III of the United States Constitution; and this Court having found that venue of this proceeding and the Motion in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and due and proper notice of the Motion having been provided; and the relief requested being in the best interests of the Debtor, its estate and creditors; and this Court having reviewed the Motion and having heard the

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statements in support of the relief requested therein at a hearing before this Court (the "Hearing"); and the Court having determined that the legal and factual bases set forth in the Motion and at the Hearing establish just cause for the relief granted herein; and upon all of the proceedings had before the Court and after due deliberation and sufficient cause appearing therefor, **IT IS HEREBY ORDERED THAT:**

1. The Motion is GRANTED as set forth herein on a final basis.

1. The Debtor is authorized, but not directed, in its sole discretion to make payments toward prepetition Critical Vendor Claims in amounts not to exceed $500,000 in the aggregate, to be allocated at the Debtor's discretion without prejudice to seek additional relief on an emergency basis.

2. The Debtor shall provide weekly reports to counsel for the DIP Lender and professionals for the Official Committee of Unsecured Creditors (the "Committee") regarding payments made to Critical Vendors. The Committee's professionals shall treat such weekly reports as confidential and on a professionals' eyes only basis.

3. The Debtor is further authorized, but not directed, to undertake appropriate efforts to enter into Trade Agreements with the Critical Vendors if the Debtor determines, in its discretion, that such an agreement is necessary to its postpetition operations, including, without limitation on the following terms:

(a) The amount of such Critical Vendor's estimated claim, after accounting for any setoffs, other credits and discounts thereto, shall be as mutually determined in good faith by the Critical Vendor and the Debtor (but such amount shall be used only for purposes of the Order and shall not be deemed a claim allowed by the Court, and the rights of all parties in interest to object to such claim shall be fully preserved until further order of the Court);

(b) The amount of payment toward the Critical Vendor's estimated claim;

(c) The Critical Vendor's agreement to be bound by the Customary Trade Terms, or such other trade terms as mutually agreed to by the Debtor and such Critical Vendor;

(d) The Critical Vendor's agreement to provide goods and services to the Debtor based upon Customary Trade Terms, and the Debtor's agreement to pay the Critical Vendor postpetition in accordance with such terms;

(e) The Critical Vendor's agreement not to file or otherwise assert against the Debtor, its estate or its respective assets or property (real or personal) any lien (a "Lien") regardless of the statute or other legal authority upon which such Lien is asserted) related in any way to any remaining prepetition amounts allegedly owed to the Critical Vendor by the Debtor arising from goods or services provided to the Debtor prior to the Petition Date, and that, to the extent that the Critical Vendor has previously obtained such a Lien, the Critical Vendor shall immediately take all necessary action to release such Lien;

(f) The Critical Vendor's acknowledgement that it has reviewed the terms and provisions of the Order and consents to be bound thereby;

(g) The Critical Vendor's agreement that it will not separately assert or otherwise seek payment of any reclamation or Bankruptcy Code section 503(b)(9) claims; and

(h) If a Critical Vendor who has received payment toward a Critical Vendor Claim subsequently refuses to supply goods or services to the Debtor on Customary Trade Terms, any payments received by the Critical Vendor on account of its Critical Vendor Claim shall be treated by the Debtor to have been in payment of then outstanding postpetition obligations owed to such Critical Vendor, and that such Critical Vendor shall repay to the Debtor any payments received on account of its Critical Vendor Claim to the extent that the aggregate amount of such payments exceed the postpetition obligations then outstanding, without the right of setoff or reclamation.

4. Notwithstanding the foregoing, the Debtor may, in its sole discretion, reinstate a Trade Agreement if the underlying default under the Trade Agreement is fully cured by the Critical Vendor not later than five (5) business days following the Debtor's notification to the Critical Vendor of such default, or the Debtor, in its discretion, reaches a favorable

alternative agreement with the Critical Vendor.

5. The Debtor shall provide notice to the Committee's professionals for any proposed payment of more than $25,000 to any particular Critical Vendor ("Reported Payment"). In connection with a Reported Payment, the Debtor shall provide the Committee's professionals with the names of any Critical Vendors to receive such payment and the amount of such payment (the "Reported Payment Information"). The Reported Payment Information shall be treated by the Committee's professionals as confidential and on a professionals' eyes only basis. To the extent that the Committee's professionals object to any of the Reported Payments, the Committee's professionals shall provide written notice of such objection to Debtor's counsel within two (2) business days of being provided notice of the Reported Payment. If no timely notice of objection is received, then the Debtor shall be authorized without further action to make the Reported Payments. If the Committee's professionals timely object to a Reported Payment, the Debtor shall not make the Reported Payment unless and until the Committee's professionals provide consent or the Court otherwise authorizes such payment.

6. The Debtor's banks shall be and hereby are authorized and directed to receive, process, honor and pay all prepetition and postpetition checks and fund transfers on account of the Critical Vender Claims that had not been honored and paid as of the Petition Date, provided that sufficient funds are on deposit in the applicable accounts to cover such payments. The Debtor shall be and hereby are authorized to issue new postpetition checks or effect new postpetition fund transfers on account of the Critical Vender Claims to replace any prepetition checks or fund transfer requests that may be dishonored or rejected.

7. Nothing herein shall be construed to limit, or in any way affect, the Debtor's ability to dispute any Critical Vendor Claim.

8. Nothing contained in this Order shall be deemed to constitute an assumption or rejection of any executory contract or prepetition or postpetition agreement between the Debtor and a Critical Vendor or to require the Debtor to make any of the payments authorized herein.

9. The authorization granted hereby to pay Critical Vendor Claims shall not create any obligation on the part of the Debtor or its officers, directors, attorneys or agents to pay the Critical Vendor Claims, none of the foregoing persons shall have any liability on account of any decision by the Debtor not to pay a Critical Vendor Claim, and nothing contained in this order shall be deemed to increase, reclassify, elevate to an administrative expense status or otherwise affect the Critical Vendor Claims to the extent they are not paid.

10. Notwithstanding the relief granted herein and any actions taken hereunder, nothing contained herein shall create, nor is it intended to create, any rights in favor of, or enhance the status of any claim held by, any person.

11. Notwithstanding any provision in the Bankruptcy Rules to the contrary, this Order shall be immediately effective and enforceable upon its entry.

12. The requirements set forth in Local Bankruptcy Rule 9013-1(b) are satisfied by the contents of the Motion.

13. The Debtor is authorized and empowered to take all actions necessary to implement the relief granted in 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. The Court shall retain jurisdiction to hear and determine all matters arising from or related to the implementation or interpretation 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. 8**

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Upon the motion (the "Motion")[2] of the Debtor for an order, styled *Debtor's Motion for Interim and Final Orders Authorizing Payment of Prepetition Claims of Certain Critical Vendors Pursuant to 11 U.S.C. §§ 105(a), 363(b), 364, 1107(a) and 1108 and Fed. R. Bankr. P. 6003 and 6004,* authorizing, but not directing, the Debtor to make payments toward the prepetition fixed, liquidated and undisputed claims of certain critical vendors; and upon the First Day Declaration; 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 *Amended Standing Order of Reference* from the United States District Court for the District of Delaware, dated February 29, 2012; and this Court having found that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2); and that this Court may enter a final order consistent with Article III of the United States Constitution; and this Court having found that venue of this proceeding and the Motion in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and due and proper notice of the Motion having been provided; and the relief requested being in the best interests of the Debtor, its

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estate and creditors; and this Court having reviewed the Motion and having heard the statements in support of the relief requested therein at a hearing before this Court (the "Hearing"); and the Court having determined that the legal and factual bases set forth in the Motion and at the Hearing establish just cause for the relief granted herein; and upon all of the proceedings had before the Court and after due deliberation and sufficient cause appearing therefor, **IT IS HEREBY ORDERED THAT:**

1. The Motion is GRANTED as set forth herein on a final basis.

1. The Debtor is authorized, but not directed, in its sole discretion to make payments toward prepetition Critical Vendor Claims in amounts not to exceed $500,000 in the aggregate, to be allocated at the Debtor's discretion without prejudice to seek additional relief on an emergency basis.

2. The Debtor shall provide weekly reports to counsel for the DIP Lender and professionals for the Official Committee of Unsecured Creditors (the "Committee") regarding payments made to Critical Vendors. The Committee's professionals shall treat such weekly reports as confidential and on a professionals' eyes only basis.

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(b) The amount of payment toward the Critical Vendor's estimated claim;

(c) The Critical Vendor's agreement to be bound by the Customary Trade Terms, or such other trade terms as mutually agreed to by the Debtor and such Critical Vendor;

(d) The Critical Vendor's agreement to provide goods and services to the Debtor based upon Customary Trade Terms, and the Debtor's agreement to pay the Critical Vendor postpetition in accordance with such terms;

(e) The Critical Vendor's agreement not to file or otherwise assert against the Debtor, its estate or its respective assets or property (real or personal) any lien (a "Lien") regardless of the statute or other legal authority upon which such Lien is asserted) related in any way to any remaining prepetition amounts allegedly owed to the Critical Vendor by the Debtor arising from goods or services provided to the Debtor prior to the Petition Date, and that, to the extent that the Critical Vendor has previously obtained such a Lien, the Critical Vendor shall immediately take all necessary action to release such Lien;

(f) The Critical Vendor's acknowledgement that it has reviewed the terms and provisions of the Order and consents to be bound thereby;

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4. Notwithstanding the foregoing, the Debtor may, in its sole discretion, reinstate a Trade Agreement if the underlying default under the Trade Agreement is fully cured by

the Critical Vendor not later than five (5) business days following the Debtor's notification to the Critical Vendor of such default, or the Debtor, in its discretion, reaches a favorable alternative agreement with the Critical Vendor.

5. The Debtor shall provide notice to the Committee's professionals for any proposed payment of more than $25,000 to any particular Critical Vendor ("Reported Payment"). In connection with a Reported Payment, the Debtor shall provide the Committee's professionals with the names of any Critical Vendors to receive such payment and the amount of such payment (the "Reported Payment Information"). The Reported Payment Information shall be treated by the Committee's professionals as confidential and on a professionals' eyes only basis. To the extent that the Committee's professionals object to any of the Reported Payments, the Committee's professionals shall provide written notice of such objection to Debtor's counsel within two (2) business days of being provided notice of the Reported Payment. If no timely notice of objection is received, then the Debtor shall be authorized without further action to make the Reported Payments. If the Committee's professionals timely object to a Reported Payment, the Debtor shall not make the Reported Payment unless and until the Committee's professionals provide consent or the Court otherwise authorizes such payment.

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7. ~~6.~~ Nothing herein shall be construed to limit, or in any way affect, the Debtor's ability to dispute any Critical Vendor Claim.

8. ~~7.~~ Nothing contained in this Order shall be deemed to constitute an assumption or rejection of any executory contract or prepetition or postpetition agreement between the Debtor and a Critical Vendor or to require the Debtor to make any of the payments authorized herein.

9. ~~8.~~ The authorization granted hereby to pay Critical Vendor Claims shall not create any obligation on the part of the Debtor or its officers, directors, attorneys or agents to pay the Critical Vendor Claims, none of the foregoing persons shall have any liability on account of any decision by the Debtor not to pay a Critical Vendor Claim, and nothing contained in this order shall be deemed to increase, reclassify, elevate to an administrative expense status or otherwise affect the Critical Vendor Claims to the extent they are not paid.

10. ~~9.~~ Notwithstanding the relief granted herein and any actions taken hereunder, nothing contained herein shall create, nor is it intended to create, any rights in favor of, or enhance the status of any claim held by, any person.

11. ~~10.~~ Notwithstanding any provision in the Bankruptcy Rules to the contrary, this Order shall be immediately effective and enforceable upon its entry.

12. ~~11.~~ The requirements set forth in Local Bankruptcy Rule 9013-1(b) are satisfied by the contents of the Motion.

13. ~~12.~~ The Debtor is authorized and empowered to take all actions necessary to implement the relief granted in this Order.

14. ~~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.

15. ~~14.~~ The Court shall retain jurisdiction to hear and determine all matters arising from or related to the implementation or interpretation 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 12:26:54 PM**	
Style name: Default Style	
Intelligent Table Comparison: Active	
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Modified filename: Achaogen - Critical Vendor Revised Final Order.docx	
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Move To	0
Table Insert	0
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Embedded Excel	0
Format changes	0
Total Changes:	24