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

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| In re | Chapter 11 |
| Achaogen, Inc. | Case No. 19-10844 (BLS) |
| Debtor.[1] | **Hearing Date:** **August 7, 2019 at 1:30 p.m. (ET)** **Objections Due:** **July 31, 2019 at 4:00 p.m. (ET)** |

**DEBTOR'S MOTION FOR ENTRY OF AN ORDER: (I) APPROVING THE EXCLUSIVE AUCTION AGREEMENT BY AND BETWEEN THE DEBTOR AND SILICON VALLEY DISPOSITION, INC. AND ITS COMPENSATION WITH RESPECT TO THE SALE OF CERTAIN DE MINIMUS ASSETS; (II) AUTHORIZING THE SALE AND LIQUIDATION OF SUCH ASSETS THROUGH AN AUCTION; AND (III) WAIVING ONE OR MORE OF THE INFORMATION REQUIREMENTS OF LOCAL RULE 2016-2**

The above-captioned debtor and debtor in possession (the "Debtor") hereby moves the Court for the entry of an order, in substantially the form attached hereto as Exhibit I (the "Proposed Order"), pursuant to sections 105, 327, 328 and 363 of title 11, United States Code (the "Bankruptcy Code"), Rules 2002, 2014, 6004 and 6005 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), and Rule 2014-1 of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware (the "Local Rules"): (i) approving the Exclusive Auction Agreement (the "Auction Agreement")[2] by and between the Debtor and Silicon Valley Disposition, Inc. ("SVD" or the "Auctioneer") and the Auctioneer's compensation, with respect to the sale of certain of the Debtor's property currently located at the Debtor's Corporate Headquarters (each as defined

[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 otherwise defined herein shall have the meanings ascribed to such terms in the Auction Agreement.

below) (collectively, the "Assets"); (ii) authorizing the sale and liquidation of the Assets free and clear of all liens, claims and encumbrances through the Auctioneer pursuant to the Auction Agreement; and (iii) waiving the information requirements of Local Rule 2016-2. In support of the relief requested herein, the Debtor submits the declaration of John Carroll on behalf of Silicon Valley Disposition (the "Carroll Declaration"), filed contemporaneously herewith. In further support of this Motion, the Debtor respectfully states as follows:

## JURISDICTION

1. This Court has jurisdiction to hear the Motion 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 as of February 29, 2012. This is a core proceeding pursuant to 28 U.S.C. § 157(b), and the Court may enter a final order consistent with Article III of the United States Constitution. Venue for this case and this Motion is proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409.

2. The statutory predicates for the relief requested herein are sections 105, 327, 328 and 363 of the Bankruptcy Code, Bankruptcy Rules 2002, 2014, 6004 and 6005, and Local Rule 2014-1.

## BACKGROUND

3. On April 15, 2019 (the "Petition Date"), the Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code thereby commencing this case (the "Chapter 11 Case"). The Debtor continues to operate its business as debtor in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. An official committee of unsecured creditors (the "Committee") was appointed in this Chapter 11 Case on April 23, 2019. No trustee or examiner has been appointed in this Chapter 11 Case.

4. A description of the Debtor's business and the facts and circumstances leading to this Chapter 11 Case are set forth in *the Declaration of Blake Wise in Support of First Day Relief* [D.I. 3] (the "First Day Declaration") and incorporated herein by reference.

5. Through a court-approved sale process, the Debtor conducted two auctions for substantially all of the Debtor's assets on June 3, 2019 and June 12, 2019. As a result of these auctions, the Debtor has entered into the following agreements: (a) an asset purchase agreement dated June 20, 2019, with Cipla USA, Inc. (the "Cipla Plazomicin Sale Agreement"), for the Debtor's rights to ZEMDRI (plazomicin) and related assets and liabilities other than the China License Rights (as defined in the Cipla Plazomicin Sale Agreement), (b) an asset purchase agreement dated June 20, 2019, with Cipla USA, Inc. (the "Cipla C-Scape Sale Agreement") for the Debtor's AMP Assets and C-Scape Assets (as defined in the C-Scape Sale Agreement), (c) an asset purchase agreement dated June 21, 2019, with Unity Biotechnology, Inc. (the "Unity Sale Agreement") for the Tie2 antibody program, (d) an asset purchase agreement dated June 23, 2019 with Heritage Global Partners, Inc. (the "Heritage Sale Agreement") for certain of the Debtor's equipment. The Debtor continues to negotiate a license agreement with Qilu Antibiotics Pharmaceutical Co. for the Debtor's China License Rights to ZEMDRI.

6. On June 26, 2019, the Court entered an order approving the Heritage Sale Agreement [D.I. 309] and on July 1, 2019, the Court entered an order approving the Unity Sale Agreement [D.I. 327].

## THE AUCTION AGREEMENT

7. As summarized above, the Debtor has undertaken a robust sale process to sell the Debtor's assets and has received court approval for the sale of certain assets. At this time, the Assets at the Debtor's corporate headquarters located at 1 Tower Place, Suite 400,

South San Francisco, CA 94080 (the "Corporate Headquarters") remain another viable source of recovery with an estimated aggregate value of $50,000 – $75,000. The Assets consist primarily of technology equipment, such as computers, iPads and chargers, audio visual equipment, such as televisions and soundbars, and servers. The Debtor's books and records will not be affected by the auction process set forth herein as the books and records are not located on any of the Assets. The Debtor entered into the Auction Agreement, subject to Court approval, in an effort to realize proceeds from these Assets in the near term.

8. Prior to entering into the Auction Agreement, the Debtor reached out to three experienced auctioneers that operate in the industry of distressed assets in the Bay Area of California. Although one of the auctioneers could not meet the expedited schedule necessitated in this Chapter 11 Case, the other two submitted proposals. Of the two auctioneers that submitted proposals, the Debtor determined that SVD provided the best proposal to sell the Assets on the terms set forth in the Auction Agreement.

9. To market the Assets most effectively and, thereby, to liquidate the Assets for the highest and best price, the Debtor requests authority to employ SVD as its sales agent pursuant to the terms and conditions of the Auction Agreement. After considering a number of potential auctioneers for the Assets, the Debtor chose SVD because of its expertise and experience in liquidating technology assets and the beneficial terms it proposed for this engagement. The Debtor and SVD engaged in lengthy discussions and negotiated the terms of the Auction Agreement, a copy of which is attached as Exhibit 1 to the Proposed Order. The Debtor believes that the sale of the Assets through SVD in accordance with the terms of the Auction Agreement is in the best interests of the Debtor and its estate.

10. As part of its duties as the Debtor's agent, SVD shall, among other things, (i) develop and implement an advertising and marketing plan for the sale of the Assets; (ii) remove the Assets from the Corporate Headquarters prior to July 15, 2019 and store the Assets prior to the Auction; (iii) provide personnel to handle computerized accounting functions necessary to provide auction buyers with invoices and the Debtor with a complete accounting of all Assets sold; and (v) provide the Debtor with reporting and reconciliation of all accounting information contemplated by the Auction Agreement within thirty (30) days after the Auction.

11. The pertinent terms of the Auction Agreement are set forth below:[3]

a) Purpose of the Auction Agreement. The Debtor has agreed to retain SVD to act as its exclusive agent to sell the Assets located at the Corporate Headquarters through a negotiated sale or private treaty sale and/or public online auction.

b) Asset Relocation: In exchange for $5,200, SVD will arrange to move the Assets and store them in a nearby warehouse facility (the "sale facility") and erase up to 150 computer hard drives which are part of the Assets, all as set forth on that certain invoice dated July 8, 2019. In the event that Court approval for the sale of the Assets and the retention of SVD is not obtained by September 14, 2019, the Debtor agrees to promptly remove the Assets from the sale facility at the Debtor's sole cost and expense.

c) Sale Term. The Auction will be conducted in two stages: (i) the Auctioneer will endeavor to sell the Assets through a negotiated sale or private treaty sale and (ii) the Auctioneer will sell any remaining Assets exclusively through an online Auction as soon as reasonably practicable after Court approval of this Motion.

d) Buyer's Premium. SVD shall charge buyers and retain an amount equal to eighteen percent (18%) of the gross proceeds received upon the sale of any Assets.

e) Commission. SVD also shall charge a fee equal to fifteen percent (15%) of the gross proceeds on the sales of the Assets, inclusive of the Auction Expenses set forth in paragraph 6 of the Auction Agreement.

[3] The summary of the terms contained in this Motion is qualified in its entirety by reference to the provisions of the Auction Agreement. In the event of any inconsistencies between the provisions of the Auction Agreement and the summary set forth herein, the terms of the Auction Agreement shall govern.

f) Auction Expenses. The Auction Expenses shall be included in SVD's commission; *provided, however*, that the Debtor agrees to reimburse SVD for moving, storage, transportation and other expenses related to the Assets (i.e. erasing computer hard drives) in the aggregate amount of $5,200 as set forth above in subsection (b) of this paragraph.

g) Taxes. SVD shall be responsible to collect, report and remit any applicable sales taxes due in connection with the sales of the Assets.

12. Given the nature of the services to be performed by SVD and the manner of compensation of such services, the Debtor respectfully requests that SVD be compensated as set forth in the Auction Agreement, which consists of SVD's retention of the buyer's premium, the Debtor's payment of expenses, the Asset removal fee, and Commission, without the need for SVD to file fee applications for compensation with the Court, and without further order of the Court. The detailed filing requirements of Bankruptcy Rule 2016 and the informational requirements of Local Rule 2016-2 would require the expenditure of unnecessary time and fees in compiling time records and preparing fee applications. Section 105 of the Bankruptcy Code allows this Court to issue any order that is necessary or appropriate to carry out the provisions of the Bankruptcy Code. *See* 11 U.S.C. § 105(a). In addition, section 328 of the Bankruptcy Code allows this Court to approve the employment of professionals retained pursuant to section 327 of the Bankruptcy Code on any reasonable terms and conditions. *See* 11 U.S.C. § 328(a). Given the limited scope and duration of SVD's employment and the nature of its compensation structure, the Debtor believes that a waiver of the detailed filing requirements of Bankruptcy Rule 2016 and the informational requirements of Local Rule 2016-2 is warranted and appropriate.

13. Finally, the Debtor requests that SVD be relieved of the requirements of any order entered by this Court approving interim compensation procedures for retained professionals. In light of SVD's payment structure, the procedures detailed in any such order

will burden—without providing any benefit to—the Debtor's estate. If the Debtor and SVD are required to prepare, file and serve monthly and quarterly fee statements, substantial administrative costs and professional time may be incurred, without any benefit provided to the estate. Therefore, the Debtor requests that SVD be relieved of the requirement to file monthly or quarterly interim fee applications. Instead, the Debtor proposes that SVD be required to file a single final report with the Court that identifies only each Asset sold pursuant to the terms set forth in the Auction Agreement, the price paid for each Asset, and the buyer's premium earned by SVD with respect to each sale. SVD shall not be required to keep or report time records of hours spent performing its services.

14. The Debtor requires an experienced and efficient auctioneer to render essential professional services described herein in order to maximize value for the Assets in an efficient manner.

**THE COURT SHOULD AUTHORIZE THE DEBTOR'S ENTRY INTO THE AUCTION AGREEMENT AND SVD'S RETENTION**

15. SVD has experience in liquidating property both in and out of bankruptcy, and has conducted liquidation processes in various assignments for the benefit of creditors and in bankruptcy cases including, *In re TranSwitch Corporation*, Case No. 13-51829-JAM (Bankr. D. Conn. 2013) [D.I. 166] (authorizing Debtor to retain SVD as auctioneer); *In re Spectrawatt, Inc.*, Case No. 11-37366-CGM (Bankr. S.D.N.Y. 2011) [D.I. 69] (authorizing Debtor to retain SVD as sales agent). Accordingly, SVD is well qualified to serve as the Debtor's agent for the sale of the Assets.

16. The Debtor seeks authority to employ and retain SVD as its sales agent under section 327 of the Bankruptcy Code, which provides that a trustee (or debtor or debtor in possession, by virtue of sections 1101(1) and 1107(a)), subject to court approval --

> may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties under this title.

11 U.S.C. § 327(a).

17. The Debtor seeks approval of the terms of the Auction Agreement, including the proposed compensation to be paid to SVD, pursuant to section 328(a) of the Bankruptcy Code. Section 328(a) of the Bankruptcy Code provides that a debtor, subject to court approval --

> may employ or authorize the employment of a professional person under section 327 or 1103 of this title, as the case may be, on any reasonable terms and conditions of employment, including on a retainer on an hourly basis, on a fixed or percentage fee basis, or on a contingent fee basis.

11 U.S.C. § 328(a).

18. Section 328(a), together with section 330, establishes a "two-tiered system for judicial review and approval of the terms of the professional's retention." *In re Smart World Technologies, LLC*, 552 F.3d 228,232 (2d Cir. 2009). Whereas section 330 authorizes a bankruptcy court to award reasonable compensation "based on an after-the-fact consideration," section 328(a) "permits a bankruptcy court to forego a full post-hoc reasonableness inquiry" if it pre-approves the terms of employment. *Id.* "These two inquiries are mutually exclusive, as '[t]here is no question that a bankruptcy court may not conduct a § 330 inquiry into the reasonableness of the fees and their benefit to the estate if the court already has approved the professional's employment under 11 U.S.C. § 328.'" *Id.* at 233 (quoting *In re B.UM Intl., Inc.*, 229 F.3d 824, 829 (9th Cir. 2000)).

19. Furthermore, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 specifically amended section 328(a) to extend its reach to include approval of

compensation "on a fixed or percentage fee basis." This change makes clear that a debtor may seek to retain a professional on a fixed or percentage fee basis, such as is proposed herein, with bankruptcy court approval.

20. Finally, Bankruptcy Rule 6005 expressly requires that "[t]he order of the court approving the employment of an appraiser or auctioneer shall fix the amount or rate of compensation." Fed. R. Bankr. P. 6005.

21. The Auction Agreement appropriately reflects the proposed (i) nature and scope of services to be provided by SVD, and (ii) terms and conditions of SVD's employment, including the proposed payment structure. This represents SVD's standard payment structure.

22. Pursuant to Bankruptcy Rule 6005, no SVD employee that will be assisting the Debtor in the sale of the Assets is an officer or employee of the Judicial Branch of the United States or the United States Department of Justice.

23. To the best of the Debtor's knowledge and except as disclosed in the Carroll Declaration, SVD has not been engaged by, and does not have any connection with, the Debtor, its creditors, insiders, shareholders, attorneys or accountants, or any other parties in interest in any matters relating to the Assets.

24. To the best of the Debtor's knowledge and except as disclosed in the Carroll Declaration, SVD does not hold or represent any interest adverse to the Debtor or its estate, SVD is a "disinterested person[s]" as that term is defined in section 101(14) of the Bankruptcy Code, as modified by section 1107(b) of the Bankruptcy Code and as required by section 327(a) of the Bankruptcy Code, and SVD's employment and retention by the Debtor is necessary and in the best interests of the Debtor and its estate.

25. Accordingly, the Debtor believes that SVD's retention on the terms and conditions proposed herein is appropriate and should be approved.

**THE SALE OF THE ASSETS PURSUANT TO THE AUCTION AGREEMENT SHOULD BE AUTHORIZED**

26. Section 363(b) of the Bankruptcy Code provides that a debtor, "after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate." In general, a debtor may engage in transactions outside the ordinary course of its business where the transaction represents an exercise of the debtor's sound business judgment. *See, e.g., In re Lionel Corp.*, 722 F.2d 1063, 1071 (2d Cir. 1983); *In re Montgomery Ward Holding Corp.*, 242 B.R. 147, 153 (D. Del. 1999); *In re Delaware & Hudson Ry. Co.*, 124 B.R. 169, 176 (D. Del. 1991) (concluding that the Third Circuit adopted the "sound business purpose" test). In determining whether to approve a transaction, the Court should consider the following: (a) whether a sound business justification exists for the transaction; (b) whether accurate and reasonable notice of the transaction was given to interested parties; (c) whether the transaction will produce a fair and reasonable price for the property; and (d) whether the parties have acted in good faith. *See, e.g., In re Delaware & Hudson Ry. Co.*, 124 B.R. 169, 176 (D. Del. 1991); *In re Titusville Country Club*, 128 B.R. 396, 399 (Bankr. W.D. Pa. 1991).

27. Sound Business Purpose. There is a sound business justification for the sale of the Assets on the terms set forth in the Auction Agreement. As described above, the Debtor is selling, or has already sold, substantially all of its assets. Moreover, the Debtor is in negotiations with its landlord to reject its lease and vacate its Corporate Headquarters in July 2019. In this context, the Debtor no longer has or will soon no longer have any need for the Assets it will seek to sell through SVD. The Debtor has concluded, in a sound exercise of its

business judgment, that the sale of the Assets in the manner contemplated herein will maximize the value of these assets for the Debtor's estate, to the benefit of all stakeholders.

28. Accurate and Reasonable Notice. SVD will market the Assets to a wide variety of potentially interested parties, and its payment structure incentivizes it to do so in order to obtain the highest prices for the Assets. SVD regularly deals in the disposition of technology assets for distressed companies and has developed a substantial list of potential purchasers of the Assets to which it will directly market the upcoming sales and auctions. In addition, as needed, SVD will advertise the sale of the Assets in appropriate marketing techniques to ensure that a wide audience will receive notice of the ongoing sales and auctions.

29. Fair and Reasonable Terms. The Debtor contacted several experienced liquidators and determined, in consultation with its advisors, that the terms of the Auction Agreement with SVD were the best terms available to the Debtor.

30. Good Faith. Courts generally conclude that parties have acted in good faith with respect to a proposed transaction if the consideration is adequate and reasonable and the terms of the transaction are fully disclosed. *See, e.g., In re Abbotts Dairies of Pa., Inc.*, 788 F.2d 143, 149-50 (3d Cir. J 986). Pursuant to the Auction Agreement, SVD will conduct the sale process to ensure that each transaction is at arm's-length, without collusion or fraud, and in good faith and will ensure that each of the Assets will be sold to the highest bidder. At the conclusion of the process, SVD shall prepare, and the Debtor shall file, a report with the Court that identifies each Asset sold, and the price paid for each Asset.

**REQUEST TO SELL THE ASSETS FREE AND CLEAR OF LIENS, CLAIMS, ENCUMBRANCES AND OTHER INTERESTS**

31. The Debtor further submits that it is necessary that the Assets be sold free and clear of liens, claims, encumbrances and other interests, pursuant to section 363(f) of the Bankruptcy Code. Section 363(f) of the Bankruptcy Code provides as follows:

> The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if --
>
> (1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;
>
> (2) such entity consents;
>
> (3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;
>
> (4) such interest is in bona fide dispute; or
>
> (5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

11 U.S.C. § 363(f).

32. The court may also authorize the sale of a debtor's assets free and clear of any liens, claims or encumbrances under section 105 of the Bankruptcy Code. *See In re Trans World Airlines, Inc.*, 322 F.3d 283 (3d Cir. 2003); *see also Volvo White Truck Corporation v. Chambersburg Beverage, Inc. (In re White Motor Credit Corp.)*, 75 B.R. 944, 948 (Bankr. N.D. Ohio 1987) ("Authority to conduct such sales [free and clear of liens] is within the court's equitable powers when necessary to carry out the provisions of [the Bankruptcy Code].")

33. The Debtor submits that it should be authorized to sell the Assets free and clear of any and all liens, claims and encumbrances, with such liens to be transferred and attached to the proceeds of the sale with the same validity and priority, and subject to the same

defenses, that such liens had against the Assets. Auction bidders generally will not participate in a sale unless good title is guaranteed.

34. To the extent there is a lien, claim, encumbrance or interest, the Debtor believes that it would satisfy at least one of the five conditions of section 363(f), and the Debtor submits that any such lien, claim, encumbrance or interest will be adequately protected by attachment to the proceeds of the sale, subject to any claims and defenses that the Debtor may possess with respect thereto. The Debtor believes that each of the parties holding liens on the assets could be compelled to accept a monetary satisfaction of such interests, satisfying section 363(f)(5) of the Bankruptcy Code.

## NOTICE

35. Notice of this Motion has been provided via first class mail to: (i) the U.S. Trustee; (ii) counsel to the Committee; (iii) counsel to the DIP Lender; and (iv) all parties entitled to notice pursuant to Bankruptcy Rule 2002. In light of the nature of the relief requested, the Debtor submits that no further notice need be given.

## CONCLUSION

WHEREFORE, the Debtor respectfully requests that the Court enter the Proposed Order attached hereto as **Exhibit A** granting the relief requested herein, and grant such other and further relief as is just and proper.

Dated: July 17, 2019
Wilmington, Delaware

MORRIS, NICHOLS, ARSHT & TUNNELL LLP

*/s/ Paige N. Topper*

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*Counsel for Debtor and Debtor in Possession*

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

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|---|---|
| In re | Chapter 11 |
| **Achaogen, Inc.** | Case No. 19-10844 (BLS) |
| Debtor.[1] | **Hearing Date:** **August 7, 2019 at 1:30 p.m.** |
| | **Objection Deadline:** **July 31, 2019 at 4:00 p.m. (ET)** |

**NOTICE OF DEBTOR'S MOTION FOR ENTRY OF AN ORDER: (I) APPROVING THE EXCLUSIVE AUCTION AGREEMENT BY AND BETWEEN THE DEBTOR AND SILICON VALLEY DISPOSITION, INC. AND ITS COMPENSATION WITH RESPECT TO THE SALE OF CERTAIN DE MINIMUS ASSETS; (II) AUTHORIZING THE SALE AND LIQUIDATION OF SUCH ASSETS THROUGH AN AUCTION; AND (III) WAIVING ONE OR MORE OF THE INFORMATION REQUIREMENTS OF LOCAL RULE 2016-2**

PLEASE TAKE NOTICE that today, the above-captioned debtor and debtor-in-possession (the "Debtor") filed the **Debtor's Motion for Entry of an Order: (I) Approving the Exclusive Auction Agreement by and Between the Debtor and Silicon Valley Disposition, Inc. and Its Compensation with Respect to the Sale of Certain De Minimus Assets; (II) Authorizing the Sale and Liquidation of Such Assets through an Auction; and (III) Waiving One or More of the Information Requirements of Local Rule 2016-2** (the "Motion").

PLEASE TAKE FURTHER NOTICE that objections, if any, to the Motion must (a) be in writing; (b) be filed with the Clerk of the Bankruptcy Court, 824 Market Street, 3rd Floor, Wilmington, Delaware 19801, on or before **July 31, 2019 at 4:00 p.m. (ET)** (the "Objection Deadline"); and (c) served so as to be received on or before the Objection Deadline.

PLEASE TAKE FURTHER NOTICE THAT only objections made in writing and timely filed and received, in accordance with the procedures above, will be considered by the Bankruptcy Court at such hearing.

PLEASE TAKE FURTHER NOTICE THAT A HEARING ON THE MOTION WILL BE HELD ON **AUGUST 7, 2019 AT 1:30 P.M.** BEFORE THE HONORABLE BRENDAN L. SHANNON, AT THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF DELAWARE, 824 MARKET STREET, 6TH FLOOR, COURTROOM #1, WILMINGTON, DELAWARE 19801.

[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.

IF YOU FAIL TO RESPOND IN ACCORDANCE WITH THIS NOTICE, THE COURT MAY GRANT THE RELIEF REQUESTED IN THE MOTION WITHOUT FURTHER NOTICE OR HEARING.

Dated: July 17, 2019
Wilmington, Delaware

MORRIS, NICHOLS, ARSHT & TUNNELL LLP

*/s/ Paige N. Topper*

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**EXHIBIT A**

**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. ___** |

**ORDER (I) APPROVING THE EXCLUSIVE AUCTION AGREEMENT BY AND BETWEEN THE DEBTOR AND SILICON VALLEY DISPOSITION, INC. AND ITS COMPENSATION WITH RESPECT TO THE SALE OF CERTAIN DE MINIMUS ASSETS; (II) AUTHORIZING THE SALE AND LIQUIDATION OF SUCH ASSETS THROUGH AN AUCTION; AND (III) WAIVING ONE OR MORE OF THE INFORMATION REQUIREMENTS OF LOCAL RULE 2016-2**

This matter coming before the Court on the motion (the "Motion")[2] of the above-captioned debtor and debtor-in-possession (the "Debtor") for the entry of an order pursuant to sections 105, 327, 328, and 363 of title 11, United States Code (the "Bankruptcy Code"), Rules 2002, 2014, 6004 and 6005 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") and Rule 2014-1 of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware (the "Local Rules"): (i) approving the Exclusive Auction Agreement (the "Auction Agreement") by and between the Debtor and Silicon Valley Disposition, Inc. ("SVD" or the "Auctioneer") and SVD's compensation, with respect to the sale of certain of the Debtor's property currently located at the Debtor's Corporate Headquarters (the "Assets"); (ii) authorizing the sale and liquidation of the Assets free and clear of all liens, claims and encumbrances through SVD; and (iii) waiving the information requirements of Local Rule 2016-2; and the Court having reviewed the Motion and

[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 otherwise defined herein have the meanings given to them in the Motion.

the Carroll Declaration; and the Court finding that (a) the Court has jurisdiction over this matter 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 as of February 29, 2012, (b) venue appropriate pursuant to 28 U.S.C. §§ 1408 and 1409, this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2) and a final order may be entered on this matter under Article Ill of the U.S. Constitution, (d) notice of the Motion was sufficient under the circumstances and no other or further notice is necessary, and (e) a sound business purpose exists for the relief granted herein; and the Court having determined that the legal and factual bases set forth in the Motion establish just cause for the relief granted herein; and after due deliberation and sufficient cause appearing therefor,

THE COURT HEREBY FINDS AND DETERMINES THAT:

A. The findings and conclusions set forth herein constitute the Court's findings of fact and conclusions of law pursuant to Bankruptcy Rule 7052, made applicable to this proceeding pursuant to Bankruptcy Rule 9014.

B. To the extent any of the following findings of fact constitute conclusions of law, they are adopted as such. To the extent any of the following conclusions of law constitute findings of fact, they are adopted as such.

C. Approval of the sale of the Assets pursuant to the terms set forth in the Auction Agreement and SVD's compensation is in the best interests of the Debtor, its creditors, estate and other parties in interest.

D. The Debtor has demonstrated a good, sufficient and sound business purpose and justification for the sale of the Assets pursuant to the terms set forth in the Auction Agreement.

E. The Debtor may sell the Assets free and clear of all interests of any kind or nature whatsoever because, in each case, one or more of the standards set forth in section 363(f)(l)-(5) of the Bankruptcy Code has been satisfied.

IT IS HEREBY ORDERED THAT:

1. The Motion is GRANTED as set forth herein.

2. The Debtor is authorized to execute and deliver, and empowered to consummate and implement the sale of the Assets pursuant to the terms set forth in the Auction Agreement, and execute and deliver, and perform under, any additional instruments and documents that the Debtor deems necessary or appropriate to implement such sales, and to take all further actions as may be necessary or appropriate to the performance of the obligations as contemplated thereby.

3. Pursuant to 11 U.S.C. § 363(b), the Debtor is authorized to perform its obligations under and comply with the terms of the Auction Agreement relating to the sale of the Assets, including the terms regarding SVD's compensation, and to consummate such sales, pursuant to and in accordance with the terms and conditions of the Auction Agreement, as outlined herein.

4. Pursuant to sections 105(a) and 363(f) of the Bankruptcy Code, the sale of the Assets under the terms set forth in the Auction Agreement shall be free and clear of all liens, claims, encumbrances and other interests of any kind or nature whatsoever. Any such interests shall be transferred and attached to the proceeds of the sale with the same validity and priority, and subject to the same defenses, that such liens had against the Assets.

5. The Debtor shall not be required to file a separate motion or seek court approval for any sale or other disposition of an Asset, or a group of Assets, which are authorized

to be sold pursuant to the terms set forth in the Auction Agreement, or to pay SVD in accordance with the Auction Agreement.

6. At the conclusion of the process, SVD shall prepare, and the Debtor shall file a report (the "Final Report") with the Court that identifies each Asset sold pursuant to the terms set forth in the Auction Agreement, the price paid for each Asset, and the buyer's premium earned by SVD with respect to each transaction. For the avoidance of doubt, the Final Report need only describe the information contained in this paragraph, and SVD shall not be required to file interim reports or to keep time records of hours spent performing the services set forth in the Auction Agreement.

7. The Debtor is authorized, directly or through SVD, to abandon any of the Assets pursuant to section 554(a) of the Bankruptcy Code, without further need for a hearing or Court order.

8. The Debtor is hereby authorized to retain and employ SVD as its agent with respect to the sale of the Assets, pursuant to sections 327(a) and 328(a) of the Bankruptcy Code, Bankruptcy Rules 2014 and 6005 and Local Rule 2014-1, on the terms and conditions set forth in the Motion and the Auction Agreement.

9. SVD shall be compensated for its services and reimbursed for any related expenses pursuant to the Auction Agreement and any other applicable orders or procedures of this Court.

10. SVD shall not be subject to any compensation procedures established for professionals in this Chapter 11 Case. SVD is authorized to receive compensation and expenses in accordance with the terms of the Auction Agreement when the compensation and expenses are

earned or come due and without the necessity of filing an interim application for compensation with the Court and without further order of the Court.

11. The indemnification provisions set forth in the Auction Agreement are approved, subject to the following:

a. Subject to the provisions of the subparagraphs below, the Debtor is authorized to indemnify, and shall indemnify, SVD for any claims arising from, related to, or in connection with the services to be provided by SVD as specified in the Auction Agreement, but not for any claim arising from, related to, or in connection with SVD post-petition performance of any other services other than those in connection with the Auction Agreement, unless such post-petition services and indemnification therefor are approved by this Court.

b. The Debtor shall have no obligation to indemnify SVD for any claim or expense that is either (i) judicially determined (the determination having become final) to have arisen from SVD's bad faith, gross negligence or willful misconduct, (ii) settled prior to a judicial determination as to SVD's bad faith, gross negligence or willful misconduct, but determined by this Court, after notice and a hearing pursuant to subparagraph (c) infra, to be a claim or expense for which SVD is not entitled to receive indemnity under the terms of the Motion.

c. If, before the earlier of (i) the entry of an order confirming a chapter 11 plan in this case (that order having become a final order no longer subject to appeal), and (ii) the entry of an order closing this Chapter 11 Case, SVD believes that it is entitled to the payment of any amounts by the Debtor on account of the Debtor's indemnification obligations under the Motion, including, without limitation, the advancement of defense costs, SVD must file an application in this Court, and the Debtor may not pay any such amounts to SVD before the entry of an order by this Court approving the payment. This subparagraph (c) is intended only to specify the period of time under which the Court shall have jurisdiction over any request for fees and expenses by SVD for indemnification, and not as a provision limiting the duration of the Debtor's obligation to indemnify SVD.

d. Any limitation of liability or limitation on any amounts to be contributed by the parties to the Auction Agreement under the terms of the Auction Agreement shall be eliminated.

12. This Order and the terms and provisions of the Auction Agreement shall be binding on all of the Debtor's creditors (whether known or unknown), the Debtor, SVD, and

their respective affiliates, successors, and assigns, and any affected third parties including, but not limited to, all persons asserting an interest in the Assets, notwithstanding any subsequent appointment of any trustee, party, entity, or other fiduciary under any section of the Bankruptcy Code with respect to the forgoing parties, and as to such trustee, party, entity, or other fiduciary, such terms and provisions likewise shall be binding. The provisions of this Order and the terms and provisions of the Auction Agreement, and any actions taken pursuant hereto or thereto shall survive the entry of any order which may be entered confirming or consummating any plan(s) of the Debtor or converting the Debtor's case from chapter 11 to chapter 7, and the terms and provisions of the Auction Agreement, as well as the rights and interests granted pursuant to this Order and the Auction Agreement, shall continue in this or any superseding case and shall be binding upon the Debtor, SVD and their respective successors and permitted assigns, including any trustee or other fiduciary hereafter appointed as a legal representative of the Debtor under chapter 7 or chapter 11 of the Bankruptcy Code. Any trustee appointed in this case shall be and hereby is authorized to operate the business of the Debtor to the fullest extent necessary to permit compliance with the terms of this Order and the Auction Agreement, and SVD and such trustee shall be and hereby are authorized to perform under the Auction Agreement upon the appointment of such trustee without the need for further order of this Court.

13. All proceeds from the Auction shall be treated in accordance with the provisions of the DIP Credit Agreement and the applicable order of the Bankruptcy Court approving the Debtor's post-petition financing (collectively, the "DIP Order"), including, but not limited to, the provisions in the DIP Order governing the use of Cash Collateral (as defined therein); *provided*, notwithstanding anything to the contrary contained in this Order, after the conclusion of the Auction, the Debtor is hereby authorized and directed to hold all cash proceeds

of the Sale in a segregated account and, pending further order of the Bankruptcy Court, such proceeds shall not be used for any purpose, other than for payment of obligations arising under the key employee retention plan that was approved by the Bankruptcy Court. Nothing in this Order shall (i) be deemed a waiver of the rights and remedies of the DIP Lender under the DIP Credit Agreement, any documents relating thereto, or the DIP Order; (ii) affect in any way the validity, perfection, priority or enforcement of the liens and claims granted to the DIP Lender under or pursuant to the DIP Credit Agreement and DIP Order; (iii) affect or limit in any way the validity, perfection, priority or enforcement of the Prepetition Loan Liens, the Prepetition Loan Obligations, the Prepetition Loan Collateral (each as defined in the DIP Order), or the Adequate Protection Liens, Adequate Protection Obligations, Adequate Protection Claims, (each as defined in the DIP Order) or any other rights and protections granted to the Prepetition Lender under the Prepetition Loan Agreement (as defined in the DIP Order) and the DIP Order; or (iv) affect in any way the validity or priority of the KEIP/KERP Plan Amount (as defined in the DIP Order), all of which shall attach to the proceeds of the Auction. For the avoidance of doubt, nothing herein shall affect the Creditors' Committee's rights to commence a Challenge or other rights as set forth in the DIP Order.

14. SVD shall pay for and/or repair any and all loss and damage to any portion of the property located at 1 Tower Place, South San Francisco, California 94080 (the "Premises"), and all improvements thereon, and any injury to and/or death of any persons whatsoever, solely caused from the access to and activities upon the Premises by SVD and/or SVD's employees, agents, vendors or contractors (collectively, the "Agents"), and shall keep the Premises free and clear of all mechanics' and materialmen's liens and claims for labor and/or materials arising out of any activity upon the Premises by SVD or its Agents. SVD shall defend,

indemnify and hold AP3-SF2 CT South, LLC (the "Landlord"), and its members, managers, officers, directors, and employees free and harmless against all claims, liens, losses, damages, injuries or death, and against all reasonable costs and expenses (including, without limitation, reasonable attorneys' fees and expenses and all reasonable costs of enforcement of this indemnity) of whatever kind or nature, to the extent arising from any activity upon the Premises by SVD or its Agents; *provided*, that the foregoing indemnification and payment obligations shall not apply to (i) any pre-existing condition at the Premises or (ii) ordinary wear and tear caused by SVD or its Agents during the reasonable removal of the Assets in accordance with industry standards.

15. Prior to entering the Premises, SVD shall provide the Landlord with evidence of insurance in form, substance and amount as may be reasonably required by the Landlord in connection with SVD's entry into, and removal from, the Premises of the Assets with liability limits not to exceed $3,000,000, and SVD shall maintain such insurance at its own cost until the Assets have been removed from the Premises and shall add Landlord as an additional insured under such insurance policies. The Debtor shall comply with the applicable provisions of the lease for the Premises, applicable laws and regulations related to the removal of the Assets from the Premises. For the avoidance of doubt, the Assets do not include any of the Included Furniture or Optional Furniture referenced and defined in Section 18 of the Debtor's sublease to Sana Biotechnology, Inc. dated October 25, 2018, and the Debtor is not selling or transferring the same pursuant to the Auction Agreement or this Order.

16. To the extent that the Debtor proposes to sell or abandon any property (including by auction) that may contain software, computer programs, or firmware (collectively, the "Software") licensed from Oracle America, Inc. ("Oracle") or its affiliates, the Debtor or its

third-party agent shall remove the Software from such items of property before such sale or abandonment and (i) return the Software to Oracle; or (ii) destroy such Software, and the Debtor is hereby authorized to use and compensate a third-party technology company to effectuate such removal and/or destruction. Notwithstanding anything to the contrary contained in this Order, this Order shall have no effect on Oracle's rights to the Software.

17. To the extent that this Order is inconsistent with the Auction Agreement, the terms of this Order shall govern.

18. This Court retains jurisdiction over any and all matters or disputes with respect to any of the relief granted in this Order.

Dated: _____, 2019

THE HONORABLE BRENDAN L. SHANNON
UNITED STATES BANKRUPTCY JUDGE

# Exhibit 1

## Exclusive Auction Agreement

**EXCLUSIVE AUCTION AGREEMENT**

This Exclusive Auction Agreement ("***Agreement***") is made as of July 15, 2019

BETWEEN:

Achaogen, Inc.
c/o Meru, LLC
1 Tower Place, Suite 400
South San Francisco, CA 94080
Attention: Mihai Cirstea
Telephone: (404) 663.3359

Fax: (650) 434-3765

("***Seller***" or the "***Debtor***"),

AND

Silicon Valley Disposition, Inc.
381 Beach Road
Burlingame, CA 94010
Attention: John Carroll, President
Telephone: (650) 678-3299
Fax: (650) 344-3182

("***Auctioneer***")

WHEREAS, on April 15, 2019, Debtor filed a petition for relief under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware (the "***Court***") and the Debtor continues to operate its business as debtor in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code; and

WHEREAS, Seller wishes to sell certain assets by negotiated or private treaty sale and/or public online auction exclusively through Auctioneer, and Auctioneer has agreed to conduct that auction on the terms and conditions set forth below.

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are mutually acknowledged, Auctioneer and Seller agree as follows:

**1. REPRESENTATION:** Seller agrees to retain Auctioneer on an exclusive basis to conduct a negotiated or private treaty sale and/or public online auction (collectively, the "***Auction***") of the assets set forth on Exhibit A to this Agreement (the "***Assets***"). Auctioneer's engagement pursuant to this Agreement, and all of its obligations hereunder, are subject to the Court's approval of this Agreement and Debtor's employment of Auctioneer; *provided, however*, that the Auctioneer agrees to transport and store the Assets pursuant to paragraph 2 below prior to the Court's approval of this Agreement. Seller agrees to use its best efforts and diligence to obtain such Court approval at its sole expense. In the event Auctioneer is required by local bankruptcy rules to obtain an auctioneer bond, Seller shall reimburse Auctioneer for all costs and expenses incurred in obtaining a bond in addition to the Auction Allowance (described below).

**2. ASSET RELOCATION; CONDUCT OF THE AUCTION:** (a) In exchange for $5,200, Auctioneer will arrange to move the Assets and store them in a nearby warehouse facility (the "***sale facility***") and erase up to 150 computer hard drives which are part of the Assets, all as set forth on that certain invoice dated July 8, 2019. Seller represents that these services may be performed by Auctioneer without Court approval and paid for by Seller as ordinary course business expenses in exchange for contemporaneous services on standard business

terms and shall not constitute preferential payments. In the event that Court approval for the sale of the Assets and the retention of Auctioneer pursuant to this Agreement is not obtained by September 14, 2019, Seller agrees promptly to remove the Assets from the sale facility at Seller's sole cost and expense.

(b) The Auction will be conducted in various stages in Auctioneer's discretion, as follows (i) during the first phase Auctioneer will endeavor to sell the Assets as a going concern and/or to sell certain high-ticket items and/or intellectual property through negotiated sale or private treaty sale; (ii) during the next phase, Auctioneer will sell any remaining Assets exclusively over the Internet via online auction as soon as reasonably practicable after Court approval (or on such other date as Seller and Auctioneer shall agree). Auctioneer may, in its discretion, choose to: (i) offer the Assets for sale by the piece or by the lot, (ii) promote, conduct and/or broadcast the Auction live over the Internet at www.siliconvalleydisposition.com (the "***Website***"), (iii) offer some or all of the Assets for sale on the Website, and/or (iv) include other assets in the Auction in order to increase public attendance at the Auction. Seller agrees that Auctioneer may use the Debtor's name, street address and logo in the advertising of this Auction, as well as on the Website.

(c) All Assets in the Auction shall be sold to the highest bidder (subject only to the purchaser's timely payment in full and removal of purchased Assets). Auctioneer, however, does not guarantee that any sale will be completed and Seller has not received from Auctioneer or any of its employees or agents, and is not relying on, any representations, warranties or guarantees as to the sale price from the Auction or for any particular Asset – any such statements are opinions only and should not be construed promises or guarantees about the outcome of the Auction. Auctioneer is not responsible in the event that a purchaser fails to live up to its agreement and complete a purchase.

**3. DISCLAIMERS OF WARRANTIES:** Auctioneer shall state both in its advertising for the Auction and at the Auction that all Assets are being sold "as is, where is and with all faults" and with any additional disclaimers of warranty, including disclaimers of the warranties of merchantability and fitness for a particular purpose (but excluding any in-place transferable maintenance agreements). Seller agrees to defend (by counsel reasonably satisfactory to Auctioneer) and indemnify Auctioneer and hold Auctioneer harmless from and against any claim or liability asserted against Auctioneer by any third party (including any purchaser of any Assets at the Auction) based on the condition of the Assets or the alleged existence or breach of any alleged warranties (including alleged warranties of merchantability or fitness for a particular purpose), or from or against any fees or expenses (including attorney's fees) incurred by Auctioneer in defending against any such claim or liability. Seller acknowledges and agrees that Auctioneer has no knowledge with respect to, and has no obligation to investigate, the condition, merchantability or fitness for any particular use of any Asset.

**4. AUTCIONEER COMPENSATION.** Auctioneer shall charge a buyer's premium (the "***Buyer's Premium***") for its own account as its compensation for auction services. The Buyer's Premium shall be 18% of the sales price of each Asset sold, and shall be collected by Auctioneer directly from each successful bidder, in addition to the purchase price as bid. The Buyer's Premium shall be collected by Auctioneer directly from each purchaser in addition to the purchase price as bid for each purchased Asset. Payment to Auctioneer of such Buyer's Premium by the successful bidder is not dependent on any other service provided by Auctioneer subsequent to the actual Auction event, if any. Seller shall not be liable to Auctioneer for Buyer's Premium in the event that a purchaser fails to live up to its agreement and complete a purchase.

In addition, Seller agrees to pay Auctioneer for its services in conducting the Sales of the Assets a commission equal to 15% of the gross proceeds of sale (the "***Commission***"), which Commission shall be deemed earned upon Auctioneer's collection of the gross proceeds from the respective purchaser(s). For purposes of this Agreement, "gross proceeds," means all revenue from the sale of Assets pursuant to this Agreement, excluding (i) any sales taxes collected by Auctioneer and (ii) any Buyer's Premium collected.

**5. INTENTIONALLY OMITTED**.

**6. AUCTION EXPENSES:**

(a) **Advertising and Direct Marketing**: Seller shall provide Auctioneer an allowance toward certain Auction advertising expenses, which may include digital photography of the Assets, print and electronic media production, creative services, ad placement fees, brochure and catalog production, telemarketing, data list purchases, fax and email advertising and postage incurred in connection with the Auction.

(b) **Labor**: Labor expenses related to the Auction. Such labor includes services rendered in connection with the collection and disbursement of Auction Proceeds.

(c) **Travel/Lodging**: Seller agrees to reimburse Auctioneer for Auctioneer's actual travel expenses related to the Auction.

(d) **Miscellaneous**: Seller also agrees to reimburse Auctioneer for miscellaneous expenses related to the Auction, including accounting, equipment rental, insurance, bonds, permits, UCC searches/lien releases, and security/armored cars.

(e) Auctioneer agrees that all of the above Auction Expenses shall be included in Auctioneer's commission; provided, however, that Seller agrees to reimburse Auctioneer for moving, storage and transportation expenses related to the Assets as set forth above in paragraph 2. Seller acknowledges and agrees that such amount (the "***Auction Allowance***") shall in all events be deducted from the gross proceeds and paid to Auctioneer following the Auction. In the event that Seller requests changes to the Assets or to the Auctioneer's set-up, Auction date or check-out plans (which changes may only be made with Auctioneer's written consent), and such changes result in additional Auction expenses, Seller agrees that the Auction Allowance may increase accordingly.

(f) Seller authorizes Auctioneer, and grants to Auctioneer a power of attorney coupled with an interest, to incur expenses on its behalf and to recoup such expenses from the gross proceeds to the extent that such expenses are reasonably necessary for the conduct of the Auction and arise from Seller's failure to prepare the Assets and the Premises for the Auction or otherwise from Seller's breach of its representations, warranties or covenants contained in this Agreement.

**7. PRE-AUCTION ASSET TRANSACTIONS:** Seller may not withdraw, sell or otherwise dispose of any of the Assets except through the Auction, without the advance written consent of Auctioneer.

**8. COLLECTION AND DISBURSEMENT OF AUCTION PROCEEDS:** (a) Auctioneer shall collect from the purchasers of the Assets the gross proceeds, any applicable sales taxes and amounts due as Buyer's Premium and deposit such funds into a bank depository account maintained by the Auctioneer. Seller agrees that Auctioneer may use funds in the account to discharge any liens on the Assets, encumbrances of record and personal property taxes ("***Liens***"); provided, however, that no such payments shall be made without the prior written consent of Seller (which consent may not be unreasonably withheld or delayed). All applicable sales taxes collected by Auctioneer shall be paid to the appropriate taxing authorities out of the account. Thereafter, no later than 30 calendar days after the Auction, Seller shall be issued a check from the account (a "***Settlement Check***"), in the amount of the net auction sale proceeds (after Auctioneer has been paid from the account its reimbursable expenses pursuant to Section 6 and amounts allocable to Commission and Buyer's Premium), subject to open items or uncollected accounts, if any.

(b) No later than 30 calendar days after the Auction, Auctioneer shall also issue to Seller a settlement report (the "***Settlement Report***") showing, generally, a record of sales of the Assets and the allocation of the funds generated by such sales. The Settlement Report shall be deemed to comply with Federal Rule of Bankruptcy Procedure 6004(f)(1). Seller acknowledges and agrees that all information that will be contained in the Settlement Report constitutes confidential and proprietary information of Auctioneer; *provided, however*, that Seller may disclose the Settlement Report to the Court if required in connection with the sale of the Assets. Seller agrees that neither the Settlement Report nor any piece of information contained in the Settlement Report may be shared with, copied or distributed to any third party without Auctioneer's prior written consent.

(c) Seller shall have sole responsibility for obtaining all court approvals necessary in connection with the settlement of Seller's auction account, at Seller's expense.

(d) Notwithstanding the provisions of Section 726(b) of the Bankruptcy Code, in all instances where the terms of this Agreement permit Auctioneer to retain proceeds received from sales of the Assets (as compensation for Auction services, as reimbursement for expenses incurred in connection with the Auction or otherwise), Auctioneer shall have right to retain such proceeds without further order of the Court and without obtaining the approval of Seller or any other party. Moreover, Auctioneer's right to retain such proceeds shall survive the conversion of Seller's bankruptcy proceeding into a proceeding under a different chapter of the federal bankruptcy code.

**9. ASSET TRANSPORTATION AND RIGHT OF SURRENDER:** If needed, Asset transportation to the sale facility prior to the Auction shall be arranged by Auctioneer pursuant to paragraph 2 above. In the event that walls or other structures must be removed or modified to remove the Assets sold at the Auction, all supervision and expense of such removal and modification shall be borne directly by the Seller and are not included in the Auction Allowance. Any labor costs that Seller directly or indirectly incurs in connection with the Auction shall be borne directly by Seller and are not included in the Auction Allowance. In the event that some Assets remain unsold at the conclusion of the Auction, or a purchaser fails to perform its obligation to pay the purchase price of an Asset, Auctioneer shall have the right to surrender, and shall have no further obligations with respect to such Assets ("***Unsold Assets***"). Seller may request that Auctioneer arrange for the removal and temporary storage of any Unsold Assets; provided, however, that (i) Auctioneer shall have no obligation to arrange for such removal or storage, and (ii) in the event that Auctioneer consents to arrange for such removal and storage, Seller must reimburse Auctioneer for the all costs and expenses incurred by Auctioneer in connection therewith. All costs and expenses related to the removal and storage of Unsold Assets shall be deducted from the gross proceeds separately and distinctly from, and shall not be deemed to be part of, the Auction Allowance. Further, Seller acknowledges that it may request Auctioneer to attempt to sell any Unsold Assets at a future auction, and, if Auctioneer agrees, such sale shall be conducted on the same terms and conditions in this Agreement.

**10. INTENTIONALLY OMITTED.**

**11. INSURANCE:** Seller shall be solely responsible for maintaining adequate insurance coverage pertaining to the Assets and their transfer to and from, and storage at, Auction sites. Seller also shall maintain adequate liability insurance covering the Premises until Auctioneer removes and transports the Assets to its sale facility, but not later than July 17, 2019. Auctioneer shall carry all workers' compensation insurance for Auctioneer's employees in compliance with all applicable state and local laws.

**12. DESTRUCTION OF ASSETS:** In the event of any loss, damage or destruction of any Assets, whether before or after the Auction, Seller shall remain liable to Auctioneer for Auctioneer's reimbursable expenses under Section 6. In the event of loss, damage or destruction of any Assets after sale at the Auction, Auctioneer also shall be entitled to its Commission and Buyer's Premium under Section 4, except to the extent that such loss, damage or destruction results from the gross negligence of Auctioneer. Seller agrees that, upon collection of any insurance proceeds payable on account of the destruction of any or all of the Assets after sale but prior to payment by a purchaser, Seller shall set aside and hold in trust for the benefit of Auctioneer a portion of such proceeds sufficient to pay Auctioneer's reimbursable expenses under Section 6, any applicable sales taxes and amounts payable as Commission and Buyer's Premium under Section 4 (collectively, the "Trust Obligations"). The trust created pursuant to the preceding sentence shall survive until Seller has paid to Auctioneer all amounts owing under the Trust Obligations.

**13. USE OF PREMISES:**

(a) For the purposes of this Agreement, the "***Premises***" shall mean Debtor's corporate headquarters at 1 Tower Place, Suite 400, South San Francisco, California 94080. Seller authorizes (and represents that its landlord AP3-SF2 CT South LLC ("***Landlord***") has authorized) Auctioneer and its Agents (as defined below) to enter upon

and use the Premises for the purposes of removing and transferring the Assets to the sale facility and for such other purposes as are reasonable and necessary to conduct the Auctions. Seller agrees that Auctioneer shall not be charged a fee for the use of or access to the Premises. Seller further agrees that it shall furnish utilities to the Premises, at Seller's sole expense.

(b) Seller acknowledges and agrees that Auctioneer has no interest of any kind or nature in the Premises, and that Auctioneer has no knowledge as to any previous use or occupancy of the Premises.

(c) Auctioneer shall pay for and/or repair any and all loss and damage to the Premises, and all improvements thereon, and any injury to and/or death of any persons whatsoever, solely caused from the access to and activities upon the Premises by Auctioneer and/or Auctioneer's employees, agents, vendors or contractors (collectively, the "***Agents***"), and shall keep the Premises free and clear of all mechanics' and materialmen's liens and claims for labor and/or materials arising out of any activity upon the Premises by Auctioneer or its Agents. Auctioneer shall defend, indemnify and hold the Landlord, and its members, managers, officers, directors, and employees free and harmless against all claims, liens, losses, damages, injuries or death, and against all reasonable costs and expenses (including, without limitation, reasonable attorneys' fees and expenses and all reasonable costs of enforcement of this indemnity) of whatever kind or nature, to the extent arising from any activity upon the Property by Auctioneer or its Agents; *provided*, that the foregoing indemnification and payment obligations shall not apply to (i) any pre-existing condition at the Premises or (ii) ordinary wear and tear caused by Auctioneer or its Agents during the reasonable removal of the Assets in accordance with industry standards.

Prior to entering the Premises, Auctioneer shall provide the Landlord with evidence of insurance in form, substance and amount as may be reasonably required by the Landlord in connection with Auctioneer's entry into, and removal from, the Premises of the Assets with liability limits not to exceed $3,000,000, and Auctioneer shall maintain such insurance at its own cost until the Assets have been removed from the Premises and shall add Landlord as an additional insured under such insurance policies. The Debtor shall comply with the applicable provisions of the lease for the Premises, applicable laws and regulations related to the removal of the Assets from the Premises.

**14. REPRESENTATIONS AND WARRANTIES:** Seller represents and warrants to Auctioneer as follows:

(a) Seller is authorized to execute and perform this Agreement, and this Agreement constitutes a valid and legally binding obligation of Seller, enforceable in accordance with its terms.

(b) Seller now holds (and, up to the moment of the Auction or other sale provided for under this Agreement, will hold) good and marketable title to all Assets free and clear of any lien, security interest, leasehold interest, co-ownership interest or any other type of encumbrance or interest.

(c) None of the Assets infringes or violates (or contains any parts or components which infringe or violate) any third party's copyright, patent, trademark, trade secret or other proprietary rights.

(d) No sale of the Assets will constitute a bulk sale subject to the Bulk Transfer Article of the Uniform Commercial Code for any state in which any of the Assets are located.

(e) No Hazardous Substances are contained in or made a part of the Assets. For purposes of this Agreement, the term "Hazardous Substances" shall mean, either individually or collectively, any chemical, solid, liquid, gas, or other substance having the characteristics identified in, listed under, or designated pursuant to (i) the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA) as amended, 42 USCA Section 9601(4), as a "hazardous substance," (ii) the Resource, Conservation and Recovery Act, 42 USCA Sections 6903(5) and 6921, as a "hazardous waste," or (iii) any other laws, statutes, or regulations of a government or political subdivision or agency thereof, as presenting an imminent and substantial danger to the public health or welfare or to the environment, or as otherwise requiring special handling, collection, storage, treatment, disposal, or

transportation. Seller agrees that nothing in this Agreement shall be construed to require Auctioneer to remove any Hazardous Substances that are present on the Premises or are contained in or a part of the Assets.

(f) None of the Assets or any components thereof, or related software or technology requires a U.S. Government license for export from the United States to countries other than those which are subject to comprehensive embargoes or support for terrorism under its Export Control Laws (e.g. Crimea - Region of Ukraine, Iran, Iraq, North Korea, Afghanistan, Democratic Republic of the Congo, Haiti, Libya, Vietnam, Somalia, Sri Lanka, Liberia, Cyprus, Zimbabwe, Lebanon, Central African Republic, Sudan, as the same may change from time to time) except those specifically listed in writing delivered by Seller to Auctioneer, with the respective Export Control Classification Numbers for such listed Assets.

Seller acknowledges and agrees that Auctioneer is relying on the foregoing representations and warranties in proceeding to conduct the Auction and/or sales provided for under this Agreement. Seller agrees to defend (by counsel reasonably satisfactory to Auctioneer) and indemnify Auctioneer and hold Auctioneer harmless from and against any claim, demand, cause of action, liability or expense (including reasonable attorneys' fees) asserted against or incurred by Auctioneer in connection with Seller's breach of any of its representations, warranties or obligations in this Agreement. If any action at law or in equity is brought to enforce the terms of this Agreement, the prevailing party shall be entitled to recover its reasonable attorneys' fees and costs from the other party.

Seller further acknowledges and agrees that Auctioneer shall rely entirely on information provided by Seller concerning ownership of and title to the Assets, and that Auctioneer has no responsibility to conduct any independent investigation in respect thereof.

**15. LIMITATION OF LIABILITY:** Auctioneer's maximum liability for the breach of any obligation in connection with this Agreement or the Auction, and for any and all damages of any type or nature (whether in contract, tort or otherwise) sustained or claimed by Seller or any other person or entity in connection with this Agreement or the Auction, shall be limited to the amounts actually received by Auctioneer as compensation under this Agreement. In no event will Auctioneer be liable for loss of profits or any special, punitive, incidental, or consequential damages, however caused, even if Auctioneer has been advised of the possibility of damages. Auctioneer shall incur no liability or loss of rights hereunder from any delay or failure in performance caused by force majeure**;** that is, circumstances beyond Auctioneer's reasonable control, including, without limitation, acts of God, fire, flood, war, government action, strikes, lockouts or other serious labor disputes, power outages, or shortage of or inability to obtain material or equipment. Notwithstanding this paragraph, Auctioneer shall be liable to the Landlord pursuant to paragraph 13(c) of this Agreement.

**16. TECHNOLOGY DISCLAIMER: AUCTIONEER DOES NOT WARRANT THAT THE FUNCTIONS, FEATURES OR CONTENT CONTAINED IN THE WEBSITE, INCLUDING ANY THIRD-PARTY SOFTWARE, PRODUCTS OR OTHER MATERIALS USED IN CONNECTION WITH THE WEBSITE, WILL BE TIMELY, SECURE, UNINTERRUPTED OR ERROR-FREE, OR THAT DEFECTS WILL BE CORRECTED.**

**17. INDEPENDENT PARTIES:** This Agreement shall not be construed (i) to create a partnership or joint venture between Seller and Auctioneer, or (ii) to imply that Auctioneer is buying the assets of, or any interest in, Seller.

**18. COUNTERPARTS; FACSIMILE SIGNATURES:** This Agreement may be executed in any number of counterparts, each of which, when executed, will be deemed to be an original and all of which, when taken together, will be deemed to be but one and the same instrument. Delivering signatures via facsimile shall be an acceptable means of executing this Agreement, and signatures so delivered shall be fully binding on the signing party.

**19. GOVERNING LAW; JURISDICTION:** This Agreement shall be governed by, construed and enforced in accordance with, the substantive laws of the State of Delaware as applied to agreements made in Delaware, without regard to choice of law principles. Any action or proceeding arising under this Agreement will

lie within the exclusive jurisdiction of the Court, which shall hear any such action upon motion and as a core matter without a jury.

**20. SEVERABILITY:** The provisions of this Agreement shall be severable. Should any part, term or provision of this Agreement be construed by any court of competent jurisdiction to be illegal, invalid or unenforceable for any reason, the legality, validity and enforceability of the remaining parts, terms and provisions shall not be affected thereby.

**21. COMPLETE AGREEMENT:** This agreement constitutes the complete and final understanding between the parties and replaces any and all prior agreements related to the Auction. This Agreement may not be modified or amended except in writing signed by both parties.

ACHAOGEN, INC.

By: _____

Name: Nick Campbell

Title: Chief Restructuring Officer

Date: 7/15/2019

SILICON VALLEY DISPOSITION, INC.
CALIFORNIA BOND NO. 100178167

By: _____

Name: John Carroll
Title: President

Date: 7/15/2019

**EXHIBIT A**

**ASSETS**

All equipment and related intellectual property located at Debtor's corporate headquarters at 1 Tower Place, Suite 400, South San Francisco, California 94080. For the avoidance of doubt, the Assets do not include any furniture or fixtures located at the Premises, and the Debtor is not transferring the Assets to Auctioneer pursuant to the Agreement.