Docket #0013 Date Filed: 4/15/2019

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

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

MOTION FOR ENTRY OF INTERIM AND FINAL ORDERS (I) AUTHORIZING ACHAOGEN, INC. TO OBTAIN POSTPETITION SECURED FINANCING, (II) GRANTING LIENS AND PROVIDING SUPERPRIORITY ADMINISTRATIVE EXPENSE CLAIMS, (III) AUTHORIZING THE USE OF CASH COLLATERAL, (IV) GRANTING ADEQUATE PROTECTION, (V) MODIFYING THE AUTOMATIC STAY, (VI) SCHEDULING A FINAL HEARING, AND (VII) GRANTING RELATED RELIEF

The above-captioned debtor and debtor-in-possession (the "Debtor", or "Achaogen"), by and through its undersigned counsel, hereby moves (this "Motion") for entry of an interim order, the form of which is attached hereto as **Exhibit A** (the "Interim Order"),[2] and a final order (the "Final Order") under sections 105, 361, 362, 363, 364, and 507 of title 11 of the United States Code, 11 U.S.C. §§101-1532 (as amended, the "Bankruptcy Code"), rules 2002, 4001, 6004, and 9014 of the Federal Rules of Bankruptcy Procedure (as amended, the "Bankruptcy Rules"), and rules 4001 and 9013-1(m) of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware (the "Bankruptcy Local Rules"):

(a) authorizing the Debtor to obtain postpetition financing in the form of a term loan facility (the "DIP Facility") on the terms and conditions set forth in that certain Senior Secured Superpriority Debtor-in-Possession Loan and Security Agreement (the "DIP Credit

[1] The last four digits of 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 defined herein shall have the meaning set forth in the DIP Credit Agreement (as defined below) attached hereto as **Exhibit B**.

Agreement")[3] attached hereto as **Exhibit 1** (as amended, supplemented, or otherwise modified from time to time), by and among the Debtor and Silicon Valley Bank (in such capacity, the "DIP Lender"), up to the aggregate principal amount of Twenty Five Million Dollars ($25,000,000), subject to the terms of the Interim Order, the Final Order, and all other agreements, documents or instruments delivered or executed in connection therewith, as hereafter amended, supplemented or otherwise modified from time to time, including the Budget (as defined below) (collectively, together with the DIP Credit Agreement, the "DIP Loan Documents");

(b) authorizing the use of Cash Collateral (as defined below) of the Prepetition Lender (as defined below) by the Debtor effective as of the Petition Date;

(c) subject to the Carve Out and KEIP/KERP Plan Amount (as each such term is defined below), granting to the DIP Lender on account of the DIP Facility and all other obligations owing thereunder and under, or secured by, the DIP Loan Documents (collectively, and including all "Obligations" as defined in the DIP Credit Agreement, the "DIP Obligations") allowed superpriority administrative expense claim status in the Debtor's chapter 11 case (the "Chapter 11 Case");

(e) subject to the Carve Out and KEIP/KERP Plan Amount, granting to the DIP Lender automatically perfected security interests in and liens on the DIP Collateral (as defined below) to the extent and in the priority set forth herein;

(f) vacating and modifying the automatic stay imposed by section 362 of the Bankruptcy Code to the extent necessary to implement and effectuate the terms and provisions of the Interim Order and the Final Order, in each case, to the extent set forth herein;

[3] Capitalized terms used but not otherwise defined herein have the meanings ascribed to them in the DIP Credit Agreement.

(g) subject to the Carve Out and KEIP/KERP Plan Amount, granting adequate protection to the Prepetition Lender;

(h) scheduling a final hearing (the "Final Hearing") to consider entry of the Final Order; and

(g) granting related relief.

In support of this Motion, the Debtor relies on the *Declaration of Blake Wise in Support of First Day Relief* (the "First Day Declaration"). In further support of this Motion, the Debtor respectfully states as follows:

JURISDICTION AND VENUE

1. The Bankruptcy Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334(b). Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2).

2. The statutory predicates for the relief requested herein are sections 105, 361, 362, 363, and 364 of the Bankruptcy Code, Bankruptcy Rules 2002, 4001 and 9014, and Rules 4001 and 9014 of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware (the "Local Rules").

RELIEF REQUESTED

3. The Debtor requests entry of the Interim Order and the Final Order, pursuant to sections 105, 361, 362, 363(c), 363(e), 364(c), 364(d)(1), and 364(e) of the Bankruptcy Code, Bankruptcy Rules 2002, 4001, 6004, and 9014 and Local Rules 4001-1 and 4001-2, granting the following relief:

a. Accessing the DIP Loans — Authority for the Debtor, on the terms set forth in the DIP Credit Agreement, to obtain the DIP Facility from the DIP Lender consisting of postpetition financing in an aggregate principal amount of up to $25,000,000, which includes (i) up to $10,000,000 to fund the Debtor's day to day operations and the costs of administering this Chapter 11 Case pursuant to the Budget (as

defined below), of which the Debtor may borrow up to $4,300,000 on an interim basis pursuant to the terms set forth in the Interim Order and the Budget (as defined below); and (ii) $15,000,000, to be used to satisfy in full the Debtor's outstanding obligations under the Prepetition Loan Facility (as defined below) upon entry of the Final Order;

b. Payment of the Term Loan Commitment Fee — Authority for the Debtor to pay, on the Term Loan Maturity Date (as defined below) (i) a non-refundable commitment fee of One Million Five Hundred Thousand Dollars ($1,500,000.00) (the "Initial Term Loan Commitment Fee"), which shall be deemed earned (but not paid) as of entry of the Interim Order; and (ii) a non-refundable commitment fee of One Million Five Hundred Thousand Dollars ($1,500,000.00) (the "Final Term Loan Commitment Fee" and, together with the Initial Term Loan Commitment Fee, the "Term Loan Commitment Fees"), which shall be deemed earned (but not paid) as of entry of the Final Order and shall be due at the Term Loan Maturity Date; provided, such Term Loan Commitment Fees shall not reduce the aggregate amount of Term Loan Advances available to the Debtor, subject to the Carve Out and the KEIP/KERP Plan Amount;

c. Entry into the DIP Credit Agreement — Authority for the Debtor to execute, deliver and perform its obligations under the DIP Loan Documents and to execute and deliver all additional documentation consistent with the terms of (or as may be required by) the DIP Credit Agreement, and to perform all such other and further acts as may be required under or in connection with the DIP Credit Agreement, which documents shall be in form and substance satisfactory to the DIP Lender and filed with the Bankruptcy Court;

d. Use of Proceeds — Authority for the Debtor to use the proceeds of the DIP Facility as permitted in the DIP Credit Agreement and in accordance with the Interim Order and Final Order (collectively, the "DIP Orders") and the Budget attached to the Interim Order as **Exhibit 2**, and any and all other Budgets approved thereafter from time to time in accordance with the DIP Credit Agreement and the DIP Orders;

e. Grant of Liens and Super-priority Claims — Authority for the Debtor to grant automatically perfected security interests in and liens on all of the DIP Collateral on the terms set forth in the DIP Credit Agreement and the DIP Orders, and granting super-priority administrative expense status to the DIP Obligations, in each case subject to the Carve Out and KEIP/KERP Plan Amount, on the terms and subject to the relative priorities set forth in the DIP Credit Agreement;

f. Provision of Adequate Protection — Authority for the Debtor to grant adequate protection to the Prepetition Lender including (i) effective and perfected upon the entry of the Interim Order, valid, binding, continuing, enforceable, fully-perfected Adequate Protection Liens (as defined below); (ii) effective upon the entry of the Interim Order, Adequate Protection Claims (as defined below) with priority over all other administrative claims in the Chapter 11 Case (subject only to the Carve Out and KEIP/KERP Plan Amount); (iii) so long as any Prepetition Loan Obligations remain outstanding, payment of present interest on the Prepetition Loan Obligations in accordance with the Prepetition Loan Documents; and (iv) payment of reasonable and

documented professional fees, expenses, and disbursements (including, but not limited to, the fees, expenses and disbursements of counsel and other third-party consultants, including financial advisors) incurred by the Prepetition Lender arising prior to the Petition Date; and, in the regular course, all reasonable and documented out-of-pocket fees and expenses incurred by the Prepetition Lender arising on or after the Petition Date;

g. Payment of Obligations Under DIP Facility — Authority for the Debtor to pay the principal, interest, fees, expenses, disbursements and other amounts payable under the DIP Credit Agreement (collectively, the "DIP Obligations") as such amounts become due and payable;

h. Use of Cash Collateral — Authority for the Debtor to use cash collateral within the meaning of section 363(c)(2) of the Bankruptcy Code in which the Prepetition Lender has an interest;

i. Modification of Automatic Stay — Vacating and modifying the automatic stay imposed under section 362 of the Bankruptcy Code to the extent necessary to implement and effectuate the terms and provisions of the DIP Credit Agreement and the DIP Orders;

j. Section 506(c) and "Equities of the Case" Waiver — Subject only to and effective upon entry of the Final Order, waiving the Debtor's ability to surcharge against any DIP Collateral pursuant to section 506(c) of the Bankruptcy Code and any right of the Debtor under the "equities of the case" exception in section 552(b) of the Bankruptcy Code;

k. Scheduling Interim Hearing — Scheduling of an emergency hearing (the "Interim Hearing") on this Motion for the Bankruptcy Court to consider entry of the Interim Order, authorizing the Debtor to borrow the DIP Facility, on an interim basis, in accordance with the terms of the DIP Credit Agreement and Interim Order;

l. Scheduling Final Hearing — Scheduling a final hearing (the "Final Hearing") on the Motion to consider entry of the Final Order authorizing the DIP Facility on a final basis and approving notice procedures with respect thereto; and

m. Certain related relief.

BACKGROUND

A. General Background

4. On April 15, 2019 (the "Petition Date"), the Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code (this "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.

5. The Debtor is a biopharmaceutical company focused on the development and commercialization of innovative antibiotic treatments against multi-drug resistant gram-negative infections. Additional details regarding the Debtor's business and the facts and circumstances supporting the relief requested herein are set forth in the First Day Declaration, which was filed contemporaneously with this Motion and is incorporated by reference.

B. Debtor's Prepetition Capital Structure

6. As of the Petition Date, the Debtor's capital structure consisted of the following:

Prepetition Secured Debt

7. On February 26, 2018, Achaogen entered into that certain Loan and Security Agreement (as heretofore amended, supplemented, or otherwise modified, including by that certain Waiver and First Amendment to Loan and Security Agreement (as defined below), the "Prepetition Loan Agreement" and, together with all other agreements, documents and instruments executed and/or delivered in connection therewith, as all of the same have been supplemented, modified, extended, renewed, restated, and/or replaced at any time prior to the Petition Date, the "Prepetition Loan Documents") by and between Achaogen and Silicon Valley Bank (the "Prepetition Lender" or "SVB"), pursuant to which the Prepetition Lender agreed to extend term loans in the aggregate principal amount of up to $50,000,000, all of which was borrowed by the Debtor. The Prepetition Loan Facility is secured by valid, fully perfected and enforceable security interests in substantially all of the Debtor's assets (the "Prepetition Loan Liens" and the collateral to which such Prepetition Loan Liens attach, the "Prepetition Loan Collateral").

8. The Prepetition Loan Facility was structured in two separate parts: first, a term loan made in a single advance in the principal amount of $25 million (the "Term A Loan"), all or a portion of which Achaogen was required to use to repay in full its outstanding obligations to Solar Capital, Ltd. ("Solar Capital"); and second, further advances to Achaogen in an amount not to exceed $25 million (the "Term B Loan"). Each of the Term A Loan and the Term B Loan is subject to (i) a final payment fee (the "Term A Final Payment" and "Term B Final Payment") equal to the original principal amount of the loan multiplied by six percent (6.0%), and (ii) a prepayment premium of one percent (1.0%) of the principal amount of the Prepetition Loan Facility outstanding as of the date immediately and prior to such prepayment (the "Prepayment Fee"), if such prepayment is made following the first anniversary but before the second anniversary of the Effective Date (as defined in the Prepetition Loan Agreement). Pursuant to the Prepetition Loan Agreement, each of the Term A Final Payment, the Term B Final Payment, and the Prepayment Premium become due and payable upon the occurrence and during the continuation of an event of default.

9. Pursuant to Section 6.6(b) of the Prepetition Loan Agreement, in the event the Debtor's cash on deposit with SVB dropped below the greater of (i) $48 million, and (ii) the "Monthly Cash Burn Amount" (as defined in the Prepetition Loan Amount), Achaogen was required to place on deposit and thereafter maintain at all times as cash collateral in a segregated account cash in an amount equal to at least 100% of the outstanding balance of the Term A Loan. In December 2018, Achaogen funded $25,000,000 into the pledged cash collateral account in accordance with Section 6.6(b) of the Prepetition Loan Agreement.

10. On April 12, 2019, pursuant to the Waiver and First Amendment to the Loan and Security Agreement (the "Prepetition Loan Amendment"), the Debtor agreed, among

other things, to permit SVB to debit $34,663,598.48 from its bank accounts held at SVB—including $25,000,000 held in the pledged cash collateral account and prepetition fees and expenses of SVB's counsel—and to apply the debited funds to the principal and interest, plus Bank Expenses, due under the Prepetition Loan Agreement. Following this sweep, $15,000,000, plus a *de minimis* amount of unpaid interest, remained outstanding under the Prepetition Loan Facility as of the Petition Date.

11. In connection with the Prepetition Loan Amendment, the Debtor agreed to extend SVB's first-priority security interest to the Debtor's Intellectual Property (in addition to SVB's existing first-priority security interest on the proceeds of the Debtor's Intellectual Property) in exchange for SVB providing a commitment to support the Debtor's sale process in a bankruptcy by providing debtor-in-possession financing in the amount of $25,000,000 in the Chapter 11 Case, which the Debtor is hereby seeking approval of. SVB also agreed to waive the Term A Final Payment and the Prepayment Premium, leaving in place the Term B Final Payment pending entry of the Final Order, at which time the Term B Final Payment shall be waived pursuant to the DIP Credit Agreement.

Unsecured Obligations

12. Solar Success Fee. As noted above, Achaogen was previously party to a loan and security agreement with Solar Capital that Achaogen satisfied from the funds of the Prepetition Loan Facility. On August 5, 2015, pursuant to that loan and security agreement, Achaogen entered into a Success Fee Agreement with Solar Capital under which Achaogen agreed to pay Solar Capital $1 million (the "Solar Success Fee") if Achaogen obtained FDA approval to market ZEMDRI. Because Achaogen obtained FDA approval for ZEMDRI, the Solar Success Fee will become due on August 5, 2019.

13. Hovione Limited. Following the FDA's approval of ZEMDRI in June 2018, Achaogen has minimum annual purchase commitments from Hovione beginning in 2020 through 2024. Specifically, Achaogen has minimum purchase commitments of $9 million in 2020; $8 million in 2021; $12 million in 2022; and $24 million in 2023 and 2024 combined, for a total commitment of $53 million.

14. Office Lease. In August 2016, Achaogen entered into an agreement to lease (the "Lease") 47,118 square feet of office, laboratory and research and development space (the "Original Space") for Achaogen's principal executive offices in South San Francisco. In July 2017, the Company entered into an amendment (the "Lease Amendment") to lease an additional 51,866 square feet of space (the "Expansion Space") for a total of 98,984 square feet (the "Premises"). The Lease commenced in March 2017 and as of January 2018, Achaogen occupied the full Premises. The lease term for the Premises is through January 31, 2028 (the "Lease Term") and contains an option to extend the Lease Term for an additional 5 years. The Lease has rent escalation clauses for approximately 3.5% of the base rent in each subsequent year of the Lease Term and a rent abatement period in the first year of the Premises.

15. Trade Debt. In addition to the Solar Success Fee, the Hovione purchase commitments and the Lease, Achaogen has unsecured obligations, as of the Petition Date, in the amount of approximately $18.7 million consisting of accounts payable to various trade creditors.

Achaogen Common and Preferred Stock

16. On March 17, 2014, Achaogen completed its initial public offering ("IPO") and sold 6,900,000 shares of common stock at a price of $12.00 per share to the public. The aggregate net proceeds received by Achaogen from the IPO, net of underwriting discounts and commissions and offering expenses, was $73.9 million. Achaogen remains a publicly traded

company with its shares listed on The NASDAQ Global Select Market. It has done a number of equity raises since its IPO, and as of the Petition Date 290,000,000 commons shares authorized under its articles of incorporation and 65,452,763 common shares outstanding.[4]

17. On April 12, 2019, the closing price of Achaogen common stock was $.50 per share. At its peak, Achaogen had a market capitalization of over $1 billion in mid-July 2017.

Assets and Receivables

18. The Debtor has total assets of approximately $82.3 million consisting of cash, inventory, receivables, intellectual property and general intangibles. As of the Petition Date, Achaogen had unrestricted cash, cash equivalents and short-term investments of approximately $1.3 million. Additionally, amounts owing to Achaogen on account of trade and contract accounts receivable total approximately $1.0 million as of March 31, 2019. Trade receivables consist of payments to be received from customers for sales of ZEMDRI recorded net of prompt-payment discounts, incentive fees, chargebacks, and doubtful accounts. Contract accounts receivables consist of payments to be received from U.S. government contracts.

C. Debtor's Immediate Need for Liquidity

19. Achaogen's primary activities since incorporation have included discovering, developing and commercializing its product candidates, including conducting preclinical studies and clinical trials and providing general and administrative support for these operations.

20. Achaogen is committed to fighting what are commonly referred to as "superbugs" – bacterial infections that have developed ways to resist treatment by even the most

[4] Achaogen also has 10,000,000 preferred shares authorized but no preferred shares are outstanding.

potent available antibiotics. Achaogen designed its lead product, ZEMDRI® (plazomicin), to fight what the Center for Disease Control ("CDC") calls a "nightmare bacteria" and has listed as the highest category threat of "urgent." ZEMDRI can be used to treat patients who have limited or no alternative treatment options from infections with these nightmare bacteria. Even with its current financial situation, Achaogen continues to commercialize ZEMDRI, in part because Achaogen believes that ZEMDRI can save lives for patients who may literally have no alternative.

21. Developing ZEMDRI, and attempting to develop other important drugs, has been a cost-intensive effort. Achaogen thus experienced losses since its inception, with an accumulated deficit as of December 31, 2018 of $559.4 million. Achaogen continues to incur losses, and its ability to successfully transition to profitability is dependent upon obtaining financial infusions to drive the commercialization of ZEMDRI to profitability, as well as to develop additional drugs. Despite significant attempts to raise sufficient working capital, a dramatic downturn in the availability of financing from both the debt and equity markets for companies in the anti-infective field, based in part on the withdrawal from the space by certain large pharmaceutical companies, has limited the Debtor's ability to bridge the gap to profitability.

22. Prior to the Petition Date, the Debtor's management determined that the Debtor would have a critical need for working capital after the commencement of this Chapter 11 Case in order to continue operating and supplying its life-saving drug. Without immediate access to the DIP Facility being provide by the DIP Lender and access to the Prepetition Lender's Cash Collateral, the Debtor will not have sufficient liquidity to be able to (i) pay its vendors, (ii) fund employee wages, benefits, and related obligations, (iii) pay for the necessary

services and materials to maintain compliance with regulatory requirements, (iv) pay for use of its business equipment, (v) fund its sale process, and (vi) continue to operate its business during the pendency of the Chapter 11 Case. Patients dependent on ongoing access to ZEMDRI will suffer.

D. The DIP Facility

i. Marketing of the DIP Facility

23. Prior to the Petition Date, the Debtor, with the assistance of its former investment banker, Evercore, Inc. ("Evercore"), worked diligently to identify lenders willing to provide postpetition financing to the Debtor. Of approximately ten interested parties with whom Evercore and the Debtor's management spoke, no potential lender was willing to extend postpetition financing secured by liens junior to the Prepetition Lender's liens, absent Achaogen securing a stalking horse purchaser offering a purchase price for the Debtor's assets sufficient to repay all amounts due under the Prepetition Loan Facility *and* all amounts due under any postpetition financing facility, which Achaogen was unable to do through its prepetition marketing process. Nor was any potential lender willing to prime the Prepetition Lender's liens absent the Prepetition Lender's consent, which was not forthcoming. And none of the potential postpetition lenders viewed the Debtor's intellectual property—which at the time was subject to a proceeds lien under the Prepetition Loan Facility—as sufficient collateral to support a non-priming DIP facility. Accordingly, the marketing process did not yield a credible preliminary proposal from a party willing to provide DIP financing.

24. Under the circumstances, the Debtor does not believe that it could obtain postpetition financing on terms more favorable than the proposed DIP Facility. As discussed above, in light of the Prepetition Lender's lien on substantially all of the Debtor's assets, the Debtor's pursuit of alternative financing that would prime such lien would lead to a hotly

contested priming fight, a value-destroying result. Further, in its capacity as Prepetition Lender, the DIP Lender already has a vested interest in seeing the value of the Debtor's business preserved and maximized, recognizing that the Debtor requires access to liquidity from the DIP Facility, and use of Cash Collateral, in order to facilitate a smooth transition into chapter 11, avoid serious impairment of its business operations, operate the Debtor's cash-intensive business in the ordinary course, and implement an auction and sale process to maximize the value of the Debtor's assets. These and other factors led the DIP Lender to offer the DIP Facility on the terms and conditions described herein and in the DIP Loan Documents, which the Debtor believes are the most favorable available under the circumstances.

ii. Critical Terms of the DIP Facility

25. As noted, the terms of the DIP Facility require the Debtor to complete a sale of its assets in accordance with certain milestones. To maximize the value of its estate, and in compliance with the milestones under the proposed DIP Facility, the Debtor has filed contemporaneously herewith a motion seeking authority to conduct an auction process by which the Debtor will solicit offers and ultimately seek approval to sell substantially all of its assets to the bidder with the highest or otherwise best offer. The Debtor also reserves the right to appoint a stalking horse purchaser of its assets and to modify its auction and sale procedures accordingly. The Debtor also will seek authority to retain Cassel Salpeter & Co. to serve as its investment banker (replacing Evercore, who ran a lengthy marketing and sale process prepetition) to assist with conducting the marketing and sale of its assets.

26. Another critical element of the negotiations between the Debtor and the DIP Lender related to payment of the KEIP/KERP Plan Amount.[5] In light of the recent

[5] The DIP Credit Agreement defines "KEIP/KERP Plan Amount" as "the aggregate amount due and owing on any date of determination to one or more individuals named in, and pursuant to, the KEIP/KERP plan of the Borrower

resignations of numerous employees before the filing of the Chapter 11 Case—including the Debtor's Chief Financial Officer and Vice President of Finance, in addition to key operations positions like the Head of Technical Operations, Senior Director of Clinical Development and Vice President of Clinical Pharmacology—the Debtor has formulated and is requesting approval for a key employee incentive plan (the "KEIP") and a key employee retention plan (the "KERP").[6] The Debtor believes that unless it can offer its employees iron-clad assurances that the KEIP and KERP (if approved) will be paid, regardless of whether the ultimate sale proceeds are sufficient to repay SVB, employees will continue to resign, leaving the Debtor unable to run an effective sale process to maximize value for all stakeholders. Accordingly, after extensive negotiations between the DIP Lender and the Debtor, the DIP Lender agreed that the KEIP/KERP Plan Amount may be paid from sale proceeds ahead of any payments to the DIP Lender on account of the DIP Obligations under the DIP Credit Agreement. The DIP Lender further agreed that a portion of the KEIP/KERP Plan Amount may be paid upon termination of the DIP Facility—ahead of payments to the DIP Lender—even in the event a sale is not consummated. The Debtor believes that the DIP Lender's agreement to this critical term will significantly improve its ability to implement a successful sale process.

27. Pursuant to this Motion, the Debtor seeks authority to use Cash Collateral and the proceeds of any borrowings under the DIP Facility, subject to and in accordance with the budget annexed to the Interim Order as **Exhibit 2** (as it may be updated periodically in accordance with the Interim Order and the DIP Loan Documents, the "Budget"). Beginning on

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that is approved by the Bank in writing and authorized by the Bankruptcy Court, as such plan may be amended from time to time with the written consent of the Bank." Notwithstanding anything to the contrary in the DIP Orders or in any of the DIP Loan Documents, the Debtor's proposed key employee incentive plan shall be funded only from proceeds of a sale of the DIP Collateral that are in excess of $25,000,000.00.

[6] *See Debtor's Motion for Entry of an Order (I) Authorizing Implementation of a Key Employee Incentive Plan and a Key Employee Retention Plan, (II) Approving the Terms of the Debtor's Key Employee Incentive Plan and Key Employee Retention Plan, and (III) Granting Related Relief,* filed contemporaneously herewith.

the first Friday following the Petition Date (as defined in the DIP Credit Agreement), and then no later than the Friday of each subsequent calendar week, the DIP Credit Agreement provides that the Debtor shall deliver to the DIP Lender an updated, proposed Budget (each, a "Proposed Budget") for the following 13-week period, which shall be in form and substance satisfactory to the DIP Lender. A Proposed Budget shall become the new Budget upon approval by the DIP Lender (which must be in writing) and, if no such approval is received, the prior approved budget shall continue in place and the DIP Lender and the Debtor shall negotiate in good faith regarding the terms of the Proposed Budget. The Debtor shall not permit the amount of its actual disbursements (excluding payment of all Bank Expenses (as defined in the DIP Loan Agreement)) for any week to exceed one hundred fifteen percent (115.0%) of the disbursements shown in the Budget for such week and on an aggregate basis, and the Debtor shall not permit the actual cash receipts for any week to be less than eighty-five percent (85.0%) of the cash receipts shown in the Budget for such week and on an aggregate basis (the "Budget Variances"; all references in the Interim Order and the DIP Loan Documents to "Budget" shall mean the Budget as it is subject to the Budget Variances). The Debtor shall also deliver with each updated Budget a variance report reflecting on a line item and an aggregate basis, Debtor's actual unrestricted cash receipts and cash disbursements compared to the Budget for such immediately preceding week and for the period commencing on the Petition Date through and including the end of the week immediately preceding the date of the variance report. For the avoidance of doubt, for purposes of calculating the Budget Variances, any unused amounts set forth in the Budget for any period of determination may be carried forward and used during subsequent periods. The Debtor will also deliver a weekly reporting package to the DIP Lender, which shall

consist of a Proposed Budget, the variance report, and any other reporting required by the DIP Loan Documents.

28. As described above, the DIP Facility includes two Term Loan Commitment Fees, each in the amount of $1.5 million, to be paid on the Term Loan Maturity Date. Pursuant to the DIP Credit Agreement, the Initial Term Loan Commitment Fee is earned upon entry of the Interim Order, and the Final Term Loan Commitment fee is earned upon entry of the Final Order. As part of the Prepetition Loan Amendment, the Prepetition Lender agreed to waive the Term A Final Payment and the Prepayment Premium due under the Prepetition Loan Agreement, leaving in place the Term B Final Payment to be waived upon entry of the Final Order. As a result, upon entry of the Interim Order, the Prepetition Lender will have waived $1.75 million in fees, and upon entry of the Final Order, a total of $3.5 million in fees. Under the proposed DIP Facility, the Term Loan Commitment Fees, in the aggregate amount of $3 million, take the place of the waived fees under the Prepetition Loan Agreement, which would have imminently become due upon the Debtor's default under the Prepetition Loan Agreement. Critically, the Term Loan Commitment Fees are to be paid out of sale proceeds, and thus will not impact the financing available to the Debtor to run the sale process.

iii. Terms of the DIP Facility are Reasonable

29. If the DIP Lender did not agree to provide the DIP Facility, given its inability to find a lender willing to even try priming the Prepetition Lender, the Debtor's only means of financing this case would have been to seek authority to use the Prepetition Lender's case collateral over its objection. This would have led to a contentious adequate protection fight, which may have proven devastating to the Debtor's business and to the contemplated auction process, subjecting the Debtor to a significant risk of being unfinanced or underfinanced for an

extended period of time, especially in light of the Debtor's low liquidity position as of the Petition Date. Based upon the foregoing, the Debtor submits that its efforts to seek the necessary postpetition financing from additional third parties, as well as vigorous negotiations with the DIP Lender, were reasonable and satisfy the statutory requirements of section 364(c) of the Bankruptcy Code.

MATERIAL TERMS OF THE DIP FACILITY

30. The terms of the DIP Facility are set forth in the DIP Credit Agreement, attached hereto as **Exhibit B**, and are incorporated herein by reference. Bankruptcy Rule 4001(c)(1)(B) requires that a motion for authority to obtain credit list or summarize, and set out the location within the relevant documents, all material provisions of the proposed credit agreement and form of order, including interest rate, maturity, events of default, liens, borrowing limits and borrowing conditions. Fed. R. Bankr. P. 4001(c)(1)(B). The material terms of the DIP Facility are as follows:[7]

Required Disclosure	**Summary of Material Terms**
Parties DIP Credit Agreement, Recitals	Borrower: Achaogen, Inc. Guarantor: None DIP Lender: Silicon Valley Bank ("Bank")
DIP Commitments DIP Credit Agreement, § 2.1.1	Interim Availability: Upon entry of the Interim Order, the DIP Lender shall make term loan advances (each an "Initial Term Loan Advance" and collectively, the "Initial Term Loan Advances") to the Debtor in an original principal amount not to exceed $4,300,000 on an aggregate basis. Aggregate Commitment: Subject to the terms and conditions of the DIP Credit Agreement, from and after the entry of the Final Order, the DIP Lender shall make term loan advances (each a "Final Term Loan Advance" and collectively, the "Final Term Loan Advances", and

[7] This summary of the DIP Facility is intended to assist the Bankruptcy Court in understanding key aspects of the arrangement and is qualified in its entirety by reference to the DIP Credit Agreement and Interim Order.

	together with the Initial Term Loan Advances, each a "Term Loan Advance" and collectively, the "Term Loan Advances"), provided that Fifteen Million Dollars ($15,000,000.00) of the Term Loan Advances shall be used to repay in full Borrower's outstanding obligations and liabilities to Bank under the Prepetition Loan Facility (including without limitation, all Bank Expenses, fees, and accrued interest) (collectively, the "Prior Obligations") upon entry of the Final Order, provided, further, that the Term Loan Advances (including the amounts used to repay the Prior Obligations in full) shall not exceed the Commitment.
Interest Rate and Default Interest DIP Credit Agreement, §§ 2.2(a), (b), (d)	Interest Rate: Pursuant to the DIP Credit Agreement, the principal amount outstanding under each Term Loan Advance shall accrue interest at a floating per annum rate equal to the Prime Rate plus five percent (5.5%), payable monthly on the Payment Date and computed on the basis of a 360-day year for the actual number of days elapsed. In computing interest, (i) all payments received after 12:00 p.m. Pacific time on any day shall be deemed received at the opening of business on the next Business Day, and (ii) the date of the making of any Credit Extension shall be included and the date of payment shall be excluded; provided, however, that if any Credit Extension is repaid on the same day on which it is made, such day shall be included in computing interest on such Credit Extension. Default Rate: Immediately upon the occurrence and during the continuance of an Event of Default, DIP Obligations shall bear interest at a rate per annum which is four percent (4.0%) above the rate that is otherwise applicable thereto (the "Default Rate") unless the DIP Lender otherwise elects from time to time in its sole discretion to impose a smaller increase.
Term Loan Commitment Fees; Bank Expenses DIP Credit Agreement § 2.3; Interim Order ¶ 20	Term Loan Commitment Fees. The Bank shall be entitled to receive the following commitment fees: (i) a non-refundable commitment fee of One Million Five Hundred Thousand Dollars ($1,500,000.00) (the "Initial Term Loan Commitment Fee"), which shall be deemed earned as of entry of the Interim DIP Order and shall be due at the Term Loan Maturity Date; and (ii) a non-refundable commitment fee of One Million Five Hundred Thousand Dollars ($1,500,000.00) (the "Final Term Loan Commitment Fee" and, together with the Initial Term Loan Commitment Fee, the "Term Loan Commitment Fees"), which shall be deemed earned as of entry of the Final DIP Order and shall be due at the Term Loan Maturity Date; provided, that the Term B Final Payment (as defined in the Prior Loan Agreement) shall be waived as of the entry of the Final DIP Order (which, for the avoidance of doubt, shall authorize the Borrower's repayment in full of the Prior Obligations and approve the Final Term Loan Commitment Fee). Bank Expenses. All Bank Expenses (including reasonable attorneys' fees and expenses for documentation and negotiation of this Agreement)

	incurred through and after the Petition Date, when due (or, if no stated due date, upon demand by Bank). Unless otherwise provided in the DIP Credit Agreement or in a separate writing by Bank, Borrower shall not be entitled to any credit, rebate, or repayment of any fees earned by Bank pursuant to this Agreement notwithstanding any termination of this Agreement pursuant to its terms or the suspension or termination of Bank's obligation to make loans and advances hereunder pursuant to the terms hereof. Bank may deduct amounts owing by Borrower under the clauses of this Section 2.3 pursuant to the terms of Section 2.4(c). Bank shall provide Borrower written notice of deductions made from the Designated Deposit Account pursuant to the terms of the clauses of this Section 2.3. Bank Expenses do not include the Term Loan Commitment Fees. Pursuant to the Interim Order, the Debtor is authorized and directed to pay the Term Loan Commitment Fees at the Term Loan Maturity Date. The Debtor is authorized and directed to pay interest on the DIP Loan Obligations in accordance with the terms of the DIP Credit Agreement.
Use of Proceeds DIP Credit Agreement, § 5.9; Interim Order, ¶ G	Subject to the terms and conditions of the DIP Credit Agreement, the Debtor shall use Fifteen Million Dollars ($15,000,000.00) of the proceeds of the Term Loan Advances to repay the Prior Obligations in accordance with the terms of this Agreement, and shall use the other Term Loan Advances and proceeds of all other Credit Extensions as working capital and to fund the Bank Expenses and its general business requirements and not for personal, family, household or agricultural purposes. Pursuant to the Interim Order, upon entry of the Final Order, outstanding Prepetition Loan Obligations, in the aggregate amount of $15,000,000.00, will be repaid with proceeds of the DIP Facility. The remaining Ten Million Dollars ($10,000,000.00) available under the DIP Facility will be used in accordance with the Budget for operating expenses, to effectuate the sale of the Debtor's assets, and to provide adequate protection in accordance with this Interim Order and the Final Order.
Limitations on and Conditions Precedent to the Use of Proceeds DIP Credit Agreement § 5.9	Except as set forth in the Budget or the Carve Out, no Collateral or proceeds thereof shall be used for the payment of Case Professionals so long as the Obligations remain outstanding.
Maturity and Termination DIP Credit	All outstanding principal and accrued and unpaid interest under the Term Loan Advances, and all other outstanding Obligations with respect to the Term Loan Advances, are due and payable in full on the Term Loan Maturity Date, which is the earlier of (a) September 30, 2019, (b)

Agreement, Definition of "Term Loan Maturity Date"	the date of a prepayment of the Obligations under Section 2.1.1 of this Agreement, (c) the date of acceleration of the Obligations pursuant to the terms of this Agreement and Financing Order, and (d) the date on which the Sale is consummated.
Events of Default DIP Credit Agreement, § 2.1.1(c)	Any one of the following shall constitute an event of default (an "Event of Default") under the DIP Credit Agreement: Payment Default. Borrower fails to (a) make any payment of principal or interest on any Credit Extension when due, or (b) pay any other Obligations within three (3) Business Days after such Obligations are due and payable (which three (3) Business Day cure period shall not apply to payments due on the Term Loan Maturity Date). During the cure period, the failure to make or pay any payment specified under clause (b) hereunder is not an Event of Default (but no Credit Extension will be made during the cure period); Covenant Default. (a) Borrower fails or neglects to perform any obligation in Sections 6.2, 6.4, 6.5, 6.6, 6.7(b), 6.11, 6.12, 6.13, 6.14, 6.15, or 6.16 of the DIP Credit Agreement, or violates any covenant in Section 7 of the DIP Credit Agreement; or (b) Borrower fails or neglects to perform, keep, or observe any other term, provision, condition, covenant or agreement contained in this Agreement or any Loan Documents, and as to any default (other than those specified in this Section 8) under such other term, provision, condition, covenant or agreement that can be cured, has failed to cure the default within ten (10) days after the occurrence thereof; provided, however, that if the default cannot by its nature be cured within the ten (10) day period or cannot after diligent attempts by Borrower be cured within such ten (10) day period, and such default is likely to be cured within a reasonable time, then Borrower shall have an additional period (which shall not in any case exceed thirty (30) days) to attempt to cure such default, and within such reasonable time period the failure to cure the default shall not be deemed an Event of Default (but no Credit Extensions shall be made during such cure period). Cure periods provided under this section shall not apply, among other things, to financial covenants (if any) or any other covenants set forth in clause (a) above; Material Adverse Change. A Material Adverse Change occurs; "Material Adverse Change" is defined as (a) a material impairment in the perfection or priority of Bank's Lien in the Collateral or in the value of such Collateral; (b) a material adverse change in the business, operations, or condition (financial or otherwise) of Borrower; or (c) a material impairment of the prospect of repayment of any portion of the

	Obligations, in each case measured from and after the date hereof; provided, however, that notwithstanding anything to the contrary, none of the following shall constitute or be deemed to have caused an Event of Default, material adverse effect, or Material Adverse Change: (i) the filing and continuance of the Chapter 11 Case; (ii) a variance in disbursements or cash receipts that does not exceed the applicable Budget Variance; or (iv) the suspension or delisting of Borrower's stock by Nasdaq or any other exchange; provided, further that Bank shall not be entitled to declare the occurrence of a Material Adverse Change prior to the conclusion of the auction described in the Sale Motion. Attachment; Levy; Restraint on Business. (a) (i) The service of process seeking to attach, by trustee or similar process, any funds of Borrower or of any entity under the control of Borrower (including a Subsidiary) in excess of One Hundred Thousand Dollars ($100,000.00), or (ii) a notice of lien or levy is filed against any of Borrower's assets by any Governmental Authority, and the same under subclauses (i) and (ii) hereof are not, within ten (10) days after the occurrence thereof, discharged or stayed (whether through the posting of a bond or otherwise); provided, however, no Credit Extensions shall be made during any ten (10) day cure period; or (b) (i) any material portion of Borrower's assets is attached, seized, levied on, or comes into possession of a trustee or receiver, or (ii) any court order enjoins, restrains, or prevents Borrower from conducting all or any material part of its business; Other Agreements. There is, under any agreement to which Borrower is a party with a third party or parties, (a) any default resulting in a right by such third party or parties, whether or not exercised, to accelerate the maturity of any Indebtedness in an amount individually or in the aggregate in excess of One Hundred Thousand Dollars ($100,000.00); or (b) any breach or default by Borrower, the result of which could have a material adverse effect on Borrower's business; provided, however, that the Event of Default under this Section 8.6 caused by the occurrence of a breach or default under such other agreement shall be cured or waived for purposes of this Agreement upon Bank receiving written notice from the party asserting such breach or default of such cure or waiver of the breach or default under such other agreement, if at the time of such cure or waiver under such other agreement (x) Bank has not declared an Event of Default under this Agreement and/or exercised any rights with respect thereto; (y) any such cure or waiver does not result in an Event of Default under any other provision of this Agreement or any Loan Document; and (z) in connection with any such cure or waiver under such other agreement, the terms of any agreement with such third party are not modified or amended in any manner which

	could in the good faith business judgment of Bank be materially less advantageous to Borrower or any Guarantor. Judgments; Penalties. One or more fines, penalties or final judgments, orders or decrees for the payment of money in an amount, individually or in the aggregate, of at least One Hundred Thousand Dollars ($100,000.00) (not covered by independent third-party insurance as to which liability has been accepted by such insurance carrier) shall be rendered against Borrower by any Governmental Authority, and the same are not, within ten (10) days after the entry, assessment or issuance thereof, discharged, satisfied, or paid, or after execution thereof, stayed or bonded pending appeal, or such judgments are not discharged prior to the expiration of any such stay (provided that no Credit Extensions will be made prior to the satisfaction, payment, discharge, stay, or bonding of such fine, penalty, judgment, order or decree); Misrepresentations. Borrower or any Person acting for Borrower makes any representation, warranty, or other statement now or later in this Agreement, any Loan Document or in any writing delivered to Bank or to induce Bank to enter this Agreement or any Loan Document, and such representation, warranty, or other statement is incorrect in any material respect when made; Subordinated Debt. Any document, instrument, or agreement evidencing any Subordinated Debt shall for any reason be revoked or invalidated or otherwise cease to be in full force and effect, in each case other than pursuant to its terms, any Person shall be in breach thereof or contest in any manner the validity or enforceability thereof or deny that it has any further liability or obligation thereunder, or the Obligations shall for any reason be subordinated or shall not have the priority contemplated by this Agreement or any applicable subordination or intercreditor agreement; or Governmental Approvals. Any Governmental Approval shall have been (a) revoked, rescinded, suspended, modified in an adverse manner or not renewed in the ordinary course for a full term or (b) subject to any decision by a Governmental Authority that designates a hearing with respect to any applications for renewal of any of such Governmental Approval or that could result in the Governmental Authority taking any of the actions described in clause (a) above, and such decision or such revocation, rescission, suspension, modification or non-renewal (i) cause, or could reasonably be expected to cause, a Material Adverse Change, or (ii) adversely affects the legal qualifications of Borrower or any of its Subsidiaries to hold such Governmental Approval in any applicable jurisdiction and such revocation, rescission, suspension, modification or non-renewal could reasonably be expected to affect the status of or legal qualifications of Borrower or any of its Subsidiaries to

	hold any Governmental Approval in any other jurisdiction; provided, however, that notwithstanding anything to the contrary, the suspension or delisting of Borrower's stock by Nasdaq or any other exchange shall not be an Event of Default. Bankruptcy Defaults: (a) the Final DIP Order is not entered within thirty (30) days (or such other period as Bank may agree to in writing with Borrower) following the Petition Date; or any Financing Order is stayed, revised, revoked, remanded, rescinded, amended, reversed, vacated, or modified in any manner not acceptable to Bank; (b) Borrower or any of its Affiliates shall file or consent to the filing of a pleading seeking to modify or otherwise alter the Interim DIP Order or the Final DIP Order without the prior consent of Bank; (c) (i) an order shall be entered by the Bankruptcy Court appointing a trustee under Section 1104 of the Bankruptcy Code, or an examiner with enlarged powers relating to the operation of the business of Borrower under Section 1106(b) of the Bankruptcy Code or (ii) the Borrower's exclusive rights to file and solicit acceptances for a plan shall terminate without the prior consent of Bank; (d) (A) Borrower shall attempt to invalidate, reduce or otherwise impair the Liens of Bank, of Bank's claims or rights against Borrower or any of its Subsidiaries or to subject any Collateral to assessment pursuant to Section 506(c) or 552(b) of the Bankruptcy Code, (B) any Lien or Superpriority Claim created by this Agreement, the Prior Loan Agreement, or the Financing Order shall, for any reason, cease to be valid or (C) any action is commenced by or on behalf of the Borrower or any of its Subsidiaries which contests the validity, perfection or enforceability of any of the Liens of Bank created by this Agreement, the Prior Loan Agreement or the Financing Order; (e) Borrower or any of its Affiliates shall file or consent to the filing of a motion seeking to dismiss the Case or convert the Case to a case under chapter 7 of the Bankruptcy Code or an order with respect to the Case shall be entered by the Bankruptcy Court dismissing the Case or converting the Case to a case under chapter 7 of the Bankruptcy Code; (f) any chapter 11 plan is filed in the Case, or an order shall be entered by the Bankruptcy Court confirming a chapter 11 plan in the Case, that does not provide for the termination of this Agreement and, if in effect at such time, the Prior Loan Agreement and the payment in full in cash of the Obligations, and, if any remain, the Prior Obligations and any Reinstated Prior Obligations on or before the effective date of such

	plan; (g) without the express prior written consent of Bank, any sale of, or motion by Borrower to sell, a material portion of its assets pursuant to Section 363 of the Bankruptcy Code that does not provide sufficient proceeds to cause the payment in full of the Obligations, the Prior Obligations and Reinstated Prior Obligations; (h) an order shall be entered in the Case without the express prior written consent of Bank, except as contemplated herein, (i) to revoke, vacate, reverse, stay, modify, supplement or amend this Agreement and the transactions contemplated hereby, any Loan Document or the Financing Order, or (ii) to permit any administrative expense or any claim (now existing or hereafter arising, of any kind or nature whatsoever) to have administrative priority equal or superior to the priority of Bank in respect of the Obligations; (i) an order shall be entered in the Case granting of relief from the automatic stay to permit a third party to foreclose or enforce on assets of Borrower that have a value that exceeds Fifty Thousand Dollars ($50,000.00) in the aggregate; (j) a motion shall be filed by Borrower seeking authority, or an order shall be entered in the Case (other than, for the avoidance of doubt, any motion or order permitting insurance premium financing agreements, which must be in form and substance acceptable to Bank), that (A) permits Borrower to incur Indebtedness secured by any claim under Section 364(c)(1) of the Bankruptcy Code or by a Lien pari passu with or superior to the Lien granted under the Loan Documents and Sections 364(c)(2) or (d) of the Bankruptcy Code, unless (1) all of the Obligations, Prior Obligations and Reinstated Prior Obligations, without duplication, have been paid in full at the time of the entry of any such order and all Commitments terminated, (2) the Obligations, Prior Obligations and Reinstated Prior Obligations, without duplication, are paid in full with such debt and all commitments terminated, or (3) such Indebtedness is subject to an intercreditor agreement in form and substance satisfactory to Bank in its sole discretion or (B) permits Borrower or any Subsidiary of Borrower the right to use Collateral other than in accordance with the terms of the Financing Order, unless all of the Obligations, Prior Obligations, Reinstated Prior Obligations, without duplication, shall have been paid in full and all commitments terminated; (k) proceeds of any sale of all or substantially all assets of Borrower, other than the Wind Down Amount, the Carve Out, and the KEIP/KERP Plan Amount are not directly remitted to Bank at the closing thereof, and the Obligations, Prior Obligations, and Reinstated Prior Obligations

	(excluding the amount of the Wind Down Amount, the Carve Out and the KEIP/KERP Plan Amount), without duplication, are not paid in full in accordance with the terms of this Agreement from such proceeds; (l) any motions by Borrower to sell Collateral or approve procedures regarding the same, any plan or disclosure statement filed by Borrower or supplements or amendments thereto, or any orders approving or amending any of the foregoing, are not in form and substance acceptable to Bank in its reasonable discretion; (m) the automatic stay terminates or expires (other than an order granting of relief from the automatic stay to permit a third party to foreclose or enforce on assets of Borrower that have a value that is Fifty Thousand Dollars ($50,000.00) or less in the aggregate), unless all of the Obligations, Prior Obligations, and Reinstated Prior Obligations shall have been paid in full; (n) [reserved]; (o) (A) Borrower, any Subsidiary of Borrower, or any of their respective Affiliates challenges the extent, validity or priority of the Obligations, the Prior Obligations or the Reinstated Prior Obligations or the application of any payments or collections received by Bank to the Obligations, the Prior Obligations or the Reinstated Prior Obligations or (B) any other Person challenges the extent, validity or priority of the Obligations, the Prior Obligations or the Reinstated Prior Obligations or the application of any payments or collections received by Bank to the Obligations, the Prior Obligations or the Reinstated Prior Obligations and, in the case of this subclause (B), such challenge is not resolved in a manner reasonably satisfactory to Bank by the later of the expiration of any applicable challenge period set forth in the Financing Order and forty-five (45) days following the assertion of such challenge; (p) (A) Borrower, any Subsidiary of Borrower, or any of their respective Affiliates challenges the validity, extent, perfection or priority of any Liens granted in the Collateral to secure the Obligations, the Prior Obligations or the Reinstated Prior Obligations or (B) any other Person challenges the validity, extent, perfection or priority of any Liens granted in the Collateral to secure the Obligations, the Prior Obligations or the Reinstated Prior Obligations and, in the case of this subclause (B), such challenge is not resolved in a manner reasonably satisfactory to Bank by the later of the expiration of any applicable challenge period set forth in the Financing Order and forty-five (45) days following the assertion of such challenge; (q) (i) Bank or the Collateral are surcharged or (ii) Borrower seeks to surcharge Bank or the Collateral, pursuant to Sections 105, 506(c),

	552 or any other section of the Bankruptcy Code or (iii) the extent of the Liens on Collateral are otherwise limited by any such section of the Bankruptcy Code; (r) payment of or granting adequate protection with respect to pre-petition debt (other than to Bank); (s) Borrower shall fail to maintain sufficient projected borrowing capacity under this Agreement to pay all accrued administrative obligations and other administrative claims when due, subject to funds being included in the Budget for such purpose; (t) [reserved]; (u) willful and uncured violation by Borrower of the terms of the Financing Order; (v) within the 13-week period covered by a Budget, the Bank, using commercially reasonable discretion, does not approve of a Proposed Budget becoming the new Budget in accordance with Section 6.2(h) hereof. (w) (i) Borrower deposits any funds (or allow any funds to be deposited) into the "Adequate Assurance Account" (as defined in any order approving adequate assurance procedures under § 366 of the Bankruptcy Code, which must be in form and substance acceptable to Bank and may only be amended or modified with Bank's prior consent (the "Utilities Order") unless such funds are deposited for purposes of adequate assurance deposits in favor of utilities providers or are otherwise required by the Utilities Order and contemplated by the Budget or (ii) Borrower uses any funds deposited in the Adequate Assurance Account in a manner inconsistent with the Utilities Order or the Budget without Bank's prior consent, or (x) any order is entered by the Bankruptcy Court sustaining any objection or challenge of any kind or nature to the validity, priority, or amount of the Liens or the Obligations, Prior Obligations or Reinstated Prior Obligations held by Bank, including with respect to an action to recharacterize or subordinate any Liens or claims of Bank against Borrower.
Priority and Security of DIP Financing Liens DIP Credit Agreement, § 4.1	**Priority** Pursuant to the DIP Credit Agreement, the Debtor warrants and covenants that, subject only to the Carve Out and the KEIP/KERP Plan Amount, upon the entry of the applicable Financing Order, the Obligations of Borrower under the Loan Documents shall at all times constitute a Superpriority Claim against the Borrower and its estate in

	the Chapter 11 Case having priority, pursuant to Section 364(c)(1) and 507(b) of the Bankruptcy Code, over the other administrative claims of any person or entity, including, without limitation any claims under Sections 105, 326, 328, 330, 331, 365, 503(a), 503(b), 506(c) (upon entry of the Final Order), 507(a), 507(b), 546(c), 546(d), 726 (to the extent permitted by law), 1113 and 1114 of the Bankruptcy Code, and any other provision of the Bankruptcy Code, and which shall at all times be, subject to the Carve Out and the KEIP/KERP Plan Amount, senior to the rights of Borrower, Borrower's estate, any trustee or successor trustee to the extent permitted by law, or any other creditor in the Chapter 11 Case. **Security** Pursuant to Section 364 of the Bankruptcy Code and the Loan Documents, the Liens of Bank under the DIP Credit Agreement shall at all times be secured by, and Borrower hereby grants to Bank, to secure the payment and performance in full of all of the Obligations, and pledges to Bank, a continuing, valid, binding, enforceable, non-avoidable and automatically properly perfected priming first priority post-petition Lien, which Lien shall be subject only to the payment of the Carve Out and the KEIP/KERP Plan Amount, on all existing and after acquired real and personal property and other assets of Borrower, tangible and intangible, whether now owned by or owing to, or hereafter acquired by or arising in favor of Borrower, whether owned or consigned by or to, or leased from or to Borrower and regardless of where located, including, without limitation, the items listed on the attached Exhibit A (collectively, the "Collateral").
Carve Out DIP Credit Agreement, § 1.1; Interim Order, ¶ 38	"Carve Out" means all Obligations, Prior Obligations and Reinstated Prior Obligations and the repayment of any of the foregoing, and the Liens and Superpriority Claims of Bank shall be subject to and subordinate to a carve out for payment of: (a) all fees required to be paid pursuant to the Clerk of the Court and to the Office of the United States Trustee under section 1930(a) of title 28 of the United States Code prior to or after delivery by the Bank of a Carve Out Trigger Notice plus interest at the statutory rate, plus (b) all reasonable fees and expenses up to $20,000 incurred by a trustee under section 726(b) of the Bankruptcy Code, plus (c) subject to the Budget, all unpaid Case Professional Fees and Expenses (excluding any success or completion fees payable to the Committee Case Professionals) incurred at any time prior to delivery by the Bank of a Carve Out Trigger Notice, plus (d) Case Professional Fees and Expenses (excluding any success or completion fees payable to the Committee Case Professionals) in an aggregate amount not to exceed the applicable Carve Out Cap incurred after delivery by the Bank of the Carve Out Trigger Notice, plus (e) all earned and unpaid advisory, success, transaction, completion or other fees and expenses payable to

	the Investment Banker pursuant to the Investment Banker Agreement incurred at any time that are allowed by the Bankruptcy Court. "Carve Out Cap" means an aggregate amount of Case Professional Fees and Expenses in accordance with the Budget not to exceed $250,000.00; provided, that the Carve Out Cap shall be reduced on a dollar-for-dollar basis by any payments of any Case Professional Fees and Expenses made after delivery of the Carve Out Trigger Notice in respect of fees and expenses incurred after delivery of the Carve Out Trigger Notice. "Carve Out Trigger Notice" means a written notice delivered by Bank to Borrower, its counsel, the United States Trustee, and lead counsel to any Creditors' Committee, which notice may be delivered at any time following the occurrence of any Event of Default under this Agreement. Carve Out Reserve. Until the Term Loan Maturity Date, the Debtor shall deposit cash on a weekly basis into an account designated by the Debtor at the DIP Lender for such purpose (the "Carve Out Account") in an amount equal to the "Carve Out" line item shown in the Budget for that week. Proceeds deposited into the Carve Out Account shall be held in trust and used solely for purposes of the Carve Out in accordance with this Interim Order and Final Order. The funds on deposit in the Carve Out Account shall be used to fund Carve Out expenses before any other funds of the Debtor may be used for such purpose. Any excess cash held in the Carve Out Account that is not used to fund Carve Out expenses in accordance with this Interim Order and Final Order, as applicable, shall be remitted to the DIP Lender. The DIP Lender and the Prepetition Lender shall each have a security interest in any residual interest in the Carve Out Account. On the day on which a Carve Out Trigger Notice is given by the DIP Lender to the Debtor with a copy to counsel to the Creditors' Committee (the "Termination Declaration Date"), the Carve Out Trigger Notice shall (i) constitute a demand to the Debtor to utilize all available cash held by the Debtor to fund any deficit in the Carve Out Reserve in an amount equal to the difference between the Carve Out Reserve balance and the amount anticipated to be need to fully fund the Carve Out (the "Carve Out Reserve Deficit"), and (ii) only if such cash on hand is insufficient for the foregoing purpose, be deemed a draw request and notice of borrowing by the Debtor for DIP Loans (as defined in the DIP Loan Documents) under the available commitments under the DIP Facility, in an amount equal to the Carve Out Reserve Deficit (any such amounts actually advanced shall constitute DIP Loans).
Conditions to Interim Availability DIP Credit	Unless otherwise waived by the Bank, the Bank's obligation to make an Initial Term Loan Advance is subject to the condition precedent that Bank shall have received, in form and substance reasonably satisfactory to Bank, such documents, and completion of such other matters, as Bank

Agreement, § 3.1	may reasonably deem necessary or appropriate, including, without limitation: a. the entry of the Interim Order shall have occurred not later than three (3) business days following the Petition Date; b. duly executed signatures to the Loan Documents; c. a secretary's corporate borrowing certificate of Borrower with respect to Borrower's Operating Documents, incumbency, specimen signatures and resolutions authorizing the execution and delivery of this Agreement and the other Loan Documents to which it is a party; d. duly executed signatures to the completed Borrowing Resolutions for Borrower; e. Bank shall have received the Initial Budget prepared in good faith based upon assumptions believed to be reasonable when made and when delivered, reasonably satisfactory in all respects to Bank. f. Borrower shall have filed the Sale Motion with the Bankruptcy Court requesting, among other things, approval of the sale process for the Sale; g. this Agreement and the other Loan Documents shall, upon entry of the Interim Order, be effective to create in favor of Bank legal, valid and enforceable first priority Lien upon all Collateral; h. [Reserved]; i. certified copies, dated as of a recent date, of financing statement searches, as Bank may request, accompanied by written evidence (including any UCC termination statements) that the Liens indicated in any such financing statements either constitute Permitted Liens or have been or, in connection with the initial Credit Extension, will be terminated or released; j. evidence satisfactory to Bank that the insurance policies and endorsements required by Section 6.5 hereof are in full force and effect, together with appropriate evidence showing lender loss payable and/or additional insured clauses or endorsements in favor of Bank; k. payment of the Bank Expenses then due as specified in Section 2.3 hereof and as set forth in an invoice delivered to

	Borrower prior to the date of funding of the Initial Term Loan Advance; l. [Reserved]; and m. all (i) "first day orders" and all related pleadings intended to be entered on or prior to the date of entry of the Interim DIP Order (including, for the purposes of the "cash management order," a bridge order authorizing continued use of the Borrower's current cash management systems until a hearing with respect to a final cash management order) shall have been entered by the Bankruptcy Court and shall be reasonably satisfactory in form and substance to the Bank and (ii) to the extent available for Bank review at that time, forms of "second day orders" shall be reasonably satisfactory in form and substance to the Bank
Conditions to Full Availability DIP Credit Agreement, § 3.2	Unless otherwise waived by the Bank, the Bank's obligation to make a Final Term Loan Advance is subject to the condition precedent that Bank shall have received, in form and substance reasonably satisfactory to Bank, such documents, and completion of such other matters, as Bank may reasonably deem necessary or appropriate, including, without limitation: (a) the entry of the Final Order shall have occurred not later than thirty (30) days following the Petition Date; (b) all material "second day orders" and all related pleadings intended to be entered on or prior to the date of entry of the Final Order, including a final cash management order, shall have been entered by the Bankruptcy Court, and all pleadings related to procedures for approval of significant transactions, including, without limitation, asset sale procedures, regardless of when filed or entered, shall be reasonably satisfactory in form and substance to the Bank; and (c) Bank shall have received when due a current Budget prepared in good faith based upon assumptions believed to be reasonable when made and when delivered, reasonably satisfactory in all respects to Bank.
Conditions to All Credit Extensions DIP Credit Agreement, § 3.3	Bank's obligations to make each Credit Extension, including the initial Credit Extension, is subject to the following conditions precedent: (a) the applicable Financing Order shall be in full force and effect and shall not have been modified or amended (unless otherwise approved by Bank), reversed, stayed or subject to a motion for

	reargument or reconsideration; (b) except as otherwise provided in Section 3.5, timely receipt of an executed Payment/Advance Form; (c) the representations and warranties in this Agreement shall be true, accurate, and complete in all material respects on the date of the Payment/Advance Form and on the Funding Date of each Credit Extension; provided, however, that such materiality qualifier shall not be applicable to any representations and warranties that already are qualified or modified by materiality in the text thereof; and provided, further that those representations and warranties expressly referring to a specific date shall be true, accurate and complete in all material respects as of such date, and no Event of Default shall have occurred and be continuing or result from the Credit Extension. Each Credit Extension is Borrower's representation and warranty on that date that the representations and warranties in this Agreement remain true, accurate, and complete in all material respects; provided, however, that such materiality qualifier shall not be applicable to any representations and warranties that already are qualified or modified by materiality in the text thereof; and provided, further that those representations and warranties expressly referring to a specific date shall be true, accurate and complete in all material respects as of such date; and (d) Bank determines in the exercise of its reasonable discretion that a Material Adverse Change has not occurred.
Acknowledgements Interim Order, ¶ E	Pursuant to the Interim Order, the Debtor acknowledges, admits, represents, stipulates, and agrees that: Prepetition Loan Agreement: As of the Petition Date, the Debtor was indebted and liable, without defense, counterclaim, or offset of any kind to the lenders under that certain Loan and Security Agreement, dated as of February 26, 2018 (as heretofore amended, supplemented, or otherwise modified, including by that certain Waiver and First Amendment to Loan and Security Agreement, dated as of April 12, 2019, the "Prepetition Loan Agreement" and, together with all other agreements, documents and instruments executed and/or delivered in connection therewith, as all of the same have been supplemented, modified, extended, renewed, restated, and/or replaced at any time prior to the Petition Date, the "Prepetition Loan Documents"), among the Debtor, and Silicon Valley Bank (the "Prepetition Lender") in the aggregate principal amount of $15,000,000.00 (the "Prepetition Loan Facility") as of the Petition Date. All obligations of the Debtor arising under the Prepetition Loan Agreement or any other Prepetition Loan

	Documents, including under the Prepetition Loan Facility, shall hereinafter be referred to collectively as the "Prepetition Loan Obligations". Pursuant to the Final Order and as set forth herein, all of the outstanding Prepetition Loan Obligations will be repaid with proceeds of the DIP Facility upon entry of the Final DIP Order. The liens and security interests securing the Prepetition Loan Obligations are referred to herein as the "Prepetition Loan Liens" and the collateral to which such Prepetition Loan Liens attach, the "Prepetition Loan Collateral". Value of the Prepetition Collateral. At all times prior to the Petition Date, the aggregate value of the Prepetition Loan Collateral exceeded the aggregate amount of the Prepetition Loan Obligations. No Claims. The Debtor has no valid claims (as such term is defined in section 101(5) of the Bankruptcy Code) or causes of action against the Prepetition Lender with respect to the Prepetition Loan Documents, the Prepetition Loan Obligations, the Prepetition Loan Liens, any prior financing transactions, or otherwise, whether arising at law or at equity, including, without limitation, any challenge, recharacterization, subordination, avoidance, or other claims arising under or pursuant to sections 105, 510, 541, or 542 through 553, inclusive, of the Bankruptcy Code. Release. Subject to entry of the Final Order, the Debtor hereby stipulates and agrees that it forever, unconditionally and irrevocably releases, discharges and acquits the Prepetition Lender and each of its successors, assigns, affiliates, subsidiaries, parents, officers, shareholders, directors, employees, attorneys, and agents, past, present, and future, and their respective heirs, predecessors, successors, and assigns (collectively, the "Releasees") of and from any and all claims, controversies, disputes, liabilities, obligations, demands, damages, expenses (including, without limitation, reasonable attorneys' fees), debts, liens, actions, and causes of action of any and every kind whatsoever, whether arising in law or otherwise, and whether or not known or matured, arising out of or relating to, as applicable, the DIP Facility, the DIP Loan Documents, the Prepetition Loan Facility, and the Prepetition Loan Documents, any prior financing transaction between the Debtor and any Releasee, and/or the transactions contemplated hereunder or thereunder including, without limitation, (x) any so-called "lender liability" or equitable subordination claims or defenses, (y) any and all claims and causes of action arising under the Bankruptcy Code, and (z) any and all claims and causes of action with respect to the validity, priority, perfection or avoidability of the liens or claims of the DIP Lender and the Prepetition Lender; provided that the forgoing shall

	not release any claims against a Releasee that a court of competent jurisdiction determines results primarily from the bad faith, gross negligence, or willful misconduct of such Releasee. The Debtor further waives and releases any defense, right of counterclaim, right of set-off, or deduction to the payment of the Prepetition Loan Obligations and the DIP Obligations, which the Debtor now has or may claim to have, directly or indirectly against the Releasees, arising out of, connected with or relating to any and all acts, omissions, or events occurring prior to the Court entering the Interim Order. No Control. Neither the DIP Lender nor the Prepetition Lender controls the Debtor or its properties or operations, has authority to determine the manner in which any of the Debtor's operations are conducted or is a control person or insider of the Debtor or any of its affiliates by virtue of any of the actions taken with respect to, in connection with, related to, or arising from this Interim Order, the DIP Facility, the DIP Loan Documents, the Prepetition Loan Facility, and/or the Prepetition Loan Documents.
363 Sale Milestones DIP Credit Agreement, Schedule 6.14	a. No later than three (3) Business Days after the Petition Date, or such later date as may be consented to by Bank, Borrower will have obtained entry of the Interim Order. b. No later than one (1) Business Day after the Petition Date, or such later date as may be consented to by Bank, Borrower will have filed the Sale Motion. c. No later than thirty (30) days after the Petition Date, or such later date as may be consented to by Bank, Borrower will have obtained entry of the Final Order. d. No later than twenty five (25) days after the Petition Date, or such later date as may be consented to by Bank, Borrower will have obtained entry of a Final Order approving bidding procedures for the Sale. e. No later than forty five (45) days after the Petition Date, or such later date as may be consented to by Bank, Borrower will have completed the marketing process described in the Sale Motion and selected a stalking horse bidder for an auction. f. No later than sixty (60) days after the Petition Date, or such later date as may be consented to by Bank, Borrower will have conducted the auction described in the Sale Motion. g. No later than sixty five (65) days after the Petition Date, or such later date as may be consented to by Bank, Borrower will have

	obtained entry of a Final Order approving the Sale. h. No later than five (5) days after the entry of the Final Order approving the sale, or such later date as may be consented to by Bank, Borrower will have consummated the Sale and use cash proceeds at the closing thereof to cause, without duplication, all Obligations and Prior Obligations to be paid in full, in cash, on a final and indefeasible basis, subject to the provisions of the Financing Order.
Modification of the Automatic Stay DIP Credit Agreement, § 9.1; Interim Order, ¶ 15	Pursuant to the Interim Order, the automatic stay imposed under section 362(a) of the Bankruptcy Code is vacated and modified to permit the Debtor to grant the liens and security interests to the DIP Lender and the Prepetition Lender contemplated by the Interim Order and the other DIP Loan Documents. Pursuant to the DIP Credit Agreement, upon five (5) Business Days' written notice (a "Remedies Notice") of the occurrence of an Event of Default (the "Remedies Notice Period"), in each case delivered in accordance with the Financing Order, unless the Bankruptcy Court orders otherwise, the automatic stay under Section 362 of the Bankruptcy Code will be automatically lifted to allow Bank to take any and all actions permitted by the Loan Documents and applicable law, as if no case were pending under the Bankruptcy Code. Prior to the expiration of the Remedies Notice Period, Borrower, United States Trustee, and/or the Creditors' Committee may contest the existence or continuation of an Event of Default, or Bank's right to assert remedies in connection with an Event of Default set forth in a Remedies Notice, by filing of an expedited motion in the Bankruptcy Court.
Indemnification DIP Credit Agreement, § 12.3; Interim Order ¶ 46	Pursuant to Section 12.3 of the DIP Credit Agreement, Borrower agrees to indemnify, defend and hold Bank and its directors, officers, employees, agents, attorneys, or any other Person affiliated with or representing Bank (each, an "Indemnified Person") harmless against: (i) all obligations, demands, claims, and liabilities (collectively, "Claims") claimed or asserted by any other party in connection with the transactions contemplated by the Loan Documents; and (ii) all losses or expenses (including Bank Expenses) in any way suffered, incurred, or paid by such Indemnified Person as a result of, following from, consequential to, or arising from transactions between Bank and Borrower contemplated by the Loan Documents (including reasonable attorneys' fees and expenses), except for Claims and/or losses directly caused by such Indemnified Person's gross negligence or willful misconduct. This Section 12.3 shall not apply with respect to Taxes other than any Taxes that represent losses, claims, damages, etc. arising from any non-Tax claim.

	Section 12.3 shall survive until all statutes of limitation with respect to the Claims, losses, and expenses for which indemnity is given shall have run. Debtor shall indemnify and hold harmless the DIP Lender and its successors, assigns, affiliates, parents, subsidiaries, partners, controlling persons, representatives, agents, attorneys, advisors, financial advisors, consultants, professionals, officers, directors, members, managers, shareholders and employees, past, present and future, and their respective heirs, predecessors, successors and assigns, in accordance with the DIP Loan Documents, which indemnification is hereby authorized and approved.

REQUIREMENTS UNDER LOCAL RULE 4001-2

31. Local Rule 4001-2(a) provides in pertinent part that:

(i) All Financing Motions must (a) recite whether the proposed form of order and/or underling cash collateral stipulation or loan agreement contains any provision of the type indicated below, (b) identify the location of any such provision in the proposed form of order, cash collateral stipulation and/or loan agreement and (c) justify the inclusion of such provision:

(A) Provisions that grant cross-collateralization protection (other than replacement liens or other adequate protection) to the prepetition secured creditors (i.e., clauses that secure prepetition debt by post-petition assets in which the secured creditor would not otherwise have a security interest by virtue of its prepetition security agreement or applicable law);

(B) Provisions or findings of fact that bind the estate or other parties in interest with respect to the validity, perfection or amount of the secured creditor's prepetition lien or the waiver of claims against the secured creditor without first giving parties in interest at least seventy-five (75) days from the entry of the order and the creditors' committee, if formed, at least sixty (60) days from the date of its formation to investigate such matters;

(C) Provisions that seek to waive, without notice, whatever rights the estate may have under 11 U.S.C. § 506(c);

(D) Provisions that immediately grant to the prepetition secured creditor liens on the debtor's claims and causes of action arising under 11 U.S.C. §§ 544, 545, 547, 548 and 549;

(E) Provisions that deem prepetition secured debt to be post-petition debt or that use prepetition loans from a prepetition secured creditor to pay part

> or all of that secured creditor's prepetition debt, other than as provided in 11 U.S.C. § 552(b);
>
> (F) Provisions that provide disparate treatment for the professionals retained by a creditors' committee from those professionals retained by the debtor with respect to a professional fee carve-out; and
>
> (G) Provisions that prime any secured lien without the consent of that lienor.
>
> (H) Provisions that seek to affect the Court's power to consider the equities of the case under 11 U.S.C. § 552(b)(1).

Del Bankr. Local Rule 4001-2(a)(i).

A. Cross-Collateralization

32. No provision of the DIP Credit Agreement or Interim Order grants cross-collateralization protection of the type contemplated by Local Rule 4001-2(a)(i)(A).

B. Stipulations and Challenge Provisions

33. The DIP Facility does not implicate Local Rule 4001-2(a)(i)(B), as the Interim DIP order provides parties in interest with 75 days from the entry of the Interim Order and the creditors' committee, if formed, 60 days from the date of its formation to challenge the liens of the Prepetition Secured Parties in the Prepetition Collateral. Interim Order, at ¶ 40.

C. Section 506(c) Waiver

34. Paragraph 41 of the Interim Order provides that:

> Subject to entry of the Final Order, (i) no costs or expenses of administration of this Chapter 11 Case, a successor case or any other future proceeding that may result therefrom, including liquidation in bankruptcy or other proceedings under the Bankruptcy Code shall be charged against or recovered from the DIP Collateral or the Prepetition Loan Collateral pursuant to section 506(c) of the Bankruptcy Code or any similar principle of law or equity and (ii) the Debtor (and any successor thereto, including any representatives thereof, including any trustee appointed in this Chapter 11 Case or any successor case) shall be deemed to have waived any rights, benefits or causes of action

> under section 506(c) of the Bankruptcy Code as they may related to or be asserted against the DIP Lender, the Prepetition Lender, the DIP Collateral or the Prepetition Loan Collateral. Nothing contained in this Interim Order, shall be deemed a consent by the DIP Lender or the Prepetition Lender to any charge, lien, assessment or claim against, or in respect of, the DIP Collateral or the Prepetition Loan Collateral under 506(c) of the Bankruptcy Code or otherwise.

35. As is customary for financing transactions of this type, the DIP Lender required the section 506(c) waiver in the Final order as a condition to providing the DIP Facility to the Debtor. Thus, the 506(c) waiver represents an integral, negotiated term of the DIP Facility, without which the Debtor would have been unable to obtain postpetition financing and is reasonable under the circumstances.

D. Liens on Proceeds of Avoidance Actions

36. Paragraph 3 of the Interim Order provide that DIP Collateral shall not include any "Bankruptcy Recoveries" (as defined in the Interim Order), but, subject to entry of the Final Order, the DIP Collateral shall include the proceeds of any Bankruptcy Recoveries. The DIP Lender required as a condition to providing the DIP Loans to the Debtor that the DIP Collateral include liens on the proceeds of avoidance actions as additional security for taking the risk of making the DIP Facility available to the Debtor. Accordingly, these provisions are appropriate to induce the DIP Lender to provide the financing necessary to fund this Chapter 11 Case.

E. Roll-up

37. As detailed above, in consideration for providing the DIP Facility, Sections 2.1.1(a) and 5.9 of the DIP Credit Agreement provide for a "roll-up" that implicates Local Rule 4001-2(a)(i)(E). Upon entry of the Final Order, the Debtor is required to repay in full its obligations under the Prepetition Loan Facility, in the total amount of $15,000,000, which

amount shall immediately thereafter be added to the DIP Obligations (the "Roll Up"). Roll-ups and repayments of prepetition debt are a common feature of debtor-in-possession financings, and have been approved in a variety of cases. *See In re Southcross Energy Partners, L.P.*, No. 19-10702 (MFW) (Bankr. D. Del. Apr. 2, 2019) (authorizing debtor-in-possession financing that included roll-up); *In re Checkout Holding Corp.*, No. 18-12794 (KG) (Bankr. D. Del. Dec. 13, 2018) (same); *In re Promise Healthcare Group LLC*, No. 18-12491 (CSS) (Bankr. D. Del. Nov. 6, 2018) (same); *In re Remington Outdoor Co., Inc.*, No. 18-10684 (BLS) (Bankr. D. Del. Mar. 28, 2018) (same); *In re The Bon-Ton Stores, Inc.*, No. 18-10248 (MFW) (Bankr. D. Del. Feb. 6, 2018) (same); *In re Charming Charlie LLC*, No. 17-12906 (CSS) (Bankr. D. Del. Dec. 13, 2017) (same); *In re American Apparel, Inc.*, No. 15-12055 (BLS) (Bankr. D. Del. Oct. 6, 2015) (same); *In re RadioShack Corp.*, No. 15-10197 (BLS) (Bankr. D. Del. Feb. 10, 2015) (same).

38. The Roll-Up is necessary because it was required by the DIP Lender as part of the DIP Facility; the DIP Lender would not have agreed to provide the new cash funding thereunder without it. In addition, the Roll-Up is reasonable because the one point five-to-one (1.5:1) ratio of Roll-Up Loans to "new money" is in line with or below other approved roll-up loans in this district. *See, e.g., In re Promise Healthcare Group LLC*, No. 18-12491 (CSS) (Bankr. D. Del. Nov. 6, 2018) (approving $85 million total financing, including an approximately $65 million roll-up, at a ratio of 3.25:1); *In re American Apparel, Inc.*, No. 15-12055 (D.I. 80) (Bankr. D. Del. Oct. 6, 2015) (approving $90 million total financing, including a $60 million roll-up, at a ratio of 2:1); *In re Cal Dive Intl, Inc.*, No. 15-10458 (D.I. 282) (Bankr. D. Del. Apr. 20, 2015) (approving $120 million total financing, including a $99.8 million roll-up, at a ratio of 4.9:1); *In re RadioShack Corp.*, No. 15-10197 (D.I. 947) (Bankr. D. Del. Mar. 12, 2015) (approving $285 million total financing, including a $250 million roll-up, at a ratio of

7.1:1); *In re AWI Delaware, Inc.,* No. 14-12092 (D.I. 279) (Bankr. D. Del. Oct. 6, 2014) (approving $193 million total financing, including a $125 million roll-up, at a ratio of 1.8:1); *In re NEC Holdings Corp.,* No. 10-11890 (D.I. 223) (Bankr. D. Del. Jul. 16, 2010) (approving $139 million total financing, including a $110 million roll-up, at a ratio of 3.79:1); *In re Real Mex Rests., Inc.,* No. 11-13122 (D.I. 392) (Bankr. D. Del. Nov. 9, 2011) (approving $49 million total financing, including a $37.5 million roll-up, at a ratio of 3.26:1); *In re Pacific Energy Res., Ltd.,* No. 09-10785 (D.I. 415) (Bankr. D. Del. Jun. 4, 2009) (approving $183 million total financing, including a $143 million roll-up, at a ratio of 3.58:1).

F. Creditors' Committee Professionals

39. Paragraph 38 of the Interim Order includes a carve out for, among other things, subject to the Budget, all accrued and unpaid fees, disbursements, costs and expenses incurred by (i) those persons or firms retained by the Debtor pursuant to sections 327, 328 or 363 of the Bankruptcy Code (collectively, the "Borrower Case Professionals") and those persons or firms retained by an official committee of unsecured creditors (a "Creditors' Committee") pursuant to section 328 or 1103 of the Bankruptcy Code (collectively, the "Committee Case Professionals" and, together with the Borrower Case Professionals, the "Case Professionals") in accordance with the Budget and allowed by the Bankruptcy Court at any time (such accrued amounts, the "Case Professional Fees and Expenses") (provided, that the term "Case Professional Fees and Expenses" shall not include any advisory, success, transaction, completion or other fees and expenses payable or paid to the Investment Banker) (excluding any success or completion fees payable to the Committee Case Professionals) incurred at any time prior to delivery by the DIP Lender of a Carve Out Trigger Notice (as defined herein), plus Case Professional Fees and Expenses (excluding any success or completion fees payable to the

Committee Case Professionals) in an aggregate amount not to exceed the applicable Carve Out Cap (as defined herein) incurred after delivery by the DIP Lender of the Carve Out Trigger Notice, plus all earned and unpaid advisory, success, transaction, completion or other fees and expenses payable to the Investment Banker pursuant to the Investment Banker Agreement incurred at any time that are allowed by the Bankruptcy Court. "Carve Out Cap" means an aggregate amount of Case Professional Fees and Expenses in accordance with the Budget not to exceed $250,000.00; provided, that the Carve Out Cap shall be reduced on a dollar-for-dollar basis by any payments of any Case Professional Fees and Expenses made after delivery of the Carve Out Trigger Notice in respect of fees and expenses incurred after delivery of the Carve Out Trigger Notice.

40. In addition to the protections afforded the Committee above, the Budget provides $450,000 to pay the fees and expenses of counsel and a financial advisor to any official committee of unsecured creditors in this Chapter 11 Case (if one is appointed). Naturally, the amounts allocated to the Debtor's professionals are higher than those allotted to professionals retained by any Committee because the Debtor's professionals are expected to perform significantly more work in connection with this Chapter 11 Case.

41. The Debtor submits that the treatment of professionals is substantially similar (giving consideration to the differing duties of the Debtor and Committee) and, therefore, there is no disparate treatment of any Committee professionals. In particular, each professional employed by the Debtor and any Committee is included in the Budget and Carve-Out protections in an amount that is commensurate with such professional's anticipated workload in this Chapter 11 Case. In recognition of the higher workload expected of the Debtor's professionals, the

amounts allotted to them are higher than those allotted to professionals retained by any Committee.

G. Priming Liens

42. Paragraph 3 of the Interim Order provides that:

> Pursuant to section 364(d)(1) of the Bankruptcy Code, the DIP Obligations are secured by a perfected first priority priming security interest and lien on all DIP Collateral (such security interest and lien, the "Priming Lien"), to the extent that such property and assets are subject to liens that secure the obligations of such Debtor under the Prepetition Loan Documents (collectively, the "Primed Liens"). The Priming Lien shall be senior (i) in all respects to the liens of the Prepetition Lenders under the Prepetition Loan Agreement and the related security documents and (ii) to any liens granted to provide adequate protection in respect of any of the Primed Liens. The Primed Liens shall be primed by and made subject and subordinate to the Priming Liens.

43. The Priming Liens are a necessary component of the DIP Facility, without which the DIP Lender would not have extended the DIP Facility. Priming Liens are a common feature of postpetition financing transactions and are expressly authorized by section 364(d)(1) of the Bankruptcy Code.

H. "Equities of the Case" Exception

44. The Interim Order provides that "subject to entry of the Final Order, the DIP Lender and the Prepetition Lender shall each be entitled to all of the rights and benefits of section 552(b) of the Bankruptcy Code, and the 'equities of the case' exception under section 552(b) of the Bankruptcy Code shall not apply to the DIP Lender or the Prepetition Lender in any respect." Interim Order, at ¶ 44.

45. This provision is common in postpetition financing transactions and, in this case, forms an integral component of the bargain achieved between the DIP Lender and the Debtor with respect to the DIP Facility following intensive negotiations.

46. Accordingly, the facts and circumstances of this Chapter 11 Case justify the inclusion of the above terms that require disclosure under Local Rule 4001-2, and these terms of the DIP Facility should be approved.

BASIS FOR RELIEF REQUESTED

A. The Debtor's Need for Postpetition Financing

47. The Debtor has a critical need for postpetition financing. The relief requested herein will enable the Debtor to continue its ordinary course, day-to-day operations and fund a sales process that will maximize the value of the Debtor's estate for the benefit of all stakeholders. Access to credit under the DIP Facility is necessary to provide working capital during the pendency of this Chapter 11 Case and provide the Debtor's employees, vendors and other key constituencies with confidence that the Debtor has sufficient resources available to maintain its operations in the ordinary course. Absent this new liquidity, not only would the Debtor's ability to maximize the value of its estate through its intended sale process be jeopardized, but the Debtor almost certainly would be forced to cease its business operations, file a chapter 7 liquidation case, and lose the going-concern value of its business to the detriment of all parties in interest.

48. Section 364 of the Bankruptcy Code "provides bankruptcy courts with the power to authorize postpetition financing for a Chapter 11 debtor-in-possession." *See In re Defender Drug Stores, Inc.*, 126 B.R. 76, 81 (Bankr. D. Ariz. 1991). "Having recognized the natural reluctance of lenders to extend credit to a company in bankruptcy, Congress designed [section] 364 to provide 'incentives to the creditor to extend postpetition credit.'" *Id.* In

particular, section 364(c) of the Bankruptcy Code establishes the conditions under which a debtor may obtain certain types of secured credit and provides, in pertinent part, as follows:

> (c) If the trustee is unable to obtain unsecured credit allowable under section 503(b)(1) of this title as an administrative expense, the court, after notice and a hearing, may authorize the obtaining of credit or the incurring of debt —
>
> (1) with priority over any or all administrative expenses of the kind specified in section 503(b) or 507(b) of this title;
>
> (2) secured by a lien on property of the estate that is not otherwise subject to a lien; or
>
> (3) secured by a junior lien on property of the estate that is subject to a lien.

11 U.S.C. § 364(c).

49. Courts have articulated a three-part test to determine whether a debtor may obtain financing under section 364(c) of the Bankruptcy Code:

> (a) the debtor is unable to obtain unsecured credit under section 364(b) (i.e., by granting a lender administrative expense priority);
>
> (b) the credit transaction is necessary to preserve the assets of the estate; and
>
> (c) the terms of the transaction are fair, reasonable and adequate, given the circumstances of the debtor and the proposed lender.

See In re Los Angeles Dodgers LLC, 457 B.R. 308, 312 (Bankr. D. Del. 2011); *In re Aqua Assocs.*, 123 B.R. 192, 195-96 (Bankr. E.D. Pa. 1991) (applying the above factors and holding that "[o]btaining credit should be permitted not only because it is not available elsewhere, which could suggest the unsoundness of the basis for the use of the funds generated by credit, but also because the credit acquired is of significant benefit to the debtor's estate and the terms of the proposed loan are within the bounds of reason, irrespective of the inability of the debtor to obtain comparable credit elsewhere"); *In re Ames Dep't Stores*, 115 B.R. 34, 37-39 (Bankr. S.D.N.Y. 1990).

iv. Credit Was Not Obtainable on Better Terms

50. To demonstrate that the credit required is not obtainable on an unsecured basis or on better terms, a debtor need only demonstrate "by a good faith effort that credit was not available without" the protections of sections 364(c) of the Bankruptcy Code. *Bray v. Shenandoah Fed. Sav. and Loan Ass'n (In re Snowshoe Co.)*, 789 F.2d 1085, 1088 (4th Cir. 1986). Thus, "[t]he statute imposes no duty to seek credit from every possible lender before concluding that such credit is unavailable." *Id.*; *see also Ames*, 115 B.R. at 40 (holding that debtor made a reasonable effort to secure financing where it approached four lending institutions, was rejected by two, and selected the least onerous financing option from the remaining two lenders). Moreover, where few lenders are likely to be able and willing to extend the necessary credit to the debtor, "it would be unrealistic and unnecessary to require [the debtor] to conduct an exhaustive search for financing." *In re Sky Valley, Inc.*, 100 B.R. 107, 113 (Bankr. N.D. Ga. 1988), *aff'd sub nom*., *Anchor Sav. Bank FSB v. Sky Valley, Inc.*, 99 B.R. 117, 120 n.4 (N.D. Ga. 1989).

51. As discussed above, to obtain postpetition financing, the Debtor and its prior advisors approached numerous sophisticated, commercial entities, including potential strategic buyers and principal creditors of the Debtor, about providing debtor-in-possession financing in conjunction with a sale or other restructuring transaction. None of those parties was willing to make a postpetition loan on an unsecured basis. In fact, other than the DIP Lender, no lender was willing to make a postpetition loan at all, even on a priming basis, in an amount necessary for the Debtor's business operations and other financing needs.

52. Given the DIP Lender's existing prepetition debt, the DIP Lender was incentivized and agreed to make a postpetition loan to fund the Debtor's business through a sale process, but would do so only on the terms set forth in the DIP Loan Documents, which includes

the provision of priming liens. As such, when considering all of the factors, including the avoidance of an expensive and drawn out priming, or cash collateral, fight with the Prepetition Lender, the Debtor concluded that the DIP Facility was its best financing alternative to achieve its goals - the sale of its assets at the highest price in order to provide the best possible recoveries to its stakeholders. The Debtor's efforts to seek necessary postpetition financing satisfy the statutory requirements of section 364 of the Bankruptcy Code. *See*, *e.g.*, *In re 495 Cent. Park Ave. Corp.*, 136 B.R. 626, 630 (Bankr. S.D.N.Y. 1992) (debtor seeking financing under section 364(c) of the Bankruptcy Code made acceptable attempt to obtain less onerous financing by speaking to several lenders that denied the loan request); *Ames*, 115 B.R. at 40.

v. The DIP Facility is Necessary to Preserve Assets of the Estate

53. It is essential that the Debtor obtain the financing required to continue, among other things, the orderly operation of the Debtor's business,satisfy certain working capital requirements of the Debtor's business, and fund the Debtor's sale process. The DIP Facility is essential to provide the Debtor's various stakeholders, including employees, vendors, service providers and other key constituencies, with confidence in the Debtor's ability to continue operating while it pursues a sale that is intended to maximize recoveries.

54. The success of this Chapter 11 Case depends, among other things, on (a) the Debtor's ability to meet its day-to-day working capital requirements without interruption or delay and (b) the confidence of the Debtor's stakeholders. If the proposed DIP Facility is denied, the Debtor almost certainly will experience business disruptions and the Debtor's ability to sell its businesses as a going-concern, and thereby maximize stakeholder value, will be damaged irreparably. In addition to ensuring that the Debtor can fund its operations, the requested availability under the DIP Facility will help provide assurances to the Debtor's

vendors and employees that they will be paid for postpetition services. Approval of the requested borrowing under the DIP Facility is thus crucial to maximizing the value of the Debtor's estate.

vi. The Terms of the DIP Facility Are Fair, Reasonable and Appropriate

55. As discussed above, the terms and conditions of the proposed DIP Facility are fair and reasonable under the circumstances and avoid priming and cash collateral disputes with the Prepetition Lender. The interest rates and other covenants negotiated with the DIP Lender are reasonable under the circumstances, and the terms of the DIP Facility were intensively negotiated.

vii. Application of the Business Judgment Standard

56. As described above, after appropriate investigation and analysis, the Debtor's management has concluded that the DIP Facility provides the best alternative available in the circumstances of this case. Bankruptcy courts routinely defer to a debtor's business judgment on most business decisions, including the decision to borrow money, unless such decision is arbitrary and capricious. *See In re Trans World Airlines, Inc.*, 163 B.R. 964, 974 (Bankr. D. Del. 1994) (noting that the interim loan, receivables facility and asset-based facility were approved because they "reflect[ed] sound and prudent business judgment on the part of TWA . . . [were] reasonable under the circumstances and in the best interest of TWA and its creditors"); *cf. Group of Inst. Investors v. Chicago Mil. St. P. & Pac. Ry.*, 318 U.S. 523, 550 (1943) (holding that decisions regarding the rejection or assumption of a lease is left to the business judgment of the debtor). In fact, "[m]ore exacting scrutiny would slow the administration of the Debtor's estate and increase its cost, interfere with the Bankruptcy Code's provision for private control of administration of the estate, and threaten the court's ability to control a case impartially." *Richmond Leasing Co. v. Capital Bank, N.A.*, 762 F.2d 1303, 1311 (5th Cir. 1985).

57. The Debtor has exercised sound business judgment in determining that this postpetition credit facility is both necessary and appropriate and has satisfied the legal prerequisites to incur debt under the DIP Facility. The terms of the DIP Facility are fair and reasonable under the circumstances, and are in the best interests of the Debtor's estate. The Debtor has reason to believe that the funds made available through the DIP Facility will be adequate to pay all administrative expenses due and payable during the postpetition periods and fund the sale of its assets. Accordingly, the Bankruptcy Court should grant the Debtor authority to enter into the DIP Facility and obtain funds from the DIP Lender on the priming secured and administrative "Super-priority" bases described above, pursuant to section 364(c) of the Bankruptcy Code.

B. Cash Collateral and Adequate Protection

58. The Prepetition Lender has consented to the Debtor's continued use of Cash Collateral and to the proposed adequate protection described herein and proposed in the DIP Credit Agreement. The Prepetition Lender is entitled, under sections 363(e) and 364(d)(1)(B) of the Bankruptcy Code, to adequate protection of its interest in the Prepetition Liens, including the Cash Collateral, for the aggregate diminution in the value of its interest in the Prepetition Collateral, including the Cash Collateral, by reason of, among other things, (i) the imposition of the automatic stay under section 362 of the Bankruptcy Code, (ii) the use of the Prepetition Lender's Cash Collateral; and (iii) the use, sale or lease of Prepetition Collateral pursuant to section 363(a) of the Bankruptcy Code. Accordingly, the Debtor has agreed, subject to the Bankruptcy Court's approval, to grant to the Prepetition Lender the following adequate protection for any diminution in the value of its interest in the Prepetition Collateral from the Petition Date:

(a) Adequate Protection Liens. Effective as of the Petition Date and in each case perfected without the necessity of the execution by the Debtor (or recordation or other filing) of security agreements, control agreements, pledge agreements, financing statements, mortgages or other similar documents, or by possession or control, the following security interests and liens are hereby granted to the Prepetition Lender: A valid, binding, continuing, enforceable, fully-perfected replacement (and if applicable, new) security interest in and lien on the DIP Collateral (the "Adequate Protection Liens"). The Adequate Protection Liens are junior to the liens securing the DIP Facility.

(b) Adequate Protection Claims. An allowed administrative expense claim against the Debtor with priority over all other administrative claims in the Case (subject only to the Carve Out and the KEIP/KERP Plan Amount), including all claims of the kind specified under sections 503(b) and 507(b) of the Bankruptcy Code (the "Adequate Protection Claims"), which administrative claim shall have recourse to and be payable from all prepetition and postpetition property of the Debtor, excluding the Carve Out and the KEIP/KERP Plan Amount. The Adequate Protection Claims are junior to the DIP Superpriority Claims.

(c) Payment of Interest. As additional adequate protection, so long as any Prepetition Loan Obligations remain outstanding, the Debtor is authorized and directed to pay interest on the Prepetition Loan Obligations in accordance with the Prepetition Loan Documents.

(d) Fees and Expenses. As additional adequate protection, the Debtor is authorized and directed to pay: (i) immediately upon the entry of the Interim Order, the reasonable and documented professional fees, expenses, and disbursements (including, but not limited to, the fees, expenses and disbursements of counsel and other third-party consultants, including financial advisors) incurred by the Prepetition Lender arising prior to the Petition Date; and (ii) in regular course, all reasonable and documented out-of-pocket fees and expenses incurred by the Prepetition Lender arising on or after the Petition Date. The Prepetition Lender (and each of its professionals) shall not be required to comply with U.S. Trustee fee guideline or file applications or motions with, or obtain approval of, the Court for the payment of any of their out-of-pocket costs, fees, expenses, disbursements and other charges.

Interim Order, at ¶ 9.

C. Additional Relief to be Sought at Final Hearing

59. The Debtor also intends to seek the following relief in connection with the DIP Facility to be approved at the Final Hearing and pursuant to the Final Order:

> (A) Subject to entry of the Final Order, the DIP Lender and the Prepetition Lender shall not be subject to the equitable doctrine of 'marshaling' or any other similar doctrine with respect to any of the DIP Collateral or the Prepetition Loan Collateral, as the case may be, and proceeds shall be received and applied pursuant to this Interim Order and the DIP Loan Documents notwithstanding any other agreement or provision to the contrary
>
> (B) Subject to entry of the Final Order, the DIP Lender and the Prepetition Lender shall have the unqualified right to credit bid (i) up to the full amount of their respective obligations in any sale of the DIP Collateral (or any part thereof), (ii) with respect to the Prepetition Lender, any Prepetition Loan Obligations or the Adequate Protection Claim, and (iii) any unpaid amounts due and owing to the DIP Lender or the Prepetition Lender under this Interim Order, without the need for further Court order authorizing the same, and whether such sale is effectuated through section 363 or 1129 of the Bankruptcy Code, by a chapter 7 trustee under section 725 of the Bankruptcy Code, or otherwise.
>
> (C) Subject to entry of the Final Order, the Debtor will seek approval of the Final Term Loan Commitment Fee, which shall be deemed earned as of entry of the Final DIP Order and shall be due at the Term Loan Maturity Date; provided, that the Term B Final Payment (as defined in the Prior Loan Agreement) shall be waived as of the entry of the Final Order (which, for the avoidance of doubt, shall authorize the Borrower's repayment in full of the Prior Obligations and approve the Final Term Loan Commitment Fee).

Interim Order, at ¶¶ 43, 47.

60. The Debtor submits that the foregoing requested relief is customary for debtor in possession financings of this nature and should be granted on a final basis pursuant to the Final Order.

D. Approval of the DIP Facility on an Interim Basis Is Necessary to Prevent Immediate and Irreparable Harm

61. Bankruptcy Rule 4001(c)(2) governs the procedures for obtaining authorization to obtain postpetition financing and provides, in relevant part:

> The court may commence a final hearing on a motion for authority to obtain credit no earlier than 14 days after service of the motion. If the motion so requests, the court may conduct a hearing before such 14 day period expires, but the court may authorize the obtaining of credit only to the extent necessary to avoid immediate and irreparable harm to the estate pending a final hearing.

Fed. R. Bankr. P. 4001(c)(2).

62. In examining requests for interim relief under the immediate and irreparable harm standard, courts apply the same business judgment standard applicable to other business decisions. *See, e.g., Ames Dep't Stores*, 115 B.R. at 36; *Simasko*, 47 B.R. at 449. After the 14-day period, the request for financing is not limited to those amounts necessary to prevent the destruction of the debtor's business, and the debtor is entitled to borrow those amounts that it believes are prudent to the operation of its business. *Ames Dep't Stores*, 115 B.R. at 36.

63. Immediate and irreparable harm would result if the relief requested herein is not granted on an interim basis. As described in detail herein and the First Day Declaration, the Debtor has an immediate need to obtain access to liquidity to, among other things, continue to operate is business, maintain key business relationships, make payroll and satisfy other working capital and operational needs. Funding each of these expenditures is necessary to preserve and maintain the value of the Debtor's estate for the benefit of all parties in interest and to continue to be in a position to provide ZEMDRI to patients who need it. Approval of the DIP Facility will ensure the Debtor is able to maintain its operations, pursue the Chapter 11 Case, and maximize the value of its estate for the benefit of all stakeholders. Absent authorization to immediately use a portion of the DIP Facility and Cash Collateral, the Debtor's estate and its creditors would suffer immediate and irreparable harm.

64. The crucial importance of a debtor's ability to secure postpetition financing repeatedly has been recognized in this district. Accordingly, the Debtor requests that,

pending the Final Hearing, the Bankruptcy Court schedule an interim hearing as soon after the Petition Date as is practical to consider the Debtor's request for authorization to obtain interim financing and the dollar-for-dollar roll-up during the interim period under the DIP Facility.

E. Good Faith

65. The terms and conditions of the DIP Facility are fair and reasonable and were negotiated by the parties in good faith and at arms' length. Therefore, the DIP Lender should be afforded the benefits of section 364(e) of the Bankruptcy Code to the extent any or all of the provisions of the DIP Facility, or any order of this Bankruptcy Court pertaining thereto, are hereafter modified, vacated, stayed or terminated by subsequent order of this or any other court. *See* Interim Order, at ¶ J, 51.

F. Modification of the Automatic Stay is Warranted

66. The Interim Order provides that the automatic stay imposed under section 362(a) of the Bankruptcy Code is vacated and modified to (i) permit the Debtor to grant the liens and security interests to the DIP Lender and the Prepetition Lender contemplated by the Interim Order and the other DIP Loan Documents, and (ii) to the extent necessary to permit the DIP Lender to exercise, upon the occurrence and during the continuation of any DIP Event of Default, all rights and remedies provided for in the DIP Credit Agreement, and to take various actions without further order of or application to the Bankruptcy Court. Interim Order, at ¶ 15.

67. The Interim Order also proposes that upon the occurrence and during the continuance of a Termination Event (as defined in the Interim Order), five (5) business days after the delivery, by the DIP Lender to the Debtor or its counsel (via email or otherwise), of a written notice (the "Remedies Notice") of the occurrence of a Termination Event (the "Remedies Notice Period"), unless such Termination Event is cured by the Debtor or waived by the DIP Lender, the DIP Lender may (1) declare (a) the commitment of the DIP Lender as to the DIP Facility to be

terminated, whereupon such commitments and obligation shall be terminated; (b) all DIP Obligations immediately due and owing, without presentment, demand, protest or other notice of any kind, all of which are hereby expressly waived by the Debtor, whereupon all DIP Obligations shall be immediately due and payable; and (c) subject to the Carve Out and the KEIP/KERP Plan Amount, that the Debtor shall have no right to request or use any proceeds of any DIP Extensions of Credit, other than towards the satisfaction of the DIP Obligations; and (2) exercise all rights and remedies provided in this Interim Order and the DIP Loan Documents, as applicable. Immediately upon the delivery of the Remedies Notice, to the extent not previously provided, the Debtor shall provide a line-by-line itemization of the Budget to the DIP Lender. During the Remedies Notice Period, (i) the Debtor and DIP Lender shall have the rights and obligations set forth in, and shall act in accordance with, section 9.1 of the DIP Credit Agreement; and (ii) the Debtor, United States Trustee, and/or Committee may contest the existence or continuation of an Event of Default, or the DIP Lender's right to assert remedies in connection with an Event of Default set forth in a Remedies Notice, by filing of an expedited motion in the Bankruptcy Court. Nothing in the DIP Loan Documents or the Interim Order shall limit the ability of Borrower and other parties-in-interest to timely request any such expedited hearing on a motion seeking such a finding, and the DIP Lender consents to the conduct of such expedited hearing (but not to the relief being sought therein).

68. Stay modification provisions of this sort are ordinary and usual features of debtor in possession financing facilities and, in the Debtor’s business judgment, are reasonable under the present circumstances. Accordingly, the Bankruptcy Court should modify the automatic stay to the extent contemplated under the DIP Credit Agreement and the proposed DIP Orders.

G. Request for Final Hearing

69. Pursuant to Bankruptcy Rules 4001(b)(2) and (c)(2) and Local Rule 4001-2(c), the Debtor requests that the Bankruptcy Court set a date for the final hearing on or prior to May 6, 2019, and fix the time and date prior to the final hearing for parties to file objections to this Motion.

H. Waiver of Bankruptcy Rules Regarding Notice and Stay of an Order

70. To implement the foregoing successfully, the Debtor seeks a waiver of the notice requirements under Bankruptcy Rule 6004(a), the twenty-one-day stay provided for by Bankruptcy Rule 6003(b), and the fourteen-day stay provided for by Bankruptcy Rule 6004(h).

NOTICE

79. Notice of this Motion, the relief requested herein, and the Interim Hearing has been served by the Debtor on (a) the Office of the United States Trustee for the District of Delaware; (b) the Debtor's top twenty (20) unsecured creditors; (c) SVB, in its capacity as Prepetition Lender and DIP Lender; (d) all other known holders of prepetition liens, encumbrances or security interests against the Debtor's property; (e) the Internal Revenue Service; (f) the Securities and Exchange Commission; (g) the Delaware Secretary of State; (h) the Delaware Secretary of the Treasury; (i) any party that has requested notice pursuant to Bankruptcy Rule 2002; and (j) any other party required to be provided notice under Local Rule 9013-1(m). As this Motion is seeking "first day" relief, within two (2) Business Days after entry of this Interim Order, the Debtor will serve copies of the Motion and any order entered in respect to the Motion as required by Local Rule 9013-l(m). Under the circumstances, notice was sent under Bankruptcy Rules 4001(b), 4001(c) and 4001(d), Local Bankruptcy Rule 4001-2 and section 102(1) of the Bankruptcy Code in light of the emergency nature of the interim relief

requested in the Motion, and no further notice of the relief sought at the Interim Hearing and the relief granted herein is necessary or required.

NO PRIOR REQUEST

71. No prior motion for the relief requested herein has been made to this or any other court.

WHEREFORE, the Debtor respectfully requests that the Bankruptcy Court (a) enter the Interim Order, substantially in the form annexed hereto as **Exhibit A**; and (b) grant to the Debtor such other and further relief as the Bankruptcy Court may deem proper.

[*Signature Page Follows*]

April 15, 2019
Wilmington, Delaware

MORRIS, NICHOLS, ARSHT & TUNNELL LLP

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Proposed Counsel for Debtor and Debtor in Possession

EXHIBIT A

PROPOSED INTERIM 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]	

INTERIM ORDER (I) AUTHORIZING ACHAOGEN, INC. TO OBTAIN POSTPETITION SECURED FINANCING, (II) GRANTING LIENS AND PROVIDING SUPERPRIORITY ADMINISTRATIVE EXPENSE CLAIMS, (III) AUTHORIZING THE USE OF CASH COLLATERAL, (IV) GRANTING ADEQUATE PROTECTION, (V) MODIFYING THE AUTOMATIC STAY, (VI) SCHEDULING A FINAL HEARING, AND (VII) GRANTING RELATED RELIEF

Upon the motion (the "Motion") of Achaogen, Inc., as a debtor and debtor in possession in the above-captioned case (the "Debtor"), for entry of an interim order (this "Interim Order") and a final order (the "Final Order") under sections 105, 361, 362, 363(c), 363(e), 364(c), 364(d)(1), 364(e), and 507 of title 11 of the United States Code, 11 U.S.C. §§101-1532 (as amended, the "Bankruptcy Code"), rules 2002, 4001, 6004, and 9014 of the Federal Rules of Bankruptcy Procedure (as amended, the "Bankruptcy Rules"), and rules 4001-1 and 9013-1(m) of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware (the "Bankruptcy Local Rules"), seeking *inter alia:*

(a) authorization for the Debtor to obtain postpetition financing in the form of a term loan facility (the "DIP Facility") as set forth in that certain Senior Secured Superpriority Debtor-in-Possession Loan and Security Agreement (the "DIP Credit Agreement")[2] attached hereto as **Exhibit 1** (as amended, supplemented, or otherwise modified from time to time), by and among

[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 have the meanings ascribed to them in the DIP Credit Agreement.

the Debtor and Silicon Valley Bank (in such capacity, the "DIP Lender"), up to the aggregate principal amount of Twenty Five Million Dollars ($25,000,000), subject to the terms of this Interim Order, the Final Order, and all other agreements, documents, instruments, delivered or executed in connection therewith, as hereafter amended, supplemented or otherwise modified from time to time, including the Budget (as defined below) (collectively, together with the DIP Credit Agreement, the "DIP Loan Documents");

(b) authorizing the continued use of Cash Collateral (as defined below) by the Debtor effective as of the Petition Date;

(c) subject to the Carve Out and KEIP/KERP Plan Amount (as each such term is defined below), granting to the DIP Lender on account of the DIP Facility and all obligations owing thereunder and under, or secured by, the DIP Loan Documents (collectively, and including all "Obligations" as defined in the DIP Credit Agreement, the "DIP Obligations") allowed superpriority administrative expense claim status in the Debtor's chapter 11 case (the "Chapter 11 Case");

(d) subject to the Carve Out and KEIP/KERP Plan Amount, granting to the DIP Lender automatically perfected security interests in and liens on the DIP Collateral (as defined below) to the extent set forth herein;

(d) vacating and modifying the automatic stay imposed by section 362 of the Bankruptcy Code to the extent necessary to implement and effectuate the terms and provisions of this Interim Order and the Final Order, in each case, to the extent set forth herein;

(e) subject to the Carve Out and KEIP/KERP Plan Amount, granting adequate protection to the Prepetition Lender (as defined below);

(f) scheduling a final hearing (the "Final Hearing") to consider entry of the Final Order; and

(g) granting related relief.

The Court having found that the relief requested in the Motion is in the best interests of the Debtor, its estate, its creditors, and other parties in interest; and the Court having reviewed the Motion and having heard the statements in support of the relief requested therein at a hearing before the Court on [--] (the "Interim Hearing"); and the Court having determined that the legal and factual bases set forth in the Motion, the *Declaration of Blake Wise in Support of First Day Relief* (the "First Day Declaration"); and at the Interim 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 FOUND AND CONCLUDED THAT:**

A. Disposition. The Motion is granted on an interim basis in accordance with the terms of this Interim Order. Any objections, reservations of rights, and/or other statements with respect to the Motion with respect to the entry of this Interim Order that have not been withdrawn, waived, or settled are hereby denied and overruled on the merits.

B. Commencement of Chapter 11 Case. On April 15, 2019 (the "Petition Date"), the Debtor filed with this Court a voluntary petition for relief under chapter 11 of the Bankruptcy Code. The Debtor is continuing to operate its business as a debtor and debtor in possession under sections 1107 and 1108 of the Bankruptcy Code. No official committee of unsecured creditors (the "Committee") or chapter 11 trustee has been appointed in the Chapter 11 Case.

C. Jurisdiction and Venue. This Court has jurisdiction over the Chapter 11 Case, the Motion, and the parties and property affected hereby pursuant to 28 U.S.C. §§ 157(b) and 1334. Consideration of the Motion constitutes a core proceeding pursuant to 28 U.S.C. § 157(b)(2).

The Court may enter a final order consistent with Article III of the United States Constitution. Venue for the Chapter 11 Case in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409. The predicates for the relief sought herein are sections 105, 361, 362, 363(c), 363(e), 364(c), 364(d)(1), 364(e), and 507 of the Bankruptcy Code, Bankruptcy Rules 2002, 4001, 6004 and 9014, and Bankruptcy Local Rules 4001-1 and 9013-1(m).

D. Adequate Notice. On the Petition Date, the Debtor filed the Motion with this Court pursuant to Bankruptcy Rules 2002, 4001, and 9014, and represents that it provided notice of the Motion and the Interim Hearing by electronic mail, facsimile, hand delivery, or overnight delivery to the following parties and/or their respective counsel as indicated below (collectively, the "Notice Parties"): (a) the Office of the United States Trustee for the District of Delaware; (b) the Debtor's top twenty (20) unsecured creditors; (c) SVB, in its capacity as Prepetition Lender and DIP Lender; (d) all other known holders of prepetition liens, encumbrances or security interests against the Debtor's property; (e) the Internal Revenue Service; (f) the Securities and Exchange Commission; (g) the Delaware Secretary of State; (h) the Delaware Secretary of the Treasury; (i) any party that has requested notice pursuant to Bankruptcy Rule 2002; and (j) any other party required to be provided notice under Local Rule 9013-1(m).

E. Debtor's Stipulations on the Prepetition Obligations. The Debtor acknowledges, admits, represents, stipulates, and agrees that:

(i) *Prepetition Loan Agreement*: As of the Petition Date, the Debtor was indebted and liable, without defense, counterclaim, or offset of any kind to the lenders under that certain Loan and Security Agreement, dated as of February 26, 2018 (as heretofore amended, supplemented, or otherwise modified, including by that certain Waiver and First Amendment to Loan and Security Agreement, dated as of April 12, 2019, the "Prepetition Loan Agreement" and,

together with all other agreements, documents and instruments executed and/or delivered in connection therewith, as all of the same have been supplemented, modified, extended, renewed, restated, and/or replaced at any time prior to the Petition Date, the "Prepetition Loan Documents"), among the Debtor, and Silicon Valley Bank (the "Prepetition Lender") in the aggregate principal amount of $15,000,000.00 (the "Prepetition Loan Facility") as of the Petition Date. All obligations of the Debtor arising under the Prepetition Loan Agreement or any other Prepetition Loan Documents, including under the Prepetition Loan Facility, shall hereinafter be referred to collectively as the "Prepetition Loan Obligations". Pursuant to the Final Order and as set forth herein, all of the outstanding Prepetition Loan Obligations will be repaid with proceeds of the DIP Facility upon entry of the Final DIP Order.

(ii) The liens and security interests securing the Prepetition Loan Obligations are referred to herein as the "Prepetition Loan Liens" and the collateral to which such Prepetition Loan Liens attach, the "Prepetition Loan Collateral".

(iii) *Value of the Prepetition Collateral*. At all times prior to the Petition Date, the aggregate value of the Prepetition Loan Collateral exceeded the aggregate amount of the Prepetition Loan Obligations.

(iv) *No Claims*. The Debtor has no valid claims (as such term is defined in section 101(5) of the Bankruptcy Code) or causes of action against the Prepetition Lender with respect to the Prepetition Loan Documents, the Prepetition Loan Obligations, the Prepetition Loan Liens, any prior financing transactions, or otherwise, whether arising at law or at equity, including, without limitation, any challenge, recharacterization, subordination, avoidance, or other claims arising under or pursuant to sections 105, 510, 541, or 542 through 553, inclusive, of the Bankruptcy Code.

(v) *Release.* Subject to entry of the Final Order, the Debtor hereby stipulates and agrees that it forever, unconditionally and irrevocably releases, discharges and acquits the Prepetition Lender and each of its successors, assigns, affiliates, subsidiaries, parents, officers, shareholders, directors, employees, attorneys, and agents, past, present, and future, and their respective heirs, predecessors, successors, and assigns (collectively, the "Releasees") of and from any and all claims, controversies, disputes, liabilities, obligations, demands, damages, expenses (including, without limitation, reasonable attorneys' fees), debts, liens, actions, and causes of action of any and every kind whatsoever, whether arising in law or otherwise, and whether or not known or matured, arising out of or relating to, as applicable, the DIP Facility, the DIP Loan Documents, the Prepetition Loan Facility, and the Prepetition Loan Documents, any prior financing transaction between the Debtor and any Releasee, and/or the transactions contemplated hereunder or thereunder including, without limitation, (x) any so-called "lender liability" or equitable subordination claims or defenses, (y) any and all claims and causes of action arising under the Bankruptcy Code, and (z) any and all claims and causes of action with respect to the validity, priority, perfection or avoidability of the liens or claims of the DIP Lender and the Prepetition Lender; provided that the forgoing shall not release any claims against a Releasee that a court of competent jurisdiction determines results primarily from the bad faith, gross negligence, or willful misconduct of such Releasee. The Debtor further waives and releases any defense, right of counterclaim, right of set-off, or deduction to the payment of the Prepetition Loan Obligations and the DIP Obligations, which the Debtor now has or may claim to have, directly or indirectly against the Releasees, arising out of, connected with or relating to any and all acts, omissions, or events occurring prior to the Court entering this Interim Order.

(vi) *No Control.* Neither the DIP Lender nor the Prepetition Lender controls the Debtor or its properties or operations, has authority to determine the manner in which any of the Debtor's operations are conducted or is a control person or insider of the Debtor or any of its affiliates by virtue of any of the actions taken with respect to, in connection with, related to, or arising from this Interim Order, the DIP Facility, the DIP Loan Documents, the Prepetition Loan Facility, and/or the Prepetition Loan Documents.

F. Cash Collateral. Any and all of the Debtor's cash including cash and other amounts on deposit or maintained in any account or accounts by the Debtor, whether subject to control agreements or otherwise, and any amount generated by the collection of accounts receivable or other disposition of the Prepetition Loan Collateral, and the proceeds of any of the foregoing, whether existing on the Petition Date or thereafter, constitutes the cash collateral (within the meaning of section 363(a) of the Bankruptcy Code) of the Prepetition Lender (the "Cash Collateral").

G. Use of DIP Facility and Cash Collateral. The Debtor has an immediate and critical need to use the DIP Facility and Cash Collateral to preserve and operate its business and effectuate a restructuring of its business, which will be used in accordance with the terms of this Interim Order and the Budget. Upon entry of the Final Order, outstanding Prepetition Loan Obligations, in the aggregate amount of $15,000,000.00, will be repaid with proceeds of the DIP Facility. The remaining Ten Million Dollars ($10,000,000.00) available under the DIP Facility will be used in accordance with the Budget for operating expenses, to effectuate the sale of the Debtor's assets, and to provide adequate protection in accordance with this Interim Order and the Final Order. The adequate protection provided herein and other benefits and privileges contained herein are consistent with and authorized by the Bankruptcy Code and are necessary in

order to avoid the objection of the Prepetition Lender. Without the use of the DIP Facility and Cash Collateral, the Debtor will not have sufficient liquidity to be able to (i) pay its vendors, (ii) fund employee wages, benefits, and related obligations, (iii) pay for the necessary services and materials to maintain compliance with regulatory requirements, (iv) pay for use of its business equipment, (v) fund its sale process, and (vi) continue to operate its business during the pendency of the Chapter 11 Case. Moreover, the provisions of the DIP Credit Agreement and the Interim Order were extensively negotiated and are the most favorable terms that the Debtor was able to obtain. Approval of the DIP Facility will ensure the Debtor is able to maintain its operations, pursue the Chapter 11 Case, and maximize the value of its estate for the benefit of all stakeholders. Absent authorization to immediately use a portion of the DIP Facility and Cash Collateral, the Debtor's estate and its creditors would suffer immediate and irreparable harm.

H. Roll-Up of Prepetition Loans. Upon entry of the Final Order, without any further action by the Debtor or any other party, outstanding principal, interest, and other amounts under the Prepetition Loan Facility, in the aggregate amount of $15,000,000.00, will be repaid with proceeds from the DIP Facility. The replacement and refinancing (or "roll-up") of the Prepetition Loan Obligations shall be authorized as compensation for, in consideration for, and solely on account of, the agreement of the DIP Lender (who is the Prepetition Lender) to commit to and fund the DIP Facility, and provide other consideration to the Debtor, under the DIP Facility and not as payments under, adequate protection for, or otherwise on account of, any Prepetition Loan Obligations. The Prepetition Lender would not otherwise consent to the use of their Cash Collateral or the subordination of their liens to the DIP Liens (as defined below), and the DIP Lender would not be willing to provide the DIP Facility or extend credit to the Debtor thereunder without the roll up of the Prepetition Loan Obligations into the DIP Obligations or the

Term Loan Commitment Fees (as defined below). Moreover, the replacement and refinancing of all outstanding amounts under the Prepetition Loan Facility into DIP Obligations will enable the Debtor to obtain urgently needed financing critical to administering this Chapter 11 Case and funding its operations. All security agreements in respect of the Prepetition Loan Obligations being refinanced shall continue in full force and effect in favor of the DIP Lender.

I. Other Financing Unavailable. As discussed in the First Day Declaration, the Debtor is unable to obtain (i) adequate unsecured credit allowable either (a) under sections 364(b) and 503(b)(l) of the Bankruptcy Code or (b) under section 364(c)(l) of the Bankruptcy Code, (ii) adequate credit secured by (x) a senior lien on unencumbered assets of its estate under section 364(c)(2) of the Bankruptcy Code or (y) a junior lien on encumbered assets of its estate under section 364(c)(3) of the Bankruptcy Code, or (iii) secured credit under section 364(d)(l) of the Bankruptcy Code from sources other than the DIP Lender on terms more favorable than the terms of the DIP Facility. The only source of secured credit available to the Debtor on commercial terms, other than the continued use of Cash Collateral, is the DIP Facility, and the Prepetition Lender would not give its consent to the Debtor to have its liens and security interests primed by a third party DIP financing source. Financing on a postpetition basis is not otherwise available without granting the DIP Lender: (1) perfected security interests in and liens on the DIP Collateral; (2) superpriority claims and liens; (3) the other protections set for in this Interim Order; and (4) a full refinancing of the outstanding Prepetition Loan Obligations.

J. Best Financing Presently Available. The DIP Lender will as of the Petition Date provide the Debtor with financing solely on the terms and conditions set forth in this Interim Order (and, subject to entry by the Court, the Final Order) and the applicable DIP Loan Documents. After considering all of its alternatives, the Debtor has concluded, in an exercise of

its sound business judgment, that the financing to be provided by the DIP Lender pursuant to the terms of this Interim Order (and, subject to entry by the Court, the Final Order) and the DIP Loan Documents, represents the best financing presently available. The DIP Lender has acted in good faith and therefore is entitled to the good faith protections under section 364(e) of the Bankruptcy Code. The DIP Lender's claims, superpriority claims, security interests, liens, and other protections granted pursuant to this Interim Order (and, subject to entry by the Court, the Final Order) and the applicable DIP Loan Documents will not be affected by any subsequent reversal, modification, vacatur, or amendment of this Interim Order, the Final Order, or any other order, as provided in section 364(e) of the Bankruptcy Code.

K. Good Cause for Immediate Entry. Good cause has been shown for immediate entry of this Interim Order pursuant to Bankruptcy Rules 4001(b)(2) and (c)(2) and Local Rule 4001-2. In particular, the authorization granted herein for the Debtor to enter into the DIP Facility, to continue using Cash Collateral and to obtain interim financing, including on a priming lien basis as set forth herein, is necessary to avoid immediate and irreparable harm to the Debtor and its estate. Entry of this Interim Order is in the best interest of the Debtor, its estate, and creditors. The terms of the DIP Facility are fair and reasonable under the circumstances, reflect the Debtor's exercise of prudent business judgment consistent with its fiduciary duties, and are supported by reasonably equivalent value and fair consideration.

L. Arm's Length Negotiation. The Debtor, the DIP Lender, and the Prepetition Lender have negotiated the terms and conditions of the DIP Facility and this Interim Order in good faith and at arm's length, and any credit extended and loans made to the Debtor pursuant to this Interim Order shall be, and hereby are, deemed to have been extended, issued or made, as the case may be, in "good faith" within the meaning of section 364(e) of the Bankruptcy Code.

M. Adequate Protection for the Prepetition Lender. The Prepetition Lender has acted in good faith regarding the DIP Facility and the Debtor's continued use of the Prepetition Loan Collateral (including the Cash Collateral) to fund the administration of the Debtor's estate and continued operation of its business, in accordance with the terms hereof. The Prepetition Lender has consented to the Debtor's use of the Prepetition Loan Collateral, including the Cash Collateral, in accordance with the terms hereof. The Prepetition Lender is entitled to the adequate protection provided in this Interim Order as and to the extent set forth herein pursuant to §§ 361, 363 and 364 of the Bankruptcy Code. Based on the Motion and on the record presented to the Court at the Interim Hearing, as of the Petition Date the terms of the proposed adequate protection arrangements and of the use of the Prepetition Loan Collateral are fair and reasonable, reflect the Debtor's prudent exercise of business judgment and constitute reasonably equivalent value and fair consideration for the use of Cash Collateral; provided, that nothing in this Interim Order or the other DIP Loan Documents shall prejudice, limit, or otherwise impair the rights of the Prepetition Lender to seek new, different, or additional adequate protection.

N. Order of the Court. Based upon the foregoing findings, acknowledgements, and conclusions, and upon the record made before this Court at the Interim Hearing, and good and sufficient cause appearing therefor:

IT IS HEREBY FOUND, DETERMINED, ORDERED, ADJUDGED AND DECREED THAT:

1. Motion Granted. The Motion is granted on an interim basis, subject to the terms set forth herein. Any objections, reservations of rights, and/or other statements with respect to the Motion that have not previously been withdrawn or resolved are hereby overruled on their merits. This Interim Order shall be valid, binding on all parties in interest, and fully effective

immediately upon entry notwithstanding the possible application of Bankruptcy Rules 6004(h), 7062, and/or 9014.

2. Authority to Enter Into DIP Facility. The Debtor is hereby authorized to incur and perform the obligations arising from and after the date of this Interim Order under the DIP Facility, on the terms set forth in this Interim Order, including entry into, execution and delivery of the DIP Credit Agreement attached hereto as **Exhibit 1** and such additional documents, instruments, and agreements as may be reasonably required by the DIP Lender to implement the terms or effectuate the purposes of and transactions contemplated by this Interim Order, the Final Order (when entered by the Court) and the DIP Credit Agreement (collectively, this Interim Order, the Final Order, the DIP Credit Agreement, and such additional documents, instruments, and agreements, the "DIP Loan Documents"). The Debtor is authorized to execute and deliver the DIP Loan Documents and borrow money under the DIP Facility, on an interim basis, up to an aggregate principal amount not to exceed Four Million Three Hundred Thousand Dollars ($4,300,000.00) during the period prior to entry of the Final Order, on the terms set forth in this Interim Order and the DIP Loan Documents.

3. DIP Liens. As used herein, "DIP Collateral" shall include all prepetition and postpetition tangible and intangible property and assets, whether real or personal of the Debtor, including, without limitation, all assets and property pledged under the DIP Loan Documents, and all cash, any investment of such cash, inventory, accounts receivable, including intercompany accounts (and all rights associated therewith), other rights to payment whether arising before or after the Petition Date, contracts, contract rights, chattel paper, goods, investment property, inventory, deposit accounts, and all amounts on deposit therein from time to time, equity interests, securities accounts, securities entitlements, securities, commercial tort

claims and claims that may constitute commercial tort claims (known and unknown), books, records, plants, equipment, general intangibles, documents, instruments, interests in leases and leaseholds, interests in real property, fixtures, payment intangibles, tax or other refunds, insurance proceeds, letters of credit, letter of credit rights, supporting obligations, machinery and equipment, patents, copyrights, trademarks, tradenames, other intellectual property, all licenses therefor, and all proceeds, rents, profits, products, and substitutions, if any, of any of the foregoing; provided that DIP Collateral shall not include any Bankruptcy Recoveries, but, subject to entry of the Final Order, the DIP Collateral shall include the proceeds of any Bankruptcy Recoveries. Effective as of the Petition Date and in each case perfected without the necessity of the execution by the Debtor (or recordation or other filing) of security agreements, control agreements, pledge agreements, financing statements, mortgages, or other similar documents, or by possession or control, subject to the Carve Out and KEIP/KERP Plan Amount, the following security interests and liens are hereby granted to the DIP Lender:

(a) Pursuant to section 364(d)(1) of the Bankruptcy Code, the DIP Obligations are secured by a perfected first priority priming security interest and lien on all DIP Collateral (such security interest and lien, the "Priming Lien"), to the extent that such property and assets are subject to liens that secure the obligations of the Debtor under the Prepetition Loan Documents (collectively, the "Primed Liens");

(b) The Priming Lien shall be senior (i) in all respects to the Primed Liens and (ii) to any liens granted to provide adequate protection in respect of any of the Primed Liens;

(c) The Primed Liens shall be primed by and made subject and subordinate to the Priming Liens;

(d) Pursuant to section 364(c)(2) of the Bankruptcy Code, the DIP Obligations are secured by a perfected first priority security interest and lien on all DIP Collateral of the Debtor (other than Bankruptcy Recoveries (as defined below)) to the extent such property and assets are not subject to valid, perfected, and non-avoidable liens as of the Petition Date (it being agreed and understood that the Final Order shall grant, for the benefit of the DIP Facility, a perfected security interest pursuant to this clause in any recoveries of Debtor, by settlement or otherwise, in respect of claims and causes of action to which Debtor may be entitled to assert by reason of any avoidance or other power vested in or on behalf of a debtor or the estate of a debtor under chapter 5 of the Bankruptcy Code ("Bankruptcy Recoveries"));

(e) Pursuant to section 364(c)(3) of the Bankruptcy Code, the DIP Obligations are secured by a perfected junior-priority security interest and lien on all DIP Collateral of the Debtor to the extent that such property and assets are subject to valid, perfected, and unavoidable liens in favor of third parties that were in existence immediately prior to the Petition Date, or to valid and unavoidable liens in favor of third parties that were in existence immediately prior to the Petition Date that were perfected subsequent to the Petition Date as permitted by Section 546(b) of the Bankruptcy Code (other than the existing Prepetition Loan Liens, which existing liens will be primed by this Interim Order), junior to the priority of such liens in favor of such third parties; and

(f) The foregoing liens and security interests are referred to herein as "DIP Liens".

4. DIP Superpriority Claims. In addition to the liens and security interests granted to the DIP Lender pursuant to this Interim Order, subject and subordinate to the Carve Out and the KEIP/KERP Plan Amount, and in accordance with sections 364(c)(1), 503, and 507 of the

Bankruptcy Code, all of the DIP Obligations (including, without limitation, all DIP Extensions of Credit (as defined below)), shall constitute allowed superpriority administrative expense claims of the DIP Lender (the "DIP Superpriority Claims") with priority over any and all administrative expenses of the Debtor, whether heretofore or hereafter incurred, of the kind specified in, or ordered pursuant to, sections 105, 326, 328, 330, 331, 364, 365, 503(b), 506(c) (subject to entry of the Final Order), 507(a), 507(b), 1113, 1114, or any other provisions of the Bankruptcy Code.

5. Continuation of Prepetition Loan Liens. The liens granted to the Prepetition Lender under the Prepetition Loan Documents shall continue in full force and effect and shall continue to secure the obligations of the Debtor under the Prepetition Loan Documents, provided that such liens are Primed Liens and junior to the DIP Liens.

6. Roll Up. Upon entry of the Final Order, without any further action by the Debtor or any other party, and as a condition to the provision of further liquidity under the DIP Facility, Prepetition Loan Obligations, in the aggregate amount of $15,000,000.00, shall be repaid with proceeds of the DIP Facility in accordance with the terms of the DIP Credit Agreement and Final Order.

7. Use of Cash Collateral and DIP Extensions of Credit. Subject to Paragraph 24 of this Interim Order, the Debtor is hereby authorized to use Cash Collateral and the proceeds of any borrowings under the DIP Facility in accordance with the DIP Credit Agreement and the other terms and conditions set forth in this Interim Order and the DIP Loan Documents and subject to and in accordance with the Budget (as defined below).

8. DIP Extensions of Credit. All loans made to or for the benefit of the Debtor on or after the Petition Date in accordance with the DIP Loan Documents are herein referred to as the "DIP Extensions of Credit". The DIP Extensions of Credit: (a) shall be evidenced by the books

and records of the DIP Lender; (b) shall bear interest payable and incur fees at the rates set forth in the applicable provisions of the DIP Credit Agreement; (c) shall be secured in the manner specified herein and in the DIP Loan Documents; (d) shall be payable in accordance with the DIP Loan Documents and Interim Order; and (e) shall otherwise be governed by the terms set forth in this Interim Order and the other DIP Loan Documents. The DIP Lender shall have no obligation to make any DIP Extension of Credit or any other financial accommodation hereunder unless all conditions precedent to making DIP Extensions of Credit under the DIP Credit Agreement have been satisfied or waived in accordance with the DIP Credit Agreement.

9. Adequate Protection for the Prepetition Lender. In addition to all the existing security interests and liens previously granted to the Prepetition Lender, as adequate protection for, and to secure the payment of an amount equal to the diminution of the value of the Prepetition Loan Collateral, due to the Debtor's sale, use, or lease of such Prepetition Loan Collateral, and as an inducement for the Prepetition Lender to permit the Debtor's use of the Cash Collateral as provided for in this Interim Order, the Prepetition Lender is hereby granted, subject to the Carve Out and the KEIP/KERP Plan Amount, the following adequate protection (the "Adequate Protection Obligations"), pursuant to sections 361, 363(e), 364(d)(1), and 507 of the Bankruptcy Code:

(a) ***Adequate Protection Liens.*** Effective as of the Petition Date and in each case perfected without the necessity of the execution by the Debtor (or recordation or other filing) of security agreements, control agreements, pledge agreements, financing statements, mortgages or other similar documents, or by possession or control, the following security interests and liens are hereby granted to the Prepetition Lender: A valid, binding, continuing, enforceable, fully-perfected replacement (and if applicable, new) security interest in and lien on

the DIP Collateral (the "Adequate Protection Liens"). The Adequate Protection Liens are junior to the liens securing the DIP Facility.

(b) ***Adequate Protection Claims.*** An allowed administrative expense claim against the Debtor with priority over all other administrative claims in the Case (subject only to the Carve Out and the KEIP/KERP Plan Amount), including all claims of the kind specified under sections 503(b) and 507(b) of the Bankruptcy Code (the "Adequate Protection Claims"), which administrative claim shall have recourse to and be payable from all prepetition and postpetition property of the Debtor, excluding the Carve Out and the KEIP/KERP Plan Amount. The Adequate Protection Claims are junior to the DIP Superpriority Claims.

(c) ***Payment of Interest.*** As additional adequate protection, so long as any Prepetition Loan Obligations remain outstanding, the Debtor is authorized and directed to pay interest on the Prepetition Loan Obligations in accordance with the Prepetition Loan Documents.

(d) ***Fees and Expenses.*** As additional adequate protection, the Debtor is authorized and directed to pay: (i) immediately upon the entry of this Interim Order, the reasonable and documented professional fees, expenses, and disbursements (including, but not limited to, the fees, expenses and disbursements of counsel and other third-party consultants, including financial advisors) incurred by the Prepetition Lender arising prior to the Petition Date; and (ii) in regular course, all reasonable and documented out-of-pocket fees and expenses incurred by the Prepetition Lender arising on or after the Petition Date. The Prepetition Lender (and each of its professionals) shall not be required to comply with U.S. Trustee fee guideline or file applications or motions with, or obtain approval of, the Court for the payment of any of their out-of-pocket costs, fees, expenses, disbursements and other charges.

10. Budget. The budget annexed hereto as **Exhibit 2** (as it may be updated periodically in accordance with this Interim Order and the DIP Loan Documents, the "Budget"), hereby is approved. Beginning on the first Friday following the Petition Date (as defined in the DIP Credit Agreement), and then no later than the Friday of each subsequent calendar week, the Debtor shall deliver to the DIP Lender an updated, proposed Budget (each, a "Proposed Budget") for the following 13-week period, which shall be in form and substance satisfactory to the DIP Lender. A Proposed Budget shall become the new Budget upon approval by the DIP Lender (which must be in writing) and, if no such approval is received, the prior approved budget shall continue in place and the DIP Lender and the Debtor shall negotiate in good faith regarding the terms of the Proposed Budget. The Debtor shall not permit the amount of its actual disbursements (excluding payment of all Bank Expenses (as defined in the DIP Credit Agreement)) for any week to exceed one hundred fifteen percent (115.0%) of the disbursements shown in the Budget for such week and on an aggregate basis, and the Debtor shall not permit the actual cash receipts for any week to be less than eighty-five percent (85.0%) of the cash receipts shown in the Budget for such week and on an aggregate basis (the "Budget Variances"; all references in this Interim Order and the DIP Loan Documents to "Budget" shall mean the Budget as it is subject to the Budget Variances). The Debtor shall also deliver with each updated Budget a variance report reflecting on a line item and an aggregate basis, Debtor's actual unrestricted cash receipts and cash disbursements compared to the Budget for such immediately preceding week and for the period commencing on the Petition Date through and including the end of the week immediately preceding the date of the variance report. For the avoidance of doubt, for purposes of calculating the Budget Variances, any unused amounts set forth in the

Budget for any period of determination may be carried forward and used during subsequent periods.

11. Weekly Reporting. The Debtor will deliver a weekly reporting package to the DIP Lender, which shall consist of a Proposed Budget, the variance report, and any other reporting required by the DIP Loan Documents.

12. Cash Management. The Debtor shall maintain its cash management arrangements in a manner consistent with that described in the orders approving the Debtor's motion for authorization to maintain its existing cash management system, which orders shall be in form and substance acceptable to the DIP Lender.

13. Validity of DIP Loan Documents. The DIP Loan Documents shall constitute valid and binding obligations of the Debtor, enforceable against the Debtor in accordance with the terms thereof. No obligation, payment, transfer or grant of security under the DIP Loan Documents as approved under this Interim Order shall be stayed, restrained, voided, voidable, or recoverable under the Bankruptcy Code or under any applicable non-bankruptcy law, or subject to any defense, reduction, setoff, recoupment, or counterclaim.

14. Preservation of Liens and Rights Granted Under this Interim Order. Except as otherwise expressly provided for herein (including with respect to the Carve Out and the KEIP/KERP Plan Amount), or permitted under the DIP Credit Agreement, no claim or lien having a priority superior to or *pari passu* with those granted by this Interim Order to the DIP Lender or to the Prepetition Lender, respectively, shall be granted or allowed while any portion of (a) the DIP Facility (or any refinancing thereof in accordance with the DIP Loan Documents) or the commitments thereunder or the DIP Obligations remain outstanding, or (b) the Prepetition Loan Obligations remain outstanding. Subject to the Carve Out and the KEIP/KERP Plan

Amount, the DIP Liens, the Adequate Protection Liens, and the Prepetition Loan Liens shall not be (i) subject or junior to any lien or security interest that is avoided and preserved for the benefit of the Debtor's estate under section 551 of the Bankruptcy Code or (ii) subordinated to or made *pari passu* with any liens arising after the Petition Date including, without limitation, any liens or security interests granted in favor of any federal, state, municipal or other domestic or foreign governmental unit (including any regulatory body), commission, board or court for any liability of the Debtor.

15. Automatic Effectiveness of Liens. The automatic stay imposed under section 362(a) of the Bankruptcy Code is hereby vacated and modified to permit the Debtor to grant the liens and security interests to the DIP Lender and the Prepetition Lender contemplated by this Interim Order and the DIP Loan Documents.

16. Automatic Perfection of Liens. The DIP Liens and the Adequate Protection Liens granted pursuant to this Interim Order shall constitute valid, enforceable, nonavoidable, and duly perfected first priority security interests and liens (subject to the priorities set forth in this Interim Order). The DIP Lender and the Prepetition Lender shall not be required to file or serve financing statements, notices of lien, mortgage deeds, deeds of trust or similar instruments which otherwise may be required under federal, state or local law in any jurisdiction, or take any action, including taking possession or control, to validate and perfect the DIP Liens and the Adequate Protection Liens, respectively, pursuant to this Interim Order. The failure by the Debtor to execute any documentation relating to the DIP Liens or the Adequate Protection Liens or deliver possessory collateral shall in no way affect the validity, enforceability, perfection, or priority of such liens. The DIP Lender and the Prepetition Lender are hereby authorized, but not required, to file or record financing statements, trademark filings, copyright filings, mortgages, deeds of

trust, notices of lien, or similar instruments in any jurisdiction or take any other action in order to validate and perfect the liens and security interests granted to them hereunder and under the DIP Credit Agreement, the Prepetition Loan Agreement, or this Interim Order. Whether or not the DIP Lender or the Prepetition Lender shall file such financing statements, trademark filings, copyright filings, mortgages, deeds of trust, notices of lien or similar instruments or otherwise take any action to validate, perfect, or confirm perfection of the liens and security interests granted to them hereunder, such liens and security interests shall be deemed valid, perfected, allowed, enforceable, nonavoidable and not subject to challenge, dispute or subordination (except as a result of the relative lien priorities set forth in this Interim Order), at the time and as of the date of entry of this Interim Order.

17. Other Automatic Perfection Matters. To the extent that the Prepetition Lender is the secured party under any account control agreements, listed as loss payee or additional insured under any of the Debtor's insurance policies or is the secured party under any Prepetition Loan Document, the DIP Lender is also deemed to be the secured party under such account control agreements, loss payee, or additional insured under the Debtor's insurance policies and the secured party under each such Prepetition Loan Document (in any such case with the same priority of liens and claims thereunder relative to the priority of the Prepetition Loan Liens and Adequate Protection Liens, and shall have all rights and powers in each case attendant to that position (including, without limitation, rights of enforcement, but subject in all respects to the terms of this Interim Order)), and shall, subject to the terms of this Interim Order, act in that capacity and distribute any proceeds recovered or received in accordance with the terms of this Interim Order and/or the Final Order, as applicable, and the other DIP Loan Documents. Security interests in and liens on all DIP Collateral that is of a type such that perfection of a

security interest therein may be accomplished by possession or control by a secured party will be delivered, upon written request, to the DIP Lender, provided that the DIP Lender continues to retain a properly perfected lien on such DIP Collateral by virtue of this Interim Order even if such other party fails to timely deliver possession to the DIP Lender.

18. Protection of DIP Lender's Rights.

(a) A "Termination Event" means: (i) the Debtor shall violate the terms of this Interim Order; (ii) the occurrence of an Event of Default (including without limitation a breach of any Milestone as defined in the DIP Credit Agreement), (ii) the Term Loan Maturity Date of the DIP Facility, (iii) this Interim Order ceasing to be in full force and effect for any reason, (iv) Debtor shall file, propose, or support confirmation of a chapter 11 plan that is not reasonably acceptable to the DIP Lender or Prepetition Lender, and (v) all or substantially all of the assets of the Debtor are sold without the prior written consent of the DIP Lender or the Prepetition Lender (each a "Termination Event"). Upon the occurrence and during the continuance of a Termination Event, five (5) business after the delivery, by the DIP Lender to the Debtor or its counsel (via email or otherwise), of a written notice (the "Remedies Notice") of the occurrence of a Termination Event (the "Remedies Notice Period"), unless such Termination Event is cured by the Debtor or waived by the DIP Lender, the DIP Lender may (1) declare (a) the commitment of the DIP Lender as to the DIP Facility to be terminated, whereupon such commitments and obligation shall be terminated; (b) all DIP Obligations immediately due and owing, without presentment, demand, protest or other notice of any kind, all of which are hereby expressly waived by the Debtor, whereupon all DIP Obligations shall be immediately due and payable; and (c) subject to the Carve Out and the KEIP/KERP Plan Amount, that the Debtor shall have no right to request or use any proceeds of any DIP Extensions of Credit, other than

towards the satisfaction of the DIP Obligations; and (2) and exercise all rights and remedies provided in this Interim Order and the DIP Loan Documents, as applicable. Immediately upon the delivery of the Remedies Notice, to the extent not previously provided, the Debtor shall provide a line-by-line itemization of the Budget to the DIP Lender. During the Remedies Notice Period, (i) the Debtor and DIP Lender shall have the rights and obligations set forth in, and shall act in accordance with, section 9.1 of the DIP Credit Agreement; and (ii) the Debtor, United States Trustee, and/or Committee may contest the existence or continuation of an Event of Default, or the DIP Lender's right to assert remedies in connection with an Event of Default set forth in a Remedies Notice, by filing of an expedited motion in the Bankruptcy Court. Nothing in the DIP Loan Documents or this Interim Order shall limit the ability of Debtor and other parties-in-interest to timely request any such expedited hearing on a motion seeking such a finding, and the DIP Lender hereby consents to the conduct of such expedited hearing (but not to the relief being sought therein).

19. DIP Fees and Expenses. The Debtor is authorized and directed to pay all reasonable and documented fees and expenses of the DIP Lender in connection with the DIP Facility, as applicable, as provided in the applicable DIP Loan Documents, whether or not the transactions contemplated hereby are consummated, whether or not incurred prepetition or postpetition. The DIP Lender (and each of its professionals) shall not be required to comply with U.S. Trustee fee guideline or file applications or motions with, or obtain approval of, the Court for the payment of any of their out-of-pocket costs, fees, expenses, disbursements and other charges. Payments of any amounts set forth in this paragraph are not subject to recharacterization, avoidance, subordination or disgorgement.

20. Term Loan Commitment Fees; Interest. The DIP Lender shall be entitled to receive the following commitment fees: (i) a non-refundable commitment fee of One Million Five Hundred Thousand Dollars ($1,500,000.00) (the "Initial Term Loan Commitment Fee"), which shall be deemed earned as of entry of this Interim Order and shall be due at the Term Loan Maturity Date; and (ii) a non-refundable commitment fee of One Million Five Hundred Thousand Dollars ($1,500,000.00) (the "Final Term Loan Commitment Fee" and, together with the Initial Term Loan Commitment Fee, the "Term Loan Commitment Fees"), which shall be deemed earned as of entry of the Final Order and shall be due at the Term Loan Maturity Date; provided, that the Term B Final Payment (as defined in the Prior Loan Agreement) shall be waived as of the entry of the Final Order (which, for the avoidance of doubt, shall authorize the Debtor's repayment in full of the Prepetition Loan Obligations and approve the Final Term Loan Commitment Fee). The Debtor is authorized and directed to pay the Term Loan Commitment Fees at the Term Loan Maturity Date. The Debtor is authorized and directed to pay interest on the DIP Loan Obligations in accordance with the terms of the DIP Credit Agreement.

21. Debtor's Right to Draw under DIP Facility. Subject to the Carve Out and the KEIP/KERP Plan Amount, unless otherwise agreed to by the DIP Lender in writing in accordance with this Interim Order and the DIP Credit Agreement, the Debtor's right to draw under the DIP Facility (a) shall be suspended upon the occurrence and during the continuation of any Event of Default pursuant to the DIP Credit Agreement, and (b) shall terminate upon the Term Loan Maturity Date.

22. Milestones. As a condition to the DIP Facility and the use of Cash Collateral, the Debtor shall comply with the Milestones. The Milestones can only be modified or waived by the DIP Lender in writing in accordance with the provisions of the DIP Credit Agreement.

23. Termination of Consent to Use of Cash Collateral.

(a) Subject to the Carve Out and the KEIP/KERP Plan Amount, the Remedies Notice Period, and opportunity to cure set forth in Paragraph 18(a) of this Interim Order, the consent of the DIP Lender and the Prepetition Lender to the use of Cash Collateral may be terminated following the occurrence of a Termination Event and expiration of the Remedies Notice Period, and any prior consent of the DIP Lender or Prepetition Lender to the Debtor's use of Cash Collateral shall be deemed automatically withdrawn upon expiration of the Remedies Notice Period.

24. Modifications of DIP Loan Documents. The Debtor and the DIP Lender are hereby authorized to implement, in accordance with the terms of the DIP Loan Documents, any modifications of the DIP Loan Documents (other than this Interim Order) that are not materially adverse to the Debtor's estate or creditors without further notice, motion, or application to, order of or hearing before, this Court. Any material modification or amendment to the DIP Loan Documents shall only be permitted pursuant to an order of this Court (which may be sought within (3) Business Days), provided, however, that any forbearance from, or waiver of, (a) a breach by the Debtor of a covenant, representation or any other agreement or (b) a default or an Event of Default (including breach of any Milestone), in each case under the DIP Loan Documents, shall not require an order of this Court.

25. DIP Lender and Prepetition Lender Authorization. Notwithstanding any provision of the Prepetition Loan Documents or the DIP Loan Documents, the DIP Lender and the Prepetition Lender are hereby authorized to make any and all account transfers requested by the Debtor in accordance with the Budget and this Interim Order, and is further authorized to take any other action reasonably necessary to implement the terms of this Interim Order.

26. Waiver of Requirement to File Proofs of Claim. The DIP Lender and the Prepetition Lender shall not be required to file proofs of claim in the Chapter 11 Case or any successor case in order to maintain their respective claims for payment of the obligations under their respective loan documents. The statements of claim in respect of the DIP Obligations and the Prepetition Loan Obligations set forth in this Interim Order, together with the evidence accompanying the Motion and presented at the Interim Hearing are deemed sufficient to and do constitute proofs of claim in respect of such obligations and such secured status.

27. Carve Out.

(a) Carve Out. For purposes of this Interim Order: (i) "Carve Out" means all Obligations, Prepetition Loan Obligations and Reinstated Prior Obligations and the repayment of any of the foregoing, and the Liens and Superpriority Claims of the DIP Lender shall be subject to and subordinate to a carve out for payment of: (A) all fees required to be paid pursuant to the Clerk of the Court and to the Office of the United States Trustee under section 1930(a) of title 28 of the United States Code prior to or after delivery by the DIP Lender of a Carve Out Trigger Notice plus interest at the statutory rate, plus (B) all reasonable fees and expenses up to $20,000 incurred by a trustee under section 726(b) of the Bankruptcy Code, plus (C) subject to the Budget, all unpaid Case Professional Fees and Expenses (excluding any success or completion fees payable to the Committee Case Professionals) incurred at any time prior to delivery by the DIP Lender of a Carve Out Trigger Notice, plus (D) Case Professional Fees and Expenses (excluding any success or completion fees payable to the Committee Case Professionals) in an aggregate amount not to exceed the applicable Carve Out Cap incurred after delivery by the DIP Lender of the Carve Out Trigger Notice, plus (E) all earned and unpaid advisory, success, transaction, completion or other fees and expenses payable to the Investment Banker pursuant to

the Investment Banker Agreement incurred at any time that are allowed by the Bankruptcy Court, (ii) "Carve Out Cap" means an aggregate amount of Case Professional Fees and Expenses in accordance with the Budget not to exceed $250,000.00; provided, that the Carve Out Cap shall be reduced on a dollar-for-dollar basis by any payments of any Case Professional Fees and Expenses made after delivery of the Carve Out Trigger Notice in respect of fees and expenses incurred after delivery of the Carve Out Trigger Notice, (iii) "Case Professional Fees and Expenses" means, all accrued and unpaid fees, disbursements, costs and expenses incurred by Case Professionals in accordance with the Budget and allowed by the Bankruptcy Court at any time; provided, that the term "Case Professional Fees and Expenses" shall not include any advisory, success, transaction, completion or other fees and expenses payable or paid to the Investment Banker; and (iv) "Carve Out Trigger Notice" means a written notice delivered by email (or other electronic means) by the DIP Lender to the Debtor, its counsel, the United States Trustee, and lead counsel to any Committee, stating that the Carve Out Cap has been invoked, which notice may be delivered at any time following the occurrence of any Event of Default under the DIP Credit Agreement.

(b) Carve Out Reserve. Until the Term Loan Maturity Date, the Debtor shall deposit cash on a weekly basis into an account designated by the Debtor at the DIP Lender for such purpose (the "Carve Out Account") in an amount equal to the "Carve Out" line item shown in the Budget for that week. Proceeds deposited into the Carve Out Account shall be held in trust and used solely for purposes of the Carve Out in accordance with this Interim Order and the Final Order. The funds on deposit in the Carve Out Account shall be used to fund Carve Out expenses before any other funds of the Debtor may be used for such purpose. Any excess cash held in the Carve Out Account that is not used to fund Carve Out expenses in accordance with

this Interim Order and Final Order, as applicable, shall be remitted to the DIP Lender. The DIP Lender and the Prepetition Lender shall each have a security interest in any residual interest in the Carve Out Account. On the day on which a Carve Out Trigger Notice is given by the DIP Lender to the Debtor with a copy to counsel to the Committee (the "Termination Declaration Date"), the Carve Out Trigger Notice shall (i) constitute a demand to the Debtor to utilize all available cash held by the Debtor to fund any deficit in the Carve Out Reserve in an amount equal to the difference between the Carve Out Reserve balance and the amount anticipated to be need to fully fund the Carve Out (the "Carve Out Reserve Deficit"), and (ii) only to the extent such cash on hand is insufficient for the foregoing purpose, be deemed a draw request and notice of borrowing by the Debtor for DIP Loans (as defined in the DIP Loan Documents) under the available commitments under the DIP Facility, in an amount equal to the Carve Out Reserve Deficit (any such amounts actually advanced shall constitute DIP Loans).

(c) Payment of Allowed Professional Fees Prior to the Termination Declaration Date. Any payment or reimbursement made prior to the occurrence of the Termination Declaration Date in respect of any Case Professional Fees and Expenses shall not reduce the Carve Out.

(d) No Direct Obligation to Pay Allowed Professional Fees. Neither the DIP Lender nor the Prepetition Lender shall be responsible for the payment or reimbursement of any fees or disbursements of any Case Professional incurred in connection with the Chapter 11 Case or any successor case under any chapter of the Bankruptcy Code. Without limiting the Debtor's rights under Paragraph 38(b)(ii), nothing in this Interim Order or otherwise shall be construed to obligate the DIP Lender or the Prepetition Lender in any way, to pay compensation to, or to reimburse expenses of, any Case Professional or to guarantee that the Debtor has sufficient funds

to pay such compensation or reimbursement. The DIP Lender and the Prepetition Lender reserve all rights to object to the payment or reimbursement of any fees or disbursements of any Case Professional or other parties seeking substantial contribution incurred in connection with the Chapter 11 Case or any successor case under any chapter of the Bankruptcy Code.

(e) Payment of Carve Out On or After the Termination Declaration Date. Any payment or reimbursement made on or after the occurrence of the Termination Declaration Date in respect of any Case Professional Fees and Expenses shall permanently reduce the Carve Out on a dollar-for-dollar basis. Any funding of the Carve Out shall be added to, and made a part of, the obligation secured by the DIP Collateral and shall be otherwise entitled to the protections granted under this Interim Order, the DIP Loan Documents, the Bankruptcy Code, and applicable law.

(f) Funding of KEIP. Notwithstanding anything to the contrary contained herein or in any of the DIP Loan Documents, the Debtor's proposed key employee incentive plan shall be funded only from proceeds of a sale of the DIP Collateral that are in excess of $25,000,000.00.

28. Prohibition on Use of Collateral; Investigation Budget. A "Termination Event" shall occur if the Debtor directly or indirectly investigates, asserts, or prosecutes (a) any claims or causes of action arising under or related to the DIP Loan Documents, the Prepetition Loan Obligations, or any other financing provided to the Debtor by the Prepetition Lender, or the liens or security interests securing the obligations under any of the foregoing or to pursue a Challenge (as defined in this Interim Order); provided that the Debtor may respond to good faith inquiries from the Committee, if any, or any other party in interest with standing, or (b) any Challenge or raise any defenses to the Prepetition Loan Obligations or the DIP Obligations. No portion of the

DIP Facility, the DIP Collateral (including the Prepetition Loan Collateral and the Cash Collateral), the Carve Out, or any disbursements set forth in the Budget, shall be used for the payment of professional fees, disbursements, costs, or expenses incurred by any party in interest in connection with the foregoing (a) and (b) of this paragraph; provided that not more than $25,000 in the aggregate of proceeds of any Cash Collateral or any proceeds of the DIP Facility or the DIP Collateral may be used to pay any allowed fees of the Committee, if any, or professionals retained by the Committee and incurred in connection with investigating the matters covered by the stipulations contained in recital Paragraph E of this Interim Order (the "Investigation Budget").

29. Stipulations Regarding Prepetition Loan Obligations and the Prepetition Loan Liens Binding on Parties in Interest. Subject to entry of the Final Order, the stipulations and admissions contained in this Interim Order, including, without limitation, in recital Paragraph E of this Interim Order, shall be binding on the Debtor's estate and any successor thereto (including, without limitation, any chapter 7 or chapter 11 trustee appointed or elected for the Debtor) and all parties in interest, including, without limitation, any Committee, unless (a) any Committee, or another party in interest (other than the Debtor) with standing and requisite authority, has timely commenced a contested matter or adversary proceeding (a "Challenge") challenging the amount, validity or enforceability of the Prepetition Loan Obligations, the perfection or priority of the Prepetition Loan Liens or otherwise asserting any objections, claims or causes of action (including, without limitation, any actions for preferences, fraudulent conveyances, or other avoidance power claims), or the "roll-up" of the Prepetition Loan Obligations on behalf of the Debtor's estate against the Prepetition Lender relating to the Prepetition Loan Obligations or the Prepetition Loan Liens from the later of (a) seventy-five (75)

days after entry of this Interim Order and (b) with respect to any Committee, sixty (60) days after the formation of the Committee (if any). If no such Challenge is timely commenced and sustained as of such dates then, without further order of the Court, to the extent not theretofore indefeasibly repaid, satisfied, or discharged, as applicable, (x) the claims, liens and security interests of the Prepetition Lender shall, without further order of the Court, be deemed to be finally allowed for all purposes in the Chapter 11 Case and any subsequent chapter 7 case and shall not be subject to challenge or objection by any party in interest as to validity, priority, amount or otherwise, and (y) without further order of the Court, the Debtor and its estate shall be deemed to have released any and all claims or causes of action against the Prepetition Lender with respect to the Prepetition Loan Documents or any related prior transactions. Notwithstanding anything to the contrary herein, if no Challenge is timely commenced, the stipulations and admissions contained in this Interim Order, including, without limitation, in recital Paragraph E of this Interim Order, shall be binding on the Debtor's estate, the Committee, and all parties in interest. If any such Challenge is timely commenced and/or sustained, the stipulations contained in recital Paragraph E shall nonetheless remain binding on the Debtor's estate, any Committee and all parties in interest, except to the extent that such stipulations were expressly challenged in such Challenge. Nothing in this Interim Order vests or confers on any Person (as defined in the Bankruptcy Code), including any committee appointed or formed in the Chapter 11 Case, standing or authority to pursue any cause of action belonging to the Debtor or its estate, including, without limitation, any Challenges, without prior express Court approval.

30. Limitation on Charging Expenses Against Collateral. Subject to entry of the Final Order, (i) no costs or expenses of administration of this Chapter 11 Case, a successor case or any other future proceeding that may result therefrom, including liquidation in bankruptcy or other

proceedings under the Bankruptcy Code shall be charged against or recovered from the DIP Collateral or the Prepetition Loan Collateral pursuant to section 506(c) of the Bankruptcy Code or any similar principle of law or equity and (ii) the Debtor (and any successor thereto, including any representatives thereof, including any trustee appointed in this Chapter 11 Case or any successor case) shall be deemed to have waived any rights, benefits or causes of action under section 506(c) of the Bankruptcy Code as they may related to or be asserted against the DIP Lender, the Prepetition Lender, the DIP Collateral or the Prepetition Loan Collateral. Nothing contained in this Interim Order, shall be deemed a consent by the DIP Lender or the Prepetition Lender to any charge, lien, assessment or claim against, or in respect of, the DIP Collateral or the Prepetition Loan Collateral under 506(c) of the Bankruptcy Code or otherwise.

31. Payments Free and Clear. Any and all payments or proceeds remitted to the DIP Lender or the Prepetition Lender pursuant to the provisions of this Interim Order or any subsequent order of the Court shall be irrevocable, received free and clear of any claim, charge, assessment or other liability, including without limitation, subject to the entry of the Final Order, any such claim or charge arising out of or based on, directly or indirectly, section 506(c) (whether asserted or assessed by, through or on behalf of the Debtor) or 552(b) of the Bankruptcy Code, and solely in the case of payments made or proceeds remitted after the delivery of a Carve Out Trigger Notice, subject to the Carve Out in all respects. No payments authorized by this Interim Order shall be subject to recharacterization, avoidance, subordination or disgorgement.

32. No Marshaling/Applications of Proceeds. Subject to entry of the Final Order, the DIP Lender and the Prepetition Lender shall not be subject to the equitable doctrine of 'marshaling' or any other similar doctrine with respect to any of the DIP Collateral or the

Prepetition Loan Collateral, as the case may be, and proceeds shall be received and applied pursuant to this Interim Order and the DIP Loan Documents notwithstanding any other agreement or provision to the contrary.

33. Section 552(b). Subject to entry of the Final Order, the DIP Lender and the Prepetition Lender shall each be entitled to all of the rights and benefits of section 552(b) of the Bankruptcy Code, and the "equities of the case" exception under section 552(b) of the Bankruptcy Code shall not apply to the DIP Lender or the Prepetition Lender in any respect.

34. Limitation of Liability. Nothing in this Interim Order, the DIP Loan Documents, or the Prepetition Loan Documents shall in any way be construed or interpreted to impose or allow the imposition upon the DIP Lender or the Prepetition Lender, or any of their successors or predecessors, of any liability for any claims arising from the prepetition or postpetition activities of the Debtor or any affiliate of the Debtor.

35. Indemnification. The Debtor shall indemnify and hold harmless the DIP Lender and its successors, assigns, affiliates, parents, subsidiaries, partners, controlling persons, representatives, agents, attorneys, advisors, financial advisors, consultants, professionals, officers, directors, members, managers, shareholders and employees, past, present and future, and their respective heirs, predecessors, successors and assigns, in accordance with the DIP Loan Documents, which indemnification is hereby authorized and approved.

36. Credit Bidding. Subject to entry of the Final Order, the DIP Lender and the Prepetition Lender shall have the unqualified right to credit bid (i) up to the full amount of their respective obligations in any sale of the DIP Collateral (or any part thereof), (ii) with respect to the Prepetition Lender, any Prepetition Loan Obligations or the Adequate Protection Claim, and (iii) any unpaid amounts due and owing to the DIP Lender or the Prepetition Lender under this

Interim Order, without the need for further Court order authorizing the same, and whether such sale is effectuated through section 363 or 1129 of the Bankruptcy Code, by a chapter 7 trustee under section 725 of the Bankruptcy Code, or otherwise.

37. Monitoring of Collateral. During normal business hours and after advanced written notice to the Debtor's counsel (email shall suffice), the Prepetition Lender and the DIP Loan Lender, and their representatives, consultants and advisors, shall be given reasonable access to the Debtor's books, records, assets and properties for purposes of monitoring the Debtor's business and the value of the DIP Collateral.

38. No Third Party Rights. This Interim Order does not create any rights for the benefit of any party, creditor, equity holder or other entity other than the DIP Lender, the Prepetition Lender, and the Debtor, and their respective successors and assigns.

39. Rights Preserved. Notwithstanding anything herein to the contrary, the entry of this Interim Order is without prejudice to, and does not constitute a waiver of, expressly or implicitly the DIP Lender's or the Prepetition Lender's right to seek any other or supplemental relief in respect of the Debtor, including the right to seek new, different or additional adequate protection, as applicable. Nothing contained in this Interim Order shall be deemed a finding by the Court or an acknowledgement by the Prepetition Lender that the adequate protection granted in this Interim Order does in fact adequately protect the Prepetition Lender against any diminution in value of the Prepetition Loan Collateral.

40. Protection under Section 364(e) of the Bankruptcy Code. If any or all of the provisions of this Interim Order are hereafter reversed, modified, vacated or stayed, such reversal, modification, vacation or stay shall not affect (i) the validity of any DIP Obligations or Adequate Protection Obligations owing to the DIP Lender or the Prepetition Lender, as

applicable, incurred prior to the actual receipt by such entities of written notice of the effective date of such reversal, modification, vacation or stay, or (ii) the validity or enforceability of any claim, lien, security interest or priority authorized or created hereby or pursuant to the DIP Loan Documents with respect to any DIP Obligations or Adequate Protection Obligations owing to the DIP Lender or the Prepetition Lender, as applicable. Notwithstanding any such reversal, modification, vacation or stay, any use of Cash Collateral or the incurrence of DIP Obligations or Adequate Protection Obligations owing to the Prepetition Lender by the Debtor prior to the actual receipt by the Prepetition Lender of written notice of the effective date of such reversal, modification, vacation or stay, shall be governed in all respects by the provisions of this Interim Order, and the Prepetition Lender shall be entitled to all of the rights, remedies, protections and benefits granted under section 364(e) of the Bankruptcy Code, this Interim Order and the other DIP Loan Documents with respect to all uses of Cash Collateral and the incurrence of DIP Obligations and Adequate Protection Obligations owing to the Prepetition Lender.

41. Binding Nature of Order. The provisions of this Interim Order shall be binding upon the Debtor and its successors and assigns (including, without limitation, any trustee or other fiduciary hereafter elected or appointed for or on behalf of the Debtor's estate or with respect to its property).

42. Survival of Order. Solely with respect to the DIP Lender and the Prepetition Lender, the provisions of this Interim Order and any actions taken pursuant hereto (a) shall survive the entry of any order: (i) confirming any plan of restructuring in the Chapter 11 Case; (ii) converting the Chapter 11 Case to a case under Chapter 7 of the Bankruptcy Code; or (iii) dismissing the Chapter 11 Case; and (b) shall continue in full force and effect notwithstanding the entry of any such order, and the claims, liens, and security interests granted

pursuant to this Interim Order shall maintain their priority as provided by this Interim Order until (x) all of the DIP Obligations are indefeasibly paid or otherwise satisfied in full and discharged in accordance with the DIP Loan Documents and (y) the obligations owed to the Prepetition Lender are paid or otherwise satisfied in full. The DIP Obligations shall not be discharged by the entry of any order confirming any plan in the Chapter 11 Case that does not provide for payment in full of the DIP Obligations or such other treatment of the DIP Obligations as may be agreed to by the DIP Lender.

43. Priority of Terms. To the extent of any conflict between or among the Motion, the DIP Loan Documents, and this Interim Order, the terms and provisions of this Interim Order shall govern.

44. Entry of Interim Order; Effect. This Interim Order shall take effect and be fully enforceable *nunc pro tunc* to the Petition Date immediately upon entry hereof, notwithstanding the possible application of Fed. R. Bankr. P. 6004(h), 7062, 9014, or otherwise, and the Clerk of this Court is hereby directed to enter this Interim Order on this Court's docket in the Chapter 11 Case. Any findings of fact shall constitute a finding of fact even if it is stated as a conclusion of law, and any conclusion of law shall constitute a conclusion of law even if it is stated as a finding of fact.

45. Final Hearing. The Final Hearing is scheduled for [--], 2019, at [--] before this Court. Any objections by creditors or other parties in interest to any relief sought at the Final Hearing to be granted pursuant to the Final Order shall be deemed waived unless timely filed and served. The Debtor shall promptly serve notice of entry of this Interim Order and the Final Hearing on the appropriate parties in interest in accordance with the Bankruptcy Rules and the Bankruptcy Local Rules. Without limiting the foregoing, the Debtor shall promptly serve a

notice of entry of this Interim Order and the Final Hearing, together with a copy of this Interim Order, by first class mail, postage prepaid, facsimile, electronic mail or overnight mail upon the Notice Parties. The notice of the entry of this Interim Order and the Final Hearing shall state that objections to the entry of a Final Order shall be filed with the United States Bankruptcy Court for the District of Delaware by no later than 4:00 p.m. (prevailing Eastern Time) on [--], 2019.

46. Retention of Jurisdiction. Notwithstanding any provision in the DIP Loan Documents or the Prepetition Loan Documents, this Court shall retain jurisdiction over all matters pertaining to the implementation, interpretation and enforcement of this Interim Order, the DIP Facility or the DIP Loan Documents.

Dated: _____, 2019
Wilmington, Delaware

THE HONORABLE BRENDAN L. SHANNON
UNITED STATES BANKRUPTCY JUDGE

EXHIBIT 1

DIP Credit Agreement

SENIOR SECURED SUPERPRIORITY DEBTOR-IN-POSSESSION LOAN AND SECURITY AGREEMENT

THIS SENIOR SECURED SUPERPRIORITY DEBTOR-IN-POSSESSION LOAN AND SECURITY AGREEMENT (this "**Agreement**") dated as of April 15, 2019, between **SILICON VALLEY BANK**, a California corporation with a loan production office located at 505 Howard Street, 3rd Floor, San Francisco, California 94105 ("**Bank**"), and **ACHAOGEN, INC.**, a Delaware corporation and a debtor and a debtor in possession ("**Borrower**"), provides the terms on which Bank shall lend to Borrower and Borrower shall repay Bank. The parties agree as follows:

1. ACCOUNTING AND OTHER TERMS

Accounting terms not defined in this Agreement shall be construed following GAAP**.** Calculations and determinations must be made following GAAP. Notwithstanding the foregoing, except as otherwise specifically set forth herein, all financial covenant calculations (if any) shall be computed with respect to Borrower only, and not on a consolidated basis. Capitalized terms not otherwise defined in this Agreement shall have the meanings set forth in Section 13. All other terms contained in this Agreement, unless otherwise indicated, shall have the meanings provided by the Uniform Commercial Code to the extent such terms are defined therein.

2. LOAN AND TERMS OF PAYMENT

2.1 Promise to Pay. Borrower hereby unconditionally promises to pay Bank the outstanding principal amount of all Credit Extensions and accrued and unpaid interest thereon as and when due in accordance with this Agreement.

2.1.1 Term Loan Advances.

(a) Availability. Subject to the terms and conditions of this Agreement, subject to the entry of the Interim DIP Order, Bank shall make term loan advances (each a "**Initial Term Loan Advance**" and collectively, the "**Initial Term Loan Advances**") to Borrower in an original principal amount not to exceed the Initial Term Loan Commitment on an aggregate basis. Subject to the terms and conditions of this Agreement, from and after the entry of the Final DIP Order, Bank shall make term loan advances (each a "**Final Term Loan Advance**" and collectively, the "**Final Term Loan Advances**", and together with the Initial Term Loan Advances, each a "**Term Loan Advance**" and collectively, the "**Term Loan Advances**") to Borrower; provided that Fifteen Million Dollars ($15,000,000.00) of the Term Loan Advances shall be used to repay in full Borrower's outstanding obligations and liabilities to Bank under the Prior Loan Agreement (including without limitation, all Bank Expenses, fees, and accrued interest) (collectively, the "**Prior Obligations**") upon entry of the Final DIP Order; provided, further, that the Term Loan Advances (including the amounts used to repay the Prior Obligations in full) shall not exceed the Commitment. Borrower may request up to one (1) Term Loan Advance in each week, which Term Loan Advance shall be in an amount not to exceed the Borrower's expenses shown in the Budget for such week. After repayment, the Term Loan Advances (or any portion thereof) may not be reborrowed. The aggregate amount of the Term Loan Advances made prior to the entry of the Final DIP Order shall not exceed the Initial Term Loan Commitment. Borrower hereby authorizes Bank to apply Fifteen Million Dollars ($15,000,000.00) of the Term Loan Advances to the Prior Obligations as part of the funding process upon entry of the Final DIP Order without actually depositing such funds into an account of Borrower. Notwithstanding anything to the contrary contained in this Agreement or any Financing Order, under no circumstances shall Bank make Term Loan Advances exceeding Ten Million Dollars ($10,000,000) in the aggregate except in connection with the repayment of the Prior Obligations following the entry of the Final DIP Order.

(b) Interest Payments. Commencing on May 1, 2019, and continuing on each Payment Date thereafter, Borrower shall make monthly payments of interest on the principal amount of the Term Loan Advances at the rate set forth in Section 2.2(a).

(c) Repayment. All outstanding principal and accrued and unpaid interest under the Term Loan Advances, and all other outstanding Obligations with respect to the Term Loan Advances, are due and payable

in full on the Term Loan Maturity Date. Upon the occurrence of the Term Loan Maturity Date, subject to the funding and/or payment of the Carve Out, KEIP/KERP Plan Amount and Wind Down Amount, all Obligations and Prior Obligations shall paid in full, in cash, on a final and indefeasible basis, subject to the provisions of the Financing Order.

(d) Permitted Prepayment of Term Loan Advances. Borrower shall have the option to prepay all, but not less than all, of the Term Loan Advances advanced by Bank under this Agreement, provided Borrower (i) provides written notice to Bank of its election to prepay the Term Loan Advances at least thirty (30) days prior to such prepayment, and (ii) pays, on the date of such prepayment (A) all outstanding principal plus accrued and unpaid interest, plus (B) all other sums, if any, that shall have become due and payable, including interest at the Default Rate with respect to any past due amounts, plus (C) the Term Loan Commitment Fees.

(e) Mandatory Prepayment Upon an Acceleration. If the Term Loan Advances are accelerated following the occurrence and during the continuance of an Event of Default, subject to the funding and/or payment of the Carve Out and KEIP/KERP Plan Amount, Borrower shall immediately pay to Bank an amount equal to the sum of: (i) all outstanding principal plus accrued and unpaid interest, plus (ii) all other sums, if any, that shall have become due and payable, including interest at the Default Rate with respect to any past due amounts, plus (iii) the Term Loan Commitment Fees.

2.2 Payment of Interest on the Credit Extensions.

(a) Interest Rate. Subject to Section 2.2(b), the principal amount outstanding under each Term Loan Advance shall accrue interest at a floating per annum rate equal to the Prime Rate plus five and one half percent (5.5%), which interest shall be payable monthly in accordance with Section 2.2(d) below.

(b) Default Rate. Immediately upon the occurrence and during the continuance of an Event of Default, Obligations shall bear interest at a rate per annum which is four percent (4.0%) above the rate that is otherwise applicable thereto (the "**Default Rate**") unless Bank otherwise elects from time to time in its sole discretion to impose a smaller increase. Fees and expenses which are required to be paid by Borrower pursuant to the Loan Documents (including, without limitation, Bank Expenses) but are not paid when due shall bear interest until paid at a rate equal to the highest rate applicable to the Obligations. Payment or acceptance of the increased interest rate provided in this Section 2.2(b) is not a permitted alternative to timely payment and shall not constitute a waiver of any Event of Default or otherwise prejudice or limit any rights or remedies of Bank.

(c) Adjustment to Interest Rate. Changes to the interest rate of any Credit Extension based on changes to the Prime Rate shall be effective on the effective date of any change to the Prime Rate and to the extent of any such change.

(d) Payment; Interest Computation. Interest is payable monthly on the Payment Date and shall be computed on the basis of a 360-day year for the actual number of days elapsed. In computing interest, (i) all payments received after 12:00 p.m. Pacific time on any day shall be deemed received at the opening of business on the next Business Day, and (ii) the date of the making of any Credit Extension shall be included and the date of payment shall be excluded; provided, however, that if any Credit Extension is repaid on the same day on which it is made, such day shall be included in computing interest on such Credit Extension.

2.3 Term Loan Commitment Fees; Bank Expenses. Borrower shall pay to Bank:

(a) Term Loan Commitment Fees. The Bank shall be entitled to receive the following commitment fees: (i) a non-refundable commitment fee of One Million Five Hundred Thousand Dollars ($1,500,000.00) (the "Initial Term Loan Commitment Fee"), which shall be deemed earned as of entry of the Interim DIP Order and shall be due at the Term Loan Maturity Date; and (ii) a non-refundable commitment fee of One Million Five Hundred Thousand Dollars ($1,500,000.00) (the "Final Term Loan Commitment Fee" and, together with the Initial Term Loan Commitment Fee, the "Term Loan Commitment Fees"), which shall be deemed earned as of entry of the Final DIP Order and shall be due at the Term Loan Maturity Date; provided, that the Term B Final Payment (as defined in the Prior Loan Agreement) shall be waived as of the entry of the Final DIP Order (which, for

the avoidance of doubt, shall authorize the Borrower's repayment in full of the Prior Obligations and approve the Final Term Loan Commitment Fee).

(b) Bank Expenses. All Bank Expenses (including reasonable attorneys' fees and expenses for documentation and negotiation of this Agreement) incurred through and after the Petition Date, when due (or, if no stated due date, upon demand by Bank).

Unless otherwise provided in this Agreement or in a separate writing by Bank, Borrower shall not be entitled to any credit, rebate, or repayment of any fees earned by Bank pursuant to this Agreement notwithstanding any termination of this Agreement pursuant to its terms or the suspension or termination of Bank's obligation to make loans and advances hereunder pursuant to the terms hereof. Bank may deduct amounts owing by Borrower under the clauses of this Section 2.3 pursuant to the terms of Section 2.4(c). Bank shall provide Borrower written notice of deductions made from the Designated Deposit Account pursuant to the terms of the clauses of this Section 2.3.

2.4 Payments; Application of Payments; Debit of Accounts.

(a) All payments to be made by Borrower under any Loan Document shall be made in immediately available funds in Dollars, without setoff or counterclaim, before 12:00 p.m. Pacific time on the date when due. Payments of principal and/or interest received after 12:00 p.m. Pacific time are considered received at the opening of business on the next Business Day. When a payment is due on a day that is not a Business Day, the payment shall be due the next Business Day, and additional fees or interest, as applicable, shall continue to accrue until paid.

(b) Bank has the exclusive right to determine the order and manner in which all payments with respect to the Obligations may be applied. Borrower shall have no right to specify the order or the accounts to which Bank shall allocate or apply any payments required to be made by Borrower to Bank or otherwise received by Bank under this Agreement when any such allocation or application is not specified elsewhere in this Agreement.

(c) Bank may debit any of Borrower's deposit accounts, including the Designated Deposit Account, for principal and interest payments or any other amounts Borrower owes Bank when due; provided, that Bank shall first debit the Designated Deposit Account. These debits shall not constitute a set-off.

2.5 Withholding.

(a) Defined Terms. For purposes of this Section 2.5, the term "applicable law" includes FATCA.

(b) Payments Free of Taxes. Any and all payments by or on account of any obligation of Borrower under any Loan Document shall be made without deduction or withholding for any Taxes, except as required by applicable law. If any applicable law requires the deduction or withholding of any Tax from any such payment, then Borrower (or applicable withholding agent) shall be entitled to make such deduction or withholding and shall timely pay the full amount deducted or withheld to the relevant Governmental Authority in accordance with applicable law and, if such Tax is an Indemnified Tax, then the sum payable by Borrower shall be increased as necessary so that after such deduction or withholding has been made (including such deductions and withholdings applicable to additional sums payable under this Section 2.5(b)), Bank receives an amount equal to the sum it would have received had no such deduction or withholding been made.

(c) Payment of Other Taxes by Borrower. Borrower shall timely pay to the relevant Governmental Authority in accordance with applicable law, or at the option of Bank timely reimburse it for the payment of, any Other Taxes.

(d) Indemnification by Borrower. Borrower shall indemnify Bank within ten (10) days after receipt by Borrower of written demand therefor, for the full amount of any Indemnified Taxes (including Indemnified Taxes imposed or asserted on or attributable to amounts payable under this Section 2.5(d)) payable or

paid by Bank or required to be withheld or deducted from a payment to Bank and any reasonable expenses arising therefrom or with respect thereto, whether or not such Indemnified Taxes were correctly or legally imposed or asserted by the relevant Governmental Authority. A certificate as to the amount of such payment or liability delivered to Borrower by Bank, shall be conclusive absent manifest error.

(e) Evidence of Payments. As soon as practicable after any payment of Taxes by Borrower to a Governmental Authority pursuant to this Section 2.5, Borrower shall deliver to Bank the original or a certified copy of a receipt issued by such Governmental Authority evidencing such payment, a copy of the return reporting such payment or other evidence of such payment reasonably satisfactory to Bank.

(f) Status of Lenders.

(i) Bank, and any other Person holding a beneficial interest in the right to make the Term Loan Advance, if entitled to an exemption from or reduction of withholding Tax with respect to payments made under any Loan Document, shall deliver to Borrower, at the time or times reasonably requested by Borrower, such properly completed and executed documentation reasonably requested by Borrower as will permit such payments to be made without withholding or at a reduced rate of withholding. In addition, Bank and any other Person holding a beneficial interest in the right to make the Term Loan Advances, if reasonably requested by Borrower, shall deliver such other documentation prescribed by applicable law or reasonably requested by Borrower as will enable Borrower to determine whether or not Bank or such other Person is subject to backup withholding or information reporting requirements. Notwithstanding anything to the contrary in the preceding two sentences, the completion, execution and submission of such documentation (other than such documentation set forth below in subparagraphs (ii)(A), (ii)(B) and (ii)(D) of this Section 2.5(f)) shall not be required if in the reasonable judgment of Bank or any other Person holding a beneficial interest in the right to make the Term Loan Advances such completion, execution or submission would subject Bank or such other Person to any material unreimbursed cost or expense or would materially prejudice the legal or commercial position of Bank or of such other Person.

(ii) Without limiting the generality of the foregoing,

(A) if requested by Borrower, Bank or any such other Person holding a beneficial interest in the right to make the Term Loan Advances that is a US Person shall deliver to Borrower on or prior to the date on which such other Person acquires a beneficial interest in the right to make the Term Loan Advances (and from time to time thereafter upon the reasonable request of Borrower), executed copies of IRS Form W-9 certifying that Bank or such other Person is exempt from U.S. federal backup withholding tax;

(B) any Foreign Lender shall, to the extent it is legally entitled to do so, deliver to Borrower (in such number of copies as shall be requested by Borrower) on or prior to the date on which such Foreign Lender acquires a beneficial interest in the right to make the Term Loan Advances (and from time to time thereafter upon the reasonable request of Borrower), executed copies of the applicable IRS Form W-8, duly completed, together with such supplementary documentation as may be prescribed by applicable law (or reasonably requested by Borrower, including a customary "non-bank" certificate) to permit Borrower to determine the withholding or deduction required to be made;

(C) any Foreign Lender shall, to the extent it is legally entitled to do so, deliver to Borrower (in such number of copies as shall be requested by the recipient) on or prior to the date on which such Foreign Lender acquires a beneficial interest in the right to make the Term Loan Advances (and from time to time thereafter upon the reasonable request of Borrower), executed copies of any other form prescribed by applicable law as a basis for claiming exemption from or a reduction in U.S. federal withholding Tax, duly completed, together with such supplementary documentation as

may be prescribed by applicable law to permit Borrower to determine the withholding or deduction required to be made; and

(D) if a payment made to Bank or any other Person holding a beneficial interest in the right to make the Term Loan Advances would be subject to U.S. federal withholding Tax imposed by FATCA if Bank or such other Person were to fail to comply with the applicable reporting requirements of FATCA (including those contained in Section 1471(b) or 1472(b) of the Internal Revenue Code, as applicable), Bank or such other Person shall deliver to Borrower at the time or times prescribed by law and at such time or times reasonably requested by Borrower such documentation prescribed by applicable law (including as prescribed by Section 1471(b)(3)(C)(i) of the Internal Revenue Code) and such additional documentation reasonably requested by Borrower as may be necessary for Borrower to comply with its obligations under FATCA and to determine that Bank or such other Person has complied with the obligations imposed by FATCA on Bank or such other Person or to determine the amount to deduct and withhold from such payment. Solely for purposes of this clause (D), "FATCA" shall include any amendments made to FATCA after the Petition Date.

Bank and any such other Person holding a beneficial interest in the right to make the Term Loan Advances agree that if any form or certification it previously delivered expires or becomes obsolete or inaccurate in any respect, it shall update such form or certification or promptly notify Borrower in writing of its legal inability to do so.

(g) Refunds. If any party determines, in its sole discretion exercised in good faith, that it has received a refund of any Taxes as to which it has been indemnified pursuant to this Section 2.5 (including by the payment of additional amounts pursuant to this Section 2.5), it shall pay to the indemnifying party an amount equal to such refund (but only to the extent of indemnity payments made under this Section 2.5 with respect to the Taxes giving rise to such refund), net of all out-of-pocket expenses (including Taxes) of such indemnified party and without interest (other than any interest paid by the relevant Governmental Authority with respect to such refund). Such indemnifying party, upon the request of such indemnified party, shall repay to such indemnified party the amount paid over pursuant to this paragraph (g) (plus any penalties, interest or other charges imposed by the relevant Governmental Authority) in the event that such indemnified party is required to repay such refund to such Governmental Authority. Notwithstanding anything to the contrary in this paragraph (g), in no event will the indemnified party be required to pay any amount to an indemnifying party pursuant to this paragraph (g) the payment of which would place the indemnified party in a less favorable net after-Tax position than the indemnified party would have been in if the Tax subject to indemnification and giving rise to such refund had not been deducted, withheld or otherwise imposed and the indemnification payments or additional amounts with respect to such Tax had never been paid. This paragraph shall not be construed to require any indemnified party to make available its Tax returns (or any other information relating to its Taxes that it deems confidential) to the indemnifying party or any other Person.

(h) Survival. Each party's obligations under this Section 2.5 shall survive the termination of this Agreement and the Loan Documents.

3. CONDITIONS OF LOANS

3.1 Conditions Precedent to Initial Term Loan Advances. Unless otherwise waived by the Bank, the Bank's obligation to make an Initial Term Loan Advance is subject to the condition precedent that Bank shall have received, in form and substance reasonably satisfactory to Bank, such documents, and completion of such other matters, as Bank may reasonably deem necessary or appropriate, including, without limitation:

(a) the entry of the Interim DIP Order shall have occurred not later than three (3) business days following the Petition Date;

(b) duly executed signatures to the Loan Documents;

(c) a secretary's corporate borrowing certificate of Borrower with respect to Borrower's Operating Documents, incumbency, specimen signatures and resolutions authorizing the execution and delivery of this Agreement and the other Loan Documents to which it is a party;

(d) duly executed signatures to the completed Borrowing Resolutions for Borrower;

(e) Bank shall have received the Initial Budget prepared in good faith based upon assumptions believed to be reasonable when made and when delivered, reasonably satisfactory in all respects to Bank.

(f) Borrower shall have filed the Sale Motion with the Bankruptcy Court requesting, among other things, approval of the sale process for the Sale;

(g) this Agreement and the other Loan Documents shall, upon entry of the Interim DIP Order, be effective to create in favor of Bank legal, valid and enforceable first priority Lien upon all Collateral;

(h) [Reserved];

(i) certified copies, dated as of a recent date, of financing statement searches, as Bank may request, accompanied by written evidence (including any UCC termination statements) that the Liens indicated in any such financing statements either constitute Permitted Liens or have been or, in connection with the initial Credit Extension, will be terminated or released;

(j) evidence satisfactory to Bank that the insurance policies and endorsements required by Section 6.5 hereof are in full force and effect, together with appropriate evidence showing lender loss payable and/or additional insured clauses or endorsements in favor of Bank;

(k) payment of the Bank Expenses then due as specified in Section 2.3 hereof and as set forth in an invoice delivered to Borrower prior to the date of funding of the Initial Term Loan Advance;

(l) [Reserved]; and

(m) all (i) "first day orders" and all related pleadings intended to be entered on or prior to the date of entry of the Interim DIP Order (including, for the purposes of the "cash management order," a bridge order authorizing continued use of the Borrower's current cash management systems until a hearing with respect to a final cash management order) shall have been entered by the Bankruptcy Court and shall be reasonably satisfactory in form and substance to the Bank and (ii) to the extent available for Bank review at that time, forms of "second day orders" shall be reasonably satisfactory in form and substance to the Bank.

3.2 Conditions Precedent to Final Term Loan Advances. Unless otherwise waived by the Bank, the Bank's obligation to make a Final Term Loan Advance is subject to the condition precedent that Bank shall have received, in form and substance reasonably satisfactory to Bank, such documents, and completion of such other matters, as Bank may reasonably deem necessary or appropriate, including, without limitation:

(a) the entry of the Final DIP Order shall have occurred not later than thirty (30) days following the Petition Date;

(b) all material "second day orders" and all related pleadings intended to be entered on or prior to the date of entry of the Final DIP Order, including a final cash management order, shall have been entered by the Bankruptcy Court, and all pleadings related to procedures for approval of significant transactions, including, without limitation, asset sale procedures, regardless of when filed or entered, shall be reasonably satisfactory in form and substance to the Bank; and

(c) Bank shall have received when due a current Budget prepared in good faith based upon assumptions believed to be reasonable when made and when delivered, reasonably satisfactory in all respects to Bank.

3.3 Conditions Precedent to all Credit Extensions. Bank's obligations to make each Credit Extension, including the initial Credit Extension, is subject to the following conditions precedent:

(a) the applicable Financing Order shall be in full force and effect and shall not have been modified or amended (unless otherwise approved by Bank), reversed, stayed or subject to a motion for reargument or reconsideration;

(b) except as otherwise provided in Section 3.5, timely receipt of an executed Payment/Advance Form;

(c) the representations and warranties in this Agreement shall be true, accurate, and complete in all material respects on the date of the Payment/Advance Form and on the Funding Date of each Credit Extension; provided, however, that such materiality qualifier shall not be applicable to any representations and warranties that already are qualified or modified by materiality in the text thereof; and provided, further that those representations and warranties expressly referring to a specific date shall be true, accurate and complete in all material respects as of such date, and no Event of Default shall have occurred and be continuing or result from the Credit Extension. Each Credit Extension is Borrower's representation and warranty on that date that the representations and warranties in this Agreement remain true, accurate, and complete in all material respects; provided, however, that such materiality qualifier shall not be applicable to any representations and warranties that already are qualified or modified by materiality in the text thereof; and provided, further that those representations and warranties expressly referring to a specific date shall be true, accurate and complete in all material respects as of such date; and

(d) Bank determines in the exercise of its reasonable discretion that a Material Adverse Change has not occurred.

3.4 Covenant to Deliver. Borrower agrees to deliver to Bank each item required to be delivered to Bank under this Agreement as a condition precedent to any Credit Extension. Borrower expressly agrees that a Credit Extension made prior to the receipt by Bank of any such item shall not constitute a waiver by Bank of Borrower's obligation to deliver such item, and the making of any Credit Extension in the absence of a required item shall be in Bank's reasonable discretion.

3.5 Procedures for Borrowing. Subject to the prior satisfaction of all other applicable conditions to the making of a Credit Extension set forth in this Agreement, to obtain a Credit Extension, other than in connection with the first Initial Term Loan Advance, Borrower shall notify Bank (which notice shall be irrevocable) by electronic mail, facsimile, or telephone by 12:00 p.m. Pacific time at least two (2) Business Days prior to the proposed Funding Date of the Credit Extension. Together with any such electronic or facsimile notification (which shall not be required in connection with the first Initial Term Loan Advance), Borrower shall deliver to Bank by electronic mail or facsimile a completed Payment/Advance Form executed by an Authorized Signer. Bank may rely on any telephone notice given by a person whom Bank reasonably believes is an Authorized Signer. Bank shall credit the Credit Extensions to the Designated Deposit Account. Bank may make Credit Extensions under this Agreement based on instructions from an Authorized Signer or without instructions if the Credit Extensions are necessary to meet Obligations which have become due.

4. GRANT OF SUPERPRIORITY CLAIM AND SECURITY INTEREST

4.1 Grant of Superpriority Claim and Security Interest. Borrower warrants and covenants that, subject only to the Carve Out and the KEIP/KERP Plan Amount, upon the entry of the applicable Financing Order, the Obligations of Borrower under the Loan Documents shall at all times constitute a Superpriority Claim against the Borrower and its estate in the Chapter 11 Case having priority, pursuant to Section 364(c)(1) and 507(b) of the Bankruptcy Code, over the other administrative claims of any person or entity, including, without limitation any claims under Sections 105, 326, 328, 330, 331, 365, 503(a), 503(b), 506(c) (upon entry of the Final DIP Order),

507(a), 507(b), 546(c), 546(d), 726 (to the extent permitted by law), 1113 and 1114 of the Bankruptcy Code, and any other provision of the Bankruptcy Code, and which shall at all times be, subject to the Carve Out and the KEIP/KERP Plan Amount, senior to the rights of Borrower, Borrower's estate, any trustee or successor trustee to the extent permitted by law, or any other creditor in the Chapter 11 Case.

Pursuant to Section 364 of the Bankruptcy Code and the Loan Documents, the Liens of Bank hereunder shall at all times be secured by, and Borrower hereby grants to Bank, to secure the payment and performance in full of all of the Obligations, and pledges to Bank, a continuing, valid, binding, enforceable, non-avoidable and automatically properly perfected priming first priority post-petition Lien, which Lien shall be subject only to the payment of the Carve Out and the KEIP/KERP Plan Amount, on all existing and after acquired real and personal property and other assets of Borrower, tangible and intangible, whether now owned by or owing to, or hereafter acquired by or arising in favor of Borrower, whether owned or consigned by or to, or leased from or to Borrower and regardless of where located, including, without limitation, the items listed on the attached **Exhibit A** (collectively, the "**Collateral**").

Borrower acknowledges that it previously has entered, and/or may in the future enter, into Bank Services Agreements with Bank. Regardless of the terms of any Bank Services Agreement, Borrower agrees that any amounts Borrower owes Bank thereunder shall be deemed to be Obligations hereunder and that it is the intent of Borrower and Bank to have all such Obligations secured by the first priority perfected Lien on the Collateral granted herein. The Collateral may also be subject to Permitted Liens.

If this Agreement is terminated, Bank's Lien on the Collateral shall continue until the Obligations (other than inchoate indemnity obligations) are repaid in full in cash. Upon payment in full in cash of the Obligations (other than inchoate indemnity obligations) and at such time as Bank's obligation to make Credit Extensions has terminated, Bank shall, at the sole cost and expense of Borrower, release its Liens in the Collateral and all rights therein shall revert to Borrower. In the event (x) all Obligations (other than inchoate indemnity obligations), except for Bank Services, are satisfied in full, and (y) this Agreement is terminated, Bank shall terminate the Lien granted herein upon Borrower providing cash collateral acceptable to Bank in its good faith business judgment for Bank Services, if any. In the event such Bank Services consist of outstanding Letters of Credit, Borrower shall provide to Bank cash collateral in an amount equal to (x) if such Letters of Credit are denominated in Dollars, then at least one hundred five percent (105.0%); and (y) if such Letters of Credit are denominated in a Foreign Currency, then at least one hundred ten percent (110.0%), of the Dollar Equivalent of the face amount of all such Letters of Credit plus, in each case, all interest, fees, and costs due or to become due in connection therewith (as estimated by Bank in its good faith business judgment), to secure all of the Obligations relating to such Letters of Credit.

4.2 [Reserved]

4.3 No Avoidance, Subordination or Modification. Borrower's Obligations and the Liens granted to the Bank hereunder shall not be subject to avoidance, subordination or modification under any provision of the Bankruptcy Code or applicable law, and all claims and Liens arising under this Agreement and the other Loan Documents shall constitute allowed claims and Liens against Borrower and its estate that are valid, binding and enforceable against Borrower and Borrower's estate, and all claims, defenses, offsets to such obligations shall be waived, and, subject to the applicable challenge periods set forth in the Financing Order, all persons and entities shall be barred from asserting any such claims, defenses or offsets to such allowed claim. The Obligations under this Agreement and the Liens in the Collateral securing the Obligations shall not be subject to, and Borrower hereby waives the right to, surcharge the same pursuant to Section 506(c) of the Bankruptcy Code upon entry of the Final DIP Order, and such Obligations and Liens shall not be subject to, and Borrower shall waive the right to assert any rights under Sections 552 of the Bankruptcy Code with respect to the Bank or the Collateral.

4.5 Authorization to File Financing Statements. Borrower hereby authorizes Bank to file financing statements, without notice to Borrower, with all appropriate jurisdictions to the extent the Bank deems such filings to be necessary or desirable. Such financing statements may indicate the Collateral as "all assets of the Debtor" or words of similar effect, or as being of an equal or lesser scope, or with greater detail, all in Bank's discretion.

4.6 No Discharge; Survival of Claims. Pursuant to Section 1141(d)(4) of the Bankruptcy Code, Borrower hereby waives any discharge of the Obligations with respect to any plan of reorganization that shall not

provide for the payment in full in cash of the Obligations (other than contingent indemnification and reimbursement Obligations not yet due) under this Agreement. Borrower hereby agrees that the Superpriority Claims and Liens granted to the Bank pursuant to the Interim DIP Order or the Final DIP Order shall not be affected in any manner by the entry of an order confirming a plan of reorganization.

5. REPRESENTATIONS AND WARRANTIES

Borrower represents and warrants as follows:

5.1 Due Organization, Authorization; Power and Authority. Borrower is duly existing and in good standing as a Registered Organization in its jurisdiction of formation and is qualified and licensed to do business and is in good standing in any jurisdiction in which the conduct of its business or its ownership of property requires that it be qualified except where the failure to do so could not reasonably be expected to have a material adverse effect on Borrower's business. Borrower previously delivered to Bank a completed certificate signed by Borrower, entitled "Perfection Certificate" dated as of February 26, 2018 (as amended, the "**Perfection Certificate**"). Borrower represents and warrants to Bank that (a) Borrower's exact legal name is that indicated on the Perfection Certificate and on the signature page hereof; (b) Borrower is an organization of the type and is organized in the jurisdiction set forth in the Perfection Certificate; (c) the Perfection Certificate accurately sets forth Borrower's organizational identification number or accurately states that Borrower has none; (d) the Perfection Certificate accurately sets forth Borrower's place of business, or, if more than one, its chief executive office as well as Borrower's mailing address (if different than its chief executive office); (e) Borrower (and each of its predecessors) has not, in the past five (5) years, changed its jurisdiction of formation, organizational structure or type, or any organizational number assigned by its jurisdiction; and (f) as of February 26, 2018, all other information set forth on the Perfection Certificate pertaining to Borrower and each of its Subsidiaries is accurate and complete in all material respects (it being understood and agreed that Borrower may from time to time update certain information in the Perfection Certificate after the date hereof to the extent such updates result from actions, transactions, circumstances or events not prohibited by this Agreement). If Borrower is not now a Registered Organization but later becomes one, Borrower shall promptly notify Bank of such occurrence and provide Bank with Borrower's organizational identification number.

The execution, delivery and performance by Borrower of the Loan Documents to which it is a party have been duly authorized, and do not (i) conflict with any of Borrower's Operating Documents, (ii) contravene, conflict with, constitute a default under or violate any material Requirement of Law, (iii) contravene, conflict or violate any applicable order, writ, judgment, injunction, decree, determination or award of any Governmental Authority by which Borrower or any of its Subsidiaries or any of their property or assets may be bound or affected, (iv) require any action by, filing, registration, or qualification with, or Governmental Approval from, any Governmental Authority (except such Governmental Approvals which have already been obtained and are in full force and effect **(**or are being obtained pursuant to Section 6.1(b)**))** or (v) conflict with, contravene, constitute a default or breach under, or result in or permit the termination or acceleration of, any material agreement by which Borrower is bound. Borrower is not in default under any agreement to which it is a party or by which it is bound in which the default could reasonably be expected to have a material adverse effect on Borrower's business.

5.2 Collateral. Borrower has good title to, rights in, and the power to transfer each item of the Collateral upon which it purports to grant a Lien hereunder, free and clear of any and all Liens except Permitted Liens. Borrower has no Collateral Accounts at or with any bank or financial institution other than Bank or Bank's Affiliates. The Accounts are bona fide, existing obligations of the Account Debtors.

The Collateral is not in the possession of any third party bailee (such as a warehouse) except as otherwise provided in the Perfection Certificate or as permitted pursuant to Section 7.2. None of the components of the Collateral shall be maintained at locations other than as provided in the Perfection Certificate or as permitted pursuant to Section 7.2.

All Inventory is in all material respects of good and marketable quality, free from material defects.

Borrower is the sole owner of the Intellectual Property which it owns or purports to own except for (a) licenses not prohibited hereunder, (b) over-the-counter software that is commercially available to the public, and (c)

material Intellectual Property licensed to Borrower and noted on the Perfection Certificate. Each Patent (other than patent applications) which it owns or purports to own and which is material to Borrower's business is valid and enforceable, and no part of the Intellectual Property which Borrower owns or purports to own and which is material to Borrower's business has been judged invalid or unenforceable, in whole or in part. To the best of Borrower's knowledge, no claim has been made that any part of the Intellectual Property violates the rights of any third party except to the extent such claim would not reasonably be expected to have a material adverse effect on Borrower's business.

Except as noted on the Perfection Certificate or with respect to which notice is provided under Section 6.7(b), Borrower is not a party to, nor is it bound by, any Restricted License.

5.3 Litigation. Other than as set forth in the Perfection Certificate or as disclosed pursuant to Section 6.2(d), there are no actions or proceedings pending or, to the knowledge of any Responsible Officer, threatened in writing by or against Borrower or any of its Subsidiaries, which could reasonably be expected to result in damages payable by Borrower, individually or in the aggregate, in excess of Five Hundred Thousand Dollars ($500,000.00).

5.4 Financial Statements. All consolidated financial statements for Borrower and any of its Subsidiaries delivered to Bank fairly present in all material respects Borrower's consolidated financial condition and Borrower's consolidated results of operations.

5.5 [Reserved].

5.6 Regulatory Compliance. Borrower is not an "investment company" or a company "controlled" by an "investment company" under the Investment Company Act of 1940, as amended. Borrower is not engaged as one of its important activities in extending credit for margin stock (under Regulations X, T and U of the Federal Reserve Board of Governors). Borrower (a) has complied in all material respects with all Requirements of Law, and (b) has not violated any Requirements of Law the violation of which could reasonably be expected to have a material adverse effect on its business. None of Borrower's or any of its Subsidiaries' properties or assets has been used by Borrower or any Subsidiary or, to the best of Borrower's knowledge, by previous Persons, in disposing, producing, storing, treating, or transporting any hazardous substance other than legally. Borrower and each of its Subsidiaries have obtained all consents, approvals and authorizations of, made all declarations or filings with, and given all notices to, all Governmental Authorities that are necessary to continue their respective businesses as currently conducted, except where the failure to obtain such consents, approvals or authorizations, make such declarations or filings, or give all notices could not reasonably be expected to have a material adverse effect on Borrower's business.

5.7 Subsidiaries; Investments. Borrower does not own any stock, partnership, or other ownership interest or other equity securities except for Permitted Investments.

5.8 Tax Returns and Payments; Pension Contributions. Borrower has timely filed all required Tax returns and reports, and Borrower has timely paid all foreign, federal, state and local Taxes, assessments, deposits and contributions owed by Borrower except (a) to the extent such Taxes are being contested in good faith by appropriate proceedings promptly instituted and diligently conducted, so long as such reserve or other appropriate provision, if any, as shall be required in conformity with GAAP shall have been made therefor, or (b) if such Taxes, assessments, deposits and contributions do not, individually or in the aggregate, exceed Fifty Thousand Dollars ($50,000.00).

To the extent Borrower defers payment of any contested Taxes, Borrower shall (i) notify Bank in writing of the commencement of, and any material development in, the proceedings, and (ii) post bonds or take any other steps required to prevent the Governmental Authority levying such contested Taxes from obtaining a Lien upon any of the Collateral that is other than a "Permitted Lien." Borrower is unaware of any claims or adjustments proposed for any of Borrower's prior tax years which could result in additional Taxes becoming due and payable by Borrower in excess of Fifty Thousand Dollars ($50,000.00). Borrower has paid all amounts necessary to fund all present pension, profit sharing and deferred compensation plans in accordance with their terms, and Borrower has not withdrawn from participation in, and has not permitted partial or complete termination of, or permitted the occurrence of any other event with respect to, any such plan which could reasonably be expected to result in any

liability of Borrower, including any liability to the Pension Benefit Guaranty Corporation or its successors or any other governmental agency.

5.9 Use of Proceeds. Borrower shall use Fifteen Million Dollars ($15,000,000.00) of the proceeds of the Term Loan Advances to repay the Prior Obligations, upon entry of the Final DIP Order and in accordance with the terms of this Agreement, and shall use the other Term Loan Advances and proceeds of all other Credit Extensions as working capital and to fund the Bank Expenses and its general business requirements and not for personal, family, household or agricultural purposes. Except as set forth in the Budget or the Carve Out, no Collateral or proceeds thereof shall be used for the payment of Case Professionals so long as the Obligations remain outstanding.

5.10 Full Disclosure. No written representation, warranty or other statement of Borrower in any certificate or written statement given to Bank, as of the date such representation, warranty, or other statement was made, taken together with all such written certificates and written statements given to Bank, contains any untrue statement of a material fact or omits to state a material fact necessary to make the statements contained in the certificates or statements not misleading (it being recognized by Bank that the projections and forecasts provided by Borrower in good faith and based upon reasonable assumptions are not viewed as facts and that actual results during the period or periods covered by such projections and forecasts may differ from the projected or forecasted results).

5.11 Definition of "Knowledge." For purposes of the Loan Documents, whenever a representation or warranty is made to Borrower's knowledge or awareness, to the "best of" Borrower's knowledge, or with a similar qualification, knowledge or awareness means the actual knowledge, after reasonable investigation, of any Responsible Officer.

5.12 Financing Order. The Financing Order is in full force and effect is not subject to a pending appeal or motion for leave to appeal or other proceeding to set aside such order and has not been reversed, modified, stayed or vacated.

6. AFFIRMATIVE COVENANTS

Borrower shall do all of the following:

6.1 Government Compliance.

(a) Maintain its and all its Subsidiaries' legal existence and good standing in their respective jurisdictions of formation and maintain qualification in each jurisdiction in which the failure to so qualify would reasonably be expected to have a material adverse effect on Borrower's business or operations. Borrower shall comply, and have each Subsidiary comply, in all material respects, with all laws, ordinances and regulations to which it is subject.

(b) Obtain all of the Governmental Approvals necessary for the performance by Borrower of its obligations under the Loan Documents to which it is a party and the grant of a Lien to Bank in all of the Collateral**.** Borrower shall promptly provide copies of any such obtained Governmental Approvals to Bank.

6.2 Financial Statements, Reports, Certificates. Provide Bank with the following:

(a) Monthly Operating Reports. Contemporaneously with delivery to the United States Trustee, copies of all monthly operating reports and supporting documentation.

(b) Other Statements. Within five (5) days of delivery, copies of all material statements, reports and notices made available to Borrower's security holders or to any holders of Subordinated Debt, in each case other than solely in their capacities as members of the Board;

(c) SEC Filings. Within five (5) days of filing, copies of all periodic and other reports, proxy statements and other materials filed by Borrower with the SEC, any Governmental Authority succeeding to any or

all of the functions of the SEC or with any national securities exchange, or distributed to its shareholders, as the case may be. Documents required to be delivered pursuant to the terms hereof (to the extent any such documents are included in materials otherwise filed with the SEC) may be delivered electronically and if so delivered, shall be deemed to have been delivered on the date on which Borrower posts such documents, or provides a link thereto, on Borrower's website on the Internet at Borrower's website address;

(d) Legal Action Notice. A prompt report of any legal actions pending or threatened in writing against Borrower or any of its Subsidiaries that could reasonably be expected to result in damages or costs to Borrower or any of its Subsidiaries of, individually or in the aggregate, Five Hundred Thousand Dollars ($500,000.00) or more;

(e) Other Financial Information. Other financial information reasonably requested by Bank;

(f) Government Notices. Deliver to Bank, within ten (10) days after the same are sent or received, copies of all material correspondence, reports, documents and other filings with any Governmental Authority regarding compliance with or maintenance of Governmental Approvals or Requirements of Law that could reasonably be expected to have a material adverse effect on any of the Governmental Approvals or on the operations of Borrower or any of its Subsidiaries;

(g) Beneficial Ownership Information. Prompt written notice of any changes to the beneficial ownership information set out in Section 15 of the Perfection Certificate. Borrower understands and acknowledges that Bank relies on such true, accurate and up-to-date beneficial ownership information to meet Bank's regulatory obligations to obtain, verify and record information about the beneficial owners of its legal entity customers;

(h) Budget. Attached as Exhibit C is Borrower's Initial Budget, which has been approved by Bank. Beginning on the first Friday following the Petition Date, and then no later than the Friday of each subsequent calendar week, Borrower shall deliver to Bank an updated, proposed Budget (each, a "**Proposed Budget**") for the following 13-week period, which shall be in form and substance reasonably satisfactory to Bank (it being agreed that using a form similar to Exhibit C shall be acceptable). A Proposed Budget shall become the new Budget upon approval by the Bank (which must be in writing) and, if no such approval is received, the prior approved Budget shall continue in place and Bank and Borrower shall negotiate in good faith regarding the terms of the Proposed Budget. Borrower shall not permit the amount of its actual disbursements (excluding payment of all Bank Expenses) for any week to exceed one hundred fifteen percent (115.0%) of the disbursements shown in the Budget for such week and on an aggregate basis, and Borrower shall not permit the actual cash receipts for any week to be less than eighty-five percent (85.0%) of the cash receipts shown in the Budget for such week and on an aggregate basis (the "**Budget Variances**"). Borrower shall also deliver with each updated Budget a variance report reflecting on a line item and an aggregate basis, Borrower's actual unrestricted cash receipts and cash disbursements compared to the Budget for such immediately preceding week and for the period commencing on the Petition Date through and including the end of the week immediately preceding the date of the variance report. For the avoidance of doubt, for purposes of calculating the Budget Variances, any unused amounts set forth in the Budget for any period of determination may be carried forward and used during subsequent periods; and

(i) Case Professional Fees and Expenses. Upon Bank's request, estimated summaries regarding all accrued and unpaid expenses of all Case Professionals, together with a reconciliation report comparing the same to the amounts set forth in the Budget for such Cash Professional (or category of Case Professional).

6.3 Inventory; Returns. Keep all Inventory in good and marketable condition, free from material defects. Returns and allowances between Borrower and its Account Debtors shall follow Borrower's customary practices as they exist at the date hereof or as is customary for companies similar in size, business and location to Borrower. Borrower must promptly notify Bank of all returns, recoveries, disputes and claims that involve more than Five Hundred Thousand Dollars ($500,000.00).

6.4 Taxes; Pensions. Timely file, and require each of its Subsidiaries to timely file, all required Tax returns and reports and timely pay, and require each of its Subsidiaries to timely pay, all foreign, federal, state and local Taxes, assessments, deposits and contributions owed by Borrower and each of its Subsidiaries, except for

deferred payment of any Taxes contested pursuant to the terms of Section 5.8 hereof and taxes with respect to which the amount does not exceed the amount set forth in Section 5.8, and shall deliver to Bank, on demand, appropriate certificates attesting to such payments, and pay all amounts necessary to fund all present pension, profit sharing and deferred compensation plans in accordance with their terms.

6.5 Insurance.

(a) Keep its business and the Collateral insured for risks and in amounts standard for companies in Borrower's industry and location and as Bank may reasonably request. Insurance policies shall be in a form, with financially sound and reputable insurance companies that are not Affiliates of Borrower, and in amounts that are reasonably satisfactory to Bank. All property policies shall have a lender's loss payable endorsement showing Bank as lender loss payee. All liability policies shall show, or have endorsements showing, Bank as an additional insured. Bank shall be named as lender loss payee and/or additional insured with respect to any such insurance providing coverage in respect of any Collateral.

(b) Ensure that proceeds payable under any property policy are, at Bank's option, payable to Bank on account of the Obligations. Notwithstanding the foregoing, (i) so long as no Event of Default has occurred and is continuing, Borrower shall have the option of applying the proceeds of any casualty policy up to Five Hundred Thousand Dollars ($500,000.00) with respect to any loss, but not exceeding Five Hundred Thousand Dollars ($500,000.00) in the aggregate for all losses under all casualty policies in any one (1) year, toward the replacement or repair of destroyed or damaged property; provided that any such replaced or repaired property (x) shall be of equal or like value as the replaced or repaired Collateral and (y) shall be deemed Collateral in which Bank has been granted a first priority Lien, and (i) after the occurrence and during the continuance of an Event of Default, all proceeds payable under such casualty policy shall, at the option of Bank, be payable to Bank on account of the Obligations.

(c) At Bank's request, Borrower shall deliver certified copies of insurance policies and evidence of all premium payments. Each provider of any such insurance required under this Section 6.5 shall agree, by endorsement upon the policy or policies issued by it or by independent instruments furnished to Bank, that it will give Bank thirty (30) days prior written notice (except for non-payment, which shall be ten (10) days prior written notice) before any such policy or policies shall be canceled. If Borrower fails to obtain insurance as required under this Section 6.5 or to pay any amount or furnish any required proof of payment to third persons and Bank, Bank may make all or part of such payment or obtain such insurance policies required in this Section 6.5, and take any action under the policies Bank deems prudent.

6.6 Operating Accounts.

Maintain all of its and its Subsidiaries' operating, depository, and securities/investment accounts with Bank and Bank's Affiliates.

6.7 Protection and Registration of Intellectual Property Rights.

(a) (i) Protect, defend and maintain the validity and enforceability of its Intellectual Property that is material to Borrower's business; (ii) promptly advise Bank in writing of material infringements or any other event that could reasonably be expected to materially and adversely affect the value of its Intellectual Property; and (iii) not allow any Intellectual Property material to Borrower's business to be abandoned, forfeited or dedicated to the public without Bank's written consent.

(b) To the extent not already disclosed in writing to Bank, if Borrower (i) obtains any Patent, registered Trademark, registered Copyright, registered mask work, or any pending application for any of the foregoing, whether as owner, licensee or otherwise, or (ii) applies for any Patent or the registration of any Trademark, then Borrower shall immediately provide written notice thereof to Bank and shall execute such intellectual property security agreements and other documents and take such other actions as Bank may request in its good faith business judgment to perfect and maintain a first priority perfected Lien in favor of Bank in such property. If Borrower decides to register any Copyrights or mask works in the United States Copyright Office,

Borrower shall: (x) provide Bank with at least fifteen (15) days prior written notice of Borrower's intent to register such Copyrights or mask works together with a copy of the application it intends to file with the United States Copyright Office (excluding exhibits thereto); (y) execute an intellectual property security agreement and such other documents and take such other actions as Bank may request in its good faith business judgment to perfect and maintain a first priority perfected Lien in favor of Bank in the Copyrights or mask works intended to be registered with the United States Copyright Office; and (z) record such intellectual property security agreement with the United States Copyright Office contemporaneously with filing the Copyright or mask work application(s) with the United States Copyright Office. Borrower shall promptly provide to Bank copies of all applications that it files for Patents or for the registration of Trademarks, Copyrights or mask works, together with evidence of the recording of the intellectual property security agreement required for Bank to perfect and maintain a first priority perfected Lien on such property.

(c) Provide written notice to Bank within the later of ten (10) days of entering or becoming bound by any Restricted License (other than over-the-counter software that is commercially available to the public). Borrower shall take such commercially reasonable steps as Bank reasonably requests to obtain the consent of, or waiver by, any person whose consent or waiver is necessary for (i) any Restricted License to be deemed "Collateral" and for Bank to have a Lien in it that might otherwise be restricted or prohibited by law or by the terms of any such Restricted License, whether now existing or entered into in the future, and (ii) Bank to have the ability in the event of a liquidation of any Collateral to dispose of such Collateral in accordance with Bank's rights and remedies under this Agreement and the other Loan Documents.

6.8 Litigation Cooperation. From the date hereof and continuing through the termination of this Agreement pursuant to its terms, make available to Bank, without expense to Bank, Borrower and its officers, employees and agents and Borrower's books and records, to the extent that Bank may deem them reasonably necessary to prosecute or defend any third-party suit or proceeding instituted by or against Bank with respect to any Collateral or relating to Borrower.

6.9 Access to Collateral; Books and Records. Allow Bank, or its agents, at reasonable times during regular business hours, on three (3) Business Days' notice (provided no notice is required if an Event of Default has occurred and is continuing), to inspect the Collateral and audit and copy Borrower's Books. Such inspections or audits shall be conducted no more often than once every twelve (12) months unless an Event of Default has occurred and is continuing in which case such inspections and audits shall occur as often as Bank shall determine is necessary. The foregoing inspections and audits shall be at Borrower's expense. In the event Borrower and Bank schedule an audit more than eight (8) days in advance, and Borrower cancels or seeks to reschedule the audit with less than eight (8) days written notice to Bank, then (without limiting any of Bank's rights or remedies), Borrower shall pay Bank a fee of Two Thousand Dollars ($2,000.00) plus any out-of-pocket expenses incurred by Bank to compensate Bank for the anticipated costs and expenses of the cancellation or rescheduling.

6.10 Further Assurances. Execute any further instruments and take further action as Bank reasonably requests to perfect or continue Bank's Lien on the Collateral or to effect the purposes of this Agreement.

6.11 Formation or Acquisition of Subsidiaries. Notwithstanding and without limiting the negative covenants contained in Sections 7.3 and 7.7 hereof, at the time that Borrower forms any direct or indirect Subsidiary or acquires any direct or indirect Subsidiary after the date hereof, Borrower shall (a) cause such new Subsidiary to provide to Bank either a joinder to this Agreement to cause such Subsidiary to become a co-borrower hereunder or a secured Guaranty to cause such Subsidiary to be a secured Guarantor under this Agreement, together with such appropriate financing statements and/or Control Agreements, all in form and substance satisfactory to Bank (including being sufficient to grant Bank a first priority Lien (subject to Permitted Liens) in and to the assets of such newly formed or acquired Subsidiary), provided that any Foreign Subsidiary shall not be required to become a co-borrower or secured Guarantor, (b) provide to Bank appropriate certificates and powers and financing statements, pledging all of the direct or beneficial ownership interest in such new Subsidiary, in form and substance satisfactory to Bank, provided that, with respect to stock, units, or other evidence of ownership held by Borrower in any Foreign Subsidiary, Borrower shall not be required to grant or pledge a security interest to Bank in more than sixty-five percent (65.0%) of such stock, units, or other evidence of ownership held by Borrower in such Foreign Subsidiary, and (c) provide to Bank all other documentation in form and substance satisfactory to Bank, including, as Bank may deem necessary, one or more opinions of counsel satisfactory to Bank, which in its opinion is appropriate with

respect to the execution and delivery of the applicable documentation referred to above. Any document, agreement, or instrument executed or issued pursuant to this Section 6.11 shall be a Loan Document.

6.12 Investment Banker; Financial Advisor.

(a) On the Petition Date, the Borrower will file a motion, in form and substance reasonably satisfactory to Bank, seeking authorization under applicable sections of the Bankruptcy Code to employ:

(i) Cassel Salpeter & Co., LLC or another investment banker satisfactory to Bank (the "**Investment Banker**"), under similar terms and conditions as those under which Cassel Salpeter & Co., LLC has been retained under that certain Investment Banking Agreement dated April 2, 2019 (the "**Investment Banker Agreement**") , and

(ii) Meru, LLC or another financial advisor satisfactory to Bank (the "**Financial Advisor**"), under similar terms and conditions as those under which Meru, LLC has been retained under that certain engagement letter dated April 2, 2019 (the "**Consulting Services Engagement Letter**"), to be Debtor's financial adviser, which retention shall include making Nick Campbell, or another professional satisfactory to Bank, under similar terms and conditions as those set forth in the Consulting Services Engagement Letter with respect to Mr. Campbell, available to be interim chief restructuring officer of Borrower.

(b) Borrower will continue to employ an Investment Banker and Financial Advisor or chief restructuring officer pursuant to the terms of Section 6.12(a) at all times during the Case, provided that upon the resignation or termination of an Investment Banker, Financial Advisor or chief restructuring officer, Borrower will have five (5) Business Days to seek court authorization to retain another Financial Advisor or chief restructuring officer, as applicable.

(c) Borrower and each of its Subsidiaries hereby authorizes the Investment Banker and Financial Advisor retained by Borrower to communicate directly with Bank and its professionals and advisors regarding Borrower and its Subsidiaries and any matters within the scope of its work related thereto.

(d) Borrower and its Subsidiaries shall cooperate with the Bank and its respective professionals and advisors and provide assistance with any and all diligence reasonably requested thereby, including, but not limited to, providing Bank and its counsel and advisors with prompt reasonable access from time to time, upon prior request, to (w) the Investment Banker and the Financial Advisor retained by Borrower pursuant hereto, (x) all related diligence materials and work product, including written reports provided by such Investment Banker and Financial Advisor to Borrower as may be reasonably requested by Bank (other than any such materials and reports determined by Borrower or its counsel to be subject to the work-product doctrine or attorney-client privilege), (y) Borrower and its Subsidiaries' respective property, business locations and books and records during regular business hours (as long as such access does not unreasonably interfere with or disrupt normal business activities), and (z) such other available information as Bank or its respective professionals or advisers shall reasonably request.

6.13 Bankruptcy Matters. Borrower will:

(a) contemporaneously with the filing thereof, deliver to Bank copies of all pleadings, motions, applications, financial information and other papers and documents filed by Borrower in the Case, which copies of such papers and documents may be provided to or served on Bank's counsel; and

(b) as long as Bank is not a bidder for such Collateral, contemporaneously with the receipt thereof, deliver to Bank copies of all letters of intent, expressions of interest, offers to purchase or draft purchase agreements (together with subsequent drafts) with respect to any of the Collateral.

6.14 Milestones. Borrower will perform and deliver each of the items set forth in Schedule 6.14 on or before the dates specified therein with respect to such items.

6.15 Payment of Post-Petition Obligations. Pay all actual and necessary material business expenses in accordance with the Budget, to the extent of funds available in the Budget for such purpose, as and when due.

6.16 Borrower's Leases. Within 90 days of the Petition Date, Borrower shall submit, and shall use commercially reasonable efforts to ensure that the Bankruptcy Court shall grant, a motion to extend the period in which Borrower can assume or reject its (and its Affiliate's) leases of non-residential real property until at least 210 days from the Petition Date, unless Borrower determines, in its reasonable business judgment to reject its lease.

7. NEGATIVE COVENANTS

Prior to the date on which the Obligations have been paid in full, Borrower shall not do any of the following without Bank's prior written consent:

7.1 Dispositions. Convey, sell, lease, transfer, assign, or otherwise dispose of (collectively, "**Transfer**"), or permit any of its Subsidiaries to Transfer, all or any part of its business or property, except for Transfers (a) of Inventory in the ordinary course of business; and (b) of worn-out, surplus or obsolete Equipment that is, in the reasonable judgment of Borrower, no longer economically practicable to maintain or useful in the ordinary course of business of Borrower.

7.2 Changes in Business, Management Control, or Business Locations. (a) Engage in or permit any of its Subsidiaries to engage in any business other than the businesses currently engaged in by Borrower and such Subsidiary, as applicable, or reasonably related thereto; (b) liquidate or dissolve; (c) fail to provide notice to Bank of any Key Person departing from or ceasing to be employed by Borrower within ten (10) days after such Key Person's departure from Borrower; or (d) permit or suffer any Change in Control.

Borrower shall not, without at least twenty (20) days prior written notice to Bank: (1) add any new offices or business locations, including warehouses (unless such new offices or business locations contain less than Five Hundred Thousand Dollars ($500,000.00) in Borrower's assets or property) or deliver any portion of the Collateral valued, individually or in the aggregate, in excess of Five Hundred Thousand Dollars ($500,000.00) to a bailee at a location other than to a bailee and at a location already disclosed in the Perfection Certificate (other than with respect to Collateral in transit or Collateral with customers or clients of Borrower in the ordinary course of business), (2) change its jurisdiction of organization, (3) change its organizational structure or type, (4) change its legal name, or (5) change any organizational number (if any) assigned by its jurisdiction of organization. If Borrower intends to deliver any portion of the Collateral valued, individually or in the aggregate, in excess of Five Hundred Thousand Dollars ($500,000.00) to a bailee (and such Collateral is not Collateral in transit or Collateral with customers or clients of Borrower in the ordinary course of business), and Bank and such bailee are not already parties to a bailee agreement governing both the Collateral and the location to which Borrower intends to deliver the Collateral, then Borrower shall use commercially reasonable efforts to cause such bailee to execute and deliver a bailee agreement in form and substance satisfactory to Bank.

7.3 Mergers or Acquisitions. Merge or consolidate, or permit any of its Subsidiaries to merge or consolidate, with any other Person, or acquire, or permit any of its Subsidiaries to acquire, all or substantially all of the capital stock or property of another Person (including, without limitation, by the formation of any Subsidiary). A Subsidiary may merge or consolidate into another Subsidiary or into Borrower.

7.4 Indebtedness. Create, incur, assume, or be liable for any Indebtedness, or permit any Subsidiary to do so, other than Permitted Indebtedness.

7.5 Encumbrance. Create, incur, allow, or suffer any Lien on any of its property, or assign or convey any right to receive income, including the sale of any Accounts, or permit any of its Subsidiaries to do so, except for Permitted Liens, permit any Collateral not to be subject to the priming first priority security interest granted herein, or enter into any agreement, document, instrument or other arrangement (except with or in favor of Bank) with any Person which directly or indirectly prohibits or has the effect of prohibiting Borrower or any Subsidiary from assigning, mortgaging, pledging, granting a security interest in or upon, or encumbering any of Borrower's or any

Subsidiary's Intellectual Property, except as is otherwise permitted in Section 7.1 hereof and the definition of "Permitted Liens" herein.

7.6 Maintenance of Collateral Accounts. Maintain any Collateral Account except pursuant to the terms of Section 6.6 hereof.

7.7 Distributions; Investments. Pay any dividends or make any distribution or payment or redeem, retire or purchase any of Borrower or any Guarantor's capital stock, provided that Borrower may convert any of its convertible securities into other securities pursuant to the terms of such convertible securities or otherwise in exchange thereof.

7.8 Transactions with Affiliates. Directly or indirectly enter into or permit to exist any material transaction with any Affiliate of Borrower, except for transactions that are in the ordinary course of Borrower's business, upon fair and reasonable terms that are no less favorable to Borrower than would be obtained in an arm's length transaction with a non-affiliated Person.

7.9 Subordinated Debt. Make or permit any payment on any Subordinated Debt.

7.10 Compliance. Become an "investment company" or a company controlled by an "investment company", under the Investment Company Act of 1940, as amended, or undertake as one of its important activities extending credit to purchase or carry margin stock (as defined in Regulation U of the Board of Governors of the Federal Reserve System), or use the proceeds of any Credit Extension for that purpose; fail to (a) meet the minimum funding requirements of ERISA, (b) prevent a Reportable Event or Prohibited Transaction, as defined in ERISA, from occurring, or (c) comply with the Federal Fair Labor Standards Act, the failure of any of the conditions described in clauses (a) through (c) which could reasonably be expected to have a material adverse effect on Borrower's business; or violate any other law or regulation, if the violation could reasonably be expected to have a material adverse effect on Borrower's business, or permit any of its Subsidiaries to do so; withdraw or permit any Subsidiary to withdraw from participation in, permit partial or complete termination of, or permit the occurrence of any other event with respect to, any present pension, profit sharing and deferred compensation plan which could reasonably be expected to result in any liability of Borrower, including any liability to the Pension Benefit Guaranty Corporation or its successors or any other governmental agency.

7.11 Cash Collateral. Subject to the Budget Variances, Borrower shall not use any cash Collateral (including proceeds of the Term Loan Advances), or pay or incur any expenses, liabilities or obligations in an amount greater than shown in the Budget, or prior to the week shown in the Budget.

7.12 Financing Order. Prior to the date on which the Obligations have been paid in full, Borrower will not:

(a) seek, consent to or suffer to exist at any time any modification, stay, vacation or amendment of the Financing Order, except for modifications and amendments joined in or agreed to in writing by Bank;

(b) seek the use of "Cash Collateral" (as defined in the Financing Order) in a manner inconsistent with the terms of the Financing Order without the prior written consent of Bank;

(c) suffer to exist at any time a priority for any administrative expense or unsecured claim against Borrower (now existing or hereafter arising of any kind or nature whatsoever), including, without limitation, any administrative expenses of the kind specified in Sections 105, 326, 328, 503((b), 506(c), 507(a), 507(b), 546(c), 552(b), 726 and 1114 of the Bankruptcy Code) or any claim which is equal or superior to the Superpriority Claim of Bank;

(d) directly or indirectly seek, consent or suffer to exist at any time after the date hereof any Lien on any properties, assets or rights except for Permitted Liens; or

(e) pay any administrative expenses, except administrative expenses incurred in the ordinary course of business of Borrower and set forth in the Budget; provided, however, that notwithstanding the foregoing, Borrower shall be permitted to pay as the same may become due and payable (i) administrative expenses of the kind specified in Section 503(b) of the Bankruptcy Code incurred in the ordinary course of business and to the extent otherwise authorized under the Budget and not in conflict with the Financing Order, and (ii) compensation and reimbursement of expenses to professionals allowed and payable under Sections 330 and 331 of the Bankruptcy Code to the extent permitted by the Budget and not in conflict with the Financing Order.

7.13 Budget Variances. Borrower shall not exceed the Budget Variances without the consent of Bank.

8. EVENTS OF DEFAULT

Any one of the following shall constitute an event of default (an "**Event of Default**") under this Agreement:

8.1 Payment Default. Borrower fails to (a) make any payment of principal or interest on any Credit Extension when due, or (b) pay any other Obligations within three (3) Business Days after such Obligations are due and payable (which three (3) Business Day cure period shall not apply to payments due on the Term Loan Maturity Date). During the cure period, the failure to make or pay any payment specified under clause (b) hereunder is not an Event of Default (but no Credit Extension will be made during the cure period);

8.2 Covenant Default.

(a) Borrower fails or neglects to perform any obligation in Sections 6.2, 6.4, 6.5, 6.6, 6.7(b), 6.11, 6.12, 6.13, 6.14, 6.15, or 6.16, or violates any covenant in Section 7; or

(b) Borrower fails or neglects to perform, keep, or observe any other term, provision, condition, covenant or agreement contained in this Agreement or any Loan Documents, and as to any default (other than those specified in this Section 8) under such other term, provision, condition, covenant or agreement that can be cured, has failed to cure the default within ten (10) days after the occurrence thereof; provided, however, that if the default cannot by its nature be cured within the ten (10) day period or cannot after diligent attempts by Borrower be cured within such ten (10) day period, and such default is likely to be cured within a reasonable time, then Borrower shall have an additional period (which shall not in any case exceed thirty (30) days) to attempt to cure such default, and within such reasonable time period the failure to cure the default shall not be deemed an Event of Default (but no Credit Extensions shall be made during such cure period). Cure periods provided under this section shall not apply, among other things, to financial covenants (if any) or any other covenants set forth in clause (a) above;

8.3 Material Adverse Change. A Material Adverse Change occurs;

8.4 Attachment; Levy; Restraint on Business.

(a) (i) The service of process seeking to attach, by trustee or similar process, any funds of Borrower or of any entity under the control of Borrower (including a Subsidiary) in excess of One Hundred Thousand Dollars ($100,000.00), or (ii) a notice of lien or levy is filed against any of Borrower's assets by any Governmental Authority, and the same under subclauses (i) and (ii) hereof are not, within ten (10) days after the occurrence thereof, discharged or stayed (whether through the posting of a bond or otherwise); provided, however, no Credit Extensions shall be made during any ten (10) day cure period; or

(b) (i) any material portion of Borrower's assets is attached, seized, levied on, or comes into possession of a trustee or receiver, or (ii) any court order enjoins, restrains, or prevents Borrower from conducting all or any material part of its business;

8.5 [Reserved].

8.6 Other Agreements. There is, under any agreement to which Borrower is a party with a third party or parties, (a) any default occurring after the Petition Date resulting in a right by such third party or parties, whether or not exercised, to accelerate the maturity of any Indebtedness in an amount individually or in the aggregate in excess of One Hundred Thousand Dollars ($100,000.00), if such default is not being disputed in good faith by Borrower or is otherwise not subject to the automatic stay; or (b) any breach or default by Borrower occurring after the Petition Date and which is not being disputed in good faith by Borrower or is otherwise not subject to the automatic stay, the result of which could have a material adverse effect on Borrower's business,; provided, however, that the Event of Default under this Section 8.6 caused by the occurrence of a breach or default under such other agreement shall be cured or waived for purposes of this Agreement upon Bank receiving written notice from the party asserting such breach or default of such cure or waiver of the breach or default under such other agreement, if at the time of such cure or waiver under such other agreement (x) Bank has not declared an Event of Default under this Agreement and/or exercised any rights with respect thereto; (y) any such cure or waiver does not result in an Event of Default under any other provision of this Agreement or any Loan Document; and (z) in connection with any such cure or waiver under such other agreement, the terms of any agreement with such third party are not modified or amended in any manner which could in the good faith business judgment of Bank be materially less advantageous to Borrower or any Guarantor.

8.7 Judgments; Penalties. One or more fines, penalties or final judgments, orders or decrees for the payment of money in an amount, individually or in the aggregate, of at least One Hundred Thousand Dollars ($100,000.00) (not covered by independent third-party insurance as to which liability has been accepted by such insurance carrier) shall be rendered against Borrower by any Governmental Authority, and the same are not, within ten (10) days after the entry, assessment or issuance thereof, discharged, satisfied, or paid, or after execution thereof, stayed or bonded pending appeal, or such judgments are not discharged prior to the expiration of any such stay (provided that no Credit Extensions will be made prior to the satisfaction, payment, discharge, stay, or bonding of such fine, penalty, judgment, order or decree);

8.8 Misrepresentations. Borrower or any Person acting for Borrower makes any representation, warranty, or other statement now or later in this Agreement, any Loan Document or in any writing delivered to Bank or to induce Bank to enter this Agreement or any Loan Document, and such representation, warranty, or other statement is incorrect in any material respect when made;

8.9 Subordinated Debt. Any document, instrument, or agreement evidencing any Subordinated Debt shall for any reason be revoked or invalidated or otherwise cease to be in full force and effect, in each case other than pursuant to its terms, any Person shall be in breach thereof or contest in any manner the validity or enforceability thereof or deny that it has any further liability or obligation thereunder, or the Obligations shall for any reason be subordinated or shall not have the priority contemplated by this Agreement or any applicable subordination or intercreditor agreement; or

8.10 Governmental Approvals. Any Governmental Approval shall have been (a) revoked, rescinded, suspended, modified in an adverse manner or not renewed in the ordinary course for a full term or (b) subject to any decision by a Governmental Authority that designates a hearing with respect to any applications for renewal of any of such Governmental Approval or that could result in the Governmental Authority taking any of the actions described in clause (a) above, and such decision or such revocation, rescission, suspension, modification or non-renewal (i) cause, or could reasonably be expected to cause, a Material Adverse Change, or (ii) adversely affects the legal qualifications of Borrower or any of its Subsidiaries to hold such Governmental Approval in any applicable jurisdiction and such revocation, rescission, suspension, modification or non-renewal could reasonably be expected to affect the status of or legal qualifications of Borrower or any of its Subsidiaries to hold any Governmental Approval in any other jurisdiction; provided, however, that notwithstanding anything to the contrary, the suspension or delisting of Borrower's stock by Nasdaq or any other exchange shall not be an Event of Default.

8.11 Bankruptcy Defaults:

(a) the Final DIP Order is not entered within thirty (30) days (or such other period as Bank may agree to in writing with Borrower) following the Petition Date; or any Financing Order is stayed, revised, revoked, remanded, rescinded, amended, reversed, vacated, or modified in any manner not acceptable to Bank;

(b) Borrower or any of its Affiliates shall file or consent to the filing of a pleading seeking to modify or otherwise alter the Interim DIP Order or the Final DIP Order without the prior consent of Bank;

(c) (i) an order shall be entered by the Bankruptcy Court appointing a trustee under Section 1104 of the Bankruptcy Code, or an examiner with enlarged powers relating to the operation of the business of Borrower under Section 1106(b) of the Bankruptcy Code or (ii) the Borrower's exclusive rights to file and solicit acceptances for a plan shall terminate without the prior consent of Bank;

(d) (A) Borrower shall attempt to invalidate, reduce or otherwise impair the Liens of Bank, of Bank's claims or rights against Borrower or any of its Subsidiaries or to subject any Collateral to assessment pursuant to Section 506(c) or 552(b) of the Bankruptcy Code, (B) any Lien or Superpriority Claim created by this Agreement, the Prior Loan Agreement, or the Financing Order shall, for any reason, cease to be valid or (C) any action is commenced by or on behalf of the Borrower or any of its Subsidiaries which contests the validity, perfection or enforceability of any of the Liens of Bank created by this Agreement, the Prior Loan Agreement or the Financing Order;

(e) Borrower or any of its Affiliates shall file or consent to the filing of a motion seeking to dismiss the Case or convert the Case to a case under chapter 7 of the Bankruptcy Code or an order with respect to the Case shall be entered by the Bankruptcy Court dismissing the Case or converting the Case to a case under chapter 7 of the Bankruptcy Code;

(f) any chapter 11 plan is filed in the Case, or an order shall be entered by the Bankruptcy Court confirming a chapter 11 plan in the Case, that does not provide for the termination of this Agreement and, if in effect at such time, the Prior Loan Agreement and the payment in full in cash of the Obligations, and, if any remain, the Prior Obligations and any Reinstated Prior Obligations on or before the effective date of such plan;

(g) without the express prior written consent of Bank, any sale of, or motion by Borrower to sell, a material portion of its assets pursuant to Section 363 of the Bankruptcy Code that does not provide sufficient proceeds to cause the payment in full of the Obligations, the Prior Obligations and Reinstated Prior Obligations;

(h) an order shall be entered in the Case without the express prior written consent of Bank, except as contemplated herein, (i) to revoke, vacate, reverse, stay, modify, supplement or amend this Agreement and the transactions contemplated hereby, any Loan Document or the Financing Order, or (ii) to permit any administrative expense or any claim (now existing or hereafter arising, of any kind or nature whatsoever) to have administrative priority equal or superior to the priority of Bank in respect of the Obligations;

(i) an order shall be entered in the Case granting of relief from the automatic stay to permit a third party to foreclose or enforce on assets of Borrower that have a value that exceeds Fifty Thousand Dollars ($50,000.00) in the aggregate;

(j) a motion shall be filed by Borrower seeking authority, or an order shall be entered in the Case (other than, for the avoidance of doubt, any motion or order permitting insurance premium financing agreements, which must be in form and substance acceptable to Bank), that (A) permits Borrower to incur Indebtedness secured by any claim under Section 364(c)(1) of the Bankruptcy Code or by a Lien pari passu with or superior to the Lien granted under the Loan Documents and Sections 364(c)(2) or (d) of the Bankruptcy Code, unless (1) all of the Obligations, Prior Obligations and Reinstated Prior Obligations, without duplication, have been paid in full at the time of the entry of any such order and all Commitments terminated, (2) the Obligations, Prior Obligations and Reinstated Prior Obligations, without duplication, are paid in full with such debt and all commitments terminated, or (3) such Indebtedness is subject to an intercreditor agreement in form and substance satisfactory to Bank in its sole discretion or (B) permits Borrower or any Subsidiary of Borrower the right to use Collateral other than in accordance with the terms of the Financing Order, unless all of the Obligations, Prior Obligations, Reinstated Prior Obligations, without duplication, shall have been paid in full and all commitments terminated;

(k) proceeds of any sale of all or substantially all assets of Borrower, other than the Wind Down Amount, the Carve Out, and the KEIP/KERP Plan Amount are not directly remitted to Bank at the closing thereof, and the Obligations, Prior Obligations, and Reinstated Prior Obligations (excluding the amount of the Wind Down Amount, the Carve Out and the KEIP/KERP Plan Amount), without duplication, are not paid in full in accordance with the terms of this Agreement from such proceeds;

(l) any motions by Borrower to sell Collateral or approve procedures regarding the same, any plan or disclosure statement filed by Borrower or supplements or amendments thereto, or any orders approving or amending any of the foregoing, are not in form and substance acceptable to Bank in its reasonable discretion;

(m) the automatic stay terminates or expires (other than an order granting of relief from the automatic stay to permit a third party to foreclose or enforce on assets of Borrower that have a value that is Fifty Thousand Dollars ($50,000.00) or less in the aggregate), unless all of the Obligations, Prior Obligations, and Reinstated Prior Obligations shall have been paid in full;

(n) [reserved];

(o) (A) Borrower, any Subsidiary of Borrower, or any of their respective Affiliates challenges the extent, validity or priority of the Obligations, the Prior Obligations or the Reinstated Prior Obligations or the application of any payments or collections received by Bank to the Obligations, the Prior Obligations or the Reinstated Prior Obligations or (B) any other Person challenges the extent, validity or priority of the Obligations, the Prior Obligations or the Reinstated Prior Obligations or the application of any payments or collections received by Bank to the Obligations, the Prior Obligations or the Reinstated Prior Obligations and, in the case of this subclause (B), such challenge is not resolved in a manner reasonably satisfactory to Bank by the later of the expiration of any applicable challenge period set forth in the Financing Order and forty-five (45) days following the assertion of such challenge;

(p) (A) Borrower, any Subsidiary of Borrower, or any of their respective Affiliates challenges the validity, extent, perfection or priority of any Liens granted in the Collateral to secure the Obligations, the Prior Obligations or the Reinstated Prior Obligations or (B) any other Person challenges the validity, extent, perfection or priority of any Liens granted in the Collateral to secure the Obligations, the Prior Obligations or the Reinstated Prior Obligations and, in the case of this subclause (B), such challenge is not resolved in a manner reasonably satisfactory to Bank by the later of the expiration of any applicable challenge period set forth in the Financing Order and forty-five (45) days following the assertion of such challenge;

(q) (i) Bank or the Collateral are surcharged or (ii) Borrower seeks to surcharge Bank or the Collateral, pursuant to Sections 105, 506(c), 552 or any other section of the Bankruptcy Code or (iii) the extent of the Liens on Collateral are otherwise limited by any such section of the Bankruptcy Code;

(r) payment of or granting adequate protection with respect to pre-petition debt (other than to Bank);

(s) Borrower shall fail to maintain sufficient projected borrowing capacity under this Agreement to pay all accrued administrative obligations and other administrative claims when due, subject to funds being included in the Budget for such purpose;

(t) [reserved];

(u) any willful and uncured violation by Borrower of the terms of the Financing Order;

(v) within the 13-week period covered by a Budget, the Bank, using commercially reasonable discretion, does not approve of a Proposed Budget becoming the new Budget in accordance with Section 6.2(h) hereof;

(w) (i) Borrower deposits any funds (or allow any funds to be deposited) into the "Adequate Assurance Account" (as defined in any order approving adequate assurance procedures under § 366 of the Bankruptcy Code, which must be in form and substance acceptable to Bank and may only be amended or modified with Bank's prior consent (the "**Utilities Order**") unless such funds are deposited for purposes of adequate assurance deposits in favor of utilities providers or are otherwise required by the Utilities Order and contemplated by the Budget or (ii) Borrower uses any funds deposited in the Adequate Assurance Account in a manner inconsistent with the Utilities Order or the Budget without Bank's prior consent; or

(x) any order is entered by the Bankruptcy Court sustaining any objection or challenge of any kind or nature to the validity, priority, or amount of the Liens or the Obligations, Prior Obligations or Reinstated Prior Obligations held by Bank, including with respect to an action to recharacterize or subordinate any Liens or claims of Bank against Borrower.

9. BANK'S RIGHTS AND REMEDIES

9.1 Rights and Remedies. Upon five (5) Business Days' written notice (a "**Remedies Notice**") of the occurrence of an Event of Default (the "**Remedies Notice Period**"), in each case delivered in accordance with the Financing Order, unless the Bankruptcy Court orders otherwise, the automatic stay under Section 362 of the Bankruptcy Code will be automatically lifted to allow Bank to take any and all actions permitted by the Loan Documents and applicable law, as if no case were pending under the Bankruptcy Code. Prior to the expiration of the Remedies Notice Period, Borrower, United States Trustee, and/or the Creditors' Committee may contest the existence or continuation of an Event of Default, or Bank's right to assert remedies in connection with an Event of Default set forth in a Remedies Notice, by filing of an expedited motion in the Bankruptcy Court. Nothing in this paragraph shall limit the ability of Borrower and other parties-in-interest to timely request any such expedited hearing on a motion seeking such a finding, and Bank hereby consents to the conduct of such expedited hearing (but not to the relief being sought therein). Upon the transmittal of a Remedies Notice:

(a) Borrower shall have no right to use any proceeds of the Collateral other than to satisfy the Obligations, the Carve Out and KEIP/KERP Plan Amount; provided, that, Borrower shall be permitted to use cash collateral (as defined in the Bankruptcy Code) to pay its employees ordinary wages accrued up to and including the date of service of the Remedies Notice;

(b) any obligation otherwise imposed on Bank to provide any loan or advance to Borrower pursuant to this Agreement or the Financing Order shall be suspended (pending the outcome of a hearing conducted under this Agreement and the Financing Order), and any loan or advance made thereafter shall be made by Bank in its sole and exclusive discretion;

(c) the Bank shall have the right to demand that Borrower (i) deposit cash with Bank in an amount equal to at least (x) one hundred five percent (105.0%) of the Dollar Equivalent of the aggregate face amount of all Letters of Credit denominated in Dollars remaining undrawn, and (y) one hundred ten percent (110.0%) of the Dollar Equivalent of the aggregate face amount of all Letters of Credit denominated in a Foreign Currency remaining undrawn (plus, in each case, all interest, fees, and costs due or to become due in connection therewith (as estimated by Bank in its good faith business judgment)), to secure all of the Obligations relating to such Letters of Credit, as collateral security for the repayment of any future drawings under such Letters of Credit, and Borrower shall forthwith deposit and pay such amounts, and (ii) pay in advance all letter of credit fees scheduled to be paid or payable over the remaining term of any Letters of Credit;

(d) the Bank shall have the right to terminate any FX Contracts;

(e) the Bank shall have the right to verify the amount of, demand payment of and performance under, and collect any Accounts and General Intangibles, settle or adjust disputes and claims directly with Account Debtors for amounts on terms and in any order that Bank considers advisable, and notify any Person owing Borrower money of Bank's Lien on such funds;

(f) the Bank shall have the right to make any payments and do any acts it considers necessary or reasonable to protect the Collateral and/or its Lien on the Collateral. Borrower shall assemble the Collateral if Bank requests and make it available as Bank designates. Bank may enter premises where the Collateral is located, take and maintain possession of any part of the Collateral, and pay, purchase, contest, or compromise any Lien which appears to be prior or superior to its Lien and pay all expenses incurred. Borrower grants Bank a license to enter and occupy any of its premises, without charge, to exercise any of Bank's rights or remedies;

(g) the Bank shall have the right to ship, reclaim, recover, store, finish, maintain, repair, prepare for sale, advertise for sale, and sell the Collateral. Upon the occurrence and during the continuance of an Event of Default, Bank is hereby granted a non-exclusive, royalty-free license or other right to use, without charge, Borrower's labels, Patents, Copyrights, mask works, rights of use of any name, trade secrets, trade names, Trademarks, and advertising matter, or any similar property as it pertains to the Collateral, in completing production of, advertising for sale, and selling any Collateral and, in connection with Bank's exercise of its rights under this Section, Borrower's rights under all licenses and all franchise agreements inure to Bank's benefit;

(h) the Bank shall have the right to place a "hold" on any account maintained with Bank and/or deliver a notice of exclusive control, any entitlement order, or other directions or instructions pursuant to any Control Agreement or similar agreements providing control of any Collateral; and

(i) the Bank shall have the right to demand and receive possession of Borrower's Books.

9.2 Power of Attorney. Borrower hereby irrevocably appoints Bank as its lawful attorney-in-fact, exercisable upon the occurrence and during the continuance of an Event of Default, to: (a) endorse Borrower's name on any checks or other forms of payment or security; (b) sign Borrower's name on any invoice or bill of lading for any Account or drafts against Account Debtors; (c) settle and adjust disputes and claims about the Accounts directly with Account Debtors, for amounts and on terms Bank determines reasonable; (d) make, settle, and adjust all claims under Borrower's insurance policies; (e) pay, contest or settle any Lien, charge, encumbrance, security interest, and adverse claim in or to the Collateral, or any judgment based thereon, or otherwise take any action to terminate or discharge the same; and (f) transfer the Collateral into the name of Bank or a third party as the Uniform Commercial Code permits. Borrower hereby appoints Bank as its lawful attorney-in-fact to sign Borrower's name on any documents necessary to perfect or continue the perfection of Bank's Lien on the Collateral regardless of whether an Event of Default has occurred until all Obligations (other than inchoate indemnity obligations) have been satisfied in full and Bank is under no further obligation to make Credit Extensions hereunder. Bank's foregoing appointment as Borrower's attorney in fact, and all of Bank's rights and powers, coupled with an interest, are irrevocable until all Obligations (other than inchoate indemnity obligations) have been fully repaid and performed and Bank's obligation to provide Credit Extensions terminates.

9.3 Protective Payments. If Borrower fails to obtain the insurance called for by Section 6.5 or fails to pay any premium thereon or fails to pay any other amount which Borrower is obligated to pay under this Agreement or any other Loan Document or which may be required to preserve the Collateral, Bank may obtain such insurance or make such payment, and all amounts so paid by Bank are Bank Expenses and immediately due and payable, bearing interest at the then highest rate applicable to the Obligations, and secured by the Collateral. Bank will make reasonable efforts to provide Borrower with notice of Bank obtaining such insurance at the time it is obtained or within a reasonable time thereafter. No payments by Bank are deemed an agreement to make similar payments in the future or Bank's waiver of any Event of Default.

9.4 Application of Payments and Proceeds Upon Default. If an Event of Default has occurred and is continuing, Bank shall have the right to apply in any order any funds in its possession, whether from Borrower account balances, payments, proceeds realized as the result of any collection of Accounts or other disposition of the Collateral, or otherwise, to the Obligations. Bank shall pay any surplus to Borrower by credit to the Designated Deposit Account or to other Persons legally entitled thereto; Borrower shall remain liable to Bank for any deficiency. If Bank, directly or indirectly, enters into a deferred payment or other credit transaction with any purchaser at any sale of Collateral, Bank shall have the option, exercisable at any time, of either reducing the Obligations by the principal amount of the purchase price or deferring the reduction of the Obligations until the actual receipt by Bank of cash therefor.

9.5 Bank's Liability for Collateral. So long as Bank complies with reasonable banking practices regarding the safekeeping of the Collateral in the possession or under the control of Bank, Bank shall not be liable or responsible for: (a) the safekeeping of the Collateral; (b) any loss or damage to the Collateral; (c) any diminution in the value of the Collateral; or (d) any act or default of any carrier, warehouseman, bailee, or other Person. Borrower bears all risk of loss, damage or destruction of the Collateral.

9.6 No Waiver; Remedies Cumulative. Bank's failure, at any time or times, to require strict performance by Borrower of any provision of this Agreement or any other Loan Document shall not waive, affect, or diminish any right of Bank thereafter to demand strict performance and compliance herewith or therewith. No waiver hereunder shall be effective unless signed by the party granting the waiver and then is only effective for the specific instance and purpose for which it is given. Bank's rights and remedies under this Agreement and the other Loan Documents are cumulative. Bank has all rights and remedies provided under the Uniform Commercial Code, by law, or in equity. Bank's exercise of one right or remedy is not an election and shall not preclude Bank from exercising any other remedy under this Agreement or other remedy available at law or in equity, and Bank's waiver of any Event of Default is not a continuing waiver. Bank's delay in exercising any remedy is not a waiver, election, or acquiescence.

9.7 Demand Waiver. Borrower waives demand, notice of default or dishonor, notice of payment and nonpayment, notice of any default, nonpayment at maturity, release, compromise, settlement, extension, or renewal of accounts, documents, instruments, chattel paper, and guarantees held by Bank on which Borrower is liable.

10. NOTICES

All notices, consents, requests, approvals, demands, or other communication by any party to this Agreement or any other Loan Document must be in writing and shall be deemed to have been validly served, given, or delivered: (a) upon the earlier of actual receipt and three (3) Business Days after deposit in the U.S. mail, first class, registered or certified mail return receipt requested, with proper postage prepaid; (b) upon transmission, when sent by electronic mail or facsimile transmission; (c) one (1) Business Day after deposit with a reputable overnight courier with all charges prepaid; or (d) when delivered, if hand-delivered by messenger, all of which shall be addressed to the party to be notified and sent to the address, facsimile number, or email address indicated below. Bank or Borrower may change its mailing or electronic mail address or facsimile number by giving the other party written notice thereof in accordance with the terms of this Section 10.

If to Borrower: Achaogen, Inc.
One Tower Place, Suite 300
South San Francisco, California 94080
Attn: Chief Financial Officer
Email: tschilke@achaogen.com

with a copy to: Hogan Lovells US LLP
1999 Avenue of the Stars, Suite 1400
Los Angeles, California 90067
Attn: Richard Wynne, Esquire
Erin Brady, Esquire
Chris Bryant, Esquire
Email: rick.wynne@hoganlovells.com
erin.brady@hoganlovells.com
chris.bryant@hoganlovells.com

If to Bank:	Silicon Valley Bank 505 Howard Street, 3rd Floor San Francisco, California 94105 Attn: Sheila Colson Email: scolson@svb.com
with a copy to:	Morrison & Foerster LLP 200 Clarendon Street, 20th Floor Boston, Massachusetts 02116 Attn: David A. Ephraim, Esquire Email: DEphraim@mofo.com

11. CHOICE OF LAW, VENUE, JURY TRIAL WAIVER AND JUDICIAL REFERENCE

Except as otherwise expressly provided in any of the Loan Documents, California law governs the Loan Documents without regard to principles of conflicts of law. Borrower and Bank each submit to the exclusive jurisdiction of the Bankruptcy Court; provided, however, that nothing in this Agreement shall be deemed to operate to preclude Bank from bringing suit or taking other legal action in any other jurisdiction to realize on the Collateral or any other security for the Obligations, or to enforce a judgment or other court order in favor of Bank. Borrower expressly submits and consents in advance to such jurisdiction in any action or suit commenced in any such court, and Borrower hereby waives any objection that it may have based upon lack of personal jurisdiction, improper venue, or forum non conveniens and hereby consents to the granting of such legal or equitable relief as is deemed appropriate by such court. Borrower hereby waives personal service of the summons, complaints, and other process issued in such action or suit and agrees that service of such summons, complaints, and other process may be made by registered or certified mail addressed to Borrower at the address set forth in, or subsequently provided by Borrower in accordance with, Section 10 of this Agreement and that service so made shall be deemed completed upon the earlier to occur of Borrower's actual receipt thereof or three (3) days after deposit in the U.S. mails, proper postage prepaid.

TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, BORROWER AND BANK EACH WAIVE THEIR RIGHT TO A JURY TRIAL OF ANY CLAIM OR CAUSE OF ACTION ARISING OUT OF OR BASED UPON THIS AGREEMENT, THE LOAN DOCUMENTS OR ANY CONTEMPLATED TRANSACTION, INCLUDING CONTRACT, TORT, BREACH OF DUTY AND ALL OTHER CLAIMS. THIS WAIVER IS A MATERIAL INDUCEMENT FOR BOTH PARTIES TO ENTER INTO THIS AGREEMENT. EACH PARTY HAS REVIEWED THIS WAIVER WITH ITS COUNSEL.

This Section 11 shall survive the termination of this Agreement.

12. GENERAL PROVISIONS

12.1 Termination Prior to Term Loan Maturity Date; Survival. All covenants, representations and warranties made in this Agreement shall continue in full force until this Agreement has terminated pursuant to its terms and all Obligations (other than inchoate indemnity obligations) have been satisfied. So long as Borrower has satisfied the Obligations (other than inchoate indemnity obligations, any other obligations which, by their terms, are to survive the termination of this Agreement and, any Obligations under Bank Services Agreements that are cash collateralized in accordance with Section 4.1 of this Agreement), this Agreement may be terminated prior to the Term Loan Maturity Date by Borrower, effective three (3) Business Days after written notice of termination is given to Bank. Those obligations that are expressly specified in this Agreement as surviving this Agreement's termination shall continue to survive notwithstanding this Agreement's termination.

12.2 Successors and Assigns. This Agreement binds and is for the benefit of the successors and permitted assigns of each party. Borrower may not assign this Agreement or any rights or obligations under it without Bank's prior written consent (which may be granted or withheld in Bank's discretion). Bank has the right, without the consent of or notice to Borrower, to sell, transfer, assign, negotiate, or grant participation in all or any

part of, or any interest in, Bank's obligations, rights, and benefits under this Agreement and the other Loan Documents. Notwithstanding the foregoing, prior to the occurrence of an Event of Default, Bank shall not assign any interest in the Loan Documents to an operating company that is a direct competitor of Borrower or a vulture fund or a distressed debt fund.

12.3 Indemnification. Borrower agrees to indemnify, defend and hold Bank and its directors, officers, employees, agents, attorneys, or any other Person affiliated with or representing Bank (each, an "**Indemnified Person**") harmless against: (i) all obligations, demands, claims, and liabilities (collectively, "**Claims**") claimed or asserted by any other party in connection with the transactions contemplated by the Loan Documents; and (ii) all losses or expenses (including Bank Expenses) in any way suffered, incurred, or paid by such Indemnified Person as a result of, following from, consequential to, or arising from transactions between Bank and Borrower contemplated by the Loan Documents (including reasonable attorneys' fees and expenses), except for Claims and/or losses directly caused by such Indemnified Person's gross negligence or willful misconduct. This Section 12.3 shall not apply with respect to Taxes other than any Taxes that represent losses, claims, damages, etc. arising from any non-Tax claim.

This Section 12.3 shall survive until all statutes of limitation with respect to the Claims, losses, and expenses for which indemnity is given shall have run.

12.4 Time of Essence. Time is of the essence for the performance of all Obligations in this Agreement.

12.5 Severability of Provisions. Each provision of this Agreement is severable from every other provision in determining the enforceability of any provision.

12.6 Correction of Loan Documents. Bank may correct patent errors and fill in any blanks in the Loan Documents consistent with the agreement of the parties so long as Bank provides Borrower with written notice of such correction and allows Borrower at least ten (10) days to object to such correction. In the event of such objection, such correction shall not be made except by an amendment signed by both Bank and Borrower.

12.7 Amendments in Writing; Waiver; Integration. No purported amendment or modification of any Loan Document, or waiver, discharge or termination of any obligation under any Loan Document, shall be enforceable or admissible unless, and only to the extent, expressly set forth in a writing signed by the party against which enforcement or admission is sought. Without limiting the generality of the foregoing, no oral promise or statement, nor any action, inaction, delay, failure to require performance or course of conduct shall operate as, or evidence, an amendment, supplement or waiver or have any other effect on any Loan Document. Any waiver granted shall be limited to the specific circumstance expressly described in it, and shall not apply to any subsequent or other circumstance, whether similar or dissimilar, or give rise to, or evidence, any obligation or commitment to grant any further waiver. The Loan Documents represent the entire agreement about this subject matter and supersede prior negotiations or agreements. All prior agreements, understandings, representations, warranties, and negotiations between the parties about the subject matter of the Loan Documents merge into the Loan Documents.

12.8 Counterparts. This Agreement may be executed in any number of counterparts and by different parties on separate counterparts, each of which, when executed and delivered, is an original, and all taken together, constitute one Agreement.

12.9 Confidentiality. In handling any confidential information, Bank shall exercise the same degree of care that it exercises for its own proprietary information, but disclosure of information may be made: (a) to Bank's Subsidiaries or Affiliates (such Subsidiaries and Affiliates, together with Bank, collectively, "**Bank Entities**"); (b) to prospective transferees or purchasers of any interest in the Credit Extensions (provided, however, Bank shall use its best efforts to obtain any prospective transferee's or purchaser's agreement to the terms of this provision); (c) as required by law, regulation, subpoena, or other order; (d) to Bank's regulators or as otherwise required in connection with Bank's examination or audit; (e) as Bank considers appropriate in exercising remedies under the Loan Documents; and (f) to third-party service providers of Bank so long as such service providers have executed a confidentiality agreement with Bank with terms no less restrictive than those contained herein. Confidential information does not include information that is either: (i) in the public domain or in Bank's possession when

disclosed to Bank, or becomes part of the public domain (other than as a result of its disclosure by Bank in violation of this Agreement) after disclosure to Bank; or (ii) disclosed to Bank by a third party, if Bank does not know that the third party is prohibited from disclosing the information.

Bank Entities may use anonymous forms of confidential information for aggregate datasets, for analyses or reporting, and for any other uses not expressly prohibited in writing by Borrower. The provisions of the immediately preceding sentence shall survive termination of this Agreement.

12.10 Right of Set Off. Borrower hereby grants to Bank, a Lien and right of set off as security for all Obligations to Bank, whether now existing or hereafter arising upon and against all deposits, credits, collateral and property, now or hereafter in the possession, custody, safekeeping or control of Bank or any entity under the control of Bank (including a Bank subsidiary) or in transit to any of them. At any time after the occurrence and during the continuance of an Event of Default, without demand or notice, Bank may set off the same or any part thereof and apply the same to any liability or obligation of Borrower even though unmatured and regardless of the adequacy of any other collateral securing the Obligations. ANY AND ALL RIGHTS TO REQUIRE BANK TO EXERCISE ITS RIGHTS OR REMEDIES WITH RESPECT TO ANY OTHER COLLATERAL WHICH SECURES THE OBLIGATIONS, PRIOR TO EXERCISING ITS RIGHT OF SETOFF WITH RESPECT TO SUCH DEPOSITS, CREDITS OR OTHER PROPERTY OF BORROWER ARE HEREBY KNOWINGLY, VOLUNTARILY AND IRREVOCABLY WAIVED.

12.11 Attorneys' Fees, Costs and Expenses. In any action or proceeding between Borrower and Bank arising out of or relating to the Loan Documents, the prevailing party shall be entitled to recover its reasonable attorneys' fees and other costs and expenses incurred, in addition to any other relief to which it may be entitled.

12.12 Electronic Execution of Documents. The words "execution," "signed," "signature" and words of like import in any Loan Document shall be deemed to include electronic signatures or the keeping of records in electronic form, each of which shall be of the same legal effect, validity and enforceability as a manually executed signature or the use of a paper-based recordkeeping systems, as the case may be, to the extent and as provided for in any applicable law, including, without limitation, any state law based on the Uniform Electronic Transactions Act.

12.13 Captions. The headings used in this Agreement are for convenience only and shall not affect the interpretation of this Agreement.

12.14 Construction of Agreement. The parties mutually acknowledge that they and their attorneys have participated in the preparation and negotiation of this Agreement. In cases of uncertainty this Agreement shall be construed without regard to which of the parties caused the uncertainty to exist.

12.15 Relationship. The relationship of the parties to this Agreement is determined solely by the provisions of this Agreement. The parties do not intend to create any agency, partnership, joint venture, trust, fiduciary or other relationship with duties or incidents different from those of parties to an arm's-length contract.

12.16 Third Parties. Nothing in this Agreement, whether express or implied, is intended to: (a) confer any benefits, rights or remedies under or by reason of this Agreement on any persons other than the express parties to it and their respective permitted successors and assigns; (b) relieve or discharge the obligation or liability of any person not an express party to this Agreement; or (c) give any person not an express party to this Agreement any right of subrogation or action against any party to this Agreement.

12.17 Release of Claims. Subject to applicable terms of the Interim DIP Order and Final DIP Order, Borrower hereby acknowledges effective upon entry of the Interim DIP Order and again upon the entry of the Final DIP Order, that Borrower has no defense, counterclaim, offset, recoupment, cross complaint, claim or demand of any kind or nature whatsoever that can be asserted to reduce or eliminate all or any part of Borrower's liability with respect to the Obligations or the Prior Obligations or to seek affirmative relief or damages of any kind or nature from Bank. Borrower, in its own right, on behalf of its bankruptcy estate, and on behalf of all its successors, assigns, and any Person acting for and on behalf of, or claiming through them, (collectively, the "**Releasing Parties**"), hereby fully, finally and forever releases and discharges Bank and all of its respective past and present

officers, directors, servants, agents, attorneys, assigns, heirs, parents, subsidiaries, and each Person acting for or on behalf of any of them (collectively, the "**Released Parties**") of any from any and all past, present and future actions, causes of action, demands, suits, claims, liabilities, Liens, lawsuits, adverse consequences, amounts paid in settlement, costs, damages, debts, deficiencies, diminution in value, disbursements, expenses, losses and other obligations of any kind or nature whatsoever, whether in law, equity or otherwise (including, without limitation, those arising under Sections 541 through 550 of the Bankruptcy Code and interest or other carrying costs, penalties, legal, accounting and other professional fees and expenses, and incidental, consequential and punitive damages payable to third parties), whether known or unknown, fixed or contingent, direct, indirect, or derivative, asserted or unasserted, foreseen or unforeseen, suspected or unsuspected, now existing, heretofore existing or which may heretofore accrue against any of the Released Parties, whether held in a personal or representative capacity, and which in each case are based on any act, fact, event or omission or other matter, cause or thing occurring at or from any time prior to and including the date hereof in any way, directly or indirectly arising out of, connected with or relating to this Agreement, the Financing Order and the transactions contemplated hereby (other than breaches by Bank or any Released Party of any of their obligations under any Loan Document or the Financing Order), the Prior Loan Agreement, and all other agreements, certificates, instruments and other documents and statements (whether written or oral) related to any of the foregoing, except for any Claims and/or losses caused by such Released Party's gross negligence or willful misconduct. Borrower, for and on behalf of itself and the applicable Releasing Parties, acknowledges and agrees that each has been informed by Borrower's attorney and advisors that, the release contained herein may extend to claims to which the parties do not know or suspect to exist in their favor, including claims which if known by them would have materially affected their decision to enter into the released contained herein, and notwithstanding the foregoing, hereby fully, finally, and irrevocably releases, acquits, waives and forever discharges any such unknown claims and any applicable law, statute or common law principle that, notwithstanding a general release, excludes from a general release and/or preserves claims that are not known or suspected at the time of executing the release. Borrower agrees that no fact, event, circumstance, evidence or transaction which could now be asserted or which may hereafter be discovered shall affect in any manner the final, absolute and unconditional nature of the release set forth above. Borrower waives the provisions of California Civil Code section 1542, which states:

> A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS THAT THE CREDITOR OR RELEASING PARTY DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE AND THAT IF KNOWN BY HIM OR HER, WOULD HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR OR RELEASED PARTY.

12.18 Wind Down Amount. The Borrower and the Bank agree to negotiate in good faith to fund a wind-down of the Borrower after consummation of the Sale (it being understood that this clause does not obligate any of the parties to reach an agreement regarding the terms of a wind-down) (the amount of any such funding, the "**Wind Down Amount**").

13. DEFINITIONS

13.1 Definitions. As used in the Loan Documents, the word "shall" is mandatory, the word "may" is permissive, the word "or" is not exclusive, the words "includes" and "including" are not limiting, the singular includes the plural, and numbers denoting amounts that are set off in brackets are negative. As used in this Agreement, the following capitalized terms have the following meanings:

"**Account**" is any "account" as defined in the Uniform Commercial Code with such additions to such term as may hereafter be made, and includes, without limitation, all accounts receivable and other sums owing to Borrower.

"**Account Debtor**" is any "account debtor" as defined in the Uniform Commercial Code with such additions to such term as may hereafter be made.

"**Acquisition**" is (a) the purchase or other acquisition by Borrower or any Subsidiary of all or substantially all of the assets of any other Person, or (b) the purchase or other acquisition (whether by means of merger,

consolidation, or otherwise) by Borrower or any Subsidiary of all or substantially all of the stock or other equity interest of any other Person.

"**Affiliate**" is, with respect to any Person, each other Person that owns or controls directly or indirectly the Person, any Person that controls or is controlled by or is under common control with the Person, and each of that Person's senior executive officers, directors, partners and, for any Person that is a limited liability company, that Person's managers and members.

"**Agreement**" is defined in the preamble hereof.

"**Authorized Signer**" is any individual listed in Borrower's Borrowing Resolution who is authorized to execute the Loan Documents, including any Credit Extension request, on behalf of Borrower.

"**Bank**" is defined in the preamble hereof.

"**Bank Entities**" is defined in Section 12.9.

"**Bank Expenses**" are all audit fees and expenses, costs, and expenses (including reasonable attorneys' fees and expenses) for preparing, amending, negotiating, administering, defending and enforcing the Loan Documents (including, without limitation, those incurred in connection with appeals or Insolvency Proceedings) or otherwise incurred with respect to Borrower or any Guarantor.

"**Bank Services**" are any products, credit services, and/or financial accommodations previously, now, or hereafter provided to Borrower or any of its Subsidiaries by Bank or any Bank Affiliate, including, without limitation, any letters of credit, cash management services (including, without limitation, merchant services, direct deposit of payroll, business credit cards, and check cashing services), interest rate swap arrangements, and foreign exchange services as any such products or services may be identified in Bank's various agreements related thereto (each, a "**Bank Services Agreement**").

"**Bank Services Agreement**" is defined in the definition of Bank Services.

"**Bankruptcy Code**" means Title 11 of the United States Code, as now and hereafter in effect, or any applicable successor statute.

"**Bankruptcy Court**" means the United States Bankruptcy Court for the District of Delaware, or any other court having jurisdiction over the Case from time to time.

"**Bankruptcy Recoveries**" means any recoveries of Borrower, by settlement or otherwise, in respect of claims and causes of action to which Borrower may be entitled to assert by reason of any avoidance or other power vested in or on behalf of a debtor or the estate of a debtor under chapter 5 of the Bankruptcy Code.

"**Board**" means Borrower's board of directors.

"**Borrower**" is defined in the preamble hereof.

"**Borrower Case Professionals**" means those persons or firms retained by the Borrower pursuant to sections 327, 328 or 363 of the Bankruptcy Code, other than ordinary course professionals.

"**Borrower's Books**" are all Borrower's books and records including ledgers, federal and state Tax returns, records regarding Borrower's assets or liabilities, the Collateral, business operations or financial condition, and all computer programs or storage or any equipment containing such information.

"**Borrowing Resolutions**" are, with respect to any Person, those resolutions adopted by such Person's board of directors (and, if required under the terms of such Person's Operating Documents, stockholders) and delivered by such Person to Bank approving the Loan Documents to which such Person is a party and the

transactions contemplated thereby, together with a certificate executed by its secretary or another authorized officer on behalf of such Person certifying (a) such Person has the authority to execute, deliver, and perform its obligations under each of the Loan Documents to which it is a party, (b) that set forth as a part of or attached as an exhibit to such certificate is a true, correct, and complete copy of the resolutions then in full force and effect authorizing and ratifying the execution, delivery, and performance by such Person of the Loan Documents to which it is a party, (c) the name(s) of the Person(s) authorized to execute the Loan Documents, including any Credit Extension request, on behalf of such Person, together with a sample of the true signature(s) of such Person(s), and (d) that Bank may conclusively rely on such certificate unless and until such Person shall have delivered to Bank a further certificate canceling or amending such prior certificate.

"**Budget**" means the Initial Budget, and each subsequent 13-week cash flow projection prepared by Borrower in accordance with Section 6.2(h), as the same may be modified, amended, supplemented, and replaced from time to time with Bank's prior written consent, and subject to the Budget Variances.

"**Budget Variances**" is defined in Section 6.2(h).

"**Business Day**" is any day that is not a Saturday, Sunday or a day on which Bank is closed.

"**Carve Out**" means all Obligations, Prior Obligations and Reinstated Prior Obligations and the repayment of any of the foregoing, and the Liens and Superpriority Claims of Bank shall be subject to and subordinate to a carve out for payment of: (a) all fees required to be paid pursuant to the Clerk of the Court and to the Office of the United States Trustee under section 1930(a) of title 28 of the United States Code prior to or after delivery by the Bank of a Carve Out Trigger Notice plus interest at the statutory rate, plus (b) all reasonable fees and expenses up to $20,000 incurred by a trustee under section 726(b) of the Bankruptcy Code, plus (c) subject to the Budget, all unpaid Case Professional Fees and Expenses (excluding any success or completion fees payable to the Committee Case Professionals) incurred at any time prior to delivery by the Bank of a Carve Out Trigger Notice, plus (d) Case Professional Fees and Expenses (excluding any success or completion fees payable to the Committee Case Professionals) in an aggregate amount not to exceed the applicable Carve Out Cap incurred after delivery by the Bank of the Carve Out Trigger Notice, plus (e) all earned and unpaid advisory, success, transaction, completion or other fees and expenses payable to the Investment Banker pursuant to the Investment Banker Agreement incurred at any time that are allowed by the Bankruptcy Court.

"**Carve Out Cap**" means an aggregate amount of Case Professional Fees and Expenses in accordance with the Budget not to exceed $250,000.00; provided, that the Carve Out Cap shall be reduced on a dollar-for-dollar basis by any payments of any Case Professional Fees and Expenses made after delivery of the Carve Out Trigger Notice in respect of fees and expenses incurred after delivery of the Carve Out Trigger Notice.

"**Case**" means the Borrower's case under chapter 11 of the Bankruptcy Code that was filed in the United States Bankruptcy Court for the District of Delaware on April 15, 2019.

"**Carve Out Trigger Notice**" means a written notice delivered by Bank to Borrower, its counsel, the United States Trustee, and lead counsel to any Creditors' Committee, which notice may be delivered at any time following the occurrence of any Event of Default under this Agreement.

"**Case Professionals**" means, collectively, Borrower Case Professionals and the Committee Case Professionals.

"**Case Professional Fees and Expenses**" means, all accrued and unpaid fees, disbursements, costs and expenses incurred by Case Professionals in accordance with the Budget and allowed by the Bankruptcy Court at any time; provided, that the term "Case Professional Fees and Expenses" shall not include any advisory, success, transaction, completion or other fees and expenses payable or paid to the Investment Banker.

"**Cash Equivalents**" means (a) marketable direct obligations issued or unconditionally guaranteed by the United States or any agency or any State thereof having maturities of not more than one (1) year from the date of acquisition; (b) commercial paper maturing no more than one (1) year after its creation and having the highest rating

from either Standard & Poor's Ratings Group or Moody's Investors Service, Inc.; (c) Bank's certificates of deposit issued maturing no more than one (1) year after issue; (d) money market funds at least ninety-five percent (95.0%) of the assets of which constitute Cash Equivalents of the kinds described in clauses (a) through (c) of this definition; and (e) any other investments held with Bank or any of Bank's Affiliates.

"**Change in Control**" means (a) at any time, any "person" or "group" (as such terms are used in Sections 13(d) and 14(d) of the Exchange Act), shall become, or obtain rights (whether by means of warrants, options or otherwise) to become, the "beneficial owner" (as defined in Rules 13(d)-3 and 13(d)-5 under the Exchange Act), directly or indirectly, of forty-nine percent (49.0%) or more of the ordinary voting power for the election of directors of Borrower (determined on a fully diluted basis) other than by the sale of Borrower's equity securities in a public offering or to venture capital or private equity investors so long as Borrower identifies to Bank the venture capital or private equity investors at least seven (7) Business Days prior to the closing of the transaction and provides to Bank a description of the material terms of the transaction; (b) except for a change in the members of the Board resulting from the sale of Borrower's equity securities in a public offering or to venture capital or private equity investors so long as Borrower identifies to Bank the venture capital or private equity investors at least seven (7) Business Days prior to the closing of the transaction and provides to Bank a description of the material terms of the transaction, during any period of twelve (12) consecutive months, a majority of the members of the board of directors or other equivalent governing body of Borrower cease to be composed of individuals (i) who were members of that board or equivalent governing body on the first day of such period, (ii) whose election or nomination to that board or equivalent governing body was approved by individuals referred to in clause (i) above constituting at the time of such election or nomination at least a majority of that board or equivalent governing body or (iii) whose election or nomination to that board or other equivalent governing body was approved by individuals referred to in clauses (i) and (ii) above constituting at the time of such election or nomination at least a majority of that board or equivalent governing body; or (c) at any time, Borrower shall cease to own and control, of record and beneficially, directly or indirectly, one hundred percent (100.0%) of each class of outstanding capital stock of each Subsidiary of Borrower (unless such Subsidiary is dissolved or merged into Borrower or a secured Guarantor) free and clear of all Liens (except Liens created by this Agreement).

"**Chapter 11 Case**" means the Case.

"**Claims**" is defined in Section 12.3.

"**Collateral**" is any and all properties, rights and assets of Borrower described on Exhibit A.

"**Collateral Account**" is any Deposit Account, Securities Account, or Commodity Account.

"**Commitment**" means Bank's obligation to make Term Loan Advances under Section 2.1.1 in an aggregate amount not to exceed Twenty Five Million Dollars ($25,000,000.00) (which amount is inclusive of the Initial Term Loan Commitment), subject to the terms and conditions set forth in this Agreement and the Financing Order, as such amount shall be reduced by the making of Term Loan Advances under Section 2.1.1; *provided* that, after the delivery of the Carve Out Trigger Notice, the amount of the Commitment shall not exceed the amount of the Carve Out.

"**Committee Case Professionals**" means those persons or firms retained by the Creditors' Committee pursuant to section 328 or 1103 of the Bankruptcy Code.

"**Commodity Account**" is any "commodity account" as defined in the Uniform Commercial Code with such additions to such term as may hereafter be made.

"**Contingent Obligation**" is, for any Person, any direct or indirect liability, contingent or not, of that Person for (a) any indebtedness, lease, dividend, letter of credit or other obligation of another such as an obligation, in each case, directly or indirectly guaranteed, endorsed, co-made, discounted or sold with recourse by that Person, or for which that Person is directly or indirectly liable; (b) any obligations for undrawn letters of credit for the account of that Person; and (c) all obligations from any interest rate, currency or commodity swap agreement, interest rate cap or collar agreement, or other agreement or arrangement designated to protect a Person against

fluctuation in interest rates, currency exchange rates or commodity prices; but "Contingent Obligation" does not include endorsements in the ordinary course of business. The amount of a Contingent Obligation is the stated or determined amount of the primary obligation for which the Contingent Obligation is made or, if not determinable, the maximum reasonably anticipated liability for it determined by the Person in good faith; but the amount may not exceed the maximum of the obligations under any guarantee or other support arrangement.

"**Control Agreement**" is any control agreement entered into among the depository institution at which Borrower maintains a Deposit Account or the securities intermediary or commodity intermediary at which Borrower maintains a Securities Account or a Commodity Account, Borrower, and Bank pursuant to which Bank obtains control (within the meaning of the Uniform Commercial Code) over such Deposit Account, Securities Account, or Commodity Account.

"**Copyrights**" are any and all copyright rights, copyright applications, copyright registrations and like protections in each work of authorship and derivative work thereof, whether published or unpublished and whether or not the same also constitutes a trade secret.

"**Credit Extension**" is the Term Loan Advances, or any other extension of credit by Bank for Borrower's benefit under the Loan Documents.

"**Default Rate**" is defined in Section 2.2(b).

"**Deposit Account**" is any "deposit account" as defined in the Uniform Commercial Code with such additions to such term as may hereafter be made.

"**Designated Deposit Account**" is the multicurrency account denominated in Dollars, account number 224 (last three digits), maintained by Borrower with Bank.

"**Dollars**," "**dollars**" or use of the sign "**$**" means only lawful money of the United States and not any other currency, regardless of whether that currency uses the "$" sign to denote its currency or may be readily converted into lawful money of the United States.

"**Dollar Equivalent**" is, at any time, (a) with respect to any amount denominated in Dollars, such amount, and (b) with respect to any amount denominated in a Foreign Currency, the equivalent amount therefor in Dollars as determined by Bank at such time on the basis of the then-prevailing rate of exchange in San Francisco, California, for sales of the Foreign Currency for transfer to the country issuing such Foreign Currency.

"**Domestic Subsidiary**" means a Subsidiary organized under the laws of the United States or any state or territory thereof or the District of Columbia.

"**Equipment**" is all "equipment" as defined in the Uniform Commercial Code with such additions to such term as may hereafter be made, and includes without limitation all machinery, fixtures, goods, vehicles (including motor vehicles and trailers), and any interest in any of the foregoing.

"**ERISA**" is the Employee Retirement Income Security Act of 1974, and its regulations.

"**Event of Default**" is defined in Section 8.

"**Exchange Act**" is the Securities Exchange Act of 1934, as amended.

"**Excluded Taxes**" means any of the following Taxes imposed on or with respect to Recipient or required to be withheld or deducted from a payment to Recipient, (a) Taxes imposed on or measured by net income (however denominated), franchise Taxes, and branch profits Taxes, in each case, (i) imposed as a result of Recipient being organized under the laws of, or having its principal office or its applicable lending office located in, the jurisdiction imposing such Tax (or any political subdivision thereof) or (ii) that are Other Connection Taxes, (b) U.S. federal withholding Taxes imposed on amounts payable to or for the account of Recipient with respect to an applicable

interest in a Term Loan Advance pursuant to a law in effect on the date on which (i) Recipient acquires such interest in a Term Loan Advance or (ii) Recipient changes its lending office, except in each case to the extent that, pursuant to Section 2.5, amounts with respect to such Taxes were payable either to such Recipient's assignor immediately before such Recipient became a party hereto or to such Recipient immediately before it changed its lending office, (c) Taxes attributable to such Recipient's failure to comply with Section 2.5(f), and (d) any U.S. federal withholding Taxes imposed under FATCA.

"**FATCA**" means Sections 1471 through 1474 of the Internal Revenue Code, as of the date hereof (or any amended or successor version that is substantively comparable and not materially more onerous to comply with), any current or future regulations or official interpretations thereof, any agreement entered into pursuant to Section 1471(b)(1) of the Internal Revenue Code, any intergovernmental agreement entered into in connection with the implementation of such sections of the Internal Revenue Code and any fiscal or regulatory legislation, rules or practices adopted pursuant to, or official interpretations implementing such, intergovernmental agreements.

"**Final DIP Order**" means a Final Order of the Bankruptcy Court in substantially the form of the Interim DIP Order (with only such modifications thereto as are satisfactory in form and substance to the Bank in its sole discretion) approving the Loan Documents on a final basis.

"**Final Order**" means an order by the Bankruptcy Court as to which: (i)(a) no request for a stay or any similar request is pending, no stay is in effect, the action or decision has not been vacated, reversed, set aside, annulled or suspended, and any deadline for filing such a request that may be designated by law, statute, regulation, or rule has passed; (b) no petition for rehearing or reconsideration or application for review is pending and the time for filing any such petition or application has passed; (c) no Governmental Authority has undertaken to reconsider the action on its own motion and the time within which it may effect such reconsideration has passed; and (d) no appeal is pending (including other administrative or judicial review) or in effect and any deadline for filing any such appeal that may be specified by law, statute, regulation, or rule has passed or (ii) any applicable stay (including, without limitation, under Bankruptcy Rule 6004(h) has been waived).

"**Financial Advisor**" is defined in Section 6.12(a)(ii).

"**Financing Order**" means the Interim DIP Order and the Final DIP Order, as applicable.

"**Foreign Currency**" means lawful money of a country other than the United States.

"**Foreign Lender**" means (a) if Borrower is a US Person, a Recipient that is not a US Person, and (b) if Borrower is not a US Person, a Recipient that is resident or organized under the laws of a jurisdiction other than that in which Borrower is resident for tax purposes.

"**Foreign Subsidiary**" means any Subsidiary which is not a Domestic Subsidiary.

"**Funding Date**" is any date on which a Credit Extension is made to or for the account of Borrower which shall be a Business Day.

"**FX Contract**" is any foreign exchange contract by and between Borrower and Bank under which Borrower commits to purchase from or sell to Bank a specific amount of Foreign Currency on a specified date.

"**GAAP**" is generally accepted accounting principles set forth in the opinions and pronouncements of the Accounting Principles Board of the American Institute of Certified Public Accountants and statements and pronouncements of the Financial Accounting Standards Board or in such other statements by such other Person as may be approved by a significant segment of the accounting profession, which are applicable to the circumstances as of the date of determination.

"**General Intangibles**" is all "general intangibles" as defined in the Uniform Commercial Code in effect on the date hereof with such additions to such term as may hereafter be made, and includes without limitation, all Intellectual Property, claims, income and other Tax refunds, security and other deposits, payment intangibles,

contract rights, options to purchase or sell real or personal property, rights in all litigation presently or hereafter pending (whether in contract, tort or otherwise), insurance policies (including without limitation key man, property damage, and business interruption insurance), payments of insurance and rights to payment of any kind.

"**Governmental Approval**" is any consent, authorization, approval, order, license, franchise, permit, certificate, accreditation, registration, filing or notice, of, issued by, from or to, or other act by or in respect of, any Governmental Authority.

"**Governmental Authority**" is any nation or government, any state or other political subdivision thereof, any agency, authority, instrumentality, regulatory body, court, central bank or other entity exercising executive, legislative, judicial, taxing, regulatory or administrative functions of or pertaining to government, any securities exchange and any self-regulatory organization.

"**Guarantor**" is any Person providing a Guaranty in favor of Bank.

"**Guaranty**" is any guarantee of all or any part of the Obligations, as the same may from time to time be amended, restated, modified or otherwise supplemented.

"**Indebtedness**" is (a) indebtedness for borrowed money or the deferred price of property or services, such as reimbursement and other obligations for surety bonds and letters of credit, (b) obligations evidenced by notes, bonds, debentures or similar instruments, (c) capital lease obligations, and (d) Contingent Obligations.

"**Indemnified Person**" is defined in Section 12.3.

"**Indemnified Taxes**" means (a) Taxes, other than Excluded Taxes, imposed on or with respect to any payment made by or on account of any obligation of Borrower under any Loan Document and (b) to the extent not otherwise described in (a), Other Taxes.

"**Initial Budget**" means the cash flow projection for the thirteen-week period beginning immediately after the Petition Date prepared by Borrower in accordance with Section 6.2(h), which shall in form and substance be satisfactory to Bank in its sole discretion and shall be annexed to and approved by the Interim DIP Order.

"**Insolvency Proceeding**" is any proceeding by or against any Person under the Bankruptcy Code, or any other bankruptcy or insolvency law, including assignments for the benefit of creditors, compositions, extensions generally with its creditors, or proceedings seeking reorganization, arrangement, or other relief.

"**Intellectual Property**" means, with respect to any Person, all of such Person's right, title, and interest in and to the following:

(a) its Copyrights, Trademarks and Patents;

(b) any and all trade secrets and trade secret rights, including, without limitation, any rights to unpatented inventions, know-how, and operating manuals;

(c) any and all source code;

(d) any and all design rights which may be available to such Person;

(e) any and all claims for damages by way of past, present and future infringement of any of the foregoing, with the right, but not the obligation, to sue for and collect such damages for said use or infringement of the Intellectual Property rights identified above; and

(f) all amendments, renewals and extensions of any of the Copyrights, Trademarks or Patents.

"**Interim DIP Order**" shall mean an order of the Bankruptcy Court (as the same may be amended, supplemented, or modified from time to time after entry thereof with the consent of the Bank and in accordance with the terms hereof) approving the Loan Documents on an interim basis. The Interim DIP Order shall be in the form set forth as **Exhibit D**, with changes to such form as are satisfactory to the Bank, in its sole discretion.

"**Initial Term Loan Commitment**" means the Bank's obligation to make Initial Term Loan Advances under Section 2.1.1 in an aggregate amount not to exceed Four Million Three Hundred Thousand ($4,300,000.000), subject to the terms and conditions set forth in this Agreement and the Interim DIP Order, as such amount shall be reduced by the making of Initial Term Loan Advances under Section 2.1.1; *provided* that, after the delivery of the Carve Out Trigger Notice, the amount of the Initial Term Loan Commitment shall not exceed the amount of the Carve Out.

"**Internal Revenue Code**" means the Internal Revenue Code of 1986, as amended.

"**Inventory**" is all "inventory" as defined in the Uniform Commercial Code in effect on the date hereof with such additions to such term as may hereafter be made, and includes without limitation all merchandise, raw materials, parts, supplies, packing and shipping materials, work in process and finished products, including without limitation such inventory as is temporarily out of Borrower's custody or possession or in transit and including any returned goods and any documents of title representing any of the above.

"**Investment**" is any beneficial ownership interest in any Person (including stock, partnership interest or other securities), and any loan, advance or capital contribution to any Person.

"**Investment Banker**" is defined in Section 6.12(a)(i).

"**IP Agreement**" is that certain Intellectual Property Security Agreement by and between Borrower and Bank dated as of the date hereof, as may be amended, modified, supplemented and/or restated from time to time.

"**KEIP/KERP Plan Amount**" is the aggregate amount due and owing on any date of determination to one or more individuals named in, and pursuant to, the KEIP/KERP plan of the Borrower that is approved by the Bank in writing and authorized by the Bankruptcy Court, as such plan may be amended from time to time with the written consent of the Bank; provided, that the Borrower's proposed key employee incentive plan shall be funded only from proceeds of a sale of the Collateral that are in excess of $25,000,000.00.

"**Key Person**" is each of Borrower's (a) Chief Executive Officer, who is Blake Wise as of the date hereof, and (b) Chief Financial Officer, who is Tobin Schilke as of the date hereof.

"**Letter of Credit**" is a standby or commercial letter of credit issued by Bank upon request of Borrower based upon an application, guarantee, indemnity, or similar agreement.

"**Lien**" is a claim, mortgage, deed of trust, levy, charge, pledge, security interest or other encumbrance of any kind, whether voluntarily incurred or arising by operation of law or otherwise against any property.

"**Loan Documents**" are, collectively, this Agreement and any schedules, exhibits, certificates, notices, and any other documents related to this Agreement, the Interim DIP Order, the Final DIP Order, the Perfection Certificate, the IP Agreement, any Control Agreement, any Bank Services Agreement, any subordination agreement, any note, or notes or guaranties executed by Borrower or any Guarantor, and any other present or future agreement by Borrower and/or any Guarantor with or for the benefit of Bank in connection with this Agreement or Bank Services, all as amended, restated, or otherwise modified.

"**Material Adverse Change**" is (a) a material impairment in the perfection or priority of Bank's Lien in the Collateral or in the value of such Collateral; (b) a material adverse change in the business, operations, or condition (financial or otherwise) of Borrower; or (c) a material impairment of the prospect of repayment of any portion of the Obligations, in each case measured from and after the date hereof; provided, however, that notwithstanding anything to the contrary, none of the following shall constitute or be deemed to have caused an Event of Default, material

adverse effect, or Material Adverse Change: (i) the filing and continuance of the Chapter 11 Case; (ii) a variance in disbursements or cash receipts that does not exceed the applicable Budget Variance; or (iv) the suspension or delisting of Borrower's stock by Nasdaq or any other exchange; provided, further that Bank shall not be entitled to declare the occurrence of a Material Adverse Change prior to the conclusion of the auction described in the Sale Motion.

"**Obligations**" are Borrower's obligations to pay when due any debts, principal, interest, fees, Bank Expenses, the Term Loan Commitment Fees, and other amounts Borrower owes Bank now or later, whether under this Agreement, the other Loan Documents, or otherwise, and including, without limitation, any interest accruing after the Case begins and debts, liabilities, or obligations of Borrower assigned to Bank, and to perform Borrower's duties under the Loan Documents.

"**Operating Documents**" are, for any Person, such Person's formation documents, as certified by the Secretary of State (or equivalent agency) of such Person's jurisdiction of organization on a date that is no earlier than thirty (30) days prior to the date hereof, and, (a) if such Person is a corporation, its bylaws in current form, (b) if such Person is a limited liability company, its limited liability company agreement (or similar agreement), and (c) if such Person is a partnership, its partnership agreement (or similar agreement), each of the foregoing with all current amendments or modifications thereto.

"**Other Connection Taxes**" means, with respect to any Recipient, Taxes imposed as a result of a present or former connection between such Recipient and the jurisdiction imposing such Tax (other than connections arising from such Recipient having executed, delivered, become a party to, performed its obligations under, received payments under, received or perfected a security interest under, engaged in any other transaction pursuant to or enforced any Loan Document, or sold or assigned an interest in any Term Loan Advance or Loan Document).

"**Other Taxes**" means all present or future stamp, court or documentary, intangible, recording, filing or similar Taxes that arise from any payment made under, from the execution, delivery, performance, enforcement or registration of, from the receipt or perfection of a security interest under, or otherwise with respect to, any Loan Document, except any such Taxes that are Other Connection Taxes imposed with respect to an assignment.

"**Patents**" means all patents, patent applications and like protections including without limitation improvements, divisions, continuations, renewals, reissues, extensions and continuations-in-part of the same.

"**Payment/Advance Form**" is that certain form attached hereto as Exhibit B.

"**Payment Date**" is the first (1st) calendar day of each month.

"**Perfection Certificate**" is defined in Section 5.1.

"**Permitted Indebtedness**" is:

(a) Borrower's Indebtedness to Bank under this Agreement and the other Loan Documents;

(b) Subordinated Debt;

(c) unsecured Indebtedness to trade creditors or unsecured Indebtedness incurred in connection with credit cards, in each case incurred in the ordinary course of business;

(d) Indebtedness secured by Liens permitted under clauses (a) and (c) of the definition of "Permitted Liens" hereunder;

(e) Indebtedness consisting of Permitted Investments;

(f) Indebtedness (i) consisting of the obligation to pay rent when due under real property leases entered into in the ordinary course of Borrower's business and (ii) incurred solely in connection with deposits for real property in the ordinary course of business;

(g) extensions, refinancings, modifications, amendments and restatements of any items of Permitted Indebtedness (a) through (f) above, provided that the principal amount thereof is not increased or the terms thereof are not modified to impose more burdensome terms upon Borrower or its Subsidiary, as the case may be; and

(h) Indebtedness existing on the Petition Date which is shown on the Perfection Certificate.

"**Permitted Investments**" are:

(a) Investments (including, without limitation, Subsidiaries) existing on the date hereof which are shown on the Perfection Certificate;

(b) (i) Investments consisting of Cash Equivalents, and (ii) any Investments permitted by Borrower's investment policy, as amended from time to time, provided that such investment policy (and any such amendment thereto) has been approved in writing by Bank;

(c) Investments consisting of the endorsement of negotiable instruments for deposit or collection or similar transactions in the ordinary course of Borrower;

(d) Investments consisting of deposit accounts (but only to the extent that Borrower is permitted to maintain such accounts pursuant to Section 6.6 of this Agreement) in which Bank has a first priority perfected Lien; and

(e) Investments (including debt obligations) received in connection with the bankruptcy or reorganization of customers or suppliers and in settlement of delinquent obligations of, and other disputes with, customers or suppliers arising in the ordinary course of business.

"**Permitted Liens**" are:

(a) Liens for Taxes, fees, assessments or other government charges or levies, either (i) not due and payable or (ii) being contested in good faith and for which Borrower maintains adequate reserves on its Books, provided that no notice of any such Lien has been filed or recorded under the Internal Revenue Code, and the Treasury Regulations adopted thereunder;

(b) Liens to secure payment of workers' compensation, employment insurance, old-age pensions, social security and other like obligations incurred in the ordinary course of business (other than Liens imposed by ERISA);

(c) leases or subleases of real property granted in the ordinary course of Borrower's business (or, if referring to another Person, in the ordinary course of such Person's business), and leases, subleases, non-exclusive licenses or sublicenses of personal property (other than Intellectual Property) granted in the ordinary course of Borrower's business (or, if referring to another Person, in the ordinary course of such Person's business), if the leases, subleases, licenses and sublicenses do not prohibit granting Bank a Lien thereon;

(d) Liens incurred in the extension, renewal or refinancing of the indebtedness secured by Liens described in (a) through (c), but any extension, renewal or replacement Lien must be limited to the property encumbered by the existing Lien and the principal amount of the indebtedness may not increase; or

(e) Liens arising from attachments or judgments, orders, or decrees in circumstances not constituting an Event of Default under Sections 8.4 and 8.7; or

(f) Liens existing on the Petition Date which are shown on the Perfection Certificate or arising under this Agreement and the other Loan Documents.

"**Person**" is any individual, sole proprietorship, partnership, limited liability company, joint venture, company, trust, unincorporated organization, association, corporation, institution, public benefit corporation, firm, joint stock company, estate, entity or government agency.

"**Petition Date**" shall mean April 15, 2019.

"**Prior Loan Agreement**" is that certain Loan and Security Agreement between Bank and Borrower dated as of February 26, 2018.

"**Prior Obligations**" is defined in Section 2.1.1(a).

"**Prime Rate**" is the rate of interest per annum from time to time published in the money rates section of The Wall Street Journal or any successor publication thereto as the "prime rate" then in effect; provided that, in the event such rate of interest is less than zero, such rate shall be deemed to be zero for purposes of this Agreement; and provided further that if such rate of interest, as set forth from time to time in the money rates section of The Wall Street Journal, becomes unavailable for any reason as determined by Bank, the "Prime Rate" shall mean the rate of interest per annum announced by Bank as its prime rate in effect at its principal office in the State of California (such Bank announced Prime Rate not being intended to be the lowest rate of interest charged by Bank in connection with extensions of credit to debtors); provided that, in the event such rate of interest is less than zero, such rate shall be deemed to be zero for purposes of this Agreement.

"**Recipient**" means Bank or any other Person holding a beneficial interest in the right to make the Term Loan Advance.

"**Registered Organization**" is any "registered organization" as defined in the Uniform Commercial Code with such additions to such term as may hereafter be made.

"**Reinstated Prior Obligations**" means any Prior Obligations constituting an Avoided Payment, to the extent such obligations have been reinstated, in each case, pursuant to, and subject to the requirements and terms of a Final Order of the Bankruptcy Court.

"**Released Parties**" has the meaning specified in Section 12.17.

"**Releasing Parties**" has the meaning specified in Section 12.17.

"**Remedies Notice**" has the meaning specified in Section 9.1.

"**Remedies Notice Period**" has the meaning specified in Section 9.1.

"**Requirement of Law**" is as to any Person, the organizational or governing documents of such Person, and any law (statutory or common), treaty, rule or regulation or determination of an arbitrator or a court or other Governmental Authority, in each case applicable to or binding upon such Person or any of its property or to which such Person or any of its property is subject.

"**Responsible Officer**" is any of the Chief Executive Officer, President and Chief Financial Officer of Borrower.

"**Restricted License**" is any material license or other agreement with respect to which Borrower is the licensee (a) that prohibits or otherwise restricts Borrower from granting a security interest in Borrower's interest in such license or agreement or any other property, or (b) for which a default under or termination of could interfere with the Bank's right to sell any Collateral.

"**Sale**" means a sale of all or substantially all of Borrower's assets, in each case pursuant to Section 363 of the Bankruptcy Code.

"**Sale Motion**" means an omnibus motion filed by Borrower requesting, among other things, the Bankruptcy Court's approval of (a) bidding procedures with respect to the Sale, and (b) approval of the Sale; provided, that the Sale Motion shall be satisfactory to the Bank in its sole discretion.

"**SEC**" shall mean the Securities and Exchange Commission, any successor thereto, and any analogous Governmental Authority.

"**Securities Account**" is any "securities account" as defined in the Uniform Commercial Code with such additions to such term as may hereafter be made.

"**Subordinated Debt**" is indebtedness incurred by Borrower subordinated to all of Borrower's now or hereafter indebtedness to Bank (pursuant to a subordination, intercreditor, or other similar agreement in form and substance satisfactory to Bank entered into between Bank and the other creditor), on terms acceptable to Bank.

"**Subsidiary**" is, as to any Person, a corporation, partnership, limited liability company or other entity of which shares of stock or other ownership interests having ordinary voting power (other than stock or such other ownership interests having such power only by reason of the happening of a contingency) to elect a majority of the board of directors or other managers of such corporation, partnership or other entity are at the time owned, or the management of which is otherwise controlled, directly or indirectly through one or more intermediaries, or both, by such Person. Unless the context otherwise requires, each reference to a Subsidiary herein shall be a reference to a Subsidiary of Borrower.

"**Superpriority Claim**" means a super-priority administrative expense claim against Borrower and its estate in the Chapter 11 Case having priority, pursuant to Section 364(c)(1) and 507(b) of the Bankruptcy Code (subject only to the payment of the Carve Out and the KEIP/KERP Plan Amount), over the other administrative claims of any person or entity, including, without limitation any claims under Sections 105, 326, 328, 330, 331, 365, 503(a), 503(b), 506(c) (upon entry of the Final DIP Order), 507(a), 507(b), 546(c), 546(d), 726 (to the extent permitted by law), 1113 and 1114 of the Bankruptcy Code, and any other provision of the Bankruptcy Code, and which shall at all times be, subject to the Carve Out and the KEIP/KERP Plan Amount, senior to the rights of Borrower, Borrower's estate, any trustee or successor trustee to the extent permitted by law, or any other creditor in the Chapter 11 Case.

"**Tax**" and "**Taxes**" means all present or future taxes, levies, imposts, duties, deductions, withholdings (including backup withholding), assessments, fees or other charges imposed by any Governmental Authority, including any interest, additions to tax or penalties applicable thereto.

"**Term Loan Advance**" and "**Term Loan Advances**" are each defined in Section 2.1.1(a) hereof.

"**Term Loan Commitment Fees**" is defined in Section 2.3(a).

"**Term Loan Maturity Date**" is the earlier of (a) September 30, 2019, (b) the date of a prepayment of the Obligations under Section 2.1.1 of this Agreement, (c) the date of acceleration of the Obligations pursuant to the terms of this Agreement and Financing Order, and (d) the date on which the Sale is consummated.

"**Trademarks**" means any trademark and servicemark rights, whether registered or not, applications to register and registrations of the same and like protections, and the entire goodwill of the business of Borrower connected with and symbolized by such trademarks.

"**Transfer**" is defined in Section 7.1.

"**Uniform Commercial Code**" is the Uniform Commercial Code, as the same may, from time to time, be enacted and in effect in the State of California provided, that, to the extent that the Uniform Commercial Code is

used to define any term herein or in any Loan Document and such term is defined differently in different Articles or Divisions of the Uniform Commercial Code, the definition of such term contained in Article or Division 9 shall govern; provided further, that in the event that, by reason of mandatory provisions of law, any or all of the attachment, perfection, or priority of, or remedies with respect to, Bank's Lien on any Collateral is governed by the Uniform Commercial Code in effect in a jurisdiction other than the State of California, the term "**Uniform Commercial Code**" shall mean the Uniform Commercial Code as enacted and in effect in such other jurisdiction solely for purposes of the provisions thereof relating to such attachment, perfection, priority, or remedies and for purposes of definitions relating to such provisions.

"**US Person**" means any Person that is a "United States Person" as defined in Section 7701(a)(30) of the Internal Revenue Code.

"**Wind Down Amount**" is defined in Section 12.18.

[Signature page follows.**]**

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed as of the date first written above.

BORROWER:

ACHAOGEN, INC.

By_____
Name:_____
Title:_____

BANK:

SILICON VALLEY BANK

By_____
Name:_____
Title:_____

EXHIBIT A – COLLATERAL DESCRIPTION

The Collateral consists of all of Borrower's right, title and interest in and to the following personal property:

All goods, Accounts (including health-care receivables), Equipment, Inventory, contract rights or rights to payment of money, leases, license agreements, franchise agreements, General Intangibles, domain names, Intellectual Property, commercial tort claims, documents, instruments (including any promissory notes), chattel paper (whether tangible or electronic), cash, deposit accounts, certificates of deposit, fixtures, letters of credit rights (whether or not the letter of credit is evidenced by a writing), securities, and all other investment property, supporting obligations, and financial assets, whether now owned or hereafter acquired, wherever located; and

All Borrower's Books relating to the foregoing, and any and all claims, rights and interests in any of the above and all substitutions for, additions, attachments, accessories, accessions and improvements to and replacements, products, proceeds and insurance proceeds of any or all of the foregoing; and

The Bankruptcy Recoveries.

EXHIBIT B – LOAN PAYMENT/ADVANCE REQUEST FORM

DEADLINE FOR SAME DAY PROCESSING IS NOON PACIFIC TIME

Fax To: Date: _____

LOAN PAYMENT: ACHAOGEN, INC.
From Account #_____ To Account #_____
(Deposit Account #) (Loan Account #)
Principal $_____ and/or Interest $_____
Authorized Signature:_____ Phone Number: _____
Print Name/Title: _____

LOAN ADVANCE:
Complete *Outgoing Wire Request* section below if all or a portion of the funds from this loan advance are for an outgoing wire.
From Account #_____ To Account #_____
(Loan Account #) (Deposit Account #)
Amount of Advance $_____
All Borrower's representations and warranties in the Loan and Security Agreement are true, correct and complete in all material respects on the date of the request for an advance; provided, however, that such materiality qualifier shall not be applicable to any representations and warranties that already are qualified or modified by materiality in the text thereof; and provided, further that those representations and warranties expressly referring to a specific date shall be true, accurate and complete in all material respects as of such date:

Authorized Signature:_____ Phone Number: _____
Print Name/Title: _____

OUTGOING WIRE REQUEST:
Complete only if all or a portion of funds from the loan advance above is to be wired.
Deadline for same day processing is noon, Pacific Time

Beneficiary Name: _____ Amount of Wire: $_____
Beneficiary Bank: _____ Account Number: _____
City and State: _____
Beneficiary Bank Transit (ABA) #: _____ Beneficiary Bank Code (Swift, Sort, Chip, etc.): _____
(For International Wire Only)
Intermediary Bank: _____ Transit (ABA) #: _____
For Further Credit to: _____
Special Instruction: _____

By signing below, I (we) acknowledge and agree that my (our) funds transfer request shall be processed in accordance with and subject to the terms and conditions set forth in the agreements(s) covering funds transfer service(s), which agreements(s) were previously received and executed by me (us).

Authorized Signature: _____ 2nd Signature (if required): _____
Print Name/Title: _____ Print Name/Title: _____
Telephone #: _____ Telephone #: _____

EXHIBIT C

BUDGET

Intentionally Omitted

EXHIBIT D

INTERIM DIP ORDER

Intentionally Omitted

Schedule 6.14 – Milestones

1. No later than three (3) Business Days after the Petition Date, or such later date as may be consented to by Bank, Borrower will have obtained entry of the Interim DIP Order.

2. No later than one (1) Business Day after the Petition Date, or such later date as may be consented to by Bank, Borrower will have filed the Sale Motion.

3. No later than thirty (30) days after the Petition Date, or such later date as may be consented to by Bank, Borrower will have obtained entry of the Final DIP Order.

4. No later than twenty five (25) days after the Petition Date, or such later date as may be consented to by Bank, Borrower will have obtained entry of a Final Order approving bidding procedures for the Sale.

5. No later than forty five (45) days after the Petition Date, or such later date as may be consented to by Bank, Borrower will have completed the marketing process described in the Sale Motion and selected a stalking horse bidder, if any, for an auction.

6. No later than sixty (60) days after the Petition Date, or such later date as may be consented to by Bank, Borrower will have conducted the auction described in the Sale Motion.

7. No later than sixty five (65) days after the Petition Date, or such later date as may be consented to by Bank, Borrower will have obtained entry of a Final Order approving the Sale.

8. No later than seven (7) days after the entry of the Final Order approving the sale, or such later date as may be consented to by Bank, Borrower will have consummated the Sale and use cash proceeds at the closing thereof to cause, without duplication, all Obligations and Prior Obligations to be paid in full, in cash, on a final and indefeasible basis, subject to the provisions of the Financing Order.

EXHIBIT 2

Budget

Achaogen, Inc.

Combined Cash Flow / § 363 DIP Budget
$ in 000's

Week	**1**	**2**	**3**	**4**	**5**	**6**	**7**	**8**	**9**	**Total**
Week-ending	**Apr-19**	**Apr-26**	**May-03**	**May-10**	**May-17**	**May-24**	**May-31**	**Jun-07**	**Jun-14**	**9 Weeks**
Inflows										
Product	$ -	$ -	$ 15	$ 15	$ 15	$ 15	$ 15	$ 15	$ 15	$ 105
BARDA - C-Scape	-	-	-	-	-	-	-	-	-	-
Sub-lease Income	-	-	-	362	-	-	-	362	-	724
Asset Sales Receipts	-	-	-	-	-	-	-	-	-	-
Total Inflows	**-**	**-**	**15**	**377**	**15**	**15**	**15**	**377**	**15**	**829**
Outflows										
Salary, Wages, and Benefits	-	-	(415)	-	(311)	-	(365)	-	(311)	(1,402)
Technical Operations	(690)	(91)	-	-	(132)	(182)	(100)	(100)	(100)	(1,395)
Sales & Marketing	(44)	(23)	(51)	(23)	(26)	(26)	(54)	(26)	(26)	(297)
Development	(28)	(269)	(69)	(18)	(18)	(262)	(69)	(18)	(18)	(771)
Medical Affairs	-	(180)	-	-	-	-	-	-	-	(180)
Research	(0)	(6)	-	-	-	-	-	-	-	(6)
G&A - Facilities	(17)	(93)	(887)	-	-	(27)	(640)	-	-	(1,665)
G&A - IT	(100)	(129)	(42)	(32)	(59)	(96)	(61)	(38)	(38)	(596)
G&A - Finance and Accounting	(10)	(17)	(4)	(4)	(4)	(17)	(4)	(4)	(4)	(70)
G&A - Legal	(28)	(93)	(28)	(28)	(29)	(94)	(29)	(29)	(29)	(388)
G&A - Other	(21)	(8)	-	-	-	-	-	-	-	(29)
Total Outflows	**(939)**	**(909)**	**(1,498)**	**(106)**	**(580)**	**(703)**	**(1,322)**	**(215)**	**(526)**	**(6,799)**
Net Cash Flow	**(939)**	**(909)**	**(1,483)**	**271**	**(565)**	**(688)**	**(1,307)**	**162**	**(511)**	**(5,970)**
Bankruptcy Related										
Professional Fees	-	-	-	(492)	-	-	(264)	-	(856)	(1,612)
DIP Interest / Adequate Protection	-	-	(157)	-	-	-	(194)	-	(95)	(446)
Critical Vendor Payments	(250)	-	-	(250)	-	-	-	-	-	(500)
Utility Deposits	-	-	-	(50)	-	-	-	-	-	(50)
Total Bankruptcy Related	**(250)**	**-**	**(157)**	**(792)**	**-**	**-**	**(458)**	**-**	**(950)**	**(2,607)**
Net Cash Flow After Bankruptcy Items	**(1,189)**	**(909)**	**(1,640)**	**(521)**	**(565)**	**(688)**	**(1,765)**	**162**	**(1,462)**	**(8,577)**
Beginning Available Cash Balance	1,332	1,332	1,332	1,332	1,332	1,332	1,332	1,332	1,332	1,332
(+/-) Borrowings / (Repayments)	1,189	909	1,640	521	565	688	1,765	(162)	1,462	8,577
(+/-) Net Cash Flow	(1,189)	(909)	(1,640)	(521)	(565)	(688)	(1,765)	162	(1,462)	(8,577)
Ending Cash Balance	**1,332**	**1,332**	**1,332**	**1,332**	**1,332**	**1,332**	**1,332**	**1,332**	**1,332**	**1,332**
Debtor-In-Possession (DIP) Financing										
Beginning DIP Balance	-	1,189	2,098	3,738	19,259	19,824	20,512	22,277	22,116	-
Loan Paydown	-	-	-	15,000	-	-	-	-	-	15,000
(+/-) Borrowings / (Repayments)	1,189	909	1,640	521	565	688	1,765	(162)	1,462	8,577
Ending DIP Balance (Excl. Carve Out)	**1,189**	**2,098**	**3,738**	**19,259**	**19,824**	**20,512**	**22,277**	**22,116**	**23,577**	**23,577**
Carve Out [(1)]	-	41	305	223	507	786	801	1,125	619	619
Ending DIP Need with Carve Out (Excl. Cash)	**$ 1,189**	**$ 2,139**	**$ 4,043**	**$ 19,482**	**$ 20,331**	**$ 21,298**	**$ 23,078**	**$ 23,241**	**$ 24,196**	**$ 24,196**

(1) If the Company consummates a Sale Transaction, the Investment Banker shall earn a Sale Transaction Fee equal to the greater of (x) $500,000 or (y) the sum of (i) 3.0% of the Sale Consideration up to $30 million; and (ii) 4.5% of the Sale Consideration in excess of $30 million. For purposes of the budget, carve out takes into account the minimum fee of $500,000.

EXHIBIT B

DIP CREDIT AGREEMENT

Intentionally Omitted