


<b>UNITED STATES BANKRUPTCY COURT</b>		<b>District of Delaware</b>	<b>PROOF OF CLAIM</b>						
Name of Debtor: Graceway Pharmaceuticals, LLC, et al.		Case Number: 11-13036							
NOTE: Do not use this form to make a claim for an administrative expense that arises after the bankruptcy filing. You may file a request for payment of an administrative expense according to 11 U.S.C. § 503.									
Name of Creditor (the person or other entity to whom the debtor owes money or property): McKesson Corporation, on behalf of itself, divisions, subsidiaries and affiliates									
Name and address where notices should be sent: Jeffrey K. Garfinkle, Esq. Buchalter Nemer 18400 Von Karman Ave., Suite 800; Irvine, CA 92612 Telephone number: (949) 760-1121 email: jgarfinkle@buchalter.com		<b>RECEIVED</b>  <b>DEC 30 2011</b>  <b>BMC GROUP</b>	<b>COURT USE ONLY</b>  <input type="checkbox"/> Check this box if this claim amends a previously filed claim.  <b>Court Claim Number:</b> _____ <i>(If known)</i>  <b>Filed on:</b> _____						
Name and address where payment should be sent (if different from above): McKesson Corporation c/o Jenifer Towsley One Post Street, 20th Floor; San Francisco, CA 94104 Telephone number: _____ email: _____		<input type="checkbox"/> Check this box if you are aware that anyone else has filed a proof of claim relating to this claim. Attach copy of statement giving particulars.							
<b>1. Amount of Claim as of Date Case Filed:</b> \$ <u>2,645,183.00</u>  If all or part of the claim is secured, complete item 4.  If all or part of the claim is entitled to priority, complete item 5.  <input type="checkbox"/> Check this box if the claim includes interest or other charges in addition to the principal amount of the claim. Attach a statement that itemizes interest or charges.									
<b>2. Basis for Claim:</b> <u>See Attachment</u> (See instruction #2)									
<b>3. Last four digits of any number by which creditor identifies debtor:</b> _____	<b>3a. Debtor may have scheduled account as:</b> _____ (See instruction #3a)	<b>3b. Uniform Claim Identifier (optional):</b> _____ (See instruction #3b)							
<b>4. Secured Claim</b> (See instruction #4) Check the appropriate box if the claim is secured by a lien on property or a right of setoff, attach required redacted documents, and provide the requested information.  <b>Nature of property or right of setoff:</b> <input type="checkbox"/> Real Estate <input type="checkbox"/> Motor Vehicle <input type="checkbox"/> Other <b>Describe:</b> _____  <b>Value of Property:</b> \$ _____  <b>Annual Interest Rate</b> _____ % <input type="checkbox"/> Fixed or <input type="checkbox"/> Variable (when case was filed)		<b>Amount of arrearage and other charges, as of the time case was filed, included in secured claim, if any:</b> \$ _____  <b>Basis for perfection:</b> _____  <b>Amount of Secured Claim:</b> \$ _____  <b>Amount Unsecured:</b> \$ _____							
<b>5. Amount of Claim Entitled to Priority under 11 U.S.C. § 507 (a). If any part of the claim falls into one of the following categories, check the box specifying the priority and state the amount.</b>  <table style="width: 100%;"> <tr> <td style="width: 33%; vertical-align: top;"> <input type="checkbox"/> Domestic support obligations under 11 U.S.C. § 507 (a)(1)(A) or (a)(1)(B).         </td> <td style="width: 33%; vertical-align: top;"> <input type="checkbox"/> Wages, salaries, or commissions (up to \$11,725*) earned within 180 days before the case was filed or the debtor's business ceased, whichever is earlier – 11 U.S.C. § 507 (a)(4).         </td> <td style="width: 33%; vertical-align: top;"> <input type="checkbox"/> Contributions to an employee benefit plan – 11 U.S.C. § 507 (a)(5).         </td> </tr> <tr> <td style="vertical-align: top;"> <input type="checkbox"/> Up to \$2,600* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use – 11 U.S.C. § 507 (a)(7).         </td> <td style="vertical-align: top;"> <input type="checkbox"/> Taxes or penalties owed to governmental units – 11 U.S.C. § 507 (a)(8).         </td> <td style="vertical-align: top;"> <input type="checkbox"/> Other – Specify applicable paragraph of 11 U.S.C. § 507 (a)( ).         </td> </tr> </table> <div style="text-align: right; margin-top: 10px;"> <b>Amount entitled to priority:</b> \$ _____  <b>Graceway Pharmaceuticals LLC</b>            00186       </div>				<input type="checkbox"/> Domestic support obligations under 11 U.S.C. § 507 (a)(1)(A) or (a)(1)(B).	<input type="checkbox"/> Wages, salaries, or commissions (up to \$11,725*) earned within 180 days before the case was filed or the debtor's business ceased, whichever is earlier – 11 U.S.C. § 507 (a)(4).	<input type="checkbox"/> Contributions to an employee benefit plan – 11 U.S.C. § 507 (a)(5).	<input type="checkbox"/> Up to \$2,600* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use – 11 U.S.C. § 507 (a)(7).	<input type="checkbox"/> Taxes or penalties owed to governmental units – 11 U.S.C. § 507 (a)(8).	<input type="checkbox"/> Other – Specify applicable paragraph of 11 U.S.C. § 507 (a)( ).
<input type="checkbox"/> Domestic support obligations under 11 U.S.C. § 507 (a)(1)(A) or (a)(1)(B).	<input type="checkbox"/> Wages, salaries, or commissions (up to \$11,725*) earned within 180 days before the case was filed or the debtor's business ceased, whichever is earlier – 11 U.S.C. § 507 (a)(4).	<input type="checkbox"/> Contributions to an employee benefit plan – 11 U.S.C. § 507 (a)(5).							
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*Amounts are subject to adjustment on 4/1/13 and every 3 years thereafter with respect to cases commenced on or after the date of adjustment.									
<b>6. Credits.</b> The amount of all payments on this claim has been credited for the purpose of making this proof of claim. (See instruction #6)									

**7. Documents:** Attached are **redacted** copies of any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, and security agreements. If the claim is secured, box 4 has been completed, and **redacted** copies of documents providing evidence of perfection of a security interest are attached. (See instruction #7, and the definition of "redacted".)

DO NOT SEND ORIGINAL DOCUMENTS. ATTACHED DOCUMENTS MAY BE DESTROYED AFTER SCANNING.

If the documents are not available, please explain:

**8. Signature:** (See instruction #8)

Check the appropriate box.

- ☐ I am the creditor. ☒ I am the creditor's authorized agent. ☐ I am the trustee, or the debtor, or their authorized agent. ☐ I am a guarantor, surety, indorser, or other codebtor.
- (Attach copy of power of attorney, if any.) (See Bankruptcy Rule 3004.) (See Bankruptcy Rule 3005.)

I declare under penalty of perjury that the information provided in this claim is true and correct to the best of my knowledge, information, and reasonable belief.

Print Name: Jeffrey K. Garfinkle  
 Title: Counsel for McKesson Corporation  
 Company: Buchalter Nemer  
 Address and telephone number (if different from notice address above):  
See Attachment

(Signature)

(Date)

Telephone number: \_\_\_\_\_ email: \_\_\_\_\_

*Penalty for presenting fraudulent claim:* Fine of up to \$500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571.

**INSTRUCTIONS FOR PROOF OF CLAIM FORM**

*The instructions and definitions below are general explanations of the law. In certain circumstances, such as bankruptcy cases not filed voluntarily by the debtor, exceptions to these general rules may apply.*

**Items to be completed in Proof of Claim form**

**Court, Name of Debtor, and Case Number:**

Fill in the federal judicial district in which the bankruptcy case was filed (for example, Central District of California), the debtor's full name, and the case number. If the creditor received a notice of the case from the bankruptcy court, all of this information is at the top of the notice.

**Creditor's Name and Address:**

Fill in the name of the person or entity asserting a claim and the name and address of the person who should receive notices issued during the bankruptcy case. A separate space is provided for the payment address if it differs from the notice address. The creditor has a continuing obligation to keep the court informed of its current address. See Federal Rule of Bankruptcy Procedure (FRBP) 2002(g).

**1. Amount of Claim as of Date Case Filed:**

State the total amount owed to the creditor on the date of the bankruptcy filing. Follow the instructions concerning whether to complete items 4 and 5. Check the box if interest or other charges are included in the claim.

**2. Basis for Claim:**

State the type of debt or how it was incurred. Examples include goods sold, money loaned, services performed, personal injury/wrongful death, car loan, mortgage note, and credit card. If the claim is based on delivering health care goods or services, limit the disclosure of the goods or services so as to avoid embarrassment or the disclosure of confidential health care information. You may be required to provide additional disclosure if an interested party objects to the claim.

**3. Last Four Digits of Any Number by Which Creditor Identifies Debtor:**

State only the last four digits of the debtor's account or other number used by the creditor to identify the debtor.

**3a. Debtor May Have Scheduled Account As:**

Report a change in the creditor's name, a transferred claim, or any other information that clarifies a difference between this proof of claim and the claim as scheduled by the debtor.

**3b. Uniform Claim Identifier:**

If you use a uniform claim identifier, you may report it here. A uniform claim identifier is an optional 24-character identifier that certain large creditors use to facilitate electronic payment in chapter 13 cases.

**4. Secured Claim:**

Check whether the claim is fully or partially secured. Skip this section if the claim is entirely unsecured. (See Definitions.) If the claim is secured, check the box for the nature and value of property that secures the claim, attach copies of lien documentation, and state, as of the date of the bankruptcy filing, the annual interest rate (and whether it is fixed or variable), and the amount past due on the claim.

**5. Amount of Claim Entitled to Priority Under 11 U.S.C. § 507 (a).**

If any portion of the claim falls into any category shown, check the appropriate box(es) and state the amount entitled to priority. (See Definitions.) A claim may be partly priority and partly non-priority. For example, in some of the categories, the law limits the amount entitled to priority.

**6. Credits:**

An authorized signature on this proof of claim serves as an acknowledgment that when calculating the amount of the claim, the creditor gave the debtor credit for any payments received toward the debt.

**7. Documents:**

Attach redacted copies of any documents that show the debt exists and a lien secures the debt. You must also attach copies of documents that evidence perfection of any security interest. You may also attach a summary in addition to the documents themselves. FRBP 3001(c) and (d). If the claim is based on delivering health care goods or services, limit disclosing confidential health care information. Do not send original documents, as attachments may be destroyed after scanning.

**8. Date and Signature:**

The individual completing this proof of claim must sign and date it. FRBP 9011. If the claim is filed electronically, FRBP 5005(a)(2) authorizes courts to establish local rules specifying what constitutes a signature. If you sign this form, you declare under penalty of perjury that the information provided is true and correct to the best of your knowledge, information, and reasonable belief. Your signature is also a certification that the claim meets the requirements of FRBP 9011(b). Whether the claim is filed electronically or in person, if your name is on the signature line, you are responsible for the declaration. Print the name and title, if any, of the creditor or other person authorized to file this claim. State the filer's address and telephone number if it differs from the address given on the top of the form for purposes of receiving notices. If the claim is filed by an authorized agent, attach a complete copy of any power of attorney, and provide both the name of the individual filing the claim and the name of the agent. If the authorized agent is a servicer, identify the corporate servicer as the company. Criminal penalties apply for making a false statement on a proof of claim.

**DEFINITIONS****Debtor**

A debtor is the person, corporation, or other entity that has filed a bankruptcy case.

**Creditor**

A creditor is a person, corporation, or other entity to whom debtor owes a debt that was incurred before the date of the bankruptcy filing. See 11 U.S.C. §101 (10).

**Claim**

A claim is the creditor's right to receive payment for a debt owed by the debtor on the date of the bankruptcy filing. See 11 U.S.C. §101 (5). A claim may be secured or unsecured.

**Proof of Claim**

A proof of claim is a form used by the creditor to indicate the amount of the debt owed by the debtor on the date of the bankruptcy filing. The creditor must file the form with the clerk of the same bankruptcy court in which the bankruptcy case was filed.

**Secured Claim Under 11 U.S.C. § 506 (a)**

A secured claim is one backed by a lien on property of the debtor. The claim is secured so long as the creditor has the right to be paid from the property prior to other creditors. The amount of the secured claim cannot exceed the value of the property. Any amount owed to the creditor in excess of the value of the property is an unsecured claim. Examples of liens on property include a mortgage on real estate or a security interest in a car. A lien may be voluntarily granted by a debtor or may be obtained through a court proceeding. In some states, a court judgment is a lien.

A claim also may be secured if the creditor owes the debtor money (has a right to setoff).

**Unsecured Claim**

An unsecured claim is one that does not meet the requirements of a secured claim. A claim may be partly unsecured if the amount of the claim exceeds the value of the property on which the creditor has a lien.

**Claim Entitled to Priority Under 11 U.S.C. § 507 (a)**

Priority claims are certain categories of unsecured claims that are paid from the available money or property in a bankruptcy case before other unsecured claims.

**Redacted**

A document has been redacted when the person filing it has masked, edited out, or otherwise deleted, certain information. A creditor must show only the last four digits of any social-security, individual's tax-identification, or financial-account number, only the initials of a minor's name, and only the year of any person's date of birth. If the claim is based on the delivery of health care goods or services, limit the disclosure of the goods or services so as to avoid embarrassment or the disclosure of confidential health care information.

**Evidence of Perfection**

Evidence of perfection may include a mortgage, lien, certificate of title, financing statement, or other document showing that the lien has been filed or recorded.

**INFORMATION****Acknowledgment of Filing of Claim**

To receive acknowledgment of your filing, you may either enclose a stamped self-addressed envelope and a copy of this proof of claim or you may access the court's PACER system ([www.pacer.psc.uscourts.gov](http://www.pacer.psc.uscourts.gov)) for a small fee to view your filed proof of claim.

**Offers to Purchase a Claim**

Certain entities are in the business of purchasing claims for an amount less than the face value of the claims. One or more of these entities may contact the creditor and offer to purchase the claim. Some of the written communications from these entities may easily be confused with official court documentation or communications from the debtor. These entities do not represent the bankruptcy court or the debtor. The creditor has no obligation to sell its claim. However, if the creditor decides to sell its claim, any transfer of such claim is subject to FRBP 3001(e), any applicable provisions of the Bankruptcy Code (11 U.S.C. § 101 *et seq.*), and any applicable orders of the bankruptcy court.



## ATTACHMENT TO PROOF OF CLAIM

McKesson Corporation, a Delaware corporation, on behalf of itself and its divisions, subsidiaries and affiliates, including McKesson Specialty Arizona, Inc. (collectively, "McKesson") hereby submits this proof of claim ("Proof of Claim") against Graceway Pharmaceuticals, LLC, a Delaware limited liability company, as debtor and debtor in possession in the Chapter 11 case filed in the United States Bankruptcy Court for the District of Delaware (Case No. 11-13036) (the "Debtor"). McKesson's claims against the Debtor are as follows and based upon the following facts:

### Basis for and Amounts of Unsecured Claims.

1. On September 29, 2011 (the "Petition Date"), Debtor filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") in the United States Bankruptcy Court for the District of Delaware (the "Bankruptcy Court").
2. On the Petition Date, Debtor filed a motion for orders authorizing it to honor certain prepetition obligations to McKesson and two other wholesalers [Docket #14] ("Wholesaler Motion").<sup>1</sup> In the Wholesaler Motion, Debtor explained the wholesalers' claims in detail and estimated outstanding liabilities as of the Petition Date as follows: (1) \$2.5 million for wholesale charge-backs and channel management commissions; (2) \$10 million for product returns and (3) \$2.9 million for McKesson's co-pay coupons.
3. As discussed in the Wholesaler Motion, McKesson and Debtor are parties to at least two interrelated and interconnected contracts for pharmaceutical supplies and services (the "Agreements"). The Agreements contain confidentiality provisions. McKesson believes Debtor possesses a complete copy of the Agreements. Any party in interest seeking a copy of the Agreements should contact McKesson's counsel at the address listed below in paragraph 9. McKesson reserves the right to withhold the Agreements from any requesting party in interest other than the Debtor.
4. The Bankruptcy Court entered interim [Docket #51] and final [Docket #121] orders approving the Wholesaler Motion (the "Wholesaler Orders"), which allow Debtor to settle by credit memo the pre-petition balances owed McKesson through a wholesaler support agreement ("Wholesaler Agreement").
5. Per the Wholesaler Orders, McKesson and Debtor were negotiating the final version of the Wholesaler Agreement to pay all pre-petition balances to McKesson in full by recoupment or direct payments to McKesson. Although McKesson believes the parties reached an agreement that would satisfy all McKesson's pre-petition balances, Debtor ultimately delayed its signature and performance until after the sale of

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<sup>1</sup> The Wholesaler Motion was also filed by affiliated debtor companies in the jointly administered case number 11-13036. As a result, McKesson reserves all rights to assert its claims under this Proof of Claim against each of the jointly administered debtors.

substantially all its asset to Medicis Pharmaceutical Corporation ("Medicis") on or about November 22, 2011. Medicis did not ask for the Agreements to be assumed and assigned as part of the sale and Debtor now refuses to execute the Wholesaler Agreement. McKesson reserves all rights to enforce the parties' agreement per the Wholesaler Agreement and Wholesaler Orders.

6. Debtor owes McKesson approximately \$2,645,183 *net* of all amounts McKesson: (a) is entitled to recoup under the Agreements; (b) certain "equitable adjustments" for "providing or winding down services" as allowed by the Agreements; and (c) indemnification for any and all claims that arise, "or are alleged to arise," under the Agreements. Estimates for future damages are based on historical performance and conduct, which may prove higher or lower than actual amounts.

7. Attached are: (i) a spreadsheet summarizing McKesson's claims (Exhibit A), (ii) a copy of Debtor's Wholesaler Motion (without exhibits) (Exhibit B); and (iii) a copy of each of the Wholesaler Orders (Exhibit C). McKesson's invoices and other documents substantiating this Proof of Claim exceed thousands of pages (collectively, the "Supporting Documents"). Any party in interest may request the Supporting Documents upon written request and reimbursement of costs to McKesson's counsel. Such written request should be sent to McKesson's counsel at the address listed in paragraph 9. McKesson reserves the right to withhold the Supporting Documents from any requesting party in interest other than the Debtor.

Distributions.

8. Any distributions on account of this Proof of Claim should be directed as follows:

McKesson Corporation  
c/o Jenifer Towsley  
One Post Street, 20<sup>th</sup> Floor  
San Francisco, CA 94104

Notices.

9. All notices with respect to this Proof of Claim should be sent to:

McKesson Corporation  
One Post Street  
San Francisco, CA 94104  
Legal Department  
Attn: Wade Estey, Esq.  
E-mail: Wade.Estey@mckesson.com

With a copy to:

Jeffrey K. Garfinkle, Esq.  
Buchalter Nemer  
18400 Von Karman Ave., Suite 800  
Irvine, CA 92612  
E-mail: jgarfinkle@buchalter.com

Reservation of Rights.

10. As of the date of this Proof of Claim, the Agreements have neither been assumed nor rejected, although a motion is pending to reject the Agreements effective December 31, 2011. Once the Agreements are rejected, McKesson reserves the right to assert additional unsecured claims arising or resulting from such rejection, including, but not limited to, all attorneys' fees and costs (as permitted by law or equity).

11. In executing and submitting this Proof of Claim, McKesson is not waiving in any manner or under any circumstances any security interest it now has or may be determined to have at any time nor is it waiving any claim, action, or cause of action it may have against Debtor or any other entity or person, including the right to assert different amounts from the amounts set forth herein, nor is it waiving any defense, offset, counter-claim or similar right or remedy it may now have or at any time have against Debtor or any other entity or person or with respect to any legal or equitable proceeding now existing or hereafter commenced.

12. McKesson reserves the right to amend or supplement this Proof of Claim in any respect including, but not limited to, the assertion, by proof of claim or other application to this Bankruptcy Court, for any amount that becomes due under any of the various agreements, pursuant to court order or otherwise, and continuing costs, fees and expenses (including legal fees and disbursements) arising in relation to the claims asserted herein or any of the agreements and the assertion of an administrative expense priority and adequate protection for any such claim or claims.

13. In submitting this Proof of Claim, McKesson is not waiving its rights to have any objections or challenges to this Proof of Claim resolved in accordance with the dispute resolution provisions of the Agreements, as appropriate. Moreover, McKesson does not submit to the Bankruptcy Court's jurisdiction for resolving all matters related to this Proof of Claim but reserves all rights accordingly.

**EXHIBIT A**

**EXHIBIT A**





# In re Graceway Pharmaceuticals, LLC (Case No. 11-13036)

## Summary of McKesson's Claim

Current AP balance (for McKesson's Purchases of Product)	\$ 6,189,243	
Deposit	\$ 59,500	
<b>Deductions</b>	<b>\$ (8,893,926)</b>	
Chargebacks <sup>1</sup>		(\$903,515)
McKesson Returns		(\$647,742)
Customer Returns <sup>2</sup>		(\$4,924,035)
Loyalty Program Fees, Charges and Reimbursements <sup>3</sup>		(\$1,846,534)
Channel Management Fees		(\$359,404)
Procurement Income		(\$212,696)
<b>Aggregate Amount of Claim</b>	<b>\$ 2,645,183</b>	

<sup>1</sup> This amount includes both actual and projected chargebacks.

<sup>2</sup> This amount includes both actual and projected customer returns. While McKesson is currently not accepting certain customer returns, it may be required to accept them in the near future.

<sup>3</sup> This amount includes only pre-petition fees, charges and reimbursements.



# **EXHIBIT B**

# **EXHIBIT B**

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

In re:

GRACEWAY PHARMACEUTICALS, LLC,  
*et al.*,<sup>1</sup>

Debtors.

Chapter 11

Case No. 11-13036 ( )

Joint Administration Pending

**MOTION OF THE DEBTORS FOR AN ORDER UNDER 11 U.S.C. §§ 105(a) AND 363  
AUTHORIZING THE DEBTORS TO HONOR CERTAIN PREPETITION  
OBLIGATIONS TO CUSTOMERS AND TO CONTINUE OTHER  
CUSTOMER, MARKETING, AND MEDICAL AFFAIRS PROGRAMS**

("Customer, Marketing and Medical Affairs Programs Motion")

The above-captioned debtors and debtors-in-possession (collectively, the "**Debtors**") hereby move this Court (the "**Motion**") for entry of interim and final orders (the "**Interim Order**" and the "**Final Order**"), in substantially the forms attached hereto as Exhibit A and Exhibit B, respectively, authorizing, but not directing, the Debtors to honor certain prepetition obligations to customers and to continue other customer, marketing, and medical affairs programs on a postpetition basis. In support of this Motion, the Debtors respectfully state:<sup>2</sup>

**Jurisdiction**

1. The Court has jurisdiction over this Motion under 28 U.S.C. §§ 157 and 1334.

This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2). Venue of this

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<sup>1</sup> The Debtors in these cases, along with the last four digits of each Debtor's federal tax identification number, are: Graceway Pharma Holding Corp., a Delaware corporation (9175); Graceway Holdings, LLC, a Delaware limited liability company (2502); Graceway Pharmaceuticals, LLC, a Delaware limited liability company (5385); Chester Valley Holdings, LLC, a Delaware limited liability company (9457); Chester Valley Pharmaceuticals, LLC, a Delaware limited liability company (3713); Graceway Canada Holdings, Inc., a Delaware corporation (6663); and Graceway International, Inc., a Delaware corporation (2399). The mailing address for Graceway Pharmaceuticals, LLC is 340 Martin Luther King Jr. Blvd., Suite 500, Bristol, TN 37620 (Attn: John Bellamy).

<sup>2</sup> The facts and circumstances supporting this Motion are set forth in the Declaration of Gregory C. Jones in Support of Chapter 11 Petitions and First Day Motions (the "**First Day Declaration**"), filed on the Petition Date (defined below).



proceeding and this Motion in this District is proper under 28 U.S.C. §§ 1408 and 1409.

2. The statutory bases for the relief requested herein are Sections 105(a) and 363 of title 11 of the United States Code, 11 U.S.C. §§ 101-1532, as amended (the “**Bankruptcy Code**”), and Rule 6003 of the Federal Rule of Bankruptcy Procedure (the “**Bankruptcy Rules**”).

### **Background**

3. On the date hereof (the “**Petition Date**”), each of the Debtors filed a petition with the Court under chapter 11 of the Bankruptcy Code (collectively, the “**Chapter 11 Cases**”). The Debtors are operating their businesses and managing their properties as debtors-in-possession pursuant to Sections 1107(a) and 1108 of the Bankruptcy Code. No request for the appointment of a trustee or examiner has been made in these Chapter 11 Cases, and no committees have been appointed or designated. Concurrently with the filing of this Motion, the Debtors have requested procedural consolidation and joint administration of these Chapter 11 Cases.

4. A description of the Debtors’ businesses, the reasons for commencing these Chapter 11 Cases, and the relief sought from the Court to allow for a smooth transition into chapter 11 (including the facts and circumstances supporting this Motion) are set forth in the First Day Declaration filed contemporaneously with this Motion.

### **Relief Requested**

5. By this Motion, the Debtors seek authority (consistent with the terms of this Motion), but not direction, to pay prepetition amounts described herein related to the Debtors’ Customer, Marketing, and Medical Affairs Programs (as defined below) and to continue such Customer, Marketing, and Medical Affairs Programs on a postpetition basis. The Debtors estimate (and further describe below) that as of the Petition Date, the current accrued prepetition expense liability for wholesale chargebacks, wholesale channel management agreement





obligations, product returns, and wholesale co-pay coupons is \$15.4 million. The Debtors further estimate that as of the Petition Date the anticipated monthly postpetition cost for continuing all other Customer, Marketing, and Medical Affairs Programs is approximately \$1.0 million.

6. The Debtors believe that a significant portion of the amounts to be paid with regard to the Customer, Marketing, and Medical Affairs Programs discussed herein will arise postpetition and, therefore, will be entitled to administrative expense priority under Section 503 of the Bankruptcy Code and may be paid in the ordinary course. The Debtors are also seeking authority, but not direction, to pay, consistent with the terms of this Motion, the prepetition obligations described herein in the ordinary course. Additionally, the Debtors request that all applicable banks and other financial institutions be authorized to receive, process, honor and pay any and all checks drawn on the Debtors' accounts on account of the Customer, Marketing, and Medical Affairs Programs, whether such checks were presented prior to or after the Petition Date.

7. Absent being afforded the relief requested herein, the Debtors would be unable to effectively maintain their customer relationships, which would cause significant harm to the Debtors, their estates, creditors, and all parties in interest at a time when customer support is critical to the Debtors' operations and sale effort.

#### **Basis for Relief**

8. In the Debtors' business judgment, the uninterrupted maintenance of the Customer, Marketing, and Medical Affairs Programs is essential to maintaining customer satisfaction, attracting new customers, and continuing their obligations to advance awareness of disease states and the range of therapies and drug treatments available. The markets the Debtors

operate within are highly competitive, and the Debtors' Customer, Marketing, and Medical Affairs Programs and ongoing relationships with physicians, clinicians, healthcare providers, academicians and their various wholesale, managed care companies and other institutional and government customers are integral to maintaining product awareness and ensuring that the Debtors' products remain competitive in the marketplace of drug treatments. Discontinuation of the Debtors' Customer, Marketing, and Medical Affairs Programs would thus disrupt their business operations, generate adverse publicity and undermine the Debtors' relationship with all of their customer groups.

9. Additionally, the Debtors believe that the Debtors' failure to honor their Customer, Marketing, and Medical Affairs Programs in the ordinary course of business and consistent with the terms of this Motion will hinder the Debtors' ability to continue operating during these Chapter 11 Cases. Indeed, the Debtors' continued relationships with their commercial, institutional and retail customers, as well as with the physicians and healthcare providers who prescribe their products and with the clinicians and academicians who advocate and research their products, are some of the key elements required for the Debtors to achieve a successful sale of their business. The value of the Debtors' operations as a going concern – a value that the Debtors are maintaining and maximizing for the benefit of all creditors in furtherance of their fiduciary duty to these estates – vastly exceeds the value of the relief requested by this Motion. The Debtors generated approximately \$185.2 million in net sales for the fiscal year 2010. Additionally the Debtors believe that potential future sales, even those conducted outside the Customer, Marketing, and Medical Affairs Programs, will be jeopardized, and may be severely impacted, if the prepetition obligations described herein and owed to

customers under the Customer, Marketing, and Medical Affairs Programs are not honored in the ordinary course and consistent with the terms of this Motion.

10. Accordingly, the Debtors request authority, but not direction, to honor those obligations related to the Customer, Marketing, and Medical Affairs Programs described below.

#### **Summary of Customer, Marketing, and Medical Affairs Programs**

11. Prior to the Petition Date, in the ordinary course of business, the Debtors offered certain incentive programs to their wholesale and retail customers, and certain medical education and medical affairs programs for the physicians, clinicians, academicians and healthcare professionals who advocate for Debtors' products or conduct research related to the Debtors' products (the "**Customer, Marketing, and Medical Affairs Programs**"). Under the Customer, Marketing, and Medical Affairs Programs, the Debtors provide (a) wholesale customers with certain chargeback benefits, volume discounts and product return privileges, (b) retail customers with certain co-pay coupons, incentive programs and purchase assistance plans and (c) physicians, clinicians, academicians and healthcare professionals with certain medical education programs and information sessions related to the Debtors' products. Virtually all of the Customer, Marketing, and Medical Affairs Programs offered by the Debtors are standard practice in the pharmaceutical industry.

#### **A. Wholesaler Chargeback Program and Channel Management Agreements**

12. Pharmaceutical companies such as the Debtors sell products through a network of large wholesale drug distributors (such distributors, as set forth on Schedule 1 attached hereto, the "**Wholesalers**"). The Wholesalers distribute the Debtors' products to various retailers, mail-order pharmacies, managed care organizations, and other institutions (the "**Dispensers**") who sell the products directly to patients. The Debtors negotiate certain channel management

agreements (“Channel Management Agreements”) and chargeback agreements (the “Wholesale Chargeback Agreements”) with the Wholesalers. Channel Management Agreements govern the terms of certain sales incentives that the Wholesalers receive for the sale of Debtors’ products (the “Channel Management Commissions”). The Wholesale Chargeback Agreements govern the terms of sale of the Debtors’ products by the Wholesalers to the Dispensers. Certain Dispensers may also negotiate a separate pricing and purchase agreement directly with the Debtors (the “Purchase Agreement”).

13. Based on the existence of certain Purchase Agreements, Wholesale Chargeback Agreements, or statutory rights, certain Wholesalers may be entitled to sell the Debtor’s products to certain eligible Dispensers at a special discounted rate (the “Wholesale Chargeback Program”). The special discounted rate is less than the wholesale acquisition cost (“WAC”) that the Wholesaler pays the Debtors. Thus, when the Wholesaler sells the Debtors’ products to eligible Dispensers at a rate lower than WAC, a chargeback obligation arises to compensate the Wholesaler for the deficiency (a “Wholesale Chargeback”). The sale is communicated to the Wholesaler, who generates an invoice for the Wholesale Chargeback obligation, which is then submitted to the Debtors. Most Wholesale Chargeback invoices are submitted to the Debtors within six weeks of the initial sale. The Debtors reimburse the Wholesalers for qualified Wholesale Chargeback invoices by issuing the Wholesaler a credit memo for the total amount owed. Since all Wholesale Chargebacks are settled by credit memo, no additional cash outlay is required under the Wholesale Chargeback Program.

14. Under the terms of the Channel Management Agreements, the Wholesalers provide the Debtors with regularly scheduled, confidential electronic reports regarding detail of the inventory of the Debtors’ products at their storage and distribution facilities, including



information related to sales and shipments of Debtors' products. Such reports help the Debtors manage their operations and ensure that the supply and distribution of their products meet fluctuating demands. The reports, in addition to other sales data, are used by the Debtors to calculate the Channel Management Commissions owed to each Wholesaler. The Channel Management Commissions are settled by credit memos issued to the Wholesalers at either the end of each month or the end of each quarter. The credit memos are deducted by the Wholesaler from future sales revenues and thus no additional cash outlay is required.

15. The Debtors estimate that the aggregate amount of (A) Wholesale Chargebacks accrued and owing as of the Petition Date under the Wholesale Chargeback Program is \$1.2 million (the "Prepetition Chargeback Amount") and (B) Channel Management Commissions accrued and owing as of the Petition Date under the Channel Management Agreements is \$1.3 million (the "Prepetition CMA Amount"). However, since no additional cash outlay is required under the Wholesale Chargeback Program or the Channel Management Agreements, the Debtors do not have any outstanding cash payments to make under the programs as of the Petition Date.

16. In order to remain competitive with other pharmaceutical companies, the Debtors request authority to settle by credit memo issued in the ordinary course of business and consistent with past practice (A) prepetition Wholesale Chargebacks owed to the Wholesalers in an aggregate amount not to exceed the Prepetition Chargeback Amount and (B) prepetition Channel Management Commissions owed to the Wholesalers in an aggregate amount not to exceed the Prepetition CMA Amount, provided, in each case, that the Wholesaler to whom any such prepetition Wholesale Chargeback or Channel Management Commission is due shall have executed a Wholesaler Support Agreement substantially in the form attached hereto as Exhibit C.



Additionally, the Debtors request authority to continue to perform under the Wholesale Chargeback Program and Channel Management Agreements on a postpetition basis in the ordinary course of business and consistent with past practice.

**B. Wholesaler Product Returns**

17. In the ordinary course of business the Debtors permit the Wholesalers to return certain unsold or expired products. Such wholesale customers therefore hold contingent claims against the Debtors for these product returns (the “**Product Returns**”). The Wholesalers also rely on the existence of such return policies to maintain products with acceptable dating. These policies are standard practice in the pharmaceutical industry. Continuing such programs are important to maintaining the Debtors’ relationships with the Wholesalers and maximizing the value of the Debtors’ estates.

18. The Debtors estimate that the total accrued expense liabilities for Product Returns as of the Petition Date is \$10.0 million (the “**Prepetition Product Returns Amount**”). The rate by which this liability will be reduced, however, is determined by the actual monthly rate of Product Returns. Such returns vary dramatically from month to month and are driven by batch expiration dates of the Debtors’ products. For instance, product return rates increase dramatically following the expiration dates of certain batch production lots but may be low during other months of the year. While difficult to predict precisely, the Debtors anticipate that due to recent batch expiration dates, the Product Returns on account of prepetition sales may reach \$1.4 million for October, 2011. The Debtors estimate, however, that after this initial period, Product Returns on account of prepetition sales will taper off to between \$300,000 and \$800,000 per month for the remainder of Q4 and throughout Q1 and Q2 of 2012.





19. In order to remain competitive with other pharmaceutical companies, the Debtors request authority to pay in the ordinary course of business and consistent with past practice prepetition accrued expense liabilities for Product Returns owed to the Wholesalers in an aggregate amount not to exceed the Prepetition Product Returns Amount, provided that the Wholesaler to whom any such prepetition accrued expense liability for Product Returns is or becomes due shall have executed a Wholesaler Support Agreement substantially in the form attached hereto as Exhibit C. Additionally, the Debtors request authority to continue to pay liabilities for Product Returns on a postpetition basis in the ordinary course of business and consistent with past practice.

**C. McKesson Co-Pay Coupons**

20. Prior to the Petition Date, and in the ordinary course of business, the Debtors offered certain “co-pay coupons” administered by a division of McKesson Corporation (“McKesson”). The co-pay coupons provide discounts off the prescription price of certain of the Debtors’ products (“McKesson Co-Pay Coupons”). The McKesson Co-Pay Coupons were provided by field sales representatives to doctors for distribution to their patients and were also available to customers online at the Debtors’ product websites. For instance, the McKesson Co-Pay Coupons for the Debtors’ topical cream Zyclara (“Zyclara”) permit the holder to reduce their prescription cost. The McKesson Co-Pay Coupons may only be used by those retail customers who are members of a commercial insurance plan, and are not available to individuals receiving any Federal or state-subsidized health insurance. The McKesson Co-Pay Coupons have been a popular program and have generated significant additional sales revenue for the Debtors.



21. McKesson Co-Pay Coupons do not have expiration dates, and as of the Petition Date certain customers had not yet redeemed all of the outstanding prepetition McKesson Co-Pay Coupons. At the time that these McKesson Co-Pay Coupons were made available to customers, the Debtors had every expectation that they would be redeemable. The Debtors estimate that the aggregate amount of prepetition McKesson Co-Pay Coupons that are outstanding as of the Petition Date is \$2.9 million (the “Prepetition McKesson Co-Pay Coupons Amount”). The Debtors’ average monthly postpetition cost for the McKesson Co-Pay Coupons is expected to be \$704,000.

**D. Product Samples, Product Donations, and the Patient Assistance Program**

22. Prior to the Petition Date, in the ordinary course of business and as part of their ongoing sales and marketing efforts, the Debtors provide free product samples to doctors to offer to their patients (the “Sampling Program”) and donate certain amounts of products with reduced shelf-life to certain charitable and non-governmental organizations (“Product Donations”). Such Sampling Program encourages both doctors and patients to sample and test Debtors’ products, which encourages doctors to learn about the Debtors’ drug treatment options and also encourages patient usage and loyalty. Product Donations also serve certain public relations goals and provide tax advantages to the Debtors.

23. Prior to the Petition Date, and in the ordinary course of business, the Debtors offered a program for indigent patients (the “Patient Assistance Program”). The Patient Assistance Program provides qualified patients with up to 3-months’ supply of certain of the Debtors’ products, administered through the patient’s healthcare provider. Qualified patients include those at or near the nationally established poverty level. The Debtors incur certain monthly costs for services associated with identifying and verifying the eligibility of such

patients. The Debtors believe that such customer programs engender loyalty and goodwill among the doctors who prescribe the Debtors' products to their patients and encourage brand and company loyalty amongst patients. The Debtors estimate that the total monthly postpetition cost for administering the Sampling Program, Product Donations and Patient Assistance Program is approximately \$205,000. The majority of these expenses take the form of net sales deductions and require no additional cash outlay. However, the Debtors estimate that out-of-pocket cash costs associated with maintaining these programs are approximately \$8,000 per month.

**E. Medical Education Programs**

24. Prior to the Petition Date, and in the ordinary course of business, the Debtors maintained various programs which provided certain not-for-profit entities with grants and sponsorship for research conferences, symposiums and regional seminars (collectively, the "**Medical Education Programs**"). The attendees of the conferences and symposiums including doctors, health care providers and researchers, attend such events to learn about the most recent updates on disease states relevant to the company. In some instances they may receive continuing medical education credit ("**CME**") from the American Medical Association for attending such events. These events provide an important educational service to doctors and healthcare professionals and other individuals who diagnose and treat diseases relevant to the company.

25. In addition to the conferences and symposiums, the Debtors also invite leading medical experts and opinion leaders (the "**Key Opinion Leaders**") to host regional dinners and seminars for local physicians, clinicians, academicians and healthcare professionals. Such dinners and seminars serve as information sessions for the attendees to learn about the Debtors' products and to share information about treatment options. The Debtors sponsor the costs of

these events and provide the Key Opinion Leaders with certain expense stipends and reasonable speaking fees. Such regional dinners and seminars form an important medical function by disseminating important medical information to physicians, clinicians, academic professionals and other healthcare providers, encouraging such people to learn about the Debtors' products and to better understand the disease states covered by Debtors' products.

26. The Debtors' ability to continue their Medical Education Programs is essential to maintaining physician knowledge and product awareness, and thus to supporting the Debtors' educational and sales efforts. Supporting Medical Education Programs are standard practice by pharmaceutical companies. The Debtors' failure to continue such programs would impact physician awareness and treatment behavior in medical conditions relevant to the Debtors. This would lead to significant erosion of the Debtors' revenues and customer base and significant impairment of the Debtors' ability to maximize the value of their assets. The Debtors estimate that the average monthly postpetition cost for the Medical Education Programs is approximately \$85,000.

#### **Applicable Authority**

27. The relief requested in this Motion is supported by several provisions of the Bankruptcy Code that authorize a debtor to honor prepetition obligations in certain circumstances. Under such provisions, various courts have permitted debtors-in-possession to pay prepetition debts on the grounds that payment of such claims was necessary to effectuate a successful sale, pursuant to other Bankruptcy Code provisions.

**A. In Order to Fulfill Their Fiduciary Obligation to Maximize the Value of Their Estates, Under Sections 1107 and 1108 of the Bankruptcy Code, the Debtors Should Be Permitted to Continue to Maintain and Honor Obligations under the Customer, Marketing and Medical Affairs Programs as Specified in the Motion.**

28. Authority for such payments may be found in Sections 1107(a) and 1108 of the Bankruptcy Code, which vest debtors-in-possession with authority to continue operating their businesses; sometimes, this duty and the concomitant fiduciary duty to maximize estate value may be fulfilled only through the pre-plan payment of certain unsecured claims. See, e.g., In re Mirant Corp., 296 B.R. 427, 429 (Bankr. N.D. Tex. 2003); In re CoServ, L.L.C., 273 B.R. 487, 498 (Bankr. N.D. Tex. 2002). The Debtors, operating their businesses as debtors-in-possession under Sections 1107(a) and 1108 of the Bankruptcy Code, are fiduciaries “holding the bankruptcy estate[s] and operating the business[es] for the benefit of [their] creditors and (if the value justifies) equity owners.” In re CoServ, L.L.C., 273 B.R. at 497. Implicit in the duties of a chapter 11 debtor-in-possession is the duty “to protect and preserve the estate, including an operating business’s going-concern value.” Id.

29. Courts have noted that there are instances in which a debtor-in-possession can fulfill its fiduciary duty “only . . . by the preplan satisfaction of a prepetition claim.” Id. The CoServ court specifically noted that preplan satisfaction of prepetition claims would be a valid exercise of a debtor’s fiduciary duty when the payment “is the only means to effect a substantial enhancement of the estate.” Id.

**B. Payment of Amounts Related to Customer, Marketing, and Medical Affairs Programs is Appropriate Under Section 363 of The Bankruptcy Code.**

30. Other courts have suggested that authority for a debtor’s determination to honor prepetition obligations may be found in Section 363(b)(1) of the Bankruptcy Code, which authorizes a debtor, after notice and a hearing, to “use, sell, or lease, other than in the ordinary course of business, property of the estate.” See 11 U.S.C. § 363(b)(1); see also In re Ionosphere

Clubs, Inc., 98 B.R. 174, 175 (Bankr. S.D.N.Y. 1989). The Debtors believe that if they are precluded from honoring their Customer, Marketing, and Medical Affairs Programs as set forth herein, their relationships with existing customers will be seriously jeopardized, and they will effectively lose the ability to attract new customers in the future. Therefore, the Debtors believe these estates as a whole will be better off, and clearly will be no worse off, if the Debtors are permitted to honor these claims in the ordinary course.

**C. Payment of Amounts Related to Customer, Marketing, and Medical Affairs Programs is also Appropriate Under Section 105 of the Bankruptcy Code and the Doctrine of Necessity.**

31. In addition, other courts have authorized payment of prepetition obligations pursuant to Section 105(a) of the Bankruptcy Code, which allows a bankruptcy court to enter any order “necessary or appropriate” to carry out the provisions of the Bankruptcy Code. See, e.g., In re Just for Feet, Inc., 242 B.R. 821, 825-26 (D. Del. 1999) (stating that where the debtor “cannot survive” absent payment of certain prepetition claims, the doctrine of necessity should be invoked to permit payment); In re Ionosphere Clubs, Inc., 98 B.R. at 175 (“The ability of a Bankruptcy Court to authorize the payment of pre-petition debt when such payment is needed to facilitate the rehabilitation of the debtor is not a novel concept.”).

32. The common source of authority for those court decisions is the “doctrine of necessity” or “necessity of payment” rule first recognized by the Supreme Court over 125 years ago in Miltenberger v. Logansport Ry. Co., 106 U.S. 286 (1882). In Miltenberger, the Supreme Court acknowledged the basic duty of an equity receiver “to protect and preserve the trust funds in its hands.” Id. at 310 (quoting Wallace v. Loomis, 97 U.S. 146, 162 (1877)). More importantly, the Court held that, consistent with this duty, “[m]any circumstances may exist which may make it necessary and indispensable to the business . . . and the preservation of the



property, for the receiver to pay preexisting debts . . . out of the earnings of the [debtor] . . . under the order of the court . . .” Id. at 311.

33. Consistent with this authority, numerous courts have held that debtors sometimes must be granted authority to honor certain prepetition obligations if they are to have a reasonable prospect of maximizing value for all constituencies; examples of the types of creditors whose prepetition claims may warrant payment include employees, foreign vendors, sole source suppliers, or customers with rebate coupons. See, e.g., In re CoServ, L.L.C., 273 B.R. at 497, 500 n.23; In re Payless Cashways, Inc., 268 B.R. 543, 546-47 (Bankr. W.D. Mo. 2001); In re Wehrenberg, Inc., 260 B.R. 468, 469 (Bankr. E.D. Mo. 2001); In re Equalnet Communic’ns Corp., 258 B.R. 368, 369-70 (Bankr. S.D. Tex. 2000); In re Just for Feet, Inc., 242 B.R. at 826; In re Sharon Steel Corp., 159 B.R. 730, 737 (Bankr. W.D. Pa. 1993); In re Eagle-Picher Indus., Inc., 124 B.R. 1021, 1023 (Bankr. S.D. Ohio 1991).

34. The Debtors’ request for authority, but not direction, to honor all Debtors’ Customer, Marketing, and Medical Affairs Programs pursuant to the terms specified herein easily satisfies these standards. As discussed herein, the Debtors believe that there is significant risk that customers whose Customer, Marketing, and Medical Affairs Programs are not honored in the ordinary course of business will refuse to conduct any further business with the Debtors or may attempt to offset future revenues owed to the Debtors, thus impairing the Debtors’ cashflow and ability to operate their business.

35. Moreover, the Debtors’ creditors and their estates will be better off as a whole if the Debtors are permitted to honor the above specified prepetition obligations to customers in the ordinary course and consistent with past practices. The Debtors’ business and prospects for a sale will be seriously undermined if their customer relationships are severed or impaired. The

damage to the value of the Debtors' assets and hence, the costs to creditors as a whole, would be immediate and irreparable.

36. Courts in this and other Districts have authorized the continuation of prepetition customer programs and the payment of prepetition obligations associated with the customer programs in numerous other chapter 11 cases. See, e.g., In re DSI Holdings, Inc., Case No. 11-11941 (KJC) (Bankr. D. Del. Jun. 26, 2011); In re Perkins & Marie Callender's Inc., Case No. 11-11795 (Bankr. D. Del. Jun. 13, 2011); In re Regent Communications Inc., Case No. 10-10632 (KG) (Bankr. D. Del. March 2, 2010); In re Accuride Corp., Case No. 09-13449 (BLS) (Bankr. D. Del. Jan. 22, 2010); In re Eddie Bauer Holdings, Inc., Case No. 09-12099 (MFW) (Bankr. D. Del. June 17, 2009); In re Hayes Lemmerz Int'l, Inc., Case No. 09-11655 (MFW) (Bankr. D. Del. May 13, 2009); In re Tweeter Home Entm't Group, Inc., Case No. 07-10787 (PJW) (Bankr. D. Del. June 13, 2007); In re Radnor Holdings Corp., Case No. 06-10894 (PJW) (Bankr. D. Del. Aug. 23, 2006); In re Werner Holding Co. (DE), Inc., Case No. 06-10578 (KJC) (Bankr. D. Del. June 13, 2006).

**D. The Relief Requested in this Motion is Necessary to Avoid Immediate and Irreparable Harm.**

37. Bankruptcy Rule 6003 provides:

Except to the extent that relief is necessary to avoid immediate and irreparable harm, the court shall not, within 21 days after the filing of the petition, grant relief regarding the following: . . . (b) a motion to use, sell, lease, or otherwise incur an obligation regarding property of the estate, including a motion to pay all or part of a claim that arose before the filing of the petition, but not a motion under Rule 4001 . . . .

Fed. R. Bankr. P. 6003; In re First NLC Fin. Servs., LLC, 382 B.R. 547, 549 (Bankr. S.D. Fla. 2008) (holding that Rule 6003 permits entry of retention orders on an interim basis to avoid irreparable harm).



38. No court within the Third Circuit has interpreted the “immediate and irreparable harm” language in the context of Bankruptcy Rule 6003 in any reported decision. However, the Third Circuit Court of Appeals has interpreted the same language in the context of preliminary injunctions. In that context, irreparable harm has been interpreted as a continuing harm that cannot be adequately redressed by final relief on the merits and for which money damages cannot provide adequate compensation. See, e.g., Norfolk S. Ry. Co. v. City of Pittsburgh, No. 05-4286, 2007 WL 1643179, at \*2 (3d Cir. June 7, 2007) (citing Glasco v. Hills, 558 F.2d 179, 181 (3d Cir. 1977)). Further, the harm must be shown to be actual and imminent, not speculative or unsubstantiated. See, e.g., Acierno v. New Castle County, 40 F.3d 645, 655 (3d Cir. 1994). To the extent that the requirements of Bankruptcy Rule 6003 are applicable to the relief requested in the Motion, the Debtors submit that for the reasons already set forth herein, the relief requested in this Motion is necessary to avoid immediate and irreparable harm as defined by the Third Circuit Court of Appeals.

**Waiver of Stay Under Bankruptcy Rule 6004(h)**

39. The Debtors also request that the Court waive the stay imposed by Bankruptcy Rule 6004(h), which provides that “[a]n order authorizing the use, sale, or lease of property other than cash collateral is stayed until the expiration of 14 days after entry of the order, unless the court orders otherwise.” Fed R. Bankr. P. 6004(h). As described above, the relief that the Debtors seek in this Motion is immediately necessary in order for the Debtors to be able to continue to operate their businesses and preserve value for their estates. Accordingly, the Debtors respectfully request that the Court waive the fourteen-day stay imposed by Bankruptcy Rule 6004(h), as the exigent nature of the relief sought herein justifies immediate relief.

40. Accordingly, for all of the foregoing reasons, the Debtors submit that cause exists for granting the relief requested herein. Based upon the foregoing, the Debtors respectfully request that this Court enter an order authorizing, but not directing, the Debtors to honor prepetition obligations on account of Customer, Marketing, and Medical Affairs Programs and to continue such Customer, Marketing, and Medical Affairs Programs on a postpetition basis.

#### **Notice**

41. No trustee, examiner or creditors' committee has been appointed in the Chapter 11 Cases. The Debtors have provided notice of this Motion to: (a) the United States Trustee for the District of Delaware; (b) financing counsel to the administrative agent for the lenders under the Debtors' prepetition first lien credit facility; (c) special restructuring and bankruptcy counsel to the administrative agent for the lenders under the Debtors' prepetition first lien credit facility; (d) counsel to the administrative agent for the lenders under the Debtors' prepetition second lien credit facility; (e) the administrative agent for the lenders under the Debtors' prepetition unsecured mezzanine credit facility; (f) the creditors listed on the Debtors' consolidated list of 30 largest unsecured creditors, as filed with the Debtors' chapter 11 petitions; (g) the Food and Drug Administration; (h) the Internal Revenue Service; and (i) all parties requesting notice pursuant to Bankruptcy Rule 2002. In light of the nature of the relief requested, the Debtors submit that no further notice is required or needed under the circumstances.

42. A copy of the Motion is available on the Court's website: [www.deb.uscourts.gov](http://www.deb.uscourts.gov). Additional copies of the Motion are available for free on the website of the Debtors' proposed claims, noticing, soliciting and balloting agent, BMC Group, Inc., at [www.bmcgroup.com/graceway](http://www.bmcgroup.com/graceway) or can be requested by calling (888) 909-0100 from within the United States or +1-310-321-5555 if calling from outside the United States.



WHEREFORE, the Debtors respectfully request that this Court enter the Interim Order and Final Order, in substantially the forms attached hereto as Exhibit A and Exhibit B, respectively, (a) authorizing, but not directing, the Debtors to continue their Customer, Marketing, and Medical Affairs Programs on a postpetition basis and honor the prepetition obligations specified in the Motion on account of such Customer, Marketing, and Medical Affairs Programs and (b) granting such other and further relief as is just and proper.

Dated: September 29, 2011  
Wilmington, Delaware

Respectfully Submitted,



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PROPOSED ATTORNEYS FOR DEBTORS AND  
DEBTORS-IN-POSSESSION





**Schedule 1**

McKesson Corp.

Cardinal Health, Inc.

AmerisourceBergen Corp.



# EXHIBIT C

# EXHIBIT C

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

In re:

GRACEWAY PHARMACEUTICALS, LLC,  
*et al.*,<sup>1</sup>

Debtors.

Chapter 11.

Case No. 11-13036 (MFW)

Joint Administration Pending

Docket Ref. No. 14

**INTERIM ORDER UNDER 11 U.S.C. §§ 105(a) AND 363 AUTHORIZING  
THE DEBTORS TO HONOR CERTAIN PREPETITION OBLIGATIONS  
TO CUSTOMERS AND TO CONTINUE OTHER  
CUSTOMER, MARKETING, AND MEDICAL AFFAIRS PROGRAMS**

("Interim Customer, Marketing, and Medical Affairs Programs Order")

Upon consideration of the motion (the "**Motion**")<sup>2</sup> of the Debtors for the entry of an interim order (the "**Interim Order**") authorizing, but not directing, the Debtors to continue to honor certain prepetition obligations to customers and to continue Customer, Marketing, and Medical Affairs Programs on a postpetition basis that the Debtors deem necessary and in the best interests of their estates and creditors in the same manner as such programs were implemented before the commencement of these bankruptcy cases; and it appearing that the relief requested is in the best interest of the Debtors' estates, their creditors, and other parties in interest; and it appearing that the Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334; and it appearing that this proceeding is a core proceeding pursuant to 28 U.S.C. § 157(b)(2); and adequate notice of the Motion and opportunity for objection having been given, with no

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<sup>1</sup> The Debtors in these cases, along with the last four digits of each Debtor's federal tax identification number, are: Graceway Pharma Holding Corp., a Delaware corporation (9175); Graceway Holdings, LLC, a Delaware limited liability company (2502); Graceway Pharmaceuticals, LLC, a Delaware limited liability company (5385); Chester Valley Holdings, LLC, a Delaware limited liability company (9457); Chester Valley Pharmaceuticals, LLC, a Delaware limited liability company (3713); Graceway Canada Holdings, Inc., a Delaware corporation (6663); and Graceway International, Inc., a Delaware corporation (2399). The mailing address for Graceway Pharmaceuticals, LLC is 340 Martin Luther King Jr. Blvd., Suite 500, Bristol, TN 37620 (Attn: John Bellamy).

<sup>2</sup> Capitalized terms used but not otherwise defined herein shall have the meaning set forth in the Motion.

objections or requests for hearing having been filed, or all objections having been overruled, as the case may be; and it appearing that no other notice be given; and after due deliberation and sufficient cause therefore, it is hereby ORDERED, ADJUDGED, AND DECREED that:

1. The Motion is GRANTED as set forth herein on an interim basis.
2. The Debtors are hereby authorized, but not required, to pay, in their discretion and in the ordinary course of business, consistent with past practice, the prepetition obligations specified in the Motion related to the Customer, Marketing, and Medical Affairs Programs, subject, in the case of Wholesale Chargebacks, Channel Management Commissions, Product Returns, and McKesson Co-Pay Coupons, to the aggregate dollar amounts specified, and the other terms and conditions set forth in the Motion; provided, that, with respect to Wholesale Chargebacks, Channel Management Commissions, liabilities for Product Returns, and McKesson Co-Pay Coupons, the Wholesaler to whom any such prepetition amount is or becomes due shall have executed (and shall be performing under) a Wholesaler Support Agreement substantially in the form attached to the Motion as Exhibit C.

3. Pursuant to Sections 105(a) and 363 of the Bankruptcy Code, the Debtors are authorized, but not directed, to honor and continue postpetition the Customer, Marketing, and Medical Affairs Programs that the Debtors deem necessary and in the best interests of their estates and creditors, in the ordinary course of business and consistent with past practice.

4. Subject to the terms set forth in the Motion, the Debtors are authorized, but not directed, to continue honoring and performing their postpetition obligations related to the Wholesale Chargeback Program, Channel Management Agreements, McKesson Co-Pay Coupons, Product Returns, the Sampling Program, Product Donations, the Patient Assistance Program, and the Medical Education Programs..



5. For the avoidance of doubt, the Debtors shall not be permitted to pay any prepetition obligations in respect of the Customer, Marketing, and Medical Affairs Programs except as expressly set forth in this Interim Order.

6. Any payment made pursuant to this Interim Order is not, and shall not be deemed, an admission as to the validity of the underlying obligation, a waiver of any rights the Debtors may have to subsequently dispute such obligation or an assumption or rejection of any executory contract.

7. The financial institutions upon which any checks, drafts or wire transfers are drawn in payment of obligations owing under the Debtors' Customer, Marketing, and Medical Affairs Programs, either before, on, or after the Petition Date are authorized and directed to honor any checks or drafts issued, upon presentation thereof, or any such wire transfer instructions, upon receipt thereof, provided that sufficient funds are immediately available and on deposit in the applicable accounts. Such financial institutions are authorized and directed to rely on the representations of the Debtors as to which checks, drafts or wire transfers are in payment of obligations owing under the Customer, Marketing, and Medical Affairs Programs.

8. This court finds and determines that the requirements of Bankruptcy Rule 6003 are satisfied and that the relief requested herein is necessary to avoid immediate and irreparable harm.

9. Notwithstanding the provisions of Bankruptcy Rule 6004 and Bankruptcy Rule 6006 or any applicable provisions of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware, this Interim Order shall not be stayed for fourteen (14) days after the entry hereof, but shall be effective and enforceable





immediately upon entry, and the fourteen (14) day stay provided in such rules is hereby expressly waived and shall not apply.

10. Any objection to the relief requested in the Motion on a permanent basis must be (a) filed in writing with the Court, at October 13, 2011, by 12:00 p.m. (Eastern Time) (the "**Objection Deadline**") and (b) served so as to be actually received by the following parties by the Objection Deadline: (i) the Debtors, c/o John A. A. Bellamy, Executive Vice President & General Counsel, Graceway Pharmaceuticals, LLC, 340 Martin Luther King Jr. Blvd., Suite 500, Bristol, TN 37620, (ii) proposed co-counsel to the Debtors, Latham & Watkins, LLP, 233 South Wacker Drive, Chicago, IL 60606 (Attn: Josef S. Athanas, Esq. and Matthew L. Warren, Esq., [josef.athanas@lw.com](mailto:josef.athanas@lw.com) and [matthew.warren@lw.com](mailto:matthew.warren@lw.com)) and Young Conaway Stargatt & Taylor, LLP, 1000 West Street, 17<sup>th</sup> Floor, Wilmington, Delaware 19801 (Attn: Michael R. Nestor, Esq. and Kara Hammond Coyle, Esq., [mnestor@ycst.com](mailto:mnestor@ycst.com) and [kcoyle@ycst.com](mailto:kcoyle@ycst.com)), (iv) financing counsel to the First Lien Agent, Morgan, Lewis & Bockius LLP, 225 Franklin Street, 16<sup>th</sup> Floor, Boston, Massachusetts 02110, Attn: Jonathan K. Bernstein, [jbernstein@morganlewis.com](mailto:jbernstein@morganlewis.com), (v) special restructuring and bankruptcy counsel to the First Lien Agent, Wachtell, Lipton, Rosen & Katz, 51 West 52<sup>nd</sup> Street, New York, New York 10019, Attn: Scott K. Charles and Michael S. Benn, [SKCharles@wlrk.com](mailto:SKCharles@wlrk.com) and [MSBenn@wlrk.com](mailto:MSBenn@wlrk.com), (vi) counsel to any Committee, (vii) counsel to the Second Lien Agent, Sidley Austin LLP, One South Dearborn, Chicago, Illinois 60603, Attn: Larry J. Nyhan, [lnyhan@sidley.com](mailto:lnyhan@sidley.com) and (viii) the U.S. Trustee for the District of Delaware, 844 King Street, J. Caleb Boggs Federal Building, Room 2207, Lockbox 35, Wilmington, Delaware 19801 (Attn: Juliet Sarkessian).




11. The final hearing to consider entry of an order granting the relief requested in the Motion on a final basis shall be held on October 17, 2011, at 4:00pm (Eastern Time).

12. Notwithstanding anything to the contrary contained herein, any payment to be made, or authorization contained, hereunder shall be subject to the requirements imposed on the Debtors under any approved debtor-in-possession financing facility, or any order regarding the use of cash collateral.

13. The Debtors are authorized to take all actions necessary to effectuate the relief granted pursuant to this Interim Order in accordance with the Motion.

14. The Court retains jurisdiction with respect to all matters arising from or related to the implementation of this Interim Order.

Dated: September 30, 2011  
Wilmington, Delaware

  
Peter J. Walsh  
United States Bankruptcy Judge

15. The Debtors shall serve due motion and this Interim order within five (5) days of entry on the notice parties identified in the motion, as well as (i) the U.S. Public Health Service; (ii) the Centers for Medicare and Medicaid Services; and (iii) the wholesalers.



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

In re:

GRACEWAY PHARMACEUTICALS, LLC,  
*et al.*<sup>1</sup>

Debtors.

Chapter 11

Case No. 11-13036 (PJW)

Jointly Administered

Ref. Doc. Nos. 14 & 51

**FINAL ORDER UNDER 11 U.S.C. §§ 105(a) AND 363 AUTHORIZING  
THE DEBTORS TO HONOR CERTAIN PREPETITION OBLIGATIONS  
TO CUSTOMERS AND TO CONTINUE OTHER  
CUSTOMER, MARKETING, AND MEDICAL AFFAIRS PROGRAMS**

("Final Customer, Marketing, and Medical Affairs Programs Order")

Upon consideration of the motion (the "**Motion**")<sup>2</sup> of the Debtors for the entry of a Final Order (the "**Final Order**") authorizing, but not directing, the Debtors to continue to honor certain prepetition obligations to customers and to continue Customer, Marketing, and Medical Affairs Programs on a postpetition basis that the Debtors deem necessary and in the best interests of their estates and creditors in the same manner as such programs were implemented before the commencement of these bankruptcy cases; and it appearing that the relief requested is in the best interest of the Debtors' estates, their creditors, and other parties in interest; and it appearing that the Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334; and it

<sup>1</sup> The Debtors in these cases, along with the last four digits of each Debtor's federal tax identification number, are: Graceway Pharma Holding Corp., a Delaware corporation (9175), Case No. 11-13037 (PJW); Graceway Holdings, LLC, a Delaware limited liability company (2502), Case No. 11-13038 (PJW); Graceway Pharmaceuticals, LLC, a Delaware limited liability company (5385), Case No. 11-13036 (PJW); Chester Valley Holdings, LLC, a Delaware limited liability company (9457), Case No. 11-13039 (PJW); Chester Valley Pharmaceuticals, LLC, a Delaware limited liability company (3713), Case No. 11-13041 (PJW); Graceway Canada Holdings, Inc., a Delaware corporation (6663), Case No. 11-13042 (PJW); and Graceway International, Inc., a Delaware corporation (2399), Case No. 11-13043 (PJW). The mailing address for Graceway Pharmaceuticals, LLC is 340 Martin Luther King Jr. Blvd., Suite 500, Bristol, TN 37620 (Attn: John Bellamy). On October 4, 2011, Graceway Canada Company filed an application in the Ontario Superior Court of Justice (Commercial List) pursuant to the *Courts of Justice Act*, R.S.O. 1990, c. C. 43.

<sup>2</sup> Capitalized terms used but not otherwise defined herein shall have the meaning set forth in the Motion.



appearing that this proceeding is a core proceeding pursuant to 28 U.S.C. § 157(b)(2); and adequate notice of the Motion and opportunity for objection having been given, with no objections or requests for hearing having been filed, or all objections having been overruled, as the case may be; and it appearing that no other notice be given; and after due deliberation and sufficient cause therefore, it is hereby ORDERED, ADJUDGED, AND DECREED that:

1. The Motion is GRANTED as set forth herein.
2. The Debtors are hereby authorized, but not required, to pay, in their discretion and in the ordinary course of business, consistent with past practice, the prepetition obligations specified in the Motion related to the Customer, Marketing, and Medical Affairs Programs, subject to the terms and conditions set forth in the Motion and the aggregate dollar amounts of: \$1.2 million for Wholesale Chargebacks, \$1.3 million for Channel Management Commissions, \$10.0 million for Product Returns, and \$2.9 million for McKesson Co-Pay Coupons, which amounts combined shall not exceed \$15.4 million; provided, that, with respect to Wholesale Chargebacks, Channel Management Commissions, liabilities for Product Returns, and McKesson Co-Pay Coupons, the Wholesaler to whom any such prepetition amount is or becomes due shall have executed (and shall be performing under) a Wholesaler Support Agreement substantially in the form attached to the Motion as Exhibit C.
3. Pursuant to Sections 105(a) and 363 of the Bankruptcy Code, the Debtors are authorized, but not directed, to honor and continue postpetition the Customer, Marketing, and Medical Affairs Programs that the Debtors deem necessary and in the best interests of their estates and creditors, in the ordinary course of business and consistent with prepetition practice.
4. Subject to the terms set forth in the Motion, the Debtors are authorized, but not directed, to continue honoring and performing their postpetition obligations related to the

Wholesale Chargeback Program, Channel Management Agreements, McKesson Co-Pay Coupons, Product Returns, the Sampling Program, Product Donations, the Patient Assistance Program, and the Medical Education Programs.

5. For the avoidance of doubt, the Debtors shall not be permitted to pay any prepetition obligations in respect of the Customer, Marketing, and Medical Affairs Programs except as expressly set forth in this Final Order.

6. Any payment made pursuant to this Final Order is not, and shall not be deemed, an admission as to the validity of the underlying obligation, a waiver of any rights the Debtors may have to subsequently dispute such obligation or an assumption or rejection of any executory contract.

7. Subject to the professionals to the Committee signing a confidentiality agreement satisfactory to the Debtors, the Debtors shall provide such professionals to the Committee with the names of any parties receiving payment and the amounts of any payments made pursuant to this Final Order. This information shall be for professionals' eyes only and shall not be shared with any person who is not a professional to the Committee.

8. The financial institutions upon which any checks, drafts or wire transfers are drawn in payment of obligations owing under the Debtors' Customer, Marketing, and Medical Affairs Programs, either before, on, or after the Petition Date are authorized and directed to honor any checks or drafts issued, upon presentation thereof, or any such wire transfer instructions, upon receipt thereof, provided that sufficient funds are immediately available and on deposit in the applicable accounts. Such financial institutions are authorized and directed to rely on the representations of the Debtors as to which checks, drafts or wire transfers are in payment of obligations owing under the Customer, Marketing, and Medical Affairs Programs.





9. This court finds and determines that the requirements of Bankruptcy Rule 6003 are satisfied and that the relief requested herein is necessary to avoid immediate and irreparable harm.

10. Notwithstanding the provisions of Bankruptcy Rule 6004 and Bankruptcy Rule 6006 or any applicable provisions of the Local Rules, this Final Order shall not be stayed for fourteen (14) days after the entry hereof, but shall be effective and enforceable immediately upon entry, and the fourteen (14) day stay provided in such rules is hereby expressly waived and shall not apply.


11. The Debtors shall serve this Final Order within five (5) days of entry on the notice parties identified in the Motion, as well as (a) the U.S. Public Health Service, (b) the Centers for Medicare and Medicaid Services, and (c) the Wholesalers.

12. Notwithstanding anything to the contrary contained herein, any payment to be made, or authorization contained, hereunder shall be subject to the requirements imposed on the Debtors under any approved debtor-in-possession financing facility, or any order regarding the use of cash collateral.

13. The Debtors are authorized to take all actions necessary to effectuate the relief granted pursuant to this Final Order in accordance with the Motion.

14. The Court retains jurisdiction with respect to all matters arising from or related to the implementation of this Final Order.

Dated: 05/17, 2011  
Wilmington, Delaware

  
Peter J. Walsh  
United States Bankruptcy Judge

Original Signed  
Proof of Claim.  
CARRIE HOFFMAN  
949-760-1211 EXT.  
6412  
Buchalter Nemer