

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

In re:

GRACEWAY PHARMACEUTICALS, LLC,
et al.,¹

Debtors.

Chapter 11

Case No. 11-13036 (____)

Joint Administration Pending

**MOTION OF THE DEBTORS FOR ENTRY OF INTERIM AND FINAL
ORDERS PURSUANT TO 11 U.S.C. §§ 105(a) AND 366 (A) PROHIBITING
UTILITY PROVIDERS FROM DISCONTINUING, ALTERING OR REFUSING
UTILITY SERVICES, (B) DEEMING UTILITY PROVIDERS ADEQUATELY ASSURED
OF FUTURE PERFORMANCE AND (C) ESTABLISHING
PROCEDURES FOR DETERMINING ADEQUATE ASSURANCE OF PAYMENT**

("Utilities Motion")

The above-captioned debtors and debtors-in-possession (collectively, the "**Debtors**") hereby move this Court (the "**Motion**") for entry of an interim order (the "**Interim Order**"), in substantially the form attached hereto as Exhibit A, and following a final hearing on the Motion (the "**Final Hearing**") entry of a final order (the "**Final Order**"), in substantially the form attached hereto as Exhibit B, (a) prohibiting Utility Providers (as defined herein) from altering, refusing or discontinuing service to, or discriminating against, the Debtors, (b) deeming the Utility Providers adequately assured of future performance, and (c) establishing procedures for

¹ 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).

determining adequate assurance of payment. In support of this Motion, the Debtors respectfully state:²

Jurisdiction

1. This 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 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 366 of the United States Code, 11 U.S.C. §§ 101-1532 (the “**Bankruptcy Code**”), Rule 1015(b) of the Federal Rules of Bankruptcy Procedure (the “**Bankruptcy Rules**”), and Rule 1015-1 of the Local Rules of Bankruptcy Practice and Procedure for the United States Bankruptcy Court for the District of Delaware (the “**Local Rules**”).

Background

3. On the date hereof (the “**Petition Date**”), each of the Debtors filed a petition with this 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.

² 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).

4. A description of the Debtors' business, the reasons for commencing these Chapter 11 Cases, and the relief sought from this 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.

The Utility Providers

5. In the operation of their businesses, the Debtors incur utility expenses for, among other things, electric service, gas service, water, cell phone service, data service, telephone service, internet services, and waste services (collectively, the "**Utility Services**") in the ordinary course of business. These Utility Services are provided by approximately twelve (12) providers (collectively, the "**Utility Providers**"), including those listed on Exhibit C hereto (the "**Utility Service List**").³ On average, the Debtors spend approximately \$70,307 each month on Utility Services. The Debtors have historically paid the Utility Providers promptly and in full. In light of this, the Debtors believe that the proposed Adequate Assurance Deposit (as defined below) is more than sufficient to provide the Utility Providers with adequate assurance of payment.

6. Uninterrupted Utility Services are essential to the Debtors' ongoing business operations. Should the Utility Providers refuse or discontinue service, even for a brief period, the Debtors' business operations would be severely disrupted. In particular, such discontinuation would irreparably disrupt the Debtors' ability to operate their businesses, which would negatively affect customers, cash flow and, ultimately, value and creditor recoveries. Simply

put, without Utility Services, the Debtors' operations will shut down. It is, therefore, critical that Utility Services continue uninterrupted.

Relief Requested

7. By this Motion, the Debtors seek entry of the Interim Order, in substantially the form attached hereto as Exhibit A, and following the Final Hearing entry of the Final Order, in substantially the form attached hereto as Exhibit B, (a) prohibiting Utility Providers from altering, refusing, or discontinuing service to, or discriminating against, the Debtors, including the making of demands for security deposits or accelerated payment terms, on account of prepetition invoices or on account of any perceived inadequacy of the Debtors' proposed adequate assurance or the commencement of these Chapter 11 Cases, (b) deeming the Utility Providers adequately assured of future performance within the meaning of Section 366 of the Bankruptcy Code, based, inter alia, on the Debtors' establishment of a segregated account containing \$35,154, an amount equal to half the average monthly cost of Utility Services based on the twelve (12) months prior to the Petition Date, which may be adjusted by the Debtors to account for the termination of Utility Services by the Debtors on account of any closed business locations, and (c) establishing procedures for determining additional adequate assurance of future payment and authorizing the Debtors to provide adequate assurance of future payment to the Debtors' Utility Providers.

³ Although the Debtors believe that Exhibit C encompasses all entities that could qualify as Utility Providers, the Debtors reserve the right, without further order of this Court, to supplement the list if any Utility Provider has been omitted. Additionally, the listing of an entity on Exhibit C is not an admission that any particular entity is a utility within the meaning of Section 366 of the Bankruptcy Code, and the Debtors reserve the right to contest any such characterization in the future. Further, this Motion does not seek assumption or rejection of any executory contracts under Section 365 of the Bankruptcy Code, and the Debtor reserves the right to claim that any contract with the Utility Companies is or is not an executory contract, as the facts may dictate.

Basis for Relief

8. Congress enacted Section 366 of the Bankruptcy Code to protect debtors from utility service cutoffs upon a bankruptcy filing while, at the same time, providing utility companies or providers with adequate assurance that the debtors will pay for postpetition services. See H.R. Rep. No. 95-595, at 350 (1978), reprinted in 1978 U.S.C.C.A.N. 5963, 6306. Accordingly, Section 366 protects debtors by enjoining utilities from altering, refusing or discontinuing services solely on account of unpaid prepetition amounts or commencement of a bankruptcy case for a period of thirty (30) days after the bankruptcy filing. Section 366 protects utilities by permitting them to alter, refuse or discontinue service after thirty (30) days if the debtor has not furnished “adequate assurance” of payment in a form “satisfactory” to the utility. 11 U.S.C. § 366(c)(2).

9. Section 366(c) of the Bankruptcy Code, which was enacted as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“**BAPCPA**”), significantly modified the existing statutory framework. It has two primary purposes. First, it permits a utility to alter, refuse or discontinue utility service if a debtor has not provided satisfactory adequate assurance within thirty (30) days of its bankruptcy filing, subject to the Court’s ability to modify the amount of adequate assurance. Second, it restricts the factors that a court can consider when determining whether an adequate assurance payment is, in fact, adequate. Specifically, courts may no longer consider (a) the absence of a security deposit before the debtor’s petition date, (b) the debtor’s history of timely payments or (c) the availability of an administrative expense priority, in determining the amount of a deposit. Notwithstanding these changes, it does not appear that Congress intended to — or did — abrogate this Court’s right to

determine the amount of adequate assurance necessary or change the fundamental requirement that assurance of payment must simply be “adequate.”

10. While Section 366(c) of the Bankruptcy Code does limit the factors a court can consider when determining whether a debtor has provided adequate assurance of payment, it does not limit the Court’s ability to determine the amount of payment necessary, if any, to provide such adequate assurance. Instead, Section 366(c) of the Bankruptcy Code gives courts the same discretion in determining the amount of payment necessary for adequate assurance as they previously had under Section 366(b) of the Bankruptcy Code. Compare 11 U.S.C. § 366(b) (2004) (pre-BAPCPA) (“On request of a party-in-interest and after notice and a hearing, the Court may order reasonable modification of the amount of the deposit or other security necessary to provide adequate assurance.”), with 11 U.S.C. § 366(c)(3)(A) (2005) (post-BAPCPA) (“On request of a party-in-interest and after notice and a hearing, the Court may order modification of the amount of an assurance payment under paragraph (2).”); see also Richard Levin & Alesia Ramley-Marinelli, The Creeping Repeal of Chapter 11: The Significant Business Provisions of the Bankruptcy Abuse Protection and Consumer Protection Act of 2005, 79 Am. Bankr. L.J. 603, 608-09 (2005) (stating that courts would likely continue to determine the amount and form of adequate protection after the implementation of the BAPCPA).

11. Further, it is well established that Section 366(b) of the Bankruptcy Code permits a court to find that no adequate assurance payment at all is necessary to provide a utility with adequate assurance of payment. See Virginia Elec. & Power Co. v. Caldor, Inc., 117 F.3d 646, 650 (2d Cir. 1997) (“Even assuming that ‘other security’ should be interpreted narrowly, we agree with the appellees that a bankruptcy court’s authority to ‘modify’ the level of the ‘deposit or other security,’ provided for under § 366(b), includes the power to require no ‘deposit or other

security’ where none is necessary to provide a utility supplier with ‘adequate assurance of payment.’”); In re Penn Jersey Corp., 72 B.R. 981, 986 (Bankr. E.D. Pa. 1987) (utility company’s request for additional security denied because debtor had never been delinquent prior to bankruptcy). This may be particularly true in cases where the debtor has made prepetition deposits or prepayments for services that utilities will ultimately render postpetition. 11 U.S.C. § 366(c)(1)(A)(v) (recognizing a prepayment for postpetition services as adequate assurance). Accordingly, courts continue to have discretion to determine the amount of adequate assurance payments and, where appropriate, to determine that no such payment is necessary. See In re Calpine Corp., Case No. 05-60200 (BRL) (Bankr. S.D.N.Y. Dec. 20, 2005) (approving adequate protection equal to the amount necessary for two weeks of utility service); In re Refco, Inc., Case No. 05-60006 (RDD) (Bankr. S.D.N.Y. Nov. 9, 2005) (approving adequate protection equal to the amount necessary for two weeks of utility service).

12. Additionally, Section 366(c) of the Bankruptcy Code, like Section 366(b), simply requires that a utility’s assurance of payment be “adequate.” Courts have long recognized that adequate assurance of performance does not require an absolute guarantee of a debtor’s ability to pay. See In re Adelphia Bus. Solutions, Inc., 280 B.R. 63, 80 (Bankr. S.D.N.Y. 2002); In re Caldor, 199 B.R. 1, 3 (S.D.N.Y. 1996) (Section 366(b) of the Bankruptcy Code “does not require an ‘absolute guarantee of payment.’”), aff’d by Virginia Elec. & Power Co. v. Caldor, Inc., 117 F.3d 646 (2nd Cir. 1997); see also In re Steinebach, 303 B.R. 634, 641 (Bankr. D. Ariz. 2004) (“Adequate assurance of payment is not, however, absolute assurance . . . all § 366(b) requires is that a utility receive only such assurance of payment as is necessary to protect its interests given the facts of the debtor’s financial circumstances.”); In re Santa Clara Circuits W., Inc., 27 B.R.

680, 685 (Bankr. D. Utah 1982); In re George C. Frye Co., 7 B.R. 856, 858 (Bankr. D. Me. 1980).

13. Courts have also recognized that in determining the amount of adequate assurance, bankruptcy courts should focus “on the need of the utility for assurance, and to require that the debtor supply *no more than that*, since the debtor almost perforce has a conflicting need to conserve scarce financial resources.” In re Caldor, 117 F.3d at 665 (emphasis in original); see also In re Penn. Cent. Transp. Co., 467 F.2d 100, 103-04 (3d Cir. 1972) (affirming the bankruptcy court’s ruling that no utility deposits were necessary where such deposits would likely “jeopardize the continuing operations of the [debtor] merely to give further security to suppliers who are already reasonably protected”). Accordingly, demands by a utility for a guarantee of payment when they already have adequate assurance of payment in light of the debtor’s specific circumstances should be refused.

Proposed Adequate Assurance

14. To provide adequate assurance of payment to the Utility Providers, the Debtors propose to deposit a sum of \$35,154, which is approximately equal to 50% of the Debtors’ average monthly utility consumption over the course of twelve (12) months prior to the Petition Date (the “**Adequate Assurance Deposit**”), into an interest-bearing, newly created segregated account within twenty (20) days of the Petition Date.

15. The Debtors submit that the Adequate Assurance Deposit, in conjunction with the Debtors’ ability to pay for future Utility Services in the ordinary course of business (collectively, the “**Proposed Adequate Assurance**”), constitutes sufficient adequate assurance to the Utility Providers. If any Utility Provider believes additional assurance is required, they may request such assurance pursuant to the procedures described below.

Proposed Adequate Assurance Procedures

16. If a Utility Provider is not satisfied with the adequate assurance and believes additional assurance is required, it may request such assurance in accordance with the following procedures (the "Adequate Assurance Procedures"):

- a. A Utility Provider desiring additional assurances of payment in the form of deposits, security or otherwise must serve a written request (an "Additional Assurance Request") upon the Debtors at the following addresses: (i) Graceway Pharmaceuticals, LLC, 40 Martin Luther King Jr. Blvd., Suite 500, Bristol, TN 37620, Attn: John Bellamy, Esq.; and (ii) co-counsel to the Debtors, Latham & Watkins LLP, Suite 5800, 233 South Wacker Drive, Chicago, IL 60606, Attn: Josef S. Athanas, Esq. and Matthew L. Warren, Esq. and Young Conaway Stargatt & Taylor, LLP, 1000 West Street, 17th Floor, Wilmington, DE 19801, Attn: Kara Hammond Coyle, Esq. (collectively, the "Service Parties"). The Additional Assurance Request must be sent to all Service Parties to be deemed valid.
- b. Any Additional Assurance Request must: (i) be made in writing; (ii) set forth the location(s) for which Utility Services are provided and the account number(s) for such location(s); (iii) include a summary of the Debtors' payment history relevant to the affected account(s), including any security deposits, and the outstanding balance for each account; and (iv) include a proposal for what would constitute adequate assurance from the Debtors, as well as set forth why the Utility Provider believes the Proposed Adequate Assurance is not sufficient adequate assurance of future payment.
- c. Upon the Debtors' and other Service Parties' receipt of any Additional Assurance Request at the addresses set forth above, the Debtors shall promptly negotiate with the Utility Provider to endeavor to resolve that Utility Provider's Additional Assurance Request (the "Resolution Period"). During the Resolution Period, Utility Providers may not discontinue, alter or refuse service to, or discriminate against, the Debtors on account of any unpaid prepetition charges or the commencement of these Chapter 11 Cases.
- d. The Debtors may resolve any Additional Assurance Request by mutual agreement with the Utility Provider and without further order of this Court, and may, in connection with any such agreement, in their discretion, increase the Adequate Assurance Deposit, without further order of this Court, if the Debtors believe such additional assurance is reasonable (provided, however, that the balance of the Adequate Assurance Deposit Account, together with the amount of any other deposit

provided as adequate assurance, shall at no time exceed an amount equal to 50% of the Debtors' average monthly utility consumption over the course of twelve (12) months prior to the Petition Date plus \$25,000, without the consent of the administrative agent for the lenders under the Debtors' prepetition first lien credit facility).

- e. If the Debtors determine that the Additional Assurance Request is not reasonable and are not able to promptly reach an alternative resolution with the Utility Provider, the Debtors will request a hearing before this Court to determine the adequacy of assurances of payment with respect to a particular Utility Provider (the "**Determination Hearing**") pursuant to Section 366(c)(3) of the Bankruptcy Code.
- f. Pending resolution of any such Determination Hearing, such particular Utility Provider shall be restrained from discontinuing, altering or refusing service to, or discriminating against, the Debtors on account of unpaid charges for prepetition services or the commencement of these Chapter 11 Cases.
- g. Unless and until a future order of this Court is entered requiring further assistance of payment, based on the establishment of the Proposed Adequate Assurance, a Utility Provider shall be deemed to have adequate assurance of payment.

17. The Debtors propose that any amounts in the Adequate Assurance Deposit Account be returned to the Debtors' estates at the earlier of (a) the closing of the Chapter 11 Cases and (b) the closing of the sale of substantially all of the Debtors' assets, unless one or more Utility Providers have asserted a claim against the Adequate Assurance Deposit, in which case such claim or claims, if not consensually resolved, will be resolved by the Court.

18. If this Court does not approve the Adequate Assurance Procedures, the Debtors could be forced to address numerous requests by their Utility Providers in a disorganized manner at a critical point in their Chapter 11 Cases. Moreover, the Debtors could be blindsided by a Utility Provider unilaterally deciding, after much delay, that it is not adequately protected and discontinuing service or making an exorbitant demand for payment to continue service. As set forth above, discontinuation of service, particularly electricity, would essentially halt the Debtors' operations. The proposed procedures set forth a fair process that will enable all parties

to negotiate their respective positions and, where necessary, seek Court intervention without jeopardizing the Debtors' ongoing operations.

The Utility Providers Will Not Be Prejudiced by the Requested Relief

19. On a monthly basis, the Debtors receive several individual invoices for Utility Services from the Debtors' Utility Providers. To the best of the Debtors' knowledge, there are no material defaults or arrearages with respect to undisputed Utility Service invoices, other than payment interruptions that may be caused by the commencement of these Chapter 11 Cases.

20. The Debtors' proposed method of furnishing adequate assurance of payment for postpetition Utility Service is not prejudicial to the rights of any Utility Provider, and is in the best interest of the Debtors' estates. This Court has granted similar relief to that requested herein following the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. See, e.g., In re Accuride Corp., Case No. 09-13449 (BLS) (Bankr. D. Del. Nov. 2, 2009); In re GWLS Holdings, Inc., Case No. 08-12430 (PJW) (Bankr. D. Del. Nov. 24, 2008); In re Sharper Image Corp., Case No. 08-10322 (KG) (Bankr. D. Del. Mar. 12, 2008); In re American LaFrance, LLC, Case No. 08-10178 (BLS) (Bankr. D. Del. Feb. 21, 2008); In re Werner Holding Co. (DE), Inc., Case No. 06-10578 (KJC) (Bankr. D. Del. June 21, 2006); In re LoveSac Corp., Case No. 06-10080 (CSS) (Bankr. D. Del. Feb. 27, 2006); In re Pliant Corp., Case No. 06-10001 (MFW) (Bankr. D. Del. Feb. 8, 2006); In re FLYi, Inc., Case No. 05-20011 (MFW) (Bankr. D. Del. Dec. 2, 2005).

21. Conversely, if the Utility Providers are permitted to refuse or discontinue service, even if for a brief period, the Debtors' business operations would be severely disrupted. In particular, such discontinuation would irreparably disrupt the Debtors' ability to operate their businesses, negatively affecting customers, cash flow and, ultimately, value and creditor

recoveries. Simply put, without Utility Services, the Debtors' operations will shut down. It is, therefore, critical that Utility Services continue uninterrupted.

22. Based on the foregoing, the Debtors request that the Motion be granted.

Subsequent Modifications of Utility Service List

23. The Debtors have made an extensive and good faith effort to identify their Utility Providers and include them on the Utility Service List. Nonetheless, it is possible that the Debtors have not yet identified or included certain Utility Providers on the Utility Service List. To the extent that the Debtors identify additional Utility Providers (the "**Additional Utility Providers**"), the Debtors will file amendments to the Utility Service List, and shall serve a copy of the Interim or Final Order, as applicable, on such Additional Utility Providers. The Debtors request that the Interim and Final Orders be binding on all Utility Providers, including the Additional Utility Providers, regardless of when such Utility Provider was added to the Utility Service List. Any Additional Assurance Request by such Additional Utility Provider must comply with the requirements set forth in the Motion and the Interim and Final Orders or shall be deemed an invalid Additional Assurance Request.

Notice

24. 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'

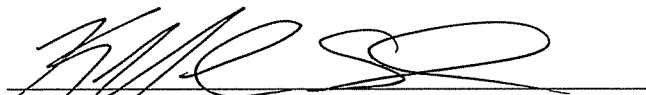
consolidated list of 30 largest unsecured creditors, as filed with the Debtors' chapter 11 petitions; (g) the Food and Drug Administration; (h) the Internal Revenue Service; and (i) all parties requesting notice pursuant to Bankruptcy Rule 2002. In light of the nature of the relief requested, the Debtors submit that no further notice is required or needed under the circumstances.

25. A copy of the Motion is available on the Court's website: 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, 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 the entry of the Interim Order, substantially in the form attached hereto as Exhibit A, and after the Final Hearing, entry of the Final Order, substantially in the form attached hereto as Exhibit B, (a) prohibiting Utility Providers from altering, refusing or discontinuing service to, or discriminating against, the Debtors, (b) deeming the Utility Providers adequately assured of future performance, (c) establishing procedures for determining adequate assurance of payment, and (d) granting such other and further relief as this Court deems appropriate.

Dated: September 29, 2011
Wilmington, Delaware

Respectfully Submitted,



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PROPOSED ATTORNEYS FOR DEBTORS AND
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