

**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 (KJC)

(Jointly Administered)

Hearing Date: Dec. 16, 2015 at 2:00 p.m.

Obj. Deadline: Oct. 28, 2015 at 4:00 p.m.

**MOTION OF THE LIQUIDATING TRUSTEE TO LIQUIDATE FIRST
LIEN FACILITY CLAIM AND FOR AUTHORITY TO
MAKE DISTRIBUTIONS CONTEMPLATED BY THE PLAN**

Kip Horton, in his capacity as the liquidating trustee (the “**Liquidating Trustee**”) of the Graceway Liquidating Trust (the “**Liquidating Trust**”), by and through his counsel, DLA Piper LLP (US), hereby moves (the “**Motion**”) this Court for an order (i) approving the liquidation of the First Lien Facility Claim, as defined in the Plan, and (ii) authorizing him to make certain distributions contemplated by the *First Amended Joint Plan of Liquidation of Graceway Pharmaceuticals, LLC, et al.* (“**Plan**”)² [D.I. 551], the *Findings of Fact, Conclusions of Law and Order Confirming First Amended Joint Plan of Liquidation of Graceway Pharmaceuticals, LLC, et al.* (the “**Confirmation Order**”) [D.I. 722] and the Liquidating Trust Agreement for the Graceway Liquidating Trust (the “**Liquidating Trust Agreement**”). In support of this Motion, the Liquidating Trustee respectfully represents as follows:

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), 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). On October 4, 2011, Graceway Canada Company (“**Graceway Canada**”) 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.

² All capitalized terms used, but not otherwise defined, herein shall have the meaning given in the Plan.

Jurisdiction

1. This Court has jurisdiction over this matter under 28 U.S.C. § 157 and 1334 and the Confirmation Order. This is a core proceeding within the meaning of 28 U.S.C. §§ 157(b)(2). Venue of this chapter 11 case in this district is proper under 28 U.S.C. §§ 1408 and 1409. The statutory basis for the relief requested herein is 11 U.S.C. §105(a). The Liquidating Trustee Consents to the entry of a final order on this Motion if it is determined that the Court, absent consent of the parties, cannot enter final orders or judgments consistent with Article III of the United States Constitution.

Background

2. On September 29, 2011 (the “**Petition Date**”), the above-captioned debtors (the “**Debtors**”) each filed a voluntary petition for relief (the “**Graceway Chapter 11 Cases**”) pursuant to chapter 11 of title 11 of the United States Code (the “**Bankruptcy Code**”).

3. On October 4, 2011, Graceway Canada filed an application in the Ontario Superior Court of Justice (Commercial List) pursuant to the *Courts of Justice Act*, R.S.O. 1990, c. 43.

4. On October 4, 2011, RSM Richter Inc. was appointed as receiver of Graceway Canada in order to oversee the sale of the assets of Graceway Canada, coordinate such sale with the Debtors in the Graceway Chapter 11 Cases and protect the creditors of Graceway Canada. Duff & Phelps Canada Restructuring Inc. (the “**Canadian Receiver**,”) was later substituted as the receiver of Graceway Canada.

5. On December 2, 2011, substantially all of the assets of the Debtors and Graceway Canada were sold to Medicis Pharmaceutical Corporation for an aggregate sale price of US\$455 million. *See* D.I. 335. The order approving the sale included an allocation of sale

proceeds as between the Debtors and Graceway Canada. *See* D.I. 306.

6. On February 28, 2012, the Debtors filed the Plan. The Court confirmed the Plan on April 20, 2012 by entering the Confirmation Order.

7. The Effective Date of the Plan was May 4, 2012 (the “**Effective Date**”) and on the Effective Date the Liquidating Trust was created and the Debtors’ remaining assets (the “**Debtors’ Assets**”) vested in the Liquidating Trust. Pursuant to the Plan, on the Effective Date the Debtors, on their own behalf and on behalf of the Beneficiaries and the Liquidating Trustee executed the Liquidating Trust Agreement, which established the Liquidating Trust for the purpose of liquidating the Debtors’ Assets and distributing the proceeds thereof to the Beneficiaries, among other things.

8. Pursuant to the Plan, on the Effective Date substantially all of the Debtors’ Assets vested in the Liquidating Trust.

9. Since the Plan’s Effective Date, the Liquidating Trustee has been engaged in a variety of efforts to maximize the value of and liquidate the Assets of the Liquidating Trust including, without limitation, the prosecution of various avoidance actions held by the Liquidating Trust, the collection of outstanding accounts receivable, the sale of the Debtors’ real property, winding down of the Debtors’ pension plan and the winding down and transfers of remaining funds from Graceway Canada to the Liquidating Trust.

10. Notably, as authorized by this Court (*see* D.I. 1065), after many months of analysis and planning on January 5, 2015, the Canadian taxing authorities granted the requested determination that Graceway Holdings is eligible for certain benefits under the *Canada—United States Income Tax Convention* and on April 30, 2015 the Liquidating Trustee and the Canadian Receiver consummated the transfer of an aggregate amount equal

to C\$20,630,943.84 from Graceway Canada to Graceway Holdings to the Liquidating Trust.

First Lien Facility Claim Reconciliation

11. The Liquidating Trustee and the First Lien Facility Agent have been engaged in an effort to reconcile and liquidate the claim asserted by the First Lien Facility Agent. Attached as Exhibit B hereto is an analysis of the final amount of the First Lien Facility Claim held by the First Lien Facility Agent, as calculated by the Liquidating Trustee. As reflected in the attached analysis, the First Lien Facility Agent holds a claim in the amount of at least \$21,188,619.29, as of September 30, 2015.

12. At the hearing on the Sale Motion (the “**Sale Hearing**”; relevant excerpts of the transcript of the Sale Hearing (the “**Sale Tr.**”) are attached hereto as Exhibit C), it was announced that the First Lien Facility Agent would not share in the distribution to General Unsecured Creditors from the Estate Fund Amount “by deficiency claim or otherwise.” Sale Tr., 6:1-3. As provided for in the Plan and Confirmation Order, the First Lien Facility Agent holds a perfected lien on all assets of the Liquidating Trust, subject only to the Estate Fund Amount.

13. Under the terms of the Plan, until such time as the First Lien Facility Secured Claim is paid in full, the First Lien Facility Agent shall receive:

“(i) any First Lien Available Cash that is available to be distributed on the Effective Date; (ii) the Nycomed Litigation Proceeds; and (iii) beneficial interests in the Liquidating trust entitling each First Lien Claim Holder to receive its pro-rata share of (A) any First Lien Available Cash that becomes available to be distributed after the Effective Date; (B) seventy five percent (75%) of any Avoidance Action Proceeds; (C) on hundred percent (100%) of any other Net Causes of Action Proceeds, including, without limitation, 549 Avoidance Action Proceeds, and (D) all Cash from the collection of accounts receivable.”

Plan, § 5.2.

14. Additionally, under the terms of the Plan, until such time as the First Lien Facility Secured Claim is paid in full, “the Liens securing the First Lien Facility Secured Claim and any First Lien Facility Adequate protection claim shall remain on the Assets, other than the Other Assets....” *Id.*

15. Finally, under the terms of the Plan, holders of General Unsecured Claims are entitled to “their Pro Rata share of the Other Available Cash” remaining after payment in full of all Allowed Other Secured Claims, Allowed Administrative Expense Claims, Allowed Priority Tax Claims, and Allowed Other Priority Claims. Plan, § 5.5.

16. Under the Plan, “Other Available Cash” from which distributions to General Unsecured Creditors includes the following Assets:

“(i) the Estate Fund Amount;³ (ii) the Liquidating Trustee Fee Amount; (iii); 25% of Avoidance Action Proceeds; and (iv) after payment in full of any First Lien Facility Adequate Protection Claim and any Second Lien Facility Adequate Protection Claim, any other Assets upon which there are no Liens.”

Plan, §§ 1.105 and 1.106.

Proposed Distribution

17. Currently the Liquidating Trust holds: (a) \$17,252,340.88 in Cash available for distribution to the First Lien Facility Agent on account of the First Lien Facility Claim and (b) \$9,211,271.80 in “Other Available Cash” for distribution to holders of General Unsecured Claims, \$400,000.00 of which is reserved to cover anticipated fees in winding up the Liquidating Trust and closing the Debtors’ bankruptcy estates. The Liquidating Trust

³ The “Estate Fund Amount” means “an amount equal to \$10,000,000.00 to be available to the Debtors’ estates free and clear of all Liens and Claims of the First Lien Facility Agent” to be funded as provided in the Plan. Plan, § 1.57. The Liquidating Trustee has filed quarterly accountings reporting on the collections and expenses of the Liquidating Trust. Of the Estate Fund Amount the net sum of \$8,811,271.80 remains available for distribution to General Unsecured Creditors, after reserving \$400,000.00 to cover anticipated fees in winding up the Liquidating Trust and closing the Debtors’ bankruptcy estates.

does not hold sufficient Cash to make a distribution to the Second Lien Facility Agent on account of the Second Lien Facility Claims.⁴

18. Therefore, at this time, the Liquidating Trustee proposes to make a distribution (the “**Proposed Distribution**”) to the following classes under the plan: Class 2 (First Lien Facility Claims); and Class 5 (General Unsecured Claims).

19. A summary of the Proposed Distribution is as follows:

Class:	Amount to Be Distributed:
Class 2 (First Lien Facility Claims)	\$17,252,340.88
Class 3 (Second Lien Facility Claims)	\$0.00
Class 4 (Other Secured Claims)	\$0.00
Class 5 (General Unsecured Claims)	\$8,811,271.80 (<i>pro-rata</i>)

20. Following the making of the Proposed Distribution, the First Lien Facility Agent will continue to hold a First Lien Facility Claim in the amount of at least \$3,936,278.41.

Relief Requested

21. By this Motion, the Liquidating Trustee seeks (i) approval of the liquidation of the First Lien Facility Claim and (ii) authority to make the Proposed Distribution to certain Beneficiaries of the Liquidating Trust.

Basis for Relief

22. Pursuant to Bankruptcy Code section 105(a), bankruptcy courts have broad equitable powers to “issue any order, process, or judgment that is necessary or appropriate to carry out the provision” of the Bankruptcy Code. 11 U.S.C. § 105(a). Additionally, the Court is not precluded from “taking any action or making any determination necessary or appropriate to

⁴ Therefore, the Second Lien Facility Agent holds a Second Lien Deficiency Claim in the General Unsecured Claims pool in the amount of \$363,945,481.44. *See* Plan, § 5.3. Additionally, until such time as the Second Lien Facility Agent has received \$10,000,000.00 in Cash from the Other Available Cash any amounts distributed on account of any Allowed Mezzanine Facility Claims shall be distributed to the Second Lien Facility Agent. *See* Plan, § 5.5.

enforce or implement court orders or rules or to prevent an abuse of process.” *Id.* Bankruptcy Rule 3020(d) further provides that the Court may issue “any other order necessary to administer the estate” pursuant to a confirmed plan. Fed. R. Bankr. P. 3020(d).

23. Following the Effective Date, Article 10 of the Plan gives the Liquidating Trustee the authority to make various payments or distributions necessary to effectuate the Plan. *See* Plan, §§ 10.1-10.10.

24. The Trustee has largely completed the review and reconciliation of claims in these cases. On July 30, 2014, the Liquidating Trustee moved for an order setting a schedule of all General Unsecured Claims (“**GUC Schedule**”) [D.I. 1043]. Prior to the objection deadline for the GUC Schedule, the Liquidating Trustee received informal comments from several parties as well as two formal limited objections to the GUC Schedule, and one reservation of rights. The Liquidating Trustee has resolved all but one of the objections to the GUC Schedule, and intends to resolve the final objection at or before any hearing on this Motion.⁵ A copy of the current GUC Schedule, reflecting those resolutions reached thus far, is attached hereto as Exhibit D, together with an extension of each General Unsecured Creditor’s proposed pro rata share of the Proposed Distribution to General Unsecured Creditors.⁶

25. The Trustee intends to make distribution to Beneficiaries of the Liquidating Trust in accordance with the Proposed Distribution and with respect to the holders of General Unsecured Claims in accordance with the GUC Schedule. Therefore, the Liquidating Trustee believes that making the Proposed Distribution at this time is both prudent and contemplated by the Plan.

⁵ The remaining objection to the GUC Schedule is the *Limited Objection of Ropes & Gray LLP to Motion of the Liquidating Trustee for Approval of Schedule of Unsecured Claims* [D.I. 1058], filed on September 15, 2015.

⁶ The GUC Schedule proposed distributions take into account the direction for distributions under the Plan, Confirmation Order and Liquidating Trust Agreement.

26. Additionally, in order to make the Proposed Distribution, it is important that the Court fix the minimum amount owing to the First Lien Facility Agent on account of its First Lien Facility Claims. As discussed above, the First Lien Facility Agent and the Liquidating Trustee have engaged in a mutual reconciliation and the Liquidating Trustee has calculated that the First Lien Facility Claims total at least \$21,188,619.29 as of September 30, 2015. Following the making of the Proposed Distribution, the First Lien Facility Agent will continue to hold a First Lien Facility Claim in the amount of at least \$3,936,278.41.

27. Accordingly, the Liquidating Trustee requests that the Court enter an order approving the final total of the First Lien Facility Claims and authorizing the Liquidating Trustee to make the Proposed Distribution.

Notice

28. Notice of this Motion will be provided to: (a) the Office of the United States Trustee for the District of Delaware; (b) counsel to the First Lien Agent; (c) counsel to the Second Lien Agent; and (d) all other parties that have requested notice pursuant to Bankruptcy Rule 2002 as of the date of filing of this Motion. Under the circumstances, the Liquidating Trustee submits that this notice is sufficient and reasonable, and that no further notice is required.

WHEREFORE, the Liquidating Trustee respectfully requests that this Court enter an order, substantially in the form attached hereto as Exhibit A authorizing him to make the Proposed Distribution to certain Beneficiaries of the Liquidating Trust.

Dated: October 13, 2015
Wilmington, Delaware

Respectfully Submitted,
DLA PIPER LLP (US)

/s/ Stuart M. Brown
Stuart M. Brown (DE 4050)
Daniel N. Brogan (DE 5723)
DLA PIPER LLP (US)
1201 N. Market Street, Suite 2100
Wilmington, Delaware 19801
Telephone: (302) 468-5700
Facsimile: (302) 394-2341
Email: stuart.brown@dlapiper.com
daniel.brogan@dlapiper.com

*Counsel for Kip Horton,
Liquidating Trustee of the
Graceway Liquidating Trust*