IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re GRACEWAY PHARMACEUTICALS, LLC, *et al.*, Debtors.	Chapter 11 Case No. 11-13036 (PJW) Jointly Administered **Hearing Date: December 16, 2015 at 2:00 p.m.** **Objection Deadline: October 28, 2015 at 4:00 p.m.** **Related to Docket No. 1106**

LIMITED OBJECTION OF ROPES & GRAY LLP TO MOTION OF THE LIQUIDATING TRUSTEE TO LIQUIDATE FIRST LIEN FACILITY CLAIM AND FOR AUTHORITY TO MAKE DISTRIBUTIONS CONTEMPLATED BY THE PLAN

Ropes & Gray LLP ("Ropes & Gray"), by and through its undersigned counsel, hereby submits this limited objection to the *Motion of the Liquidating Trustee to Liquidate First Lien Facility Claim and for Authority to Make Distributions Contemplated by the Plan* [D.I. 1106] (the "Motion"). In support thereof, Ropes & Gray respectfully represents as follows:

BACKGROUND

1. Prior to the petition date, Ropes & Gray represented Graceway Pharmaceuticals, LLC (the "Debtor") in patent litigation against Nycomed U.S. Inc. ("Nycomed") in the United States District Court for the District of New Jersey (Case No. 10-cv-00937, the "Nycomed Litigation"). The Nycomed Litigation asserted patent infringement claims against Nycomed in connection with Nycomed's production and sale of a generic version of one of the Debtor's core products, Aldara. *See* Decl. of Gregory C. Jones in Support of Chapter 11 Petitions and First Day Motions [D.I. 3] ¶¶ 13-26 (noting Aldara accounted for 84.95%, or approximately $301 million, of the Debtor's net sales in 2009, which declined to 23.9%, or approximately $52.5 million, of net sales in 2010). The Debtor asserted claims for, *inter alia*, damages for lost sales and profits of Aldara, including lost reputation and market share, and lost business

opportunities. *Id.* ¶ 23. The Debtor's loss of its market share for Aldara was the "primary factor" for the Debtor's bankruptcy filing. *Id.* ¶ 26. The Nycomed Litigation was ongoing as of the petition date, and the Debtor's bankruptcy filing resulted in a stay of the Nycomed Litigation.

I. ROPES & GRAY HAS A SECURED CLAIM FOR UNPAID FEES AND EXPENSES INCURRED IN THE NYCOMED LITIGATION THAT ATTACHED TO THE SALE PROCEEDS

2. As of the petition date, the Debtor had incurred $431,627.66 in unpaid fees (the "Unpaid Fees") for legal services provided by Ropes & Gray in connection with the Nycomed Litigation. In accordance with New York law, Massachusetts law, and the law of any other potentially applicable state, Ropes & Gray had a lien on the Nycomed Litigation and any proceeds thereof to secure its claim for unpaid legal fees. *See, e.g.*, N.Y. Jud. Law § 475 ("From the commencement of an action . . . the attorney who appears for a party has a lien upon his client's cause of action . . . and the proceeds thereof in whatever hands they may come . . . ."); Mass. Gen. Laws ch. 221, § 50 ("From the authorized commencement of an action . . . the attorney who appears for a client in such proceeding shall have a lien for his reasonable fees and expenses upon his client's cause of action . . . and upon the proceeds derived therefrom."); N.J.S.A. 2A:13-5 ("After the filing of a complaint . . . the attorney . . . shall have a lien for compensation, upon his client's action . . . and the proceeds thereof in whosesoever hands they may come.").

3. Shortly after its bankruptcy filing, the Debtor sold the Nycomed Litigation and various other assets to Medicis Pharmaceutical Corporation for an aggregate purchase price of approximately $455 million plus the assumption of certain enumerated liabilities. *See* Sale Order [D.I. 306]. The sale of the Nycomed Litigation to Medicis was made free and clear of Ropes & Gray's attorney lien, with the attorney's lien to attach to the "proceeds of the Transactions to be

received by the Debtors with the same validity, force, priority and effect" as prior to the sale. *See id.* ¶ 8.

4. There are two types of proceeds of the Nycomed Litigation to which Ropes & Gray's attorney lien attached upon the sale. First, the attorney lien attached to the cash proceeds realized by the Debtor in the sale in respect of the Nycomed Litigation. In light of the extraordinary amount of damages asserted in the Nycomed Litigation, upon information and belief, the sale proceeds in respect of the Nycomed Litigation significantly exceeded the $431,627.66 in Unpaid Fees. Second, the Debtors received as proceeds of the sale a residual right to payment in the Nycomed Litigation based on a waterfall set forth in the asset purchase agreement. *See id.* Ex. A (Asset Purchase Agreement) § 8.10 (obligating Medicis to transfer 50% of remaining litigation recoveries to the Debtor after the first $3 million is paid to Medicis and after the payment of certain litigation expenses). Ropes & Gray's attorney's lien also attached to this right to payment received by the Debtor in the sale.

II. THE TIMELY FILED PROOF OF SECURED CLAIM

5. On December 28, 2011, Ropes & Gray timely filed a proof of claim asserting a claim for the Unpaid Fees secured by the proceeds of the Nycomed Litigation and, alternatively, for a general unsecured deficiency claim to the extent the claim was disallowed as a secured claim. A copy of Ropes & Gray's proof of claim is included as Exhibit A hereto.

III. THE CONFIRMED PLAN PROVIDES FOR UNIMPAIRED TREATMENT OF THE SECURED CLAIM OF ROPES & GRAY

6. The Debtor's confirmed chapter 11 plan provides for the unimpaired treatment of "Other Secured Claims," which includes Ropes & Gray's secured claim for Unpaid Fees. *See* First Am. Joint Plan of Liquidation of Graceway Pharmaceuticals, LLC, et al. (the "Plan") [D.I. 557] § 4.1. Specifically, Other Secured Claims are to receive (i) the collateral securing the

claim, (ii) payment in full in cash, or (iii) such other treatment that leaves the secured claimant unimpaired. *Id.* § 5.4.

IV. THE PENDING PREFERENCE ACTION

7. On September 13, 2013, the Liquidating Trustee for the Graceway Liquidating Trust (the "Liquidating Trustee") commenced a preference action against Ropes & Gray in connection with $491,948.25 in legal fees paid to Ropes & Gray in the 90-days prior to the petition date. *See* Compl. [Adv. P. No. 13-52248, D.I. 1]. The adversary proceeding also included a claim for disallowance of the claim for the Unpaid Fees pursuant to section 502(d) of the Bankruptcy Code.

8. Ropes & Gray has asserted various complete defenses to the preference claims, including, *inter alia*, that Ropes & Gray's attorney lien and resultant secured status precludes liability under section 547 of the Bankruptcy Code. *See* Answer [Adv. P. No. 13-52248, D.I. 4]. This preference litigation has been stayed by agreement of the parties and remains pending.

V. THE PRIOR MOTION TO DETERMINE CLAIMS

9. On July 30, 2014, the Liquidating Trustee filed the Motion for Approval of Schedule of Unsecured Claims [D.I. 1043] (the "Unsecured Claims Motion"), which sought to "determin[e] the claims identified on Exhibit 2 as the 'Class 5: General Unsecured Claims,' pursuant to Article 3 of the Plan" so that the Liquidating Trustee could commence plan distributions. Unsecured Claims Motion ¶ 11.

10. On September 15, 2014, Ropes & Gray filed a limited objection to the Unsecured Claims Motion [D.I. 1058] (the "Prior R&G Objection"), which sought to characterize Ropes & Gray's secured claim for the Unpaid Fees as "contingent" on the unsecured claim schedule, mischaracterizing Ropes & Gray's claim for the Unpaid Fees and the status of such claim.

Following the Prior R&G Objection, the Unsecured Claims Motion has been continually adjourned, with no hearing held to date.

VI. THE MOTION TO MAKE PLAN DISTRIBUTIONS

11. On October 13, 2015, the Liquidating Trustee filed the Motion seeking to approve plan distributions of approximately $26.5 million in cash. Importantly, the Motion proposes no distribution to Class 4 (Other Secured Claims), and instead proposes to distribute all "Other Available Cash" in the amount of $8.8 million to general unsecured creditors (after reserving $400,000 to cover anticipated fees in winding up these cases).

12. The Motion does acknowledge the Prior R&G Objection and indicates that the Liquidating Trustee intends to resolve the objection at or before any hearing on the Motion. Motion ¶ 24 and n.5. Ropes & Gray has been available to discuss resolution of the secured claim for Unpaid Fees, and has continued to agree to the stay of the preference action, for over two years, and remains open to further discussions. However, in light of the present Motion, Ropes & Gray must again object to distributions under the Plan unless and until the Liquidating Trustee reserves cash in an amount equal to Ropes & Gray's full claim for Unpaid Fees until the secured claim for Unpaid Fees is resolved in the ordinary course.

OBJECTION

13. As set forth above, Ropes & Gray has a secured claim for the Unpaid Fees which has not yet been resolved. By the Motion, the Liquidating Trustee appears to seek to make final distributions of all "Other Available Cash" to general unsecured creditors, but without making any distributions to, or reserving for, Class 4 (Other Secured Claims), including the secured claim of Ropes & Gray for the Unpaid Fees. Accordingly, Ropes & Gray objects to the Motion and respectfully requests that any order approving the Motion expressly provide that (i) Ropes & Gray's secured claim for Unpaid Fees is not adjudicated, disallowed, resolved, altered, amended

or in any way affected, including with respect to its secured status, by the Motion or the relief requested therein, and (ii) requiring that, in connection with any distributions under the Plan, the Liquidating Trustee reserve cash in an amount equal to the full claim for Unpaid Fees, plus interest, until the secured claim for Unpaid Fees is resolved in the ordinary course.

14. To the extent that the current Motion again seeks to characterize Ropes & Gray's secured claim for the Unpaid Fees as a "contingent" unsecured claim, Ropes & Gray objects and incorporates by reference the entirety of the Prior R&G Objection.

WHEREFORE, Ropes & Gray respectfully requests that any order approving the Motion provide that: (i) Claim No. 168 by Ropes & Gray for unpaid legal fees is not adjudicated, disallowed, resolved, altered, amended or in any way affected, including with respect to its secured status, by the Motion or the relief requested therein, and (ii) the Liquidating Trustee shall, in connection with any distributions under the Plan, reserve cash in an amount equal to the full claim of Ropes & Gray for Unpaid Fees, plus interest, until the claim for Unpaid Fees is resolved pursuant to the Plan and applicable law.

Dated: October 28, 2015
Wilmington, Delaware

Respectfully submitted,

COLE SCHOTZ P.C.

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