

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: Mar. 28, 2017 at 1:45 p.m. (ET)

**RESPONSE AND RESERVATION OF RIGHTS OF
DEUTSCHE BANK TRUST COMPANY AMERICAS AS ADMINISTRATIVE AGENT
AND COLLATERAL AGENT FOR CERTAIN SECOND LIEN LENDERS
REGARDING MOTION OF THE LIQUIDATING TRUSTEE FOR AN ORDER (I)
APPROVING FINAL ACCOUNTING AND GRANTING AUTHORITY TO MAKE
FINAL DISTRIBUTIONS CONTEMPLATED BY THE PLAN; (II) EXCUSING THE
LIQUIDATING TRUSTEE FROM COMPLIANCE WITH WITHHOLDING TAX
LAWS UNDER PLAN OR IN THE ALTERNATIVE DISALLOWING THE
CLAIMS OF CLAIMANTS WHO FAILED TO PROVIDE THE LIQUIDATING
TRUSTEE WITH I.R.S. FORMS W-9; (III) GRANTING A FINAL DECREE AND
CLOSING THESE CASES; (IV) TERMINATING CLAIMS AND NOTICING
AGENT SERVICES AND (V) GRANTING RELATED RELIEF**

Deutsche Bank Trust Company Americas, in its capacities as Administrative Agent and Collateral Agent for the lenders (the “Second Lien Lenders”) which from time to time are parties to that certain Second Lien Credit Agreement dated as of May 3, 2007 (as amended from time to time) by and among Graceway Pharmaceuticals, LLC (“Graceway”); Graceway Holdings, LLC; the Second Lien Lenders; Deutsche Bank Trust Company Americas (“Agent”) and other agents name therein, hereby submits this response and reservation of rights (the “Response”) with respect to the Motion Of The Liquidating Trustee For An Order (I) Approving Final Accounting And Granting Authority To Make Final Distributions Contemplated By The Plan; (II) Excusing The Liquidating Trustee From Compliance With Withholding Tax Laws

¹ The Debtors in these cases, along with the last four digits of each Debtor’s federal tax identification number, are: Graceway Pharmaceuticals, LLC, a Delaware limited liability company (5385), Case No. 11-13036 (KJC); and Graceway Canada Holdings, Inc., a Delaware corporation (6663), Case No. 11-13042 (PJW).

Under Plan Or In The Alternative Disallowing The Claims Of Claimants Who Failed To Provide The Liquidating Trustee With I.R.S. Forms W-9; (III) Granting A Final Decree And Closing These Cases; (IV) Terminating Claims And Noticing Agent Services And (V) Granting Related Relief [Docket No. 1141] (the "Motion").² In support of this Response, Agent has filed contemporaneously herewith the Declaration of Christina M. Craige (the "Craige Declaration") and respectfully states as follows:

BACKGROUND

1. On February 28, 2012, the Debtors filed the First Amended Joint Plan of Liquidation of Graceway Pharmaceuticals, LLC, et al. (the "Plan") [D.I. 551]. The Court confirmed the Plan on April 20, 2012 (the "Confirmation Order") [D.I. 722]. The Plan became effective on May 4, 2012, at which point the Liquidating Trust was created and took possession of the Debtors' remaining assets.

2. On December 16, 2016, the Court entered two orders: the Distribution Order and the Order approving the GUC Schedule proposed by the Liquidating Trust.

3. As evidenced by the original GUC Schedule and the revised schedule (the "Revised GUC Schedule") attached as Exhibit B to the Motion, Agent holds an unsecured claim of \$363,945,481.44. Further, as a result of the turnover mechanism embodied in section 5.5 of the Plan, Agent is entitled to any distribution otherwise payable to Goldman Sachs Credit Partners on account of its \$83,883,912.70 mezzanine facility claim until Agent has received \$10,000,000 in cash (the "Turnover").

4. The Distribution Order required the Liquidating Trust to "reserve cash in an amount equal to (i) \$431,627.66, plus (ii) an amount sufficient to pay interest on the [Ropes &

² All capitalized terms not otherwise defined herein shall have the same meaning ascribed to such terms in the Motion.

Gray Claim] at the maximum rate allowed by law.” Distribution Order ¶ 5. The Revised GUC Schedule lists Ropes & Gray’s allowed claim at \$0.

5. The Distribution Order also authorized the Liquidating Trustee, among other things, to distribute \$8,746,138.43 on account of General Unsecured Claims and to reserve \$400,000 for “anticipated future expenses of the Liquidating Trust.” Distribution Order ¶¶ 3-4. The Liquidating Trustee only distributed \$8,679,372.45 on account of General Unsecured Claims pursuant to the Distribution Order, of which Agent received \$8,387,429.39. *See* Craige Declaration Exs. A & B. Thus, the Turnover remains in place unless and until Agent receives a further \$1,612,570.61.

6. After entry of the Distribution Order, but prior to the Liquidating Trustee’s distribution pursuant to the Distribution Order, Agent became aware that the Liquidating Trustee had sent \$66,765.98 less to its distribution agent for distribution on account of General Unsecured Claims than what it had sought and been granted authority to distribute by the Distribution Order. Counsel for the Liquidation Trustee described the disparity as driven by “a timing issue on the payment of certain expenses.” *See* Craige Declaration Ex. C.

7. After a discussion between counsel for the Agent and counsel for the Liquidating Trustee, counsel for the Liquidating Trustee confirmed in writing that “the Trust shall earmark from the \$400,000 reserve permitted under the order the amount of \$66,765.98 for distribution to unsecured creditors and not invade that amount. That amount will be distributed at the time the Trust makes its final distribution.” Craige Declaration Ex. A. Counsel for the Trustee clarified shortly thereafter that the original figure included certain amounts the Trust was not required to distribute under the Trust Agreement, and that “the amount is \$62,684.25, the amount of the actual expenses paid, that is to be earmarked for distribution to unsecured creditors

at a later date.” Craige Declaration Ex. D. Counsel for the Agent then confirmed the understanding of the parties (the “December 2015 Agreement”). Craige Declaration Ex. E. No conditions were placed on the Liquidating Trust’s commitment, including the timing of the closure of the cases, additional expenses incurred by the Liquidating Trust, or otherwise.

8. Counsel for the Agent discussed its concerns with Counsel for the Liquidating Trustee over email prior to and after the original objection deadline on the Motion, and obtained an extension of the objection deadline to attempt to resolve its concerns. As of the date of this Response, the parties were unable to reach a full resolution of the Agent’s concerns.

RESPONSE

9. Agent supports the prompt closure and final distribution of funds from the Liquidating Trust. However, there are certain ambiguities in the relief sought in the Motion that first require clarification.

10. The Liquidating Trustee has not filed the proposed distribution schedule contemplated as Annex 1 to the proposed order granting its Motion or the Final Report showing what amounts will be paid and what amounts will remain. Thus, Agent cannot confirm whether the proposed distribution will properly implement (i) the Turnover and (ii) the December 2015 Agreement. Agent believes that the Liquidating Trustee intends to implement the Turnover in the final distribution, pending actual review of the proposed Annex 1. Based on an email response from the Liquidating Trustee’s counsel, however, it is not clear to the Agent whether the Liquidating Trustee intends to distribute at least \$62,684.25 on account of General Unsecured Claims as required by the December 2015 Agreement. The Agent therefore requests that the proposed order granting the Motion require that the Liquidating Trustee’s distribution reflect both the Turnover and the December 2015 Agreement.


11. Although the Liquidating Trustee appears not to have yet filed the Final Report for which it is seeking approval in the Motion, the most recently-filed Post-Confirmation Quarterly Report, detailing cash as of January 2017, reveals that the Liquidating Trustee held \$554,600.75 on hand— far in excess of the amount it agreed to earmark for general unsecured creditors and not invade. Thus, there should be no question of the Liquidating Trustee’s ability to satisfy its obligations under the December 2015 Agreement.

RESERVATION OF RIGHTS

12. Given that the Liquidating Trustee has not yet filed the Final Report or Annex 1 to the proposed order granting its Motion, Agent reserves its rights to supplement this Response and object and raise any other arguments in respect of any amounts paid from the Liquidating Trust.

Respectfully submitted,

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Dated: Wilmington, Delaware
March 21, 2017

*Counsel For Deutsche Bank Trust Company Americas,
As Administrative Agent And Collateral Agent*