

**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 AN ORDER UNDER
11 U.S.C. §§ 105, 363(b), 506 AND 546(b) AUTHORIZING THE DEBTORS TO PAY
CERTAIN PREPETITION IMPORTING, SHIPPING AND DELIVERY CLAIMS**

(“Shipping Motion”)

The above-captioned debtors and debtors-in-possession (collectively, the “**Debtors**”) file this motion (the “**Motion**”) for entry of an order (the “**Order**”), substantially in the form attached hereto as Exhibit A, under 11 U.S.C. §§ 105, 363(b), 506 and 546(b), authorizing, but not directing, the Debtors to pay certain prepetition shipping and delivery charges, import obligations, and related possessory liens. 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

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).

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).

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, 363(b), 506 and 546(b) 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 Rules of Bankruptcy Procedure (the “**Bankruptcy 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.

4. A description of the Debtors’ businesses, 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 filed contemporaneously with this Motion.

Relief Requested

5. By this Motion, the Debtors seek authority, but not direction, to pay prepetition shipping and importing expenses, including customs duties, general order penalties, ocean freight, air freight, trucking charges, brokerage fees, detention and demurrage fees, surety bond premiums, consolidation and deconsolidation charges, and the like (collectively, the “**Importing and Shipping Claims**”). Payment of such Importing and Shipping Claims may be necessary or appropriate, as the Debtors may determine in the exercise of their business judgment, to obtain goods in transit or to satisfy the liens, if any, in respect thereof. On a monthly basis, the Debtors pay approximately \$72,000 in charges related to shipping and importing. The Debtors are current on their payments and estimate, to the best of their ability, that their current liability as of the Petition Date for Importing and Shipping Claims is \$35,000. Out of an abundance of caution, the Debtors respectfully request authority to honor, continue, and/or renew their Import Obligations and Shipping Obligations (each as defined below) on a postpetition basis in the ordinary course of business.

6. The Debtors request that all banks and other financial institutions, on which checks with respect to the Importing and Shipping Claims that have been or may be drawn on the Debtors’ accounts, be authorized to receive, process, honor, and pay any and all such checks, whether presented prior to or after the Petition Date, upon the receipt by each such bank of notice of such authorization.

7. Finally, the Debtors request that any payment made to a third party on account of the prepetition claims discussed herein be subject to disgorgement in the event that such third party does not continue to provide services to the Debtors during the pendency of these chapter 11 cases on the same terms as existed prior to the Petition Date.

Basis for Relief

8. An integral component of the Debtors' retail operations is the efficient flow of finished goods from domestic and foreign manufacturers and suppliers to the Debtors' U.S. distribution centers. In the ordinary course of their businesses, the Debtors arrange for the development, production and testing of their unique pharmaceutical products, in finished form, bulk form or clinical trial configurations, with certain sole source suppliers located outside the United States (the "**Imported Goods**"). There the Debtors pursue such arrangements due to the highly specialized nature of such goods and the unique manufacturing processes available by these suppliers. Such products are then shipped to the Debtors' distribution center in the United States and Canada where the products are then picked up by the Debtors' U.S. commercial wholesale customers (the "**Wholesalers**"), U.S. distributors, and overnight courier services, for final delivery to retail pharmacies, clinics, health care centers, hospitals, research institutions, laboratories and certain retail locations. Certain products housed at the Debtors' Distribution Centers are also shipped for repackaging, disposal, or further testing by certain labs and research institutions. Accordingly, the Debtors rely heavily on their foreign and domestic commercial common carriers, couriers, shippers, warehousemen and certain third party vendors and logistics service providers to ship, transport, store, and move through customs and deliver goods through established distribution networks.

A. Shipping Obligations

9. In the normal course of their business, the Debtors incur certain freight bills and other charges owed to certain commercial common carriers and overnight courier services (the "**Shippers**") to ship, transport, store and deliver bulk and finished goods, samples, materials, products, promotional items, supplies and related items as well as to manage the return shipping

and disposal of expired products and other product returns (the foregoing, collectively, the “**Shipping Obligations**”). On average, the Debtors pay, in the aggregate, approximately \$43,000³ on a monthly basis on account of the Shipping Obligations.

10. The Debtors seek to pay the prepetition Shipping Obligations for several reasons. First, if they are not paid, the Shippers may refuse to perform additional services for the Debtors. In such event, the Debtors will incur additional expenses (such as premium shipping costs) to replace these Shippers, which amounts will likely exceed the amount of unpaid prepetition Shipping Obligations that the Debtors request permission to pay hereunder.

11. Second, any delays in delivery with respect to goods that may be in the possession of Shippers or customs brokers as of the commencement of these cases will likely result in the assertion, under applicable law, of possessory liens upon the Debtors’ property in the possession of such Shippers or customs brokers and could disrupt the Debtors’ inventory distribution network to the detriment of their operations.⁴

12. The Debtors estimate that as of the Petition Date they owe \$19,000 on account of prepetition Shipping Obligations.

B. Import Obligations

13. In connection with the Imported Goods, the Debtors have certain import expenses, including customs duties, general order penalties, ocean freight, air freight, trucking charges, brokerage fees, detention and demurrage fees, surety bond premiums, consolidation and deconsolidation charges, and the like, including a \$100,000 customs bond outstanding to the United States Department of Homeland Security to secure the payment of certain custom

³ Note, the Shipping Obligations exclude amounts included in the Import Obligations, as defined below.

⁴ At any given time, Shippers utilized by the Debtors are in possession of property of the Debtors in an amount of approximately \$915,000. Such property generally consists of the Debtors’ finished product as well as certain packaging and marketing materials.

obligations (the foregoing, collectively, the “**Import Obligations**”). The Debtors typically incur approximately \$29,000 per month in Import Obligations. Payment of the Import Obligations is managed through third-party logistics providers, including Panalpina World Transport LTD and its associated companies (“**Panalpina**”) and Schenker LTD and its associated companies (“**Schenker**”), and is necessary to obtain possession of the Imported Goods. Absent payment, the Debtors’ customs brokers (the “**Customs Brokers**” and collectively with Panalpina and Schenker, the “**Importers**”) may assert shipper’s liens against the goods, and the United States Customs Service may assert a lien against such goods under 19 C.F.R. 141.1 (2010). The Debtors’ non-debtor affiliate, Graceway Canada Company (“**Graceway Canada**”), currently manages and pays for its own Import Obligations.

14. Pursuant to Section 507(a)(8) of the Bankruptcy Code a substantial portion, if not all, of the Debtors’ accrued, but unpaid Import Obligations are priority claims. Additionally, if the Import Obligations are not timely paid, the U.S. Customs Service may demand, pursuant to U.S. Customs Regulations, liquidated damages far in excess of the Import Obligations, in addition to other sanctions. It is therefore in the best interests of the Debtors’ estates that the Debtors be authorized to pay all Import Obligations when they become due, including prepetition Import Obligations, in order to ensure continuous operations and product distribution and to avoid paying significant amounts in damages and sanctions and the assertion of various liens against the Debtors’ goods.

15. Payment of the Debtors’ Import Obligations will benefit the Debtors’ estates because (a) the Debtors’ operations might otherwise be interrupted, (b) the eventual sale of the products so imported will generate substantial gross income, (c) forfeiture of goods or the imposition of damages and sanctions on goods which the Debtors have already become

indirectly obligated to deliver will be avoided, (d) the shelf-life of the Debtors' products is limited, thereby necessitating that any delay to the Debtors' operations be limited to avoid product wastage; (e) important relationships with doctors, based upon the availability of products, will be protected, and (f) customer loyalty will not be jeopardized.

16. As of the Petition Date, the Debtors have already become indirectly obligated to pay for certain Imported Goods which they have not yet received, because such goods were either in transit overseas; in transit to or within the United States or Canada or awaiting U.S. Customs or Canada Border Services Agency clearance; or clearance by the customs authorities of a foreign country. The Debtors estimate that as of the Petition Date, the amount of such Import Obligations will not exceed \$16,000. Thus, in the aggregate, the Debtors believe they owe \$35,000 in prepetition Shipping Obligations and Import Obligations.

17. The Debtors believe that the relief requested herein will ensure the continuous supply of goods that are vital to the Debtors' continuous operations and integral to a successful sale. Absent the relief requested in this Motion, the Debtors would be required to expend substantial time and resources convincing Shippers, Importers and parties holding goods that they should not assert a lien on or hold goods in transit. The attendant disruption to the continuous flow of goods (including Imported Goods held by Shippers and Importers) to the Debtors would likely result in a shortage of goods used by the Debtors in their operations. Without the goods, the Debtors' business would rapidly deteriorate and their opportunity to achieve a successful sale would be seriously jeopardized.

18. In return for payment of the prepetition Importing and Shipping Claims, the Debtors propose that the Shippers and Importers continue to provide goods and services to the Debtors on the most favorable terms in effect between such Shippers or Importers and the

Debtors in the twelve months prior to the Petition Date or on such other terms more favorable to the Debtors as the Debtors and the Shippers and Importers may otherwise agree (“**Customary Trade Terms**”). The Debtors propose that the Customary Trade Terms apply for the remaining term of the Shippers’ and Importers’ relationship with the Debtors, as long as the Debtors agree to pay for such goods and services in accordance with such terms. If any Shipper or Importer accepts payment on account of a prepetition obligation of the Debtors and thereafter does not continue to provide goods or services to the Debtors on Customary Trade Terms, any payments made will be deemed an avoidable postpetition transfer under Section 549 of the Bankruptcy Code and, therefore, will be recoverable by the Debtors in cash upon written request. Upon recovery by the Debtors, the Shipper’s or Importer’s claim will be reinstated as a prepetition claim in the amount so recovered. Upon recovery by the Debtors, any such prepetition shipping or importing claim will be reinstated as if the payment had not been made; provided, however, that nothing will preclude such third party from contesting such treatment by making a written request to the Debtors to schedule a hearing before this Court, which hearing the Debtors will set for the next regularly-scheduled omnibus hearing date occurring more than twenty (20) days after the date of receipt of such request.

Applicable Authority

19. 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 reorganization or 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 Pay Certain Importing and Shipping Claims.

20. 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. See, e.g., In re Mirant Corp., 296 B.R. 427 (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 Bankruptcy Code Sections 1107(a) and 1108, 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.

21. 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 Certain Importing and Shipping Claims is Appropriate under Sections 363, 506 and 546 of the Bankruptcy Code.

22. 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 to use estate funds outside the ordinary course of business. See In re Ionosphere Clubs, Inc., 98 B.R. 174, 175 (Bankr. S.D.N.Y. 1989); see, e.g., FV Steel and Wire Co., Case No. 04-22421 (Bankr. E.D. Wis. Feb. 26, 2004). Under this section, a court authorizes a debtor to pay certain prepetition claims, however, to do so, “the debtor must articulate some

business justification, other than the mere appeasement of major creditors.” In re Ionosphere Clubs, Inc., 98 B.R. at 175.

23. In addition, the Debtors believe that their failure to pay the Shipping Obligations may result in the assertion of possessory liens by the respective claimants under applicable state law with respect to any goods in their possession (collectively, the “Liens”). Under Section 362(b)(3) of the Bankruptcy Code, the act of perfecting such Liens, to the extent consistent with Section 546(b) of the Bankruptcy Code,⁵ is expressly excluded from the automatic stay otherwise imposed by Section 362(a) of the Bankruptcy Code.

24. Moreover, to protect their asserted lien rights, the Shippers or Importers may refuse to release goods in their possession unless and until their prepetition claims for services have been satisfied. Therefore, notwithstanding the automatic stay imposed by Section 362 of the Bankruptcy Code, many of these parties: (a) may be entitled to assert and perfect Liens against the Debtors’ property, which would entitle them to payment ahead of other general unsecured creditors in any event; and (b) may hold the property subject to the asserted Liens pending payment, to the direct detriment of the Debtors and their estates.

25. Moreover, since the amount of Shipping Obligations may be less than the value of any property securing those claims, any party holding lien rights arguably is a fully secured creditor. In general, under Section 506(b) of the Bankruptcy Code, fully secured creditors are entitled to receive: (a) payment in full of their prepetition claims under any confirmed plan or plans in these chapter 11 cases; and (b) the postpetition interest accruing on such claims to the extent that such claims are oversecured. Consequently, payment of the Shipping Obligations may: (a) give the Shippers or Importers no more than that to which they otherwise would be

⁵ Under Bankruptcy Code Section 546(b), a debtor’s lien avoidance powers “are subject to any generally applicable law that . . . permits perfection of an interest in property to be effective against an entity that acquires rights in such property before the date of perfection.” 11 U.S.C. § 546 (b) (1) (A) .

entitled under a plan; and (b) save the Debtors the interest costs that otherwise may accrue on the Shipping Obligations during these Chapter 11 Cases.

C. Payment of Importing and Shipping Claims is also Appropriate under Section 105 of the Bankruptcy Code and the Doctrine of Necessity.

26. Still 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 (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 (Bankr. S.D.N.Y. 1989) (“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.”).

27. 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 120 years ago in Miltenberger v. Logansport, C. & S. Ry. Co., 106 U.S. 286 (1882). In Miltenberger, the Supreme Court acknowledges 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.

28. 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 reorganizing their businesses and maximizing value for all constituencies; examples

of the types of creditors whose prepetition claims may warrant payment include employees, non-U.S. vendors, sole source suppliers, customers with warranty or rebate claims, governmental units who may exercise their police powers to revoke licenses and other permits, and vendors who may go out of business if their claims are not paid and whose financial survival is necessary to the debtor's own rehabilitation efforts. See, e.g., In re CoServ, 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 (Bankr. E.D. Mo. 2001); In re Equalnet Communications Corp., 258 B.R. 368 (Bankr. S.D. Tex. 2000); In re Just for Feet, Inc., 242 B.R. 821; In re CAF Bindery, Inc., 199 B.R. 828 (Bankr. S.D.N.Y. 1996); In re Columbia Gas Sys., Inc., 171 B.R. 189 (Bankr. D. Del. 1994); In re Sharon Steel Corp., 159 B.R. 730 (Bankr. W.D. Pa. 1993); In re Quality Interiors, Inc., 127 B.R. 391 (Bankr. N.D. Ohio 1991); In re Eagle-Picher Industries, 124 B.R. 1021 (Bankr. S.D. Ohio 1991); In re Ionosphere Clubs, Inc., 98 B.R. 174 (Bankr. S.D.N.Y. 1989); In re Structurlite Plastics Corp., 86 B.R. 922 (Bankr. S.D. Ohio 1988).

29. The Debtors easily satisfy these standards. First, as established by the First Day Declaration, the Debtors believe that there is a significant risk that if Importing and Shipping Claims are not honored, the Shippers, Importers and other parties holding goods and materials will fail to deliver such goods or materials and will cease doing business with the Debtors. As set forth in the First Day Declaration, the continuous flow of the Debtors' products on a timely basis to their various commercial, retail and institutional customer groups, and for clinical testing, is critical to their operations and the prospects for the Debtors' successful sale. In order to avoid any disruptions at the Debtors' facilities and any attendant failure to deliver products to customers, the Debtors simply must have authority, but not direction, to pay or otherwise satisfy Importing and Shipping Claims.

30. Second, payment of the Importing and Shipping Claims will do little or no harm to the priorities established by the Bankruptcy Code. The Debtors believe that most, if not all, of the Importing and Shipping Claims are secured claims under Section 506 of the Bankruptcy Code or will become secured upon assertion of possessory liens. The Shippers, Importers and other such parties holding goods and materials would be entitled to payment to the extent of the value of the product to which their lien attaches, potentially on an expedited basis as adequate protection given the perishable nature of the collateral. Thus, paying the Importing and Shipping Claims in the ordinary course of business will not leave the Debtors' other creditors worse off because doing so simply accelerates the time of payment of obligations that otherwise may have to be paid in any event.

31. Third, as established by the First Day Declaration, the Debtors' creditors and these estates as a whole will be better off, and at least no worse off, if the Debtors are authorized to pay such claims. As contemplated under the Asset Purchase Agreement (as defined in the First Day Declaration), the Debtors covenant and agree to use "commercially reasonable efforts... to carry on in the Ordinary Course of Business..." consistent with past practice and custom. See Asset Purchase Agreement at § 7.2(a). The maximum estimated amount of all outstanding prepetition Importing and Shipping Claims the Debtors request authority, but not direction, to pay is approximately \$35,000. By paying such amounts, if necessary, the Debtors will obtain a far greater value in products belonging to the Debtors and being delivered by Shippers and Importers and other parties who are likely to assert possessory liens and hold up delivery of such products indefinitely. Making such payments thus represents a commercially reasonable action by the Debtors to help ensure that the flow of products are maintained and the value of the Debtors' business is preserved. Alternatively, if such claims were not paid, the

Debtors may have to incur a like or greater amount of expense to replace such products in the event the goods were not released. Such actions could damage the Debtors' relationship with its customers and thus impair the value of its estate.

32. Finally, the amounts to be paid pursuant to this Motion are de minimis compared with the importance and necessity of the products in possession of the Shippers and Importers and other such parties.

33. The relief requested in this Motion has been granted in comparable chapter 11 cases in this district. 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 Accuride Corp., Case No. 09-13449 (BLS) (Bankr. D. Del. Jan. 22, 2010); In re Goody's Family Clothing, Inc., Case No. 08-11133 (CSS) (Bankr. D. Del. June 10, 2008); In re Tweeter Home Entertainment Group, Inc., Case No. 07-10787 (PJW) (Bankr. D. Del. June 12, 2007); 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.

34. Bankruptcy Rule 6003 provides:

Except to the extent that relief is necessary to avoid immediate and irreparable harm, the court shall not, within 20 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).

35. 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.2d 645, 653-55 (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)

36. 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.

37. In sum, it is necessary to the Debtors’ operations and to the success of the Debtors’ sale that the relief requested herein be granted. Authorizing, but not directing, the

Debtors' payment of the Importing and Shipping Claims in satisfaction of potential liens will help ensure that ongoing services are provided by the Shippers, Importers and other parties holding goods and materials in an efficient manner. Accordingly, the relief requested herein is in the best interests of the Debtors and their estates and creditors.

38. Nothing in this Motion should be construed as, or deemed to be, a request for authority to assume any executory contract or unexpired lease under Section 365 of the Bankruptcy Code.

Notice

39. 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 First Lien Administrative Agent; (c) special restructuring and bankruptcy counsel to the First Lien Administrative Agent; (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.

40. 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

40. 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 that the Court enter the Order, in substantially the form attached hereto as Exhibit A, (i) authorizing, but not directing, payment of the prepetition Importing and Shipping Claims in the ordinary course of business and (ii) granting the Debtors such other and further relief as is just and proper.

Dated: September 29, 2011
Wilmington, Delaware

Respectfully Submitted,



Michael R. Nestor (No. 3526)
Kara Hammond Coyle (No. 4410)
YOUNG CONAWAY STARGATT & TAYLOR, LLP
1000 West Street, 17th Floor
Wilmington, Delaware 19801
Telephone: (302) 571-6600
Facsimile: (302) 571-1253

-and-

David S. Heller
Josef S. Athanas
Matthew L. Warren
LATHAM & WATKINS LLP
Suite 5800
233 South Wacker Drive
Chicago, IL 60606
Telephone: (312) 876-7700
Facsimile: (312) 993-9767

PROPOSED ATTORNEYS FOR DEBTORS AND
DEBTORS-IN-POSSESSION