

**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(a) AND 363
AUTHORIZING THE DEBTORS TO HONOR CERTAIN PREPETITION
OBLIGATIONS TO CUSTOMERS AND TO CONTINUE OTHER
CUSTOMER, MARKETING, AND MEDICAL AFFAIRS PROGRAMS**

(“Customer, Marketing and Medical Affairs Programs Motion”)

The above-captioned debtors and debtors-in-possession (collectively, the “**Debtors**”) hereby move this Court (the “**Motion**”) for entry of interim and final orders (the “**Interim Order**” and the “**Final Order**”), in substantially the forms attached hereto as Exhibit A and Exhibit B, respectively, authorizing, but not directing, the Debtors to honor certain prepetition obligations to customers and to continue other customer, marketing, and medical affairs programs on a postpetition basis. In support of this Motion, the Debtors respectfully state:²

Jurisdiction

1. The 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(a) and 363 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 Rule of Bankruptcy Procedure (the “**Bankruptcy Rules**”).

Background

3. On the date hereof (the “**Petition Date**”), each of the Debtors filed a petition with the 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 the 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 (consistent with the terms of this Motion), but not direction, to pay prepetition amounts described herein related to the Debtors’ Customer, Marketing, and Medical Affairs Programs (as defined below) and to continue such Customer, Marketing, and Medical Affairs Programs on a postpetition basis. The Debtors estimate (and further describe below) that as of the Petition Date, the current accrued prepetition expense liability for wholesale chargebacks, wholesale channel management agreement

obligations, product returns, and wholesale co-pay coupons is \$15.4 million. The Debtors further estimate that as of the Petition Date the anticipated monthly postpetition cost for continuing all other Customer, Marketing, and Medical Affairs Programs is approximately \$1.0 million.

6. The Debtors believe that a significant portion of the amounts to be paid with regard to the Customer, Marketing, and Medical Affairs Programs discussed herein will arise postpetition and, therefore, will be entitled to administrative expense priority under Section 503 of the Bankruptcy Code and may be paid in the ordinary course. The Debtors are also seeking authority, but not direction, to pay, consistent with the terms of this Motion, the prepetition obligations described herein in the ordinary course. Additionally, the Debtors request that all applicable banks and other financial institutions be authorized to receive, process, honor and pay any and all checks drawn on the Debtors' accounts on account of the Customer, Marketing, and Medical Affairs Programs, whether such checks were presented prior to or after the Petition Date.

7. Absent being afforded the relief requested herein, the Debtors would be unable to effectively maintain their customer relationships, which would cause significant harm to the Debtors, their estates, creditors, and all parties in interest at a time when customer support is critical to the Debtors' operations and sale effort.

Basis for Relief

8. In the Debtors' business judgment, the uninterrupted maintenance of the Customer, Marketing, and Medical Affairs Programs is essential to maintaining customer satisfaction, attracting new customers, and continuing their obligations to advance awareness of disease states and the range of therapies and drug treatments available. The markets the Debtors

operate within are highly competitive, and the Debtors' Customer, Marketing, and Medical Affairs Programs and ongoing relationships with physicians, clinicians, healthcare providers, academicians and their various wholesale, managed care companies and other institutional and government customers are integral to maintaining product awareness and ensuring that the Debtors' products remain competitive in the marketplace of drug treatments. Discontinuation of the Debtors' Customer, Marketing, and Medical Affairs Programs would thus disrupt their business operations, generate adverse publicity and undermine the Debtors' relationship with all of their customer groups.

9. Additionally, the Debtors believe that the Debtors' failure to honor their Customer, Marketing, and Medical Affairs Programs in the ordinary course of business and consistent with the terms of this Motion will hinder the Debtors' ability to continue operating during these Chapter 11 Cases. Indeed, the Debtors' continued relationships with their commercial, institutional and retail customers, as well as with the physicians and healthcare providers who prescribe their products and with the clinicians and academicians who advocate and research their products, are some of the key elements required for the Debtors to achieve a successful sale of their business. The value of the Debtors' operations as a going concern – a value that the Debtors are maintaining and maximizing for the benefit of all creditors in furtherance of their fiduciary duty to these estates – vastly exceeds the value of the relief requested by this Motion. The Debtors generated approximately \$185.2 million in net sales for the fiscal year 2010. Additionally the Debtors believe that potential future sales, even those conducted outside the Customer, Marketing, and Medical Affairs Programs, will be jeopardized, and may be severely impacted, if the prepetition obligations described herein and owed to

customers under the Customer, Marketing, and Medical Affairs Programs are not honored in the ordinary course and consistent with the terms of this Motion.

10. Accordingly, the Debtors request authority, but not direction, to honor those obligations related to the Customer, Marketing, and Medical Affairs Programs described below.

Summary of Customer, Marketing, and Medical Affairs Programs

11. Prior to the Petition Date, in the ordinary course of business, the Debtors offered certain incentive programs to their wholesale and retail customers, and certain medical education and medical affairs programs for the physicians, clinicians, academicians and healthcare professionals who advocate for Debtors' products or conduct research related to the Debtors' products (the "**Customer, Marketing, and Medical Affairs Programs**"). Under the Customer, Marketing, and Medical Affairs Programs, the Debtors provide (a) wholesale customers with certain chargeback benefits, volume discounts and product return privileges, (b) retail customers with certain co-pay coupons, incentive programs and purchase assistance plans and (c) physicians, clinicians, academicians and healthcare professionals with certain medical education programs and information sessions related to the Debtors' products. Virtually all of the Customer, Marketing, and Medical Affairs Programs offered by the Debtors are standard practice in the pharmaceutical industry.

A. Wholesaler Chargeback Program and Channel Management Agreements

12. Pharmaceutical companies such as the Debtors sell products through a network of large wholesale drug distributors (such distributors, as set forth on Schedule 1 attached hereto, the "**Wholesalers**"). The Wholesalers distribute the Debtors' products to various retailers, mail-order pharmacies, managed care organizations, and other institutions (the "**Dispensers**") who sell the products directly to patients. The Debtors negotiate certain channel management

agreements (**“Channel Management Agreements”**) and chargeback agreements (the **“Wholesale Chargeback Agreements”**) with the Wholesalers. Channel Management Agreements govern the terms of certain sales incentives that the Wholesalers receive for the sale of Debtors’ products (the **“Channel Management Commissions”**). The Wholesale Chargeback Agreements govern the terms of sale of the Debtors’ products by the Wholesalers to the Dispensers. Certain Dispensers may also negotiate a separate pricing and purchase agreement directly with the Debtors (the **“Purchase Agreement”**).

13. Based on the existence of certain Purchase Agreements, Wholesale Chargeback Agreements, or statutory rights, certain Wholesalers may be entitled to sell the Debtor’s products to certain eligible Dispensers at a special discounted rate (the **“Wholesale Chargeback Program”**). The special discounted rate is less than the wholesale acquisition cost (**“WAC”**) that the Wholesaler pays the Debtors. Thus, when the Wholesaler sells the Debtors’ products to eligible Dispensers at a rate lower than WAC, a chargeback obligation arises to compensate the Wholesaler for the deficiency (a **“Wholesale Chargeback”**). The sale is communicated to the Wholesaler, who generates an invoice for the Wholesale Chargeback obligation, which is then submitted to the Debtors. Most Wholesale Chargeback invoices are submitted to the Debtors within six weeks of the initial sale. The Debtors reimburse the Wholesalers for qualified Wholesale Chargeback invoices by issuing the Wholesaler a credit memo for the total amount owed. Since all Wholesale Chargebacks are settled by credit memo, no additional cash outlay is required under the Wholesale Chargeback Program.

14. Under the terms of the Channel Management Agreements, the Wholesalers provide the Debtors with regularly scheduled, confidential electronic reports regarding detail of the inventory of the Debtors’ products at their storage and distribution facilities, including

information related to sales and shipments of Debtors' products. Such reports help the Debtors manage their operations and ensure that the supply and distribution of their products meet fluctuating demands. The reports, in addition to other sales data, are used by the Debtors to calculate the Channel Management Commissions owed to each Wholesaler. The Channel Management Commissions are settled by credit memos issued to the Wholesalers at either the end of each month or the end of each quarter. The credit memos are deducted by the Wholesaler from future sales revenues and thus no additional cash outlay is required.

15. The Debtors estimate that the aggregate amount of (A) Wholesale Chargebacks accrued and owing as of the Petition Date under the Wholesale Chargeback Program is \$1.2 million (the "**Prepetition Chargeback Amount**") and (B) Channel Management Commissions accrued and owing as of the Petition Date under the Channel Management Agreements is \$1.3 million (the "**Prepetition CMA Amount**"). However, since no additional cash outlay is required under the Wholesale Chargeback Program or the Channel Management Agreements, the Debtors do not have any outstanding cash payments to make under the programs as of the Petition Date.

16. In order to remain competitive with other pharmaceutical companies, the Debtors request authority to settle by credit memo issued in the ordinary course of business and consistent with past practice (A) prepetition Wholesale Chargebacks owed to the Wholesalers in an aggregate amount not to exceed the Prepetition Chargeback Amount and (B) prepetition Channel Management Commissions owed to the Wholesalers in an aggregate amount not to exceed the Prepetition CMA Amount, provided, in each case, that the Wholesaler to whom any such prepetition Wholesale Chargeback or Channel Management Commission is due shall have executed a Wholesaler Support Agreement substantially in the form attached hereto as Exhibit C.

Additionally, the Debtors request authority to continue to perform under the Wholesale Chargeback Program and Channel Management Agreements on a postpetition basis in the ordinary course of business and consistent with past practice.

B. Wholesaler Product Returns

17. In the ordinary course of business the Debtors permit the Wholesalers to return certain unsold or expired products. Such wholesale customers therefore hold contingent claims against the Debtors for these product returns (the “**Product Returns**”). The Wholesalers also rely on the existence of such return policies to maintain products with acceptable dating. These policies are standard practice in the pharmaceutical industry. Continuing such programs are important to maintaining the Debtors’ relationships with the Wholesalers and maximizing the value of the Debtors’ estates.

18. The Debtors estimate that the total accrued expense liabilities for Product Returns as of the Petition Date is \$10.0 million (the “**Prepetition Product Returns Amount**”). The rate by which this liability will be reduced, however, is determined by the actual monthly rate of Product Returns. Such returns vary dramatically from month to month and are driven by batch expiration dates of the Debtors’ products. For instance, product return rates increase dramatically following the expiration dates of certain batch production lots but may be low during other months of the year. While difficult to predict precisely, the Debtors anticipate that due to recent batch expiration dates, the Product Returns on account of prepetition sales may reach \$1.4 million for October, 2011. The Debtors estimate, however, that after this initial period, Product Returns on account of prepetition sales will taper off to between \$300,000 and \$800,000 per month for the remainder of Q4 and throughout Q1 and Q2 of 2012.

19. In order to remain competitive with other pharmaceutical companies, the Debtors request authority to pay in the ordinary course of business and consistent with past practice prepetition accrued expense liabilities for Product Returns owed to the Wholesalers in an aggregate amount not to exceed the Prepetition Product Returns Amount, provided that the Wholesaler to whom any such prepetition accrued expense liability for Product Returns is or becomes due shall have executed a Wholesaler Support Agreement substantially in the form attached hereto as Exhibit C. Additionally, the Debtors request authority to continue to pay liabilities for Product Returns on a postpetition basis in the ordinary course of business and consistent with past practice.

C. McKesson Co-Pay Coupons

20. Prior to the Petition Date, and in the ordinary course of business, the Debtors offered certain “co-pay coupons” administered by a division of McKesson Corporation (“**McKesson**”). The co-pay coupons provide discounts off the prescription price of certain of the Debtors’ products (“**McKesson Co-Pay Coupons**”). The McKesson Co-Pay Coupons were provided by field sales representatives to doctors for distribution to their patients and were also available to customers online at the Debtors’ product websites. For instance, the McKesson Co-Pay Coupons for the Debtors’ topical cream Zyclara (“**Zyclara**”) permit the holder to reduce their prescription cost. The McKesson Co-Pay Coupons may only be used by those retail customers who are members of a commercial insurance plan, and are not available to individuals receiving any Federal or state-subsidized health insurance. The McKesson Co-Pay Coupons have been a popular program and have generated significant additional sales revenue for the Debtors.

21. McKesson Co-Pay Coupons do not have expiration dates, and as of the Petition Date certain customers had not yet redeemed all of the outstanding prepetition McKesson Co-Pay Coupons. At the time that these McKesson Co-Pay Coupons were made available to customers, the Debtors had every expectation that they would be redeemable. The Debtors estimate that the aggregate amount of prepetition McKesson Co-Pay Coupons that are outstanding as of the Petition Date is \$2.9 million (the “**Prepetition McKesson Co-Pay Coupons Amount**”). The Debtors’ average monthly postpetition cost for the McKesson Co-Pay Coupons is expected to be \$704,000.

D. Product Samples, Product Donations, and the Patient Assistance Program

22. Prior to the Petition Date, in the ordinary course of business and as part of their ongoing sales and marketing efforts, the Debtors provide free product samples to doctors to offer to their patients (the “**Sampling Program**”) and donate certain amounts of products with reduced shelf-life to certain charitable and non-governmental organizations (“**Product Donations**”). Such Sampling Program encourages both doctors and patients to sample and test Debtors’ products, which encourages doctors to learn about the Debtors’ drug treatment options and also encourages patient usage and loyalty. Product Donations also serve certain public relations goals and provide tax advantages to the Debtors.

23. Prior to the Petition Date, and in the ordinary course of business, the Debtors offered a program for indigent patients (the “**Patient Assistance Program**”). The Patient Assistance Program provides qualified patients with up to 3-months’ supply of certain of the Debtors’ products, administered through the patient’s healthcare provider. Qualified patients include those at or near the nationally established poverty level. The Debtors incur certain monthly costs for services associated with identifying and verifying the eligibility of such

patients. The Debtors believe that such customer programs engender loyalty and goodwill among the doctors who prescribe the Debtors' products to their patients and encourage brand and company loyalty amongst patients. The Debtors estimate that the total monthly postpetition cost for administering the Sampling Program, Product Donations and Patient Assistance Program is approximately \$205,000. The majority of these expenses take the form of net sales deductions and require no additional cash outlay. However, the Debtors estimate that out-of-pocket cash costs associated with maintaining these programs are approximately \$8,000 per month.

E. Medical Education Programs

24. Prior to the Petition Date, and in the ordinary course of business, the Debtors maintained various programs which provided certain not-for-profit entities with grants and sponsorship for research conferences, symposiums and regional seminars (collectively, the "**Medical Education Programs**"). The attendees of the conferences and symposiums including doctors, health care providers and researchers, attend such events to learn about the most recent updates on disease states relevant to the company. In some instances they may receive continuing medical education credit ("**CME**") from the American Medical Association for attending such events. These events provide an important educational service to doctors and healthcare professionals and other individuals who diagnose and treat diseases relevant to the company.

25. In addition to the conferences and symposiums, the Debtors also invite leading medical experts and opinion leaders (the "**Key Opinion Leaders**") to host regional dinners and seminars for local physicians, clinicians, academicians and healthcare professionals. Such dinners and seminars serve as information sessions for the attendees to learn about the Debtors' products and to share information about treatment options. The Debtors sponsor the costs of

these events and provide the Key Opinion Leaders with certain expense stipends and reasonable speaking fees. Such regional dinners and seminars form an important medical function by disseminating important medical information to physicians, clinicians, academic professionals and other healthcare providers, encouraging such people to learn about the Debtors' products and to better understand the disease states covered by Debtors' products.

26. The Debtors' ability to continue their Medical Education Programs is essential to maintaining physician knowledge and product awareness, and thus to supporting the Debtors' educational and sales efforts. Supporting Medical Education Programs are standard practice by pharmaceutical companies. The Debtors' failure to continue such programs would impact physician awareness and treatment behavior in medical conditions relevant to the Debtors. This would lead to significant erosion of the Debtors' revenues and customer base and significant impairment of the Debtors' ability to maximize the value of their assets. The Debtors estimate that the average monthly postpetition cost for the Medical Education Programs is approximately \$85,000.

Applicable Authority

27. 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 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 Continue to Maintain and Honor Obligations under the Customer, Marketing and Medical Affairs Programs as Specified in the Motion.

28. 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; sometimes, this duty and the concomitant fiduciary duty to maximize estate value may be fulfilled only through the pre-plan payment of certain unsecured claims. See, e.g., In re Mirant Corp., 296 B.R. 427, 429 (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 Sections 1107(a) and 1108 of the Bankruptcy Code, 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.

29. 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 Amounts Related to Customer, Marketing, and Medical Affairs Programs is Appropriate Under Section 363 of The Bankruptcy Code.

30. 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, after notice and a hearing, to “use, sell, or lease, other than in the ordinary course of business, property of the estate.” See 11 U.S.C. § 363(b)(1); see also In re Ionosphere

Clubs, Inc., 98 B.R. 174, 175 (Bankr. S.D.N.Y. 1989). The Debtors believe that if they are precluded from honoring their Customer, Marketing, and Medical Affairs Programs as set forth herein, their relationships with existing customers will be seriously jeopardized, and they will effectively lose the ability to attract new customers in the future. Therefore, the Debtors believe these estates as a whole will be better off, and clearly will be no worse off, if the Debtors are permitted to honor these claims in the ordinary course.

C. Payment of Amounts Related to Customer, Marketing, and Medical Affairs Programs is also Appropriate Under Section 105 of the Bankruptcy Code and the Doctrine of Necessity.

31. In addition, 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, 825-26 (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 (“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.”).

32. 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 125 years ago in Miltenberger v. Logansport Ry. Co., 106 U.S. 286 (1882). In Miltenberger, the Supreme Court acknowledged 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.

33. 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 maximizing value for all constituencies; examples of the types of creditors whose prepetition claims may warrant payment include employees, foreign vendors, sole source suppliers, or customers with rebate coupons. See, e.g., In re CoServ, L.L.C., 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, 469 (Bankr. E.D. Mo. 2001); In re Equalnet Communic’ns Corp., 258 B.R. 368, 369-70 (Bankr. S.D. Tex. 2000); In re Just for Feet, Inc., 242 B.R. at 826; In re Sharon Steel Corp., 159 B.R. 730, 737 (Bankr. W.D. Pa. 1993); In re Eagle-Picher Indus., Inc., 124 B.R. 1021, 1023 (Bankr. S.D. Ohio 1991).

34. The Debtors’ request for authority, but not direction, to honor all Debtors’ Customer, Marketing, and Medical Affairs Programs pursuant to the terms specified herein easily satisfies these standards. As discussed herein, the Debtors believe that there is significant risk that customers whose Customer, Marketing, and Medical Affairs Programs are not honored in the ordinary course of business will refuse to conduct any further business with the Debtors or may attempt to offset future revenues owed to the Debtors, thus impairing the Debtors’ cashflow and ability to operate their business.

35. Moreover, the Debtors’ creditors and their estates will be better off as a whole if the Debtors are permitted to honor the above specified prepetition obligations to customers in the ordinary course and consistent with past practices. The Debtors’ business and prospects for a sale will be seriously undermined if their customer relationships are severed or impaired. The

damage to the value of the Debtors' assets and hence, the costs to creditors as a whole, would be immediate and irreparable.

36. Courts in this and other Districts have authorized the continuation of prepetition customer programs and the payment of prepetition obligations associated with the customer programs in numerous other chapter 11 cases. 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 Regent Communications Inc., Case No. 10-10632 (KG) (Bankr. D. Del. March 2, 2010); In re Accuride Corp., Case No. 09-13449 (BLS) (Bankr. D. Del. Jan. 22, 2010); In re Eddie Bauer Holdings, Inc., Case No. 09-12099 (MFW) Bankr. D. Del. June 17, 2009); In re Hayes Lemmerz Int'l, Inc., Case No. 09-11655 (MFW) (Bankr. D. Del. May 13, 2009); In re Tweeter Home Entm't Group, Inc., Case No. 07-10787 (PJW) (Bankr. D. Del. June 13, 2007); In re Radnor Holdings Corp., Case No. 06-10894 (PJW) (Bankr. D. Del. Aug. 23, 2006); 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.

37. Bankruptcy Rule 6003 provides:

Except to the extent that relief is necessary to avoid immediate and irreparable harm, the court shall not, within 21 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).

38. 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.3d 645, 655 (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)

39. 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.

40. Accordingly, for all of the foregoing reasons, the Debtors submit that cause exists for granting the relief requested herein. Based upon the foregoing, the Debtors respectfully request that this Court enter an order authorizing, but not directing, the Debtors to honor prepetition obligations on account of Customer, Marketing, and Medical Affairs Programs and to continue such Customer, Marketing, and Medical Affairs Programs on a postpetition basis.

Notice

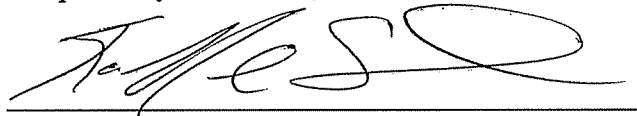
41. No trustee, examiner or creditors' committee has been appointed in the Chapter 11 Cases. The Debtors have provided notice of this Motion to: (a) the United States Trustee for the District of Delaware; (b) financing counsel to the administrative agent for the lenders under the Debtors' prepetition 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.

42. 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 this Court enter the Interim Order and Final Order, in substantially the forms attached hereto as Exhibit A and Exhibit B, respectively, (a) authorizing, but not directing, the Debtors to continue their Customer, Marketing, and Medical Affairs Programs on a postpetition basis and honor the prepetition obligations specified in the Motion on account of such Customer, Marketing, and Medical Affairs Programs and (b) granting such other and further relief as is just and proper.

Dated: September 29, 2011
Wilmington, Delaware

Respectfully Submitted,



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PROPOSED ATTORNEYS FOR DEBTORS AND
DEBTORS-IN-POSSESSION

Schedule 1

McKesson Corp.

Cardinal Health, Inc.

AmerisourceBergen Corp.