

**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 (MFW)

Joint Administration Pending

**MOTION OF THE DEBTORS FOR AUTHORITY TO RETAIN AND COMPENSATE
PROFESSIONALS USED IN THE ORDINARY COURSE OF BUSINESS**

("Ordinary Course Professional Motion")

The above-captioned debtors and debtors-in-possession (collectively, the "**Debtors**"), hereby move this Court (the "**Motion**") for entry of an order (the "**Order**"), in substantially the form attached hereto as Exhibit A, pursuant to Sections 105(a), 327, 328, and 330 of title 11 of the United States Code, authorizing the Debtors to retain and compensate professionals used in the ordinary course of business (collectively, the "**Ordinary Course Professionals**"), effective as of the Petition Date, subject to certain monthly expenditure limitations. In support of this Motion, the Debtors respectfully state:

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).

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 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), 327, 328, and 330 of title 11 of the United States Code, 11 U.S.C. §§ 101-1532 (the “**Bankruptcy Code**”), and Rule 1015-1 of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware (the “**Local 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 official 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 are set forth in the Declaration of Gregory C. Jones in Support of Chapter 11 Petitions and First Day Motions, filed on the Petition Date.

Relief Requested

5. By this Motion, the Debtors seek authorization to retain and compensate professionals used in the ordinary course of business, effective as of the Petition Date, as may be necessary, pursuant to Sections 327, 328 and 330 of the Bankruptcy Code. A non-exhaustive list of (a) each of the Debtors' Ordinary Course Professionals as of the Petition Date and (b) a description of the services provided to the Debtors by each of the Ordinary Course Professionals is attached hereto as Exhibit B.

6. Prior to the Petition Date, the Debtors employed various Ordinary Course Professionals, including accountants and attorneys, in the ordinary course of business to provide services relating to, among other things, audits, tax returns, intellectual property counseling, various other legal services, and other matters requiring the advice and assistance of professionals. The Debtors believe that the postpetition services of such Ordinary Course Professionals are necessary for the continued operation of the Debtors' businesses.

7. The Debtors request that the Court suspend its requirement for the submission of individual employment applications with respect to each Ordinary Course Professional. The Debtors submit that, in light of the costs associated with the preparation of employment applications for professionals who will receive relatively small fees, it is impractical and costly for the Debtors to prepare individual applications for each such professional. However, the Debtors further request that within twenty-one (21) days of the later of (a) the Petition Date or (b) the date on which any Ordinary Course Professional begins work for the Debtors, such Ordinary Course Professional be required to file an affidavit setting forth the information required under Bankruptcy Rule 2014, substantially in the form attached hereto as Exhibit C

8. While the Debtors have attempted to include a list of all Ordinary Course Professionals currently utilized in the Debtors' businesses, the Debtors reserve the right to amend or supplement the list of Ordinary Course Professionals, from time to time, as necessary. In the event that amendments to the list of Ordinary Course Professionals are deemed necessary, the Debtors shall file a supplemental list with this Court and serve it in accordance with any Case Management Order entered by this Court. The Debtors request that to the extent no objections are filed to any supplemental lists within twenty-one (21) days after service thereof, such lists be deemed approved without the necessity of a hearing or entry of a further order by this Court.

9. The Debtors propose that they be permitted to pay each Ordinary Course Professional, without prior application to the Court by such professional, all of the fees and expenses incurred postpetition, upon submission to, and approval by, the Debtors of an appropriate invoice setting forth in reasonable detail the nature of the services rendered and expenses actually incurred, up to \$50,000 per month per Ordinary Course Professional, and not to exceed \$300,000 per Ordinary Course Professional for the entire case (the "**Ordinary Course Professional Cap**"). Except as otherwise provided herein, if any Ordinary Course Professional's combined fees and expenses exceed the Ordinary Course Professional Cap, such excess payments shall be subject to the prior approval of the Court.

Basis for Relief

10. The Debtors submit that the continued employment and compensation of the Ordinary Course Professionals is in the best interests of their estates, creditors and other parties in interest. While some Ordinary Course Professionals may wish to continue to represent the Debtors on an ongoing basis, others may be unwilling to do so if the Debtors cannot pay them on a regular basis, or, given the relatively small fees that may be involved, if they are required to

comply with the requirements for retention under Section 327(a) of the Bankruptcy Code. If the background knowledge, expertise and familiarity that the Ordinary Course Professionals have with the Debtors and their operations are lost, the Debtors will undoubtedly incur additional and unnecessary expenses in getting replacement professionals “up to speed.” The Debtors rely on the assistance of the Ordinary Course Professionals for essential business functions and would be unable to operate without their services. The Debtors’ estates and their creditors are best served by avoiding any disruption in the professional services required in the day-to-day operation of their businesses.

11. In determining whether an entity is a “professional” whose retention must be approved by a court as required by Section 327 of the Bankruptcy Code, courts generally consider the following factors:

- a. whether the entity controls, manages, administers, invests, purchases or sells assets that are significant to the debtor’s reorganization;
- b. whether the entity is involved in negotiating the terms of a plan of reorganization;
- c. whether the entity is directly related to the type of work carried out by the debtor or to the routine maintenance of the debtor’s business operations;
- d. whether the entity is given discretion or autonomy to exercise his or her own professional judgment in some part of the administration of the debtor’s estate;
- e. the extent of the entity’s involvement in the administration of the debtor’s estate; and
- f. whether the entity’s services involve some degree of special knowledge or skill, such that it can be considered a “professional” within the ordinary meaning of the term.

See, e.g., In re Am. Tissue, Inc., 331 B.R. 169, 173 (Bankr. D. Del. 2005); In re First Merchants Acceptance Corp., 1997 WL 873551, at *2 (D. Del. Dec. 15, 1997) (defining “professionals”

within the meaning of Section 327 of the Bankruptcy Code as those whose “occupations . . . play

a central role in the administration of the debtor proceeding, and not involved in the day-to-day mechanics of the debtor's business . . . [or those who are] given discretion or autonomy in some part of administration of the debtor's estate").²

12. These factors must be considered in the totality – none of the factors alone is dispositive. See First Merchants Acceptance Corp., 1997 WL 873551, at *3. Considering all of the factors, the Debtors believe the Ordinary Course Professionals are not “professionals” within the meaning of Section 327 of the Bankruptcy Code whose retention must be approved by the Court. In particular, the Ordinary Course Professionals will not be involved in the administration of these Chapter 11 Cases, but rather will provide services, which were commenced prior to these Chapter 11 Cases, in connection with the Debtors' ongoing business operations and services ordinarily provided by in-house counsel or other non-bankruptcy professionals. Nevertheless, out of an abundance of caution, the Debtors seek the relief requested in this Motion to avoid any subsequent controversy as to the Debtors' employment and payment of the Ordinary Course Professionals during these Chapter 11 Cases. The Debtors will seek specific Court authority under Section 327 of the Bankruptcy Code to retain any professionals involved in the actual administration of these Chapter 11 Cases.

13. This Court and others have routinely granted the same or similar relief to chapter 11 debtors in other large chapter 11 cases. See, e.g., In re NEC Holdings Corp., Case No. 10-11890 (PJW) (Bankr. D. Del. July 13, 2010); In re Accuride Corp., Case No. 09-13449 (Bankr. D. Del. Nov. 2, 2009) (BLS); In re Pierre Foods, Inc., Case No. 08-11480 (KG) (Bankr. D. Del.

² See also Elstead v. Nolden, 168 B.R. 226, 230 Bankr (N.D. Cal. 1994) (only the retention of professionals whose duties are central to the administration of the estate require prior court approval under Section 327); In re Madison Mgmt. Group, Inc., 137 B.R. 275, 283 (Bankr. N.D. Ill. 1992) (same); In re Sieling Assocs. L.P., 128 B.R. 721, 723 (Bankr. E.D. Va. 1991) (same); In re Riker Indus., Inc., 122 B.R. 964, 973 (Bankr. N.D. Ohio 1990) (no need for Section 327 approval of the fees of a management and consulting firm that performed only “routine administrative functions” and whose “services were not central to [the] bankruptcy case”).

Aug. 14, 2008); In re W. Nonwovens, Inc., Case No. 08-11435 (PJW) (Bankr. D. Del. Aug. 4, 2008); In re Global Motorsport Group, Inc., Case No. 08-10192 (KJC) (Bankr. D. Del. Feb. 29, 2008).

14. The Debtors and their estates would be well served by the continued retention of the Ordinary Course Professionals because of their prior relationships with the Debtors and their understanding of the Debtors and their operations. It is in the best interest of all creditors and parties in interest to avoid any disruption in the Ordinary Course Professionals' services.

Notice

15. 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; (i) the Ordinary Course Professionals listed on Exhibit B hereto; and (j) 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.


16. 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 Order, substantially in the form attached hereto as Exhibit A, (a) authorizing the Debtors to retain and compensate professionals used by the Debtors in the ordinary course of business, effective as of the Petition Date, subject to certain monthly expenditure limitations, and (b) granting such other and further relief as this Court deems appropriate.

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