

**UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE**

In re:	)	Chapter 11
	)	
GRACEWAY PHARMACEUTICALS, LLC	)	Case No. 11-13036 (MFW)
et al.,	)	
	)	Jointly Administered
	)	
	)	Re: D.I. No. 12
Debtors.	)	Hearing Date: Nov. 22, 2011 at 11:00 a.m.

**LIMITED OBJECTION OF METAPHOR, INC. TO THE DEBTORS' MOTION TO  
APPROVE THE TERMS OF SALE PURSUANT TO AN ASSET PURCHASE  
AGREEMENT DATED SEPTEMBER 27, 2011 BETWEEN GRACEWAY  
PHARMACEUTICALS AND GRACEWAY CANADA COMPANY**

Metaphor, Inc. ("Metaphor") by and through its undersigned counsel hereby responds and objects (the "Objection") to the Debtor Graceway Pharmaceuticals, LLC ("Graceway" or "Debtor"), its related entities (the "Graceway Entities " or "Debtors") including Graceway Canada Company ("Graceway Canada") of the Debtor's motion to approve the proposed terms of sale of certain of its and Graceway Canada's assets to Galderma S.A ("Galderma") or other successful bidder and to set bidding procedures and granting related relief.

**BACKGROUND**

1. On September 29, 2011 (the "Petition Date") the Debtors each filed for relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code").
2. The Debtors cases are being jointly administered. The Debtors are operating their businesses as debtors-in-possession pursuant to Sections 1107(a) and 1108 of the Bankruptcy Code.
3. On the Petition Date, the Debtors filed a Motion for an Order approving the Debtor's sale of its certain of its assets to Galderma pursuant to Bankruptcy Code Section 363

pursuant to an Asset Purchase Agreement dated September 27, 2011 between Galderma, the Debtor and Graceway Canada and to establish and approve bidding procedures and procedures for a Section 363 auction [D.I. No. 12] (the "Sale Motion").

4. By way of the Sale Motion, the Debtors seek the authority to, *inter alia*, transfer substantially all of the Debtors' assets free and clear of all liens and encumbrances or to the highest bidder according to procedures to be set at that hearing (the "Sale Hearing"). The Sale Hearing is scheduled to be heard on November 14, 2011.

6. Metaphor is the owner of certain intellectual property that, upon information and belief, is intended to be part of that proposed sale. However, the Debtors have no property interest in Metaphor's intellectual property and as such cannot transfer any interest of any kind to Galderma absent Metaphor's consent.

7. Metaphor is a marketing, advertising, public relations and sales promotion company firm specializing in the healthcare industry.

8. For the past six (6) years, Metaphor has provided Graceway and its predecessor entity, debtor Chester Valley Pharmaceuticals LLC, with valuable services and products in the areas of marketing, advertising, sales and promotional support, web development, internet marketing and brand management.

9. Metaphor has created, prepared, designed and developed all advertising and promotional materials and campaigns for Zyclara and Aldara, Graceway's current and past best selling products as well as many of their other products. A copy of some of the works is annexed hereto as Exhibit A.

10. Metaphor is the author of most of the materials produced and used in the Consumer, and Healthcare Professional Marketing Program, described more fully in paragraphs

90-112 in the Declaration of Gregory C. Jones in support of Chapter 11 Petitions and First Day Motion.

11. Metaphor is not, and was never an employee of any of the Debtors.
12. Metaphor has no work for hire agreement in place with any of the Debtors.
13. Metaphor has no agreement of any kind with any of the Debtors transferring ownership or assigning its copyrights and/or its intellectual property rights to any of the Debtors either for Zyclara, Aldara or any of the Debtors other products.
14. Metaphor has licensed the Debtor to use its intellectual property based upon the expectation that it continue to be paid for its work and upon the continuing volume of business it received from Debtor which averaged approximately \$185,745.00 per month beginning January 2007.
15. Since filing the Petition, the Debtors continue to use Metaphor's intellectual property in all of its dealings with its customers including the general public, doctors, pharmacists and pharmaceutical industry without Metaphor's approval or any payment for its post petition usage.
16. Metaphor has authored and created a brand image for Zyclara as it did for all of the Debtor's earlier and continuing brands.
17. Since its bankruptcy filing, Graceway continues to use Metaphor's intellectual property to support its sales force, customer marketing efforts, coupon redemption program, print and web based advertising and public relation efforts.
18. The past and continuing value of the past, current, and future use of Metaphor's intellectual property to the Debtors and Galderma or any higher or greater bidder is great.

19. The Debtors currently owe Metaphor \$481,084.54 on account of unpaid prepetition fees.

20. Neither the Debtor nor Galderma have sought or received Metaphor's approval to transfer its intellectual property and copyrighted works to Galderma or the successful bidder.

21. Metaphor estimates the removal and destruction of advertising sample packaging, trade packaging and promotional materials in the hands of the trade and the Debtors' sales force will take between 3-6 months.

22. Upon information and belief, neither the Debtors nor Galderma have begun work on a new advertising, public relations, educational and sales promotional campaigns to replace Metaphor's campaigns to be used by Galderma following the sale to it or any other successful bidder.

### OBJECTION

23. By way of the Sale Motion, the Debtors seek the authority to sell Metaphor branded images and materials for which Metaphor is the copyright owner. The owner of a copyright is the author of the work absent a transfer of the copyright or a work for hire agreement. 17 U.S.C. § 101.

24. In order to have a work for hire agreement either:

(i) the work is prepared by the employee within the scope of his employment;

or

(ii) the work is specifically ordered or commissioned...if the parties expressly agree in a written instrument signed by them that the work shall be considered a work for hire. 17 U.S.C. § 101 (*emphasis added*).

25. Metaphor is not an employee of any of the Debtors and there is no work for hire agreement between the Debtors and Metaphor. There are no agreements either orally or

documented between the Debtors and Metaphor transferring or assigning ownership of Metaphor's copyrights and other intellectual property rights to any of the Debtors. Therefore, pursuant to section 101 of title 17, there has been no transfer of Metaphor's copyright and/or intellectual property rights to any of the Debtors. These rights continue to remain vested in Metaphor.

26. Because Metaphor is the copyright owner, and the Debtors, as the licensee of a non-exclusive license to use the Metaphor branded images and materials, are seeking the transfer of these images and materials, the Debtors must first seek Court authority and obtain Metaphor's consent to assume and assign their non-exclusive license<sup>1</sup>.

Section 365(c) of the Bankruptcy Code provides in pertinent part:

The trustee may not assume or assign any executory contract or unexpired lease of the debtor, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, if--

(1)

(A) applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties; and

(B) such party does not consent to such assumption or assignment;

11 U.S.C. § 365(c).

27. To date, the Debtors have not sought Court authority or Metaphor's consent to assume and assign the copyright licenses.

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<sup>1</sup> Courts generally have found intellectual property licenses to be "executory" within the meaning of section 365(c) because each party to the license had the material duty of "refraining from suing the other for infringement of any of the [intellectual property] covered by the license." *In re Access Beyond Tech., Inc.*, 237 B.R. 32, 43 (Bankr.D.Del.1999).

28. Prior to the Petition Date, by oral agreement, the Debtors and Metaphor agreed that the Debtors may use Metaphor's copyrights all of its marketing, advertising, public relations, educational and public relations campaigns. Since the filing of the petitions in Bankruptcy the Debtor in possession and Graceway Canada have continued to use the marketing campaigns using the Metaphor copyrights. Both parties agreed that the Debtor and Graceway Canada could use Metaphor's work for the purpose for which it was produced. Since no transfer or assignment occurred, the Debtor and Graceway Canada had an implied license to use Metaphor's copyrights in their various campaigns. An implied license can be established through course of conduct. Lowe v. Loud Records 126 Fed. Appx. 545, 547 (3d Cir. 2005) citing McLean Associates Inc.v. Wm. Mercer Meidinger-Hansen 952 F. 2d 769, 778 (3<sup>rd</sup> Cir 1991).

29. An implied license is a nonexclusive license because an exclusive license must be memorialized in writing. 17 U.S.C. § 204. “[A] non-exclusive licensee has... only a personal and not a property interest in the [intellectual property]” which cannot be assigned unless the [intellectual property] owner authorizes the assignment...” In re Golden Books Family Entertainment, Inc. 269, B.R. 300, 309 (Bankr. D. Del. 2001) quoting In Re Patient Educational Media, 210 B. R.237, 242-243 (Bankr. S.D. N.Y. 1997) (other citations omitted ).

30. Conversely, an exclusive license, requiring a writing expressly transferring all intellectual property rights is akin to the sale of the intellectual property and is generally transferrable. Id.

31. Here, there is no writing, hence no exclusive license agreement. The Debtors previous and continued use of Metaphor's copyrights constitutes a non-exclusive license. Because a non-exclusive license creates a personal and not a property interest there is no bona fide dispute over ownership of the Metaphor copyrights. The Debtors have not sought Court

authority to assume and assign this non-exclusive license agreement, nor have they obtained Metaphor's consent to do so as is required pursuant to 11 U.S.C. 365(c). Accordingly, Metaphor respectfully objects to the Debtors offering for sale any and all of its copyrighted material which without its express consent. Metaphor further objects to the Debtors representing to third parties that the Debtors have rights, title and interest in any and all of the copyrighted material, that could be transferred absent Metaphor's consent, pursuant to an asset purchase agreement or otherwise.

### **RESERVATION OF RIGHTS**

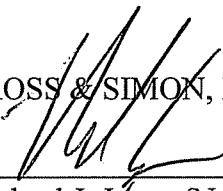
32. Metaphor hereby respectfully reserve all rights with respect to the Sale Motion to the extent the Debtors seek further relief thereunder.

### **CONCLUSION**

WHEREFORE Metaphor respectfully requests that the Court deny the Debtor's Sale Motion to the extent the Debtors and/or the Stalking Horse buyer or the successful bidder believes that it will acquire any interest in Metaphor's copyrights or be able to continue with the current advertising, marketing, sales promotion and public relations campaigns utilizing those copyrights beyond the date of the sale.

Dated: November 4, 2011  
Wilmington, Delaware

CROSS & SIMON, LLC

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