

EXHIBIT C

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

**IN THE MATTER OF THE RECEIVERSHIP OF
GRACEWAY CANADA COMPANY AND IN THE MATTER
OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990 c. C.43, AS
AMENDED**

GRACEWAY CANADA COMPANY

Applicant

FACTUM OF THE APPLICANT

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A. OVERVIEW

1. The Applicant seeks an order:

- (a) subject to the approval by the United States Bankruptcy Court for the District of Delaware (the “**U.S. Bankruptcy Court**”) in the Chapter 11 Proceedings (as defined below) of Graceway Pharmaceuticals, LLC and certain of its U.S. affiliates (collectively with Graceway Pharmaceuticals, LLC, the “**U.S. Debtors**”), approving an allocation of the Purchase Price (as defined in the asset purchase agreement (the “**Asset Purchase Agreement**”) among Medicis Pharmaceutical Corporation (“**Medicis**” or the “**Purchaser**”), as the purchaser, and the Applicant and the U.S. Debtors, as sellers) among (i) the Canadian Assets (as defined in the Asset Purchase Agreement) and (ii) the assets of the U.S. Debtors;
- (b) subject to the approval by the U.S. Bankruptcy Court in the Chapter 11 Proceedings of the U.S. Debtors, approving the sale transaction (the “**Transaction**”) contemplated by the Asset Purchase Agreement;
- (c) vesting the Applicant’s right, title and interest in the Canadian Assets (as defined in the Asset Purchase Agreement) in the Purchaser (or a designee) upon delivery by the Receiver (as defined below) of a Receiver’s Certificate to the Purchaser; and
- (d) such further and other relief as counsel may request and this Honourable Court deems just.

2. The primary purpose of these proceedings is to allow the Applicant and the U.S. Debtors the opportunity to maximize the value of their business and assets pursuant to a unified, court-supervised stalking horse sale process. The Applicant submits that it is appropriate and in the best interests of its stakeholders for the Court to approve the Transaction and to grant the Order sought in these circumstances.

Second Report of the Receiver dated November 18, 2011 ("Second Report"), p. 2, Supplemental Motion Record of the Applicant ("Supplement"), Tab 2

B. Facts

(a) Background

3. On September 29, 2011, the U.S. Debtors filed voluntary petitions (the "**Chapter 11 Proceedings**") for relief pursuant to chapter 11 of title 11 of the *United States Code*, 11 U.S.C. §§ 101-1532, as amended (the "**U.S. Bankruptcy Code**"), in the U.S. Bankruptcy Court.
4. On October 4, 2011, this Honourable Court granted an Order under the *Courts of Justice Act*, R.S.O. 1990, c. C-43, as amended (the "**Receivership Order**"), *inter alia*, appointing RSM Richter Inc. ("**Richter**") as the receiver (the "**Receiver**") of the Applicant with a mandate to oversee the sale of any of the assets of the Applicant in coordination with the Chapter 11 Proceedings.

Second Report, p. 1, Supplement, Tab 2

5. The Applicant and the U.S. Debtors are collectively referred to herein as "**Graceway**".
6. Following a joint hearing with the U.S. Bankruptcy Court, on October 17, 2011, both this Honourable Court and the U.S. Bankruptcy Court (i) approved, as a stalking horse

purchase agreement, an asset purchase agreement dated as of September 27, 2011 (the “**Stalking Horse APA**”) among Galderma S.A. (“**Galderma**”), as purchaser, and the U.S. Debtors and the Applicant, as sellers, and (ii) approved certain bidding procedures to govern a stalking horse auction process for the sale of the assets of Graceway (the “**Bidding Procedures**”).

Second Report, p. 4, Supplement, Tab 2

Bidding Procedures Order dated October 17, 2011 (“**Bidding Procedures Order**”), Supplement, Tab C

(b) The Sale Process

7. Lazard Frères & Co. LLC (“**Lazard**”), an investment banking firm, was retained in March 2010 by Graceway to assist Graceway in addressing its financial situation and exploring potential financing and restructuring alternatives.
8. Graceway, with the assistance of Lazard, pursued a range of options, including new financing, refinancing and the sale of certain or all of Graceway’s assets. After exploring the available strategic alternatives, Graceway determined that the best way to maximize the value of the business for the benefit of its creditors was to seek a sale of substantially all of Graceway’s assets pursuant to Section 363 of the Bankruptcy Code in coordination with a sale of certain assets of Graceway Canada in these proceedings.
9. Lazard’s marketing materials for Graceway’s business and assets included the business and assets of the Applicant. The Applicant was not marketed as an independent business given its reliance on the U.S. Debtors in all aspects of its operations and on an exclusive and royalty-free intercompany license agreement between Graceway Pharmaceuticals and

the Applicant (the "**Intercompany License Agreement**"), which can be terminated by Graceway Pharmaceuticals on three months' notice.

First Report of the Receiver dated October 13, 2011 ("First Report"), p. 3-4, Supplement, Tab F

10. A summary of the marketing process and its results is as follows:
- (a) 60 potential investors were identified and contacted;
 - (b) Approximately 21 of these parties executed a confidentiality agreement and were provided with access to an electronic data room (the "**Interested Parties**");
 - (c) 11 Interested Parties responded with preliminary letters of interest (the "**Potential Purchasers**"), of which seven expressed an interest in purchasing all of Graceway's assets and four were interested in certain assets only;
 - (d) After evaluating the preliminary letters of interest, Graceway, in consultation with Lazard, continued discussions with four of the Potential Purchasers;
 - (e) The four Potential Purchasers received additional information and attended management presentations in June and July, 2011; and
 - (f) Galderma and one other party submitted "fully diligenced" bids to purchase substantially all of the assets of Graceway.

First Report, p. 4-5, Supplement, Tab F

11. A special committee of the Board of Directors of the U.S. Debtors (the "**Special Committee**") was established to evaluate the offers submitted in the process. Following negotiations with each bidder it was determined by the Special Committee that pursuing a transaction with Galderma was in the best interests of Graceway.
12. On September 27, 2011, Galderma, as purchaser, and the U.S. Debtors and the Applicant, as sellers, entered into the Stalking Horse APA, which was supported by the steering committee of the "First Lien Lenders" of the U.S. Debtors.

First Report, p. 5, Supplement, Tab F

13. Following a joint hearing with the U.S. Bankruptcy Court, on October 17, 2011, both this Honourable Court and the U.S. Bankruptcy Court approved the Stalking Horse APA and the Bidding Procedures.

Second Report, p. 4, Supplement, Tab 2

14. The stalking horse sale process was carried out in accordance with the Bidding Procedures Order by Graceway with assistance from Lazard. In accordance with the Bidding Procedures Order, the bid deadline was November 14, 2011, and if there were Qualified Bids (as defined in the Bidding Procedures) submitted, the auction was to be carried out on November 17, 2011. By November 14, 2011, two additional parties submitted Qualified Bids, meaning there was a total of three Qualified Bidders (as defined in the Bidding Procedures).

Second Report, p. 4, Supplement, Tab 2

Bidding Procedures Order, Tab C

15. As required by the Bidding Procedures, all of the parties with consultation rights (including the Receiver) were provided copies of the bids and had an opportunity to comment upon whether they were Qualified Bids.

16. Medicis' bid was the lead bid to start the auction at a price of \$305 million. At the conclusion of the auction, the Medicis bid in the amount of \$455 million was determined to be the best offer. Medicis' offer yields the highest net recovery for the creditors of the Graceway.

Second Report, p. 5, Supplement, Tab 2

17. The Back-Up Bidder (as defined in the Bidding Procedures) is Sun Pharma Global FZE and the value of its bid is \$452.5 million.

Second Report, p. 5, Supplement, Tab 2

Bidding Procedures Order, Tab C

18. The U.S. Debtors and the Receiver have agreed that of the \$455 of sale proceeds, \$4.4 million, subject to adjustments, is appropriately regarded as allocable to the Canadian Assets. This allocation has been calculated as follows:

- (a) The sum of the book value of the Applicant's inventory, prepaid expenses and product samples as at September 30, 2011, totalling approximately \$2.5 million; plus

- (b) Approximately \$1.9 million, being the three year average EBITDA of the Applicant for the three month period¹ immediately following the

¹ The three month period was used as this is the notice period required of the Intercompany License Agreement.

projected closing date of the transaction (assumed to be a December 31st closing date), adjusted to exclude extraordinary or non-recurring gains and/or losses.

Second Report, p. 8, Supplement, Tab 2

19. The proposed allocation methodology, described in detail in the U.S. Debtors' *Supplement to Debtors' Motion for Entry of an Order Determining the Value of the Assets of Graceway Canada Company Proposed to be Purchased under the Stalking Horse Asset Purchase Agreement* ("**Valuation Motion Supplement**"), also provides for (i) an inventory adjustment mechanism to account for fluctuations between September 30, 2011 and the closing date of the Transaction; (ii) an adjustment mechanism for the EBITDA calculation so that the appropriate three prospective months (which depend on the ultimate closing date) are used for the calculation; and (iii) a notice period which permits the Receiver or any other interested party to request an emergency hearing before the U.S. Bankruptcy Court and this Court should it not agree with the final allocation once the above noted adjustments are accounted for.

Second Report, p. 8, Supplement, Tab 2

Valuation Motion Supplement, Supplement, Tab E

20. Since the approval of the Bidding Procedures, the Receiver has been provided with the consultation rights required by the Bidding Procedures in connection with all of the relevant aspects of the auction process concerning the Applicant's assets. The Receiver is satisfied that the sale process is commercially reasonable and was carried out in accordance with the Bidding Procedures Order, that the market was canvassed and that the process was run with integrity. The Receiver reports that the price allocated to the

Applicant's assets is a reasonable value in the circumstances given, *inter alia*: (i) the Applicant's reliance on the U.S. Debtors, particularly the Intercompany License Agreement; and (ii) that the Applicant's operations will discontinue after the closing of the Transaction and there will be a process commencing forthwith after closing to liquidate the Applicant's remaining business and assets. The Receiver further reports that no stakeholder with an economic interest is opposed to the Transaction. The Receiver has therefore recommended that the relief sought be granted.

Second Report, pp. 5, 12-13, Supplement, Tab 2

First Report, pp. 9-10, Supplement, Tab F

C. ISSUES AND THE LAW

21. In accordance with the jurisprudence, this Court ought to consider the following factors in deciding whether to approve the sale of a business by a receiver:
- (a) Did the receiver make a sufficient effort to get the best price and did it act providently?
 - (b) Did the receiver consider the interests of all parties?
 - (c) Did the receiver consider the efficacy and integrity of the process by which offers are obtained?
 - (d) Did the receiver consider whether there has been unfairness in the working out of the process?

Royal Bank v. Soundair Corp., 1991 CarswellOnt 205, 4 OR (3d) 1; 83 DLR (4th) 76; 7 CBR (3d) 1; 46 OAC 321 (Ont. C.A.) at para. 16 [*Soundair*], Book of Authorities of the Applicant ("Book of Authorities"), Tab 1

22. With respect to the first factor, the prices in other offers become relevant “only if they show that the price contained in the offer accepted by the receiver was so unreasonably low as to demonstrate that the receiver was improvident in accepting it” and as such the Court should only consider competitive bids where such bids are so substantially higher than the offer accepted by the receiver that the competitive bids indicate that the receiver did not properly conduct the sale process.

Soundair, at paras. 30-31, Book of Authorities, Tab 1

23. Furthermore, the Ontario Court of Appeal in the *Soundair* decision held that the Court should not re-examine every minute detail of a sale process adopted by a receiver in determining the efficacy, integrity or fairness of the process:

[T]he court must exercise extreme caution before it interferes with the process adopted by a receiver to sell an unusual asset. It is important that prospective purchasers know that, if they are acting in good faith, bargain seriously with a receiver and enter into an agreement with it, a court will not lightly interfere with the commercial judgment of the receiver to sell the asset to them.

Soundair, at paras. 46-49, Book of Authorities, Tab 1

24. The above factors adopted by the Ontario Court of Appeal’s decision in *Soundair* have been applied in the context of a sale approval in cross-border insolvency proceedings in *Nortel Networks Corp, Re.* 2009 CarswellOnt 9345, where upon the Court’s satisfaction that the *Soundair* principles had been adhered to, the Court granted the requested Approval and Vesting Order.

Nortel Networks Corp, Re., 2009 CarswellOnt 9345, at paras. 8 and 13, Book of Authorities, Tab 2; see also *Nortel Networks Corp, Re.*, 2009 CarswellOnt 4838 at paras. 36-37, Book of Authorities, Tab 3

25. It is submitted that the stalking horse auction process is a well-accepted method for the sale of distressed assets that protects the going concern nature of the underlying business while the auction process proceeds. As the Applicant does not have any ability to carry on business independent of its U.S. affiliates, the Court already approved the participation of the Applicant in the U.S.-based auction process.

26. The sale process and auction yielded a total sale price of \$455 million, resulting in an increase of \$180 million above the Stalking Horse APA. Of these sale proceeds, approximately \$4.4 million will be allocated to the Canadian Assets. In addition, the Applicant's excluded assets, consisting of cash, accounts receivable, a secure \$6 million DIP loan with first priority to the assets of the U.S. Debtors, fixed assets, tax assets and other sundry assets, are to be liquidated. These excluded assets have a book value of approximately \$17.6 million as at October 31, 2011. The book value of the Applicant's liabilities as at September 30, 2011, was approximately \$3.3 million. It is anticipated that there will be sufficient funds to pay all of the Applicant's creditors, including unliquidated restructuring liabilities, in full.

Second Report, p. 6, Supplement, Tab 2

Debtor's Motion for Entry of an Order Determining the Value of the Assets of Graceway
Canada Company Proposed to be Purchased under the Stalking Horse Asset Purchase
Agreement, Exhibit A, Supplement, Tab C

27. The Applicant submits that the proposed sale meets the factors set out in *Soundair* and protects the interests of the Applicant and its creditors, and that the proposed allocation methodology is commercially reasonable and represents an appropriate value allocated to the assets of the Applicant sold as part of the Transaction. Any remaining issues as to the

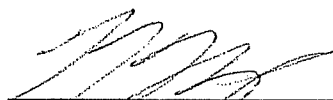
availability or application of proceeds in the U.S. are best left to the creditors of the U.S. Debtors in the Chapter 11 Proceedings.

D. ORDER REQUESTED


28. It is therefore submitted that the Court ought to approve the Transaction and the allocation of the Purchase Price and grant the requested relief.

November 21, 2011

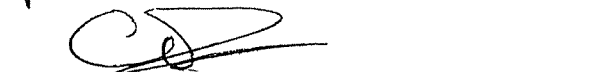
ALL OF WHICH IS RESPECTFULLY
SUBMITTED



Fred Myers



L. Joseph Latham



Caroline Descours

SCHEDULE "A"
LIST OF AUTHORITIES

1. *Royal Bank v. Soundair Corp.*, 1991 CarswellOnt 205, (1991), 4 OR (3d) 1; 83 DLR (4th) 76; 7 CBR (3d) 1; 46 OAC 321 (Ont. C.A.)
2. *Nortel Networks Corp, Re.*, 2009 CarswellOnt 9345
3. *Nortel Networks Corp, Re.*, 2009 CarswellOnt 4838

IN THE MATTER OF THE RECEIVERSHIP OF GRACEWAY CANADA COMPANY

AND IN THE MATTER OF SECTION 101 OF THE COURTS OF JUSTICE ACT, R.S.O. 1990
c. C.43, AS AMENDED

Court File No: CV-11-9411CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
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Proceeding commenced at Toronto

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