

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

In re:

GRACEWAY PHARMACEUTICALS, LLC,  
*et al.*,<sup>1</sup>

Debtors.

Chapter 11

Case No. 11-13036 (PJW)

Jointly Administered

Hearing Date: December 28, 2011 at 11:30 a.m. (ET)

Objection Deadline: December 23, 2011 at 4:00 p.m. (ET)

**DEBTORS' MOTION FOR AN ORDER AUTHORIZING  
THE DEBTORS TO ENTER INTO AN AGREEMENT  
WITH EDWARDS WILDMAN PALMER LLP**

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, authorizing and approving the Agreement (as defined below) between the Debtors and Edwards Wildman Palmer LLP ("**EWP**"). In support of this Motion, the Debtors respectfully state as follows:

**JURISDICTION**

1. This Court has jurisdiction over this Motion pursuant to 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.

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<sup>1</sup> 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), Case No. 11-13037 (PJW); Graceway Holdings, LLC, a Delaware limited liability company (2502), Case No. 11-13038 (PJW); Graceway Pharmaceuticals, LLC, a Delaware limited liability company (5385), Case No. 11-13036 (PJW); Chester Valley Holdings, LLC, a Delaware limited liability company (9457), Case No. 11-13039 (PJW); Chester Valley Pharmaceuticals, LLC, a Delaware limited liability company (3713), Case No. 11-13041 (PJW); Graceway Canada Holdings, Inc., a Delaware corporation (6663), Case No. 11-13042 (PJW); and Graceway International, Inc., a Delaware corporation (2399), Case No. 11-13043 (PJW). The mailing address for Graceway Pharmaceuticals, LLC is 340 Martin Luther King Jr. Blvd., Suite 500, Bristol, TN 37620 (Attn: John Bellamy). On October 4, 2011, Graceway Canada Company filed an application in the Ontario Superior Court of Justice (Commercial List) pursuant to the *Courts of Justice Act*, R.S.O. 1990, c. C. 43.

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 (the “**Bankruptcy Code**”), and Rule 9019 of the Federal Rules of Bankruptcy Procedure (the “**Bankruptcy Rules**”).

### **BACKGROUND**

3. On September 29, 2011 (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. On September 30, 2011, the Court entered an order consolidating these Chapter 11 Cases for procedural purposes only [Docket No. 42].

4. Prior to the Petition Date, EWP received a retainer in the aggregate amount of \$367,000 (the “**Retainer**”).

5. On the Petition Date the Debtors filed the *Debtors’ Motion for Interim and Final Orders (I) Authorizing Debtors to Utilize Cash Collateral Pursuant to 11 U.S.C. § 363; (II) Granting Adequate Protection to Prepetition Secured Parties Pursuant to 11 U.S.C. §§ 361, 362, 363 and 364; (III) Authorizing Debtors to Obtain Postpetition Financing Pursuant to 11 U.S.C. § 364 and (IV) Scheduling a Final Hearing Pursuant to Bankruptcy Rule 4001* [Docket No. 15] (the “**DIP Motion**”) as well as the *Debtors’ Motion For Entry Of (I) An Order Approving and Authorizing (A) Bidding Procedures in Connection with the Sale of Certain Assets of the Debtors, (B) Stalking Horse Bid Protections, (C) The Form and Manner of Notice of the Sale Hearing and (D) Related Relief; and (II) An Order Authorizing (A) The Sale Of Certain Assets of the Debtors Free and Clear of all Claims, Liens, Liabilities, Rights, Interests and Encumbrances; (B) The Debtors to Enter into and Perform their Obligations under the Asset*

*Purchase Agreement; (C) The Debtors to Assume and Assign Certain Executory Contracts and Unexpired Leases; and (D) Granting Related Relief* [Docket No. 12] (the “**Sale Motion**”).

6. On October 21, 2011, the Debtors filed the *Debtors’ Application for an Order Pursuant to Section 327(e) of the Bankruptcy Code Authorizing the Debtors to Retain and Employ Edwards Wildman Palmer LLP as Special Intellectual Property Counsel for the Debtors Nunc Pro Tunc to the Petition Date* [Docket No. 149] (the “**EWP Application**”).

7. On November 7, 2011, the Court entered the *Order Authorizing the Debtors to Retain and Employ Edwards Wildman Palmer LLP as Special Intellectual Property Counsel for the Debtors Nunc Pro Tunc to the Petition Date* [Docket No. 221] (the “**EWP Retention Order**”) as well as the *Final Order (I) Authorizing Debtors to Utilize Cash Collateral Pursuant to 11 U.S.C. § 363; (II) Granting Adequate Protection to Prepetition Secured Parties Pursuant to 11 U.S.C. §§ 361, 362, 363 and 364 and (III) Authorizing Debtors to Obtain Postpetition Financing Pursuant to 11 U.S.C. § 364* [Docket No. 219] (the “**Final DIP Order**”).

8. The Final DIP Order provides that “[i]n the case of the Debtors’ Professionals (other than Latham & Watkins LLP and Alvarez & Marsal North America, LLC), any and all retainers shall be applied no later than the date on which the Sale is consummated, it being understood, for avoidance of doubt, that any retainer received by any Debtors’ Professionals (including Latham & Watkins LLP and Alvarez & Marsal North America, LLC) shall be counted against, and shall not be in addition to, the aggregate amount budgeted for such Debtors’ Professional in the Approved Budget.” Final DIP Order, ¶ 8(c).

9. On November 17, 2011, the Debtors held an auction pursuant to the *Order Approving and Authorizing (A) Bidding Procedures in Connection with the Sale of Certain Assets of the Debtors, (B) Stalking Horse Bid Protections, (C) Form and Manner of Notice of the*

*Sale Hearing and (D) Related Relief* [Docket No. 119] (the “**Bid Procedures Order**”). At the conclusion of the Auction (as defined in the Bid Procedures Order), Medicis Pharmaceutical Corporation was selected as the bidder submitting the highest and best bid. On November 22, 2011, the Court entered the *Order Authorizing (A) the Sale of Certain Assets of the Debtors Free and Clear of all Claims, Liens, Liabilities, Rights, Interests and Encumbrances; (B) the Debtors to Enter into and Perform their Obligations under the Asset Purchase Agreement; (C) the Debtors to Assume and Assign Certain Executory Contracts and Unexpired Leases; and (D) Granting Related Relief* [Docket No. 306] (the “**Sale Order**”). The Debtors consummated the transactions authorized by the Sale Order (the “**Sale**”) on December 2, 2011 (the “**Closing Date**”). See *Notice of Closing of Sale of Substantially all of Debtors’ Assets to Medicis Pharmaceutical Corporation* [Docket No. 335].

10. In connection with the Closing (as defined in the Sale Order), the Debtors and the First Lien Lenders, negotiated an amended budget (the “**Revised Budget**”) reflecting the revised timeline for the wind down of the Debtors’ estates following the Closing Date. The agreed upon Revised Budget was attached as Exhibit A to that certain Amendment No. 1 dated as of December 2, 2011 and filed with the Court on December 2, 2011. See *Notice of Filing* [Docket No. 330]. The Revised Budget included \$600,000 as the “Estimated Carve-Out” for the fees and expenses of EWP.

11. Commencing shortly after the Closing Date, the Debtors, EWP, and the First Lien Agent engaged in good faith negotiations to determine how EWP’s Retainer should be applied and what amount of Cash Collateral should be retained by the Debtors to pay the postpetition fees and expenses of EWP. Pursuant to the Agreement, dated as December 13, 2011, between the Debtors and EWP (the “**Agreement**”), attached hereto as Exhibit B, the Debtors, EWP and

the First Lien Agent have reached agreement on how EWP's Retainer should be applied and what amount of Cash Collateral should be retained by the Debtors to pay the postpetition fees and expenses of EWP. The Agreement does not alter the total "Estimated Carve-Out" for the fees and expenses of EWP set forth in the Revised Budget.

### **RELIEF REQUESTED**

12. By this Motion, the Debtors seek entry of an order approving the terms of the Agreement pursuant to Bankruptcy Rule 9019(a) and Sections 105(a) and 363(b) of the Bankruptcy Code. The material terms of the Agreement are set forth below. All capitalized terms that are used but not defined herein shall have the meanings ascribed to such terms in the Agreement, which is incorporated herein by reference:<sup>2</sup>

- (A) The Debtors, the First Lien Agent and EWP agree that \$300,000 of the Retainer (as defined in the Agreement) shall be applied solely to the fees and expenses of EWP arising after the Petition Date and allowed by this Court; provided, however, that nothing contained in the Agreement will alter the amounts budgeted and carved out for the payment of EWP's fees and expenses pursuant to the Final DIP Order, as amended.
- (B) The Debtors, the First Lien Agent and EWP agree that \$67,000 of the Retainer may be applied by EWP to pay fees and expenses incurred by third party vendors and paid by EWP for the Debtors' benefit prior to the Petition Date.
- (C) The Debtors release any and all avoidance claims, rights or causes of action against EWP and its transferees (including claims arising under Sections 544, 547, 548 and 550 of the Bankruptcy Code) solely with respect to the Retainer. Any and all avoidance claims, rights or causes of action with respect to any other payments received by EWP or its transferees are expressly preserved and any and all defenses of EWP and such transferees to any such claims, rights or causes of action are expressly preserved
- (D) Within five (5) business days after the approval of the Agreement by the Bankruptcy Court, the Debtors will distribute \$300,000 of Cash Collateral (as defined in the Final DIP Order) to the First Lien Agent for application to the First Lien Obligations (as defined in the Final DIP Order).

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<sup>2</sup> Reference is made to Agreement for a complete description of its terms. To the extent any summaries and/or descriptions of the terms of the Agreement contained in the Motion differ in any way from those contained in the Agreement, the Agreement shall govern.

### **BASIS FOR RELIEF REQUESTED**

13. Bankruptcy Rule 9019(a) provides, in relevant part, that “[o]n motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement.” Fed. R. Bankr. P. 9019(a). Compromises and settlements are “a normal part of the process of reorganization.” Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, 424 (1968) (quoting Case v. L.A. Lumber Prods. Co., 308 U.S. 106, 130 (1939)). The compromise or settlement of time-consuming and burdensome litigation, especially in the bankruptcy context, is encouraged and “generally favored in bankruptcy.” In re World Health Alternatives, Inc., 344 B.R. 291, 296 (Bankr. D. Del. 2006); see also In re Penn Cent. Transp. Co., 596 F.2d 1102 (3d Cir. 1979).

14. “[T]he decision whether to approve a compromise under Bankruptcy Rule 9019 is committed to the sound discretion of the Court, which must determine if the compromise is fair, reasonable, and in the interest of the estate.” In re Louise’s, Inc., 211 B.R. 798, 801 (D. Del. 1997) (declining to approve settlement found to be sub rosa plan). Courts should not, however, substitute their judgment for that of the debtor, but instead canvas the issues to see whether the compromise falls below the lowest point in the range of reasonableness. See In re Neshaminy Office Bldg. Assocs., 62 B.R. 798, 803 (E.D. Pa. 1986); In re W.T. Grant and Co., 699 F.2d 599, 608 (2d Cir. 1983); see also In re World Health, 344 B.R. at 296 (“The court does not have to be convinced that the settlement is the best possible compromise. Rather, the court must conclude that the settlement is within the reasonable range of litigation possibilities.”) (internal citations and quotations omitted).

15. The Third Circuit Court of Appeals has enumerated four factors that should be considered in determining whether a compromise should be approved. The four enumerated

factors are: “(1) the probability of success in litigation; (2) the likely difficulties in collection; (3) the complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it; and (4) the paramount interest of the creditors.” Meyers v. Martin (In re Martin), 91 F.3d 389, 393 (3d Cir. 1996); accord Will v. Nw. Univ. (In re Nutraquest, Inc.), 434 F.3d 639, 644 (3d Cir. 2006) (finding that the Martin factors are useful when analyzing a settlement of a claim against the debtor as well as a claim belonging to the debtor); see also TMT Trailer Ferry, Inc., 390 U.S. 414, 424 (1968); In re Marvel Entm’t Group, Inc., 222 B.R. 243 (D. Del. 1998) (proposed settlement held in best interest of the estate); In re Mavrode, 205 B.R. 716, 721 (Bankr. D.N.J. 1997). The test boils down to whether the terms of the proposed compromise fall “within a reasonable range of litigation possibilities.” In the Matter of Penn Central Transportation Co., 596 F.2d 1102, 1114 (3d Cir. 1979) (citations omitted); see In re Pennsylvania Truck Lines, Inc., 150 B.R.595, 598 (E.D. Pa. 1992) (same).

16. The compromise embodied in the Agreement is fair and equitable. It represents a compromise that is in the reasonable range of potential litigation outcomes and obviates the expense, delay, inconvenience and uncertainty that would attend any litigation regarding the application by EWP of its Retainer or the amount of Cash Collateral that should be retained by the Debtors to pay EWP’s postpetition fees and expenses. The parties negotiated the terms of the Agreement in good faith and at arm’s length. Accordingly, because the Agreement is in the best interests of the Debtors, it should be approved pursuant to Bankruptcy Rule 9019(a).

17. Additionally, to the extent that Section 363 of the Bankruptcy Code is implicated in connection with the compromise embodied in the Agreement, the Debtors seek authority thereunder to approve and effectuate the Agreement. The Debtors submit that the terms of the Agreement have a sound business purpose and represent the exercise of their sound business

judgment and, accordingly, any actions required to effectuate the terms of the Agreement should be authorized and approved pursuant to Section 363(b). See In re Lionel Corp., 722 F. 2d 1063, 1071 (2d Cir. 1983) (“The rule we adopt requires that a judge determining a 363(b) application expressly find from the evidence presented before him a good business reason to grant the application.”); In re Delaware Hudson Ry. Co., 124 B.R. 169, 179 (Bankr. Del. 1991).

18. Finally, authorizing the Debtors to enter into and effectuate the terms of the Agreement is well within the equitable powers of this court. See 11 U.S.C. § 105(a) (“The court may issue any order, process, or judgment that is necessary to carry out the provisions of [the Bankruptcy Code].” ); See also Chinichian v. Campolongo (In re Chinichian), 784 F.2d 1440, 1443 (9th Cir. 1986) (“Section 105 sets out the power of the bankruptcy court to fashion orders as necessary pursuant to the purposes of the Bankruptcy Code.”); In re Cooper Props. Liquidating Trust, Inc., 61 B.R. 531, 537 (Bankr. W.D. Tenn. 1986) (noting that bankruptcy court is “one of equity and as such it has a duty to protect whatever equities a debtor may have in property for the benefit of its creditors as long as that protection is implemented in a manner consistent with the bankruptcy laws.”).

19. The Agreement is in the best interests of the Debtors and their estates. Accordingly, it should be approved under Bankruptcy Rule 9019 and Sections 363 and 105 of the Bankruptcy Code.



## NOTICE

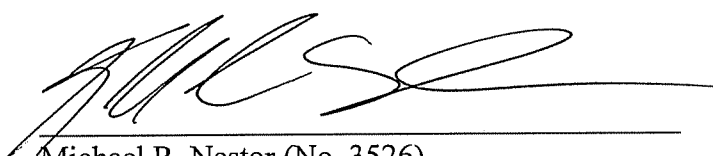
20. The Debtors have provided notice of this Motion to: (a) the United States Trustee for the District of Delaware; (b) financing counsel to the administrative agent for the lenders under the Debtors' prepetition first lien credit facility; (c) special restructuring and bankruptcy counsel to the administrative 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 Committee; (g) the creditors listed on the Debtors' consolidated list of 30 largest unsecured creditors, as filed with the Debtors' chapter 11 petitions; (h) the Food and Drug Administration; (i) the Internal Revenue Service; (j) counsel to Edwards Wildman Palmer LLP; and (k) 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.

21. A copy of the Motion is available on the Court's website: [www.deb.uscourts.gov](http://www.deb.uscourts.gov). Additional copies of the Motion are available for free on the website of the Debtors' claims, noticing, soliciting and balloting agent, BMC Group, Inc., at [www.bmcgroup.com/graceway](http://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) approving the Agreement, (b) authorizing the Debtors to effectuate the compromise embodied therein, including the distribution of \$300,000 of Cash Collateral to the First Lien Agent for application to the First Lien Obligations, and (c) granting such other and further relief as the Court deems appropriate.

Dated: December 14, 2011  
Wilmington, Delaware

Respectfully Submitted,



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