

**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: January 25, 2012 at 2:00 p.m. (ET)

Objection Deadline: January 12, 2012 at 4:00 p.m. (ET)

**DEBTORS' MOTION FOR ORDER EXTENDING TIME TO ASSUME  
OR REJECT NON-RESIDENTIAL REAL PROPERTY LEASES**

The debtors and debtors in possession in the above-captioned cases (collectively, the “**Debtors**”), hereby move (the “**Motion**”), under Section 365(d)(4) of title 11 of the United States Code (the “**Bankruptcy Code**”), for the entry of an order, in the form attached hereto as Exhibit A, extending the time within which they may assume or reject their existing unexpired leases of nonresidential real property (the “**Leases**”). In support of the Motion, the Debtors, by and through their undersigned counsel, respectfully represent as follows:

**Jurisdiction**

1. This Court has jurisdiction to consider this Motion under 28 U.S.C. §§ 157 and 1334. This is a core proceeding under 28 U.S.C. § 157(b). 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 predicate for the relief requested herein is Section 365(d)(4) of the Bankruptcy Code.

### **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]. On October 11, 2011, the Office of the United States Trustee appointed an official committee of unsecured creditors pursuant to Section 1102 of the Bankruptcy Code (the "**Committee**") [Docket No. 90].

4. A description of the Debtors' business and the reasons for commencing these Chapter 11 Cases are set forth in the Declaration of Gregory C. Jones in Support of Chapter 11 Petitions and First Day Motions [Docket No. 3], filed on the Petition Date.

5. 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], which authorized the sale of substantially all of the Debtors' assets to Medicis Pharmaceutical Corporation pursuant to Section 363 of the Bankruptcy Code (the "**Sale**"). The Sale was consummated on December 2, 2011.

### **Relief Requested**

6. By this Motion, the Debtors request that the Court enter an order, pursuant to section 365(d)(4) of the Bankruptcy Code, granting an extension of the period to assume or reject the Leases, which currently expires on January 27, 2012, through the earlier to occur of (a) the effective date of a plan of reorganization and (b) April 26, 2012. This extension will be without any prejudice to the rights of the Debtors to seek additional extensions of such period with the consent of the affected lessors, as provided in Bankruptcy Code Section 365(d)(4)(B)(ii).

### **Basis for Relief Requested**

7. Bankruptcy Code Section 365(d)(4) provides as follows:

- (A) Subject to paragraph (B), an unexpired lease of nonresidential real property under which the debtor is the lessee shall be deemed rejected, and the trustee shall immediately surrender that nonresidential real property to the lessor, if the trustee does not assume or reject the unexpired lease by the earlier of –
  - (i) the date that is 120 days after the date of the order for relief; or
  - (ii) the date of the entry of an order confirming a plan.
- (B)
  - (i) The Court may extend the period determined under subparagraph (A), prior to the expiration of the 120-day period, for 90 days on the motion of the trustee or lessor for cause.
  - (ii) If the court grants an extension under clause (i), the court may grant a subsequent extension only upon prior written consent of the lessor in each instance.

11 U.S.C. § 365(d)(4). Thus, upon a showing of cause, a court has the discretion to grant an extension of 90 days after the conclusion of the initial 120 days allotted to debtors to assume or reject nonresidential real property leases.

8. What constitutes “cause” for the approval of an extension is not specifically defined in the Bankruptcy Code. However, courts have articulated certain factors that indicate whether there is cause to grant the relief. These factors include:

- (i) whether the debtor is paying for the use of the property;
- (ii) whether the debtor's continued occupation could damage the lessor beyond the compensation available under the Bankruptcy Code;
- (iii) whether the lease is the debtor's primary asset;
- (iv) whether the debtor has had sufficient time to formulate a plan of reorganization;
- (v) complexity of the case facing the debtor; and
- (vi) number of leases the debtor must evaluate.

South St. Seaport Ltd. P'ship. v. Burger Boys, Inc. (In re Burger Boys, Inc.), 94 F.3d 755, 760-61 (2d Cir. 1996); See also Vermont Partners, Ltd. v. Thaler, 377 B.R. 52, 61 (E.D.N.Y. 2007); In re Wedtech Corp., 72 B.R. 464, 471 (Bankr. S.D.N.Y. 1987). Additionally, courts have considered the particular needs of the debtor in considering whether to grant an extension. See, e.g., In re Channel Home Ctrs., Inc., 989 F.2d 682, 689 (3d Cir. 1993), *cert. denied*, 510 U.S. 865 (1993); See also In re GST Telecom Inc., 2001 U.S. Dist. LEXIS 8817, \*9 (D. Del. 2001) (stating that "equity dictates that courts can grant debtors additional time in which to decide whether to assume or reject a particular lease").

9. Applying these factors to the circumstances of the Debtors' Chapter 11 Cases leads to the overwhelming conclusion that the relief requested should be granted. *First*, the Debtors have been paying for the use of the premises that are subject to the Leases and will continue to pay for such use of the premises until the Leases are assumed or rejected. *Second*, the Debtors are not aware of any basis for the lessors to assert that the Debtors' continued occupation in the premises that are subject to the Leases would damage such lessors beyond the compensation available under the Bankruptcy Code. *Third*, the Leases are important assets of the Debtors. *Fourth*, the Debtors have committed significant time and energy to dealing with various matters, including among other things: (a) stabilizing their businesses after the filing of

these cases and responding to myriad requests and inquiries from the Committee, vendors, customers, employees and other creditors; (b) preparing schedules of assets and liabilities, and statements of financial affairs for each of the Debtors; (c) preparing and filing a motion seeking to sell substantially all of the Debtors' assets, conducting the sale process in connection therewith, and consummating such Sale; and (d) beginning the review of hundreds of their executory contracts and unexpired leases and the potential cure amounts related thereto. Simultaneously, the Debtors are assiduously working to run their business operations. *Fifth*, the numerous business and legal issues facing the Debtors are at least as complex (if not more so) as those facing debtors in bankruptcy cases of similar size.

10. Despite the Debtors' focus on numerous tasks such as the ones described above, the Debtors have already begun the process of reviewing outstanding real property leases for all of the Debtor entities, and have received approval to reject substantially all of their non-residential real property leases.

11. Despite progress made in many areas, given the competing demands on their time and resources since the Petition Date, many of which are continuing, the initial 120-day time frame does not afford the Debtors the necessary time to determine whether to assume or reject their remaining Leases. Prudence dictates that maximum flexibility be retained and that final assumption decisions not be made hastily. To foreclose the opportunity to assume, or to require premature assumption, would hinder the Debtors' ability to maximize value for their estates.

12. During the course of these Chapter 11 Cases, the Debtors have continued to uphold their obligations under the Leases and the Debtors will continue to do so until the Leases are assumed and assigned or rejected. Therefore, the counterparties to the Leases will not be harmed by the 90-day extension. Finally, should the Debtors ultimately decide to reject the

Leases, nothing will prejudice the rights of the affected lessors to assert a rejection damage claims as provided for in the Bankruptcy Code.

13. Courts in this district and others have granted similar relief in other large chapter 11 cases. See, e.g. In re Premier Int'l, Case No. 09-12019 (Bankr. D. Del. Oct. 6, 2009); In re Eddie Bauer Holdings, Inc., Case No. 09-12099 (Bankr. D. Del. July 23, 2009); In re Journal Register Co., Case No. 09-10769 (Bankr. S.D.N.Y. June 16, 2009); In re Tribune Co., Case No. 08-13141 (Bankr. D. Del. Mar. 25, 2009); In re Pierre Foods, Inc., Case No. 08-11480 (Bankr. D. Del. Oct. 29, 2008); In re Tropicana Entm't LLC, Case No. 10856 (Bankr. D. Del. Aug. 8, 2008); In re Linens Holdings Co., Case No. 08-10832 (Bankr. D. Del. June 4, 2008).

14. Accordingly, the Debtors respectfully submit that cause exists to justify an extension of the time within which the Debtors must assume or reject the Leases through the earlier to occur of (a) the effective date of a plan of reorganization and (b) April 26, 2012, without any prejudice to the Debtors' rights to seek additional extensions of this deadline with the consent of the affected lessors as provided in Bankruptcy Code Section 365(d)(4)(B)(ii).

#### 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 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) the non-

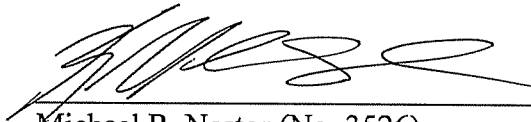
debtor counterparties to the Leases; and (k) all parties requesting notice pursuant to Bankruptcy Rule 2002. In light of the nature of the relief requested, the Debtors submit that no further notice is required or needed under the circumstances.

16. 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 the Court enter an order, substantially in the form attached hereto as Exhibit A, (i) extending the period to assume or reject the Leases as set forth herein; and (ii) granting such other and further relief as may be just and proper.

Dated: December 29, 2011  
Wilmington, Delaware

Respectfully Submitted,



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