

**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 (PJW)

Jointly Administered

Proposed Hearing Date: April 11, 2012 at 2:00 p.m. (ET)

Proposed Obj. Deadline: April 5, 2012 at 4:00 p.m. (ET)

**DEBTORS' MOTION PURSUANT TO SECTIONS 105 AND 363 OF THE
BANKRUPTCY CODE AND BANKRUPTCY RULE 9019
FOR AN ORDER AUTHORIZING THE DEBTORS TO ENTER INTO A
SETTLEMENT AGREEMENT WITH HUMANA INC.**

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 a Settlement Agreement by and among the Debtors and Humana Inc. ("**Humana**"). In support of this Motion, the Debtors respectfully represent as follows²:

JURISDICTION

1. This Court has jurisdiction over this Objection 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).

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), 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 400, 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 facts and circumstances supporting this Motion are set forth in the *Declaration of Thomas E. Hill in Support of Debtors' Objection to Claim No. 192 Pursuant to § 502(b) of the Bankruptcy Code, Bankruptcy Rules 3001, 3003 and 3007, and Local Rule 3007-1* [Docket No. 538].

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) 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, 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. These Chapter 11 Cases are pending before the Honorable Peter J. Walsh, Judge for the United States Bankruptcy Court for the District of Delaware, located at the United States Bankruptcy Court, 824 North Market Street, 6th Floor, Wilmington, Delaware 19801 (the “**Bankruptcy Court**”). 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 “**Creditors’ Committee**”) [Docket No. 90].

5. On December 2, 2011, the Debtors filed a motion to, among other things, reject certain executory contracts, effective as of December 31, 2011 (the “**Rejection Motion**”) [Docket No. 333]. The Debtors designated certain managed care rebate agreements by and between Graceway Pharmaceuticals, LLC and Humana to be rejected under the Rejection

Motion. On December 28, 2011, the Bankruptcy Court entered the Order granting the Rejection Motion [Docket No. 416].

6. On January 27, 2012, Humana filed a proof of claim against the Debtors asserting that Humana was owed at least \$93,847.94 (Claim No. 212) as of the Petition Date (the “**Humana Unsecured Proof of Claim**”). Humana has also asserted that it is owed an administrative claim in the amount of \$47,776.58 for which a proof of claim has not yet been filed (the “**Humana Administrative Claim**” and together with the Humana Unsecured Proof of Claim, the “**Humana Claims**”).

7. The Debtors and Humana have engaged in good faith negotiations to settle, resolve and release all claims, disputes and issues between them, including, but not limited to, the Humana Claims, and as a result of such good faith negotiations, have entered into that certain Agreement, dated as March 23, 2012, between the Debtors and Humana (the “**Agreement**”), which is attached hereto as Exhibit B. The Debtors believe that the administrative agent to the lenders under the Debtors’ first lien facility will not object to the Agreement.

RELIEF REQUESTED

8. 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.

9. All capitalized terms that are used but not defined herein shall have the meanings ascribed to such terms in the Agreement, which is attached hereto as Exhibit B and incorporated herein by reference. The material terms of the Agreement are set forth below:³

- A. Within five (5) days of the Settlement Effective Date, the Debtors shall pay Humana \$45,000 (the “Settlement Payment”) on account of and in final satisfaction of the Humana Administrative Claim.
- B. Effective on the Settlement Effective Date, but subject to Humana’s receipt of the Settlement Payment, all claims of Humana against the Debtors shall be deemed withdrawn and denied without further action of Humana or the Debtors and Humana waives in full any and all claims against the Debtors; provided, however, that if the recovery to general unsecured claimants exceeds 15% of the aggregate amount of general unsecured claims, the Humana Unsecured Proof of Claim shall be reinstated and shall no longer be deemed withdrawn and denied, and instead shall be allowed in full as a general unsecured nonpriority claim.
- D. Effective on the Settlement Effective Date, each of the Debtors and each of their respective current and future estates, successors, assigns and representatives (including, for the avoidance of doubt, any representative appointed pursuant to Section 1123(b)(3)(B) of the Bankruptcy Code or otherwise) (i) conclusively, absolutely, unconditionally, irrevocably and forever remises, acquits, waives, releases and discharges Humana from any and all Released Causes of Action (as defined below), and (ii) covenants and agrees never to institute or cause to be instituted any suit, investigation or other form of action or proceeding of any kind or nature whatsoever against Humana based upon the Released Causes of Action.
- E. Effective on the Settlement Effective Date, but subject to Humana’s receipt of the Settlement Payment, Humana (i) conclusively, absolutely, unconditionally, irrevocably and forever remises, acquits, waives, releases and discharges each of the Debtors and each of their respective current and future estates, successors, assigns and representatives (including, for the avoidance of doubt, any representative appointed pursuant to Section 1123(b)(3)(B) of the Bankruptcy Code or otherwise) from any and all Released Causes of Action, and (ii) covenants and agrees never to institute or cause to be instituted any suit, investigation or other form of action or proceeding of any kind or nature whatsoever against any of the Debtors based upon the Released Causes of Action.
- F. The term “**Released Causes of Action**” means any and all claims (including, but not limited to any “claim” as defined in Section 101(5) of the Bankruptcy Code), demands, rights, suits, remedies, indebtedness, agreements, promises, Causes of

³ Reference is made to the 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.

Action (as defined in the Plan), obligations, damages or liabilities of any nature whatsoever, in law, in equity or otherwise, whether or not known, foreseen or unforeseen, existing or hereafter arising, suspected or claimed, that such Party ever had, claimed to have, now have, may have, claim to have or may claim to have in the future against the other Party or Parties, by reason of any matter, cause, thing, act, transaction, agreement, event or omission of such Party or Parties, including, without limitation, any and all of the Avoidance Actions (as defined in the Plan); *provided, however*, that the foregoing will not include any rights to enforce obligations under the Agreement, the Order or any other order of the Bankruptcy Court, including, without limitation, the Confirmation Order, the Plan and all contracts, instruments, releases and other agreements delivered in connection therewith.

G. Humana agrees not to file any further proofs of claim in the Chapter 11 Cases.

BASIS FOR RELIEF REQUESTED

10. 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).

11. “[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).

12. 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 re Penn Cent., 596 F.2d at 1114 (citations omitted); see In re Pa. Truck Lines, Inc., 150 B.R. 595, 598 (E.D. Pa. 1992) (same).

13. The compromise embodied in the Agreement is fair and equitable. The Debtors and their professionals have analyzed the Humana Claims and believe that the Agreement represents a compromise that is within the reasonable range of potential litigation outcomes. Additionally, the Agreement obviates the expense, delay, inconvenience and

uncertainty that would attend any litigation regarding the Humana Claims. Fully litigating the Humana Claims likely would not result in a better outcome for the Debtors' estates but would involve significant expenses and a significant delay in resolving the Humana Claims.

14. The Agreement serves the paramount interest of the Debtors' creditors. The Agreement resolves and satisfies claims that Humana has asserted against the Debtors that otherwise would require costly litigation with little certainty regarding the ultimate outcome and timing of such outcome. The parties negotiated the terms of the Agreement in good faith and at arm's length, and the Debtors believe that the administrative agent to the lenders under the Debtors' first lien facility will not object to the Agreement.

15. To the extent that Section 363 of the Bankruptcy Code is implicated in connection with the settlement embodied in the Agreement, the Debtors seek authority thereunder to execute and perform their obligations under 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. 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 Del. Hudson Ry. Co., 124 B.R. 169, 179 (Bankr. D. Del. 1991).

16. 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(1) ("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.”).

17. The settlement embodied in the Agreement (i) is fair and equitable; (ii) represents a settlement that is in the reasonable range of potential litigation outcomes; and (iii) obviates the expense, delay, inconvenience and uncertainty that would attend any litigation against Humana. Therefore, because the Agreement is in the best interests of the Debtors and their estates, it should be approved pursuant to Bankruptcy Rule 9019(a).

NOTICE

18. 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’ 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) Humana Inc.; and (k) all parties requesting notice pursuant to Bankruptcy Rule 2002.

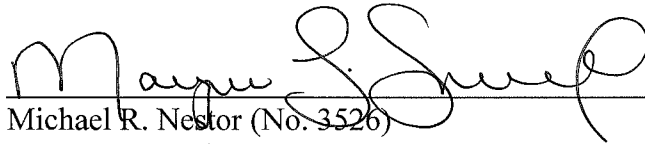
In light of the nature of the relief requested, the Debtors submit that no further notice is required or needed under the circumstances.

19. 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' 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) approving the Agreement, (b) authorizing the Debtors to effectuate the compromise embodied therein, and (c) granting such other and further relief as the Court deems appropriate.

Dated: March 23, 2012
Wilmington, Delaware

Respectfully Submitted,



Michael R. Nestor (No. 3526)
Kara Hammond Coyle (No. 4410)
Morgan L. Seward (No. 5388)
YOUNG CONAWAY STARGATT & TAYLOR, LLP
Rodney Square
1000 North King Street
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

ATTORNEYS FOR DEBTORS AND DEBTORS-IN-
POSSESSION