

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

In re:

GRACEWAY PHARMACEUTICALS, LLC, *et al.*,¹

Debtors.

Chapter 11

Case No.: 11-13036 (PJW)
(Jointly Administered)

**Objections Due: April 30, 2012 at 4:00 p.m.
(EDT)**

Hearing Date: May 9, 2012 at 10:00 a.m. (EDT)

**TRC VALLEY CREEK ASSOCIATES-C, LP'S MOTION FOR ALLOWANCE
AND PAYMENT OF ADMINISTRATIVE EXPENSE CLAIM PURSUANT TO
11 U.S.C. §§ 503(b) AND 365(d)(3)**

TRC Valley Creek Associates-C, LP ("TRC" or "Landlord"), by and through its undersigned counsel, hereby submits TRC Valley Creek Associates-C, LP's Motion for Allowance and Payment of Administrative Expense Claim Pursuant to 11 U.S.C. §§ 503(b) and 365(d)(3) (the "Motion"). In support of the Motion, TRC states as follows:

BACKGROUND

1. On September 29, 2011 (the "Petition Date"), the above-captioned debtors and debtors-in-possession (each a "Debtor" and collectively, the "Debtors") each filed a voluntary petition for relief under chapter 11 of Title 11 of the United States Code, 11 U.S.C. §§ 101-1532 (the "Bankruptcy Code"), in the United States Bankruptcy Court for the District of Delaware (the "Court").

¹ The Debtors in these cases, along with the last four digits of each Debtor's federal tax identification number, are: Graccway Pharma Holding Corp., a Delaware corporation (9175), Case No. 11-13037 (PJW); Graccway Holdings, LLC, a Delaware limited liability company (2502), Case No. 11-13038 (PJW); Graccway 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); Graccway Canada Holdings, Inc., a Delaware corporation (6663), Case No. 11-13042 (PJW); and Graccway International, Inc., a Delaware corporation (2399), Case No. 11-13043 (PJW). The mailing address for Graccway Pharmaceuticals, LLC is 340 Martin Luther King Jr. Blvd., Suite 400, Bristol, TN 37620 (Attn: John Bellamy). On October 4, 2011, Graccway 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. Pursuant to Bankruptcy Code sections 1107(a) and 1108, the Debtors continue to manage their property as debtors-in-possession.

3. On October 12, 2011, the Office of the United States Trustee for the District of Delaware appointed the official Committee of Unsecured Creditors (the "Committee").

4. Debtor, Graceway Pharmaceuticals, LLC ("Graceway"), and TRC are parties to that certain lease agreement dated January 9, 2007 (as amended, the "Lease") whereby Graceway leased 27,127 square feet of office space located at Building 222, Valley Creek Corporate Center Third Floor – Suite 300, Exton, Pennsylvania 19341 (the "Property") from TRC.

5. Pursuant to the Court's Order Authorizing the Debtors to (i) Reject Certain Unexpired Leases of Nonresidential Real Property, (ii) Sell Certain Property Outside the Ordinary Course of Business, (iii) Abandon Certain Expendable Property and (iv) Reject Certain Executory Contracts entered December 29, 2011 [D.I. 416], the Lease was rejected effective as of December 31, 2011.

6. To date, TRC has filed the following claims in the Debtors' bankruptcy cases: (i) claim number 176, filed as a general unsecured claim for \$12,261.48 for amounts due under the Lease before the Petition Date; and (ii) claim number 209, filed in the aggregate amount of \$551,631.98, which is a partially secured claim representing TRC's damages related to the Debtor's rejection of the Lease

7. Lease sections 3.5 provides that

[a]ll sums payable by [Graceway] under this Lease, whether or not stated to be rent, minimum rent or additional rent (including, without limitation, the amounts due under [section 5] of this Lease), shall be collectible by Landlord as rent, and upon default in payment thereof Landlord shall have the same rights and remedies for failure to pay rent (without prejudice to any other right or remedy available therefor). All minimum rent, additional rent and other sums payable by Tenant under this Lease shall be paid, when due, without demand, offset, abatement, diminution or reduction, except as otherwise set forth herein.

Lease § 3.5.

8. Lease section 5.1 provide that the Landlord shall provide “electricity for lighting and general power for office use . . . to be paid for by [Graceway]” (the “Electricity Service”).

Lease § 5.1. The Lease further provides that Graceway

shall pay [its] pro rata share (based on the ratio of RSF of the [Property] to the total RSF of the Building (including applicable sales or use taxes) for the foregoing services during ‘Business Hours’ . . . and for ‘Building Standard Consumption’ . . . Such payment shall be made by [Graceway] within thirty (30) days after submission by Landlord of a statement to [Graceway] setting forth the amount due.

Lease § 5.1(i).

9. The Lease further provides that the Debtors shall be responsible for their share of water and sewer services (the “Water Service” and collectively with the Electricity Service, the “Utility Services”) provided by the Landlord to be paid pursuant to the following terms

[t]he cost of usage of such services attributable to the [Property] shall be paid for by [Graceway] pursuant to a statement furnished by the Landlord to [Graceway] setting forth the amount due as a result of such [water and sewer] usage attributable to the [Property], and the total amount set forth in such statement shall be due and payable by [Graceway] within thirty (30) days after submission thereto by Landlord of such statement.

Lease § 5.2.

10. After the Petition Date, TRC issued three separate invoices to the Debtors for Utility Services and other miscellaneous charges due under the lease (collectively, the “Additional Rent”). The aggregate amount of post-petition Additional Rent due is \$22,360.82.

A copy of TRC’s most recent invoice reflecting all amounts due for post-petition Additional Rent is attached as Exhibit A.

JURISDICTION AND VENUE

11. The Court has jurisdiction over this Motion pursuant to 28 U.S.C. §§ 157 and 1334.
12. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A).
13. Venue of this proceeding and this Motion is proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409.

RELIEF REQUESTED

14. By the Motion, TRC requests the Court enter an order substantially in the form of order attached hereto granting TRC an allowed administrative expense claim in the amount of \$22,360.82 and directing the Debtors to pay such claim within 10 calendar days from the entry of such order pursuant to Bankruptcy Code sections 503(b) and 365(d)(3).

BASIS FOR RELIEF

A. Post-petition Additional Rent is an Allowable Administrative Expense Pursuant to 11 U.S.C. 503(b).

15. Despite enjoying continuous possession of the Premises from the Petition Date through December 31, 2011, the Debtors have not paid to Landlord all of the post-petition Additional Rent due under the Lease. Accordingly, the Landlord is entitled to an allowed administrative claim for the unpaid post-petition Additional Rent, in the amount of \$22,360.82 (the "Administrative Claim").

16. The Landlord submits that the Administrative Claim constitutes an allowable administrative expense claim pursuant to 11 U.S.C. § 503(b), which provides in relevant part:

After notice and a hearing, there shall be allowed administrative expenses . . . including-

(1)(A) the actual, necessary costs and expenses of preserving the estate, including wages, salaries, or commissions for services rendered after the commencement of the case.

11 U.S.C. § 503(b).

17. Bankruptcy Code section 503(b)(1)(A) has been interpreted to require that “[f]or a claim in its entirety to be entitled to first priority under [§ 503(b)(1)(A)], the debt must arise from a transaction ... the debtor-in-possession [and] the consideration supporting the claimant’s right to payment [must be] beneficial to the debtor-in-possession in the operation of the business.” See *In re O’Brien Environmental Energy, Inc.*, 181 F.3d 527, 532-33 (3d Cir. 1999) (quoting *Cramer v. Mammoth Mart, Inc. (In re Mammoth Mart, Inc.)*, 536 F.2d 950, 954 (1st Cir. 1976)); COLLIER ON BANKRUPTCY, 15th Ed. ¶ 503.06[3] (claim must have arisen from a transaction with the estate and must have benefited the estate in a demonstrable way).

There is no question, of course, that the payment of rent for the use and occupancy of real estate ordinarily counts as an ‘actual, necessary’ cost to which a landlord, as a creditor, is entitled ... rent is clearly an ‘actual necessary’ cost of preserving the estate However, the landlord’s right to collect monetary relief is somewhat curtailed: a debtor is generally required to pay only a reasonable value for the use and occupancy of the landlord’s property, which may or may not equal the amount agreed upon in the terms of the lease.

Zagata Fabricators v. Superior Air Prod., 893 F.2d 624, 627 (3d Cir. 1990).

18. Although *Zagata* does not set forth a method for determining the “reasonable value” of the Debtors’ use and occupancy of the Premises, decisions interpreting *Zagata* suggest that the so-called “objective” approach, the majority view, should be used rather than the so-called “subjective” approach, the minority view. The objective approach measures the value to the estate as the reasonable value of the leased property without regard to the actual use made by the debtor, *In re F.A. Potts & Co., Inc.*, 137 B.R. 13, 17 (E.D. Pa. 1992) (using the “objective” approach, citing *In re Mohawk Industries, Inc.*, 54 B.R. 409 (Bankr. D. Mass. 1985) (allowing use and occupancy claim in amount equal to former lease rate through date all materials were removed from the premises)), while the subjective approach values the leased property based

upon the actual use of the property made by the debtor. *F.A. Potts & Co.*, 137 B.R. at 17; *but see In re Lease-a-Fleet, Inc.*, 140 B.R. 840, 846-47 (Bankr. E.D. Pa. 1992) (rejecting *F.A. Potts & Co.* and noting costs for unused property do not constitute administrative expenses).

The measure of the benefit to the estate is typically the reasonable rental value of the property that was occupied or used by the trustee. Using reasonable rental value allows the court to apply an objective standard in determining the benefit to the estate.

COLLIER ON BANKRUPTCY, 15th Ed. ¶ 503.06[6][c][ii].

19. In applying the “objective” approach, “the rental value fixed in the lease will control, unless there is convincing evidence that such rental rate is unreasonable.” *F.A. Potts & Co.*, 137 B.R. at 18; *In re Cornwall Paper Mills Co.*, 169 B.R. 844, 851 (Bankr. D.N.J. 1994) (same); *In re Mohawk Indus. Inc.*, 54 B.R. 409, 412 (Bankr. D. Mass. 1985) (same); *see also Thompson v. IFG Leasing Co. (In re Thompson)*, 788 F.2d 560, 563 (9th Cir. 1986).

20. In the instant case, the Debtors benefited by having control of the Premises during the time period during which the Administrative Claim accrued. Accordingly, the Landlord should be allowed a Chapter 11 administrative claim in the amount of the of the Additional Rent.

B. The Debtors’ are Obligated to Pay Post-Petition Lease Obligations Pursuant to 11 U.S.C. § 365(d)(3).

21. Bankruptcy Code section 365(d)(3) requires that “the trustee shall timely perform all the obligations of the debtor . . . arising from and after the order for relief under any unexpired lease . . . until such lease is assumed or rejected, notwithstanding section 503(b)(1) of this title.” 11 U.S.C. § 365(d)(3). As the Third Circuit Court of Appeals noted in *Centerpoint Properties v. Montgomery Ward Holding Corp.*, “[section] 365(d)(3) is not ambiguous.” *Centerpoint Prop. v. Montgomery Holding Corp. (In re Montgomery Ward Holding Corp.)*, 268 F.3d 205, 210 (3d Cir. 2001).

22. Moreover, section 365(d)(3) “require[s] the trustee to perform the lease in accordance with its terms,” and the clear and unambiguous language of section 365(d)(3) mandates that a debtor-tenant’s obligation arises when the debtor is required to perform such obligation under the terms of the lease. *Id.* at 209-10. As the Third Circuit correctly noted in *Montgomery Ward*, “[w]e are not alone in holding that an obligation arises under a lease for the purposes of [section] 365(d)(3) when the legally enforceable duty to perform arises under that lease.” *Id.*

23. In the present case, post-petition Additional Rent are due and owing to TRC pursuant to the terms of Lease sections 3.5, 5.1, and 5.2. As set forth above TRC properly invoiced the Debtors their share of the Additional Rent accrued while in possession of the Property. To date, Landlord is owed \$22,360.82 in unpaid post-petition Additional Rent.

NOTICE AND NO PRIOR REQUEST

24. Notice of this Motion has been provided to (i) the Office of the United States Trustee for the District of Delaware, (ii) Debtors’ counsel, (iii) the Committee’s counsel, and (iv) all parties requesting notices pursuant to Bankruptcy Rule 2002. TRC submits that no other or further notice need be provided.

25. No previous request for the relief sought by the Motion has been made to this or any other court.

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WHEREFORE, TRC requests that this Court enter an Order: (i) allowing Landlord's administrative claim for the Additional Rent in the amount of \$22,360.82; (ii) compelling Debtors to pay \$22,360.82 which represents Debtors' Additional Rent due and owing after the Petition Date within 10 calendar days from the entry of such order; and (iii) granting such other relief and the Court deems just and proper.

Dated: April 12, 2012

FOX ROTHSCHILD LLP

/s/ John H. Strock
John H. Strock (No. 4965)
919 N. Market St., Suite 1300
P.O. Box 2323
Wilmington, DE 19899
Telephone: 302.654.7444
Facsimile: 302.656.8920

-and-

Michael G. Menkowitz
Brian J. Levin
2000 Market St. – 20th Floor
Philadelphia, PA 19103
Telephone: 215.299.2000
Facsimile: 215.299.2150

*Counsel to TRC Valley
Creek Associates-C, LP*