

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

In re:

GRACEWAY PHARMACEUTICALS, LLC,  
et. al.

Debtors.

Chapter 11  
Case No. 11-13036  
(Jointly Administered)

**Hearing Date: TBD**  
**Objection Date: August 7, 2012**

**UNITED STATES' MOTION FOR ALLOWANCE AND PAYMENT  
OF ADMINISTRATIVE EXPENSE CLAIM PURSUANT TO 11 U.S.C. § 503(b)**

The United States of America (United States), on behalf of the Secretary of Health and Human Services (Secretary) and the Centers for Medicare and Medicaid Services (CMS), which administers the Medicare program, moves this court for the allowance and payment of administrative expenses arising between September 29, 2011, and December 31, 2011, under the Medicare Coverage Gap Discount Program Agreement (MCGDPA) between the Secretary and Graceway Pharmaceuticals, LLC, (Graceway). In support of the United States' Motion for Allowance and Payment of Administrative Expense Claim Pursuant to 11 U.S.C. § 503(b), the United States asserts as follows:

**BACKGROUND**

1. On September 29, 2011 (Petition Date), Graceway and its subsidiaries and affiliates (collectively Debtors) filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code.
2. On August 13, 2010, the Secretary and Graceway entered into the MCGDPA. Declaration of Cynthia Tudor (Tudor Decl.) at ¶ 4. The MCGDPA provides a mechanism to reimburse discounts provided to Medicare Part D beneficiaries under the Gap Discount Program. The Gap Discount Program provides a 50% discount on the negotiated price of pharmaceuticals at the point of sale when the beneficiary exceeds his or her initial coverage limits but has yet to reach

his or her out-of-pocket threshold.<sup>1</sup> 42 U.S.C. § 1395w-114a (b)(1)(B), (g)(1), & (g)(4). The pharmacy or dispensary is subsequently paid the amount of the discount through the Medicare Part D plan. 42 U.S.C. § 1395w-114a (c)(1)(A)(iv); 42 C.F.R. § 423.2325(g). Under the MCGDPA, Graceway agreed to reimburse such discounts provided through the Medicare Part D plan within thirty-eight (38) days of being invoiced. Exhibit 1 ¶¶ II(a) - (c) & (e); *see also* 42 C.F.R. § 423.2315 (b)(2) & (3). Graceway was required to enter into a MCGDPA for its pharmaceuticals to be covered under the Medicare Part D program. 42 U.S.C. § 1395w-153(a)(1).

3. On November 22, 2012, the bankruptcy court approved the sale of substantially all of Graceway's assets free and clear of all liens, claims, and interests to Medicis Pharmaceuticals Corporation (Medicis). Dkt. No. 306. The MCGDPA was not among the assets sold to Medicis.

4. The same day, the bankruptcy court established the procedures by which the Debtors could reject certain unexpired leases and executory contracts following the close of the sale. Dkt. No. 302. Under those procedures, the Debtors would file and serve a Notice of the Rejection of Leases and Contracts (Rejection Notice) upon the counterparties whose leases and contracts would be rejected at closing. *Id.* The rejection of those leases and contracts in the Rejection Notice would be effective as of sale closing. *Id.*

5. On November 23, 2011, the Debtors filed the Rejection Notice. Dkt. No. 309. The MCGDPA was not listed in the schedules to the Rejection Notice. *Id.*, Schedules 1 & 2.

6. On December 2, 2011, the Debtors closed its sale of substantially all of its assets. Dkt. No. 335.

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<sup>1</sup> For calendar year 2011, the initial coverage limit was \$2,840 and the out of pocket threshold was \$4,550.

7. The same day, the Debtors filed Debtors' Motion for Entry of an Order Authorizing the Debtors to (I) Reject Certain Unexpired Lease 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 (Rejection Motion), which, among others things, sought to reject the contracts and leases listed in the attached Exhibits. Dkt. No. 333. The Debtors listed the MCGDPA in Schedule 2 of Exhibit A. Dkt. No. 333.

8. On December 28, 2011, this Court authorized the Debtors to reject the leases and contracts listed in the Rejection Motion, including the MCGDPA, effective December 31, 2011 (Rejection Date). Dkt. No. 416.

9. On April 20, 2012, this Court confirmed Debtors' First Amended Joint Plan of Liquidation of Graceway Pharmaceuticals, LLC, et.al. (Plan), under which a liquidating trustee (Liquidating Trustee) would oversee the windup of the Debtors' affairs and administration of the Plan.

10. Between the Petition Date and the Rejection Date, Medicare Part D beneficiaries were provided benefits under the MCGDPA for prescriptions of Debtors products filled during that time. Tudor Decl. at ¶¶ 7 & 8. Pursuant to the MCGDPA, the Debtors owe the Secretary \$228,648.85 for reimbursement under the MCGDPA for those benefits. Tudor Decl. at ¶ 3. The Debtors have yet to reimburse the Secretary for the benefits provided between the Petition Date and the Rejection Date. Tudor Decl. at ¶¶ 3, 7, & 8.

### **JURISDICTION AND VENUE**

11. This 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 this Motion, the United States ask this Court to enter an order substantially in the form of order attached as Exhibit A granting the Secretary and CMS an allowed administrative expense claim of \$228,648.85 and directing the Liquidating Trustee to pay such claim in accordance with the terms and conditions of the Plan.

### **BASIS FOR RELIEF**

15. The Bankruptcy Code provides that the amount Graceway owes CMS under the MCGDPA for prescriptions filled between the Petition Date and the Rejection Date is entitled to administrative expense priority. From the Petition Date through the Rejection Date, the Debtors enjoyed the benefits they received under the MCGDPA without paying for those benefits.

16. The Bankruptcy Code entitles expenses that are “actual and necessary costs and expenses of preserving the estate” to administrative expense priority. 11 U.S.C. § 503(b)(1)(A). “For [an expense] in its entirety to be entitled to first priority under [§ 503(b)(1)(A) ], the debt must arise from a transaction with 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.” *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)) (second, third, fourth alteration in original).

17. The Debtors benefitted from the MCGDPA after filing for bankruptcy. The Debtors were required to enter into and maintain the MCGDPA as a prerequisite to having their drugs

covered by Medicare Part D. 42 U.S.C. § 1394w-153. Without the MCGDPA, the Debtors would have been unable to sell their pharmaceuticals to those Medicare Part D beneficiaries who could not have afforded the Debtors' pharmaceuticals without such coverage. By rejecting the MCGDPA nearly a month after the closing of the sale, the Debtors were able to maintain market share for their pharmaceuticals and reduce their existing inventory, increasing the amount the Debtors could obtain for the sale of its assets and monetizing their existing inventory.

18. The Debtors' own acts demonstrate that they benefitted from the MCGDPA. A few days after this Court authorized the Debtors to sell substantially all of its assets, the Debtors filed the Rejection Notice that listed those contracts that would be rejected at sale closing. Absent from that list was the MCGDPA. The Debtors did not reject the MCGDPA until after they had closed the sale: they rejected the MCGDPA on December 31, 2011, nearly a month after sale closing. By rejecting the MCGDPA nearly a month after the closing and after the rejection of many of their other contracts, the Debtors have demonstrated that the MCGDPA benefitted the estate.

19. Because the MCGDPA benefitted the Debtors, CMS is entitled to an administrative expense in the reasonable value of that benefit. *Sharon Steel Corp. v. Nat'l Fuel Gas Distrib.*, 872 F.3d 36, 41-43 (3d Cir. 1988). The amount due CMS under the terms MCGDPA is reasonable. Under the MCGDPA, the Debtors need only partially reimburse the negotiated price for beneficiaries that have spent \$2,840 on prescription drugs but have yet to reach the catastrophic limit of \$4,550 for the year. For this partial reimbursement of a subset of Medicare Part D beneficiaries, the Debtors' pharmaceuticals are covered for all Medicare Part D beneficiaries.

**CONCLUSION**

For the reason set forth above, the Secretary and CMS is entitled to the allowance and payment of an administrative expense of \$228,648.85.

Dated: June 8, 2012

Respectfully submitted,

STUART DELERY  
Acting Assistant Attorney General

CHARLES M. OBERLY, III  
United States Attorney

ELLEN W. SLIGHTS (DE Bar No. 2782)  
Assistant United States Attorney  
1007 Orange Street, Suite 700  
P.O. Box 2046  
Wilmington, Delaware 19899-2046

/s/ Rodney Morris  
J. CHRISTOPHER KOHN  
TRACY J. WHITAKER  
RODNEY A. MORRIS  
Commercial Litigation Branch  
Civil Division  
United States Department of Justice  
P.O. Box 875  
Ben Franklin Station  
Washington D.C. 20044  
Tel. (202) 305-1759  
Fax (202) 514-9163

**Attorneys for the United States of America**