

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

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 In re: :
 Graceway Pharmaceuticals, LLC, *et al.*,¹ : Chapter 11
 Debtors. : Case No. 11-13036 (PJW)
 : (Jointly Administered)
 :
 : Hearing Date: March 27, 2013 at 9:30 a.m. (ET)
 : Objection Deadline: March 20, 2013 at 4:00 p.m. (ET)
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**MOTION OF LIQUIDATING TRUSTEE FOR AN ORDER
MODIFYING THE AUTOMATIC STAY WITH
RESPECT TO THE NYCOMED LITIGATION**

Kip Horton, the Liquidating Trustee (the “Liquidating Trustee”), on behalf of the Graceway Liquidating Trust² and the First Lien Agent, by and through his undersigned counsel, hereby submits this motion (the “Motion”) for entry of an order pursuant to sections 105(a) and 362(d) of title 11 of the United States Code (the “Bankruptcy Code”) modifying the automatic stay with respect to the Nycomed Litigation (as defined below). In support of this Motion, the Liquidating Trustee respectfully represents 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 pursuant to 28 U.S.C. § 157(b).

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 Capitalized terms used but not defined herein shall have the meanings set forth in the Plan.

2. Venue of these cases and this Motion in this district is proper under 28 U.S.C. §§ 1408 and 1409. The statutory bases for the relief requested herein are sections 105(a) and 362(d) of the Bankruptcy Code.

BACKGROUND

A. Chapter 11 Cases

3. On September 29, 2011 (the “**Petition Date**”), each of the Debtors (the “**Debtors**”) filed a petition with this Court under chapter 11 of the Bankruptcy Code (collectively, the “**Chapter 11 Cases**”).

4. 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**”), which authorized the sale of substantially all of the Debtors’ assets (the “**Sale**”) to Medicis Pharmaceutical Corporation (the “**Buyer**”) pursuant to the Asset Purchase Agreement (the “**APA**”). The Sale was consummated on December 2, 2011.

5. On February 28, 2012, the Debtors filed the *First Amended Joint Plan of Liquidation of Graceway Pharmaceuticals, LLC, et al.* (the “**Plan**”) [Docket No. 551]. The Court confirmed the Plan on April 20, 2012 (the “**Confirmation Order**”) [Docket No. 722].

6. The Effective Date of the Plan was May 4, 2012 (the “**Effective Date**”).

7. Pursuant to the Plan, the Debtors, on their own behalf and on behalf of holders of Allowed Claims (the “**Beneficiaries**”) and the Liquidating Trustee executed that certain Liquidating Trust Agreement, dated May 4, 2012, which, among other things, established a

Liquidating Trust for the purpose of liquidating the Debtors' Assets and distributing the proceeds thereof to the Beneficiaries.

8. Pursuant to the Plan, Kip Horton of RPA Advisors, LLC was appointed as Liquidating Trustee of the Liquidating Trust.

B. Nycomed Litigation

9. Prior to the Petition Date, the Debtors commenced litigation against Fougera Pharmaceuticals Inc. (f/k/a Nycomed US Inc.) ("**Fougera**"), Civil Action No. 10-937, which remains pending in the United States District Court for the District of New Jersey (the "**Nycomed Litigation**"). The Nycomed Litigation seeks compensation for violations of the Debtors' intellectual property rights that caused substantial damage to the Debtors before the Petition Date. The Debtors expended significant fees and expenses to prosecute the Nycomed Litigation.

10. Following the Petition Date, the Nycomed Litigation was stayed pursuant to the Joint Stipulation and Order to Stay All Deadlines and Proceedings in View of Bankruptcy Petition (Docket No. 279) (the "**Stay Order**"), entered on October 17, 2011 in the Nycomed Litigation. Pursuant to the Stay Order, the Nycomed Litigation was stayed by agreement of the parties to the litigation until (i) either party provides written notice of the closing or dismissal of the bankruptcy cases or (ii) the Bankruptcy Court orders otherwise. A copy of the Stay Order is attached hereto as Exhibit A.

11. Pursuant to section 2.1(h) of the APA, the Buyer acquired the Nycomed Litigation and agreed to pursue the litigation for the benefit of itself and the Debtors.

12. Pursuant to section 8.10 of the APA, any recovery obtained from the Nycomed Litigation (the "**Nycomed Litigation Proceeds**") is to be distributed according to a detailed

distribution framework. The Debtors are entitled to the first \$3 million of the Nycomed Litigation Proceeds. Then after Buyer's expenses are paid, the Debtors are entitled up to an additional \$6 million to reimburse the Debtors' costs incurred in the Nycomed Litigation. The balance of the Nycomed Litigation Proceeds are to be split 50/50 between the Buyer and the Debtors.

13. Section 7.15 of the Plan assigned the Nycomed Litigation Proceeds to and for the benefit of the First Lien Agent. The First Lien Agent has appointed the Liquidating Trustee as its attorney in fact in order to pursue the relief requested herein and a recovery of the Nycomed Litigation Proceeds.

14. Following the Effective Date, the Buyer has failed to take any action to lift the Stay Order and/or the automatic stay in order to continue to prosecute the litigation. No substantive pleadings have been filed on the Nycomed Litigation docket since entry of the Nycomed Stay Order and no party has moved this Court to proceed with the Nycomed Litigation. The non-Debtor parties to the Nycomed Litigation did not file a proof of claim on account of the claims and counterclaims asserted in the Nycomed Litigation and have not requested the allowance of an administrative expense on account thereof.

RELIEF REQUESTED

15. By this Motion, the Liquidating Trustee seeks entry of an order, pursuant to sections 105(a) and 362(d) of the Bankruptcy Code, modifying the automatic stay to permit the prosecution of the Nycomed Litigation.

BASIS FOR RELIEF

16. Under the APA, the Buyer purchased the Nycomed Litigation and the parties negotiated a distribution scheme for any recovery obtained, contemplating that the first \$3

million of recovery would be distributed to the Debtors before the Buyers were entitled to keep any of the recovery amount. Section 8.10 of the APA provides for a distribution of any recovery from the Nycomed Litigation pursuant to a specific and detailed structure, allocating such recoveries between the Buyer and the Debtors. Consistent with that structure, section 8.10 of the APA specifically requires the Buyer to keep the Debtors informed of the status of the litigation. Indeed, it is the view of the Liquidating Trustee that implicit in the distribution provisions of the APA is the covenant that the Buyer will continue to pursue the Nycomed Litigation not only for its own benefit, but also for the benefit of the First Lien Agent and Beneficiaries.

17. Since entry of the Confirmation Order, however, the Buyer has failed to move forward with the Nycomed Litigation in any material respect. In fact, counsel for the Liquidating Trustee has sought updates with respect to the status of the Nycomed Litigation from counsel for the Buyer, without meaningful response. Instead, to date, the Buyer has simply affirmed that no action has been taken to pursue the Nycomed Litigation, has not sought to lift the stay of the litigation, and to the Liquidating Trustee's knowledge has not taken any action to prosecute the litigation.

18. Accordingly, the Liquidating Trustee seeks entry of an order modifying the automatic stay to the extent necessary to allow the parties to proceed with the Nycomed Litigation.

ARGUMENT

I. MODIFICATION OF THE AUTOMATIC STAY

19. Section 362(d) of the Bankruptcy Code provides, in part, that:

the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying or conditioning such stay –

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest;

11 U.S.C. § 362(d).

20. A court may grant relief from the automatic stay for “cause.” See 11 U.S.C. § 362(d)(1). While the Bankruptcy Code does not define “cause,” it is a flexible concept, and whether sufficient cause exists to modify the stay is determined by the totality of the circumstances on a case-by-case basis. See Baldino v. Wilson (In re Wilson), 116 F.3d 87, 90 (3d Cir. 1997); In re The SCO Group, Inc., 395 B.R. 852, 856 (Bankr. D. Del. 2007).

21. In evaluating whether “cause” exists to modify the stay, “[a] court may consider the policies reflected in the bankruptcy code, and the interests of the debtor, other creditors and any other interested parties.” See In re Mu’min, 374 B.R. 149, 164 (Bankr. E.D. Pa. 2007) (citing In re Brown, 311 B.R. 409, 412–13 (E.D. Pa. 2004)); see also Izzarelli v. Rexene Prods. Co. (In re Rexene Prods. Co.), 141 B.R. 574, 576 (Bankr. D. Del. 1992). Courts will consider: (i) the hardship to the estate if relief is granted; (ii) the hardship to the movant if stay relief is not granted; and, where an underlying dispute is at issue, (iii) the underlying merits. See, e.g., In re Rexene Prods. Co., 141 B.R. at 576. Further, “cause” is not limited to lack of adequate protection. In re Cumberland Farms, 162 B.R. 62, 69 (Bankr. D. Mass. 1993) (“Grounds for lifting the automatic stay are not limited to the creditor’s lack of adequate protection.”); In re Madison Hotel Corp., 175 B.R. 94, 97 (Bankr. N.D. Ala. 1994) (“Although Congress singled

out lack of adequate protection as sufficient cause for modification of the automatic stay, it also made clear that cause under section 362(d)(1) was not limited to lack of adequate protection.”).

22. The Liquidating Trustee consents to modification of the stay and submits there is no party in interest that benefits from the continuation of the stay, save the potentially liable parties. Further, cause exists here to modify the stay. A balancing of the relative hardships and the underlying merits of the Nycomed Litigation favors a modification of the automatic stay to allow the Buyer to prosecute the Nycomed Litigation, as such modification is the only way for the First Lien Agent and Beneficiaries to realize any benefit from the sale of the Nycomed Litigation. Without modifying the automatic stay, the Nycomed Litigation will remain indefinitely stayed and the First Lien Agent and Debtors' creditors will lose any benefit from the deal the Debtors bargained for in selling an asset that the parties to the APA contemplated could result in proceeds to the First Lien Agent and Beneficiaries well in excess of \$9 million.

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CONCLUSION

WHEREFORE, the Liquidating Trustee respectfully requests the entry of an order, substantially in the form attached hereto as Exhibit B, granting the relief requested herein and such other further relief the Court deems just and proper.

Dated: February 27, 2013
Wilmington, Delaware

Respectfully Submitted,
DLA PIPER LLP (US)

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