

**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

Hearing Date: November 22, 2011 at 11:00 a.m. (ET)

Objection Deadline: November 14, 2011 at 4:00 p.m. (ET)

**DEBTORS' MOTION FOR ENTRY OF AN ORDER (A) AUTHORIZING
PROCEDURES BY WHICH THE DEBTORS MAY REJECT CERTAIN UNEXPIRED
LEASES AND EXECUTORY CONTRACTS AND (B) APPROVING THE FORM AND
MANNER OF REJECTION NOTICE**

The above-captioned debtors and debtors-in-possession (collectively, the "**Debtors**") hereby move this Court (the "**Motion**") for entry of an order, in substantially the form attached hereto as Exhibit A, (a) authorizing procedures by which the Debtors may reject certain unexpired leases and executory contracts following the close of the sale of substantially all of the Debtors' assets and (b) approving the form and manner of Rejection Notice (as defined below).

In support of this Motion, the Debtors respectfully state:

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 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.

Jurisdiction

1. This Court has jurisdiction over this Motion under 28 U.S.C. §§ 157 and 1334.

This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2). 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 365 of title 11 of the United States Code, 11 U.S.C. §§ 101-1532 (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**”).

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. As set forth in detail in the *Debtors’ Motion for Entry of (I) an Order Approving and Authorizing (A) Bidding Procedures in Connection with the Sale of Certain Assets of the Debtors, (B) Stalking Horse Bid Protections, (C) the Form and Manner of Notice of the Sale Hearing, and (d) Related Relief; and (II) an 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 (the “**Sale Motion**”) [Docket No. 12], the Debtors are seeking to sell substantially all of their assets through a sale pursuant to Section 363 of the Bankruptcy Code (the “**Sale**”).*

6. Prior to the Petition Date, the Debtors selected Galderma S.A. as the stalking horse bidder (the “**Stalking Horse Bidder**”). *See Declaration of Daniel Aronson in Support of the Debtors’ Motion for Entry of an Order Approving and Authorizing (A) Bidding Procedures in Connection with the Sale of Certain Assets of the Debtors’, (B) Stalking Horse Bid Protections, (C) the Form and Manner of Notice of the Sale Hearing, and (D) Other Related Relief*, attached as Exhibit C to the Sale Motion (the “**Sale Declaration**”), ¶ 15. Thereafter, the Debtors and the Stalking Horse Bidder entered into the Asset Purchase Agreement, dated September 27, 2011, among the Debtors, as sellers, and the Stalking Horse Bidder, as buyer (the “**APA**”).² *See id.* ¶ 16. Pursuant to the APA, (a) the Stalking Horse Bidder agreed to pay \$275,000,000 and to assume certain liabilities for certain acquired assets, subject to the outcome of the auction, if one is needed, and Court approval, and (b) the Debtors agreed to provide the Bid Protections (as defined in the Sale Motion).

7. The APA also contemplates that the Debtors will assume and assign to the Stalking Horse Bidder or the bidder that submits the winning bid at the auction (the “**Successful Purchaser**”) certain Contracts (as defined below) and Leases (as defined below). Section 7.9 of the APA provides, with certain restrictions, that prior to one business day before the Sale Hearing (as defined below), the Successful Purchaser may amend the schedules to the APA to alter the list of Contracts and Leases to be assumed and assigned to the Successful Purchaser. In

² A copy of the APA is attached to the Sale Motion as Exhibit D.

particular, the Successful Purchaser may add additional Contracts or Leases to the list of Contracts and Leases to be assumed and assigned to the Successful Purchaser following the auction, but may not remove Contracts or Leases from the list of Contracts and Leases to be assumed and assigned to the Successful Bidder.

8. The auction contemplated by the Sale Motion will be held on November 17, 2011. The Court has scheduled a hearing at which it will consider the approval of the Sale (the “**Sale Hearing**”) for November 22, 2011.

The Unexpired Leases and Executory Contracts

9. The Debtors are party to hundreds of unexpired leases (the “**Leases**”) and executory contracts (the “**Contracts**”) related to the operation of their business. As discussed above, certain of the Leases and Contracts (the “**Assumed Leases and Contracts**”) will be assumed and assigned to the Stalking Horse Bidder or Successful Purchaser in connection with the Sale. Additionally, certain other Leases and Contracts (the “**Retained Leases and Contracts**”) will be retained by the Debtors, as they are necessary to wind-down the Debtors’ estates and conclude these Chapter 11 Cases following the closing date of the Sale (the “**Closing Date**”).

10. All Leases and Contracts which are not either (a) Assumed Leases and Contracts or (b) Retained Leases and Contracts (the “**Leases and Contracts to Be Rejected**”) will not be necessary to the Debtors after the Closing Date.

Relief Requested

11. Because the list of Assumed Leases and Contracts has not yet been determined, the Debtors are unable at this time to provide a final list of the Leases and Contracts to Be Rejected. Yet, it would be harmful to the Debtors’ estates for the Debtors to incur unnecessary administrative expenses with respect to Leases and Contracts that will be unnecessary following

the Closing Date. Consequently, by this Motion, the Debtors seek entry of an order approving the following procedures by which the Debtors may reject the Leases and Contracts to Be Rejected with such rejection becoming effective as of the Closing Date:³

- a. The Debtors will serve a copy of this Motion on all known Lease and Contract counterparties to provide each counterparty with notice that its Lease or Contract may be rejected on the Closing Date;
- b. The Debtors propose that within three days following the conclusion of the Sale Hearing, the Debtors will file and serve on the counterparties to all Leases and Contracts to Be Rejected a rejection notice (the “**Rejection Notice**”), substantially in the form attached hereto as Exhibit B. The Rejection Notice will list (i) all known Leases and Contracts to Be Rejected and (ii) the Retained Leases and Contracts.
- c. The Debtors propose that rejection of the Leases and Contracts to Be Rejected be effective as of the Closing Date.

12. By this Motion, the Debtors also seek approval of the form and manner of Rejection Notice described herein.

Basis for Relief

13. Section 365(a) of the Bankruptcy Code provides that a debtor in possession, “subject to the court’s approval, may . . . reject any executory contract or unexpired lease of the debtor.” 11 U.S.C. § 365(a). See also Univ. Med. Ctr. v. Sullivan (In re Univ. Med. Ctr.), 973 F.2d 1065, 1075 (3d Cir. 1992). Under Section 365 of the Bankruptcy Code, a debtor may relieve itself of burdensome agreements where performance still remains. See Stewart Title Guar. Co. v. Old Republic Nat’l Ins. Co., 83 F.3d 735, 741 (5th Cir. 1996) (stating that Section 365 “allows a [debtor] to relieve a bankruptcy estate of burdensome agreements which have not been completely performed”) (citing Phoenix Exploration, Inc. v. Yaquinto (In re Murexco

³ The Debtors reserve the right to seek to reject other Contracts and Leases at a later date.

Petroleum, Inc.), 15 F.3d 60, 62 (5th Cir. 1994)); L.R.S.C. Co. v. Rickel Home Ctrs., Inc. (In re Rickel Home Ctrs., Inc.), 209 F.3d 291, 298 (3d Cir. 2000) (stating that “Section 365 enables the trustee to maximize the value of the debtor’s estate by assuming executory contracts and unexpired leases that benefit the estate and rejecting those that do not”).

14. The decision to assume or reject an executory contract is a matter within the “business judgment” of the debtor. See NLRB v. Bildisco & Bildisco (In re Bildisco), 682 F.2d 72, 79 (3d Cir. 1982) (“The usual test for rejection of an executory contract is simply whether rejection would benefit the estate, the ‘business judgment’ test.”). See also Computer Sales Int’l, Inc. v Fed. Mogul Global, Inc. (In re Fed. Mogul Global, Inc.), 293 B.R. 124, 126 (D. Del. 2003); In re HQ Global Holdings, Inc., 290 B.R. 507, 511 (Bankr. D. Del. 2003). The business judgment standard mandates that a court approve a debtor’s business decision unless the decision is the product of bad faith, whim or caprice. See In re Caribbean Petroleum Corp., 444 B.R. 263, 268 (Bankr. D. Del. 2010) (citing In re Trans World Airlines, Inc., 261 B.R. 103, 121 (Bankr. D. Del. 2001)); see also Fed. Mogul, 293 B.R. at 126 (“[A] court should approve a debtor’s decision to reject a contract unless that decision is the product of bad faith or a gross abuse of discretion.”); Summit Land Co. v. Allen (In re Summit Land Co.), 13 B.R. 310, 315 (Bankr. D. Utah 1981) (absent extraordinary circumstance, court approval of a debtor’s decision to assume or reject an executory contract “should be granted as a matter of course”).

15. Rejection of an executory contract is appropriate where rejection would benefit the estate. See Sharon Steel Corp. v. Nat’l Fuel Gas Distrib. Corp. (In re Sharon Steel Corp.), 872 F.2d 36, 39-40 (3d Cir. 1989); In re Exide Techs., 340 B.R. 222, 239 (Bankr. D. Del. 2006). The standard for rejection is satisfied when a debtor has made a business determination that rejection will benefit the estate. See Commercial Fin. Ltd. v. Haw. Dimensions, Inc. (In re Haw.

Dimensions, Inc.), 47 B.R. 425, 427 (D. Haw. 1985) (“Under the business judgment test, a court should approve a debtor’s proposed rejection if such rejection will benefit the estate.”). If a debtor has reasonably exercised its business judgment, a court should approve the assumption or rejection of an executory contract. See, e.g., Fed. Mogul, 293 B.R. at 126.

16. The Leases and Contracts to Be Rejected all constitute agreements that the Debtors have determined will not benefit the Debtors’ estates or their creditors following the Closing Date. Because the Debtors have proposed to sell substantially all of their assets, the Leases and Contracts to Be Rejected will no longer be necessary to the Debtors as they wind-down their estates and conclude these Chapter 11 Cases. It would be detrimental to the Debtors and their creditors if the Debtors continued to incur unnecessary administrative expenses with respect to Leases and Contracts that were no longer necessary once the Debtors’ assets had been sold and they no longer had any meaningful ongoing business operations.

17. Accordingly, the Debtors have determined, in the exercise of their sound business judgment, that the Leases and Contracts to Be Rejected will be burdensome to their estates and that it is in the best interests the Debtors, their estates and their creditors to reject the Leases and Contracts to Be Rejected, effective as of the Closing Date.

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 Committee; (g) the creditors listed on the

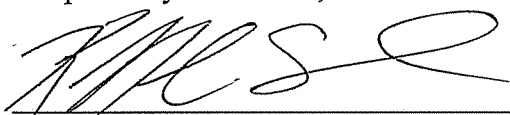
Debtors' consolidated list of 30 largest unsecured creditors, as filed with the Debtors' chapter 11 petitions; (h) the Food and Drug Administration; (i) the Internal Revenue Service; (j) all known Contract and Lease counterparties; and (k) all parties requesting notice pursuant to Bankruptcy Rule 2002. 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) authorizing procedures by which the Debtors may reject all Leases and Contracts that are not Assumed Leases and Contract or Retained Leases and Contracts, effective as of the Closing Date; (b) approving the form and manner of Rejection Notice; and (c) granting such other and further relief as this Court deems appropriate.

Dated: October 31, 2011
Wilmington, Delaware

Respectfully Submitted,



Michael R. Nestor (No. 3526)
Kara Hammond Coyle (No. 4410)
YOUNG CONAWAY STARGATT & TAYLOR, LLP
1000 West Street, 17th Floor
Wilmington, DE 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