

**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)

**UNITED STATES' OBJECTION TO ASSUMPTION AND ASSIGNMENT OF  
MEDICARE COVERAGE GAP DISCOUNT PROGRAM AGREEMENT**

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, objects to the assumption and assignment of the Medicare Coverage Gap Discount Program Agreement (MCGDPA) for the cure amount listed in the Second Amended Notice of (I) Cure Amount with Respect to Executory Contracts to be Assumed and Assigned and (II) Potential Assumption and Assignment of Executory Contracts (Docket No. 231) (Second Amended Contract Notice). In support of its objection, the United States asserts as follows:

1. On September 29, 2011, Graceway Pharmaceuticals, LLC (Graceway) and its subsidiaries and affiliated companies (collectively "Debtors") filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code.
2. On September 29, 2011, the Debtors filed a Motion of 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 (Docket No. 12) (Sale Motion), in which the Debtors seek authority to assume and assign executory contracts and unexpired leases to the successful bidder of the auction to be held on November 17, 2011.

3. On November 9, 2011, the Debtors filed the Second Amended Contract Notice. Exhibit 1 to the Second Amended Contract Notice lists the MCGDPA as a contract that may be assumed and lists a cure amount of \$24,895.32 for the MCGDPA.

4. On August 13, 2010, the Secretary and Graceway entered into the MCGDPA. Exhibit 1. Under the MCGDPA, Graceway agreed to reimburse certain discounts provided to Medicare Part D beneficiaries under certain conditions by a Medicare Part D sponsor within thirty-eight days (38) days of being invoiced. The MCGDPA Agreement is a prerequisite to coverage of Graceway's covered drugs under the Medicare Part D program. 42 U.S.C. § 1394w-153.

5. On September 1, 2011, Graceway was sent an invoice totaling \$9,428.92 for discounts provided by Medicare Part D sponsors for qualifying prescription drug events (PDEs) between April 1, 2011 and June 30, 2011 (Second Quarter Invoice). Exhibit 2. The last day for payment of the Second Quarter Invoice was October 9, 2011. Declaration of Cynthia Tudor, dated November 15, 2011, (Exhibit A) at ¶4. As of November 15, 2011, the Debtors have yet to pay the Second Quarter Invoice. Exhibit A at ¶5.

6. On November 1, 2011, Graceway was sent an invoice totaling \$15,466.40 for discounts provided by Medicare Part D sponsors for qualifying PDEs between July 1, 2011, and September

30, 2011 (Third Quarter Invoice). Exhibit 3. The last day for payment of the Third Quarter Invoice is December 9, 2011. Exhibit A at ¶7. As of November 15, 2011, the Debtors have yet to pay the Third Quarter Invoice. Exhibit A at ¶8.

7. Besides the discounts for PDEs included in the Third Quarter Invoice, a number of additional discounts provided by Medicare Part D sponsors for qualifying PDEs that occurred in the third quarter (between July 1, 2011, and September 30, 2011) have yet to be invoiced (Unbilled Third Quarter Obligations). Exhibit A at ¶9. According to CMS's records, the total known amount due from Graceway for Unbilled Third Quarter Obligations is \$222,536.15. Exhibit A at ¶9. This amount arises from "low volume" PDEs, which have not yet been invoiced to protect the privacy of the Medicare beneficiaries.

8. A number of additional discounts provided by Medicare Part D sponsors for qualifying PDEs involving pharmaceuticals subject to the MCGDPA have occurred since October 1, 2011 (Unbilled Fourth Quarter Obligations). Exhibit A at ¶10. As of November 15, 2011, CMS is unable to determine the amount of the Unbilled Fourth Quarter Obligations. Exhibit A at ¶10.

### **ARGUMENT**

9. The Secretary objects to the assumption and assignment of the MCGDPA without cure and adequate assurance of future performance. Section 365 of the Bankruptcy Code conditions the assumption and assignment of an executory contract upon the cure of any defaults under the contract and adequate assurance of future performance. 11 U.S.C. §§ 365(b)(1)(A), (b)(1)(C), & (f). When a contract is assumed, the debtor assumes the contract's benefits along with its burdens and obligations. *In re Fleming Cos.*, 499 F.3d 300, 308 (3d Cir. 2007).

10. Graceway has yet to pay the Second Quarter Invoice and the Third Quarter Invoice,

which total \$24,895.32. While Graceway has until December 9, 2011 to pay the Third Quarter Invoice, Graceway is past due on the Second Quarter Invoice, which was due on October 9, 2011.

11. Besides the Second Quarter Invoice and Third Quarter Invoice, Graceway will owe \$222,536.15 for the Unbilled Third Quarter Obligations. Additionally, CMS expects that Graceway will owe an amount yet to be determined for discounts provided by Medicare Part D Sponsors for qualifying PDEs that occurred on or after October 1, 2011 (Unbilled Fourth Quarter Obligations).

12. The Secretary objects to the assumption and assignment of the MCGDPA to ensure (1) payment of the Second Quarter Invoice and Third Quarter invoice, (2) that CMS is not precluded from seeking payment of the Unbilled Third Quarter Obligations and Unbilled Fourth Quarter Obligations when due; and (3) that any potential buyer or bidder is aware of Graceway's outstanding obligations under the MCGDPA.

13. If the MCGDPA is assumed and assigned to the buyer, the Secretary is entitled to the cure of \$247,431.47, the total of the Second Quarter Invoice, Third Quarter Invoice, and the Unbilled Third Quarter Obligations. Also, the Secretary is entitled to adequate assurance of the payment of the Unbilled Fourth Quarter Obligations.

### **CONCLUSION**

For the foregoing reasons, the United States requests that this court set \$247,431.47 as the cure amount for the MCGDPA and require adequate assurance of the payment of the Unbilled Fourth Quarter Obligations if the MCGDPA is assumed and assigned.

Dated: November 16, 2011

Respectfully Submitted,

TONY WEST  
Assistant Attorney General

CHARLES M. OBERLY, III  
Acting 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