

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

In re:

GRACEWAY PHARMACEUTICALS, LLC,  
*et al.*,<sup>1</sup>

Debtors.

Chapter 11

Case No. 11-13036 (PJW)

Jointly Administered

Hearing Date: December 28, 2011 at 11:30 a.m. (ET)

Objection Deadline: December 21, 2011 at 4:00 p.m. (ET)

**DEBTORS' MOTION FOR ENTRY OF AN ORDER AUTHORIZING  
THE DEBTORS TO REJECT AN EXECUTORY CONTRACT  
BETWEEN THE DEBTORS AND CAPITAL RETURNS, INC.**

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, authorizing the Debtors to reject an executory contract with Capital Returns, Inc., effective as of December 31, 2011. In support of this Motion, the Debtors respectfully state as follows:

**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.

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<sup>1</sup> 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.

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**”) [Docket No. 90].

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. 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], which authorized the sale of substantially all of the Debtors’ assets to Medicis Pharmaceutical Corporation pursuant to Section 363 of the Bankruptcy Code (the “**Sale**”). The Sale was consummated on December 2, 2011 (the “**Closing Date**”).

6. On December 2, 2011, the Debtors filed the *Debtors’ Motion for Entry of an 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* [Docket No. 333] (the “**Executory Contracts Rejection Motion**”), which among other things, seeks an entry of an order authorizing the Debtors to reject certain executory contracts that primarily relate to the Debtors’ supply and distribution chain for the products sold by the Debtors prior to the Closing Date. Schedule 2 to Exhibit A of the Executory Contracts Rejection Motion sets forth a list of contracts the Debtors seek to reject, effective as of December 31, 2011. An executory contract between the Debtors and Capital Returns, Inc. (the “**Capital Returns, Inc. Contract**”), described in greater detail below, was erroneously not included on Schedule 2 to Exhibit A of the Executory Contracts Rejection Motion. As a result, the Debtors have filed this Motion seeking rejection of the Capital Returns, Inc. Contract on substantially the same terms as the other executory contracts and unexpired leases to be rejected pursuant to the Executory Contracts Rejection Motion.

#### **The Capital Returns, Inc. Contract**

7. The Capital Returns, Inc. Contract is a services agreement between the Debtors and Capital Returns, Inc. relating to, among other thing, the destruction of certain of the Debtors’ unusable products. Listed as entry seventy-seven (77) on Exhibit 1 of the *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. 148], the Capital Returns, Inc. Contract has a cure amount of \$5,626.77 and a contract identification number of forty-three (43). The Debtors have determined in their business judgment that the Capital Returns, Inc. Contract is no longer necessary to the Debtors’ business operations and does not benefit the Debtors’ estates or their creditors because the continued benefits under the Capital Returns, Inc. Contract does not outweigh the costs of maintaining the Capital Returns, Inc.

Contract. In particular, because the Debtors will no longer be required to continue processing returns and destroying the product following the rejection of the executory contracts requested in the Executory Contracts Rejection Motion, the services provided under the Capital Returns, Inc. Contract are no longer required. As a result, the Debtors request authority to reject the Capital Returns, Inc. Contract, effective as of December 31, 2011. This is the same effective date of rejection as the contracts the Debtors seek authority to reject pursuant to the Executory Contracts Rejection Motion.

### **Relief Requested**

8. By this Motion, the Debtors seek entry of an order authorizing the Debtors to reject the Capital Returns, Inc. Contract, effective as of December 31, 2011.

### **Basis for Relief**

#### **I. Rejection of the Capital Returns, Inc. Contract Reflects the Debtors' Sound Business Judgment**

9. 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 Muerexco Petroleum, Inc.), 15 F.3d 60, 62 (5th Cir. 1994)).

10. 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 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 Trans World Airlines, Inc., 261 B.R. 103, 121 (Bankr. D. Del. 2001); see also 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”).

11. 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). 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’s business judgment has been reasonably exercised, a court should approve the assumption or rejection of an executory contract. See, e.g., Fed. Mogul, 293 B.R. at 126.

12. As set forth above, the Debtors have determined that the Capital Returns, Inc. Contract will not benefit the Debtors’ estates or their creditors after December 31, 2011. The Capital Returns, Inc. Contract will no longer be necessary to the Debtors as they wind-down their estates and conclude these Chapter 11 Cases, and it would be detrimental to the Debtors and

their creditors if the Debtors continued to incur unnecessary administrative expenses with respect to the Capital Returns, Inc. Contract that are no longer necessary.

13. Accordingly, the Debtors have determined, after reviewing their operations and in the exercise of their sound business judgment, that the Capital Returns, Inc. Contract is burdensome to their estates and that it is in the best interests of the Debtors, their estates and their creditors to reject the Capital Returns, Inc. Contract.

### **Notice**

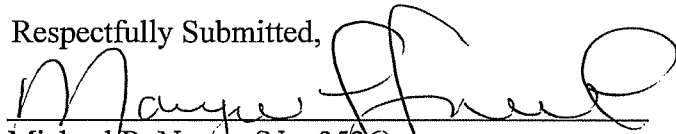
14. The Debtors have provided notice of this Motion to: (a) the United States Trustee for the District of Delaware; (b) financing counsel to the administrative agent for the lenders under the Debtors' prepetition first lien credit facility; (c) special restructuring and bankruptcy counsel to the administrative 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) the counterparties to the Capital Returns, Inc. Contract; and (k) those 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.

15. A copy of the Motion is available on the Court's website: [www.deb.uscourts.gov](http://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](http://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 the Debtors to reject the Capital Returns Contract, effective as of December 31, 2011; and (b) granting such other and further relief as this Court deems appropriate.

Dated: December 13, 2011  
Wilmington, Delaware

Respectfully Submitted,



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