

**UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MINNESOTA**

In re:

Gander Mountain Company,

Case No.: 17-30673

Chapter 11 Case

Debtor.

In re:

Overton's, Inc.,

Case No.: 17-30675

Chapter 11 Case

Debtor.

**NOTICE OF HEARING AND MOTION FOR EXPEDITED RELIEF AND FOR ORDER
AUTHORIZING THE DEBTORS TO PAY THE PREPETITION AMOUNTS
RELATING TO CERTAIN CRITICAL VENDORS**

TO: The Office of the United States Trustee and Other Parties in Interest as Specified in Local Rule 9013.

1. The above-captioned debtors and debtors in possession (collectively, the "Debtors") hereby move this Court for the relief requested below and give notice of hearing.

2. The Court will hold a hearing on this motion at 1:30 p.m. on March 14, 2017, in Courtroom No. 8 West, United States Courthouse, 300 South Fourth Street, Minneapolis, Minnesota.

3. Local Rule 9006-1(b) provides deadlines for responses to this motion. However, given the expedited nature of the relief sought, the Debtors do not object to written responses being served and filed two (2) hours before the hearing. **UNLESS A RESPONSE OPPOSING THE MOTION IS TIMELY FILED, THE COURT MAY GRANT THE MOTION WITHOUT A HEARING.**

4. This Court has jurisdiction over this motion pursuant to 28 U.S.C. §§ 157 and 1334, Rule 5005 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”) and Local Rules 1070-1 and 1073-1. This is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409. The petitions commencing these chapter 11 cases were filed on March 10, 2017 (the “Filing Date”). The cases are currently pending in this Court.

5. This motion arises under sections 105(a), 363(b), 363(c), 364, 503(b), 507(a)(1), 541(d), 1107 and 1108 of title 11 of the United States Code, 11 U.S.C. §§ 101-1532 (the “Bankruptcy Code”). This motion is filed under Bankruptcy Rules 6004 and 9014 and Local Rules 9013-1 through 9013-3. Expedited relief is requested pursuant to Bankruptcy Rule 9006(c) and Local Rule 9006-1(e). Notice of the hearing on this motion is provided pursuant to Bankruptcy Rule 2002(a) and Local Rules 9013-3 and 2002-(1)(b). To avoid immediate and irreparable harm, the Debtors request an order authorizing them, in their sole discretion and in exercise of their reasonable business judgment, to pay the prepetition amounts relating to certain critical vendors in the ordinary course of business.

BACKGROUND

6. On the Filing Date, the Debtors filed voluntary petitions for relief pursuant to chapter 11 of Title 11 of the United States Code (the “Bankruptcy Code”). The Debtors continue to operate their businesses as debtors in possession pursuant to section 1107(a) and 1108 of the Bankruptcy Code.

7. Additional general background information about the Debtors and the events leading up to the Filing Date is set forth in the Declaration of Timothy G. Becker in Support of Chapter 11 Petitions and Initial Motions. The additional facts relevant to this motion set forth below are verified by Timothy G. Becker, as evidenced by the attached verification.

BACKGROUND RELATED TO RELIEF REQUESTED

8. As described in the Declaration of Timothy G. Becker in Support of the Petitions and Initial Motions, the Debtors believe that many of their vendors will continue to do business with the Debtors after the commencement of the Chapter 11 Cases because doing so makes good business sense for them. The Debtors anticipate, however, that certain vendors that supply goods and/or services that are critical to the Debtors' businesses will: (a) refuse to deliver goods and services without payment of their pre-petition claims; (b) refuse to deliver goods and services on reasonable credit terms absent payment of pre-petition claims, thereby requiring the Debtors to use greater liquidity and increase their operating costs; or (c) because of their own financial circumstances, suffer significant financial hardship, such that the Debtors' non-payment of their prepetition claims could have a significant negative effect on a critical vendor's business and therefore its ability to supply the Debtors with necessary goods and services.

9. To identify which vendors are critical to the Debtors' ongoing business operations, the Debtors and their advisors spent a significant amount of time reviewing invoice data, accounts payable, prepetition vendor lists, legal and regulatory compliance requirements, and go-forward business and operating plans during the pendency of the cases. As part of their analysis and review, the Debtors considered the following factors:

- Whether a particular vendor is a sole source vendor;
- Whether there are alternative vendors who could provide similar goods or services on better terms and whether any such potential alternate vendor could supply the required goods or service within the time constraints applicable to the Debtors' cases;
- Whether the Debtors receive advantageous pricing or other terms from a vendor such that a postpetition replacement would result in significantly higher costs;
- The state of the Debtors' existing inventory and whether it was sufficient to provide time necessary to find another vendor, taking into account quality and

quantity requirements, geographic constraints, customizations or other specifications that may prevent the Debtors from obtaining the necessary goods from alternative sources within a reasonable timeframe;

- whether a vendor's prepetition claim is entitled to administrative expense status under Bankruptcy Code Section 503(b)(9); and
- whether a vendor has possession of goods, products, or other deliverables as to which they are able to claim a possessory lien and thus, decline to deliver such items to the Debtors without payment.

10. Upon the conclusion of that process, out of a total of approximately 1760 vendors, holding an aggregate of approximately \$115 million in prepetition claims, the Debtors have identified approximately 15 vendors who are in fact critical (the "Critical Vendors") and who hold prepetition claims of approximately \$1.5 million (the "Critical Vendor Claims").

11. Among the types of Critical Vendors identified by the Debtors are certain vendors of products that enhance the Debtors' businesses and enhance sales. The Debtors believe that if they fail to pay the Critical Vendor Claims owed to certain of their vendors on a timely basis, their existing relationships with such vendors will be negatively affected resulting in value loss to the detriment of all stakeholders. The Debtors are mindful of their fiduciary obligations to seek to preserve and maximize the value of their estates. The preservation of key business relationships is among the Debtors' primary goals as they transition into chapter 11.

12. More specifically, the Critical Vendors generally (but not exclusively) can be categorized as (i) IT-related services and data centers, (ii) retail website services including an internet search engine optimization facilitator, and vendors providing content management, and firewall application services, and (iii) vendors who provide services to support the Debtors' retail operations. While the Debtors hope and expect to assure a continuing postpetition supply of goods and services by consensual negotiation with the vendors in the categories above, the

Debtors also recognize that their fiduciary duties bind them consider and plan for vendors that may refuse to provide future goods or services unless their prepetition claims are paid.

13. As discussed below, the Critical Vendors are essential to the Debtors' businesses and the lack of any of their particular services, even for a short duration, could disrupt the Debtors' operations and cause irreparable harm to the Debtors' businesses, goodwill and marketshare. This irreparable harm to the Debtors and to the recovery of all of the Debtors' creditors will far outweigh the cost of payment of the prepetition claims of the Critical Vendors.

14. What follows is a summary of the two categories of critical vendors and why they are critical:

Vendors providing services related to the Debtors' IT and data center: the Debtors rely on several vendors to provide numerous interconnected IT and data hosting services, which services include the generation of nightly reports on sales and inventory, purchase orders and invoices to and from vendors, and financial processing of the same, maintenance of security firewalls for the Debtors' computer networks including both internal networks and external facing websites, co-located data centers hosting all of the Debtors' financial information, and the like. Any interruption in these services will severely disrupt the Debtors' operations and has the potential to cause irreparable harm to the Debtors' business, goodwill and marketshare.

Vendors providing services related to the Debtors' retail websites: with regard to the vendor providing search engine optimization services, the Debtors rely on this vendor to drive traffic to their websites, and continuing this traffic is essential to the Debtors' business. Likewise, other vendors provide content management and web application firewall services for the retail websites. Any disruption in these services has the potential to inflict a serious blow to the e-commerce portion of the Debtors' business.

Vendors supporting the retail operations: the Debtors rely on several vendors to provide services related to operating the retail stores, including specialized security services relating to the storage and transport of firearms and inspection services to ensure store compliance, and other services that enable the Debtors to continue to provide services to retail customers.

RELIEF REQUESTED

15. By this Motion, and pursuant to sections 105(a), 363(b) and 503(b)(9) of the Bankruptcy Code, the Debtors seek entry of an order substantially in the form filed herewith: (a)

granting them authority in their sole discretion, but not requiring them, to pay all or a part of their prepetition obligations to certain Critical Vendors on the terms set forth below, and (b) granting them authority in their sole discretion, but not requiring them, to pay claims of Critical Vendors for the value of goods received by the Debtors in the ordinary course of their business during the 20-day period immediately prior to the Filing Date, which are likely entitled to administrative expense priority under section 503(b)(9) of the Bankruptcy Code. Specifically, the Debtors seek authority, (a) upon entry of the Order, to pay up to an aggregate amount of \$1.5 million (the “Claims Cap”) on account of such Critical Vendor Claims on account of such Critical Vendor Claims.¹

16. The Claims Cap represents the Debtors’ best estimate as to how much must be paid to such creditors to continue the supply of critical goods and services. The Debtors hope to pay far less than the requested amount.

17. To minimize the amounts of the payments required, the Debtors request authority to identify Critical Vendors in the ordinary course of their businesses. Identifying the Critical Vendors now would likely cause all such vendors to demand payment in full. The Debtors propose that they may, in their sole discretion, condition payment of all such Critical Vendor Claims on the agreement of the individual Critical Vendor to continue supplying goods and/or services to the Debtors on terms that are consistent with the historical trade terms between the parties (the “Customary Trade Terms”). However, the Debtors seek authority to negotiate different trade terms with any Critical Vendor, as a condition to payment of any Critical Vendor Claim, to the extent the Debtors determine that such trade terms are (i) necessary to procure essential goods and/or services or (ii) otherwise in the best interests of the Debtors’ estates.

¹ Certain parties may receive payment on account of their prepetition claims pursuant to other motions that have been filed or may be filed by the Debtors. To the extent a party receives payment on account of its prepetition claim pursuant to an order approving any such motion, this Motion shall not apply to such prepetition claim.

18. The Debtors propose that a letter be sent to the Critical Vendors (in the form attached hereto as Exhibit A), along with a copy of the Order, that sets forth the following information and terms:

- (a) The amount of such Critical Vendor's estimated prepetition claim, after accounting for any setoffs, other credits and discounts thereto, shall be as mutually determined in good faith by the Critical Vendor and the Debtors (but such amount shall be used only for purposes of the Order and shall not be deemed a claim allowed by the Court, and the rights of all parties in interest to object to such claim shall be fully preserved until further order of the Court);
- (b) The Critical Vendor's agreement to be bound by the Customary Trade Terms (including, but not limited to, credit limits, pricing, cash discounts, timing of payments, allowances, rebates, coupon reconciliation, normal product mix and availability and other applicable terms and programs), which were favorable to the Debtors and in effect between such Critical Vendor and the Debtors on a historical basis for the period within one-hundred twenty (120) days of the Filing Date, or such other trade terms as mutually agreed to by the Debtors and such Critical Vendor;
- (c) The Critical Vendor's agreement to provide goods and/or services to the Debtors based upon Customary Trade Terms, and the Debtors' agreement to pay the Critical Vendor in accordance with such terms;
- (d) The Critical Vendor's agreement not to file or otherwise assert against any of the Debtors, their estates or any of their respective assets or property (real or personal) any lien (a "Lien") (regardless of the statute or other legal authority upon which such Lien is asserted) related in any way to any remaining prepetition amounts allegedly owed to the Critical Vendor by the Debtors arising from goods and/or services provided to the Debtors prior to the Filing Date, and that, to the extent the Critical Vendor has previously obtained such a Lien, the Critical Vendor shall immediately take all necessary actions to release such Lien;
- (e) The Critical Vendor's acknowledgment that it has reviewed the terms and provisions of the Order, and consents to be bound thereby;
- (f) The Critical Vendor's agreement that it will not separately assert or otherwise seek payment of any reclamation claims; and
- (g) The Critical Vendor's agreement that it has received payment of a prepetition claim, but if it subsequently refuses to supply goods and/or services to the Debtors on Customary Trade Terms, any payments received by the Critical Vendor on account of its Critical Vendor Claim will be deemed to have been in payment of then outstanding postpetition obligations owed to such Critical Vendor, and that such Critical Vendor shall immediately repay to the Debtors any payments received on account of its Critical Vendor Claim to the extent the aggregate amount of such payments exceed the postpetition obligations then outstanding, without the right of setoff or reclamation.

19. Such letter, once agreed to and accepted by a Critical Vendor, shall be the agreement between the parties that governs their postpetition trade relationship (the “Trade Agreement”). The Debtors hereby seek authority to enter into Trade Agreements with the Critical Vendors to the extent that the Debtors determine, in their discretion, that such an agreement is necessary to their postpetition operations. In the event the Debtors do not or are unable to enter into a Trade Agreement with any Critical Vendor, however, the Debtors nevertheless seek authority to pay such vendor’s Critical Vendor Claim if the Debtors determine, in their sole discretion, that such payment is necessary to prevent irreparable harm to the Debtors’ business operations.

20. For those Critical Vendors who have agreed to provide goods and/or services to the Debtors on terms different from their Customary Trade Terms, the Debtors reserve the right to seek written acknowledgment of such terms on a case-by-case basis.

21. If a Critical Vendor refuses to supply goods and/or services to the Debtors on Customary Trade Terms following payment of its Critical Vendor Claim, or fails to comply with any Trade Agreement it entered into with the Debtors, the Debtors hereby seek authority to, in their discretion and without further order of the Court, (i) declare that any Trade Agreement between the Debtors and such Critical Vendor is terminated (if applicable), and (ii) declare that any payments made to such Critical Vendor on account of its Critical Vendor Claim, whether pursuant to a Trade Agreement or otherwise, constitute a voidable postpetition transfer pursuant to section 549(a) of the Bankruptcy Code that the Debtors may recover from such Critical Vendor in cash or goods.

22. In addition, in the event the Debtors exercise either of the rights set forth in the preceding paragraph, the Debtors request that the Critical Vendor against which the Debtors

exercise such rights be required to immediately return to the Debtors any payments made on account of its Critical Vendor Claim to the extent such payments exceed the postpetition amounts then owed to such Critical Vendor, without giving effect to any rights of setoff or reclamation. In essence, the Debtors seek to return the parties to their respective positions immediately prior to entry of the Order in the event a Trade Agreement is terminated or a Critical Vendor refuses to supply goods and/or services to the Debtors on Customary Trade Terms following payment of its Critical Vendor Claim. Nothing in this Motion should be deemed to constitute an assumption or rejection of any executory contract or agreement between the Debtors and any Critical Vendor, or to require the Debtors to make any of the payments authorized herein.

23. Nothing in this Motion shall be construed as prejudicing the Debtors' right to dispute or contest the amount or validity of any claims asserted against the Debtors by any of the Critical Vendors.

REQUEST FOR EXPEDITED RELIEF

24. The Debtors request expedited relief on this Motion. The Debtors believe that without immediate relief regarding the requests made herein, they could have breakdowns in their supply chain and the inability to obtain critically needed inventory in the early days of the chapter 11 cases. Accordingly, the Debtors request that the Court authorize the use of \$1.5 million to pay Critical Vendor Claims.

25. Pursuant to Local Rule 9013-2(a), this Motion is verified and is accompanied by a Memorandum, a Proposed Order and proof of service.

26. Pursuant to Local Rule 9013-2, Debtors give notice that they may, if necessary call one or more of the following to testify regarding the facts set forth in this Motion: (a) Timothy G. Becker, the Executive Vice President of Lighthouse Management Group, Inc., the

Chief Restructuring Officer of the Debtors, whose business address is 900 Long Lake Road, Suite 180, New Brighton, Minnesota, 55112; (b) James A. Bartholomew, the President of Lighthouse Management Group, Inc., the Chief Restructuring Officer of the Debtors, whose business address is 900 Long Lake Road, Suite 180, New Brighton, Minnesota, 55112; or (c) Eric R. Jacobsen, the Chief Administrative Officer and Chief Legal Officer for Gander Mountain Company and the Director and Secretary of Overton's, Inc., whose business address is 180 East Fifth Street, Suite 1300, St. Paul, Minnesota 55101.

WHEREFORE, the Debtors move the Court for an order:

- a. granting the Debtors' request for an expedited hearing;
- b. authorizing, but not directing, the Debtors to pay, in their sole discretion and reasonable business judgment, the prepetition claims of the Critical Vendors up to an aggregate amount of \$1.5 million;
- c. authorizing and directing the Debtors' financial institutions to honor and process checks drawn on funds transferred to pay the prepetition obligations owing on account of the Critical Vendors; and
- d. granting such other relief as the Court deems just and equitable.

Dated: March 10, 2017

/e/ Cynthia A. Moyer

Clinton E. Cutler (#0158094)

Cynthia A. Moyer (#0211229)

Ryan T. Murphy (#0311972)

James C. Brand (#387362)

Sarah M. Olson (#0390238)

Steven R. Kinsella (#0392289)

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PROPOSED ATTORNEYS FOR DEBTORS

VERIFICATION

I, Timothy G. Becker, the Executive Vice President of Lighthouse Management Group, Inc., the Chief Restructuring Officer of the Debtors, declare under penalty of perjury that the facts set forth in the preceding motion are true and correct according to the best of my knowledge, information, and belief.

Dated: March 10, 2017

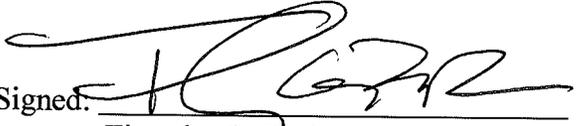
Signed: 
Timothy G. Becker

Exhibit A

(Trade Letter)

EXHIBIT A

_____, 2017

TO: **[Critical Vendor/Service Provider]**
[Name]
[Address]

Dear Valued Supplier/Service Provider:

As you are aware, Gander Mountain Company and Overton's, Inc. (collectively, the "Company") filed voluntary petitions (the "Bankruptcy Cases") for relief under chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware ("Bankruptcy Court") on _____, 2017 (the "Filing Date"). On the Filing Date, in recognition of the importance of its relationship with such vendors and suppliers and its desire that the Bankruptcy Cases have as little effect on such parties as possible, the Company requested the Bankruptcy Court's approval to pay the prepetition claims of certain critical vendors and suppliers, and/or to otherwise allow such critical vendors and suppliers to apply postpetition payments made by the Company (for postpetition deliveries of goods and/or services) against the oldest outstanding prepetition invoices of such critical vendors and suppliers. On [•], 2017, the Bankruptcy Court entered an order (the "Order") authorizing the Company, under certain conditions, to pay the prepetition claims, in accordance with the terms of the Order, of certain trade creditors that agree to the terms set forth below and agree to be bound by the terms of the Order. A copy of the Order is enclosed for your reference.

Under the Order, in order to receive payment of its prepetition claim, each selected trade creditor must agree to continue to supply goods and/or services to the Company based on "Customary Trade Terms." In the Order, Customary Trade Terms are defined as the normal and customary trade terms, practices and programs (including, but not limited to, credit limits, pricing, cash discounts, timing of payments, allowances, rebates, normal product mix and availability and other applicable terms and programs), which were most favorable to the Company and in effect between such trade creditor and the Company on a historical basis for the period within one-hundred twenty (120) days of the Filing Date, or such other trade terms as mutually agreed to by the Company and such trade creditor.

For purposes of administering this trade program, as authorized by the Bankruptcy Court and in accordance with the terms of the Order, the Company and **[Name of Trade Vendor]** agree as follows (the "Agreement"):

- (a) The estimated balance of the prepetition trade claim (net of any setoffs, credits or discounts) (the "Trade Claim") that the Company will pay to **[Name of Trade Vendor]** is \$_____. Your Trade Claim does not constitute a claim allowed by the Bankruptcy Court in the Bankruptcy Cases, and signing this Trade Agreement does not excuse you from any requirement of filing a proof of claim in the Bankruptcy Cases.

- (b) The Company shall pay \$ ___ towards the Trade Claim (the "Payment").
- (c) **[Name of Trade Vendor]** agrees to supply goods/services to the Company in accordance with the Customary Trade Terms, and the Company agrees to pay **[Name of Trade Vendor]** in accordance with such terms, provided that following the Payment, **[Name of Trade Vendor]** will supply postpetition goods/services to the Company on net thirty (30) day terms.

For purposes of this paragraph (c), the term "net thirty (30) day terms," as the case may be, shall refer to the number of days from the date that the particular goods/services are received by the Company.

- (d) The open trade balance or credit line that **[Name of Trade Vendor]** will extend to the Company for shipment of postpetition goods/services is \$_____.
- (e) In consideration for the Payment, you agree not to file or otherwise assert against any or all of the Debtors, their estates or any other person or entity or any of their respective assets or property (real or personal) any lien (a "Lien") or claim for reclamation ("Reclamation Claim") or claim under Bankruptcy Code section 503(b)(9) (a "503(b)(9) Claim"), regardless of the statute or other legal authority upon which such Lien or Reclamation Claim may be asserted, related in any way to any remaining prepetition amounts allegedly owed to you by the Debtors arising from agreements or other arrangements entered into prior to the Filing Date and, to the extent you have already obtained or otherwise asserted such a Lien, Reclamation Claim or 503(b)(9) Claim, you shall take (at your own expense) whatever actions are necessary to remove such Lien or withdraw such Reclamation Claim or 503(b)(9) Claim unless your participation in the trade payment program authorized by the Order (the "Trade Payment Program") is terminated.

Your execution of this Agreement and return of the same to the Company constitutes an agreement by **[Name of Trade Vendor]** and the Company:

1. to be bound by the Customary Trade Terms (as modified herein) and, subject to the reservations set forth in the Order, to the amount of the Trade Claim set forth above;
2. that **[Name of Trade Vendor]** will continue to supply the Company with goods and/or services pursuant to the Customary Trade Terms (as modified herein) and that the Company will pay for such goods and/or services in accordance with the Customary Trade Terms (as modified herein);

3. that **[Name of Trade Vendor]** has reviewed the terms and provisions of the Order and that it consents to be bound by such terms, except as modified herein;

4. that **[Name of Trade Vendor]** will not separately seek payment for Reclamation Claims, 503(b)(9) Claims and similar claims outside of the terms of the Order unless its participation in the trade payment program authorized by the Order (the "Trade Payment Program") is terminated;

5. that if either the Trade Payment Program or your participation therein terminates as provided in the Order, any payments received by you on account of your Trade Claim will be deemed to have been in payment of postpetition obligations owed to you and you will immediately repay to the Debtors any payments made to you on account of your Trade Claim to the extent that the aggregate amount of such payments exceed the postpetition obligations, without the right of any setoffs, claims, provision for payment of reclamation or trust fund claims, or other defense;

6. that the Company will agree to pay **[Name of Trade Vendor]** on net thirty (30) day terms in accordance with paragraph (c), hereinabove; and

7. that if the Company shall be in default under this Agreement, **[Name of Trade Vendor]** shall have no obligation to supply goods and/or services to the Company on Customary Trade Terms (as modified herein) until the Company cures such default and **[Name of Trade Vendor]** shall have the right to terminate this Agreement upon written notice to the Company detailing the Company's defaults hereunder (which the Company shall have the right to dispute) and the Company's failure to cure such default within five (5) business days of such notice, in which event **[Name of Trade Vendor]** may retain all sums paid to it hereunder on account of its Trade Claim.

The Company and **[Name of Trade Vendor]** also hereby agree that any dispute with respect to this Agreement, the Order and/or **[Name of Trade Vendor]**'s participation in the Trade Payment Program shall be determined by the Bankruptcy Court.

If you have any questions about this Agreement or our financial restructuring, please do not hesitate to call **[Contact Person]** at (____) ____-____:

Very truly yours,

Gander Mountain Company and Overton's, Inc.

By: _____

Name:

Title:

Agreed and Accepted by:

[Name of Trade Vendor]

By: _____
Name: [Name]
Title: [Title]

Dated: _____, 2017

**UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MINNESOTA**

In re:

Gander Mountain Company,

Case No.: 17-30673

Chapter 11 Case

Debtor.

In re:

Overton's, Inc.,

Case No.: 17-30675

Chapter 11 Case

Debtor.

**MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR EXPEDITED RELIEF
AND FOR AN ORDER AUTHORIZING THE DEBTORS TO PAY THE PREPETITION
AMOUNTS RELATING TO CERTAIN CRITICAL VENDORS**

Gander Mountain Company and Overton's, Inc. (together the "Debtors") submit this memorandum of law in support of the motion submitted herewith (the "Motion") in accordance with Local Rule 9013-2(a). The Debtors seek the entry of an order substantially in the form filed herewith granting expedited relief and authorizing but not requiring the Debtors to pay certain prepetition amounts relating to certain critical vendors.

BACKGROUND

The supporting facts are set forth in the verified Motion. All capitalized terms used herein and not otherwise defined shall have the meanings ascribed to them in the Motion.

The Debtors seek the entry of an order substantially in the form filed herewith (i) granting an expedited hearing, (ii) authorizing, but not requiring, the Debtors, in their sole discretion, to pay the prepetition claims of certain critical vendors and (iii) authorizing applicable

banks and other financial institutions to receive, process, honor and pay checks or electronic transfers used by the Debtors to pay such claims. This relief will avoid delays in payment of prepetition obligations and ensure as smooth a transition as possible into chapter 11; therefore, the Court should grant the relief sought.

LEGAL ANALYSIS

I. THE DEBTORS' REQUEST FOR EXPEDITED RELIEF SHOULD BE GRANTED.

The Debtors request expedited relief on the Motion. Bankruptcy Rule 9006(c) provides that the Court may reduce the notice period for a Motion "for cause shown." Cause exists here to grant the Motion on an expedited basis. As described in the Motion, the Critical Vendors are indispensable to the success of the Debtors' reorganization efforts under chapter 11. Indeed, if the Debtors' access to the Critical Vendors' goods or services is impeded or delayed, it will inflict significant harm on the Debtors to the prejudice of all parties in interest. In the days and weeks leading up to the Petition Date, certain of the Debtors' Critical Vendors made clear they intend to cease providing goods and services to the Debtors, which will have a significant negatively effect on operations if not remedied. Accordingly, expedited relief requested is necessary to avoid immediate and irreparable harm.

II. THE PAYMENTS TO THE CRITICAL VENDORS SHOULD BE AUTHORIZED.

Authority to pay Critical Vendors has been granted in other chapter 11 cases in this district. *See, e.g., In re Antioch Co.*, No. 13-41898 (DDO) (Bankr. D. Minn. Apr. 19, 2013) [ECF No. 50] (order authorizing debtors to pay up to \$350,000 in critical vendor claims); *In re Wagstaff Minnesota, Inc.*, No. 11-43073 (RJK) (Bankr. D. Minn. May 5, 2011) [ECF No. 28] (order authorizing debtors to pay up to \$800,000 in critical vendor claims); *In re Duke and King Acquisition Corp.*, No. 10-38652 (Bankr. D. Minn. Dec. 8, 2010) [ECF No. 30] (order

authorizing debtors to pay up to \$1.4 million in critical vendor claims); *In re BMC Indus., Inc.*, No. 04-43515 (Bankr. D. Minn. June 28, 2004) [ECF No. 39] (order authorizing debtors to pay prepetition claims of a list of certain critical vendors). Similar relief has been granted repeatedly in other districts as well. *See, e.g., In re Quicksilver Res. Inc.*, No. 15-10585 (LSS) (Bankr. D. Del. Mar. 19, 2015) [ECF No. 95] (interim order authorizing debtors to pay up to \$5 million in critical vendor claims); *In re Allied Nev. Gold Corp.*, No. 15-10503 (MFW) (Bankr. D. Del. Mar. 11, 2015) [ECF No. 54] (interim order authorizing debtors to pay up to \$10.9 million in critical vendor claims); *In re ProNerve Holdings, LLC*, No. 15-10373 (KJC) (Bankr. D. Del. Feb. 26, 2015) [ECF No. 36] (order authorizing debtors to pay prepetition claims of certain critical vendors); *In re James River Coal Co.*, No. 14-31848 (KRH) (Bankr. E.D. Va. May 9, 2014) [ECF No. 243] (order authorizing debtors to pay up to \$7.5 million in critical vendor claims); *In re Patriot Coal Corp.*, No. 12-12900 (SCC) (Bankr. S.D.N.Y. Aug. 2, 2012) [ECF No. 257] (order authorizing debtors to pay up to \$25 million in critical vendor claims).

Section 105(a) of the Bankruptcy Code empowers the Court to “issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.” 11 U.S.C. § 105(a). “Pursuant to 11 U.S.C. § 105(a) the Court may authorize the payment of prepetition claims when such payments are necessary to the continued operation of the Debtor.” *In re Wehrenberg, Inc.*, 260 B.R. 468, 469 (Bankr. E.D. Mo. 2001); *see also In re Ionosphere Clubs, Inc.*, 98 B.R. 174, 175 (Bankr. S.D.N.Y. 1989) (stating that the bankruptcy court’s use of equitable powers to “authorize the payment of prepetition debt when such payment is needed to facilitate the rehabilitation of the debtor is not a novel concept”). “Courts have used their equitable power under section 105(a) of the Code to authorize the payment of prepetition claims

when such payment is deemed necessary to the survival of a debtor in a chapter 11 reorganization.” *In re Just for Feet, Inc.*, 242 B.R. 821, 824 (D. Del. 1999).

In a long line of well-established cases, federal courts have consistently permitted postpetition payment of prepetition obligations where necessary to preserve or enhance the value of a debtor’s estate for the benefit of all creditors. *See, e.g., Miltenberger v. Logansport Ry.*, 106 U.S. 286 (1882) (payment of pre-receivership claim prior to reorganization permitted to prevent “stoppage of [crucial] business relations”); *In re Payless Cashways, Inc.*, 268 B.R. 543, 546 (Bankr. W.D. Mo. 2001); *In re Lehigh and N.E. Ry. Co.*, 657 F.2d 570, 581 (3d Cir. 1981); *In re Just for Feet, Inc.*, 242 B.R. at 825.

This “doctrine of necessity” functions in a chapter 11 reorganization as a mechanism by which the bankruptcy court can exercise its equitable power to allow payment of critical prepetition claims not explicitly authorized by the Bankruptcy Code. *See In re Boston & Me. Corp.*, 634 F.2d 1359, 1382 (1st Cir. 1980) (recognizing the existence of a judicial power to authorize trustees to pay claims for goods and services that are indispensably necessary to the debtors’ continued operation); *In re Payless Cashways, Inc.*, 268 B.R. at 546 (Bankr. W.D. Mo. 2001); *In re Just for Feet, Inc.*, 242 B.R. at 824 (“While the doctrine [of necessity] was not codified in the Bankruptcy Code, courts have used their equitable power under Section 105(a) of the Code to authorize the payment of prepetition claims”); *In re United Am., Inc.*, 327 B.R. 776, 781 (Bankr. E.D. Va. 2005) (recognizing the doctrine of necessity as an equitable doctrine). The doctrine is frequently invoked early in a reorganization, particularly in connection with those chapter 11 sections that relate to payment of prepetition claims. The court in *In re Structurelite Plastics Corp.*, 86 B.R. 922, 931 (Bankr. S.D. Ohio 1988) indicated its accord with “the principle that a bankruptcy court may exercise its equity powers under section 105(a) to authorize payment

of prepetition claims where such payment is necessary to ‘permit the greatest likelihood of survival of the debtor and payment of creditors in full or at least proportionately.’” The court stated that “a *per se* rule proscribing the payment of prepetition indebtedness may well be too inflexible to permit the effectuation of the rehabilitative purposes of the Code.” *Id.* at 932. Accordingly, pursuant to section 105(a) of the Bankruptcy Code, this Court is empowered to grant the relief requested herein.

Moreover, section 363(b)(1) of the Bankruptcy Code empowers the Court to allow the debtor to “use, sell, or lease, other than in the ordinary course of business, property of the estate.” 11 U.S.C. § 363(b)(1). Debtors’ decisions to use, sell or lease assets outside the ordinary course of business must be based upon the sound business judgment of the debtor. *In re Montgomery Ward Holding Corp.*, 242 B.R. 147, 153 (D. Del. 1999); *see also In re Chateaugay Corp.*, 973 F.2d 141, 143 (2d Cir. 1992) (holding that a judge determining a section 363(b) application must find from the evidence presented before him or her a good business reason to grant such application); *see also In re Trilogy Dev. Co.*, 2010 Bankr. LEXIS 5636, at *3-4 (Bankr. W.D. Mo. Aug. 31, 2010); *In re Channel One Comm., Inc.*, 117 B.R. 493, 496 (Bankr. E.D. Mo. 1990) (citing *Comm. of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.)*, 722 F.2d 1063, 1071 (2d Cir. 1983)); *In re Global Crossing Ltd.*, 295 B.R. 726, 743 (Bankr. S.D.N.Y. 2003); *In re Ionosphere Clubs, Inc.*, 100 B.R. 670, 674 (Bankr. S.D.N.Y. 1989) (noting the standard for determining a section 363(b) motion is “a good business reason”).

Courts emphasize that the business judgment rule is not an onerous standard and may be satisfied “‘as long as the proposed action *appears* to enhance the debtor’s estate.’” *Crystalin, LLC v. Selma Props. Inc. (In re Crystalin, LLC)*, 293 B.R. 455, 463-64 (B.A.P. 8th Cir. 2003) (quoting *Four B. Corp. v. Food Barn Stores, Inc. (In re Food Barn Stores, Inc.)*, 107 F.3d 558,

566 n.16 (8th Cir. 1997) (emphasis original, internal alterations and quotations omitted)); *see also In re AbitibiBowater*, 418 B.R. 815, 831 (Bankr. D. Del. 2009) (the business judgment standard is “not a difficult standard to satisfy”). Under the business judgment rule, “management of a corporation’s affairs is placed in the hands of its board of directors and officers, and the Court should interfere with their decisions only if it is made clear that those decisions are, *inter alia*, clearly erroneous, made arbitrarily, are in breach of the officers’ and directors’ fiduciary duty to the corporation, are made on the basis of inadequate information or study, are made in bad faith, or are in violation of the Bankruptcy Code.” *In re Farmland Indus., Inc.*, 294 B.R. 855, 881 (Bankr. W.D. Mo. 2003) (citing *In re United Artists Theatre Co.*, 315 F.3d 217, 233 (3d Cir. 2003), *Richmond Leasing Co. v. Capital Bank, N.A.*, 762 F.2d 1303 (5th Cir. 1985) and *In re Defender Drug Stores, Inc.*, 145 B.R. 312, 317 (B.A.P. 9th Cir. 1992)).

The Debtors submit that the requested relief represents a sound exercise of the Debtors’ business judgment and is justified under sections section 105(a) and 363(b) of the Bankruptcy Code, and is also in line with the relief granted in this and other districts. The Debtors strongly believe that the uninterrupted supply of goods and services, on Customary Trade Terms, and the continuing support of their customers are imperative to the ongoing operations and viability of the Debtors. Authority to pay the Critical Vendors in the ordinary course of the Debtors’ businesses is in the best interest of the Debtors’ estates and creditors. Absent such payment, the operations and value of the Debtors’ estates will suffer, possibly precipitously. Thus, the requested relief is necessary to avoid immediate and irreparable harm to the Debtors and to the recovery of all creditors. This irreparable harm will far outweigh the cost of payment to Critical Vendors.

The Claims Cap represents the Debtors' best estimate as to how much must be paid to such creditors to continue the supply of critical goods and services. The Debtors hope to pay far less than the requested amount. The Debtors' proposed Claims Cap is within the range of amounts awarded by courts in other cases. *See, e.g., In re Quicksilver Res. Inc.*, No. 15-10585 (LSS) (Bankr. D. Del. Mar. 19, 2015) (authorizing debtors to pay up to \$5 million in critical vendor claims on an interim basis); *In re Allied Nevada Gold Corp.*, No. 15-10503 (MFW) (Bankr. D. Del. Mar. 11, 2015) (authorizing debtors to pay up to \$10.9 million in critical vendor claims on an interim basis); *In re Cal Dive Int'l, Inc.*, No. 15-10458 (CSS) (Bankr. D. Del. Mar. 6, 2015) (authorizing debtors to pay up to \$2.6 million in critical vendor claims on an interim basis); *In re Dendreon Corp.*, No. 14-12515 (PJW) (Bankr. D. Del. Nov. 12, 2014) (authorizing debtors to pay up to \$3 million in critical vendor claims); *In re Natrol, Inc.*, No. 14-11446 (BLS) (Bankr. D. Del. July 15, 2014) (authorizing debtors to pay up to \$3.5 million in critical vendor claims); *In re GSE Envtl., Inc.*, No. 14-11126 (MFW) (Bankr. D. Del. May 30, 2014) (authorizing debtors to pay up to \$4.1 million in critical vendor claims); *In re Energy Future Holdings*, No. 14-10979 (CSS) (Bankr. D. Del. July 3, 2014) (authorizing debtors to pay up to \$40 million in critical vendor claims); *In re James River Coal Co.*, No. 14-31848 (KRH) (Bankr. E.D. Va. May 9, 2014) [ECF No. 243] (authorizing debtors to pay up to \$7.5 million in critical vendor claims); *In re Patriot Coal Corp.*, No. 12-12900 (SCC) (Bankr. S.D.N.Y. Aug. 2, 2012) [ECF No. 257] (authorizing debtors to pay up to \$25 million in critical vendor claims).

CONCLUSION

For the foregoing reasons, the Debtors respectfully request that the Court grant the relief requested in the Motion.

Dated: March 10, 2017

/e/ Cynthia A. Moyer

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**UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MINNESOTA**

In re:

Gander Mountain Company,

Case No.: 17-30673
Chapter 11 Case

Debtor.

In re:

Overton's, Inc.,

Case No.: 17-30675
Chapter 11 Case

Debtor.

**ORDER GRANTING MOTION FOR EXPEDITED RELIEF AND
AUTHORIZING THE DEBTORS TO PAY THE PREPETITION
AMOUNTS RELATING TO CERTAIN CRITICAL VENDORS**

These cases came before the court on the debtors' Motion for Expedited Relief and For an Order Authorizing the Debtors to Pay the Prepetition Amounts Relating to Certain Critical Vendors (the "Motion"). Capitalized terms not defined in this order have the meanings ascribed to them in the Motion. Based on the Motion, all the files, records and proceedings herein,

IT IS ORDERED:

1. The Motion is granted, including the request for expedited relief.
2. Pursuant to sections 105(a), 363(b) and 503(b)(9) of the Bankruptcy Code, the Debtors are authorized, but not directed, in the reasonable exercise of their business judgment, to pay some or all of the prepetition claims of the Critical Vendors (the "Vendor Claims").
3. The Debtors' payment of Vendor Claims shall not exceed \$1.5 million in the aggregate (the "Vendor Claims Cap") unless otherwise ordered by the Court.

4. The Debtors, in their sole discretion, may condition payment of any Vendor Claims upon agreement by the Critical Vendor to continue to supply goods or services to the Debtors on such Critical Vendor's "Customary Trade Terms" for a period following the date of the agreement or on other such terms and conditions as are acceptable to the Debtors. As used herein, "Customary Trade Terms" means, with respect to a Critical Vendor, (i) the normal and customary trade terms, practices and programs (including, but not limited to, credit limits, pricing, cash discounts, timing of payments, allowances, rebates, coupon reconciliation, and availability, and other applicable terms and programs), that were most favorable to the Debtors and in effect between such Critical Vendor and the Debtors prior to the Petition Date or (ii) such other trade terms as agreed by the Debtors and such Critical Vendor.

5. As a further condition of receiving payment on a Vendor Claim, the Debtors are authorized, in their sole discretion, to require that such Critical Vendor agree to take whatever action is necessary to remove any existing trade liens at such Critical Vendor's sole cost and expense and waive any right to assert a trade lien on account of the paid Vendor Claim.

6. After the date hereof, the Debtors shall determine, in the ordinary course of business, which entities are Critical Vendors by considering, among other things, (a) which suppliers were sole-source or limited-source suppliers, without whom the Debtors could not continue to operate without disruption, (b) which suppliers would be prohibitively expensive to replace, (c) which suppliers present an unacceptable risk should they cease the provision of truly essential services or supplies and (d) the extent to which suppliers may be able to obtain or have obtained trade liens on equipment, supplies or goods of the Debtors.

7. The Debtors, in their sole discretion, may require Critical Vendors to enter into an agreement (the “Vendor Agreement”) including provisions substantially in the form attached to the Motion as Exhibit A as a condition to paying a Vendor Claim.

8. The Debtors are authorized, but not required, to enter into Vendor Agreements when the Debtors determine, in their sole discretion, that it is appropriate to do so in connection with making payments to Critical Vendors. However, the Debtors’ inability to enter into a Vendor Agreement shall not preclude them from paying a Vendor Claim when, in their sole discretion, such payment is necessary to the Debtors’ operations.

9. If the Debtors, in their sole discretion, determine that a Critical Vendor has not complied with the terms and provisions of the Vendor Agreement or has failed to continue to provide Customary Trade Terms following the date of the agreement, or on such terms as were individually agreed to between the Debtors and such Critical Vendor, the Debtors may terminate a Vendor Agreement, together with the other benefits to the Critical Vendor as contained in this Order; *provided, however*, that the Vendor Agreement may be reinstated if (x) such determination is subsequently reversed by the Court for good cause after it is shown that the determination was materially incorrect after notice and a hearing following a motion from the Critical Vendor, (y) the underlying default under the Vendor Agreement is fully cured by the Critical Vendor not later than five business days after the date the initial default occurred or (z) the Debtors, in their sole discretion, reach a subsequent agreement with the Critical Vendor.

10. If a Vendor Agreement is terminated as set forth above, or if a Critical Vendor that has received payment of a prepetition claim later refuses to continue to supply goods or services for the applicable period in compliance with the Vendor Agreement or this Order, then (a) the Debtors may, in their sole discretion, declare that the payment of the creditor’s Vendor

Claim is a voidable postpetition transfer pursuant to section 549(a) of the Bankruptcy Code that the Debtors may recover in cash or in goods from such Critical Vendor, (b) the creditor shall immediately return such payments in respect of a Vendor Claim to the extent that the aggregate amount of such payments exceeds the postpetition obligations then outstanding without giving effect to alleged setoff rights, recoupment rights, adjustments, or offsets of any type whatsoever and (c) the creditor's Vendor Claim shall be reinstated in such an amount so as to restore the Debtors and the Critical Vendor to their original positions as if the Vendor Agreement had never been entered into and no payment of Vendor Claim had been made.

11. All Vendor Agreements shall be deemed to have terminated, together with the other benefits to Critical Vendors as contained in this Order, upon entry of an order converting the Debtors' chapter 11 cases to cases under chapter 7 of the Bankruptcy Code.

12. Nothing contained in this Order shall be deemed to constitute (a) a rejection, assumption or postpetition reaffirmation of any executory contract or to require the Debtors to make any of the payments or to post any of the deposits authorized herein, (b) a grant of third-party beneficiary status or bestowal of any additional rights on any third party or (c) a waiver of any rights, claims or defenses of the Debtors.

13. Nothing in this Order or the Motion shall be construed as prejudicing any rights the Debtors may have to dispute or contest the amount of or basis for any claims against the Debtors arising in connection with the Vendor Claims.

14. The Debtors are authorized and empowered to take all actions necessary to implement the relief granted in this Order.

15. Notwithstanding anything to the contrary contained herein, any payment made or to be made under this Order, any authorization contained in this Order, or any claim for which

payment is authorized hereunder, shall be subject to any orders of this Court approving any debtor in possession financing for, or any use of cash collateral by, the Debtors, and any documents providing for such debtor in possession financing and the Budget governing such debtor in possession financing and use of cash collateral.

16. This Court shall retain jurisdiction over any and all matters arising from or related to the implementation or interpretation of this Order.

Dated:

Robert J. Kressel
United States Bankruptcy Judge