

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

In re:

Gander Mountain Company,

Debtor.

Case No.: 17-30673
Chapter 11 Case

In re:

Overton's, Inc.,

Debtor.

Case No.: 17-30675
Chapter 11 Case

NOTICE OF HEARING AND MOTION FOR AN ORDER (I) GRANTING EXPEDITED RELIEF, (II) AUTHORIZING DEBTORS TO PAY CERTAIN PREPETITION TAXES AND FEES AND (III) AUTHORIZING FINANCIAL INSTITUTIONS TO HONOR AND PROCESS RELATED CHECKS AND TRANSFERS

TO: The parties in interest as specified in Local Rule 9013-3(a)(2).

1. The above-captioned debtors and debtors in possession (together, 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 8 West, U.S. Courthouse, 300 South Fourth Street, Minneapolis, Minnesota**.

3. Local Rule 9006-1 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 prior to 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 Rule 1070-1. 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 before this Court.

5. This motion arises under sections 105(a), 363(b), 507(a)(8), and 541 of the Bankruptcy Code, and is filed under Local Rules 9013-1, 9013-2 and 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). The Debtors seek entry of an order granting expedited relief, and authorizing them to pay to the appropriate federal, state, and local taxing authorities and other governmental agencies, in the ordinary course of business, certain: (i) unpaid taxes accrued prior to the Filing Date, including employment and withholding taxes, sales and use taxes, corporate franchise taxes, and certain property taxes; and (ii) hunting, fishing, and firearm-related licensing, permit, and other fees.

GENERAL 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 sections 1107(a) and 1108 of the Bankruptcy Code.

7. Further general background information about the Debtors and this case 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.

8. By this Motion, and pursuant to sections 105(a) and 363(b) of the Bankruptcy Code, the Debtors seek entry of an order substantially in the form filed herewith (a) granting expedited relief; (b) authorizing, but not requiring, the Debtors to pay any Covered Taxes and Fees (as defined below), whether asserted prior to or after the Filing Date; and (c) authorizing the Banks (as defined below) to receive, process, honor and pay checks or electronic transfers used by the Debtors to pay such Covered Taxes and Fees.

REQUEST FOR AUTHORITY TO PAY COVERED TAXES AND FEES

9. In connection with the normal operation of their businesses, the Debtors: (a) collect fees for customer purchases of: (i) hunting and fishing licenses and permits, (ii) NRA memberships, and (iii) firearm-related background checks; and (b) collect, withhold and incur sales and use taxes, corporate franchise taxes, employment and wage-related taxes, and property taxes (all such collected fees, taxes, and charges, collectively, the “Covered Taxes and Fees”).¹ The Debtors remit the Covered Taxes and Fees to various federal, state and local governments,² including taxing and licensing authorities (collectively, the “Governmental Authorities”). The Covered Taxes and Fees are remitted by the Debtors through checks and electronic transfers that are processed through their banks and other financial institutions (the “Banks”).

10. The Debtors believe that many of the Covered Taxes and Fees collected prepetition are not property of the Debtors’ estates and must for that reason be turned over to the Governmental Authorities. To the extent that they are not actually the property of the Governmental Authorities, they may well give rise to priority claims. Moreover, the Debtors

¹ The Debtors also incur other taxes based on or measured by their net income (including, but not limited to, federal and state corporate income taxes), but this Motion does not pertain to such taxes.

² The NRA membership fees collected are remitted to the NRA, rather than a governmental authority. For ease of reference, however, the NRA is sometimes included in the references to “Governmental Authorities.”

also seek to pay prepetition Covered Taxes and Fees in order to forestall the Governmental Authorities from taking actions that might interfere with the Debtors' continued operations as they pursue a going-concern sale, such as blocking the receipt or renewal of permits required for the Debtors' continued operations or possibly bringing personal liability actions against directors, officers and other employees in connection with non-payment of the Covered Taxes and Fees. Actions against the Debtors' directors, officers and other employees would likely distract key personnel, whose full-time attention to the Debtors' efforts in these Chapter 11 cases is required, and would likely cause business disruptions. Any such business disruptions would erode the Debtors' customer base and negatively impact these chapter 11 cases. Accordingly, the Debtors submit that the proposed relief is in the best interest of the Debtors' estates.

Fees for Hunting, Fishing, and Firearm-Related Licenses, Permits, and Memberships

11. The Debtors are authorized sellers of hunting and fishing licenses and permits in the states in which the Debtors have retail stores. Customers who purchase such licenses and permits from the Debtors pay the related fee to the Debtors, and the Debtors are required to remit the fees to the applicable state and local Governmental Authorities on a monthly basis. In connection with this obligation, the Debtors have posted bonds in the total amount of approximately \$800,000 to approximately 20 state and local Governmental Authorities. In addition, in connection with firearms sales, the Debtors collect background check fees from customers, and are required to remit the fees (together with the hunting and fishing fees, the "Sports Fees") to the applicable state and local Governmental Authorities on a monthly basis. The Debtors are also authorized sellers of NRA memberships. Customers who purchase such memberships from the Debtors pay the related fee to the Debtors, which are then required to remit the fee to the NRA. As of the Filing Date, a total of approximately \$465,000 in such fees had been collected by the Debtors and not yet remitted to the relevant Governmental Authorities

or NRA. If this Motion is approved, the Debtors intend to pay the Sports Fees to the appropriate Governmental Authorities and to pay the NRA membership fees to the NRA. The Debtors generally also intend to pay to the appropriate Governmental Authorities or NRA any Sports Fees or membership fees they collect after the Filing Date.

Sales and Use Taxes

12. The Debtors collect or incur various general sales and use taxes in twenty-seven states (the “Sales and Use Taxes”). The Debtors are required to remit these Sales and Use Taxes to the applicable Governmental Authorities on a periodic basis. As of the Filing Date, approximately \$1.587 million in Sales and Use Taxes had been incurred or collected by the Debtors and not yet remitted to the relevant Governmental Authorities. If this Motion is approved, the Debtors intend to pay any Sales and Use Taxes to the appropriate Governmental Authorities. The Debtors generally also intend to pay to the appropriate Governmental Authorities any Sales and Use Taxes that arise after the Filing Date.

State Corporate Franchise Taxes

13. The Debtors incur various state corporate franchise taxes based on gross sales, net worth, or other value added taxes (the “Franchise Taxes”). The Debtors are required to remit these Franchise Taxes to the applicable Governmental Authorities on a periodic basis. As of the Filing Date, approximately \$100,000 in Franchise Taxes had been incurred by the Debtors and not yet remitted to the relevant Governmental Authorities. If this Motion is approved, the Debtors intend to pay any Franchise Taxes to the appropriate Governmental Authorities. The Debtors generally also intend to pay to the appropriate Governmental Authorities any Franchise Taxes that arise after the Filing Date.

Employment and Wage-Related Taxes

14. The Debtors are required by law to withhold from domestic employees' wages or pay directly various amounts related to federal, state and local taxes. These taxes include, but are not limited to, income taxes, FICA Taxes (as defined below), certain unemployment benefits for the Debtors' employees and amounts held in respect of unemployment-related fees, and similar state, local and federal taxes that accrue on wages, benefits, disability and workers' compensation paid to the Debtors' employees (collectively, the "Employment and Wage-Related Taxes"). The Debtors pay the Employment and Wage-Related Taxes to various Governmental Authorities in accordance with the Internal Revenue Code and applicable state and local laws.

15. Specifically, pursuant to section 3402 of the Internal Revenue Code and under various state and local laws, all employers generally are required to withhold income taxes on wages paid to employees. The Debtors' current practice is to pay—via ADP, its payroll provider—the withheld income tax amounts on employee wages to the appropriate Governmental Authorities on a biweekly basis.

16. The Federal Insurance Contributions Act ("FICA") requires employers to pay an old-age, survivors and disability tax and a hospital insurance tax on wages paid to employees and to withhold from such wages a separate old-age, survivors and disability tax and hospital insurance tax ("FICA Taxes"). *See* I.R.C. §§ 3102 and 3111. The employer portion of FICA Taxes and the separate employee portion of FICA Taxes generally arise when employee wages are paid, and employers, such as the Debtors, are obligated to pay such taxes to the applicable Governmental Authorities promptly thereafter. *See* I.R.C. §§ 3101 and 3111. The Debtors' current practice is to pay—via ADP, its payroll provider—such amounts to the appropriate Governmental Authorities on a biweekly basis.

17. Consistent with the income taxes and FICA Taxes, the Debtors' current practice is to pay—again, via ADP, its payroll provider—all other Employment and Wage-Related Taxes to the appropriate Governmental Authorities on a biweekly basis.

18. Although it is difficult to assess precisely the amount of Employment and Wage-Related Taxes that have been or will be withheld on account of prepetition services, the Debtors estimate that their next obligation to remit such taxes will be in the amount of approximately \$622,000. If this Motion is approved, the Debtors intend to pay all withheld Employment and Wage-Related Taxes as they come due.

19. Contemporaneously herewith, the Debtors have filed a motion seeking, among other things, authorization to continue to pay prepetition wages, salaries and other compensation to employees. The postpetition payment of prepetition wages, salaries and other compensation will result in additional withholding of and direct payment obligations for various Employment and Wage-Related Taxes as described above, for which authorization for remittance to the appropriate Governmental Authorities is also requested by this Motion.

Property Taxes

20. The Debtors have property tax obligations to certain Governmental Authorities, including, without limitation, for personal property and certain leased real property pursuant to the relevant leases (collectively, the "Property Taxes"). It is critical that the Debtors are authorized to pay any Property Taxes, particularly where under applicable law the failure to pay gives rise to a secured state law lien.

21. The Debtors estimate that they owe approximately \$3.329 million for such real and personal property tax obligations that arose prepetition but are unpaid and come due after the Filing Date. The Debtors' current practice generally is to pay such amounts to the appropriate Governmental Authorities on various dates during the year, and no later than when they become

due. Interest and penalties accrue if such Property Taxes are not timely paid. Timely paying these Property Taxes, therefore, will reduce costs by minimizing interest and penalty charges.

**REQUEST FOR AUTHORITY FOR BANKS
TO HONOR AND PROCESS RELATED CHECKS AND TRANSFERS**

22. The Debtors also request that all applicable Banks be authorized to receive, process, honor, and pay all checks presented for payment of, and to honor all fund transfer requests made by the Debtors related to, the claims that the Debtors request authority to pay in this Motion, regardless of whether the checks were presented or fund transfer requests were submitted before or after the Filing Date, *provided* that: (a) funds are available in the Debtors' accounts to cover the checks and fund transfers and (b) all the Banks are authorized to rely on the Debtors' designation of any particular check as approved by the proposed order.

23. Nothing in this Motion should be construed as impairing the Debtors' rights to contest the validity or amount of the Covered Taxes and Fees assessed by the Governmental Authorities, and the Debtors expressly reserve all of their rights with respect thereto.

24. Based upon the foregoing, the Debtors submit that the relief requested herein is essential, appropriate, and in the best interest of the Debtors' estates and creditors. Absent this relief, the value of the Debtors' estates will suffer, possibly precipitously. Consequently, all of the Debtors' creditors will benefit if the requested relief is granted.

REQUEST FOR EXPEDITED RELIEF

25. The Debtors request expedited relief on this Motion. The Debtors have scheduled and served a number of "first day" motions designed to facilitate an orderly transition to chapter 11. The granting of this Motion on an expedited basis will enable the Debtors to remain current on their outstanding tax obligations so that federal or state-by-state involvement in this bankruptcy case does not unduly delay and complicate the process.

26. Pursuant to Local Rule 9013-2, this Motion is verified and is accompanied by a memorandum of law, proposed order, and proof of service.

27. Pursuant to Local Rule 9013-2(c), the 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.

REQUEST FOR WAIVER OF STAY

28. In addition, by this Motion, the Debtors seek a waiver of any stay of the effectiveness of the order approving this Motion. Pursuant to Bankruptcy Rule 6004(h), “[a]n order authorizing the use, sale, or lease of property other than cash collateral is stayed until the expiration of 14 days after entry of the order, unless the court orders otherwise.” As discussed above, the Debtors require immediate relief to continue ordinary business operations for the benefit of all parties in interest. Accordingly, the Debtors submit that ample cause exists to justify a waiver of the 14-day stay imposed by Bankruptcy Rule 6004(h), to the extent that it applies.

NO PREVIOUS REQUEST

29. No previous request for the relief sought herein has been made by the Debtors to this or any other court.

WHEREFORE, the Debtors request entry of an Order

- A. Granting expedited relief;
- B. Authorizing the Debtors to pay the Covered Taxes and Fees, whether relating to the period before or after the Filing Date, to the Governmental Authorities;
- C. Authorizing the Banks to honor and process related checks and transfers; and
- D. Granting such other relief as the Court deems just and equitable.

Dated: March 10, 2017

/e/ Sarah M. Olson

Clinton E. Cutler (#0158094)
Cynthia A. Moyer (#0211229)
Ryan T. Murphy (#0311972)
James C. Brand (#387362)
Sarah M. Olson (#0390238)
Steven R. Kinsella (#0392289)
FREDRIKSON & BYRON, P.A.
200 South Sixth Street, Suite 4000
Minneapolis, MN 55402-1425
Telephone: 612.492.7000
ccutler@fredlaw.com
cmoyer@fredlaw.com
rmurphy@fredlaw.com
jbrand@fredlaw.com
solson@fredlaw.com
skinsella@fredlaw.com

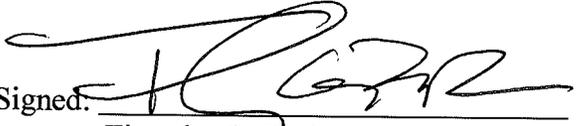
PROPOSED ATTORNEYS FOR DEBTORS

60648384

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

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

In re:

Gander Mountain Company,

Debtor.

Case No.: 17-30673
Chapter 11 Case

In re:

Overton's, Inc.,

Debtor.

Case No.: 17-30675
Chapter 11 Case

**MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR AN ORDER
(I) GRANTING EXPEDITED RELIEF, (II) AUTHORIZING DEBTORS TO PAY
CERTAIN PREPETITION TAXES AND FEES AND (III) AUTHORIZING FINANCIAL
INSTITUTIONS TO HONOR AND PROCESS RELATED CHECKS AND TRANSFERS**

The above-captioned debtors (the "Debtors") submit this memorandum of law in support of their Motion for an Order (I) Granting Expedited Relief, (II) Authorizing Debtors to Pay Certain Prepetition Taxes and Fees and (III) Authorizing Financial Institutions to Honor and Process Related Checks and Transfers (the "Motion"). The Motion should be granted because certain of the amounts involved are trust fund taxes, so not property of the Debtors' estate, and the Debtors have a compelling business justification for payment of these obligations.

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.

LEGAL ANALYSIS

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

The Debtors request expedited relief on the Motion. Local Rule 9006-1(b) provides that “moving documents shall be filed and served . . . not later than fourteen days before the hearing date.” Local Rule 9006-1(e), however, provides that a court may reduce notice for cause. Cause exists here to grant the motion on an expedited basis. The granting of this Motion on an expedited basis will enable the Debtors to remain current on their outstanding tax obligations and obligations to remit collected fees to various governmental authorities so that federal, state-by-state, or locality-by-locality involvement in this bankruptcy case does not unduly delay and complicate the process. If expedited relief is not granted and the Debtors are not able to remain current on such obligations, it is possible that Governmental Authorities would take actions that might interfere with the Debtors’ success in this case, such as blocking the receipt or renewal of permits required for the Debtors’ continued operations, drawing upon bonds, terminating the Debtors’ rights to make hunting and fishing licenses and permits available to customers, or possibly bringing personal liability actions against directors, officers and other employees in connection with non-payment of the Covered Taxes and Fees. Actions against the Debtors’ directors, officers and other employees would likely distract key personnel, whose full-time attention to the Debtors’ reorganization efforts is required, and would likely cause potential business disruptions. Any such business disruptions would likely erode the Debtors’ customer base and negatively impact these chapter 11 cases. Accordingly, expedited relief requested is necessary to avoid immediate and irreparable harm, and cause exists to reduce the notice period of the Motion.

II. THE COURT HAS AUTHORITY TO APPROVE POSTPETITION PAYMENT OF PREPETITION TAX OBLIGATIONS

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). A bankruptcy court’s use of its 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.” *In re Ionosphere Clubs, Inc.*, 98 B.R. 174, 175 (Bankr. S.D.N.Y. 1989). “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 (“The Supreme Court, the Third Circuit and the District of Delaware all recognize the court’s power to authorize payment of prepetition claims when such payment is necessary for the debtor’s survival during chapter 11.”).

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; *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.

III. POSTPETITION PAYMENT OF CERTAIN PREPETITION TAX OBLIGATIONS IS APPROPRIATE IN THESE CASES

A. Certain of the Covered Taxes and Fees Are Not Property of the Debtors' Estates

Certain of the Covered Taxes and Fees are collected or withheld by the Debtors on behalf of the applicable Governmental Authorities and are held in trust by the Debtors. *See, e.g.*, I.R.C. § 7501 (stating that certain Covered Taxes and Fees are held in trust). As such, these Covered Taxes and Fees are not property of the Debtors' estates under section 541 of the Bankruptcy

Code. *See, e.g., Begier, Jr. v. IRS*, 496 U.S. 53 (1990) (stating that withholding taxes are property held by debtor in trust for another and, as such, are not property of debtor's estate); *DeChiaro v. N.Y. State Tax Comm'n*, 760 F.2d 432, 433-34 (2d Cir. 1985) (concluding that sales taxes are "trust fund" taxes); *Al Copeland Enter., Inc. v. Texas (In re Al Copeland Enter., Inc.)*, 991 F.2d 233, 235-37 (5th Cir. 1993) (holding that debtors' prepetition collection of sales taxes and interest thereon were held subject to trust and were not property of the estate); *Texas Comptroller of Pub. Accounts v. Megafoods Stores, Inc. (In re Megafood Stores, Inc.)*, 163 F.3d 1063, 1067-69 (9th Cir. 1998) (determining that under Texas law, state sales taxes collected created statutory trust fund, if traceable, and were not property of the estate); *Shank v. Wash. State Dept. of Revenue, Excise Tax Div. (In re Shank)*, 792 F.2d 829, 830 (9th Cir. 1986) (concluding that sales taxes required by state law to be collected by sellers from their customers are "trust fund" taxes); *In re Am. Int'l Airways, Inc.*, 70 B.R. 102, 103 (Bankr. E.D. Pa. 1987) (holding that excise and withholding taxes are "trust fund" taxes); *Shiple Co. v. Darr (In re Tap, Inc.)*, 52 B.R. 271, 277 (Bankr. D. Mass. 1985) (finding that withholding taxes are "trust fund" taxes). *See generally Official Comm. of Unsecured Creditors of the Columbia Gas Transmission Corp. v. Columbia Gas Sys. Inc. (In re Columbia Gas Sys. Inc.)*, 997 F.2d 1039, 1060 (3d Cir. 1993) (indicating that even if the statute does not establish an express trust, a constructive trust may be found). Because certain of the Covered Taxes and Fees are not property of the Debtors' estates, such funds are not available for the satisfaction of creditors' claims and are the property of the relevant Governmental Authorities.

B. Certain of the Covered Taxes and Fees Are Priority Claims

To the extent any amounts in respect of the Covered Taxes and Fees are property of the estates under section 541 of the Bankruptcy Code, many claims in respect of those amounts would likely be afforded priority status under section 507(a)(8) of the Bankruptcy Code. As

priority claims, those portions of the Covered Taxes and Fees must be paid in full before any general unsecured obligations of the Debtors can be satisfied. The Debtors believe that sufficient assets will exist to pay all priority Covered Taxes and Fees in full under any plan that may ultimately be proposed and confirmed by this Court. Accordingly, to the extent the Covered Taxes and Fees are property of the Debtors and give rise to priority claims, the relief requested will only affect the timing of the payment of these priority Covered Taxes and Fees and will not prejudice the rights of general unsecured creditors.

In this respect, it should be noted that obligations labeled as “fees” or “charges” may also be entitled to priority status as taxes. *See* 11 U.S.C. § 507(a)(8). A fee or charge is a tax if it is an involuntary pecuniary burden: (i) laid upon the individual or their property, (ii) imposed by or under authority of a legislative body, (iii) assumed for public purposes, including the purposes of defraying expenses of government or undertakings authorized by it and (iv) assessed under the police or taxing power of the state. *See LTV Steel Co. v. Shalala (In re Chateaugay Corp.)*, 53 F.3d 478, 498 (2d Cir. 1995). Many of the Covered Taxes and Fees are involuntary pecuniary burdens imposed by the authority of a federal, state or local legislature under its police or taxing power. Regardless of their statutory characterization as “fees” or “charges,” many of the claims in respect of the Covered Taxes and Fees may well qualify for priority under section 507(a)(8) of the Bankruptcy Code and, as such, must be paid in full before any general unsecured obligations of a debtor may be satisfied. Thus, payment of these Covered Taxes and Fees will only affect the timing of the payment and will not prejudice the rights of the general unsecured creditors of these estates.

C. Non-Payment of Certain Covered Taxes and Fees Would Cause Immediate and Irreparable Harm to the Debtors' Estates

The Covered Taxes and Fees include amounts collected from customers for the sale of hunting and fishing licenses and permits. The Debtors are required to remit such amounts to the appropriate Governmental Authorities. If the Debtors fail to do so, the Governmental Authorities may terminate the Debtors' authorization to sell such licenses and permits, which would likely reduce customer traffic into the stores. In addition, certain Governmental Authorities are holding bonds relating to the payment of these fees. In the event of non-payment, the Governmental Authorities may turn to the bonds, which could cause financial and operational issues for the Debtors, and thus could interfere with their successful pursuit of a going-concern sale.

In addition, many federal and state statutes hold certain directors, officers and other employees of entities responsible for collecting or withholding taxes, or remitting certain taxes, personally liable for these types of taxes. *See, e.g.*, I.R.C. § 6672 (imposing personal liability in connection with non-payment of employment taxes described above). To the extent such Covered Taxes and Fees were incurred by the Debtors before the Filing Date and are not remitted or paid by the Debtors, certain of the Debtors' directors, officers and other employees may be subject to lawsuits during the pendency of these chapter 11 cases. Payment of the Covered Taxes and Fees will avoid director and employee loss of focus and morale resulting from the risk of personal liability. A lawsuit and any ensuing liability would distract personnel from important tasks, to the detriment of all parties in interest in these chapter 11 cases. The dedicated and active participation of the Debtors' directors, officers and other employees is not only integral to the Debtors' continued, uninterrupted operations, but is also essential to their successful reorganization.

As described above and in the Motion, payment of certain of the prepetition Covered Taxes and Fees is critical to the Debtors' continued, uninterrupted operations and to avoid immediate and irreparable harm to the Debtors' estates. Non-payment of the Covered Taxes and Fees may cause certain Governmental Authorities to take precipitous action, including, but not limited, to conducting audits, filing liens, pursuing payment of the Covered Taxes and Fees from the Debtors' directors, officers and other employees, and seeking to lift the automatic stay, any of which would disrupt the Debtors' day-to-day operations and could potentially impose significant costs and burdens on the Debtors' estates. Prompt payment of the Covered Taxes and Fees will avoid these unnecessary and potentially costly governmental actions. *See In re FCC*, 217 F.3d 125, 137 (2d Cir. 2000). Accordingly, to the extent the relief requested herein involves the use of property of the estate and Bankruptcy Rule 6003 is applicable, the requested relief is consistent with such Bankruptcy Rule because failure to pay the Covered Taxes and Fees would cause immediate and irreparable harm to the Debtors.

D. Substantial Precedent Exists for Authorizing Payment of Prepetition Taxes

In numerous chapter 11 cases in this and other districts, courts have authorized debtors to pay similar prepetition tax obligations. *See, e.g., In re SCICOM Data Services, Ltd.*, No. 13-43894 (MER) (Bankr. D. Minn. Aug. 20, 2013) [ECF No. 20]; *In re Genmar Holdings, Inc.*, No. 09-43537 (KAC) (Bankr. D. Minn. June 4, 2009) [ECF No. 21]; *In re Polaroid Corp.*, No. 08-46617 (GFK) (Bankr. D. Minn. Dec. 23, 2008) [ECF No. 22]; *In re Quicksilver Res. Inc.*, No. 15-10585 (LSS) (Bankr. D. Del. Mar. 20, 2015) [ECF No. 101]; *In re RadioShack Corp.*, 15-10197 (BLS) (Bankr. D. Del. Feb. 9, 2015) [ECF No. 164]. The Debtors submit that the circumstances described herein warrant similar relief.

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, LLC*, 2010 Bankr. LEXIS 5636, at *3-4 (Bankr. W.D. Mo. 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 to the extent the use of property of the estate is implicated here, the actions for which relief is requested represent a sound exercise of the Debtors' business judgment and are justified under section 363(b), as well as under section 105(a), of the Bankruptcy Code. As noted above, if the Covered Taxes and Fees are not paid, the Governmental Authorities could take actions that could be costly and distracting to the Debtors and interfere with the Debtors' ability to succeed in these cases and maximize value for creditors, which would negatively affect all of the Debtors' creditors and employees, and other parties in interest. Moreover, because most of the Covered Taxes and Fees either (i) are "trust fund" taxes, and are therefore not property of the Debtors' estates, or (ii) would be afforded priority status under section 507(a)(8) of the Bankruptcy Code, the Debtors' general unsecured creditors would not be prejudiced by the Court's granting of the relief requested herein.

CONCLUSION

For the foregoing reasons, the Debtors respectfully request that the Court enter an order granting the relief requested in the Motion.

Dated: March 10, 2017

/e/ Sarah M. Olson

Clinton E. Cutler (#0158094)
Cynthia A. Moyer (#0211229)
Ryan T. Murphy (#0311972)
James C. Brand (#387362)
Sarah M. Olson (#0390238)
Steven R. Kinsella (#0392289)
FREDRIKSON & BYRON, P.A.
200 South Sixth Street, Suite 4000
Minneapolis, MN 55402-1425
Telephone: 612.492.7000
ccutler@fredlaw.com
cmoyer@fredlaw.com
rmurphy@fredlaw.com
jbrand@fredlaw.com
solson@fredlaw.com
skinsella@fredlaw.com

PROPOSED ATTORNEYS FOR DEBTORS

60876695

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

In re:

Gander Mountain Company,

Debtor.

Case No.: 17-30673
Chapter 11 Case

In re:

Overton's, Inc.,

Debtor.

Case No.: 17-30675
Chapter 11 Case

**ORDER GRANTING EXPEDITED RELIEF AND AUTHORIZING
DEBTORS TO PAY CERTAIN PREPETITION TAXES AND FEES**

This case came before the court on the debtors' Motion for Order (I) Granting Expedited Relief; (II) Authorizing Debtors to Pay Certain Prepetition Taxes and Fees and (III) Authorizing Financial Institutions to Honor and Process Related Checks and Transfers (the "Motion"). Capitalized terms not defined in this order have the meanings ascribed to them in the Motion. Based on the Motion and all of the files, records and proceedings in the case,

IT IS ORDERED:

1. The Motion is granted, including the request for expedited relief.
2. The debtors are authorized, but not required, to pay, in their sole discretion, the Covered Taxes and Fees, whether relating to the period before or after the Filing Date, to the Governmental Authorities or NRA, as applicable.
3. All applicable Banks are hereby authorized to receive, process, honor and pay any and all checks, drafts, wires, check transfer requests or automated clearing house transfers

evidencing amounts paid by the debtors under this order whether presented prior to or after the Filing Date to the extent the debtors have good funds standing to their credit with such bank or other financial institution. Such Banks are authorized to rely on the representations of the debtors as to which checks are issued or authorized to be paid pursuant to this order without any duty of further inquiry and without liability for following the debtors' instructions.

4. 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.

5. Nothing in this order shall be construed as impairing the debtors' rights to contest the validity or amount of any Covered Taxes and Fees assessed by the Governmental Authorities or NRA, and all of the debtors' rights with respect thereto are hereby reserved.

6. Notwithstanding the possible applicability of Bankruptcy Rules 6003 and 6004(h), the terms and conditions of this order shall be immediately effective and enforceable upon its entry

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

Dated:

United States Bankruptcy Judge

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