

**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 ORDER (I) GRANTING EXPEDITED RELIEF, (II) AUTHORIZING DEBTORS TO PAY PREPETITION AMOUNTS RELATING TO CERTAIN SHIPPERS, WAREHOUSEMEN, AND CUSTOMS DUTIES, 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(c) 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) and 363 of the Bankruptcy Code, and is filed under Local Rules 9013-1, 9013-2 and 9013-3. Notice of the hearing on this Motion is provided pursuant to Bankruptcy Rule 9013 and Local Rules 9013-2(b) and 9013-3. The Debtors request entry of an order granting expedited relief and authorizing them to pay certain prepetition amounts relating to shippers, warehousemen, and customs duties.

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 Petition 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.

RELIEF REQUESTED

8. By this Motion, and pursuant to sections 105(a) and 363 of the Bankruptcy Code, the Debtors seek entry of an order: (a) granting them the authority in their sole discretion, but not requiring them, to pay all or a portion of those prepetition labor, shipping and delivery charges to

Shippers and Warehousemen (each as defined below) that the Debtors determine, in their sole discretion, to be necessary or appropriate to obtain the release of goods, components, materials, equipment, or other items (collectively, the “Goods”) held by any such Shippers or Warehousemen;¹ (b) authorizing, but not directing, the Debtors to pay all or a portion of those prepetition Customs Duties (as defined below) and such other incidental prepetition import expenses that the Debtors determine, in their sole discretion, to be necessary or appropriate to obtain the Goods in transit and to satisfy any liens on the goods for Customs Duties; and (c) authorizing banks to receive, process, honor and pay checks or electronic transfers used by the Debtors to pay the foregoing.

SHIPPERS AND WAREHOUSEMEN

9. In operating their businesses, the Debtors use and make payments to (i) domestic and foreign commercial common carriers, movers, shippers, freight forwarders/consolidators, delivery services, customs brokers, shipping auditing services, deconsolidators, distributors, logistics management companies, and certain other third-party service providers (collectively, the “Shippers”) that facilitate the shipment or movement of the Debtors’ Goods—primarily outdoor and sporting apparel, supplies, products, and accessories—to and among the Debtors’ facilities and to their customers; and (ii) warehousemen, bailees, storage facilities, and other storage providers (collectively, the “Warehousemen”) to whom Goods are delivered through established national and international distribution networks to store Goods in transit (all such payments, collectively, the “Shipping and Warehousing Charges”).

¹ Certain parties may receive payment on account of their prepetition claims pursuant to other motions that have been or may be filed by the Debtors. To the extent that 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.

10. The Debtors seek to pay the prepetition shipping and warehousing charges with respect to Goods in transit for several important reasons. The services provided by the Shippers and Warehousemen are essential to the Debtors' day-to-day operations because they facilitate the shipment of inventory to the Debtors' brick-and-mortar retail stores and to direct customers (customers who place orders online or through a catalogue). Specifically, most items are shipped to one of the Debtors' distribution centers, and from there to the retail stores or to direct customers. Other items may be shipped directly from vendors to direct customers. The Shippers and Warehousemen facilitate all of these movements. Those shipments are vital to the Debtors' businesses because they enable the Debtors to keep their physical stores stocked, which ensures that there is product to attract customers and generate revenue through sales, and to ensure that online or other orders are delivered to customers. At any given time, there are numerous shipments en route to or between the Debtors' distribution centers or retail stores, and to the Debtors' customers. Therefore, the Shippers and Warehousemen currently possess Goods that are vital to the Debtors' operations.

11. If shipping and warehousing charges are not paid, Shippers and Warehousemen may refuse to perform additional services for the Debtors. In such event, the Debtors would incur additional expenses, such as premium replacement shipping and warehousing costs. Moreover, the time to find replacement Shippers and Warehousemen would have devastating effects on the Debtors' operations by delaying the delivery of critical inventory or time-sensitive customer orders. In many cases, the Shippers and Warehousemen represent one of the only means to cost-effectively transport and store the Debtors' Goods. The Debtors' businesses depend critically on their relationships with the Shippers and Warehousemen for which there are few, if any, adequate, available, or comparably-priced substitutes in the market. If the Debtors

were unable to promptly locate suitable replacements for these and similar Shippers and Warehousemen, the Debtors' operations would likely soon halt, and they would be unable to stock the warehouses from which certain orders are shipped, and would not be able to get Goods to their retail stores for sales to customers.

12. Moreover, to the extent the Debtors have not paid for such services, the Shippers and Warehousemen may be able, pursuant to state law, to assert liens on the Goods in their possession to secure the charges and expenses incurred in connection with the transportation, storage and preservation of the Debtors' Goods.

13. Further, it is essential to their reorganization efforts that the Debtors be permitted to pay selected counterparties in order to continue the Debtors' businesses and to honor their commitments to their customers. Because of the commencement of these chapter 11 cases, certain Shippers and Warehousemen that hold Goods for delivery to the Debtors or the Debtors' customers may refuse to release such Goods pending receipt of payment for their prepetition services, which would disrupt the Debtors' operations. The transport of inventory and timely delivery of customer orders is critical to the value of the Debtors' businesses, and any delays in this logistics chain would lead to a substantial loss of revenue.

14. Finally, many of the Shippers and Warehousemen may hold liens against the Debtors' property in their possession under applicable state warehousemen's and shipping lien statutes, which liens (the "Liens") and/or interests (the "Interests") may be perfected notwithstanding the automatic stay established by section 362(a) of the Bankruptcy Code. Additionally, pursuant to section 363(e) of the Bankruptcy Code, the Shippers and Warehousemen, as bailees, may be entitled to adequate protection as holders of possessory liens.

15. Because the Debtors are, in many cases, dependent on third-party Shippers and Warehousemen, it is essential that the commencement of these chapter 11 cases not give any Shippers or Warehousemen reason or excuse to cease performing or to retain products, equipment or other Goods.

16. As of the Filing Date, the Debtors estimate that they owe approximately \$760,000 in the aggregate to Shippers and Warehousemen.

17. The Debtors seek the authority to make those payments to Shippers and Warehousemen that they determine, in their sole discretion, are necessary or appropriate. To minimize the amount of payments required, the Debtors request authority to identify Shippers and Warehousemen in the ordinary course of their businesses. Identifying these vendors now would likely cause all such creditors to demand payment in full. The Debtors propose that they may, in their sole discretion, condition payment of the claims of each Shipper or Warehouseman upon an agreement to continue to supply goods or services to the Debtors on such creditor's "Customary Trade Terms" for a period of time and on other such terms and conditions as are acceptable to the Debtors. As used herein, "Customary Trade Terms" means, with respect to a Shipper or Warehouseman, (a) 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, normal product mix and availability and other applicable terms and programs, that were most favorable to the Debtors and in effect between such creditor and the Debtors prior to the Filing Date) or (b) such other trade terms as agreed by the Debtors and such creditor. However, in certain circumstances, a Shipper or Warehouseman may refuse to provide services to the Debtors on the creditor's Customary Trade Terms even after payment of its claim. To accommodate these circumstances, the Debtors seek approval to

enter into other agreements, in the Debtors' sole discretion, with each such Shipper or Warehouseman on a case-by-case basis.

18. The Debtors further propose that if a Shipper or Warehouseman later refuses to continue to supply goods or services to the Debtors on the Customary Trade Terms for the applicable period, or on such terms as were individually agreed to between the Debtors and such creditor, then the Debtors may, in their sole discretion, and without further order of the Court: (i) declare that the payment of the creditor's claim is a voidable postpetition transfer pursuant to section 549(a) of the Bankruptcy Code that the Debtors may recover from such Shipper or Warehouseman in cash or in goods and (ii) demand that the creditor immediately return such payments in respect of its 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 setoffs of any type whatsoever, and the creditor's claim shall be reinstated in such an amount as to restore the Debtors and the creditor to their original positions, as if the agreement had never been entered into and the payment of the creditor's claim had not been made. In sum, the Debtors would return the parties to their positions immediately prior to the entry of the order approving the relief sought herein.

19. To ensure that Shippers and Warehousemen transact business with the Debtors on Customary Trade Terms, the Debtors propose the following procedures, to be implemented in the Debtors' sole discretion, as a condition to paying any Shipper or Warehouseman: (a) that a letter or contract including provisions substantially in the form of the letter attached hereto as Exhibit A (a "Vendor Agreement") be delivered to, and executed by, the creditor along with a copy of the order granting the relief sought herein and (b) that payment of the creditor's claims include a communication of the following statement:

By accepting this payment, the payee agrees to the terms of the Order of the U.S. Bankruptcy Court for the District of Minnesota, dated March [•], 2017 in the chapter 11 cases of Gander Mountain Company and Overton's, Inc. (Case Nos. 17-30673 and 17-20675), entitled "Order Granting Expedited Relief and Authorizing Debtors to Pay Prepetition Amounts Relating to Certain Shippers, Warehousemen, and Customs Duties" and submits to the jurisdiction of that Court for enforcement thereof.

20. As a further condition of receiving payment on a claim of a Shipper or Warehouseman, the Debtors are seeking authorization, in their sole discretion, to require that a Shipper or Warehouseman agree to take whatever action is necessary to remove any existing trade liens at such Shipper's or Warehouseman's sole cost and expense and waive any right to assert a trade lien on account of the paid claim of such Shipper or Warehouseman.

21. To the extent an agreement relating to Shipping and Warehousing Charges is deemed an executory contract within the meaning of section 365 of the Bankruptcy Code, the Debtors do not, at this time, seek to assume such contract. Accordingly, if the Court authorizes the payments described above, such payments should not be deemed to constitute postpetition assumption, reaffirmation or adoption of the programs, policies, or agreements as executory contracts pursuant to section 365 of the Bankruptcy Code. The Debtors reserve all of their rights under the Bankruptcy Code. In addition, nothing in this Motion shall be an admission as to any lien or interest, including any possessory lien.

CUSTOMS DUTIES

22. The Debtors also seek authority for their customs brokers, as the Debtors' agents, to continue to make necessary payments of customs duties, import-related taxes, and other incidental import expenses (collectively, the "Customs Duties") to the U.S. Customs and Border Protection Agency (the "U.S. Customs Service") and to non-U.S. customs authorities, even if the Debtors incurred the relevant liability prior to the Filing Date. In the ordinary course of their businesses, the Debtors purchase certain of their inventory from overseas, and then import such

goods into the United States (collectively, the "Imported Goods"). The Debtors' purchase of the Imported Goods is vital to the operation of their business. Without the uninterrupted purchase and delivery of Imported Goods, the Debtors could not continue business in the ordinary course with their suppliers and maintain uninterrupted stocking of their retail locations and sales to customers.

23. If Customs Duties are not timely paid, the U.S. Customs Service and non-U.S. customs authorities may demand liquidated damages, assess interest, or impose other sanctions. Even if the Debtors are able to contest these measures, doing so would require time, effort, and expense and would distract the Debtors' management from the restructuring process. Furthermore, absent payment, the Debtors' customs brokers may, in some instances, assert liens against the Imported Goods, the U.S. Customs Service may assert a lien against such goods under 19 C.F.R. § 141.1(d) (2011), and non-U.S. customs authorities may assert similar liens or take other action against the Debtors in their respective jurisdictions. Accordingly, the Debtors submit that it is in the best interests of their estates and creditors that the Debtors be authorized to pay such Customs Duties as they become due, even if such liabilities were incurred prior to the Petition Date, in order to ensure continuous manufacturing operations. The Debtors estimate that the amount of any such Customs Duties accrued, but unpaid, as of the Petition Date is approximately \$181,000.

24. Thus, payment of the Customs Duties will benefit the Debtors' estates because (a) the Debtors' operations might otherwise be interrupted, (b) forfeiture of goods for which the Debtors have already become indirectly obligated will be avoided, and (c) potential liens, fines, penalties, and interest charges will be avoided. Accordingly, the Debtors request that this Court authorize, but not direct, the Debtors to pay prepetition Customs Duties that they determine, in

their sole discretion, are necessary or appropriate to continue their business operations in the ordinary course.

REQUEST FOR AUTHORITY TO HONOR AND PROCESS RELATED CHECKS AND TRANSFERS

25. The Debtors also request that all applicable banks and other financial institutions 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 Petition Date, *provided, however*, that: (a) funds are available in the Debtors' accounts to cover the checks and fund transfers and (b) all the banks and other financial institutions are authorized to rely on the Debtors' designation of any particular check as approved by the attached proposed order.

REQUEST FOR EXPEDITED RELIEF

26. Cause exists for expedited relief on this matter. As described herein, the Shippers and Warehousemen provide critical Goods and services to the Debtors, the uninterrupted flow of which is crucial to the Debtors' ability to preserve the going-concern value of their businesses. In addition, certain Customs Duties must be paid to avoid lack of inventory, customer orders going unfilled, and other business disruptions. Indeed, if the Debtors' access to these Goods or services is impeded or delayed, certain business operations likely will have to be shut down to the severe detriment and prejudice of all parties in interest. Accordingly, expedited relief requested is necessary to avoid immediate and irreparable harm.

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

28. 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

29. 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 set forth 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

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

WHEREFORE, the Debtors respectfully request entry of an order:

A. Granting expedited relief;

- B. Authorizing the Debtors to pay certain prepetition claims of Shippers and Warehousemen;
- C. Authorizing the Debtors to pay certain prepetition Customs Duties;
- D. Authorizing financial institutions to honor and process related checks and transfers; and
- E. Granting such other and further relief as the Court may deem just and equitable.

Dated: March 10, 2017

/e/ Sarah M. Olson

Clinton E. Cutler (#0158094)
Cynthia A. Moyer (#0211229)
Ryan T. Murphy (#0311972)
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PROPOSED ATTORNEYS FOR DEBTORS

60758596

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

[Letterhead]

_____, 2017

TO: [Shipper or Warehouseman]
[Name]
[Address]

Dear Valued Supplier:

As you are aware, Gander Mountain Company and Overton's, Inc. (together, the "**Company**") filed voluntary petitions for relief under chapter 11 of title 11 of the United States Code (the "**Bankruptcy Code**") in the United States Bankruptcy Court for the District of Minnesota (the "**Bankruptcy Cases**" and the "**Bankruptcy Court**," respectively) on March 10, 2017 (the "**Filing Date**"). On the Filing Date, the Company requested the Bankruptcy Court's authority to pay the prepetition claims of certain suppliers in recognition of the importance of the Company's relationship with such suppliers and its desire that the Bankruptcy Cases have as little effect on the Company's ongoing business operations as possible. On [●], the Bankruptcy Court entered an order (the "**Order**") authorizing the Company, under certain conditions, to pay the prepetition claims of certain suppliers that agree to the terms set forth below and to be bound by the terms of the Order. A copy of the Order is enclosed.

In order to receive payment on account of prepetition claims, you must agree to continue to supply goods and 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, coupon reconciliation, normal product mix and availability and other applicable terms and programs), that were most favorable to the Company and in effect between you and the Company prior to the Filing Date, or such other trade terms as you and the Company agree.

For purposes of administration of this trade program as authorized by the Bankruptcy Court, you and the Company both agree that:

1. The estimated balance of the prepetition claim (net of any setoffs, credits or discounts) (the "**Claim**") that you will receive from the Company is \$_____.
2. You will waive any remaining prepetition general unsecured claim against the Company.
3. You will provide an open trade balance or credit line to the Company for shipment of postpetition goods in the amount of \$_____ (which shall not be less than the greater of the open trade balance outstanding: (a) on _____, or (b) on normal and customary terms on a historical basis before and up to the Filing Date).

4 The terms of such open trade balance or credit line are as follows (if more space is required, attach continuation pages):

5. During the pendency of the Bankruptcy Cases, you will continue to extend to the Company all Customary Trade Terms (as defined in the Order).

6. You will not demand a lump sum payment upon consummation of a plan of reorganization in the Bankruptcy Cases on account of any administrative expense priority claim that you assert, but instead agree that such claims will be paid in the ordinary course of business after consummation of a plan under applicable Customary Trade Terms, if the plan provides for the ongoing operations of the Company.

7. The undersigned, a duly authorized representative of [Shipper or Warehouseman], has reviewed the terms and provisions of the Order and agrees that [Shipper or Warehouseman] is bound by the terms of the Order;

8. You will not separately seek payment for reclamation and similar claims outside of the terms of the Order unless your participation in the Shippers and Warehousemen payment program authorized by the Order (the “**Shippers and Warehousemen Payment Program**”) is terminated;

9. You will not file or otherwise assert against the Company, the estates or any other person or entity or any of their respective assets or property (real or personal) any 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 you by the Company arising from agreements entered into prior to the Filing Date. Furthermore, you agree to take (at your own expense) all necessary steps to remove any such lien as soon as possible; and

10. If either the Shippers and Warehousemen Payment Program or your participation therein terminates as provided in the Order, or you later refuse to continue to supply goods to the Company on Customary Trade Terms during the pendency of the Bankruptcy Cases, any payments you receive on account of your Claim (including claims arising under section 503(b)(9) of the Bankruptcy Code) will be deemed voidable postpetition transfers pursuant to section 549(a) of the Bankruptcy Code. You will immediately repay to the Company any payments made to you on account of your 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. Your Claim shall be reinstated in such an amount so as to restore the Company and you to the same positions as would have existed if payment of the Claim had not been made.

11. Any dispute with respect to this letter agreement, the Order and/or your participation in the Shippers and Warehousemen 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.

Sincerely,

[Gander Mountain Company or
Overton's, Inc.]

By: _____
Name: _____
Title: _____

Agreed and Accepted by:
[Shipper or Warehouseman]

By: _____
Its: _____

Dated: _____, 2017

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

In re:

Gander Mountain Company,

Debtor.

Case No.: 13-30673
Chapter 11 Case

In re:

Overton's, Inc.,

Debtor.

Case No.: 13-30675
Chapter 11 Case

**MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR ORDER (I) GRANTING
EXPEDITED RELIEF, (II) AUTHORIZING DEBTORS TO PAY PREPETITION
AMOUNTS RELATING TO CERTAIN SHIPPERS, WAREHOUSEMEN, AND
CUSTOMS DUTIES, AND (III) AUTHORIZING FINANCIAL INSTITUTIONS TO
HONOR AND PROCESS RELATED CHECKS AND TRANSFERS**

Gander Mountain Company and Overton's, Inc. (together, the "Debtors") submit this memorandum of law in support of their Motion for Order (I) Granting Expedited Relief, (II) Authorizing Debtors to Pay Prepetition Amounts Relating to Certain Shippers, Warehousemen, and Customs Duties, and (III) Authorizing Financial Institutions to Honor and Process Related Checks and Transfers (the "Motion"). The Motion should be granted because the relief requested will avoid delays in the delivery of inventory and customer orders, which will preserve the going-concern value of the Debtors' businesses, and will smooth the transition into chapter 11.

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. As described in the Motion, the Shippers and Warehousemen provide critical Goods and services to the Debtors, the uninterrupted flow of which is crucial for the success of their reorganization efforts under chapter 11. In addition, payment of the Customs Duties is critical to maintaining such uninterrupted flow. Indeed, if the Debtors’ access to these Goods (including the Imported Goods) or services is impeded or delayed, certain business operations likely will have to be shut down to the severe detriment and prejudice of all parties in interest. Accordingly, expedited relief requested is necessary to avoid immediate and irreparable harm.

II. THE PAYMENTS TO THE SHIPPERS, WAREHOUSEMEN, AND PAYMENT OF THE CUSTOMS DUTIES, SHOULD BE AUTHORIZED.

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 pre-petition 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 pre-petition 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 pre-petition 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 (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 pre-petition 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 pre-petition 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); *In re Trilogy Dev. Co.*, 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 Inc.*, 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)).

Finally, a substantial portion, if not all, of the Customs Duties sought to be paid hereunder would be entitled to priority pursuant to section 507(a)(8)(F) of the Bankruptcy Code, which affords eighth priority in payment to the allowed unsecured claims of governmental units for certain customs duties. *See* 11 U.S.C. § 507(a)(8)(F). As priority claims, the Customs Duties must be paid in full before the Debtors may make any distributions to holders of general unsecured claims in connection with a chapter 11 plan. *See* 11 U.S.C. § 1129(a)(9)(D). Accordingly, the proposed relief most likely will affect only the timing of the payment of the Customs Duties and, therefore, will not prejudice the rights of general unsecured creditors.

Accordingly, the Debtors submit that the requested relief represents a sound exercise of the Debtors’ business judgment, is justified under sections 105(a), 363(b), and 507(a)(8)(F) of the Bankruptcy Code, and that all of the Debtors’ creditors will benefit if the requested relief is granted. The critical need for the continued receipt and distribution of Goods that Shippers or

Warehousemen may hold on the Filing Date, or Imported Goods for which Customs Duties must be paid to complete delivery, amply justifies the grant of the relief sought herein. The prompt payment to Shippers and Warehousemen, and of Customs Duties is crucial for the orderly and efficient operation of the Debtors' businesses. Unless the Debtors have the authority to pay for these essential services and required import costs, their businesses will suffer irreparable harm.

Courts in this and other jurisdictions have authorized similar relief in other major chapter 11 cases. *See, e.g., In re Magnetation, LLC*, No. 15-50307 (Bankr. D. Minn. May 7, 2015) [ECF No. 63]; *In re Antioch Company*, Case No. 13-41898 (DDO) (Bankr. D. Minn. Apr. 19, 2013) [ECF No. 50]; *see also In re Quicksilver Res. Inc.*, No. 15-10585 (LSS) (Bankr. D. Del. Mar. 19, 2015) [ECF No. 96]; *In re Allied Nev. Gold Corp.*, No. 15-10503 (Bankr. D. Del. Mar. 12, 2015) [ECF No. 97]; *In re RadioShack Corp.*, No. 15-10197 (BLS) (Bankr. D. Del. Feb. 9, 2015) [ECF No. 162]; *In re Endeavour Operating Corp*, No. 14-12308 (KJC) (Bankr. D. Del. Nov. 6, 2014) [ECF No. 148]; *In re Longview Power, LLC*, No. 13-12211 (BLS) (Bankr. D. Del. Sept. 4, 2013) [ECF No. 97].

Based upon the foregoing, the relief requested herein is essential, appropriate, and in the best interest of the Debtors' estates and creditors and, therefore, should be granted.

CONCLUSION

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

Dated: March 10, 2017

/e/ Sarah M. Olson

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PROPOSED ATTORNEYS FOR DEBTORS

60876349

**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
PREPETITION AMOUNTS RELATING TO CERTAIN SHIPPERS,
WAREHOUSEMEN, AND CUSTOMS DUTIES**

This case came before the court on the debtors' Motion for Order (I) Granting Expedited Relief; (II) Authorizing Debtors to Pay Prepetition Amounts Relating to Certain Shippers, Warehousemen, and Customs Duties, 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 directed, to pay all or some of the Shipping and Warehousing Charges, whether relating to the period before or after the Filing Date, as the debtors determine, in their sole discretion, to be necessary or appropriate.

3. The debtors, in their sole discretion, may condition payment to the Shippers and Warehousemen upon agreement by the Shipper or Warehouseman to continue to supply goods or services to the debtors on such creditor'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 Shipper or Warehouseman: (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 creditor and the debtors prior to the Filing Date or (ii) such other trade terms as agreed by the debtors and such creditor.

4. As a further condition of receiving payment on a claim of a Shipper or Warehouseman, the debtors are authorized, in their sole discretion, to require that such Shipper or Warehouseman agree to take whatever action is necessary to remove any existing Liens or Interests at such Shipper's or Warehouseman's sole cost and expense and waive any right to assert a Lien or Interest on account of the paid claim of such Shipper or Warehouseman.

5. The debtors, in their sole discretion, may undertake to cause Shippers and Warehousemen to enter into an agreement (a "Vendor Agreement") including provisions substantially in the form attached to the Motion as Exhibit A.

6. 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 the Shippers and Warehousemen.

7. If the debtors, in their sole discretion, determine that a Shipper or Warehouseman 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 creditor, the debtors may terminate a Vendor Agreement, together with the other benefits to the creditor 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 creditor, (y) the underlying default under the Vendor Agreement is fully cured by the creditor 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 creditor.

8. If a Vendor Agreement is terminated as set forth above, or if a Shipper or Warehouseman 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 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 creditor, (b) the creditor shall immediately return such payments in respect of its 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 claim shall be reinstated in such an amount so as to restore the debtors and the Shipper or Warehouseman to their original positions as if the Vendor Agreement had never been entered into and no payment of the creditor's claim had been made.

9. All Vendor Agreements shall be deemed to have terminated, together with the other benefits to Shippers or Warehousemen 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.

10. The debtors and their customs brokers, as the debtors' agents, are authorized, but not directed, to make payments to the U.S. Customs and Border Protection Agency and to non-U.S. customs authorities in satisfaction of customs duties, import-related taxes, and other incidental import expenses, whether relating to the period before or after the Filing Date.

11. All applicable banks and other financial institutions 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 and financial institutions are authorized to rely on 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.

12. 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.

13. Unless expressly provided for herein, 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.

14. Notwithstanding the possible applicability of Bankruptcy Rule 6004(h) or any other Bankruptcy Rule, the terms and conditions of this order shall be immediately effective and enforceable upon its entry.

15. 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 Shipping and Warehousing Charges or the Customs Duties.

16. The debtors are authorized and empowered to take all actions necessary to implement the relief granted in this order.

17. 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