

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

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In re:

Gander Mountain Company,

Case No.: 17-30673

Chapter 11 Case

Debtor.

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In re:

Overton's, Inc.,

Case No.: 17-30675

Chapter 11 Case

Debtor.

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**NOTICE OF HEARING AND JOINT MOTION FOR ORDER (I) GRANTING  
EXPEDITED RELIEF AND (II) APPROVING KEY EMPLOYEE RETENTION PLAN  
AND KEY EMPLOYEE INCENTIVE PLAN**

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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 20, 2017**, in Courtroom 7 West, of the United States Courthouse at 300 South Fourth Street, 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 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 11 U.S.C. §§ 363 and 503(c)(3). The Debtors request an order of this Court approving the Debtors’ key employee retention plan (the “KERP”) and key employee incentive plan (the “KEIP”).

### **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. No trustee or examiner has been appointed in the Debtors’ chapter 11 cases. No creditors’ or other official committee has yet been appointed pursuant to section 1102 of the Bankruptcy Code.<sup>1</sup>

7. The Debtors are one of the nation’s largest specialty outdoor sporting goods retailers for hunting, fishing, camping, shooting, and outdoor lifestyle products. The Debtors have accumulated substantial operating losses over the past two fiscal years, primarily as a result of changing market trends, including shifting sales from traditional brick and mortar retailers to a host of online resellers. The Debtors have also faced significant competition from a combination of other sporting goods retailers and competition from certain of their own largest apparel and

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<sup>1</sup> The Debtors expect an Official Committee of Unsecured Creditors (the “Committee”) to be appointed in this case.

softlines vendors, who have launched strategies to open their own networks of brick and mortar retail stores that typically feature a more extensive and exclusive selection of the vendor's branded apparel at more attractive prices. Moreover, in response to these competitive pressures, many such retailers have adopted persistent and aggressive promotional selling strategies that deeply discount the prices for a wide range of products, forcing other retailers to match such promotional activity in order to retain customer traffic, thus further diluting the profitability of the Debtors' sales. The negative impact of these competitive forces – which in one shape or another are impacting nearly all brick and mortar retailers – can be seen in the unprecedented number of bankruptcy filings by retailers over the past 24 months.

8. 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.

9. In this challenging environment for retail store operations, the Debtors have commenced these cases with the goal of selling a substantial portion of their assets on a going concern basis and liquidating other assets through a series of “store closing” sales on a very accelerated basis – the first 32 store closing sales to commence immediately upon court approval to enable the Debtors to supplement their operating liquidity during the pendency of the auction sale process. The Debtors, together with their advisors, must act quickly to preserve the value of a core portion of the Debtors' business that operates at a sufficient level to enable a successful sale process, preserve jobs, vendor and landlord relationships and emergence of the Debtors from bankruptcy. The Debtors must accomplish this in an environment of unprecedented volatility in retail, which has created an extremely challenging operating environment, adversely affecting employee morale and the attractiveness of a career in retail, while at the same time maximizing

proceeds from “store closing” sales to be conducted at a time when the market has seen an unprecedented number of recently completed or planned liquidation sales of similar sporting goods, apparel, and footwear retailers.

10. In order to overcome these challenges and achieve these goals for the benefit of all parties in interest, the Debtors require the ongoing commitment of their employees and executives in maintaining the stability of day-to-day operations while they manage an accelerated sale process, preserve valuable relationships with key vendors, and execute a large number of simultaneous “store closing” sales in a manner that both maximizes proceeds and preserves brand value. The Debtors believe that the success of the restructuring goals described above hinges in vital respects on the Debtors’ ability to continue to retain and incentivize its key employees and incentivize its key executives to perform at high levels under difficult circumstances.

11. Prior to the Filing date, the Debtor Gander Mountain Company adopted a long term incentive plan (the “LTIP”) that provided for three annual bonus payments equal to 40% of a participant’s base salary as long as the participant remained actively and continuously employed by the Debtors through December 31, 2019. The LTIP had a projected total cost of \$3,300,000. The LTIP was discontinued when the Debtors filed these bankruptcy cases. The former LTIP participants were determined pursuant to an exhaustive performance assessment process administered by the Debtors’ human resources department in November 2016. The Debtors propose to implement the KERP and KEIP in lieu of the LTIP.

**I. THE DEBTORS’ KEY EMPLOYEE RETENTION PLAN.**

12. The Debtors have identified certain key, non-insider employees whose unique institutional and operational knowledge and skill, and continuity throughout the process, are

essential to the Debtors' ability to manage their business and maximize the value of the Debtors' estates during the pendency of these cases (the "KERP Participants"). The KERP Participants are identified in Exhibit 1 to the KERP, which is attached to this Motion as **Exhibit A**. Exhibit 1 to the KERP contains personal information of the KERP Participants and, as noted in Exhibit A, the Debtors have filed a separate motion seeking an order authorizing the filing of the Exhibit under seal. The KERP Participants include employees with various job functions, including without limitation, store operations, information technology, e-commerce, merchandising, supply chain management, accounting, finance, legal, and human resources.

13. While several KERP Participants have titles that include terms such as "vice president," "director," "senior," or "chief," none of the KERP Participants are "insiders" as that term is defined in 11 U.S.C. § 101(31)(B). Although the KERP Participants play a vital role in the Debtors' day-to-day business operations and will play a similarly vital role during the Debtors' bankruptcy cases, the KERP Participants do not have the ability to influence the direction of the Debtors' business operations or policies, nor do they have access to complete, high-level strategic inside information. None of the KERP Participants attended meetings of the Debtors' boards of directors unless invited to make a specific presentation and, after which, they exited. None of the KERP Participants have been aware of, or participated in, previous discussions with potential strategic or financial partners and each of the KERP Participants has a limited and very defined scope of authority subject to the oversight from the Debtors' three most senior executives that are the participants in the proposed KEIP.

14. The KERP Participants will perform their normal job responsibilities related to the Debtors' ordinary course operations, but the KERP Participants will, and in most cases already have, assumed significant additional responsibilities as a result of the Debtors' filing for

chapter 11 protection. The KERP Participants' contributions are essential to maximize the value of the Debtors' business during the auction sale process and ensure that the Debtors' business will continue to operate during the pendency of the case. Due to these expanded responsibilities and the uncertainty regarding the Debtors' financial future, the Debtors believe the payments under the KERP are necessary to ensure the KERP Participants continue to work for the Debtors and continue to focus their efforts on maximizing estate value. In fact, during the past two months during which the Debtors' financial challenges have received public press, the Debtors have experienced a loss of 16 employees. Losing more key employees will significantly harm the Debtors' business as it would be highly unlikely that the Debtors could recruit under these circumstances similarly experienced and skilled replacements at less cost or within the accelerated time frame under which the Debtors' cases are structured.

15. Furthermore, prior to the Filing Date, the Debtors embarked on a process seeking a stalking horse bid for a sale of a substantial portion of its assets on a going concern basis. The Debtors continue to negotiate with potential bidders and will file a motion for approval of an auction process and sale. The continued commitment of the KERP Participants will be a major component in reaching an agreement with a stalking horse buyer or other successful bidder, including providing diligence and other information the bidders may require and maintaining continuity of operations.

16. To that end, the Debtors worked with their advisors, including the Chief Restructuring Officer (the "CRO"), to design the KERP with the goal of maximizing the value of the bankruptcy estates for the benefit of all interested parties and ensuring that the Debtors' operations will continue to be conducted in an effective and stable manner. The Debtors have also disclosed the terms of the KERP to the Debtors' pre-petition and DIP secured lenders and

such lenders have agreed to include the aggregate amount of the KERP payments as a reserve against the Debtors' borrowing base in the post-petition DIP Credit Facility until the payment in full of the prepetition and postpetition secured obligations. The Debtors believe the KERP is a reasonable, cost-effective way to ensure the commitment of the KERP Participants, which is essential to the Debtors' success in these cases.

17. With input from their legal and financial advisors, the CRO on behalf of the Debtors has surveyed information on KERPs approved in similar size cases and in similar industries to determine that the KERP proposed herein is market competitive.

18. The KERP is made up of two tiers (Tier I and Tier II) and contains the following terms<sup>2</sup>:

a. **Participation** – the KERP has 37 KERP Participants. The Debtors reserve the right, in their reasonable business judgment, to select additional, non-insider KERP Participants and will provide notice to the U.S. Trustee, the Debtors' secured lenders, and the Committee.

b. **Cost** - the aggregate cost of Tier I shall be no greater than \$1,045,000 and the aggregate cost of Tier II shall be no greater than \$1,125,000 at "Target" and \$1,500,000 at "Maximum." In total, the aggregate cost of the KERP shall be no greater than \$2,170,000 at "Target" and \$2,545,000 at "Maximum."

c. **Tier I Retention Bonus** – for substantially all of the Tier I KERP Participants, the retention bonus that can be earned is an amount equal to 20% of their respective base salary, and for the remaining participants, the potential award is an amount equal to 25% or less of their respective base salary. The retention bonus will be paid in lump sums on dates tied to important events in the bankruptcy cases: (i) 50% of the retention bonus is earned if the KERP Participant remains employed by the Debtors as of the date on the hearing to approve the Debtors' motion under 11 U.S.C. § 363 to sell substantially all of the Debtors' assets (expected to occur on or about May 1, 2017) (the "Sale Hearing Date") and (ii) the remaining 50% is earned either after the closing of the sale under section 363 or the effective date (the "Effective Date") of the Debtors' Chapter 11 Plan of Reorganization or Plan of Liquidation (collectively, the "Plan"), whichever occurs earlier. If the condition to the payment of the first installment of the retention

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<sup>2</sup> This summary is not intended to modify or supersede the terms of the KERP and, to the extent there is a discrepancy, the provisions of the KERP control.

bonus under clause (c)(i) is not satisfied, a participant can earn the 100% of his or her retention bonus upon compliance with the conditions of clause (c)(ii) above. In all cases payments will be made on earned bonuses after the completion of asset sales resulting in payment in full of the Debtors' pre-petition and DIP loan secured creditors.

d. **Tier I Termination Provision** – any Tier I KERP Participant that voluntarily resigns or is terminated for cause prior to payment of the retention bonus, will forfeit his or her entire retention bonus. If the KERP Participant is terminated “without cause,” the KERP Participant will remain eligible to receive payment of the retention bonus on a prorated basis considering the portion of time the KERP Participant was employed from the Filing Date to the date the award is earned.

e. **Tier II Retention Bonus** – the retention bonus paid to each of the five Tier II KERP Participant will be paid based on the following:

i. **Threshold** – a Tier II KERP Participant will earn and be paid 50% of his or her base salary if the Debtors' plan of reorganization or plan of liquidation is confirmed;

ii. **Target** – a Tier II KERP Participant will earn 75% of his or her base salary if the Net Operating Activity line item set forth in the cash flow projection and budget under the DIP Credit Facility is met or exceeded on a cumulative basis as of the Sale Hearing Date; and

iii. **Maximum** – a KERP Participant will earn and receive 100% of his or her salary if the net proceeds estimated to be distributable to unsecured creditors as of the date of confirmation of the Debtors' plan of reorganization or plan of liquidation meets or exceeds the Debtors' projected net proceeds estimated to be available for distribution to those unsecured creditors in the Debtors' CRO's estimated net liquidation analysis determined as of March 11, 2017 (“CRO Net Liquidation Analysis”), without taking into account any net recoveries from avoidance actions or other litigation recoveries.

iv. Each performance metric operates independently. However, if a lower level performance metric is satisfied and a higher level performance metric is subsequently satisfied, the KEIP Participant will receive only the incremental amount necessary to bring the total payments equal to the higher earned bonus level. For instance, if a Tier II KERP Participant satisfies the Threshold metric, receives a bonus payment of 50% of his or her salary, and subsequently satisfies the Target metric, the Tier II KERP Participant is not entitled to a second bonus payment of 75% of his or her base salary. Instead, the Tier II KERP participant is entitled to a second bonus payment of the difference between 75% of his or her base salary and 50% of his or her base salary.

f. **Tier II Termination Provision** – any Tier II KERP Participant that voluntarily resigns or is terminated for cause prior to payment of a retention bonus will forfeit his or her retention bonus. If the KERP Participant is terminated “without cause” or due to death or total disability prior to the payment of a retention bonus, the KERP Participant will receive his or her prorated share of the retention bonus based on the portion of the time spent employed from the Filing Date through the termination date.

g. **Release of Claims** – as a condition of receiving a bonus payment under the KERP, the KERP Participants will release all claims they may hold against the Debtors, including claims if any under the LTIP.

19. Without the retention bonuses under the proposed KERP, the KERP Participants are more likely to seek alternative employment prior to the conclusion of the sale process, substantially decreasing the Debtors’ ability to sell assets on a going concern basis, their ability to effectively manage large number of simultaneous “store closing” or similar sales, and their ability to maximize the value of the estates for the benefit of all parties in interest.

## **II. THE DEBTORS’ KEY EMPLOYEE INCENTIVE PROGRAM.**

20. The Debtors also propose to implement the KEIP for three participants: the Debtors’ president, chief administrative officer/chief legal officer, and chief financial officer (the “KEIP Participants”). A copy of the KEIP is attached as **Exhibit B**.

21. The KEIP participants are the three senior executives of the Debtors, holding executive officer and/or director positions at both of the Debtors. They each have deep industry knowledge and specific skills and expertise that, along with a familiarity and understanding of the operations, customer and supplier relationships, lender and landlord relationships, employee relationships, and infrastructure of the Debtors, are critical to the daily operation of the Debtors’ business and also the Debtors’ ability to maximize the value of the estates. Moreover, the KEIP Participants have played a major role in marketing the Debtor’s assets to potential strategic buyers, making substantial progress on this process before the Debtors hired advisors and professionals to assist the Debtors. The interest of third parties in purchasing a substantial

portion of the Debtors' assets on a going concern basis is a direct result of the KEIP Participants' work-to-date. The role of the KEIP Participants in moving forward in negotiations with the Stalking Horse, the marketing of the Debtors' assets, arranging DIP financing, and preparing the Debtors for entry into these cases has been vital.

22. The KEIP Participants are highly accomplished and capable professional managers employed or appointed by the Debtors' boards. The Debtors have previously provided an incentive program to the KEIP Participants designed to encourage superior performance. Among other things, the KEIP Participants have been offered incentive plans based on achieving metrics associated with pre-tax operating income and earnings before interest, taxes, depreciation, and amortization. These annual programs were based on a percentage of the relevant metric and were uncapped - it was possible for a participant to receive incentive compensation well in excess of base salary. The KEIP Participants were also offered the opportunity to participate in longer-term equity programs that would provide additional and significant incentives to increase the Debtors' equity value. As a result of the filing of these bankruptcy cases, the former annual incentive programs are no longer operative and the long-term equity programs are now without value.

23. In order to overcome the significant challenges facing the Debtors' restructuring plans and to achieve the desired results for the benefit of all parties in interest, the Debtors believe it is vital to incentivize the ongoing commitment of their senior executives. The best and sustained efforts of the KEIP Participants is absolutely necessary in maintaining stability of the Debtors' day-to-day operations during the accelerated competitive sale process, operating the Debtors' business under very tight operating and cash flow restrictions imposed by the DIP Credit Facility, obtaining additional financial support to supplement the Debtors' operating

liquidity during the sale process, encouraging and fostering the continued retention of the Debtors' employees (including the KERP Participants), preserving valuable relationships with key industry vendors, and effectively executing a large number of simultaneous "store closing" or similar sales in a manner that both maximizes proceeds and preserves brand equity.

24. As discussed above, the aim of these cases is to achieve a sale on a going concern basis of a substantial amount of the Debtors' assets, which is expected to maximize value of these estates and will result in the preservation of numerous jobs for the Debtors' rank and file employees, and preserve important vendor relationships. The continued participation of the KEIP Participants in the going concern sale process and the rationalization of the Debtors' other assets is vital to the successful outcomes of those processes. For example, the continued participation of the KEIP Participants sends a strong message to the Debtors' vendor community regarding the Debtors' ongoing viability.

25. The KEIP is purely an incentive-based, and not a retention-based, plan that rewards the KEIP Participants only if the Debtors achieve the operational and financial benchmarks that are directly related to (i) preservation of the Debtors' business, (ii) managing the Debtors' business under very tight operating and cash flow restrictions imposed by the DIP Credit Facility, (iii) ensuring additional and necessary operating liquidity during the critical auction sale process by supplementing the limited proceeds available under the DIP Credit Facility with proceeds generated from an expedited "store closing" sale process conducted at approximately 32 stores identified by the KEIP Participants, and (iv) realizing distributions to unsecured creditors in excess of the net proceeds estimated to be available for distributions to those unsecured creditors in the CRO's Net Liquidation Analysis.

26. The Debtors worked with their advisors to formulate and structure a KEIP reflecting the current realities and headwinds in the retail industry, establishing award metrics that are difficult to achieve especially given the short time frame to achieve a sale of the Debtors' assets, the limited operating liquidity through the completion of "store closing" or similar sales at a substantial number of locations in a manner that generates significant proceeds and preserves brand equity and the concerns and issues that are unique to the bankruptcy proceedings.

27. The KEIP Participants must significantly expand their pre-bankruptcy job responsibilities to achieve the KEIP bonus payments. The KEIP Participants played a vital role in obtaining interest of potential bidders and conducting initial face-to-face meetings and information exchanges without the knowledge of other employees. This sale process will continue in these cases and the KEIP participants will continue to play critically important roles. The KEIP Participants will be responsible for interacting with the Debtors' lenders, creditors, financial partners, and potential purchasers, including organizing, managing, supervising, and participating in all negotiations, management presentations, and responses to extensive data and information requests in connection with the sale process. The KEIP Participants will be expected to provide, among other things, extensive and crucial assistance to the Debtors' CRO, all case professionals, counsel, and advisors, manage and maintain relationships with key vendors, landlords, and other parties, as well as manage the daily operations and finances of the Debtors during the case.

28. The KEIP is designed to incentivize the KEIP Participants to preserve the value of the Debtors' business by increasing operating liquidity and maintaining positive cash flow during the auction sale process, thereby allowing the Debtors to obtain the highest and best terms for any proposed sale transaction and thus increasing the net distributions to the Debtors' unsecured

creditors above the net proceeds estimated to be available for distribution to those unsecured creditors in the CRO's estimated net liquidation analysis.

29. The KEIP contains the following terms<sup>3</sup>:

a. **Participation** – the Debtors have limited participation in the KEIP to the three KEIP Participants. The Debtors reserve the right, in their reasonable business judgment, to select additional KEIP Participants upon notice to the U.S. Trustee, the Debtors' secured lenders, and any official Committee in the cases.

b. **Cost** - the aggregate cost of the KEIP ranges from \$1,350,000 at "Threshold," to \$2,025,000 at "Target," \$2,362,500 at "Stretch," and "2,700,000 at "Maximum."

c. **Incentive Bonus** – the KEIP provides four independent performance metrics that the KEIP Participants may satisfy in order to earn the corresponding amount of the bonus. Each metric representing a step along the path to maximizing the value of the Debtors' estate and the distributions to unsecured creditors. The terms are:

i. **Threshold** – the KEIP Participants will earn 100% of their base salary if they accomplish on an expedited basis the following milestones intended to provide the Debtors' with additional and necessary operating liquidity during the auction sale process: (1) determine a list of not less than 25 underperforming or unprofitable stores (the "Closing Stores") to conduct expedited, post-petition, and orderly store closing sales, (2) adopt measures to facilitate a reallocation and redistribution of inventory to the Closing Stores to maximize the proceeds from the store closing sales, (3) engage one or more recognized liquidating consultants or agents to advise and/or conduct the closing sales, (4) promptly file necessary motions for the Court's approval of the Closing Stores sales plan and any agency agreement, (5) substantially complete the Closing Stores sales within 120 days after the Court issues an order approving the Closing Stores sales plan, and (6) realizing gross proceeds from the sale of assets at the Closing Stores equal to at least 110% of the cost value of the assets (as customarily defined in the consulting agreement entered into with a liquidating agent);

ii. **Target** – the KEIP Participants will earn 150% of their base salary if they manage the Debtors' business to meet or exceed the cumulative Net Operating Activity line item set forth in the cash flow projection and budget under the DIP Credit Facility as of the Sale Hearing Date.

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<sup>3</sup> This summary is not intended to modify or supersede the KEIP terms and, to the extent there is a discrepancy, the provisions of the KEIP control.

iii. **Stretch** – the KEIP Participants will earn 175% of their base salary if the cash or other property estimated to be available for distribution to unsecured creditors as of the date of confirmation of the Debtors’ plan of reorganization or plan of liquidation exceeds the net proceeds estimated to be available for distribution to unsecured creditors in the CRO’s Net Liquidation Analysis in an amount not less than \$5 million without taking into account any net recoveries on avoidance actions or other litigation recoveries.

iv. **Maximum** – the KEIP Participants will earn 200% of their base salary if the cash or other property estimated to be available for distribution to unsecured creditors as of the date of confirmation of the Debtors’ plan of reorganization or plan of liquidation exceeds the projected net proceeds to unsecured creditors in the CRO’s Net Liquidation Analysis in an amount not less than \$15 million without taking into account any net recoveries on avoidance actions or other litigation recoveries.

v. As stated above, each performance metric may be met independently of the other metrics. However, if a lower level performance metric is satisfied and a higher level performance metric is subsequently satisfied, the KEIP Participant will receive only the incremental amount necessary to bring the total payments equal to the higher earned bonus level. For instance, if a KEIP Participant satisfies the Threshold metric, and is entitled to or receives a bonus payment of 100% of his or her salary, and subsequently satisfies the Target metric, the KEIP Participant is not entitled to a second bonus payment of 150% of his or her base salary. Instead, the KEIP participant is entitled to a second bonus payment of the difference between 150% of his or her base salary and 100% of his or her base salary.

d. **Termination** – any KEIP Participant that voluntarily resigns, or is terminated for cause, prior to payment of an incentive bonus, will forfeit his or her incentive bonus. If the KEIP Participant is terminated “without cause” or due to death or total disability prior to the payment of an incentive bonus, the KEIP Participant will receive his or her prorated share of the incentive bonus based on the portion of the time spent employed from the Filing Date through the termination date.

e. **Release of Claims** – as a condition of receiving a bonus payment under the KEIP, the KEIP Participants will release all claims they may hold against the Debtors, including claims, if any, under the LTIP.

30. The CRO, acting on behalf of the Debtors, in its business judgment, and with extensive input from financial advisors and restructuring counsel, has designed the KEIP as a reasonable way to incentivize the KEIP Participants to maximize the value of the bankruptcy estates. The Debtors restricted participation in the KEIP to only three employees and structured the KEIP around benchmarks related to financial performance, as well as to the achievement of critical case milestones on a short time frame for a case of this size and scope.

31. The KEIP terms were reviewed and approved by the Debtors' CRO, who is disinterested in the terms and payments proposed under the KEIP. In evaluating the KEIP terms, the CRO requested input and advice from the Debtors' legal and financial advisory professionals and surveyed market data for KEIP terms for companies of similar size and scope. The Debtors have also disclosed the terms of the KEIP to the Debtors' pre-petition and DIP secured lenders and such lenders have agreed to include the aggregate amount of the KEIP payments as a reserve against the Debtors' borrowing base in the postpetition DIP Credit Facility until the payment in full of the prepetition and postpetition secured obligations.

32. The Debtors' CRO and financial and legal advisors conducted due diligence in assessing the need for, and designing the terms of, the KEIP. Based on this review, the CRO, acting on behalf of the Debtors, found the design and cost of the proposed KEIP to be reasonable and appropriate for the unique challenges of the Debtors' case and to be within range of the market practices as compared to plans that were approved in comparable chapter 11 cases – seven retail companies and 15 other companies. The Debtors' CRO and advisors found that, although the size and scale of the Debtors' business falls above the average of the comparable cases in terms of prepetition funded debt and close to the upper 90<sup>th</sup> percentile in terms of total assets and last-twelve-months (“LTM”) revenue: (A) the cost of the KEIP at “Target” is only

modestly above the average in terms of percentage of prepetition funded debt and substantially below the average in terms of percentage of total assets and percentage of LTM revenue and (B) the cost of the KEIP at “Maximum” is below the average in terms of percentage of prepetition funded debt and substantially below the average in terms of percentage of total assets and percentage of prepetition LTM revenue.

33. Based on the foregoing, the CRO, on behalf of the Debtors, has determined that the design and cost of the KEIP is appropriate in the Debtors’ circumstances. Without the expertise of the Debtors’ three senior executives to efficiently and effectively operate the Debtors’ business and without appropriate incentives to induce them to commit the additional time and efforts necessary to successfully manage all aspects of the Debtors’ attempt to reorganize their business, the Debtors’ ability to maintain operating stability, generate and maintain operating liquidity, respond to diligence requests from prospective bidders, and successfully navigate the restructuring process on an expedited basis to preserve a core going concern business for the benefit of customers, employees, and local communities and thus to maximize the distributions to unsecured creditors will be greatly impaired. For these reasons, the CRO, on behalf of the Debtors, has determined that the KEIP, as well as the KERP, are reasonable and appropriate for the Debtors’ circumstances and are in the best interests of the Debtors’ estates and all parties in interest.

34. As with the KERP, the Debtors’ DIP lenders under the DIP Credit Facility have agreed to reserve against the Debtors’ borrowing base amounts needed to fund payments of the KEIP. The KERP and KEIP payments earned under the terms of the programs will not be paid to the participants until after the pre-petition secured lenders and the DIP lenders have been paid in full. Therefore, the Debtors expect the cash for such payments to be generated from the

expected sales of its assets through the “store closing” process or a sale on a going concern basis or both.

35. Many of the KERP and KEIP Participants were retained by the Debtors to make operational improvements. Unfortunately, despite significant progress in reorienting and narrowing the go-to-market strategy of the Debtors around their core specialties of hunt, fish, camp, and shoot, launching the successful “America’s Firearms Supercenter<sup>TM</sup>” concept that has increased the Debtors’ market share in the shooting sports categories, and driving significant cost savings from the operating model, the improvements were not able to alleviate the difficult environment for retailers facing the Debtors. In most cases, the KERP and KEIP Participants (approximately 45% of the Tier I KERP Participants, all five of the Tier II KERP Participants, and all three of the KEIP Participants) were either hired or promoted to assume new and significant responsibilities within the past two years in connection with the turnaround effort.

#### **RELIEF REQUESTED**

36. Under 11 U.S.C. § 363(b), the Debtors are authorized to use property of the estate outside of the ordinary course of business after notice and a hearing.

37. The KERP and KEIP are not prohibited by 11 U.S.C. § 503(c)(3) and are the product of the proper exercise of the Debtors’ business judgment.

38. By this Motion, the Debtors seek entry of an order approving the Debtors’ KERP and KEIP.

39. The Debtors request expedited relief on this motion pursuant to Bankruptcy Rule 9006(c). The granting of this motion on an expedited basis is necessary to the Debtors’ ability to maximize the value of the estates and maintain operations during the bankruptcy cases. The KERP provides clear incentives for the KERP Participants to remain working for the Debtors, if

the KERP is not authorized on an expedited basis, the KERP Participants are likely to begin seeking alternative employment while the Debtors wait for such authorization, substantially harming the sale process and operation of the Debtors' business. The KEIP identifies clear incentives for the KEIP Participants, many of which are tied to an expedited sale process. Consequently, cause exists to authorize the KERP and the KEIP on an expedited basis in order to incentivize the KEIP Participants during the sale process.

40. The Debtors also request waiver of the 14-day stay that would otherwise apply to the Court's approval of the KERP and KEIP pursuant to Bankruptcy Rule 6004(h). In order to implement the KERP and KEIP successfully, the Debtors must be able to provide certainty to the KERP and KEIP Participants that they will be compensated for their efforts to maximize the value of the Debtors' estates.

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

42. 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.

**WHEREFORE**, the Debtors move the Court for an order approving the Debtor's KERP and KEIP and granting such other and further relief as the Court may deem just and equitable.

Dated: March 10, 2017

*/e/ Steven R. Kinsella*

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Clinton E. Cutler (#0158094)

Cynthia A. Moyer (#0211229)

Ryan T. Murphy (#0311972)

James C. Brand (#387362)

Sarah M. Olson (#0390238)

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**PROPOSED ATTORNEYS FOR DEBTORS**

60863403\_6

VERIFICATION

I, James A. Bartholomew, the President of Lighthouse Management Group, Inc., the Chief Restructuring Officer of the Debtors, declare under penalty of perjury that the foregoing is true and correct according to the best of my knowledge, information and belief.

Dated: March 10, 2017

Signed:   
James A. Bartholomew

**EXHIBIT A**

**KERP TIER I**



## Key Employee Retention Plan

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To: [Name of Participant]

Gander Mountain (the “Company”) previously created a **Long-Term Incentive Program (LTIP)** to recognize and reward a select group of our Management Team whose contributions are key to our continued performance and success (“Key Employees”). As a result of the Company’s filing of a petition for relief under Chapter 11 of the federal Bankruptcy Code (the “Code”), the former LTIP will not continue. In order to continue to reward, recognize and retain Key Employees the Company is instituting this Key Employee Retention Plan (“KERP”), which is intended to replace any previous incentive plan you formerly had, including the former LTIP. Please read the program details carefully.

**1. KERP Bonus Payments.** You are eligible to earn total KERP bonus payments equal to 20% of your current base salary, payable in two cash payments as set forth herein.

Current Base Salary	20% of Current Base Salary
\$100,000	\$20,000

**(A).** You will be entitled to receive your KERP bonus payments pursuant to the following:

- (a) If you are employed by the Company as of the date of the hearing to approve the Company’s motion under Section 363 of the Code to sell all or a substantial portion of its assets (expected to occur on or about May 1, 2017) (the “Sale Hearing Date”), you will receive a cash payment equal to fifty percent (50%) of your total bonus opportunity payable within fifteen (15) days of the Sale Hearing Date.
- (b) You will receive a cash payment equal to the remaining fifty percent (50%) of your total bonus opportunity (or, equal to one hundred percent (100%) of your total bonus opportunity, if the Sale Hearing Date has not occurred) payable within fifteen (15) days of the earlier to occur of the following:
  - 1) The closing on a sale of all or a substantial portion of the assets of the Company to one or more buyers in one or more transactions approved by the Bankruptcy Court; or
  - 2) The effective date (“Effective Date”) of the Company’s Chapter 11 Plan of Reorganization and/or a Plan of Liquidation (“Plan”) as approved by the Bankruptcy Court.
- (c) The date on which a KERP bonus payment is earned under either clause (a) or (b) of this section shall be a “Bonus Date.”

**(B). Additional Payment Provisions.** If you are terminated without “cause” prior to a Bonus Date, you will receive any remaining unpaid portion of your bonus opportunity on a prorated basis considering the proportion of the time you were employed from the petition date to the date the award would have been earned. If you voluntarily leave or are terminated for “cause”, you will forfeit any right to any unpaid portion of your award under the KERP. The Company shall have no obligation to make any bonus payment unless you execute a release of claims in customary form reasonably satisfactory to the Company.



**2. Miscellaneous.** During your employment you agree not to disclose any confidential or proprietary information of Gander Mountain, except as required in connection with your duties. This KERP Agreement is not an employment agreement and does not change the nature of your employment with Gander Mountain.

We look forward to your continuing contributions to Gander Mountain.

Sincerely,

Gander Mountain Company

\_\_\_\_\_  
Jay Tibbets, President

I have read, understand and agree to the terms of this KERP Agreement.

\_\_\_\_\_  
[Name of Participant]

Date: \_\_\_\_\_

**KERP TIER II**



## Key Employee Retention Plan (Tier II)

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To: [Name of Participant]

Gander Mountain (the “Company”) has created a Key Employee Retention Plan (“KERP”) to continue to reward, recognize and retain Key Executives in order to preserve and maximize the value of the Company during its reorganization under the Bankruptcy Code (the “Code”). Your contributions are essential to our continued performance and success. The KERP (Tier II) described herein replaces any previous incentive plan you formerly had, including the former LTIP. Please read the program details carefully.

1. **KERP Bonus Payment.** You are eligible to earn KERP bonus payments as set forth herein. Your level of bonus opportunity as a percent of your Base Salary for meeting the respective metrics associated with Threshold, Target and Maximum performance is set forth in the following table:

Current Base Salary	Threshold (50%)	Target (75%)	Maximum (100%)
\$300,000	\$150,000	\$225,000	\$300,000

- A. **Threshold.** You will earn an amount equal to your Threshold opportunity upon the effective date (“Effective Date”) of the Company’s Chapter 11 Plan of Reorganization and/or Plan of Liquidation (“Plan”).
- B. **Target.** You will earn an amount equal to your Target opportunity upon meeting or exceeding: (i) the cumulative [Net Operating Activity] line item as set forth in the cash flow projection and budget under the DIP Credit Facility as of the date of the hearing to approve the Company’s motion under Section 363 of the Code to sell all or a substantial portion of its assets (“Sale Hearing Date”); or (ii) if the Company does not enter into a DIP Credit Facility, the cumulative net cash flow as of the Sale Hearing Date set forth in the Company’s operating budget/cash plan as filed with the Bankruptcy Court.
- C. **Maximum.** You will earn an amount equal to your Maximum opportunity if the cash or other property estimated to be available for distribution to priority and non-priority unsecured creditors as of the date of confirmation of the Company’s Plan meets or exceeds the net proceeds estimated to be available for distribution to those unsecured creditors in the Company’s Estimated Net Liquidation Analysis, in either case without taking into account any net recoveries from avoidance actions or other litigation recoveries of the Company.
- D. **Payment Provisions.**
- a. Each higher level of opportunity, if earned, will be in lieu of (and replace in its entirety) any bonus earned under a lower tier (e.g., if you earn your Target opportunity, you will not receive any payment in respect of your Threshold opportunity). If you receive actual payment in respect of a lower level bonus opportunity and thereafter qualify for a higher level bonus opportunity, you shall be entitled to receive in payment for such higher level bonus only the incremental amount necessary to bring the total payments equal to the higher earned bonus level. In no event will the total incentive payments received exceed your applicable opportunity as set forth above. The Company shall have no obligation to make any bonus payment unless you execute a release of claims in customary form reasonably satisfactory to the Company.



- b. The date or dates on which the respective criteria are satisfied for the Threshold, Target and Maximum bonus opportunities shall each be a "Bonus Date." Any KERP bonus payments hereunder shall be payable in cash on the date ("Payment Date") that is within fifteen (15) days of the earlier to occur of: (i) the closing on a sale of all or a substantial portion of the assets of the Company to one or more buyer(s) pursuant to Section 363 of the Code, (ii) the substantial completion (whether performed by one or more third party liquidator(s) or by the Company) of "Going Out of Business" or similar liquidation sales at not less than two-thirds of the Company's retail store locations that are not part of a going-concern or other bulk sale approved by the Bankruptcy Court, or (iii) the Effective Date of the Company's Plan.
- c. If you are terminated without "cause" or due to death or total disability prior to any Bonus Date and any Bonus Date is thereafter triggered, you will receive the bonus award on a prorated basis considering the proportion of the time you were employed from the petition date to the date of termination as compared to the time elapsed from the petition date to the relevant Bonus Date. If you voluntarily resign prior to a Bonus Date, you will forfeit any right to receive a future KERP bonus payment tied to a later occurring Bonus Date, but shall be entitled to receive payment for any bonus opportunity tied to a Bonus Date occurring prior to the date of such voluntary resignation. If you are terminated for "cause," you will forfeit immediately any earned but unpaid KERP bonus payment and any right to a future KERP bonus payment.

**2. Miscellaneous.** During your employment you agree not to disclose any confidential or proprietary information of Gander Mountain, except as required in connection with your duties. This KERP Agreement is not an employment agreement and does not change the nature of your employment with Gander Mountain.

We look forward to your continuing and important contributions to Gander Mountain.

Sincerely,

By: Lighthouse Management Group,  
as Chief Restructuring Officer  
for Gander Mountain Company

\_\_\_\_\_  
Timothy G. Becker, EVP

Gander Mountain Company:

By: \_\_\_\_\_  
Jay Tibbets, President

I have read, understand and agree to the terms of this KERP Agreement.

\_\_\_\_\_  
[Name of Participant]

Date: \_\_\_\_\_

Exhibit 1

**FILED UNDER SEAL**

**EXHIBIT B**



## Key Employee Incentive Plan

To: [Name of Participant]

Gander Mountain (the “Company”) has created a Key Employee Incentive Plan (“KEIP”) to incentivize Key Executives, who hold critical corporate officer positions with the Company, to preserve and maximize the going concern value of the Company’s business during its reorganization under the Bankruptcy Code (the “Code”), to enable the Company to conduct an expedited auction sale process and to effectively manage the Company’s reorganization process and inventory realization process so as to maximize value for the benefit of the Company’s unsecured creditors, employees and other stakeholders. The KEIP described herein replaces any previous incentive plan you formerly had, including the former LTIP. Please read the program details carefully.

**1. KEIP Bonus Payment.** You are eligible to earn KEIP bonus payments as set forth herein. Your level of bonus opportunity as a percent of your Base Salary for meeting the respective metrics associated with Threshold, Target, Stretch and Maximum performance is set forth in the following table:

Current Base Salary	Threshold (100%)	Target (150%)	Stretch (175%)	Maximum (200%)
\$300,000	\$300,000	\$450,000	\$525,000	\$600,000

**A. Threshold.** You will earn an amount equal to your Threshold opportunity upon:

- (1) Accomplishing on an expedited basis the following milestones intended to provide the Company with additional operating liquidity during the case and to preserve the value of the Company’s business as a going concern, including a potential auction process to be conducted under Section 363 of the Code: (i) completing a comprehensive review to determine a list of not less than twenty-five (25) underperforming or unprofitable stores (“Closing Stores”) to conduct orderly store closing sales on an expedited basis post-petition, (ii) adopting measures to facilitate a reallocation and redistribution of inventory to the Closing Stores to enhance the proceeds from store closing sales, (iii) engaging one or more recognized liquidating consultants or agents to advise and/or conduct such closing sales, (iv) promptly filing necessary motion(s) for Bankruptcy Court approval of the Closing Store sales plan and any related agency agreements, (v) substantially completing the Closing Store sales within 120 days following the receipt of Bankruptcy Court approval of the Closing Store sales plan, and (vi) generating gross proceeds from the sale of assets at the Closing Stores as of the end of the 120-day period equal to at least 110% of the Cost Value of the sold assets (as customarily defined in the consulting agreement entered into with a liquidating agent); or
- (2) In lieu of meeting the requirements of Section 1.A(1) above, if requested by the Stalking Horse bidder (as selected by the Company) in an effort to preserve brand equity, obtaining a junior debtor-in-possession credit arrangement or other financial support providing the Company not less than \$10 million in additional operational funding during the initial 90-days of the case.

**B. Target.** You will earn an amount equal to your Target opportunity upon meeting or exceeding: (i) the cumulative [Net Operating Activity] line item as set forth in the cash flow projection and budget under the DIP Credit Facility as of the date of the hearing to approve the Company’s motion under Section 363 of the Code to sell all or a substantial portion of its assets (“Sale Hearing Date”); or (ii) if the Company does not enter into a DIP Credit Facility, the cumulative net cash flow as of the Sale Hearing Date set forth in the Company’s operating budget/cash plan as filed with the Bankruptcy Court.

**C. Stretch.** You will earn an amount equal to your Stretch opportunity if the cash or other property estimated to be available for distribution to priority and non-priority unsecured creditors as of the date of confirmation of the Company’s Plan of Reorganization and/or Liquidation (the “Plan”) exceeds by \$5.0 million or more the net proceeds estimated to be available to those unsecured creditors in the Company’s Estimated Net Liquidation Analysis, in either case without taking into account any net recoveries on avoidance actions or other litigation recoveries of the Company.



D. **Maximum.** You will earn an amount equal to your Maximum opportunity if the cash or other property estimated to be available for distribution to priority and non-priority unsecured creditors as of the date of confirmation of the Company's Plan exceeds by \$15.0 million or more the net proceeds estimated to be available to those unsecured creditors in the Company's Estimated Net Liquidation Analysis, in either case without taking into account any net recoveries on avoidance actions or other litigation recoveries of the Company.

E. **Payment Provisions.**

- (1) Each higher level of opportunity, if earned, will be in lieu of (and replace in its entirety) any bonus earned under a lower tier (e.g., if you earn your Target opportunity, you will not receive any payment in respect of your Threshold opportunity). If you receive actual payment in respect of a lower level bonus opportunity and thereafter qualify for a higher level bonus opportunity, you shall be entitled to receive in payment for such higher level bonus only the incremental amount necessary to bring the total payments equal to the higher earned bonus level. In no event will the total incentive payments received exceed your applicable opportunity as set forth above. With respect to Section 1.A.(1)(vi), the realization metric shall be deemed satisfied if the secured lenders advise the Company to accept a cash guarantee bid from a third party liquidator(s) in respect of asset sales at the Closing Stores. The Company shall have no obligation to make any bonus payment unless you execute a release of claims in customary form reasonably satisfactory to the Company.
- (2) The date or dates on which the respective criteria are satisfied for the Threshold, Target, Stretch and Maximum bonus opportunities shall each be a "Bonus Date." Any KEIP bonus payments hereunder shall be payable in cash on the date ("Payment Date") that is within fifteen (15) days of the earlier to occur of: (i) the closing on a sale of all or a substantial portion of the assets of the Company to one or more buyer(s) pursuant to Section 363 of the Code, (ii) the substantial completion (whether performed by one or more third party liquidator(s) or by the Company) of "Going Out of Business" or similar liquidation sales at not less than two-thirds of the Company's retail store locations that are not part of a going-concern or other bulk sale approved by the Bankruptcy Court, or (iii) the effective date of the Company's Plan ("Effective Date").
- (3) If you are terminated without "cause" or due to death or total disability prior to any Bonus Date and any Bonus Date is thereafter triggered, you will receive the bonus award on a prorated basis considering the proportion of the time you were employed from the petition date to the date of termination as compared to the time elapsed from the petition date to the relevant Bonus Date. If you voluntarily resign prior to a Bonus Date, you will forfeit any right to receive a future KEIP bonus payment tied to a later occurring Bonus Date, but shall be entitled to receive payment for any bonus opportunity tied to a Bonus Date occurring prior to the date of such voluntary resignation. If you are terminated for "cause," you will forfeit immediately any earned but unpaid KEIP bonus payment and any right to a future KEIP bonus payment.

2. **Miscellaneous.** During your employment you agree not to disclose any confidential or proprietary information of Gander Mountain, except as required in connection with your duties. This KEIP Agreement is not an employment agreement and does not change the nature of your employment with Gander Mountain.

We look forward to your continuing and important contributions to Gander Mountain.

Sincerely,

By: Lighthouse Management Group,  
as Chief Restructuring Officer  
for Gander Mountain Company

I have read, understand and agree to the terms of the KEIP:

\_\_\_\_\_  
Timothy G. Becker, EVP

\_\_\_\_\_  
[Name of Participant]  
Date: \_\_\_\_\_

Exhibit A

**FILED UNDER SEAL**

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

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In re:

Gander Mountain Company,

Case No.: 17-30673  
Chapter 11 Case

Debtor.

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In re:

Overton's, Inc.,

Case No.: 17-30675  
Chapter 11 Case

Debtor.

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**MEMORANDUM IN SUPPORT OF JOINT MOTION FOR ORDER (I) GRANTING  
EXPEDITED RELIEF AND (II) APPROVING KEY EMPLOYEE RETENTION PLAN  
AND KEY EMPLOYEE INCENTIVE PLAN**

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The above-captioned debtors (the "Debtors") submit this memorandum of law in support of the Joint Motion for Order (I) Granting Expedited Relief and (II) Approving Key Employee Retention Plan and Key Employee Incentive Plan (the "Motion").

**BACKGROUND**

The supporting facts are set forth in the Motion and the Declaration of Timothy G. Becker in Support of Chapter 11 Petitions and Initial Motions. All capitalized terms used herein and not otherwise defined shall have the meanings ascribed to them in the Motion.

## 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.” Fed. R. Bankr. P. 9006(c). Cause exists here to grant the Motion on an expedited basis.

As further described in the Motion, the Debtors are moving forward with an accelerated sale process for the sale of all or substantially all of the Debtors' assets while simultaneously conducting “store closing” sales at approximately 32 stores on an expedited basis to provide additional and needed operating liquidity during the auction process. The KERP Participants and the KEIP Participants are critical to the Debtors' ability to manage a successful sale process, conduct the “store closing” sales, operate under the tight operating and cash flow restrictions imposed by the DIP Credit Facility, and maximize the value of the bankruptcy estates for the benefit of all parties in interest. Due to the expedited timeline of the sale process and the “store closing” sales, the Debtors require the KERP and KEIP to also be approved on expedited basis.

The Debtors believe that, without the KERP, the KERP Participants are likely to seek alternative employment immediately, which will directly harm the Debtors' ability to preserve the going-concern value of their most profitable stores, conduct the sale process, conduct the “store closing” or similar sales, and manage day-to-day operations of the Debtors' business. Moreover, the Debtors require the KEIP Participants' ongoing commitment to maintaining stability of the Debtors' day-to-day operations while they manage an accelerated competitive sale process, managing the Debtors' business under very tight operating and cash flow restrictions imposed by the DIP Credit Facility, encouraging and fostering the continued retention of the Debtors' employees, preserving valuable relationships with key industry

vendors, and effectively executing a large number of simultaneous “store closing” sales. The Debtors believe that, in order to achieve these results, they must incentivize the KEIP Participants and that, without approval of the KEIP, the KEIP Participants will not be incentivized during the accelerated sale process and the “store closing” sales that need to occur in a short time frame. Accordingly, the expedited relief requested is necessary to avoid immediate and irreparable harm.

**II. THE KERP IS NOT PROHIBITED BY SECTION 503(c) OF THE BANKRUPTCY CODE.**

Pursuant to 11 U.S.C. § 363, a debtor in possession may use property of the estate outside the ordinary course of business after appropriate notice and hearing. 11 U.S.C. § 363(b)(1). However, 11 U.S.C. § 503(c) acts as a limitation on that authority by prohibiting “transfers made to . . . an insider of the debtor for purpose of inducing such person to remain with the debtors’ business” and severance payments made to an insider of the debtor. 11 U.S.C. § 503(c)(1)-(2). The Bankruptcy Code defines an insider as any director, officer, person in control of the debtor, partnership where the debtor is a general partner, general partner of the debtor, or relative of a general partner, director, officer, or person in control of the debtor. 11 U.S.C. § 101(31)(B).

Courts have generally held that any person holding an officer’s title is presumptively an officer and thus an insider. *In re Foothills Texas, Inc.*, 408 B.R. 573, 578-79 (Bankr. D. Del. 2009). However, a party may rebut this presumption by presenting “evidence sufficient to establish that the person holds the title of an officer in name only and, in fact, does not meet the substantive definition of the same, *i.e.*, he or she is not taking part in the management of the debtor.” *Id.* at 574-75; *see also In re Borders Grp., Inc.*, 453 B.R. 459, 469 (Bankr. S.D.N.Y. 2011) (declining to find insider status where the scope of the employee’s authority is limited); *see also In re NMI Sys., Inc.*, 179 B.R. 357, 370 (Bankr. D.D.C. 1995) (holding that a vice

president was not an insider because he was conferred with the title “for purposes of marketing” only and was not “in the inner circle making the company’s critical financial decisions.”). If a director-level employee is not a member of the board, does not participate in corporate governance, does not attend board meetings, and does not report to the board, the employee is not an officer. *In re Global Aviation Holdings, Inc.*, 478 B.R. 142, 148 (Bankr. E.D.N.Y. 2012).

To qualify as a “person in control of the debtor,” the individual must have actual control, which constitutes “the ability to ‘unqualifiably dictate corporate policy and [control] the disposition of corporate assets.’” *In re U.S. Medical, Inc.*, 531 F.3d 1272, 1279 (10th Cir. 2008) (quoting *In re Three Flint Hill Ltd. P’ship*, 213 B.R. 292, 299 (D. Md. 1997)); *see also In re Residential Capital, LLC*, 491 B.R. 73, 85 (Bankr. S.D.N.Y. 2013) (finding that none of the participants under the proposed KERP had “the ability to dictate overall company policy” and therefore, were not insiders).

Here, while several of the KERP Participants have titles that include terms such as “vice president,” “director,” “senior,” or “chief,” none of the KERP Participants are officers of the Debtors. None of the KERP Participants attended meetings of the Debtors’ boards of directors unless invited to make a specific presentation and, after which, they exited. None of the KERP Participants participates in any discussions or negotiations with the Debtors’ lenders under their secured revolving credit facility or their secured term loans. None of the KERP Participants have been aware of, or participated in, previous discussions with potential strategic or financial partners. Each of the KERP Participants has a very limited and defined scope of authority subject to oversight from the Debtors’ senior executives. While the KERP Participants play a vital role in the Debtors’ day-to-day business operations and will play a major role in the

Debtors' bankruptcy cases, the KERP Participants do not have the ability to influence the Debtors' business operations or policies.

Consequently, the Debtors are not "insiders" pursuant to 11 U.S.C. § 101(31)(B) and the restrictions on retention plans for insiders found in 11 U.S.C. § 503(c) do not apply.

**III. THE KERP IS A VALID EXERCISE OF THE DEBTORS' BUSINESS JUDGMENT PURSUANT TO 11 U.S.C. §§ 503(c)(3) AND 363(b).**

"Transfers or obligations that are outside the ordinary course of business and not justified by the facts and circumstances of the case" are prohibited by 11 U.S.C. § 503(c)(3). In applying this section to non-insider employee retention plans, courts use the business judgment standard of 11 U.S.C. § 363(b). *In re Patriot Coal Corp.*, 492 B.R. 518, 530-31 (Bankr. E.D. Mo. 2013); *In re Dana Corp.*, 358 B.R. 567, 576-77 (Bankr. S.D.N.Y. 2006).

Section 363(b)(1) of the Bankruptcy Code provides that a debtor, "after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate." 11 U.S.C. § 363(b)(1). Under section 363(b), courts generally approve transactions outside of the ordinary course of business as long as a debtor's decision is supported by some articulated business justification. *Four B v. Food Barn Stores, Inc. (In re Food Barn Stores, Inc.)*, 107 F.3d 558, 567 (8th Cir. 1997); *Fulton State Bank v. Schipper (In re Schipper)*, 933 F.2d 513, 515 (7th Cir. 1991); *In re Continental Air Lines, Inc.*, 780 F.2d 1223, 1226 (5th Cir. 1986); *In re Patriot Coal Corp.*, 492 B.R. at 530-31. The debtor bears the burden of articulating a valid business justification for the use of estate property. *In re Lionel Corp.*, 722 F.2d 1063, 1071 (2d Cir. 1983); *In re Trilogy Dev. Co., LLC*, No. 09-42219, 2010 Bankr. LEXIS 5636, \*3-4 (Bankr. W.D. Mo. Aug. 31, 2010).

After the debtor articulates a valid business purpose for use of the property, a presumption arises that the Debtors' decision is made on an informed basis, in good faith, and in

the honest belief that the action is in the best interest of the debtor. *Official Comm. of Subordinated Bondholders v. Integrated Res., Inc. (In re Integrated Res., Inc.)*, 147 B.R. 650, 656 (Bankr. S.D.N.Y. 1992). Courts are hesitant to substitute their own judgment for the debtor's business judgment and give deference to the debtor's decision making. *In re GSC, Inc.*, 453 B.R. 132, 174 (Bankr. S.D.N.Y. 2011); *see also In re LeBlanc*, 299 B.R. 546, 552 (Bankr. N.D. Iowa 2003).

The implementation of the KERP is a proper exercise of the Debtors' business judgment. First, the Debtors engaged in a careful process, with the assistance of their advisors, to identify key contributors to the Debtors and the bankruptcy cases when selecting the KERP Participants. Second, as described in the Motion, the Debtors and their advisors considered a number of different retention plans approved by other bankruptcy courts and developed the KERP to be comparable in design and scope. Third, the KERP will replace the LTIP, which was the Debtors' similar plan that existed prior to the Filing Date. Considering the relevant comparable retention plans and the replacement of the LTIP, the Debtors and their advisors designed the KERP in a reasonable and cost-effective way.

The filing of the Debtors' bankruptcy cases has understandably created unease among the Debtors' employees and harmed employee morale. The Debtors are concerned that the KERP Participants may seek alternative employment. The unease regarding the Debtors' future, the decline in employee morale, and the potential for the Debtors' employees to be actively seeking new employment during these bankruptcy cases threaten the Debtors' ability to maximize the value of the bankruptcy estates through the preservation of the going-concern value of their most profitable stores, conducting an accelerated auction sale process, and completing "store closing" sales at designated stores on an expedited basis to supplement operating liquidity. At this critical

time in the chapter 11 process, the Debtors require approval of the KERP to combat these issues and ensure that the KERP Participants will remain with the Debtors and assume greater responsibilities due to the commencement of these bankruptcy cases. The KERP Participants' contributions are essential to ensure that the Debtors' business will continue to operate and to maximize the value of the Debtors' business during the auction sale process and the "store closing" sales.

For these reasons, the Debtors believe that the KERP is reasonable and appropriate in the Debtors' business judgment and that the requested approval of the KERP will allow the Debtors to retain and motivate employees to maximize the value of the bankruptcy estates. Thus, approval of the KERP is in the best interest of all parties in interest and the Debtors respectfully request that the Court approve the KERP.

#### **IV. THE KEIP IS NOT IS NOT PROHIBITED BY SECTION 503(c)(1) OF THE BANKRUPTCY CODE.**

The restrictions found in section 503(c)(1) of the Bankruptcy Code regarding transfers to insiders of a debtor only apply to retention plans. *In re Patriot Coal Corp.*, 492 B.R. at 531; *see also In re Velo Holdings Inc.*, 472 B.R. 201, 210 (Bankr. S.D.N.Y. 2012). A debtor must show that a plan is primarily an incentive plan by a preponderance of the evidence. *In re Residential Capital, LLC*, 478 B.R. 154, 170 (Bankr. S.D.N.Y. 2012); *see also In re Hawker Beechcraft, Inc.*, 479 B.R. 308, 313 (Bankr. S.D.N.Y. 2012). A purported key employee incentive plan may have some retentive effect as long as the purpose of the plan is primarily to incentivize. *In re Nellson Nutraceutical, Inc.*, 369 B.R. 787, 802 (Bankr. D. Del. 2007) (citing *In re Dana Corp.*, 351 B.R. 96, 103 (Bankr. S.D.N.Y. 2006)).

Generally, if a plan has clear and specific milestones that are not easily achieved, courts have treated the plans as incentive plans. *In re Patriot Coal Corp.*, 492 B.R. at 532-33

(concluding that the plan set specific performance targets and was not primarily retentive); *In re Residential Capital, LLC*, 491 B.R. at 79 (finding that the key employee incentive plan was not primarily retentive because the plan rewarded key employees for achieving specific milestones related to the asset disposition and the efficient management of the estate); *In re Mesa Air Grp.*, No. 10-1018, 2010 WL 3810899, \*4 (Bankr. S.D.N.Y. Sept. 24, 2010) (finding that a plan was an incentive plan because it was tied to specific performance goals and overall profits); *In re Global Home Prods., LLC*, 369 B.R. 778, 787 (Bankr. D. Del. 2007) (deciding that a plan paying quarterly incentive payments if minimum earnings and cash flow objectives are met at the end of specific periods was an incentive plan).

Here, the KEIP is clearly an incentive plan rather than a retention plan. The KEIP is restricted to pinpointed incentive awards based on the achievement of (1) challenging asset disposition timelines that are also tied to minimum valuation metrics, (2) tight financial targets provided for in the DIP Credit Facility, (3) ensuring additional and necessary operating liquidity, and (4) elevated distribution goals to unsecured creditors. Attaining these results will require substantial efforts from the KEIP Participants and a significant expansion of their pre-bankruptcy job responsibilities and, importantly, will result in the maximization of the value of the Debtors' estates. For these reasons, section 503(c)(1) of the Bankruptcy Code does not prohibit the implementation of the KEIP.

**V. THE KEIP IS A VALID EXERCISE OF THE DEBTORS' BUSINESS JUDGMENT PURSUANT TO SECTIONS 503(c)(3) AND 363(b) OF THE BANKRUPTCY CODE.**

Similar to key employee retention plans, when analyzing whether a key employee incentive plan satisfies 11 U.S.C. § 503(c)(3), courts employ the business judgment standard. *In*

*re Glob. Home Prod., LLC*, 369 B.R. at 786. For key employee incentive plans, courts look to the following non-exclusive factors to determine if the business judgment test is satisfied:

- (1) is the plan calculated to achieve the desired performance?
- (2) are the costs of the plan reasonable within the context of the debtor's assets?
- (3) is the scope of the plan fair and reasonable?
- (4) is the plan consistent with industry standards?
- (5) did the debtor engage in due diligence related to the need for the plan?
- (6) did the debtor receive independent counsel in performing the due diligence and creating and authorizing the incentive compensation?

*In re Patriot Coal Corp.*, 492 B.R. at 530-31; *In re Global Home Prods.*, 369 B.R. at 786. The KEIP satisfies these six factors.

First, the KEIP is calculated to achieve the desired performance. The four independent performance metrics that the KEIP Participants may satisfy are specifically designed to preserve the Debtors' business, require operation of the Debtors' business under very tight operating and cash flow restrictions imposed by the DIP Credit Facility, ensure additional and necessary operating liquidity during the accelerated auction process by conducting concurrent "store closing" sales, and realizing distributions to unsecured creditors in excess of the net proceeds estimated to be available for distributions to the Debtors' unsecured creditors. All of the KEIP performance metrics were designed to promote the maximization of the value of the Debtors' estates and align the interests of the KEIP Participants with the parties in interest in these cases.

Second, the costs associated with the KEIP are reasonable and fair. The Debtors conducted due diligence when assessing a need for the KEIP and when designing the KEIP. The Debtors' CRO and other advisors analyzed plans that were approved in comparable chapter 11 cases. After conducting this analysis, the Debtors determined that, although the size and scale of

the Debtors' business falls above the average of the comparable cases in terms of prepetition funded debt and close to the upper 90<sup>th</sup> percentile in terms of total assets and last-twelve-months ("LTM") revenue, the cost of the KEIP at "Target" is modestly above the average in terms of percentage of prepetition funded debt and substantially below the average in terms of percentage of total assets and percentage of LTM revenue. The cost of the KEIP at "Maximum" is below the average in terms of percentage of prepetition funded debt and substantially below the average in terms of percentage of total assets and percentage of prepetition LTM revenue. Furthermore, the costs associated with the KEIP are fair because they are directly tied to the performance metrics and payment of bonus payments under the KEIP will be a direct result of the KEIP Participants' performance.

Third, the KEIP is reasonable in scope because it only applies to the three KEIP Participants. The KEIP Participants are the key drivers of success of the Debtors' business and success of these bankruptcy cases. The KEIP Participants will play a critical role in attempting to secure a stalking horse bid and will continue to play a necessary role in facilitating a competitive sale process. The KEIP Participants are responsible for interacting with the Debtors' lenders, creditors, and potential purchasers and have developed strong relationships with key vendors, landlords, and other parties. The Debtors must rely on the efforts of the KEIP Participants and their performance will have the greatest impact on achieving success in these bankruptcy cases.

Fourth, the KEIP is consistent with industry standards. The Debtors' CRO requested advice from the Debtors' legal and financial advisors and reviewed market data for key employee incentive plan terms for companies of similar size and scope. As noted above, the

KEIP compares favorably to key employee incentive plans that have been approved in previous bankruptcy cases.

Fifth, the Debtors engaged in substantial due diligence related to the need for the plan. The Debtors conducted a thorough analysis concerning the key employee incentive plans in cases substantially similar to the Debtors' bankruptcy cases. The Debtors also consulted with the Debtors' legal and financial advisors regarding the need for the KEIP, the terms of the KEIP, and the risk to the Debtors' estates if the KEIP is not implemented. The Debtors' analysis of comparable plans and consultation with the Debtors' advisors is evidence of sufficient due diligence.

Sixth, the Debtors received independent counsel when performing their due diligence and when formulating the incentive compensation. The Debtors' CRO, who is disinterested in the terms and payments proposed under the KEIP, ultimately determined that the design and cost of the KEIP is appropriate in the Debtors' circumstances. The Debtors' CRO arrived at this decision after consultation with the Debtors' legal and financial advisors and after conducting an analysis of similar key employee incentive plans.

For these reasons, the implementation of the KEIP is an exercise of the Debtors' sound business judgment and the Debtors believe it will provide substantial benefit to the parties in interest in these bankruptcy cases. Consequently, the Debtors respectfully request that the Court approve the KEIP.

**VI. THE KERP AND KEIP ARE APPROPRIATE UNDER 11 U.S.C. § 105(a).**

As set forth in more detail above and in the Motion, the KERP and KEIP are critical to the Debtors' efforts to maximize the value of their estates during these chapter 11 cases. Maintaining employee morale among the KERP Participants and ensuring that the KERP

Participants continue to work for the Debtors are critical to maximizing return for the Debtors' creditors and other parties in interest. Moreover, aligning the KEIP Participants' interests with the interests of the Debtors' creditors and other parties in interest and incentivizing the KEIP Participants to satisfy difficult sale process timelines and requirements, meet tight budget restrictions, and maximize return to unsecured creditors provides a substantial value to the bankruptcy estates. Therefore, the costs associated with the KERP and KEIP are reasonable and necessary and are justified by the benefits that the Debtors will realize as a result of the services of the KERP and KEIP Participants.

**VII. WAIVER OF THE 14-DAY STAY IS WARRANTED.**

Finally, the Debtors request a waiver of the 14-day stay that would otherwise apply to the Court's approval of the KEIP and KERP pursuant to Bankruptcy Rule 6004(h). In order to benefit from the KERP and KEIP, the Debtors must implement the KERP and KEIP as soon as possible. Any delay in implementation will likely result in many of the KERP Participants seeking new employment and the KEIP Participants will not be properly incentivized. Due to the accelerated sale process and the simultaneous "store closing" sales that will begin shortly after the Filing Date, the Debtors require the KERP Participants and KEIP Participants to be properly motivated. Therefore, the Debtors respectfully request that the Court approve the waiver of the 14-day stay under Bankruptcy Rule 6004(h).

**CONCLUSION**

The implementation of the KERP and the KEIP is an exercise of the Debtors' sound business judgment and will provide substantial value to the bankruptcy estates. Consequently, the Debtors respectfully request that the Court grant the Motion and approve the KERP and KEIP.

Dated: March 10, 2017

*/e/ Steven R. Kinsella*

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**PROPOSED ATTORNEYS FOR DEBTORS**

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

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In re:

Gander Mountain Company,

Case No.: 17-30673  
Chapter 11 Case

Debtor.

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In re:

Overton's, Inc.,

Case No.: 17-30675  
Chapter 11 Case

Debtor.

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**ORDER (I) GRANTING EXPEDITED RELIEF AND (II) APPROVING KEY  
EMPLOYEE RETENTION PLAN AND KEY EMPLOYEE INCENTIVE PLAN**

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This case is before the court on the Joint Motion for Entry of an Order (I) Granting Expedited Relief and (II) Approving Key Employee Retention Plan and Key Employee Incentive Plan (the "Motion") filed by the above-captioned debtors (the "Debtors").

Based on the Motion and the file,

**IT IS ORDERED:**

1. Expedited relief is granted.
2. The KERP is approved on the terms described in the Motion.
3. The Debtors are authorized to take any and all actions necessary or appropriate to implement the KERP and to make all payments provided for under the KERP.
4. The KEIP is approved on the terms described in the Motion.
5. The Debtors are authorized to take any and all actions necessary or appropriate to implement the KEIP and to make all payments provided for under the KEIP.

6. All amounts earned and payable under the KERP and KEIP shall have administrative expense priority under sections 503(a) and 507(a)(2) of the Bankruptcy Code for all purposes in the above-captioned bankruptcy cases, regardless of whether or not these bankruptcy cases are later converted to cases arising under a different chapter of the Bankruptcy Code.

7. Notwithstanding Bankruptcy Rule 6006(h), the terms and conditions of this order shall be immediately effective and enforceable upon its entry.

Dated:

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Michael E. Ridgway  
United States Bankruptcy Judge