UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MINNESOTA

In re:	Jointly Administered Under Case No. 17-30673 (MER)
Gander Mountain Company, Overton's, Inc.,	Case No. 17-30673 Case No. 17-30675
Debtors.	Chapter 11 Cases

NOTICE OF HEARING AND MOTION FOR SUBSTANTIVE CONSOLIDATION OF THE DEBTORS' ASSETS, LIABILITIES, AND OPERATIONS

TO: The Office of the United States Trustee and Other 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 **9:30 a.m. on May 1, 2017**, in Courtroom 7 West, U.S. Courthouse, 300 South Fourth Street, Minneapolis, Minnesota

3. Any response to this Motion must be filed and served not later than April 26, 2017, which is five days before the time set for the hearing (including Saturdays, Sundays, and holidays). **UNLESS A RESPONSE OPPOSING THE MOTION IS TIMELY FILED, THE COURT MAY GRANT THE MOTION WITHOUT A HEARING.**

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

5. This Motion arises under 11 U.S.C. §§ 105(a) and is filed under Fed. R. Bankr. P. 9013 and Local Rules 9013-1 through 9013-3. The Debtors request entry of an order substantively consolidating the assets, liabilities, and operations of debtor Gander Mountain Company with the assets, liabilities, and operations of debtor Overton's, Inc.

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 these cases 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.

FACTS RELEVANT TO THE RELIEF REQUESTED

8. Debtor Gander Mountain Company ("GMC") is the parent company of, and owns 100% of the outstanding shares of, debtor Overton's, Inc. ("Overton's"). Ever since Overton's was acquired by GMC, Overton's has essentially been run as a division of GMC rather than a separate entity, including with respect to management, financing, cash flow, operations and bookkeeping, and relationships with and interactions among many creditors.

A. GMC's Acquisition of Overton's and Creation of "Gander Direct" Business Segment.

9. Prior to its acquisition of Overton's in 2007, GMC focused on brick and mortar operations. Overton's was a direct sales company focused on selling directly to customers through internet and catalog sales, and had a relatively minor bricks and mortar presence.

10. GMC acquired Overton's not only to take advantage of the product synergies and existing customer base of Overton's, but also as a way to create a platform for and jumpstart GMC's own online sales. Essentially, at or around the time of the acquisition, GMC created what it refers to as its "Gander Direct" segment. The "Gander Direct" segment encompassed Overton's as well as the direct (online) sales for GMC. Thus, from the very start of its relationship with GMC, the Overton's operations were essentially consolidated with the direct sales portion of GMC's business. As further described below, the Debtors have historically made a distinction and kept separate books and records for the Gander Direct segment, with Overton's subsumed in that but not separately split out. Thus, with respect to most assets, liabilities, and financial information, it would be very difficult or impossible for the Debtors to separate out that belonging or attributable to only Overton's, Inc. as a separate legal entity.

11. This consolidation and relationship is made more confusing (including likely from the perspective of creditors) by a series of changes of Overton's formal entity name. As noted, one key reason GMC acquired Overton's was for the e-commerce platform. That Overton's platform was developed to also service GMC's direct sales and the Gander Direct segment grew and evolved, including the combined purchasing and vendor relationships described below. In 2015, to better reflect this evolution, the Debtors changed the formal name of Overton's to Gander Mountain Direct, Inc., and merged into it several other Overton's entities that had been created and used in connection with the acquisition and management of Overton's. Then, in December 2016, the entity name was officially changed back to Overton's, Inc. in anticipation of marketing the Overton's-specific business for sale. The intention was that, if Overton's was sold, the Debtors would then attempt to untangle Overton's from the GMC-specific parts of the Gander Direct segment. The Debtors anticipated that such extraction would be extremely

difficult. Ultimately, no transaction occurred, so the Debtors did not attempt to create that separation.

12. Currently, there generally remains an internal divide based not on legal entity, but rather on type of sale: direct sales or physical retail sales through bricks and mortar stores. The Gander Direct business segment continues to focus on direct sales to customers, and encompasses all of GMC's internet sales activity as well as all Overton's activity. For its portion of the Gander Direct segment, Overton's focuses on direct marketing of a subset of sporting and outdoor products, namely products for recreational boaters, specialty water sports, and related marine accessories. Overton's does have some limited physical retail operations, as two of the Debtors' 162 brick and mortar stores are Overton's-branded stores. GMC focuses on the other 160 brick and mortar retail stores.

13. Though Overton's focuses on a subset of products, customers can essentially access nearly all of the products offered by the Debtors through either the Overton's or GMC channel. Certain products that bear the Overton's private-label brand are sold through the GMC website and stores, and products with the Gander Mountain label are sold via Overton's catalogs and website. Essentially, the GMC website and Overton's website carry mostly overlapping products but utilize different website addresses (and aesthetics). In addition, orders shipped directly to customers are shipped with packaging—such as sealing tape—that bears both Debtors' names.

14. In terms of relative size of operations, the Debtors estimate that Overton's-related operations constitute less than 5% of the Debtors' total operations. One item the Debtors can identify, based on which channel it comes in through, is which revenue belongs to which Debtor.

Overton's revenues constitute approximately 23% of the "Gander Direct" segment revenues, and approximately 5% of the Debtors' total combined revenues.

B. Management

15. With respect to management, the Debtors have overlapping management teams, and appointed the same Chief Restructuring Officer prepetition. Both pre- and post-petition, key decisions were made for both Debtors by the same main individuals.

C. Financing

16. The Debtors' financial structures are intertwined. Both Debtors are borrowers under the Prepetition ABL Credit Agreement[1] and the Prepetition Term Loan Agreement. Both Debtors have granted security interests in substantially all personal property of the Debtors, including, without limitation, accounts, inventory, equipment, and general intangibles, to the Prepetition ABL Agent and the Prepetition Term Loan Agent to secure repayment of the Prepetition Secured Obligations. This consolidated capital structure has continued post-petition, with both Debtors being borrowers under the DIP Credit Facility and granting security interests in substantially all of the Debtors' property to secure their obligations thereunder.

17. During fiscal 2013 and 2014, GMC, but not Overton's, entered into a series of Equipment/Fixture Financing Notes ("EFNs") under the terms of a Master Loan Agreement, dated as of July 26, 2013, with U.S. Bank Equipment Finance, a division of U.S. Bank National Association. The proceeds of the EFNs were used to finance the purchase of furniture, fixtures and equipment in connection with the opening of new and/or remodeled Gander Mountain stores. The EFNs are secured by a first priority security interest in equipment and fixtures at designated

[1] Capitalized terms in this section are defined, and more detail is provided, in the Debtors' Motion for Orders (I) Granting Expedited Relief, (II) Approving Postpetition Financing, (III) Granting Liens and Providing Superpriority Administrative Expense Status, (IV) Authorizing Use of Cash Collateral, (V) Granting Adequate Protection, (VI) Modifying Automatic Stay, and (VII) Granting Related Relief [Doc. No. 26]

stores of GMC, which have an estimated market value of less than $3 million. As of the Filing Date, GMC owed approximately $17,746,631 in principal plus accrued and unpaid interest on the EFNs.

D. Cash Flow

18. As described in more detail in the Debtors' previously-filed cash management and bank account motion, the Debtors share certain main bank accounts as part of their cash management system, which is centrally administered on behalf of both Debtors. All revenues, whether attributable to Overton's sales or GMC's sales, flow up into these shared bank accounts, and are then applied to the loans obtained from their principal secured lenders.

19. All expenses of Overton's, except for certain customer refunds and other de minimis miscellaneous items, are paid through the bank accounts shared with GMC and with funds borrowed under their joint lending facility.

20. Where the expenses overlap, the Debtors generally do not distinguish in payments to creditors as being from Overton's or GMC. In the Debtors' books and records, some allocations of shared expenses are made on a Gander Direct level, but expenses are generally not tracked or allocated specifically to Overton's. Any allocations made are based on historical patterns or a run rate, not on an actual identification of which entity or segment owed which portions of the amount paid. Other expenses are not allocated between GMC and Gander Direct. Corporate overhead, for example, is not allocated or otherwise split out between GMC and Gander Direct (or Overton's).

E. Operations and Bookkeeping

21. Inventory for both Debtors is purchased and paid for on a consolidated basis. Most purchases are made pursuant to a form Supplier Business Agreement ("SBA"). The same

form SBA is used by buyers for GMC and buyers for Gander Direct, and there is no separate form for Overton's. If a vendor has signed an SBA, orders may be placed under it by either GMC or Gander Direct.

22. Approximately 90% of purchase orders are generated by an Electronic Data Interchange ("EDI") system, which sends purchase orders to vendors electronically. Due to the EDI system, the purchase orders do not identify whether the goods being ordered are intended for sale by GMC or Overton's, or a combination of both. Most of the time, one order will include product that ends up being used partially by GMC and partially by Overton's, but the order itself does not identify which Debtor is receiving the goods or is obligated for which portion of the ordered product. Not only does the order not indicate that, but the Debtors have not tracked those liabilities separately for Overton's or in books and records specific to just Overton's.

23. Most invoices from vendors are also submitted via the EDI system. Again, due to the way that system works, the vendor invoices submitted through the system do not identify either GMC or Overton's as the party obligated to pay any one invoice. Payments on vendor invoices are made out of the Debtors' shared bank accounts. As a result, most trade vendors likely believed or had reason to believe that they were receiving the benefit of both Debtors' credit.

24. When orders are placed through the consolidated ordering and payment system, the Debtors instruct vendors where to ship the product. Typically, product is initially delivered to either the Debtors' Lebanon, Indiana distribution center—which services the Debtors' brick and mortar stores—or the Debtors' Greenville, North Carolina facility—which services the Gander Direct operations. Some product may be delivered directly to specific stores. In

addition, it is common for there to be frequent inventory transfers between the Lebanon and Greenville facilities. Once delivered, the inventory is not separated or tracked as belonging to either GMC or Overton's; it is commingled, and used as needed by either Debtor.

25. On their books and records, the Debtors allocate the purchased inventory value based on where it is initially delivered, and spread it across recipients as a weighted average cost. This method of recording and lack of physical segregation of inventory between GMC and Overton's at facilities makes it impossible or impractical to separate the inventory assets of GMC and Overton's. For example, if product is shipped to Greenville, it may be actually used by the GMC component of the Gander Direct operations, or it may be actually used by the Overton's component of the Gander Direct operations.

26. Relatedly, the Debtors do not keep a separate balance sheet for Overton's. Rather, they maintain a Gander Direct balance sheet. Again, Gander Direct includes more than just Overton's. Accordingly, it is impossible or impracticable to separately identify most of Overton's assets and liabilities. Indeed, the only Overton's-specific item on the Debtors' financial statements is a legacy goodwill component related to the Overton's acquisition.

27. Generally, the Debtors would give out a combined balance sheet (encompassing both GMC and Gander Direct) in connection with obtaining credit. As a result, creditors would have relied on that combined information in making decisions regarding extending credit. The Debtors do not believe that, since it was acquired, Overton's has regularly or ever separately applied for credit from a vendor.

F. Major Unsecured Creditor Groups

28. Prepetition, the Debtors shared not only their principal secured lenders, but also had substantial overlap of other creditors. For example, the Debtors estimate that of their approximately 1,350 vendors, approximately 80% involve an overlap between the Debtors.

29. As a result of the consolidated ordering and payment systems described above—and lack of tracking on an debtor-by-debtor basis—it would be impossible or impracticable for the Debtors to identify which amounts of the debts to trade vendors "belong" to which Debtor. The Debtors also believe it would be impossible for their trade vendors, who are the bulk of their creditors, to separate or identify which amounts may be owed by which of the Debtors, and the Debtors do not have records to make the distinction. Furthermore, if creditors were required to file separate claims against GMC and Overton's, it would be difficult or impossible for the Debtors to analyze the claims and determine how to separate their trade liabilities without employing some sort of overall estimation other than actual facts.

30. In relation to tax obligations, GMC files a consolidated federal income tax return for itself and its subsidiaries, including Overton's. Overton's-specific numbers are not distinguished or separated on that consolidated return. State and local taxes are generally paid on a Gander Direct basis that also does not split out Overton's.

31. Some employees—particularly those who worked for Overton's prior to its acquisition by GMC—would identify themselves as Overton's employees, and some employee badges specify Overton's as the employer. Most other employees that do work related to Overton's, however, also do work for the rest of the Gander Direct segment and/or GMC. For example, the Debtors' accounting, IT, and call center departments service both Debtors as needed, and time spent for either Debtor is not separately recorded. Employee wage and benefit

amounts are paid out of the Debtors' shared bank accounts. Some employees' pay statements identify "Gander Mountain Direct" as the employer, but most employees' pay statements refer generally to "Gander Mountain Companies." Employees' medical cards to not distinguish between GMC and Overton's, and employees' dental cards say "Gander Mountain/Overton's."

32. The Debtors lease all of their 162 store locations, as well as certain other real property used for warehouse and distribution purposes. Accordingly, a large creditor constituency is landlords. Five real property leases are in Overton's name, for property in Greenville and Raleigh, North Carolina. GMC signed a guaranty for one of those Overton's leases. The remaining real property leases are in GMC's name. The landlord creditors are one group for which it is not difficult to identify which amounts are owed by which of the Debtors.

33. The Debtors' property and general liability insurance is bundled and purchased on a consolidated basis.

34. Neither of the Debtors has loaned the other money through a formal note receivable or similar instrument. Ordinary course inter-entity credits and debits are tracked. However, due to the way the balance sheets are maintained—with tracking at the GMC and Gander Direct (but not separately for Overton's) levels—it would be impossible or impracticable to determine which amounts, if any, are owed between GMC and Overton's at any one time.

35. In sum, for most creditors, it would be difficult, time-consuming, and imprecise to attempt to identify which creditors are owed by which debtors or, in the case of overlapping creditors—those that are owed some amount by each Debtor, which is the vast majority of the creditors—to attempt to allocate debts between the Debtors.

G. Sale Process

36. The Debtors have entered into a Stalking Horse Agency Agreement for a comprehensive sale of their merchandise inventory through a store closing or going out of business sale process. The Debtors are also actively soliciting bids to sell assets on a going concern basis. Qualified bids are due on April 24, 2017. The Debtors expect to receive one or more qualified bids for a going concern sale that will include certain stores, merchandise and other assets, including the Gander Direct business. The Debtors expect any such transactions, if successful and approved by the Court, will result in a consolidated payment for the assets.

37. Because the Debtors cannot effectively identify assets belonging to each Debtor, the proceeds likewise will not be susceptible to a division or allocation among the Debtors through a tracing or some other methodology. Moreover, to the extent there are sale proceeds or proceeds from other assets dispositions available to pay claims of unsecured creditors, the Debtors expect to propose a joint plan of liquidation to implement the distribution, with equal distributions made to unsecured creditors of both Debtors. If the Debtors are forced to somehow allocate the proceeds differently, the process will be delayed and will become time consuming.

38. Given the entanglement described above, the Debtors are unable, without significant disruption to their operations and considerable time and expense, to separate out their assets, liabilities, and operations post-filing. If the Debtors were required to do so for items such as the bankruptcy schedules, statements of financial affairs, claims analyses (including for a plan), a ballot report, or other purposes, it would require not only extensive time and resources by the Debtors and their professionals, but would also necessarily require certain fictional or arbitrary allocations of assets and liabilities.

39. Just as it would be difficult for the Debtors to separate out their creditors, it may be difficult for many creditors to determine which amounts are owed by which of the Debtors.

40. In addition, the Debtors' bookkeeping practices, combined purchasing system, payment of obligations out of their shared accounts, and lack of tracking and recording of actual disbursements on a GMC or Overton's-specific level would make it extremely difficult or impossible—without employing some form of generalized allocations not based on actual amounts—to prepare separate monthly operating reports for the Debtors. Accordingly, the Debtors propose that, if this motion is granted, they would prepare a consolidated monthly operating report, and any other reports required by the Bankruptcy Code or Local Rules would likewise be prepared on a combined basis.

RELIEF REQUESTED

41. Given the facts and circumstances described above, the Debtors believe that: (a) their intertwined relationship would be impossible or impracticable to unravel; (b) the benefits of consolidation outweigh any harm to creditors; and (c) creditors may be prejudiced if the Debtors are not consolidated. Accordingly, the Debtors seek an order substantively consolidating their assets, liabilities, and operations.

42. Pursuant to Local Rule 9013-2(a), this motion is verified and is accompanied by a memorandum of law and a proposed order.

43. 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) Eric R. Jacobsen, the Chief Administrative Officer and Chief Legal Officer for GMC and the Secretary and a Director of Overton's, whose

business address is 180 East Fifth Street, Suite 1300, St. Paul, Minnesota 55101; or (c) Brian D. Kohlbeck, the Chief Financial Officer and Treasurer for GMC and the Treasurer for Overton's, whose business address is 180 East Fifth Street, Suite 1300, St. Paul, Minnesota 55101.

WHEREFORE, the Debtors respectfully request that the Court enter an order substantively consolidating the assets, liabilities, and operations of the Debtors, and granting such other and further relief as the Court deems just and equitable.

Dated: April 17, 2017

/e/ Sarah M. Olson

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ATTORNEYS FOR DEBTORS

VERIFICATION

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

Dated: April 17, 2017

Signed: ______________________
Timothy G. Becker

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MINNESOTA

In re:	Jointly Administered Under Case No. 17-30673 (MER)
Gander Mountain Company, Overton's, Inc.,	Case No. 17-30673 Case No. 17-30675
Debtors.	Chapter 11 Cases

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUBSTANTIVE CONSOLIDATION OF THE DEBTORS' ASSETS, LIABILITIES, AND OPERATIONS

The above-captioned debtors (the "Debtors") submit this memorandum of law in support of their Motion for Substantive Consolidation of the Debtors' Assets, Liabilities, and Operations (the "Motion"). The Court should substantively consolidate the assets, liabilities, and operations of the Debtors because: (1) such a consolidation is necessary due to the interrelationship of the Debtors; (2) the benefits of such a consolidation outweigh the potential harm to creditors; and (3) not consolidating the cases would prejudice creditors.

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

The doctrine of substantive consolidation treats separate legal entities as if they were a single entity, consolidating their assets and satisfying each entity's liabilities from this consolidated pool of assets. *In re Owens Corning*, 419 F.3d 195, 205 (3d Cir. 2005). The purpose and goal of substantive consolidation is the "equitable treatment of all creditors." *In re Augie/Restivo Baking Co., Ltd.*, 860 F.2d 515, 518 (2d Cir. 1988). The doctrine of substantive consolidation traces its roots to the Bankruptcy Act of 1898. *See In re Reider*, 31 F.3d 1102, 1105 (11th Cir. 1994). The authority to order substantive consolidation is implied in a bankruptcy court's general equitable powers and is exercisable under 11 U.S.C. § 105. *In re Auto-Train Corp., Inc.*, 810 F.2d 270, 276 (D.C. Cir. 1987); *In re Archdiocese of St. Paul & Minneapolis*, 553 B.R. 693, 701 (Bankr. D. Minn. July 28, 2016).

In 1987, the District of Columbia Circuit established a two-prong test, requiring the proponent of consolidation to make a *prima facie* case demonstrating (i) that there is "substantial identity between the entities to be consolidated" and (ii) "that consolidation is necessary to avoid some harm or to realize some benefit." *In re Auto-Train*, 810 F.2d at 276. Once the proponent for consolidation has made this showing, the burden shifts to an objecting creditor to show that (i) it has relied on the separate credit of one of the entities to be consolidated, and (ii) it will be prejudiced by substantive consolidation. *Id.* The Eleventh Circuit has adopted the D.C. Circuit test. *Eastgroup Props. v. S. Motel Ass'n, Ltd.*, 935 F.2d 245, 249 (11th Cir. 1991).

The Eighth Circuit developed a substantially similar three-factor test, which analyzes whether substantive consolidation is appropriate based on (i) "the necessity of consolidation due to the interrelationship among the debtors," (ii) "whether the benefits of consolidation outweigh the harm to creditors," and (iii) the "prejudice resulting from not consolidating the debtors." *In re Giller*, 962 F.2d 796, 799 (8th Cir. 1992); *Boellner v. Dowden*, 612 F. App'x 399, 401 (8th Cir. 2015). Courts have explicitly recognized the similarities between the *Giller* test and the *Auto-Train* test, noting that "despite the brevity of the Eighth Circuit's discussion, it clearly reflects the touchstones of *Auto-Train*" and that "*Giller's* non-exhaustive list of factors may be informed and supplemented by the *Auto-Train* progeny." *In re Petters Co., Inc.*, 506 B.R. 784, 798-99 (Bankr. D. Minn. 2013); *see also In re Affiliated Foods, Inc.*, 249 B.R. 770, 777 (Bankr.

W.D. Mo. 2000) (noting the similarities). Each of the three *Giller* factors weighs in favor of substantive consolidation of the Debtors' bankruptcy cases.

I. CONSOLIDATION IS NECESSARY DUE TO THE INTERRELATIONSHIP BETWEEN THE DEBTORS.

Since GMC acquired Overton's in 2007, the Debtors have effectively operated as a single business, with Overton's forming a component of the Debtors' "Gander Direct" operations—direct sales to customers via the internet or catalogs. Products that bear the Overton's private-label brand are sold through the GMC website and stores, and products with the Gander Mountain label are sold via Overton's catalogs and website. Essentially, the GMC website and Overton's website carry mostly overlapping products but utilize different website addresses (and aesthetics). Both pre- and post-petition, key decisions were made for both Debtors by the same key individuals on overlapping management teams.

The Debtors' financials are similarly interrelated, particularly given that no separate balance sheet is maintained for Overton's—instead, Overton's is just a component (though not separated out) of the Gander Direct balance sheet, which also includes GMC assets. Pre-petition, the Debtors generally gave out a combined balance sheet in connection with obtaining credit, and do not believe that Overton's has regularly or ever separately applied for credit from a vendor. The Debtors have substantial overlap among their creditors, with both Debtors jointly obligated to the principal secured lenders and both Debtors obligated to the majority of their trade vendors (or unable to accurately separate each's obligation to shared trade vendors). Inventory is purchased and paid for on a consolidated basis, with both Debtors using the same form Supplier Business Agreement and both placing orders with vendors under the same SBAs. Prior to the Filing Date, the Debtors did not separately allocate inventory purchases between the Debtors. Rather, the inventory value was booked in a way that does not necessarily match which Debtor ultimately used and benefitted from it, and proceeds from the sale of inventory flowed into shared bank accounts and were applied to the loans obtained from their secured lenders. The Debtors would then jointly borrow new funds to pay their expenses. The Debtors' shared bank accounts would be used to pay substantially all expenses of both of the Debtors. For most creditors, including trade vendors, the Debtors did not distinguish if the creditor was a creditor of GMC or of Overton's when making payments to the creditor. Due to the ordering and invoicing systems described in the motion, the creditors themselves likely did not know or distinguish whether orders were made by or ended up being used by GMC or Overton's.

On the facts currently before this Court, it is virtually impossible to effectively separate the liabilities and assets of the Debtors. It would take substantial time and expense to identify which creditors are owed by which of the Debtors and, in the case of overlapping creditors, how much of the amount owed is attributable to each of the Debtors. The Debtors estimate that 80% of their approximately 1,350 trade vendors have overlapping debts with a portion attributable to each of the Debtors. Particularly for the overlapping creditors, it would essentially require the creation of a broad fiction to determine which amounts are owed by which of the Debtors. Furthermore, the Debtors did not consistently allocate which of the Debtors purchased inventory or which inventory on hand belongs to which Debtor. Instead, all revenues simply flow up into the Debtors' shared bank accounts. The difficulties that would arise in attempting to untangle the Debtors are more than just a practical nuisance; they are a near impossibility.

Faced with similar facts, the court in *In re Affiliated Foods, Inc.* determined that "[r]evenues, expenses, employees, and operations were intermingled to such an extent that separating them now, if it could be accomplished at all, would be inordinately expensive and time-consuming, and would serve no useful purpose." *In re Affiliated Foods, Inc.*, 249 B.R.

at 770. Similarly, the interrelationship between the Debtors in this case clearly makes substantive consolidation necessary.

II. THE BENEFITS OF CONSOLIDATION OUTWEIGH THE HARM TO CREDITORS.

Both estates will benefit from substantive consolidation of the Debtors' bankruptcy cases. First, the Debtors and all creditors will benefit by avoiding the significant costs associated with attempting to allocate the assets and liabilities between the Debtors. As stated above, the Debtors' affairs are so interrelated that deciphering individual claims would be a practical impossibility for many creditors. Both estates would be forced to expend substantial resources unscrambling common (and potentially conflicting) claims. Second, consolidation will result in payment of a larger portion of creditors' claims than would be paid if consolidation is not ordered because there will be a larger pool of assets, substantive consolidation will eliminate claims that the Debtors may assert against each other, and the Debtors will avoid the expenses detailed above. *Eastgroup Props. v. S. Motel Ass'n, Ltd.*, 935 F.2d at 251 (finding a direct benefit of substantive consolidation to creditors is that a larger pool of assets is created and inter-debtor claims are eliminated). Finally, the majority of the creditors treated the Debtors as a single operating entity and likely believed that the amounts owed were owed by both of the Debtors. Substantive consolidation ensures that these creditors are not harmed by their reliance on the combined credit of both Debtors. *In re Petters Co., Inc.*, 506 B.R. at 824 ("The point here is that it may be 'necessary' to consolidate the entities to reflect reality and maintain equity, if the objecting parties never expected to exclusively treat them as separate, and took actions that in fact did not treat them consistently and exclusively as separate.").

The harm to creditors from substantive consolidation of the Debtors' cases would be minimal. First, most of the largest group of the Debtors' creditors—trade vendors—likely viewed and treated the Debtors as a single operating entity, and the amounts owed to such creditors are likely attributable to both of the Debtors. To the extent a creditor argues that it relied on the separateness between the Debtors, the creditor must demonstrate that reliance and, even if successful, reliance alone is not sufficient under the *Giller* standard. *Id.* (finding that certain creditors' reliance on separateness between the debtors had "no firm basis in current Eighth Circuit precedent" and, even if reliance was demonstrated, the creditor may be estopped from asserting reliance if a reasonable creditor would not have similarly relied on the alleged separateness of the debtors). Second, secured creditors would remain protected to the amount of their security interest and/or lien in a consolidated bankruptcy. Consolidation will not affect the validity or priority of the lien of any secured creditors; after consolidation, their lien would still be in existence. As a result, to the extent a party is secured it would suffer no harm if the Debtors' bankruptcy cases were consolidated.

For these reasons, the benefits of consolidation substantially outweigh any harm that might be suffered by a creditor.

III. PREJUDICE WOULD RESULT IF THE DEBTORS' CASES ARE NOT CONSOLIDATED.

Refusal to consolidate the Debtors' bankruptcy cases would substantially prejudice creditors. As noted in *In re Affiliated Foods, Inc.*, the facts supporting consolidation under the first two *Giller* factors are also applicable to whether failing to consolidate a case would prejudice the debtors. *In re Affiliated Foods, Inc.*, 249 B.R. at 783. The same is true here. First, unsecured creditors that interacted with both Debtors and believed they were receiving the benefit of both Debtors' credit will be prejudiced if the bankruptcy estates are not consolidated. Second, all creditors may be prejudiced without consolidation because, based on the interrelatedness of the Debtors' financials and ordinary course operations, there may be inter-debtor debts that will decrease recovery to creditors if paid. Third, the cost of separating the two bankruptcy cases will be substantial, which prejudices the Debtors and the Debtors' unsecured creditors. Fourth, the Debtors have entered into a Stalking Horse Agency Agreement for a comprehensive sale of their merchandise inventory through a store closing or going out of business sale process. The Debtors are also actively soliciting bids to sell assets on a going concern basis. Qualified bids are due on April 24, 2017. The Debtors expect to receive one or more qualified bids for a going concern sale that will include certain stores, merchandise and other assets, including the Gander Direct business. The Debtors expect any such transactions, if successful and approved by the Court, will result in a consolidated payment for the assets. Because the Debtors cannot effectively identify assets belonging to each Debtor, the proceeds likewise will not be susceptible to a division or allocation among the Debtors through a tracing or some other methodology. Moreover, to the extent there are sale proceeds or proceeds from other assets dispositions available to pay claims of unsecured creditors, the Debtors expect to propose a joint plan of liquidation to implement the distribution, with equal distributions made to unsecured creditors of both Debtors. If the Debtors are forced to somehow allocate the proceeds differently, the process will be delayed and will become time consuming. Consequently, the Debtors and their creditors will be prejudiced if the Debtors' cases are not substantively consolidated.

CONCLUSION

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

Dated: April 17, 2017

/e/ Sarah M. Olson

Clinton E. Cutler (#0158094)
Ryan T. Murphy (#0311972)
James C. Brand (#387362)
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60987723

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MINNESOTA

In re:	Jointly Administered Under Case No. 17-30673 (MER)
Gander Mountain Company, Overton's, Inc.,	Case No. 17-30673 Case No. 17-30675
Debtors.	Chapter 11 Cases

ORDER FOR SUBSTANTIVE CONSOLIDATION

This case came before the court on the debtors' Motion for Substantive Consolidation of the Debtors' Assets, Liabilities, and Operations (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.

2. The above cases are substantively consolidated for all purposes.

3. This Court's previous order authorizing joint administration of these cases [dkt. no. 88], required that all documents and proofs of claim against either debtor be filed only in Case No. 17-30673. That requirement shall continue given the consolidation effected by this order.

4. The debtors shall file one combined set of schedules and one statement of financial affairs that reflect the assets, liabilities, and other information contained therein on a basis that consolidates and does not differentiate between both debtors.

5. All reporting required by the Bankruptcy Code or Local Rules, including but not limited to monthly operating reports, shall be completed on a combined basis that consolidates and does not differentiate between both debtors.

6. All rights under applicable law to avoid transfers of the property of either of the debtors or their respective bankruptcy estates, which rights of avoidance originally vested in each separate bankruptcy estate, are preserved for the debtors-in-possession or a trustee or other successor in interest to exercise for the benefit of the single bankruptcy estate that results from the consolidation effected by this order; provided, however, that all such rights 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.

7. This order is effective immediately upon entry, and the Clerk of Bankruptcy Court shall cause this order to be entered on the docket of each of the above cases.

Dated:

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Michael E. Ridgway
United States Bankruptcy Judge

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