

**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

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**SUPPLEMENTAL BRIEF IN OBJECTION TO MOTION FOR AN ORDER  
COMPELLING REJECTION OF CONTRACT**

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**INTRODUCTION**

Gander Mountain Company (“Gander Mountain”) and Overton’s, Inc. (“Overton’s” and, collectively with Gander Mountain, the “Debtors”) submit this supplemental brief as ordered by the Court at its hearing on Mastercard International Incorporated’s (“MasterCard”) motion for an order compelling the Debtors to assume or reject a Co-Branding Agreement.

Gander Mountain and MasterCard are parties to a Co-Branding Agreement. Neither party disputes that this agreement is an executory contract. Therefore, Gander Mountain may assume or reject the contract at any time before confirmation of a plan, unless the court orders, at the request of a party to the contract, that the determination be made within a specified period. 11 U.S.C. § 365(d)(2).

Section 365(d)(2) does not itself establish express standards by which the determination to compel assumption or rejection prior to plan confirmation is to be made. Similarly, the Eighth Circuit, and all lower courts within the circuit, are silent as to which party bears the burden to demonstrate cause to shorten the statutory period. Courts in other circuits, however, have unanimously held that the burden lies with the movant. In addition, while there is no established

precedent within the Eighth Circuit regarding what must be shown to justify the shortening, decisions from other courts provide a number of factors to consider.

## ARGUMENT

### A. **MasterCard Bears the Burden of Demonstrating Cause to Shorten the Statutory Period.**

As described in the Debtors' Objection [ECF No. 949], section 365(d)(2) provides that the court "may," but is not required to, order the debtor to make its decision to assume or reject within a specified period of time. "In deciding whether to accelerate the debtor's decision, the court must balance the interests of the contracting party against the interests of the debtor and its estate." *In re Physician Health Corp.*, 262 B.R. 290, 292 (Bankr. D. Del. 2001). In balancing these interests, this Court should require the party moving for acceleration to demonstrate cause for its request.

While neither the Eighth Circuit nor any lower court in the circuit has ruled on burden of proof in this situation, the courts that have discussed the topic have explicitly and unanimously held that the movant bears the burden to show cause. *In the Matter of Memory Lane of Bremen, LLC*, 535 B.R. 901, 906 (Bankr. N.D. Ga. 2015) ("The movant bears the burden of demonstrating cause to shorten the debtor's time . . . ."); *In re Hawker Beechcraft, Inc.*, 483 B.R. 424, 429 (Bankr. S.D.N.Y. 2012) (same); *In re Cabi SMA Tower I, LLLP*, No. 10-49009-BKC-AJC, 2011 WL 1321366, at \*2 (Bankr. S.D. Fla. Apr. 5, 2011) (same); *In re Greektown Holdings, L.L.C.*, No. 08-53104, 2008 WL 5567556, at \*2 (Bankr. E.D. Mich. Dec. 16, 2008) (same); *In re Republic Techs. Int'l, LLC*, 267 B.R. 548, 554 (Bankr. N.D. Ohio 2001) (same); *see also In re Kmart Corp.*, 290 B.R. 614, 620 (Bankr. N.D. Ill. 2003) (ruling that the *movant* had not convinced the Court that cause existed to shorten the time); *In re Physician Health Corp.*, 262 B.R. 290, 295 (Bankr. D. Del. 2001) ("[Movant] has failed to establish a compelling reason

for the Debtors to decide whether to assume or reject its contract now.”); *In re Monroe Well Serv., Inc.*, 83 B.R. 317, 323 (Bankr. E.D. Pa. 1988) (“[T]he *movant* has not articulated any need for a more prompt decision.”) (emphasis added); *In re N-Ren Corp.*, 69 B.R. 85, 87 (Bankr. S.D. Ohio 1987) (“In short, *movant* has shown no reason why a date should be set within which debtor must assume or reject the executory contracts here in question, and we decline to set such a date.”) (emphasis added). This Court should follow the persuasive reasoning of these numerous courts and hold that MasterCard bears the burden of demonstrating cause to change the status quo and shorten the time period in which the Debtors must assume or reject the Co-Branding Agreement.

**B. MasterCard Has Not Met Its Burden to Shorten the Statutory Period.**

In its Memorandum of Law, MasterCard attempts to meet its burden by listing three reasons to shorten the statutory period: 1) the Debtors are in the process of liquidating; 2) the Debtors are failing to perform as contemplated under the contract; and 3) neither the Debtors nor the estates will realize any benefit by delaying assumption or rejection. While an analysis of all relevant facts and circumstances invariably involves the factors discussed in the next section, these three assertions on their own fail to establish any urgency that would support shortening the statutory period. An alleged lack of benefit to the Debtors does not harm MasterCard, and MasterCard fails to adequately allege how Gander Mountain is failing to perform under the contract or the prejudice to MasterCard as a result. Even on a *prima facie* basis, these allegations do not articulate the need for an expedited decision. Accordingly, MasterCard has not met its burden and the Motion should be denied.

**C. The Facts and Circumstances Do Not Support a Shortened Statutory Period.**

The facts and circumstances of this case do not support the time period requested by MasterCard. Should the Court find that MasterCard has met its burden to accelerate the Debtors' decision, it must then determine the appropriate time period. Courts use a number of factors in deciding whether and how to shorten the statutory period. The guiding principal universally acknowledged is that debtors are entitled to a reasonable amount of time. *See Philadelphia Co. v. Dipple*, 312 U.S. 168, 174 (1941) (holding "it is well settled that [trustees] have [the right to reject burdensome leases or contracts] and are accorded a reasonable time within which to exercise it" under the predecessor statute to Section 365(d)(2)); *Data-Link Sys. Inc. v. Whitcomb & Keller Mortg. Co.*, 715 F.2d 375, 379 (7th Cir.1983); *Theatre Holding Corp. v. Mauro*, 681 F.2d 102, 105 (2d Cir. 1982); *In the Matter of Memory Lane of Bremen, LLC*, 535 B.R. 901, 906 (Bankr. N.D. Ga. 2015); *In re Hawker Beechcraft, Inc.*, 483 B.R. 424, 429 (Bankr. S.D.N.Y. 2012).

**1. Factors Used**

Courts use a number of factors to determine whether a shortened statutory period is justified. The most commonly used factors are:

- (1) the nature of the interests at stake;
- (2) the balance of the hurt to the litigants;
- (3) the good to be achieved;
- (4) the safeguards afforded those litigants; and
- (5) whether the action would be considered arbitrary.

*See, e.g., In re Beker Indus. Corp.*, 64 B.R. 890, 896 (Bankr. S.D.N.Y. 1986). The only court in the Eighth Circuit to issue a decision on this matter also adopted these five factors. *In re Shalom Hosp. Inc.*, No. 02-00276, 2002 WL 1001000, at \*2 (Bankr. N.D. Iowa May 9, 2002).

In addition, while somewhat superfluous, some courts, especially those in the Second Circuit, consider these additional factors:

- (6) the debtor's failure or ability to satisfy post-petition obligations;
- (7) the damage that the non-debtor will suffer beyond the compensation available under the Bankruptcy Code;
- (8) the importance of the contract to the debtor's business and reorganization;
- (9) whether the debtor has sufficient time to appraise its financial situation and the potential value of the assets in formulating a plan;
- (10) whether there is a need for judicial determination as to whether an executory contract exists;
- (11) whether exclusivity has been terminated; and
- (12) "above all," the purpose of Chapter 11, to permit successful rehabilitation of debtors.

*See In re Cabi SMA Tower I, LLLP*, No. 10-49009-BKC-AJC, 2011 WL 1321366, at \*2 (Bankr. S.D. Fla. Apr. 5, 2011); *In re Adelpia Commc'ns Corp.*, 291 B.R. 283, 293 (Bankr. S.D.N.Y. 2003).

In evaluating these factors, it should also be noted that some courts combine the inquiry of whether to shorten the statutory period with the determination of what amount of time would be reasonable should the period be shortened. In these cases, courts frame the factors listed above as indicators of a reasonable decision period and conduct a more holistic, as opposed to

sequential, review of the relevant facts and circumstances. *See, e.g., In re G-I Holdings, Inc.*, 308 B.R. 196, 213 (Bankr. D.N.J. 2004); *In re Monroe Well Serv., Inc.*, 83 B.R. 317, 323 (Bankr. E.D. Pa. 1988); *In re GHR Energy Corp.*, 41 B.R. 668, 676 (Bankr. D. Mass. 1984).

## **2. Applying the Factors**

In applying the factors discussed above, courts rarely grant requests to shorten the statutory period. In those cases where courts have set an early deadline, the potential harm to the movant is obvious and the need for an expedited determination is clear. *See, e.g., In re Shalom Hosp. Inc.*, No. 02-00276, 2002 WL 1001000, at \*2 (Bankr. N.D. Iowa May 9, 2002) (shortening the statutory period because debtor was in arrears on its contract payments and movant would likely suffer significant financial hardship without some expedited relief). Decisions to shorten the statutory period also focus on the amount of time a debtor has already been afforded and the progress made during that time. *See In re Hawker Beechcraft, Inc.*, 483 B.R. 424, 430-32 (Bankr. S.D.N.Y. 2012) (finding that a reasonable amount of time for debtor's decision had already expired when confirmation of plan hearing was only four weeks away and the contract in question was the single most important agreement to the debtor's reorganization); *In re Travelot Co.*, 286 B.R. 462, 469 (Bankr. S.D. Ga. 2002) (shortening the period when debtor's case had been pending for more than six months, its exclusivity period had expired, and debtor had not taken any action to raise the capital necessary to cure its defaults of \$1 million in order to make assumption possible). Further, even when courts have set a specified period, that deadline is not always immediate. *See, e.g., In re Adelpia Commc'ns Corp.*, 291 B.R. 283, 300 (Bankr. S.D.N.Y. 2003) (shortening the statutory period, but finding a reasonable deadline to be an additional three months from the date of the order).

Accordingly, when no harm to the movant is clearly demonstrated, courts are wary to shorten the time that Congress intended debtors to have under Section 365. *See In re G-I Holdings, Inc.*, 308 B.R. 196, 213-14 (Bankr. D.N.J. 2004) (denying motion to shorten the statutory period, citing the complexity of the case, the lack of harm to the movant by the delay of the decision, and the only true concern about the agreement being the payment of money); *In re Monroe Well Serv., Inc.*, 83 B.R. 317, 323 (Bankr. E.D. Pa. 1988) (declining to shorten the statutory period when the debtors did not have unsatisfied financial obligations to the movant, the movant failed to articulate why it needed a more prompt decision, and requiring the debtors to assume or reject prior to plan confirmation would incur administrative cost to the estate).

Instead, courts often reject requests to shorten the statutory period, and frequently do so even when it is likely that movant may suffer concrete harm as a result. *See In re Cabi SMA Tower I, LLLP*, No. 10-49009-BKC-AJC, 2011 WL 1321366 (Bankr. S.D. Fla. Apr. 5, 2011) (declining to shorten the statutory period despite continuing harm to movant the longer its construction project was delayed); *In re Dana Corp.*, 350 B.R. 144, 148-49 (Bankr. S.D.N.Y. 2006) (rejecting request to shorten the statutory period where both parties contended the other was breaching and movant's motives in requesting a shortened period seemed to be targeted at gaining leverage in their negotiations); *In re Physician Health Corp.*, 262 B.R. 290, 295 (Bankr. D. Del. 2001) (denying a motion to shorten the statutory period despite facts suggesting that the debtors would almost certainly be rejecting the contract and that the movant will continue to pay a \$62,000 monthly management fee to the debtors each month the decision is delayed).

In this case, MasterCard does not allege that it will suffer any harm, financial or otherwise, if the statutory period is not shortened. As summarized by another court: "The Debtors are evaluating and analyzing their businesses and making progress in deciding which

contracts to keep and which to divest. The bankruptcy case is only five months old. There is no evidence that the Debtors are being dilatory in addressing these issues . . . .” *In re Physician Health Corp.*, 262 B.R. at 295.

CWI Inc., the approved buyer of certain Gander Mountain assets, is presently in discussions with MasterCard regarding the Co-Branding agreement, and there have been no claims that Gander Mountain or CWI are delaying or prolonging the disposition of this contract. Further, \$613,111.27 in incentive payments were due on June 20, 2017 under the Co-Branding Agreement and MasterCard has refused to pay the amount. This material breach should weigh heavily in favor of denying MasterCard’s motion, which appears to be strategically filed for the purpose of gaining leverage in its ongoing negotiations with CWI and complicating the collection of the incentive payments. *See In re Dana Corp.*, 350 B.R. 144, 148-49 (Bankr. S.D.N.Y. 2006) (declining to shorten the period after noting that movant’s motives seemed to be targeted at gaining leverage in their negotiations); *In re Travelot Co.*, 286 B.R. 462, 467 (Bankr. S.D. Ga. 2002) (holding that if there were a substantial likelihood the movant had materially breached the contract, “[t]hat likelihood would be a factor weighing heavily in [debtor’s] favor when it argues that it should not be forced to make a decision whether to assume or reject this contract at [this] time . . . .”). As MasterCard has no compelling reason to shorten the statutory period, there is no basis to approve MasterCard’s request.

### CONCLUSION

In summary, this Court is not bound by any controlling precedent from the Eighth Circuit regarding the standard for determining whether to the shorten the statutory period in section 365(d)(2) of the Bankruptcy Code or which party bears the burden of demonstrating cause. In addition, there is very little case law from lower courts in this circuit. As the party

moving for acceleration, MasterCard should bear the burden to show cause for its request, which is the rule adopted by courts across the nation. If required to bear this burden, MasterCard's motion fails. Even if its allegations of "cause" are taken as true, which is not supported by the record, MasterCard has failed to establish a compelling reason why the statutory period should be shortened.

Further, under the factors developed in the case law, the relevant facts and circumstances do not support a shortened statutory period. MasterCard will not suffer harm without an immediate decision to assume or reject the Co-Branding Agreement and Gander Mountain has not delayed in progressing through its chapter 11 case. At present, MasterCard is the party who has materially breached the Co-Branding Agreement and should not be allowed the opportunity to use this motion as leverage in its ongoing negotiations with CWI or as a way to evade its own obligations under the agreement.

Alternatively, if the Court finds that a specified period is warranted for the assumption or rejection of the Co-Branding Agreement, the deadline suggested by MasterCard is not a reasonable amount of time and Gander Mountain should be given a reasonable deadline by which to make its decision.

Dated: June 14, 2017

*/e/ James C. Brand*

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