

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

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| 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 |

MOTION FOR ORDER APPROVING STIPULATION

TO: The parties specified in Local Rule 9013-3(a)(2) and the parties identified on the certificate of service list.

1. The above-captioned debtors and debtors in possession (collectively, the “Debtors”) move the Court for the relief requested below and give notice of a hearing.

2. The Court will hold a hearing on the Motion at **1:30 p.m.** on **December 6, 2017**, in Courtroom 7 West at the United States Courthouse at 300 South Fourth Street, Minneapolis, Minnesota.

3. Any response to this Motion must be filed and served no later than **December 1, 2017**, pursuant to the applicable Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”) and Local Rules. **UNLESS A RESPONSE OPPOSING THIS 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, Bankruptcy Rule 5005, and Local Rule 1070-1. This is a core proceeding. The petitions commencing the Debtors’ chapter 11 cases were filed on March 10, 2017 (the “Filing Date”). The cases are now pending in this Court.

5. This Motion arises under section 105(a) of title 11 of the United States Code (the “Bankruptcy Code”). This Motion is filed under Bankruptcy Rule 9019 and Local Rules 2002-1, 9013-1, and 9013-2. The Debtors request an order: (i) approving the stipulation between the Debtors and B.H. West (defined below) and (ii) granting such other relief as is just and proper.

GENERAL BACKGROUND

6. On the Filing Date, each of the Debtors’ businesses and the events leading up to the Filing date can be found in the Declaration of Timothy G. Becker in Support of Chapter 11 Petitions and Initial Motions [Docket No. 38].

BACKGROUND SPECIFIC TO MOTION

7. B.H. West Baraboo, LLC (“B.H. West”) owns real property located at 315 West Pine Street, Baraboo, Sauk County, Wisconsin 53913. B.H. West owns, and the Debtors have been operating, a 48,538 square-foot commercial retail store located on the real property (the “Baraboo Store”).

8. The Debtors’ lease of the Baraboo Store originated in 2003. On July 17, 2003, B.H. West’s predecessor, Wal-Mart Real Estate Business Trust (“Wal-Mart”) entered into a sublease of the Baraboo Store with Gander Mountain Company, under which Wal-Mart agreed to lease the Baraboo Store to the Debtors until October 31, 2013 (the “Sublease”). On August 29, 2003, the parties entered into a First Amendment of the Sublease (the “First Amendment”).

9. In 2007, after acquiring the fee interest in the property, Wal-Mart conveyed the Baraboo Store to B.H. West. Thereafter, in 2013, B.H. West and the Debtors (together, the “Parties”) entered into a Second Amendment to Sublease dated October 2013 (the “Second Amendment”). In 2015, the Parties entered into a Third Amendment to Sublease dated September 29, 2015 (the “Third Amendment” and, collectively with the First Amendment and

Second Amendment, the “Amendments”). The Sublease, as amended by the Amendments, is referred to as the “Lease.”

10. From the Filing Date through the end of August 2017, the Debtors occupied the Baraboo Store.

11. On August 18, 2017, the Debtors filed a Notice of Hearing and Rejection of Unexpired Lease and Abandonment of Any Remaining Personal Property in the Leased Premises (Store Nos. 152, 200, 215, 220, 253, 259, 261, 367, 380, 408, 470, 493) [Docket No. 1148], which included the rejection of the Lease effective August 31, 2017 (the “Rejection Date”). The Court entered an order approving the rejection on September 8, 2017 [Docket No. 1203].

12. After the Filing Date, the Debtors routinely paid rent and other amounts owed to B.H. West pursuant to the terms of the Lease. However, B.H. West asserts that additional amounts were due under the Lease after the Filing Date and prior to the Rejection Date. Consequently, B.H. West has asserted that it holds an administrative expense claim in the amount of \$85,774.67 under 11 U.S.C. § 365(d)(3).

13. The Debtors dispute that B.H. West holds an administrative expense claim in that amount.

14. The Parties entered into negotiations and ultimately reached a resolution, subsequently entering into a Stipulation for Allowed Administrative Expense Claim (the “Stipulation”). The Stipulation is attached as **Exhibit A**.

15. The terms of the Stipulation are generally as follows:

- B.H. West shall have an allowed administrative expense claim in the amount of \$65,000, which the Debtors shall pay within 5 business days after entry of the order approving the Stipulation.
- The payment described in the preceding paragraph shall be in full satisfaction for all unpaid post-petition amounts due to B.H. West under the Lease and B.H. West

shall not assert any additional claims under 11 U.S.C. §§ 365(d)(3) and 503(b)(1)(A).

- The Debtors release any and all claims that they may assert against B.H. West regarding the tenant improvement allowance under the Lease.

RELIEF REQUESTED

16. The Debtors seek an order approving the Stipulation and further implementing the Stipulation by granting B.H. West an allowed administrative expense claim in the amount of \$65,000.

17. The legal basis for the relief requested is set forth in the accompanying Memorandum of Law.

18. The Debtors believe that the relief requested is in the best interests of the estates and the Debtors' creditors because it preserves resources by avoiding the costs of litigation, ensures B.H. West will not assert any additional administrative expense claims, and creates certainty regarding B.H. West's claim.

CONCLUSION

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

20. 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 or (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.

WHEREFORE, the Debtors respectfully request that the Court enter an order:

- A. Authorizing the Debtors to enter into the Settlement;
- B. Granting B.H. West an allowed administrative expense claim;
- C. Such other and further relief as the Court deems just and equitable.

Dated: November 14, 2017

/e/ Steven R. Kinsella

Clinton E. Cutler (#0158094)
Cynthia A. Moyer (#0211229)
Ryan T. Murphy (#0311972)
James C. Brand (#387362)
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ATTORNEYS FOR DEBTORS

62678516.1

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: November 14, 2017

Signed: 

Timothy G. Becker

EXHIBIT A

**UNITED STATES BANKRUPTCY COURT
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STIPULATION FOR ALLOWED ADMINISTRATIVE EXPENSE CLAIM

This stipulation (the "Stipulation") is entered into by and between B.H. West Baraboo, LLC ("B.H. West") and Gander Mountain Company and Overton's, Inc. (the "Debtors").

RECITALS

A. B.H. West owns real property located at 315 West Pine Street, Baraboo, Sauk County, Wisconsin 53913. B.H. West owns, and the Debtors have been operating, a 48,538 square-foot commercial retail store located on the real property (the "Baraboo Store").

B. The Debtors' lease of the Baraboo Store originated in 2003. On July 17, 2003, B.H. West's predecessor, Wal-Mart Real Estate Business Trust ("Wal-Mart") entered into a sublease of the Baraboo Store with Gander Mountain Company, under which Wal-Mart agreed to lease the Baraboo Store to the Debtors until October 31, 2013 (the "Sublease"). On August 29, 2003, the Debtors and Wal-Mart entered into a First Amendment of the Sublease (the "First Amendment").

C. In 2007, after acquiring the fee interest in the property, Wal-Mart conveyed the Baraboo Store to B.H. West. Thereafter, in 2013, B.H. West and the Debtors (together, the "Parties") entered into a Second Amendment to Sublease dated October 2013 (the "Second Amendment"). In 2015, the Parties entered into a Third Amendment to Sublease dated

September 29, 2015 (the “Third Amendment” and, collectively with the First Amendment and Second Amendment, the “Amendments”). The Sublease, as amended by the Amendments, is referred to as the “Lease.”

D. On March 10, 2017 (the “Filing Date”), the Debtors filed for chapter 11 protection under title 11 of the United States Code (the “Bankruptcy Code”). Pursuant to sections 1106 and 1107 of the Bankruptcy Code, the Debtors are currently serving as debtors in possession.

E. From the Filing Date through the end of August 2017, the Debtors occupied the Baraboo Store.

F. On August 18, 2017, the Debtors filed a Notice of Hearing and Rejection of Unexpired Lease and Abandonment of Any Remaining Personal Property in the Leased Premises (Store Nos. 152, 200, 215, 220, 253, 259, 261, 367, 380, 408, 470, 493) [Docket No. 1148], which included the rejection of the Lease effective August 31, 2017 (the “Rejection Date”). The Court entered an order approving the rejection on September 8, 2017 [Docket No. 1203].

G. After the Filing Date, the Debtors routinely paid rent and other amounts owed to B.H. West pursuant to the terms of the Lease. However, B.H. West asserts that additional amounts were due under the Lease after the Filing Date and prior to the Rejection Date. Consequently, B.H. West has asserted that it holds an administrative expense claim in the amount of \$85,774.67 under 11 U.S.C. § 365(d)(3).

H. The Debtors dispute that B.H. West holds an administrative expense claim in that amount.

I. The Debtors and B.H. West entered into negotiations regarding B.H. West’s asserted administrative expense claim and ultimately reached a consensual resolution.

J. The Parties desire to avoid the uncertainties and expenses of litigation and desire to settle and compromise under the terms set forth below in full and final settlement of all claims asserted under 11 U.S.C. §§ 365(d)(3) and 503(b)(9).

AGREEMENT

1. Recitals Incorporated. The above recitals are acknowledged by the Parties to be true and correct and are incorporated herein by reference.

2. Court Approval. This Stipulation is subject to, and conditioned upon, the Court's approval in accordance with Rule 9019 of the Federal Rules of Bankruptcy Procedure. If the Court does not approve the Stipulation, nothing contained herein shall constitute an admission or a stipulation by any of the Parties and nothing shall constitute a waiver of any claims or issues by any of the Parties. The Debtors shall file a motion seeking Court approval of this Stipulation so as to be heard as soon as possible.

3. Allowed Administrative Expense Claim. B.H. West shall have an allowed administrative expense claim in the amount of \$65,000, which the Debtors shall pay within 5 business days after entry of the order approving the Stipulation.

4. No Additional Administrative Expense Claims. The payment described in Section 3 shall be in full satisfaction for all unpaid post-petition amounts due to B.H. West under the Lease and the B.H. West shall not assert any additional claims under 11 U.S.C. §§ 365(d)(3) and 503(b)(1)(A).

5. Release of Claims Against B.H. West. The Debtors shall release any and all claims that they may assert against B.H. West regarding the tenant improvement allowance under the Lease.

6. No Limit to Rejection Damages Claim and Defenses. Nothing contained herein shall limit, in any way, any claim B.H. West may assert for lease rejection damages pursuant to 11 U.S.C. § 502(b)(6). Nothing contained herein shall limit, in any way, the Debtors' defenses to any such lease rejection damages claim.

7. Fees and Costs. Each of the Parties to this Stipulation agrees to bear its own costs and expenses, including attorneys' fees, arising out of the matters addressed in this Stipulation.

8. Representation and Warranties. It is acknowledged that each of the Parties has read this Stipulation and has consulted counsel, or knowingly chose not to consult counsel, before executing the same. Each of the Parties has relied upon its own judgment and/or that of its counsel in executing this Stipulation, and has not relied on, or been induced by, any representation, statement, or act by any party that is not referred to in this instrument. Each of the Parties entered into this Stipulation voluntarily, with full knowledge of its significance, and the Stipulation is, in all respects, complete and final.

9. Applicable Law and Jurisdiction. This Stipulation shall be construed and governed by the laws of the State of Minnesota and the Court shall have exclusive jurisdiction over any dispute between the Parties arising out of, or relating to, this Stipulation.

10. Binding Effect. This Stipulation shall be binding upon, and inure to the benefit of, the Parties and their respective successors and assigns.

11. Entire Agreement. This Stipulation constitutes the entire agreement of the Parties as to the subject matter contained herein. The undersigned acknowledge that there are no communications or oral understandings that are contrary to, or that in any way restrict, this Stipulation and that all prior agreements or understandings within the scope of the subject matter

of this Stipulation are, upon the execution and delivery of this Stipulation, superseded, null, and void.

12. Interpretation. This Stipulation has been reached through negotiations between the Parties. Each of the Parties acknowledges that it has participated in the drafting of this Stipulation and reviewed the terms of the Stipulation and, as such, no rule of construction shall apply which might result in this Stipulation being construed in favor of or against any of the Parties, including, without limitation, any rule of construction to the effect that ambiguities ought to be resolved against the drafting party. The Parties have used their own judgment in entering into this Stipulation.

13. Electronic Signatures. Pursuant to Local Rule 9011-4(f), B.H. West's counsel listed below has authorized the Debtors' counsel to e-file this Stipulation bearing each of their respective e-signatures.

Dated: November 14, 2017

/e/ Steven R. Kinsella

Clinton E. Cutler (#0158094)

Steven R. Kinsella (#0392289)

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Dated: November 14, 2017

/e/ David E. Runck

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**ATTORNEYS FOR B.H. WEST BARABOO,
LLC**

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**MEMORANDUM IN SUPPORT OF MOTION FOR ORDER APPROVING
STIPULATION**

The above-captioned debtors (the “Debtors”), as debtors in possession, move the Court for entry of an order approving a stipulation. The supporting facts are set forth in the verified Motion. All capitalized terms have the meaning ascribed to them in the Motion. The Court should grant the relief requested because the proposed Stipulation is in the best interests of the parties, including the Debtors’ estates and creditors.

ANALYSIS

Compromise is favored by the law as a normal part of the reorganization process. *In re Trism, Inc.*, 282 B.R. 662, 666 (B.A.P. 8th Cir. 2002). The Bankruptcy Rules provide that, “[o]n motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement.” Fed. R. Bankr. P. 9019(a). “A decision to approve or disapprove a proposed settlement under Bankruptcy Rule 9019 is within the discretion of the bankruptcy judge.” *In re Trism, Inc.*, 282 B.R. at 666 (citing *In re Flight Transp. Corp. Sec. Litig.*, 730 F.2d 1128, 1135-36 (8th Cir. 1984)). Bankruptcy Rule 9019 vests a bankruptcy court with “broad authority to approve or disapprove all compromises and settlements affecting the bankruptcy estate.” *In re Bates*, 211 B.R. 338, 343 (Bankr. D. Minn. 1997).

In exercising its discretion, a court should consider the following factors:

- (1) “[t]he probability of success in the litigation”;
- (2) “[t]he difficulties, if any, to be encountered in the matter of collection”;
- (3) “[t]he complexity of the litigation involved, and the expense, inconvenience, and delay necessarily attending to it”; and
- (4) “[t]he paramount interests of the creditors and a proper deference to their reasonable views in the premises.”

In re Flight Transportation Corporate Securities Litigation, 730 F.2d at 1135-36 (citing *Drexel v. Loomis*, 35 F.2d 800, 806 (8th Cir. 1929), and *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424-25 (1968)). More recently, a fifth factor has been added:

- (5) “[w]hether the conclusion of the litigation promotes the integrity of the judicial system.”

In re Bates, 211 B.R. at 343; *see also In re Farmland Indus., Inc.*, 289 B.R. 122 (B.A.P. 8th Cir. 2003) (suggesting that compromise should further the goals of bankruptcy – fairness, finality, integrity, and maximization of assets).

After consideration of these factors, a court can determine whether a settlement is “fair and equitable” and in the best interests of the estate. *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. at 424; *In re Trism, Inc.*, 282 B.R. at 668. The court’s function is not to ensure that the proposed settlement is the best possible settlement obtainable. Rather, the court must determine only whether the settlement falls below the lowest point on the range of reasonableness. *In re Hanson Indus., Inc.*, 88 B.R. 942, 945 (Bankr. D. Minn. 1988).

Here, the facts justify approval of the Stipulation, as set forth in the Motion. The Stipulation preserves assets of the estates by reducing litigation costs, ensuring no additional

administrative expense claims will be asserted by B.H. West, and creating certainty regarding B.H. West's administrative expense claim.

CONCLUSION

The Debtors respectfully request that the Court grant the Motion.

Dated: November 14, 2017

/e/ Steven R. Kinsella

Clinton E. Cutler (#0158094)

Cynthia A. Moyer (#0211229)

Ryan T. Murphy (#0311972)

James C. Brand (#387362)

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ORDER APPROVING STIPULATION

This matter is before the court on the Motion for Order Approving Stipulation (the "Motion") filed by the above-captioned debtors (the "Debtors"). Based on the Motion and all papers filed by the Debtors in support of the Motion, all the files, records, and proceedings, herein,

IT IS HEREBY ORDERED:

1. The Motion is granted.
2. The Stipulation is approved.
3. B.H. West Baraboo, LLC ("B.H. West") is granted an allowed claim under 11 U.S.C. § 365(d)(3) in the total amount of \$65,000. The Debtors shall pay this amount to the Landlord within five business days from the entry of this order.
4. The payment described in paragraph 3 is in full satisfaction for all unpaid post-petition amounts due to B.H. West under B.H. West's lease and B.H. West shall not assert any additional claims under 11 U.S.C. §§ 365(d)(3) and 503(b)(1)(A).

Dated:

Michael E. Ridgway
United States Bankruptcy Judge