

**IN THE 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 |

**MEMORANDUM OF LAW IN SUPPORT OF THIRTY AND SUMMIT
BILLBOARD COMPANY, LLC'S MOTION FOR AN ORDER
ALLOWING ADMINISTRATIVE EXPENSE CLAIM**

Thirty and Summit Billboard Company LLC ("Summit"), through its undersigned counsel, submits this Memorandum of Law in support of its motion for an order allowing an administrative expense claim for unpaid post-petition base rent.

FACTS

The relevant facts are set forth in the Motion and Verification, which are incorporated herein by reference. Unless otherwise defined herein, all capitalized terms herein have the meanings given to them in the Motion.

ARGUMENT

**1. SUMMIT IS ENTITLED TO AN ADMINISTRATIVE EXPENSE CLAIM
UNDER 11 U.S.C. § 365(d)(3) FOR UNPAID POST-PETITION BASE RENT.**

11 U.S.C. § 365(d)(3) requires a Debtor "to timely perform all the obligations of the debtor arising from and after the order for relief under any unexpired lease of nonresidential real

property, until such lease is assumed or rejected, notwithstanding section 503(b)(1) of this title.” Case law is clear, the debtor must pay all rent and other charges under the lease that arise after the filing date and before the rejection date. *In re Burival*, 613 F.3d 810, 812 (8th Cir. 2010) (“Section 365(d)(3) is unambiguous and requires payment, in full, of post-petition, pre-rejection rent obligations in unexpired leases of nonresidential property.”); *see also, In re Sky Ventures, LLC*, 523 B.R. 163 (Bankr. D. Minn. 2014) (discussing *Burival* and the bright-line rule the debtor must “timely perform all post-petition, pre-rejection obligations as they become due, with no need for proration.”) Here, the Debtors filed for bankruptcy on March 10, 2017 (the “Filing Date”), and have yet to accept or reject the Lease. By operation of the Plan (Docket #1359) the Lease was rejected as of February 8, 2018, the Effective Date (Docket #1590). The 2017 rent which accrued during this time, \$2,058.94 from June 1, 2017 through September 30, 2017, and this post-petition rent remains unpaid despite Debtors using the leased premises during this timeframe. Accordingly, Summit requests payment of \$2,058.94 as an administrative expense claim under 11 U.S.C. § 365(d)(3).

2. SUMMIT IS ENTITLED TO AN ADMINISTRATIVE EXPENSE CLAIM UNDER 11 U.S.C. § 503(b)(1)(A) FOR UNPAID POST-PETITION BASE RENT.

Alternatively, even if Section 363(d)(3) were inapplicable, Summit would be entitled to an administrative expense claim under 11 U.S.C. § 503(b)(1)(A). The Debtors gained an actual benefit from the use and occupancy of the Premises from the date of filing until September 30, 2017. After filing, the Debtors continued to operate a Gander Mountain store in the Premises and during the summer, the Debtors used the Premises to conduct a going out of business sale.

Although the Debtors received the benefit of using the Premises, they have not paid the rent (in the form of base rent) associated with their use and occupation of the Premises. Accordingly, while Summit believes that Section 363(d)(3) is the applicable authority, even if it were determined otherwise, Summit would still have an administrative expense claim for the rent that accrued post-petition and pre-rejection based on the Debtor's actual benefit from the use and occupancy of the Premises from the Filing Date to the date of rejection under Section 503(b)(1)(A).

3. CONCLUSION

The Debtor used billboard post-petition and pre-rejection. The Debtor benefitted from using the billboard and, under the Bankruptcy Code, is required to pay Summit for the costs associated with its use. Therefore, Summit respectfully requests an order allowing an administrative expense claim under 11 U.S.C. § 365(d)(3) for base rent in the amount of \$2,058.94.

Respectfully submitted,

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