UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re: Case No. 17-30673 (MER) (Jointly Administered)

Gander Mountain Company,
Overton's, Inc. Chapter 11

Debtor.

KEY EXECUTIVE'S SUPPLEMENTAL MEMORANDUM OF LAW IN SUPPORT OF RESPONSE TO THE TRUST'S OMNIBUS OBJECTION

TO: The entities specified in local rule 3007-1.

PROCEDURAL POSTURE

1. This matter was last before the Court on November 29, 2018, on the Trust's Omnibus Objection to Claims Filed by Certain Former Key Emplyees ("Objection"). This Court previously heard oral argument from the parties on the merits of the Objection.

2. Following oral argument, this Court requested additional briefing on (1) the nature and extent of any ambiguity contained in the Key Employee Incentive Plan ("KEIP") and Key Employee Retention Plan ("KERP"); and (2) whether any of those ambiguities support the Trust's objection to the Key Employees' claims.

FACTUAL BACKGROUND

3. The factual background of this matter is more fully set forth in the Memorandum of Law of Darrel (Jay) Tibbets, Brian Kohlbeck, Joseph Fusaro, Michael Kalck, Ronald Stoupa, Robert Walker, and Eric Jacobsen (collectively referred to herein as the "Key Employees") in Response to the Trust's Omnibus Objection to Claims Filed by Certain Key Employees ("First Memorandum") and the supporting affidavit of Darrel "Jay" Tibbets ("Tibbets Affidavit"). All

capitalized terms not defined herein shall have the meaning set forth in the First Memorandum and the Tibbets Affidavit.

LEGAL ARGUMENT

I. The KEIP and KERP are ambiguous and, under Minnesota law, must be construed against the drafter.

The KEIP and KERP contain metrics that are ambiguous. Under Minnesota law, the "terms of a contract are ambiguous if they are susceptible to more than one reasonable interpretation." *In re Enggren's Enterprises, Inc.*, 253 B.R. 431, 434 (8th. Cir. B.A.P. 2000) (citing *Current Technology Concepts, Inc. v. Irie Enterprises, Inc.*, 530 N.W.3d 539, 543 (Minn. 1995)); *Denelsbeck v. Wellsfargo & Co.*, 666 N.W.2d 339, 346 (Minn. 2003). Where a contact is ambiguous, the parol evidence rule permits a party to supplement its terms using extrinsic evidence. *In re Bren*, 284 B.R. 861, 691 (Bankr. D. Minn. 2002); *In re Petters Co., Inc.*, 480 B.R. 346, 366 (Bankr. D. Minn. 2012); *Flynn v. Sawyer*, 272 N.W.2d 904, 908 (Minn. 1978) If, after considering parol evidence, the parties' intention is not clear, then the contract is construed against the drafter. *In re Eggren's*, 253 B.R. at 436 (interpreting Minnesota law); *In re Jr. Food Mark of Arkansas, Inc.*, 132 B.R. 915, 921 (Bankr. E.D. Ark. 1991) (construing ambiguities in a contract against their drafter); *Staffing Specifix Inc. v. TempWorks Management Services, Inc.*, 913 N.W.2d 687, 693 (Minn. 2018); *In re RFC and RESCAP Liquidating Trust Action*, 332 F.Supp.3d 1101, 1131 (D. Minn. 2018).

Thus, in Minnesota, to construe a contract against its drafter courts follow a three-part approach. First, the Court must determine whether the contract can reasonably have more than one interpretation. Second, the Court looks to extrinsic evidence to determine the intention of the parties as to the material terms. Finally, if the parties' intent cannot be ascertained, the contract is construed against the drafter. Where a contract is construed against the drafter, the court should

apply the interpretation that is "more favorable to the party who did not draft the instrument in the absence of a clear showing that a contrary meaning was intended by the parties at the time of execution." *Wick v. Murphy*, 54 N.W.2d 805, 809 (1952); *In re Buckeye Countrymark, Inc.*, 251 B.R. 835, 839 (Bankr. S.D. Ohio 2000) (providing that contract should be construed "in the way most favorable" to the non-drafter); *In re Dalton*, 2012 WL 314882 (N.D. Miss. Feb. 1, 2012) (construing contract most favorably to non-drafter).

a. The KEIP and KERP can be interpreted in several ways.

The KEIP and KERP are both susceptible to more than one possible reasonable interpretation. Ordinarily, courts may not read ambiguity into agreements and must define terms by their plain, ordinary, and popular meaning, unless the parties have otherwise defined the term. *Columbia Heights Motors, Inc. v. Allstate Ins. Co.*, 275 N.W.3d 32, 34 (Minn. 1979). In doing so, courts should not "rewrite, modify, or limit [a contract's] effect by a strained construction." *Savela v. City of Duluth*, 806 N.W.3d 793, 798 (Minn. 2011). Thus, where courts are unable to ascertain the intent of the parties without strained construction or adding additional language, a contract is ambiguous.

In this case, the KEIP and KERP use identically flawed metrics that result in ambiguity. At oral argument, the Trust attempted to salvage these metrics through the clause that provides "the cash value of other property estimated to be available for distribution on allowed claims of general unsecured creditors as of the date of confirmation of the Company's Plan of Reorganization and/or Liquidation (the "Plan") is equal to or exceeds 5%". [KEIP and KERP at ¶ 1B. (emphasis in original).] During oral argument and in their Memorandum in Support of the Objection to the Key Employees' claims, the Trust argued that the Plan confirmed by this Court contemplated that the amount of the distribution to be made to the unsecured creditors at the time

of the confirmation was clearly less than five percent (5%). The Trust's proposal was to average the current estimated distribution to unsecured creditors, between 2.2 and 6.4 percent, for a total of 4.3 percent (4.3%). Alternatively, the Trust suggests that this Court should apply the low-end of the range, which is 2.2 percent (2.2%). As a result, the Trust contends that the objection must be sustained because the Plan may provide less than a five percent (5%) distribution. Unfortunately for the Trust, that's not what was contained in the confirmed Plan.

The Trust's interpretation completely ignores the phrase "estimated to be available" that is clearly stated in the agreements. In fact, the confirmed plan provided an estimation of what the distribution available to unsecured creditors would be. That estimation was between 2.2 and 6.4 percent (2.2 % - 6.4%). Based on the plain language contained in the confirmed Plan, the Debtor estimated that there may ultimately be a distribution to unsecured creditors of five percent (5%) or more. Under that scenario, the Key Employees' interpretation of the Plan is correct, and that the various metrics cited in the First Memorandum would be satisfied and the claims asserted by the Key Employees could be allowed, or at a minimum, would justify denial of the Trust's omnibus motion objecting to the claims filed on behalf of the Key Employees. Had the drafters of the KEIP and KERP (namely the creditors committee and the Debtor) wanted to avoid some of the ambiguity associated with these agreements, the creditors committee should have requested a modification or objected to the proposed Plan and inserted a provision whereby the contemplated distribution would be a fixed amount as opposed to a range of distribution. The agreements' failure to account for a range of distribution results in an ambiguity that requires this Court to consider parol evidence to determine what the parties' intentions were when they entered into the KEIP and KERP. Should the extrinsic evidence fail to resolve the question of what the parties intended, then the contracts should be construed against the drafters. There is no dispute that the drafters of the KEIP and

KERP agreements were the Committee of Unsecured Creditors and the Debtor.

The Trust also asserted that the number of stores contained in each of the metrics that are at issue needed to be "assumed or assigned" or opened at the time of the Plan's confirmation. Again, there is no language that would support that interpretation found in either the KEIP or the KERP. Neither agreement even contains the words "assumed", "assigned", or "opened." What the Trust really asks of this Court to do is to either add language into the agreements where none exists or strain the interpretation of the existing language to encompass those requirements. Under Minnesota law, however, that would be wholly inappropriate. Instead, the proper course is to review parol evidence and determine whether the intent of the parties supports that interpretation. If the existing parol evidence does not establish the parties' intent, the contract should be construed against the drafters. At the time of confirmation, the Debtor ceased to be in a position to "assume," "assign," or otherwise control what may, or may not happen to its stores, given that all of these functions were transferred to the Trust at the time of confirmation.

The KEIP and KERP are also ambiguous because they fail to establish crucial deadlines. Although the distributions to unsecured creditors must meet a certain threshold "as of the date of the confirmation" of the Plan, there is no deadline for selling or transferring the stores. Instead, the Target, Stretch, and Maximum Metrics all provide that a certain number of stores must be "sold or transferred by the Company to one or more parties, and it is **contemplated** (emphasis added) at the time of such transaction(s) that such stores will be operated as retail stores under one or more trade names selling sporting goods with a prominent or seasonal emphasis on hunting, camping, fishing, shooting, marine, or outdoor recreational products (a '<u>Going Concern Sale</u>')." But the "Going Concern Sale" does not specify when the sale or transfer must be effectuated. Similarly, a "Going Concern Sale" cannot reasonably be construed to incorporate the deadline of the Plan's

confirmation because that date is not included in the term's definition. To the contrary, that deadline is only tied to the question of the contemplated amount of the distribution to be made to the unsecured creditors and the contemplated number of stores to be reopened under the CWH banner. As a result, when the stores need to be sold or transferred is not defined and is subject to multiple interpretations. This Court should consider the parol evidence attached to the Tibbets Affidavit to ascertain the parties' intent.

b. Parol evidence in the record cannot demonstrate the intent of the parties, so the KEIP and KERP must be construed against the drafter.

In the record before this Court, the extrinsic evidence attached to the Tibbets Affidavit significantly undermines the Trust's position. Between April 13, 2017, when the KEIP and KERP were executed, and January 26, 2018 ("Confirmation Date"), the Key Employees successfully sought and ultimately obtained a buyer who was actively working to open at least sixty (60) of the previously branded Gander Mountain stores, and that more than seventy (70) store openings was also contemplated. Their success may result in an estimated distribution to unsecured creditors that exceeds five percent (5%).

The uncontested record before this Court illustrates the following:

- On April 30, 2017, the CEO of CWH issued a press release saying that his company intended to purchase "as many as 70" stores. [Docket No. 1845 at 16, Tibbets Aff. at Ex. B.]

- On May 1, 2017, CWH issued another press release describing Debtor as a "perfect complement" to their existing stores. Moreover, CWH made a commitment to "assume certain liabilities, such as cure costs for leases and other agreements…" [Docket No. 1845 at 18, Tibbets Aff. at Ex. C.]

- On May 5, 2017, the CEO of CWI, Inc., an indirectly wholly-owned subsidiary of CWH, issued a press release describing his intentions to open "seventy or more, locations subject to, among other things, our ability to negotiate lease terms with landlords on terms acceptable to us and approval of the Bankruptcy Court." [Docket No. 1845 at 21, Tibbets Aff. at Ex. D.]

- Between May 5, 2017, and May 11, 2017, the CEO's Twitter account tweeted at least two

(2) documents containing specific locations that CWH was actively working to acquire and open as Camping World locations. In each of these tweets, the CEO indicates that he intends on opening, and assuming leases for between fifty (50) and sixty-four (64) stores. [Docket No. 1845 23-24, Tibbets Aff. at Exs. E-F.]

- On June 30, 2017, CWH issued a press release providing a list of fifty-seven (57) stores that it intended to keep open and indicated that it was "currently pursuing other locations for expansion and expect[ed] to announce additional locations and markets in the near term…" [Docket No. 1845 at 25-26, Tibbets Aff. at Ex. G.]

- CWH's Annual Report filed with the SEC for the fiscal year ending on December 31, 2017, represented that CWH planned "to operate a total of 74 Gander Outdoors stores by May 2018." [Docket No. 1845 at 30, Tibbets Aff. at Ex. H.]

- On January 4, 2018, the CEO of CWH issued a press release that included a list of sixty-nine (69) stores. The CEO indicated that the "list of locations is very solid and ready to be up and running in the coming months." The release indicated than an additional five (5) stores still being negotiated with landlords. [Docket No. 1845 at 31-34, Tibbets Aff. at Ex. I.]

CWH's press releases are important parol evidence regarding the parties' intent when entering into the KEIP and KERP. Neither party disputes that part of the intention of the KEIP and KERP was to maximize the value the Debtor could obtain for the sale of its assets, which were directly attributable to efforts expended by the Key Employees. To accomplish that intent, the Key Employees met with CWH and entered into an agreement for the purchase of certain assets of the Debtor. How those agreements and negotiations took place is significant because it sheds light on how the Key Employees understood the agreement.

During oral argument, the Trust's counsel contended that the parties must have intended for the stores to be assigned and assumed on, or before, the Confirmation Date because, otherwise, the Debtor would face untold rejection damages from the leases. The Trust's argument is hamstrung by CWH's press releases, social media postings, and SEC filings. As evidenced by the May 1, 2017 press release, CWH's intent to open stores has always been contingent upon assuming the cure costs of leases. CWH reiterated its intention to open in excess of sixty (60) stores as recently as January 3, 2018, which was just over three (3) weeks before the Plan's confirmation.

That evidence suggests that the Key Employees negotiated with CWH with the goal of relieving the Debtor of the burdens of the unexpired leases. Accordingly, although maximizing the Debtor's assets may have been part of the parties' intention, the parol evidence contradicts the Trust's position that the immediate assignment, assumption, or opening of all stores prior to, or at, the time of confirmation was the parties' intent. The parol evidence suggests the parties intended to locate a buyer willing to assume the leases or damages for curing any existing breach. The Key Employees found that buyer which immediately stated its intention to reopen at least sixty (60) of the Gander Mountain stores under the CWH banner.

This Court is compelled to consider CWH's representations to shareholders, the public, and the SEC in light of the regulations imposed on publicly traded entities when making such representations. Generally, false or misleading statements made by officers of a corporation can lead to liability, should a consumer, shareholder, or investor rely upon the information. 15 U.S.C. § 78. The information provided to the public, then, must, at very least, not be misleading to consumers. *In re Stratasys Ltd. Shareholder Securities Litig.*, 864 F.3d 879, 883 (8th Cir. 2017) (citing *Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 38 (2011)). Even forward looking statements regarding a company's growth in the future cannot be made in a way that is misleading or omits material information, including possible liabilities or other risks. *In Re Harman Intern. Industries Securities Litig.*, 791 F.3d 90, 98 (D.C. Cir. 2015) *cert. denied* 136 S.Ct. 1167 (2016).

Moreover, the annual report filed must contain all information "as may be necessary to make the required statements, in the light of the circumstances under which they are made not misleading." 17 C.F.R. 240.12b-20. As a result, CWH certified that the disclosures did not "contain any untrue statement of material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statement were made, not

misleading with respect to the period covered by this report." The SEC has issued guidance permitting companies to disclose material information via social media or websites where the company discloses to shareholders that those mediums may be used to transmit the information. *See*, SEC Release No. 69279 (April 2, 2013). As a result, the medium in which these statements are found should not impact this Court's assessment of their reliability. The Key Employees would submit that, under those circumstances, the parol evidence in this matter is inherently reliable.

CWH's representations were that it intended on opening more than seventy (70) specific locations. It represented that one of the possible liabilities from that course was that it would need to assume the cure costs for unexpired leases and other damages. Although CWH was not a party to the KEIP or KERP terms, how the Key Employees performed its duties under those contracts is probative of the parties' intentions.

II. Construed in a light most favorable to the Key Employees, it is reasonable to find that the metrics have been met for each bonus.

If this Court finds that the parol evidence in the record before it does not shed light on the intention of the parties, then it must construe the contract against the drafter. *Staffing Specifix, Inc.*, 913 N.W.2d at 694. In doing so, this Court should construe the contract in a manner most favorable to the non-drafting party. *Id*. (citing *Wick*, 54 N.W.2d at 809).

a. The Target metric has been met because, as of January 26, 2018, over a five percent (5%) distribution is estimated to be available for unsecured creditors and CWH was actively working toward opening at least thirty-five (35) stores.

The Target Metric provides:

> **Target.** You will earn an amount an amount equal to 25% of your base salary if (i) the cash or value of all of the property estimated to be available for distribution on allowed claims of general unsecured creditors as of the date of confirmation of the company's plan of reorganization and/or liquidation the plan is equal to or exceeds 5%; and at least 35 stores are sold or transferred by the Company to one or more parties, and it is contemplated at the time of such transaction that such stores will be operated as retail stores under one or more trade names

> selling sporting goods, with a prominent or seasonal emphasis on hunting, camping, fishing, shooting, marine, or outdoor recreational products ("a Going Concern Sale").

There are two requirements for the Target Metric to be met as applied to the facts before this Court. First, the cash value available for distribution to unsecured creditors as of the date of confirmation must be *estimated* to be equal to or exceed five percent (5%). Second, CWH must be actively working to open at least thirty-five (35) stores as retail stores with an emphasis on hunting, camping, fishing, shooting, marine, or outdoor recreational products. Clearly, both requirements have been met.

Debtor estimates that the distribution to unsecured creditors is between 2.2 and 6.4 percent (2.2% - 6.4%). As a result, it is estimated that the distribution to unsecured creditors could very well exceed five percent (5%). Although the actual amount is not known, an estimation of that amount is known. Construing the metric in the light most favorable to the Key Employees, this requirement has been met.

Additionally, there is no question that CWH intended to open at least thirty-five (35) stores with an emphasis on hunting, camping, fishing, shooting, marine, or outdoor recreation products. The press releases, social media posting, and SEC filings of CWH all confirm that CWH was working to open more than thirty-five (35) stores. Also of importance is that CWH also represented that would assume the liability for any uncured portion of the existing leases as part of the ongoing discussions taking place with landlords. The Key Employees are entitled to their bonuses associated with the Target Metric.

b. The Stretch Metric has been met because CWH actively worked to open at least sixty (60) stores.

The Stretch Metric provides:

> **Stretch.** You will earn an additional amount equal to 25% of your base salary if (i) the cash value or other property estimated to be available for

> distribution on allowed claims of general unsecured creditors as of the date of confirmation of the plan is equal to or exceeds 10%; **or** (ii) at least 60 stores are sold by the Company as a Going Concern Sale.

Unlike the Target Metric, the Stretch metric only requires the Key Employees to have achieved one of two requirements: (1) that a property value of ten percent (10%) be available to distribute to unsecured creditors as of the date of the Plan's confirmation; **or** (2) CWH is actively working to open at least sixty (60) stores as retail stores with an emphasis on hunting, camping, fishing, shooting, marine, or outdoor recreational products.

The distribution that will be available to unsecured creditors is currently between 2.2 and 6.4 percent (2.2% - 6.4%), so it is unlikely that the ten percent (10%) distribution to unsecured creditors portion of the Stretch Metric will be met. What is clear, however, is that the second part of the Stretch Metric has been met. CWH, in fact, has listed more than sixty (60) specific locations throughout the United States that it intends to open, assume leases for, and operate as outdoor recreational retailers. CWH has also represented to the SEC and shareholders in its annual reports that over sixty (60) stores will be opened. The Key Employees are entitled to the bonus from the Stretch Metric on this basis alone.

c. The Maximum Metric has been met because, as of January 26, 2018, CWH contemplated opening at least seventy (70) stores and the estimated distribution to unsecured creditors could be at least five percent (5%) but less than ten percent (10%).

The Maximum Metric provides:

> **Maximum.**
>
> (1) You will earn an additional amount equal to 25% of your base salary if (i) the cash or value of other property estimated to be available for distribution to general unsecured creditors as of the date of confirmation of the plan is equal to or exceeds 10%; and (ii) at least 70 stores are sold by the Company as a Going Concern Sale.

> (2) In the event the cash or value of other property estimated to be available for distribution on allowed claims of general unsecured creditors as of the date of confirmation of the Plan is at least 5% of such allowed claims but less than 10% of such allowed claims, the applicable bonus amount for the Maximum opportunity shall be a prorated amount calculated as the product of your Maximum opportunity bonus amount multiplied by a fraction, the numerator of which is the percentage of cash or value of other property estimated to be available for distribution to general unsecured creditors as of the date of confirmation of the Plan and the denominator of which is 10%.

The Maximum Metric is distinct from the Target or Stretch Metrics. It is similar in that it requires: (1) the estimated distribution to unsecured creditors to be estimated at somewhere between five percent (5%) and ten percent (10%); **and** (2) that at least seventy stores (70) are opened with a prominent or seasonal emphasis on hunting, camping, fishing, shooting, marine, or outdoor recreation products. Unique to the Maximum Metric, however, is the possibility for the Key Employees to earn a pro rata share if the estimated distribution to unsecured creditors is at least five percent (5%) but less than ten percent (10%) and at least seventy (70) stores are opened.

The evidence in the record before this Court demonstrates that, construing the KEIP and KERP in a manner most favorably to the Key Employees, they satisfy the first requirement of the Maximum Metric. Setting aside the likelihood of whether a ten percent (10%) distribution to unsecured creditors is available, the Debtor has already estimated in its confirmed Plan that a 2.2 to 6.4 percent (2.2% – 6.4%distribution to unsecured creditors will occur. Since it is estimated that upwards of a 6.4 percent (6.4%) distribution may be made, the first component of the Maximum Metric is satisfied.

The Key Employees have also satisfied the requirement that a purchaser be working toward openining seventy (70) or more stores. In public filings with the SEC, made mere weeks before the Plan's confirmation, CWH represented to the SEC, the public, and its shareholders that it anticipated and was actively working towards opening seventy-four (74) stores. The evidence

before this Court demonstrates that the Key Employees are entitled to the bonus from the Maximum Metric.

III. The Trust's objection is premature and should be resolved after all other claims and objections have been adjudicated.

Ultimately, the Trust's objection is premature and should be stayed until all other claims have been resolved. Given that the estimated distribution to unsecured creditors is between 2.2 and 6.4 percent (2.2% - 6.4%), it is unclear whether the Target Metric and Maximum Metrics are even capable of being satisfied. Further complicating the question of the estimated distribution are several other objections that the Trust has filed. Continuing this objection until a final allowance of claims is made which will be outcome determinative as to both the Target and Maximum Metrics. The Key Employees concede that, should the distribution to unsecured creditors be 4.99 percent (4.99%) or below, the Key Employees would not be entitled to receive a bonus derivative from either the Stretch or Maximum Metrics. However, as outlined above, the Stretch Metric is not contingent upon a certain distribution to unsecured creditors because it can be satisfied by CWH actively working to open at least sixty (60) stores. Until it is clear which other metrics are in play, this Court should, at a minimum, reserve ruling on the Trust's Objection until all claims have been allowed or disallowed.

CONCLUSION

The KEIP and KERP agreements are ambiguous. Several of its clauses and terms are subject to multiple reasonable interpretations. On the record before it, this Court cannot accurately ascertain the intention of the parties from the existing extrinsic evidence. Accordingly, under Minnesota law, the contract must be construed against the Trust and the Debtor. In doing so, this Court should apply the construction most favorable to the Key Employees'.

In the alternative, this Court should reserve its ruling on the Trust's objection until all other

claims and objections have been resolved. At that time, the actual distribution to unsecured creditors will be known, which resolves questions associated with the Target and Maximum Metrics.

Respectfully submitted,

ANASTASI JELLUM, P.A.

Dated: January 17, 2019

/s/ T. Chris Stewart

T. Chris Stewart, #152316
Attorneys for Darrell (Jay) Tibbets, et al.
14985 60th Street North
Stillwater, MN 55082
Telephone: (651) 332-8302
Fax: (651) 332-8302
E-Mail: chris.stewart@aj-law.com