

**UNITED STATES BANKRUPTCY COURT  
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

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**THE TRUST'S REPLY TO THE KEY EXECUTIVES'  
SUPPLEMENTAL MEMORANDUM OF LAW IN SUPPORT  
OF RESPONSE TO THE TRUST'S OMNIBUS OBJECTION**

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This reply is submitted by the Gander Mountain Liquidating Trust (the "Trust") in response to the *Key Executives' Supplemental Memorandum of Law in Support of Response to the Trust's Omnibus Objection* (the "Executives' Brief") [Docket No. 1922].

**REPLY**

Lost in the Key Executives'<sup>1</sup> attempts to insert ambiguity into the KERP/KEIP, is the fact that the Key Executives had no concerns about ambiguity when reading the requirements entitling them to payment under the Threshold Bonus. The Key Executives took no issue with this portion of the KERP/KEIP, which paid them \$1,250,000 in the aggregate, upon the Gander Mountain Company "closing on (i) one or more assets sales under Section 363 of the Code or (ii) one or more consulting or agency agreements for the conduct of going out of business or similar sales . . .".

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<sup>1</sup> Capitalized terms not otherwise defined herein shall have the meaning ascribed to them in the *Supplemental Memorandum of Law in Further Support of the Trust's Omnibus Objection to Claims Filed by Certain Former Key Executives* [Docket No. 1921].

It appears of no consequence to the Key Executives that the Threshold Bonus specifically required that the *Gander Mountain Company* close on such sales or agreements, or that no specific time period was referenced by which such sales or agreements had to close. While the Key Executives now point to ambiguity concerning which entity is required to sell or transfer stores, and by what date such sales and transfers must close, it is notable that they raised no such objection to the portion of the KERP/KEIP under which they were already compensated.

In short, the parties agreed on certain milestones to satisfy the Threshold Bonus, and after the Key Executives met those requirements, they were appropriately compensated. The Key Executives are now overreaching. Unsatisfied with the \$1,250,000 already received, they are attempting to secure an additional \$1,875,000 in compensation for the Unearned Bonuses. However, under the plain terms of the KERP/KEIP they have not satisfied those milestones. Accordingly, they now conveniently argue that *all* of the Unearned Bonuses provisions are ambiguous.

Under Minnesota law, a contract “must be construed as a whole, and unambiguous language must be given its plain and ordinary meaning.” *Henning Nelson Const. Co. v. Fireman's Fund American Life Ins. Co.*, 383 N.W.2d 645, 652 (Minn. 1986). Despite attempting to convince the Court to accept strained readings of the Unearned Bonuses provisions to purposefully create ambiguity, the Key Executives fail to overcome to two fundamental requirements:

- (i) the recoveries to unsecured creditor metric is based upon estimates as of the date of confirmation of the Plan; and
- (ii) the minimum number of stores metric required the stores to be sold or transferred by the Gander Mountain Company.

These two requirements are clear and unambiguous under a plain reading of the KERP/KEIP and are fatal to the Key Executives’ attempts to insert ambiguity and introduce parol

evidence. *Valspar Refinish, Inc. v. Gaylord's, Inc.*, 764 N.W.2d 359, 364–65 (Minn. 2009) (“when a contractual provision is clear and unambiguous, courts should not rewrite, modify, or limit its effect by a strained construction”).

Most telling, the Key Executives find no ambiguity with regard to the portion of the KERP/KEIP for which they have already been compensated, yet assert that the provisions of the KERP/KEIP that they are unable to satisfy “contain metrics that are ambiguous.”<sup>2</sup> *Cf. Motorsports Racing Plus, Inc. v. Arctic Cat Sales, Inc.*, 666 N.W. 2d 320, 323-24 (Minn. 2003) (words and phrases are to be given meaning in accordance with the obvious purpose of the contract as a whole, not dissected from their context). Indeed, illustrative of the KERP/KEIP’s purpose to maximize value for the Debtors’ estates and unsecured creditors, the milestones contained in the Unearned Bonuses ultimately approved by this Court through the KERP/KEIP were far more stringent than the management-friendly milestones originally sought by the Debtors.<sup>3</sup>

Moreover, running far afield from simply presenting arguments concerning whether the text of the KERP/KEIP is ambiguous, the Key Executives improperly attempt to argue the merits of what they assert is admissible parol evidence of the parties’ intent. However, parol evidence is not properly considered, if at all, until after this Court makes a legal determination of whether the KERP/KEIP is ambiguous, based solely upon the text of the agreement. *Lafarge N. Am., Inc. v. Discovery Grp. L.L.C.*, 574 F.3d 973, 979 (8th Cir. 2009) (applying Missouri law) (“If the contract is unambiguous, then the intent of the parties is to be gathered from the contract alone, and any extrinsic or parole evidence as to the intent and meaning of the contract must be excluded from the court's review.”).

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<sup>2</sup> Executives’ Brief at p. 2.

<sup>3</sup> *See Notice of Hearing and Joint Motion for Order (I) Granting Expedited Relief and (II) Approving Key Employee Retention Plan and Key Employee Incentive Plan* [Docket No. 28] at ¶¶ 18(e) and 29(c).

The Court requested briefing at this junction only to determine whether or not the KERP/KEIP is ambiguous:

THE COURT: Very interesting.

What I would like to see from both sides, and I know it's worked up in preparation for today's hearing, but I wanted to hear the arguments so that it can coalesce a little bit better into a recognizable mask, so to speak. I would like to see further briefing on the issue that the agreements are what they are. They are unambiguous. They are interpreted in such a manner that I should sustain the motion objecting to the claims of the key executives, period end of story.

I want to hear from Mr. Stewart why that should not be the case, that the contract or agreements are ambiguous and therefore should lend themselves to extrinsic evidence and his argument that we don't know because we haven't hit the five percent yet and we won't know it until the claims period to object to has passed and there's been a distribution.

*See November 29, 2018 Hearing Transcript at pp. 28-29*, a copy is annexed hereto as **Exhibit A**.

If and when this Court determines that parol evidence is appropriate, the Trust reserves all its rights to seek discovery under the Federal Rules of Bankruptcy Procedure, to introduce extrinsic evidence in further support of the Trust's position, and to rebut any parol evidence introduced by the Key Executives. *See, e.g., Craigmile v. Sorenson*, 239 Minn. 383, 395 (1953) (approving admission of rebuttal parol evidence to refute the other party's parol evidence).

Similarly, the Key Executives' arguments concerning whether the KERP/KEIP should be construed against a particular party is beyond the scope of the Court's requested briefing. *See also Swift & Co. v. Elias Farms, Inc.*, 539 F.3d 849, 854 (8th Cir. 2008) (construing a contract against a drafter "only as a last resort, after all other evidence fails to demonstrate the intent of the parties."). Application of this doctrine also turns in part upon a determination of whether the subject contract is one of adhesion. *See Staffing Specifix, Inc. v. TempWorks Mgmt. Servs., Inc.*,

896 N.W.2d 115, 130 (Minn. Ct. App. 2017), *review granted in part* (June 28, 2017), *aff'd*, 913 N.W.2d 687 (Minn. 2018). The Trust reserves all rights to make and advance all arguments concerning whether and how the KERP/KEIP should be construed against or in favor of a particular party when and if such issue becomes ripe for adjudication.

*[Remainder of page intentionally left blank.]*

**CONCLUSION**

Wherefore, the Trust respectfully requests that the Court grant the relief requested through the Motion, and grant such other and further relief as is just and equitable.

Dated: February 1, 2019

Respectfully Submitted,

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## **EXHIBIT A**

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UNITED STATES BANKRUPTCY COURT  
OF MINNESOTA

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In Re:

Gander Mountain Company

File No. 17-30673  
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BEFORE THE HONORABLE  
MICHAEL E. RIDGWAY  
United States Bankruptcy Judge

\* \* \*

TRANSCRIPT OF PROCEEDINGS

November 29, 2018

\* \* \*

Proceedings recorded by digitally recording,  
transcript prepared by transcription service.

NEIL K. JOHNSON REPORTING AGENCY  
332 Minnesota Street, Suite 2625  
Saint Paul, Minnesota 55101  
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**APPEARANCES**

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3

4 **MR. CHRISTOPHER KNAPP,**

5 Attorney at Law, 225 South Sixth Street,

6 Suite 2800, Minneapolis, Minnesota 55402

7 appeared on behalf of the liquidating

8 trustee.

9

10

11 **MR. SCOTT CARGILL, Attorney at**

12 Law, One Lowenstein Drive, Roseland, New

13 Jersey 07068 appeared on behalf of the

14 liquidating trustee.

15

16

17 **MR. T. CHRIS STEWART, Attorney**

18 at Law, 14985 60th Street North, Stillwater,

19 Minnesota 55082 appeared on behalf of Key

20 Executives.

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**REPORTER'S DISCLAIMER**

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3 The proceedings contained herein were

4 transcribed via stenographic means from the

5 official court audio file.

6

7 There was no court reporter present

8 recording the proceedings to capture the

9 proceedings live, obtain clarifications, etc.

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11 The spellings of case names and citations

12 contained herein were taken from the official

13 court docket produced in the matter to be utilized

14 for transcription purposes and may not be the

15 correct spellings and/or citations.

16

17 Any portions of the transcript identified

18 as "UNINTELLIGIBLE" are proceedings where the

19 audio file is not clear enough to understand the

20 actual spoken words which may be due to distance

21 from a microphone or other audio interference.

22

23 Every attempt has been made to

24 produce the most accurate transcript possible

25 considering the above limitations.

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**PROCEEDINGS**

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3 (Wherein, the following digitally

4 recorded proceedings were had)

5

6 **THE COURT:** This is the time and

7 place set for a hearing in the

8 Chapter 11 case of Gander Mountain Company,

9 Case No. 17-30673.

10 Before the court today is a motion brought

11 on behalf of the Chapter 11 liquidating

12 trustee objecting to certain claims. Those

13 claims pertain to a group of individuals

14 known throughout these proceedings as the,

15 quote-unquote, key executives and they have

16 filed a timely response.

17 May I have appearances, please, first on

18 behalf of the liquidating trustee.

19 **MR. KNAPP:** Good afternoon, Your

20 Honor. Chris Knapp on behalf of the

21 liquidating trust. With me is Scott Cargill,

22 our co-counsel from the Lowenstein Sandler

23 firm, and Mr. Cargill will be giving the

24 presentation.

25 **THE COURT:** Excellent. Good

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1 afternoon, gentlemen.

2 And on behalf of the key executives?

3 **MR. STEWART:** Thank you, Your

4 Honor. Chris Stewart appearing on behalf of

5 the seven key executives, that would be

6 (UNINTELLIGIBLE), Robert Walker, Eric

7 Jacobson (UNINTELLIGIBLE).

8 **THE COURT:** Either one sounds

9 fine by me.

10 Before we get started, I might just share

11 some preliminary thoughts with you and get

12 your respective reactions to that.

13 In reading both the objection to the

14 claimants and then their response by the key

15 executives, it seems like there may be a

16 certain prematurity aspect to this, and I am

17 wondering now that both sides have kind of

18 staked out their respective positions if this

19 proceeding might be allowed to run a little

20 bit further its course to determine and

21 solidify what actually is happening here so

22 that the matters could be coalesced.

23 I know there's also a dispute with regard

24 to potential ambiguities in the contracts

25 that surround and are underlying these

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1 particular entitlements that the key  
2 employees are claiming, so reactions to that,  
3 Mr. Cargill?  
4 **MR. CARGILL:** Yes, Your Honor. I  
5 appreciate it. (UNINTELLIGIBLE).  
6 The trust's position is that there's no  
7 need for adjournment at this time because  
8 everything -- all the information the court  
9 needs to make a determination as to whether  
10 these key executives are entitled to their  
11 claims is already before the court and in the  
12 record.  
13 We believe that both as to distributions  
14 to unsecured creditors as well as to stores  
15 sold and transferred, that that is measured  
16 as of the confirmation hearing and that  
17 there's no need for determined -- to  
18 determine what actual recoveries or what  
19 additional store re-openings may occur, so we  
20 believe that this matter is ripe for  
21 adjudication.  
22 If Your Honor has a certain view as to  
23 whether or not the contract is ambiguous and  
24 would call for evidentiary hearing and  
25 perhaps parol evidence coming in, that would

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1 be a different story, but at first blush we  
2 think that this is clearly a question of law  
3 that can be resolved before the court upon  
4 the record as it exists today.  
5 **THE COURT:** Thank you,  
6 Mr. Cargill.  
7 Mr. Stewart.  
8 **MR. STEWART:** Thank you, Your  
9 Honor.  
10 The court hit on one of the themes and  
11 actually the first theme that we had filed  
12 and a response to the claim objection is the  
13 premature nature of this, and Mr. Cargill  
14 laid out obviously the position of the  
15 liquidating trustee, but I would take issue  
16 and further try to bolster the court's  
17 concern that this may be premature.  
18 The court is well aware -- I'm assuming,  
19 looked at the three metrics that we're  
20 talking about and it does call for a certain  
21 percentage of distribution to be made to the  
22 general unsecured creditors on both the  
23 target metric, which is the first one that's  
24 at issue here, and then there's a ten percent  
25 distribution to unsecured creditors in the

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1 maximum metric, that's the third one.  
2 However, that one is also subject to a  
3 prorating formula in the event that ten  
4 percent anticipated distribution to unsecured  
5 creditors turns out to be somewhere between  
6 five and ten percent, so it was contemplated.  
7 However, with respect to the stretch  
8 metric, which is the one that's in the  
9 middle, that doesn't require necessarily a  
10 distribution to the unsecured creditors in  
11 any amount.  
12 As the court will note, there's a keyword  
13 in that particular metric and that is that  
14 metric can be met if, in fact, there's a ten  
15 percent distribution to the general unsecured  
16 creditors at the end of the day or, and  
17 that's the big or, 60 stores are sold by the  
18 company as a going concern sale.  
19 Now, it's our contention with respect to  
20 Mr. Cargill touched on, the ambiguity is --  
21 you know, what does 60 stores are sold by the  
22 company as a going concern sale. Their  
23 obvious position is, well, that's got to be  
24 by the time of confirmation. That's not what  
25 the agreements say.

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1 In any event, I would reiterate we do  
2 think it is premature because if you take a  
3 look at any of the percentages that are  
4 required by any one of the three metrics, we  
5 don't know what that will be.  
6 Now, I am not going to sit here and  
7 necessarily say there's going to be a ten  
8 percent distribution to the unsecured  
9 creditors. I don't think that's the case,  
10 but nobody here can say with any certainty  
11 that after all of the claims obligations are  
12 heard we won't know what the actual allowed  
13 claims are and what the percentage may be, so  
14 we do think that it's premature because of  
15 that. We just don't know what that eventual  
16 distribution is going to be, as we sit here  
17 today.  
18 **THE COURT:** And both parties seem  
19 to agree that the one metric has been met  
20 with regard to payments already having been  
21 made of one point --  
22 **MR. STEWART:** Yes. The first one  
23 was --  
24 **THE COURT:** \$1.25 million.  
25 **MR. STEWART:** Yes, the first one

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1 was the threshold and that was if these key  
2 employees were able to facilitate a sale of  
3 the Gander Mountain and Overton assets, they  
4 would then receive 50 percent of their base  
5 salary.  
6 There's no dispute there was an aggregate  
7 amount of \$1,250,000.00 paid for having met  
8 that metric.  
9 **THE COURT:** Very well. Thank  
10 you.  
11 Mr. Cargill, tell me why you think I can  
12 pull the trigger right now to get down to the  
13 colloquial phrase of the day?  
14 **MR. CARGILL:** Happy to, Your  
15 Honor.  
16 **THE COURT:** Or maybe that's not  
17 politically correct in this day and age  
18 either. Sorry about that.  
19 **MR. CARGILL:** That's okay.  
20 Your Honor, the key executives position,  
21 which says we need to wait for distributions  
22 to be made, I am going to quote from the  
23 target bonus which was in the key employee  
24 retention plan that was filed by -- by the  
25 key executives and the target, and I will

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1 quote in full but highlight the relevant  
2 portion. It says the target will earn an  
3 additional amount equal to 25 percent of your  
4 base salary if 1(i), the cash or value of  
5 other property estimated to be available for  
6 distribution on allowed claims of general  
7 unsecured creditors as of the date of  
8 confirmation of the company's plan of  
9 reorganization is equal to or exceeds five  
10 percent.  
11 Similar language is for the instruction to  
12 maximum. In order to delay or reject the  
13 trust's position, you would effectively, it's  
14 our position, be required to read out the  
15 language that says estimated to be available  
16 for distribution on allowed claims as of the  
17 date of confirmation.  
18 To give purpose and meaning to every part  
19 of a contract or a governing doctrine --  
20 document, you would have to ascribe some  
21 meaning to the fact that it's estimated and  
22 it's as of the confirmation date.  
23 In our papers, Your Honor, we placed in  
24 what the estimate was as -- in the documents  
25 that were submitted to the court and it was

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1 not dependent on we wait until the end of the  
2 case and end of the distributions. That's  
3 what this court approved and we believe  
4 that's a fair and natural reading of the  
5 document.  
6 As to the other issue with regards to  
7 stores that were sold and/or transferred,  
8 again, we believe a natural reading and plain  
9 meaning of that phrase would require for  
10 Gander to have assumed and assigned the  
11 leases. I don't know how else a debtor in  
12 possession transfers or sells a store and it  
13 would be -- it's the trust's position to be  
14 an absurd reading to say that any store that  
15 went dark and at some point later in the day  
16 Camping World decided to re-approach -- have  
17 them re-approach that landlord and reopen  
18 those stores has absolutely nothing to do  
19 with the benefit to the estate.  
20 What happened here, honestly, is there was  
21 19 leases that were assumed, a couple million  
22 dollars in cure costs and then 96 leases that  
23 were rejected and left the estate with  
24 \$150 million in rejection damages claims.  
25 It's unclear to me how the key executives

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1 should benefit on an inventive plan when all  
2 that the buyer here did was simply allow the  
3 estate to reject those contracts and then  
4 went back to landlords.  
5 The only connection was they happen to  
6 reopen with the intellectual property and use  
7 the Gander name. Other than this, this had  
8 nothing to do with some type of sale or  
9 transfer. This was just them approaching a  
10 store that happened to be the same retail  
11 space or some portion of it that was formerly  
12 a Gander store and that's why we believe that  
13 Your Honor can rule on this as a matter of  
14 law because all the information that the  
15 court needs to decide whether or not the  
16 metrics were met in the KERP is before the  
17 court in the record.  
18 **THE COURT:** It's of no  
19 consequence that the period for which  
20 objections to the claims may be made is still  
21 outstanding?  
22 **MR. CARGILL:** No, Your Honor,  
23 because if that was relevant then there  
24 wouldn't be the phrase in there of property  
25 estimated to be available for general

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1 unsecureds as of the date of confirmation.  
2 If they wanted to, I'm sure the parties  
3 could have negotiated a KERP agreement that  
4 had fairly said, you know, after all  
5 distributions are made, that's when we take a  
6 look and that's when we decide, but that's  
7 not what the language of the plan is and that  
8 was the plan that was approved by the court  
9 and relied upon by the parties.  
10 **THE COURT:** So let me ask you  
11 this: If I buy into your position, would it  
12 make any difference, then, if the trustee is  
13 successful in challenging other outstanding  
14 claims? Would that change the formula?  
15 Would that change the metric and the  
16 possibility of additional compensation to the  
17 key executives?  
18 **MR. CARGILL:** No, because it had  
19 to be as -- the estimates had to be made as  
20 of confirmation and for a very good reason,  
21 because let's say Mr. Stewart's clients were  
22 very successful and got Camping World to  
23 accept 71 leases, we're not in a we're going  
24 to wait for a lease to get rejected and then  
25 we're going to approach the store. It would

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1 be a savings of \$150 million in rejection  
2 damages claims.  
3 I could pretty fairly confidently say that  
4 the trust would be happy to pay the  
5 additional \$2.2 million if they didn't have  
6 to pay or have claims against them for over  
7 \$150 million in rejection damages.  
8 So I think that's why it all goes back to  
9 confirmation because at confirmation, you  
10 know, we knew how many stores Camping World  
11 ultimately agreed and they took the absolute  
12 minimum that they were obligated. Even those  
13 19 stores was heavily negotiated because the  
14 Creditor's Committee in the case wanted to  
15 make sure that there was some continuing --  
16 some leases that would be assumed and  
17 assigned because we were concerned about  
18 there being a large amount of rejection  
19 damages claim, and that's why we wanted to  
20 motivate the executives to actually have the  
21 company, Gander, assume and assign and not  
22 stick the estate with those rejection damages  
23 claims.  
24 **THE COURT:** So it goes back to  
25 the interpretation of the language that you

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1 recited to me in the agreement?  
2 **MR. STEWART:** Yes. Our position  
3 is it's an unambiguous contract -- agreement  
4 that's straightforward and by giving plain  
5 and ordinary meaning to each word and giving  
6 meaning to each phrase in the plan that these  
7 claims should be disallowed.  
8 **THE COURT:** So if that is  
9 correct, the agreement is clear and  
10 unambiguous and I should look to the four  
11 corners of the document and allow no  
12 extrinsic or parol evidence to come in to  
13 reshape or redefine those words?  
14 **MR. CARGILL:** Your Honor, that's  
15 the trust's position.  
16 In that regard, I would note that I had a  
17 conversation with Mr. Stewart earlier this  
18 morning where he did file a number of  
19 exhibits to the motion yesterday or to his  
20 response, I should say, and the trust's  
21 position is -- I don't know if parol or  
22 extrinsic is in fashion, which one to use, I  
23 think when I went to law school it was parol,  
24 but in any event, that's irrelevant to what  
25 was contemplated at the time -- the

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1 contemplation language really only goes --  
2 there was actually -- it goes to the issue of  
3 when a store is being assumed or assigned  
4 under the agreement what is that store being  
5 used for. It's not this open ended, well,  
6 did Camping World have it in its head that  
7 they were going to open 30 or maybe it was 70  
8 or maybe it was 20 additional stores.  
9 That's, again, plain reading of the document.  
10 It's our position that it all had to be as  
11 of confirmation and, yes, no parol evidence  
12 should be allowed or considered.  
13 **THE COURT:** You know, speaking  
14 about that, and I have given presentations at  
15 continuing legal education and I even teach a  
16 bankruptcy class here at St. Thomas Law  
17 School, it's amazing the number of students  
18 and for that matter attorneys, when you say  
19 parol evidence rule, they think of the rules  
20 of evidence. Well, it's not really a rule of  
21 evidence. It's a substantive contractual  
22 rule, but some people still get that messed  
23 up.  
24 Anything further?  
25 **MR. CARGILL:** No, Your Honor.

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1           **THE COURT:** Thank you,  
 2 Mr. Cargill.  
 3           Mr. Stewart, I have a hunch that you are  
 4 going to respectfully disagree with that  
 5 approach?  
 6           **MR. STEWART:** It's old people  
 7 that -- any time I'm in front of the court  
 8 and I hear somebody say respectfully, Your  
 9 Honor, let them go because it's got to be  
 10 good for my side, not their's, but I do  
 11 disagree with some of what Mr. Cargill has  
 12 laid out.  
 13           Let's even assume that what Mr. Cargill  
 14 told you was absolutely correct, that you  
 15 don't get into the claims allowances. You  
 16 don't get into claims objections. You have  
 17 to look at the time the plan was confirmed.  
 18 Well, here's what the plan said, the  
 19 estimated distribution to the general  
 20 unsecured creditors was going to be -- and  
 21 the plan says 2.2 percent to 6.4 percent.  
 22           By my math then, even by their own  
 23 estimate, if we take as true that the  
 24 confirmation date is going to be the  
 25 dispositive of the estimated distribution,

Page 19

1 well, I agree 2.2 percent is less than five.  
 2 Then we don't have any claim under the  
 3 threshold or the maximum metric, but it says  
 4 6.4 percent. Well, by my math that's more  
 5 than five.  
 6           So even by their own estimate we don't  
 7 know whether or not it's going to wind up  
 8 being more than five or less than five, which  
 9 is why to argue that at the time of  
 10 confirmation that's when everything was set  
 11 in stone, I would argue we win that because  
 12 they estimated that the distribution to  
 13 unsecured creditors might be as high as  
 14 6.4 percent.  
 15           Mr. Cargill, I am sure on the other side  
 16 is going to say, wait a minute, our estimate  
 17 was maybe 2.2 percent. Well, then we have a  
 18 problem with the interpretation of this  
 19 contract if that's when we cast the cement  
 20 for determining the distribution to unsecured  
 21 creditors. Even by their own admission, it's  
 22 either more than five or less than five and I  
 23 think then because the estimate didn't -- if  
 24 the plan had said our estimated distribution  
 25 is 4.5 percent, I probably would be sitting

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1 here going that's what the plan said, that's  
 2 less than five percent, your argument is  
 3 that's the point in time where we cast the  
 4 concrete for the estimated amount of  
 5 distribution.  
 6           I would probably only be here arguing the  
 7 target -- I'm sorry, the stretch metric under  
 8 the 60 store provision, because we certainly  
 9 wouldn't have then five percent or more and  
 10 we won't have ten percent or more, but that's  
 11 not what the agreement says.  
 12           I think naturally the court has to look at  
 13 the agreement and contemplate, okay, since  
 14 there was no set amount for the actual  
 15 distribution to the unsecured creditors and  
 16 there was an estimate between 2.2 percent and  
 17 6.4 percent, I think that naturally then  
 18 leads to the conclusion you have to let the  
 19 claims objections and the allowance of claims  
 20 to run its course to determine what metrics,  
 21 if any, may still be in effect with respect  
 22 to the claims filed on behalf of the seven  
 23 key employees.  
 24           Touching on the store openings, we would  
 25 argue the agreement says nothing about

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1 assuming, assigning, or anything else. The  
 2 interesting language in this agreement makes  
 3 it very clear and specific that with respect  
 4 to the anticipated distribution to the  
 5 unsecured creditors, specifically says at the  
 6 time of confirmation, but if you read the  
 7 additional language associated with the store  
 8 openings it says and at least your number of  
 9 stores, 35, 60 or 70, are sold or transferred  
 10 by the company to one or more parties and  
 11 doesn't make any reference whatsoever to  
 12 confirmation date, and then has a comma and  
 13 then goes on to say and it is contemplated at  
 14 the time of such transaction or transactions  
 15 that such stores will be operated as retail  
 16 stores.  
 17           Now, what we have submitted in conjunction  
 18 with the affidavit of Mr. Tibbets is  
 19 immediately after the sale occurred Gander  
 20 Mountain was anticipating opening anywhere  
 21 from, pick your numbers, there's 35 or more,  
 22 so that would kick in the threshold metric --  
 23 I'm sorry, the target metric of anywhere up  
 24 to 70 stores.  
 25           Even if we follow the argument of

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1 Mr. Cargill, okay, there are 160 stores. If  
2 96 were rejected at least 64, so that  
3 naturally then would leave both the target  
4 and the stretch metric still in play.  
5 So we would contend that if everything was  
6 supposed to revolve around the confirmation  
7 date, then I think it behooved the creditor's  
8 committee and the debtor who drafted the  
9 agreement to include language of confirmation  
10 date and not only the percentage to be  
11 distributed to unsecured creditors, but have  
12 that very same language with respect to the  
13 contemplated store openings. It doesn't, so  
14 we think that a reasonable interpretation of  
15 this contract is, look it, if this number of  
16 stores were contemplated to be opened by the  
17 buyer and we have submitted, we think, a host  
18 of press releases and submissions to the SEC  
19 which have to be assumed to be correct at the  
20 time they are issued, that Mr. Lemonis, who  
21 is heading up Camping World, had every  
22 intention and contemplated opening up far  
23 more than 35 stores.  
24 So our position is we think that all three  
25 of the metrics are still in play, but we

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1 would still come back to we think it's still  
2 premature because we don't get to the five  
3 percent threshold, like I said, then the  
4 target is out and the maximum is out and then  
5 all we're left arguing is whether or not the  
6 60 store provision in the stretch metric is  
7 still in play.  
8 **THE COURT:** So, again, it comes  
9 down to a matter of how we interpret the  
10 agreements?  
11 **MR. STEWART:** That would be our  
12 position, which is why we had the ambiguity  
13 argument in the response and I would --  
14 before I forget, I apologize to the court and  
15 to counsel, I missed that we did not file the  
16 exhibits attached to the affidavit. Not in  
17 my defense, but I think having quoted a lot  
18 of the language out of those exhibits, I'm  
19 hoping that counsel wasn't blindsided, but I  
20 certainly understand that because of the late  
21 file date if there was any prejudice that  
22 they want to put before the court we would  
23 certainly let them do that.  
24 **THE COURT:** So if I buy into your  
25 premise that all of these metrics are still

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1 in play and this is premature, what is the  
2 appropriate time frame by which the standard  
3 by what compensation your key executives are  
4 entitled to is in play here? Is it until --  
5 when is it, because you got stores out there,  
6 some 70 if I look at your exhibits correctly,  
7 which are hearsay obviously, and then you  
8 have got the other metric of the actual  
9 distribution and who knows when that may  
10 happen, and the claims objection period  
11 obviously hasn't run yet, so we have all  
12 those things in play, but at what point -- if  
13 I say that it is premature, at what point  
14 does it ripen into something that we hang our  
15 hats on to say, uh-huh, there's the date,  
16 there's the number, they get extra money or  
17 they don't.  
18 **MR. STEWART:** I think it would  
19 make sense, given that we have argued that  
20 the premature nature of the motion is tied to  
21 the allowance of claims to the unsecured  
22 creditors, is that when there is a submission  
23 by the liquidated trust as to the final  
24 amount of the allowed claims, I think that  
25 would be the triggering date for then making

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1 this particular controversy ripe.  
2 **THE COURT:** Thank you.  
3 Mr. Cargill, any response?  
4 **MR. CARGILL:** Yes, I would like  
5 to, Your Honor.  
6 One, is with regard to the target, and  
7 that's the 5 percent one and 35 stores, I  
8 think, you know, the issue there is if it was  
9 just about five percent, you know, I feel  
10 like that's a pretty good settlement  
11 discussion to have. We have a 4.2 and 6.2.  
12 Do you take a median? Do you take an  
13 average? You know, what was meant? What do  
14 other courts have to do? But I think that's  
15 a good discussion to have if that was the  
16 only issue there, but the target is one of  
17 those with and as conjunctive. So they would  
18 have to win on the argument of the -- that  
19 even though only 35 stores or 19 stores were  
20 assumed and assigned, the target there is 35.  
21 So if Your Honor finds for the trust, that  
22 point becomes moot as to the five percent.  
23 We don't have to wait down the road.  
24 The other point, and I guess the trust's  
25 position, is that it does injustice to

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1 separate out on the -- with regard to the  
2 transferred stores is -- you know, the  
3 language of it says at least 35 stores are  
4 sold or transferred by the company. The  
5 company here doesn't have anymore assets.  
6 The company transferred all of its assets to  
7 a trust.  
8 I am still not understanding how the  
9 company is able to reopen or have anything to  
10 do with the reopening of these stores. And  
11 it's not in the disjunctive. It's not saying  
12 either the company sells or transfers the  
13 stores or it's contemplated and even if you  
14 look under the definition of target where it  
15 relates to it's contemplated at the time of  
16 such transaction that such stores will  
17 operate as retail stores under these trade  
18 names, the defined term is kind of telling.  
19 It's a going concern sale.  
20 Now, if the key executives are saying you  
21 need to wait awhile down the road and see if  
22 Camping World -- that kind of might have  
23 thought of opening up a few stores, you have  
24 to see -- maybe we'll come back next year and  
25 see if they opened up any stores.

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1 And again, it wouldn't be a transfer of  
2 the lease. It would be negotiating a new  
3 lease. That's all going to follow under the  
4 defined term of going concern sale. It  
5 doesn't feel like a going concern sale.  
6 So if we're looking at the document as a  
7 whole and what was the intent of the parties  
8 from the four corners of the agreement,  
9 again, it's our position that it isn't  
10 ambiguous, that all of the -- that when read  
11 as a whole and giving natural and regular  
12 meaning to all the terms, the court can  
13 decide.  
14 The other final issue that counsel points  
15 out or he says, you know, it was clear on  
16 the -- for the distributions and it's as of  
17 the date of confirmation. I believe that  
18 argument kind of cuts against his position,  
19 but at least that's what the words say, as  
20 estimates as of date of the confirmation. I  
21 would submit that such -- as of confirmation  
22 wouldn't need to be included in the portion  
23 of the test with regard to the going concern  
24 sale, and because of the fact that by  
25 definition its stores were sold or

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1 transferred by the company.  
2 After the confirmation we had a trust, so  
3 it could be kind of -- it would be repetitive  
4 at least to say by the company at  
5 confirmation. After confirmation there's no  
6 ability to assume or assign under 365. We  
7 have some cases to that effect in our papers.  
8 And for that reason, again, we think that  
9 the agreement is unambiguous. It's clear and  
10 the court can decide this issue now.  
11 **THE COURT:** Thank you,  
12 Mr. Cargill.  
13 **MR. CARGILL:** Thank you, Your  
14 Honor.  
15 **THE COURT:** Any other remarks,  
16 Mr. Stewart?  
17 **MR. STEWART:** No, Your Honor. I  
18 think they have all been (UNINTELLIGIBLE).  
19 **THE COURT:** Very interesting.  
20 What I would like to see from both sides,  
21 and I know it's worked up in preparation for  
22 today's hearing, but I wanted to hear the  
23 arguments so that it can coalesce a little  
24 bit better into a recognizable mask, so to  
25 speak. I would like to see further briefing

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1 on the issue that the agreements are what  
2 they are. They are unambiguous. They are  
3 interpreted in such a manner that I should  
4 sustain the motion objecting to the claims of  
5 the key executives, period end of story.  
6 I want to hear from Mr. Stewart why that  
7 should not be the case, that the contract or  
8 agreements are ambiguous and therefore should  
9 lend themselves to extrinsic evidence and his  
10 argument that we don't know because we  
11 haven't hit the five percent yet and we won't  
12 know it until the claims period to object to  
13 has passed and there's been a distribution.  
14 The other issue with regard to, well,  
15 going concern, opening businesses, 35 store  
16 metric. Is it 60? Is it 70? Were they  
17 assumed or assigned or weren't they and does  
18 it make any difference in the overall scheme  
19 of things.  
20 So I think what I need to get a grip on is  
21 parol evidence rule, the contract, ambiguous  
22 or not, and if they are not ambiguous why  
23 Cargill should win -- excuse me, why  
24 Mr. Cargill's client should win.  
25 And Mr. Stewart is opposing that

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1 obviously, saying wait, wait, wait, this is  
2 all premature here for these reasons.  
3 And we have got three metrics in play, the  
4 target, the maximum, and the stretch, and how  
5 we look at those in terms of whether or not  
6 these key executives are entitled to the  
7 additional compensation being sought, so I  
8 guess there's no real rush in this particular  
9 case and we're nearing the end of the year.  
10 So just a time lapse, what I'm  
11 contemplating, gentlemen, is having  
12 contemporaneous briefs submitted within a  
13 time period and then another shorter time  
14 period in which each side may respond to the  
15 others also contemporaneously.  
16 Mr. Cargill, your schedule? What would  
17 that lend itself to with regard to a time  
18 frame for submission of a brief and similarly  
19 Mr. Stewart?  
20 **MR. CARGILL:** Your Honor, I will  
21 share that the trust is contemplating a  
22 number of omnibus --  
23 **THE COURT:** It's better -- those  
24 microphones are more sensitive.  
25 **MR. CARGILL:** The trust is

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1 contemplating a number of omnibus objections  
2 and cleaning up the registry over the next  
3 several weeks, so maybe something -- a  
4 schedule towards January submissions or  
5 briefs and perhaps with a hearing sometime in  
6 February. Like you said, there's no -- the  
7 trust obviously would like to have this  
8 resolved, but there's no pressing urgency, so  
9 if that comports with --  
10 **THE COURT:** That's helpful.  
11 Thank you. And Mr. Stewart?  
12 **MR. STEWART:** Your Honor, I think  
13 there were a number of claims objection  
14 hearings moved to, I think, like a  
15 January 9th calendar.  
16 **THE COURT:** That sounds right.  
17 **MR. STEWART:** So my suggestion  
18 would have been to allow counsel to prepare  
19 for those and I think Mr. Cargill may be in  
20 agreement to then have additional briefing  
21 in -- on or about a week or two later with a  
22 February hearing date, as he suggested.  
23 **THE COURT:** Well, let's do this,  
24 how about a deadline for the original  
25 submissions contemporaneously by both sides

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1 on or before January 18, and that's a Friday,  
2 and then allowing another two weeks, which  
3 would be February 1st for a response thereto.  
4 And then depending on what's in the  
5 briefs, I may or may not need another hearing  
6 on the matter. I may be able to rule  
7 decisively without the need for further oral  
8 argument.  
9 So looking at those dates, Mr. Cargill,  
10 18th for the original submission and a reply,  
11 if any, you don't have to, but a reply, if  
12 any, on February 1. Is that acceptable?  
13 **MR. CARGILL:** Your Honor, we  
14 would have no issue with that. That's  
15 perfectly acceptable.  
16 For verification, would you expect this  
17 to be purely legal briefing argument? We're  
18 not bringing additional facts in or would  
19 Your Honor benefit from that? I just want to  
20 get an extent on the scope of the briefing  
21 that --  
22 **THE COURT:** Well, I think we know  
23 what the documents are. That's a known  
24 source and there's no dispute. They are what  
25 they are. The key executives signed it. A

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1 representative from the debtor in possession  
2 signed it and we know what they are, so  
3 that's the known universe of that.  
4 I think if you are going to hang your hat  
5 on the four corners approach to those  
6 documents that it is unambiguous, I think  
7 we're looking at just a legal argument here  
8 with regard to that particular position.  
9 **MR. CARGILL:** That was my  
10 understanding. I just wanted to clarify  
11 that.  
12 **THE COURT:** And I'll ask  
13 Mr. Stewart the same question, but I want  
14 to -- since you seem to be saying, Your  
15 Honor, we can do it just on the record as it  
16 currently exists, we have the agreement, we  
17 know what the language is, it's clear, it's  
18 unambiguous, we win, kick the key executives  
19 out. Mr. Stewart says not so fast.  
20 So Mr. Stewart, first of all, are those  
21 deadlines and time frames acceptable?  
22 **MR. STEWART:** Your Honor, yes,  
23 the times and deadlines are fine with us.  
24 **THE COURT:** Any other comment  
25 with regard to the issue Mr. Cargill raised?

