

**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 EMPLOYEES' SUPPLEMENTAL REPLY MEMORANDUM OF LAW IN
SUPPORT OF RESPONSE TO THE TRUST'S OMNIBUS OBJECTION TO THE
CLAIMS FILED ON BEHALF OF THE KEY EMPLOYEES**

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

INTRODUCTION

In its Supplemental Memorandum, the Trust fails to acknowledge the realities of this case or even cite the full text of the KEIP and KERP. Instead, the Trust once again: (a) recites once again the arguments already provided to this Court in its principal brief; (b) relies on strained interpretations of the agreements; and, (c) outright ignores the terms of the agreements. Accordingly, this Court should deny the relief requested in the Trust's omnibus motion.

LEGAL ARGUMENT

I. The Trust is the successor in interest to the Debtor and retains the Debtor's rights.

Implicit in the Trust's position is that because the KEIP and KERP define "the Company" as the Debtor, any action taken after creation of the Trust cannot satisfy the KEIP and KERP. According to the confirmed plan, the "Liquidating Trust is the successor to the Debtors and their Estates." [Doc. No. 1572 at 49.] The Plan contains a laundry list of specific powers and authorities that the Trust has gained from the Debtor, including the ability to object to and resolve claims as well as administer the assets of the Debtor. Although the Debtor after confirmation of the Plan was in no position to transfer or sell additional stores, the Trust obtained and subsumed those powers

from the Debtor. In other words, the Trust essentially stepped into the shoes of the Debtors to carry out and complete the Plan provisions. Accordingly, this Court should treat the Trust's obligations as the Debtor's under the KEIP and KERP through its assumption of the power to resolve claims related to post-petition contracts and to carry out the mandates of the Plan, including the additional assumption or renegotiation of prepetition leases for the multiple Gander Mountain stores converted to retail stores under the Camping World Holdings banner.

II. The remaining contracts were not rejected as a matter of law because the Trust continued using them to house equipment, unsold goods, and inventory.

The Trust's argument that any leases that were not explicitly assumed were rejected, in spite of CWH's active efforts to open those locations, lacks merit. Under the very caselaw cited by opposing counsel, the Trust's actions following the Plan's confirmation refutes the assertion that the unexpired leases were rejected as a matter of law. *In re Kreger*, 296 B.R. 202, 206 (D. Minn. 2003) (holding that trust's conduct rendered post-petition agreement enforceable against the estate). In the *Kreger* case, a debtor entered into an agreement for the sale of property and instructed the trust take over the agreement and obtain the court's approval for that agreement after a plan was confirmed. *Id.* at 205. When the debtor and trust realized that sale of the property would not be necessary, the debtor argued that 11 U.S.C. § 365 deemed the contract rejected because it was not explicitly assumed by the trustee. *Id.* at 206. The court refused to apply 11 U.S.C. § 365 and reasoned that the trust's conduct rendered the estate liable for its post-petition agreements.

In the instant case, the Trust attempts to do much of the same. Rather than honor the KEIP and KERP in their entirety, the Trust attempts to selectively honor the agreement reasoning that any leases that were not explicitly assumed have been rejected. However, the Trust's actions belie that argument.

It is undisputed that the Debtor sold all of its assets, including inventory and equipment, to CWH. That equipment and inventory remained in the very locations that the Trust attempts to argue had their leases rejected. If the leases were truly rejected, then those landlords would not allow the inventory and equipment to remain on the premises while a new lease was negotiated. Unless the Trust asserts that it had previously removed all equipment and inventory from each of the locations where CWH has actively been renegotiating leases, it defies logic to hold that these contracts were rejected as a matter of law.

III. Even if the leases were deemed rejected, the efforts of the Key Employees still provided value to the bankruptcy estate and unsecured creditors.

The Trust correctly notes that the purpose of the KEIP and KERP agreements was to “preserve and maximize the value of the company during its reorganization under the Bankruptcy Code.” [Trust Supplemental Memorandum at 5-6.] The Trust is incorrect in its contention that maximizing the value to unsecured creditors required the leases to be assumed, purchased, or opened by the Plan’s confirmation. Notwithstanding whether the leases were rejected, the Key Employees’ efforts still resulted in an increased value to unsecured creditors.

A debtor’s rejection of an unexpired lease provides the lessor with a general unsecured claim. *First Sec. Bank of Utah, N.A. v. Gillman*, 158 B.R. 498, 504 (D. Utah 1993). “The source of allowable contract damages in this context, as in bankruptcy in general, is state law.” *In re Western Real Estate Fund, Inc.*, 922 F.2d 592, 595 (10th Cir. 1990). Courts in this district have recognized that “once [a] lease is terminated a duty to mitigate damages arises under Minnesota law.” *In re Timber Lodge Steakhouse, Inc.*, 377 B.R. 604, 607 (Bankr. D. Minn. 2007). A landlord’s decision to lease property previously held by a debtor in bankruptcy to a third-party is “unequivocal proof that the landlord intended to forgive the tenant’s further obligations under the lease and accepted the tenant’s surrender of the lease.” *Id.* (citing *Bowman v. Plumb*, 547, 550 20

N.W.2d 493 (Minn. 1945)).

Thus, the Trust's position is undermined by both longstanding Minnesota law and the precedent established in this district. In this instance, even if CWH waited for the Debtors to reject store leases before it opened its locations, any rejection damages would be reduced by CWH's execution of new leases. Accordingly, the actual timing of when the leases were assumed is wholly irrelevant insofar as it relates to the damages the estate will suffer. Unsecured creditors stand to benefit from the efforts of the Key Employees finding a purchaser who is actively working to open upwards of seventy-four (74) stores because the renegotiation of those leases will reduce the general unsecured claims of landlords whose leases were purportedly rejected. Reducing the landlords' claims will simultaneously create additional value for other unsecured creditors. Those benefits trace directly back to the efforts of the Key Employees.

IV. The goals for distribution to unsecured creditors are ambiguous.

The Trust's argument that "the KEIP/KERP clearly and unambiguously implemented a metric that used estimated recoveries as of the date of confirmation" undermines its position. [Trust's Supplemental Brief at 7]. As matters stand, the estimated distribution to unsecured creditors could be as high as 6.4 percent (6.4%). Under the Trust's interpretation the Target and Maximum Metrics have already been met because a range of possible distributions is, by definition, an estimation. Relying on the plain language of the KEIP and KERP, there is no principled reason for adopting the Trust's position that the phrase "estimated to be available" would necessarily require using the lowest number of the range, save and except the Trust's "say-so." It would be equally true, based on the reading of the Plan, and as argued by the Key Employees, that the upper end of the estimated distribution to unsecured creditors ought to be the barometer for determining whether the Target and Maximum Metrics have been met. By including

a range in excess of five percent (5%) in the Plan, the Key Employees have an equally compelling argument to be made in support of their individual claims. At the very least, the range itself creates an ambiguity that should be construed against the Trust. The reality is that the provision is subject to multiple interpretations because the contracts are hopelessly ambiguous.

Staying this Court's decision until the actual distribution to unsecured creditors is fixed and a known quantity would be appropriate under the facts and circumstances of this motion and opposition to the motion. At that point, this Court will be able to say with a much more degree of confidence which metrics may, or may not, still be in play. Indeed, this Court could make an estimation of what the distribution to unsecured creditors would have been as of the Plan's confirmation considering the claims that are ultimately either allowed or disallowed. In doing so, this Court would both give meaning to the text of the KEIP and KERP and equitably resolve the dispute of the parties.

V. The Trust fails to fully cite the Maximum Metric.

The Trust attempts to mislead this Court by failing to cite the entirety of the Maximum Metric. In its quote of the KEIP and KERP agreements, the Trust omits the option for the Key Employees to receive a pro rata share. Curiously, the Trust omits the second paragraph of the Maximum Metric **in its entirety**. [Trust Supplemental Brief at 2.] The second paragraph permits the Key Employees to receive a pro rata bonus if the "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 Key Employees have met the Maximum Metric because the estimated distribution to unsecured creditors at the time of the Plan's confirmation is between 2.2 and 6.4 percent (2.2% and 6.4%). Once again, the barometer that the Court should use to determine whether the relief sought by the Trust in its omnibus motion is the 6.4 percent (6.4%)

estimated distribution to unsecured creditors given that the agreements should be construed against the drafter of the KEIP/KERP agreements.

CONCLUSION

Contrary to the assertions in the Trust's supplemental brief, the KEIP and KERP are ambiguous. Given the Trust's continued reliance on the commercial leases that CWH is actively working to open, it is questionable whether they have been rejected as a matter of law. Moreover, rejection of the contracts is not dispositive because the Key Employee's efforts in obtaining a purchaser for over seventy (70) locations provided value to the estate and unsecured creditors. Finally, this Court should stay issuing its order until the final distribution to unsecured creditors is known. Doing so will provide certainty as to whether the Key Employees are entitled to the Target and Maximum Metrics.

ANASTASI JELLUM, P.A.

Dated: February 1, 2019

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