

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF MISSOURI  
SOUTHEASTERN DIVISION

**In re:**  
  
**BRIGGS & STRATTON CORPORATION, et al.,**  
  
**Debtors.**

**Chapter 11**  
  
**Case No. 20-43597-399**  
  
**(Jointly Administered)**  
  
**Ref. Docket No. 516**

**OBJECTION OF THERMOTECH LLC TO DEBTORS’ NOTICE OF CURE COSTS  
AND PROPOSED ASSUMPTION AND ASSIGNMENT OF EXECUTORY CONTRACTS  
AND UNEXPIRED LEASES IN CONNECTION WITH SALE**

Thermotech LLC (“Thermotech”), by and through its undersigned counsel, files this objection (the “Objection”)<sup>1</sup> to the *Notice of Cure Costs and Proposed Assumption and Assignment of Executory Contracts and Unexpired Leases in Connection with Sale* [Docket No. 516] (collectively with all attachments thereto, the “Cure Notice”) filed by the above-captioned debtors and debtors in possession (collectively, the “Debtors”). In support of its Objection, Thermotech respectfully states as follows:

**Background**

1. Thermotech and Debtor Briggs & Stratton Corporation (“B&S”) are parties to (i) that certain Purchase Terms Agreement, dated as of March 22, 2019 (as amended by that certain amendment, effective as of November 4, 2019, the “Purchase Terms Agreement”), which governs the terms and conditions of purchase orders placed by B&S with Thermotech; and (ii) that certain

<sup>1</sup> In accordance with the Cure Notice and the Bidding Procedures Order (as defined in the Cure Notice [Docket No. 505]), the deadline to object to the Cure Amount was September 4, 2020 at 5:00 p.m. (prevailing Central Time) (as extended, the “Objection Deadline”). However, in accordance with the Cure Notice, counsel for Thermotech contacted Debtors’ counsel in advance of the Objection Deadline to attempt to resolve the issues related to the Cure Notice. As part of such negotiations, by e-mail sent on September 3, 2020, Debtors’ counsel extended the Objection Deadline for Thermotech to September 8, 2020 at 5:00 p.m. (prevailing Central Time); by email sent on September 8, 2020, Debtors’ counsel further extended the Objection Deadline for Thermotech to September 9, 2020 at 5:00 p.m. (prevailing Central Time).



Tooling Products Agreement, effective as of March 12, 2020 (the “Tooling Products Agreement” and together with the Purchase Terms Agreement, the “Agreements”), which governs B&S’s purchase of tooling design and manufacturing services, tools and related products and services.

2. On July 20, 2020 (the “Petition Date”) the Debtors filed voluntary petitions for relief under chapter 11 of title 11 the United States Code (the “Bankruptcy Code”) in the United States Bankruptcy Court for the Eastern District of Missouri, Southeastern Division (the “Court”). The Debtors are continuing to operate their businesses as debtors in possession.

3. On the Petition Date, the Debtors filed a motion seeking entry of an order, *inter alia*, establishing certain bidding procedures and procedures for the assumption and assignment of executory contracts and unexpired leases in connection with the sale of substantially all of Debtors’ assets (the “Sale”), authorizing the sale of such assets, and authorizing the assumption and assignment of certain executory contracts [Docket No. 53] (the “Sale Motion”).

4. On August 19, 2020 the Debtors filed the Cure Notice. The *Schedule of Assumed Contracts which May be Assumed and Assigned to Successful Bidder*, attached as Exhibit A to the Cure Notice, lists Thermotech as the counterparty to approximately 70 contracts, each with one of the following descriptions: “Confidentiality Agreement”, “Bailment Agreement”, “Term Agreement”, or “Tooling Products Agreement”.

5. The Cure Notice includes amounts the Debtors propose to pay to satisfy existing monetary defaults (the “Cure Amounts”) associated with the contracts identified. The Cure Amounts were calculated as of August 6, 2020. The last contract with Thermotech, listed as a “Tooling Products Agreement”, lists a Cure Amount of \$730,278.79, while each of the other contracts is listed with a Cure Amount of \$0.00.

### **Objection**

6. Thermotech is a counter-party to one or more executory contracts that B&S proposes to assume and assign to the Stalking Horse Bidder. Thermotech does not oppose assumption and assignment of its contracts with B&S to the Stalking Horse Bidder, in general, however, based on the descriptions of agreements set forth in the Cure Notice, Thermotech is unable to determine the specific contracts to which it is a counter-party that B&S proposes to assume and assign to the Stalking Horse Bidder.

7. As noted above, the Cure Notice currently sets forth approximately 70 “contracts” with Thermotech with nothing more than one of the following titles: “Confidentiality Agreement”, “Bailment Agreement”, “Term Agreement”, or “Tooling Products Agreement”. Prior to assumption and assignment of any agreements with Thermotech, the Debtors must revise the Cure Notice to accurately reflect, with specificity, the contracts with Thermotech that are to be assumed and assigned.<sup>2</sup>

8. Thermotech further objects to the adequacy and accuracy of the Cure Notice insofar as it does not provide for the correct Cure Amount with respect to the Agreements. In accordance with section 365 of the Bankruptcy Code, the Debtors may not assume an executory contract unless at the time of assumption they cure any default under the contract or provide adequate assurance that the default will be promptly cured. *See* 11 U.S.C. § 365(b)(1).

9. With respect to a “Tooling Products Agreement” with Thermotech, the Debtors proposed a Cure Amount of \$730,278.79; each of the other contracts is listed with a Cure Amount of \$0.00. First, the Cure Amount is understood to be an aggregate amount owed by the Debtors

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<sup>2</sup> In the correspondence with Debtors’ counsel regarding the issues with the Cure Notice, Debtors’ counsel advised that after a review of the Cure Notice, the Debtors’ records reflected that the only operative contracts with Thermotech are the three (3) Agreements.

(more specifically B&S) under all of the operative Agreements, not any particular agreement. Second, the amount is incorrect. The Debtors filed the Cure Notice on August 19<sup>th</sup> and calculated the asserted Cure Amounts as of August 6<sup>th</sup>. Nevertheless, the Debtors paid Thermotech approximately \$193,080.89 on or around August 25<sup>th</sup>. In addition, the asserted Cure Amount for contracts with Thermotech (i) fails to include the amount owed in connection with a June 12<sup>th</sup> invoice in the amount of \$9,220.10, (ii) improperly reduces the amount due under an unpaid invoice by \$210.10, (iii) fails to take into consideration \$19,571.58 in credits already provided by Thermotech on account of unsatisfied orders, and (iv) incorporates an additional \$4,583.62 in credits for which Thermotech is uncertain the basis and lacks an independent record of such credits.

10. To the extent the Agreements are assumed by the Debtors and assigned to the Stalking Horse Bidder (as define in the Cure Notice) as part of the Sale, the Debtors or the Stalking Horse Bidder, as applicable, should pay the appropriate Cure Amount to Thermotech as of the date of assumption and assignment of the Agreements.

11. Accounting for the foregoing, the Cure Notice should be revised to properly reflect (i) that the Agreements (including the amendment to the Purchase Terms Agreement) are the only effective executory contracts between Thermotech and B&S subject to assumption and assignment as part of the Sale, and (ii) the aggregate cure amount with respect to the Agreements should be at least \$570,783.30. Thermotech is continuing to do business with B&S and, therefore, there may be other amounts due at the time of assumption and assignment of the Agreements.

12. As set forth in footnote 1, *supra*, counsel for Thermotech contacted Debtors' counsel to attempt to resolve the discrepancies between Thermotech's records and the information set forth in the Cure Notice. Unfortunately, the parties were unable to resolve the dispute in advance of the extended Objection Deadline.

13. Thermotech reserves its rights to (i) supplement or amend this Objection to alter the asserted Cure Amount at any time prior to assumption and assignment of the Agreements, (ii) object to jurisdiction of this Court over Thermotech or to consent to entry of final judgments or orders by this Court regarding this Objection or any matter involving Thermotech; and (iii) any other rights, claims, actions, defenses, set-offs, or recoupments to which Thermotech is or may be entitled under the Agreements, in law, in equity or otherwise, all of which rights, claims, actions, defenses, set-offs, and recoupments are expressly reserved.

**WHEREFORE**, Thermotech respectfully requests this Court (i) does not approve the Sale Motion, solely with respect to assumption and assignment of the Agreements, unless (a) the appropriate contracts between Thermotech and B&S are identified (*i.e.*, the Agreements) and (b) the proper Cure Amount is paid to Thermotech; and (ii) provides such other relief as the Court deems appropriate.

Dated: September 9, 2020

GREENBERG TRAURIG, LLP

/s/ Nathan A. Haynes  
Nathan A. Haynes (admitted *pro hac vice*)  
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*Counsel for Thermotech LLC*

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing document was filed with the U.S. Bankruptcy Court, Eastern District of Missouri and served by ECF electronic noticing this 9th day of September, 2020 upon all parties who have requested notice, including all Objection Notice Parties referenced in the Cure Notice and by first class mail, postage prepaid on the Debtors (Attn: Kathryn M. Buono, Esq.) at 12301 West Wirth Street, Wauwatosa, WI 53222.

*/s/ Nathan A. Haynes*

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Nathan A. Haynes