

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
SOUTHEASTERN DIVISION

In re:	§	Chapter 11
	§	
BRIGGS & STRATTON	§	Case No. 20-43597-399
CORPORATION, <i>et al.</i> ,	§	
	§	(Jointly Administered)
Debtors.	§	
	§	Hearing Date: December 16, 2020
	§	Hearing Time: 10:00 a.m. (Central Time)
	§	Hearing Location: Courtroom 5 North
	§	111 S. 10th St., St. Louis, MO 63102

**MOTION OF DEBTORS FOR AUTHORITY
TO EXTEND THE TIME TO ASSUME OR REJECT
UNEXPIRED LEASE OF NONRESIDENTIAL REAL PROPERTY**

Briggs & Stratton Corporation and its debtor affiliates in the above-captioned chapter 11 cases, as debtors and debtors in possession (collectively, the “**Debtors**”), respectfully represent as follows in support of this motion (the “**Motion**”):

Background

A. General Background

1. On July 20, 2020 (the “**Petition Date**”), the Debtors each commenced with this Court a voluntary case under title 11 of the United States Code (the “**Bankruptcy Code**”). The Debtors are authorized to continue to operate their business and manage their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. The Debtors’ chapter 11 cases are being jointly administered for procedural purposes only pursuant to Rule 1015(b) of the Federal Rules of Bankruptcy Procedure (the “**Bankruptcy Rules**”) and Rule 1015(b) of the Local Rules of Bankruptcy Procedure for the Eastern District of Missouri (the “**Local Rules**”).



2. On August 5, 2020, the United States Trustee appointed an official committee of unsecured creditors (the “**Creditors’ Committee**”) in these chapter 11 cases pursuant to section 1102 of the Bankruptcy Code. No trustee or examiner has been appointed in these chapter 11 cases.

3. On the Petition Date, the Debtors filed their Bidding Procedures Motion.¹ On August 19, 2020, the Court entered the Bidding Procedures Order² that, among other things, (a) approved bidding procedures in connection with the sale of the Debtors’ assets, (b) approved the designation of a stalking horse bidder and stalking horse bid, (c) scheduled an auction to take place on September 1, 2020, and (d) scheduled a sale hearing for September 15, 2020. On September 15, 2020, the Court entered the Sale Order³ authorizing the Debtors to sell substantially all of their assets (the “**Sale Transaction**”) to Bucephalus Buyer, LLC (the “**Purchaser**”) pursuant to that certain *Stock and Asset Purchase Agreement*, effective as of July 19, 2020, as amended by that certain *Amendment No. 1 to Stock and Asset Purchase Agreement*, dated as of September 18, 2020 (together with the exhibits thereto, as may be amended, modified, or

¹ *Motion of Debtors for Entry of an Order (I) Approving (A) Bidding Procedures, (B) Designation of Stalking Horse Bidder and Stalking Horse Bid Protections, (C) Scheduling Auction and Sale Hearing, (D) Form and Manner of Notice of Sale, Auction, and Sale Hearing, and (E) Assumption and Assignment Procedures; (II) Authorizing (A) Sale of Debtors’ Asserts and Equity Interests Free and Clear of Liens Claims, Interests, and Encumbrances and (B) Assumption and Assignment of Executory Contracts and Unexpired Leases; and (III) Granting Related Relief* [Docket No. 53] (the “**Bidding Procedures Motion**”).

² *Order (I) Approving (A) Bidding Procedures, (B) Designation of Stalking Horse Bidder and Stalking Horse Bid Protections, (C) Scheduling Auction and Sale Hearing, (D) Form and Manner of Notice of Sale, Auction, and Sale Hearing, and (E) Assumption and Assignment Procedures and Form and Manner of Notice of Assumption and Assignment and (II) Granting Related Relief* (Docket No. 505) (the “**Bidding Procedures Order**”).

³ *Order (I) Authorizing the Sale of the Asserts and Equity Interests to the Purchaser Free and Clear of Liens, Claims, Interests, and Encumbrances; (II) Authorizing the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases; and (III) Granting Related Relief* [Docket No. 898] (the “**Sale Order**”).

supplemented from time to time in accordance with the terms thereof, the “**Purchase Agreement**”). The Sale Transaction closed on September 21, 2020 (the “**Sale Closing**”).⁴

4. Following the successful sale of substantially all of their assets, the Debtors have focused their efforts and resources on developing and filing a workable and confirmable chapter 11 plan of liquidation supported by the Creditors’ Committee. On October 9, 2020, the Debtors filed the *Joint Chapter 11 Plan of Briggs & Stratton Corporation and its Affiliated Debtors* [Docket No. 1066] and the *Disclosure Statement for Joint Chapter 11 Plan of Briggs & Stratton Corporation and Its Affiliated Debtors* [Docket No. 1067]. On November 9, 2020, the Debtors filed the *Amended Joint Chapter 11 Plan of Briggs & Stratton Corporation and its Affiliated Debtors* (the “**Amended Plan**”) [Docket No. 1226] and the *Amended Disclosure Statement for Amended Joint Chapter 11 Plan of Briggs & Stratton Corporation and its Affiliated Debtors* [Docket No. 1227] (the “**Amended Disclosure Statement**”).⁵ On November 10, 2020, the Court entered an order approving the Amended Disclosure Statement and scheduled the hearing for confirmation of the Amended Plan for December 18, 2020.⁶

5. The Debtors continue to honor their post-closing sale obligations, wind down their estates, pursue confirmation of the Amended Plan, and otherwise work on concluding these chapter 11 cases.

⁴ See Notice of (I) Filing of Amendment to Stock and Asset Purchase Agreement, And (II) the Occurrence of Closing of the Sale Transaction [Docket No. 964].

⁵ Capitalized terms used in this Motion, but not defined herein, shall have the meanings ascribed to such terms in the Amended Plan, the Amended Disclosure Statement, or the Ficks Declaration, as applicable.

⁶ See Order (I) Approving Disclosure Statement; (II) Establishing Notice and Objection Procedures for Confirmation of Plan; (III) Approving Solicitation Packages and Procedures for Distribution Thereof; (IV) Approving the Form of Ballots and Establishing Procedures for Voting on the Plan; and (V) Granting Related Relief [Docket No. 1233].

6. Additional information regarding the Debtors' business and capital structure and the circumstances leading to the commencement of these chapter 11 cases is set forth in the Disclosure Statement and the *Declaration of Jeffrey Ficks, Financial Advisor of Briggs & Stratton Corporation, in Support of the Debtors' Chapter 11 Petitions and First Day Relief* [Docket No. 51] (the "**Ficks Declaration**").

B. The Debtors' Leases

7. With the exception of two unexpired nonresidential leases, each of the Debtors' unexpired leases was assumed and assigned to the Purchaser as of the Sale Closing. *See* Sale Order § 21; Disclosure Schedule to Purchase Agreement § 1.1(ii). As discussed below, one of the two non-assigned leases is the subject of this Motion and the other one is subject to a pending motion to reject.

8. On October 19, 2020, the Court entered the *Order (I) Authorizing Use, Sale, or Lease of Certain Property of the Estate, (II) Establishing Procedures for De Minimis Asset Sales, and (III) Granting Related Relief* [Docket No. 1222] authorizing, among other relief, the Debtors to sell real property located in Murray, Kentucky (the "**Owned Murray Property**") pursuant to procedures outlined therein. Access to the Owned Murray Property requires use of real property currently leased by the Debtors, pursuant to that certain *Land Lease Agreement*, dated October 20, 2018, by and between KWT Railway, Inc. ("**Landlord**") and Briggs & Stratton Corporation (the "**Murray Lease**"). As of the date of this Motion, the Debtors have not assumed or rejected the Murray Lease.

9. Pursuant to the Murray Lease, for the term of October 20, 2020 to October 19, 2021, Briggs & Stratton Corporation was required to make an annual payment of \$6,500.

10. On October 31, 2020, the Debtors filed their *First Omnibus Motion of Debtors for Order (I) Authorizing (A) Rejection of Certain Executory Contracts and Unexpired Leases and (B) Abandonment of Property in Connection Therewith; and (II) Granting Related Relief* [Docket No. 1184], seeking, among other relief, to reject that certain *Commercial Lease Agreement*, dated December 4, 2008, by and between 243 Overhill, LLC and Briggs & Stratton Corporation, successor by merger to Briggs & Stratton Power Products Group, LLC, as amended by Addendum 1, dated December 4, 2008, Addendum 2, dated December 8, 2009, Addendum 3, dated December 10, 2010, Addendum 4, dated December 31, 2012, Addendum 5, dated January 5, 2016, Addendum 6, dated December 20, 2016, Addendum 7, dated February 1, 2018, Addendum 8, dated January 18, 2019, and Addendum 9, dated December 13, 2019.

Jurisdiction

11. The Court has jurisdiction to consider this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue is proper before the Court pursuant to 28 U.S.C. §§ 1408 and 1409.

Relief Requested

12. By this Motion, the Debtors seek entry of an order (the “**Proposed Order**”)⁷ pursuant to section 365(d)(4) of the Bankruptcy Code granting (a) an extension of the period of time to assume or reject the Murray Lease (the “**Assumption/Rejection Deadline**”) for an additional ninety (90) days up to and including February 15, 2021,⁸ and (b) related relief. Such

⁷ Copies of the Proposed Order will be made available on the Debtors’ case information website at <http://www.kcellc.net/Briggs>.

⁸ Pursuant to Local Rule 9006 and the *Order Pursuant to Section 105(a) of the Bankruptcy Code and Bankruptcy Rules 1015(c), 2002 and 9007 Establishing Certain Notice, Case Management and Administrative Procedures* [Docket No. 195], the filing of this Motion prior to the expiration of the current Assumption/Rejection Deadline (i.e., November 17, 2020) extends such deadline until such time as the Court rules on this Motion.

an extension would be without prejudice to the Debtors' rights to seek further extensions with the consent of the affected landlord, as provided by section 365(d)(4)(B)(ii) of the Bankruptcy Code.

Relief Requested Should Be Granted

13. Section 365(d)(4) of the Bankruptcy Code provides both a 120-day window—and a discretionary 90-day extension—for the assumption or rejection of an unexpired nonresidential lease:

(A) Subject to subparagraph (B), an unexpired lease of nonresidential property under which the debtor is the lessee shall be deemed rejected and the trustee shall immediately surrender that nonresidential real property to the lessor, if the trustee does not assume or reject the unexpired lease by the earlier of

(i) the date that is 120 days after the date of the order for relief; or

(ii) the date of the entry of an order confirming the plan.

(B)(i) The court may extend the period determined under subparagraph (A), prior to the expiration of the 120-day period, for 90 days on the motion of the trustee or lessor for cause.

11 U.S.C. § 365(d)(4). Thus, absent the relief requested herein, a debtor's lease that is not assumed within the initial 120 days of these chapter 11 cases and that is not the subject of a motion to assume such lease will be deemed rejected.

14. In determining whether cause exists to extend the time to assume or reject unexpired leases of nonresidential real property, courts have considered the following non-exhaustive factors:

- a. whether the debtor was paying for the use of the property;
- b. whether the debtors' continued occupation could damage the lessor beyond the compensation available under the Bankruptcy Code;
- c. whether the debtor has had sufficient time to formulate a plan of reorganization;

- d. whether the bankruptcy case is large; and
- e. the number of leases the debtor must evaluate.

See, e.g., In re S&M Food Servs., Inc., 117 B.R. 497, 498 (Bankr. E.D. Mo. 1990) *citing In re 611 Sixth Avenue Corp.*, 191 B.R. 295 (Bankr. S.D.N.Y. 1996); *see also In re Gateway Apparel, Inc.*, 210 B.R. 567, 57` (Bankr. E.D. Mo. 1997); *S. St. Seaport Ltd. P'ship v. Burger Boys, Inc. (In re Burger Boys, Inc.)*, 94 F.3d 755, 761–62 (2d Cir. 1996) (citing *Theatre Holding Corp. v. Mauro*, 681 F.2d 102, 105–06 (2d Cir. 1982), and noting that the list of factors “is by no means exhaustive”); *In re Adelphia Commc'ns Corp.*, 291 B.R. 283, 293 (Bankr. S.D.N.Y. 2003).

15. Application of these factors to the circumstances of these chapter 11 cases demonstrates that cause exists to extend the Assumption/Rejection Deadline. The Debtors are undertaking a review of their books and records to determine whether the postpetition obligations under the Murray Lease have been paid, and, if not paid, then pursuant to Section 365(d)(3), the Debtors intend to pay such postpetition obligations. Moreover, the continued occupation of the Murray Lease is important for the Debtors' chapter 11 cases as the Murray Lease provides access to the Owned Murray Property for potential bidders of the Owned Murray Property. An extension will permit the Debtors to continue to market the Murray Lease to assume and assign or sell the Murray Lease to another tenant, likely the purchaser of the Owned Murray Property. Accordingly, the Debtors need additional time to finalize and consummate their election to assume or reject the Murray Lease.

16. Pending the Debtors' assumption or rejection the Murray Lease, the Debtors will have performed, and will continue to perform, in a timely fashion all of their obligations under the Murray Lease due from and after the Petition Date to the extent required by section 365(d)(3) of the Bankruptcy Code. No party in interest will be prejudiced by the relief requested in this Motion. Accordingly, the relief requested in the Motion should be granted.

17. For the foregoing reasons, an extension of the Assumption/Rejection Deadline as to the Murray Lease to February 15, 2021, is necessary, appropriate, and in the best interests of the Debtors, their estates, and all other parties in interest in these cases. Accordingly, the Court should authorize the extension.

Reservation of Rights

18. Nothing contained in this Motion or any actions taken by the Debtors pursuant to relief granted in the Proposed Order is intended or should be construed as (i) an assumption or rejection of the Murray Lease under section 365(a) of the Bankruptcy Code or (ii) an admission by the Debtors that a particular instrument is or is not a true lease. If the Court grants the relief sought herein, any and all of the Debtors' rights, claims, and defenses with respect to the characterization of the Murray Lease under sections 365(d)(3) and 365(d)(4) of the Bankruptcy Code or otherwise are expressly reserved.

Notice

19. Notice of this Motion will be provided to (i) the Office of the United States Trustee for the Eastern District of Missouri (Attn: Sirena Wilson, Esq.); (ii) the holders of the thirty (30) largest unsecured claims against the Debtors on a consolidated basis; (iii) Latham & Watkins LLP (Attn: Peter P. Knight, Esq. and Jonathan C. Gordon, Esq.), as counsel to JPMorgan Chase Bank, N.A., as the administrative agent and collateral agent under the ABL Credit Facility and DIP Facility; (iv) Pryor Cashman LLP (Attn: Seth H. Lieberman, Esq. and David W. Smith, Esq.), as counsel to Wilmington Trust, N.A., as successor indenture trustee under the Unsecured Notes; (v) the United States Attorney's Office for the Eastern District of Missouri; (vi) Brown Rudnick LLP (Attn: Oksana P. Lashko, Esq.), as counsel to the Creditors' Committee; (vii) Landlord; (viii) any other party that has requested notice pursuant to Bankruptcy Rule 2002; and (ix) any other party entitled to notice pursuant to Local Rule 9013-3(E) (collectively, the "**Notice Parties**").

Notice of this Motion and any order entered hereon will be served in accordance with Local Rule 9013-3(E)(1).

No Previous Request

20. No previous request for the relief sought herein has been made by the Debtors to this or any other Court.

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WHEREFORE the Debtors respectfully request entry of an order granting the relief requested herein and such other and further relief as the Bankruptcy Court may deem just and appropriate.

Dated: November 17, 2020
St. Louis, Missouri

Respectfully submitted,

CARMODY MACDONALD P.C.

/s/ Robert E. Eggmann

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