UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
SOUTHEASTERN DIVISION

	§	**Chapter 11**
In re:	§	
	§	**Case No. 20-43597-399**
BRIGGS & STRATTON CORPORATION, *et al.*,	§	
	§	**(Jointly Administered)**
	§	
Debtors.	§	
	§	Judge Barry S. Schemer Hearing Date: December 18, 2020 Time: 9:00 am (CST) Related Docket No. 1226

UNITED STATES TRUSTEE'S OBJECTION
TO AMENDED JOINT CHAPTER 11 PLAN OF REORGANIZATION
OF BRIGGS & STRATTON CORPORATION AND ITS AFFILIATIED DEBTORS

Daniel J. Casamatta, the Acting United States Trustee for the Eastern District of Missouri ("the U.S. Trustee"), by his attorney, and, pursuant to section 1129 of the Bankruptcy Code ("the Code"), 11 U.S.C. § 1129, hereby objects to the Amended Joint Chapter 11 Plan of Reorganization of Briggs & Stratton Corporation and Its Affiliated Debtors, Docket No. 1226 ("the Plan") filed on behalf of Briggs & Stratton Corporation and its affiliated Debtors ("the Debtors"). In support of this Objection, the U.S. Trustee states as follows:

PRELIMINARY STATEMENT

1. The Plan does not satisfy Section 1129's confirmation requirements for several reasons. The U.S. Trustee objects to the Plan on various grounds, including:

   a. First, the Plan improperly proposes non-consensual third-party releases in favor of numerous non-Debtors through an opt out election.

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b. Second, the Plan inappropriately extends exculpation coverage beyond estate fiduciaries. The U.S. Trustee objects to the Exculpation Clause of the Plan because it exculpates persons and entities that are not fiduciaries of the estate. The exculpation also is not limited to actions or inactions taking place during the bankruptcy cases, as required by applicable law.

c. Third, the Plan seeks to improperly pay Indentured Trustee Fees and Expenses.

d. Fourth, the Plan Compromise and Settlement is overbroad seeking to bind parties that did not consent.

2. Absent additional evidence or amendments sufficient to satisfy this objection, the Court should deny confirmation of the Plan.

JURISDICTION

3. Under (i) 28 U.S.C. § 1334, (ii) applicable orders of the United States District Court for the Southeastern District of Missouri issued pursuant to 28 U.S.C. § 157(a), and (iii) 28 U.S.C. § 157(b)(2), this Court has jurisdiction to hear and rule on this objection.

4. Pursuant to 28 U.S.C. § 586(a)(3), the U.S. Trustee is charged with administrative oversight of the bankruptcy system in this District.

5. Under 11 U.S.C. § 307, the U.S. Trustee has standing to be heard on the issues raised in this objection. *See* United States Trustee v. Columbia Gas Systems, Inc. (In re Columbia Gas Systems, Inc.), 33 F.3d 294, 295-96 (3d Cir. 1994) (noting that the U.S. Trustee has 'public interest standing' under 11 U.S.C. § 307 which goes beyond mere pecuniary interest).

FACTUAL BACKGROUND

The Plan and Disclosure Statement

6. On July 20, 2020 (the "Petition Date"), the Debtors filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code.

7. The Debtors remain in possession of their assets and continue to manage their business as Debtor-in-possession pursuant to sections 1107 and 1108 of the Bankruptcy Code.

8. On September 15, 2020, the Bankruptcy Court entered an order authorizing the sale of Debtors' assets.

9. The Debtors filed the Disclosure Statement and Joint Chapter 11 Plan on October 09, 2020.

10. On November 02, 2020, the U.S. Trustee filed his Objection to the Disclosure Statement for the Joint Plan of Reorganization (Docket No. 1125).

11. Debtors filed an amended plan on November 09, 2020 (Docket No. 1226).

12. The Plan provides for the distribution of each Debtor's available cash from the Sale Transaction Proceeds and Wind-down Operation. *See* Disclosure Statement at B, Page 9 of 190.

13. The Plan provides for a Plan Administrator ("**Plan Administrator**") to oversee the Plan, including to liquidate remaining assets, resolve dispute and make distribution to creditors under the plan. Disclosure Statement at B, Page 9 of 190.

14. The Plan contains certain releases by the Debtors (the "**Debtor Release**") and certain releases by third parties (the "**Third Party Release**"). Plan at Sections 10.6.

15. The Plan defines the term "Released by Holders of Claims and Interest" in pertinent part as follows:

10.6. Releases by Holders of Claims and Interests

As of the Effective Date, except (A) for the right to enforce the Plan (including the Plan Supplement) and the Confirmation Order or any right or obligation arising under the Plan (including the Plan Supplement) or the Confirmation Order that remain in effect or become

effective after the Effective Date and (B) as otherwise expressly provided in the Plan or in the Confirmation Order, in exchange for good and valuable consideration, including the obligations of the Debtors under the Plan and the contributions of the Released Parties to facilitate and implement the Plan, to the fullest extent permissible under applicable law, as such law may be extended or integrated after the Effective Date, the Released Parties shall be deemed conclusively, absolutely, unconditionally, irrevocably and forever, released, and discharged by each of the following (each such Person or Entity, a "Releasing Party" and, collectively, the "Releasing Parties"):

(a) the Creditors' Committee and each of its members in their capacity as such;
(b) all holders of Claims who are entitled to vote on the Plan and vote to accept the Plan;
(c) all holders of Claims who (i) are entitled to vote on the Plan and abstain from voting on the Plan or (ii) vote to reject the Plan and, in either case, do not elect to exercise their right, as provided in the Ballot, to opt-out of granting the releases set forth in this Section 10.6;
(d) all holders of Claims who are deemed to accept or reject the Plan, are provided with a notice of non-voting status providing them with the right to opt-out of the releases contained in this Section 10.6, and do not elect to exercise such right;…

Plan, Section 10.6, (Docket No. 1226).

16. Under the terms of the Plan, the Released Claims include claims and causes of action that the Releasing Parties does not know or suspect to exist in its favor.

17. The Plan shields a very broad collection of individuals and entities included in the Plan's definition of Exculpated Parties, Related Parties and through the Plan's exculpation provisions. Specifically, the Plan and Disclosure state:

1.52 Exculpated Parties means collectively: (a) the Debtors, (b) the Creditors' Committee and each of its members in their capacity as such, and (c) with respect to each of the foregoing Persons or Entities in clauses of their Related Parties who acted on their behalf in connection with the matters as to which exculpation is provided herein.

Plan, Definitions, Section A 1.52, (Docket No. 1226)

1.96 Related Parties means with respect to any Exculpated Party or Released Party: (a) such Entities' predecessors, successors and assigns, subsidiaries, Affiliates, managed accounts or funds, (b) all of their respective current and former officers, directors, principals, stockholders (and any fund managers, fiduciaries or other agents of stockholders with any involvement with the Debtors), members, partners, employees, agents, advisory board members, financial advisors, attorneys, accountants, investment bankers, consultants, representatives, management companies, fund advisors and other professionals, solely to the extent such persons and entities acted on the behalf of the Released Parties or Exculpated Parties in connection with the matters as to which exculpation or releases are provided in the Plan, and (c) such persons' respective heirs, executors, estates, servants and nominees.

Plan, Definitions, Section A 1.96, (Docket No. 1226)

10.7. Exculpation
To the maximum extent permitted by applicable law, no Exculpated Party will have or incur, and each Exculpated Party is hereby released and exculpated from, any claim, obligation, suit, judgment, damage, demand, debt, right, Cause of Action, remedy, loss, and liability for any claim in connection with or arising out of the administration of the Chapter 11 Cases, the postpetition marketing and sale process, the purchase, sale, or rescission of the purchase or sale of any security or asset of the Debtors; the negotiation and pursuit of the Disclosure Statement, the Plan, or the solicitation of votes for, or confirmation of, the Plan; the funding or consummation of the Plan; the occurrence of the Effective Date; the DIP Loan Documents; the administration of the Plan or the property to be distributed under the Plan; or the transactions in furtherance of any of the foregoing; except for fraud, gross negligence, or willful misconduct, as determined by a Final Order. This exculpation shall be in addition to, and not in limitation of, all other releases, indemnities, exculpations and any other applicable law or rules protecting such Exculpated Parties from liability. Notwithstanding anything to the contrary in the foregoing, the exculpation set forth herein does not release any post-Effective Date obligation or liability of any Entity under the Plan or any document, instrument, or agreement (including those set forth in the Plan Supplement) executed to implement the Plan.

Plan, Section 10.7, (Docket No. 1226)

18. The U.S. Trustee objects to the release and exculpation provisions in the Plan in that they (a) require holders of claims and interests to opt out of them rather than opt into them, while also deeming those holders of claims and interests that are not entitled to vote on the Plan or that are entitled to vote on the Plan but do not vote, to have accepted the release and exculpation provisions (b) are overly broad, both in terms of the parties covered, and for the time periods actions are exculpated, among other things.

ARGUMENT

Confirmation Standards

19. There are two relevant statutes pertinent to the issues herein governing chapter 11 plan provisions and confirmation. Section 1123(b)(6) allows plan proponents to include terms that are "not inconsistent with the applicable provisions" of the Code. 11 U.S.C. § 1123(b)(6). Section 1129 of the Bankruptcy Code authorizes the bankruptcy court to confirm a plan only when it

"complies with the applicable provisions of the Code." 11 U.S.C. 1129. The plan proponent bears the burden of establishing compliance with section 1129. In re Charter Commc'ns, 419 B.R. 221, 243-44 (Bankr. S.D.N.Y. 2009) (citing Heartland Fed. Savs. & Loan, Ass'n v. Briscoe Enters. (In re Briscoe Enters.), 994 F.2d 1160, 1165 (5th Cir. 1993) (stating that "[t]he combination of legislative silence, Supreme Court holdings, and the structure of the Code leads this Court to conclude that preponderance of the evidence is the Debtor's appropriate standard of proof both under §1129(a) and in a cramdown")); In re Worldcom, Inc., No. 02-13533 (AJG), 2003 WL 23861928, at *46 (Bankr. S.D.N.Y. Oct. 31, 2003) (citing In re Briscoe Enters).

The Plan Improperly Deems Consent to Third-Party Releases

20. As mentioned above, the Plan contains broad release and exculpation provisions of various non-Debtor parties by other non-Debtor parties from all sorts of liability. *See* Plan, Section 10.6, Section 10.7. As the U.S. Trustee describes more fully below, the Debtors have not demonstrated the appropriateness of these provisions.

21. The Debtors appear to view the third-party releases included in the Plan as being consensual, but the existence of this "consent" is questionable. Under the definition of Releasing Parties included in the Plan, the third-party releases are deemed effective against any creditor or interest holder that, are entitled to vote and do not or those that reject the plan and fail to complete the opt out.

22. The fact that a claimant who had the right to vote on the plan and did not return a ballot does not mean that such party consented to giving a third-party release. Rather, their silence could mean that the solicitation package never reached them, or it did not reach them in a timely manner. There may be several reason a claimant did not complete the ballot, including but not limited to the fact the claimant may not have received a ballot and opt out form.

23. In this case, according to Debtors' Noticing Agent, KCC, a few thousand claimants have undeliverable mailing addresses.[1] General unsecured creditors and other claimants should not bear the risk of mail errors, especially when they are projected to receive little to no distribution. Misunderstanding, mistake or inattentiveness are other reasons claimants may not return a opt out form.

24. While directly addressing this issue, the Court in In re Emerge Energy Servs. LP, No. 19-11563, 2019 Bankr. LEXIS 3717, 2019 WL 7634308, at 53- 56 (Bankr. D. Del. Dec. 5, 2019) concluded that a waiver cannot be discerned through a party's silence or inaction unless specific circumstances are present. Similar to the case at hand, Debtors' Plan in In re Emerge, proposed that general unsecured creditors and equity holders, receiving no distribution, be required to complete and return a form (Opt-Out Form) or ballot indicating their affirmative opt-out of the third party release. Without opting out the parties would be deemed to have consented to the release and waiver of current and future claims against the "Released Parties." The U.S. Trustee among others objected asserting the release did not meet the legal standard set forth in Gillman v. Continental Airlines (In re Continental Airlines) 203 F.3d 203, 212-14 (3d Cir. 2000), of fairness and necessity to reorganization and that consent cannot be inferred by the failure of a creditor or equity holder to return a ballot or Opt-Out Form, the Court agreed. The Court found that while the Debtors included on the ballot and Opt-Out Form notice to the recipients of the implications of a failure to opt-out, the Court could not on the record before it find that the failure of a creditor or equity holder to return a ballot or Opt-Out Form manifested their intent to provide a release. Carelessness, inattentiveness, or mistake are three reasonable alternative explanations. Emerge,

[1] http://www.kccllc.net/briggs/document/20435972012090000000000004. It is unclear the number of claimants from this list that have provided an accurate address to Debtor.

2019 Bankr. Lexis 3717at 54. Here, the Debtors seek approval of third party releases from creditors that reject the Plan but fail to opt-out of the releases. Accordingly, the Plan at hand should be revised to provide for affirmative consent to the third-party releases being proposed.

25. The Court in In re SunEdison, Inc., 576 B.R. 45, 13-14 (Bankr. S.D.N.Y. 2017), ruled that creditors who did not affirmatively vote could not be deemed to consent to the releases in the plan. The Court in SunEdison cited to the following language in In re Chassix Holdings, 533 B.R. 54, 81 (Bankr. S.D.N.Y. 2015) ("Chassix"):

> Charging all inactive creditors with full knowledge of the scope and implications of the Proposed third party *releases*, and implying a "consent" to the third party *releases* based on the creditors' inaction, is simply not realistic or fair, and would stretch the meaning of "consent" beyond the breaking point.

Emphasis in original.

26. Further, the SunEdison Court held that the Debtors have failed to sustain their burden of proving that the Court had subject matter jurisdiction to approve the third-party releases. In re SunEdison, Inc., 576 B.R. 453 (Bankr. S.D.N.Y. 2017). In that case, the non-voting releasors did not consent to the release, the creditors were not being paid in full, and the third-party claims would have been extinguished rather than channeled to a fund for payment. Id. Further, the Debtors did not identify which third party claims would directly impact their reorganization and given the scope of the release, the Court determined that it is likely that many of the claims would not impact the reorganization. Id. Thus, the Court granted the Debtors leave to propose a modified form of release under the condition that they must specify the release by name or readily identifiable group and the claims to be released, demonstrate how the outcome of the claims to be released might have a conceivable effect on the Debtors' estates, and show that the Debtors' case was one of the rare cases involving unique circumstances in which the release of the claims is

appropriate under Metromedia In re Metromedia Fiber Network, Inc., 416 F.3d 136, 141 (2d Cir. 2005). Id.

27. The Chassix Court also made clear its opposition to requiring creditors to opt out of the releases. The Court required the Debtors to revise the definition of "Consenting Creditors" in the plan and did not permit an opt-out procedure for creditors who abstained from voting, voted to reject the plan, or were deemed to accept or reject the plan. Chassix, 533 B.R. at 80-82. Accordingly, creditors who reject the Plan or abstain from voting on the Plan but do not opt- out of the releases on their ballots should not be deemed to have consented to the third-party releases in the Plan.

The Exculpation Clause Is Overbroad

28. The Plan's exculpation provisions are unduly expansive. The exculpation clause and defined terms inappropriately include a variety of entities and individuals who are not estate fiduciaries and are not limited to actions taken during the pendency of the Chapter 11 cases. In particular, the exculpation provision extends to "Related parties." The Related parties as defined in the plan include entity *predecessors, successors and heirs*. An exculpation clause must be limited to the *fiduciaries* who have served *during* the chapter 11 proceeding: estate professionals, the Committees and their members, and the Debtors' directors and officers." Washington Mutual, 442 B.R. at 350-51 (emphasis added). *See* In re Tribune Company, 464 B.R. 126, 189 (Bankr. D. Del. 2011) (holding that exculpation provision "must exclude non-fiduciaries"). The Debtors have failed to explain why it is appropriate to extend the exculpation provisions to these non-estate fiduciaries. As such, the U.S. Trustee objects to the Exculpation Clause of the Plan because it exculpates persons and entities that are not fiduciaries of the estate. The exculpation also is not

limited to actions or inactions taking place during the bankruptcy cases, as required by applicable law.

Settlement Should Be Limited to Parties Who Have Expressly Agreed to Its Terms

29. The language in the Plan, Sections 5, 5.2, Sale Order and Global Settlement ("compromise or settlement of all such Claims, Interest …") purports to bind all creditors to the Global Settlement agreed to by the Debtors, the Creditors' Committee, the PBGC, the DIP Lenders, the DIP Agent and the Purchaser. The settlement of claims against a Debtor subject to FRBP 9019 is limited solely to those parties who have expressly entered into a settlement agreement. The Global Settlement should be limited to the parties that have expressly agreed, instead of all claimants, which include general unsecured creditors. Each claimant has rights and interests that another party cannot settle without direct consent. Although Bankruptcy Code Section 1123(b)(3) allows a Debtor to settle claims it has against others, it does not allow a Debtor to settle the claims held by third parties.

The Indentured Trustee's Fee and Expense Payment Provisions Are Inappropriate

30. The Plan provides in Section 2, 2.4 Unsecured Notes Indenture Trustee Fees and Expenses, for the payment of all accrued and unpaid reasonable fees without requirement for Bankruptcy Court review. Notwithstanding, the Indenture Trustee shall also have the right to exercise its charging lien against distributions. The Plan indicates that this payment is a material term of the Global Settlement which is embodied in the Plan.

31. Section 2,2.4 of the Plan is contrary to 11 U.S.C. § 503, which imposes detailed requirements that must be met before approval and payment, including the timely filing of a request for payment by the professional, *see* 11 U.S.C. § 503(a); notice and a hearing before the court, *see* 11 U.S.C. § 503(b); a showing that such expenses were "actual" and "necessary," *see* 11 U.S.C.

§ 503(b)(3); a showing that the creditor, unofficial committee, or indenture trustee has made a "substantial contribution" to the bankruptcy case, *see* 11 U.S.C. § 503(b)(3)(D); and a finding by the Court that any compensation paid to an attorney or accountant is "reasonable." *See* 11 U.S.C. § 503(b)(4). Moreover, a party's right to payment under section 503(b) is not automatic but "depends upon the requesting party's ability to show that the fees were actually necessary to preserve the value of the estate." Calpine Corp. v. O'Brien Envtl. Energy, Inc. (In re O'Brien Envtl. Energy, Inc.), 181 F.3d 527, 535 (3d Cir.1999).

32. The fact that these payments of professional fees are proposed as part of the Plan does not relieve the third-party professionals of their obligation to comply with the requirements of section 503, which is the "sole source" of authority to pay post-petition professional fees on an administrative basis. Davis v. Elliot Management Corp. (In re Lehman Bros. Holdings Inc.), 508 B.R. 283, 290 (S.D.N.Y. 2014).

WHEREFORE, for the foregoing reasons, the United States Trustee respectfully requests that this Court sustain this Objection and deny confirmation of the Plan as presently filed.

Respectfully Submitted,

DANIEL J. CASAMATTA
ACTING UNITED STATES TRUSTEE

PAUL A. RANDOLPH
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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing document was filed electronically on December 11, 2020, with the Clerk of the United States Bankruptcy Court for the Eastern District of Missouri, and has been served upon the parties in interest via email by the Court's CM/ECF System as listed on the Court's Electronic Mail Notice List.

/s/Sirena Wilson
Sirena Wilson
Trial Attorney
Office of the United States Trustee