Docket #0007 Date Filed: 7/20/2020

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
SOUTHEASTERN DIVISION

In re:	§	**Chapter 11**
	§	
BRIGGS & STRATTON CORPORATION, *et al.*,	§	**Case No. 20-43597-399**
	§	**(Joint Administration Requested)**
Debtors.[1]	§	Hearing Date: July 21, 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 ORDERS (I) GRANTING AUTHORITY TO HONOR CERTAIN PREPETITION OBLIGATIONS TO CUSTOMERS AND CONTINUE AND MAINTAIN CUSTOMER PROGRAMS IN THE ORDINARY COURSE OF BUSINESS; AND (II) GRANTING RELATED RELIEF

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

1. On the date hereof (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. No trustee, examiner, or statutory committee of creditors has been appointed in these chapter 11 cases. The Debtors have also filed a motion requesting joint administration of their chapter 11 cases pursuant to Rule 1015(b) of the Federal Rules of Bankruptcy Procedure (the "**Bankruptcy Rules**") and

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number are: Briggs & Stratton Corporation (2330), Billy Goat Industries, Inc. (4442), Allmand Bros., Inc. (4710), Briggs & Stratton International, Inc. (9957), and Briggs & Stratton Tech, LLC (2102). The address of the Debtors' corporate headquarters is 12301 West Wirth Street, Wauwatosa, Wisconsin 53222.

Rule 1015(b) of the Local Rules of Bankruptcy Procedure for the Eastern District of Missouri (the "**Local Rules**").

2. The Debtors, combined with their non-Debtor affiliates (collectively, the "**Company**"), are the world's largest producer of gasoline engines for outdoor power equipment and a leading designer, manufacturer and marketer of power generation, pressure washer, lawn and garden, turf care and job site products. The Company's products are marketed and serviced in more than a hundred (100) countries on six (6) continents through 40,000 authorized dealers and service organizations. 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 *Declaration of Jeffrey Ficks, Financial Advisor of Briggs & Stratton Corporation, in Support of the Debtors' Chapter 11 Petitions and First Day Relief*, sworn to on the date hereof (the "**Ficks Declaration**"),[2] which has been filed with the Court contemporaneously herewith and is incorporated by reference herein.

Jurisdiction

3. 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

4. By this Motion, the Debtors seek entry of an interim order (the "**Proposed Interim Order**") and, pending a final hearing on the relief requested herein, a final order (the "**Proposed Final Order**" and, together with the Proposed Interim Order, the

[2] Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to such terms in the Ficks Declaration. All dollar ($) references in this Motion are to the U.S. dollar, unless stated otherwise.

"**Proposed Orders**"),[3] pursuant to sections 105(a) and 363(b) of the Bankruptcy Code, granting the authority, but not direction, to maintain and administer, in the ordinary course of business and consistent with past practice, customer-related programs, promotions, and practices, and to pay and otherwise honor their obligations to customers thereunder, whether arising prior to or after the Petition Date, as necessary and appropriate in the Debtors' business judgment. Although they arise in the ordinary course of business, out of an abundance of caution, the Debtors also request the authority to continue honoring their obligations to customers on a go forward basis.

The Customer Programs

5. The Debtors are leading manufacturers and distributors of gasoline engines and outdoor power equipment for a diversified base of customers. For years, the Debtors have been trusted suppliers of both residential and commercial engines, generators, lawn mowers, pressure washers, snow blowers, and other outdoor equipment. To solicit and retain customer business, the Debtors provide certain rebates, warranties, and benefits under the following programs (collectively, the "**Customer Programs**"): (i) Customer Warranty Programs, (ii) Tiered Discount Programs, (iii) Customer Rebate Programs, (iv) Customer Incentive Program, and (v) Credit Cards and Other Payment Processors (each as defined herein).

6. Approximately eighty-five percent (85%) of the Debtors' customers in each of their four business segments—engine, turf and consumer, standby generator, and job site—utilize and participate in at least one of the Customer Programs, and the uninterrupted continuation of the Debtors' business depends upon the continued support of such customers, as well as their ability to attract new customers. Without the ability to pay or otherwise honor their prepetition

[3] Copies of the Proposed Orders will be made available on the Debtors' case information website at http://www.kccllc.net/Briggs.

obligations under the Customer Programs (collectively, the "**Customer Program Obligations**") and continue the Customer Programs in the ordinary course, the Debtors risk (i) a significant decline in their current market share, (ii) losing the hard-earned trust, loyalty, and goodwill of their customers, and (iii) the loss of valuable and continuing customer referrals, all of which would irreparably damage the value of their business. Indeed, the costs associated with honoring the Customer Program Obligations is offset by the revenue earned under the Customer Programs, and maintaining the Customer Programs on a postpetition basis is critical to keeping such programs in place for the Company when they emerge from these chapter 11 cases. Accordingly, the Debtors seek authorization to continue administering the Customer Programs and to honor the Customer Program Obligations in the ordinary course and consistent with past practice.

7. A chart outlining the Customer Programs and approximate amounts due in connection therewith is set forth below.

Customer Programs	Interim Relief Requested (due within 30 days of Petition Date)	Total Relief Requested (inclusive of interim relief requested)[4]
Customer Warranty Programs[5]	$2,406,911	$17,923,122
Customer Rebate Programs[6]	$6,010,448	$27,540,973
Customer Incentive Program	$1,872,782	$7,695,022
Total	$10,290,140	$53,159,118

4 Final relief requested includes interim relief amounts and pertains to estimated payments between the filing date and December 31, 2020.

5 Payouts of warranties between now and the end of the calendar year have been estimated based on discussions with the Company, historical payments, and expected seasonality. Payments relates to warranty claims that are dependent on sales levels and warranty claims submitted. To the extent sales levels fluctuate significantly (higher or lower), it will impact the actual payouts on warranties. The same is true for warranty claims being submitted as compared to prior year (same time) or the last few months. Certain of the Debtors' warranties are credit only applied to customer invoices and require no cash payment.

6 Rebates for certain customer programs include marketing support as discussed in more detail below. Certain of the Debtors' rebates are credit only applied to customer invoices and require no cash payment.

A. Customer Warranty Programs

8. The Debtors recognize a standard warranty on all engines and product lines. The average warranty in the engine business segment is a two (2) year period from the customer's date of purchase of a particular product, which protects against manufacturing defects in workmanship and defects in materials contained in the purchased product. Certain product lines in the engine business segment offer extended warranties. The average warranty in the turf and consumer and job site business segments is a three (3) year limited warranty that is standard for all products purchased in this line, which protects against defects in the purchased product's material or manufacturing. Finally, the standby generators business segment offers, at varying prices, five (5), six (6), and ten (10) year limited warranties for its products (collectively, the "**Customer Warranty Programs**").

9. Generally, the end purchaser of the product is the sole beneficiary of the warranty under the Customer Warranty Programs. If the warranty is implicated, the purchaser takes the Debtors' product to an approved dealer, which repairs the product and then submits a claim to the Debtors. The Debtors then pay the dealer cash upon an approved claim. In some circumstances, the Debtors refund the total purchase price to the customer. There may be warranty claims owed to customers as of the Petition Date that customers may request be honored postpetition. If the Debtors fail to continue providing services under the Customer Warranty Programs, many repeat customers, on which the Company's business relies, may discontinue their business with the Debtors.

10. The Debtors accrue liability under the Customer Warranty Programs based on historical estimates and recently reported sales information. As of the Petition Date, based on historical estimates and recently reported sales information, the Debtors estimate that approximately $17,923,122 of liabilities arising from prepetition purchases may become due under

the Customer Warranty Programs, approximately $2,406,911 of which may come due within thirty (30) days of the Petition Date.

B. Tiered Discount Programs

11. All four of the Debtors' business segments offer tiered incentive programs based on either a retail customer's annual amount of sales or the customer's volume purchased (the "**Tiered Discount Programs**"). The standby generator business segment offers a tiered pricing structure that allows larger retailers and distributors that purchase a higher volume by dollar amount to receive a discounted price for the balance of the current year and the following program year. The larger the customer's annual purchase level, the larger the discount it receives off the Debtors' base price. The turf and consumer business segment offers a Tiered Discount Program based on the three (3) year historical average of dealer purchases, providing benefit to loyal, long-time customers; a dealer's tier classification can be reevaluated if its overall purchase performance exceeds historical data. The job site business segment, which focuses primarily on customers that rent to end users, offers a Tiered Discount Program based on the annual volume of product customers purchase.

12. Additionally, each business segment offers anywhere from three (3) to five (5) potential tier-based discounts off the Debtors' list price based on what tier a customer reaches. There are a range of discount levels provided under each segment's Tiered Discount Program to encourage customers of all sizes to purchase the most product within their ability, whether a customer is a smaller account or it is a national account.

13. The Debtors' tiered system not only generates the Tiered Discount Programs, but also gives rise to additional Customer Rebate Programs upon reaching certain levels, as discussed below.

C. Customer Rebate Programs

14. The Debtors provide rebates to customers that purchase the Company's products under all four business segments. Rebates are tied to either the volume of the customer's order, reconciliation in pricing, cooperative business arrangements, or the purchase of certain products (the "**Customer Rebates**"). Such rebates incentivize customers to purchase additional equipment or new products and thereby obtain a greater rebate, resulting in larger net revenue for the Debtors. These rebates generally accrue on a monthly basis, and customers can redeem rebates through cash or credit from the Debtors for use on current or future invoices.

15. The Debtors accrue liability under Customer Rebates in the standby generator and turf and consumer business segments as customers obtain certain purchase volumes for that year, which entitle such customers to rebates thereunder. Additionally, customers buying under the engine, turf and consumer, and job site business segments accumulate rebates as these customers achieve certain sales targets overall or for specific products that entitle such customers to the rebates associated with that program.

16. Additionally, the Debtors maintain business with several large retailers and distributors that maintain client retention, customer satisfaction, and brand promotion through the use of the customer's name. Through these valuable relationships, the Debtors offer certain licensing contracts, promotional incentives, competitive incentives, wallet shares, and marketing incentives to these customers to build up the Debtors' brand recognition, product loyalty, and goodwill among end purchasers ("**Marketing Rebates**" and, together with Customer Rebates, the "**Customer Rebate Programs**"). The Marketing Rebates help the Debtors promote certain equipment in key geographical areas and market strategic products against competitors.

17. The Debtors' engine business segment incentivizes the Debtors' larger customers and certain other customers to retain key store and aisle placement for marketing

purposes, maintain established product volume and diversity, and ensure the Debtors are a preferred provider of certain types of products and SKUs through the use of the Marketing Rebates.

18. The Debtors' turf and consumer business segment drives sales and generates more customers for the Company by purchasing certain advertising space and marketing materials from the Debtors' major retailers. This use of Marketing Rebates helps promote seasonal products and programs or generates goodwill and market excitement around new products.

19. As of the Petition Date, obligations under the Customer Rebate Programs totaled approximately $27,540,973, of which approximately $22,088,949 represents cash payment obligations and the remaining $5,452,024 represents credits to be issued to customers for their use on future purchases. Approximately $6,010,448 of cash obligations will become due and owing within thirty (30) days of the Petition Date.

D. Customer Incentive Programs

20. The Debtors offer Customer Programs to promote goodwill, foster trust, and build lifelong relationships with customers. Additionally, the Customer Programs offer financing at competitive rates which facilitate ongoing purchases. Two such programs, pursuant to certain Vendor Financing Agreements (as defined below) and Retail Financing Agreements (as defined below) (collectively, the "**Customer Incentive Programs**"), are critical to the Debtors' business, and if not continued in the ordinary course, would create a distraction and expense that would compound the potential loss of sales experienced and goodwill generated by the Customer Incentive Programs.

1. Dealer Floor Plan Financing Programs

21. The Debtors sell inventory to various dealers and distributors (the "**Dealers**") in the United States and Canada for subsequent resale to end users. As described more fully in the Ficks Declaration, to promote the Debtors' sale of inventory to their dealers, certain of

the Debtors participate in programs to provide financing to their Dealers for the purchase of goods and accessories from the Debtors displayed on the Dealers' showroom floors (the "**Dealer Floor Plan Financing Programs**").

22. As described further in the Ficks Declaration, Debtors Briggs & Stratton Corporation ("**BSC**") and Billy Goat Industries, Inc. (collectively, the "**Vendors**") and Wells Fargo Commercial Distribution Finance, LLC ("**CDF-US**") and Wells Fargo Capital Finance Corporation Canada ("**CDF-Canada**," together with CDF-US, "**CDF**") are parties to the Vendor Agreement, dated as of June 30, 2011 (as amended, restated, amended and restated, supplemented or otherwise modified from time to time, the "**Wells Fargo Floor Plan Financing Agreement**") that describes support the Vendors provide to encourage CDF to provide financing to the Dealers. CDF's financing encourages Dealers to purchase the Debtors' goods and accessories, thereby increasing the Company's overall revenue. Thus, the Vendors use commercially reasonable efforts to recommend and promote CDF's product financing to their Dealers over other commercial lenders.[7]

23. The Wells Fargo Floor Plan Financing Agreement provides for certain obligations of the Vendors to CDF. In the event CDF deems it necessary to repossess inventory acquired by a Dealer, or if CDF comes into possession of inventory acquired by a Dealer during a Dealer's event of default under its own financing agreement with CDF, the Vendors are required to purchase such inventory from CDF, in whatever condition it comes into CDF's possession (the "**Purchase Obligation**").

[7] CDF has a right of first refusal to finance all whole goods and accessory sales of the Vendors' products to their Dealers, other than parts sales that are sold on an open account directly by the Vendor to such Dealers.

24. Under the Wells Fargo Floor Plan Financing Agreement, the obligations of Dealers to CDF arising out of financing extended by CDF to the Dealers have been guaranteed on a limited basis by the Vendors up to an aggregate amount of $2 million in any one fiscal year of the Vendors. Moreover, the Vendors provided an irrevocable, standby letter of credit issued under the ABL Credit Agreement (the "**Wells Fargo Floor Plan Letter of Credit**") in an aggregate principal amount of $15 million to secure any and all of the Vendors' obligations to CDF under the Wells Fargo Floor Plan Financing Agreement.[8]

25. In addition, the Vendors have agreed to pay CDF an interest subsidy for the first year of financing extended by CDF to any such Dealer (the "**Wells Interest Subsidy**") pursuant to the terms of that certain Program Terms Letter, dated as of January 20, 2016 (as amended by the Amendment to Vendor Program Terms Letter dated as of May 28, 2020, the "**Vendor Program Terms Letter**"). Under the terms of the Vendor Program Terms Letter, the Wells Interest Subsidy paid by the Vendors is based on the delayed funding option chosen (*i.e.*, 15-day delayed funding or 30-day delayed funding) and adjusts each month with changes in the applicable Reference Rate as set forth therein.

26. Moreover, the Company executed an amendment with CDF, dated July 14, 2020. The amendment will continue the Wells Fargo Floor Plan Financing Agreement postpetition, eliminate bankruptcy and cross-defaults so CDF cannot draw on the Wells Fargo Floor Plan Letter of Credit, and increase the annual recourse cap for Dealer defaults from $1.5 million to $2 million.

[8] The Wells Fargo Floor Plan Letter of Credit was issued under the ABL Credit Agreement in the face amount of $7.5 million on March 13, 2020. On or about April 24, 2020, the face amount was increased to $15 million. The Wells Fargo Plan Letter of Credit has been included in the figures shown in paragraph 25 above.

27. The Wells Fargo Floor Plan Financing Agreement is critical to the Debtors' ongoing business operations, and the Vendors gain substantial benefits from the same. Consequently, the Vendors expect to continue to fully perform under the Wells Fargo Floor Plan Financing Agreement.

28. In the event that CDF decides not to finance the sales of BSC's products to its dealers under the Wells Fargo Floor Plan Financing Agreement, BSC has a second source of financing under the terms of (i) a letter agreement, dated March 9, 2020, between BSC and Northpoint Commercial Finance LLC ("**Northpoint U.S.**"), (ii) a repurchase agreement, dated as of March 9, 2020, between BSC and Northpoint U.S., (iii) a letter agreement, dated March 9, 2020, between BSC and Northpoint Commercial Finance Canada Inc. ("**Northpoint Canada**" and, together with Northpoint U.S., "**Northpoint**"), and (iv) a repurchase agreement, dated as of March 9, 2020, between BSC and Northpoint Canada (such agreements, as amended, restated, amended and restated, supplemented or otherwise modified from time to time, collectively, the "**Northpoint Floor Plan Financing Agreement**"). Pursuant to the terms of the Northpoint Floor Plan Financing Agreement, Northpoint agreed to finance the purchase by dealers of goods sold by BSC to BSC's dealers and, subject to the terms and conditions set forth in the Northpoint Floor Plan Financing Agreement, BSC agreed to repurchase any goods financed by Northpoint upon the repossession of such goods by Northpoint. By the terms of the Northpoint Floor Plan Financing Agreement, BSC also subsidizes the first year's interest of financing extended to any Dealer (together with the Wells Interest Subsidy, the "**Interest Subsidies**").

29. As of the Petition Date, Vendors owe CDF up to $5,922,495 in Interest Subsidies, of which up to $1,129,535 will become due and owing within thirty (30) days of the Petition Date.

2. Retailer Financing Programs

30. The Debtors also offer through the various business channels retail finance programs, which enable end users to afford the purchase of Debtors' products (the "**Retailer Financing Programs**"). The Retail Finance Programs include interest deals, revolving loans, and term loan programs for both residential and commercial customers. Approximately fifty percent (50%) of all end user purchases from retailers are purchased through select Retail Financing Programs.

31. The Debtors maintain the Retail Financing Programs with six (6) banks, which provide financing to end user purchasers and end user lessors. These six (6) institutions provide financing under the terms of (i) a Consumer and Commercial Revolving and Closed-End Credit Program Agreement, dated December 14, 2012, by and between BSC and Synchrony Bank (formerly GE Capital Retail Bank, "**Synchrony**") (as may be amended, restated, extended, modified, and/or supplemented from time to time, the "**Synchrony Financing Agreement**"), (ii) a letter agreement, dated March 25, 2015, between BSC and Synchrony, (iii) a letter agreement, dated June 26, 2017, between BSC and Synchrony, (iv) the First Amendment to the Synchrony Financing Agreement, dated March 1, 2018, by and between BSC and Synchrony (together with (i)-(iv), the "**Synchrony Financing Documents**"), (v) the Confidential Financing Services Agreement, dated January 1, 2018, between BSC and Sheffield Financial ("**Sheffield**") (as amended, restated, amended and restated, supplemented or otherwise modified from time to time, the "**Sheffield Financing Agreement**"), (vi) the Manufacturer Agreement, dated April 12, 2017, between BSC and Flexiti Financial Inc. ("**Flexiti**") (as amended, restated, amended and restated, supplemented or otherwise modified from time to time, the "**Flexiti Financing Agreement**"), (vii) the Preferred Lending Partnership Agreement, dated June 1, 2018, between BSC and Octane Lending, Inc., (viii) the Mower Preferred Lending Partnership Term Sheet, dated June 1, 2018,

between BSC and Octane Lending, Inc. ("**Octane**") (together with the Preferred Lending Partnership Agreement with Octane Lending, Inc., the "**Octane Financing Agreements**"), (ix) the Program Agreement, dated February 13, 2019, between BSC and CWB National Leasing Inc. ("**CWB**") (as amended, restated, amended and restated, supplemented or otherwise modified from time to time, the "**CWB Financing Agreement**"), and (x) the Program Agreement, dated August 20, 2018, between BSC and Western Equipment Finance, Inc. ("**WEF**") (together with the Synchrony Financing Documents, the Sheffield Financing Agreement, the Flexiti Financing Agreement, the Octane Financing Agreements, and the CWB Financing Agreement, the "**Retail Financing Agreements**").

32. The Retail Financing Agreements support end users by providing installment loan programs, revolving credit card programs, and other financing services through agreements executed directly between Synchrony, Sheffield, Octane, Flexiti, CWB, or WEF and the Dealers or one of the six financing institutions and the end users. The Retail Financing Agreements provide a large majority of end users with the ability to purchase the Debtors' products through the financing services and promotions, thereby increasing Company sales overall, thus making the Retailer Financing Programs vital to the Company's business.

33. The cost of subsidizing the interest for end users under the Retailer Financing Programs' terms are commonly shared between the Debtors and channel partners and are accrued as part of the ongoing budget in order to support Customer Programs. As of the Petition Date, obligations under the Retailer Financing Programs totaled approximately $1,772,527, of which approximately $743,247 will become due and owing within thirty (30) days of the Petition Date.

E. Credit Cards and Other Payment Processors

34. In addition to cash, the Debtors accept the following methods of payment from customers: Visa, MasterCard, American Express, Discover (the "**Credit Cards**") and debit cards (together with Credit Cards, the "**Non-Cash Payments**"). To process Non-Cash Payments, the Debtors are party to certain agreements (the "**Payment Processing Agreements**") with payment processors (the "**Payment Processing Companies**" and each, a "**Payment Processing Company**"). Pursuant to the Payment Processing Agreements, the Debtors generally receive gross customer sales from the Payment Processing Companies in a designated Company bank account (a "**Designated Account**") and then are immediately debited any chargebacks, returns, and processing fees charged. The processing fees charged for each company vary, but are in the range of two percent (2%) to five percent (5%) (the "**Processing Fees**"). The Payment Processing Companies also charge the Debtors maintenance fees (the "**Maintenance Fees**") on a monthly basis.

35. When customers either return merchandise to the Debtors following a purchase made by Non-Cash Payment or dispute charges with a Payment Processing Company, the Debtors may be obligated to refund to such Payment Processing Company the purchase price of the returned merchandise or the amount of disputed charge, subject to certain adjustments (collectively, "**Chargebacks**," and together with the Processing Fees and the Maintenance Fees, the "**Processing Obligations**"). Generally, Chargebacks are debited from the Designated Account along with the Processing Fees. It is likely that certain Processing Obligations incurred by the Debtors prior to the Petition Date may not have been fully debited from the Company's account prior to the Petition Date.

36. To avoid disrupting these vital payment processing services, the Debtors seek authority to continue paying the Processing Obligations in the ordinary course of business pursuant to the terms of the Payment Agreements, in a manner consistent with past practices.

Relief Requested Should Be Granted

37. Section 363(c) of the Bankruptcy Code authorizes a debtor in possession to operate its business and to use property of the estate in the ordinary course of business without having to provide notice or obtain a court hearing. *See In re Cnty. Line Homes, Inc.*, 43 B.R. 440, 441 (E.D. Mo. 1984); *see also In re Roth Am.*, 975 F.2d 949, 952 (3rd Cir. 1992) ("The framework of section 363 is designed to allow a [debtor-in-possession] the flexibility to engage in ordinary transactions without unnecessary creditor and bankruptcy court oversight, while protecting creditors by giving them an opportunity to be heard when transactions are not ordinary").

38. Courts apply a two-pronged test to determine whether a particular transaction was conducted in the ordinary course of business. The first prong, which is known as the horizontal test, "examines whether the transaction is of a type that is commonly undertaken within the debtor's industry. The second prong, labeled the vertical test, analyzes whether interested parties would reasonably expect[] the particular debtor in possession to seek court approval before entering into the questioned transaction." *Peltz v. Gulfcoast Workstation Group (In re Bridge Info. Sys., Inc.)*, 293 B.R. 479, 486 (Bankr. E.D. Mo. 2003) (citing *Roth Am.,* 975 F.2d at 953); *In re Crystal Apparel, Inc.,* 220 B.R. 816, 831-32 (Bankr. S.D.N.Y. 1998)).

39. The Debtors' Customer Programs are typical in their industry, have been a part of the Debtors' business operations for many years and are programs offered in the ordinary course of the Debtors' business. Accordingly, continuing, renewing, replacing, initiating, and/or terminating such Customer Programs falls well within the scope of permitted activities under sections 363(c) of the Bankruptcy Code.

40. To the extent that payment of prepetition obligations owed pursuant to the Customer Programs would be deemed to constitute a use of property outside of the ordinary course of business, the Debtors submit that the Court may grant the relief requested herein, including payment of prepetition Customer Obligations, under sections 105(a) and 363(b) of the Bankruptcy Code.

41. Section 363 of the Bankruptcy Code provides, in relevant part, that "[t]he [debtor], after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate . . . ." 11 U.S.C. § 363(b)(1). Section 363 of the Bankruptcy Code is designed to serve the "'overriding goal of maximizing the value of the estate' by striking the optimal balance between the interests of the debtor and the creditors." *Habinger, Inc. v. Metropolitan Cosmetic and Reconstructive Surgical Clinic, P.A.*, 124 B.R. 784, 786 (Bankr. D. Minn. 1990) (citing *United States ex rel. Harrison v. Estate of Deutscher*, 115 B.R. 592 (Bankr. M.D. Tenn. 1990)). "The 'ordinary course of business' standard is intended to allow a debtor the flexibility it needs to run its business and respond quickly to changes in the business climate." *Habinger*, 124 B.R. at 786; *see also In re Farmland Indus. Inc.*, 294 B.R. 903, 913 (Bankr. W.D. Mo. 2003) ("Under the business judgment standard, the question is whether the [proposed action] is in the Debtors' best economic interests, based on the best business judgment in those circumstances.").

42. Additionally, a debtor's request to use property of the estate outside of the ordinary course of business pursuant to section 363(b) of the Bankruptcy Code must be supported by sound business reasons. *See, e.g.*, *In re Trilogy Dev. Co., LLC*, 2010 Bankr. LEXIS 5636, at *3-4 (Bankr. W.D. Mo. 2010); *In re Channel One Comm., Inc.*, 117 B.R. 493, 496 (Bankr. E.D. Mo. 1990) (citing *Comm. of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.)*, 722 F.2d

1063, 1071 (2d Cir. 1983)); *In re Montgomery Ward Holding Corp.*, 242 B.R. 147, 153 (D. Del. 1999). The business judgment rule is highly deferential to debtors and may be satisfied "'as long as the proposed action *appears* to enhance the debtor's estate.'" *Crystalin, LLC v. Selma* Props. *Inc. (In re Crystalin, LLC)*, 293 B.R. 455, 463–64 (B.A.P. 8th Cir. 2003) (quoting *Four B. Corp. v. Food Barn Stores, Inc. (In re Food Barn Stores, Inc.)*, 107 F.3d 558, 566 n.16 (8th Cir. 1997)).

43. The Court also has the authority, pursuant to its equitable powers under section 105(a) of the Bankruptcy Code, to authorize the relief requested herein, because such relief is necessary for the Debtors to carry out their fiduciary duties under section 1107(a) of the Bankruptcy Code. Pursuant to section 105(a) of the Bankruptcy Code, "[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. §105(a); *see also In re Wehrenberg, Inc.*, 260 B.R. 468, 469 (Bankr. E.D. Mo. 2001) ("Pursuant to 11 U.S.C. § 105(a) the Court may authorize the payment of prepetition claims when such payments are necessary to the continued operation of the Debtor"). Section 1107(a) of the Bankruptcy Code "contains an implied duty of the debtor-in-possession" to act as a fiduciary to "protect and preserve the estate, including an operating business' going-concern value," on behalf of a debtor's creditors and other parties in interest. *In re CEI Roofing, Inc.*, 315 B.R. 50, 59 (Bankr. N.D. Tex. 2004) (quoting *In re CoServ, L.L.C.*, 273 B.R. 487, 497 (Bankr. N.D. Tex. 2002)); *see also Unofficial Comm. of Equity Holders v. McManigle (In re Penick Pharm., Inc.)*, 227 B.R. 229, 232–33 (Bankr. S.D.N.Y. 1998) ("[U]pon filing its petition, the Debtor became debtor in possession and, through its management . . . was burdened with the duties and responsibilities of a bankruptcy trustee."). Courts consistently have permitted payment of prepetition obligations where necessary to preserve or enhance the value of a debtor's estate for the benefit of all creditors. *See, e.g.*, *In re Payless Cashways, Inc.*, 268 B.R. 543, 546 (Bankr. W.D. Mo. 2001) (describing

the "doctrine of necessity" as the idea "that payment of [prepetition] claims was necessary to keep the debtor in business, and that keeping the debtor in business, and its employees at wage-paying jobs, was in the best interest of all concerned"); *In re Lehigh & New Eng. Ry. Co.*, 657 F.2d 570, 581 (3d Cir. 1981) (holding that "if payment of a claim which arose prior to reorganization is essential to the continued operation of the . . . [business] during reorganization, payment may be authorized even if it is made out of [the] corpus").

44. The Court may authorize the payment of prepetition claims in appropriate circumstances under section 105(a) of the Bankruptcy Code and the doctrine of necessity when such payment is essential to the continued operation of a debtor's business. *See, e.g., In re Wehrenberg, Inc.*, 260 B.R. 468 (Bankr. E.D. Mo. 2001) ("Pursuant to 11 U.S.C. § 105(a) the Court may authorize the payment of prepetition claims when such payments are necessary to the continued operation of the Debtor"); *In re Just for Feet, Inc.*, 242 B.R. 821, 824–25 (D. Del. 1999) (holding that section 105(a) of Bankruptcy Code provides a statutory basis for payment of prepetition claims under the doctrine of necessity and noting that "[t]he Supreme Court, the Third Circuit and the District of Delaware all recognize the court's power to authorize payment of pre-petition claims when such payment is necessary for the debtor's survival during chapter 11"); *In re Columbia Gas Sys., Inc.*, 171 B.R. 189, 191–92 (Bankr. D. Del. 1994) (confirming that the doctrine of necessity is standard for enabling a court to authorize payment of prepetition claims prior to confirmation of a reorganization plan).

45. Moreover, Bankruptcy Rule 6003 itself implies that the payment of prepetition obligations may be permissible within the first twenty-one (21) days of a case where doing so is "necessary to avoid immediate and irreparable harm." Fed. R. Bankr. 6003. Accordingly, the Bankruptcy Code authorizes the postpetition payment of prepetition claims

where, as here, such payments are critical to preserving the going-concern value of a debtor's estate.

46. As described above, the Customer Programs are an important part of the Debtors' business and necessary to their continued and uninterrupted operations during these chapter 11 cases. The Debtors operate in a competitive and seasonal market and their business depends on the quality and strength of their customer relationships across various original equipment manufacturer, dealer, retail, and rental channels, as well as their ability to attract new customers and gain new market share. The continuation of the Customer Programs is critical to maintain such customer support and loyalty and maximize value in the chapter 11 cases.

47. The relief requested by this Motion is necessary to avoid immediate and irreparable harm to the Debtors' estates and to preserve the value of Debtor's estate for the benefit of creditors. If the Debtors are unable to continue the Customer Programs or honor the obligations thereunder, including prepetition obligations, the Company risks alienating certain customers, resulting in losses of customer support and goodwill that will harm the Debtors' prospects for a successful postpetition sale process and damage their ability to maximize the value of their estates. Indeed, the Debtors' failure to honor the Customer Programs could place the Debtors at a competitive disadvantage, amplifying the negative effect of customer uncertainty that may arise from the commencement of these chapter 11 cases. Additionally, the Customer Programs are essential for attracting new customers and expanding the Debtors' business. For these reasons, the Debtors submit that the continuation of Customer Programs is critical to their ability to compete effectively, and to avoid immediate and irreparable harm to the Debtors' estates.

48. Where, as here, maintaining the loyalty and continued patronage of customers is critical to a debtor's business, courts in this and other districts have routinely granted

relief similar to the relief requested herein in other chapter 11 cases. *See, e.g.*, *In re Foresight Energy LP*, No. 20-41308 (KSS) (Bankr. E.D. Mo. Mar. 10, 2020) [Docket No. 116] (granting relief to maintain and honor prepetition customer program obligations); *In re Payless Holdings LLC*, No. No. 17-42267 (Bankr. E.D. Mo. May 09, 2017) [Docket No. 638] (authorizing the continuation and payment of prepetition customer and partner programs); *In re Peabody Energy Corp.*, No. 16- 42529 (BSS) (Bankr. E.D. Mo. Apr. 15, 2016) [Docket No. 141] (authorizing maintenance of customer programs); *In re Noranda Aluminum, Inc.*, No. 16-10083-399 (BSS) (Bankr. E.D. Mo. Feb. 10, 2016) [Docket No. 84] (same); *In re Arch Coal, Inc.*, No. 16-40120-705 (Bankr. E.D. Mo. Jan. 14, 2016) [Docket No. 88] (same); *see also In re Murray Energy Holdings Co.*, No. 19- 56885 (JEH) (Bankr. S.D. Ohio Oct. 31, 2019) [Docket No. 103] (same). The Debtors submit that the circumstances of these chapter 11 cases warrant granting similar relief, for doing so will greatly enhance the value of the Debtors' business, their estates, and all other parties in interest in these chapter 11 cases, and therefore should be granted.

49. Accordingly, the Court should authorize the Debtors to pay and/or honor, as applicable, any prepetition obligations that may be outstanding with respect thereto and to continue the Customer Programs in the ordinary course of business.

Applicable Financial Institutions
Should Be Authorized to Receive, Process, Honor, and Pay
Checks Issued and Transfers Requested to Pay Customer Program Obligations

50. The Debtors further request that the Court authorize applicable financial institutions (the "**Banks**") to receive, process, honor, and pay any and all checks issued, or to be issued, and electronic funds transfers requested, or to be requested, by the Debtors relating to the Customer Program Obligations, to the extent that sufficient funds are on deposit in available funds in the applicable bank accounts to cover such payment. The Debtors also seek authority to issue new postpetition checks or effect new postpetition electronic funds transfers in replacement of any

checks or fund transfer requests on account of prepetition Customer Program Obligations dishonored or rejected as a result of the commencement of the Debtors' chapter 11 cases.

Bankruptcy Rule 6003(b) Has Been Satisfied

51. The Debtors respectfully request emergency consideration of this Motion under Bankruptcy Rule 6003, which provides that the Court may grant relief within the first twenty-one (21) days after the Petition Date to the extent such relief is necessary to avoid immediate and irreparable harm. As described herein and in the Ficks Declaration, the relief requested is essential to avoid the immediate and irreparable harm that would be caused by the Debtors' inability to transition smoothly into chapter 11. Accordingly, the Debtors submit that the requirements of Bankruptcy Rule 6003 are satisfied.

Compliance with Bankruptcy Rule 6004(a) and Waiver of Bankruptcy Rule 6004(h)

52. To implement the foregoing successfully, the Debtors seek waivers of the notice requirements under Bankruptcy Rule 6004(a) and the 14-day stay of an order authorizing the use, sale, or lease of property under Bankruptcy Rule 6004(h). As explained above and in the Ficks Declaration, the relief requested herein is necessary to avoid immediate and irreparable harm to the Debtors. Accordingly, ample cause exists to justify the waiver of the notice requirements under Bankruptcy Rule 6004(a) and the 14-day stay imposed by Bankruptcy Rule 6004(h), to the extent such notice requirements and such stay apply.

Reservation of Rights

53. Nothing contained herein is intended to be or shall be deemed as (i) an admission as to the validity of any claim against the Debtors, (ii) a waiver or limitation of the Debtors' or any party in interest's rights to dispute the amount of, basis for, or validity of any claim, (iii) a waiver of the Debtors' rights under the Bankruptcy Code or any other applicable

nonbankruptcy law, (iv) an agreement or obligation to pay any claims, (v) a waiver of any claims or causes of action which may exist against any creditor or interest holder, or (vi) an approval, assumption, adoption, or rejection of any agreement, contract, lease, program, or policy under section 365 of the Bankruptcy Code. Likewise, if the Court grants the relief sought herein, any payment made pursuant to the Court's order is not intended to be and should not be construed as an admission to the validity of any claim or a waiver of the Debtors' rights to dispute such claim subsequently.

Notice

54. Notice of this Motion will be provided to (i) the Office of the United States Trustee for the Eastern District of Missouri; (ii) the holders of the 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 Internal Revenue Service; (vi) the United States Attorney's Office for the Eastern District of Missouri; (vii) the Securities and Exchange Commission; (viii) the Banks; (ix) Reed Smith LLP (Attn: Richard J. Tannenbaum, Esq.), as counsel to Wells Fargo Bank, N.A.; (x) Northpoint Commercial Finance LLC; (xi) the parties to the Retail Financing Agreements; and (xii) any other party that has requested notice pursuant to Bankruptcy Rule 2002 (collectively, the "**Notice Parties**"). Notice of this Motion and any order entered hereon will be served in accordance with Local Rule 9013-3(A)(1).

No Previous Request

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

WHEREFORE the Debtors respectfully request entry of the Proposed Order[s] granting the relief requested herein and such other and further relief as the Court may deem just and appropriate.

Dated: July 20, 2020
St. Louis, Missouri

Respectfully submitted,

CARMODY MACDONALD P.C.

/s/ Robert E. Eggmann
Robert E. Eggmann, #37374MO
Christopher J. Lawhorn, #45713MO
Thomas H. Riske, #61838MO
120 S. Central Avenue, Suite 1800
St. Louis, Missouri 63105
Telephone: (314) 854-8600
Facsimile: (314) 854-8660
Email: ree@carmodymacdonald.com
cjl@carmodymacdonald.com
thr@carmodymacdonald.com

Proposed Local Counsel to the Debtors and Debtors in Possession

-and-

WEIL, GOTSHAL & MANGES LLP
Ronit J. Berkovich (*pro hac vice* pending)
Debora A. Hoehne (*pro hac vice* pending)
Martha E. Martir (*pro hac vice* pending)
767 Fifth Avenue
New York, New York 10153
Telephone: (212) 310-8000
Facsimile: (212) 310-8007
Email: Ronit.Berkovich@weil.com
Debora.Hoehne@weil.com
Martha.Martir@weil.com

Proposed Counsel to the Debtors and Debtors in Possession