

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
SOUTHEASTERN DIVISION

In re:

BRIGGS & STRATTON
CORPORATION, *et al.*,¹

Debtors.

Chapter 11

Case No. 20-43597-399

(Jointly Administered)

Re: Docket No. 35

Response Deadline: August 13, 2020 at 4:00 pm (CT)
Hearing Date: August 18, 2020 at 10:00 am (CT)

**OBJECTION OF AD HOC GROUP OF SENIOR NOTEHOLDERS
TO MOTION OF DEBTORS FOR FINAL ORDER (I) AUTHORIZING DEBTORS TO
OBTAIN POSTPETITION FINANCING, (II) AUTHORIZING DEBTORS TO USE
CASH COLLATERAL, (III) GRANTING LIENS AND SUPERPRIORITY CLAIMS, (IV)
GRANTING ADEQUATE PROTECTION TO PREPETITION SECURED PARTIES, (V)
MODIFYING AUTOMATIC STAY, (VI) SCHEDULING FINAL HEARING AND (VII)
GRANTING RELATED RELIEF**

The ad hoc group of holders (the “Ad Hoc Group”) of 6.875% senior notes due December 2020 (the “Notes”) issued by Briggs & Stratton Corporation files this objection (this “Objection”) to the *Motion Of Debtors For Interim And Final Orders (I) Authorizing Debtors To Obtain Postpetition Financing, (II) Authorizing Debtors To Use Cash Collateral, (III) Granting Liens And Superpriority Claims, (IV) Granting Adequate Protection To Prepetition Secured Parties, (V) Modifying Automatic Stay, (VI) Scheduling Final Hearing And (VII) Granting Related Relief* [Dkt. No. 35] (the “DIP Motion”).² In support of the Objection, the Ad Hoc Group states as follows:

¹ The debtors in these chapter 11 cases (the “Debtors”), 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.

² Capitalized terms used herein but not otherwise defined shall have the meanings ascribed to them in the DIP Motion and Bidding Procedures Motion.



PRELIMINARY STATEMENT

1. The current members of the Ad Hoc Group hold approximately \$37.5 million in unsecured Notes. The Ad Hoc Group objects to final approval of the DIP Motion because such final approval of the DIP Motion would lock in the milestone dates in the proposed Sale Procedures Motion and allow the proposed stalking horse bidder to become a DIP lender with the power to dictate a fire sale of all of the Debtors' assets in a manner that likely will eliminate competitive bidding and, therefore, will not maximize value. Indeed, under the circumstances of the current cases the Debtors cannot at this time prove that a sale under Bankruptcy Code § 363, which eviscerates the protections afforded by a plan and disclosure statement, is appropriate. Thus, this Court can and should defer ruling on this critical question for the short period necessary for the Ad Hoc Group to complete diligence and so that the professionals engaged by the Official Committee of Unsecured Creditors (the "**Committee**") can complete their initial analysis.³ Therefore, the Ad Hoc Group respectfully requests that this Court defer entering a final order on the DIP Motion or an order on the *Motion of Debtors for Entry of an Order (I) Approving (A) Bidding Procedures, (B) Designation of Stalking Horse Bidder, (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' Assets*

³ As the Ad Hoc Group demonstrated in the *Preliminary Objection of Ad Hoc Group of Senior Noteholders to Motion of Debtors for Entry of an Order (I) Approving (A) Bidding Procedures, (B) Designation of Stalking Horse Bidder, (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' Assets 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* [Dkt. No. 300] (the "**Bid Procedures Objection**"), a court should approve a sale of substantially all of the Debtors' assets outside of a plan and without the protections that a plan and disclosure statement and solicitation of creditor votes provide, only if there is a business reason not to proceed by way of a plan. The Debtors cannot demonstrate that such a business reason exists before the Ad Hoc Group has a reasonable opportunity to propose an alternative DIP term loan that could make a plan process viable.

*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 (the “**Bid Procedures Motion**”), until not sooner than September 4, 2020.*

2. The pressure to enter a final order sooner appears to be the result of a manufactured crisis. The Debtors assert a need for immediate access to funding, but have substantially outperformed their DIP budget during the first 3 weeks of the case. Approval of the DIP, as currently structured, will lock in a fast-tracked sale of substantially all of the Debtors’ assets to KPS Capital Partners, LP (“**KPS**”) at a bargain price that leaves little to no recovery to bondholders, pensioners, retirees, and any other unsecured creditors whose claims KPS does not deign to assume.

3. Even if this Court were to conclude that KPS’s dictated pre-plan sale of all of the Debtors’ assets is the best approach to maximizing value and that the protections afforded by a plan and disclosure statement can be ignored in this case, the time frame proposed by the Debtors – less than 2 months from the Petition Date - is just too short to run an effective process.⁴ The Debtors point to the COVID-19 pandemic as a reason that the business is facing challenges, but ignore the reality that the pandemic may render a sale at this time not the optimal solution. It is, therefore, critical that the DIP Loan not dictate a sale and preclude a toggle to a chapter 11 plan. In addition, challenges that the pandemic may generate for potential bidders may require a longer period for competing bidders to finalize qualified bids, even if an expedited auction is the optimal solution.

⁴ The process is separately defective for the reasons set forth in the Sale Motion Objection and the failure to provide flexibility for potential bidders to formulate bids for a subset of the Debtor’s assets. *See* Generac Objection at 4-5. Individual bidders may offer a higher purchase price for a subset of the assets that, in combination with the value of the remaining assets, generates greater overall value for the Debtors’ estates.

4. There is no imminent financial urgency or need and therefore no justification for allowing the Debtors to bind themselves to DIP financing, which compels them to conduct a sale process on an extremely compressed timeline that is likely to chill the bidding process altogether. The DIP Motion seeks DIP financing in the amount of \$350 million (DIP ABL Facility (as defined below)) plus \$265 million (DIP Term Loan Facility (as defined below)), which goes well beyond the Debtors' financing needs, and requires the Debtors to consummate an expedited all-asset sale at a purchase price that was determined via a sale process that occurred during the height of the COVID-19-induced market volatility to the lender of the DIP Term Loan Facility, KPS, as the stalking horse bidder for \$550 million. The DIP milestones effectively lock in the KPS bid with no meaningful market test.

5. The DIP Facilities' milestones include: (a) entry of the bid procedures order not later than August 25, 2020, (b) auction to commence by September 15, 2020, (c) entry of the sale order not later than September 25, 2020, and (d) close the sale by November 19, 2020, subject to possible extension in limited circumstances. *See* DIP Credit Agreement § 9.24. In parallel, the proposed sale timeline dictated by KPS, as the Stalking Horse Bidder and the DIP Lender, seeks submission of binding bids and deposits of at least \$60 million just days after the hearing. These milestones are driven by KPS, whose goal is to minimize the time others have to submit either a stand alone restructuring alternative or a competing bid.

6. Perhaps the best evidence of the chilling impact of the milestones locked in by the DIP Loan is the objection ("**Generac Objection**") filed by one potential competing bidder: Generac Power Systems, Inc. ("**Generac**") as Docket No. 367 on August 11, 2020. Generac states that it was not contacted as part of the prepetition marketing process. This begs the question of what other potential buyers may not have been contacted prior to the filing. It goes

on to describe delays in obtaining access to the information that it needs to perform diligence. Generac Objection p 3-4. The Debtors may have reasons for not yet having provided Generac with the information that it needs to engage in expedited diligence, but even short delays render it impossible for others to bid within what was already an incredibly aggressive time schedule. Generac also indicates that the process effectively excludes bidders for less than the whole, even though the best way to maximize aggregate value may be separate sales of component parts. Generac requests a mechanism to permit bids for distinct portions of the Debtors' businesses and for at least 30 additional days before a qualifying bid must be submitted once the final bid procedures are established. Generac states that "the proposed timing of this sale, the proposed bid procedures, and certain provisions in the proposed debtor-in-possession financing package suggest that the Debtors are slouching toward the stalking horse bidder at the expense of value. The result is a sale process that is unlikely to maximize value for creditors, is unfair to potential bidders, and unreasonably favors the stalking horse bidder."

7. The Ad Hoc Group's Bid Procedures Objection demonstrates that the parties who will receive the marginal gain or loss from an effective process – the bondholders, the pensioners, the retirees, the trade claimants and other unsecured creditors – were left largely out of the Debtors' restructuring process and stand to receive very little in these Chapter 11 cases. The Committee was appointed on August 5, 2020 [Dkt. No. 304], and hired financial advisors on approximately August 10, 2020. The Committee, which represents the holders of the Notes as well as other unsecured creditors, must be provided with a reasonable opportunity to analyze, consider, and respond to the relief requested in the DIP Motion and the Debtors' Bid Procedures Motion.

8. The asserted need for the Court to enter a final order and the Bid Procedures Motion is based on the assertion that if the DIP order is not entered the Debtors could lose the DIP Lenders or the stalking horse bid. The actual milestone for entry of an order approving the Bid Procedures Motion is August 25, 2020, and the milestone for entry of a final DIP order (40 days after entry of the Interim DIP Order⁵) is August 30, 2020. Even these milestones are arbitrary. They create a manufactured emergency where none exists, to the detriment of the Debtors and their stakeholders, because KPS wants to minimize competition and the Prepetition ABL Lenders want to be prepaid a portion of their debt even before a sale under this extremely short timeline can be consummated. These Chapter 11 cases do not involve the proverbial melting ice cube. Under the unique circumstances of these Chapter 11 cases, where the Stalking Horse Bidder is also the proposed lender of the DIP Term Loan Facilities, the risk that KPS will withdraw if the Court extends the deadline for entry of a final order on the DIP Motion by a few days is minimal.⁶ Moreover, even this risk would not arise from a postponement of the hearing to August 25, 2020, because none of the milestones actually occur prior to August 25, 2020.

9. Entry of the final order approving the DIP Motion on August 18, 2020, would irreversibly predetermine the course of these Chapter 11 cases on a trajectory that precludes the possibility of an alternative Chapter 11 plan process, even though such an alternative could provide more value to creditors than a rushed sale process.

⁵ On July 21, 2020, the Court approved the *Debtors' Interim Order (I) Authorizing Debtors To Obtain Postpetition Financing, (II) Authorizing Debtors To Use Cash Collateral, (III) Granting Liens And Superpriority Claims, (IV) Granting Adequate Protection To Prepetition Secured Parties, (V) Modifying Automatic Stay, And (VI) Scheduling A Final Hearing* [D.I. 148] (the “**Interim DIP Order**”).

⁶ KPS must be substantially invested in its offer. The proposed bid protections include reimbursement of \$2.75 million in expenses. Unless it believes that a fair process will prevent it from acquiring the Debtors' assets it seems unlikely that KPS would abandon this transaction because of a delay of 10 days from its originally proposed milestone for entry of the bid procedures order.

10. Prior to the Petition Date, the Ad Hoc Group tried to engage constructively and in good faith with the Debtors on terms of an out-of-court financing solution that would have bridged the Debtors through the challenging environment, injected capital into the business well in-excess of the \$100 million requirement in the pre-petition ABL credit agreement, and provided a principal reduction on notes held by the ad hoc group. Instead of formally responding to the Ad Hoc Group's proposals, which contemplated the new capital the Debtors required, the company plowed ahead with the KPS bid that was obtained as the business was marketed in the depths of the COVID-induced market turmoil.

11. The Ad Hoc Group sought to re-engage with the Debtors after the Petition Date with respect to an alternative DIP financing proposal without the milestones that dictate the forced sale of the Debtors' assets. After negotiation of confidentiality agreements with the Ad Hoc Group, the Debtors granted the Ad Hoc Group access to diligence on the Debtors' near-term liquidity needs on Sunday, August 9, 2020, just nine days before the hearing.

12. The Ad Hoc Group hired legal and financial advisors, at its own expense to conduct diligence on an expedited basis to formulate a proposal to step in as lenders under the DIP Term Loan Facility, with the critical distinction that the Ad Hoc Group's proposal would provide flexibility to toggle to a plan process. Under the circumstances of these Chapter 11 cases, an extension of the deadline to enter a final order on the DIP Motion from August 30, 2020 to September 4, 2020 would be reasonable.

13. The Debtors' Chapter 11 process would be better served if the Stalking Horse Bidder were not also the DIP Term Loan Lender, with the ability to dictate a sale process on such a short time frame that others are not likely to be able to complete diligence in time to participate. Allowing KPS as the lender under the DIP Term Loan Facility and the Stalking

Horse Bidder to set the DIP milestones and the sale process is tantamount to allowing the fox to guard the henhouse. The DIP Motion (and the bid procedures motion), if approved, would harm all unsecured creditors and the Debtors' estates by dictating a rushed sale and imposing unreasonable constraints on the Committee. The Ad Hoc Group will not duplicate the objections of the Committee to the budget constraints on its efforts to maximize value for all unsecured creditors, the challenge periods, or the investigation process. The Ad Hoc Group joins in such objections and reserves the right to argue in support of them.

14. Based upon the foregoing, the Ad Hoc Group submits that the final order approving the DIP Motion and the current bid procedures should not be approved unless and until the Ad Hoc Group has had more time to complete its diligence process to provide an alternative DIP financing option with greater flexibility to facilitate a fair, transparent process that maximizes value for the Debtors' estates and all of their creditors through either (1) a sale process on a reasonable timeline that permits an adequate marketing process and flexibility to bid for less than the entire business, or (2) a Chapter 11 plan process.

RELEVANT FACTUAL BACKGROUND

A. The Debtors' Chapter 11 Proceedings.

15. On July 20, 2020 (the "**Petition Date**"), the Debtors filed voluntary cases under Chapter 11 of the Bankruptcy Code. The Debtors continue to operate their businesses as debtors-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. The Committee was formed on August 5, 2020, and had interviewed and engaged both counsel and advisors in the past week.

16. According to the Debtors' pleadings, their unsecured debts as of the Petition Date, included (a) more than \$202 million of principal and interest outstanding in respect of the Notes, (b) substantial liabilities related to retiree plans and underfunded pension obligations, and (c)

prepetition trade claims, some of which will not be assumed in the proposed sale to KPS. *See* Ficks Decl. ¶¶ 67-73.

B. The Proposed DIP Motion.

17. The headline number for the Debtors' proposed DIP financing package totals \$677.5 million but this is far more than the Debtors need or will actually receive in new financing. The outstanding balance of the Prepetition ABL Lenders on the Petition Date will be rolled up into the DIP Facility. KPS will provide \$265 million of last out DIP term loan (the "**DIP Term Loan Facility**"), much of which will be used to pay down the Prepetition ABL Lenders, leaving them with a reduced balance all of which shall be granted superpriority status.

18. KPS will receive, in addition to interest and other fees, a 2% closing fee and a disguised additional break-up fee of 1%, in the form of a premium that has to be paid by any other bidder but does not have to be paid if KPS is the winning bidder, just like any other break-up fee. The amount it advances, plus interest at approximately 8%, the 2% closing fee and the 1% prepayment penalty will all get credited against its purchase price. It will be repaid everything it advanced, either in cash or through its bid, plus interest and fees, in just 3 months

19. The DIP Loan states that it is not due until 9 months after the Petition Date unless a sale is closed or a plan is confirmed before that date. A short extension of time for the entry of the final DIP Loan approval order and Bid Procedures Order will not require an extension of the ultimate 9-month term of the DIP Loan as proposed by the Debtors and the DIP Lenders.

20. The Interim DIP Order authorized the interim availability of \$158 million under the DIP ABL Facility as well as the application of all collections to the Prepetition ABL obligations with respect to the interim draw and an interim draw of \$20 million under the DIP Term Loan Facility provided by KPS. Based on their actual performance to date, this appears to provide sufficient availability for the Debtors through September 4, 2020.

21. Contemporaneously with the filing of the DIP Motion, the Debtors filed the *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' Assets 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* [Dkt. No. 53] (the “**Bidding Procedures Motion**”).

22. The Bidding Procedures Motion seeks approval of KPS as the Stalking Horse Bidder pursuant to the Stalking Horse Agreement. The Stalking Horse Agreement contemplates a sale of substantially all of the Debtors' assets to KPS for \$550 million, \$265 million of which is effectively being advanced through the DIP Term Loan, which will be repaid with interest and fees from the sale proceeds.

OBJECTION

A. The DIP Facilities Impermissibly Dictate and Limit the Terms of the Debtors' Restructuring

23. Approval of the DIP Facilities would require the Debtors to prove, *inter alia*, that the proposed DIP Facilities are fair, reasonable and adequate and necessary to preserve the estate. *In re Farmland Indus., Inc.*, 294 B.R. 855, 879-80 (Bankr. W.D. Mo. 2003), appeal dismissed, No. 03-00472 (W.D. Mo. Jan. 9, 2004); *In re Los Angeles Dodgers LLC*, 457 B.R. 308, 312 (Bankr. D. Del. 2011) (“In seeking approval of [DIP financing], the Debtors have the burden of proving that ... the terms of the transaction are fair, reasonable, and adequate, given the circumstances of the debtor-borrower and the proposed lender.”); *Farmland Indus.*, 294 B.R. 881; *In re Mid-State Raceway, Inc.*, 323 B.R. 40, 60 (Bankr. N.D.N.Y. 2005).

24. Bankruptcy courts have refused to approve proposed debtor in possession financing “where it is apparent that the purpose of the financing is to benefit a creditor rather than the estate,” (citing *In re Crouse Grp., Inc.*, 71 B.R. 544, 549 (Bankr. E.D. Pa. 1987), or “leverage the Chapter 11 process by granting the lender excessive control over the debtor or its assets as to unduly prejudice the rights of other parties in interest.” *In re Defender Drug Stores, Inc.*, 145 B.R. 312, 317 (B.A.P. 9th Cir. 1992). See also *In re Tenney Village Co.*, 104 B.R. 562, 567-70 (Bankr. D.N.H. 1989). Similarly, debtor in possession financing cannot convert the bankruptcy process from one designed to benefit all creditors to one designed for the sole or primary benefit of the debtor’s secured lenders or the proposed stalking horse bidder. See *In re Laffite’s Harbor Dev. I, LP*, 2018 WL 272781, at *2-3 (Bankr. S.D. Tex. Jan. 2, 2018) (bankruptcy courts “do not allow terms in financing arrangements that convert the bankruptcy process from one designed to benefit all creditors to one designed for the unwarranted benefit of the post-petition lender”); *In re Tenney Village Co., Inc.*, 104 B.R. 562, 568 (Bankr. D.N.H. 1989) (holding that the terms of a postpetition financing facility must not “pervert the reorganizational process from one designed to accommodate all classes of creditors ... to one specially crafted for the benefit [of one creditor]”). Here the proposed DIP Facilities benefit the stalking horse bidder by railroading a rushed, inadequate marketing process before it can even be reasonably determined whether sale is better for the Debtors, unsecured creditors and pension beneficiaries than a stand-alone plan. Even if a sale process were the best path forward, the rushed process that KPS seeks to drive through the strings it has attached to the proposed DIP Term Loan, are solely for its benefit.

25. Members of the Ad Hoc Group only received post-petition access to diligence starting in Sunday, August 9, 2020. In addition, the Committee was appointed on August 5,

2020, and then had to engage counsel and an investment advisor to start analyzing alternatives. The parties with the largest economic stake in any marginal dollars gained or lost through a sale must be given a reasonable amount of time to assess the Debtors' proposed DIP financing and cash needs over the course of the Chapter 11 cases, whether a sale is appropriate and, if so, what the timing of such a sale must be to maximize value, before this Court locks in a predetermined conclusion to these cases through the milestones in the DIP Facilities. The DIP Motion should not be granted on a final basis at this time on the proposed terms.

26. There are two distinct reasons not to rush to judgment on the approval of the milestones. First, creditors and this court need more time to determine whether a sale of the Debtors' assets is in the best interests of the Debtors' estates and their creditors. A plan of reorganization or a sale of non-core assets accompanied by stand-alone reorganization around a core business may generate far greater value. Entry into the DIP Facilities requiring the Debtors to consummate a sale of their assets now would be premature. *See, e.g., Mid-State Raceway*, 323 B.R. 59 (“[t]he bankruptcy court cannot, under the guise of section 364, approve financing arrangements that amount to a plan of reorganization but evade confirmation requirements”).

27. Moreover, even if a sale were the optimal path forward, the proposed milestones must be carefully scrutinized here because KPS has demanded the milestones because it is also the stalking horse bidder, who will benefit from minimizing competition. If this proposed DIP financing is approved, the compressed sale timeline and elimination of the alternative of a stand-alone plan create a substantial likelihood that bidding for the Debtors' assets will be chilled. The objection by Enerac demonstrates that the milestones provide bidders with inadequate time to submit competing bids.

28. Any competing DIP term loan facility from the Ad Hoc Group will be on similar

economic terms as the DIP Term Loan Facility funded by KPS, but without dictating a rushed, uncompetitive sale. Accordingly, the Court should not at this time enter a final order granting the DIP Motion, but rather defer entry of such final order to allow the Ad Hoc Group to complete its diligence process and be prepared to propose an alternative DIP term loan.

RESERVATION OF RIGHTS

29. As of this date of the filing of this Objection, the Ad Hoc Group and its professionals are still performing diligence relevant to the proposed DIP Facilities. Accordingly, the Ad Hoc Group reserves all rights to amend or supplement this Objection, to raise additional objections and to introduce evidence at any hearing relating to this Objection and the DIP Motion. The Ad Hoc Group also joins in and supports the Committee's objections to the financial and time limits the proposed DIP Facilities seek to impose on the Committee, which serves as the fiduciary for all unsecured creditors including the holders of Notes.

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CONCLUSION

WHEREFORE, the Ad Hoc Group requests that the Court (i) sustain this Objection, (ii) deny the relief requested in the DIP Motion, and (iii) grant the Ad Hoc Group such other or further relief as it deems appropriate.

Dated: August 13, 2020
Saint Louis, Missouri

Respectfully submitted,

/s/ Marshall C. Turner

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing pleadings was filed electronically on August 13, 2020, with the United States Bankruptcy Court, and has been served on the parties in interest via e-mail by the Court's CM/ECF System as listed on the Court's Electronic Mail Notice List.

Dated this 13th day of August 2020.

s/ Marshall C. Turner _____
Marshall C. Turner
Counsel for the Ad Hoc Group of Unsecured Noteholders