

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
SOUTHEASTERN DIVISION

In re:	§	Chapter 11
	§	
	§	Case No. 20-43597-399
BRIGGS & STRATTON CORPORATION, <i>et al.</i> ,	§	
	§	(Jointly Administered)
	§	
Debtors.	§	Hearing Date: November 9, 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 ORDER (I) AUTHORIZING USE, SALE, OR LEASE OF CERTAIN PROPERTY OF THE ESTATE, (II) ESTABLISHING PROCEDURES FOR DE MINIMIS ASSET SALES, AND (III) GRANTING RELATED RELIEF

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 July 20, 2020 (the “**Petition Date**”), the Debtors each commenced with this Court a voluntary case under title 11 of the United States Code (the “**Bankruptcy Code**”). The Debtors are authorized to continue to operate their business and manage their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. On August 5, 2020, the United States Trustee appointed an official committee of unsecured creditors (the “**Creditors’ Committee**”) in these chapter 11 cases pursuant to section 1102 of the Bankruptcy Code. No trustee or examiner has been appointed in these chapter 11 cases. The Debtors’ chapter 11 cases are being jointly administered for procedural purposes only pursuant to Rule 1015(b) of the Federal Rules of Bankruptcy Procedure



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

2. On the Petition Date, 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* [Docket No. 53]. On August 19, 2020, the Court entered an order [Docket No. 505] that, among other things, approved bidding procedures in connection with the sale of the Debtors’ assets, scheduled an auction to take place on September 1, 2020, and scheduled a sale hearing for September 15, 2020. On September 15, 2020, the Court entered an order authorizing the Debtors to sell substantially all of their assets¹ to Bucephalus Buyer, LLC (the “**Purchaser**”). On September 21, 2020, the Debtors closed the sale transaction (the “**Sale**”).² The Debtors continue to honor their post-closing Sale obligations, wind down their estates, and work on confirming a chapter 11 plan and otherwise concluding these chapter 11 cases

3. 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*

¹ *Order (I) Authorizing the Sale of the Assets and Equity Interests to the Purchaser Free and Clear of Liens, Claims, Interests, and Encumbrances; (II) Authorizing the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases; and (III) Granting Related Relief* [Docket No. 898].

² *See Notice of (I) Filing of Amendment to Stock and Asset Purchase Agreement, And (II) the Occurrence of Closing of the Sale Transaction* [Docket No. 964].

Support of the Debtors' Chapter 11 Petitions and First Day Relief [Docket No. 51] (the “**Ficks Declaration**”).³

Jurisdiction

4. 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

5. By this Motion, the Debtors seek entry of an order (the “**Proposed Order**”),⁴ pursuant to sections 363 and 105(a) of the Bankruptcy Code and Bankruptcy Rule 6004, (i) authorizing the use, sale, or lease of certain property of the Debtors’ estate, (ii) establishing procedures (as set forth below, the “**De Minimis Transaction Procedures**”) to authorize the Debtors to sell or otherwise transfer certain assets efficiently, including any rights or interests therein, that are of relatively *de minimis* value compared to the Debtors’ total asset base (the “**De Minimis Assets**”), and (iii) granting related relief.

De Minimis Assets and Proposed De Minimis Transaction Procedures

6. As the Court is aware, on September 21, 2020, the Debtors consummated the sale of substantially all of the Debtors’ assets and certain of the Debtors’ liabilities to Purchaser. In connection with the Debtors’ efforts to wind down their estates, the Debtors and their advisors are undertaking an analysis of the Debtors’ assets that were excluded from the sale and anticipate that they are likely to consummate certain sales, leases, or other transfers of De

³ 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.

⁴Copies of the Proposed Order will be made available on the Debtors’ case information website at <http://www.kccllc.net/Briggs>.

Minimis Assets during the pendency of these chapter 11 cases (the “**De Minimis Transactions**”).

A. Non-Sale De Minimis Assets

7. The De Minimis Transactions include the non-sale transfer of the following (the “**Non-Sale De Minimis Assets**”): (i) real property located in Munnsville, New York (the “**Munnsville Property**”) and (ii) funds in a bank account established by Briggs & Stratton Corporation (“**BSC**”) for the benefit of BSC and Daihatsu Motor Company Ltd. (“**Daihatsu**”) in connection with the now-dissolved joint venture between the parties (the “**DBS Bank Account**”).

8. The Munnsville Property is a small landlocked parcel of undeveloped land located adjacent to a wilderness trail that was initially part of a larger parcel of land that the Debtors purchased in January 2019 for \$120,000. The Debtors estimate the value of the Munnsville Property to be approximately \$48,000, based solely on the size of the property (as a percentage of the total parcel purchased) and multiplied by its assessed value. Prior to the Petition Date, the Debtors agreed to donate the property to a local school district in New York for use in the district’s agricultural education program, which would be the highest and best use of the property and would result in cost savings related to the payment of taxes on the property as well as the receipt of a tax deduction upon donation to the local school district.

9. The DBS Bank Account was funded through a \$25,000 contribution by each of BSC and Daihatsu in 1989 and was intended to cover product liability claims relating to engines manufactured by the joint venture. The joint venture was dissolved as of December 31, 2019, and the only remaining obligation of the Debtors is to wind down the DBS Bank Account, which currently has a balance of approximately \$80,000. Thus, upon Court approval, the Debtors intend to close the account and remit 50% of the account’s balance to Daihatsu based on

the parties' 50/50 contribution and ownership, while retaining the remaining 50% for the benefit of the Debtors' estates.

B. Sale/Lease De Minimis Assets

10. The Sale/Lease De Minimis Assets include: (i) real property located in Murray, Kentucky (the "**Murray Property**"); (ii) real property in Fort Pierce, Florida (the "**Fort Pierce Property**");⁵ and (iii) furniture, fixtures, vehicles, equipment and other miscellaneous personal property located at the Murray Property and Fort Pierce Property (collectively with the Murray Property and Fort Pierce Property, the "**Sale/Lease De Minimis Assets**").

11. While the Debtors intend to sell all the Sale/Lease De Minimis Assets as soon as possible, in the interim, the Debtors may have the opportunity to let the Fort Pierce Property to the Purchaser for use as a test site. The lease terms would include, among other things, the Purchaser (i) paying a monthly rental fee to the Debtors and (ii) paying all costs associated with the lease, including insurance coverage.

C. De Minimis Transactions

12. The Debtors expect that most of the De Minimis Transactions will be consummated in the ordinary course of the Debtors' business and, therefore, are arguably permitted under section 363(c) of the Bankruptcy Code without the need for Court authority. The Debtors also believe, however, that potential purchasers or sellers may request confirmation that the De Minimis Transactions are authorized by the Bankruptcy Court and/or are made free and clear of any liens under section 363(f) of the Bankruptcy Code. Further, the Debtors anticipate that it is possible that some De Minimis Transactions could conceivably constitute

⁵ The Debtors intend to enter into a listing agreement with, and file a retention application for, a broker to list and market the Murray Property and Fort Pierce Property.

transactions outside the ordinary course of the Debtors' business, thereby requiring this Court's approval pursuant to section 363(b)(1) of the Bankruptcy Code.

13. The Debtors submit that obtaining Court approval of each De Minimis Transaction would be administratively burdensome and costly to the Debtors' estates and could eliminate or substantially undermine economic benefits that would be realized from such transactions. In some instances, for example, the usual process for obtaining Court approval for such transactions may hinder the Debtors' ability to take advantage of sale opportunities that are available for only a limited time.

14. Accordingly, to alleviate the cost and delay of filing a separate motion for each proposed De Minimis Transaction, the Debtors seek approval of the De Minimis Transaction Procedures. The Debtors propose to utilize the De Minimis Transaction Procedures to obtain more expeditious and cost-effective review by parties in interest.

15. The Debtors believe that the proposed De Minimis Transaction Procedures set forth below will conserve the resources of the Court and the Debtors by avoiding the need for numerous motions to approve relatively modest sales or other transfers. The Debtors, with the support of the Creditors' Committee, submit that the entry of an order approving such procedures, and authorizing the sale or transfer of De Minimis Assets without further notice or hearing, other than as set forth below, is warranted under the circumstances and in furtherance of the Debtors' efforts to prosecute these chapter 11 cases efficiently, particularly in light of the market challenges faced by the Debtors.

D. Proposed De Minimis Transaction Procedures

16. The Debtors seek authorization to sell, lease, or transfer De Minimis Assets outside of the ordinary course of business pursuant to the procedures set forth below:⁶

- a. Non-Noticed Asset Transactions: For property that, in the Debtors' good faith determination, has a fair market value (aggregating the value of all property to be sold to the same purchaser) of less than \$250,000 and is proposed to be sold or transferred in a transaction, or in a series of related transactions (each, a "**Non-Noticed Transaction**"):
 - i. Business Judgment Standard. The Debtors are authorized to consummate the sale or transfer of such property without further order of the Bankruptcy Court or notice to any party if the Debtors determine in a reasonable exercise of their business judgment that such a sale or transfer is in the best interest of the Debtors' estates; provided that, three (3) business days prior to the consummation of such sale or transfer, the Debtors will (a) provide e-mail notification to counsel to the Creditors' Committee and the Office of the United States Trustee (the "**U.S. Trustee**") and (b) serve a notice to all known parties holding or asserting liens, claims, encumbrances or other interests in the assets being sold or transferred and their respective counsel, if known (collectively with the Creditors' Committee and U.S. Trustee, the "**Transaction Notice Parties**").
 - ii. Sale Free and Clear. Any such sale of property shall be free and clear of all liens, claims, and encumbrances ("**Liens**"), with any valid and properly perfected Liens attaching only to the sale proceeds with the same validity, extent, and priority as immediately prior to the transaction.
 - iii. Good Faith Purchaser. Each purchaser of property pursuant to such a sale will be afforded the protections of section 363(m) of the Bankruptcy Code as a good faith purchaser.
 - iv. Transaction Reports. Within 30 days following each quarterly period, commencing with the period ending December 31, 2020, the Debtors will file with the Bankruptcy Court a report summarizing any Non-Noticed Transactions that were completed pursuant to the De Minimis Transaction Procedures during the immediately preceding quarter, and serve it on the Transaction Notice Parties. With respect to each applicable Non-Noticed Transaction, each quarterly report shall identify (as applicable): (a) the De Minimis Assets sold or transferred; (b) a summary of the reasons for

⁶ Nothing in this Motion, the Proposed Order, or the De Minimis Transaction Procedures shall prohibit the Debtors from filing one or more motions to approve a sale of assets.

selling or transferring such De Minimis Assets; (c) the entity that purchased or received the De Minimis Assets; (d) the sale price for such De Minimis Assets; and (e) any broker or auctioneer that advised or assisted the Debtors with such transactions and any fees paid to such party in connection with such transactions.

b. Noticed Asset Transactions. For property that, in the Debtors' good faith determination, has a fair market value equal (aggregating the value of all property to be sold to the same purchaser) to or greater than \$250,000, and less than or equal to \$2,500,000, and is proposed to be sold in a transaction, or in a series of related transactions (each, a "**Noticed Transaction**"); provided, that the Debtors in their discretion may treat certain transactions with a fair market value of less than \$250,000 as a Noticed Transaction:

i. Business Judgment Standard. The Debtors are authorized to consummate such a sale without further order of the Bankruptcy Court, subject to the procedures set forth herein, if the Debtors determine in a reasonable exercise of their business judgment that such a sale or transfer is in the best interest of the Debtors' estates.

ii. Sale or Purchase Free and Clear. Any such sale shall be free and clear of all Liens, with any valid and perfected Liens attaching only to the sale proceeds with the same validity, extent, and priority as immediately prior to the transaction.

iii. Good Faith Purchaser. Each purchaser of property to such a sale will be afforded the protections of section 363(m) of the Bankruptcy Code as a good faith purchaser.

iv. Transaction Notice. The Debtors shall, at least seven days prior to closing such sale, file a written notice of such sale with the Court (each notice, a "**Transaction Notice**") and serve a Transaction Notice of such sale by e-mail, facsimile, or overnight delivery service to the Transaction Notice Parties. The Transaction Notice shall consist of, as applicable:

1. identification of the De Minimis Asset being sold;
2. identification of the purchaser of the De Minimis Asset and any relationship such party has with the Debtors;
3. identification of any parties known to the Debtors as holding Liens on the property being sold and a statement indicating whether (i) all such Liens are capable of monetary satisfaction, or (ii) the holders of such Liens have consented to the sale;
4. the sale price;
5. any other significant terms of the sale;

6. the date and time within which objections must be filed and served on the Debtors; and
 7. any broker or auctioneer that advised or assisted the Debtors with such transaction and any fees paid or to be paid to such party in connection with such transaction.
- v. Objection Procedures. Parties objecting to a Noticed Transaction must file and serve a written objection so that such objection is filed with the Bankruptcy Court and is actually received by the Transaction Notice Parties as well as counsel to the Debtors no later than seven (7) days after the date the Debtors serve the relevant Transaction Notice.
 - vi. No Objection. If no objection to a Noticed Transaction is timely filed by any of the Transaction Notice Parties within seven (7) days of service of such Transaction Notice, the Debtors are authorized to consummate such transaction immediately.
 - vii. Unresolved Objections. If a timely objection is filed and not withdrawn or resolved, the Debtors shall file a notice of hearing to consider the unresolved objection, and such hearing shall be held on an expedited basis. If such objection is overruled or withdrawn, or if the sale of De Minimis Assets is specifically approved by further order of the Bankruptcy Court, the Debtors are authorized to immediately consummate such transaction.
 - viii. Transaction Reports. Within 30 days following each quarterly period, commencing with the period ending December 31, 2020, the Debtors will file with the Bankruptcy Court a report summarizing any Noticed Transactions that were completed pursuant to the De Minimis Transaction Procedures during the immediately preceding quarter, and serve it on the Transaction Notice Parties. With respect to each applicable Noticed Transaction, each quarterly report shall identify (as applicable): (a) the De Minimis Assets sold; (b) a summary of the reasons for selling such De Minimis Assets; (c) the entity that purchased the De Minimis Assets; (d) the sale price for such De Minimis Assets; and (e) any broker or auctioneer that advised or assisted the Debtors with such transactions and any fees paid to such party in connection with such transactions.
- c. Sale Pursuant to Motion. For property that, in the Debtors' good faith determination, has a fair market value (aggregating the value of all property to be sold to the same purchaser) greater than \$2,500,000, and is proposed to be sold in a transaction, or in a series of related transactions, the Debtors shall seek authority to sell such property pursuant to a motion and in accordance with the Bankruptcy Code, Bankruptcy Rules, and Local Rules.

Relief Requested Should Be Granted

A. Selling or Buying De Minimis Assets Pursuant to Proposed De Minimis Transaction Procedures is a Reasonable Exercise of Debtors' Sound Business Judgment and in Best Interests of Estates

17. Section 363(b)(1) of the Bankruptcy Code provides, in relevant part, that “[t]he trustee, 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). Although section 363 does not specify a standard for determining when it is appropriate for a court to authorize the use, sale, or lease of property of the estate, courts routinely authorize a sale of a debtor’s assets if such sale is based upon the sound business judgment of the debtor. *See, e.g., 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 The Landing*, 156 B.R. 246, 249 (Bankr. E.D. Mo. 1993) (citing *In re George Walsh Chevrolet*, 118 B.R. 99, 102 (Bankr. E.D. Mo. 1990)); *see also Meyers v. Martin (In re Martin)*, 91 F.3d 389, 395 (3d Cir. 1996) (citing *In re Schipper*, 933 F.2d 513 (7th Cir. 1991)); *In re Chateaugay Corp.*, 973 F.2d 141, 143 (2d Cir. 1992); *Stephen Indus., Inc. v. McClung*, 789 F.2d 386 (6th Cir. 1986); *In re Trilogy Dev. Co., LLC*, 2010 Bankr. LEXIS 5636, at *3-4 (Bankr. W.D. Mo. 2010).

18. Courts typically consider the following factors in determining whether a proposed sale satisfies this standard: (i) whether a sound business justification exists for the sale; (ii) whether adequate and reasonable notice of the sale was provided to interested parties; (iii) whether the sale will produce a fair and reasonable price for the property; and (iv) whether the parties have acted in good faith. *See In re George Walsh Chevrolet*, 118 B.R. at 102; *In re The Landing*, 156 B.R. at 249; *In re Decora Indus., Inc.*, Case No. 00-4459, 2002 WL 32332749, at *2 (D. Del. May 20, 2002) (citing *In re Delaware & Hudson Ry. Co.*, 124 B.R. 169, 176 (D. Del. 1991)). Where a debtor demonstrates a valid business justification for a decision, it is presumed

that “in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company.” *Official Comm. of Subordinated Bondholders v. Integrated Res., Inc. (In re Integrated Res., Inc.)*, 147 B.R. 650, 656 (S.D.N.Y. 1990) (quoting *Smith v. Van Gorkom*, 488 A.2d 858, 872 (Del. 1985)).

19. A sound business purpose for the sale of a debtor’s assets outside the ordinary course of business exists where such sale is necessary to preserve the value of the estate for the benefit of creditors and interest holders. *See, e.g., In re Abbotts Dairies of Pa., Inc.*, 788 F.2d 143 (3d Cir. 1986); *In re Lionel Corp.*, 722 F.2d at 1063; *see also In re Food Barn Stores, Inc.*, 107 F.3d 558, 564–65 (8th Cir. 1997) (recognizing that paramount goal of any proposed sale of property of estate is to maximize value); *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.*, 107 F.3d at 566 n.16 (emphasis original, internal alterations and quotations omitted)).

20. Further, section 105 of the Bankruptcy Code provides, in relevant part, that “The 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). The Debtors submit that the Court 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 to the efficient administration of the Debtors’ estates.

21. The Debtors submit that selling or otherwise transferring De Minimis Assets pursuant to the proposed De Minimis Transaction Procedures represents a reasonable exercise of sound business judgment and is in the best interests of the Debtors’ estates. As

discussed above, the De Minimis Transaction Procedures provide for an efficient and cost-effective means of maximizing the value to be realized with respect to De Minimis Assets. The Debtors submit that obtaining Court approval for each De Minimis Transaction would be administratively burdensome to the Court, would result in unnecessary legal costs, and could significantly reduce the ultimate net benefit of certain De Minimis Transactions to the Debtors' estates. Further, as to the Murray and Fort Pierce properties, the Debtors are currently incurring costs associated with maintenance and the services of transferred employees needed to wind down the properties. As such, the Debtors would like to act expeditiously to sell the remaining assets at those locations to minimize administrative costs to the estates and provide a distribution to creditors as soon as possible upon emergence from chapter 11.

22. Moreover, the Debtors may face time constraints in meeting closing deadlines established by interested purchasers. The De Minimis Transaction Procedures will permit the Debtors to be responsive to the needs of interested purchasers (thereby minimizing the risk of lost sales due to delay), while still providing appropriate notice to review proposed transactions.

23. Notably, although the Debtors request authority to sell De Minimis Assets for a price of up to \$2,500,000, the Debtors believe that many individual transactions will, in fact, be for assets worth substantially less. In light of the size of the Debtors' estates, the proposed sale price limitations are relatively modest and appropriate. Further, the proposed price thresholds in the Motion were determined through negotiations and discussions with the Creditors' Committee.

24. For the foregoing reasons, the entry of an order authorizing and establishing procedures to use, lease, sell or transfer De Minimis Assets and to pay reasonable

and necessary fees and expenses incurred in connection with such transactions is necessary, appropriate, and in the best interests of the Debtors, their estates, and all other parties in interest in these cases. Accordingly, the Court should enter the Proposed Order and approve the proposed De Minimis Transaction Procedures.

B. De Minimis Transaction Procedures Satisfy Notice and Hearing Requirements Under Section 363(b)(1)

25. The notice and hearing requirements contained in section 363(b)(1) of the Bankruptcy Code are satisfied if appropriate notice and an opportunity for a hearing are given in light of the particular circumstances of a proposed transaction. *See* 11 U.S.C. § 102(1)(A) (defining “after notice and a hearing” to mean such notice and opportunity for a hearing “as [are] appropriate in the particular circumstances”). Courts have noted that “the notice requirements of bankruptcy law are ‘founded in fundamental notions of procedural due process.’” *Morgan Olson L.L.C. v. Frederico (In re Grumman Olson Indus., Inc.)*, 467 B.R. 694, 706 (S.D.N.Y. 2012) (citations omitted). Due process requires “notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Id.* (internal quotation marks and citations omitted).

26. Bankruptcy Rules 2002(a)(2) and 2002(i) require that a minimum of twenty-one (21) days’ notice of the proposed sale of property outside the ordinary course of business be provided by mail to “the debtor, the trustee, all creditors and indenture trustees” and any committee appointed under section 1102 of the Bankruptcy Code, unless a debtor shows “cause.” *See* Fed. R. Bankr. P. 2002(a)(2) and (i). Once the debtor shows “cause,” however, Bankruptcy Rule 2002(a)(2) authorizes this Court to shorten the generally applicable 21-day notice period and direct a method of giving notice other than by mail. *See* Fed. R. Bankr. P. 2002(a)(2). Moreover, this Court is authorized to limit notice of asset sales or purchases outside

of the ordinary course of a debtor's business, even without a prior showing of cause, to any official committee appointed under section 1102 of the Bankruptcy Code and any creditor or equity holder requesting notice. *See* Fed. R. Bankr. P. 2002(i).

27. In addition, the sale or transfer of property by the Debtors outside the ordinary course of business may be authorized without an actual hearing, if no party in interest timely requests such a hearing. *See* 11 U.S.C. § 102(1)(B)(i) (notwithstanding the statutory requirement for "notice and a hearing," the Bankruptcy Code "authorizes an act without an actual hearing if such notice is given properly and if such a hearing is not requested timely by a party in interest").

28. The De Minimis Transaction Procedures comply with the notice requirements of the Bankruptcy Code, as well as due process, by providing the Transaction Notice Parties with an opportunity to present objections to De Minimis Transactions for sales and transfers over \$250,000. With respect to sales or transfers up to \$250,000, the Debtors will file notices with the Court on a quarterly basis summarizing any such transactions.

29. Based on the foregoing, the Debtors submit that sufficient cause exists to implement the De Minimis Transaction Procedures and such procedures will improve the efficiency of the sale or transfer process for De Minimis Assets and maximize the value of the Debtors' estates.

C. Proposed De Minimis Transaction Procedures Satisfy Requirements of Section 363(f) and Allow Debtors to Sell or Transfer Property Free and Clear

30. Pursuant to section 363(f) of the Bankruptcy Code, a debtor may sell property under section 363(b) free and clear of any liens, claims, encumbrances, and other interests of an entity other than the estate if one of the following conditions is satisfied: (i) applicable nonbankruptcy law permits the sale of such property free and clear of such interest;

(ii) such entity consents; (iii) the interest is a lien and the sales price of the property exceeds the value of all liens on the property; (iv) the interest is in bona fide dispute; or (v) the holder of the interest could be compelled in a legal or equitable proceeding to accept a monetary satisfaction of its interest. 11 U.S.C. § 363(f)(1)–(5); *see Lindsay v. Ipock*, 732 F.2d 619, 622 (8th Cir. 1984) (citing the conditions set forth in section 363(f)); *see also In re Kellstrom Indus., Inc.*, 282 B.R. 787, 793 (Bankr. D. Del. 2002) (“Section 363(f) is written in the disjunctive, not the conjunctive, and if any of the five conditions are met, the debtor has the authority to conduct the sale free and clear of all liens.”); *The Mutual Life Inc. Co. of New York v. Red Oak Farms, Inc. (In re Red Oak Farms, Inc.)*, 36 B.R. 856, 857–858 (Bankr. W.D. Mo. 1984) (same); *Citicorp Homeowners Servs., Inc. v. Elliot (In re Elliot)*, 94 B.R. 343, 345 (E.D. Pa. 1988) (same).

31. The Debtors submit that the De Minimis Transaction Procedures satisfy the requirements of section 363(f) of the Bankruptcy Code. Pursuant to the De Minimis Transaction Procedures, for sales of assets worth more than \$1,000,000, to the extent there are any known holders of liens on the De Minimis Assets, the Debtors will provide such parties with a Transaction Notice prior to the disposition of the applicable De Minimis Asset. Absent any objection to a De Minimis Asset Transaction, a holder of a lien shall be deemed to consent to the De Minimis Transaction and such asset may be sold free and clear of such lien. *See Veltman v. Whetzal*, 93 F.3d 517, 520 (8th Cir. 1996) (finding that having received adequate notice of sale free of ownership interest, a lack of objection constituted a waiver of a request for a hearing); *see also FutureSource LLC v. Reuters Ltd.*, 312 F.3d 281, 285 (7th Cir. 2002) (“It is true that the Bankruptcy Code limits the conditions under which an interest can be extinguished by a bankruptcy sale, but one of those conditions is the consent of the interest holder, and lack of objection (provided of course there is notice) counts as consent.”); *In re Christ Hosp.*, 502 B.R.

158, 174-75 (Bankr. D.N.J. 2013) (“Silence by affected claim holders may constitute consent for purposes of section 363(f)(2).”); *In re Borders Grp., Inc.*, 453 B.R. 477 (Bankr. S.D.N.Y. 2011) (“Under section 363(f)(2), a lienholder who receives notice of a sale but does not object within the prescribed time period is deemed to consent to the proposed sale, and assets thereafter may be sold free and clear of liens.”); *In re Enron Corp.*, Case No. 01–16034 (AJG), 2003 WL 21755006, at *2 (Bankr. S.D.N.Y. July 28, 2003) (order deeming all parties who did not object to proposed sale to have consented under section 363(f)(2)). As noted above, the interests of a holder of a lien will attach to the proceeds of the sale or transfer, subject to any rights and defenses of the Debtors with respect thereto. To the extent consent of a lienholder is not obtained or deemed to have been obtained, the Debtors submit that with respect to any proposed transaction, the holder of any lien could be compelled in a legal or equitable proceeding to accept a monetary satisfaction of its interest.

D. Purchasers of De Minimis Assets Should Be Entitled to Protections of Section 363(m)

32. Section 363(m) of the Bankruptcy Code provides:

The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

11 U.S.C. § 363(m).

33. Pursuant to Bankruptcy Code section 363(m), a good faith purchaser is one that purchases assets for value, in good faith, and without notice of adverse claims. *See In re Trism, Inc.*, 328 F.3d 1003, 1008 (8th Cir. 2003) (“Section 363(m) protects a good faith purchaser and lists no other exceptions or any other qualifications to receive the protection of section 363(m).”). Section 363(m) fosters the “policy of not only affording finality to the

judgment of the [B]ankruptcy [C]ourt, but particularly to give finality to those orders and judgments upon which third parties rely.” *Reloeb Co. v. LTV Corp (In re Chateaugay Corp.*, No. 92 Civ. 7054 (PKL), 1993 U.S. Dist. Lexis 6130, at *9 (S.D.N.Y. May 10, 1993) (quoting *In re Abbotts Dairies of Pa., Inc.*, 788 F.2d 143, 147 (3d Cir. 1986)); *see also U.S. v. Whitney Design, Inc. (In re Whitney Design, Inc.)*, No. 4:10-CV-441, 2011 WL 13254299, at *2 (E.D. Mo. Jan. 11, 2011) (the purpose of Section 363 is to protect third party purchasers in good faith and “by providing reliability and finality, §363 enhances the value of the debtor’s assets sold in bankruptcy”). The De Minimis Transaction Procedures provide for certain parties to receive notice and the opportunity to object for sales and transfers over \$250,000, and for the Debtors to file a notice summarizing sales or transfers up to \$250,000. Further, the Proposed Order provides that the De Minimis Transaction Procedures do not apply to transactions with insiders. As such, the Debtors submit that any De Minimis Transaction consummated in accordance with such procedures will be an arm’s length transaction entitling a purchaser to the protections of section 363(m) of the Bankruptcy Code.

E. Procedures Similar to the Proposed De Minimis Transaction Procedures Have Been Approved in Other Chapter 11 Cases

34. In light of the demonstrable benefits of streamlined procedures to sell or transfer De Minimis Assets and the legal justifications described above, this Court and bankruptcy courts in other circuits have approved procedures similar to the De Minimis Transaction Procedures in other large chapter 11 cases. *See, e.g., In re Noranda Aluminum*, No. 16-10083 (Bankr. E.D. Mo. Apr. 15, 2016) (authorizing sales up to \$ 2 million pursuant to de minimis asset sale procedures); *In re Arch Coal, Inc.*, No. 16-40120 (CER) (Bankr. E.D. Mo. Feb. 24, 2016) (authorizing sales up to \$7.5 million pursuant to de minimis asset sale procedures); *see also In re EP Energy Corp.*, No. 19-35654 (MI) (Bankr. S.D. Tex. Apr. 27,

2020) (Docket No. 1198) (authorizing sales up to \$10 million pursuant to de minimis asset sale procedures); *In re Bristow Group Inc.*, No. 19-32713 (Bankr. S.D. Tex. July 22, 2019) (authorizing sales up to \$10 million pursuant to de minimis asset sale procedures); *In re iHeartMedia, Inc.*, No. 18-31274 (Bankr. S.D. Tex. June 21, 2018) (authorizing sales up to \$15 million pursuant to de minimis asset sale procedures); *In re Westinghouse Electric Company LLC* No. 17-10751 (Bankr. S.D.N.Y. January 25, 2018) (authorizing sales up to \$5 million pursuant to de minimis asset sale procedures); *In re Vanguard Natural Resources, LLC*, No. 17-30560 (Bankr. S.D. Tex. March 1, 2017) (authorizing sales up to \$10 million pursuant to de minimis asset sale procedures); *In re CHC Group Ltd.*, No. 16-31854 (Bankr. N.D. Tex. Dec. 5, 2016) (authorizing sales up to \$10 million pursuant to de minimis asset sale procedures); *In re Energy Future Holdings Corp.*, No. 14-10979 (Bankr. D. Del. Jun. 3, 2014) (authorizing sales up to \$5 million pursuant to de minimis asset sale procedures); *In re Visteon Corp.*, No. 09-11786 (Bankr. D. Del. July 16, 2009) (authorizing sales up to \$10 million pursuant to de minimis asset sale procedures); *In re Charter Communications, Inc.*, Case No. 09-11435 (Bankr. S.D.N.Y. Apr. 15, 2009) (authorizing sales up to \$15 million pursuant to de minimis asset sale procedures); *In re Calpine Corp.*, Case No. 05-60200 (Bankr. S.D.N.Y. March 1, 2006) (authorizing sales up to \$15 million pursuant to de minimis asset sale procedures).

35. For the foregoing reasons, the requested relief is necessary, appropriate, and in the best interests of the Debtors, their estates, and all other parties in interest in these cases. Accordingly, the Court should authorize the Debtors to use, sell, and lease the De Minimis Assets as described here and approval the De Minimis Asset Transaction Procedures.

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

36. To implement the foregoing successfully, the Debtors request that the Court find that notice of the Motion satisfies Bankruptcy Rule 6004(a) and that the Court waive the 14-day period under Bankruptcy Rule 6004(h).

Reservation of Rights

37. 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

38. 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 thirty (30) largest unsecured claims against the Debtors on a consolidated basis; (iii) Latham & Watkins LLP (Attn: Peter P. Knight, Esq. and Jonathan C. Gordon, Esq.), as counsel to JPMorgan Chase Bank, N.A., as the administrative agent and collateral agent under the ABL Credit Facility and DIP Facility; (iv) Pryor Cashman LLP (Attn: Seth H. Lieberman, Esq. and David W. Smith, Esq.), as counsel

to Wilmington Trust, N.A., as successor indenture trustee under the Unsecured Notes; (v) the United States Attorney's Office for the Eastern District of Missouri; (vi) Brown Rudnick LLP (Attn: Robert J. Stark, Esq. and Osaka P. Lashko, Esq.), as counsel to the Creditors' Committee; (vii) any other party that has requested notice pursuant to Bankruptcy Rule 2002; and (viii) any other party entitled to notice pursuant to Local Rule 9013-3(E) (collectively, the "**Notice Parties**"). Notice of this Motion and any order entered hereon will be served in accordance with Local Rule 9013-3(E)(1).

No Previous Request

39. 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 granting the relief requested herein and such other and further relief as the Court may deem just and appropriate.

Dated: October 19, 2020
St. Louis, Missouri

Respectfully submitted,

CARMODY MACDONALD P.C.

/s/ Robert E. Eggmann

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