Docket #1444 Date Filed: 12/16/2020

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. 1434** **Response Deadline: December 16, 2020** **Hearing Date: December 18, 2020 at 9 a.m. (CT)**

STATEMENT OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS IN SUPPORT OF CONFIRMATION OF THE DEBTORS' SECOND AMENDED JOINT CHAPTER 11 PLAN OF BRIGGS & STRATTON CORPORATION AND ITS AFFILIATED DEBTORS

The Official Committee of Unsecured Creditors (the "Committee") appointed in the above-captioned Chapter 11 cases of Briggs & Stratton Corporation (with its affiliated debtors and debtors-in-possession, collectively, the "Debtors"), by and through its undersigned counsel, hereby files this statement (the "Statement") in support of the *Second Amended Joint Chapter 11 Plan Of Briggs & Stratton Corporation And Its Affiliated Debtors* [Exhibit A to Dkt. No. 1434] (the "Plan") and reply to the objections of the United States Trustee [Dkt. No. 1405] the ("UST Objection") and the Securities and Exchange Commission [Dkt. No. 1401] (the "SEC Objection" and, together with the UST Objection, the "Objections").[2] In support of this Statement, the Committee respectfully states as follows:

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[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.

[2] Capitalized terms used herein but not otherwise defined shall have the meanings ascribed to them in the Plan.

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PRELIMINARY STATEMENT

1. Just a few months ago, the Committee was preparing to challenge the proposed sale of the Debtors to KPS. Such challenge would have set these cases on an elongated trial path with an uncertain litigation outcome that would have likely eroded whatever distributable value was left for unsecured creditors.

2. Fortunately, such a fight was avoided. The Committee, the Debtors, the Pension Benefit Guaranty Corporation (the "PBGC") and the DIP ABL Secured Parties reached a consensual and comprehensive settlement (the "Global Settlement") with the valuable participation of all Committee members (including Wilmington Trust as indenture trustee (the "Indenture Trustee") to the Debtors' noteholders) and the ad hoc group of unsecured noteholders.

3. The Global Settlement was approved by this Court at the sale hearing and is embodied in the Plan. Notably, the Global Settlement provides for, among other things:

a) PBGC's subordination of the first $5 million of its recoveries for the benefit of general unsecured creditors;
b) releases by the PBGC of certain non-debtor foreign subsidiaries from pension obligations;
c) contribution of $800,000 by the prepetition ABL lenders of their recoveries to resolve the Committee's potential lien challenge;
d) meaningful recoveries for unsecured creditors; and
e) release and waiver of all Chapter 5 causes of action against general unsecured creditors.[3]

4. Importantly, the Global Settlement is predicated on a timely sale (on or prior to September 27, 2020, which had occurred) and confirmation of the Plan that "facilitates, implements, and otherwise gives effect to the [Global Settlement]" in order to maximize the

[3] *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* (the "Sale Order") [Dkt. No. 898] at ¶ 37.

recoveries available for unsecured creditors. Sale Order at ¶ 37(g) and (k). As the terms of the Global Settlement dictate, during the past few months, the Debtors and the Committee have worked diligently and in good faith towards achieving a confirmation of the Plan that would effectuate the Global Settlement by year-end. As a result of the Global Settlement, the Plan enjoys overwhelming support from all creditors.[4] However, any delay in confirmation beyond December 2020 risks significant costs to the Debtors' estates and to unsecured creditor recoveries and threatens to unwind the hard work of the parties in reaching this point.

5. Despite the overwhelming creditor support for the Plan, the United States Trustee (the "UST") and the Securities and Exchange Commission (the "SEC") seek to block what otherwise can only be described as a successful chapter process—achieving a real distribution to unsecured creditors. Specifically, the UST Objection alleges that the Plan (i) improperly proposes the third-party releases (the "Third-Party Releases") through an opt-out election;[5] (ii) inappropriately extends exculpation coverage beyond estate fiduciaries; (iii) fails to meet the requirements of Section 503(b) as it pertains to payment of indenture trustee fees (the "Indenture Trustee Fees"); and (iv) improperly imposes the terms of the Global Settlement on parties-in-interest affected by the Plan. As explained in greater detail below, neither of the Objections hold any merit and the objectors ignore the fact that, absent the Global Settlement embodied in the Plan, the distributable cash that is currently available to general unsecured creditors would have likely

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4 Pursuant to the voting results, creditor acceptance by class ranged from 77% to 100% in number and 96% to 100% in amount. *See Declaration Of Angela M. Nguyen With Respect To The Tabulation Of Votes On The Amended Joint Chapter 11 Plan Of Briggs & Stratton Corporation And Its Affiliated Debtors* [Docket No. 1410].

5 The SEC's Objection is limited to this one issue.

been reduced to zero.[6]

6. With respect to exculpation, release and settlement provisions of the Plan, as detailed below, each of these provisions is appropriate under the circumstances, supported by the Bankruptcy Code and legal precedent. The Committee also fully joins and supports the Debtors' arguments set forth in the Debtors' *Memorandum of Law in Support of Confirmation of Second Amended Joint Chapter 11 Plan of Briggs & Stratton Corporation and Its Affiliated Debtors and Response to Objections to Confirmation*, filed concurrently herewith, with respect to these and all other issues.

7. Likewise, the UST's objection to the payment of the Indenture Trustee Fees should be overruled. The payment of the Indenture Trustee Fees was specifically included as an integral component of the Global Settlement embodied in the Plan. Absent this key component, the Indenture Trustee would be forced to utilize its charging lien under the unsecured notes indenture (the "Indenture") against the unsecured noteholders' distributions under the Plan. In short, the UST insists that the Court unilaterally strip out of the Global Settlement a material and vital component of that comprehensive resolution. However, forcing the Indenture Trustee to exercise its charging lien under these circumstances would lower the noteholders' projected distributions under the Plan. The unsecured creditors are not made whole, by any means, under the projected Plan distributions, but the Global Settlement ensures that unsecured creditors receive whatever available cash is left in the Debtors' estates, rather than walking away with nothing. Mandating that section 503(b) is the only means for payment of the Indenture Trustee Fees not only flies in the face of prevailing jurisprudence, but also undermines the Global Settlement and the Plan that

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[6] *See* Sale Order at ¶ 37; *Key Terms of Global Settlement* presented at the sale hearing on September 15, 2020, attached hereto as **Exhibit A**.

was voted and overwhelmingly approved by a majority of creditors. The payment of the Indenture Trustee Fees under the Plan pursuant to the Global Settlement is both permissible under the Bankruptcy Code and consistent with the precedent in this and other districts.

8. As such, the Committee respectfully requests that this Court overrule any and all objections and confirm the Plan.

STATEMENT IN SUPPORT

I. EXCULPATION OF THE RELEASED PARTIES IS APPROPRIATE.

9. There is no controversy to include the Related Parties in the exculpation under the Plan. Section 10.7 of the Plan provides for exculpation of (i) the Debtors; (ii) the Committee; and (iii) all Related Parties (as defined in Section 1.96 of the Plan) of the Debtors and the Committee from certain liabilities relating to the Plan or these cases. *See* Plan at § 10.7. The UST objects to the exculpation provision to the extent that it includes the Related Parties as non-estate fiduciaries. Specifically, the UST Objection draws a quixotic line with the inclusion of "predecessors, successors, and heirs" of the Exculpated Parties because they were not fiduciaries of the Estates during the chapter 11 proceedings. UST Obj. at ¶ 28.

10. The UST Objection appears to both misplace and misunderstand the purpose of the exculpation and the inclusion of the Related Parties. The exculpation is a limited form of relief "*arising out of the administration of*" and other postpetition efforts taken during the Chapter 11 Cases. Plan at § 10.7 (emphasis added). Inclusion of the Related Parties is necessary to provide the proper protection of the exculpation to the fiduciaries it is intended to protect.

11. For example, without the protection the exculpation provides, parties could pursue causes of action against the Debtors' successors, for actions taken by the Debtors during the administration of the Chapter 11 Cases. In such a scenario, the exculpation would provide no real

purpose or protection. Similarly, many of the Related Parties include professionals and officers and directors of the Exculpated Parties who, if not direct fiduciaries of the Estates, are the parties whose judgement and expertise led to the actions taken by those fiduciaries. Exculpation for these "fiduciaries of fiduciaries" is a logical and direct extension of the protections that the exculpation is meant to provide where the mandate of such parties is ultimately to act in the best interests of the Estates.

12. Inclusion of the Related Parties in the exculpation is not controversial. In fact, numerous courts in this and other districts have recognized that a plan exculpation may extend to parties beyond those that are direct estate fiduciaries. *See, e.g., In re Patriot Coal Corp.*, Case No. 12-51502 (KAS) (Bankr. E.D. Mo. Dec. 18, 2013) (exculpation included DIP Agent, DIP lenders, prepetition lenders and prepetition notes trustees); *In re Am. Bancorporation*, Case No. 14-31882 (KAC) (Bankr. D. Minn. Feb. 29, 2016) (exculpation included debtor's shareholders); *In re Deerfield Retirement Cmty., Inc.*, Case No. 14-00052 (ALS) (Bankr. S.D. Iowa Mar. 7, 2014) (exculpation included prepetition secured lender and prepetition bondholders); *In re Otter Tail Ag Ent.*, LLC, Case No. 09-61250 (DDO) (Bankr. D. Minn. June 1, 2011) (exculpation included prepetition lenders and prepetition bondholders); *In re Sabine Oil & Gas Corp.*, Case No. 15-11835 (SCC) (Bankr. S.D.N.Y. July 27, 2016) (exculpation included prepetition lenders); *In re Venoco, Inc.*, Case No. 16-10655 (KG) (Bankr. D. Del. July 14, 2016) (exculpation included DIP agent, DIP lenders, each party to the debtors' restructuring support agreement, prepetition noteholders and prepetition notes trustees); *In re Alpha Natural Res.*, Inc., Case No. 15-33896 (KRH) (Bankr. E.D. Va. July 12, 2016) (exculpation included DIP Agent, DIP lenders, prepetition lenders and prepetition notes trustee); *In re Verso Corp.*, Case No. 16-10163 (KG) (Bankr. D. Del. June 23, 2016) (exculpation included DIP agent, DIP lenders, each party to the debtors'

restructuring support agreement, agents under the debtors' prepetition credit agreements and the debtors' private equity sponsor); *In re Magnum Hunter Res. Corp.*, Case No. 15-12533 (KG) (Bankr. D. Del. Apr. 18, 2016) (exculpation included DIP agent, DIP lenders and prepetition notes trustee); *In re James River Coal Co.*, Case No. 14-31848 (KHR) (Bankr. E.D. Va. Mar. 21, 2016) (exculpation included DIP agent, DIP lenders and prepetition notes trustee).

13. Moreover, courts have allowed exculpation provisions to extend to non-estate fiduciaries where such provisions contain carve-outs for behavior amounting to gross negligence or willful misconduct. *See, e.g., In re Loehmann's Holdings Inc.*, Case No. 10-16077 (REG) (Bankr. S.D.N.Y. Feb. 9, 2011) (upholding similar exculpation provision as "appropriately tailored" to protect released parties from "inappropriate litigation").

14. Accordingly, the exculpation set forth in Section 10.7 of the Plan should be allowed for those Exculpated Parties, including the Related Parties thereof.

II. THE THIRD-PARTY RELEASES ARE APPROPRIATE.

15. Section 10.6 of the Plan provides for certain releases, on a consensual basis, of claims against the Released Parties held by certain creditors and interest holders. Specifically, Section 10.6 provides that the following parties are deemed to have made certain releases of claims and causes of action:

a) the Committee;

b) all holders of Claims who are entitled to vote on the Plan and who vote to accept the Plan;

c) all holders of Claims whose vote is solicited but who abstain from voting and do not elect to exercise their right to opt-out of the releases;

d) holders of Claims or Interests who are deemed to accept or reject but do not exercise their right to opt-out of the releases; and

e) with respect to any person or entity in (a) to (d), such entity's predecessors, successors, assigns, subsidiaries, affiliates, managed accounts or funds.

Plan at § 10.6.

16. Courts have consistently allowed opt-out mechanisms to be applied to non-debtor third-party releases like those in the Plan where the debtor provided creditors with detailed instructions on how to opt-out. *See, e.g.*, *In re Foresight Energy LP*, Case No. 20-41308 (KAS) (Bankr. E.D. Mo. Jun. 24, 2020) [Docket No. 593] (confirming plan and approving third-party releases by creditors who had consented by not opting out of the release, either by abstaining from voting or by voting against the plan without affirmatively electing to opt out); *In re Payless Holdings LLC II*¸ Case No. 19-40883 (KAS) (Bankr. E.D. Mo. Oct. 23, 2019) [Docket No. 1701] (same); *In re Armstrong*, Case No. 17-47541 (KAS) (Bankr. E.D. Mo. Feb. 2, 2018) [Docket No. 527] (same); *In re Payless Holdings LLC I*, Case No. 17-42267 (KAS) (Bankr. E.D. Mo. July 26, 2017) [Docket No. 1676] (same); *In re Arch Coal, Inc.*, Case No. 16-40120 (CER) (Bankr. E.D. Mo. Sep. 15, 2016) [Docket No. 1334] (same).[7]

17. Moreover, courts have found that non-debtor releases are allowable where claimants or interest holders are unimpaired or are in classes deemed to reject the plan where they are given an opportunity to opt-out of such releases. *See, e.g.*, *In re Payless Holdings LLC II*¸ Case No. 19-40883 (KAS) (Bankr. E.D. Mo. Oct. 23, 2019) [Docket No. 1701] (approving a plan with third-party releases that included as releasing parties all holders deemed to reject that did not opt out of the releases); *In re Armstrong*, Case No. 17-47541 (KAS) (Bankr. E.D. Mo. Feb. 2, 2018)

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[7] *See also In re Rentpath Holdings, Inc.*, Case No. 20-10312 (BLS) (Bankr. D. Del. Jun. 10, 2020) [Docket No. 416] (same*); In re Gen. Wireless Ops. Inc. dba Radioshack*, Case No. 17-10506 (BLS) (Bankr. D. Del. Oct. 26, 2017) [Docket No. 1117] (same); *In re New Gulf Res., LLC*, Case No. 15-12566 (BLS) (Bankr. D. Del. Apr. 20, 2016) [Docket No. 514] (same); *In re Am. Apparel, Inc.*, Case No. 15-12055 (BLS) (Bankr. D. Del. Jan. 27, 2016) [Docket No. 687] (same); *see also In re Indianapolis Downs LLC*, 486 B.R. 286, 306 (Bankr. D. Del. 2013) ("As for those impaired creditors who abstained from voting on the Plan, or who voted to reject the Plan and did not otherwise opt out of the releases, the record reflects these parties were provided detailed instructions on how to opt out, and had the opportunity to do so by marking their ballots. Under these circumstances, the Third Party Releases may be properly characterized as consensual and will be approved.").

[Docket No. 527] (same); *In re Payless Holdings LLC I*, Case No. 17-42267 (KAS) (Bankr. E.D. Mo. Aug. 10, 2017) [Docket No. 1759] (same); *In re Arch Coal, Inc.*, Case No. 16-40120 (CER) (Bankr. E.D. Mo. Sep. 15, 2016) [Docket No. 1334] (same).[8]

18. Here, claimants and interest holders have been given ample notice of and clear instruction regarding their ability to opt-out of the Third-Party Releases. The Debtors' ballots provide, in bold font:

> **a) If you vote to accept the Plan, you shall be deemed to have consented to the release, injunction, and exculpation provisions set forth in Sections 10.4, 10.5, 10.6, 10.7, 10.8, and 10.9 of the Plan.**
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> **b) If you (i) do not vote either to accept or reject the Plan or (ii) vote to reject the Plan and, in each case, do not check the box in Item 3 below, you shall be deemed to have consented to the release provisions set forth in Section 10.6 of the Plan.**

19. Where a creditor is not entitled to vote on the Plan, such creditor has been provided with notice of such non-voting status. This notice includes the following statement regarding the opt-out provision of the Third-Party Releases:

> **"IF YOU DO NOT OPT OUT OF GRANTING THE RELEASES SET FORTH IN THE PLAN USING THE "OPT-OUT FORM" ANNEXED HERETO, YOU SHALL BE DEEMED TO HAVE CONSENTED TO THE RELEASES CONTAINED IN SECTION 10.6 OF THE PLAN."**

20. Courts in this district have approved similar means of disclosure concerning release

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[8] *See also In re SLT Holdco, Inc*, Case No. 20-18368 (MBK) (Bankr. D.N.J. Sep. 16, 2020) [Docket No. 461] (approving disclosure statement for plan in which holders deemed to reject were included as releasing parties); *In re Rentpath Holdings, Inc.*, Case No. 20-10312 (BLS) (Bankr. D. Del. Jun. 10, 2020) [Docket No. 416] (confirming plan in which holders deemed to reject were included as releasing parties); Hr'g Tr. at 110:5-22, *In re Insys Therapeutics, Inc.*, Case No. 19-11292 (KG) (Bankr. D, Del. Jan. 16, 2020) (approving third party releases in plan where there was clear notice of the opt-out requirement and the releases were essential to the plan); *In re Hexion Holdings LLC*, Case No. 19-10684 (KG) (Bankr. D. Del. June, 25, 2019) [Docket No. 920] (confirming a plan with third-party releases that included as releasing parties all holders deemed to reject that did not file a timely objection to confirmation of the plan with respect to the releases); *In re EV Energy Partners, L.P.*, Case No. 18-10814 (CSS) (Bankr. D. Del. May 17, 2018) [Docket No. 238] (confirming a plan where holders in deemed rejecting classes had to affirmatively opt out of third-party releases).

opt-out mechanisms. *See, e.g.*, *In re Foresight Energy LP*, Case No. 20-41308 (KAS) (Bankr. E.D. Mo. May 20, 2020) [Docket No. 463] (approving disclosure statement and ballots that described the consequences of abstaining or not checking the opt-out box); *In re Payless Holdings LLC II*¸ Case No. 19-40883 (KAS) (Bankr. E.D. Mo. Sep. 18, 2019) [Docket No. 1595] (same); *In re Armstrong*, Case No. 17-47541 (KAS) (Bankr. E.D. Mo. Dec. 18, 2017) [Docket No. 322] (same); *In re Payless Holdings LLC I*, Case No. 17-42267 (KAS) (Bankr. E.D. Mo. Jun. 23, 2017) [Docket No. 1261] (same); *In re Arch Coal, Inc.*, Case No. 16-40120 (CER) (Bankr. E.D. Mo. Jul. 8, 2016) [Docket No. 1101] (same).[9]

21. Moreover, the Released Parties, including the Indenture Trustee, have been crucial to arriving at a successful Plan with a meaningful recovery to unsecured creditors. Throughout these cases and even before, the Indenture Trustee has worked tirelessly with the Debtors in achieving a successful resolution given the circumstances of this case for all stakeholders.

22. Holders of Claims subjected to the Third-Party Releases have been provided proper notice for the ability to opt-out of such releases in a manner this Court and others have found acceptable. As such, the Third-Party Releases should be approved.

III. PAYMENT OF THE UNSECURED NOTES INDENTURE TRUSTEE FEES IS APPROPRIATE UNDER THE PLAN.

23. Section 2.4 of the Plan provides for the payment in full on the Effective Date "of all accrued and unpaid reasonable and documented and undisputed [Indenture Trustee Fees]"

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[9] *See also In re Insys Therapeutics, Inc.*, Case No. 19-11292 (KG) (Bankr. D. Del. Jan. 16, 2020) [Docket No. 1115] (approving third party releases in plan where there was clear notice of the opt-out requirement); *In re Allied Nev. Gold Corp.*, Case No. 15-10503 (MFW) (Bankr. D. Del. Aug. 28, 2015) [Docket No. 940] (order approving disclosure statement and ballots that described in bold font the consequences of abstaining or not checking the opt out box); *In re Dendreon Corp.*, Case No. 14-12515 (LSS) (Bankr. D. Del. Apr. 15, 2015) [Docket No. 596] (same); *In re CWC Liquidation Inc.*, Case No. 14-10867 (BLS) (Bankr. D. Del. Aug. 8, 2014) [Docket No. 839] (same).

pursuant to the terms of the Global Settlement, incurred up to (and including) the Effective Date. Plan at § 2.4. Section 2.4 of the Plan further explains that such payment is authorized under "Sections 363(b), 364(b), and 503(b) of the Bankruptcy Code as said payment is a material term of the Global Settlement which is embodied in and is part of the Plan . . . ." *Id.*

24. The UST objects to the payment of the Indenture Trustee Fees and contends that the payment of such fees does not meet the requirements under Section 503, "which is the 'sole source' of authority to pay post-petition professional fees on an administrative basis." UST Obj. at ¶ 32. The UST relies on *Davis v. Elliot Management Corp. (In re Lehman Bros. Holdings Inc.)*, 508 B.R. 283, 290 (S.D.N.Y. 2014) to support its contentions. However, the UST is incorrect as a matter of law and the facts of this case necessitate payment of such fees as provided for in Section 2.4 of the Plan.

A. Payment of Indenture Trustee Fees is an Integral Part of Global Settlement.

25. Contrary to the UST's suggestion that the payment of trustee fees can only be approved by separate application under section 503(b), as several courts in this and other districts have held, payment of Indenture Trustee fees under a plan and pursuant to a settlement is proper. Payment of the Indenture Trustee Fees is a key part of the Global Settlement and enables the Debtors to pay amounts necessary to permit the unsecured noteholders to obtain the full benefit of their projected Plan recoveries free and clear of the Indenture Trustee's right to withhold the Indenture Trustee Fees from such recoveries. Absent such payment pursuant to the Global Settlement and the Plan, the agreed distributions to unsecured noteholders would be reduced as the Indenture Trustee would have no choice but to exercise its charging lien under the Indenture.[10]

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[10] Section 7.07 [Compensation and Indemnity] of the Indenture, attached hereto as **Exhibit B**, provides in relevant part:

26. The UST's precise objection on this identical issue was raised by the UST in this district and overruled. *In re Arch Coal, Inc*., et al. (No. 16-40120) (CER). In *Arch Coal*, after months of negotiations, the debtors, the unsecured creditors' committee, the indenture trustee and the secured lenders achieved a global settlement that resolved numerous case issues and avoided multiple significant litigations. At confirmation, unsecured creditors voted overwhelmingly to accept the plan, and no economic party in interest was challenging confirmation. However, there too, the UST objected to, among other things, the payment of indenture trustee fees under the plan. After hearing oral arguments from all parties, Judge Rendlen overruled the UST's objection and

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> The Company shall pay to the Trustee and Agents from time to time such compensation for their services hereunder (which compensation shall not be limited by any provision of law in regard to the compensation of a trustee of an express trust) as shall be agreed upon in writing. The Company shall reimburse the Trustee and Agents upon request for all reasonable disbursements, expenses and advances incurred or made by them in connection with the Trustees duties under this Indenture, including the reasonable compensation, disbursements and expenses of the Trustees agents and external counsel, except any expense disbursement or advance as may be attributable to its willful misconduct or negligence.
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> To secure the payment obligations of the Company to the Trustee in this Section 7.07 or otherwise pursuant to this Indenture, the Trustee shall have a lien prior to the Securities on all money or property held or collected by the Trustee and such money or property held in trust to pay principal of and interest on particular Securities.
>
> The obligations of the Company under this Section 7.07 to compensate and indemnify the Trustee, Agents and each predecessor Trustee and to pay or reimburse the Trustee, Agents and each predecessor Trustee for expenses, disbursements and advances shall be the liability of the Company and shall survive the resignation or removal of the Trustee and the satisfaction, discharge or other termination of this Indenture, including any termination or rejection hereof under any Bankruptcy Law.

Section 6.11 [Priorities] of the Indenture, attached hereto as **Exhibit B**, further provides that the Indenture Trustee Fees have first priority in the distribution waterfall:

> Any money collected by the Trustee pursuant to this Article Six or property distributable in respect of the Company's obligations under th[e] Indenture after an event of Default in respect of any series shall be applied in the following order:
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> FIRST: to the Trustee for amounts due under Section 7.07 or otherwise under this Indenture;
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> SECOND: to Holders for amounts due and unpaid on the affected Securities for principal, premium, if any, and interest as to each, ratably, without preference or priority of any kind, according to the amounts due and payable on the Securities; and
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> THIRD: to the Company with respect to any such series of Securities.

confirmed the chapter 11 plan. The court found it compelling that (i) "none of the other 40,000 individuals" with a direct interest in the fee issues had objected to these payments, and (ii) the plan did not provide that these payments were "administrative expense claims" but were rather, "part of the deal." *See Arch Coal* Confirmation Hr'g Tr., (Sept. 13, 2016) at 56:25; 57:1-3, 19-22, attached hereto as **Exhibit C**.

27. As in *Arch Coal*, no party-in-interest in these cases has raised any objections to the Indenture Trustee Fees other than the UST and the Plan does not provide that such payments are solely allowable as administrative expense claims because the Indenture Trustee Fees are paid pursuant to the Global Settlement embodied in the Plan. In the face of overwhelming support for the Plan and the Global Settlement by all economic stakeholders, the UST asks this Court to unwind the Global Settlement and deny confirmation of the Plan. However, like all other components of the Global Settlement set forth in the Plan, payment of Indenture Trustee Fees cannot be singularly extracted without undermining the agreed upon recoveries to unsecured creditors under the Plan. *See In re Peabody Energy Corporation*, 582 B.R. 771, 780 (E.D. Mo. 2017) (noting that "agreement [was] inextricably intertwined with the Plan as a whole, which itself was the product of intense, multi-party negotiations undertaking in the context of a volatile coal market" and another party's interference with that agreement "would alter and unfairly dilute the interests of those who agreed to its terms.").

28. The UST's sole reliance on the Southern District of New York *Lehman* decision to support its objection is misplaced. There, the court construed a plan provision permitting members of the creditors' committee to be reimbursed for professional fees solely by virtue of their membership on a committee. *See In re Lehman Brothers Holdings Inc.*, 508 B.R. 283, 295. The debtors were not required to pay those payments pursuant to prepetition contractual arrangements

and the court found that section "503(b) does not authorize payment of professional fee expenses solely on the basis of official committee membership." *Id.* at 295. In contrast, here, the Indenture Trustee does not seek reimbursement of professional fees by virtue of its membership on the Committee. Instead, the Indenture Trustee Fees arise under the Indenture and were negotiated as part of the Global Settlement. The Debtors here entered into a transaction outside the ordinary course of business, *i.e.*, the Global Settlement, which was approved by this Court, and incurred the obligation to pay the Indenture Trustee Fees as part of that settlement. Accordingly, payment of Indenture Trustee Fees should be allowable pursuant to the Global Settlement and Bankruptcy Rule 9019.

29. Moreover, the Indenture requires the payment of Indenture Trustee Fees and the Indenture Trustee has the right to assert its charging lien and to deduct its unpaid fees and expenses from Unsecured Notes Claims distributions. *See* Indenture at § 7.07. The Plan appropriately (in the unlikely event of administrative insolvency) preserves the Indenture Trustee's right to exercise its charging lien. *See* Plan at § 2.4. However, forcing the Indenture Trustee to waive its rights to payment under the Global Settlement and instead exercise its charging lien would eviscerate a key part of the Global Settlement and thereby recoveries to the very stakeholders who are already receiving a fraction of what they are owed. This is not the outcome that the Committee, the Debtors, the noteholders and other parties have negotiated—instead, the parties agreed in the Global Settlement that the Indenture Trustee Fees would be paid directly and without reducing recoveries to unsecured noteholders.

30. Creditors were also made aware of the Indenture Trustee Fees and their importance to the Global Settlement. A description of the Global Settlement clearly states that as part of the settlement "the Debtors agreed to pay the fees of the trustee to the unsecured notes" and that the

payment of the Indenture Trustee Fees was "an integral part of the Global Settlement." Disclosure Statement, p. 39 at n.45. As stated above, no creditors objected to the payment of the Indenture Trustee Fees and, impaired creditors voted overwhelmingly to confirm the Plan.

31. Courts in this and other districts have authorized the payment of indenture trustee fees and expenses in similar circumstances pursuant to chapter 11 plans. *See, e.g., In re Patriot Coal Corp.*, Case No. 12-51502 (KAS) (Bankr. E.D. Mo. Dec. 18, 2013); *In re Alpha Natural Res., Inc.*, Case No. 15-33896 (KRH) (Bankr. E.D. Va. July 12, 2016); *In re Verso Corp.*, Case No. 16-10163 (KG) (Bankr. D. Del. June 23, 2016); *In re Foresight Energy, LP*, Case No. 20-41308 (KAS) (Bankr. E.D. Mo. June 24, 2020); *In re Armstrong Energy, Inc.*, Case No. 17-47541 (KAS) (Bankr. E.D. Mo. Feb. 2, 2018); *In re Abengoa Bioenergy US Holding, LLC*, Case No. 16-41161 (KAS) (Bankr. E.D. Mo. June 8, 2017); *In re Peabody Energy Corp.*, Case No. 16-42529 (BSS) (Bankr. E.D. Mo. Mar. 17, 2017); *In re Arch Coal, Inc.,* Case No. 16-40120 (CER) (Bankr. E.D. Mo. Sept. 15, 2016); *In the Matter of Se. Grocers LLC*, No. 18-10700 (MFW) (Bankr. D. Del. May 14, 2018).

B. Payment of Indenture Trustee Fees Does Not Require an Independent Section 503 Showing of Substantial Contribution.

32. Contrary to the UST's position, payment of the Indenture Trustee Fees is not a grant of an administrative claim for the benefit of Indenture Trustee and does not require a showing of substantial contribution under § 503(b)(3)(D). As noted above, numerous courts in this and other districts have authorized the payment of indenture trustee fees and expenses pursuant to chapter 11 plans without requiring such a showing.

33. Instructive on this point is the decision in the *Southeastern Grocers*, where Judge Walrath held that section 503(b) is "not the only way where such expenses can be approved and paid in a case." *In the Matter of Se. Grocers LLC*, No. 18-10700 (MFW) (Bankr. D. Del. May 14,

2018), Hr'g Tr., at 37:23-25; 38:1-9, attached hereto as **Exhibit D**. In *Southeastern Grocers* chapter 11 case, the unsecured bondholders were the only impaired creditor class, and voted unanimously in favor of the plan. *Id.* The UST objected to plan confirmation contending that payment of the indenture trustee's fees and expenses contravened section 503(b) of the Bankruptcy Code. The debtor, the indenture trustee and noteholders responded, as several courts have held, that section 503(b)(3)(D) is simply the means by which an indenture trustee or other party-in-interest can compel payment of its fees and expenses, and that there is nothing in that subsection which in any way prevents a debtor from agreeing to pay such fees and expenses as part of a settlement. *Id.*

34. Judge Walrath agreed with the debtors and the indenture trustee and rejected UST's arguments, stating:

> Section 503(b)(3)(D) is not the only way where such expenses can be approved and paid in a case. And I think it is perfectly appropriate to agree . . . to the payment of those expenses without the necessity of a court having to approve them after the fact in order to get the parties to come to the table and negotiate [a] successful reorganization . . . I think that the fact that the debtors agreed to that . . . was perfectly appropriate, and that there is no necessity that I review those expenses or otherwise interfere with that agreement.

Id.

35. Similarly, in *In re Adelphia Commc'ns Corp.*, Judge Gerber approved the payment of professional fees of fourteen ad hoc groups and certain individual creditors pursuant to a plan, and held, over the objection of the UST, that section 1123(b)(6) of the Bankruptcy Code provides the bankruptcy court with a "broad grant of authority" to permit the payments of reasonable professional fees without showing compliance with section 503(b) on the basis that "reorganization plans, after they get the requisite assent, may allocate and distribute the value of the debtors' estates by a broad array of means." 441 B.R. 6, 19 (Bankr. S.D.N.Y. 2010); *see also In re Stearns Holdings, LLC*, 607 B.R. 781, 792 (Bankr. S.D.N.Y. 2019) (declining to evaluate

trustee fees under section 503(b) because "pursuant to Bankruptcy Rule 9019, the Court has approved the Global Settlement"). As discussed above, in this district, a similar conclusion was reached in *Arch Coal*.

36. As these courts have described, Section 503(b) is not the sole means by which the Indenture Trustee Fees can be paid. Indeed, section 1123(b)(6) of the Bankruptcy Code provides a bankruptcy court with a "broad grant of authority" to permit the payment of an indenture trustee's reasonable fees and expenses without the need to comply with section 503(b). *See* 441 B.R. at 19. Pursuant to section 1123(b)(6) of the Bankruptcy Code, a chapter 11 plan may "include any . . . appropriate provision not inconsistent with the applicable provisions of this title." 11 U.S.C. § 1123(b)(6). Courts interpret section 1123(b)(6) very broadly and generally permit the inclusion of any provision in a reorganization plan, including provisions for the payment of fees, as long as such provision is not contrary to any other provision of the Bankruptcy Code. *See infra* at ¶¶ 29, 31-32.

37. Accordingly, the UST's objection should be overruled as the proposed payment of the Indenture Trustee Fees under Section 2.4 of the Plan is plainly permissible without the necessity of separate application under section 503(b).

IV. THE GLOBAL SETTLEMENT IS PROPERLY INCORPORATED INTO THE PLAN.

38. The UST takes issue with the incorporation of the Global Settlement in the Plan. The inclusion of a settlement as part of a plan is perfectly acceptable and merely requires the same standard as a settlement pursued by the Debtors pursuant to Bankruptcy Rule 9019. *See Wigley v. Wigley (In re Wigley)*, 557 B.R. 678, 685 (B.A.P. 8th Cir. 2016). Moreover, all the provisions of a confirmed plan bind all parties-in-interest under that plan. *See* 11 U.S.C. § 1141(a).

39. Here, the Global Settlement was the inflection point in these Chapter 11 Cases; its incorporation in the Plan was necessarily unavoidable. Indeed, the Global Settlement itself provides that the "Debtors and the Committee shall work in good faith on a chapter 11 plan that facilitates, implements, and otherwise gives effect to the settlement based on Distributable Value Analysis." Sale Order at ¶ 37(g). Moreover, the Disclosure Statement provides in bold and all capital letters:

> **"CONFIRMATION OF THE AMENDED PLAN WILL BIND ALL CREDITORS TO THE GLOBAL SETTLEMENT WHETHER OR NOT SUCH CREDITORS HAVE VOTED TO ACCEPT THE AMENDED PLAN**."

Disclosure Statement, p. 40.

40. The Court found that the Disclosure Statement provided adequate information to creditors.[11] No creditors objected to being bound to the terms of the Global Settlement and on the contrary, creditors voted overwhelmingly in favor of the Plan. It is axiomatic that every creditor is benefited by the Global Settlement, and every creditor is bound by its terms upon confirmation of the Plan pursuant to section 1141(a) of the Bankruptcy Code.

41. Accordingly, the Global Settlement is appropriately incorporated into the Plan and, upon confirmation, should be binding on all parties-in-interest.

---

[11] *See Order (I) Approving Disclosure Statement; (II) Establishing Notice And Objection Procedures For Confirmation Of Plan; (III) Approving Solicitation Packages And Procedures For Distribution Thereof; (IV) Approving The Form Of Ballots And Establishing Procedures For Voting On The Plan; And (V) Granting Related Relief* [Dkt. No. 1233].

RESERVATION OF RIGHTS

42. The Committee reserves all rights to amend or supplement this Statement, to raise additional points, or to seek to introduce evidence with respect to this Statement and the Plan, at any time prior to or at the hearing to confirm the Plan.

[*Remainder of page intentionally left blank.*]

CONCLUSION

The Committee respectfully requests that the objections of the UST, SEC, and all other objections to confirmation of the Plan, be overruled, and the Plan be confirmed.

Dated: December 16, 2020
Saint Louis, Missouri

Respectfully submitted,

DOSTER ULLOM & BOYLE, LLC

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Counsel to the Official Committee of Unsecured Creditors

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing was filed electronically using the Court's CM/ECF system and was served electronically on all parties on the Court's Electronic Mail Notice List on the date set forth above.

/s/ Alexander L. Moen

EXHIBIT A

Key Terms of Global Settlement

EXHIBIT B

Indenture

EXHIBIT C

Arch Coal Transcript

EXHIBIT D

Southeastern Grocers Transcript

brownrudnick

SEPTEMBER 15, 2020

Key Terms of Global Settlement

Case 20-43597 Doc 1444-1 Filed 12/16/20 Entered 12/16/20 14:29:49 Exhibit Exhibit A Pg 2 of 5

- **Condition Precedent**: Close on or before 9/27/20 or parties revert to *status quo ante.*

- **GUC Recovery**: Estimated at $35-$45 million (7%-9% excluding PBGC) paid *in cash*.

- **PBGC-Related Accommodations**:

  a) **Briggs & Stratton Cash Balance Retirement Plan**: Assumed by KPS. Underfunding ($1.6 million) covered by KPS purchase price reduction (half off-set by ABL Lenders, see below).

  b) **Briggs & Stratton Pension Plan**: Consensually terminated. PBGC waives "control group" claims against non-debtor affiliates.

  c) **PBGC Unsecured Claim**: Capped at $225 million.

  d) **PBGC Recovery Contribution**: PBGC contributes first $5 million recovery to other GUCs.

- **Chapter 5 Causes of Action**: Released as to GUCs (*e.g.*, KPS not "purchasing" preference claims against trade).

- **ABL Lenders Contribution**: $800,000 to settlement amount (to half off-set purchase price reduction).

Case 20-43597 Doc 1444-1 Filed 12/16/20 Entered 12/16/20 14:29:49 Exhibit Exhibit A Pg 3 of 5

1.	**<u>The "Cash-Burn" Risk</u>:** • The business is not generating sufficient cash to cover bankruptcy costs. • Delay risks $35-$45 million in cash distributable to GUCs. • GUC-distributable cash reduces to 1% to 3% in weeks, 0% by early November (see next slide). • Thus, continued litigation presents substantial opportunity "costs" for GUCs.
2.	**<u>The "Dog-That-Caught-The-Bus" Dilemma</u>:** • Successful objection to the KPS sale does not provide a case solution. • It is far from assured that KPS and/or ABL Lenders will agree to a greater settlement with GUCs. • Meanwhile, the DIP Loan will promptly default, resulting in an immediate $500+ million administrative payable. • No obvious liquidity source for (i) DIP refinancing or (ii) liquidity "bridge" to a new exit solution.
3.	**<u>The "Quantum vs. Currency" Consideration</u>:** • Presume that stalemate yields additional distributable value. • Given the company's liquidity needs, cash is unlikely to be the currency for GUC value distribution. • More likely, settlement currency will be some form of "upside" security, such as illiquid stock or warrants. • We anticipate that, to many GUCs (*e.g.*, trade and retirees), settlement currency is important.
4.	**<u>PBGC-Related Considerations</u>:** • Absent a settlement (and if the KPS Sale is approved), <u>both</u> pension plans will be terminated. • GUCs will recover less because: (i) the PBGC claims will be larger; and/or (ii) presumptively, the PBGC will not agree to the $5 million redistribution to other GUCs.
5.	**<u>The "Add-Insult-To-Injury" Risk For Trade Creditors</u>:** • Absent a settlement (and if the KPS Sale is approved), KPS will be "purchasing" Chapter 5 avoidance actions. • Trade creditors in particular thus face the risk of a preference suit (perhaps to incentivize improved "go-forward" terms). • Or Section 502(d) off-set against claim recovery.

Case 20-43597 Doc 1444-1 Filed 12/16/20 Entered 12/16/20 14:29:49 Exhibit Exhibit A Pg 4 of 5

ILLUSTRATIVE NET PROCEEDS AVAILABLE AND ESTIMATED RECOVERIES TO GENERAL UNSECURED CREDITORS

- Net proceeds available to General Unsecured Claims ("GUCs") is based on the Debtors' Waterfall as of September 7, 2020 and assumes various sale closing dates.

- The below illustrative estimated recoveries uses estimated total GUCs pool of $575 million to $675 million, including the PBGC's estimated claim of $225 million.

Illustrative estimated recoveries if all GUC distributions are pro rata shows GUCs' recoveries reducing to 1% to 3% in weeks (0% by early November)

Illustrative Recoveries at Various Sale Close Dates								
($ in millions)		Assumes Pro Rata Distribution to All GUCs						
Assumed sale closing dates		*9/25/2020*	*10/2/2020*	*10/9/2020*	*10/16/2020*	*10/23/2020*	*10/30/2020*	*11/6/2020*
Net Proceeds Range for GUCs		$ 40	$ 23	$ 19	$ 16	$ 15	$ 8	$ 2
Total Range of GUCs Pool	$ 675	5.9%	3.4%	2.8%	2.4%	2.2%	1.2%	0.3%
	$ 650	6.2%	3.5%	2.9%	2.5%	2.3%	1.2%	0.3%
	$ 625	6.4%	3.7%	3.0%	2.6%	2.4%	1.3%	0.3%
	$ 600	6.7%	3.8%	3.2%	2.7%	2.5%	1.3%	0.3%
	$ 575	7.0%	4.0%	3.3%	2.8%	2.6%	1.4%	0.3%

See next page for illustrative estimated recoveries for GUCs with Global Settlement

ILLUSTRATIVE NET PROCEEDS AVAILABLE AND ESTIMATED RECOVERIES TO GENERAL UNSECURED CREDITORS *(continued)*

BRIGGS&STRATTON

Net proceeds available to GUCs of $40 million is based on the Debtors' Waterfall as of September 7, 2020 and assumes a sale closing by no later than September 27, 2020. The below illustrative estimated recoveries assumes a range of $35 million to $45 million of net proceeds available to GUCs ($40 million as a midpoint) using an estimated total GUCs pool of $575 million to $675 million, including the PBGC's estimated claim of $225 million.

Illustrative estimated recoveries if all GUC distributions are pro rata

Illustrative Recoveries if All GUCs are Pro Rata

($ in millions)		Net Proceeds Range for GUCs		
Assumes sale closing on/about Sept 25, 2020		$ 35	$ 40	$ 45
Total Range of GUCs Pool	$675	5.2%	5.9%	6.7%
	$650	5.4%	6.2%	6.9%
	$625	5.6%	6.4%	7.2%
	$600	5.8%	6.7%	7.5%
	$575	6.1%	7.0%	7.8%

Illustrative estimated recoveries for GUCs with Global Settlement

- PBGC agrees to waive and subordinate the first $5.0 million that it would otherwise recover under a pro rata distribution, for the benefit of the remaining GUCs (the "PBGC Contribution")
- Estimated recoveries for remaining GUCs excluding the PBGC's $225 million claim shows a percentage recovery inclusive of the PBGC Contribution
- Estimated recovery percentage for the PBGC is calculated using PBGC's share of net proceeds after deducting the PBGC Contribution for the benefit of remaining GUCs

Improved Estimated Recoveries for Remaining GUCs (excluding PBGC)

Illustrative Recoveries for Remaining GUCs (excluding PBGC) with PBGC Settlement

($ in millions)				Net Proceeds Range for GUCs		
Assumes sale closing on/about September 25, 2020				$ 35	$ 40	$ 45
				Net % Recovery for Remaining GUCs (excluding PBGC)		
Total Range of GUCs Pool	$675	Remaining GUCs (excl. PBGC)	$450	6.3%	7.0%	7.8%
	$650		$425	6.6%	7.3%	8.1%
	$625		$400	6.9%	7.7%	8.5%
	$600		$375	7.2%	8.0%	8.8%
	$575		$350	7.5%	8.4%	9.3%

PBGC Estimated Recovery

Illustrative Recoveries for PBGC with PBGC Settlement

($ in millions)				Net Proceeds Range for GUCs		
Assumes sale closing on/about September 25, 2020				$ 35	$ 40	$ 45
				Net % Recovery for PBGC		
Total Range of GUCs Pool	$675	PBGC Claim	$225	3.0%	3.7%	4.4%
	$650		$225	3.2%	3.9%	4.7%
	$625		$225	3.4%	4.2%	5.0%
	$600		$225	3.6%	4.4%	5.3%
	$575		$225	3.9%	4.7%	5.6%

Briggs & Stratton Corporation

and

, as Trustee

INDENTURE

Dated as of

Subordinated Debt Securities

SECTION 6.11. Priorities.

Any money collected by the Trustee pursuant to this Article Six or property distributable in respect of the Companys obligations under this Indenture after an event of Default in respect of any series shall be applied in the following order:

FIRST: to the Trustee for amounts due under Section 7.07 or otherwise under this Indenture;

SECOND: to Holders for amounts due and unpaid on the affected Securities for principal, premium, if any, and interest as to each, ratably, without preference or priority of any kind, according to the amounts due and payable on the Securities; and

THIRD: to the Company with respect to any such series of Securities.

The Trustee may fix a record date and payment date for any payment to Holders pursuant to this Section 6.11.

SECTION 6.12. Undertaking for Costs.

In any suit for the enforcement of any right or remedy under this Indenture or in any suit against the Trustee for any action taken or omitted by it as Trustee, a court in its discretion may require the filing by any party litigant in the suit of an undertaking to pay the costs of the suit, and the court in its discretion may assess reasonable costs, including reasonable attorneys fees and expenses, against any party litigant in the suit, having due regard to the merits and good faith of the claims or defenses made by the party litigant. This Section 6.12 does not apply to a suit by the Trustee, a suit by a Holder pursuant to Section 6.08 or a suit by Holders of more than 10% in principal amount of the Securities then outstanding.

ARTICLE VII

TRUSTEE

SECTION 7.01. Duties of Trustee.

(a) If an Event of Default actually known to a Responsible Officer of the Trustee has occurred and is continuing, the Trustee shall exercise such of the rights and powers vested in it by this Indenture and use the same degree of care and skill in their exercise as a prudent person would exercise or use under the circumstances in the conduct of such Persons own affairs.

(b) Except during the continuance of an Event of Default:

(1) The Trustee need perform only such duties as are specifically set forth in this Indenture and no others and no implied covenants or obligations shall be read into this Indenture against the Trustee.

(2) In the absence of bad faith or willful misconduct on its part, the Trustee may conclusively rely, as to the truth of the statements and the correctness of the opinions expressed therein, upon certificates or opinions furnished to the Trustee and conforming to the requirements of this Indenture but, in the case of any such certificates which by any provision hereof are specifically required to be furnished to the Trustee, the Trustee shall be under a duty to examine the same to determine whether or not they conform on their face to the requirements of this Indenture (but need not confirm or investigate the accuracy of mathematical calculations or other facts stated therein). Whenever in the administration of this Indenture the Trustee shall deem it desirable that a matter be proved or established prior to taking, suffering or omitting any action hereunder, the Trustee (unless other evidence be herein specifically prescribed) may, in the absence of bad faith on its part, conclusively rely upon an Officers Certificate, subject to the requirement in the preceding sentence, if applicable.

(c) The Trustee may not be relieved from liability for its own negligent action, its own negligent failure to act, or its own willful misconduct, except that:

(1) This paragraph does not limit the effect of Section 7.01(b).

(2) The Trustee shall not be liable for any error of judgment made in good faith by a Responsible Officer or Responsible Officers of the Trustee, unless it is proved that the Trustee was negligent in ascertaining the pertinent facts.

Reports pursuant to this Section 7.06 shall be transmitted by mail:

(1) to all Holders of Securities, as the names and addresses of such Holders appear on the Registrars books; and

(2) to such Holders of Securities as have, within the two years preceding such transmission, filed their names and addresses with the Trustee for that purpose.

A copy of each report at the time of its mailing to Holders shall be filed with the Commission and each stock exchange on which the Securities are listed. The Company shall promptly notify the Trustee when the Securities are listed on any stock exchange or delisted therefrom.

SECTION 7.07. Compensation and Indemnity.

The Company shall pay to the Trustee and Agents from time to time such compensation for their services hereunder (which compensation shall not be limited by any provision of law in regard to the compensation of a trustee of an express trust) as shall be agreed upon in writing. The Company shall reimburse the Trustee and Agents upon request for all reasonable disbursements, expenses and advances incurred or made by them in connection with the Trustees duties under this Indenture, including the reasonable compensation, disbursements and expenses of the Trustees agents and external counsel, except any expense disbursement or advance as may be attributable to its willful misconduct or negligence.

The Company shall fully indemnify each of the Trustee and any predecessor Trustee for, and hold each of them harmless against, any and all loss, damage, claim, liability or expense, including without limitation taxes (other than taxes based on the income of the Trustee or such Agent) and reasonable attorneys fees and expenses incurred by each of them in connection with the acceptance or performance of its duties under this Indenture including the reasonable costs and expenses of defending itself against any claim (whether asserted by the Company, any Holder or any other Person) or liability in connection with the exercise or performance of any of its rights, powers or duties hereunder (including, without limitation, settlement costs) or in connection with enforcing the provisions of this Section 7.07. The Trustee or Agent shall notify the Company in writing promptly of any claim of which a Responsible Officer of the Trustee has actual knowledge asserted against the Trustee or Agent for which it may seek indemnity; *provided* that the failure by the Trustee or Agent to so notify the Company shall not relieve the Company of its obligations hereunder except to the extent the Company is actually prejudiced thereby.

The Trustee shall have the right to employ separate counsel in any such action or proceeding and participate in the investigation and defense thereof, and the Company shall pay the reasonable fees and expenses of such separate counsel.

Notwithstanding the foregoing, the Company need not reimburse the Trustee for any expense or indemnify it against any loss or liability to have been incurred by the Trustee through its own willful misconduct, gross negligence or bad faith.

To secure the payment obligations of the Company to the Trustee in this Section 7.07 or otherwise pursuant to this Indenture, the Trustee shall have a lien prior to the Securities on all money or property held or collected by the Trustee and such money or property held in trust to pay principal of and interest on particular Securities.

The obligations of the Company under this Section 7.07 to compensate and indemnify the Trustee, Agents and each predecessor Trustee and to pay or reimburse the Trustee, Agents and each predecessor Trustee for expenses, disbursements and advances shall be the liability of the Company and shall survive the resignation or removal of the Trustee and the satisfaction, discharge or other termination of this Indenture, including any termination or rejection hereof under any Bankruptcy Law.

When the Trustee incurs expenses or renders services after an Event of Default specified in Section 6.01(4) or (5) occurs, the expenses and the compensation for the services are intended to constitute expenses of administration under any Bankruptcy Law.

For purposes of this Section 7.07, the term "Trustee" shall include any trustee appointed pursuant to this Article Seven.

1 IN THE UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI (ST. LOUIS)

2

In re) Case No. 16-40120
3) St. Louis, Missouri
ARCH COAL, et al.,)
4) September 13, 2016
Debtors.) 11:06 AM
5 ________________________________)

6 TRANSCRIPT OF CONTINUED HEARINGS RE:
MOTION FOR RELIEF FROM STAY,
7 FILED BY CREDITOR ERVIN LEE ARMBRUSTER [717];
MOTION FOR RELIEF FROM STAY,
8 FILED BY CREDITOR CDS FAMILY TRUST, LLC [930];
MOTION FOR TEMPORARY ALLOWANCE OF CLAIMS SOLELY FOR THE
9 PURPOSES OF VOTING ON THE DEBTORS' PROPOSED PLAN OF
REORGANIZATION, FILED BY CREDITORS IRONSHORE INDEMNITY, INC.,
10 BOND SAFEGUARD INSURANCE COMPANY,
LEXON INSURANCE COMPANY [1147];
11 MOTION TO ESTIMATE AND TEMPORARILY ALLOW CLAIMS, PURSUANT TO
RULE 3018(A), FOR THE PURPOSES OF ACCEPTING OR REJECTING ANY
12 PROPOSED PLAN OF REORGANIZATION, FILED BY CREDITORS INDEMNITY
NATIONAL INSURANCE CO., WESTCHESTER FIRE INSURANCE CO.,
13 ZURICH NORTH AMERICA [1187]

14 HEARING RE: MOTION TO APPROVE ABANDONMENT AND DESTRUCTION OF
CERTAIN BUSINESS AND OTHER RECORDS RELATED TO HORIZON NATURAL
15 RESOURCES COMPANY AND ITS AFFILIATED ENTITIES, FILED BY
DEBTOR ARCH COAL, INC. [1266]

16

BEFORE THE HONORABLE CHARLES E. RENDLEN, III,
17 UNITED STATES BANKRUPTCY JUDGE

18 APPEARANCES:
For Debtors: MARSHALL S. HUEBNER, ESQ.
19 MICHELLE M. MCGREAL, ESQ.
DAVIS POLK & WARDWELL LLP
20 450 Lexington Avenue
New York, NY 10017

21

BRIAN C. WALSH, ESQ.
22 BRYAN CAVE LLP
211 North Broadway
23 Suite 3600

24 (Cont'd. on next page)

25

1 unusually candid, thoughtful, precise set of distributions as
2 well as just saying unsecureds get X million and that's all
3 the public needs to know. In fact, the exactitude is now
4 fully public. And the notion that anything was kept from the
5 Court is wrong. The notion that the Court would normally have
6 the ability to approve these fees is wrong. The notion that
7 503(b) is the only vehicle is wrong. And in fact, the case
8 law that actually applies, which is the troika of cases from
9 the Southern District in mega cases, as well as the endless
10 litany of cases that do this every day, make it very clear
11 that this provision, which in this case is part of an
12 unbelievably carefully calibrated negotiation by the payors
13 and the payees and the give-ups, is appropriate.
14 It is very, very important to Arch that the Court
15 enter the confirmation order, and the world is sort of waiting
16 to hear that the nation's second largest coal company has had
17 its plan confirmed. And we would respectfully ask in the
18 strongest possible terms -- there're 40,000 economic parties-
19 in-interest, thousands of employees; every one of them wants
20 this plan confirmed; not one of them has objected to this
21 provision. It's an economics point. It's absolutely legal --
22 THE COURT: Well, and even the UST --
23 MR. HUEBNER: -- and should be overruled.
24 THE COURT: -- said they wanted it confirmed; they're
25 just picking around. And since I heard none of the other

1 40,000 individuals who are directly related to it, there -- no
2 reason for me to -- I overrule the objection -- to go with
3 that objection at this time.
4 And furthermore --
5 Oh, you want to say something, Ms. Long?
6 MS. LONG: Your Honor, would you please consider
7 making a finding that the amount of money to pay -- it's clear
8 that it's not -- that it is part of their distribution?
9 THE COURT: Well, I read the plan; I thought I caught
10 that.
11 MR. HUEBNER: Yeah, Your Honor, we're --
12 THE COURT: I thought I read that. I was looking for
13 that when I reviewed it yesterday, or the fourth amended.
14 MR. HUEBNER: Yeah.
15 THE COURT: Is everybody --
16 MR. HUEBNER: Yes. Your Honor, let me help --
17 THE COURT: I didn't find any language that said any
18 different.
19 MR. HUEBNER: Yeah. Your Honor, we are not seeking
20 any sort of finding that this is an administrative expense.
21 This is just part of the deal.
22 THE COURT: It's part of the deal.
23 MR. HUEBNER: And what I was whispering before --
24 THE COURT: Yeah.
25 MR. HUEBNER: -- to try to see if we could quickly

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
	)	
SOUTHEASTERN GROCERS,	)	Case No. 18-10700 (MFW)
LLC, et al.,	)	
	)	
Debtors.	)	(Jointly Administered)

Wilmington, Delaware
May 14, 2018
10:30 a.m.

TRANSCRIPT OF AN ELECTRONIC RECORDING
BEFORE THE HONORABLE MARY F. WALRATH
UNITED STATES BANKRUPTCY JUDGE

OMNIBUS/CONFIRMATION

APPEARANCES:

For the Debtors	DANIEL J. DeFRANCESCHI, ESQ. BRETT M. HAYWOOD, ESQ. RICHARDS LAYTON & FINGER, P.A. -and- RAY C. SCHROCK, ESQ. SUNNY SINGH, ESQ. ANDRIANA GEORGALLAS, ESQ. WEIL GOTSHAL & MANGES
For The Ad Hoc Committee	ROBERT K. MALONE, ESQ. PATRICK A. JACKSON, ESQ. DRINKER BIDDLE & REATH LLP
FOR Deutsche Bank AG New York Branch	MARGARET MANNING, ESQ. FOX ROTHSCHILD, LLP -and- ANDREW C. AMBRUOSO, ESQ. WHITE & CASE LLP
For Sun Trust Bank	IAN J. SILVERBRAND, ESQ. WHITE & CASE LLP
For the Ad Hoc Group Of Noteholders	DENNIS L. JENKINS, ESQ. MORRISON & FOERSTER LLP

1 Trustee's objections to confirmation.
2 First, with respect to the third-party releases, I
3 will overrule that objection. The unimpaired creditors were,
4 in fact, given notice and required to object to the releases,
5 and I deem that to be consent. The concept of being required
6 to take an action in order to protect one's rights is not a
7 novel concept, either in civil litigation or in the bankruptcy
8 context. And I will note that many, in fact, did object, and
9 have been carved out in accordance with the terms of the plan.
10 So I think that that is sufficient in this case.
11 Even if they had not, I do think that the Continental
12 and Zenith factors are met here with respect to third-party
13 releases. There's overwhelming support of all the impaired
14 creditors. Creditors are being paid in full, pursuant to the
15 Bankruptcy Code, both the impaired and the unimpaired with the
16 exception of the noteholders who have consented to taking
17 equity.
18 The releases are necessary to the plan. There is an
19 identity of interest of all the parties in reorganizing this
20 debtor along the terms of the global settlement reached before
21 the bankruptcy. So I think that the releases in either event
22 are appropriate in this case.
23 With respect to the payment of expenses, 503(b)(3)(D)
24 is not the only way where such expenses can be approved and
25 paid in a case. And I think it is perfectly appropriate to

1 agree prebankruptcy to the payment of those expenses without
2 the necessity of a court having to approve them after the fact
3 in order to get the parties to come to the table and negotiate
4 what ultimately in this case is a very successful
5 reorganization of this entity.
6 So I think that the fact that the debtors agreed to
7 that prebankruptcy was perfectly appropriate, and that there
8 is no necessity that I review those expenses or otherwise
9 interfere with that agreement.
10 With respect to the allowance of the general
11 unsecured, I think that the plan language is sufficient. I'm
12 satisfied, given the fact that over 90 percent of the trade
13 that the debtors were authorized to pay on the first day have
14 in fact been paid, quote, in the ordinary course of business,
15 and that there is a mechanism in place to resolve those if
16 need be. There is a mechanism that allows the filing of
17 proofs of claim, that allows creditors to bring this to the
18 Court's attention if they are not in fact being paid, in their
19 view, in the ordinary course.
20 So I will overrule the U.S. Trustee's objections.
21 MR. SINGH: Thank you, Your Honor. Sunny Singh, Weil
22 Gotshal, on behalf of the debtors.
23 THE COURT: Yes.
24 MR. SINGH: Your Honor, so then that leaves us, and we
25 can turn to the remaining objections to confirmation filed by