SO ORDERED
Docket #1337 Date Filed: 11/25/2020
Provisionally granted until an order is entered after the final hearing on this document.

Not later than two business days after the entry of this Order the Debtors shall service a copy of this Order and shall file a certificate of service not later than 24 hours after service.

Nov 25, 2020

Barry S Schermer

BARRY S. SCHERMER
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
SOUTHEASTERN DIVISION

In re:	§	**Chapter 11**
	§	
	§	**Case No. 20-4359[illegible]-399**
BRIGGS & STRATTON CORPORATION, *et al.*,	§	
	§	**(Jointly Administered)**
	§	
Debtors.[1]	§	
	§	

APPLICATION OF DEBTORS FOR AN ORDER AUTHORIZING THE RETENTION AND EMPLOYMENT OF PERKINS COIE LLP, KOHNER, MANN & KAILAS, S.C. AND POLSINELLI PC AS SPECIAL COUNSEL TO THE DEBTORS

The above-captioned debtors and debtors in possession (the "**Debtors**") file this application (this "**Application**") for entry of an order (the "**Proposed Order**"), pursuant to sections 327(e), 328, 329, 330, 331, 1107, and 1108 of title 11 of the United States Code, 11 U.S.C. §§ 101, *et seq.* (the "**Bankruptcy Code**"), Rules 2014 and 2016 of the Federal Rules of Bankruptcy Procedure (the "**Bankruptcy Rules**"), and Rules 2014 and 2016-1 of the Local Rules of Bankruptcy Procedure for the United States Bankruptcy Court for the Eastern District of Missouri (the "**Local Rules**"), authorizing the retention and employment of Perkins Coie LLP ("**Perkins**"), Kohner, Mann & Kailas, S.C. ("**KMK**") and Polsinelli PC[2] ("**Polsinelli**," and together with Perkins and KMK, "**Class Counsel**") as special counsel to the Debtors in the above-captioned chapter 11 cases (the "**Chapter 11 Cases**"). In support of this Application, the Debtors submit and rely upon the declarations of Christopher Hanewicz, Esq., Robert Gegios, Esq. and Russell Jones, Esq. (collectively, the "**Class Counsel Declarations**"), attached hereto as Exhibit A, and the *Declaration of Kathryn M. Buono in Support*

[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] Polsinelli LLP in California and Polsinelli PC (Inc.) in Florida.

of Application of Debtor Briggs & Stratton Corporation for an Order Authorizing the Retention and Employment of Perkins Coie LLP, Kohner, Mann & Kailas, S.C. and Polsinelli PC as Special Counsel for the Debtor Effective as of the Petition Date, attached hereto as Exhibit B (the **"Buono Declaration**"). In further support of this Application, the Debtors respectfully state as follows:

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. 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 (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 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.

3. On the Petition Date, the Debtors filed their Bidding Procedures Motion.[3] On August 19, 2020, the Court entered the Bidding Procedures Order[4] that, among other things,

[3] *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' Asserts 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] (the "**Bidding Procedures Motion**").

[4] *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 and Form and Manner of Notice of Assumption and Assignment and (II) Granting Related Relief* (Docket No. 505) (the "**Bidding Procedures Order**").

(a) approved bidding procedures in connection with the sale of the Debtors' assets, (b) approved the designation of a stalking horse bidder and stalking horse bid, (c) scheduled an auction to take place on September 1, 2020, and (d) scheduled a sale hearing for September 15, 2020. On September 15, 2020, the Court entered the Sale Order[5] authorizing the Debtors to sell substantially all of their assets (the "**Sale Transaction**") to Bucephalus Buyer, LLC (the "**Purchaser**"). On September 21, 2020, the Debtors closed the Sale Transaction.[6]

4. Following the successful sale of substantially all of their assets, the Debtors have focused their efforts and resources on developing and filing a workable and confirmable chapter 11 plan of liquidation supported by the Creditors' Committee. On October 9, 2020, the Debtors filed the *Joint Chapter 11 Plan of Briggs & Stratton Corporation and its Affiliated Debtors* [Docket No. 1066] and the *Disclosure Statement for Joint Chapter 11 Plan of Briggs & Stratton Corporation and Its Affiliated Debtors* [Docket No. 1067]. On November 9, 2020, the Debtors filed the *Amended Joint Chapter 11 Plan of Briggs & Stratton Corporation and its Affiliated Debtors* (the "**Amended Plan**") [Docket No. 1226] and the *Amended Disclosure Statement for Amended Joint Chapter 11 Plan of Briggs & Stratton Corporation and its Affiliated Debtors* [Docket No. 1227] (the "**Amended Disclosure Statement**").[7] On November 10, 2020, the Court entered an order approving the Amended Disclosure Statement and scheduled the hearing for confirmation of the Amended Plan for December 18, 2020.[8]

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[5] *Order (I) Authorizing the Sale of the Asserts 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] (the "**Sale Order**").

[6] *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].

[7] Capitalized terms used in this Motion, but not defined herein, shall have the meanings ascribed to such terms in the Amended Plan, the Amended Disclosure Statement, or the Ficks Declaration, as applicable.

[8] *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* [Docket No. 1233].

5. The Debtors continue to honor their post-closing sale obligations, wind down their estates, pursue confirmation of the Amended Plan, and otherwise work on concluding these chapter 11 cases.

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 Disclosure Statement and the *Declaration of Jeffrey Ficks, Financial Advisor of Briggs & Stratton Corporation, in Support of the Debtors' Chapter 11 Petitions and First Day Relief* [Docket No. 51] (the "Ficks Declaration").Jurisdiction

6. The United States Bankruptcy Court for the Eastern District of Missouri (the "**Court**") has jurisdiction to consider this Application 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

7. By this Application, the Debtors seek entry of the Proposed Order authorizing it to retain and employ Class Counsel to serve as their special counsel in accordance with the terms and conditions set forth in that certain Joint Counsel Contingent Fee Agreement (the "**Engagement Agreement**"), attached as Exhibit C, approving the compensation for any fees and expenses that Class Counsel seek to be paid from the Debtors' estates (the "**Estate Fees and Expenses**") under 11 U.S.C. § 328(a), a copy of which (minus attachments) is attached to the Class Counsel Declarations and incorporated herein by reference.

Applicable Authority

8. Section 327(e) of the Bankruptcy Code provides the following:

> The [debtor in possession], with the court's approval, may employ, for a specified special purpose, other than to represent the [debtor in possession] in conducting the case, an attorney that has represented the debtor, if in the best interest of the estate, and if such attorney does not represent or hold any interest adverse to the debtor or to the estate with respect to the matter on which such attorney is to be employed.

11 U.S.C. § 327(e).

9. Section 327(e) of the Bankruptcy Code thus authorizes the retention of an attorney who previously represented a debtor prior to the commencement of its bankruptcy case, provided that: (a) such retention is for a special purpose; (b) the purpose of the retention is not to conduct the chapter 11 cases; (c) the retention is in the best interests of the debtor's estate; and (d) the attorney does not hold any interest adverse to the debtor with respect to the subject of its retention. Of note, Section 327(e) of the Bankruptcy Code does not require that special counsel be "disinterested," just that special counsel not hold or represent interests adverse to the debtor. *See* COLLIER ON BANKRUPTCY ¶ 327.04 (Alan N. Resnick & Henry J. Sommer eds., 16th ed.) ("[T]he 'disinterested' test of section 327(a) does not apply to section 327(e) . . ."). Thus, retaining an attorney under Section 327(e) of the Bankruptcy Code does not require the same searching inquiry required for a debtor to retain general bankruptcy counsel under Section 327(a) of the Bankruptcy Code. *See Meespierson Inc. v. Strategic Telecom Inc.*, 202 B.R. 845, 847 (D. Del. 1996) ("[S]pecial counsel employed under [section] 327(e) need only avoid possessing a conflict of interest concerning the matter at hand.").

10. Furthermore, Section 1107(b) of the Bankruptcy Code provides that "a person is not disqualified for employment under Section 327 of [the Bankruptcy Code] by a debtor in possession solely because of such person's employment by or representation of the debtor before the commencement of the case." 11 U.S.C. § 1107(b).

11. Bankruptcy Rule 2014(a) requires that an application for retention include the following:

> [S]pecific facts showing the necessity for the employment, the name of the [firm] to be employed, the reasons for the selection, the professional services to be rendered, any proposed arrangement for compensation, and, to the best of the applicant's knowledge, all of

> the [firm's] connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee.

FED. R. BANKR. P. 2014(a).

12. The Debtors submit that, for all the reasons stated in this Application and in the Class Counsel Declarations and Buono Declaration, their proposal to retain and employ Class Counsel as special counsel is appropriate under Section 327(e) of Bankruptcy Code and Bankruptcy Rule 2014(a).

Class Counsel's Qualifications and Scope of Services

13. Class Counsel are experienced litigators with respect to both class action and antitrust matters. Bios for the lead attorneys from each firm are attached hereto as Exhibit D Class Counsel have represented the Debtors and other industrial purchasers of natural gas (the "**Class**") in consolidated ongoing class-action antitrust cases filed in 2006 and pending in the Western District of Wisconsin: *Arandell Corporation, et al., v. XCEL Energy, Inc., et al.* (Case No. 07-cv-00076), *consolidated with NewPage Wisconsin System Inc., v. CMS Energy Resource Management Company, et al.* (Case No. 09-cv-00240) (collectively, the "**Wisconsin Class Action**").[9] The Wisconsin Class Action relates to allegations that certain defendant natural gas marketers manipulated industry pricing to the harm of the Debtors and other industrial natural gas purchasers. The matter was originally filed in Wisconsin in 2006, but was subsequently transferred to a multi-district litigation in the District of Nevada. During that multi-district litigation, Class Counsel defeated dozens of motions for summary judgment brought against Debtor Briggs & Stratton Corporation ("**Briggs & Stratton**"), including three successful appeals to the Ninth Circuit Court

[9] On August 5, 2020, the Court approved a settlement between Briggs & Stratton (in its capacity as a member of the Class) and Cantrera Gas Company, LLC, CMS Energy Corporation, and CMS Energy Resource Management Company [ECF No. 295].

of Appeals and the United States Supreme Court. Class Counsel have already secured seven settlements on behalf of Briggs & Stratton and the Class, with total class settlement proceeds of nearly $65 million. The case is currently scheduled for trial in June 2021. Based on prior class settlements, Briggs & Stratton's pro rata share of any recovery will likely be approximately 2%.

14. All of the foregoing services that Class Counsel has provided to the Debtors, and seeks to continue providing to the Debtors, are referred to herein as the "**Represented Matters**," which are active and time-sensitive. It is therefore critical that the Debtors retain Class Counsel in these Chapter 11 Cases.

15. Pursuant to this Application, the Debtors seek to retain Class Counsel to continue representing them in the Represented Matters. As noted above, Class Counsel have been highly effective in representing Debtor and other plaintiffs in the Wisconsin Class Action, having defeated dozens of motions for summary judgment, including three successful appeals to the Ninth Circuit Court of Appeals and the United States Supreme Court. As a result of their efforts, Class Counsel have already secured seven settlements totaling nearly $65 million. Class Counsel are uniquely familiar with the Debtors' operations, and the business and the legal issues that may arise in the Wisconsin Class Action during the pendency of the Chapter 11 Cases. As such, the retention of Class Counsel as special counsel to continue representing the Debtors in connection with the Represented Matters will promote the efficient administration of these Chapter 11 Cases and the Represented Matters.

16. Conversely, if required to retain different counsel to represent the Debtors in connection with the Represented Matters, the Debtors will be forced to expend significant resources and expense to make such new counsel familiar with the Debtors' business and the

Represented Matters and to familiarize such counsel with the legal issues and status of matters that Class Counsel have handled or are handling for the Debtors.

17. Pursuant to separate retention applications filed with this Court, the Debtors have retained Weil, Gotshal & Manges LLP ("**Weil**") and Carmody MacDonald P.C. ("**Carmody**") as general bankruptcy co-counsel to the Debtors. Importantly, the services rendered and functions to be performed by Class Counsel will not be duplicative of work performed by Weil, Carmody, or any other law firms retained by the Debtors. The Debtors have discussed a division of responsibilities with Class Counsel, Weil and Carmody and intend to monitor carefully these and any other retained legal professionals to ensure a clear delineation of their respective duties and roles so as to prevent duplication of effort.

18. In light of the proposed scope of Class Counsel's services, the Debtors submit that Class Counsel's retention is appropriate under Section 327(e) of the Bankruptcy Code, as it is for the limited purpose of representing the Debtors as counsel in connection with the Represented Matters. For the reasons noted above, the Debtors further believe that: (a) the attorneys at Class Counsel are well qualified to act in that capacity on behalf of the Debtors, and (b) retaining Class Counsel on the terms set forth in the Engagement Agreement and as otherwise described herein is an efficient and cost-effective means for the Debtors to obtain the requisite services. The proposed retention of Class Counsel is, therefore, in the best interests of the Debtors' estate and its creditors. Subject to the Court's approval of this Application, Class Counsel are willing to serve as the Debtors' special counsel and perform the services described above.

Terms and Conditions of Class Counsel's Retention

19. Section 328(a) of the Bankruptcy Code provides for the "employment of a professional person under section 327 or 1103 of this title, as the case may be, on any reasonable

terms and conditions of employment, including on a retainer, on an hourly basis, on a fixed or percentage fee basis, or on a contingent fee basis." 11 U.S.C. § 38(a).

20. The terms and conditions of Class Counsel's retention are set forth in the Engagement Agreement, which provides that if there is a recovery arising from the Wisconsin Class Action, Class Counsel are entitled to collectively seek an award of fees from the Court overseeing the Wisconsin Class Action in an amount equal to 35% of any recovery, whether by settlement or verdict, after expenses by Class Counsel are reimbursed. Payment to Class Counsel of expenses in this manner and contingent attorney's fees in this amount are reasonable and typical in anti-trust class matters, as was found by both the MDL court and the Western District of Wisconsin in the Wisconsin Class Action in approving each of the seven settlements to date.

21. Class Counsel does not anticipate that the Debtors will need to make any payments to Class Counsel as any payment to Class Counsel from a class recovery is not made from the assets of the Debtors or any other class representative, but rather from a class fund (the "**Non-Estate Fees and Expenses**"). In the unlikely event of a recovery for the Debtors arising from the Wisconsin Class Action that is not a class recovery, Class Counsel will file an application with the Bankruptcy Court for approval of Class Counsel fees to be paid from such recovery under the terms of the Engagement Agreement (the "**Estate Fees and Expenses**"), to wit: fees in an amount equal to 35% of any recovery, whether by settlement or verdict, after expenses by Class Counsel are reimbursed.

22. Class Counsel also intend to make a reasonable effort to comply with requests for information and additional disclosures from the Office of the United States Trustee for the Eastern District of Missouri (the "**U.S. Trustee**"), as set forth in the U.S. Trustee Guidelines, in

connection with both this Application and applications for allowance of Estate Fees and Expenses, if any, to be filed by Class Counsel in this Chapter 11 Case.

23. While the Engagement Agreement enumerates certain Class Counsel professionals who will provide services to the Debtor, the Debtor and Class Counsel have agreed that other Class Counsel professionals and paraprofessionals will also provide services to the Debtor, as necessary.

Compensation Received by Class Counsel

24. As of the Petition Date, Class Counsel have not received any compensation or reimbursement of their expenses from the Debtors. As of the Petition Date, Class Counsel have received contingent fee compensation from the court-supervised escrow account for professional services performed in the year prior to the Petition Date, as well as additional amounts for the reimbursement of reasonable and necessary expenses incurred in connection therewith from the court-supervised escrow account. As of the Petition Date, the Debtors owe nothing to Class Counsel for compensation for professional services performed in the year prior to the Petition Date.

25. Other than as set forth in the Class Counsel Declarations, no arrangement is proposed between the Debtors and Class Counsel for compensation to be paid in the Chapter 11 Cases. Under Bankruptcy Rule 2016(b), Class Counsel have informed the Debtor that, except for sharing arrangements among Class Counsel, and by the partners of Class Counsel, Class Counsel have no agreement with any other entity to share any compensation received, nor will any be made, except as permitted under Section 504(b)(1) of the Bankruptcy Code.

26. The Debtors submit that the employment and retention of Class Counsel on the terms and conditions set forth herein is necessary and in the best interests of the Debtors, their estates and their creditors and should be approved.

Disclosure Concerning Any Adverse Interests

27. As noted above, Section 327(e) of the Bankruptcy Code requires that the attorney proposed to be retained "does not represent or hold any interest adverse to the debtor or to the estate with respect to the matter on which such attorney is to be employed." 11 U.S.C. § 327(e). As provided in the Class Counsel Declarations, in connection with their proposed retention by the Debtors, Class Counsel have researched their client and other databases to determine and disclose whether Class Counsel have any connections to the Debtors, the Debtors' affiliates or entities whose specific names were provided to Class Counsel by the Debtor (the "**Potential Parties in Interest**"), which connections make Class Counsel adverse to the Debtors or their estates with respect to the matters on which Class Counsel are to be employed. Class Counsel have various connections with some of the Potential Parties in Interest, including as former or current counsel to certain Potential Parties in Interest and counsel to an adversary of certain Potential Parties in Interest. However, none of those connections cause Class Counsel to be adverse to the Debtors or their estates with respect to matters on which Class Counsel are to be employed.

Notice

28. Notice of this Application will be provided to (i) the Office of the United States Trustee for the Eastern District of Missouri (Attn: Sirena Wilson, Esq.); (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: Oksana 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

29. The Debtor has not made any prior application for the relief sought in this Application to this Court or any other court.

WHEREFORE, the Debtors respectfully request that the Court enter the Proposed Order, granting the relief requested in this Application and such other and further relief as may be just and proper.

Dated: November 25, 2020
Wauwatosa, Wisconsin

Respectfully submitted,

BRIGGS & STRATTON CORPORATION

/s/ Kathryn M. Buono
Kathryn M. Buono
Vice President and Secretary