UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF MISSOURI
SOUTHEASTERN DIVISION

In re:	)	**Chapter 11**
BRIGGS & STRATTON CORP., *et al*.,	)	**Case No. 20-43597-399**
	)	**(Jointly Administered)**
Debtors.[1]	)	

OBJECTION OF THE SECURITIES AND EXCHANGE COMMISSION TO CONFIRMATION OF DEBTORS' AMENDED JOINT CHAPTER 11 PLAN

The United States Securities and Exchange Commission (the "SEC"), a statutory party to this case[2] and the federal agency responsible for enforcing the federal securities laws, objects to the *Amended Joint Chapter 11 Plan of Briggs & Stratton Corporation and its Related Affiliates* [Dkt 1226] (the "Plan") because the Plan imposes non-debtor third party releases on the Debtors' public investors without their consent. In support of its objection, the SEC respectfully states as follows:

INTRODUCTION

1. The SEC objects to the Plan because it: (i) contains provisions that release and discharge the liability of numerous non-debtor parties in a manner that contravenes applicable law in the Eighth Circuit and Section 524(e) of the Bankruptcy Code; and (ii) does not provide an

[1] The Debtors in these Chapter 11 cases are: Briggs & Stratton Corporation, Billy Goat Industries, Inc., Allmand Bros., Inc., Briggs & Stratton International, Inc., and Briggs & Stratton Tech, LLC..

[2] As a statutory party in Chapter 11 proceedings, the SEC "may raise and may appear and be heard on any issue." 11 U.S.C. §1109(a).

opportunity for claim and interest holders subject to these releases to affirmatively consent to be bound by them.

2. As a general matter, non-debtor third party releases contravene Section 524(e) of the Bankruptcy Code, which provides that only debts of the debtor are affected by the Chapter 11 discharge provisions. Such releases have special significance for public investors because they enable non-debtors to benefit from a debtor's bankruptcy by obtaining their own releases with respect to past misconduct, including violations of the federal securities laws or breaches of fiduciary duty under state law. Such provisions are at odds with sound public policy considerations underlying the rights of investors to pursue legitimate claims against wrongdoers. In this case, such releases are especially troubling because under the Plan, public investors will receive nothing, their shares will be canceled, and they are not allowed to vote. In addition, the releases here benefit a litany of unnamed entities and individuals (some of whom may have no direct connection to the Chapter 11 cases) who are providing no consideration in exchange for the releases.

3. While the Eighth Circuit has not directly addressed whether nonconsensual releases are permissible as a matter of law, it has found that such releases are "rare" and "allowed only in extraordinary cases and only under exceptional circumstances…." *Murray Ky. Energy Inc. v. Ceralvo Holdings LLC (In re Armstrong Energy Inc.)*, 613 B.R. 529, 535 (8th Cir. B.A.P. 2020) (citations omitted). No extraordinary facts are present here. In an attempt to relieve the Debtors of their burden to show that this is an extraordinary case justifying the imposition of nonconsensual third-party releases, the Debtors assert that the inclusion of an opt-out election renders the releases consensual with respect to public investors. However, investor silence, in the form of a failure to opt out, does not constitute "consent" to third party releases in our view. Consent to releases can be achieved only if affected parties are given an opportunity to provide affirmative and

unambiguous consent by opting *in* to the releases. It makes little sense that a shareholder would agree to be bound by a release in exchange for nothing; it is therefore paramount that consent to such releases be unequivocal.

BACKGROUND

4. On July 20, 2020, Briggs & Stratton Corporation ("BSC") and its affiliates (collectively, the "Debtors") filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Eastern District of Missouri. BSC is a public company; its common stock traded on the NYSE until it was delisted on July 20, 2020, and currently trades on the OTC Pink marketplace under the symbol "BGGSQ." On September 21, 2020, this Court approved the joint sale of substantially all of the assets of the Debtors for a purchase price of $550 million and the assumption of certain liabilities (the "Sale").

5. On November 9, 2020, the Debtors filed the Plan, which generally provides for the distribution of remaining cash proceeds of the Sale and the orderly wind-down of the Debtors' estates. Under the Plan, unsecured creditors of BSC, which include holders of outstanding unsecured notes in the aggregate principal amount of $203.5 million, will receive remaining available cash for an estimated 6% - 8% recovery. All existing equity interests in BSC will be extinguished, and shareholders will receive no distribution and are deemed to reject the Plan. Section 510(b) claimants also will receive no consideration and are deemed to reject the Plan.

Third Party Release Provisions of the Plan

6. Articles 10.6 and 10.4 of the Plan (the "Releases") contain provisions that would release and discharge the liability of numerous, unnamed non-debtor parties, including the Debtors' current and former officers and directors and many other entities that appear to have no direct connection or relationship to the Debtors or Chapter 11 cases (the "Released Parties"). Plan

at 8. Significantly, the Released Parties are not required to pay or provide any consideration in exchange for the benefits of the Releases.

7. The Releases are for any and all claims and causes of action, whether known or unknown, based on or related to the Debtors, among other things, but exclude claims based on intentional fraud, willful misconduct and gross negligence. Plan at 48. The Plan provides that creditors who vote to accept the Plan are deemed to consent to the Releases, and that claim and interest holders who abstain from voting, vote to reject the Plan, or are deemed to reject or accept the Plan are also bound by the Releases unless they opt out. Plan at 48.

DISCUSSION

I. The Releases are not consensual and do not meet the standard to be approved as nonconsensual releases.

A. The Releases do not meet the standard to be approved as nonconsensual releases.

8. Although the Eighth Circuit has not squarely addressed whether Section 524(e) limits a bankruptcy court's authority to approve nonconsensual third-party releases, it has found that such releases are "rare" and "allowed only in extraordinary cases and only under exceptional circumstances." *Murray Ky. Energy*, 613 B.R. at 535 (affirming decision that plan release did not release contingent indemnity obligations). In doing so, the Eighth Circuit has noted that "[c]ourts should treat third-party releases with caution" in order to "prevent an abuse of the bankruptcy process…." *Id*. The imposition of non-debtor releases is a "rare thing," the possibility of which a court will not entertain absent a showing of "exceptional circumstances." *Master Mortg.*, 168 B.R. at 937. *See also In re Archdiocese of St Paul & Minneapolis*, 578 B.R. 823, 833 (Bankr. D. Minn. 2017) (finding that third party releases "should be the exception and approved only in rare circumstances").

9. To that end, courts in the Eighth Circuit will consider the following factors set forth in *Master Mortgage* to determine whether "exceptional circumstances" are present: (i) an identity of interest between the debtor and the third party, usually an indemnity relationship, such that a suit against the non-debtor is, in essence, a suit against the debtor or will deplete assets of the estate; (ii) the non-debtor has contributed substantial assets to the reorganization; (iii) the injunction is essential to the reorganization; without it, there is little likelihood of success; (iv) the impacted class, or classes, has overwhelmingly voted to accept the proposed plan treatment; (v) the plan provides a mechanism for the payment of all, or substantially all, of the claims of the class or classes affected by the injunction. *Master Mortg.*, 168 B.R. at 935 (citations omitted). *See also Archdiocese*, 578 B.R. at 833.

10. Here, it is clear that the Releases do not meet *any* of the factors considered in *Master Mortgage.* First, shareholders are deemed to reject the Plan. *See Archdiocese*, 578 B.R. at 833 (denying confirmation of plan for the sole reason that creditors subject to releases had overwhelmingly rejected the plan). Moreover, shareholders receive nothing and their interests are canceled under the Plan, while unsecured creditors of BSC are estimated to receive only a 6% - 8% recovery. It also appears that not one of the many Released Parties is making a separate financial contribution in exchange for the Releases. With respect to "the contributions of the Released Parties to facilitate and implement the Plan," the Released Parties had pre-existing duties to participate in the Chapter 11 cases, including the sale and plan processes, and have been separately compensated for their services. *See In re Exide Technologies, Inc.*, 303 B.R. 48, 74 (Bankr. D. Del. 2003) (even "meaningful" work contribution is not justification for releases). Such general statements are wholly insufficient to show, as prescribed in *Master Mortgage*, that *each* Released Party is making a substantial contribution under the Plan in exchange for the Releases.

See Class Five Nev. Claimants (In re Dow Corning Corp.), 280 F. 3d 648, 658 (6th Cir. 2002) (bankruptcy court's determinations did not support a finding of "unusual circumstances" where the court "did not discuss the facts as they relate specifically to the various released parties, but merely made sweeping statements as to all released parties collectively").

11. Finally, because the Debtors are liquidating, the Releases are not essential to a *reorganization*, as contemplated under *Master Mortgage*. The Plan and Disclosure Statement also fail to show that there is an identity of interests between the Debtors and *each* of the Released Parties such that a suit against them would deplete assets of the estate. It is highly improbable that each of the many Released Parties is entitled to indemnification from the Debtors. But even with respect to those Released Parties to whom the Debtors owe indemnification obligations, there is no showing that the amount of potential indemnification claims is so out of the ordinary that they would deplete assets of the estate, in particular an estate that is winding-down under the Plan. This is a liquidating case; it is not a case such as *A.H. Robins* where pending mass tort litigation rendered the non-debtor releases critical to the debtor's ability to reorganize. *See In re A.H. Robins Co*., 880 F. 2d 694 (4th Cir. 1989). Indeed, courts have found that the simple fact that a debtor may face indemnity claims sometime in the future, in some unspecified amount, is insufficient to justify the imposition of releases as necessary to a reorganization. *See Gillman v. Continental Airlines (In re Continental Airlines)*, 203 F. 3d 203, 216 (3rd Cir. 2000).

12. Thus, because the Releases do not appear to satisfy even a single factor set forth in *Master Mortgage*, there is no evidence of the extraordinary circumstances that would justify the imposition of the Releases on claim and interest holders. If releases such as these can be approved, then almost any third party release would pass muster, a result that would undermine the policy

recognized by the Eighth Circuit that third party releases should be rare "so as to prevent an abuse of the bankruptcy process." *See Murray Ky. Energy*, 613 B.R. at 535.

B. The Releases are not consensual.

13. To avoid having to satisfy the *Master Mortgage* standard, the Debtors contend that the Releases may be deemed consensual—and hence permissible under applicable law—as to holders of claims and interests who do not opt out of the Releases. In the SEC's view, however, a release is consensual only when the affected parties are given an opportunity to affirmatively and unambiguously grant the release, separate and apart from voting on the plan, by making a specific election on the ballot or non-voting notice to opt *in* to the release. Because no such mechanism was provided for creditors and shareholders to *affirmatively* consent to the Releases, they are not consensual.

14. Although Chapter 11 plans containing opt-out procedures have been confirmed in this district, the SEC is unaware of any published precedent in this district or the Eighth Circuit holding that the inclusion of an opt-out election on a ballot or non-voting notice renders plan releases "consensual." In the absence of guidance in the Eighth Circuit, decisions in other jurisdictions are instructive in considering whether a failure to opt-out of a third party release constitutes consent.

15. Recently, a bankruptcy court in the District of Delaware held that a failure to return an opt-out form is not a manifestation of an intent to provide a release, specifically finding that "[a] party's receipt of a notice imposing an artificial opt-out requirement, the recipient's *possible* understanding of the meaning and ramifications of such notice, and the recipients' failure to opt-out simply do not qualify [as consent]." *In re Emerge Energy Servs. LP*, 2019 Bankr. LEXIS 3717, at *54 (Bankr. D. Del. Dec. 5, 2019).

16. Bankruptcy courts in other circuits have agreed. In *In re Chassix Holdings, Inc.*, 533 B.R. 64 (Bankr. S.D.N.Y. 2015), the bankruptcy court held that where creditors and interest holders who were deemed to reject the plan, voted to reject the plan, or abstained from voting were not provided with an "opt in" mechanism, such parties had not consented to the releases proposed in the plan. *Chassix,* 533 B.R. at 80-81. In reaching that decision, the court found that to approve releases with an "opt out" requirement for creditors who voted to reject the plan would be "little more than a Court-endorsed trap for the careless or inattentive creditor," and to imply consent to releases based on the inaction of a creditor who abstained from voting "would stretch the meaning of 'consent' beyond the breaking point." *Id.* at 79, 81, *citing In re Washington Mutual, Inc*., 442 B.R. 314, 355 (Bankr. D. Del. 2011) ("[f[ailing to return a ballot is not a sufficient manifestation of consent to a third party release"). The court concluded that with respect to creditors and interest holders who were deemed to reject the plan and hence were given no opportunity to vote or "opt in" to the releases, it would "defy common sense to conclude that those parties had 'consented' to releases." *Id*. at 81. *See also In re Arrowmill Dev. Corp.*, 211 B.R. 497, 507 (Bankr. D.N.J. 1997) (finding that a court must determine whether the creditor "unambiguously manifested assent to the release of the nondebtor from liability on its debt" in order to determine whether a release is consensual.) As the *Chassix* court recognized, it makes no sense that a shareholder who is deemed to reject a plan, or a creditor who votes to reject a plan, would at the same time consent to give up anything of value through third party releases contained in the plan. Indeed, if a creditor who votes in favor of a plan is deemed to consent to third party releases that are contained in the plan, then

"by that same logic a creditor who votes to reject a plan should also be presumed to have rejected" such releases. *Id*. at 79.[3]

17. Here, the Plan does not allow shareholders or creditors to affirmatively consent to the Releases. Merely voting to accept a plan is not sufficient evidence of consent. *See Arrowmill*, 211 B.R. at 507 (because validity of releases hinges on contract law rather than the bankruptcy court's confirmation order, "it is not enough for a creditor to abstain from voting on a plan, or even to simply vote 'yes' as to a plan"); *In re Congoleum Corp*., 362 B.R. 167, 194 (Bankr. D.N.J. 2007) (a consensual release "cannot be based solely on a vote in favor of a plan"). *See also In re AOV Indus*., 31 B.R. 1005, 1010 (D.D.C. 1983), *aff'd in part*, 792 F. 2d 1140 (D.C. Cir. 1986) (releases not tied to acceptance or rejection of plan were given voluntarily and thus were enforceable). Further, abstaining from voting, voting to reject, and being deemed to reject the Plan without executing an opt-out, are also not sufficient evidence of consent. As the court in *Chassix* observed, there could be any number of reasons why a shareholder who is not allowed to vote, or a creditor that fails to vote or votes to reject the Plan, might fail to execute an opt-out that have nothing to do with consenting to the Releases:

> The purpose of the "opt-out" and "deemed consent" voting rules … was to aid the parties in compiling a broader set of third party releases than might be obtained if a different, "affirmative consent" approach were adopted. The proposed procedures would have done so by deeming "consent" to exist in situations where no affirmative consent had actually been manifested. Finding "consent" in these circumstances is to some extent a legal fiction. We know from experience that many creditors and interest holders who receive disclosure statement and solicitation materials simply will not respond to them, either because they elect not to read them at all or for other reasons…. The point is that inattentiveness, inaction and mistake are a known and expected part of the voting process.

[3] If the Court is inclined to accept the Debtors' position that a creditor who votes in favor of the Plan has accepted the Releases, then the Court should also rule that any investor who rejects the Plan or is deemed to reject the Plan should be deemed to reject the Releases.

Chassix, 533 B.R. at 78. *See also In re SunEdison, Inc.*, 576 B.R. 453, 460-61 (Bankr. S.D.N.Y. 2017) (finding that failure to object to releases was not consent because silence could be attributable to other causes, such as a "meager" recovery of less than 3% to creditors). Particularly with respect to shareholders who receive nothing under the Plan, it is neither fair nor reasonable to conclude that their inaction, by failing to opt out, demonstrates consent to the Releases. [4]

18. The Debtors contend that because the ballots and non-voting notices included a full description of the opt-out process, a creditor or shareholder's failure to opt out should be deemed consent to the Releases. However, regardless of how detailed or conspicuous the opt-out notice was (and even assuming that all claim and interest holders actually received the notice), the fact remains that there is no way to know whether a shareholder's failure to opt out reflects intentional consent to the Releases or, more likely, inaction for a reason wholly unrelated to consent. An opt-out election in a notice remains an artificial requirement created to manufacture consent even where there may be none. *See Emerge Energy*, 2019 Bankr. LEXIS 3717, at *54 (finding that the receipt of a notice "imposing an artificial opt-out requirement" and subsequent failure to opt out does not qualify as consent to releases); *In re Aegean Marine Petroleum Network Inc.*, No. 18-13374, Transcript of Hearing, at 28:8-10 (Bankr. S.D.N.Y. Feb. 14, 2019) (denying approval of opt-out mechanism at disclosure hearing and finding "all that this opt-out approach does is it seeks to manufacture judicial deemed consent…."). [5] Thus, "[i]f we're going to seek consent [to third

[4] The SEC notes that many of BSC's securities are likely held in street name and continue to trade during the bankruptcy. It is therefore quite possible that beneficial holders did not receive delivery of the non-voting notice from their respective brokers in time to opt out of the Releases by the given deadline. As for former shareholders who no longer hold the securities at the time of solicitation, and holders of unknown claims such as Section 510(b) claimants, such parties likely will not receive any notice, much less an opportunity to opt out, of the Releases.

[5] The relevant pages of the *Aegean Marine* Transcript of Hearing (Bankr. S.D.N.Y. Feb. 14, 2019) are attached hereto as Exhibit A.

party releases], it ought to be real consent, and it should be on an opt-in basis, not an opt-out basis." *Id.* at 29:4-6.

19. The SEC notes that one bankruptcy court in the Eighth Circuit has indicated in *dicta* that a creditor's silence can be construed as consent to third party releases contained in a plan, after holding that unimpaired creditors whose claims were carved out from the releases lacked standing to object to them. *See U.S. Fidelis*, 481 B.R. at 514-15. In that factually dissimilar case, the plan incorporated a global settlement whereby a released party, Mepco Finance Corporation, agreed to compromise $60 million in claims it held against the debtor in order to make possible a $14.1 million restitution fund for defrauded consumer creditors. *Id*. at 509-10. In *dicta*, the court ruled that under the facts before it, voting to accept the plan would not be required to establish consent to Mepco's release, and indicated that creditors would be bound by the release if they failed to object to the plan. *Id.* at 517. In concluding that the releases were consensual, however, the court limited its ruling to the narrow circumstances before it. In particular, the court found that the consent of consumer creditors had been shown by the support for confirmation of state attorneys general whom consumer creditors had relied on throughout the case. *Id*. at 517-18. Thus, the court was willing to find that a vote to accept the plan was not required to show consent when those affected by the releases were effectively represented in the bankruptcy proceeding. *See id*. at 518. In contrast, even assuming the thousands of public shareholders in this case received timely notice of the Plan and an opt-out form, they nonetheless have no representation in the bankruptcy proceeding and may not have the understanding or the resources to object to confirmation of a plan containing releases. The *U.S. Fidelis* court also did not address whether failure to object to plan releases can be deemed consent by claim or interest holders who do not vote or are deemed to

reject the plan. *U.S. Fidelis* therefore lends little support to the proposition that a failure to opt out of a release is sufficient to show consent under the circumstances in this case.

20. Finally, courts have recognized that the determination of what constitutes consent to a release is governed by contract principles. *See id.* at 517 (consensual releases sound in contract law rather than arise under bankruptcy statutes); *SunEdison,* 576 B.R. at 458 ("Courts generally apply contract principles in deciding whether a creditor consents to a third party release")(citations omitted); *Arrowmill*, 211 B.R. at 507 (validity of a release hinges on principles of contract law rather than the bankruptcy court's confirmation order). Deeming consent to non-debtor releases to be established by silence or inaction is inconsistent with basic contract principles. Under Missouri law, silence or inaction generally will not constitute an acceptance of an offer. *Pride v. Lewis*, 179 S.W. 3d 375, 379 (Mo. App. W.D. 2005); *Revere Copper & Brass v. Mftrs. Metals & Chemicals Inc.,* 662 S.W. 2d 866, 870 (Mo. App. W.D. 1983) ("mere silence or failure to reject an offer when it is made, do not constitute acceptance of an offer"), *citing* 17 Am. Jur. 2d Contracts, §47, at 385; *Kunzie v. Jack-In-The-Box Inc*., 330 S.W. 3d 476, 483 (Mo. App. E.D. 2010) ("in order for an acceptance to be effective, it 'must be positive and unambiguous'"), *citing* 2 Williston on Contracts, §6.10 (4th ed. 2007). This is because the "meeting of the minds" between two parties that is essential to the formation of a contract occurs only when "there is a definite offer and an unequivocal acceptance." *Kunzie*, 330 S.W. 3d at 483. Further, a party has no duty to speak where no circumstances are present that would justify treating silence as an acceptance, such as previous relations between the parties in similar transactions or dealings. *Revere Copper & Brass*, 662 S.W. 2d at 870. And if the offeree has no duty to speak, "his silence may not be translated into an acceptance merely because the offeror purports to attach that effect to it." *Id*. Here, there were no previous relations or dealings between shareholders and each of the Released Parties that gave rise

to a duty to speak on the part of shareholders. Accordingly, their silence cannot be construed as consent to releases simply because the Debtors deem it so.

21. Thus, Missouri contract law further supports the view that a failure to opt out, which amounts to no more than inaction or silence on the part of a creditor or interest holder, does not manifest consent sufficient to support a third party release. Accordingly, a release is consensual only if the affected parties provide affirmative and unequivocal consent by opting in to the release, regardless of how they vote on the plan or are deemed to have voted on the plan. Because public investors had no ability to opt in, they cannot be found to have consented to the Releases. And because the Releases are nonconsensual releases that do not meet any of the factors set forth in *Master Mortgage*, the Plan cannot be confirmed.

CONCLUSION

22. For all of the foregoing reasons, the SEC requests that the Court enter an order denying confirmation of the Plan because of the Releases, and providing such other relief as the Court deems appropriate.

Dated: December 11, 2020

U.S. SECURITIES AND EXCHANGE COMMISSION

By: /s/ Sonia Chae____

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CERTIFICATE OF SERVICE

I, Sonia Chae, do hereby certify that a copy of the foregoing *OBJECTION OF THE SECURITIES AND EXCHANGE COMMISSION TO CONFIRMATION OF THE DEBTORS' AMENDED JOINT CHAPTER 11 PLAN* has been served by the Electronic Case Filing System for the Eastern District of Missouri on this 11th day of December, 2020.

/s/ *Sonia Chae*
Sonia Chae

Attorney for the

U.S. Securities and Exchange Commission

EXHIBIT A

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 18-13374-mew

- x

In the Matter of:

AEGEAN MARINE PETROLEUM NETWORK INC.,

Debtor.

- x

United States Bankruptcy Court

One Bowling Green

New York, NY 10004

February 14, 2019

10:08 AM

B E F O R E :

HON MICHAEL E. WILES

U.S. BANKRUPTCY JUDGE

ECRO: MATTHEW

HEARING RE: Approval of disclosure Statement

Objections Filed

Application authorizing the employment and retention of Moelis & Company LLC as its investment banker and financial advisor for the Debtor effective nunc pro tunc to the petition date

Transcribed by: Sonya Ledanski Hyde

THE COURT: This is all about consent and what consent means, right? So you're basically urging me to say that you need me to manufacture consent for you because we know, we know in every one of these cases, there are people who are going to get this big package and they're not going to open it, or even if they open it, they're not going to understand it, and they're not going to respond. We know that. So all that this opt-out approach does is it seeks to manufacture judicial deemed consent without an actual thought process on behalf of the person whose consent is being sought.

As I said in Chassix, there are times in the law when policies put that burden on people. The law supports class actions. It supports it for the purpose of judicial efficiency. And so it puts on people the burden of opting out, otherwise, they're included. There is no such policy in favor of releases. In fact, the policy is the opposite. What I'm told me Metromedia is that they ought to be rare. They are anything but rare. I have not had a single Chapter 11 case in which people have not sought third-party releases. They're sought in every single case.

And to me, using an opt-out approach is not consistent with what Metromedia tells me to do. I know what I said in Chassix. I've been doing this job an extra almost four years now, and I'm more firmly convinced. I have never

allowed an opt-out form. I won't say that I can never be convinced that there are circumstances that require it, but nothing that you've said here convinces me that it's appropriate. If we're going to seek consent, it ought to be real consent, and it should be on an opt-in basis, not an opt-out basis.

MR. WINGER: If I may respond to a few points, Your Honor. The opt-out/opt-in issue applies to different stakeholders who frankly have a different set of facts depending on where they're sitting. So what Your Honor described, I believe, was focused on folks that are entitled to vote. They get a massive solicitation package, and they just throw it away. That is one category of folks whose consent would be deemed in the absence of taking an affirmative step.

THE COURT: Let me just say in plenty of cases, I have approved voting in favor of the plan as a consent to the releases. I'm not taking that away from you.

MR. WINGER: Correct. So --

THE COURT: I'm talking about people who fail to vote or who vote no.

MR. WINGER: So I believe we have what I'll call four or five categories where consent is the opt-out versus opt-in is relevant. Obviously, we have parties that vote to accept that is consistent with Your Honor's rulings in other

cases, and we don't believe that that is objectionable to the UST or the SEC, for example. Parties like the RSA parties who are contractually agreeing, we know Your Honor has looked at that in relativity fashion, for example, in those releases and on a consensual basis are not issue.

The next category that we would focus on are unimpaired creditors. And this is where I think Metromedia and your comments may be worth looking at a little further. These are paid-in-full creditors. That's a factor that Metromedia looked at directly. In some cases, paid-in-full creditors don't even get the ability to opt-out. They're just deemed to consent to the third-party release. What we're doing here that's different from Genco, that's different from Chassix is we are allowing those parties the ability to opt-out of the third-party release, and we're making it as easy as we can, Your Honor.

We're saying you can send an email to Epiq with the subject line "Aegean Opt-Out" and that will be a sufficient manifestation of consent that they will not be giving a third-party release even though they're being paid in full. And there is plenty of cases that deem that as consent.

THE COURT: Well, here's the problem, as I said in Chassix. Either the creditors who are unimpaired don't have any claims other than what the Debtor is satisfying, in

which case the release is pointless and meaningless and totally unnecessary, or they do. If they do and if they lose it, then they're not unimpaired because you're taking something away from them. You can't say I will pay you the full amount of your claim and take back 5 percent of it, for example, but you're still unimpaired because of that first step I purported to pay you for the full claim.

So unless they opt in to the release, if you are involuntarily taking something from somebody due to their inaction, they're not unimpaired anymore. And the idea that you can say that they are unimpaired as to their claim against the Debtor, therefore, it's reasonable to deem them to have consented to give up an independent claim against somebody else, makes no sense. It makes absolutely no sense. They shouldn't have to give up that claim unless they consent to give up that claim and not by default.

So they, too, are bound only to the extent that you tell them that they would like their releases and you would like them to opt in but if they don't opt in, they haven't given anything up.

MR. WINGER: Understood, Your Honor.

THE COURT: And then you had another category, "All holders of claims and interest not described in the foregoing." Who's that supposed to cover, just the unimpaireds or somebody else?

MR. WINGER: That is the category of holders of claims and interests, frankly, that have abstained or they would also fit in to the unimpaired creditor category. These are people who have not affirmatively manifested consent that they have an issue with the third-party release.

THE COURT: Right. Yeah, just to reiterate what I said in Chassix and what Judge Bernstein held in SunEdison, I think that what the Court in Metromedia instructed us to do was to be careful and limited and prudent in the extent to which we grant third-party releases. These opt-out structures go too close to a situation where we grant releases by default due solely to a failure to object. And I think Metromedia, the specific holding of Metromedia, was that we should not do that, that we have an independent obligation to exercise our judicial authority in this regard sparingly and only under the circumstances specified in Metromedia.

And I think that consent in that context requires something more than inaction and that I won't say it's never appropriate. I won't say that there isn't room for disagreement of opinion, but in my own mind, the opt-out approach is not really consistent with what Metromedia had in mind. Something more affirmative is required before I will hold that somebody has given up their third-party

claims.

So in all these situations, some kind of affirmative consent to the people who signed the RSA, that's fine. People who vote in favor of the plan, that's fine. Otherwise, people are bound and they're only releasing parties if they themselves have opted in, okay?

MR. WINGER: Your Honor, if we can have a moment, this was, as you could tell, a highly-negotiated port in the plan. I just want to confer with the RSA parties.

THE COURT: Okay.

(Pause)

MR. WINGER: Your Honor, in light of the comments with respect to the opt-in versus opt-out and which categories would be affected, what the Debtors would like to do is put the world on notice in the disclosure statement that insofar as a party does not opt in to the release, that we would reserve the ability to seek a nonconsensual release and satisfy the Metromedia standard with evidence and a proper showing at the confirmation hearing.

THE COURT: Okay. You can certainly do that.

MR. WINGER: Thank you, Your Honor.

THE COURT: Okay.

MR. WINGER: Unless Your Honor has any other questions, this may be an opportunity --

THE COURT: Before we get to the schedule and the