

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:)
) Chapter 11
)
PGX HOLDINGS, INC., et al., ¹) Case No. 23-10718 (CTG)
)
Debtors.) (Jointly Administered)
)
) Related to Docket Nos. 124 and 155

**REPLY IN SUPPORT OF DEBTORS’ APPLICATION
FOR ENTRY OF ORDER (I) AUTHORIZING THE EMPLOYMENT
AND RETENTION OF GREENHILL & CO., LLC AS FINANCIAL ADVISOR AND
INVESTMENT BANKER TO THE DEBTORS AND DEBTORS IN POSSESSION,
EFFECTIVE AS OF PETITION DATE, AND (II) GRANTING RELATED RELIEF**

The debtors and debtors in possession (collectively, the “Debtors,” and each, a “Debtor”) in the above-captioned chapter 11 cases (the “Chapter 11 Cases”) respectfully submit this reply (the “Reply”) in further support of the *Debtors’ Application For Entry of Order (I) Authorizing the Employment and Retention of Greenhill & Co., LLC as Financial Advisor and Investment Banker to the Debtors and Debtors In Possession, Effective as of Petition Date, and (II) Granting Related Relief* [Docket No. 124] (the “Application”) and in response to *the Preliminary Objection and Reservation of Rights of Official Committee of Unsecured Creditors to Retention Application for Greenhill & Co., LLC* [Docket No. 155] (the “Objection”), and respectfully state as follows:

PRELIMINARY STATEMENT

1. It is undisputed that the Debtors need an investment banker in these chapter 11 cases, that Greenhill is well-qualified to meet that need, and that Debtors and Greenhill negotiated

¹ The Debtors in these chapter 11 cases, along with the last four digits of each Debtor’s federal tax identification number, are: PGX Holdings, Inc. (2510); Credit Repair UK, Inc. (4798); Credit.com, Inc. (1580); Creditrepair.com Holdings, Inc. (7536); Creditrepair.com, Inc. (7680); eFolks Holdings, Inc. (5213); eFolks, LLC (5256); John C. Heath, Attorney At Law PC (8362); Progrexion ASG, Inc. (5153); Progrexion Holdings, Inc. (7123); Progrexion IP, Inc. (5179); Progrexion Marketing, Inc. (5073); and Progrexion Teleservices, Inc. (5110). The location of the Debtors’ service address for purposes of these chapter 11 cases is: 257 East 200 South, Suite 1200, Salt Lake City, Utah 84111.



the terms under which Greenhill would be retained in good faith, and at arm's-length resulting in a fee structure that is well within market terms. After exercising their reasonable business judgment to engage Greenhill more than two months before filing for bankruptcy, the Debtors now seek to retain Greenhill as their investment banker and financial advisor under section 328(a) of the Bankruptcy Code on the terms set forth in the Engagement Letter² attached to the Application and to pay Greenhill the fees set forth in the Engagement Letter.

2. In preparing for and commencing this chapter 11 case, the Debtors engaged in a thorough, thoughtful process designed to ensure that the Debtors had adequate liquidity to continue operating and maximize value for all constituents. The initial steps in that process necessarily involved, among other things, interviewing and retaining highly-qualified investment banking professionals with significant experience and expertise in financing advisory, including debtor-in-possession financing, marketing businesses' assets and advising companies in complex distressed situations. The Debtors selected Greenhill as its investment banker after careful consideration of several proposals based not only on the unassailable—and uncontested—credentials of Greenhill's restructuring professionals, but also on the market-based terms of the Engagement Letter. As it stands today, due in no small part to Greenhill's commitment of time and effort to date, the Debtors have obtained much needed liquidity to fund the business and these cases and are poised, to continue the marketing and sale process—a crucial step on the path to ultimately maximizing the value of the estates. Yet, at this critical juncture—mere days before the bidding procedures hearing—the Committee filed the Objection in a counterproductive attempt to gain leverage in potentially renegotiating the fee and expense structure in the Engagement Letter (the "Fee and Expense Structure"). In fact, despite being involved in these cases for over thirty (30) days, the

² Capitalized terms not otherwise defined herein shall have the meaning ascribed to such terms as set forth in the Application.

Committee did not even approach the Debtors with the concerns set forth in their Objections. Instead, the Committee has filed an Objection asserting unreasonable and off-market requests.

3. The terms of Greenhill’s compensation are negotiated, reasonable, and consistent with the terms of similar retentions. Prior to arriving at the agreed Fee and Expense Structure, Greenhill made a series of good-faith concessions with the Debtors. The Objection casts some vague concern that the Fee and Expense Structure “are warranted and aligned with the objectives of the Debtors.” *see* Objection at ¶ 2, attempts to rewrite arm’s-length, negotiated terms, second-guess the Debtors’ reasoned business judgment, and should be overruled.

4. As described in more detail herein, the relevant factors that Courts consider—nearly all of which are uncontested—overwhelmingly support approval of the Application under section 328(a) of the Bankruptcy Code. The Committee’s Objection runs contrary to the market standards for investment banker compensation (both in and out of bankruptcy), and its arguments lack any meaningful factual or legal support. The Committee presents no credible evidence about the typical compensation structures in the marketplace today for investment bankers in comparable chapter 11 cases, let alone any credible evidence that the Fee and Expense Structure deviates from the prevailing market standards. The Committee’s vague commentary in the Objection regarding the “insider financing and sale transaction” and the purported lack of need for any investment banker for these cases, where sales of the Debtors’ are being actively pursued, amounts to nothing more than misplaced understanding. The only issue before the Court is whether the terms and conditions of Greenhill’s retention are “reasonable terms and conditions of employment” under section 328(a) of the Bankruptcy Code.

5. Greenhill agreed to undertake the substantial work required in this matter, including with respect to the debtor-in-possession financing and the sale process, among other workstreams, with the understanding that it would be entitled to the benefit of the terms agreed with the Debtors,

including the Fee and Expense Structure, as is typical in the world of investment banking. If the Court were to deny the relief requested in the Application, it would result in value-destruction, including potentially negatively impacting the sale process, which remains in process. Accordingly, the Debtors urge the Court to overrule the Objection and approve the terms and conditions of Greenhill's employment, including the Fee and Expense Structure, as set forth in the Application, under section 328(a) of the Bankruptcy Code.

BACKGROUND

A. General Case Background

6. The Debtors are a technology and services company that specializes in credit report repair services and consumer credit education. One of the nation's leading credit repair service providers, PGX helps customers repair their credit and achieve their credit goals. Setting the industry standard for transparency, cutting edge technology-enabled solutions, and quality customer service, PGX assists consumers with accessing and understanding the information contained in their credit reports, ensures the information contained in those reports is fair, accurate, and substantiated, educates consumers to make better financial decisions and build positive credit, and helps to address other factors that may negatively impact customers' credit scores. PGX owns the consumer-facing brands and trademarks "Lexington Law," "CreditRepair.com," and "Credit.com." The Lexington Law brand is licensed to Debtor John C. Heath, Attorney at Law P.C. ("Lexington Law Firm"), an independently-owned Utah professional corporation that provides credit repair legal services directly to its clients. Through a set of Operating Agreements, PGX provides comprehensive operational support services to Lexington Law Firm, including marketing, custom proprietary software, technology, and administrative services. Additional information regarding the Debtors' business, capital structure and the circumstances preceding this chapter 11 case may be found in the *Declaration of Chad Wallace, Chief Executive Officer of PGX*

Holdings, Inc., in Support of the Debtor's Chapter 11 Petition and First Day Motions [Docket No. 12] (the "First Day Declaration"), which is incorporated herein by reference.

7. On June 4, 2023 (the "Petition Date"), the Debtors each filed a voluntary petition for relief under sections 101–1532 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware (the "Court"). The Debtors continue to operate its business as debtor in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No party has requested the appointment of a trustee or examiner.

8. On June 14, 2023, over one month ago, the Office of the United States Trustee (the "U.S. Trustee") appointed the Committee. In the days following the Committee's appointment, the Debtors' professionals, including Greenhill, engaged constructively with the Committee's professionals to get them up to speed on the Debtors' business, financial condition, and sale process.

B. The Fee and Expense Structure of Greenhill's Employment is Market

9. Prior to the Petition Date, the Debtors' determined that it required the services of a full-service banking and restructuring advisor to pursue incremental liquidity solutions, including potentially debtor-in-possession financing, and potentially a sale process that could maximize the value of the Debtors' assets. To that end, the Debtors contacted several investment bankers on a confidential basis to solicit proposed terms of engagement. The Debtors then evaluated the proposals—and reviewed comparable fees similar to the Fee Comps (as defined in the Supplemental Declaration) all of which included fixed or minimum monthly fees and transaction fees with fixed and/or minimum fee components. *See Supplemental Declaration of Neil A. Augustine in Support of Debtors' Application For Entry of Order (I) Authorizing the Employment and Retention of Greenhill & Co., LLC as Financial Advisor and Investment Banker to the Debtors*

*and Debtors In Possession, Effective as of Petition Date, and (II) Granting Related Relief (the “Supplemental Declaration”).*³

10. Based on the aforementioned proposals and negotiations, and review of the fee analysis referenced above, the Debtors, in the exercise of their reasonable business judgment, determined that Greenhill was the candidate best-qualified for the role and that the terms and conditions of the Engagement Letter were fair, market-based, consistent with investment banker fee structures approved by bankruptcy courts in relation to similarly situated companies. *See* Supplemental Declaration at ¶ 5 and Exhibit A. Further, Greenhill offered not only deep expertise and strong relationships in the mergers and acquisitions space, but also extensive experience with restructuring matters. Ultimately, the Engagement Letter, including the Fee and Expense Structure, reflected the negotiated terms that drove the Debtors’ decision to retain Greenhill, and Greenhill’s decision to accept the engagement.

ARGUMENT

11. Section 328(a) of the Bankruptcy Code provides that a debtor in a chapter 11 case may employ a professional person “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. § 328(a). The “reasonableness” standard under section 328 of the Bankruptcy Code does not require a debtor to negotiate or select the lowest possible economic terms available on the market. Instead, in deciding whether to approve the terms of an investment banker’s retention under section 328(a), the appropriate inquiry for the court “is whether taken as a whole, the terms of the retention are fair and reasonable, and the retention is in the bests [sic] interest of the estate.” *In re Joan and David Halpern*, 248 B.R. 43, 47 (Bankr. S.D.N.Y. 2000). In making this

³ The Supplemental Declaration shall be filed in advance of any hearing on the Application.

determination, courts generally consider a non-exhaustive list of common-sense factors, including (i) the debtor's need for the professional's services; (ii) the professional's experience and expertise; (iii) the relationship and relative bargaining power of the debtor and the professional; (iv) the typical business terms in the marketplace; and (v) creditor opposition to the retention, if any. *See, e.g., In re Insilco Techs., Inc.*, 291 B.R. 628, 634 (Bankr. D. Del. 2003); *Halpern*, 248 B.R. at 47.

C. The Greenhill Engagement Letter Is Reasonable Under Section 328(a) of the Bankruptcy Code.

12. The terms and conditions of Greenhill's Engagement Letter satisfy the reasonableness standard required for retention under section 328(a) of the Bankruptcy Code. Despite the Committee's baseless accusations to the contrary, the Debtors have demonstrated that the aforementioned factors overwhelmingly weigh in favor of this Court approving the Application.

1. The Services Are Necessary and Greenhill Is Highly Qualified to Provide Them.

13. Notably, the Committee has expressed no assertion that Greenhill is not qualified for the proposed engagement". In order to raise much needed liquidity, market-test the value of its assets, and optimize the potential recovery for all stakeholders, the Debtors reasonably determined that it requires the services of a professional investment banker with relevant expertise, such as Greenhill. These Chapter 11 Cases are "sale cases" that require incremental debtor in possession financing to provide a runway for the marketing and sale process. If the Debtors had not retained an investment banker to provide a market test with respect to its assets or seek alternative debtor in possession financing, it is likely that the Committee would be raising objections that the process is not fair or reasonably structured to provide a market test for the Debtors' assets or demonstrate that no other better financing was available to the Debtors. The necessity of Greenhill to run this process is clear on its face. Further, the necessity of this process cannot necessarily be measured

by reference to the number of hours expended or, in the event of a transaction that may be disappointing in hindsight, by reference to the value of such transaction. The marketing process itself provides significant, necessary value to the Debtors and its stakeholders; a rigorous market test provides impartial, decisive evidence of the value of the Debtors' assets, which in turn reduces the likelihood of expensive and protracted valuation fights later in the chapter 11 case.

2. *The Terms of Greenhill's Engagement Reflect Good Faith Arm's-Length Negotiations and Prevailing Market-Based Terms.*

14. As a result of good faith, arm's-length negotiations, the Debtors and Greenhill—two sophisticated parties with comparable bargaining power—agreed upon the market-based terms and conditions of the Engagement Letter. The Fee Comps which are a survey of recent, similar investment banker retentions—supplies uncontroverted evidence that the Fee and Expense Structure reflects prevailing market conditions. *See, e.g., In re PhaseBio Pharmaceuticals Inc.*, No. 22-10995 (LSS) (Bankr. D. Del. Dec. 16, 2022); *In re Gold Standard Baking, LLC*, No. 22-10559 (JKS) (Bankr. D. Del. Aug. 24, 2022); *In re Armstrong Flooring Inc.*, No. 22-10426 (MFW) (Bankr. D. Del. June 8, 2022); *In re MD Helicopters Inc.*, No. 22-10263 (KBO) (Bankr. D. Del. May 6, 2022); *In re Teligent, Inc.*, No. 21-11332 (BLS) (Bankr. D. Del. Nov. 10, 2021); *In re Sequential Brands Group, Inc.*, No. 21-11194 (JTD) (Bankr. D. Del. Oct. 4, 2021). Terms that do not necessarily vary in parallel with variances in the value or structure of the transactions that the Debtors may pursue—like a minimum fee—appear in the Engagement Letter (and in many engagement letters approved by courts in this District and elsewhere nationwide) because they reasonably reflect the complexity and uncertainty involved in the provision of Greenhill's services. For example, the Fee and Expense Structure anticipates that Greenhill has provided, and will continue to provide, a substantial commitment of professional time and effort, which may foreclose Greenhill from accepting other opportunities. Although the actual time and commitment required

of Greenhill's professionals may vary substantially over the course of this chapter 11 case, this fluctuation does not necessarily mitigate Greenhill's need to forego alternative opportunities. Greenhill must take into consideration "peak load" issues that could arise if multiple engagements ramp up into high gear simultaneously. For this reason, among others, minimum fees are standard, market-based components of engagement agreements for investment banking services.

15. The Committee offers no evidence that calls into question the arm's-length nature of the negotiations between Greenhill and the Debtors or the market-based nature of the terms of the Engagement Letter. The Committee's Objection in no way rebuts the Debtors' conclusion in selecting Greenhill that the terms of the Engagement are standard for investment bankers in comparable situations. The Committee's efforts to Monday morning quarterback the terms of Greenhill's retention and to create market standards out of thin air are entirely unsubstantiated, and the Court therefore should disregard the Objection. Instead, the Court should rely on the record before it, which incontrovertibly establishes the arm's-length negotiation of the parties and market-based nature of the agreed-upon terms, and approve the Application.

3. *The Committee's Opposition to the Application Does Not Outweigh the Other Factors.*

16. Although the Committee objected to the Application, due to the complete lack of evidence or market data calling into question the reasonableness of the terms and conditions of Greenhill's retention, the Court should discount the weight of this final factor. *See Insilco*, 291 B.R. at 634 (noting that, in evaluating the reasonableness of a professional's proposed retention under section 328(a), not "every factor [will] necessarily be of equal weight, depending upon the circumstances").

D. It is Reasonable and Customary for Transaction Fees to Be Awarded in Connection with a Credit Bid.

17. The Committee’s complaint that Greenhill should not be entitled to receive a Transaction Fee with respect to a credit bid for an “insider sale transaction”. is untenable and unsupported by the law.

18. The Committee’s assertions are simply not consistent with market terms approved by this court in other credit bid situations. In *RM Holdco LLC*, No. 18-11795 (MFW) (Bankr. D. Del. Oct. 14, 2018), *KG Wind Down, Inc.*, No. 19-10953 (CSS) (Bankr. D. Del. June 13, 2019), *Global Eagle Entertainment, Inc.*, Case No. 20-11835 (JTD) (Bankr. D. Del. Aug. 28, 2020), *Furniture Factory Ultimate Holdings, L.P.*, No. 20-12816 (JTD) (Bankr. D. Del. Jan. 4, 2021), and *Gold Standard Baking, LLC*, No. 22-10559 (JKS) (Bankr. D. Del. Aug. 24, 2022), for example, the debtor's investment banker was expressly entitled to payment of a Sale Fee in the event a sale was consummated with a credit bid from the debtor's existing lenders.

E. The Committee’s Interests Are Adequately Protected by the U.S. Trustee’s Right to Review Greenhill’s Fees and Expenses Under Section 330 of the Bankruptcy Code.

19. Even if the Committee could credibly contend that the Fee and Expense Structure is not “warranted and aligned with the objectives of the Debtors”—which the Debtors dispute—the Objection is unnecessary and inappropriate. *See* Objection at ¶ 2. The proposed order appended to the Application (the “Proposed Order”) would permit the U.S. Trustee to exercise reasonableness review under section 330, if necessary, as is standard. *See* Proposed Order at ¶ 13 (“Notwithstanding the preceding paragraph, the Office of the United States Trustee for the District of Delaware (the “U.S. Trustee”) and this Court shall retain the right to object to the compensation and fees and expenses to be paid to Greenhill pursuant to the Application and the Engagement Letter, including, without limitation, the Monthly Fee, based on the reasonableness standard provided for in section 330 of the Bankruptcy Code, and this Court shall consider any such objection by the U.S. Trustee under section 330 of the Bankruptcy Code.”). This approach, known

as the “Blackstone Protocol” in the Second Circuit, has been widely adopted, including in Delaware. *See In re Relativity Fashion, LLC*, 2016 WL 8607005, at *5–6 (Bankr. S.D.N.Y. Dec. 16, 2016) (“The Blackstone Protocol was an arrangement that started in the Southern District of New York, I believe. It says, in effect, that parties are bound by the Section 328(a) standards, except for the United States Trustee, which has the right to object on Section 330 grounds . . . A similar approach is now reflected in orders entered in Delaware.”).

F. Greenhill Will Not Duplicate Service of the Debtors’ Other Advisors

20. The Debtors will retain the services of other professionals over the course of the Chapter 11 Cases. By separate application, the Debtors are requesting that the Court approve the retention of Alvarez & Marsal North America, LLC (“A&M”) as the Debtors’ financial advisors in the Chapter 11 Cases. The Debtors discussed with both firms the division of roles and responsibilities as between Greenhill and A&M and the Debtors intend to monitor carefully these and other retained professionals to prevent a duplication of effort in the Chapter 11 Cases. While both Greenhill and A&M recognize that it is difficult to predict how the Chapter 11 Cases will proceed, they have informed the Debtors that they will undertake to coordinate all of their services in order to minimize, wherever possible, any unnecessary duplication of services.

CONCLUSION

WHEREFORE, for the foregoing reasons and those set forth in the Application, the Debtors respectfully requests that the Court grant the relief sought in the Application and overrule the Committee Objection thereto.

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Dated: July 19, 2023
Wilmington, Delaware

/s/ Domenic E. Pacitti

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