Docket #0563 Date Filed: 10/20/2023

**IN THE UNITED STATES BANKRUPTCY COURT**
**FOR THE DISTRICT OF DELAWARE**

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| PGX HOLDINGS, INC., *et al.*[1], Debtors | Chapter 11<br>Case No. 23-10718 (CTG)<br>(Jointly Administered)<br>**Re: D.I. 486**<br>**Hearing Date: October 27, 2023 @ 10:00 a.m.**<br>**Objection Deadline: October 20, 2023 @ 4:00 p.m.** |

**OBJECTION OF KIRSTEN HANSEN, ON BEHALF OF HERSELF AND OTHERS SIMILARLY SITUATED, TO CONFIRMATION OF THE FIRST AMENDED JOINT CHAPTER 11 PLAN OF PGX HOLDINGS, INC. AND ITS DEBTOR AFFILIATES PURSUANT TO CHAPTER 11 OF THE BANKRUPTCY CODE**

Kirsten Hansen, on behalf of herself and all others similarly situated (the "WARN Claimants"), submits this objection (the "Objection") to the confirmation of the First Amended Joint Chapter 11 Plan of PGX Holdings, Inc. and its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code (D.I. 486 the "Plan").

## PRELIMINARY STATEMENT

1. This small-to-mid-market bankruptcy case involves a perennial problem that, at least from the objector's perspective, is all too common. An employer effects a mass-layoff without providing sixty-days-notice as required by the WARN Act. It then files for chapter 11. WARN claimants commence an adversary proceeding which, due to the nature of WARN claims,

[1] The debtors ("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.

asserts substantial priority status under 11 U.S.C. § 507(a)(4), (5). The debtors put a pre-petition lender DIP (or cash collateral) facility in place and propose a plan. But more often than not, despite the requirement of 11 U.S.C. § 1129(a)(9) to pay priority claims in 100% in cash on the plan's effective date, the plan either ignores the priority WARN Claims, or as here, does not properly treat the priority WARN Claims.

2. Many techniques have been tried over the years to avoid paying WARN claimants. These include structured dismissals[2]; improper solicitation of WARN priority claims[3]; failing to establish adequate disputed claims reserves[4]; improper efforts to "estimate" WARN claims[5]; and conditioning the Plan's effective date on the disallowance of WARN claims[6]—among others.

3. In this case, the Debtors have come up with another tactic. While the Plan is no model of clarity on this point, it appears that all WARN claims (including *priority* WARN claims) are classified in Class 6C as *general unsecured claims.* Claims in Class 6C will receive either a pro-rata share of $300,000 (a miniscule fraction of the $10.5 million of priority WARN Claims) if it votes to accept; or be treated in Class 6B as other general unsecured creditors with a projected dividend of less than 1% to 11% if it votes to reject. This treatment plainly violates both sections 1122 and 1129(a)(9) of the Bankruptcy Code in that it lumps the priority and non-priority WARN

[2] See Objection of Former Employees to Joint Motion of The Debtors, CIT, Sun Capital and the Official Committee of Unsecured Creditors Pursuant to 11 U.S.C. §§ 105(A) and 363 and Federal Rule of Bankruptcy Procedure 9019 for Entry of an Order Approving Settlement Agreement, In re Jevic Holding Corp., Case No. 08-11006 (BLS) [D.I. 1778.]

[3] See Objection of Thomas Karaniewsky and Angela Rodriguez, on Behalf of Themselves and others Similarly Situated, to Approval of the Debtors' Proposed Disclosure Statement, In re Altegrity, Inc., Case No. 15-10226 (LSS) [D.I. 476]

[4] See Objection of Jonathan Gass, on Behalf of Himself and Others Similarly Situated, to Confirmation of the First Amended Combined Joint Chapter 11 Plan of Liquidation and Disclosure Statement of Boxed, Inc. and Its Debtor Affiliates, In re Boxed Inc., Case No. 23-10397 (BLS) [D.I. 399].

[5] See Transcript of Video Hearing Before The Honorable Craig T. Goldblatt United States Bankruptcy Judge, In Re First Guaranty Mortgage Corp., Case No. 22-10584 (CTG) [10/31/2023 Tr. at 23, ll. 13-17] (THE COURT: "What you're proposing is you do all of that discounting and then that basically operates as a cap on the claimants' upside in the event they win because that's all the cash that's left. And if you prevail, they get nothing.")

[6] See Response of Vladimir Boyko to Proposed Amendments to Plan and Disclosure Statement, In re Virgin Orbit Holdings, Inc., Case No. 23-10405 (KBO) [D.I. 420].

claims into the same class and fails to pay the priority portion 100% of the claims with cash on the effective date. It also violates the priority scheme of the Code.

4. The WARN Claimants object to confirmation of the Plan because the Plan (i) appears to recharacterize 100% of the WARN Act claims as general unsecured claims without any stated or actual basis; (ii) improperly classifies the priority WARN Act claims and the non-priority WARN Act claims in a single general unsecured class in violation of 11 U.S.C. § 1122; (iii) does not provide that the priority WARN Act claims be paid cash on the effective date as required by 11 U.S.C. § 1129(a)(9)(B)(ii); (iv) does not establish any disputed claims reserve for the approximately $10.5 million in priority WARN Act claims and hence is not feasible under 11 U.S.C. §§ 1129(a)(11) and (v) violates the priority structure of the Code by paying general unsecured creditors ahead of the WARN priority claims.

## FACTUAL BACKGROUND

### A. General Background

5. Debtors operated two of the nation's largest credit repair brands, Lexington Law and CreditRepair.com. The brands were the public face of Debtors' interconnected entities, which employed over 1,000 telemarketing and customer service employee-agents. The common enterprise offered to help consumers remove disparaging information from their credit reports and improve their credit scores.

6. On June 4, 2023 (the "Petition Date"), the Debtors each commenced their cases under Chapter 11 of the Bankruptcy Code, in the United States Bankruptcy Court for the District of Delaware (the "Bankruptcy Court") and the bankruptcy cases are being jointly administered under Bankr. Case No. 23-10718 (CTG).

**B. Background of the WARN Act Claims**

7. Debtors employed approximately 1,080 employees who worked at, reported to, or, received assignments from facilities in New York, New York, Las Vegas, Nevada, Union, New Jersey, and Flower Mound, Texas (collectively, the "Facilities") and who, in the aggregate, worked at least 4,000 hours per week, exclusive of hours of overtime, within the United States.

8. Debtors relied on three closely affiliated entities to brand, market, and provide credit repair services: Lexington Law, Credit.Com, and CreditRepair.com. Together these entities formed and operated as a common enterprise, along with Heath PC.

9. Debtors operated as a common "business enterprise" as defined by 29 U.S.C. § 2101(a)(1). Debtors operated under common control, shared a common business purpose, shared officers, employees, and office locations, shared advertising and marketing, and performed day-to-day functions with or for each other without reference to legal or nominal distinctions. None of the Debtors acted independently of parent PGX in any material respect regarding their business practices, policies, finances, management, or employees.

10. The Debtors' Board managed operations with the same Executive Team.

11. Mike DeVico led certain of the Debtors, as did Executive Team members Chad Wallace, Vice President Finance & Corporate Controller Eric Cameron, Chief Legal Officer Judy Morris, Chief Human Resources Officer and Chief Operations Officer, Ty Weston, who was responsible for call center operations and strategy for Progrexion Teleservices and CreditRepair.com.

12. Upon information and belief, the decisions to terminate Plaintiff and 1,080 others and shut down were made by Debtors' upper-level corporate management, approved by the Board of Directors, and executed by Mike DeVico and the Executive Team.

13. Debtors touted the efficacy of their services, claiming success in raising credit scores. Debtors claimed their clients saw an average of 10 negative items removed within the first few months from their credit reports.

14. Debtors' 1,000 or so telemarketing agents, on average, made 115,000 telephone calls each day to potential customers, which yielded on average 2,500 sales per day.

15. Debtors' telemarketers asked specific questions of customers and input the answers into Progrexion's software program. Each month, the program then automatically generated and sent the letters to various creditors and credit bureaus. The number of letters sent each month was dictated by the price the customer paid.

16. Most sales required the customer to make a first payment of $149.99 for which Debtors sent a certain number of letters over the customer's own signature. Debtors then charged the customer's credit card $149.99 for each subsequent month for more letters until the customer cancelled (most continued for 5-6 months).

17. Debtors cast themselves to the public, regulators, customers, and employees as a company with a specific mission and culture. They claimed to be "committed to fighting for the Hardest Working Americans"™ who "need to navigate the credit ecosystem with confidence and expertise." They claimed to be "the destination" for these people "to improve and navigate the path of financial wellbeing."

18. Debtors sought to inculcate its enterprise's mission, vision, and values in their recruitment ads and throughout their employment relationship with their staff, emphasizing a "dream job" image, characterized by consumer advocacy, responsibility, excellence, development, inspiration and teamwork.

19. Debtors sought to demonstrate their deeply-held values when they conducted two employee layoffs in 2022. They provided generous severance packages to the 100 or so employees in each layoff to enable to them to find new work without financial distress.

20. On information and belief, Debtors cleared their peak profit of about $65 million in 2020. Their profit was $40 million and $30 million in 2021 and 2022, respectively. In the first quarter of 2023, they were on track to record $23 million in profit.

21. In the spring of 2022, Debtors' leadership became increasingly concerned that its money-making business model was being threatened. The Federal Bureau of Consumer Financial Protection ("CFPB") filed a complaint in the United States District Court for the District of Utah in 2019. The complaint alleged various improper practices on the part of certain Debtors, one of which was the violation of the CFPB's Telemarketing Sales Rule ("TSR") found at 16 C.F.R. § 310.4(a)(2). The CFPB alleged that certain Debtors ("CFPB Debtors") had been receiving payment of fees for their credit repair services upfront upon the sending of letters. Under the TSR, companies can only charge fees for tele-marketed credit repair services after the promised results have been achieved. Once the promised results have been achieved, the provider must observe a six-month waiting period, and then provide the customer with documentation of the results. Only when the documentation has been furnished can the provider first charge the customer for its fees.

22. In the winter of 2021-22, the CFPB moved for partial summary judgment on the issue of the CFPB Debtors' failure to meet the TSR's precondition given the evidence that they did not wait for results when charging customers.

23. In early 2022, Debtors' chief officers became increasingly concerned that an adverse ruling by the court on CFPB's motion would jeopardize their business. They were aware

that the TSR rule ran headlong into their practice of generating revenue upfront. They quickly sought to determine whether there was a viable path for Debtors to remain financially sound. They brainstormed to formulate alternative practices and business models that would not violate the TSR. Over the spring and summer of 2022, they beta-tested several concepts by arming a cohort of telemarketers with new pitches and methods to see if they could generate sufficient sales to save the Debtors.

24. After analyzing the data, over the summer and into the fall of 2022, the corporate leadership realized that none of the experiments had worked.

25. Upon information and belief, in the fall of 2022, Debtors' equity sponsor/owner H.I.G. walked away, wanting nothing more to do with Debtors. Upon information and belief, ownership was assumed by Debtors' two secured lenders, Prospect Partners and Blue Torch, and within months Blue Torch replaced Prospect Partners as the senior lender.

26. Over the course of 2022, the awaited District Court decision on the summary judgment motion caused intensified unease. By year's end, top management was in disarray about the path forward and dysfunctional in terms of taking constructive steps to avert disaster. There was full awareness that the legal and financial issues were dire. "We're f***ked," someone said.

27. By late-2022, reductions in the ranks of the Executive Team were taking place, leaving only four by early 2023.

28. Upon information and belief, the executives who left had been paid large severances and bonuses. Those who stayed also received hefty incentive awards.

29. On information and belief, by early 2023, the remaining Executive Team members were quietly planning for significant headcount reductions. At the same time, they

assured employees that there was nothing to fear, that the situation was under control, and that backup plans were being put in place so that, regardless of the CFPB lawsuit, Debtors would endure and continue treating employees with the characteristic dignity, respect, and care.

30. On March 10, 2023, the District Court granted summary judgment on the TSR violation, finding that the undisputed facts showed a violation of the TSR because "no attempt was made to comply with the express payment preconditions." The Court did not reach the issue of damages, nor did it enjoin Debtors' activities, as the CFPB had sought in its Amended Complaint.

31. Debtors sought stays from the District Court and Tenth Circuit Court Appeals, and remained unswerving in reassuring employees of their financial security because their jobs would remain unaffected and secure.

32. Between April 3 and April 6, both Courts denied the stay requests. In its denial on April 6, the District Court grounded its denial by finding that Debtors had not met the burden of showing a likelihood of success, given the TSR set preconditions for payment that Debtors never tried to meet.

33. On April 5, 2023, with no advance notice, Debtors shut down, terminating approximately 80% of their employees. The employees were paid no severance. They were told their health insurance would stop at the end of the month. Managers with incentive compensation agreements were not paid first quarter bonuses. The sudden loss of compensation, security and healthcare access caused significant hardships.

34. Employees were stunned not by the Courts' decisions, but rather how abruptly Debtors betrayed their practices of decency that they had sought to instill in their valued employees.

35. Debtors describe themselves relentlessly as providers of "vital" services to "hard-working" customers. Declaration of Chad Wallace in Support of Debtors' Chapter 11 Petitions and First Day Motions, 23-10718-CTG, D.I. 12, at 15, 19, 38, 47, 55. Having made hundreds of millions of dollars from the hard work of its 1,080 employees, Debtors put them out on the curb.

36. At all relevant times, Debtors were an "employer," as that term is defined in 29 U.S.C. § 2101 (a)(1) (the "WARN Act") and 20 C.F.R. § 639(a) and continued to operate as a business until they decided to order a mass layoff or plant closing at the Facilities.

37. Debtors failed to pay Plaintiff and each of the Class Members their respective wages, salary, commissions, bonuses, health and life insurance premiums, accrued holiday pay and accrued paid time off for 60 days following their respective terminations, and failed to provide employee benefits including health insurance, for 60 days from and after the dates of their respective terminations.

38. On June 5, 2023, just one day after the Petition Date, the WARN Claimants commenced an adversary proceeding in this **Error! Bookmark not defined.**Court (Adv. Pro. No. 23-50396 (CTG), the "WARN Adversary") under the WARN Act. The WARN Adversary Complaint (Adv. D.I. 1, the "Complaint") asserts WARN Act damages (the "WARN Act Claim") for the WARN Claimants as entitled to wage priority claim treatment under 11 U.S.C. § 507(a)(4) and (5) (the "Priority WARN Act Claims"), and any remainder as a general unsecured claim, as well as reasonable attorneys' fees and expenses under 29 U.S.C. § 2104(a)(6). See Complaint, Prayer for Relief.

39. The WARN Claimants estimate that their WARN Act Claim is $11,800,000 of which approximately $10,498,846 million (not including litigation fees and expenses) constitutes a § 507(a) (4), (5) wage priority amount. The average priority amount is roughly $9,721 per employee, which is about what one would expect given the number of employees, the timing of the layoffs and the $15,150 cap under 11 U.S.C. § 507(a)(4),(5).

**C. The Plan**

40. The Plan defines a "Litigation Claim" as "any Claims, other than the CFPB Claim, **arising under the WARN Act**[7], class action, or other litigation claim or controversy." Plan Art. I pt. A § 105 (emphasis added).

41. "Litigation Claims" are treated under Class 6C as follows:

> *Treatment:* If Class 6C is an accepting Class, except to the extent that a Holder of a Litigation Claim agrees to less favorable treatment, in full and final satisfaction, compromise, settlement, and release of and in exchange for such Litigation Claim, each Holder of a Litigation Claim shall receive its Pro Rata share of a portion of the GUC Litigation Claims Settlement Cash (as allocated by the Committee in its sole discretion and to be disclosed in the Plan Supplement); *provided* that, if the Class of Litigation Claims is not an accepting Class, then such Holders of Litigation Claims shall receive their Pro Rata share of the Other General Unsecured Claim Proceeds on a *pari passu* basis as Holders of Other General Unsecured Claims.

Plan Art. III pt. B § 8(b).

42. The Plan Supplement (D.I. 546) in Exhibit "F" lists the "litigation portion of the GUC litigation claims settlement cash" at $300,000. In the event that Class 6C votes to reject, such claims are lumped into GUC Class 6B, with a projected dividend of <1% to 11%. Disclosure Statement (as defined infra) at 8.

[7] The Plan defines the "WARN Act" as "the Worker Adjustment and Retraining Notification Act of 1988, as amended, and the rules and regulations promulgated thereunder." Plan Art. I pt. A § 180.

43. Although the bulk of the WARN Act Claims are priority claims under 11 U.S.C. § 507(a)(4), (5) (i.e., $10.5 of $11.8 million), the Plan appears to characterize *all* WARN Act Claims as general unsecured claims in Class 6C.

44. The Plan does have provisions governing priority claims. The Plan defines an "Other Priority Claim" as "any Claim, to the extent such Claim has not already been paid during the Chapter 11 Cases, other than an Administrative Claim or a Priority Tax Claim, entitled to priority in right of payment under section 507(a) of the Bankruptcy Code." Plan Art. I pt. A § 112.

45. The Plan provides for the following treatment of Other Priority Claims:

> *Treatment:* Except to the extent that a Holder of an Allowed Other Priority Claim agrees to less favorable treatment, in full and final satisfaction, compromise, settlement, and release of and in exchange for such Allowed Other Priority Claim, on or as soon as reasonably practicable after the later to occur of (i) the Effective Date and (ii) the date such Claim becomes Allowed (or as otherwise set forth in the Plan), **each Holder of an Administrative, Priority or Priority Tax Claim will either be satisfied in full, in Cash, or otherwise receive treatment consistent with the provisions of section 1129(a)(9) of the Bankruptcy Code.**

Plan Art. III, pt. B § 2(b) (emphasis added).

46. This provision is odd for a couple reasons. First, Administrative and Priority Tax Claims are listed as being treated under Class 3 even though 11 U.S.C. § 1123(a)(1) does not permit the classification of administrative and priority tax claims. Presumably, this is just an oversight as other provisions of the Plan address administrative and priority tax claims. See Plan, Art. II pts. A and D.

47. More important, this section states that Other Priority Claims will either be satisfied in full in Cash "or otherwise receive treatment consistent with the provisions of section 1129(a)(9) of the Bankruptcy Code." However, as to non-tax non-administrative priority claims, the only treatment available as to an unimpaired priority claim is "cash on the effective date of the plan equal to the allowed amount of such claim." 11 U.S.C. § 1129(a)(9)(B)(ii). Hence, it is not clear how Other Priority Claims could "otherwise receive treatment" as the Code plainly requires payment in full on the Plan's effective date.

48. The Plan itself does not contain an analysis or estimate of the amount of Other Priority Claims. The liquidation analysis (the "Liquidation Analysis"), attached as Exhibit "B" to the disclosure statement accompanying the Plan (D.I. 489, the "Disclosure Statement"), similarly does not contain a line item for "Other Priority Claims" or indeed *any* priority claims other than administrative claims. This is consistent with the estimated distribution table in part III(C) of the Disclosure Statement that estimates the amount of Other Priority Claims as "N/A" (presumably meaning "zero").[8]

49. Still more troubling is that the Liquidation Analysis *does* contain a specific line item for WARN Act Claims at $18,517,000 *as a purely general unsecured claim*.[9] This is also consistent with the estimated distribution table in part III(C) of the Disclosure Statement which lists the estimated amount of "Litigation Claims" at $18.5 million, with an estimated dividend of 1%-4%. Again, "Litigation Claims" are general unsecured claims under the Plan.

[8] Another puzzling fact is that Ms. Hansen received a notice of non-impaired status. But as Other Priority Claims are estimated to be "zero" and there is no reserve in the Plan for contested Other Priority Claims, there is no means to pay her "unimpaired" claim.

[9] The Liquidation Analysis also sets out a TCPA Class Action Lawsuit Claim ranging from $0.00 to $1770,615,500. These claims are presumably included in Class 6C, but for whatever reason, the Disclosure Statement does not include those claims in the estimated amount of Class 6C Claims. It also appears that although Class 6C contains WARN Act claims, most of the creditors solicited to vote in Class 6C appear to hold general unsecured consumer fraud claims. See Certificate of Service, D.I. 560 at Exhibit "E" (listing Class 6C members who received ballots).

50. Consistent with its estimate that there are no Other Priority Claims, the Plan does not establish a reserve for Other Priority Claims.

51. While the Plan provides for no means to pay the Priority WARN Act Claims anything (except as general unsecured claims in Class 6C), it provides for substantial distributions to lower-priority general unsecured creditors in Classes 6A, 6B, 6C and 6D. Plan Art. III pt. B §§ 6-9.

## ARGUMENT

### A. The Plan Appears to Recharacterize All WARN Act Claims as General Unsecured Claims Without Any Basis.

52. The Plan simply ignores the Priority WARN Act claims completely. These claims appear to be estimated to be zero. The Liquidation Analysis has no line item for Priority WARN Act Claims--or indeed *any* Other Priority Claims. Yet the same Liquidation Analysis contains a specific line item for WARN Act Claims as purely general unsecured claims of $18,517,000. The Disclosure Statement itself estimates "Other Priority Claims" at "N/A"; but Class 6C "Litigation Claims" at $18,500,000.

53. There is no explanation in the Plan or Disclosure Statement as to why 100% of the WARN Act claims are deemed to be general unsecured claims not entitled to priority under 11 U.S.C. § 507(a)(4), (5). The Plan cannot magically recharacterize 100% of the WARN Act Claims as general unsecured claims.

54. WARN Act claims—as claims for wages and benefits arising within 180 days of the Petition Date—are virtually always entitled to priority status. E.g. Czyzewski v. Jevic Hldg. Corp., 137 S. Ct. 973, 980 (2017) ("Some $8.3 million of that [WARN Act] judgment counts as a priority wage claim under 11 U.S.C. §507(a)(4), and is therefore entitled to payment ahead of general unsecured claims against the Jevic estate."); In re Bake-Line Gp., LLC, No. 04-10104 (CSS), 2019 Bankr. LEXIS 1946, at *29 (Bankr. D. Del. July 1, 2019) ("Therefore, because the WARN Act wage claims are priority claims, claims for taxes withheld from the WARN Plaintiffs' wages are also priority claims pursuant to section 507(a)(8)(C)"); Oil, Chem. & Atomic Workers v. Hanlin Gp. (In re Hanlin Gp.), 176 B.R. 329, 333 (Bankr. D.N.J. 1995) (in discussing the priority of WARN claims under then section 507(a)(3), the Court stated that "'[t]he "back pay" liability of the employer is comparable to privately negotiated severance pay. It is severance pay in lieu of notice, imposed by statute. It is a "quasi contractual" obligation. As a statutorily imposed form of severance pay, it is "wages" within the meaning of § 507(a)(3) of the Code.'") (internal citations omitted); see also, In re FAH Liquidating Corp., 13-13087-KG, 2019 WL 8269114 (Bankr. D. Del. Dec. 27, 2019)(WARN Act damages and wages are 11 U.S.C. §§ 507(a)(4) and (a)(5) priority claims when earned or vested within 180 days pre-petition); In re Powermate Holding Corp., 394 B.R. 765, 773 (Bankr. D. Del. 2008) (same).

55. The only real limitation on the priority status of WARN Act claims is that some such claims exceed the statutory cap of $15,150. 11 U.S.C. § 507(a)(4), (5).

56. There is not one word in the Plan or Disclosure Statement to explain why 100% of the WARN Act claims are characterized as general unsecured claims not entitled to any priority. To the extent that the Plan conjures some extra-statutory authority to do so, it is unconfirmable.

**B. The Plan Improperly Classifies the Priority WARN Act Claims and the General Unsecured WARN Act Claims in a Single Class in Violation of 11 U.S.C. § 1122(a).**

57. Code section 1122(a)(2) provides in pertinent part that "a plan may place a claim or an interest in a particular class **only if such claim or interest is substantially similar to the other claims or interests of such class."** (emphasis added). This has been interpreted to mean that claims of different priority levels may not be classified in a single class:

> In reviewing classification schemes, bankruptcy judges are given limited guidance from the Bankruptcy Code itself. Section 1122(a) provides that "a plan may place a claim or an interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class." **As a result, a plan proponent cannot place dissimilar claims together in the same class, such as secured claims with unsecured claims, or priority unsecured claims with non-priority unsecured claims**. But § 1122(a) does not require the converse—that similar claims be placed in the same class.
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> Mins. Techs., Inc. v. Novinda Corp. (In re Novinda Corp.), 585 B.R. 145, 154 (B.A.P. 10th Cir. 2018) (emphasis added)

58. While not a model of clarity, the Plan appears to place 100% of the WARN Act claims—that is, both the Priority WARN Act Claims and the general unsecured WARN Act claims--in a single general unsecured class, namely, Class 6C—along with $175 million of other non-priority litigation claims. That is a plain violation of 11 U.S.C. § 1122(a)(2).

**C. The Plan Violates Code Section 1129(a)(9)(B)(ii) Because it Fails to Provide for Full Payment of the Priority WARN Act Claims.**

59. Code section 1129(a)(9)(B)(ii) requires that non-administrative, non-tax priority claims be paid in full with cash on the plan's effective date. 11 U.S.C. § 1129(a)(9)(B)(ii).[10]

[10] Code section 1129(a)(9)(B)(i) contemplates that a *solicited* class of non-tax priority claims may, by voting to accept the plan, be paid through deferred cash payments. See *7 Collier on Bankruptcy P 1129.02* (16th 2023) ("Subparagraph (B) authorizes deferred payments . . . provided that the requisite majority of the priority class consents to the treatment accorded its

60. Although the Plan states that Other Priority Claims will be paid in full in Cash, the Plan appears to improperly treat 100% of the WARN Act claims as non-priority general unsecured claims. While the WARN Act Claims may be contested claims (as to allowance, amount and/or priority), that does not mean they are not priority claims and hence must be treated as such under the Plan. The Plan's failure to do so violates 11 U.S.C. § 1129(a)(9)(B)(ii).

61. While the WARN Claimants should not have to engage in mind reading, perhaps it is Debtors' position that if the Class 6C Claimants vote to accept the Plan, any non-voting or rejecting members can be dragged along. There is absolutely nothing in the Code, however, that permits priority claimants to be voted out of their priority status. As noted in note 10 supra, in the rare instance that priority claims are solicited, acceptance can at most permit a debtor to pay 100% of such claims over time. In no case can solicitation of priority claims deprive a priority claimant of her priority status.

**D. The Plan's Failure to Provide for 100% Payment of Priority WARN Act Claims Violates Code Section 1129(a)(11) as to Feasibility.**

62. Code section 1129(a)(11) provides that a plan may only be confirmed if "[c]onfirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan." 11 U.S.C. § 1129(a)(11). This is commonly known as the "feasibility" test.

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classes under the plan and the present value of deferred cash payments to members of the class equal the allowed amount of their claims."). It is the experience of undersigned counsel that solicitation of priority claimants under this provision is exceedingly rare. The Plan here is not clear on this point as Class 6C purports to be a class of general unsecured claims yet the WARN Act Claims, which are lumped into that class, are predominantly priority claims under 11 U.S.C. § 507(a) (4), (5).

63. A plan—even a liquidating plan—is confirmable only if it is feasible under Section 1129(a)(11). See In re American Cap. Equip., LLC, 688 F.3d 145, 155-56 (3d Cir. 2012). Feasibility means that a plan must be "reasonably likely to succeed on its own terms without a need for further reorganization on the debtor's part." Id. at 156 (citations, brackets omitted).

64. A plan proponent must show feasibility by a preponderance of the evidence. See In re W.R. Grace & Co., 475 B.R. 34, 114 (D. Del. 2012) (citing cases). A "debtor's own unsupported sincerity and belief that its plan is feasible is insufficient to satisfy the inquiry." Id. at 115.

65. When considering a plan, the Court has "an affirmative obligation to scrutinize the plan and determine whether it is feasible." In re Young Broadcasting Inc., 430 B.R. 99, 128 (Bankr. S.D.N.Y. 2010) (citing cases). The Court has this duty "regardless of whether there is any objection raised by a party in interest." In re Mid-State Raceway, Inc., 2006 WL 4050809 at *19 (Bankr. N.D.N.Y. Feb. 10, 2006). Similarly, the Court must determine a plan's feasibility even if the plan has received overwhelming creditor support. See In re Las Vegas Monorail Co., 462 B.R. 795, 803-04 (Bankr. D. Nev. 2011).

66. "A plan will not be feasible if its success hinges on future litigation that is uncertain and speculative, because success in such cases is only possible, not reasonably likely." American Cap. Equip., 688 F.3d at 156 (citations omitted); accord In re W.R. Grace & Co., 729 F.3d 332, 348-49 (3d Cir. 2013).

67. Where a plan does not contain sufficient means to pay priority claims in full, it is not feasible. See In re Harbin, 486 F.3d 510, 518 (9th Cir. 2007) (bankruptcy court erred in confirming plan where it did not consider impact of appeal of conditionally disallowed claim on plan feasibility); In re Holmes, 301 B.R. 911, 915 (Bankr. M.D. Ga. 2003) (chapter 11 plan not feasible where debtor merely hoped to compromise IRS claim and "[d]ebtor does not have the ability to pay the IRS's priority tax claim of $9,372,245 over a term of sixty months as proposed in his Chapter 11"); In re Thornhill, 268 B.R. 570, 573 (Bankr. E.D. Cal. 2001) (chapter 13 plan not feasible where it did not provide for payment of priority and secured claims in full).

68. The Plan is not feasible. Despite the assertion of over $10 million in Priority WARN Act Claims, the Plan does not reserve a single dollar as a contested claims reserve for such claims. The Debtors here have not even endeavored to propose a feasible plan.

**E. The Plan Violates the Priority Scheme of the Code**

69. The Plan provides for payment to several classes of general unsecured claims—6A (continuing trade claims); 6B (other general unsecured claims); 6C (unsecured litigation claims into which the WARN claims are improperly classified) and 6D (CFPB claims). Yet, the Priority WARN Act Claims are not being paid in full as required by the Code. Distribution of estate assets must adhere to the priority scheme of the Code. Czyzewski., 137 S. Ct. at 984 ("The priority system applicable to those distributions has long been considered fundamental to the Bankruptcy Code's operation. See H. R. Rep. No. 103-835, p. 33 (1994) (explaining that the Code is 'designed to enforce a distribution of the debtor's assets in an orderly manner . . . in accordance with established principles rather than on the basis of the inside influence or economic leverage of a particular creditor'")).

70. Debtors will no doubt argue that the "gifting" doctrine applies here. Gifting has limited application in the context of chapter 11 plans, however. In re Armstrong World Induss., 432 F.3d 507, 516 (3d Cir. 2005) (where equity received value under the Plan in excess of the value of a release of intercompany claims, such value was deemed to be "on account of" such interests in violation of the absolute priority rule). Here, unsecured creditors are plainly receiving value on account of their claims and gifting has no application.[11]

## VOTING AND RELEASE OPT OUT

71. To the extent that Kirsten Hansen, on behalf of herself and all others similarly situated, has a right to vote as a member of Class 6C or otherwise, she votes to reject the Plan. Ms. Hansen, on behalf of herself and all others similarly situated, also opts-out of any third-party releases in the Plan.

## CONCLUSION

For all of these reasons, this Court should either deny confirmation of the Plan or require that the Debtors expressly reserve for the full value of the Priority WARN Act Claims.

DATED: October 20, 2023

Respectfully submitted,

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[11] The WARN Claimants, while recognizing that the gifting doctrine has been blessed in other contexts (*e.g. In re ICL Hldg. Co.*, 802 F.3d 547, 555 (3d Cir. 2015)), believe that this doctrine conflicts with the Code and reserve all of their rights in any appeal.

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**IN THE UNITED STATES BANKRUPTCY COURT**
**FOR THE DISTRICT OF DELAWARE**

| | |
|---|---|
| PGX HOLDINGS, INC., *et al.*,<br><br>Debtors | Chapter 11<br><br>Case No. 23-10718 (CTG)<br><br>(Jointly Administered) |

**CERTIFICATE OF SERVICE**

I, Christopher D. Loizides, hereby certify that on October 20, 2023, I caused true and correct copies of the foregoing *Objection of Kristin Hansen, on Behalf of Herself and Others Similarly Situated, to Confirmation of the First Amended Joint Chapter 11 Plan of PGX Holdings, Inc. and its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code, and this Certificate of Service* to be served via electronic mail on the parties as per the service list.

DATED: October 20, 2023

Respectfully submitted,

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