IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
PGX HOLDINGS, INC., *et al.*,	Case No. 23-10718 (CTG)
Debtors.[1]	(Jointly Administered)

THE UNITED STATES OF AMERICA'S OBJECTION TO THE SALE OF SUBSTANTIALLY ALL OF THE DEBTORS' ASSETS AND MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO CONVERT CHAPTER 11 CASES TO CHAPTER 7

[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.

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The United States of America (the "United States"), on behalf of the Consumer Financial Protection Bureau (the "CFPB"), submits its memorandum of law in support of the United States' *Motion to Convert Chapter 11 Cases to Chapter 7* (the "Motion") at Docket No. 233. The United States further objects to the sale of substantially all of the Debtors' assets under Section 363(f) of the Bankruptcy Code pursuant to the *Motion of the Debtors for Entry of Order (I)(A) Approving Bidding Procedures for Substantially All of the Debtors' Assets, (B) Authorizing the Debtors to Enter into One or More Stalking Horse Agreements and to Provide Bidding Protections Thereunder, (C) Scheduling an Auction and Approving the Form and Manner of Notice Thereof, (D) Approving Assumption and Assignment Procedures, and (E) Scheduling A Sale Hearing and Approving the Form and Manner of Notice Thereof; (II)(A) Approving the Sale of the Debtors' Assets Free and Clear of Liens, Claims, Interests and Encumbrances and (B) Approving the Assumption and Assignment of Executory Contracts and Unexpired Leases; and (III) Granting Related Relief* [Docket No. 66] (the "Sale Motion").

PRELIMINARY STATEMENT

1. The foundational principal of the Bankruptcy Code is that it permits a "fresh start" to the "honest but unfortunate debtor."[2] Accordingly, Chapter 11 and Section 363 do not concern merely the unbridled maximation of value for a debtor's estate—they concern the maximation of *legitimate* value. Recognizing the potential for abuse of the bankruptcy system by unscrupulous debtors who are not purely "honest but unfortunate," courts have imposed equitable requirements on chapter 11 filings to deter filings that serve purposes outside of the legitimate scope of the bankruptcy laws. Among these illegitimate purposes are filings that amount to tactics to gain an

[2] *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365, 367 (2007) (internal quotes omitted).

unfair litigation advantage, filings that seek to abuse the automatic stay, and filings for businesses whose activities violate federal law. When made for some illegitimate purpose, a chapter 11 filing is deemed in "bad faith"—a determination based not on a debtor's subjective intent, but on whether a filing serves a legitimate reorganizational purpose.

2. These chapter 11 cases advance at least two such illegitimate purposes.

3. First, the Debtors' use of chapter 11 to consummate a sale of substantially all of their assets is a bad faith litigation tactic to avoid not simply a monetary claim, but regulatory obligations arising from the Debtors' historical and ongoing violation of consumer protection laws related to abusive telemarketing. In the CFPB Litigation, the Utah District Court[3] granted summary judgment in favor of the CFPB, finding that the Debtors' business had for years violated the advanced fee provision of the Telemarketing Sales Rule.[4] Because abusive telemarketing practices comprised the majority of the Debtors' business prior to the Utah District Court's Summary Judgment Order, in support of a stay of the order, executives of the Debtors testified, that the court's ruling posed an existential threat to the Debtors' business.[5] The Debtors, however, continue to violate the Telemarketing Sales Rule by charging, on a monthly basis, customers who

[3] Unless otherwise defined in this memorandum, capitalized terms have the meaning ascribed to them in the Motion.

[4] 16 C.F.R. § 310.4(a)(2).

[5] *See* Case No. 2:19-cv-00298-BSJ (D. Utah), Decl. of John Heath in Support of Defs.' Motion for Stay of the March 10 Order (ECF No. 510-1) (Motion, Exhibit B) ("Lexington Law cannot afford to wait to bill its clients until six months after achieving results. Nor is it likely to survive if it is unable to use the telephone in the engagement process."); D. Utah Case No. 2:19-cv-00298-BSJ, Decl. of Chad Wallace In Support of Defs.' Motion for Stay of the March 10 Order (ECF No. 510-2) (Motion, Exhibit C) ("The Court's Order poses a serious, immediate threat to Lexington Law and Progrexion's existence which cannot be meaningfully remedied after a final judgment. Even if the Court's Order were ultimately overturned on appeal months in the future, the harm to Lexington Law and Progrexion in the interim would be irreparable, absent a stay.").

were initially telemarketed. To cleanse this impermissible stream of revenue, stakeholders seek to sell the Debtors' business under Section 363(f) of the Bankruptcy Code to prevent the CFPB from challenging the future billing of these customers on the basis of pre-sale conduct. The proposed sale likewise aims to allow the business to sidestep any prospective injunctive relief that the Utah District Court might enter as a consequence of the Debtors' historical business practices violating the Telemarketing Sales Rule. These are impermissible uses of chapter 11 and of Section 363(f).

4. Second, protection of a business whose core activities violate federal law—and which continues to violate federal law during the bankruptcy case—is outside the scope of the bankruptcy laws. Courts have observed that it is inconceivable that Congress intended that bankruptcy courts approve activities that violate federal criminal law. It is no more conceivable that Congress intended for bankruptcy protections to extend to businesses that overwhelmingly derive revenue by violating federal consumer protection law. A debtors' business operations must conform with all applicable non-bankruptcy law. In this case, whether the Debtors' business operations, even following the Debtors' voluntary purported reforms to their conduct, conform to applicable non-bankruptcy law is far from clear. Because substantial questions exist regarding the legality of the present (and thus any go-forward) business, the Court should not afford the Debtors and their stakeholders the protections of chapter 11 or Section 363(f).

5. For these reasons, the United States requests that the Court grant its Motion and convert the above-captioned chapter 11 cases to cases under chapter 7 of the Bankruptcy Code or, in the alternative, dismiss these chapter 11 cases prior to approving the sale of substantially all of the Debtors' assets. In addition, if the Court declines to grant the Motion prior to ruling on the sale, the United States objects to the sale of substantially all of the Debtors' assets under Section

363(f) of the Bankruptcy Code free of the prospective injunctive relief sought in the CFPB Litigation.

RESERVATION OF RIGHTS

6. As discovery in support of the United States' Motion and objection is ongoing, the United States expressly reserves the right to supplement the arguments and evidence presented below.

ARGUMENT

I. THESE CHAPTER 11 CASES SHOULD BE CONVERTED TO CASES UNDER CHAPTER 7

A. These Cases Were Not Filed in Good Faith

7. Inherent to the Bankruptcy Code is the tacit requirement that every chapter 11 petition must be filed in good faith. *Official Comm. of Unsecured Creditors v. Nucor Corp. (In re SGL Carbon Corp.)*, 200 F.3d 154, 162 (3d Cir. 1999) ("[A] Chapter 11 petition is subject to dismissal for 'cause' under 11 U.S.C. § 1112(b) unless it is filed in good faith."). The Debtors bear the burden of demonstrating good faith. *NMSBPCSLDHB, L.P. v. Integrated Telecom Express, Inc. (In re Integrated Telecom Express, Inc.)*, 384 F.3d 108, 118 (3d Cir. 2004); *In re Tamecki*, 229 F.3d 205, 207 (3d Cir. 2000). Though it suggests inquiry into debtors' "subjective intent," this "good faith" requirement instead encompasses "equitable limitations that courts have placed on Chapter 11 filings . . . to deter filings that seek to achieve objectives outside the legitimate scope of the bankruptcy laws [or] cases filed for a variety of tactical reasons unrelated to reorganization." *In re Marsch*, 36 F.3d 825, 828 (9th Cir. 1994).

8. These chapter 11 proceedings lack the requisite good faith because: (1) these cases were filed to obtain a tactical litigation advantage in the CFPB Litigation where the CFPB has already obtained an order granting partial summary judgment in its favor, and (2) substantial

questions exist on the continuing legality of the Debtors' business and, thus, whether it is a saleable asset under Section 363(f) of the Bankruptcy Code.

9. *First*, "because filing a Chapter 11 petition merely to obtain tactical litigation advantages is not within 'the legitimate scope of the bankruptcy laws,' courts have typically dismissed Chapter 11 petitions under these circumstances[.]" *See Integrated Telecom Express, Inc.,* 384 F.3d at 120 (internal citation omitted); *see also In re Argus Group 1700, Inc*., 206 B.R. 757, 765–66 (E.D. Pa. 1997); *Furness v. Lilienfield*, 35 B.R. 1006, 1013 (D. Md. 1983) ("The Bankruptcy provisions are intended to benefit those in genuine financial distress. They are not intended to be used as a mechanism to orchestrate pending litigation."). The Debtors endeavor to use these chapter 11 cases as an escape hatch from the CFPB Litigation that seeks to enjoin ongoing and future unlawful conduct. The proposed sale seeks to prevent the CFPB from litigating either historical or ongoing violations of law to conclusion, and to insulate any post-sale business from prospective injunctive relief that could be imposed by the Utah District Court as a result of those violations. Thus, these chapter 11 cases amount to a bad faith litigation tactic.

10. *Second*, it is outside the "the legitimate scope of the bankruptcy laws" to use Bankruptcy Code protections and Section 363(f) to sell, free-and-clear, a business that has derived years of revenue from activities a federal court has found to be abusive and illegal and that still derives revenue by violating consumer protection laws. *See e.g.*, *In re Way to Grow, Inc.*, 610 B.R. 338, 345-46 (D. Colo. 2019); *In re Burton*, 610 B.R. 633, 638 (B.A.P. 9th Cir. 2020). As discussed below, bankruptcy courts recognize that businesses that violate federal criminal law may not avail themselves of the Bankruptcy Code's protections. *See id.* Accordingly, it should be

equally clear that a business that derived the overwhelming majority of its historical revenue[6] from conduct that the Federal Trade Commission, acting at Congress' direction,[7] has deemed "abusive"[8] should be not have its past conduct absolved so that a purchaser may reap the benefits of business built on an illegal bedrock.

1. The Debtors Seek to Shed Affirmative Regulatory Obligations as a Litigation Tactic

11. "[F]iling a Chapter 11 petition merely to obtain tactical litigation advantages is not within 'the legitimate scope of the bankruptcy laws.'" Thus, "courts have typically dismissed Chapter 11 petitions," where the core purpose of the bankruptcy filing was a litigation tactic. *See In re SGL Carbon Corp.*, 200 F.3d at 162, 165 (internal citation omitted); *see also 15375 Memorial Corp. v. BEPCO, LP (In re 15375 Mem'l Corp.)*, 589 F.3d 605, 618 (3d Cir. 2009); *Integrated Telecom Express, Inc.*, 384 F.3d at 118; *In re Argus Group 1700, Inc*., 206 B.R. at 765–66; *Furness v. Lilienfield*, 35 B.R. at 1013 ("The Bankruptcy provisions are intended to benefit those in genuine financial distress. They are not intended to be used as a mechanism to orchestrate pending litigation."); *In re HBA East, Inc*., 87 B.R. 248, 259–60 (Bankr. E.D.N.Y. 1988) ("As a general rule where, as here, the timing of the filing of a Chapter 11 petition is such that there can be no doubt that the primary, if not sole, purpose of the filing was a litigation tactic, the petition may be dismissed as not being filed in good faith."); *see also, In re Martin*, 51 B.R. 490, 495 (Bankr. M.D.

[6] *See* Wallace Decl., ¶ 10; Response to Interrogatory No. 13, PGX_DEBTORS-0005876.

[7] *See* Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. § 6101 (finding statute necessary because consumers "are victimized by…telemarketing deception and abuse" and "lose $40 billion a year" due to it); § 6102(a) (directing FTC to promulgate regulations prohibiting "other abusive telemarketing acts or practices").

[8] 16 C.F.R. § 310.4(a)(2).

Fla. 1985); *In re Derma Pen, LLC*, Case No. 14-11894 (KJC), 2014 WL 7269762, at *9 (Bankr. D. Del. Dec. 19, 2004).

12. The admitted—and singular—purpose of these chapter 11 cases is to sell the Debtors' business free and clear of its regulatory obligations after years of abusive telemarketing practices. *See* Wallace Decl., ¶ 56 ("As contemplated by the Restructuring Support Agreement, the Debtors commenced these chapter 11 cases to execute a value-maximizing Section 363 sale to sell these assets free and clear of all claims and interests . . ."). The conduct-focused nature of the CFPB Litigation renders these cases distinct from those where the Government's claims can be reduced to a pecuniary claim. The CFPB's claims are not merely a matter of successor liability. Stakeholders here instead seek to use Section 363(f) to absolve the Debtors' business not of pecuniary liability, but of affirmative "obligations or restrictions related to or resulting from the CFPB Litigation," to operate post-sale. *See* Sale Motion, at 5; Wallace Decl., ¶ 15. This is a transparent attempt to hinder the CFPB's regulatory authority to curtail unlawful conduct under the TSR. A sale free of prospective injunctions in the CFPB Litigation to prevent abusive telemarketing practices would leave any post-sale going-concern business unrestrained from engaging in the same conduct that led to the Utah District Court finding that the Debtors "violated 16 C.F.R. § 310.4(a)(2) [the TSR] from March 8, 2016, through the present," and from continuing to collect payment from consumers in violation of the TSR. Case No. 2:19-cv-00298-BSJ, Summary Judgment Order at 13 (D. Utah Mar. 10, 2023).

13. Approving the Debtors' proposed sale would allow debtors to play hot potato with businesses that other federal courts have deemed to have engaged in unlawful practices before those courts could enjoin such practices. In such scenarios, even if a court were to later find that a business operated illegally, and was thus unsaleable, enforcement authorities could be left with

no recourse against the business's purchaser. Not only would this inequitably render toothless all injunctive remedies the court could impose in the CFPB Litigation, but it could more generally impede regulatory enforcement agencies' ability to enjoin purchasers from engaging in previously determined illegal conduct after Section 363(f) sales.[9]

14. The bankruptcy court's ruling in *In re National Rifle Association of Am*erica, 628 B.R. 262 (Bankr. N.D. Tex. 2021) is illustrative. While avoiding ruling on the merits of the New York Attorney General's case against the National Rifle Association of America ("NRA"), the court held that "the Bankruptcy Code does not provide sanctuary from" dissolution under New York state law, "which is a distinct litigation advantage." *Id.* at 281. It observed that "[u]sing the bankruptcy process to avoid dissolution" was "problematic because it deprives the [State] of the ability to regulate not-for-profit corporations in accordance with its laws." *Id.* The court concluded that "a bankruptcy case filed for the purpose of avoiding a regulatory scheme is not filed in good faith and should be dismissed." *Id.* at 282 (collecting cases); *see also In re Halo Wireless, Inc*., 684 F.3d 581, 587 (5th Cir. 2012) (observing that section 362(a)(4) advances the goal of "discourage[ing] debtors from submitting bankruptcy petitions either primarily or solely for the purpose of evading impending governmental efforts to invoke the governmental police powers to enjoin or deter ongoing debtor conduct which would seriously threaten the public safety and welfare.") (quoting *In re McMullen*, 386 F.3d 320, 324-25 (1st Cir. 2004)); H.R.Rep. No. 95–595, at 343, *reprinted in* 1978 U.S.C.C.A.N. 5963, 6299 ("where a governmental unit is suing a

[9] As discussed *infra* at 13, in the alternative, the Court should rule that the obligations that the CFPB seeks to impose on the Debtors' business through a sale under Section 363(f) are not "interests in property" of which the Debtors' business would be sold free and clear, and that any purchaser would become a successor in interest as to the injunctive relief sought in the CFPB Litigation.

debtor to prevent or stop violation of fraud, environmental protection, consumer protection, safety, or similar police or regulatory laws, or attempting to fix damages for violation of such a law, the action or proceeding is not stayed under the automatic stay.").

15. Indeed, it is "a fundamental policy behind the police or regulatory power exception . . . to prevent the bankruptcy court from becoming a haven for wrongdoers." *In re Commonwealth Cos., Inc*., 913 F.2d 518, 527 (8th Cir. 1990). When the purpose of a bankruptcy filing is to avoid a regulatory scheme, courts have a "duty to conduct a fact-intensive inquiry to determine where a particular petition for bankruptcy relief falls along the spectrum ranging from the clearly acceptable to the patently abusive." *In re Nat'l Rifle Ass'n of Am*., 628 B.R. at 283 (*citing In re 15375 Mem'l Corp.*, 589 F.3d at 618 (3d Cir. 2009) (discussing the duties of courts in examining whether bankruptcy petitions are filed in good faith)). The Debtors should not be permitted to circumvent this clear policy through a sale under Section 363(f).

2. An Unlawful Enterprise Cannot Avail Itself of Bankruptcy Protections in Good Faith, and Substantial Questions Exist Regarding the Continuing Legality of the Debtors' Business Under the Consumer Protection Laws

16. Indeed, compounding the inequity of these chapter 11 cases, the record here and in the CFPB Litigation shows that the Debtors continue to charge consumers for telemarketed credit repair services, which the CFPB maintains continues to violate the TSR. *See* Response to Interrogatory No. 13 [**Exhibit C**] ("the Debtors refer the United States to documents produced by the Debtors that reflect the assumptions and financials around their go-forward business at: . . . PGX_DEBTORS-0005876 at 19 ("Total re-enrollment opportunity ~240k clients, of which over 105k clients successfully ***re***-enrolled") (emphasis added))).

17. Using the Bankruptcy Code and Section 363(f) sales to set back government enforcement litigation seeking to enjoin and end abusive and illegal conduct core to the reorganizing business is outside the "the legitimate scope of the bankruptcy laws." *See, e.g.*, *In re Way to Grow, Inc.,* 610 B.R. at 346.

18. For example, in the criminal context, courts have observed that "the Code is not blind to criminal behavior" and that it "is frankly inconceivable that Congress could have ever intended that federal judicial officials could, in the course of adjudicating disputes under the Bankruptcy Code, approve a reorganizational plan that relies on violations of federal criminal law." *Id.* This principle applies no less when a court has found that the Debtors' business violates federal consumer protection laws, and where those violations accounted for at least 80% of the Debtors' business activity, s*ee* Wallace Decl., ¶ 10.

19. The Ninth Circuit, has observed that, "[s]everal courts have held that a bankruptcy case must be dismissed if the continuation of the case would require the court, trustee, or debtor in possession to administer assets that are illegal under the [Controlled Substances Act ("CSA")] or that constitute proceeds of activity criminalized by the CSA." *In re Burton*, 610 B.R. at 638 (collecting cases). The court further observed that "some courts have held that a bankruptcy filing or a plan of reorganization proposed by a debtor who is involved in an illegal enterprise is not in good faith, even where the debtor does not have a subjective bad motive, is in legitimate need of bankruptcy relief, and there are no other indicia of an attempt to abuse the bankruptcy process." *Id.* (citations omitted).

20. Here, continued monthly billing of telemarketed credit repair customers, irrespective of any purported reform of customer contracts, violates the TSR [16 C.F.R. § 310.4(a)(2)] because the ultimate mechanism (paper, online, fax, etc.) used to sign a contract for

telemarketed goods or services has no bearing on whether a transaction is governed by or violates the TSR. *See, e.g.*, *FTC v. Washington Data Resources*, 856 F. Supp. 2d 1247, 1252 (M.D. Fla. 2012) (finding a TSR violation where the telemarketing salesperson "sent the [consumer] an enrollment package that consisted of an attorney retainer agreement"); *FTC v. Affiliate Strategies*, 849 F. Supp. 2d 1085, 1098 (D. Kan. 2011) (finding a TSR violation where "[Defendant] asked each consumer who purchased…services to sign and return a form setting forth the terms of the consumer's purchase"); *CFPB v. Prime Mktg. Holdings*, No. CV 16-07111-BRO (JEM), 2016 WL 10516097, at *1 (C.D. Cal. Nov. 15, 2016) (finding the CFPB adequately pleaded a TSR violation where, in the course of a telemarketing call, "[i]f the consumer agreed to hire Defendant, he or she was required to sign an online contract").

21. Regardless of whether credit repair customers subsequently signed agreements online, transactions with consumers who were initially acquired through a sales campaign conducted over the telephone are subject to the TSR. *See* 16 C.F.R. § 310.2 (gg) ("Telemarketing means a plan, program, or campaign which is conducted to induce the purchase of goods or services…by use of one or more telephones and which involves more than one interstate telephone call."). Accordingly, substantial questions exist about whether the Debtors' business, even following the represented closure of their call centers and cessation of telemarketing activities (*see* Wallace Decl., ¶¶ 10, 15), violates the TSR and derives profits illegally. Thus, these chapter 11 cases lack the requisite good faith, and should be converted to cases under chapter 7.

II. THE PROPOSED SALE UNDER SECTION 363(F) OF THE BANKRUPTCY CODE IS IMPERMISSIBLE

A. The Proposed Sale is Not a Valid Exercise of the Debtors' Business Judgment.

22. Furthermore, 28 U.S.C. § 959(b) requires that the Debtors comply with applicable non-bankruptcy law during their cases. *See In re American Coastal Energy Inc.*, 399 B.R. 805, 810 (Bankr. S.D. Tex. 2009) ("Bankruptcy debtors are no different from any citizen in that they must comply with state and federal laws."); *see also Midlantic Nat'l Bank v. N.J. Dept. of Envtl. Protection*, 474 U.S. 494, 502 (1986) ("Congress has repeatedly expressed its legislative determination that the trustee is not to have *carte blanche* to ignore nonbankruptcy law."); *In re H.L.S. Energy Co., Inc.*, 151 F.3d 434, 438 (5th Cir. 1998). Courts have interpreted Bankruptcy Code Section 959(b) to apply to compliance obligations under federal laws. *See Mission Prod. Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652, 1665-66 (2019) (noting that a 28 U.S.C. § 959(b) requires a trustee to manage the estate "in accordance with applicable law" in a trademark case); *Norris Square Civic Ass'n v. Saint Mary Hosp.*, 86 B.R. 393, 398 (Bankr. E.D. Pa. 1988) ("28 U.S.C. § 959(b) requires a debtor to conform with applicable federal, state, and local law in conducting its business"). Therefore, selling a business that violates federal law is not a valid exercise of the Debtors' business judgment. This is particularly true where the sale of assets essentially seeks to exculpate a third-party purchaser from the injunctive relief sought by a single adversary as a litigation tactic, as discussed above. *See supra* at 4-9.

B. The Injunctive Relief Sought by the CFPB is Not an "Interest in Property" and Thus Would Enjoin a Purchaser of the Debtors' Assets

23. A Debtor can use Section 363(f) to sell property free and clear of an "interest in such property" of a non-debtor entity. 11 U.S.C. § 363(f). The Third Circuit has interpreted "interest in such property" to mean both in rem interests, and "'other obligations that may flow

from ownership of the property.'" *In re Trans World Airlines, Inc.* 322 F.3d 283, 289 (3d Cir. 2003) (quoting 3 Collier on Bankruptcy ¶ 363.06[1]). These obligations must be "connected to, or arise from, the property being sold." *Folger Adam Security, Inc. v. DeMatteis/MacGregor JV*, 209 F.3d 252, 259 (3d Cir. 2000).

24. In *Trans World Airlines*, the Third Circuit held that certain EEOC discrimination charges were "interests in property" because "it was the assets of the debtor which gave rise to the claims." *Trans World Airlines*, 322 F.3d at 289. The court relied heavily on the Fourth Circuit's decision in *In re Leckie Smokeless Coal Co.*, 99 F.3d 573 (4th Cir. 1996). There, the court found that a debtor could sell operating coal assets free and clear of successor liability for actions to collect Coal Act premium payments brought by two employer-sponsored benefit plans. *Id.* at 587.

25. Unlike the EEOC charges at issue in *Trans World Airlines*, and the Coal Act liability at issue in *Leckie*, the injunctive relief sought in the CFPB Litigation is not connected to, and does not arise from the property being sold in this case. The CFPB Litigation is affirmative civil law enforcement litigation seeking prospective injunctive relief to curtail violations of consumer protection laws. It is not a potential action to remedy past employment discrimination like the EEOC charges in *Trans World Airlines*, which arose incident to, and in the ordinary course of, the Debtors' ownership and operation of airline assets. Likewise, the CFPB does not have a relationship with the assets being sold, in the nature of the employee benefit plans in *Leckie*, and the CFPB-sought injunctive relief does not arise from the operation of the business in the nature of the Coal Act premiums at issue in that case.

26. Accordingly, the CFPB Litigation is not an "interest in property" subject to section 363(f).

C. The Proposed Sale of the Debtors' Assets Does Not Satisfy the Enumerated Conditions of Section 363(f)

27. Even assuming the prospective injunctive relief sought in the CFPB Litigation is an "interest in property" subject to Section 363(f), the Debtors cannot sell their assets free and clear of such prospective injunctive relief because they cannot meet any of the five conditions set forth in Section 363(f)(1)–(5).

28. The Bankruptcy Code allows sales free and clear of interests in property of entities other than the estate only under five enumerated conditions under Section 363(f). None of these conditions apply to the prospective injunctive relief sought in the CFPB Litigation.

29. *First*, a Debtor can sell property free and clear of an interest in property if "applicable nonbankruptcy law permits the sale of such property free and clear of any interests in such interest." 11 U.S.C. § 363(f)(1). No applicable nonbankruptcy law permits the sale of an ongoing business as a going concern free and clear of a federal civil law enforcement action. Thus, Section 363(f)(1) does not permit the sale of [the assets] free and clear of the CFPB Litigation.

30. *Second*, a Debtor can sell property free and clear of an interest in property held by an entity other than the estate if "such entity consents." 11 U.S.C. § 363(f)(2). The CFPB does not consent, and thus the Debtors also cannot satisfy this condition.

31. *Third*, a Debtor can sell property free and clear of an interest in property if "such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property." 11 U.S.C. § 363(f)(3). The CFPB Litigation is not a lien, and thus the Debtors cannot satisfy this condition either.

32. *Fourth*, a Debtor can sell property free and clear of an interest in property if "such interest is in bona fide dispute." 11 U.S.C. § 363(f)(4). An interest is in bona fide dispute only

when there is an "objective basis—either in law or fact—to cast doubt on the validity of [the interest]." *In re Revel AC, Inc.*, 802 F.3d 558, 573 (3d Cir. 2015); *Union Planters Bank, N.A. v. Burns (In re Gaylord Grain L.L.C.)*, 306 B.R. 624, 627 (8th Cir. BAP 2004).

33. The CFPB has an unstayed order as to liability on Count I of its Amended Complaint. While the Debtors will, upon entry of final judgment in the CFPB Litigation, have an appeal right as to that decision, the existence of an appeal right does not, standing alone, create a bona fide dispute. *Cf. In re Drexler*, 56 B.R. 960, 967 (Bankr. S.D.N.Y. 1986) ("It would be contrary to the basic principles respecting, and would effect a radical alteration of, the long-standing enforceability of unstayed final judgments to hold that the pendency of the debtor's appeal created a 'bona fide dispute' within the meaning of Code § 303."). Thus, there is no question that there is no bona fide dispute as to the relief sought in Count I of the Amended Complaint.

34. Even assuming that the prospective relief sought in the CFPB Litigation is an interest subject to a bona fide dispute, cases allow assets to be sold free and clear of an interest under Section 363(f)(4) only where the interest-holder's rights are adequately protected, for instance, where the validity or amount of a lien is disputed and the proceeds of the sale can be held in escrow pending resolution of the dispute. *See In re DVI, Inc.*, 306 B.R. 496, 504–05 (Bankr. D. Del. 2004); *In re Clark*, 266 B.R. 163, 171 (9th Cir. BAP 2001) ("Typically, the proceeds of sale are held subject to the disputed interest and then distributed as dictated by the resolution of the dispute," which "preserves all parties' rights by simply transferring interests from property to dollars that represent its value."); *see also Atlantic Gulf Communities Corp.*, 326 B.R. 294, 300–01 (Bankr. D. Del. 2005) (allowing a sale to proceed where the creditor's rights to assert that they owned the property subject to the sale would not be adversely affected by the sale).

35. Here, the CFPB's rights related to the CFPB Litigation cannot be adequately protected. The CFPB's rights to prosecute its enforcement action, seek injunctive relief to curtail unlawful conduct, and implement compliance monitoring procedures to prevent the recurrence of unlawful conduct cannot be adequately protected or satisfied through sale proceeds. No amount of monetary recovery out of sale proceeds could adequately protect the CFPB in this scenario because a monetary recovery cannot prevent future violations of consumer protection laws. Allowing the sale of the Debtors' ongoing business free and clear of the CFPB Litigation pursuant to Section 363(f)(4) could have the practical effect of extinguishing the CFPB's rights rather than preserving them for later resolution as in the case of a disputed lien.

36. For these reasons, the Debtors cannot satisfy Section 363(f)(4).

37. *Fifth*, a Debtor can sell property free and clear of an interest in property if "such entity could be compelled . . . to accept a money satisfaction of such interest." 11 U.S.C. § 363(f)(5). An entity may be compelled to accept money satisfaction in lieu of an injunction where the claim for injunctive relief "is reducible to, and can be satisfied by, monetary awards." *In re Trans World Airlines*, 322 F.3d 283, 291 (3d Cir. 2003). A claim for injunctive relief is reducible to a monetary award where: (1) money payment is an alternative to injunctive relief; (2) either the injunction or monetary relief would leave the injured party in the same position, and; (3) the action the injunction targeted is not "an ongoing and continuous threat." *In re Continental Airlines*, 125 F.3d 120, 133-34 (3d Cir. 1997)).[10]

[10] While *Continental* addressed whether certain equitable remedies constituted "claims" within the definition of section 101(5), the *Trans World Airlines* court cited the decision in the context of determining whether the EEOC discrimination claims were claims for which the EEOC could be compelled to accept money satisfaction, despite being injunctive in nature. *Trans World Airlines*, 322 F.3d 291.

38. Here, unlike the EEOC discrimination claims in *Trans World Airlines*, the prospective injunctive relief sought in the CFPB Litigation cannot be reduced to a monetary award, and finding otherwise would effectively strip the CFPB of its ability to exercise its enforcement authority.

39. *First*, the CFPB seeks both injunctive and monetary relief in the CFPB Litigation. The CFPB seeks injunctive relief to require the Debtors to stop violating consumer protection laws, and to protect consumers from future violations. The monetary relief consists of consumer redress—in the form of legal restitution or refund of moneys to the consumers harmed by Debtors' unlawful billing practices—and civil money penalties.[11] This monetary relief is not an alternative to the injunctive relief sought. Rather, the consumer redress sought is intended to ensure that the Debtors do not benefit from their prior unlawful conduct at their customers' expense, and the penalties sought are to hold Debtors accountable for their past misconduct and deter future misconduct. These two categories of relief (injunctive and monetary) address separate law enforcement policy goals, and are not interchangeable.

40. *Second*, as set forth above, the CFPB commenced the CFPB Litigation to end the Debtors unlawful business conduct. Among the tools available to the CFPB to achieve this is imposing ongoing reporting requirements on the Debtors that permit the CFPB to ensure that the Debtors comply with consumer protection laws. Essential compliance monitoring functions cannot be reduced to, or replaced by, a monetary recovery. Doing so converts the CFPB's

[11] 12 U.S.C. §§ 5565(a)(2)(B), (C); 5565(c).

injunctive enforcement authority to merely levying a fine.[12] Thus, replacing the injunctive relief sought in the CFPB Litigation with monetary relief would not leave the CFPB in the same position.

41. *Third*, and most importantly, the injunctive relief in the CFPB Litigation is targeted at preventing future violations of the same consumer protection laws Debtors previously violated. The purpose of the CFPB's enforcement authority is to protect consumers from ongoing abusive, unfair, or deceptive acts or other unlawful conduct in the provision of financial services,[13] and a key vehicle through which it achieves this statutory mandate is through its statutory authority to seek injunctive relief.[14] Unlike the EEOC discrimination claims addressed in *Trans World Airlines*, the injunctions sought by the CFPB in the CFPB Litigation do not simply remedy past conduct, but rather protect consumers from future misconduct.

42. If the Court allows the sale free and clear of the CFPB Litigation, and the purchasers immediately resume unlawfully telemarketing customers, rather than being able to hold the company in contempt in the current CFPB Litigation, it is likely that the CFPB's only remedy will be to commence a new investigation, file a new lawsuit, and seek new findings that the conduct again violates the law. At which point, presumably, the purchasers could file for bankruptcy and, once again, sell the assets to avoid the findings and any injunctive relief. This absurd result cannot be permitted.

43. Accordingly, because the CFPB cannot be compelled to accept money satisfaction for the CFPB Litigation, the Debtors cannot satisfy Section 363(f)(5) as to the CFPB Litigation.

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[12] A fine that, moreover, would be relegated to the general unsecured creditor pool and, in all likelihood, receive little to no recovery.

[13] *See* 12 U.S.C. §§ 5511(b)(2); 5531(a); 5536(a).

[14] *See* 12 U.S.C. § 5565(a)(2)(G).

Thus, even if the Court concludes that the CFPB Litigation is an interest in property, the Debtors cannot sell their ongoing business free and clear of the prospective injunctive relief sought in the CFPB Litigation.

CONCLUSION

44. For the forgoing reasons, the Court should grant the Motion and convert the above-captioned chapter 11 cases to cases under chapter 7 of the Bankruptcy Code, and the Court should withhold approval of the proposed sale.

Dated: August 18, 2023

Respectfully submitted,

BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General
Civil Division

/s/ Victor S. Leung
KIRK MANHARDT
RODNEY A. MORRIS
J. ZACHARY BALASKO
VICTOR S. LEUNG
United States Department of Justice
Civil Division, Commercial Litigation Branch
1100 L Street, NW
Washington, DC 20005
Tel: (202) 514-7162
Fax: (202) 514-9163
E-mail: john.z.balasko@usdoj.gov
victor.leung@usdoj.gov

Attorneys for the United States

CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of August, 2023, I caused to be electronically served a true and correct copy of the foregoing document upon the parties that are registered to receive notice via the Court's CM/ECF notification system.

/s/ Victor S. Leung
VICTOR S. LEUNG

EXHIBIT C

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, 155, and 206**

DEBTORS' RESPONSES AND OBJECTIONS TO UNITED STATES OF AMERICA'S INTERROGATORIES TO THE DEBTORS

GENERAL OBJECTIONS TO INTERROGATORIES

1. The Debtors object to the Interrogatories as seeking responses prior to the deadline imposed by the Federal Rules of Bankruptcy Procedure. The Debtors provide these Responses and Objections based on the information currently available and expressly reserve the right to amend or supplement these responses in the future.

2. The Debtors object to these Interrogatories to the extent they seek information protected by the attorney-client privilege, the work product doctrine, or any other applicable privilege.

[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.

SPECIFIC RESPONSES TO INTERROGATORIES

INTERROGATORY NO. 12: Identify all holders of voting interest in the Debtors and the periods during which such voting interests were held.

RESPONSE TO INTERROGATORY NO. 12: The Debtors object to this interrogatory as vague and ambiguous with respect to the term "voting interests." Subject to and without waiving this or the General Objections, the Debtors state that they have produced capital tables reflecting the ownership interests in PGX Holdings, Inc. at relevant points in time at PGX_DEBTORS-0006458 through PGX_DEBTORS-0006461 and PGX_DEBTORS-0006483 through PGX_DEBTORS-0006489.

The Debtors further state that, at all relevant times, the ownership interests in John C. Heath, Attorney At Law PC have been held 99% by John Heath and 1% by Eric Kamerath.

INTERROGATORY NO. 13: Describe in detail the "business model changes occasioned by the CFPB Litigation" referenced in paragraph 44 of the Wallace Declaration, including without limitation:

a. Any business segments scaled back, wound down, or otherwise modified following the CFPB Summary Judgment Order;

b. The percentage of revenues attributable to such business segment(s) prior to the CFPB Summary Judgment Order.

RESPONSE TO INTERROGATORY NO. 13: The Debtors object to this request as vague, ambiguous, and unduly burdensome in asking the Debtors to "[d]escribe in detail" certain changes made to the Debtors' businesses in response to the CFPB Litigation.

Subject to and without waiving this or the General Objections, the Debtors state that, in response to the CFPB Litigation, the Debtors closed all of their call centers used for customer acquisition and took steps to ensure that no customers were acquired via telemarketing. The Debtors further state that this was not a scaling back, winding down, or modification of a "business segment," but instead was a material change in the Debtors' customer acquisition. As a result of that change, the Debtors recognized substantial reductions in revenue. Answering further, the Debtors refer the United States to the *Declaration of Chad Wallace, Chief Executive Officer of PGX Holdings, Inc., In Support of Debtors' Chapter 11 Petitions and First Day Motions* [Docket No. 12].

Answering further, the Debtors refer the United States to documents produced by the Debtors that reflect the assumptions and financials around their go-forward business at: PGX_DEBTORS-0005876; PGX_DEBTORS-0005905; PGX_DEBTORS-0005914; PGX_DEBTORS-0006028; PGX_DEBTORS-0006057; PGX_DEBTORS-0006066; PGX_DEBTORS-0006287.

Answering further, the Debtors state that they have also produced historical financial information at: PGX_DEBTORS-0006332; PGX_DEBTORS-0006355; and PGX_DEBTORS-0006372 through PGX_DEBTORS-0006455. The Debtors state that they continue to produce documents containing financial information that will be responsive to this interrogatory.

INTERROGATORY NO. 14: Describe in detail the remaining business operations and revenue streams following such "business model changes occasioned by the CFPB Litigation" referenced in paragraph 44 of the Wallace Declaration.

RESPONSE TO INTERROGATORY NO. 14: The Debtors objects to this request as vague, ambiguous, unduly broad, and overly burdensome as it effectively asks the Debtors describe "in

detail," the entirety of their business operations. Subject to and without waiving this or the General Objections, *see* Response to Interrogatory No. 13.

INTERROGATORY NO. 15: State the projected annual revenue of the business operations You describe in response to Interrogatory No. 14, including a breakdown of revenue by business segment.

RESPONSE TO INTERROGATORY NO. 15: Subject to and without waiving the General Objections, the Debtors refer to the United States to documents produced by the Debtors referenced in response to Interrogatory No. 13.

INTERROGATORY NO. 16: Describe in detail the circumstances of the Debtors' request "that Prospect fund the $30 million of delay draw term loans" and the Debtors' March 31, 2023 default referenced in paragraph 53 of the Wallace Declaration.

RESPONSE TO INTERROGATORY NO. 16: The Debtors object to this request as vague, ambiguous, and unduly burdensome in asking the Debtors to "[d]escribe in detail the circumstances" of the Debtors' interactions with Prospect and the draw requests.

Subject to and without waiving this or the General Objections, the Debtors state that on March 17, 2023, the PGX Holdings, Inc. provided notice to Prospect of its Request to draw $30 million in delayed draw term loans. On March 24, 2023, Prospect sent a response letter to PGX, which asserted that Prospect was not required to fund the requested delayed draw terms loans asserting that not all conditions precedent for funding the loan were satisfied. PGX responded to Prospect's letter on March 29, 2023, disputing that any conditions precedent to funding had not occurred and against requesting that Prospect fund the delayed draw loan.

Answering further, the Debtors state that, without the funds from the delayed draw term loan, PGX was unable to make a required interest payment on March 31, 2023, and this nonpayment resulted in PGX defaulting on its prepetition credit facility.

The Debtors refer to documents they have produced to the United States including the correspondence with Prospect at PGX_DEBTORS-0000001, PGX_DEBTORS-0000004, and PGX_DEBTORS-0006456.

Answering further, the Debtors refer the United States to the *Declaration of Chad Wallace, Chief Executive Officer of PGX Holdings, Inc., In Support of Debtors' Chapter 11 Petitions and First Day Motions* [Docket No. 12].

INTERROGATORY NO. 17: Identify all persons who participated in answering or who supplied information upon which You relied in answering these Interrogatories.

RESPONSE TO INTERROGATORY NO. 17: Subject to and without waiving the General Objections, the Debtors state that, in addition to legal and other advisors, Eric Kamerath, Chad Wallace, and John Heath assisted in responding to these Interrogatories.

Dated: August 14, 2023
Wilmington, Delaware

/s/ Casey McGushin

KLEHR HARRISON HARVEY BRANZBURG LLP
Domenic E. Pacitti (DE Bar No. 3989)
Michael W. Yurkewicz (DE Bar No. 4165)
919 North Market Street, Suite 1000
Wilmington, Delaware 19801
Telephone: (302) 426-1189
Facsimile: (302) 426-9193
Email: dpacitti@klehr.com
myurkewicz@klehr.com

- and -

Morton R. Branzburg (*pro hac vice* pending)
1835 Market Street, Suite 1400
Philadelphia, Pennsylvania 19103
Telephone: (215) 569-3007
Facsimile: (215) 568-6603
Email: mbranzburg@klehr.com

Co-Counsel to the Debtors and Debtors in Possession

KIRKLAND & ELLIS LLP
KIRKLAND & ELLIS INTERNATIONAL LLP
Joshua A. Sussberg, P.C. (admitted *pro hac vice*)
601 Lexington Ave
New York, New York 10022
Telephone: (212) 446-4800
Facsimile: (212) 446-4900
Email: joshua.sussberg@kirkland.com

- and -

Spencer A. Winters (admitted *pro hac vice*)
Whitney C. Fogelberg (admitted *pro hac vice*)
Alison J. Wirtz (admitted *pro hac vice*)
300 North LaSalle
Chicago, Illinois 60654
Telephone: (312) 862-2000
Facsimile: (312) 862-2200
Email: spencer.winters@kirkland.com
whitney.fogelberg@kirkland.com
alison.wirtz@kirkland.com

Co-Counsel to the Debtors and Debtors in Possession

AS TO RESPONSES AND ANSWERS ON BEHALF OF PGX HOLDINGS, INC.

Verification

I hereby verify under penalty of perjury that the facts stated in these interrogatories are true and correct to the best of my knowledge and belief. For the avoidance of doubt, the information provided in these interrogatory responses is derived from information obtained by, or in consultation with others, with either personal knowledge or who have reviewed documents to obtain the information. I am not providing any verification as to the legal conclusions, contentions, or objections contained in these responses.

Chad Wallace

AS TO RESPONSES AND ANSWERS ON BEHALF OF JOHN C. HEATH, ATTORNEY AT LAW PC.

Verification

I hereby verify under penalty of perjury that the facts stated in these interrogatories are true and correct to the best of my knowledge and belief. For the avoidance of doubt, the information provided in these interrogatory responses is derived from information obtained by, or in consultation with others, with either personal knowledge or who have reviewed documents to obtain the information. I am not providing any verification as to the legal conclusions, contentions, or objections contained in these responses.

John Heath