IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

BUREAU OF CONSUMER FINANCIAL PROTECTION,

Plaintiff,

v.

PROGREXION MARKETING, INC., et al.

Defendants.

Case No. 2:19-CV-00298-BSJ

DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF THEIR MOTION TO CERTIFY THE COURT'S ORDER FOR INTERLOCUTORY APPEAL

The Bureau's opposition to an interlocutory appeal is the second half of its two-pronged strategy—coupled with its staunch opposition to an interim stay—to squeeze Defendants to extinction before an appeal can be taken. The notion that Defendants have the luxury to wait until the Bureau gets around to moving for final judgment, nearly a decade after it began investigating its claim, is fanciful. Even if Defendants somehow still would be solvent by the time a final judgment is entered (they will not be, absent a stay), the Bureau's demand for well over ***five billion dollars*** in monetary relief on Count I would provide the perfect hog-tie: Defendants likely would have no meaningful chance of securing a supersedeas bond needed to file an appeal of such a massive award. The Court should reject the Bureau's calculated campaign to insulate the Court's March 10, 2023 summary judgment order ("Order") from appellate review.[1]

The interlocutory appeal right under 28 U.S.C. § 1292(b) is tailor-made for cases like this one. The Order is the first of its kind. In the nearly thirty years since the regulation was promulgated, no court has ever enforced the billing requirements in the AFP against a credit repair company that bills in arrears and does not promise any results. The Order's contrary conclusion does not cite a single legal authority, or address two courts that reached the ***opposite*** conclusion. Failure to permit immediate interlocutory appeal of the Court's holding will terminate the litigation for good and render irreversible the Order's business-ending errors.

The Court should certify its Order for the court of appeals to consider whether the AFP's billing restrictions apply to credit repair organizations that bill in arrears and do not promise

[1] Defendants seek an expedited decision, or as desired by the Court, a hearing at the Court's earliest convenience on their Motion to Certify the Order for Interlocutory Appeal and Defendants' previously-briefed Motion to Stay.

results and, whether the Court determines to certify the matter or not, stay the effect of its Order pending either appeal or entry of final judgment. *See* ECF Nos. 510, 519, 532.

ARGUMENT

The Bureau's opposition does not engage meaningfully with any of the prongs for interlocutory review identified in 28 U.S.C. § 1292(b). It does not dispute—nor could it—that the questions for appeal are dispositive. Yet in arguing that judicial economy would be served by deferring an appeal, the Bureau completely ignores the possibility that Defendants will prevail on their appeal, which would foreclose any need to address "significant disagreement[s]" about remedies and "additional appellate questions" that, it says, otherwise await the parties. Opp., ECF No. 523 at 5. Moreover, as the Bureau well knows, the question posed by the pending motion is not whether there will be one appeal or two; it is whether there will be any appeal at all. If the Court denies certification, Defendants will "not [be] in business very long," and the Bureau will 'win' on appeal by default. *See* Dec. 13, 2019 Tr. at 37:13–14.

For the Tenth Circuit, if not the Bureau, "[t]he preferred disposition of any case is upon its merits and not by default judgment." *Gomes v. Williams*, 420 F.2d 1364, 1366 (10th Cir. 1970); *see also In re Neary*, 634 B.R. 1074, 1076 (D. Colo. 2021) ("Default judgments are not favored in the Tenth Circuit because public policy prefers trying civil cases on their merits." (citations omitted)); *Gates Rubber Co. v. Bando Chem. Indus., Ltd.*, 167 F.R.D. 90, 106 (D. Colo. 1996) ("Any consideration of default judgment raises concerns of a constitutional dimension" because it "runs counter to sound public policy of deciding cases on their merits and against depriving a party of his fair day in court." (cleaned up)).

I. Certification of the Order's Controlling Questions of Law Would Materially Advance the Litigation.

There is no real dispute that the Order decided questions of law and that those questions are controlling. A question of law is "a question of the meaning of a statutory or constitutional provision, regulation, or common law doctrine," and it "is controlling if its resolution is quite likely to affect the further course of the litigation, even if not certain to do so." *Chamberlain v. Crown Asset Mgmt.*, No. 1:21-CV-146, 2022 WL 3445952, at *1 (D. Utah Aug. 17, 2022) (internal citations and quotation marks omitted). The Bureau cannot and does not contest that the Order decided "the meaning of a [regulation]" when it held the advance-fee provision applies to companies like Defendants who bill in arrears and do not promised result.[2] *Id.*

Nevertheless, the Bureau *now* claims that resolution of these questions may not materially advance the litigation because there is "potential for the Court's relief determinations to generate additional appellate questions." ECF No. 523 at 5. That is always the case when liability is appealed before relief, and it is no bar to certification. *See, e.g.*, *Fox v. TransAm Leasing, Inc.*, No. 12-2706-CM, 2015 WL 4243464, at *1 (D. Kan. July 13, 2015) (certifying partial summary judgment on liability for interlocutory appeal prior to remedies determination); *see also Fox v. TransAm Leasing, Inc.,* 839 F.3d 1209, 1220 (10th Cir. 2016) (affirming in part and reversing in part, remanding for further proceedings). Indeed, the possibility of a second, later appeal does nothing to negate that reversal of the court's legal determinations would

[2] The parties' principal dispute is about whether the AFP, 16 C.F.R. § 310.4(a)(2), applies to a credit repair organization that does not represent promised results to consumers. If the answer to that question is *no*, then Defendants cannot be liable under either of the AFP's romanette provisions. Defendants additionally argue that, even if the AFP applies, their practices are compliant with romanette (i) because they bill only in arrears for work completed in a prior service interval. To the extent the Order appears to suggest Defendants could be independently liable under romanette (i) but not romanette (ii), *see* Order at 12 n.57, Defendants have proposed that the court of appeals address both questions on interlocutory appeal.

advance the litigation now. As in *Chamberlain*, interlocutory appeal here would materially advance the litigation here "because it would greatly clarify the law" and "[s]uch clarification would simplify the issues of this case . . . and possibly eliminate the need for trial entirely." 2022 WL 3445952, at *2.

Indeed, the Bureau's stated concern about the possibility of additional appellate proceedings actually weighs in favor of certification. If Defendants prevail in their appeal now, those purportedly difficult and costly proceedings would be avoided, along with all "additional appellate questions" that might be raised along the way. ECF No. 523 at 5. That is entirely consistent with the "[v]ision [of] the drafters of 28 U.S.C. § 1292(b)" to "avoid the wasted effort of a protracted litigation over damages where there might be no liability." *Amerisourcebergen Drug Corp. v. Meier*, No. 03-CV-6769, 2005 WL 2645000, at *4 (E.D. Pa. Oct. 14, 2005) (citing *Katz v. Carte Blanche Corp.*, 496 F.2d 747, 754 (3d. Cir. 1974)). The Bureau's only basis for suggesting that an appeal would not "materially advance" the litigation is its hope that Defendants' appeal will not succeed.

What's more, the Bureau all along has insisted that a final resolution on Count 1 would hasten the end of this case. The Court is well aware of this because it became the Bureau's mantra in 2022. For example, in seeking a ruling on its summary judgment motion, the Bureau affirmatively argued to this Court exactly what Defendants now submit: that "***disposition of count one would materially assist*** in preparing the pretrial materials regarding the remainder of the case and in determining what evidence needs to be presented to the jury, and even potentially smoothing the way for the parties to discuss resolution of the remainder of the case and ***potentially obviate the need to impanel a jury at all***." ECF No. 489, Mar. 11, 2022 Tr. 14:23-15:4; *see also* ECF No. 462 at 26 ("The possibility of settlement is considered poor if Count I is

not resolved in either Plaintiff's or Defendants' favor on summary judgment. If Count I is resolved before trial, negotiations on Counts II-V would be possible."); *see also* ECF No. 498 at 4 ("The Court's decision on Count I would significantly aid the parties' pretrial preparations, and ultimately the final resolution of this litigation . . . ."). On the Bureau's own admission, an "immediate appeal [may] materially advance the ultimate termination of the litigation" both because final resolution of Count I could "eliminate the need for trial" or "eliminate complex issues so as to simplify the trial." *See U.S. v. Intermountain Healthcare, Inc.*, No. 20-CV-372, 2022 WL 742693, at *1–*2 (D. Utah Mar. 11, 2022) (interlocutory review materially advanced litigation because it simplified discovery, even if plaintiffs still could pursue another claim). The Court should take the Bureau at its word: final disposition of Count I by an appellate court will facilitate settlement discussions and could avoid a costly and time-consuming trial.

In any event, the Bureau's framing of the possible outcomes following the Court's decision on certification presents a false dichotomy. According to the Bureau, either the Court denies certification and there will be a single appeal following final judgment, or the Court grants certification and there will be an appeal of liability now and an appeal of remedies later. In reality, neither outcome will occur. An appeal is now or never. If they cannot appeal now, Defendants will become insolvent and unable to appeal at all. And even if Defendants are still around to file an appeal after final judgment (absent an immediate stay, they will not be), the Bureau seeks such exorbitant monetary relief that Defendants likely would not be able to bond the appeal if the Bureau prevails. *See* Fed. R. Civ. P. 62(b); *Strong v. Laubach*, 443 F.3d 1297, 1299 (10th Cir. 2006) ("The bond secures the judgment against insolvency of the judgment debtor and is usually for the full amount of the judgment . . . ."). On Count I alone, the Bureau seeks so-called "restitution" of well over $1.9 billion and additional civil penalties amounting to

more than $3.5 billion.[3] *See* Ex. 1, Bureau's 8th Suppl. Disclosures, at 3–8. There is no chance Defendants (who, as of last Wednesday, together had about $13.3 million cash on hand and whose assets are declining, *see* ECF No. 530-2 ¶ 5), could afford to secure or post a ***$5.5 billion*** appeal bond.

If, on the other hand, the Court grants Defendants' motion and permits interlocutory appeal, there is likely to be no need for a second appeal at all. The Bureau doesn't entertain this probability when it claims that denial of certification would necessarily be "the most orderly and expeditious course of action." ECF No. 523 at 5. But in the likely event Defendants succeed on the merits, there will be no need for protracted disputes or an appeal concerning the calculation of remedies, because no remedies will be due at all.

II. There is Substantial Ground for Difference of Opinion with Respect to the Order's Controlling Legal Conclusions.

The Court itself has inquired about the "rather strange" language in the regulation, Sept. 21, 2022 Tr. 21:10-16, and has acknowledged that "one may think the rule may have need for improvement," ECF 508 at 10. Nevertheless, the Bureau says there is no substantial ground for difference of opinion regarding the Order's interpretation of the AFP because it "is correct, and no court has ever adopted a contrary interpretation." ECF No. 523 at 10. The Bureau has it precisely backwards. The Bureau has never cited (and still cannot cite) *a single case* that has ever adopted its promise-free interpretation of the AFP, and neither does the Order.

Both ignore two federal courts that applied the AFP, consistent with its text, only against credit repair organizations that represent promised results to consumers. First, a 22-year-old federal court order in Tennessee expressly allows Lexington Law to bill immediately in arrears

[3] Defendants dispute both figures.

for services rendered, so long as "no promised results have been represented to client[s] by" Lexington Law. ECF No. 278-61 at 5. Second, when the Bureau urged (in the alternative) in *CFPB v. Prime Marketing Holdings* that the "advance fee ban applies to all telemarketers who offer credit repair services[,]" ECF No. 523-3 at 5, the court in that case ***disagreed*** and clarified emphatically that it "did *not* hold that 'whether or not' [the] Defendant made a promised result was immaterial" but rather that the Bureau in its complaint had "adequately pleaded facts indicating that [the] Defendant made promises." No. 16-cv-7111, 2017 WL 2772313, at *8 (C.D. Cal. Jan. 19, 2017) (emphasis in original); *see id.* at *2–3 (detailing alleged promised results). These contrary decisions by other federal courts is sufficient to establish that there is a substantial difference of opinion as to the Court's conclusions. *See In re U.S.*, No. 10-303, 2010 WL 8426951, at *1 (6th Cir. July 2, 2010) ("based on the conflicting case law, there is a substantial difference of opinion concerning these issues").

Rather than engage with those contrary authorities, the Bureau claims there is no substantial ground for a difference of opinion because everyone agrees that Defendants provide credit repair services. ECF No. 523 at 9. That is an irrelevant diversion. Defendants have never disputed that they provide credit repair services (of course they do). But that fact has no bearing on the questions to be certified, which instead address whether the AFP imposes billing constraints on ***all*** entities that "offer credit repair services"[4] even when they make no "deceptive guarantees or promises," as the Bureau urges, ECF No. 462 at 2-3, or only on those that

[4] Contrary to the Bureau's implication, the colloquial term "credit repair" appears nowhere in the regulation. The Bureau simply recites the conditions in the AFP's coverage clause, 16 C.F.R. § 310.4(a)(2), then asserts without any support that the term "credit repair" is in all cases a convenient shorthand for services that meet those conditions, regardless of how the services are "represented to" consumers. *See* ECF No. 523 at 8–9. Of course, if the FTC had meant to say "any credit repair service" is subject to the AFP's billing constraints, it easily could have done so, as it did for "any debt relief service" three paragraphs later in § 310.4(a)(5).

"represent" "promised results" to consumers, consistent with the text of the regulation. 16 C.F.R. § 310.4(a)(2).[5]

Given that Defendants do not promise results—a fact the court assumed and the Bureau does not dispute—there is no mechanism by which Defendants can comply with the Rule as the Order interprets it. The Order would require Defendants to visibly demonstrate "promised results" on a consumer report in order to bill customers. But without "promis[ing]" a "result," there is no "promised result" for Defendants to "demonstrat[e]" "in the form of a consumer report." 16 C.F.R. § 310.4(a)(2)(ii). Compliance with the Order is facially impossible—which is perhaps why the Order is the first to impose such a requirement on companies that bill in arrears and do not promise results, and is contrary to the conclusions of federal courts in both Tennessee and California.

CONCLUSION

The Court should certify its Order for interlocutory appeal under 28 U.S.C. § 1292(b) because it decides controlling questions of law about which there is substantial difference of opinion, and final resolution would materially advance termination of this case. The Court additionally should stay the effect of the Order pending appeal or final judgment.

Dated: April 4, 2023

Respectfully submitted,

/s/ Edward J. Bennett
Edward J. Bennett*

[5] The Bureau resorts to citing inoperative pleadings to support this argument. *See* ECF No. 523 at 8 (citing Defendants' initial answers, ECF Nos. 65 and 66). Defendants' operative answers clarify that while the services they provide "may result in the removal of inaccurate, unfair, and/or unverifiable derogatory information from consumers' credit record and/or the improvement of consumers' credit rating," they expressly deny that they "make any guarantee or promise regarding the removal of derogatory information from, or a consumer's individual ability to improve, the consumers' credit history, credit record, or credit rating." *See* ECF No. 458 ¶ 112; ECF No. 459 ¶ 112.

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CERTIFICATE OF SERVICE

I hereby certify that on April 4, 2023, I caused a true and correct copy of the foregoing to be filed on the CM/ECF system, which will send notification of such filing to all parties and counsel in this case.

/s/ Atticus DeProspo
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