

**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

**PROGREXION MARKETING, INC.; PGX HOLDINGS, INC.; PROGREXION
TELESERVICES, INC.; eFOLKS, LLC; AND CREDITREPAIR.COM'S
ANSWER TO AMENDED COMPLAINT AND JURY DEMAND**

Defendants Progrexion Marketing, Inc., PGX Holdings, Inc., Progrexion Teleservices, Inc., eFolks, LLC, and CreditRepair.com (collectively, the “Progrexion Defendants” or “Defendants”) by and through undersigned counsel, hereby answer and otherwise respond to the Amended Complaint (ECF No. 457) filed by Plaintiff, Bureau of Consumer Financial Protection (“Plaintiff” or “CFPB”).

INTRODUCTION

In the CFPB’s December 2019 report on quarterly consumer credit trends, it acknowledged that “[i]naccurate credit reports can prevent consumers from getting credit that they need” and “can also create costs for lenders, who benefit from accurate assessments of

risk when conducting underwriting and pricing.”¹ According to a Congressionally-mandated study by the Federal Trade Commission, one in five consumers have “a potentially material error” on his or her credit report, which could prevent him or her from obtaining a car loan, insurance, a home, or even a job.² These errors and unverified entries arise because of identity theft, incorrect reporting by credit providers and data furnishers, or other life circumstances, such as divorce, military service, or medical debt.³ The CFPB received over 710,000 complaints from consumers about credit or consumer reporting in 2021 alone—representing over 70% of all consumer complaints about consumer products and services.⁴ Congress has taken notice because these errors materially and negatively impact consumers’ finances and lives—as the House Financial Services Committee Chair observed in 2019: “credit reports are routinely filled with errors that are difficult for consumers to correct . . . [and which] directly impact” credit and employment opportunities.⁵ These errors often originate with the over 10,000 companies (such as credit card companies, department stores, and debt collectors) that

¹ See *Quarterly Consumer Credit Trends: Public records, credit scores, and credit performance*, CFPB 2 (Dec. 2019), https://files.consumerfinance.gov/f/documents/cfpb_quarterly-consumer-credit-trends_public-records-credit-scores-performance_2019-12.pdf.

² Statement of Commissioner Brill on the Federal Trade Commission’s Sixth and Final Report to Congress Under Section 319 of the Fair and Accurate Credit Transactions Act of 2003 (Jan. 21, 2015), <https://www.ftc.gov/public-statements/2015/01/statement-commissioner-brill-federal-trade-commissions-sixth-final-report>.

³ See *What are common credit report errors that I should look for on my credit report?*, CFPB (June 8, 2017), <https://www.consumerfinance.gov/ask-cfpb/what-are-common-credit-report-errors-that-i-should-look-for-on-my-credit-report-en-313/>.

⁴ *Consumer Response Annual Report*, CFPB at 11 (Mar., 2022), https://files.consumerfinance.gov/f/documents/cfpb_2021-consumer-response-annual-report_2022-03.pdf.

⁵ Press Release, *Waters Hold Credit Bureaus Accountable*, (Feb. 26, 2019), <https://financialservices.house.gov/news/documentsingle.aspx?DocumentID=402368>.

furnish data about consumers' accounts and tradelines—over 1.3 billion accounts and tradelines monthly. And consumers are not party to the communications between these data furnishers and the major three credit reporting agencies.

Credit report errors can be difficult to correct. Many consumers do not have the time, knowledge, ability, or perseverance necessary to enforce their right to a fair, accurate, and substantiated credit report. In addition, many consumers are uncertain as to their legal rights or prefer to have assistance from a law firm when enforcing their rights. For these and other reasons, hundreds of thousands of consumers have turned to Defendants John C. Heath, Attorney at Law, PC⁶ (d/b/a/ Lexington Law) and CreditRepair.com for assistance.

CreditRepair.com is a professional credit repair agency that, when possible, helps consumers improve their credit online. CreditRepair.com offers free credit consultations to potential customers. And, if customers sign up, CreditRepair.com works to remove inaccurate and unsubstantiated negative items from their credit reports by appropriately asking creditors to verify negative items they are reporting and challenging such items with all three credit bureaus. In the past, CreditRepair.com customers saw an average of 11.6 removed negative items in 4 months across their reports with the three credit bureaus. Virtually none of these items were re-reported. CreditRepair.com also offers credit education to consumers and credit monitoring services.

Lexington Law is a law firm in Salt Lake City. For over twenty years it has offered ethical and effective credit repair services to its clients. During this time, Lexington Law

⁶ Incorrectly named in the Amended Complaint as John C. Heath, Attorney at Law, PLLC.

pioneered legal strategies that increased the effectiveness of case outcomes. Lexington Law has educated consumer clients around the country on how to read, interpret, and understand what affects their credit report and credit score, helped clients challenge and seek correction of inaccurate, unsubstantiated, and unfair information reported in their credit history, and advised clients on how to manage their credit profile.

When a client retains Lexington Law for credit repair services, the firm acquires the TransUnion credit report associated with that client and loads it into a client facing internet portal. Clients use the portal, and the guidance provided by Lexington Law, to identify and prioritize any creditor entries on the report that they question and the basis for their challenge—such as the account is an “unrecognized collection,” “isn’t mine,” or is impacted by divorce. Depending on the client’s instructions, Lexington Law generates letters to send to the relevant data furnisher regarding certain entries. The firm also communicates with the credit reporting agencies themselves. At the same time, Lexington Law provides other assistance to its clients, such as robust educational assistance so that clients can learn to understand and manage their own credit profile. Depending on what happens during the course of the representation, Lexington Law provides other services to its credit repair clients, such as advice about the results of the furnisher’s response to correspondence questioning report entries, advocacy, and the like.

Consumers who sign up for services through CreditRepair.com have a similar customer experience, but without the added benefit of the assistance of a law firm and access to an attorney. Lexington Law and CreditRepair.com are able to provide these services at low monthly costs because they use innovative technological solutions developed and owned by

the Progexion Defendants. Consumers are not charged for credit repair services until after those services have been provided.

The credit repair services provided to consumers by Lexington Law and CreditRepair.com, with technology and support services by the other Progexion Defendants, serve as an important and meaningful check on furnishers and the credit reporting agencies. Together Lexington Law, CreditRepair.com, and the other Progexion Defendants (with their collective 2,000 employees) have helped hundreds of thousands of consumers take charge of their credit by helping them understand the credit reporting system and ensuring that system results in reporting that is verifiable, fair, accurate, and relevant. For example, in 2016, Lexington Law and CreditRepair.com helped customers remove over nine million negative credit report items from their credit reports.

In this suit, the CFPB and its current Director seek to unfairly attack Lexington Law's and CreditRepair.com's business models based on a novel interpretation of law that would ultimately deprive consumers of critical access to credit repair services from both companies, and threaten the entire credit repair industry. Specifically, the CFPB seeks to weaponize the Federal Trade Commission's Advance Fee Provision of the Telemarketing Sales Rule, 16 C.F.R. §310.4(a)(2) (the "AFP"), a regulation written by the FTC over 25 years ago ostensibly to protect against a breed of credit repair companies who promised unattainable success without providing any service. The rule generally regulates telemarketers who make broad and unattainable guarantees that they will remove derogatory items on a credit report permanently, simply by questioning the entries. The restrictions the rule places on what the FTC called "bogus" companies include that they must wait more than six months to be paid and then can

only be paid if their overblown promises of success came true, as demonstrated on a credit report. 16 C.F.R. § 310.4(a). The rule is so onerous that its real purpose is to keep those companies out of business entirely.

The rule has almost never been used, as it was immediately made obsolete when Congress passed the Credit Repair Organizations Act (15 U.S.C. § 1679 et seq.) (“CROA”), which provides the fundamental guidelines for how credit repair companies can charge consumers. CROA allows credit repair organizations to charge clients on a current basis, once services are performed, and be paid on a current basis, like any service provider. 15 U.S.C. § 1679b(b). And CROA dictates contract requirements which contain none of the sort of restrictions the AFP previously required. *Id.* § 1679d. Notably, the CFPB makes no claim that Defendants violated CROA, the sole federal statute that specifically and directly regulates credit repair. Defendants only charge for credit repair services after services have been provided.

Nor did Defendants violate the TSR’s 25-year old AFP. They promise no results, so have no obligation to wait 6 months before billing.

No credit repair organization could stay in business were it to be forced to wait six months before billing to be paid for *any* service it provides. To the extent the CFPB is suggesting that the rule applies that broadly, it has offered no explanation—to this Court, to Defendants, or to the public—of how any legitimate credit repair business could comply with each component of the rule and stay in business. It is no answer for the CFPB to claim that somehow credit repair providers using telesales to reach injured consumers can be singled out for such an onerous and unprecedented treatment, for that method of communicating is far and

away the industry norm— as the CFPB doubtless knows—such that this suit undermines all credit repair. The needs of consumers, and their right to push back against improper credit reporting and shoddy recordkeeping by furnishers and/or credit bureau companies, underscore the fundamental reason why the CFPB’s claim against Defendants’ billing practices should be rejected.

The CFPB attempts to punish Defendants for making truthful, non-misleading statements about the credit repair services offered by Lexington Law and the Progrexion Defendants. *See, e.g.*, Am. Complaint, ¶¶ 112-121 Similarly, its prayed for prohibition would prevent consumers from using their phones to access truthful and accurate financial and credit-related information. In addition to the AFP count, the CFPB also seeks to punish CreditRepair.com and the other Progrexion Defendants for the alleged deceptive acts of third parties.

While consumers can and do find Lexington Law and CreditRepair.com on their own, many others are introduced with and through the assistance of the other Progrexion Defendants. For example, Progrexion Marketing, Inc. provides advertising and lead generation services for both Lexington Law and CreditRepair.com. Some of those introductions start after a third party (like a consumer mortgage, auto, or other lender) identifies a potential consumer client, the client applies for a financial product or service, but the third party (or “introducer”) denies the consumer the requested product or service because of the consumer’s credit history. The introducer will then discuss credit repair with the consumer and, where appropriate, offer to connect the consumer to Lexington Law or to CreditRepair.com.

The growth of third-party introducers has benefited consumers by enhancing their awareness of a variety of services of interest. In a September 2016 report, the FTC noted that “lead generation has become more sophisticated, rapid, and data- intensive” and “a key marketing technique used in a variety of industries, particularly lending, postsecondary education, and insurance.” The lead generation ecosystem includes publishers who advertise online in an effort to identify customers in need of particular services and then connects them with the appropriate merchants or service providers. The FTC recognized that publishers are often “small companies that simply collect consumer information and pass it on to larger, more sophisticated actors in the lead ecosystem.”⁷

In its 2016 Report, the FTC trumpeted the benefits of lead generators, noting their expertise in quickly connecting interested consumers and service providers, and the positive effects that lead generation has on price and competition. *Id.* at 4. The FTC also claims “broad jurisdiction over lead generators ... [and] has brought law enforcement actions against unscrupulous actors in the lead generation industry.” *Id.* at 1. Unscrupulous lead generators that send consumers to service providers hurt both the consumers and the service providers. Thus, as the FTC recognized, legitimate service providers—entities like Defendants in this action—are “increasingly making efforts to discover and reject leads obtained through deceptive or other problematic marketing practices, in part because these consumers are less likely to actually purchase their products or services – and are thus less valuable as leads.” *Id.* at 6.

⁷ See Evan Zullo et al., “*Follow the Lead*” Workshop, FTC Staff Paper 2 (Sept. 2016), https://www.ftc.gov/system/files/documents/reports/staff-perspective-follow-lead/staff_perspective_follow_the_lead_workshop.pdf

Yet in this lawsuit, the CFPB has turned its fire on the Progrexion Defendants for the apparent bad acts of third-party lead generators. The CFPB's contentions couple the thinnest of allegations regarding the conduct of five introducers⁸ with unsupported claims that Defendants knew about and assisted any such conduct. The CFPB has not alleged deception directly by CreditRepair.com or any of the other Progrexion Defendants. And the CFPB has not alleged any deceptive conduct by any specific introducer besides HOPE.

As shown in its Additional Defenses and Answer, Defendants vehemently deny the Amended Complaint's allegations of wrongdoing and deny any liability and that Plaintiff should take any relief from this case.

Demand for Jury Trial

Defendants demand a jury trial as to all issues so triable.

ADDITIONAL DEFENSES

By setting forth these defenses, Defendants do not assume the burden of proving any fact, issue, or element of a cause of action where such burden properly belongs to Plaintiff. Nothing stated herein is intended or shall be construed as an admission that any particular issue or subject matter is relevant to Plaintiff's allegations.

First Defense

Plaintiff's claims and recovery under Count I are barred, or limited, because the subject conduct is permitted under the Credit Repair Organizations Act, 15 U.S.C. §§ 1679 et seq. ("CROA"). As such, CROA—a federal law, enacted after the so-called Advance Fee Provision

⁸ To date, the CFPB has not brought an enforcement action against any of the identified "Relevant Hotswap Partners."

of the Telemarketing Sales Rule, 16 C.F.R. §310.4(a)(2) (the “AFP”), on which Count I is based—preempted and overrode the AFP, preserved for each of Defendants Lexington Law and CreditRepair.com the right and permission to provide its services and collect payment in the manner it did, and provided for consumers the right and permission to access credit repair services and pay for them as they agreed to do so.

Second Defense

Plaintiff’s claims and recovery under Count I are barred, or limited, to the extent Count I seeks to impose liability on Defendants for acts or omissions taken in good faith, with a reasonable basis in fact and/or law. Defendants reasonably interpreted applicable law, including the Credit Repair Organizations Act, to allow credit repair service providers to charge consumers for services when rendered.

Third Defense

Plaintiff’s claims and recovery are barred or limited, in whole or in part, by the terms of the applicable statute of limitations. Plaintiff knew, or with reasonable diligence would have known, the facts supporting its claims more than 3 years before entering a tolling agreement with Defendants on March 8, 2019 and subsequently filing its initial Complaint. Prior to March 8, 2016, among other things, Plaintiff had already reviewed many consumer complaints (which it later parroted in its pleadings), interviewed insiders and consumers about the events at issue, engaged in undercover phone calls and emails to Progexion and the hotswaps posing as consumers, taken days of sworn testimony of Defendants’ employees, and compelled discovery from Defendants and third parties.

Fourth Defense

Plaintiff's claims and recovery are barred or limited, in whole or in part, by equitable doctrines due to the CFPB's unreasonable and prejudicial delay. Defendants' billing practices have been known to Plaintiff and its predecessor agency since at least 1997, but Plaintiff did not publicly signal its new interpretation of the AFP until it brought this action in 2019. For example, it never before has sought to enforce the AFP against any company that was not expressly promising results that could be reflected on a credit report.

Fifth Defense

Plaintiff's claims and recovery for injunctions, restitution, rescission, reformation, disgorgement or other forms of equitable relief are barred or limited, in whole or in part, by equitable doctrines, including but not limited to unclean hands, estoppel, availability of legal remedies, and inequitable windfall. Defendants' billing practices have been known to Plaintiff and its predecessor agency since at least 1997, but Plaintiff did not signal its new interpretation of the AFP until it brought this action in 2019. Further, consumers understood the terms of their agreements with Lexington Law and CreditRepair.com, agreed to pay the bills rendered pursuant to those agreements, and received valuable credit repair services.

Sixth Defense

Plaintiff's claims and recovery are barred or limited, in whole or in part, to the extent they seek to impose liability on Defendants for reliance upon, use, or awareness of information provided to them by third parties that was inaccurate or misleading. For example, Defendants relied on Hotswap Partners' assurances that they conformed their practices with Defendants' compliance guidance and only communicated truthfully to consumers.

Seventh Defense

Plaintiff's causes of action are barred insofar as they are based on the acts or omissions of third parties for whom Defendants are not responsible. Specifically, as to Counts II, III, IV, and V of the Amended Complaint, Defendants are not liable for alleged misrepresentations or deception by third parties regarding those third parties' own products, and over whom Defendants exercised no control, right of control, or legal responsibility.

Eighth Defense

Defendants reserve all rights they have with respect to the imposition of civil monetary penalties or other monetary remedies that would result in a violation of the First, Fifth, Sixth, and/or Eighth Amendments to the United States Constitution.

Ninth Defense

Plaintiff's claims and recovery are barred or limited, in whole or in part, to the extent the clients on behalf of whom Plaintiff seeks to obtain customer-focused relief understood and agreed to the terms of Lexington Law's and CreditRepair.com's services, voluntarily paid for delivered credit repair services, and/or consented to or expressly authorized the alleged conduct.

Tenth Defense

Plaintiff's claims and recovery for restitution, refunds, and/or disgorgement are barred, in whole or in part, on the ground and to the extent that Defendants were not unjustly enriched. Consumers did not suffer any injury as a result of any conduct alleged in the Amended Complaint, and Defendants received no payments exceeding the amounts they were owed pursuant to valid contracts.

Eleventh Defense

Plaintiff's claims are barred, in whole or in part, on the ground that some or all of the consumers on behalf of whom Plaintiff seeks to obtain relief have valid and outstanding legal obligations to Lexington Law and/or CreditRepair.com. Consumers knowingly and voluntarily agreed to the terms of Lexington Law's and CreditRepair.com's services, voluntarily paid for delivered credit repair services, and/or consented to or expressly authorized the alleged conduct.

Twelfth Defense

Each of the Progrexion Defendants hereby assert and rely upon every defense by Lexington Law to the extent such defense is applicable to the Progrexion Defendants or would provide a defense to Lexington Law such that the Progrexion Defendants could not be liable.

Reservation of Rights

Defendants hereby give notice that they intend to rely upon such other and further defenses as may become available or apparent during pre-trial proceedings in this case and hereby reserve all rights to amend their answer, if necessary, to assert such defenses.

Defendants reserve the right to pursue, on appeal, the following defenses previously addressed by the Court, specifically that (1) Plaintiff fails to state a claim upon which relief can be granted; (2) Plaintiff fails to meet the pleading requirements for a claim of fraud pursuant to Rule 9(b); (3) that Plaintiff's claims and recovery are barred or limited by laches; (4) that Plaintiff's claims and recovery in Count I are barred or limited by the Due Process Clause and/or the Administrative Procedure Act; (5) that the AFP is unenforceable on its face and as applied to Defendants; (6) that Plaintiff's claims and recovery are barred by Articles I

and II of the United States Constitution; (7) that Plaintiff's claims and recovery are barred or limited by the applicable statute of limitations, effective July 7, 2017, because Plaintiff was not constitutionally authorized to bring this action when it purported to do so; and (8) that Plaintiff's claims and recovery in Count I are barred or limited by the freedom of speech protections of the First Amendment.⁹

ANSWERS TO NUMBERED PARAGRAPHS

As laid out in this Answer, the Progexion Defendants deny the Amended Complaint's allegations because they did not engage in any wrongful conduct in violation of the Telemarketing Sales Rule, Consumer Financial Protection Act, or otherwise. All responses are based solely on the knowledge and information of the Progexion Defendants. Unless otherwise stated, the Progexion Defendants do not purport to admit or characterize the conduct of another person or entity. Defendants deny all allegations to the extent they are found in the headings, subheadings, footnotes, prayer for relief, or any other text not appearing in a numbered paragraph. Except as expressly admitted herein, all allegations in the Amended Complaint are denied.

1. The allegations in Paragraph 1 are introductory and therefore require no response.

2. Regarding Paragraph 2, Defendants admit that Lexington Law and CreditRepair.com each provide credit repair services and that they separately market their services through various media. Defendants also admit that, on information and belief, certain

⁹ At the June 30, 2022 Pretrial Conference, the Court issued a ruling dismissing the defenses listed in this paragraph as (4)-(8).

individuals who retain Lexington Law or sign up for CreditRepair.com seek help understanding their credit reports and challenging inaccurate, unsubstantiated, or unfair items on those reports that negatively affect credit scores and access to credit products. Those individuals pay varying amounts based on what level of services they chose and how long they receive the services.

Defendants deny that Defendants operate Lexington Law and deny all other allegations contained in Paragraph 2.

3. The allegations contained in the first two sentences of Paragraph 3 are introductory and non-specific and therefore do not require a response. To the extent a response is required, Defendants admit that they pay for leads from third-party entities who advertise and/or offer a variety of products and services but deny Plaintiff's characterization of the third-party advertising and/or services. Defendants deny all other allegations in Paragraph 3.

4. The allegations in Paragraph 4 set forth legal conclusions to which no answer is required. To the extent an answer is required, Defendants deny the allegations in Paragraph 4.

5. Paragraph 5 consists of Plaintiff's characterization of the intent of their purported claims, to which no answer is required. To the extent a response is required, Defendants deny the allegations in Paragraph 5.

6. Defendants admit that this Court has subject matter jurisdiction.

7. Defendants admit that venue is proper in this district.

8. The allegations in Paragraph 8 set forth legal conclusions to which no answer is required. To the extent an answer is required, Defendants deny that Plaintiff has the authority it claims in Paragraph 8 because its organic statute is unconstitutional.

9. Defendants admit the allegations in the first four sentences of Paragraph 9,

except that they deny that PGX Holdings exercises control over all aspects of the activities of its subsidiaries and further deny Plaintiff's characterization of the referenced software. Defendants deny the allegations in the final sentence of Paragraph 9 that PGX Holdings offers and provides financial advisory services and services relating to consumer report information, or that it engages in telemarketing and telesales.

10. Defendants admit the allegations of sentences 1 and 2 of Paragraph 10, except that they deny that Progrexion Marketing engages in telemarketing. Sentence 3 of Paragraph 10 is too vague for Defendants to form a response, and therefore the allegations in Sentence 3 are denied. Defendants deny the allegations in Sentence 4 of Paragraph 10. The final sentence of Paragraph 10 sets forth legal conclusions to which no response is required.

11. Defendants admit the allegations of sentence 1 of Paragraph 11. Defendants deny the allegations of sentences 2 and 3 of Paragraph 11. The final sentence of Paragraph 11 sets forth legal conclusions to which no response is required.

12. Defendants admit the allegations of sentences 1 and 3 of Paragraph 12. Defendants deny the allegation in sentence 2 of Paragraph 12 that eFolks generates leads for Lexington Law. The final sentence of Paragraph 12 sets forth legal conclusions to which no response is required.

13. Defendants admit the allegations contained in the first four sentences of Paragraph 13, except that they deny that PGX Holdings created CreditRepair.com in January 2012. The final sentence of Paragraph 13 sets forth legal conclusions to which no response is required.

14. Defendants admit the allegations in sentences 1, 4, and 5 of Paragraph 14.

Sentences 2 and 6 appear to reference specific contractual agreements between Lexington Law and the Progexion Defendants, which are the best evidence of those arrangements. To the extent a response is required, Defendants admit that the contractual agreements exist but deny Plaintiff's characterization of them. Defendants deny the allegations in sentences 3 and 7 of Paragraph 14, except that Defendants admit that Lexington Law is a law firm performing legal services.

15. Defendants admit the allegations in Paragraph 15, except for the allegation that Lexington Law offers products or services as defined by the referenced statute—such allegation is a legal conclusion that does not require a response.

16. Paragraph 16 sets forth legal conclusions that do not require a response.

17. Paragraph 17 sets forth legal conclusions that do not require a response.

18. Paragraph 18 sets forth legal conclusions that do not require a response.

19. Paragraph 19 sets forth legal conclusions that do not require a response.

20. Paragraph 20 sets forth legal conclusions that do not require a response.

21. Paragraph 21 sets forth legal conclusions that do not require a response.

22. Defendants deny the allegations in Paragraph 22.

23. Paragraph 23 sets forth legal conclusions that do not require a response.

24. Defendants deny the allegations in Paragraph 24.

25. Paragraph 25 sets forth legal conclusions that do not require a response.

26. Defendants deny the allegations in Paragraph 26.

27. Paragraph 27 sets forth legal conclusions that do not require a response.

28. Defendants admit on information and belief that Lexington Law and

CreditRepair.com have a greater number of clients than many of their competitors.

29. Defendants deny the allegations in Paragraph 29.

30. Defendants deny the allegations in Paragraph 30.

31. Defendants admit that certain of Defendants pay third parties for leads and that Paragraph 31 reflects without context a quotation found on a website associated with a Progrexion entity. The allegations in Paragraph 31 are otherwise denied.

32. Defendants deny the allegations in Paragraph 32, except Defendants admit that certain of Defendants pay third parties for live transfers of leads and that such transfers are sometimes referred to as hotswaps.

33. Defendants deny the allegations in Paragraph 33, except that Defendants admit on information and belief that certain Hotswap Partners—i.e., third parties who provide live transfers to Progrexion—offer their own products and/or services.

34. Defendants deny the allegations in Paragraph 34, except Defendants admit on information or belief that certain Hotswap Partners—i.e., third parties who provide live transfers—use inbound and outbound telephone calls to market products and services.

35. Paragraph 35 refers to unidentified calls made by or to third parties at unspecified times, and its allegations are therefore too vague for Defendants to admit or deny. To the extent a response is required, Defendants deny the allegations in Paragraph 35.

36. Defendants admit that they from time to time refer to certain incoming live telephone transfers from third-party affiliates as “hotswaps.”

37. Defendants deny the allegations in Paragraph 37.

38. Defendants admit that Progrexion Marketing manages relationships with

“Hotswap Partners” as that term is defined in the Amended Complaint, but otherwise deny the allegations in Paragraph 38.

39. Paragraph 39 sets forth vague allegations making it impossible to affirm or deny the claim.

40. Defendants admit that the second sentence of Paragraph 40 reflects without context a quotation found on a website associated with a Progrexion entity. The allegations in Paragraph 40 are otherwise denied.

41. Defendants admit on information and belief the allegations in sentence 1 of Paragraph 41. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in sentence 2 of Paragraph 41 with respect to each Hotswap Partner, and so deny the allegations.

42. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations Paragraph 42 with respect to each Hotswap Partner or consumer, and so deny the allegations.

43. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations Paragraph 43 with respect to each Hotswap Partner or consumer, and so deny the allegations.

44. Defendants deny the allegations in Paragraph 44.

45. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations Paragraph 45 with respect to each Hotswap Partner or consumer, and so deny the allegations.

46. Defendants deny the allegations in Paragraph 46.

47. Defendants admit that Paragraph 47 reflects without context a quotation found in a script sent by a Progrexion marketing affiliate to a Progrexion Marketing employee. Defendants otherwise deny the allegations in Paragraph 47.

48. Defendants admit that employees of Progrexion have requested that Hotswap Partners pre-qualify consumers as individuals who can benefit from, are interested in, and can afford Lexington Law or CreditRepair.com's credit repair services prior to transferring them. The allegations in Paragraph 48 are otherwise denied.

49. Defendants admit that employees of Progrexion have requested that Hotswap Partners pre-qualify consumers as individuals who can benefit from, are interested in, and can afford Lexington Law or CreditRepair.com's credit repair services prior to transferring them. The allegations in Paragraph 49 are otherwise denied.

50. Defendants deny the allegations in Paragraph 50.

51. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations Paragraph 51 with respect to each Hotswap Partner or consumer, and so deny the allegations, except that Defendants admit that Lexington Law and CreditRepair.com provide free credit consultations to consumers.

52. Paragraph 52 sets forth vague allegations making it impossible to affirm or deny the claim. To the extent a response is required, Defendants deny the allegations in Paragraph 52.

53. Defendants deny the allegations in Paragraph 53.

54. Defendants deny the allegations in Paragraph 54, except Defendants admit that dedicated phone numbers may be assigned to particular third-party lead sources.

55. Defendants deny the allegations in Paragraph 55, except Defendants admit that

there are particular instances where live transfers proceed as described in Paragraph 55.

56. Defendants deny the allegations in Paragraph 56, except Defendants admit that there are particular instances where live transfers involve a free credit repair consultation, a description of the Lexington Law or CreditRepair.com's credit repair services available for purchase, and a discussion of the individual consumer's goals.

57. Defendants admit that the language quoted in Paragraph 57 is an incomplete quotation from a Progrexion Teleservices script and admit that there are particular instances where live transfers proceed as described, but otherwise deny the allegations in Paragraph 57

58. Defendants admit that the language quoted in Paragraph 58 is an incomplete quotation from a Progrexion Teleservices script and admit that there are particular instances where live transfers proceed as described, but otherwise deny the allegations in Paragraph 58.

59. Defendants deny the allegations in Paragraph 59.

60. Paragraph 60 alleges vague allegations that reference unidentified trainings, making it impossible to affirm or deny the claims. To the extent a response is required, Defendants deny the allegations in Paragraph 60.

61. The allegations in Paragraph 61 are vague and reference unidentified trainings, making it impossible to affirm or deny the claims. To the extent a response is required, Defendants deny the allegations in Paragraph 61.

62. The allegations in Paragraph 62 are vague and reference unidentified guidance, making it impossible to affirm or deny the claims. To the extent a response is required, Defendants deny the allegations in Paragraph 62, except Defendants admit that they tell third-party lead sources they may not condition a consumer's receipt of third-party services or

products on signing up for credit repair with Lexington Law or CreditRepair.com.

63. The allegations in Paragraph 63 are vague in that they characterize unspecified instances of “assistance” given to unspecified recipients on unspecified occasions at unspecified times, making it impossible to affirm or deny the claims. To the extent a response is required, Defendants deny the allegations in Paragraph 63.

64. Defendants deny the allegations in Paragraph 64.

65. Defendants admit the allegations in Paragraph 65.

66. Defendants deny the allegations in Paragraph 66.

67. The allegations in Paragraph 67 are vague in that they reference unspecified representations given to unspecified recipients on unspecified occasions at unspecified times, and do not explain in what sense the representations “tie” credit repair to “particular products,” making it impossible to affirm or deny the claims. To the extent a response is required, Defendants deny the allegations in Paragraph 67.

68. Defendants admit that the text quoted in Paragraph 68 reflects without context partial quotations from a Progrexion document but deny Plaintiff’s characterization of that document.

69. The allegations in Paragraph 69 are vague, making it impossible to affirm or deny the claims. To the extent a response is required, Defendants deny the allegations in Paragraph 69, except Defendants admit that one purpose of their marketing efforts is to increase sales of Lexington Law and CreditRepair.com services.

70. Defendants admit that the text quoted in Paragraph 70 reflects without context language contained in an email sent on or about the date cited but deny Plaintiff’s

characterization of the language.

71. Paragraph 71 sets for legal conclusions to which no response is required. To the extent a response is required, Defendants deny the allegations in Paragraph 71.

72. Defendants deny the allegations in Paragraph 72.

73. Defendants deny the allegations in Paragraph 73.

74. Defendants deny the allegations in Paragraph 74.

75. Defendants admit on information and belief that HOPE was in contact with consumers and admit that HOPE transferred to Progrexion over 100,000 consumers who signed up for Lexington Law credit repair services during the referenced period.

76. Defendants deny the allegations in Paragraph 76.

77. Paragraph 77 purports to provide a partial quotation of an unidentified person at an unidentified time, making it impossible to affirm or deny the claims. To the extent a response is required, Defendants deny the allegations in Paragraph 77.

78. Defendants deny the allegations in Paragraph 78.

79. Defendants deny the allegations in Paragraph 79.

80. Paragraph 80 alleges generalizations about unspecified instances in which unidentified persons spoke with one another, and purports to provide a partial quotation of an unidentified person at an unidentified time, making it impossible to affirm or deny the claims. To the extent a response is required, Defendants deny the allegations in Paragraph 80.

81. Defendants admit that the quotation in the first sentence of Paragraph 81 reflects a partial quotation without context of language found in an email from a HOPE employee regarding scripting but otherwise deny the allegations in Paragraph 81.

82. Defendants admit that the quotation in the second sentence of Paragraph 82 reflects a quotation without context of language found in an email from a HOPE employee regarding scripting but otherwise deny the allegations in Paragraph 82.

83. Paragraph 83 alleges generalizations about unspecified instances in which unidentified persons spoke with one another, making it impossible to affirm or deny the claims. To the extent a response is required, Defendants deny the allegations in Paragraph 83.

84. Paragraph 84 alleges generalizations about unspecified instances in which unidentified persons spoke with one another, making it impossible to affirm or deny the claims. To the extent a response is required, Defendants deny the allegations in Paragraph 84.

85. Paragraph 85 purports to provide a partial quotation of an unidentified document at an unidentified time, making it impossible to affirm or deny the claims. To the extent a response is required, Defendants deny the allegations in Paragraph 85.

86. Defendants deny the allegations in Paragraph 86.

87. Paragraph 87 alleges claims by Progexion in a form too general to admit or deny. To the extent a response is required, Defendants deny the allegations in Paragraph 87.

88. Defendants deny the allegations in Paragraph 88.

89. Defendants deny the allegations made in sentence 1 of Paragraph 89. Defendants admit that the quotation in the second sentence of Paragraph 89 reflects a quotation without context of language found in an email from a Progexion employee but otherwise deny the allegations.

90. Paragraph 90 alleges generalizations about unspecified instances in which unidentified persons spoke with one another, making it impossible to affirm or deny the claims.

To the extent a response is required, Defendants deny the allegations in Paragraph 90.

91. Defendants deny the allegations in Paragraph 91, except Defendants admit that a policy existed that restricted referrals of consumers to Lexington Law or CreditRepair.com who had contacted the Hotswap Partner via advertisements on Craigslist.

92. Defendants deny the allegations in Paragraph 92.

93. Paragraph 93 is vague in that it alleges behavior by an unspecified entity, making it impossible to affirm or deny the claims. To the extent a response is required, Defendants deny the allegations in Paragraph 93.

94. Defendants deny the allegations in sentence 1 of Paragraph 94. Defendants admit that the quotations in the second and third sentences of Paragraph 94 reflect, in part and without context, language that appears in an email sent by a Progrexion employee, but otherwise deny the allegations.

95. Defendants deny the allegations in Paragraph 95.

96. Defendants deny the allegations in Paragraph 96, except that Defendants admit to at times providing scripting suggestions to third-party lead sources pertaining to credit repair.

97. Defendants admit that that the quoted language in Paragraph 97 reflects without context language that appears in an email sent by a Progrexion employee, but otherwise deny the allegations.

98. Paragraph 98 alleges generalizations about unspecified instances in which unidentified persons took unidentified actions at unidentified times, making it impossible to affirm or deny the claims. To the extent a response is required, Defendants deny the allegations in Paragraph 98.

99. Defendants admit that that the quoted language in Paragraph 99 reflects without context language that appears in an email sent to a Progrexion employee, but otherwise deny the allegations.

100. Defendants deny the allegations in Paragraph 100.

101. Defendants lack knowledge or information sufficient to form a belief as to the contents of conversations between unidentified individual consumers and HOPE, and on that basis deny the allegations in Paragraph 101, except that Defendants admit that for a time HOPE provided consumer leads to eFolks.

102. Defendants deny the allegations in Paragraph 102.

103. Defendants admit that the first sentence of Paragraph 103 reflects without context a partial quotation of language found in an email sent by a Progrexion employee. Defendants deny any characterization of the email, and otherwise deny the allegations in Paragraph 103, except Defendants admit that as a technical matter certain fields, including zip code, needed to be populated to allow for a successful upload to a dialer.

104. Defendants admit that there were communications between a Progrexion employee and HOPE regarding inputting zip codes for consumer leads provided by HOPE to eFolks. Defendants deny any characterization of those communications, which are the best evidence of their own contents, and otherwise deny the allegations in Paragraph 104.

105. The allegations in Paragraph 105 are vague because they allege knowledge by unidentified persons of unidentified activities by unidentified third parties, making it impossible to affirm or deny the claims. To the extent a response is required, Defendants deny the allegations in Paragraph 105.

106. Defendants deny the allegations contained in Paragraph 106, except that Defendants admit that the third and fourth sentences reflect without context a partial quotation of language found in an email sent in or around July 2016. Defendants deny any characterization of the email, which is itself the best evidence of its contents, and of the quoted material, which is incomplete.

107. Defendants admit that Paragraph 107 reflects without context a partial quotation of language found in an email sent in or around December 2014. Defendants deny any characterization of the email, which is itself the best evidence of its contents, and of the quoted material, which is incomplete.

108. Defendants admit on information and belief that from time to time Lexington Law corresponds with Plaintiff regarding consumer questions or complaints, and that Paragraph 108 appears to reflect partial, out of context quotations from some of that correspondence. On information and belief, the consumer referred to in Paragraph 108 cancelled her credit repair service two days after engaging Lexington Law, before she was billed by or paid Lexington Law for credit repair services. Defendants deny the allegation in sentence 3 regarding Progrexion's prior knowledge of "similar guarantee claims." Defendants otherwise lack sufficient information to either confirm or deny the allegations in Paragraph 108 and on that basis deny them.

109. Paragraph 109 comprises Plaintiff's characterization of the scope of its claims and therefore requires no response. With respect to the allegations regarding the specific Hotswap Partners, Defendants lack knowledge or information sufficient to affirm or deny the allegations in Paragraph 109 and on that basis deny them.

110. The allegations contained in Paragraph 110 state a legal conclusion as to which

no response is required.

111. Defendants admit that Lexington Law and CreditRepair.com send communications to furnishers and consumer reporting agencies on behalf of consumers and at their direction, some of which question information found on the consumers' credit reports.

112. Defendants admit that Progrexion markets Lexington Law and CreditRepair.com as providing, among other products and services, credit repair services that 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. Defendants 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.

113. Paragraph 113 reflects without context quoted language found on a webpage associated with Lexington Law. Defendants deny any characterization of the quoted language, including that any quoted statement represents a promise or guarantee of a specific outcome.

114. Paragraph 114 reflects without context quoted language that has appeared in advertisements for Lexington Law. Defendants deny any characterization of the quoted language, including that any quoted statement represents a promise or guarantee of a specific outcome.

115. Defendants admit that the image in Paragraph 115 reflects an online advertisement, at least in part, for Lexington Law.

116. Defendants admit that the image in Paragraph 116 reflects an online advertisement, at least in part, for Lexington Law.

117. Defendants admit that the image in Paragraph 117 reflects an online advertisement, at least in part, for Lexington Law.

118. Paragraph 118 purports to provide partial quotations of unidentified advertisements at unidentified times, making it impossible to affirm or deny the claims. To the extent a response is required, Defendants deny the allegations in Paragraph 118.

119. Defendants admit that the image in Paragraph 119 reflects an online advertisement, at least in part, for CreditRepair.com.

120. Defendants deny the allegations in Paragraph 120.

121. Defendants deny the allegations in Paragraph 121, except Defendants admit that some of the quoted portions in Paragraph 121 reflect without context language that appears in a script from 2012.

122. Defendants admit that the quoted text in Paragraph 122 reflects without context language from a call that occurred in May 2016, but otherwise deny the allegations.

123. Paragraph 123 sets forth legal conclusions to which no response is required.

124. Defendants deny the allegations in Paragraph 124, but admit that consumers who elect to enroll may purchase a copy of their credit report from Lexington Law or CreditRepair.com at the time they enroll.

125. The allegations in Paragraph 125 are vague because they allege unspecified communications to unspecified consumers by unspecified persons at unspecified times, making it impossible to affirm or deny the claims. To the extent a response is required, Defendants deny the claims.

126. Defendants admit that consumers who enroll in credit repair services with

Lexington Law or CreditRepair.com are charged a first credit repair service work fee five to fifteen days after enrollment for services previously provided during their first service interval according to their chosen service level and consistent with their contractual agreement with Lexington Law or CreditRepair.com.

127. Defendants admit that consumers who elect to remain enrolled in credit repair services with Lexington Law or CreditRepair.com are charged after the conclusion of each monthly service interval for services provided during that completed service interval according to their chosen service level and consistent with their contractual agreement with Lexington Law or CreditRepair.com so long as they choose to remain enrolled.

128. Defendants deny the allegations in Paragraph 128 as no credit repair results have been promised.

129. Defendants admit that consumers who elect to remain enrolled in credit repair services with Lexington Law or CreditRepair.com are charged after the conclusion of each monthly service interval for services provided during that completed service interval according to their chosen service level and consistent with their contractual agreement with Lexington Law or CreditRepair.com for so long as they choose to remain enrolled. Consumers agree to review their engagements with Lexington Law and CreditRepair.com monthly, and they may cancel their service at any time, either by phone or in writing.

130. Defendants incorporate by reference, as if fully set forth herein, its responses to Paragraphs 1-129.

131. Paragraph 131 sets forth legal conclusions to which no response is required.

132. Paragraph 132 sets forth legal conclusions to which no response is required.

133. Defendants deny the allegations in Paragraph 133.

134. Defendants deny the allegations in Paragraph 134.

135. Paragraph 135 sets forth legal conclusions to which no response is required. To the extent a response is required, Defendants deny the allegations in Paragraph 135.

136. Defendants incorporate by reference, as if fully set forth herein, its responses to Paragraphs 1-129.

137. Paragraph 137 sets forth legal conclusions to which no response is required.

138. Paragraph 138 sets forth legal conclusions to which no response is required.

139. Defendants deny the allegations in Paragraph 139.

140. Defendants deny the allegations in Paragraph 140.

141. Defendants deny the allegations in Paragraph 141.

142. Paragraph 142 sets forth legal conclusions to which no response is required. To the extent a response is required, Defendants deny the allegations in Paragraph 142.

143. Defendants deny the allegations in Paragraph 143.

144. Paragraph 144 sets forth legal conclusions to which no response is required. To the extent a response is required, Defendants deny the allegations in Paragraph 144.

145. Defendants incorporate by reference, as if fully set forth herein, its responses to Paragraphs 1-129.

146. Paragraph 146 sets forth legal conclusions to which no response is required.

147. Paragraph 147 sets forth legal conclusions to which no response is required.

148. Defendants deny the allegations in Paragraph 148.

149. Defendants deny the allegations in Paragraph 149.

150. Defendants deny the allegations in Paragraph 150.

151. Paragraph 151 sets forth legal conclusions to which no response is required. To the extent a response is required, Defendants deny the allegations in Paragraph 151.

152. Defendants deny the allegations in Paragraph 152.

153. Paragraph 153 sets forth legal conclusions to which no response is required. To the extent a response is required, Defendants deny the allegations in Paragraph 153.

154. Defendants incorporate by reference, as if fully set forth herein, its responses to Paragraphs 1-129.

155. Paragraph 155 sets forth legal conclusions to which no response is required.

156. Paragraph 156 sets forth legal conclusions to which no response is required.

157. Paragraph 157 sets forth legal conclusions to which no response is required.

158. Defendants deny the allegations in Paragraph 158.

159. Paragraph 159 sets forth legal conclusions to which no response is required. To the extent a response is required, Defendants deny the allegations in Paragraph 159.

160. Paragraph 160 sets forth legal conclusions to which no response is required. To the extent a response is required, Defendants deny the allegations in Paragraph 160.

161. Paragraph 161 sets forth legal conclusions to which no response is required. To the extent a response is required, Defendants deny the allegations in Paragraph 161.

162. Defendants incorporate by reference, as if fully set forth herein, its responses to Paragraphs 1-129.

163. Paragraph 163 sets forth legal conclusions to which no response is required.

164. Paragraph 164 sets forth legal conclusions to which no response is required.

165. Defendants deny the allegations in Paragraph 165.

166. Paragraph 166 sets forth legal conclusions to which no response is required. To the extent a response is required, Defendants deny the allegations in Paragraph 166.

167. Paragraph 167 sets forth legal conclusions to which no response is required. To the extent a response is required, Defendants deny the allegations in Paragraph 167.

168. Paragraph 168 sets forth legal conclusions to which no response is required. To the extent a response is required, Defendants deny the allegations in Paragraph 168.

169. Paragraph 169 sets forth only legal conclusions that do not require a response. To the extent a response is required, Defendants deny the allegations in Paragraph 169.

170. Defendants deny that Plaintiff is entitled to any of the relief requested in Paragraph 170.

Dated: August 31, 2022

Respectfully submitted,

/s/ Edward J. Bennett

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CERTIFICATE OF SERVICE

I hereby certify that on August 31, 2022, 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/ Emma J. Nino
Emma J. Nino

EXHIBITS 1-3

FILED UNDER SEAL

EXHIBIT 4

ALLEN WEINBERG

Payment Card Chargebacks – It Pays for Merchants to Put Up a Fight!

By [Allen Weinberg](#) on March 24 2006

By **Allen Weinberg**

With online payment fraud now entering its second decade, recent fraud studies are somewhat encouraging and show that the percentage of revenue lost by eCommerce merchants to online fraud is declining. But these same studies also underscore that with the steady growth of online commerce and digital goods and services, the actual sales revenue lost to payment fraud continues to increase year over year. The eCommerce paradox is that while online payment fraud is dropping in relative terms, it is growing in absolute terms. And with eCommerce merchants expected to lose as much as \$2.8 billion to payment fraud in 2005, according to the *2006 CyberSource Annual Fraud Report*, the problem is demanding greater management attention, the development of industry best practices, and the pursuit of new solutions.

Understanding Payment Fraud in an Online World

How do online merchants know if a purchase is fraudulent? They actually don't know at the point the customer hits the "Buy Now" button. Through the use of sophisticated fraud screening techniques, they might have a high-degree of confidence that a transaction

could be good. But ultimately it all comes down to whether or not they get paid for the goods—and if they do get paid, whether or not they get to keep the money.

For merchants, payment fraud appears on their doorstep in one of two forms. A customer approaches them with a problem—such as the goods never arrived—and asks for a refund. The merchant might suspect that the request isn't legitimate, but often provides the customer with a refund in order to maintain a good relationship. Either way, the merchant is out the sale—and in many cases they have lost their inventory as well.

In a more costly form, payment fraud arrives via a "chargeback", a term that eCommerce merchants have learned to hate. In the world of payment cards a chargeback refers to the process by which a cardholder disputes a payment made to a merchant. Cardholders generally initiate chargebacks based on claims such as the transaction was not authorized by them, the products or services were not as promised, the goods were not delivered, or it was a duplicate charge. After filing their claim with their issuing bank, the bank will either issue a request for more information about the purchase or initiate a chargeback—a reversal of the transaction that results in the money being taken back from the merchant. Getting the merchant's side of the story generally takes the form of a retrieval request (also known as an RFCO or 'ticket request') that asks for more information about the transaction. Retrieval requests only occur about 10% to 15% of the time. Usually, the bank will immediately issue a chargeback and reverse the funds flow.

eCommerce merchants can dispute (or "represent") the chargeback back through their acquirer with evidence of

through their acquirer. Their evidence of purchase, delivery, or service consumption. If the evidence is strong, they might get to keep the money earned from the sale. If the evidence is weak, they are out the sale, out the inventory, are usually out the interchange fee, and are assessed a chargeback processing fee by their acquirer. If the representment leads into arbitration (1) between the issuer and the acquirer, the merchant might also be assessed with the arbitration costs if they lose their case.

Online merchants define payment fraud as either "real" or "friendly". "Real fraud" is usually committed by a third party masquerading as the cardholder, and is increasingly being conducted by organized crime. "Friendly fraud" refers to purchases disputed by the cardholder as "not authorized" even though they really did perform the transaction and receive the goods. Since they obviously don't have the cardholder's signature as proof, eCommerce merchants are often unsure about how to respond to these types of chargebacks.

Chargebacks in either form—real or friendly—are a problem for almost all online merchants, and a serious problem for some. In addition to the lost revenue, lost merchandise, processing fees, and staff cost, the card associations will often classify merchants with high chargeback rates as "high risk" and start assessing additional transaction fees and other fees on a monthly basis. If high chargeback rates are not reduced, these merchants risk being assessed hefty financial penalties and ultimately losing their merchant accounts.

Learning from the Leaders

To better understand how eCommerce merchants are responding to the chargeback challenge, Glenbrook Partners recently undertook a

comprehensive study of its eCommerce clients to determine the cost of payment card chargebacks and best practices for mitigating losses. The study focused on eCommerce merchants' operational costs, the write-offs associated with chargebacks, and the representment practices used to fight chargebacks.

The study was based on six months of actual chargeback data from eight large U.S. eCommerce merchants, ranging in size from \$100 million in annual online sales to several billion in sales. Most were in the \$500 million to \$1 billion annual sales range. Four of the merchants sell "tangible goods" such as general merchandise, apparel, and electronics, while four sell "digital goods" such as travel reservations, downloadable music, electronic books, information services, and event tickets

In order to quantify the comprehensive costs of chargebacks to large eCommerce merchants, we asked each client to provide cost and related data that included:

- Chargebacks as a percent of total transactions
- Line staff, supervisory, and FTEs (full time equivalents) per chargeback
- Differences in chargeback rates by brand and by type of chargeback
- Representment rate by card brand and percent of representments won
- Any third party services utilized in helping to research or process chargebacks, RFCOs, and
- Percent of chargebacks arbitrated and percent of arbitrations won, by card brand

arbitration
actions

- Average chargeback ticket size vs. all tickets
- RFCOs as a percent of total transactions
- Refund of interchange, assessments, and processing fees for chargebacks (i.e., whether any of those fees are refunded)
- Fully loaded hourly cost of chargeback staff (salaries, benefits, and taxes for line and supervisory personnel)
- Time spent per representation
- RFCO fulfillment rate
- Labor cost per chargeback by type of chargeback and by card brand
- Representation, pre arbitration, arbitration, and compliance fees assessed by the acquirer
- Chargeback fees assessed by the acquirer or card system

From their responses we saw that the merchants exhibited a range of understanding and expertise in chargebacks management. Because the merchants were able to readily identify and manage non-fraudulent chargebacks (i.e., the merchant dropped the ball in some fashion), we asked for and received just fraud-related chargeback data. Importantly, because all of the merchants had a difficult time distinguishing between “friendly” and “real” chargebacks, we focused on fraud-related chargebacks in aggregate and did not try to drill down into the two

different forms.

Key Lessons

Based on our analysis of the 350,000 plus chargebacks that were received by the eight merchants in the second half of 2004, we drew the following conclusions:

Merchants *Can* Successfully Fight Chargebacks for Digital Goods

Quite a few merchants believe they can't win the chargeback fight for digital goods and services—and are incurring significant losses as a result. This belief is generally based on a number of factors including feedback from their acquirers, perceptions of the associations' rules and how they are enforced, as well as their own inability to provide compelling evidence that cardholder did in fact consummate the transaction.

// Our analysis showed that best-in-class digital goods merchants are choosing to fight 35% to 40% of their chargebacks (most likely friendly fraud) and are achieving 70% to 80% win rates.

While not quite as effective, the digital goods merchants that are “throwing everything against the wall” (i.e., representing everything with varying levels of research and support) are still seeing 30% to 40% win rates.

Respectable Win Rates are Achievable for Tangible Goods Merchants

As might be expected, the percentage of chargebacks fought and won did vary between merchants selling tangible goods as opposed to intangible goods. Based on the hypothesis that tangible goods (e.g., consumer electronics,

jewelry, etc.) are more prone to real fraud, there isn't much the e-tailer can do to fight the chargeback, resulting in fewer representations and a lower win rate on those that are represented.

// *The data showed that best-in-class tangible goods merchants are achieving 30% to 40% win rates on the chargebacks they choose to fight.*

Given that and the fact that tangible merchants tend to have a much higher cost-of-goods sold relative to digital content merchants, it is a given that they are much more reliant on their up-front fraud screening tools.

Chargeback Processing Strategies can be Successfully Optimized

It is clear from the data that those merchants with a comprehensive understanding of their chargeback processing costs, the nature of their chargebacks, and their ability to win a given chargeback, can optimize the ROI on chargeback related labor and fees. For example, the data indicated that merchants with the lowest chargeback rates spend the most time per representation, which is more than offset by their higher win rates. The data also showed that merchants with lower representation rates had higher win rates, also demonstrating the benefits of focusing resources on those items with the highest probability of return.

Everything is Negotiable

Respondents reported a wide range of chargeback-related fees and fee policies. Chargeback fees varied widely but were generally in the \$0 to \$5 range, reflecting the strong bargaining power of large merchants (smaller merchants generally pay between \$10 and \$25 per

returned item). (2)

One of the more valuable findings for study participants was learning about the wide range of acquirer policies regarding fees on chargebacks. Some merchants were refunded interchange fees, acquirer processing fees, or association assessments. (3) Specifically, about half of the merchants had the interchange fees on the transactions reversed, while a relative few had the association assessments and their acquirer's processing fees refunded. In addition, American Express and Discover are refunding the merchant discount on returned items for approximately half of the participants (but not necessarily for the same merchants that are receiving refunds from their bank card acquirers).

Extrapolating from the study results, merchants with less sophisticated tools can expect to spend between 15 and 20 minutes on chargebacks deemed to be winnable (i.e., the ones they really want to fight). As an example, those with more sophisticated chargeback support tools have the relevant data available to them on a single system (e.g., from CRM tools, customer databases, web logs/server data that show what was used, what was downloaded, etc.). Study data shows more sophisticated merchants spending approximately 10 minutes to fight winnable chargebacks.

Other Key Findings

Getting new headcount tends to be so hard in large organizations that merchants are considering outsourcing all or parts of the chargeback function in order to avoid adding headcount to meeting growing volume, or to redeploy their FTEs in higher priority areas.

The cross-merchant data from our benchmarking initiative required somewhat customized, merchant-level analysis to be most useful and actionable

analysts to be most useful and actionable since each merchant's chargeback performance is a function of:

- The relative effectiveness of its initial fraud screens
- How well the merchant communicates with its customers
- Whether the merchant fights (or represents) everything or is selective in researching and representing chargebacks
- Degree of workflow automation, how easily staff can access relevant information, and other related infrastructure factors
- "Terms and Conditions" of the sale
- Shipping and invoicing practices
- What appears on the cardholder's statement
- Wage rates

Ironically, chargeback rates can be *too* low. While a detailed analysis of this hypothesis was outside of the scope of this study, there were sufficient data to at least highlight this as a potential issue. In fact, several merchants are collecting and analyzing data on an ongoing basis in an attempt to lower their "false positives" (i.e., declining a good, profitable order because of suspected fraud). One potential indicator of overly restrictive fraud screens is a chargeback rate far below norms for the merchant's vertical segment. To properly perform the associated cost/benefit analysis, merchants need to have a reasonable understanding of their chargeback processing costs.

Recommendations

Work the Chargebacks and Pay Attention to Reason Codes

Successful strategies for both digital goods and tangible goods merchants include analysis of the chargeback reason code. The chargeback reason code often does not accurately reflect the actual reason the transaction is being charged back, since consumers and issuers often insert arbitrary reasons to get the chargeback process going. A merchant cannot accurately analyze its chargeback situation and subsequent chargeback dispute decision-making and actions based on simply relying on the chargeback reason codes associated with the chargebacks it receives. Successfully fighting these chargebacks requires analyzing the situation and correctly recategorizing the chargeback reason code—in other words, looking beyond the stated reason code to make a compelling assertion on whether a given chargeback is a case of true fraud or friendly fraud.

While some large merchants may have the systems resources to facilitate cost-effective data collection, those that don't, such as most mid-sized and smaller merchants should consider viable third party tools and outsourcing opportunities.

Focus on Winnable Chargebacks and Present Compelling Evidence

Sophisticated merchants also recognize that fighting chargebacks can have important, albeit somewhat less quantifiable benefits as well. In addition to optimizing operational processes and customer experience via root cause analysis, there is anecdotal evidence that supports the hypothesis that merchants develop both good and bad chargeback

develop both good and bad chargeback processing reputations with issuers—to the point that it affects the number of chargebacks generated to a given merchant and the intensity with which that issuer works the merchant's representations.

If a merchant has a reputation, for example, of representing all chargebacks—independent of supporting data—issuers will tend to more liberally charge items back to the merchant knowing that the merchant isn't really "working" the items, and will correspondingly and effectively challenge the representation.

Understand the ROI and Use It To Make Better Decisions

While merchants recognize the associated cost of goods sold and acquirer fees, they do not generally have a comprehensive strategy for understanding the true costs of chargebacks to their organizations, taking full advantage of the valuable learning available through chargeback analyses, nor for truly optimizing the appropriate quantity and quality of resources devoted to working chargebacks.

For example, this survey highlighted the fact that many merchants do not have an adequate understanding of the ROI on an additional chargeback FTE.

Merchants should have the data available to assess on a periodic basis how cost effective it is for them to work chargebacks at various dollar thresholds. This analysis is a function of staff costs, chargeback and related fees, and win rates.

Conclusion

While many myths and misinformation exist about chargebacks and what merchants can and should do with them, chargeback analysis and chargeback

management can and should be viewed as a strategic opportunity for merchants. Rather than viewing chargeback processing as a tactical nuisance, thoughtful analysis and tight management can help improve merchants' revenues and profits, as well as serve as a leading indicator of the health of the business and customers' buying experience. Best in class eCommerce merchants use chargeback analysis as a feedback mechanism to understanding how to improve business operations and online processes, and of course, to reduce their chargeback rates.

References

1. Inside the chargeback process, issuers and acquirers have a well-defined procedure for settling disputes. When both sides feel strongly about the case, it can move into pre-arbitration, and eventually to full arbitration with the losing side usually paying significant fees.
2. A word of caution may be in order: a number of acquirers (but not all) develop merchant-level P&L's when preparing to negotiate contacts/renewals, implying that they may just try and recoup lower negotiated fees somewhere else. Having said that, in general, chargeback processing fees are a large and profitable source of revenues for acquirers.
3. MasterCard and Visa acquirer assessments are 9.50 and 9.25 basis points (.0925%) on volume, respectively

Acknowledgments

Several of my partners at Glenbrook (Jay DeWitt, Russ Jones, and Dennis Moser) helped shape this report.

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EXHIBITS 5-8

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