

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CONSUMER FINANCIAL
PROTECTION BUREAU,

Plaintiff,

v.

UNIVERSAL DEBT & PAYMENT
SOLUTIONS, LLC, *et al.*,

Defendants.

Case No. 1:15-cv-0859-RWS

**BRIEF IN SUPPORT OF DEFENDANT PATHFINDER
PAYMENT SOLUTIONS, INC.'S MOTION FOR
RULE 11 SANCTIONS AGAINST PLAINTIFF**

More than eighteen months ago, and two months after this case had been filed, Pathfinder Payment Solutions, Inc. (“Pathfinder”) informed the CFPB that the CFPB had knowingly exceeded its statutory authority, deliberately disregarded the law, consciously distorted the facts against Pathfinder in the Complaint, and should be sanctioned for this conduct.¹ The CFPB’s case against Pathfinder has always been a farce. Discovery simply reinforced this.

INTRODUCTION

In the payment processing services industry, chargebacks are a fact of life. In the same way that a fruit farmer must deal with some worm-ridden apples, so too must a payment processor expect a reasonable amount of reversed transactions.² The farmer wouldn’t abandon the production of apples based on these expected, regular losses of product. In fact, the farmer may not be concerned with such losses at all if the number of bad apples didn’t increase from prior years and the apple yield was otherwise in line with projected expectations. The CFPB’s cherry-picking view—that a high percentage rate of chargebacks *in a single month* for transactions by UDPS and by Credit Power

¹ **Exhibit 1**, Rule 11 Motion, together with cover letters (May 19, 2015).

² Pathfinder is not a payment processor—a basic fact the CFPB has refused to acknowledge. Pathfinder is an independent sales organization (“ISO”) and marketer of payment processing services. **Exhibit 2**, Merchant Services Agreement between Pathfinder and Global Payments (“Pathfinder-MSA”). The Rule 11 Motion refers to Pathfinder as a payment processor based on the allegations made by the CFPB in the Complaint.

(collectively, “Debt Collectors”) should have caused Pathfinder to terminate their accounts—is the sort of second-guessing regulatory tunnel vision that would bring the entire credit card processing industry to a screeching halt.³ The CFPB would have the farmer fell the entire orchard, return the money from selling good apples, accuse him of misconduct if he did not, and end his business to the chagrin of apple consumers.

The only question before this Court regarding Pathfinder’s conduct is this: under what standard must Pathfinder’s conduct be reviewed? The CFPB has alleged only three circumstances that it believes make Pathfinder liable for violations of the CFP Act.

- 1) Pathfinder should have noticed the excessively “high” chargeback rates for UDPS and Credit Power for isolated months.⁴
- 2) Pathfinder ignored other ongoing warning signs of fraudulent activity.⁵
- 3) Pathfinder should not have submitted application packages for UDPS and Credit Power for Global’s approval.⁶

The CFPB’s entire case rests on these claims. Even after its present investigation and extensive discovery in this litigation, the CFPB has no facts to support them.

³ Under the terms of the Pathfinder-MSA with Defendant Global Payments Direct, Inc. (“Global”), Pathfinder did not have the power to terminate the accounts for UDPS or Credit Power. **Exhibit 2**, Pathfinder-MSA § F.5.

⁴ ECF No. 1, Compl. ¶¶ 180, 191–92.

⁵ Compl. ¶¶ 186–88.

⁶ Compl. ¶¶ 165–71.

The CFPB has submitted that Pathfinder should have been aware of the “excessive chargeback volume” of Credit Power and UDPS. The CFPB further claims that the “high rates” of chargebacks for single months for UDPS and Credit Power should have caused Pathfinder to investigate and to terminate their accounts. But the questions remain: who is entitled to define what volume of chargebacks is “high” or “excessive”? Against whose measure should Pathfinder’s conduct be marked? There are only two conceivable answers, only one of which is workable: (1) Pathfinder’s chargeback monitoring should be governed by the acceptable practices of the industry as a whole, or (2) Pathfinder is at the mercy of the CFPB to conjure an *ex post* standard out of thin air and at its own discretion.

The evidence demonstrates that Pathfinder’s monitoring conduct met industry standards and practices. As a result, the CFPB’s allegations fall woefully short of Rule 11’s required evidentiary demands. The CFPB’s discovery responses make clear that its narrow view is supported only by misleading selection of a single month of chargeback data for UDPS and Credit Power. Discovery in this case established that UDPS and Credit Power chargebacks were not excessive in any single month—let alone the specific months cited by the CFPB. Moreover, Pathfinder’s conduct was commensurate with every applicable industry or internal standard. By cherry-picking individual months—ones with low sale

transactions counts and a few chargebacks, the CFPB mischaracterized the overall view of the risk presented by UDPS and Credit Power and keeps presenting that skewed theory to the Court. The CFPB and its Counsel should be sanctioned.

The Government, by and through its agencies and counsel, is not above Rule 11.⁷ Not only may the CFPB and its attorneys be sanctioned, but when the law entrusts officials with prosecutorial power, those same officials are held to a high standard.⁸ Enormous power should not be wielded with reckless abandon. But at best, the CFPB's arguments against Pathfinder are unscrupulous; at worst, they are dishonest and cynical. The CFPB and its attorneys are sophisticated litigants. Rule 11 is designed to protect defendants from these and other abuses of power.

In denying Pathfinder's Motion to Dismiss, the Court was bound to assume the truth of the allegations contained in the Complaint.⁹ But the CFPB is not entitled to rely upon that pleading when it was based on blatant untruths that were

⁷ See, e.g., *United States v. RJ Reynolds Tobacco Co.*, 416 F. Supp. 316, 325 (D.N.J. 1976) ("The responsibility expressed in F.R.Civ.P. 11, applies to the United States as any other party. As the party that filed the complaint, it had an obligation to have reasonable grounds to make the allegations in it.").

⁸ Cf., e.g., Ga. R. Prof. C. 3.8 ("The prosecutor in a criminal case shall refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause.").

⁹ ECF No. 149, Order Denying Pathfinder's Mot. to Dismiss.

easily revealed in discovery.

Having failed to withdraw their spurious claims against Pathfinder, the Court should award sanctions against the CFPB and its counsel, including but not limited to Jonathan Engle, David Dudley, John Horn, Anthony Alexis, and Frank Kulbaski (collectively, "Plaintiff's Counsel").

PROCEDURAL POSTURE: FACT DISCOVERY COMPLETE

Even though its extensive pre-suit investigation of defendants did not reveal evidence to support claims against Pathfinder,¹⁰ the CFPB filed its regulatory Complaint on March 26, 2015. In the Complaint, the CFPB was quick to point out purported high chargeback ratios for the Debt Collectors in isolated months. Even here, the CFPB was already hiding the ball, including misstating that one month's chargeback rate as 28.5% when in actuality it was 0%. The CFPB had access to the entire processing history for these merchants.¹¹ In light of the frivolity of those allegations, Pathfinder served Plaintiff's counsel with its Rule 11 Motion.

In opposing Pathfinder's motion to dismiss, the CFPB continued to hide the truth. It cited to its own misleading allegations, and failed to disclose the entire processing history for the Debt Collectors. The Court was therefore obligated to

¹⁰ See generally **Exhibit 3**, Processing History for UDPS and Credit Power.

¹¹ **Exhibit 3**.

accept as true the CFPB's narrow and misleading contention that the Debt Collectors caused a "high rate" of chargebacks.¹²

Despite the hundreds of thousands of pages that have been sent to the CFPB (both before and during this litigation), it has steadfastly resisted providing parallel discovery to Defendants and continues to delay its own deposition. Save the CFPB's own failures to provide relevant information, fact discovery in this case is complete. The CFPB has had the benefit of document productions and testimony from Defendants and many non-parties—taken both during its pre-suit investigation and during discovery in this action. Unsurprisingly, the only party that the CFPB believes shouldn't have to give testimony is itself.¹³ The CFPB has every document and piece of testimony it could obtain to substantiate its claims against Pathfinder. Rather than admit defeat, the CFPB instead doubled down.

ARGUMENT AND CITATIONS OF AUTHORITY

Rule 11(b) provides guidance to parties and their attorneys:

By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: ... (b)(3) the factual contentions

¹² ECF No. 149, Order Denying Pathfinder's Mot. to Dismiss.

¹³ *See, e.g.*, ECF No. 327, CFPB Mot. for Protective Order Against Global's Rule 30(b)(6) Dep. Notice. *See also* CFPB Letter to Clerk (Aug. 22, 2016) (same).

have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery.¹⁴

Plaintiff's Counsel were required to "stop-and-think before initially making legal or factual contentions."¹⁵ Because they failed to do so, they and the CFPB are subject to "potential sanctions for insisting upon a position after it is no longer tenable."¹⁶ The duties to withdraw unsupportable contentions "are not measured solely as of the time they are filed with or submitted to the court, but include reaffirming to the Court and advocating positions contained in those pleadings and motions after learning that they cease to have any merit."¹⁷ The purpose of Rule 11 sanctions is to "deter repetition of the conduct or comparable conduct by others similarly situated."¹⁸

The CFPB and Plaintiff's Counsel violated Rule 11(b)(3) by making representations to the Court that are (1) devoid of evidentiary support or (2) facially wrong. Plaintiff's Counsel have presented the Court with deliberately misleading allegations about Pathfinder. This conduct is particularly disturbing

¹⁴ Fed. R. Civ. P. 11(b)(3).

¹⁵ Fed. R. Civ. P. 11, Cmt. to 1993 Am.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

because fact discovery is nearly complete. The CFPB has been given a more than reasonable opportunity to find evidence of its claims.

The CFPB has no support for its contentions that Pathfinder knowingly or recklessly disregarded excessive chargeback rates for UDPS or and Credit Power. Further, the CFPB has no support for its allegations that Pathfinder ignored or recklessly disregarded risk policies or chargeback narratives for these merchants. There was no excuse for making the baseless allegations in the Complaint. There is no excuse for the CFPB and Plaintiff's Counsel to continue to advocate these unsupportable positions now. Accordingly, the Court should award sanctions.

4) The CFPB misstates and mischaracterizes the chargeback rate for UDPS and Credit Power.

The CFPB has no evidentiary support for its allegations that Pathfinder knew or recklessly disregarded UDPS's and Credit Power's allegedly excessive chargeback rates. Simply put, how could Pathfinder know or recklessly disregard "high" or "excessive" chargeback rates if those chargeback rates were not excessive or high under the industry's clear (and publically available) standards? The CFPB mischaracterized the overall risk UDPS and Credit Power presented to Consumers. By using the skewed statistics from one month of data in isolation, and data for another month erroneously, the CFPB continues to peddle this misrepresentation of the overall risk these merchants presented.

The Complaint contends that Pathfinder should have more closely monitored the Debt Collectors or terminated their accounts because of their excessive chargeback rates. For example, Paragraph 191 alleges that Pathfinder allowed the Debt Collectors to continue processing transactions even though Credit Power's chargeback rate for July 2013 was 28.5% and UDPS's chargeback rate in August 2013 was 31%.¹⁹ The CFPB echoed these baseless allegations in *verified* answers to discovery:

Pathfinder knew, or recklessly disregarded, that CP's chargeback rate for July 2013 was 28.5% and UDPS's chargeback rate in August 2013 was 31%, while by Pathfinder's own admission, any chargeback rate greater than zero was a sign of suspicious activity.... Pathfinder knew, or recklessly disregarded, that CP and UDPS experienced single- and double-digit chargeback rates for other months, while by Pathfinder's own admission, any chargeback rate greater than zero was a sign of suspicious activity.²⁰

But these numbers were presented devoid of context. Pathfinder did monitor merchants to avoid potential risk of loss associated with chargebacks, but context explains why the numbers did not—and should not have—put Pathfinder or anyone else on notice that the Debt Collectors were potentially violating the law.

¹⁹ See Compl. ¶ 191. This Paragraph alleges that Credit Power's chargeback rate for July 2013 was 28.5% and UDPS's chargeback rate in August 2013, was 31%. In fact, this is false. Credit Power's chargeback rate for July 2013 was 0.00% and UDPS's chargeback rate for August 2013 was 30%.

²⁰ **Exhibit 4**, CFPB Supp. Ans. to Pathfinder's Interrog. 9.

A. The percentage of chargebacks by month, taken alone, is meaningless for determining credit card fraud.

The CFPB would have Pathfinder and this Court analyze a tallish blade of grass as if it were in a desert, when, in fact, it grew amidst a prairie. The CFPB alleges and argues that chargeback ratios were excessive and recklessly or knowingly disregarded, even though a proper review and calculation of chargebacks did not trigger any excessive chargeback monitoring protocols by the payment processor (Global) or by the card brands (Visa and MasterCard).

Context requires taking into account the entire time period that the merchant has been processing transactions with the particular payment processor, looking either to the overall chargeback rates from (1) onboarding to date or (2) a period of consecutive months or the entire prior year.²¹ At a minimum, the calculation should account for the previous year's data:

²¹ Global Corp. Test. 360:13–361:23 (Sept. 28, 2016) (discussing Exhibit 194) (“Q. On Exhibit 194 that you just looked at with Mr. Ockner, the first page, earlier Mr. Gleason asked you about the chargeback percentages listed for Credit Power under item 1 on the first page. And I believe your response was that you believe the percentages would have been based on the entire time period that the merchant had been signed up, from the boarding time through whatever the current period was; is that correct? A. Correct.”).

See also id. at 361:8–13 (“Q. Would the timeframe, when you say the time period from when the merchant was first boarded, for Credit Power, would that have been the time starting from the time when it was first boarded by Frontline in 2013? A. Yes.”).

So this model literally starts with taking the merchant's expected annual volume. So what is their total credit card processing that we expect them to actually put through their merchant account. Each of these ratios is applied against that volume to determine a dollar amount risk exposure. When you add them all up, that's the worst-case exposure for that merchant if they go out of business.²²

Whichever method used, the correct calculation takes into account more than one month of chargeback data to arrive at the proper context to evaluate the risks and to determine if the rates are high or excessive. In this case, neither UDPS or Credit Power's chargeback statistics rose to the level of triggering any specific or special monitoring under an excessive chargeback monitoring program.

There is no evidence that Pathfinder knew or recklessly disregarded excessive chargeback rates for UDPS or Credit Power when the chargeback rates reflect more than one isolated month – as required by industry practice.

Appendix 1 contains a graphic representation of the chargeback percentage by month for both UDPS and Credit Power. The "high rate" months alleged by the CFPB in the Complaint are marked in red.²³ Essentially, the CFPB's position is that

²² Global Corp. Test. 117:17–25 (Sept. 28, 2016).

²³ **Appendix 1**. The months the Complaint describes as "high rate" are marked in red. All months with chargeback percentages of 25% or greater (but not alleged to have been "high rates") are marked in orange since it is impossible to guess what the CFPB means by "high rate," and because the CFPB described as "high rate" a month with 0% chargebacks, further confusing their *ex post* standard.

the isolated red rates made the entire grid red.

The full data from 2012 and 2013 shows the chargeback rates to be minute:²⁴

Merchant	Chargebacks Rate (%) (2012)	Chargebacks Rate (%) (2013)	Chargebacks Rate (%) (2012-2013 Total)
UDPS	1.68%	3.94%	3.73%
Credit Power	1.41%	2.20%	2.11%

It therefore shouldn't have been a surprise to the CFPB that industry Defendants could not make heads or tails of these allegations. Global's senior vice president for worldwide credit and risk (Mr. Kurt Schaeffer) testified based on his personal experience, industry standards, the standards and practices at Global, and the standards and practices of the credit card companies that:

- Transaction counts, transaction amounts, charge back counts, and chargeback percentages for UDPS's full processing history (2012-14) didn't show any red flags or troubling factors that would have qualified it for a chargeback program under Visa, MasterCard, or Global rules.²⁵
- UDPS's transaction and chargeback history for August 2013, *even viewed in isolation* based on the number of chargebacks and dollar amount of those chargebacks, was not significant enough to cause further investigation.²⁶
- UDPS's transaction and chargeback history for June 2012, *even viewed in isolation* based on the number of chargebacks and dollar amount of

²⁴ **Exhibit 3**, Chargeback History for UDPS and Credit Power.

²⁵ Global Corp. Test. 127:6-128:3 (Sept. 27, 2016).

²⁶ Global Corp. Test. 128:11-23 (Sept. 27, 2016).

those chargebacks, was not significant enough to stand out.²⁷

- The transaction counts, transaction amounts, charge back counts, and chargeback percentages for Credit Power's entire processing history (2012-2014) didn't show any red flags or troubling factors that would have qualified UDPS for a chargeback program under Visa, MasterCard, or Global rules.²⁸

These sentiments are consistent with the publically available chargeback monitoring guidelines promulgated by both Visa and MasterCard.²⁹

There is no evidence to support the CFPB's contention that Pathfinder should have figured out that UDPS and Credit Power were supposedly carrying on fraudulent schemes based on the *actual* chargeback numbers.

B. The industry recognizes that a low transaction volume may result in a high, but insignificant chargeback percentage.

Chargeback rates are also affected by the processing transaction volume of the merchant. Mr. Schaeffer testified about the importance of the data as a whole:

So this model literally starts with taking the merchant's expected

²⁷ Global Corp. Test. 131:4-22 (Sept. 27, 2016).

²⁸ Global Corp. Test. 128:25-130:5 (Sept. 27, 2016).

²⁹ "Chargeback Monitoring Guidelines for Visa Merchants," VISA (accessed Dec. 30, 2016), available at <https://usa.visa.com/dam/VCOM/download/merchants/chargeback-management-guidelines-for-visa-merchants.pdf> ("Visa Chargeback Rules"); MasterCard Security Rules and Procedures, MASTERCARD (accessed Dec. 30, 2016), available at https://globalrisk.mastercard.com/online_resource/excessive-chargeback-program-ecp-compliance-program-2/ ("MasterCard Chargeback Rules").

annual volume. So what is their total credit card processing that we expect them to actually put through their merchant account. Each of these ratios is applied against that volume to determine a dollar amount risk exposure. When you add them all up, that's the worst-case exposure for that merchant if they go out of business.³⁰

The CFPB's allegations plainly ignore this.

Low transaction volume can cause an artificial spike in chargeback percentages (*e.g.*, one chargeback measured against five sale transactions results in a 20% chargeback percentage; if the volume of sales transactions were 10,000, the rate of one chargeback drops to just .01%). **Appendix 2** contains the actual transaction and chargeback numbers and demonstrates why the isolated months have misleadingly high chargeback percentages.³¹

UDPS's August 2013 chargeback percentages were based on low transaction volume (20 new sales) and six chargebacks. (Its average monthly new sale transaction volume for 2013 was 488). Credit Power's June 2012 chargeback rates were based on transaction volume of five new sales and two chargebacks.³² (Its average monthly transaction volume for 2012 was 11.83). Other months have "excessive" percentage rates for the same reasons. The CFPB had all this

³⁰ Global Corp. Test. 117:17-25 (Sept. 28, 2016).

³¹ "TT" means "Total Transactions." "CB" means "Chargebacks"

³² **Exhibit 3**, Chargeback History for UDPS and Credit Power.

information before filing the Complaint. Instead, it chose to present the Court with out-of-context figures from isolated months.

Since isolated, one-month figures can distort chargeback ratios, card brands (Visa and MasterCard) have established transaction volume and consecutive-month thresholds for their Excessive Chargeback monitoring programs – none of which were met by UDPS or Credit Power during the relevant period.³³

The MasterCard Excessive Chargeback Program guidelines, available publically online, outline two levels of scrutiny for wayward merchants. The guidelines are very clear under which circumstances a merchant becomes a “Chargeback Monitored Merchant” (one with 1% chargebacks plus a 100+ chargeback volume for a single month) or an “Excessive Chargeback Merchant” (one with, in each of two consecutive months, 1.5% chargebacks plus a 100+ chargeback volume).³⁴ UDPS and Credit Power never came close to these

³³ ECF No. 93-1, at 15-16 (citing Visa, Visa Core Rules and Visa Products and Service Rules §§ 10.5.3.6-10.5.3.7, at 499-500 (Apr. 15, 2015); MasterCard, Security Rules and Procedures: Merchant Edition, §§ 8.3.1-8.3.2, at 54-56 (Feb. 5, 2015)). *See also* Global Corp. Test. 130:22-131:2 (Sept. 27, 2016) (“And that’s one of the reasons when I spoke earlier that the card associations, you know, their calculation that they -- they try to scrub out low transactions sorts of months or charge back months so that they don’t fall into the programs.”).

³⁴ Excessive Chargeback Program, Security Rules and Procedures, MasterCard Fraud Control Program (published Mar. 31, 2016), available at <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&c>

thresholds. Similarly, the Visa Merchant Fraud Program monitors chargeback activity for all U.S. merchants on a monthly basis. If a merchant meets or exceeds specified chargeback thresholds, its acquirer (i.e., the Visa client that signed the merchant, here, HSBC Bank/Global) is notified in writing.³⁵

Deposition testimony indicates that the overall chargeback volume for UDPS was “not something that would be large enough to stand out or hit [Global’s] radar screen.”³⁶ Nor was the volume of chargebacks something that

ad=rja&uact=8&ved=0ahUKEwiDjNfy8qbRAhWFNiYKHZb_DlwQFggoMAE&url=https%3A%2F%2Fwww.mastercard.us%2Fcontent%2Fdam%2Fmccom%2Fen-us%2Fdocuments%2FSPME-manual-February2015.pdf&usg=AFQjCNEq_pAfEvbi0WRkubl7jgBTsmQmhw&sig2=FR9cma9CSCZUL_ILUu_K2w&bvm=bv.142059868,d.eWE.

³⁵ Management Guidelines for Visa Merchants, Visa (accessed Jan. 3, 2017) <https://usa.visa.com/dam/VCOM/download/merchants/chargeback-management-guidelines-for-visa-merchants.pdf>.

³⁶ Global Corp. Test. 128:2–3 (Sept. 27, 2016). *See also generally id.* at 127:7–17, 127:20–128:3 (discussing UDPS chargeback history, as presented in Exhibit 175) (“Q. Well, the experience that you’ve testified to I’d like you to just take a look at the, uhm -- the transaction counts, the transaction amount, the charge back counts, and charge back percentages as reflected in the first four pages of Exhibit 175 which was for UDPS. And I would like you to tell me whether or not based on your experience and based on the standards and practices at Global and of the credit card companies if there’s any red flags or troubling factors that you see in the processing and charge back history reflected in those four pages? ... THE WITNESS: Uhm, just looking at the charge back counts compared to the transaction counts it would -- it would not have qualified for like a charge back program under like Visa, MasterCard, that sort of thing. Uhm, again just again looking at the counts if this was a Global Payments’ direct merchant, which again it’s not. But if it was it’s not something that would

would have triggered an investigation by Global.³⁷ The evidence supports the same conclusion with respect to Credit Power:

Q. [] I can represent to you the CFPB has taken the position that the 40 percent charge back percentage in isolation is an -- is an indicator of excessive charge backs. In your experience at Global, in your experience working with the credit card companies and your experience in risk management and in charge backs is there any, uhm, factors or any training or experience you have that would lead you to conclude that the 40 percent in June 2012 and charge back percentage in isolation is a factor of excessiveness?

...

A. Okay. Based purely on the numbers in isolation those months are not typically something that would stand out.³⁸

And again:

A. [] The month we looked at it's the number of charge backs compared to the number of transactions and the dollar amount is just way below the radar from a -- what would cause someone to -- to the

be large enough to stand out or hit our radar screen.").

³⁷ Global Corp. Test. 128:18-23 (Sept. 27, 2016) ("[T]he number . . . of the charge backs and the dollar amount of the charge backs is just not something significant enough to -- that would normally stand out in a way that would cause us to go investigate the merchant further."). *See also id.* at 128:5-23 ("Q. [] I'd like to draw your attention to August of 2013. And you see there it has 20 transactions and six charge back counts. And it has a 30 percent number there. . . . Can you tell me whether or not that 30 percent number in isolation gives you any concern and if not can you explain why it doesn't in the context of the four pages altogether? . . . A. Uhm, again I'll speak to this as if this was a direct merchant, which obviously it's not. But the number of -- of the charge backs and the dollar amount of the charge backs is just not something significant enough to -- that would normally stand out in a way that would cause us to go investigate the merchant further.").

³⁸ Global Corp. Test. 131:4-14, 20-22 (Sept. 27, 2016).

really dig into this merchant.³⁹

C. The CFPB’s continued emphasis on chargebacks more than zero being a sign of suspicious activity is baseless.

The Complaint alleges, in the purported words of Pathfinder, that “any chargeback rate greater than zero was a sign of suspicious activity.”⁴⁰ The CFPB re-emphasized this out-of-context statement in *verified* answers to discovery: “[B]y Pathfinder’s own admission, any chargeback rate greater than zero was a sign of suspicious activity”⁴¹ That the CFPB continues to rely on this isolated statement as if it were the Holy Grail reveals the extent to which the entire Complaint is ignorant. A merchant without chargebacks is a unicorn—like an apple farmer that has never had a single worm. The industry regulations—Visa and MasterCard Guidelines—demonstrate this.⁴²

Of course, Pathfinder reviewed chargeback data about Merchants it referred to Global because (under the Pathfinder-MSA) Pathfinder would have been liable

³⁹ Global Corp. Test. 130:17-22 (Sept. 27, 2016).

⁴⁰ Compl. ¶ 190.

⁴¹ **Exhibit 4**, CFPB Supp. Answer to Pathfinder’s Interrog. 9.

⁴² Management Guidelines for Visa Merchants, p. 17 (“The most common reasons for chargebacks include: customer disputes, fraud, processing errors, authorization issues. Although you probably cannot avoid chargebacks completely”).

for the amount of *any* such chargeback if the Merchant itself had been unable or refused to cover it. A sensible review implemented by Pathfinder in order to avoid and monitor possible financial losses *to itself* was not a signal that a chargeback was the result of “fraud.”

D. The CFPB recklessly disregarded the public information available on the Visa and MasterCard Excessive Chargeback Programs and procedures for evaluating, determining, and monitoring merchants with excessive chargebacks.

The CFPB and Plaintiff’s Counsel ignored the Visa and MasterCard rules regarding excessive chargebacks. Even a quick google search for the card brand rules would have provided the CFPB with adequate information to conclude that the UDPS and Credit Power chargebacks were well within tolerable levels. The entire chargeback history (Appendices 1 and 2) for the Debt Collectors was in the CFPB’s hand before it filed suit. The CFPB and its attorneys had adequate information to stop and think before filing suit. They did not.

The CFPB has no evidentiary support for its allegation that Pathfinder ignored risk policies when onboarding UDPS and Credit Power. There is no evidence of a complete prohibition in 2011 against the processing of credit card transactions for merchants who collect debt. Global began processing payments for UDPS and Credit Power in 2011 after the merchants were referred by Pathfinder. The CFPB lacks evidentiary support for its contention that “Pathfinder

provided [payment processing] capabilities to the Debt Collectors while ignoring numerous red flags beginning with the application process . . . and while ignoring and violating its own risk policies and those of Global Payments and the card associations.”⁴³ There is no evidentiary support for the allegation that “Pathfinder knew, or recklessly disregarded, that UDPS and C[redit] P[ower] were prohibited merchants according to Pathfinder’s, Global Payments’, card association, and acquiring bank policies.”⁴⁴ This is because the Debt Collectors were not prohibited merchants in 2011. In 2011, Visa, MasterCard, and Global all had policies in place that permitted processing of credit card transactions by debt collectors.⁴⁵ Accordingly, the CFPB’s position is patently false. Its ludicrous argument would have required Pathfinder to ignore at least four sets of policies, including its own.

A. Global has acknowledged that Pathfinder’s referral of UDPS and Credit Power did not violate Global’s credit policy.

Apparently, the CFPB believes that it is itself better capable of determining what is a violation of Global’s credit policy than Global itself. Global testified that UDPS and Credit Power were not prohibited merchants in 2011: “The first set of

⁴³ **Exhibit 4**, CFPB Supp. Answer to Pathfinder’s Interrog. 7.

⁴⁴ **Exhibit 4**, CFPB Supp. Answer to Pathfinder’s Interrog. 9.

⁴⁵ See generally Visa Dep., Ex. 80, Visa International Operating Regulations (2010), pp. 292, *et seq.* (no blanket prohibition on debt collectors).

accounts in 2011 would not have been because they weren't prohibited."⁴⁶ Nor did Pathfinder breach any duties by submitting the merchant applications to Global:

Q. Ms. Crowley, does Global [Payments] believe that Pathfinder Payment Systems violated any of the master services agreement by submitting either of the two debt collectors that we've have been talking about? ... [A.] No.⁴⁷

Moreover, Global Payments' independent decision to approve these merchants negates the allegation that these merchants were "prohibited."⁴⁸

Thus, the allegation that Pathfinder onboarded merchants prohibited by Global's is plainly contradicted by the evidence.

B. Pathfinder did not violate its own policy.

Pathfinder's Credit Policy Manual is the same as Global's ISO Credit Policy Manual with the Pathfinder logo placed on it for re-distribution to Pathfinder's sales agents.⁴⁹ Since Pathfinder's and Global's policies were identical, Pathfinder did not violate its own policy.

⁴⁶ Global Corp. Test. 118:25-119:1 (Sept. 28, 2016). *See also id.* at 118:18-119:4.

⁴⁷ Global Corp. Test. 325:6-12 (emphasis added).

⁴⁸ *See, e.g.,* Global Corp. Test. 51:5-9 (Sept. 20, 2016) ("Q [I]n any point in time did Global, you know, detect a problem with the merchant's processing activity? A. No. Q. [I]s it fair to say that in this instance Global did in fact, uhm, accept and approve UDPS and Credit Power as merchants? A. Yes."); *see also* Global Corp. Test. 50:16-51:9, 53:15-25, 54:1-7, 54:23-55:7, 325:6-12 (Sept. 20, 2016).

⁴⁹ Pathfinder Corp. Test. 71:8-25.

C. The CFPB has no evidentiary support for its allegation that Pathfinder ignored or recklessly disregarded consumer chargeback narratives.

The CFPB allegation that Pathfinder “knew of, or recklessly disregarded, consumer complaints about the debt collection practices of C[redit] P[ower] and UDPS, including chargeback documentation provided by consumers”⁵⁰ lacks support. Pathfinder cannot be said to have ignored chargeback documentation that it had no duty to review and did not as a matter of course receive.

Pathfinder only had access to information that a cardholder provided, or that a card issuing bank might have required.⁵¹ Chargeback information available to Pathfinder “*may*” include “documentation on the chargeback itself, perhaps the reason code that the card issuing bank used.”⁵² “Card issuing banks vary on what they require from their consumer. So the type of data that could be there would vary widely from merchant to merchant.”⁵³ Many chargeback documents lack narratives.⁵⁴ Second, neither the law nor the applicable contracts required

⁵⁰ **Exhibit 4**, CFPB Supp. Answer to Pathfinder’s Interrog. 9.

⁵¹ *See, e.g.*, Global Corp. Test. 65:12–66:15 (Sept. 20, 2016).

⁵² Global Corp. Test. 65:18–66:2 (Sept. 20, 2016).

⁵³ Global Corp. Test. 66:9–15 (Sept. 20, 2016).

⁵⁴ Global Corp. Test. 23:14–19 (Sept. 28, 2016). Global Payments also testified that reviewing chargeback data under these circumstances was “not normal.” *See* Global Corp. Test. 22:8–24:2 (Sept. 28, 2016).

Pathfinder to review consumer chargeback narratives.

[Global] provide[s] a tool that if they want to go look at the chargeback information, they can. But it's not something that we would necessarily require because of the rules and the industry standards around chargeback programs.⁵⁵

And the CFPB has not identified any other provision requiring Pathfinder to review consumer chargeback narratives under these circumstances. In fact, the CFPB failed to produce *any* evidentiary support for the idea that Pathfinder had a duty to review such documentation. When asked to describe the entire factual and legal basis for this contention, the CFPB merely offered unsupported allegations:

Pathfinder counseled the Debt Collectors on minimizing chargebacks, provided the Debt Collectors templates for credit card authorizations and form letters for chargebacks disputes, and requested and obtained documents from the Debt Collectors in the course of disputing chargebacks.⁵⁶

Third, there is no evidence that consumer chargeback narratives contained anything suggesting the massive fraudulent scheme alleged by the CFPB. Global (1) wasn't aware of any UDPS- or Credit Power- related chargeback where a

⁵⁵ Global Corp. Test. 22:1-7 (Sept. 28, 2016); *see also* Global Corp. Test. 87:23-88:2 (Sept. 28, 2016) ("Q. And again, Global Payments doesn't require its ISOs to look at chargeback narratives to identify money laundering; is that right? A. Not specifically.").

⁵⁶ **Exhibit 4**, CFPB Supp. Answer to Pathfinder's Interrog. 9.

narrative/reason was provided⁵⁷ and (2) couldn't identify any consumer complaint or communication naming Pathfinder alleging misconduct by Pathfinder.⁵⁸ Ultimately, there is no support for the CFPB's mere allegation that that Pathfinder had an obligation to review consumer chargeback narratives.

CONCLUSION

By isolating one month each for UDPS and Credit Power where there were a low number of new sale transactions and a few chargebacks, the CFPB and Plaintiff's Counsel intentionally mischaracterized the overall view of the risk to Consumers presented by those merchants. The CFPB is left only with its allegations that Pathfinders conduct in submitting applications on behalf of the Debt Collectors was supposedly a violation of an industry credit policy. This too, was patently untrue. The Court should sanction the CFPB and Plaintiff's Counsel and award Pathfinder its attorneys' fees and costs incurred in this action.

This 4th day of January 2017.

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⁵⁷ Global Corp. Test. 67:21-68:1 (Sept. 20, 2016); *see also id.* 67:21-68:1.

⁵⁸ Global Corp. Test. 75:20-23 (Sept. 20, 2016).

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CERTIFICATE OF COMPLIANCE

Pursuant to N.D. Ga. LR 7.1D, I hereby certify that the foregoing *BRIEF IN SUPPORT OF DEFENDANT PATHFINDER PAYMENT SOLUTIONS, INC.'S MOTION FOR RULE 11 SANCTIONS AGAINST PLAINTIFF* has been prepared in accordance with N.D. Ga. LR 5.1C using Book Antiqua, 13-point font.

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IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CONSUMER FINANCIAL
PROTECTION BUREAU,

Plaintiff,

v.

UNIVERSAL DEBT & PAYMENT
SOLUTIONS, LLC, *et al.*,

Defendants.

Case No. 1:15-cv-0859-RWS

CERTIFICATE OF SERVICE

I hereby certify that on January 4, 2017, I caused to be electronically filed the foregoing *BRIEF IN SUPPORT OF DEFENDANT PATHFINDER PAYMENT SOLUTIONS, INC.'S MOTION FOR RULE 11 SANCTIONS AGAINST PLAINTIFF* with the Clerk of Court using the CM/ECF system, which will automatically send email notification of such filing to all counsel of record.

/s/John Da Grosa Smith

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