

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF FLORIDA  
TALLAHASSEE DIVISION**

**BUREAU OF CONSUMER  
PROTECTION,**

**Plaintiff,**

vs.

**Case No. 4:20-MC-6**

**OLP.com, Inc.,**

**Defendant.**

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**OLP.com, Inc.’s Initial Response to Motion to Compel Production,  
Consent to Transfer, and Alternative Motion to Extend Time to Respond**

OLP.com, Inc., a Florida corporation (“OLP.com” or the “Company”), responds to the Motion to Compel Production of Documents and Incorporated Memorandum of Law that the Bureau of Consumer Protection (the “Bureau”) filed on August 25, 2020 (the “Motion,” Doc. 1).

The Motion seeks the enforcement of a Subpoena to Produce Documents dated January 21, 2020 (the “Subpoena,” Doc. 1-2) that the Bureau issued to OLP.com, a company located in this judicial district. The Subpoena, however, relates to the civil proceedings pending in the United States District Court for the District of Utah styled *Bureau of Consumer Protection v. Progrexion Marketing, Inc. et al.*, Case No 2:19-cv-00298-DBP (the “Underlying Action”). See Complaint dated May 2, 2019, Doc. 1-1.

OLP.com is not a party to that proceeding, is not named in the Bureau’s pending Complaint, nor does the Company do business in that judicial district. Nonetheless, pursuant to Fed. R. Civ. P. 45(f), OLP.com consents to the transfer of the Motion from this Court to the United States District Court for the District of Utah because a transfer is warranted for several reasons. First and perhaps most importantly, the Subpoena requires OLP.com’s production of

recordings of thousands of telephone calls that Company representatives had with various of its clients or consumers who, in turn, were then referred to one of the Defendants in the Underlying Action to see if the client would benefit from what the Complaint refers to as the “credit repair services” that one or more of the Defendants offer, but OLP.com does not.

As OLP.com only recently determined, the Company’s recording software through a software error continued to record in numerous instances the conversation even after the Company’s representative had made a referral or handoff of a customer or client to a Defendant representative and, therefore, was no longer participating in the continuing conversation that the other representative was having. At least one of the Defendants in the Underlying Action, however, is a law firm and, therefore, many of the telephone call recordings that OLP.com is now being required to produce under the Subpoena may implicate the attorney-client privilege. The law firm defendant in the Underlying Litigation, however, has not waived any rights or claims that it may be entitled to assert related to any of OLP.com’s recordings.<sup>1</sup> Moreover, the law firm is likely not subject to this Court’s personal jurisdiction, but is a party to the Underlying Litigation where it may, following transfer, presumably seek to assert any privilege or other claims related to the call recordings that the Subpoena now implicates.

Next, several of OLP.com’s pending objections to the Subpoena take the position that many of its production demands improperly seek information that is not relevant to the issues pending in the Underlying Action, or are overly broad. As is reflected in the limited and selective materials from the Underlying Action that the Bureau has elected to file in this Court in support of the Motion, the scope of what is relevant to those proceedings, and is not, has been the subject

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<sup>1</sup>One of the attorneys who is representing the Defendant, namely Lexington Law, in the Underlying Action was notified last week of these issues involving the telephone recordings and, therefore, his client has likely not had time to consider and assert any pertinent positions.

of at least two prior orders that were entered in the Underlying Action. It also appears from what OLP.com can observe that district court in Utah continues to have to oversee the discovery process being conducted by and between the parties to the Underlying Action. Therefore, that court instead of this one is probably better positioned to rule upon any relevancy objections, particularly if the risk of inconsistent rulings in that regard is to be avoided.

Entry of an order transferring the Motion to the United States District Court for the District of Utah is therefore appropriate. Moreover, although this Court has required a substantive response to the Motion by September 9, OLP.com should be granted an extension of time of not less than two weeks following entry of any order of transfer to respond further to the Motion, unless of course otherwise directed by the district judge overseeing the Underlying Action. An extension is also warranted to allow any interested party, the law firm being the most obvious one, to assert its position and claims following any transfer or, if transfer is not ordered, to intervene here if the law firm should choose to do so. Also, if a transfer is not ordered, undersigned counsel requests a two-week extension to respond further to the Motion due to his other, previously scheduled professional commitments and obligations.

As grounds for all of the requested relief, OLP.com further states as follows:<sup>2</sup>

General Background

1. According to the Motion, the Bureau commenced the Underlying Action on May, 2, 2019, with the filing of its pending Complaint (Doc. 1-1). It asserted several claims against what the Bureau asserted were several affiliated companies referred to collectively as the “Progrexion Defendants.” According to the Bureau, as a unified business organization or

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<sup>2</sup>This Response is supported by the accompanying Declaration of Kyle Garrett Brownell dated September 9, 2020, attached as Exhibit A, as well as all other matters of record.

“common enterprise,” they “operate two of the largest credit repair companies in the country, Lexington Law and CreditRepair.com,” Complaint, ¶¶2, 19. More particularly, those companies offer “credit repair services” to consumers seeking to “remove negative information from their credit reports and improve their credit scores,” Complaint, ¶2.

2. The Complaint also alleges that to “generate credit repair sales, Defendants rely on a network of marketing affiliates who advertise a variety of products and services, often related to consumer products.” *Id.* at ¶3. More particularly, the Complaint refers to companies having contractual relationships with the Progexion Defendants for these purposes as “Hotswap Partners” because they -

use telemarketing campaigns consisting of inbound and outbound telephone calls to consumers across the country to market these products and services to consumers. During these telemarketing calls, the Hotswap Partner identifies potential credit repair customers to refer to Progexion, and live transfers them to Progexion’s telemarketing sales operations. Progexion refers to these live transfers as “hotswaps.”

Complaint, ¶¶34 - 36.

3. OLP.com is not an affiliate of any of the Progexion Defendants, is not a party to the Underlying Action, and is not named in the Complaint. Nor does the Bureau claim that the Company offers “credit repair services.” Instead, the Company is in the business, among other things, of assisting consumers and business who are seeking loans first to find and then make application to one or more lenders who, in turn, may provide the requested loan based on the information provided, particularly involving the consumer’s or business’s credit profile and general worthiness.

4. OLP.com does have a contractual relationship with Lexington Law, one of the Progexion Defendants, under which OLP.com would at various times refer certain of the

Company's clients or customers to that entity because they might benefit from the credit repair services it offered. OLP.com presumes that it is for that reason that prior to the issuance of the Subpoena, the Bureau sent the Company a retention letter that required, among other things, that the Company preserve any recordings of telephone calls involving a transfer or "hotswap" of one its clients to Lexington law. Then, in the Subpoena's Request No. 20, the Company was ordered to produce to the Bureau -

All recordings, notes, or other documents memorializing phone calls with Consumers that resulted in Direct Transfers,<sup>3</sup> including all recordings, notes or other documents memorializing each Direct Transfer.

5. As OLP.com states in the accompanying Declaration, and consistent with the Subpoena's requirements, the Company has retained recordings of pertinent telephone calls that occurred during a period of time extending back to February 1, 2019. Due to what the Company has now identified as a software problem or glitch, OLP.com's recording system or software in many instances unfortunately continued to record conversations that occurred between representatives of Lexington Law and the consumer *after* the Company's representative had ceased participating, or after a "handoff" of the client to Lexington law had seemingly occurred. OLP.com estimates that over 28,000 of its phone conversation recordings may be implicated. Normally OLP.com would have deleted the recordings as part of its normal business practices but, having been served with the Subpoena, the Company has instead retained them but, other than to verify that the recordings continued, has not listened to them for what transpired or was discussed after the "handoff" to Lexington Law had occurred.

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<sup>3</sup>The Subpoena defines a "Direct Transfer" as "the transfer of a Consumer during a phone call from the Company or its agent to Lexington Law, CreditRepair.com, Progrexion, or their agents." *Id.* at p. 7, ¶11.

6. The Bureau readily acknowledges, however, that Lexington Law just as its name implies is a firm that provides legal services to its clients. More particularly, the Complaint states that one of the named Progexion Defendants is a company called “Heath PLLC” which, according to the Bureau -

is a law firm based in . . . Utah that does business under the trade names Lexington Law Firm and Lexington Law. Heath PLLC has been associated with Progexion [one of the other Defendants in the Underlying Action], or its predecessors, and has licensed the trademark “Lexington Law: since at least 2004. Progexion conducts most of Lexington Law’s core business operations, but Heath PLLC, operating as Lexington Law, serves as the face of Lexington Law . . . [and] consumers’ contracts [related to credit repair services] are with Heath PLLC . . . Because Heath PLLC is a law firm, Progexion markets Lexington Law’s credit repair services *as legal services*.

Complaint, ¶14 (emphasis added). Therefore, OLP.com’s retained telephone recording of conversations that occurred between Lexington Law’s representatives and a client or consumer very well could come within the ambit of the attorney-client privilege. Also, Lexington Law from these allegations does not appear to be subject to this Court’s personal jurisdiction.

7. Returning to the Complaint’s other allegations, the Bureau generally charges that the Progexion Defendants engaged in “deceptive telemarketing acts or practices” in violation of federal law. Complaint, ¶1. While also claiming that they allegedly improperly charged various fees, the Bureau also claims that “[a]t least one, if not more, of Progexion’s Hotswap Partners have made misrepresentations to consumers to generate consumer leads and induce consumers to sign up for Lexington Law or CreditRepair.com.” Complaint, ¶1. Most particularly within the Bureau’s gaze in this regard is the company that the Complaint refers to extensively as Hotswap Partner 1 or “HSP1.” From the description of that company provided in the Complaint, it is not OLP.com. In fact, the Company is not named anywhere in the Complaint.

8. Regarding OLP.com's prior responses to the Subpoena, the Motion includes among its supporting attachments the Company's prior responses and objections set forth in letters from undersigned counsel dated February 4, 2020, and July 10, 2020 (Docs. 1 - 3 and 1 - 5). A review of the responses indicates that OLP.com raised several objections to a number of the Subpoena's production requests, including relevancy, overbreadth and other objections. The Company, however, made production of thousands of pages of its documents and materials to the Bureau on July 17, 2020, in response to several of the Subpoena's non-objectionable requests.

9. Also accompanying the Motion were copies of two orders that the Utah district court had entered on March 13, 2020, and June 18, 2020 (Docs. 1-8 and 1-9). They followed what appeared, from the limited record the Bureau has elected to file here, to have been sharp and extended disagreements between the Bureau and the Progrexion Defendants regarding a number of discovery issues including, most particularly, the reasonable scope of any information that the Bureau should be allowed to seek and obtain from third-parties in OLP.com's position given the scope of the issues the Complaint framed.

10. In the Order dated March 13, 2020 (Doc 1-8), a magistrate judge apparently overseeing the Underlying Action ruled that the Bureau would be permitted to seek discovery related to HSP1, but denied any discovery related to "other hotswap partners not mentioned in the complaint." Doc. 1 - 8, p. 8. Instead, the Utah magistrate judge ordered the Bureau to meet and confer with counsel to the Progrexion Defendants to see if the parties could reach agreement regarding the scope of any discovery that should be allowed into other "Hotswap Partners" including, apparently, from OLP.com.<sup>4</sup>

11. The Bureau also filed as Doc. 1-10 the parties' Joint Status Report Pursuant to

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<sup>4</sup>The Company was not a party to any of the parties' resulting discussions.

March 13, 2020 Order. None of the exhibits referenced in the Report, however, accompanied the filing and, therefore, other than the fact that the Report itself reflects that the parties remained in sharp and continuing disagreement regarding the proper scope of discovery directed or related to third parties, the precise nature of those disagreements cannot be determined on this record.

12. The assigned district judge then apparently needed to become involved and, in the Order dated June 18, 2020, he declined to enter a proposed order from the Bureau that it claimed reflected the magistrate judge's earlier rulings, and that would have apparently allowed broad discovery into the Progrexion Defendants' relationships with seven of its "Hotswap Partners." OLP.com assumes, but cannot know, that it was one of those seven entities. The district court then ruled, however, that "[a]fter reviewing the transcript from the hearing, the Court finds that the Bureau's proposed order exceeds the scope of the Court's ruling." Doc. 1-8, p. 2. More particularly, and apparently contrary to the Bureau's proposed order, the district judge found that "the parties had not come to an agreement as to the date and scope of production of telephone calls for the seven hotswap partners." *Id.* at p. 3. Moreover, from the limited portion of the Joint Status Report that the Bureau filed, it cannot be determined what agreements, if any, the Bureau may have reached with the Progrexion Defendants generally, and Lexington Law in particular, bearing on the Subpoena's propriety with respect to the relevancy and overbreadth concerns that OLP.com has now raised in response.<sup>5</sup>

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<sup>5</sup>More particularly, this record does not support the Bureau's sweeping contention that the "Utah District Court has authorized discovery of Progrexion's relationship and marketing activities with OLP and has permitted discovery from July 21, 2011 forward," or that the Utah court "has [already] ruled that such information is relevant and within the scope of the Complaint as pleaded." Motion, p. 6. At least with respect to OLP.com telephone recordings, the opposite appears to be the case. Again, the Bureau's other statements in this regard cannot be confirmed or determined on this record, particularly because the agency has elected not to file with the Status Report the various attachments reflecting the parties' actual positions that the document mentions.

Argument

I. The Court Should Transfer the Motion.

Fed. R. Civ. P. 45(f) states in pertinent part that with respect to a motion or application in which an issuing party seeks enforcement of a records subpoena -

[w]hen the court where compliance is required did not issue the subpoena, it may transfer a motion under this rule to the issuing court if the person subject to the subpoena consents or if the court finds exceptional circumstances.

When, as in this case, the party in OLP.com's position has consented to a transfer of the enforcement action to the district court overseeing the underlying litigation, that normally ends the inquiry in favor of the requested transfer. *See Pfizer, Inc. v. Mylan Inc.*, 2016 WL 3021911 \*1 (M.D. Fla. 2016) ("As Unimark does not oppose Plaintiffs' Motion to Transfer, transfer is appropriate under Federal Rule of Civil Procedure 45(f)").

A transfer may also be ordered, even in the absence of the subpoena recipient's consent, if "exceptional circumstances" make the transfer warranted. Recognized examples of those situations include cases in which privilege claims held by one or more of the parties to the underlying case may be at issue. *See Judicial Watch, Inc. v. Valle Del Sol, Inc.*, 307 F.R.D. 30, 34 (D.D.C. 2014) ("Specifically, the authority to transfer subpoena-related motions under Rule 45(f) broadly applies to all motions under this rule, including motions for a privilege determination."). Transfers are also warranted when there is a risk that the district court initially overseeing a subpoena enforcement action may reach conclusions or rulings on relevancy issues that would be inconsistent with the prior rulings or future views of the district judge overseeing the underlying litigation. *See The Dispatch Printing Company v. Zuckerman*, 2016 WL 335753 \*2 (S.D. Fla. 2016); *InterAmerican Dev. Bank v. Venti, S.A.*, 2016 WL 5786982 \*2 – 3 (S.D. Fla. 2016).

That is the situation presented here. OLP.com consents to the transfer and, to the extent necessary, has several sound reasons to do so that also present, individually or collectively, the “exceptional circumstances” that Rule 45(f) contemplates. The issue of whether OLP.com should be required to turn over its telephone recordings to the Bureau directly implicates the interests, or potential interests, of Lexington Law who is not before the Court and which is unlikely to be subject to its personal jurisdiction. The company is, of course, a party to the Underlying Litigation and, therefore, that Court appears uniquely positioned to address any privilege claims the law firm may choose to assert.

Also, as has been seen from the orders entered in the Underlying Action that the Bureau has filed here, the District Court in Utah apparently continues to have to preside over ongoing disputes and disagreements between the parties to the litigation regarding the proper scope of permitted discovery, including discovery directed to third parties such as OLP.com. Those disputes in turn appear to bear directly on what should be the permissible scope of the Subpoena. That Court is therefore better positioned to resolve any relevancy objections that OLP.com has raised in response to the Subpoena (as well as any others), particularly because that Court will have access to the parties’ additional filing and communications setting forth their actual positions in this regard. Also, the judges presiding in the Underlying Action can summon the parties and their representatives to state their respective positions to the extent they bear on the issues that the Subpoena and OLP.com’s responses present.

II. The Court Should Also Extend the Time for OLP.com to Respond Further to the Motion.

The Court in its Order filed August 26, 2020, directed that OLP.com respond to the Motion by September 9. As stated previously, this is the Company’s initial response and transfer request. OLP.com intends to respond further in response to the Motion and in support of the

Company's pending objections. The Progexion Defendants, particularly Lexington Law, may also wish to weigh in on the issues the Subpoena presents.

Under these circumstances, the Court if transfer is ordered should direct that further briefings of the parties proceed according to the schedule that the Utah District Court directs. If the Court nonetheless directs that OLP.com file substantive responses to the Motion now, or declines to transfer the case, undersigned counsel requests that he be afforded at least an additional two weeks of time to do so because of this other, previously scheduled professional commitments. OLP.com also notes in this regard that the Bureau issued the Subpoena back in January but has not sought to enforce it until 9 months later. Therefore, it is unclear why the matter must proceed in other than deliberative fashion.

Certificate of Prior Conferral

As required by Local Rule 7.1(B) and (C), undersigned counsel certifies that he conferred with counsel to the Bureau who did not consent to or agree with the relief requested herein. The Bureau's contrary positions are reflected in its counsel's email attached as Exhibit B.

Very generally, the Bureau does not appear to oppose having the Utah District Court, as opposed to this one, resolve any issues related to the Subpoena. However, rather than proceeding with a simple transfer, the Bureau instead proposed to dismiss this action, file a new one in Utah while requiring what may be a burdensome briefing schedule that may not take into account the interests of the other parties to the Underlying Action. Instead, OLP.com's position is that the Court should follow the procedure set forth in Rule 45(f) and merely transfer the existing enforcement action.

**WHEREFORE**, the Court should transfer the Motion to the United States District Court for the District of Utah. The Court should also recede from any directive that OLP.com file its additional, substantive responses to the Subpoena pending the subsequent orders or directives of that court or, alternatively, should extend the time for the Company to do so for not less than two weeks. The Court should also grant OLP.com such other and further relief that is just and appropriate.

/s/ David P. Healy

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Certificate of Word Count

As required by Local Rule 7.1(f), I certify that the number of words in this document is 3400.

Certificate of Service

**I HEREBY CERTIFY** that I filed the foregoing on September 9, 2020, using the CM/ECF filing system which will cause a true and correct copy to be transmitted electronically to all attorneys and interested parties of record.

/s/ David P. Healy