

**SUBSTANTIVE DEFENSES  
TO  
CONSUMER DEBT COLLECTION  
SUITS**

**February 24, 2010  
Suffolk University Law School**

**NATIONAL CONSUMER LAW CENTER  
WILMERHALE LEGAL SERVICES CENTER OF  
HARVARD LAW SCHOOL**

**VOLUNTEER LAWYERS PROJECT**

**SENIOR PARTNERS FOR JUSTICE**

**and**

**BOSTON BAR ASSOCIATION**

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## **AGENDA\***

### **Attorney for the Day Training Session**

Wednesday, February 24, 2010

10:00 a.m. to 12:00 p.m.

10:00-10:10 Opening Remarks

- Introduction & Program Overview

10:10-10:45 Interviewing Clients & Evaluating Cases

- What information do you need to obtain from clients?
- What does the debt collector need to prove?
- What defenses and counterclaims are available to consumers?
- What remedies are available in debt collection cases?

10:45-10:50 Q&A

10:50-11:20 Collection Case Procedures in District Court

- What is the purpose of a case management conference?
- What is the debt collectors' perspective on managing collection cases
- Identifying what motions need to be filed
- Preparing for trial

11:20-11:25 Q&A

11:25-11:50 Supplementary Process

- Limitations on the debt collector's ability to take the defendant's property
- Setting aside a judgment for failure to serve the defendant

11:50-12:00 Q&A and Closing Remarks

\*Agenda is subject to change.

## ABOUT THE SPEAKERS

**Stuart T. Rossman** is director of litigation at NCLC. After thirteen years of private trial practice in Boston, he served as chief of the Trial Division and chief of the Business and Labor Protection Bureau at the Massachusetts Attorney General's Office from 1991 to 1999, before joining NCLC. He is a coauthor of *Consumer Class Actions* (6th ed. 2006), and established the annual NCLC Consumer Class Action Symposium in 2001. He is a former chair of the Volunteer Lawyers Project, Massachusetts' oldest and largest pro bono legal referral service program, and is on the adjunct faculty at the Northeastern University School of Law, teaching civil trial advocacy. In 2004, Stuart and his co-counsel were recognized as Finalists for Trial Lawyer of the Year by the Trial Lawyers for Public Justice for their contribution to the public interest through their work on the case of *Coleman v. General Motors Acceptance Corporation*. He also was awarded the 2005 Thurgood Marshall Award by the Rainbow/PUSH Coalition and its Wall Street Project.

**Roger Bertling** is Clinical Instructor in the Predatory Lending/Consumer Protection Clinic and Lecturer on Law at the WilmerHale Legal Services Center of Harvard Law School. He joined the Center in 1993 as a Clinical Instructor/Attorney in the Housing Unit. Roger was previously employed at Southeastern Massachusetts Legal Assistance Corporation where he specialized in landlord/tenant cases and other legal services. From 1984 to 1992, Roger was staff attorney with Legal Services of Eastern Missouri, Inc. where he specialized in subsidized housing, private landlord/tenant disputes, consumer and bankruptcy cases and litigation. His work included an emphasis on mortgage problems and foreclosures. Legal Services of Eastern Missouri also offered clinical placements in conjunction with Washington University and St. Louis University where Roger was an active and popular clinical supervisor. Roger was also a past recipient of the Bar Association of Metropolitan St. Louis Award of Merit in 1989. He received his B.A. at the University of Northern Iowa 1980 and his J.D. at the University of Iowa Law School in 1983.

**Frank J. Kautz, II** graduated from the Widener School of Law in Harrisburg, Pennsylvania. After law school, Frank married and moved to Massachusetts, where he has practiced law for over eleven years. Frank has worked as a debt collector for a small firm and in his own practice. He also had a general law practice with an emphasis on litigation. Frank left private practice to work at Community Service Network, Inc., a Local HUD non-profit Housing Counseling Agency, where he works to prevent foreclosures, represents low and very low income tenants, teaches first time homebuyer workshops, and performs reverse mortgage counseling, among other tasks.

**Kenneth D. Quat** is a private practicing consumer law attorney and owner of Quat Law Offices in Cambridge, MA. Kenneth's practice focuses on debt collection defense, foreclosure prevention, consumer bankruptcy, and consumer class action litigation. Kenneth has spoken at numerous consumer law seminars and conferences, and he is a long-standing member of the National Association of Consumer Advocates (NACA) and the Association of Trial Lawyers of America (ATLA).

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## **Related NCLC Publications**

Collection Actions (2008) with Website

Fair Debt Collection (6<sup>th</sup> ed. 2008) with Website

Surviving Debt (2008)

### ***Also of Interest:***

Bankruptcy Basics (2007) with Website

Consumer Bankruptcy Law and Practice (9<sup>th</sup> ed. 2009) with Website

Fair Credit Reporting (6<sup>th</sup> ed. 2006 and 2009 Supp.) with Website

Repossessions (6<sup>th</sup> ed. 2005 and 2009 Supp.) with Website

Student Loan Law (3<sup>rd</sup> ed. 2006 and 2009 Supp.) with Website

Truth in Lending (6<sup>th</sup> ed. 2007 and 2009 Supp.) with Website

Unfair and Deceptive Acts and Practices (7<sup>th</sup> ed. 2008 and 2009 Supp.) with Website

### ***For More Information:***

***[www.consumerlaw.org](http://www.consumerlaw.org)***



**Section I:  
INTRODUCTION**

- **Types of Debt:**
  - The common types of debt in debt collection actions in Massachusetts are credit card debt, cellular phone debt and credit debt from retail stores. Credit cards and credit agreements are generally enforced by debt collectors as a claim for breach of *contract*. Cell phone and utilities bills may be claimed by debt collectors in actions on an *account*, which may have looser proof requirements for the plaintiff.
  - **Credit Cards & Charge Cards**
    - A credit card is “any instrument or device... issued with or without fee by an issuer for the use of the cardholder in obtaining money, goods, services or anything else of value on credit.” MASS. GEN. LAWS Ch. 266, § 37A.
    - A charge card is “any card, plate, coupon book, or other single device existing for the purpose of being used from time to time upon presentation to obtain goods or services and which is issued pursuant to a charge card agreement.” MASS. GEN. LAWS Ch. 255, § 12H.
    - There are two main differences between a credit card and charge card. First, a charge card may not have any finance charges assessed, while a credit card may have finance charges assessed. Second, a charge card must be paid in full every month, while the balance on a credit card can be paid over time.
    - Credit cards and credit agreements are generally enforced by debt collectors by a claim for breach of contract. *See* Lechmere Tire & Sales Co. v. Burwick, 360 Mass. 718 (1972) (treating a credit card agreement as an adhesion contract); Connecticut Nat. Bank of Hartford v. Kommit, 31 Mass. App. Ct. 348, 349 (1991) (identifying an action to collect debt on a charge card as a contract action).
  - **Open Accounts:**
    - An open account is “an unpaid or unsettled account; an account that is left open for ongoing debt and credit entries by two parties and that has a fluctuating balance until either party finds it convenient to settle and close, at which time there is a single liability.” BLACK’S LAW DICTIONARY, “Account” (8th ed. 2004). Common examples of open accounts include cell phone bills and utilities bills.
    - A transaction or series of transactions creates a type of debtor-creditor relationship between the parties. *Smith v. Davis*, 323 U.S. 111, 114 (1944).
    - The account must be kept open in anticipation of future transactions. 1 AM. JUR. 2D *Accounts and Accounting* § 4.

- The parties must intend that the ‘individual transactions in the account be considered as a connected series.
  - When one of the parties decides to close the account and settle the tab, ‘there is but one single and indivisible liability arising from such series of related and reciprocal credits and debits.’
  - The debtor has not, in a written document, promised to pay the creditor’s claim at a certain time in the future, ‘nor is there any binding acknowledgement by the debtor of the correctness of the creditor’s claim.’ *Smith*, 323 U.S. at 114.
- **Accounts Stated:**
- An account stated is a manifestation of assent by the debtor and creditor to a stated sum as an accurate computation of an amount due the creditor. A party’s retention of a statement of account rendered by the other party without objection for an unreasonably long period of time is a manifestation of assent; The account stated does not itself discharge any duty but is an admission by each party of the facts asserted and a promise by the debtor to pay the sum according to its terms. *See* Restatement (Second) Contracts § 282.
  - An action for an account stated must be based on previous monetary transactions to create a relationship between the creditor and debtor. *Rizkalla v. Abusamra*, 284 Mass. 303 (1933). The creditor must prove that the debtor agreed to a certain amount due to the creditor. *See* *Milken v. Warwick*, 306 Mass. 192, 196-97 (1940). An account stated “cannot be made the instrument to create liability where none before existed, but only determines the amount of a debt where liability exists. *Chase v. Chase*, 191 Mass. 556, 562 (1902).
  - An account stated fundamentally changes the collection action. The parties’ assent or acknowledgement of the amount due “implies a promise to pay whatever balance is thus acknowledged to be due.” *Meredith & Grew, Inc. v. Worcester Lincoln, L.L.C.*, 16 Mass. L. Rptr. 411, 415 (Mass. Super. 2003). In short, the debt collector is not suing on the old promise to pay the debt that was formed when the debtor agreed to the terms of the credit card, but rather the debt collector is suing on the debtor’s new promise to pay the creditor a certain amount of money as an account stated. The new agreement has important consequences for statute of limitations.
    - The statute of limitations clock can be restarted if the debtor makes payments on the debt or agrees to on an amount owed. MASS. GEN. LAWS Ch. 260, § 14.
  - A debt collector cannot recover on an account stated where evidence shows a balance due which is different than that pleaded. *Baker Auto Co. v. Bennett*, 219 Mass. 304, 308 (1914).

- *See also* Braude & Marguiles, P.C. v. Fireman’s Fund Ins. Co., 468 F.Supp.2d 190 (D.D.C., 2007) (“The mere mailing of a bill and the recipient’s silence do not reflect an agreement to pay”).
    - Note that debt collectors will attempt to add contractual interest on an account stated. As one New York court has held, a “request for contract interest should not be made if judgment is requested on an account stated, for this claim is independent of any contract provision.” *Citibank (S.D.) v. Martin*, 807 N.Y.S.2d 284, 291 (Civ. Ct. 2005). The same case also held that attorney’s fees are not available to the debt collector on an account stated cause of action. *Id.* at 290.
  - **Assignment:**
    - Collection debts can be assigned to third parties. As one Massachusetts case explains:
      - “...Prior cases have not prohibited an assignor from proceeding against a debtor as long as the debtor is not in danger of double liability. It makes no difference to a debtor whom he pays as long as he does not pay twice. *Barry v. Duffin*, 290 Mass. 398 (1935); *Gillespie v. McCourt*, 889 F. Supp. 5, 7 (D. Mass. 1995). Where there had been a total assignment, as in this case, the modern rules of practice indicate that it is the assignee who is the real party in interest and the party in whose name an action is to be prosecuted.” *Platt v. Plymouth Rock Assur. Corp.*, 2006 Mass. App. Div. 1, 2.
      - The assignor does not need to notify the debtor to complete a valid assignment. *Frank v. Bobbitt*, 155 Mass. 112, 116 (1891).
    - Assignees are subject to defenses:
      - “An assignee of contract rights stands in the shoes of the assignor and has no greater rights against the debtor than the assignor had.” *Graves Equipment, Inc. v. M. DeMatteo Constr. Co.*, 397 Mass. 110, 112 (1986). The debtor can raise the same defenses against the assignee as he would have had against the original creditor. *Ford Motor Credit Co. v. Morgan*, 404 Mass. 537, 545 (1989).
      - Holder-in-due-course rarely applies in consumer credit cases because the contract typically is not a negotiable instrument. *See* U.C.C. § 3-104(1). The contract contains too many promises.
    - How is assignment relevant to defending against debt collection cases?
      - Preliminarily, the debt collector is claiming to be the assignee of the original creditor, while the debtor is the obligor. In debt collection cases brought by a party other than the original creditor, the assignment itself should be verified. The debtor-defendant should request the assignee-plaintiff to demonstrate that the assignee has rights against the debtor. The purported assignee bears the burden of proving that it was properly assigned the specific debt at issue. *Norfolk Fin. Corp. v. Mazard*, 2009 WL 3844481 (Mass.App.Div.).

## Section II: PROOF

- **Basic elements for contract actions:**
  - “(1) An agreement, express or implied, in writing or oral; (2) For a valid consideration; (3) Performance or its equivalent by the plaintiff; (4) Breach by the defendant; and (5) Damage to the plaintiff.” *Singarella v. City of Boston*, 342 Mass. 385, 387 (1961).
  - The burden of proof is on the plaintiff to show that a contract creating the debt existed. *Canney v. New England Tel. & Tel. Co.*, 353 Mass. 158, 164 (1967). The plaintiff also bears the burden of proving that the defendant breached the contract. Beware situations where debt collectors try to shift the burden informally to the defendant. Frequently, debt collectors improperly present the issue to the defendants as “this debt is yours, and you owe it, unless you can prove otherwise.”
  - In cases involving credit cards, courts require the actual terms and conditions of the agreement with the user’s actual signature as proof of a contract. A photocopy of general terms to which the credit issuer may currently demand of its customers is not sufficient. For example, if a model credit card contract provides for the creditor to recover attorney’s fees and court costs in a collection action, the burden is on the creditor to show that the debtor in fact received and agreed to that contract. *Norfolk Financial Corporation v. MacDonald*, 2003 Mass. App. Div. 153, 154.
  - DO NOT ASSUME THAT A DEBT BUYER OWNS THE DEBT. The debt collector must also show that a particular consumer is liable for a particular debt claimed as owed, and that the debt has been transferred properly by the original creditor to the plaintiff, usually by showing proof of assignment.
- **How the Business Records Act & the Best Evidence Rule are Relevant to Debt Collection Cases**
  - “The customary way of proving an agreement with the defendant is by introducing into evidence a written agreement which is signed by the defendant.” 17 MASS. PRAC., *Prima Facie Case* § 2.2.
  - Proving the debt, however, is often easier said than done for the debt collector. Generally, debt buyers receive little or no substantive documentation about the debts they purchase. Rarely do they have evidence of the original agreement. Without this information, debt buyers attempt to introduce whatever information they have to prove the contract and the defendant’s breach. Defendants, accordingly, can object to this evidence as inadmissible hearsay that does not comply with the Massachusetts Business Records Act (MASS. GEN. LAWS ch. 233, § 78).
    - **First**, to qualify as a business record, the document must have been made: (1) in good faith, (2) in the regular course of business, (3) before the commencement of the legal action, and (4) that it is the regular course or practice of the business to make such records. MASS. GEN. LAWS Ch. 233, § 78; *MacDonald*, 2003 Mass. App.

Div. 153, 154; *DiMarzo v. Amer. Mut. Ins. Co.*, 389 Mass. 85, 105-06 (1983); *NationsBanc Mortg. Corp. v. Eisenhauer*, 49 Mass. App. Ct. 727, 733 (2000).

- Purported records made years after the fact for the purpose of litigation are NOT admissible. Often the collection attorney will compose a document using the information it has related to the defendant's debt.
  - **Always inquire who made each purported document and when it was made.** The debt buyer's own records are not admissible to prove the existence of a debt, the transactions, amount of debt, or that this consumer is liable because the debt buyer likely did not transact any business with the consumer.
  - Note that an employee for the debt collector is generally not competent to offer testimony concerning the records of an assignor, because the employee will often lack the personal knowledge to testify as to those records. Thus, if a debt collector's employee offers an affidavit attesting that the original creditor's debt information is correct, the defendant should question its authenticity.
- **Second**, after the "first four requirements are met, the burden is on the proponent of the evidence to demonstrate further that the information contained in the business record was either originally reported to the preparer as a matter of business duty, or that it falls into a separate exception to the hearsay rule." *MacDonald*, 2003 Mass. App. Div. 153, 154., *Irwin v. Ware*, 392 Mass. 745, 749 (1984); *Wingate v. Emery Air Freight Corp.*, 385 Mass. 402, 406 (1982).
    - For example, in *MacDonald*, the court admitted copies of credit card statements from the original creditor into evidence as business records, because they "were made before the civil action commenced, and can be reasonably inferred to have been made by [the original creditor's account representative] in the ordinary course of recording accurate account balances, including the receipt of payments." *MacDonald*, 2003 Mass. App. Div. at 154.
  - **Alternatively**, if a debt collector does not have the original contract evidencing the debt, the defendant may challenge the admission of secondary evidence under the Best Evidence Rule.
    - "Under [the Best Evidence Rule], once 'evidence has been introduced sufficient to support a finding that the writing ... once existed and is not a writing produced at the trial,' secondary evidence may be introduced if the judge finds, after 'assuming that the writing once existed,' that the writing is 'now unavailable for some reason other than the culpable negligence or wrongdoing of the proponent of the

evidence, or [that] it would be unfair or inexpedient to require the proponent to produce the writing.” *Fauci v. Mulready*, 337 Mass. 532, 542 (1958).

- In sum, either the plaintiff must provide the original contract document, or it must provide a good reason for not being able to do so. Most likely, debt collectors will assert that it is unfair, overly burdensome, and/or inexpedient to dig up the original contract.
  - Practically speaking, the defendant may assert in its answer that the plaintiff has not shown the existence of an agreement, part of the plaintiff’s prima facie case.
- **Married Debtors**
    - In Massachusetts, “both spouses are liable, jointly or severally, for debts incurred on account of necessities furnished to either spouse or to a member of their family.” *Mediplex of Mass., Inc. v. Donovan*, 1194 Mass. App. Div. 123, citing MASS. GEN. LAWS Ch. 209, § 1.
    - “The term ‘necessaries’ in this connection is not confined to articles of food or clothing required to sustain life, but has a much broader meaning and includes such articles for use by a wife as are suitable to maintain her according to the property and condition of life of her husband.” *Pioneer Valley Postal Fed. Credit Union v. Soja*, 2002 Mass. App. Div. 193, citing *Jordan Marsh & Co. v. Cohen*, 242 Mass. 245, 249 (1922). Whether a debt is considered necessary is an issue of fact. *Id.*
  - **Mistaken Identity:**
    - DEBT COLLECTORS FREQUENTLY SUE THE WRONG PERSON. While statistics are unavailable, anecdotal evidence from Boston-area courts indicates that it is fairly common for a debt collector to sue the wrong person.
      - In March 2004, the FTC brought a complaint against CAMCO a debt collector. The FTC charged that “as much as 80 percent of the money CAMCO collects [came] from consumers who never owed the original debt in the first place. Many consumers [paid] the money to get CAMCO to stop threatening and harassing them, their families, their friends, and their co-workers.” FTC Press Release, December 8, 2004, “FTC Asks Court to Halt Illegal CAMCO Operation: Company Uses Threats, Lies, and Intimidation to Collect “Debts” Consumers Do Not Owe,” <http://www.ftc.gov/opa/2004/12/camco.shtm> (last accessed 04/10/2008.) To access the FTC filings for this case, see <http://www.ftc.gov/os/caselist/camco/camco.shtm>.
      - One of the legislative purposes behind the federal Fair Debt Collection Practices Act (FDCPA) was to “eliminate the recurring problem of debt collectors dunning the wrong person or attempting to collect debts the consumer has already paid.” *Magrin v. Unifund CCR Partners, Inc.*, 52 F. App’x. 938 (9th Cir. 2002), citing S. Rep. No. 382, 95th Cong.2d Sess. 4, reprinted in 1977

U.S.Code Cong. & Admin. News 1695, 1699. A wrongly accused defendant may have remedies in the FDCPA.

○ WHAT IS THE PLAINTIFF'S BURDEN OF PROOF TO SHOW THAT IT HAS IDENTIFIED THE CORRECT DEFENDANT?

- In Massachusetts, “bald identity of name without confirmatory facts or circumstances is not sufficient to prove identity of person.” *Herman v. Fine*, 314 Mass. 67, 68, 49 N.E.2d 597, 598 (1943), citing *Ayers v. Ratschesky*, 213 Mass. 589, 593, 594, 101 N.E. 78. See also 65 C.J.S. *Names* § 31.
- In *Herman*, the plaintiff brought an action on a judgment he alleged he had recovered against the defendant. The judgment was made against a “Jacob Fine” and the defendant’s name was Jacob Fine. The defendant made a general denial. The court found that the “defendant’s general denial made it incumbent upon the plaintiff to prove every element of his case, including the fact that the defendant was the person against whom he had a judgment.” *Herman*, 314 Mass. at 69. Additionally, “[a]lthough very slight evidence might have been enough, at least something more than identity of names was necessary.” *Id.*
- In *Deutsch v. Ormsby*, a truck accident tort suit, the plaintiff sued the owner of the truck and the truck driver, James Nigro. 354 Mass. 485 (1968). The court found that the evidence was “sufficient to establish that a person variously described as ‘Nigro,’ ‘Jerry Nigro’ and ‘James Nigro’ was the operator of the truck involved in the accident.” *Id.* At 488. But, the court found that the evidence was *not* “sufficient to show that the defendant Nigro was that person” reasoning that the “bald identity of name” and no further evidence was “not enough.” *Id.* at 488-9.
- In *Hinds v. Bowen*, a car-accident tort suit in which the identity of the defendant was disputed, the court found that the “similarity of [the defendant’s] name is not sufficient evidence to warrant a finding of identity; although taken with other evidence of likeness it may suffice to take the issue of identity to a jury.” 268 Mass. 55, 58 (1929). The court dismissed the action, explaining that the plaintiff failed to meet her “burden of proving the identity of the defendant with the driver of the car...” and that the “defendant was under no obligation to be present in court or to introduce evidence until the plaintiff had show enough to require it.” *Id.* at 59.
- The case law indicates that, in Massachusetts debt collection cases where the defendant denies that he is the alleged debtor, the plaintiff (1) has the burden to show that the defendant is, in fact, the debtor and (2) that the plaintiff must provide more evidence in addition to the identity of names to do so. These rules are very helpful to defendants. Since many debt collectors will not have additional information beyond the debtor’s name, the debt collector may not be able to show that defendant is the debtor.

- **Identity Theft:**
  - Identity theft is the crime of “stealing personal information and obtaining credit cards or doing other activities in another person’s name.” 81 AM. JUR. PROOF OF FACTS *Identity Theft and Other Misuses of Credit and Debit Cards* § 113 (3d ed.)
  - Massachusetts law makes identity theft or fraud a crime:
    - “(b) Whoever, with intent to defraud, poses as another person without the express authorization of that person and uses such person’s identifying information to obtain or to attempt to obtain money, credit, goods, services, anything of value, any identification card or other evidence of such person’s identity, or to harass another shall be guilty of identity fraud...
    - “(c) Whoever, with intent to defraud, obtains personal identifying information about another person without the express authorization of such person, with the intent to pose as such person or who obtains personal identifying information about a person without the express authorization of such person in order to assist another to pose as such person in order to obtain money, credit, goods, services, anything of value, any identification card or other evidence of such person’s identity, or to harass another shall be guilty of the crime of identity fraud.” MASS. GEN. LAWS, Ch. 266, § 37 E.
  - The key elements of identity theft are: (1) using (or intending to use) another person’s identifying information (2) without express authorization (3) to obtain a financial benefit.
  - WHAT EFFECT DOES IDENTITY THEFT HAVE ON THE PLAINTIFF’S BURDEN OF PROOF?
    - Whether there is identity theft or not, the plaintiff has the burden of proof. However, as discussed in the “Wrong Defendant” scenarios, the plaintiff can meet this burden by demonstrating congruity of names plus additional corroborating evidence. *See* *Deutsch v. Ormsby*, 354 Mass. 485, 488-9. If the plaintiff can satisfactorily produce enough evidence tying the defendant’s personal information (such as Social Security number) to the debt, then this will likely be sufficient to satisfy plaintiff’s burden of proof. Assuming the plaintiff meets its burden, then the defendant must rebut the plaintiff’s showing with evidence of identity theft.
  - WHAT STEPS SHOULD THE DEFENDANT TAKE TO SHOW HE OR SHE BELIEVES THAT IDENTITY THEFT HAS OCCURRED?
    - **Preliminarily**, the defendant should request information about the debt from the debt collector to see if the debt collector’s account information contains personal information (such as full name, address, and social security number) that matches the defendant’s. If the account information matches, but the defendant does not believe he or she ever opened the account, then it may be a case of identity theft. If the account information does not match,



especially if the last 4 digits of the social security number are different, then the debt collector is likely to be suing the wrong person. As discussed above, the debt collector will likely not be able show that the defendant is the breaching party.

- **Next**, the Federal Truth In Lending Act, 15 U.S.C. § 1642, “requires an application of request for credit card before such an account can be opened.” The consumer should request the debt collector to produce the original application for a credit card. If the debt collector cannot produce it, then inference should favor the consumer.
- **Finally**, the consumer’s credit reports should be examined and disputed. If the debt does not appear in the reports, that is some corroboration that the plaintiff has sued the wrong person. If the disputed debt appears in the credit reports, original creditors and furnishers of information and the credit reporting agency should be asked to correct the erroneous list of debt.
- **File Police Report.** Massachusetts law states “A law enforcement officer shall accept a police incident report from a victim and shall provide a copy to such victim, if requested, within 24 hours.” MASS. GEN. LAWS, Ch. 266, § 37 E (f).
- **FTC Theft of Identity Affidavit.** The link to the FTC Affidavit and the steps recommended by the FTC is available at: <http://www.ftc.gov/opa/2002/idtheft.shtm>. The practice packet also contains a copy of the affidavit.
- **U.S. Postal Inspectors Mail Fraud Complaint.** The link to the complaint form is: <http://www.usps.com/postalinspectors/fraud/welcome.htm>. The U.S. Postal Inspection Service website explains that “U.S. Postal Inspectors investigate any crime in which the U.S. Mail is used to further a scheme – whether it originated in the mail, by telephone, or on the Internet.” The use of the U.S. Mail is what makes it mail fraud.
- **Start discovery immediately.** Get specimens of client’s signature, ID cards, and driver’s license. Find out all addresses the client has lived at in recent years. Ask what credit accounts, good and defaulted, the client *does* have. What’s in your wallet?
- **Cite media articles or FTC reports showing the prevalence of identity theft to persuade Court that identity theft is common, that your client is a victim, and not a deadbeat.** Ask to what address were monthly statements sent? And is the creditor’s alleged evidence to prove that address admissible? Can assignee produce monthly statements, for example?
- **Watch out for relatives and friends as identity thieves.** Your client should be willing to file a Police Report before you represent him or her in Court. When a close relative is the thief, you will have problems: the client may be unwilling to report it, and the creditors

will gloat “Ah ha! A family conspiracy, authorized use, etc.” But if your client did not sign the contract or use the account or see the monthly statements, the client is legally not liable.

- For additional information on identity theft in Massachusetts, please see [http://www.mass.gov/mova/pdfs/Identity\\_Fraud.pdf](http://www.mass.gov/mova/pdfs/Identity_Fraud.pdf).

- **Statute of Limitations Issues:**

- The plaintiff has the burden of proving that the claim is within the time limit. *Mendes v. Roche*, 317 Mass. 321 (1944); *Williams v. Ely*, 423 Mass. 467, 474 (1996). Thus, the defendant can raise statute of limitations as a defense, and the plaintiff has the burden to prove the claim is within the limit.
- HOW TO COUNT THE STATUTE OF LIMITATIONS:
  - **First**, you must identify the type of debt
  - **Second**, after identifying the type of debt at issue, find the corresponding statute of limitations
    - In MA, contract actions have a six year statute of limitations period. However, contracts for a sale of goods under the Uniform Commercial Code have a four year statute of limitations.
    - Claims to collect interstate cellular phone charges are governed by 47 U.S.C. § 415(a), which establishes a two year statute of limitations period.
    - Also note the statute of limitations periods for common counterclaims. State law claims under Chapter 93A have a four year statute of limitations period after the cause of action accrues. MASS. GEN. LAWS Ch. 260, § 2A. Federal law claims under the Fair Debt Collection Practices Act (FDCPA) have a one year statute of limitations period from the date of the alleged violation. 15 U.S.C. § 1692k(d).
  - **Third**, figure out when the statute of limitations begins to run
    - For contract actions, the cause of action accrues at the time of the breach. *Boston Tow Boat Co. v. Medford Nat'l Bank*, 232 Mass. 28 (1919). In debt collection cases, the breach generally occurs on the date of the first missed payment, not the date of the defendant's last payment.
    - A payment on account of a debt within the statute of limitations period may revive the debt. *Norfolk Financial Corp. v. Wynn*, 2003 Mass.App.Div. 145 citing *Boles v. Katz*, 340 Mass. 496, 407 (1960).
  - **Fourth**, determine when the action was commenced. Ordinarily, in debt collection cases, the action commences on the date the plaintiff files the Summons and Complaint forms with the court. Marc G. Perlin and John M. Connors, HANDBOOK OF CIVIL PROCEDURE IN THE MASSACHUSETTS DISTRICT COURT (3d ed.)
- Tricky situations for contracts:

- In Massachusetts, a partial payment of debt can be considered an acknowledgement of the debt, implying a promise to pay. Typically, when debtors stop and later resume making payments when their financial affairs improve, they renew their promises to pay the debt and restart the statute of limitations.
  - Partial payment does not necessarily revive the promise to pay and restart the statute of limitations. For instance, if the circumstances support a reasonable inference that the debtor intended to renew the promise to pay the debt by making a payment.
  - Also, the mere promise to pay or acknowledgement of the debt may revive the statute of limitations if: (1) the promise or acknowledgement is in writing and signed by the debtor, MASS. GEN. LAWS Ch. 260, § 13; or if the writing is an “unqualified acknowledgement of the debt” or an unconditional promise to pay the debt. *Epstein v. Seigal*, 396 Mass. 278 (1985).
  - If the writing indicates that the debtor questions the amount owed or indicates that the debtor may not be able or willing to pay, the promise would likely be a conditional promise and is insufficient to revive the statute of limitations.
- Tricky situations for accounts:
  - The statute of limitations for actions on accounts “commences from the date the account is due.” 1 Am. Jur. 2d *Accounts and Accounting* § 22. Note that an action *on account* is a contract action and has a six-year statute of limitations.
  - The statute of limitations for open accounts, which usually list multiple items and the dates they were added to the account, runs from the time each item was added to the account. However, if all items in the account were billed together as part of work done under an entire contract, the statute of limitations commences on the date the last item was posted to the account. *Hall v. Wood*, 75 Mass. 60 (1857); *see also* *Jenny v. Airtek Corp.*, 402 Mass. 152 (1988). In this situation, items older than six years are not barred.
  - The statute of limitations for accounts stated commences on the date of the breach of the new promise to pay the agreed on and not the breach of the original contract.
  - The statute of limitations for mutual and open accounts runs from the date the last item is billed to the mutual and open account. MASS. GEN. LAWS Ch. 260, § 6. Here, items older than six years are not barred.
- Choice of Law:
  - If a contract stipulates that it will be governed using a forum state’s laws, MA courts will apply the statute of limitations of the state that has the most significant relationship to the occurrence and to the parties. *New England Tel. & Tel. Co. v. Gourdeau Construction Co.*, 419 Mass. 658 (1995)(concluding that New

Hampshire had a more significant relationship to the parties and the occurrence because the events in question occurred there).

- “The forum should not entertain a claim when doing so would not advance any local interest and would frustrate the policy of a state with a closer connection with the case and whose statute of limitations would bar the claim.” *Id.* at 661 citing Restatement (Second) of Conflict of Laws § 142 comment g (Supp. 1989).
  - Where New Hampshire law governs a collection action in Massachusetts, however, several issues must be addressed. For example, in *Avery v. First Resolution Mgmt., Corp.*, 568 F.3d 1018 (9th Cir. 2009), an Oregon court determined that the shorter N.H. period of limitations prescribed by contract was applicable under Oregon choice of law rules until the N.H. law was determined to be tolled as to an Oregon consumer. The court then reverted to Oregon’s own, longer statute of limitations. The debtor in *Avery* failed to challenge the constitutionality of New Hampshire’s statute of limitations, which effectively allowed the statute to toll in perpetuity against any person living outside of New Hampshire. Additionally, the debtor in *Avery* could have argued that the choice of law provision was unconscionable because the debt collector could have sued at anytime in the debtor’s jurisdiction.
  - For further discussion on statutes of limitations and choice of law provisions, see NCLC’s *Collection Actions* § 3.7 (1st ed. 2008 and Supp.).
- **Frivolous Suits:**
    - If a debt buyer sued without any reasonable investigation of the facts, and there is no evidence to show that the defendant is liable, you can make a Rule 11 demand in your answer that plaintiff withdraw its unfounded and unsubstantiated complaint within a specified number of days. Where an attorney has failed to show a subjective good faith belief that the pleading was supported in both fact and law, the judge is authorized to grant attorneys fees and costs to the moving party. *Vittands v. Sudduth*, 49 Mass.App.Ct. 401 (2000).
    - If a pro se consumer has attempted to convince collection attorneys that he is a victim of identity theft and/or mistaken identity, and the firm sues him anyway, then there is a strong argument that the lawsuit was frivolous.

### Section III: AFFIRMATIVE DEFENSES

- **Accord & Satisfaction:**
  - Concept
    - “If a creditor, having an unliquidated or disputed claim against his debtor, (2) accepts a sum smaller than the amount claimed, (3) in satisfaction of the claim,” *then* (4) “the creditor cannot afterwards maintain an action for the unpaid balance of his original claim.” (Numbering added). *Cuddy v. A&E Mechanical, Inc.*, 53 Mass. App. Ct. 901 (2001), citing *Chamberlain v. Barrows*, 282 Mass. 295, 299 (1933).
  - Limitations
    - The creditor must *agree* that the smaller sum will fully satisfy the original debt. There is no accord & satisfaction when the debtor unilaterally conditions a payment on “its being accepted in discharge of what is in dispute.” *Cuddy*, 53 Mass. App. Ct. at 901, citing *Whittaker Chain Tread Co. v. Standard Auto Supply Co.*, 216 Mass. 204, 208 (1913)
    - The defendants must also prove satisfaction (that the defendant paid the full agreed-on amount.) “An unexecuted accord is not satisfaction.” *McFaden v. Nordblom*, 307 Mass. 574 (1941).
  - Pleading & Proof
    - It is an affirmative defense that must be pleaded specifically by the defendant. 17 MASS. PRAC., *Prima Facie Case* § 2.44 (5<sup>th</sup> ed.).
    - The defendant bears the burden of proving an accord and satisfaction. *Sherman v. Sidman*, 300 Mass. 102, 105 (1938). Whether accord and satisfaction has been proved is a question of fact. *Wong v. Paisner*, 14 Mass. App. Ct. 923 (1982).
- **Payment**
  - Concept
    - The debt collector is not owed anything because the debtor previously made full payment to the creditor or assignee for the debt and this payment was accepted by the creditor or assignee. Since debt collectors purchase the debts in large portfolios with little information about the debts and conducts little due diligence as to the status of the debt, it is possible that the debtor has already paid the debt off.
  - Limitations
    - The unilateral act of mailing a check to the creditor or assignee is not sufficient. To be “payment,” the creditor must *accept* the debtor’s check as payment. Conclusive evidence of the creditor’s acceptance is “presentment for payment on the bank on which it was drawn and receipt of the amount.” *Illustrated Card & Novelty Co. v. Dolan*, 208 Mass. 53, 54 (1911).
  - Pleading & Proof

- Payment is an affirmative defense that must be pleaded specifically and proved by the defendant. MASS. R. CIV. P. 8(c). *See also* 17 MASS. PRAC. *Prima Facie Case* § 2.69 (5<sup>th</sup> ed.).
- **Discharge in Bankruptcy**
  - Concept
    - Check to see if the defendant has declared bankruptcy at any point in time when the outstanding debt existed. Bankruptcy does not *extinguish* debts, but it does *discharge* the debtor’s legal obligation to pay the debt. *Canton Lumber & Supplies, Inc. v. MacNevin*, 354 Mass. 563, 564 238 N.E.2d 879, 880. Neil J. Fogarty reports that “[e]ven debts which the debtor forgot to list are generally discharged, absent debtor fraud. *Judd v. Wolfe*, 78 F.3d 110 (3rd Cir. 1996).” Neil J. Fogarty, “Substantive Defenses to Debt buyer Suits,” *Defending Debt Collection suits*, National Consumer Law Center Conference, Nov. 11, 2007, p. 26.
  - Pleading & Proof
    - Pleading “discharge in bankruptcy” is an affirmative defense. *Smith v. Hill*, 232 Mass. 188, 191 (1919). Importantly, the defendant must plead the defense of “discharge in bankruptcy” to be protected by the prior bankruptcy. *Canton Lumber & Supplies, Inc. v. MacNevin*, 354 Mass. 563, 564 238 N.E.2d 879, 880, citing *Herschman v. Justices of the Municipal Court*, 220 Mass. 137, 141, 107 N.E. 543.
    - The defendant bears the burden of proving a discharge of the plaintiff’s debt “under such circumstances as would bar the plaintiff’s judgment.” *Hill*, 232 Mass. at 191.
- **Minority & Capacity to Contract**
  - Concept
    - “The general rule is that contracts of *minors* are voidable at the option of the minor in accordance with the policy of the law to afford protection to minors from their own improvidence and want of sound judgment.” *Fry v. Yasi*, 327 Mass. 724, 728 (1951). The age of majority for contracts is 18. *See* MASS. GEN. LAWS c. 213, § 85 P. Therefore, any contract made by a minor (a person who is under the age of 18) is voidable. The rules for contracts made by mentally disabled people follow the same tract as the minority defense (voidable, affirmative defense.) *See* *Krasner v. Berk*, 366 Mass. 464.
  - Limitations
    - Because contracts made by a child are *voidable* and not *void*, the contracting party has a duty to disaffirm the contract within a reasonable time after attaining majority. *Adamowski v. Curtiss-Wright Flying Service*, 300 Mass. 281, 283-4 (1938). If the party does not act to disaffirm the contract within a reasonable time frame after turning 18, he or she may be deemed to have ratified the contract. 17 MASS. PRAC. *Prima Facie Case* § 2.98 (5<sup>th</sup> ed.).

- Pleading & Proof
  - Minority (or infancy) is an affirmative defense which must be specifically pleaded and proved by the defendant. *Moskow v. Marshall*, 271 Mass. 302, 306.
- **Real Party in Interest Defense**
  - Concept
    - Rule 17 (a) of the Massachusetts Rules of Civil Procedure requires that every action be prosecuted in the name of the real party in interest. MASS. R. CIV. P. 17(a).
    - The rule is that “A party is the real party in interest if, under the relevant substantive law creating the right being sued upon ... the suit has been commenced by the party holding the substantive right to relief.” *MHI Shipbuilding, LLC v. National Fire Ins. Co. of Hartford*, 286 B.R. 16, 27-28 (D.Mass, 2002) citing *Swanson v. Bixler*, 750 F.2d 810, 813 (10th Cir. 1984) and *Clymer v. Mayo*, 393 Mass. 754, 763 (1985).
    - The important policy accomplished by RPII is “to avoid a multiplicity of suits by similarly situated plaintiffs involving the same or similar causes of action.” *Mass. Ass’n of Indep. Ins. Agents and Brokers v. Commissioner of Ins.*, 373 Mass. 290, 297 (1977). In other words, the rule “assure[s] that a defendant is only required to defend an action brought by a proper plaintiff and that such action must be defended only once.” *Id.* at 297.
  - Limitations
    - While the RPII defense targets the debt collector’s ability to prove assignment, Massachusetts case law has taken a flexible approach as to what constitutes proof of assignment. As a result, it will be fairly easy for debt collectors to prove a valid assignment. Nevertheless, the debt collectors may not want to take the time to gather the evidence of assignment, making the RPII defense a tool to push the debt collector to drop its claims.
  - Pleadings & Proof
    - The objection that the plaintiff is not the RPII may be brought under a Rule 12 motion to dismiss, or may be raised in the answer. 17 MASS. PRAC. *Prima Facie Case* § 60.35 (5th ed.).
- **Res Judicata**
  - Concept
    - “*Res judicata* bars relitigation of ‘an issue that has been definitively settled by judicial decision,’ or can be ‘an affirmative defense barring the same parties from litigating a second lawsuit on the same claim, or any other claim arising from the same transaction or series of transactions and that could have been – but was not – raised in the first suit.’” *Adams Bldg. Corp. v. Cadle Co.*, 2008 WL 384230 (Mass. Land Ct. 2008) citing BLACK’S LAW DICTIONARY (3<sup>rd</sup> ed. 1996).





- (5th ed.). *See also* *Danca v. Taunton Sav. Bank*, 385 Mass. 1, 8 (1982); *Barrett Assoc. v. Aronson*, 346 Mass. 150, 152 (1963).
- Limitations
    - First, note that this type of fraud is getting at the contract signed with the original creditor, not the debt collector's subsequent actions. Second, the biggest limitation to the fraud defense is that the defendant most likely does not recall the contract negotiations (if any) or representations that the creditor made during the process of applying for the credit card or signing the credit contract.
  - Pleading & Proof
    - Fraud is an affirmative defense that must be specifically pleaded and proved by the defendant. *Barron v. International Trust Co.*, 184 Mass. 440, 443 (1903).
  - **Good Faith & Fair Dealing**
    - Concept
      - The rule in Massachusetts is that “every contract implies good faith and fair dealing between the parties to it.” *Warner Ins. Co. v. Commissioner of Ins.*, 406 Mass. 354, 362 n.9 (1990), quoting *Kerrigan v. Boston*, 361 Mass. 24, 33 (1972). This implied covenant provides “that neither party shall do anything that will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract...” *Anthony's Pier Four, Inc. v. HBC Associates*, 411 Mass. 451, 471 (1991) quoting *Drucker v. Roland Wm. Jutras Assocs.*, 370 Mass. 383, 385 (1976).
      - In the debt collection context, breach of the covenant of good faith & fair dealing may be applied to the actions of the original creditor or the debt collector. In regards to the original creditor's actions, it may be applied where the facts indicate the creditor acted in an unfair, misleading, sneaky, or extremely advantageous manner. In regards to the debt collector's actions, the general duty of good faith and fair dealing in business transactions takes the shape of a claim of “unfair or deceptive acts or practices” as defined by G.L. c. 93A. *See Zapatha v. Dairy Mart, Inc.*, 381 Mass. 284, 299 (1980). Claims alleging unfair or deceptive acts are discussed in subsequent sections.
    - Pleading & Proof
      - Breach of the covenant of good faith & fair dealing can be framed as an affirmative defense.
  - **Mitigation & Unjust Enrichment**
    - Concept
      - There are two concepts at play: mitigation and unjust enrichment. **Mitigation** is the duty by the injured party “to mitigate his damage;” the injured party “may not recover those damages that he could reasonably have avoided.” *Discover Bank v. Owens*, 129 Ohio Misc.2d 71, 73 (Ohio Mun., 2004). One Massachusetts court explains that, the law “does nothing to compensate [the injured

party] for the loss that he helped to cause” by not taking reasonable measures to avoid the loss. *McKenna v. Commissioner of Mental Health*, 347 Mass. 674, 676 (1964).

- **Unjust enrichment** is an equitable remedy. The elements of unjust enrichment are: “(1) an enrichment, (2) an impoverishment, (3) a connection between the enrichment and the impoverishment, (4) the absence of a justification for the enrichment and impoverishment, and (5) the absence of a remedy provided by law.” 66 AM. JUR. 2D *Restitution and Implied Contracts* § 30.
- The duty to mitigate and unjust enrichment were applied by an Ohio court in a debt collection case. The court found that the original creditor, Discover, kept the debtor’s account “open and active long after it was painfully obvious that [the debtor] was never going to be able to make payments at the expected level.” *Owens*, 129 Ohio Misc. 2d at 73. The debtor, who was on Social Security Disability, stopped using the card when the balance was approximately \$1,900, but continued to make the minimal monthly payments for six years. During this six-year period in which the debtor never used the card, the debtor paid out \$3,392 (on a \$1,900 original balance), but with “all the fees and accrued finance charges, [the debtor] was nevertheless faced with a \$5,564.28 balance *still* owing on the account.” *Id.* at 872.
- When Discover brought suit on the balance, the court found that Discover, as the injured party, had failed to mitigate its damages and that it was “unreasonable and unjust for [Discover] to allow defendant’s debts to continue to accumulate well after it had become clear the defendant would be unable to pay it.” *Id.* at 873. The court reasoned that “because of [Discover’s] failure to even minimally pay attention to Owen’s circumstances, and for allowing the debt to accumulate unchecked,” “Discover would be unjustly enriched if this court were now to grant judgment in its favor.” *Id.*
- In sum, an *Owens*-type claim incorporates *mitigation* with *unjust enrichment*. The basic elements are: (1) the creditor knew or should have known that the debtor could never pay off the balance; (2) the creditor kept the card open although eventual default was inevitable; (3) during the time the account was open, the debtor made payments in excess of the originally outstanding balances (4) the creditor’s failure to close the account and cut its losses is a failure to mitigate damages; (5) to award the creditor a judgment on the outstanding balance (which far exceeds the original balance and has substantial fees and penalties) would be unfair and unjust enrichment. Also, look for additional facts that strengthen the position that the creditor acted unfairly or that make the debtor sympathetic, like the defendant being on Social Security, making a good-faith effort to pay down the debt, and attempting to work out an agreement with the creditor. For additional Massachusetts case

law see *Salamon v. Terra*, 394 Mass. 857 (1985) and *LaRocca v. Borden, Inc.*, 276 F.3d22 (1st Cir. 2002).

- Limitations
  - Unjust enrichment is typically used as a basis for restitution. See RESTATEMENT (FIRST) OF RESTITUTION § 1 (1937). For the purposes of the debtor's defense, the unjust enrichment principle is applied to *prevent* the debt collector or creditor from *extracting* additional money from the debtor (which would constitute an unjust gain).
  - One important limitation is that the "equitable remedy for unjust enrichment is not available to a party with an adequate remedy at law." *Santagate v. Tower*, 64 Mass.App.Ct. 324, 329 (2005).
- Pleading & Proof
  - In this context, mitigation and unjust enrichment are affirmative defenses which should be pleaded specifically by the defendant.
- **Unconscionability**
  - Concept
    - There are two types of unconscionability: procedural and substantive. See *Waters v. Min. Ltd.*, 412 Mass. 64 (1992).
    - **Procedural unconscionability** "looks to the contract formation process, with emphasis on such factors as inequality of bargaining power, use of deceptive or high-pressure sales techniques and confusing or hidden language." 35 MASS. PRAC., *Consumer Law* § 5:21 (2d ed.)
    - **Substantive unconscionability** addresses the terms of the contract, where are usually "unreasonably favorable to the seller or commercial party" such that the terms are "so one-sided as to be oppressive." 35 MASS. PRAC., *Consumer Law* § 5:33 (2d ed.). Examples of unconscionable terms include those "calling for a price greatly varying from the value of the goods sold or excessive financing costs or leaving the buyer without a remedy for the seller's default." 14 MASS. PRAC., *Summary of Basic Law* § 5.50 (4th ed.).
    - An unconscionability defense against the original creditor is that (1) the creditor used deceptive sales techniques and confusing language and (2) the terms of the original agreement (interest rates, fees, penalties) were so unfair, unreasonable, one-sided, and outrageous that "the sum total of its provisions drives too hard a bargain for a court of conscience to assist." *Waters*, 412 Mass. at 66. An unconscionability defense can also be crafted against the assignment itself. Credit card companies sell (or assign) debts for pennies on the dollar, and that this practice is outrageous, unfair, violative of public policy and shocks the conscious.
  - Limitations
    - The biggest limitation to the unconscionability claim is that the defendant most likely does not have a copy of the original contract

underlying the debt, and probably does not recall the negotiations or process of applying for the credit card or other debt contract.

- Pleading & Proof
  - Unconscionability is an affirmative defense which should be pleaded and proved by the defendant.
- **Servicemembers on Active Duty**
  - The Servicemembers Civil Relief Act (SCRA), 50 U.S.C. App. §§ 501-96, limits collection tactics and enforcement of claims against active military personnel and their dependants. Specifically, SCRA's language protects servicemembers whose ability to defend themselves against civil suits is "materially affected by military service."
  - Servicemembers are protected under the Act from the date they begin active duty to the date they are discharged.

## Section IV: COUNTERCLAIMS

- **Unlicensed Debt Collector**
  - Debt collectors need a license to collect debts in MA. The list of licensed debt collectors is available on the Massachusetts Division of Banks website, located at <http://db.state.ma.us/dob/licenseelist.asp>. If a debt collector practices without a license, it may have violated several MA statutes, including:
    - G.L. c. 93, § 24A, which requires debt collectors to be licensed;
    - G.L. c. 93, § 28, which provides that failure to comply with the licensing requirement is an unfair or deceptive act or practice;
    - G.L. c. 93A, § 2(a), which declares that unfair or deceptive acts or practices are unlawful; and
    - G.L. c. 93A, § 9(a)(1), which provides that any person injured by an unlawful act or practice can bring an action against a third party for damages or equitable relief.
  - Also, since MA requires licensing for debt collectors, the filing of or threat to file a complaint by an unlicensed debt collector is a “threat of action that cannot legally be taken,” which is a false and misleading representation violating 15 U.S.C. § 1692(e)(5) and 209 C.M.R. § 18.16.
- **Unregistered Debt Collector**
  - Foreign debt collecting corporations transacting any business in MA are required to register with the MA Secretary of State. The list of registered corporations is available on the MA Secretary of State website, located at <http://corp.sec.state.ma.us/corp/corptest/corptestinput.asp>.
  - Since MA requires registration for foreign corporations, the filing of or threat to file a complaint by an unregistered corporation is a “threat of action that cannot legally be taken,” which is a false and misleading representation violating 15 U.S.C. § 1692(e)(5) and 209 C.M.R. § 18.16.
  - Debt collecting corporations may argue that merely filing a lawsuit in MA is not “transacting business” for the purposes of the registration requirement. However, as is commonly the case with debt collecting firms, the act of filing hundreds of suits in MA to collect debts suggests that its business is to sue on debts.
- **Improper Venue**
  - The Fair Debt Collection Practices Act (FDCPA) limits where debt collectors can file to two judicial districts: (1) where the contract was signed, or (2) where the debtor lives. 15 U.S.C. § 1692(i).
  - If the venue is improper, the debtor may argue that the debt collector’s claim should be dismissed or moved to the proper judicial district. The debtor may then seek a separate action for the FDCPA violations to recover
- **Validation Notice Requirement**
  - The debt collector is required to send the debtor written notice within five days after the initial communication with the debtor of the consumer’s

right to obtain validation of the debt. 15 U.S.C. § 1692(g)(a); 209 C.M.R. § 18.16.

- The FDCPA requires the written notice to contain the following information:
  - Amount of debt;
  - Name of the creditor to whom debt is owed;
  - Statement that unless consumer, within 30 days of receipt of notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector;
  - Statement that if the consumer notifies the debt collector in writing within the 30-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector; and
  - Statement that, upon consumer's written request within the 30-day period, the debt collector will provide the consumer with the name and address of the original creditor, if different from the current creditor. 15 U.S.C. § 1692(g)(a); 209 C.M.R. § 18.18.
- In addition to the failure to send a validation notice, the debtor may also counterclaim that the debtor made false, misleading or contradictory statements, overshadowing the validation notice requirements in violation of 15 U.S.C. §1692(e) and 209 C.M.R. § 18.16.
- **Suits on a "Stale Debt"**
  - The debtor may counterclaim that the debt collector filed (or threatened to file) a time-barred suit on debt it knew or should have known was barred by the statute of limitations, constituting a false representation regarding the character or legal status of the debt and a false representation or deceptive means to collect a debt in violation of 15 U.S.C. § 1692(e)(2)(A).
- **Usury**
  - Massachusetts usury law prohibits taking more than 20 percent annual interest. MASS. GEN. LAWS Ch. 271, § 49. However, the usury statute does not apply to creditors governed by federal law or the laws of another state. Thus, since the overwhelming majority of creditors are either incorporated in other states or are governed by federal regulations, it is unlikely that § 49 will apply to debt collection cases in Massachusetts.
- **Torts for abuses**
  - Invasion of Privacy:
    - Intrusion upon a person's physical solitude or seclusion
      - A creditor was held liable on this theory for phoning a debtor's home 8-10 times a day for two weeks, phoning the debtor at work three times in 15 minutes, and phoning the debtor's employer and landlord. *Housh v. Peth*, 165 Ohio St. 35 (1956).

- Another creditor was held liable for making repeated threatening or abusive telephone calls and continuing collection efforts while the debtor was in hospital for an operation. *Carey v. Statewide Fin. Co.*, 3 Conn. Cir. 716 (1966).
  - Public disclosure of private facts
    - Publicizing indebtedness in such a manner as to be offensive to a reasonable person and harmful to the debtor
    - Deadbeat lists
    - “In one case a debtor’s tires were repossessed while he was working and his car was left standing on its rims in his employer’s parking lot in full view of the employer and his co-workers, prompting the employer to ask the debtor to remove the car because it was a source of embarrassment.” *Santiesteban v. Goodyear Tire & Rubber Co.*, 306 F.2d 9 (5th Cir. 1962).
    - “Where a store agent appeared in a cage where the debtor worked as a waitress, followed her about, and shouted that she and her husband were deadbeats who refused to pay for furniture they bought.” *Biederman’s of Springfield, Inc. v. Wright*, 322 S.W.2d 892 (Mo. 1959).
  - False light
    - Creditors or debt collectors have been held liable for trying to collect from the wrong person after being informed of the error
- Negligent Infliction of Emotional Distress
  - Elements:
    - Defendant’s negligence caused emotional distress;
    - Plaintiff suffered physical harm which either caused or was caused by the emotional distress; and
    - A reasonable person would have suffered emotional distress under the same circumstances.
  - “74 year-old widow who owed a judgment of \$2720 alleged that she was told by the creditor’s attorney, after she failed to appear for a court-ordered debtor examination, that the court had issued a warrant for her arrest and that the warrant would not be recalled unless she paid \$1000.” *Carney v. Rotkin, Schmerin & McIntyre*, 206 Cal. App. 3d 1513 (1988).
  - The statement was false, because (a) the attorney never appeared for the hearing and (b) the court never issued a warrant. *Id.*
- Intentional Infliction of Emotional Distress
  - “One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another.” Restatement (Second) of Torts, § 46.
  - *George v. Jordan Marsh Co.*, 359 Mass. 244 (1971) (“Agents of a department store badgered and harassed the mother of an adult

debtor [by calling her late at night and threatening to revoke her credit, intending] to intimidate her to pay a debt she did not owe or guarantee... she experienced severe emotional distress and suffered two heart attacks”).

- Interference with Contractual Relations
  - Elements:
    - Debtor had an existing employment contract with another person;
    - The creditor or collector knew of it;
    - The creditor or collector intentionally induced the employer to break the contract or bring about its termination;
    - The creditor’s or collector’s interference was intentional and improper in motive or means; and
    - The debtor was damaged as a result of the creditor’s or collector’s action.
- Malicious Prosecution
  - Elements: A civil or criminal prosecution:
    - Was commenced against plaintiff;
    - Was instituted or instigated by the creditor;
    - Was brought maliciously;
    - Was finally terminated in the consumer’s favor;
    - Was without probable cause; and
    - Caused him damage.
  - Since there is usually a contractual arrangement between the creditor and debtor, probable cause for the creditor will typically be present for a civil case. 36 MASS. PRAC., *Consumer Law* § 20:112 (2d ed.).
- Abuse of Process
  - Elements:
    - The defendant used lawful process to accomplish an unlawful purpose;
    - With malice; and
    - To the plaintiff’s detriment. *Shaw v. Fulton*, 266 Mass. 189 (1929).
  - “Process” limited to:
    - Writs of attachment and garnishment;
    - Process used to commence a civil action; and
    - Process related to the bringing of criminal charges.
  - “The bringing of supplementary process against a debtor when the debtor knew that the debt had been paid, or the commencement of unmeritorious actions in the wrong venue in order to secure default judgments gives rise to liability for abuse of process.” 36 MASS. PRAC., *Consumer Law* § 20:113 (2d ed.), quoting *Lorusso v. Bloom*, 321 Mass. 9 (1947), and *Barquis v. Merchants Collection Ass’n of Oakland, Inc.*, 7 Cal. 3d 94 (1972),



- “There may be liability for abuse of process when a creditor uses the criminal process to pressure a debtor to pay a debt. However, there would be no liability if the creditor only set the criminal process in motion and did not direct the process or control or influence the public officials in charge of the prosecution.” *Wood v. Bailey*, 144 Mass. App. Ct. 365 (1887).
  - Defamation
    - Defamation is generally not a viable consumer remedy against a debt collector, because “[m]uch of the collector’s efforts involve contacts only with the consumer, and therefore there is no publication to third persons of any defamatory communication.” 36 MASS. PRAC., *Consumer Law* § 20:114 (2d ed.).
    - “Unless the consumer is being accused of a crime, special damages would have to be proved even if the oral communications were made in the presence of third persons.” *Id.*
    - Found in very extreme cases:
      - “Creditor publishes a ‘deadbeat list’ in a store window or in written materials.” *Hinkle v. Alexander*, 244 Or. 267 (1966).
      - In those cases where the creditor communicates false information to the alleged debtor’s employer, there can be liability for defamation, because the creditor and the employer do not share a common interest upon which a qualified privilege might be based. *See e.g.*, *Stickle v. Trimmer*, 50 N.J. Super. 518 (1958).
- **Unauthorized Practice of Law**
  - A creditor may bring a suit on behalf of itself without a lawyer’s assistance and may decide whether to do so or threaten to do so. *In re Lyon*, 301 Mass. 30 (1938). Debt collection agencies may also threaten legal action against debtors at the creditor’s direction. *Id.* However, lay members of a debt collection agency cannot advise a creditor to bring suit against a debtor. *Id.* Likewise, a debt collection agency cannot threaten legal action against the debtor without the creditor’s direction. *Id.*

**Section V:  
POST-JUDGMENT**

- **Limitations on Debt Collector’s Ability to Take Defendant’s Property (Exempted Property)**
  - WHAT PROPERTY IS PROTECTED FROM ATTACHMENT OR EXECUTION?
    - Federal and state laws designate certain property (income, assets, entitlements, and benefits) as protected from attachment, assignment, execution, or other legal process. This means that the plaintiff cannot require the defendant to use protected property as payment for the debt.
    - The concept of “not having to pay but still owing money” can be confusing for defendants, especially when explained in complicated legal terminology. Anecdotal evidence suggests defendants are hesitant to exercise the exemption. Some are afraid of being dragged back to court in the future, others do not want to “shirk” responsibility, and others do not fully understand how the exemptions work. Attorneys assisting defendants who are deciding between setting up a payment plan or exercising the exemption should explain the pros and cons to help the defendant make the best decision for herself.
  - WHAT DOES FEDERAL LAW EXEMPT?
    - Importantly, federal law exempts Social Security benefits from “execution, levy, attachment, garnishment or other legal process...” 42 U.S.C. § 407(a). Many defendant-debtors in receive Social Security benefits. Attorneys for debt collectors will frequently encourage the defendants to set up a payment plan, without informing them that Social Security benefits are exempt.
  - WHAT IF THE DEBTOR IS JUDGMENT PROOF?
    - If the debtor has no property that is not exempted from execution under Massachusetts or federal law and is unable to pay the judgment, the court must dismiss the case under MASS. GEN. LAWS Ch. 224, § 16.

---

**WHAT DOES STATE LAW COMPLETELY EXEMPT?** Massachusetts state law *completely* exempts:

- |   |                                    |
|---|------------------------------------|
| • Worker’s Compensation                   | MASS. GEN. LAWS ch. 152, § 47      |
| • Veteran’s Benefits                      | MASS. GEN. LAWS ch. 115, § 5       |
| • Aid to Families with Dependant Children | MASS. GEN. LAWS ch. 118, § 10      |
| • Unemployment Insurance                  | MASS. GEN. LAWS ch. 151A, § 36     |
| • General Public Assistance               | MASS. GEN. LAWS ch. 235, § 34 (15) |
| • Pension or Retirement Plans             | MASS. GEN. LAWS ch. 246, § 28      |
| • IRA Plans                               | MASS. GEN. LAWS ch. 235, § 34A.    |

**WHAT DOES STATE LAW PARTIALLY EXEMPT?** Massachusetts state law, MASS. GEN. LAWS ch. 235, § 34 *partially* exempts:

- Monthly amount needed for fuel, heat, water, hot water and light, not to exceed \$75.
  - Provisions and money necessary for use by the family, not to exceed \$300.
  - Homes or amount of money each rental period necessary to pay the rent for the dwelling unit, not to exceed \$200 per month.
  - Cash, savings or other deposits in a banking institution or money owed to the debtor each pay period as wages, not to exceed \$125.
  - Car necessary for personal transportation or to secure and maintain employment, not to exceed \$700.
  - Necessary household furniture, not to exceed \$3,000.
  - Tools, implements and fixtures necessary for carrying on his trade or business, not to exceed \$500.
  - Materials and stock designed and procured necessary for carrying on trade or business, not to exceed \$500.
- 

• **Setting Aside a Judgment for Failure to Serve Defendant**

- A common complaint is that the address supplied is not the defendant's current address. A Massachusetts judgment based on service at the wrong address is void and may be set aside under MASS. R. CIV. P. 60b(4). *Farley v. Sprague*, 374 Mass. 419 (1978); *see also* Citicorp Vendor Fin., Inc. v. Margolius, 72 Mass. App. Ct. 1110; *Dombrowski v. Chute*, 2000 Mass. App. Div. 127. The proper procedure is for the defendant to move under Rule 60b(4) to set aside the judgment as void with the motion accompanied by an affidavit establishing the improper service of process. *Farley*, 374 Mass. 419. If the defendant's affidavit is uncontroverted by the plaintiff, the judgment must be set aside. *Id.*
- MASS. R. CIV. P. 60: RELIEF FROM JUDGMENT OR ORDER
  - Within one year of the date of judgment the court may, upon a party's application and after notice to the other party in such form as the court deems appropriate, vacate or grant relief from any judgment or order entered under these Rules for want of actual notice to a party, for error or for any other cause that the court may deem sufficient, and may supersede execution. In addition, several federal courts have found that reasonable time limits do not apply to motions for relief under the federal version of Rule 60b(4). *See Crosby v. Bradstreet Co.*, 312 F.2d 483 (2nd Cir. 1963) (court vacated a judgment as void 30 years after entry); *Marquette Corp. v. Priester*, 234 F.Supp. 799 (E.D.S.C. 1964) (holding that Rule 60(b)(4) carries no real time limit).
  - If the defendant never lived at the address listed as the last and usual abode on the return of service, the service was improper and the judgment void. *First Select Co. v. Mastromattei*, 2007 Mass. App. Div. 77 (2007). In *Mastromattei* the defendant's affidavit stated that he had never live at the place listed in the return and had

lived at another address in a different town for 50 years. The defendant's affidavit was supported by the affidavit of the owner of the residence at the place where service was made. The owner stated that the defendant had never lived at that address as far as the owner knew. The debt buyer alleged that it obtained the address used for service from its assignor credit card company and had verified the address as one of the defendant's addresses with an address location service. The court found that the defendant's affidavit was uncontroverted by those facts and set aside the judgment. *See also Dombrowski v. Chute*, 2000 Mass.App.Div. 127 (voiding judgment as defendant had never lived in the condominium where service was made).

- Similarly a default judgment was set aside in *Citicorp Vendor Finance, Inc. v. Margolius*, 72 Mass.App.Ct. 1110 (Table) (2008), where the defendant had moved from the alleged last and usual place of abode one year before the service was made. In *Citicorp Vendor Finance, Inc. v. Margolius*, 72 Mass.App.Ct. 1110 (Table) (2008), the judgment was set aside as the summons and complaint were left at the defendant's ex-girlfriend's mother's house where the defendant had not lived for several months.
- The decision in *Farley* implicitly overruled decisions in which indicated the return of the process server was conclusively binding on the parties, with the remedy an action by the defendant against the process server. *See Atlas Elev. Co. v. Stasinos*, 4 Mass.App.Ct. 285, 287 (1976). The scope of that purported rule overruled by *Farley* was limited: "Such rule as to the conclusiveness of the sheriff's return is applicable, however, 'only when it appears that the defendant or the party against whom it is applied has had some actual notice of the pendency of the action and some opportunity to be heard prior to judgment.'" *Shapiro v. Roper's Enterprises, Inc.*, 1981 Mass.App.Div. 195, 197, citing *Hardy v. Utica Mut. Ins. Co.*, 369 Mass. 696, 700 (1976); *Smith v. Arnold*, 4 Mass.App.Ct. 614, 616-617 (1976).

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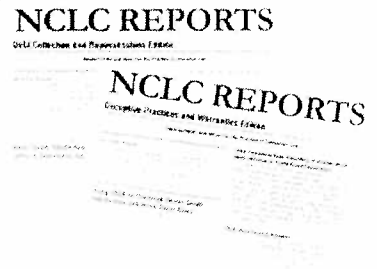
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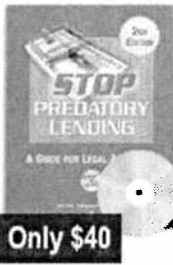


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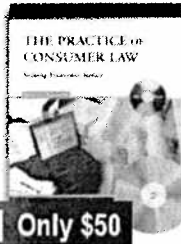
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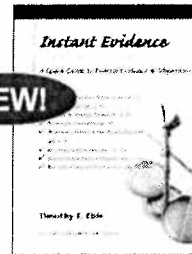


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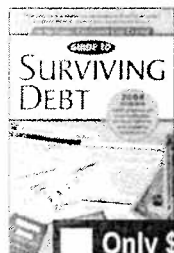
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**SUBSTANTIVE DEFENSES  
TO  
CONSUMER DEBT COLLECTION  
SUITS**

**Section VI: FORMS & SAMPLE PLEADINGS**

## CLIENT INTAKE FORM

Date \_\_\_\_\_

Court \_\_\_\_\_

Docket No. \_\_\_\_\_

### CLIENT INFORMATION

Full Name	
Address	
Years at Present Address	(Note former address if any)
Cell/Home Phone	
Alternate Phone	

### DEBT INFORMATION

Debt collector amount claimed	\$ _____
Description of debt	
Client owes debt?	<input type="checkbox"/> <u>Unsure</u> <input type="checkbox"/> <u>No</u> <input type="checkbox"/> <u>Yes</u>
Explain	
Client believes he/she owes	\$ _____
Date card/account opened	
Date last used card/account	
Additional information	



**DEBT COLLECTOR (DC) INFORMATION**

Name & Phone of Attorney	
Name of Debt Collector	
DC is Assignee of	
Client has other accounts w/ DC? If Yes, describe	<u>Yes</u> <u>No</u>
Describe contact w/ DC or Attorney (letters, calls, etc.)	

**CLIENT FINANCIAL INFORMATION**

SSI/Unemployment/Other Benefits	<u>Yes</u> <u>No</u> <u>Applied, waiting for response</u>
Past Bankruptcy If yes, when?	<u>Yes</u> <u>No</u>
Monthly Income	

**ADVOCATE FOLLOW-UP & NOTES**

Client signed Retainer Agreement	<u>Yes</u> <u>No</u>
Made copy of pleadings	<u>Yes</u> <u>No</u>
Next court date	
Description of events:	
To do:	

\_\_\_\_\_ Plaintiff(s)

v.  
\_\_\_\_\_ Defendant(s),

**ANSWER & COUNTERCLAIMS**

Defendant \_\_\_\_\_ answers the Complaint as follows:

ANSWER: (Check all that apply)

- 1. \_\_\_ General Denial: I deny each of the Plaintiff's allegations in the Complaint.
- 2. \_\_\_ I deny or do not have sufficient information to respond to the following numbered paragraphs in the Plaintiff's Complaint: \_\_\_\_\_.

SERVICE

- 3. \_\_\_ I did not receive a copy of the Summons and Complaint.
- 4. \_\_\_ I received the Summons and Complaint, but it was not properly served.

AFFIRMATIVE DEFENSES

- 5. \_\_\_ I do not owe this debt.
- 6. \_\_\_ I dispute the amount of the debt.
- 7. \_\_\_ I do not have a business relationship with Plaintiff.
- 8. \_\_\_ I am a victim of identity theft or mistaken identity.
- 9. \_\_\_ If I ever owed a debt to the Plaintiff, I paid it off within the time required by law (accord & satisfaction).
- 10. \_\_\_ I lacked capacity to contract when I entered into this agreement.
- 11. \_\_\_ This debt is over six years old, and the Plaintiff cannot sue to collect it (statute of limitations).
- 12. \_\_\_ This debt has been discharged in bankruptcy.
- 13. \_\_\_ The amount demanded is excessive (unjust enrichment).
- 14. \_\_\_ The contract is unconscionable.
- 15. \_\_\_ A court has already decided this claim in my favor (res judicata).
- 16. \_\_\_ I am a member of the military on active duty.
- 17. \_\_\_ The Massachusetts Division of Banks shows no record of Plaintiff having a license to collect debt.
- 18. \_\_\_ Plaintiff is an out-of-state corporation not registered to transact business in Massachusetts.
- 19. \_\_\_ Plaintiff did not file this suit in a judicial district where I live or where the contract was signed.
- 20. \_\_\_ My only source of income is \_\_\_\_\_, which is exempt from collection.

COUNTERCLAIMS

- 21. \_\_\_ Plaintiff has committed unfair or deceptive practices in violation of G.L. Ch. 93A.
- 22. \_\_\_ Counterclaim(s): \$ \_\_\_\_\_ Reason: \_\_\_\_\_.

The Defendant further states that other defenses and counterclaims may exist and will become added as they become known.

Submitted by,

\_\_\_\_\_  
Defendant

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was served upon the attorney of record for each other party in hand/  
by regular mail on \_\_\_\_\_.

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Date

# Answer

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

BOSTON MUNICIPAL  
COURT DEPARTMENT  
OF THE TRIAL COURT  
FOR CIVIL BUSINESS  
CENTRAL DIVISION  
CIVIL NO.

\_\_\_\_\_  
Plaintiff )  
 )  
V. )  
 )  
 )  
 )  
Defendant )  
\_\_\_\_\_ )

ANSWER

The defendant answers the complaint as follows:

1. The defendant is without knowledge of the truth of allegations of paragraph 1 of the complaint and therefore denies the allegations of said paragraph.
2. The defendant admits the allegations of paragraph 2 of the complaint.
3. The defendant admits that she had a credit card with [ \_\_\_\_\_ ] Bank, denies that the sum of [ ] is the unpaid balance and is without knowledge of the truth of all the other allegations of paragraph [ ] of the complaint and therefore denies the allegations of said paragraph and calls upon the plaintiff to prove that it is the assignor of a credit card account with an unpaid balance of [\$ \_\_\_\_\_].

And further answering the defendant states:

4. The complaint fails to state a claim against the defendant upon which relief can be granted.
5. The plaintiff did not commence this action within six years after the claim accrued and is therefore barred from recovery by the Statute of Limitations.

Date:

For the plaintiff,

\_\_\_\_\_

## CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was served upon the attorney of record for each other party by regular mail, postage prepaid on [ \_\_\_\_\_ ].

\_\_\_\_\_

# Defendant's First Request for Production of Documents Directed to Plaintiff

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

BOSTON MUNICIPAL COURT  
DEPARTMENT OF THE TRIAL COURT  
FOR CIVIL BUSINESS  
CENTRAL DIVISION  
CIVIL NO.

\_\_\_\_\_  
Plaintiff )  
 )  
V. )  
 )  
 )  
Defendant )  
\_\_\_\_\_ )

## DEFENDANT'S FIRST REQUEST FOR PRODUCTION OF DOCUMENTS DIRECTED TO PLAINTIFF[ \_\_\_\_ ]

This Request for Production of Documents is submitted for you to answer pursuant to Rule 34 of the Massachusetts Rules of Civil Procedure, with such production to take place by mail within the time allowed at the office of the Defendant's attorney, [address].

(a) The term "document" as used here includes: writings, drawings, graphs, charts, photographs, recordings, data compilations (translated, if necessary by the respondent through detection devices into reasonable usable form), contracts, agreements, correspondence, memoranda, reports, notes, requests, bills, orders, notices, writs, declarations, complaints, answers and other court pleadings, schedules, tabulations, checks, diary entries, telegrams, diagrams, films, newspaper clippings, computer files, e-mails, and other writings and recordings of whatever nature, whether signed or unsigned, transcribed or not, and whether asserted to be privileged or not.

(b) The term "plaintiff" refers to [ \_\_\_\_\_ ], and its agents, contractors, servants, employees, attorneys and accountants.

(c) The term "communication" as used herein shall mean the transfer, exchange, disclosure, or transmittal of information (in the form of facts, ideas, inquiries, or otherwise) whether orally, or by document, whether face-to-face, by telephone, by mail, by personal delivery, by computer, by e-mail, or otherwise.

Copies of all credit applications or contracts which were signed by .

Copies of all charge slips which were signed by .

A copy of each monthly statement for the [bank] credit card, account number [ \_\_\_\_ ] from the date that the account was opened until [date].

Copies of any and all documents which show that the plaintiff is the owner of the specific obligation or claim upon which it sues.

A copy of all contracts, agreements or other documents between the plaintiff and any of its predecessors in interest relating to the purchase of debts, the collection of debts, or transfers of funds between such parties.

Copies of any and all documents that which supports your claim that the defendant owes the plaintiff [ \_\_\_\_\_ ].

Copies of any and all communications between the defendant and the plaintiff or any of its predecessors in interest.

Copies of any and all documents that in any way relate to or involve [ \_\_\_\_\_ ] Bank credit card account number, [ \_\_\_\_ ].

Copies of the credit card terms and conditions with respect to [ \_\_ ] Bank credit card account number, [ \_\_\_\_\_ ] at all times said account was open and active.

Copies of any and all documents that relate to the [ \_\_\_\_\_ ] Bank Credit Protection Plan.

Copies of any and all marketing materials with respect to [ \_\_\_\_\_ ] Bank credit cards or the [ \_\_\_\_\_ ] Bank Credit Protection Plan.

Copies of any and all documents that the plaintiff intends to introduce as evidence at the trial of this action.

Copies of any and all documents that the plaintiff intends to use in any way at the trial of this matter.

Date:  
For the Defendant,

\_\_\_\_\_

#### CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was served upon the attorney of record for each other party by regular mail, postage prepaid on [ \_\_\_\_\_ ].

\_\_\_\_\_

# Defendant's First Set of Interrogatories to Plaintiff

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

BOSTON MUNICIPAL COURT  
DEPARTMENT OF THE TRIAL COURT  
FOR CIVIL BUSINESS  
CENTRAL DIVISION  
CIVIL NO.

\_\_\_\_\_  
Plaintiff )  
 )  
V. )  
 )  
 )  
 )  
 )  
Defendant )  
\_\_\_\_\_ )

## DEFENDANT'S FIRST SET OF INTERROGATORIES TO PLAINTIFF [name]

In answering each of the following Interrogatories, you must make such inquiry of your principals, agents, servants, and attorneys as will enable you to make complete and true answers to these Interrogatories and examine all bills, letters, files and other instruments which in any way refer to the transactions purported to have taken place.

You must supplement and/or amend your responses to this discovery if after you have responded you learn:

- (1) the identity of other persons with information about the question asked or the identity of expert witness you intend to have testify at trial; and
- (2) that any of the information you gave in the responses was incorrect when made or is no longer true.

Also, in answering each of the following Interrogatories:

- (a) identify any document relied upon or which forms a basis for the answer given by date, sender, recipient, location and custodian; and,
- (b) state whether the information furnished is within the personal knowledge of the person answering and, if not, give the name of each person to whom the information is a matter of personal knowledge; and,
- (c) identify each person who assisted or participated in preparing or supplying any of the information given in answer to, or relied upon in preparing in preparing answers to, each of the following Interrogatories by supplying the name and address of each such person.

For purposes of these **Interrogatories**, the following definitions apply:

- (a) The term "document" as used here includes: writings, drawings, graphs, charts, photographs, recordings, data compilations (translated, if necessary by the respondent through detection devices into reasonable usable form), contracts, agreements, correspondence, memoranda, reports, notes, requests, bills, orders, notices, writs, declarations, complaints, answers and other court pleadings, schedules, tabulations, checks, diary entries, telegrams, diagrams, films, newspaper clippings, computer files, e-mails, and other writings and recordings of whatever

nature, whether signed or unsigned, transcribed or not, and whether asserted to be privileged or not.

(b) The terms "you" and "your" refer to the Plaintiff, [ \_\_\_\_\_ ] and its agents, contractors, servants, employees, attorneys and accountants.

(c) The term plaintiff refers to [name] and its agents, contractors, servants, employees, attorneys and accountants.

(d) The term defendant refers to [name].

(e) The term "communication" as used herein shall mean the transfer, exchange, disclosure, or transmittal of information (in the form of facts, ideas, inquiries, or otherwise) whether orally, or by document, whether face-to-face, by telephone, by mail, by personal delivery, by computer, by e-mail, or otherwise.

#### INTERROGATORIES

1. Please state the name, address, employer, business location and position of the person or persons answering these Interrogatories and also of all other persons who assisted in gathering information for the answers.

2. On [ date], did the plaintiff or its counsel possess any written credit application signed by the defendant or any written contract signed by the defendant. If your answer is yes, please identify any such document by date, sender, recipient, location and custodian.

3. For [ \_\_\_\_\_ ] Bank credit card, account number [ \_\_\_\_ ], please state:

- a) the date that [ \_\_\_\_\_ ] Bank opened the account;
- b) the date that [ \_\_\_\_\_ ] Bank closed the account;
- c) the date of the last purchase on the account;
- d) the date of the last payment on the account.

4. State the date, amount, and nature of each late charge or other penalty charge assessed to the [ \_\_\_\_\_ ] Bank credit card, account number [ \_\_\_\_\_ ].

5. For each month that [ \_\_\_\_\_ ] Bank credit card, account number [ \_\_\_\_\_ ] was open, please state what interest rate was charged on the account.

6. Please list all charges and debits to [ ] Bank credit card, account number [ \_\_\_\_\_ ], by date, amount of charge or debit, nature of the charge or debit, and resulting balance on the account, from the date that the account was opened through December 11, 2004.

7. For all payments that were received by the plaintiff or its predecessors in interest on this account, please state the date, amount, and how the payment was applied to interest, principal, and/or other charges, specifying same.

8. As to the claim in question upon which the plaintiff is suing, please state:

- a) the amount which plaintiff paid to acquire the claim;
- b) the name and address of the entity from which the plaintiff purchased the claim;
- c) the date of such purchase;
- d) the manner of purchase.

9. Identify any document relied upon or which forms a basis for the answer given to Interrogatory number 8 by date, sender, recipient, location and custodian.

10. Please state whether the claim upon which plaintiff is suing may be returned or refunded to the predecessor in interest, and under what circumstances.

11. Please state the name and address of all entities, corporations, partnerships, which have owned the claim upon which the plaintiff sues, and, for each entity, state the amount each entity paid to acquire the claim and the date of acquisition.

12. State the full name, residential address, name of employer, position, business address and relationship (if any) to you of each person who has knowledge of the facts in this case, or who might possibly be called by plaintiff as a fact witness, and for each such person summarize the facts within the knowledge of such person.

13. Please identify by full name, residential address, name of employer and business address each person whom you expect to call as an expert witness at the trial of this action and, with respect to such expert witness, please state the subject matter on which each such expert is expected to testify, the substance of the facts and opinions to which each such expert is expected to testify and a summary of the grounds for each opinion to which each such expert is expected to testify.

14. Please state in detail and with particularity each and every fact and circumstance which supports your claim that the defendant owes the plaintiff [ \_\_\_\_\_ ].

15. Please describe in detail the Visa [ \_\_\_\_\_ ] Bank Credit Protection plan that was sold to the defendant, including the terms of the plan, the date the plan was sold to the defendant, the cost of the plan, the date the plan was terminated and any benefits that were paid to the defendant or to [ \_\_\_\_\_ ] Bank credit card, account number [ \_\_\_ ] by the plan.

Date:

For the defendant,

\_\_\_\_\_

#### CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was served upon the attorney of record for each other party by regular mail, postage prepaid on [ . ].

\_\_\_\_\_



# Defendant's Response to Plaintiff's First Request for Admissions

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

BOSTON MUNICIPAL COURT  
DEPARTMENT OF THE TRIAL COURT  
FOR CIVIL BUSINESS  
CENTRAL DIVISION  
CIVIL NO.

\_\_\_\_\_  
Plaintiff )  
 )  
V. )  
 )  
 )  
Defendant )  
\_\_\_\_\_ )

## DEFENDANT'S RESPONSE TO PLAINTIFF'S FIRST REQUEST FOR ADMISSIONS

The defendant responds to the Request for Admissions as follows:

### REQUEST 1

You applied to [ \_\_\_\_\_ ] Bank for a credit card.

### RESPONSE 1

I can neither admit nor deny this request as I have no memory concerning it and no records of it and the information known to me or readily obtainable by me is insufficient to enable me to admit or deny.

### REQUEST 2

You received a credit card from [ \_\_\_\_\_ ] Bank.

### RESPONSE 2

Admitted

### REQUEST 3

You have a credit card from [ \_\_\_\_\_ ] Bank.

### RESPONSE 3

Admitted

### REQUEST 4

Credit Card account numbered [ \_\_\_\_\_ ] was issued to you by [ \_\_\_\_\_ ] Bank.

### RESPONSE 4

Admitted

### REQUEST 5

You used Credit Card account numbered [ \_\_\_\_\_ ] to make purchases of goods and/or services.

### RESPONSE 5

Admitted

REQUEST 6

You used Credit Card account numbered [ \_\_\_\_\_ ] to obtain cash advances.

RESPONSE 6

Denied

REQUEST 7

You transferred balanced from other Credit Card accounts to your Credit Card numbered [ \_\_\_\_\_ ].

RESPONSE 7

Denied

REQUEST 8

You received periodic account statements with respect to Credit Card account numbered [ \_\_\_\_\_ ].

RESPONSE 8

Admitted

REQUEST 9

You received monthly account statements from [ \_\_\_\_\_ ] Bank with respect to Credit Card account numbered [ \_\_\_\_\_ ].

RESPONSE 9

Admitted

REQUEST 10

You received periodic account statements from [ \_\_\_\_\_ ] Bank with respect to Credit Card account numbered [ \_\_\_\_ ].

RESPONSE 10

Admitted

REQUEST 11

You made payments with respect to Credit Card account numbered [ \_\_\_\_\_ ].

RESPONSE 11

Admitted

REQUEST 12

You received a copy of the credit card agreement with respect to Credit Card account numbered [ \_\_\_\_\_ ].

RESPONSE 12

I can neither admit nor deny this request as I have no memory concerning it and no records of it and the information known to me or readily obtainable by me is insufficient to enable me to admit or deny.

REQUEST 13

You were required to make at least the minimum payment amount as shown due on the periodic account statements you received regarding your Credit Card account numbered [ \_\_\_\_\_ ].

RESPONSE 13

The defendant objects to this request as stating a conclusion of law and also states that I can neither admit nor deny this request as I have no memory concerning it and no records of it and the information known to me or readily obtainable by me is insufficient to enable me to admit or deny.

REQUEST 14

You failed to make at least some of the minimum periodic payments regarding your Credit Card account numbered [ \_\_\_\_ ].

RESPONSE 14

Admitted.

REQUEST 15

You defaulted with respect to your payment obligations relating to your Credit Card account numbered [ \_\_\_\_\_ ].

RESPONSE 15

The defendant objects to this request as stating a conclusion of law.

REQUEST 16

You did not authorize any other person to make charges, obtain cash advances and/or transfer account balances from other credit cards with respect to your Credit Card account numbered [ \_\_\_\_\_ ].

RESPONSE 16

Admitted.

REQUEST 17

No person other than you used your Credit Card account numbered [ \_\_\_\_ ] to make charges, obtain cash advances and/or transfer account balances from another credit card.

RESPONSE 17

Admitted.

REQUEST 18

You have not disputed the validity of any charges for goods or services made, cash advances obtained and/or other credit card balances transferred to your Credit Card numbered [ \_\_\_\_\_ ].

RESPONSE 18

I can neither admit nor deny this request as I do not know what charges there currently are on Credit Card numbered [ \_\_\_\_\_ ] so I am unable to say whether they are valid.

REQUEST 19

As of December 11, 2004, the balance due on your Credit Card account numbered [ \_\_\_\_\_ ] was [ \_\_\_\_\_ ].

RESPONSE 19

I can neither admit nor deny this request as the information known to me or readily obtainable by me is insufficient to enable me to admit or deny.

REQUEST 20

You owe the Plaintiff the sum of [ \_\_\_\_\_ ] with respect to your Credit Card account numbered [ \_\_\_\_\_ ].

RESPONSE 20

I deny that I ever entered into any kind of contract with Plaintiff [ \_\_\_\_\_ ], and can neither admit nor deny the remainder of this request as the information known to me or readily obtainable by me is insufficient to enable me to admit or deny.

Signed under the pains and penalties of perjury this \_\_\_\_\_ day of \_\_\_\_\_.

Date:  
For the defendant

\_\_\_\_\_

**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the above document was served upon the attorney of record for each other party by regular mail, postage prepaid on[ \_\_\_\_\_ ].

\_\_\_\_\_

# Defendant's Answers to Plaintiff's First Set of Interrogatories

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

BOSTON MUNICIPAL COURT  
DEPARTMENT OF THE TRIAL COURT  
FOR CIVIL BUSINESS  
CENTRAL DIVISION  
CIVIL NO.

\_\_\_\_\_  
Plaintiff )  
 )  
V. )  
 )  
 )  
Defendant )  
\_\_\_\_\_ )

## DEFENDANT'S ANSWERS TO PLAINTIFF'S FIRST SET OF INTERROGATORIES

### General Objections

1. The defendant objects to each interrogatory to the extent that it seeks information that is within the attorney-client privilege.
2. The defendant objects to each interrogatory to the extent that it seeks information that constitutes attorney work product and is protected by the trial preparation privilege.

Each of the foregoing general objections is incorporated, as though fully set forth, in each response below.

### Reservation of Rights

Defendant expressly reserves her right to supplement these responses if additional information is later identified. By responding to any interrogatory, defendant does not concede the materiality of the subjects to which it refers. By providing the following answers, defendant does not waive, and hereby expressly reserves her right to assert any and all objections as to the admissibility of such answers into evidence at the trial of this action, or in any other proceedings, on any and all grounds, including, but not limited to, competency, relevancy, materiality, and privilege.

### INTERROGATORY 1

Please identify yourself fully, giving your full name, date of birth, the last four (4) digits of your Social Security number, current residential address, current business address, occupation, and the name of your current employer.

### ANSWER 1

### INTERROGATORY 2

Please state whether you maintain a credit card account with [ \_\_\_\_\_ ] Bank.

### ANSWER 2

Not currently.

### INTERROGATORY 3

Please state whether you received the [ \_\_\_\_\_ ] Bank credit card, account number [ \_\_\_\_\_ ].

ANSWER 3

Yes.

INTERROGATORY 4

Please state each and every address at which you have resided for the period of more than two weeks, and each and every address at which you have received mail, including but not limited to post office boxes, since the date you applied for or received the [ \_\_\_\_\_ ] Bank credit card, account number [ \_\_\_\_\_ ].

ANSWER 4

Dorchester, MA

Dorchester, MA

Dorchester, MA

INTERROGATORY 5

Please state whether you used the [ \_\_\_\_\_ ] credit card, account number [ \_\_\_\_\_ ] to make charges.

ANSWER 5

Yes.

INTERROGATORY 6

If the answer to the above-interrogatory is in the affirmative please state the following information about the [ \_\_\_\_\_ ] Bank credit card, account number [ \_\_\_\_\_ ].

- (a) the date you first used the credit card;
- (b) the date you last used the credit card;
- (c) the amount of the charges you made in connection with the credit card;
- (d) the present location of the credit card; and
- (e) the reason you stopped making charges on the credit card.

ANSWER 6

(a) I'm not sure.

(b) I believe it was in 2001.

(c) I don't have a record of this.

(d) I have the card.

(e) I was diagnosed with breast cancer and was unable to work due to my medical condition and treatment.

INTERROGATORY 7

Please state whether you received monthly statements for the [ \_\_\_\_\_ ] Bank credit card, account number [ \_\_\_\_\_ ].

ANSWER 7

Yes, in the past.

INTERROGATORY 8

Please state whether you received a copy of the cardholder agreement for the [ \_ ] Bank credit card account number [ \_\_\_\_\_ ] from [ \_\_\_\_\_ ] Bank and whether you have a copy of it in your possession.

ANSWER 8

I don't remember being given a cardholder agreement. I do not have a copy in my possession.

INTERROGATORY 9

Please state whether you made monthly payments on the [ \_\_\_\_\_ ] Bank credit card, account number [ \_\_\_\_ ], at issue in this litigation.

ANSWER 9

Yes.

INTERROGATORY 10

If the answer to the preceding interrogatory is in the affirmative, please state the following information about the [ \_\_\_\_\_ ] Bank credit card, account number [ \_\_\_\_\_ ].

- (a) the date of each such payment made on this credit card account,
- (b) the amount of each payment made on this credit card account,
- (c) whether you currently have in your possession copies of the checks or the actual returned checks which you sent as payments on this account,
- (d) the date of the last payment you made with respect to this account, and
- (e) to whom each of the payments on the account was made.

ANSWER 10

- (a) I don't recall or have a record of this.
- (b) Before I got sick, I paid the amount on the bill every month.
- (c) No.
- (d) I don't recall.
- (e) [ \_\_\_\_\_ ] Bank.

INTERROGATORY 11

Please state the full name and address of each and every person, including yourself, who signed the application for the [ \_ ] Bank credit card, account number [ \_\_\_\_\_ ].

ANSWER 11

INTERROGATORY 12

Was the application for the [ \_\_\_\_\_ ] Bank credit card, account number [ \_\_\_\_\_ ], made over the telephone or through the use of the Internet?

ANSWER 12

No.

INTERROGATORY 13

If at any time since the date you applied for or received the [ \_\_\_\_\_ ] Bank credit card, account number [ \_\_\_\_\_ ], you did not make the monthly payments, please describe in detail your reason for not doing so.

ANSWER 13

I was diagnosed with breast cancer in 2001 and was unable to work due to my disability. I did not have enough money to make payments on the credit card. I was under severe financial strain. I couldn't even afford to pay my rent. I told the [ \_\_ ] Bank that I could not afford to make any payments because I had cancer and was disabled and couldn't work.

INTERROGATORY 14

Please describe by full name, residential address, name of employer, business address and relationship (if any) to you, each person whom you expect to call as an expert witness at the trial of this action and, with respect to each such expert witness, please state the subject matter on which each such expert is expected to testify, the substance of the facts and opinions to which

each such expert is expected to testify and a summary of the grounds for each opinion to which each such expert is expected to testify.

ANSWER 14

None planned presently.

INTERROGATORY 15

Please describe by full name, residential address, name of employer, business address and relationship (if any) to you, each person whom you expect to call as a witness at the trial of this action and with respect to each such person, please state in detail the substance of the facts to and/or about which each such person is expected to testify.

ANSWER 15

Dorchester, MA 02

Unemployed due to disability

I will testify as to my illness and disability and inability to make payments to the [ \_\_\_\_\_ ] Bank. I began to feel ill in or about May of 2001 and started missing work. I was diagnosed with inflammatory breast cancer on August 3, 2001 and had a mastectomy in 2002. I told the Bank about my cancer and treatment and that I could not make payments. I am still disabled.

INTERROGATORY 16

If you believe that a sum of money is due the Plaintiff, with respect to the [ \_\_\_\_\_ ] Bank credit card, account number [ \_\_\_\_\_ ], at issue in this litigation, but that amount due is different than the amount claimed by the Plaintiff in the Complaint and/or Statement of Damages, please state the amount that you believe to be due and describe in full and complete detail and with particularity the method by and manner in which you calculated said amount.

ANSWER 16

I do not have records from which I can calculate an amount that might be due. I do have a record that shows that I was enrolled in the [ \_\_\_\_\_ ] Bank's Credit Protection Plan. My lawyer tells me that this plan should have made payments for me when I was unable to work due to my disability. This would affect any amount that might be due.

INTERROGATORY 17

Did you ever authorize a person other than yourself to utilize the [ \_\_\_\_\_ ] Bank credit card, account number [ \_\_\_\_\_ ], at issue in this litigation to incur charges. If so, please state the full names and addresses of each such person and when they used the credit card.

ANSWER 17

No.

INTERROGATORY 18

Please state your knowledge whether any person(s) other than yourself ever used the [ \_\_\_\_\_ ] Bank credit card, account number [ \_\_\_\_\_ ], without your permission or made charges to your account that you did not authorize.

ANSWER 18

Not to my knowledge.

INTERROGATORY 19

If the answer to the preceding interrogatory is in the affirmative please state the following information regarding unauthorized use of the [ \_\_\_\_\_ ] Bank credit card, account number [ \_\_\_\_\_ ]:



- (a) the full name and address of each such person;
- (b) the date and time each such charge was made;
- (c) the amount of each unauthorized charge;
- (d) the nature of the goods or services charged to the account in an unauthorized manner;
- (e) the manner in which the person(s) obtained your credit card or credit card account number in order to make the charges;
- (f) whether you reported the unauthorized use of the credit card to [ \_\_\_\_\_ ] Bank;
- (g) the full name of each person to whom you reported the unauthorized use of your credit card;
- (h) the manner you reported the unauthorized use of your credit card; and
- (i) the date you reported the unauthorized use of your credit card; and
- (j) what, if anything, was done by [ \_\_\_\_\_ ] Bank regarding the unauthorized charges to your account.

ANSWER 19

N/A

INTERROGATORY 20

If you or anyone on your behalf, ever disputed any amount or item charged to the [ \_\_\_\_\_ ] credit card, account number [ \_\_\_\_\_ ], at issue in this litigation please state in detail and with particularity the following information:

- (a) identify the date of each such disputed charge;
- (b) identify the amount of each such disputed charge;
- (c) identify the merchant, individual, firm or entity identified as making each disputed charge;
- (d) whether each such disputed charge was made in writing; and if so, identify the date of each such writing and the person or entity to whom each such writing was directed; and
- (e) the results of each said dispute; or, in any such dispute has not been resolved, please identify each of those disputes which have not been resolved.

ANSWER 20

None.

INTERROGATORY 21

Please state in detail and with particularity each and every reason why you feel you do not owe the Plaintiff the amount of money alleged in their Complaint in this action to be due and owing on the [ \_\_\_\_\_ ] Bank credit card, account number [ \_\_\_\_\_ ].

ANSWER 21

I never entered into any kind of contract or agreement with the [ \_\_\_\_\_ ] Investment Corporation and have never been presented with any documentation that shows that any debt I had to the [ \_\_\_\_\_ ] Bank was validly sold to the plaintiff. In addition, my lawyer tells me that the [ \_\_\_\_\_ ] Bank's Credit Protection Plan should have made payments on my account when I developed cancer and was unable to work. I do not think that these payments were made. Also, I dispute the validity of interest, fees and charges that were added to this account after my last payment.

INTERROGATORY 22

Please state in detail and with particularity each and every fact and circumstance which supports your claim that the Plaintiff has failed to state a claim upon which relief may be granted as is alleged in your Answer to the Plaintiff's Complaint.

ANSWER 22

Objection: This interrogatory calls for a conclusion of law.

INTERROGATORY 23

Please state in detail and with particularity each and every fact and circumstance which supports your claim that the Plaintiff's claim is barred by the Statute of Limitations as is alleged in your

Answer to the Plaintiff's Complaint, including in your response the date upon which the Statute of Limitations began to run and the date upon which the Plaintiff's claim was extinguished by the running of the Statute of Limitations.

ANSWER 23

I believe that the statute of limitations began to run in 2001. I will provide a further answer to this interrogatory after I receive the defendant's responses to my discovery requests.

Signed under the pains and penalties of perjury this \_\_\_\_ day of \_\_\_\_\_.

\_\_\_\_\_

For the Defendant

# Final Request for Answers under Rule 33 (a)

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS

BOSTON MUNICIPAL COURT  
CIVIL ACTION No. :

\_\_\_\_\_  
Plaintiff )  
 )  
V. ) FINAL REQUEST FOR ANSWERS  
 ) UNDER RULE 33 (a)  
Defendant )  
\_\_\_\_\_ )

Now comes the Defendant, [ \_\_\_\_\_ ] and says that on [ \_\_\_\_\_ ], Interrogatories were served upon Plaintiff's Attorney, [ \_\_\_\_\_ ] and the provisions of Rule 33 (a) of this Court relative thereto have been complied with, and that the party interrogated has failed to serve or file timely Answers thereto within forty-five days.

Wherefore, Defendant, hereby makes this final request, pursuant to Rule 33 (a) (3), that the Plaintiff serve Defendant's Counsel, [ \_\_\_ ] with Answers to Interrogatories at [ \_\_\_\_\_ ] within the thirty days from the date of this final request.

Notice: The Defendant may apply for final judgment for relief or dismissal in the event that Answers are not timely received pursuant to this request in accordance with the provisions of Massachusetts Rules of Civil Procedure, Rule 33 (a) (4).

Date:  
For the defendant,

\_\_\_\_\_

## CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was served upon the attorney of record for each other party by regular mail, postage prepaid on [ \_\_\_\_\_ ].

\_\_\_\_\_

# Stipulation of Dismissal

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS

BOSTON MUNICIPAL COURT  
CIVIL ACTION No. :

\_\_\_\_\_)  
Plaintiff, )  
 )  
vs. )  
 )  
 )  
Defendant )  
\_\_\_\_\_)

## STIPULATION OF DISMISSAL

Now come the parties in the above entitled action and, pursuant to Mass.R.Civ.P. Rule 41(a)(1)(ii) stipulate that the within action shall be dismissed **WITH** prejudice and **WITHOUT** costs as to either party, waiving any and all rights to appeal.

By its attorney,

\_\_\_\_\_

By her attorney,

\_\_\_\_\_

# Defendant's Motion for Relief from Judgment

Commonwealth of Massachusetts  
, ss.

DISTRICT COURT  
DEPARTMENT OF THE TRIAL COURT  
Civil Action No.:

\_\_\_\_\_  
PLAINTIFF )  
 )  
v. )  
 )  
DEFENDANT )  
\_\_\_\_\_ )

## DEFENDANT'S MOTION FOR RELIEF FROM JUDGMENT

NOW COMES Defendant, [ \_\_\_\_\_ ], in the above-captioned matter and, pursuant to Rule 60(b) of the Massachusetts Rules of Civil Procedure, respectfully moves this Honorable Court, for relief from the Judgment entered by the Court on [date], on the grounds of [mistake, inadvertence, excusable neglect or any other reason justifying relief from the operation of the judgment]. As grounds in support of this motion Defendant refers to the Affidavit attached hereto and incorporated by reference herein.

Dated: \_\_\_\_\_ Respectfully submitted.

\_\_\_\_\_  
, Esq.  
Attorney for Defendant

## NOTICE OF HEARING ON MOTION

To:

**Please take notice** that the undersigned will present for hearing the within Defendant's Motion for Relief from Judgment before the District Court Department of the Trial Court in [ \_\_\_\_\_ ], MA on [ \_\_\_\_\_ ], at **9:00 a.m.**, or as soon thereafter as counsel can be heard.

Dated: \_\_\_\_\_, Esq.

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the within Defendants Motion for Relief from Judgment and affadavit was this day served upon Plaintiff by mailing same, first class postage prepaid, to \_\_\_\_\_, Esq., Attorney for Plaintiff, of [ \_\_\_\_\_ ], together with notice of the place, date and time of hearing thereon.

SIGNED under the pains and penalties of perjury.

Dated: \_\_\_\_\_, Esq.  
Attorney for Defendant  
BBO#

# Defendant's Motion to File Answer Late, Assert Affirmative Defenses and Counterclaims

Commonwealth of Massachusetts  
Worcester, ss

The Trial Court  
Gardner Division  
District court department  
Civil Action #

\_\_\_\_\_  
PLAINTIFF )  
 )  
v. )  
 )  
DEFENDANT )  
\_\_\_\_\_ )

## DEFENDANT'S MOTION TO FILE ANSWER LATE, ASSERT AFFIRMATIVE DEFENSES AND COUNTERCLAIMS

NOW COMES Defendant, [ \_\_\_\_\_ ], in the above-captioned matter and respectfully moves this Honorable Court to allow her to file her answer late, assert affirmative defenses and counterclaims for the following reasons:

The Defendant was served with the complaint herein on or about [ \_\_\_\_\_ ]

Shortly thereafter, the Defendant called Plaintiff's attorney and responded to the complaint.

The Defendant disputed the complaint to Plaintiff's attorney and also told him that collection of this debt was barred as the statute of limitations to sue on it had passed.

Plaintiff's attorney misled the Defendant as to the status of her account and stated he would request further documentation.

The Defendant called the Gardner District Court and asked them when she was to appear on this matter. The clerk stated that no court date had been set. The Defendant reasonably believed that she could plead her defenses when a court date was set.

The Defendant reasonably believed that the Plaintiff would not go forward on this matter as Plaintiff had promised to provide further documentation and Defendant reasonably relied on this promise.

On February 27, 2006 a default judgment was entered against her.

The Defendant reasonably believed she was protected from having a judgment entered against her by the applicable Statute of Limitations.

The Defendant has filed a Motion for Relief from Judgment that is to be heard before this court simultaneously with this motion.

The Plaintiff has not provided sufficient documentation to substantiate its claim for damages.

The Plaintiff claims the Defendant breached the payment terms and conditions of her obligation to Plaintiff but has failed to submit documentation as to those terms and conditions.



# Affidavit of Defendant in Support of Motion for Relief from Judgment

Commonwealth of Massachusetts  
, ss.

DISTRICT COURT DEPARTMENT  
OF THE TRIAL COURT  
Civil Action No.:

\_\_\_\_\_  
PLAINTIFF )  
 )  
v. )  
 )  
DEFENDANT )  
\_\_\_\_\_ )

## Affadavit of defendant, [ \_\_\_\_\_ ], in support of MOTION FOR RELIEF FROM JUDGMENT

NOW COMES Defendant, [ \_\_\_\_\_ ], in the above-captioned matter and states under the pains and penalties of perjury the following facts to support the within Motion for Relief From Judgment.

On or about December 20 2005 I received a mailing from the Plaintiff's attorney [ \_\_\_\_\_ ]. The letter contained a photocopy of a court complaint with my name on it. The court document did not have a docket number or date.

Upon receipt of this court document I called Plaintiff's attorney [ \_\_\_\_\_ ]. I was told by the firm's representative, Sara, that this was a warning and I had one month to pay or they would file this document with the court.

I asked her if she was threatening me and she stated that she was not threatening me and that this was just a warning.

The representative for the Plaintiff stated that a payment of \$57.22 had been received in Feb. 2000. My credit report that I pulled on June 21, 2006 stated that I made a recent payment of \$487.00 on this account. I knew this statement to be untrue so I asked for proof of payment which they have failed to send me.

I have not paid on this account for over 6 years and I believed that no law suit could be legally filed. I looked on the Attorney General's website and found that the statute of limitation was six years.

On January 28, 2006 I received another copy of the court filing which demanded payment and response.

I called Plaintiff's attorney and was told by Attorney [ \_\_\_\_\_ ] that I needed to respond to him. I believed that I had responded to him through my phone call.

I told Attorney [ \_\_\_\_\_ ] that this debt was uncollectible as the statute of limitations had passed.

Attorney [ \_\_\_\_\_ ] stated to me that the statute of limitations did not count on unsecured debt.



On or about February 2006, I called the Gardner District Court and asked them when I was scheduled to appear.

The clerk from the Gardner District Court stated that I did not need to appear and no hearing was scheduled in my case.

I thought that this was just another attempt by the Plaintiff to give me another warning.

I thought that since I was protected by the statute of limitations the court case would not proceed.

On or about March 2006 I received notice that a default judgment was entered against me. Again I thought that I was protected by the Statute of Limitations.

On May 12, 2006 my employer received a letter from the Leominster District Court regarding my wage garnishment.

On or about May 16, 2006 I was served with a copy.

My boss called me in and stated that this court document concerned a wage garnishment. I was very embarrassed, humiliated and distressed that my boss was notified of these proceedings and ordered to take time off work to be present for the court proceeding.

On or about June 15, 2006 I received a copy of an entry for default for the wage attachment. I called The Leominster Court and asked how I could have defaulted when the court date wasn't until June 28, 2006. I was told that I was supposed to respond to the complaint. I thought that the court date was scheduled so I could respond to the complaint.

I did not hire an attorney because I did not have the financial means to do so.

On or about June 21, 2006 I retained an attorney because these proceedings have caused me and my family great emotional distress.

Signed under the pains and penalties of perjury:

Dated: June 23, 2006 ,

---

# Defendant's Memorandum of Law in Support of Motion for Relief from Judgment [Rule 60(b)]

Massachusetts Trial Court  
District Court Department  
Gardner District  
Civil No. 1

WORCESTER, ss.

\_\_\_\_\_  
Plaintiff )  
          v. )  
                  ) )  
Defendant )  
\_\_\_\_\_) )

## DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR RELIEF FROM JUDGMENT [RULE 60(b)]

The Defendant, by her counsel, respectfully submits this Memorandum of Law in support of her motion for relief from the default judgment entered against her in this action on February 27, 2006.

### STATEMENT OF THE CASE

The Plaintiff commenced this action on December 12, 2005. A Deputy Sheriff served the Defendant on January 28, 2006, by leaving a copy of the summons and complaint at [address]. For purposes of this motion, the Defendant does not controvert the sufficiency of service.

On February 27, 2006, this court entered a default against the Defendant for failure to answer or otherwise defend.

On February 27, 2006, this court entered a default judgment against the Defendant in the amount of \$3,148.32.

The Defendant retained counsel on or about June 21, 2006. Counsel filed an appearance on June 23, 2006.

### FACTS

On or about May 1993 Defendant opened a Charge Account with Sears.

On or about February 2000 this account was purchased by another lender.

On or about January 28, 2006 Defendant was served with a lawsuit from Portfolio Recovery Associates.

Shortly after being served Defendant called Plaintiff's attorney and spoke with [name] Esq. disputing the validity of the debt.

Defendant stated to Plaintiff's attorney that the debt was more than 6 years old; it had been more than 6 years since she paid on this account and that the statute of limitations had run on this account.

The Plaintiff's attorney sent a letter to the Defendant detailing their conversation and alluded to the fact that further documentation regarding her account would be forthcoming.

The Plaintiff's attorney's letter states, "The report is dated April 1, 2002. If you review the report that at the time Sears reported the account as charge off bad debt and that the account had been sold to another lender." These sentences together are confusing and are made to convince the client that her debt was charged off in 2002 when it was actually charged off in 2000. (Exhibit A.)

The Plaintiff's attorney gave misleading information and supplied the Defendant with a confusing credit report which she did not understand. (Exhibit B.)

The Defendant called the Gardner Court on or about the first work day in February to inquire as to the court date. The clerk of the court told her that no court date had been set for this docket number.

The Defendant believed this to mean that the court case would not proceed until a court date had been set and Plaintiff's attorney could demonstrate they had a valid claim.

The Defendant also checked the Massachusetts Attorney General's website as to the Statute of Limitations on debt and believed that since more than 6 years had passed since the last payment that the court case could not proceed against her.

The Plaintiff's attorney gave the Defendant a credit report that states the balance on this account in 2000 and 2002 was \$3,148.00.

The Defendant pulled her credit report on June 21, 2006 in which the Plaintiff states that a recent payment of \$487.00 has been paid and reports the balance as of May 2006 to be \$3,148.00.

The claim made by the Plaintiff that a recent payment had been made is misleading and inaccurate as the balance does not reflect any "recent" payment and there has been no payment on this account for more than 6 years. (Exhibit C.)

The Plaintiff is now seeking a wage attachment on the Judgment granted on February 27, 2006 on an account that is believed to be beyond the statute of limitations.

The wage attachment hearing is scheduled for Wednesday, June 28, 2006 to be heard in the Leominster District Court.

The Defendant was unable to afford to retain an attorney to assist her in defending this action until recently. She engaged her present counsel on or about June 21, 2006, and filed the instant motion shortly thereafter.

#### STANDARD FOR GRANTING RELIEF

Mass. R. Civ. P. 60(b) permits a court, on motion made within a reasonable time, to relieve a party from a final judgment for mistake; inadvertence; excusable neglect, newly discovered evidence, fraud or any other reason justifying relief from the operation of the judgment.

A motion under clause (6) must be filed within a reasonable time after entry of the judgment. The question of what constitutes a "reasonable time" for seeking relief under Rule 60(b)(6) is a matter within the sound discretion of the court. *E.g., Gath v. M/A-COM, Inc.*, 440 Mass. 482, 497 (2003).

#### ARGUMENT

The Defendant submits that she filed this motion within a reasonable time after learning of the judgment. After discovery, she may be able to establish one or more defenses or counterclaims that would extinguish or reduce her liability to the Plaintiff. The interests of justice therefore support vacating the judgment.

1. THE DEFENDANT'S FAILURE TO ANSWER TIMELY WAS DUE TO MISTAKE AND EXCUSABLE NEGLIGENCE, AND DEFENDANT FILED THIS MOTION WITHIN A REASONABLE TIME AFTER LEARNING ABOUT THE JUDGMENT

The Defendant's affidavit shows that she first learned about this action and the judgment against her on or about January 28, 2006. After learning of the court proceeding she immediately called Plaintiff's attorney to discuss the matter and to dispute the debt. Defendant then called the Gardner District Court to ask when her court date was scheduled so she could plead her case. The clerk from the Gardner District Court stated that no court date was scheduled in this matter. The Defendant reasonably believed that she would be notified of a court date and that Plaintiff's counsel would send her supporting documentation. She also reasonably believed that she had pled her defense to Plaintiff's attorney. Defendant relied on the Plaintiff's attorney letter of January 30, 2006 and believed that he was investigating the matter. Her failure to answer within the time allowed by law was thus due to mistake and excusable neglect.

After being notified in March of the Default Judgment the Defendant did not at that time have money to retain an attorney and so delayed actually doing so until June 21, 2006. Counsel avers that the approximate three month delay between then and the filing of this motion is not unreasonable given the requirements of researching the facts and the applicable law.

2. THE DEFENDANT HAS POTENTIALLY MERITORIOUS CLAIMS AND DEFENSES

In ruling on a Rule 60(b)(6), the court *may* consider whether the moving party has a meritorious claim or defense. *Parrell v. Keenan*, 389 Mass. 809, 815 (1983). The Defendant need not, however, definitively establish that claim or defense to obtain relief from the judgment. *See Key Bank v. Tablecloth Textile Co.*, 74 F.3d 349, 354-355 (1st Cir. 1996). Rather, she need only show "a potentially meritorious claim or defense which, if proven, will bring success in its wake." *Teamsters, Chauffeurs, Warehousemen & Helpers Union, Local No. 59 v. Superline Transp. Co.*, 953 F.2d 17, 21 (1st Cir. 1992). The Defendant has asserted such a claim as grounds for relief in this case.

The Defendant's affidavit establishes, for purposes of this motion, that she has made no payment of this account in more than 6 years and that she called the Plaintiff's attorney and told him of this fact. The Plaintiff's attorney misled her into thinking he would be investigating this matter and that further documentation of this account would be forthcoming. Defendant's stated that she called the Gardner District Court to inquire as to when her court date was scheduled so she could plead her defense and was told that no hearing was scheduled in this matter. Defendant believed that she would be noticed of a court date to plead her defense.

In short, and through no fault of her own, the Defendant lacked knowledge of the legal process. The Plaintiff, on the other hand, is not blameless with respect to the Defendant's ignorance. The Plaintiff's attorney letter was misleading and attached a confusing credit report which the Defendant did not understand. Plaintiff's attorney did not supply the further documentation and his letter of January 30, 2006 had misleading and confusing language. The sentence in the middle of its letter states:

"If you review the report that at the time Sears reported the account as charge off bad debt and that the account had been sold to another lender"

This statement makes no sense and was designed to confuse the Defendant. The Defendant was misled through the correspondence and phone conversation as to how the case would proceed. Although the letter further states that she could seek an attorney she did not have the financial means to do so and believed that Plaintiff's counsel was further investigating the matter.

The Defendant states that this case is beyond the Statute of Limitations as set forth in M.G.L. Chapter 260 § 2.

As in the case now before this court, the plaintiff in *Tateosian v. Carrie Chakarian*, 199 Mass. App. Div. 144, claimed to have a valid statute of limitations defense against the Defendant. The appellate court supported the trial court's decision to vacate the previously-entered default judgment. The plaintiff has the burden of proving facts that will take the case out of the statute of limitation. *Norfolk Financial Corporation v. Wynn*, 2003 Mass. App. Div. 14 and *Williams v. Ely* 423 Mass 467, 474, 668 N.E.2d 799(1996); *Chandler v. Dunlop*, 311 Mass. 1,7, 39N.E. 2d, 969 (1942).

The second ground for relief against the Plaintiff is that it has provided to this court absolutely no evidence that any account ever existed, that any credit card agreement was ever entered into by the Defendant, and that the Plaintiff debt buyer has a legal claim to this debt, nor any evidence as to how it calculated the amount allegedly owed or that they are entitled to fees and interest as stated in its complaint. In *Norfolk Financial Corporation v. McDonald*, 2003 Mass. App. Div. 1533(2003), the court denied attorneys fees and costs based on a sample credit card agreement. Norfolk did not present a copy of the original credit card agreement signed by the Defendant and thus it was not appropriate to award fees and costs. Although the Plaintiff has not asked for attorney's fees in the complaint, it did ask for costs and interest. Costs and interest should not be awarded because there is no contract to support these costs.

The Defendant also has meritorious counterclaims against the Plaintiff under Massachusetts Attorney General Debt Collection Regulations, The Massachusetts Division of Banking Conduct of the Business of Debt Collectors and Loan Servicers, and The Fair Debt Collection Practices Act for, *inter alia*, seeking to collect a time-barred debt.

#### CONCLUSION

For the reasons set forth above, the Defendant is entitled to relief from the judgment entered against her on February 27, 2006. The judgment should be vacated in order to permit the Defendant to answer and assert her potentially meritorious defenses and counterclaims.

Dated:

[ \_\_\_\_\_ ],  
by her attorney,

\_\_\_\_\_  
(BBO # )

, MA

#### CERTIFICATE OF SERVICE

I hereby certify under the penalties of perjury that I served the within Defendant's Memorandum of Law in Support of Motion for Relief from Judgment on the Plaintiff by mailing it, postage prepaid by first class mail, to the Plaintiff's counsel of record, to wit: [name and address]

Dated: June 26, 2006

\_\_\_\_\_  
, Esq.

# Interrogatories to Plaintiff Bank

COMMONWEALTH OF MASSACHUSETTS

CAMBRIDGE DISTRICT COURT  
Middlesex Division  
Civil Action No.: xxx

\_\_\_\_\_  
[ \_\_\_\_\_ ], assignee of  
Credit Card Bank  
Plaintiff  
vs.  
EJ,  
Defendant  
\_\_\_\_\_

## INTERROGATORIES TO PLAINTIFF BANK

The Defendant, EJ ("Defendant"), requests that the Plaintiff, [ \_\_\_\_\_ ], assignee of Credit Card Bank ("Plaintiff"), answer under oath, in accordance with Rule 33 of the Federal Rules of Civil Procedure, the following interrogatories.

## INSTRUCTIONS AND DEFINITIONS

Answers to the Interrogatories must be furnished within thirty days of the service of these Interrogatories.

In answering these Interrogatories, for the convenience of counsel and the Court, please set forth each Interrogatory immediately before your response thereto.

Each Interrogatory should be answered upon your entire knowledge from all sources and all information in your possession or otherwise available to you, including information from your officers, employees, agents, representatives, or consultants and information which is known by each of them. An incomplete or evasive answer is a failure to answer.

If any answer is qualified, state specifically the terms of each qualification and the reasons for it. If an Interrogatory cannot be answered in full, state the part which can be answered and answer the same in full to the extent possible; state further and specifically the reasons(s) why the remainder cannot be answered.

Each Interrogatory is considered continuing, and if Plaintiff obtains information which renders its answers or one of them incomplete or inaccurate, Plaintiff is obligated to serve amended answers on the undersigned.

The terms "document" or "documents" in these Interrogatories shall refer to all writings and recorded materials, of any kind, that are or have been in the possession, control, or custody of Plaintiff or which Plaintiff has knowledge, whether originals or copies.

A request to identify a document is a request to state as applicable:

The date of the document;

The type of the document;

The names and present addresses of the person or persons who prepared the document and of the signers and addresses of the document;

The name of the employer or principal whom the signers, addressers and prepares were representing;

The present location of the document;

The name and current business and home addresses of the present custodians of the original document, and any copies of it;

A summary of the contents of the document; and

If the original document was destroyed, the date and reason for or circumstances under which it was destroyed.

If any Interrogatory may be answered fully by a document, the document may be attached in lieu of an answer if the document is marked to refer to the Interrogatory to which it responds.

#### INTERROGATORIES

State the name(s), business address(es), and job title(s) or capacity(ies) of the officer(s), employee(s), or agent(s) answering or providing any information used to answer each Interrogatory.

Identify all present and past contracts or agreements between Defendant and Credit Card Bank which Plaintiff sought to collect on.

Identify all present and past contracts or agreements between Plaintiff and Credit Card Bank.

Identify the terms relating to interest and fees of all agreements between Plaintiff and Credit Card Bank pursuant to which Plaintiff sought to collect the amount allegedly owed from the Defendant and the effective dates of each such agreement.

Explain how the debt allegedly owed by Defendant was calculated, including an itemization of each fee or interest charge assessed to the account as well as any amounts paid by Defendant.

With respect to each contact with Defendant made on behalf of Plaintiff in connection with the collection of the debt allegedly owed by Defendant, identify the date, time, type (e.g. letter, telephone call), witnesses to or participants in, and the substance of. the contact.

With respect to each contact with someone other than Defendant made on behalf of Plaintiff in connection with the collection of the debt allegedly owed by Defendant, identify the date, time, type (e.g. letter, telephone call), witnesses to or participants in, and the substance of. the contact.

With regard to the debt allegedly owed by Defendant, identify the date Defendant last made a payment. With respect to this date, identify:

What company and/or person accepted the payment;

What company and/or person processed the payment;

Any and all documents identifying the date of last payment;

Any and all documents showing payment was made on this date, including but not limited to, a copy of a cancelled check or other proof of payment; and

Any person with knowledge of the date of last payment.

With respect to any documents identified in Interrogatory 8, state with specificity:

- a. Who created the document;
- b. What date the document was created; and
- c. The source(s) of information used to create the document.

Identify by name, position, address, and phone number all witnesses Plaintiff proposes to call to trial.

List all exhibits Plaintiff proposes to introduce at trial.

Identify each person whom the Plaintiff expects to call as an expert witness at trial, state the subject matter on which the expert is expected to testify and the substance of the facts and opinions to which the expert is expected to testify, and a summary of the grounds for each opinion.

Dated: Respectfully submitted,

The Defendant  
By his Attorney

---

MA BBO #



# Defendant's Request for Production of Documents from Debt Buyer

COMMONWEALTH OF MASSACHUSETTS  
Suffolk, ss.

THE TRIAL COURT  
DISTRICT COURT DEPARTMENT  
EAST BOSTON DIVISION  
Civil Action No.: xxx

_____	)
XX FUNDING LLC,	)
Assignee of Bank and Store XX	)
Plaintiff	)
vs.	)
FM,	)
Defendant	)
_____	)

## DEFENDANT'S REQUEST FOR PRODUCTION OF DOCUMENTS

Defendant FM ("Defendant") requests that Plaintiff XX Funding LLC, Assignee of Bank and Store XX ("Plaintiff") pursuant to Rule 34 of the Federal Rules of Civil Procedure, produce the documents herein described and permit Defendant and his attorney to inspect them and copy such of them as they may desire.

## INSTRUCTIONS AND DEFINITIONS:

Production of the documents must occur within thirty days of the service of these Interrogatories.

This request is intended to cover all documents in possession of Plaintiff, or subject to its custody and control, regardless of location.

The documents must be made available for this inspection at the offices of counsel for Defendant, [name and address], or at such office of Plaintiff's as may be the location of any of the documents requested.

Inspection and copying of the documents must be permitted by Plaintiff immediately after Plaintiff's response to this request has been filed.

As used in this request, the terms "document" or "documents" shall refer to all writings and recorded materials, of any kind, that are or have been in the possession, control, or custody of Plaintiff or which Plaintiff has knowledge, whether originals or copies.

This request shall be deemed continuing so as to require further and supplemental production if Plaintiff obtains additional documents required to be produced herein between the time of the initial production and the time of trial.

## REQUESTS FOR PRODUCTION

Please produce the following:

All documents relating to the alleged debt of Defendant and the collection thereof.

All documents relating to the original credit card agreement between Defendant and Bank.

All documents relating to Plaintiff's procedures to provide verification of Defendant's alleged debt.

All documents between Plaintiff and Bank regarding the collection of her alleged debt.

All documents relating to Plaintiff's activities to collect the alleged debt of Defendant.

All documents containing a transaction history or itemization of the amount of each portion of the debt and the authority therefore, as well as any amounts already paid by Defendant.

Copies of all reports and documents utilized by any expert Plaintiff proposes to call at trial.

All exhibits which Plaintiff proposes to introduce at trial.

Dated: November 8, 2007

Respectfully submitted,  
The Defendant  
By her Attorney

---

Esq.

MA BBO#

# Defendant 's Answers and Counterclaims (Debt Collection Harassment by Credit Card Bank)

Commonwealth of Massachusetts

Worcester, ss.

DISTRICT COURT DEPARTMENT  
OF THE TRIAL COURT  
Civil Action No.:

\_\_\_\_\_  
BANK )  
 )  
Plaintiff )  
 )  
v. )  
 )  
DEBTOR )  
 )  
Defendant )  
\_\_\_\_\_ )

ANSWER AND  
COUNTERCLAIMS

## DEFENDANT'S ANSWER AND COUNTERCLAIMS

Defendant admits that the Complaint was filed in the Winchendon District Court.  
Defendant has insufficient information to admit or deny Paragraph 2 of the Complaint as to the Plaintiff's address.  
Defendant admits his name and address as stated on Paragraph 3 of the Complaint.  
Defendant denies the allegations set forth in Paragraph 4 of the Complaint.  
Defendant denies each and every allegation of the plaintiff's complaint except as specifically admitted above.

**WHEREFORE**, The Defendant requests that the court dismiss this complaint, with prejudice, and award damages on his counterclaims and legal fees and costs for defending said complaint.

## AFFIRMATIVE DEFENSES

### Affirmative Defense 1

The Plaintiff has failed to state a claim upon which relief can be granted.

### Affirmative Defense 2

The Plaintiff has failed to commence the action within the applicable State of Limitations.

### Affirmative Defense 3

The Court lacks subject matter jurisdiction.

### Affirmative Defense 4

The Court lacks personal jurisdiction over the Defendant.

### Affirmative Defense 5

The Plaintiff has not properly credited the Defendant for payments made.

### Affirmative Defense 6

The Plaintiff waived any right it might otherwise have had to collect on this debt.

### Affirmative Defense 7

The Plaintiff is estopped from asserting a claim to collect on this debt.

**Affirmative Defense 8**

The Plaintiff's claim is barred by the doctrine of res judicata.

**Affirmative Defense 9**

The Plaintiff's claim is barred by accord and satisfaction.

**Affirmative Defense 10**

The Plaintiff's claim is barred because the alleged debt was incurred as a result of fraud.

**Affirmative Defense 11**

The Plaintiff knowingly and willfully engaged in unfair and deceptive practices, in violation of M.G.L. c.93A, and is therefore barred from collecting on the alleged debt.

**Affirmative Defense 12**

The Plaintiff knowingly and willfully violated 940 CMR 7.00 et seq. of the Massachusetts Attorney General's Debt Collection Regulations, and is therefore barred from collecting on the alleged debt.

**FACTS**

On or about March 8, 2006, Defendant wrote to Bank , through his attorney, and enclosed a cease and desist demand stating that Bank should contact Defendant through his attorney.

This letter was sent to Bank via certified mail/return receipt and was signed for on March 13, 2006.

On or about March 24, 2006, Bank notified Defendant that they were in receipt of his cease and desist notice and would only contact his attorney.

On March 30, 2006, Bank wrote to Defendant's attorney acknowledging the cease and desist notice.

Nevertheless, Defendant continued to receive collection calls up to nine times per day on the alleged debt well until April 16, 2006 more than a month after Bank was in receipt of his cease and desist.

At the time they issued the credit cards upon which Plaintiff has sued him, Bank knew that Defendant's sole source of income was Social Security Disability.

All of Defendant's accounts are being charged unconscionable fees, including late fees of \$29.00 per month, over the limit fees of \$29.00 per month, and a Bank Monthly Member Fee of \$4.00, and the default interest of 28.24% is being applied.

**COUNTERCLAIMS OF DEFENDANT/PLAINTIFF**

**PARTIES**

Defendant/Plaintiff in counterclaim is a natural person residing at [address].

Bank Plaintiff/Defendant in counterclaim (hereinafter "Bank ") claims to have a usual place of business at [address]. As used herein, "Bank" refers to the Plaintiff/Defendant in Counterclaim Bank and all those acting on its behalf, including its employees and its agent, TDM TSYS Total Debt Management, Inc.

**COUNT I**

**VIOLATION OF M.G.L. c. 93A**

Defendant /Plaintiff in counterclaim repeats, realleges and incorporates by reference the foregoing allegations of this pleading as stated above.

Plaintiff/Defendant in Counterclaim Bank's multiple failures to comply with the provisions of M.G.L. 93 § 49 and 940 CMR 7.00 et seq. constitutes an unfair or deceptive act or practice under the provisions of M.G.L. c. 93A.

The said failures include the following:

a. VIOLATION OF M.G.L. c. 93§ 49 (a): Debt Collection in an unfair, deceptive or unreasonable manner

Bank has violated M.G.L. c.93§ 49 (a) which states in part that it is an unfair, deceptive or unreasonable debt collection procedure if: "The creditor communicates, threatens to communicate or implies the fact of such debt or alleged debt to a person other than the person who might reasonably be expected to be liable therefore..." Bank and/or its agent, TDM TSYS Total Debt Management, Inc., spoke with his companion on several occasions giving her specific information regarding his account and the alleged debts.

b. VIOLATION OF M.G.L. c. 93§ 49 (b): Debt Collection in an unfair, deceptive or unreasonable manner

Bank has violated M.G.L. c.93§ 49 (b) which states in part that it is an unfair, deceptive or unreasonable debt collection procedure if: "The creditor communicates directly with the alleged debtor after notification from an attorney representing such debtor that all further communications relative to the debt should be addressed to him."

Defendant/Plaintiff's attorney notified Bank through certified mail/return receipt of the cease and desist yet Bank continued to call his home.

Bank ignored these requests to only communicate with his attorney and continued to call him at home.

Bank refused to take his attorney's contact information and stated they would not call his attorney.

c. VIOLATION OF M.G.L. c. 93§ 49(c) : Debt Collection in an unfair, deceptive or unreasonable manner

Bank has violated M.G.L. c.93§ 49 (c) which states in part that it is an unfair, deceptive or unreasonable debt collection procedure if: "The creditor communicates with the alleged debtor in such a manner as to harass or embarrass the alleged debtor, including but not limited to communication at an unreasonable hour . . ."

Bank ignored his Cease & Desist on numerous occasions and harassed him through its collection tactics.

Bank ignored his requests to only communicate with his attorney and continued to call him at home.

On or about March 8, 2006, a representative from Bank began calling his home in excess of 2 calls per day and as many as 9 times a day collecting on this account.

In March and April 2006, a representative from Bank harassed Defendant /Plaintiff in counterclaim and his companion on a daily basis.

On or about March 2006, Defendant /Plaintiff in counterclaim's companion was subjected to verbal abuse by a representative from Bank, stating, "Is he in jail, prison, ill or what? He needs to pay his bill. He owes us money."

On or about March 2006, a representative from Bank disclosed pertinent information regarding Defendant /Plaintiff in counterclaim's account to his companion without prior authorization in an attempt to embarrass, humiliate and coerce payment from Defendant /Plaintiff in counterclaim.

d. VIOLATION OF 940 CMR 7.04(l)(f) Contact with Debtors

Bank violated 940 CMR 7.04(l)(f) of the Massachusetts Attorney General's Debt Collection Regulations which prohibits, *inter alia*, "engaging any debtor in communication via telephone, initiated by the creditor, in excess of two calls in each seven-day period at a debtor's residence . . ."

Bank called Defendant /Plaintiff in counterclaim's house up to nine times per day to collect on this alleged debt.

e. VIOLATION OF 940 CMR 7.04(l)(2) Contact with Debtors

Bank violated 940 CMR 7.04(l)(2) of the Massachusetts Attorney Debt Collection Regulations which prohibits contact with a debtor " after notification from an attorney for a debtor that all contacts relative to the particular debt in question should be addressed to the attorney."

Defendant/Plaintiff in counterclaim alleges that Bank ignored his notifications of his Cease & Desist/Limited Power of Attorney and continued to contact him directly regarding this debt.

Bank ignored his requests that they only contact his attorney and continued to harass him through its collection tactics.

f. VIOLATION OF 940 CMR 7.05 (2) Contact with Persons Residing in the Household of a Debtor

Bank violated 940 CMR 7.05(2) of the Massachusetts Attorney Debt Collection Regulations which state in part, " It shall constitute an unfair or deceptive act or practice for a creditor to imply the fact of a debt, orally or in writing, to persons who reside in the household of a debtor."

Bank disclosed specific information regarding his alleged debt to his companion.

g. VIOLATION OF 940 CMR 7.05 3(d) Harrassing Contact with Persons Residing in the Household of a Debtor

Bank violated 940 CMR 7.05 3(d) of the Massachusetts Attorney Debt Collection Regulations which prohibits ". . . engaging any person in non-identifying communication via telephone with such frequency as to be unreasonable or to constitute a harassment to such person . . . and engaging any person in communications via telephone, initiated by the creditor, in excess of two calls in each seven-day period . . ."

Bank called Defendant/Plaintiff in counterclaim's home up to nine times a day and sometimes spoke with his companion.

At times Bank would refuse to give any identifying information to Defendant/Plaintiff in counterclaim's companion yet stay on the phone with her and harass her as to Defendant/Plaintiff in counterclaim's whereabouts.

h. VIOLATION OF 940 CMR 7.0(6) Contact with Persons  
Other Than Debtors or Persons Residing in the Household of a Debtor

Bank violated 940 CMR 7.06(1)(a) of the Massachusetts Attorney Debt Collection Regulations which state in part, " It shall constitute an unfair or deceptive act or practice for a creditor to contact or threaten to contact persons , other than the debtor...implying the fact of the debt to any such person . . ."

Bank disclosed specific information regarding his alleged debt to his companion.

As a direct and proximate result of the collection activity of Bank as alleged in this Count, Defendant/Plaintiff in counterclaim suffered actual damages in the form of emotional distress, anxiety, anger, headaches, worry, frustration, sleeplessness, and humiliation among other negative emotions.

COUNT II

Reckless and/or intentional infliction of emotional distress

Defendant/Plaintiff in counterclaim repeats, realleges and incorporates by reference the foregoing allegations of this pleading as stated above.

Bank's actions in contacting Defendant /Plaintiff in counterclaim directly, after it knew he was represented by an attorney, calling up to nine times per day, and failing to supervise the collection activities of its agents were intended to inflict emotional distress upon him. Bank knew/should have known that Defendant/Plaintiff in counterclaim would suffer emotional distress from its collection activities.

Bank's collection activities were extreme and outrageous for the following reasons:

Bank knew that Defendant/Plaintiff in counterclaim was represented by an attorney yet continued to contact him directly and knew that he would be intimidated by this direct contact. This was an attempt to harass him and to coerce payment and interfere with his relationship with and reliance upon his attorney.

Bank and/or its agents called up to 9 times a day in order to intimidate and coerce payment on this account causing Defendant/Plaintiff in counterclaim extreme emotional distress.

Bank and/or its agents knew that Defendant/Plaintiff in counterclaim's only source of income was Social Security Disability, knew of his disabilities and vulnerabilities yet continued to harass him and his companion in order to intimidate him and to coerce payment.

Bank and/or its agents embarrassed and humiliated Defendant /Plaintiff in counterclaim by disclosing specific information regarding his account to his companion.

As a direct and proximate result of the collection efforts of Bank, Defendant/Plaintiff in counterclaim has suffered actual damages in the form of emotional distress, anger, anxiety, headaches, worry, frustration, sleeplessness, humiliation among other negative emotions.

COUNT III

Invasion of Privacy by Intrusion upon Seclusion

Defendant/Plaintiff in counterclaim repeats, realleges and incorporates by reference the foregoing allegations of this pleading as stated above.

Bank intentionally interfered, physically or otherwise, with the solitude, seclusion and or private concerns or affairs of Defendant /Plaintiff in counterclaim.

Bank intentionally caused harm to Defendant /Plaintiff in counterclaim's emotional well being by engaging in highly offensive conduct in the course of collecting this alleged debt.

As a direct and proximate result of the collection efforts of Bank, Defendant/Plaintiff in counterclaim has suffered actual damages in the form of emotional distress, anger, anxiety, headaches, worry, frustration, sleeplessness, humiliation among other negative emotions.

COUNT IV  
NEGLIGENCE

Defendant/Plaintiff in counterclaim repeats, realleges and incorporates by reference the foregoing allegations of this pleading as stated above.

Bank hired TDM TSYS Total Debt Management, Inc. to collect monies on this account.

Bank knew or should have known that this firm was not following collection laws and were using tactics known to harass and intimidate debtors such as Defendant/Plaintiff in counterclaim.

Bank had a duty to monitor, oversee and supervise the account placed with TDY TSYS Total Debt Management, Inc. to prevent any violation of Mass. Gen. Laws 93 § 49 and 940 CMR 7.00 et seq.

Bank could have reasonably foreseen that debtors may suffer emotional distress if the debt collection firm it hires resorts to harmful conduct. *See, e.g., Colorado Capital v. Owens*, 03-CV-1126(JS), 2005 US Dist. LEXIS 5219.

As a direct and proximate result of the failure of Bank to supervise and monitor the account placed for collection with its collection agencies, Defendant /Plaintiff in counterclaim suffered emotional distress as alleged above.

**WHEREFORE**, Defendant/Plaintiff in counterclaim prays that judgment be entered against Bank in an amount that will fairly and adequately compensate Defendant/Plaintiff in counterclaim for his emotional distress and conscious pain and suffering and all other damages recoverable, including attorney's fees and costs together with interest, and such other relief as this Honorable Court may deem appropriate. As the Plaintiff/Defendant in counterclaim has violated M.G.L. 93A, the court should exercise its discretion to award double or treble damages in accordance with this statute.

Dated:  
Respectfully submitted,  
Defendant /Plaintiff in counterclaim  
By his Attorney,

---

Attorney for Defendant, and Plaintiff in counterclaim

MA BBO#  
Telephone:

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was served upon the attorney of record for each other party by regular mail, postage prepaid on[ \_ ].



# Defendant's Motion to Dismiss

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

BOSTON MUNICIPAL  
COURT DEPARTMENT  
OF THE TRIAL COURT  
FOR CIVIL BUSINESS  
CENTRAL DIVISION  
CIVIL NO.

\_\_\_\_\_  
Plaintiff )  
 )  
 )  
V. )  
 )  
 )  
Defendant )  
\_\_\_\_\_ )

DEFENDANT'S MOTION TO DISMISS

## DEFENDANT'S MOTION TO DISMISS

The Defendant, \_\_\_\_\_, by counsel, moves that this action be dismissed pursuant to Rule 17(a) of the Mass. Rules of Civil procedure because the action is not prosecuted in the name of the real party in interest. In support of this motion, the Defendant states the following:

1. This action is based on a Complaint which was served upon the Defendant on \_\_\_\_\_ by the Plaintiff, \_\_\_\_\_.
2. The action is a contract action, in which the Plaintiff alleges the Defendant owes the Plaintiff \$\_\_\_\_\_ on the account ending in \_\_\_\_\_.
3. The Plaintiff has failed to provide proof that the Defendant entered into a contract with the Plaintiff regarding account ending in \_\_\_\_\_.
4. The Plaintiff has failed to provide proof of proper assignment from \_\_\_\_\_ of contract rights regarding the account ending in \_\_\_\_\_.
5. Therefore, the Plaintiff lacks status as the real party in interest, and the action must be dismissed.

Date: March 19, 2008

Respectfully Submitted,

\_\_\_\_\_  
Roger Bertling  
Legal Services Center  
122 Boylston St.  
Jamaica Plain, MA 02130  
(617) 522-3003

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS

BOSTON MUNICIPAL COURT  
WEST ROXBURY DIVISION

<p>CAPITAL ONE BANK N.A.,</p> <p>Plaintiff,</p> <p>v.</p> <p>[REDACTED]</p> <p>Defendant.</p>	<p>Civ. Action No. [REDACTED]</p>
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**DEFENDANT’S OPPOSITION TO  
PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT**

Plaintiff has filed a Motion for Summary Judgment (“Plaintiff’s Motion”) on its claim for an account stated and on Defendant’s counterclaims in the above-captioned matter. Under an account stated cause of action, Plaintiff must demonstrate, among other things, that Plaintiff rendered an account statement to Defendant, and that Defendant assented to the amount stated in that account statement. Because Plaintiff has failed to demonstrate the absence of triable issues on both these elements, this Court should deny Plaintiff’s Motion. In addition, other than the conclusory comments of Plaintiff’s counsel, Plaintiff has made no affirmative demonstration to support its motion for summary judgment on Defendant’s counterclaims. Accordingly, summary judgment is not appropriate in this case and Defendant respectfully requests that the Court deny Plaintiff’s Motion.

**ARGUMENT**

Summary judgment may be granted only if the documentary evidence before the court shows that “there is no genuine issue as to any material fact and . . . the moving party is entitled

to summary judgment as a matter of law.” Mass.R. Civ. P. 56(c). In considering a motion for summary judgment, the court must draw inferences from the record against the moving party, and in favor of the party opposing the motion. Coveney v. President and Trustees of the College of Holy Cross, 388 Mass. 16 (1983). Indeed, a “party moving for summary judgment assumes the burden of affirmatively demonstrating that there is no genuine issue of fact on every relevant issue raised by the pleadings. This is so even though . . . he would have no burden if the case were to go to trial.” Mack v. Cape Elizabeth School Bd., 553 F. 720, 722 (1st Cir. 1977); Attorney General v. Bailey, 386 Mass. 367, (1982).

As the Supreme Judicial Court noted in Kourouvacilis v. General Motors Corp., 410 Mass. 706 (1991):

... a party who moves for summary judgment has the burden of initially showing that there is an absence of evidence to support the case of the nonmoving party shouldering the burden of proof at trial. That burden is not sustained by the mere filing of the summary judgment motion or by the filing of a motion together with a statement that the other party has produced no evidence that would prove a particular necessary element of this case. The motion must be supported by one or more of the materials listed in rule 56(c) and, although that supporting material need not negate, that is, disprove, an essential element of the claim of the party on whom the burden of proof at trial will rest, it must demonstrate that proof of that element at trial is unlikely to be forthcoming.

Viewing the facts most favorably to Defendant, Plaintiff’s Motion must be denied.

A. PLAINTIFF HAS FAILED TO DEMONSTRATE THE ABSENCE OF TRIABLE ISSUES UNDER AN ACCOUNT STATED CAUSE OF ACTION.

“An account stated is an acknowledgement of the existing condition of liability between the parties.” Rizkalia v. Abusamra, 284 Mass. 303, 307. An account stated “cannot be made the instrument to create a liability where none before existed, but only determines the amount of a debt where liability exists.” Chase v. Chase, 191 Mass. 556, 562 (1902). A claim for an account stated requires either express or implied assent by the debtor to the amount claimed to be owed.

See Milliken v. Warwick, 306 Mass. 192, 196 (1940); Meredith & Grew, Inc. v. Worcester Lincoln, LLC, 64 Mass.App.Ct. 142, 152-3 (2005). The Supreme Judicial Court has found, however, that “the rendition of an account and its retention by the party to whom it is sent, without objection within a reasonable time, **present a jury question whether the silence of the receiver of the account warrants an inference of the admission of its correctness.**” (emphasis added.) Milliken at 197; see also, Braude & Margulies, P.C. v. Fireman's Fund Ins. Co. 468 F.Supp.2d 190 (D.D.C., 2007.) (Under claim for account stated, the “mere mailing of a bill, and the recipient's silence, do not reflect an agreement to pay.”) A true and accurate copy of the opinion is attached hereto as Ex. A.

To begin with, Plaintiff is simply incorrect as a matter of law when it states that “if the Debtor retains [monthly account] statements for a period of time, without objection, an account stated is constituted....The rendition of the account statements and retention by the party to whom it is sent without objection constitutes a claim for an account stated.” Plaintiff’s Motion at pg. 4. As the Milliken Court noted, the mere retention of the monthly account statements by Defendant presents a jury question as to whether her retention of those monthly bills demonstrated her assent to the amount stated therein.

Plaintiff’s claim for an account stated suffers two additional deficiencies: 1.) Plaintiff is suing for an amount that was never rendered or delivered to Defendant, and 2.) the amount Plaintiff alleges is owed inappropriately includes contract interest. As Plaintiff acknowledges, the monthly credit card account statement would constitute the rendition of the account upon which Plaintiff could sue. Plaintiff then alleges that “Plaintiff **rendered** to the Defendant(s) monthly, full and true accounts of the indebtedness owing by the Defendant(s)...**in an amount as hereinabove set forth** [\$3219.26] which account statements were **delivered to Defendant(s)**

resulting in account stated **for the amount set forth above.**” Complaint at ¶ 5. The allegations contained in paragraph 5 of the Complaint are simply not supported by the documentary evidence before the Court. First, there is no evidence before the Court that an account stated **in the amount of \$3219.26** was ever delivered to the Defendant. In fact, the attachments to Plaintiff’s Motion would appear to directly contradict Plaintiff’s pleadings. The final monthly account statement sent to Defendant states that \$2,763.94 is the amount due, and not \$3,219.26. See May 26, 2007 Monthly Account Statement, attached to the Affidavit of Darina Johnson (“Johnson Affidavit”), and attached hereto as Ex. B. Setting aside the issue that there is no evidence that Defendant ever assented to the correctness of the amount in the May 26, 2007 monthly statement, this discrepancy between Plaintiff’s evidence and Plaintiff’s pleadings is fatal to Plaintiff’s motion. As the Supreme Judicial Court in Baker Auto Co. v. Bennett held, a Plaintiff can not recover on an account stated where evidence shows a balance due which is different than that pleaded. Baker Auto Co. v. Bennett, 219 Mass. 304, 308 (1914).

In addition, Plaintiff’s claim that it is owed \$3,219.26 stems partially from the fact that Plaintiff is inappropriately attempting to add contractual interest to an account stated. As one New York Court that expressly addressed this issue held, a “request for contract interest should not be made if judgment is requested on an account stated, for this claim is independent of any contract provision.” Citibank (S.D.) v. Martin, 807 N.Y.S.2d 284, 291 (Civ. Ct. 2005). A true and accurate copy of the opinion is attached hereto as Ex. C. Likewise, attorneys fees are not available to a plaintiff on an account stated cause of action. Id. at 290.

B. PLAINTIFF'S CONCLUSORY COMMENTS REGARDING DEFENDANT'S COUNTERCLAIMS ARE NOT SUFFICIENT TO DEFEAT DEFENDANT'S COUNTERCLAIMS IN A MOTION FOR SUMMARY JUDGMENT.

Defendant has counterclaimed against Plaintiff for unfair and deceptive practices pursuant to G.L. c. 93A, breach of implied covenant of good faith and fair dealing, unconscionability, and negligent misrepresentation.<sup>1</sup> In opposition to Defendant's counterclaims, Plaintiff merely makes conclusory comments about the terms and conditions of the credit card agreement, but the comments of Plaintiff's counsel are not sufficient to carry Plaintiff's affirmative burden on its motion for summary judgment. See Affirmation In Support of Plaintiff's Motion for Summary Judgment at ¶10. To begin with, the credit card agreement that Plaintiff refers to is not part of the record before the court, so Plaintiff's claims regarding its terms and conditions are wholly unsupported by the record. Although Plaintiff has attached a document labeled "Customer Agreement" and a purported executed signature page to that agreement, a review of these documents demonstrates that the "Customer Agreement" attached **is not** the agreement signed by Defendant. Defendant opened her account in 2000, but the Customer Agreement that Plaintiff has attached to its Motion has a copyright date of 2002, clearly evidencing that this Customer Agreement is not the one Defendant signed. See Customer Agreement attached to Johnson Affidavit, and attached hereto as Ex. D.

In addition, the statement contained in Paragraph 10 of Plaintiff's Affirmation does nothing to address the facts or law underlying Plaintiff's counterclaims. G.L. c. 93A, § 2(a) makes unlawful any "unfair or deceptive acts or practices in the conduct of any trade or commerce." An act or practice that is deceptive or fraudulent may be found to be unfair, but an act or practice need not be deceptive or fraudulent to be unfair. Massachusetts Farm Bureau

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<sup>1</sup> Although Defendant has made several counterclaims against Plaintiff, this Opposition will specifically address the facts as they relate to Defendant's claim for unfair and deceptive practices pursuant to Chapter 93A, as those facts also underlie Defendant's other counterclaims.

Federation, Inc. v. Blue Cross of Massachusetts, Inc., 403 Mass. 722, 729 (1989). An act may be unfair even if it does not violate a statute, or a regulation issued under G.L. c. 93A, § 2. See Schubach v. Household Finance Corp., 375 Mass. 133, 137 (1978). Chapter 93A is "a statute of broad impact which creates new substantive rights and provides new procedural devices for the enforcement of those rights." Slaney v. Westwood Auto, Inc., 366 Mass. 688, 693 (1975). The relief available under Chapter 93A is "sui generis. It is neither wholly tortious nor wholly contractual in nature, and is not subject to the traditional limitations of preexisting causes of action." Id. at 704. The meaning of unfairness under Chapter 93A is not fixed in stone; nor is it limited to conduct that is unlawful under the common law or prior statutes. See Kattar v. Demoulas, 433 Mass. 1, 12-13 (2000). Rather, it is forever evolving to adapt to changing social, economic, and technological circumstances. Nei v. Burley, 388 Mass. 307, 313 (1983).

The Supreme Judicial Court recently addressed the issue of violations of Chapter 93A in a related context – the extension of mortgage loans to debtors ill equipped to pay them back. See Com. v. Fremont Inv. & Loan, 452 Mass. 733 (2008). In Fremont, the Supreme Judicial Court agreed with a Superior Court's finding that a lender's conduct was unfair when it gave mortgage loans to borrowers when the lender should have recognized that those borrowers would be unable and unlikely to repay them. Id. Likewise in this matter, a jury could find that it was unfair for Plaintiff to extend additional credit to Defendant when it should have recognized she would be unable and unlikely to pay it back. The record before the Court demonstrates that Plaintiff originally solicited Defendant for a credit card knowing that she had no employment income and was relying on public assistance to support her children. See Defendant's Amended Answer and Counterclaims<sup>2</sup> at ¶ 10. In addition, the record demonstrates that even though

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<sup>2</sup> Plaintiff's failure to deny the averments in Defendant's Amended Answer and Counterclaims means those averments are deemed admitted, pursuant to Mass. Rule Civ. P. 8(d).

Defendant was consistently over her credit limit, Plaintiff nevertheless solicited Defendant to increase her credit limit from **\$300 to \$2300**. See Monthly Statements attached to Johnson Affidavit; Solicitation, attached to Johnson Affidavit, and attached hereto as Ex. E. The record also demonstrates that Plaintiff used misleading tactics to solicit Defendant to increase her credit limit, by claiming for instance that the offer to increase her credit limit was based on the fact that she was one of Plaintiff's "best customers" and a "preferred cardholder." See Solicitation. Based on this record, a triable issue exists as to whether Plaintiff should have known that Defendant would be unable and unlikely to pay back the credit.

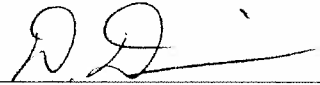

**CONCLUSION**

For the reasons stated herein, Plaintiff's Motion for Summary Judgment should be denied.

Respectfully submitted,

  
By her attorney,

Dated: 

  
David M. Dineen, BBO#   
Greater Boston Legal Services  
197 Friend Street  
Boston, MA 02114



**[EXHIBITS A & C ARE OMITTED]**

**EXHIBIT B**

# NOT PAYING YOUR DEBT DOESN'T MAKE IT GO AWAY.

509013

In fact, even if we report your account as charged off, you'll still be responsible for paying your debt. So why not call us to see what we can do together to keep you from receiving such a serious mark on your credit record?

**YOU'RE BEHIND BY**  
**6**  
**PAYMENTS**

We're here to help. Please contact us to find a solution that's right for you.

You can make a payment with our free check by phone service or speak to an associate by calling 1.800.955.6600.

Make sure you call or pay the amount due on your statement within 30 days to keep your account from being charged off.

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500013-08503

Previous Balance	Payments & Credits	FINANCE CHARGE	Transactions	New Balance	Minimum Payment	Due Date
\$2,690.89	\$0.00	\$38.05	\$35.00	\$2,763.94	\$531.00	May. 26, 2007

Mar. 27, 2007 — Apr. 26, 2007 Page 1 of 1

PLEASE PAY AT LEAST THIS AMOUNT

**Your Account Information**  
 TOTAL CREDIT LINE \$2,300.00  
 TOTAL AVAILABLE CREDIT \$0.00  
 CREDIT LINE FOR CASH \$2,300.00  
 AVAILABLE CREDIT FOR CASH \$0.00

Your account is six payments behind. If we charge off your account due to late payments, we will report the charged-off status to several national credit bureaus, and the Purchase APR as reflected on this statement will be applied to all your outstanding balances. Act now to prevent this from happening. Please pay the amount due on your statement or give us a call at 1.800.955.6600. We'll work with you so you can take control of your account and start rebuilding your credit with Capital One.

**Finance Charges** (Please see reverse for important information)

	Balance rate applied to	Periodic rate	Corresponding APR	FINANCE CHARGE
Purchases	\$1,554.00	0.05425%	19.80%	\$26.13
Cash	\$260.85	0.05425%	19.80%	\$4.39
SpecialTrans	\$895.51	0.02712%	9.90%	\$7.53

ANNUAL PERCENTAGE RATE applied this period: 18.85%

**\*\*Important Notice\*\*** Under the terms we previously disclosed to you, your account is now eligible for an increase in Annual Percentage Rates (APRs) effective immediately. However, Capital One has elected not to raise your APRs at this time. Please be advised that if you fail to keep your account in good standing, Capital One reserves the right to raise your APRs in the future.

**Payments, Credits & Adjustments**

**Transactions**

1	26 APR	PAST DUE FEE	\$35.00
---	--------	--------------	---------

- At Your Service 1-800-955-7070**  
To call Customer Relations or to report a lost or stolen card:
- Send payments to:**  
Capital One Bank - P.O. Box 70884 - Charlotte, NC 28272-0884
- Send inquiries to:**  
Capital One - P.O. Box 30285 - Salt Lake City, UT 84130-0285

As you asked, we've designated your account to close. Please note that your account balance must remain at \$0 for two consecutive monthly statements before it is closed. Please continue to make necessary payments on your account and stop any automatic payments or pre-authorized charges you may have set up. If you make any charges on your Capital One credit card before your account closes (including automatic or pre-authorized charges), your account will remain open and we'll remove the request to close your account.

You were assessed a past due fee because your minimum payment was not received by the due date. To avoid this fee in the future, we recommend that you allow at least 7 business days for your minimum payment to reach Capital One.

6056 506 1 7 26 070426 PAGE 1 of 1 01BC6056  
PLEASE RETURN PORTION BELOW WITH PAYMENT

New Balance	Minimum Payment	Due Date
\$2,763.94	\$531.00	May. 26, 2007

PLEASE PAY AT LEAST THIS AMOUNT

Please print address or phone number changes below using blue or black ink.

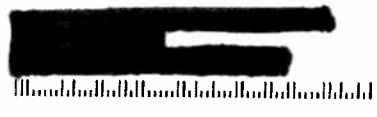
Address \_\_\_\_\_

Home Phone \_\_\_\_\_ Alternate Phone \_\_\_\_\_

E-mail address \_\_\_\_\_

Amount Enclosed

Capital One Bank  
P.O. Box 70884  
Charlotte, NC 28272-0884



1. **How to Avoid a Finance Charge.**

**1. Grace Period.** You will have a minimum grace period of 25 days without finance charge on new purchases, new balance transfers, new special purchases and new other charges if you pay your total "New Balance", in accordance with the important Notice for payments below, and in time for it to be credited by your next statement closing date. There is no grace period on cash advances and special transfers. In addition, there is no grace period on any transaction if you do not pay the total "New Balance."

**2. Accruing Finance Charge.** Transactions which are not subject to a grace period are assessed finance charge 1) from the date of the transaction or 2) from the date the transaction is processed to your Account or 3) from the first calendar day of the current billing period. Additionally, if you did not pay the "New Balance" from the previous billing period in full, finance charges continue to accrue to your unpaid balance until the unpaid balance is paid in full. This means that you may still owe finance charges, even if you pay the entire New Balance indicated on the front of your statement by the next statement closing date, but did not do so for the previous month. Unpaid finance charges are added to the applicable segment of your Account.

**3. Minimum Finance Charge.** For each billing period that your account is subject to a finance charge, a minimum total FINANCE CHARGE of \$0.50 will be imposed.

**4. Temporary Reduction in Finance Charge.** We reserve the right to not assess any or all finance charges for any given billing period.

**2. Average Daily Balance (Including New Purchases).**

Finance charges are calculated by multiplying the daily balance of each segment of your account (e.g., cash advance, purchase, special transfer, and special purchase) by the corresponding daily periodic rate(s) that has been previously disclosed to you. At the end of each day during the billing period, we apply the daily periodic rate for each segment of your account to the daily balance of each segment. Then at the end of the billing period, we add up the results of these daily calculations to arrive at your periodic finance charge for each segment. We add up the results from each segment to arrive at the total periodic finance charge for your account. To get the daily balance for each segment of your account, we take the beginning balance for each segment and add any new transactions and any periodic finance charge calculated on the previous day's balance for that segment. We then subtract any payments or credits posted as of that day that are allocated to that segment. This gives us the separate daily balance for each segment of your account. However, if you paid the New Balance shown on your previous statement in full (or if your new balance was zero or a credit amount), new transactions, which post to your purchase or special purchase segments are not added to the daily balances. We calculate the average daily balance by adding all the daily balances together and dividing the sum by the number of the days in the current billing cycle. To calculate your total finance charge, multiply your average daily balance by the daily periodic rate and by the number of days in the billing period. Due to rounding on a daily basis or due to minimum finance charge assessment, there may be a variance between this calculation and the amount of finance charge actually assessed.

**3. Annual Percentage Rates (APR).**

**4. The term "Annual Percentage Rate" may appear as "APR" on the front of this statement.**

**b. If the code P (Quarterly Prime), L (Quarterly LIBOR), C (Quarterly CD), or S (Bankcard Prime) appears on the front of this statement next to the periodic rate(s), the periodic rate and corresponding ANNUAL PERCENTAGE RATES may vary quarterly and may increase or decrease based on the stated index, as found in The Wall Street Journal, plus the margin previously disclosed to you. These changes will be effective on the first day of your billing period covered by your periodic statement ending in the months of January, April, July and October.**

**c. If the code D (Monthly Prime), F (Monthly LIBOR), or G (Treasury LIBOR) appears on the front of your statement next to the periodic rate(s), the periodic rate and corresponding ANNUAL PERCENTAGE RATES may vary monthly and may increase or decrease based on the stated index, as found in The Wall Street Journal, plus the margin previously disclosed to you. These changes will be effective on the first day of your billing period each month.**

**4. Assessment of Late, Overlimit and Returned Payment Fees.** Under the terms of your customer agreement, we reserve the right to waive or not to assess any fees without prior notification to you without waiving our right to assess the balance of your Account's statement.

**5. Renewing Your Account.** If a membership fee appears on the front of your statement, you have 30 days from the date this statement was mailed to you to avoid paying the fee or to have such fee credited to you if you cancel your account without having to pay the membership fee. To cancel your account, you must notify us by calling our Customer Relations Department and pay your "New Balance" in full (excluding the membership fee) prior to the end of the thirty-day period.

**6. If You Close Your Account.** You can request to close your account by calling our Customer Relations Department. You must destroy your credit card(s) and account access checks, cancel all preauthorized billing and cease using your account. After your request to close, if you continue to transact or do not cancel preauthorized billing arrangements, we will consider receipt of a charge your authorization to keep your account open. Additionally, your account will not be closed until you pay all amounts you owe us including: any transactions you have authorized, finance charges, past due fees, overlimit fees, returned payment fees, cash advance fees and any other fees assessed to your account. You are responsible for these amounts whether they appear on your account at the time you request to close the account or they are incurred subsequent to your request to close the account. This may result in charges appearing on your account after you have requested the account to be closed.

**7. Using Your Account.** Your card or account cannot be used in connection with any internet gaming transactions.

**8. Notice About Electronic Check Conversion.** When you provide a check as payment, you authorize us either to use information from your check to make a one-time electronic fund transfer from your bank account or to process the payment as a check transaction. When we use information from your check to make an electronic fund transfer, funds may be withdrawn from your bank account as soon as the same day we receive your payment, and you will not receive your check back from your financial institution.

**BILLING RIGHTS SUMMARY**  
(In Case of Errors or Questions about Your Bill)

If you think your bill is wrong, or if you need more information on a transaction or bill, write to us on a separate sheet as soon as possible at the address for inquiries shown on the front of this statement. We must hear from you no later than 60 days after we sent you the first bill on which the error or problem appeared. You can call our Customer Relations number, but doing so will not preserve your rights. In your letter, give us the following information: your name and account number, the dollar amount of the suspected error, a description of the error, and an explanation, if possible, of why you believe there is an error; or if you need more information, a description of the item you are unsure about. You do not have to pay any amount in question while we are investigating it, but you are still obligated to pay the parts of your bill that are not in question. While we investigate your question, we cannot report you as delinquent or take any action to collect the amount in question.

**2. Special Rule for Credit Card Purchases**

If you have a problem with the quality of property or service that you purchased with a credit card and you have tried in good faith to correct the problem with the merchant, you may have the right not to pay the remaining amount due on the property or services. You have this protection only when the purchase price was more than \$50.00 and the purchase was made in your home state or within 100 miles of your mailing address. (If we own or operate the merchant, or if we mailed you the advertisement for the property or services, all purchases are covered regardless of amount or location of purchase.) Please remember to sign all correspondence.

† Does not apply to consumer non-credit card accounts  
‡ Does not apply to business non-credit card accounts  
Capital One supports information privacy protection; see our website at [www.capitalone.com](http://www.capitalone.com)  
Capital One is a federally registered service mark of Capital One Financial Corporation. All rights reserved. © 2006 Capital One

TC-06

O1BC6056 - 8 - 12/21/06

**Important Notice:** Payments you mail to us will be credited to your account as of the business day we receive it, provided (1) you send the bottom portion of this statement and your check in the enclosed remittance envelope and (2) your payment is received in our processing center by 3 p.m. ET (12 noon PT). Please allow at least five (5) business days for postal delivery. Payments received by us at any other location or in any other form may not be credited as of the day we receive them. Our business days are Monday through Saturday, excluding holidays. Please do not use staples, paper clips, etc. when preparing your payment.

## EXHIBIT D

## CUSTOMER AGREEMENT

Welcome to Capital One. We are pleased to open your credit card account. This Agreement contains information about your account. Please read it and keep it for your records. In this Agreement the words "you," "your" and "yours" refer to each person who signed the application and to anyone else who uses the account in any way. Each of you is individually and jointly obligated under this Agreement. The words "we," "us" and "our" mean Capital One Bank and its successors or assigns. We can delay enforcing our rights under this Agreement without losing them.

**Using Your Account.** You can make purchases and obtain cash advances (if we have told you that cash advances are an option for your account) by using your card, account number, and any account access checks (including Purchase Checks, Convenience Checks, Special Transfer Checks and other similar checks) that we may send to you. When we provide you with account access checks, we will tell you whether they will be treated as purchases, cash advances, or special transfers. Unless we tell you otherwise, Convenience Checks will always be treated as cash advances.

Your card or account cannot be used in connection with any Internet or illegal gambling transactions. Your card and account may only be used for valid and lawful purposes. If you use, or allow someone else to use, the card or account for any impermissible purpose, you will be responsible for such use and may be required to reimburse us and MasterCard International Incorporated or Visa USA, Inc., as applicable, for all amounts or expenses we or they pay as a result of such impermissible use.

You agree that we are not responsible if anyone refuses to honor your account. If you do not use your account, you may cancel it by calling our Customer Relations department and destroying your card(s) and account access checks within 30 days after you receive them.

**Cash Equivalent Transactions.** If cash advances are an option for your account, you can use your account to purchase items that are directly convertible to cash. These cash equivalent transactions will be treated as cash advances and will be billed to the cash advance segment of your account. Cash equivalent transactions include the purchase of wire transfer money orders, bets, lottery tickets, casino gaming chips, and other similar products or services.

**Your Credit Limit.** You were told your credit limit when you opened your account. You also may have different credit limits that apply to different segments of your account (such as purchases, cash advances, and special transfers). These credit limits will be identified on your periodic statement. You agree to make purchases or obtain cash advances only up to the relevant credit limit. We may increase or decrease your credit limits at any time, may limit the amount that is available for cash advances, or may exclude cash advances entirely from your account. We may honor transactions in excess of your credit limit, even if those transactions result in an overlimit fee, and those transactions and fees will be covered by this Agreement.

**Making Payments.** You promise to pay us all amounts due resulting from the use of your account, including any finance charges and other charges due under the terms of this Agreement. Payments must be made in U.S. dollars. Payments made by a negotiable instrument such as a check or a money order must be in a form acceptable to us and be drawn on a U.S. financial institution. We may allocate payments among the various segments of your account in any way we determine.

You must pay at least the minimum amount due by the date requested on your statement to avoid a late payment fee. However, you may pay more than the minimum payment or pay the balance in full. In any case, finance charges will continue to be assessed during billing periods that you carry a balance regardless of whether or not your statement shows a minimum payment due.

We can accept late payments or partial payments or checks and money orders marked "payment in full" or other similar language without losing any of our rights under this Agreement, including our right to receive payment in full.

**Periodic Statement.** Each month you have a balance in your account, we will send you a statement showing all transactions billed to your account during the billing period. The billing period is the time from one statement closing date through and including the next statement closing date. The statement closing date determines the month of a specific billing period. For example, your January billing period is the billing period with the statement closing date in January.

#### Finance Charge Information.

**A. Grace Period.** You will have a minimum grace period of 25 days without finance charge on new purchases, new balance transfers, new special purchases, and new other charges if you pay your total New Balance as shown on your periodic statement in full and in time for it to be credited by your next statement closing date. There is no grace period on cash advances and special transfers. In addition, if you did not pay the total New Balance from the previous billing statement in full and in time for it to be credited by your next statement closing date, there is no grace period on any transaction.

**B. Accruing Finance Charge.** Transactions which are not subject to a grace period are assessed finance charge as follows:

- Transactions made during the current billing period: from the transaction date.

- Undated transactions and transactions made with account access checks: from the date the transaction is processed to your account.

- Transactions made prior to the current billing period: from the first calendar day of the current billing period.

Additionally, if you did not pay the New Balance from the previous billing period in full, finance charges continue to accrue to your unpaid balance until the unpaid balance is paid in full. This means that you may still owe finance charges, even if you pay the entire New Balance indicated on the front of your statement by the next statement closing date, but did not do so for the previous month. Unpaid finance charges are added to the applicable segment of your account.

**C. Minimum Finance Charge.** For each billing period that your account is subject to a finance charge, a minimum total finance charge of \$0.50 will be imposed. If the total finance charge resulting from the application of your periodic rate(s) is less than \$0.50, we will subtract that amount from the \$0.50 minimum and the difference will be billed to the purchase segment of your account.

**D. Periodic Rates.** We determine the daily periodic rate by dividing the annual percentage rate by 365 and rounding it to the nearest 1/100,000th of 1%. The rate may be different for each segment of your account (e.g., cash advance, purchase, special purchase, and special transfer if applicable for your account). You were told the daily periodic rate(s) when you opened your account and it appears on your statement.

**E. Calculating Finance Charge.** Finance charge is calculated by multiplying the daily balance of each segment of your account (e.g., cash advance, purchase, special transfer, and special purchase) by the corresponding daily periodic rate(s) that has been previously disclosed to you. At the end of each day during the billing period, we apply the daily periodic rate for each segment of your account to the daily balance of each segment. Then at the end of the billing period, we add up the results of these daily calculations to arrive at your periodic finance charge for each segment. We add up the results from each segment to arrive at the total periodic finance charge for your account.

To get the daily balance for each segment of your account, we take the beginning balance for each segment and add any new transactions and any periodic finance charge calculated on the previous day's balance for that segment. We then subtract any payments or credits posted as of that day that are allocated to that segment. This gives us the separate daily balance for each segment of your account. However, if you paid the New Balance shown on your previous statement in full (or if your New Balance was zero or a credit amount), new transactions which post to your purchase or special purchase segments are not added to the daily balances.

To calculate your total finance charge, multiply your average daily balance by the daily periodic rate and by the number of days in the billing period. Due to rounding on a daily basis, there may be a slight variance between this calculation and the amount of finance charge actually assessed.

**F. Variable Rates.** Where and when variable rates apply to your account, the rate(s) may vary quarterly based on changes in the highest Prime rate published in the "Money Rates" section of *The Wall Street Journal*. Any changes will be effective on the first day of your January, April, July, and October billing periods, and will be based on the Prime rate published on the 25th day of the preceding month or, if not published on that day, on the most recent previous date of publication. If the periodic rate(s) and corresponding annual percentage rate(s) increase, the finance charge will increase and your minimum payment may be greater.

**G. Cash Advance Fee.** If a cash advance fee applies to your account, you were told the fee when you opened your account. The fee will be charged each time you obtain a cash advance and will be added to the cash advance segment of your account and will reduce your available credit. The amount of the cash advance fee will be added to other finance charges on your periodic statement for the purpose of calculating the annual percentage rate disclosed there. This may cause the annual percentage rate disclosed on your statement to be greater than the annual percentage rate that was disclosed to you when you opened your account.

**H. Temporary Reduction in Finance Charge.** We reserve the right to not assess any or all finance charges for any given billing period.

**Other Fees and Charges.** The following fees may be billed to the purchase segment of your account, unless otherwise specified, in every billing period in which they apply: late payment fee if we do not receive your payment in time for it to be credited by the following statement closing date; overlimit fee if your account (or any segment of your account) goes or stays above any temporarily or permanently assigned credit limit, even if we approved the overlimit amount, at any time during the billing cycle (regardless of whether you went overlimit as a result of a transaction, finance charge, or any other fee or charge); returned check fee, imposed every time a check is returned to us for any reason, or if we cannot honor your account access checks for any reason; and copying charges for duplicate copies of transactions or statements unless required for billing dispute resolution. These fees and charges will not be assessed if your billing address was in Puerto Rico when your account was opened. The fee and charge amounts were disclosed to you when you opened your account. If any of these fees or charges are changed subsequent to your account opening, you will be advised of the new amount. We reserve the right to waive these fees without prior notification to you.

**Membership Fee.** If your account has a membership fee, it was disclosed to you when you

opened your account. The fee will be billed to the purchase segment of your account.  
Credit Bureau Information. You agree that we may obtain your credit information from credit reporting agencies at any time for the purposes of monitoring your credit performance, managing your account and considering you for new offers and programs.  
Future Offers. The terms of any future offer will be disclosed to you at the time the offer is made. If you accept an offer, the terms will become effective immediately unless otherwise specified in the offer.

Default. We may consider you to be in default under this Agreement if: (a) you fail to pay the minimum payment on time, (b) you exceed your credit limit, or (c) you pay us with funds that are returned for any reason. To the extent permitted by law, you may also be in default under this Agreement if: (1) you violate any of the other terms of this Agreement, or any of the terms of any other agreement with us or any of our affiliates, or (2) you made any false or misleading statements on your application, or (3) bankruptcy or other insolvency proceedings are instituted by you or against you. After you are in default (or after we give you any notice of or right to cure the default if required by law), we may restrict your account from new transactions, or close your account and demand immediate payment of the entire outstanding balance. In addition, as a result of the default, your minimum payment may increase without advance notice.

To the extent permitted by law, you agree to pay all court costs and collection expenses incurred by us in the collection of any amount you owe us under this Agreement. If you default and we refer your account for collection to an attorney who is not our salaried employee, to the extent permitted by law, you agree to pay reasonable attorneys' fees. You also agree to pay any costs we may incur in retrieving your cards, including any costs we may incur by having your account placed on a restricted list.

If You Close Your Account. You can request to close your account by calling our Customer Relations department. You must destroy all cards and account access checks, cancel all preauthorized billing arrangements, and cease using your account. If you do not cancel preauthorized billing arrangements, we will consider receipt of a charge your authorization to reopen your account. Additionally, your account will not be closed until you pay all amounts you owe us including: any transactions you have authorized, finance charges, late payment fees, overlimit fees, returned check fees, cash advance fees and any other fees assessed to your account. You are responsible for these amounts whether they appear on your account at the time you request to close the account or they are incurred subsequent to your request to close the account. This may result in charges appearing on your account after you have requested the account to be closed or the reopening of your account if it has already been closed. For example, if you authorized a purchase from a merchant and we receive the transaction from the merchant after your account has been closed, your account will be reopened, the amount of the charge will be added to your account, and you will be responsible for payment. If there is a membership fee for your account, the fee will continue to be charged, to the extent permitted by law, until the account balance has been paid in full as defined above.

If you want to stop an authorized user's access to your account, you must call our Customer Relations department and destroy the user's card (if any) and any account access checks he or she may have. If you are unable to destroy that person's card and account access checks, and you call our Customer Relations department to close your account, your account will be closed and both you and the joint cardholder, if any, may apply for a new account if we close the

account, you and the joint cardholder, if any, will still be liable, individually and together for all amounts charged to your account.

**If We Cancel Your Account or Suspend Credit Privileges.** We may at any time, with or without cause and with or without advance notice, terminate this Agreement and/or temporarily or permanently suspend your credit privileges. This includes, but is not limited to, situations where you have violated this Agreement or where we have reason to doubt your creditworthiness. Your obligations under this Agreement continue after your rights to obtain credit have been terminated or suspended. We may delay in enforcing our rights under this Agreement without losing them.

**Changes in Terms.** We may amend or change any part of your Agreement, including the periodic rates and other charges, or add or remove requirements (including adding new requirements of the same or a different nature as the existing requirements in this Agreement) at any time. If we do so, we will give you notice if required by law of such amendment or change. Notice will be mailed to the last billing address indicated in our records. (However, no notice will be mailed if we previously had notified you that your account would be subject to such amendment or change without notice.) Changes to the annual percentage rate(s) will apply to your account balance from the effective date of the change, whether or not the account balance included items billed to the account before the change date and whether or not you continue to use the account. Changes to fees and other charges will apply to your account from the effective date of the change.

**Applicable Law.** This Agreement will be governed by Virginia law and Federal law. Severability. The invalidity of any provision of this Agreement shall not affect the validity of any other provisions.

**Lost or Stolen Cards or Account Access Checks.** If your cards or account access checks are lost or stolen or if someone else may be using them without your permission, notify us at once by calling the telephone number shown on the front of your periodic statements. You will not be liable in any amount for unauthorized use of your cards or account access checks.

**Your Billing Address.** You agree to give us written notice of any change in your billing address at least 10 days before the change. Changes may be written in the space provided on the remittance coupon portion of your periodic statement or may be sent to the following address: Capital One, P.O. Box 85015, Richmond, VA 23285-5015. If your account is a joint account or if more than one person is permitted to use it, you agree that all notices regarding the account may be sent solely to the address shown on our billing records.

**Communications.** We may call you (using live operators, automatic dialing devices, or recorded messages) at home or work and those calls will not be considered unsolicited. We may monitor or record any calls we make or receive. We may release information to others regarding the status or history of your account as is more fully discussed in the Capital One privacy policy, a copy of which has been provided to you. We may make inquiries of third parties in connection with maintaining and collecting your account, and you authorize such third parties to release information about you to us.

**Cardholder Benefits.** Cardholder benefits may be changed or terminated without notice. The benefits may be provided by third parties; we are not liable for such benefits or for the actions or omissions of the third parties.

**U.S. Currency.** If you make a purchase or cash advance in foreign currency, the transaction will be converted into U.S. dollars using Visa or MasterCard regulations and conversion procedures in effect at the time. Visa or MasterCard may increase the conversion rate and keep this increased amount. The rate in effect on the conversion date may differ from the rate used on the transaction date.

#### ARBITRATION:

You and we agree that either you or we may, at either party's sole election, require that any Claim (as defined below) be resolved by binding arbitration.

**IF YOU OR WE ELECT ARBITRATION OF A CLAIM, NEITHER YOU NOR WE WILL HAVE THE RIGHT TO PURSUE THAT CLAIM IN COURT OR BEFORE A JUDGE OR JURY OR TO PARTICIPATE IN A CLASS ACTION OR ANY OTHER COLLECTIVE OR REPRESENTATIVE PROCEEDING. EXCEPT AS SET FORTH BELOW, THE ARBITRATOR'S DECISION WILL BE FINAL AND BINDING. OTHER RIGHTS THAT YOU WOULD HAVE IF YOU WENT TO COURT, INCLUDING THE RIGHT TO CONDUCT DISCOVERY OR TO APPEAL, MAY BE LIMITED OR UNAVAILABLE IN ARBITRATION. THE FEES ASSOCIATED WITH ARBITRATION MAY BE HIGHER THAN THE FEES ASSOCIATED WITH COURT PROCEEDINGS.**

**Special Definitions for this Arbitration Provision.** For the purposes of this arbitration provision ("Arbitration Provision"), the following definitions shall apply in addition to the definitions set forth in this Customer Agreement ("Agreement"):

"We," "us" and "our" mean the owner of your account (Capital One Bank or Capital One F.S.B.), its parent, and their direct and indirect subsidiaries and affiliates, as well as all of their respective employees, officers, directors, licensees, predecessors, successors, and assigns

"Claim" means any claim, controversy, or dispute of any kind or nature between you and us.

A. This definition includes, without limitation, any Claim that in any way arises from or relates to:

- this Agreement and any of its terms (including any prior agreements between you and us or between you and any other entity from which we acquired your account)
- this Arbitration Provision (including whether any Claim is subject to arbitration)
- the establishment, operation, or termination of your account
- any disclosures, advertisements, promotions, or other communications relating to your account, whether they occurred before or after your account was opened
- any transactions or attempted transactions involving your account
- any billing or collections matters relating to your account
- any posting of transactions (including payments or credits) to your account
- any goods or services charged to your account
- any fees, interest, or other charges assessed to your account, or their calculation
- any products, services, or benefits programs related to or offered in connection with your account (including any insurance, debt cancellation, or extended service contracts and any programs, rebates, rewards, sweepstakes, memberships, discounts, or coupons) whether or not we offered, introduced, sold, or provided them
- our receipt, use, or disclosure of any information about you or your account
- any other matters relating to your account or your relationship with us.

B. This definition also includes, without limitation, any Claim:

- regardless of how or when it is brought (for example, as an initial claim, counterclaim, cross-claim, interpleading, or third-party claim)
- based on any theory of relief or damages (including money damages and any form of specific performance or injunctive, declaratory or other equitable relief)
- based on any theory of law or equity (including contract, tort, fraud, constitution, statute, regulation, ordinance, or wrongful acts or omissions of any type, whether negligent, reckless, or intentional)
- made by you or by anyone connected with you or claiming through or for you (including a co-applicant or authorized user of your account, your agent, your representative, your heirs, or a trustee in bankruptcy)
- for which we may be directly or indirectly liable under any theory, including respondeat superior or agency (even if we are not properly named at the time the Claim is made)
- now in existence or that may arise in the future, regardless of when the facts and circumstances that give rise to the Claim occurred or when the Claim accrued
- made as part of a class action, private attorney general action, or other representative or collective action, which Claim shall proceed on an individual basis as set forth more fully in this Arbitration Provision

**Arbitration Administrators.** One of the following arbitration administrators ("Administrator" or, collectively, "Administrators") will administer the arbitration:

JAMS	American Arbitration Ass'n	National Arbitration Forum
1920 Main St., Ste. 300 Irvine, CA 92610 <a href="http://www.jamsadr.com">www.jamsadr.com</a>	335 Madison Ave., Floor 10 New York NY 10017-4605 <a href="http://www.adr.org">www.adr.org</a>	P.O. Box 50191 Minneapolis, MN 55405 <a href="http://www.arbitration-forum.com">www.arbitration-forum.com</a>

You may contact any of the Administrators to obtain information about arbitration, arbitration rules and procedures, fee schedules, and claim forms.

**Election and Initiation of Arbitration.** You or we may elect arbitration under this Arbitration Provision with respect to any Claim, even if the Claim is part of a lawsuit brought in court. You or we may make a motion or request in court to compel arbitration of any Claim brought as part of any lawsuit. We will not elect or initiate arbitration of any Claim brought in a small claims court (or the equivalent), so long as the Claim remains in that court. Is made solely on behalf of an individual or joint account holder, and is not made as part of a class action, private attorney general action, or other representative or collective action.

You and we must follow the rules of the Administrators to initiate arbitration. If you initiate arbitration, you may choose one of the Administrators, and you must mail us any notice required by the Administrator to P.O. Box 85550, Richmond VA 23285-5550. If we initiate arbitration, we will choose one of the Administrators, and we will mail you any notice required by the Administrator to your last-known billing address. If we have initiated arbitration, we will change the Administrator at your request if you notify us in writing at the above address within fifteen days of the date of any notice we send you of our initiation of arbitration.

**Procedures and Law Applicable in Arbitration.** This Arbitration Provision is made pursuant to a transaction involving interstate commerce and shall be governed by and enforceable under the Federal Arbitration Act (the "FAA"). Questions about whether any Claim is subject to arbitration shall be resolved by interpreting this Arbitration Provision in the broadest way it may be enforced, consistent with the FAA and the terms of this Arbitration Provision. The arbitrator will apply substantive law consistent with the FAA and applicable statutes of limitations. The arbitrator may award any damages or other relief permitted by applicable substantive law, but the award shall determine the rights and obligations of only the named parties and only with respect to the Claims in arbitration. The rules and procedures of the Administrator, which you



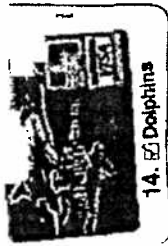
may obtain from the Administrator, shall govern the arbitration unless they conflict with this Arbitration Provision, in which case this Arbitration Provision will apply. The arbitrator will not be bound by, and this Arbitration Provision shall not be subject to, the federal, state, or local rules of procedure and evidence that would apply in any court, or to state or local laws that relate to arbitration proceedings. You or we may have a hearing in arbitration. Any arbitration hearing that you attend in person will take place at a location in the federal judicial district that includes your last-known billing address or at some other place upon which you and we agree. You or we may be represented by counsel. If you or we request, the arbitrator will honor claims of privilege recognized under applicable law and will use best efforts to protect confidential information (including through the use of protective orders). The arbitrator will make any award in writing and, at the timely request of either party, will provide a written statement of reasons for the award.

**Costs.** The party initiating arbitration will pay the initial filing fee. You may seek a waiver of the initial filing fee or any of the Administrator's other fees (collectively, "Administrator's Fees") under any applicable rules of the Administrator. If you seek, but do not qualify for, a waiver, we will consider any written request by you for us to pay or reimburse you for all or part of the Administrator's Fees. We also will pay or reimburse you for all or part of the Administrator's Fees if the arbitrator determines there is good reason for us to do so. We will pay any fees and costs we are required to pay by law. Otherwise, and except as provided in this Agreement, you and we will bear all of our respective fees and costs (including the Administrator's fees and the fees and costs relating to attorneys, experts, and witnesses), regardless of who prevails. Allocation of fees and costs relating to appeals in arbitration will be handled in the same manner.

**No Consolidation or Joinder of Parties.** The arbitration of any Claim must proceed on an individual basis, even if the Claim has been asserted in a court as a class action, private attorney general action, or other representative or collective action. Unless all parties consent, neither you nor we may join, consolidate, or otherwise bring Claims related to two or more accounts, individuals, or account holders in the same arbitration. Also, unless all parties consent, neither you nor we may pursue a class action, private attorney general action, or other representative or collective action in arbitration, nor may you or we pursue such actions in Court if any party has elected arbitration. You will not have the right to act as a class representative or participate as a member of a class of claimants with respect to any Claim as to which arbitration has been elected.

**Judgment, Enforcement, Finality, and Appeal.** The arbitrator's decision will be final and binding after fifteen days unless you or we seek an appeal of the award by making a written request to the Administrator. The appeal panel, which will consist of three arbitrators, will consider all factual and legal issues anew, will conduct the appeal in the same manner as the initial arbitration, and will make decisions based on the vote of the majority. The panel's decision will be final and binding. Any final decision of the arbitrator or of the appeal panel is subject to judicial review only as set forth under the FAA. An award in arbitration will be enforceable under the FAA by any court having jurisdiction.

**Miscellaneous, Waiver, Severability, Survival.** If you or we do not elect arbitration or otherwise enforce this Arbitration Provision in connection with any particular Claim, you or we will not waive any rights to require arbitration in connection with that or any other Claim. This Arbitration Provision shall survive: (i) suspension, termination, revocation, closure, or changes of this Agreement, your account, and your relationship with us; (ii) the bankruptcy or insolvency of any party; and (iii) any transfer of your account, or any amounts owed on your account, to any other person or entity. If any portion of this Arbitration Provision is deemed invalid or unenforceable, the remaining portions of this Arbitration Provision shall nevertheless remain valid and in force. In the event of a conflict or inconsistency between this Arbitration Provision and the other provisions of this Agreement or any prior agreement, this Arbitration Provision shall govern.



**This Offer Expires: November 27, 2000**



Upon approval, if no card design is selected, you will receive our standard Visa card.

- Yes  No Would you be interested in blank checks to use for cash advances?  
 Yes  No I would like an Express Account (\$19.95 non-refundable fee; please see reverse of letter for details\*\*).

Please send me 12 free issues of:

1.  Entertainment Weekly\* 2.  Sports Illustrated\* 3.  Neither

Do you have any bank accounts?

1.  Checking & Savings 2.  Checking only 3.  Savings only 4.  Neither

What is your employment status? (Check the box that most closely applies.)

1.  Full-time 2.  Part-time 3.  Not employed

PAEN/NE/A

1700

Your card and statements will be mailed to the address above. (Please cross out and change if you want them mailed to a different address.)

on request. Please print clearly in black or blue ink. ▲

Social Security Number [REDACTED]

Date of Birth (Month/Day/Year) [REDACTED]

Home Phone Number (at permanent address) [REDACTED]

Mother's Maiden Name (for security purposes) [REDACTED]

E-mail Address (if applicable) [REDACTED]

If you are currently enrolled in school, please complete the following section.

Name of School you are attending (no abbreviations, please) [REDACTED]

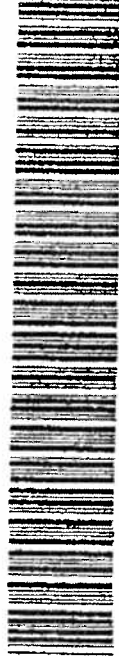
School year:  Freshman  Sophomore  Junior  Senior  Graduate Student

School Phone Number [REDACTED]

When do you expect to graduate? (Month/Year) [REDACTED]

I have read the Important Disclosures and Miscellaneous Information on the reverse side of the letter and agree to be bound as specified therein. You are authorized to check my credit and employment history and school status, if applicable. This offer is nontransferable.

X Signature [REDACTED] Date 3982-4 [REDACTED]



**EXHIBIT E**

# Increase your credit line

when you transfer balances to your Capital One® card!

YES, I know a great deal when I see one.

YES, I prefer to pay fewer bills each month.

YES, I'm willing to spend just a few minutes to save money.

Say "Yes" to a *Smart Switch*® Transfer. Return the Transfer Request attached to the enclosed letter or call 1-800-955-7070 today!

Transfer balances to a new, low 9.9% fixed APR and increase your credit line by up to \$2,000

Save with a 9.9% fixed APR on transferred balances

Increase your credit line up to \$2,000 when you transfer balances

Transfer up to \$2,000

Two easy ways to transfer

No transfer fee

Don't wait—offer expires 10/31/03

Thank you for choosing

**Capital One**®

Preferred Cardholder  
Smart Switch Line:  
1-800-955-7070  
www.capitalone.com

Dear [REDACTED]

Page 2 of 2

You're a preferred Capital One cardholder, and to show you how much we appreciate your business, we're offering extended purchasing power to our best customers. You've been selected for this exclusive offer for up to a \$2,000 credit line increase when you transfer balances to a lower 9.9% fixed APR! There's no transfer fee.

Take advantage of the savings—transfer today

Simply transfer your higher-interest-rate credit card and loan balances to your Capital One card and you'll enjoy a new, lower 9.9% fixed APR on transferred balances along with up to a \$2,000 credit line increase. That's it. Now you can save time and money every month with fewer checks to write and a low APR.

Transferring balances has never been easier

It's simple. You can complete and return the attached Smart Switch Transfer Request in the postage-paid envelope provided. Or you can call 1-800-955-7070 and our friendly Smart Switch Specialists will help you transfer balances right over the phone.

Respond today for this limited-time offer

This exclusive preferred cardholder offer is only available until 10/31/03, so transfer your balances to increase your credit line by up to \$2,000 and save with a low 9.9% fixed APR for the life of the transfer.\* So make sure you return your transfer request or call 1-800-955-7070 today!

Sincerely,

*Carole M. Vaughn*

Carole M. Vaughn, Director of New Accounts



P.S. Transfer your balances to your new 9.9% fixed APR and earn additional purchasing power with a credit line increase. This offer expires 10/31/03, so transfer today!

\*Please see reverse side for the Important Notice.

\*Rates are subject to change if you do not keep your account in good standing as previously disclosed.

**Smart Switch**®

Transfer Request

Detach here and return. ▼

04218  
200986

**YES!** I want to start saving by transferring my balances to Capital One.\*

Start saving time and money now with our *Smart Switch*® special transfer program. The maximum total transfer amount will be based on your available credit line. Minimum transfer amount must be greater than \$10, and with no transaction fee for this service, you can combine your outstanding loans and credit card balances without additional fees. Please print clearly in black or blue ink to complete this request.

04218  
200986

**Capital One**

I authorize you to bill my Capital One credit card account for the amount(s) listed for special transfers. I understand that if the full amount of my transfer request is greater than my available credit and I am not approved for a line increase, I may be approved for a partial special transfer (minimum \$10) up to my available credit. I understand that you will advise me if you are unable to process my payment request for any reason. In addition, Capital One will not be responsible for any charges billed to me for the account(s) indicated. Please remember that special transfers may not qualify for any reward programs.

<b>1</b> Other Issuer Acct. #	<input type="text"/>
Pay To	Exact Amount \$ <input type="text"/>
Payment Address	<input type="text"/>
City	State ZIP
Signature	Date

I have read the Important Notice on the reverse and agree to be bound as specified therein.

Use the reverse side for any additional transfers...

**Certificate of Service**

I, David M. Dineen, hereby certify that on this 6<sup>th</sup> day of October, 2009, I caused a true and accurate copy of the above Opposition to Plaintiff's Motion for Summary Judgment to be served upon Counsel for Plaintiff, Julie B. Solomon, by sending a copy by email to jsolomon@solomonpc.com and by fax to (518) 456-0651.

Dated: October 6, 2009

A handwritten signature in black ink, appearing to read 'D. Dineen', written over a horizontal line.

David M. Dineen