



ZWICKER & ASSOCIATES, P.C.
 ATTORNEYS AT LAW
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THIS LAW FIRM EMPLOYS
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06/25/2019

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 DISTRICT OF
 COLUMBIA

WAREHAM DISTRICT COURT
 CIVIL CLERK'S DEPARTMENT
 2200 CRANBERRY HIGHWAY
 WEST WAREHAM, MA 02576

Attention: Civil Clerk's Office

Re: MASSACHUSETTS EDUCATIONAL FINANCING AUTHORITY
 Vs. JAMES J. BENTING
 Docket No. 1960CV000080

Enclosed please find the following for filing:

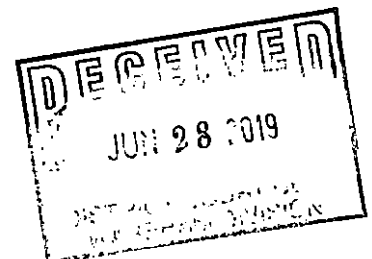
1. Massachusetts Educational Financing Authority's Motion to Dismiss James J. Benting's Counterclaims;
2. Certificate of Service.

Please mark up this motion for hearing on July 10, 2019 at 10:00 a.m. Thank you for your attention to this matter.

Sincerely,

Zwicker & Associate, P.C.

cc: JAMES J. BENTING (via postal mail)
 107 PRECINCT ST
 LAKEVILLE, MA 02347



COMMONWEALTH OF MASSACHUSETTS

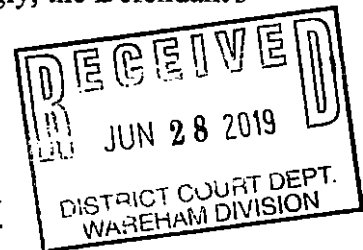
PLYMOUTH, ss

DISTRICT COURT DEPARTMENT
WAREHAM DIVISION
DOCKET NO. 1960CV000080

MASSACHUSETTS EDUCATIONAL)
FINANCING AUTHORITY,)
Plaintiff/Defendant in Counterclaim)
)
v.)
)
JAMES J. BENTING,)
Defendant/ Plaintiff in Counterclaim)

MASSACHUSETTS EDUCATIONAL FINANCING AUTHORITY'S MOTION TO DISMISS JAMES J. BENTING'S COUNTERCLAIMS PURSUANT TO MASS. R. CIV. P. 12(b)(6)

NOW COMES, Plaintiff/Defendant-in-Counterclaim, Massachusetts Educational Financing Authority (hereinafter "MEFA"), and through its counsel of record, moves to dismiss with prejudice James J. Benting's (hereinafter "Benting" or "Defendant") Counterclaims pursuant to Rule 12(b)(6) of the Massachusetts Rules of Civil Procedure. In support of its Motion to Dismiss, MEFA states that Benting's Counterclaims fail as a matter of law, as (1) MEFA's student loan program is not subject to M.G.L.c. 93A claims; (2) the FDCPA is inapplicable to MEFA, the original creditor; and, (3) Defendant's remaining allegations fail to state a claim upon which relief can be granted. Accordingly, the Defendant's Counterclaims should be dismissed.



FACTUAL AND PROCEDURAL HISTORY

MEFA filed this Complaint on May 13, 2019 for breach of contract for sums owed on an outstanding student loan account balance. MEFA alleges that Benting received a student loan from MEFA, used the credit extended, and later defaulted on the terms of the account by

ceasing to make payments when due. MEFA asserts that Benting owes the outstanding balance of \$10,738.90 plus costs as allowed by this Court.

Benting filed an Answer and Counterclaims with the Court on or about June 5, 2019. In his Answer and Counterclaims, Defendant alleges that MEFA violated various provisions of the Fair Debt Collections Practices Act (hereinafter “FDCPA”) and M.G.L. ch. 93A.

LEGAL STANDARD

A complaint (or counterclaim) may be dismissed, pursuant to Mass.R.Civ.P. 12(b)(6), for failure to state a claim upon which relief may be granted. Courts have imposed upon a plaintiff a requirement to plead sufficient facts to warrant a finding of a viable cause of action. “Factual allegations must be enough to raise a right to relief above the speculative level ... [based] on the assumption that all the allegations in the complaint are true (even if doubtful in fact)’ What is required at the pleading stage are factual ‘allegations plausibly suggesting (not merely consistent with)’ an entitlement to relief.” *Iannacchino v. Ford Motor Co.*, 451 Mass. 623, 636 (2008), quoting *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1964-1965 (2007) (edits in original). The Court further stated that courts “do not accept legal conclusions cast in the form of factual allegations.” *Schaer v. Brandeis University*, 432 Mass. 474, 477, 735 N.E.2d 373 (2000).

Although courts are required to review a complaint liberally when met with a challenge of failing to state a claim for relief, the complaint must “plead basic facts sufficient to state a claim.” *Ferranti v. Moran*, 618 F.2d 888, 890 (1st Circuit, 1980). “While a complaint attacked by a . . . motion to dismiss does not need detailed factual allegations . . . a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions...” *Iannacchino*, 451 Mass. At 636. To survive a motion to dismiss, a counterclaim

must contain factual allegations which, if true, raise a right to relief above the speculative level. Id. Moreover, at the pleading stage, what is required are factual "allegations plausibly suggesting (not merely consistent with)" an entitlement to relief, in order to reflect the threshold requirement of Mass.R.Civ.P. 8(a)(2) that the "plain statement" possess enough heft to demonstrate that the pleader is entitled to relief. Id. Dismissal under Mass.R.Civ.P. 12(b)(6) is proper where a reading of a counterclaim establishes beyond doubt that the facts alleged do not add up to a cause of action which the law recognizes, such that the counterclaim is legally insufficient. See McKesson Specialty Care Distrib. Joint Venture L.P. v. Dow, 2009 Mass. Super. LEXIS 388 (Mass. Super. Ct. Nov. 3, 2009).

ANALYSIS

I. BENTING'S COUNTERCLAIM AGAINST MEFA MUST BE DISMISSED BECAUSE MEFA IS NOT ENGAGED IN "TRADE OR COMMERCE."

Benting's first Counterclaim alleges that MEFA "has committed unfair or deceptive practices in violation of Mass. Gen. Laws Chapter 93A." As explanation of his claim, the Defendant stated "The Plaintiff told me if I pay them \$50 a week, they would not sue me. I asked for proof I owed them money and I never received anything. Now they are suing." The Defendant has failed to provide any grounds showing he is entitled to relief under M.G.L. c. 93A or any other statute.

Benting claims that MEFA violated M.G.L.c. 93A, which prohibits "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." The Supreme Judicial Court of Massachusetts extensively analyzed the meaning of the term "trade or commerce" in Lantner v. Carson, 374 Mass. 606, 373 N.E.2d 973 (1978). In Lantner, the plaintiffs, home buyers, pursued the private seller of their home for numerous

defects that became apparent after the sale had been completed. See id. at 608-609, 975. The plaintiffs asserted a claim under M.G.L.c. 93A, arguing that the statute is applicable to any commercial transaction, without regard to the nature of the parties involved. See id. at 610, 976. The Court disagreed, finding a clear distinction between business persons and those who participate in commercial transactions on a private, nonprofessional basis. See id. The Court additionally noted that limiting the private remedies of M.G.L.c. 93A furthered the statute's purpose of equalizing the bargaining positions of buyers and sellers in traditional marketplace transactions, in which inequality can be presumed. See id. at 612, 977.

In determining whether a party is acting in a business context, the court may consider "the nature of the transaction, the character of the parties involved, and [their] activities . . . and whether the transaction [was] motivated by business or personal reasons." Begelfer v. Najarian, 381 Mass. 177, 190-191, 409 N.E.2d 167, 191 (1980).¹⁵ Consistent with the Lantner decision, courts have sought a "profit-seeking motive" on the part of defendants to hold them liable under 93A. See, e.g., Klairmont v. Gainsboro Rest., Inc., 465 Mass. 165, 176, 987 N.E.2d 1247, 1256 (2013).

In contrast, Massachusetts courts have repeatedly held that 93A claims cannot be asserted against non-profit entities. For example, the Supreme Judicial Court of Massachusetts held that a 93A claim could not be asserted against Boston City Hospital in relation to an alleged tainted bid evaluation process for contractors, as it was a charitable organization which did not seek to profit from such transactions. See All Seasons Servs. v. Commissioner of Health & Hosps., 416 Mass. 269, 271, 620 N.E.2d 778, 780 (1993). Non-profit, statutorily-created entities have been routinely found to conduct business outside of the "general marketplace" to which 93A exclusively applies. In Poznik v. Massachusetts Medical Professional Ins. Ass'n, 417 Mass. 48, 53, 628 N.E.2d 1, 4 (1994), the Court found that the Massachusetts Medical Professional

Insurance Association (MMPIA) does not fall within the ambit of 93A. The MMPIA was created by the Massachusetts legislature to address a shortage of insurers willing to provide medical malpractice insurance. See id. at 50, 3. It was established as a temporary non-profit joint underwriting association responsible for providing medical malpractice insurance on a self-supporting basis. See id. Because it assumed no risk of loss and was not in the “business” of insurance to make a profit, it could not be the subject of 93A claims. See id. at 52, 4.¹

Similarly, the Court held that 93A was inapplicable to the Massachusetts Insurers Insolvency Fund in Barrett v. Massachusetts Insurance Insolvency Fund, 412 Mass. 774, 777, 592 N.E.2d 1317, 1319 (1992). The Massachusetts Insurance Insolvency Fund was created as a conduit by which solvent insurers would contribute to a fund to pay claims for insureds whose insurance companies became insolvent. See id. at 776, 1319.² The Court held that the “transactions are motivated by legislative mandate, not business or personal reasons.” See id. at 777, 1319. In Peabody N.E., Inc. v. Town of Marshfield, 426 Mass. 436, 440, 689 N.E.2d 774, 779 (1998), the Court held that 93A could not be asserted against the Town of Marshfield by a general contractor hired to construct a waste treatment facility. The contract had been entered into by the town pursuant to an administrative order, which stemmed from a legislative mandate. See id. at 440, 778. Further, the court found that the town was not in the business of making a profit off of its waste treatment facility. See id. at 440, 779. In Boston Hous. Auth. V. Howard,

¹ In 1996, the Massachusetts legislature amended General Laws c. 176D, which defines and regulates unfair and deceptive practices in “the business of insurance,” to explicitly include joint underwriters such as MMPIA in the definition of “persons” subject to its provisions. In Wheatley v. Mass. Insurers Insolvency Fund, 456 Mass. 594, 610, 925 N.E.2d 9, 21 (2010), the Court held that this amendment, in effect, provided a business context to MMPIA’s activities, rendering it subject to liability under M.G.L.c. 93A. Tellingly, no equivalent attempt has been made by the legislature to define MEFA’s activities as business-related and bring it within the scope of M.G.L.c. 93A.

² Like Poznik, this case was determined to have been superseded by the amendment to General Laws c. 176D, causing the Massachusetts Insurers Insolvency Fund to be deemed an entity in “the business of insurance,” thereby subjecting it to M.G.L.c. 93A liability. To date, no amendments have been made to the statutory scheme creating MEFA which would subject it to liability as a business.

427 Mass. 537, 695 N.E.2d 192 (1998), the public housing authority defended itself against allegations that it provided unsanitary housing in violation of M.G.L.c. 93A. While the lower court found the housing authority liable under M.G.L.c. 93A, the Supreme Judicial Court of Massachusetts disagreed, indicating that the housing authority was solely the product of a state statute and its accompanying regulations. See id. at 539, 193. Because it was statutorily-created and not setting out to make a profit, it did not fall within the definition of “trade or commerce” of M.G.L.c. 93A. See id.

In the case at bar, MEFA is exactly the type of organization that Massachusetts courts have repeatedly rejected 93A claims against. MEFA is a state authority created by M.G.L.c. 15C, also known as “the Massachusetts Educational Financing Authority Act.” MEFA was created with the express purpose of promoting higher education in the Commonwealth and providing lower cost financial assistance to residents of the state. M.G.L.c. 15C, §1. All funds received by MEFA are held in trust, and are only to be used for the purposes provided for by law. M.G.L.c. 15C, §14. By statute, MEFA is a public instrumentality and “the exercise by the Authority of the powers granted by this chapter shall be deemed and held to be the performance of an essential public function.” M.G.L.c. 15C, §4. MEFA is authorized to perform a wide variety of actions in furtherance of its core mission of providing affordable access to education, including extending educational loans and filing lawsuits. M.G.L.c. 15C, §5(d); M.G.L.c. 15C, §5(l).

In this case, all of Benting’s claims arise out of MEFA’s alleged conduct in the servicing and collection of a loan administered through its loan program. The legislature has explicitly deemed the administration of this program “the performance of an essential public function.” M.G.L.c. 15C, §4. MEFA is motivated by “legislative mandate, not business or personal reasons.” Poznik v. Massachusetts Medical Professional Ins. Ass’n, 417 Mass. 48, 52, 628

N.E.2d 1, 4 (1994). MEFA has no profit motive, as it is a state authority and all of its funds are either returned to outside institutions or are used in furtherance of MEFA's statutory directives. M.G.L.c. 15C, §8; M.G.L.c. 15C, §14.

As MEFA is not engaged in trade or commerce, M.G.L.c. 93A does not apply to MEFA and Benting's counterclaims against MEFA must be dismissed.

II. THE FDCPA IS INAPPLICABLE TO MEFA AS IT IS AN ORIGINAL CREDITOR

Benting's second counterclaim alleges that "Plaintiff did not send me a written validation notice within five days after first contacting me. The law requires a debt collector send you a letter after they first contact you with certain information if they do not give you that information over the phone. I have never received any notice or anything in the mail from the Plaintiff saying I have the right to dispute the debt". Benting fails to cite a violation of any specific statute or contractual obligation. Even assuming he intended to allege that MEFA had violated the FDCPA by not sending a validation notice, this Counterclaim also fails to state a claim upon which relief can be granted. As an original creditor collecting its own debt, MEFA is not subject to the FDCPA. As a matter of law, it cannot have violated a statute to which it is not bound.

The only entities that can be liable under the FDCPA are debt collectors. See 15 USC §1692(a). MEFA is not a business whose principal purpose is the collection of debts, and it does not regularly attempt to collect debts owed to another. As MEFA is not a debt collector, it cannot be liable under the FDCPA. MEFA is the originator of this account, and the debt is owed and due to MEFA. As such, MEFA is specifically exempted from the FDCPA. Accordingly, Benting's claim that MEFA violated the FDCPA is a legal impossibility.

Nevertheless, attached hereto as Exhibit A is the letter sent by Plaintiff's counsel on July 28, 2014 to the Defendant. The letter was addressed to the Defendant and sent to him at 9 Holly Hill Ave, Westport, MA 02790-4602, which was the address on the account at that time. The letter contains the language required by the FDCPA to be sent to the Defendant, including the statement, "This firm is a debt collector," and the statement, "This firm is attempting to collect a debt and any information obtained will be used for that purpose." Therefore, the counterclaims based on violation of the FDCPA fail to state a cause of action upon which relief can be granted and must be dismissed.

Benting's third counterclaim alleges that "Plaintiff's attorney did not disclose that she was a debt collector and that any information I provided would be used to collect the debt when I talked to him or her and the plaintiff is responsible for the misconduct of its agent. Plaintiff also did not mention that she was calling on behalf of the 'Massachusetts Educational Finance Authority' nor provided any documentation to support it." MEFA's counsel is not a party to this lawsuit and, as noted previously, the FDCPA is not applicable to MEFA. Additionally, Benting does not plead this allegation with any particularity. There are no specific dates or descriptions of the alleged incident(s), and "when I talked to him or her" lacks any specificity about who the Defendant may have spoken to or when or how many people on how many occasions. Any alleged violations of law or contract on the part of MEFA are not pleaded with any specificity. There is no plausible suggestion of an entitlement to relief sufficient to survive a motion to dismiss.

III. DEFENDANT'S REMAINING COUNTERCLAIMS FAIL TO PLEAD SUFFICIENT FACTS TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED

Benting's remaining Counterclaims also fail to point to any specific violation of law or contract and are without specificity sufficient to survive a motion to dismiss. Benting states that he is "Counter suing Plaintiff for mis representation [sic] of themselves and who they were. Pain and suffering from the harassing phone calls and threats to make payments so that I would not be sued. Counter sue in the amount of \$1,000 in statutory damages and \$4,000 and loss and suffering. The attorney called me back after I called them and they did not tell they were a debt collector." These claims appear to allege violations of the FDCPA by either MEFA or its counsel, and as stated above, MEFA's counsel is not a party to this lawsuit and the FDCPA is not applicable to MEFA. These claims also lack the requisite particularity and fail to plausibly suggest an entitlement to relief sufficient to survive a motion to dismiss.

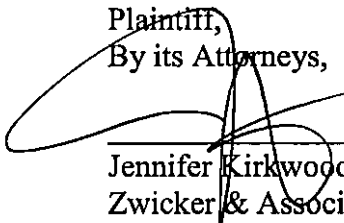
Lastly, Benting states "Exhibit B only shows current amount due \$120.60 But also shows current status 'Paid in Full[.]' Exhibit B Section III last line shows Claim Payment \$11,391.59 Principal Bal 0.00[.] On the Summons Letter there is no date of signature of the clerk Magistrate which deems this Summons invalid"[.] Again, there is no allegation that MEFA has violated any statute or provision of the contract that existed between the parties. These allegations fail to state a claim upon which relief can be given and must be dismissed.

PRAYER FOR RELIEF

WHEREFORE, MEFA Bank respectfully requests that the Counterclaims be dismissed with prejudice for failure to state a claim.

Plaintiff,
By its Attorneys,

June 25, 2019
Date



Jennifer Kirkwood, Esq., BBO# 667265
Zwicker & Associates, P.C.
A Law Firm Engaged in Debt Collection
225 Foxboro Blvd., Ste. 102
Foxboro, MA 02035
877-347-4399

COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, ss

DISTRICT COURT DEPARTMENT
WAREHAM DIVISION
DOCKET NO. 1960CV000080

MASSACHUSETTS EDUCATIONAL)
FINANCING AUTHORITY,)
Plaintiff/Defendant in Counterclaim)
)
v.)
)
JAMES J. BENTING,)
Defendant/ Plaintiff in Counterclaim)

NOTICE OF MOTION

You are hereby notified that the Plaintiff's Motion to Dismiss JAMES J. BENTING Counterclaims will be heard in the **WAREHAM DISTRICT COURT** on **July 10, 2019** at **10:00 a.m.**, on that day or as soon thereafter as counsel may be heard.

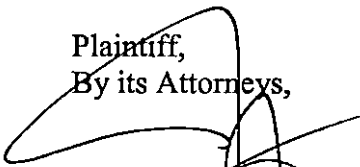
CERTIFICATE OF SERVICE

I, Attorney for the above-named Plaintiff, hereby certify that on this day, this office served a copy of:

- Massachusetts Educational Financing Authority's Motion to Dismiss James J. Benting's Counterclaims;
- Certificate of Service.

by mailing, via first-class mail, a copy of same to Defendant at 107 PRECINCT ST in LAKEVILLE, MA 02347.

June 25, 2019
Date

Plaintiff,
By its Attorneys,


Jennifer Kirkwood, Esq., BBO# 667265
Zwicker & Associates, P.C.
A Law Firm Engaged in Debt Collection
225 Foxboro Blvd., Ste. 102
Foxboro, MA 02035
877-347-4399

EXHIBIT A





50417-28A 2***AUTO**MIXED AADC 350
James J Benting
9 Holly Hill Ave
Westport MA 02790-4602

THIS LAW FIRM
EMPLOYS ONE OR
MORE ATTORNEYS
ADMITTED TO
PRACTICE IN THE
FOLLOWING
STATES:

- ALASKA
- ARIZONA
- CALIFORNIA
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- PENNSYLVANIA
- SOUTH CAROLINA
- TENNESSEE
- TEXAS
- VIRGINIA
- WASHINGTON
- WEST VIRGINIA
- WISCONSIN
- DISTRICT OF COLUMBIA

Personal and Confidential

07/26/2014
File ID: 4564477
Creditor: Massachusetts Educational Financing Authority
Account number ending in: *****0048-03 ^{1,2,3,4} Balance: \$11461.11

Dear JAMES J BENTING:

This law firm has been retained by the above-named creditor to assist it in the collection of the funds you owe on the above-referenced account. As of the date of this letter, you owe \$11461.11.

As of this time, no attorney with this firm has personally reviewed the particular circumstances of your account. This letter is not a threat of suit and should not be construed to be a threat of suit.

Please note that unless you dispute said debt, or any portion thereof, within thirty (30) days after your receipt of this letter, this office shall assume the validity of this debt. Upon your written notification within such thirty-day period that this debt, or any portion thereof, is disputed, this office shall obtain verification of the debt or a copy of a judgment, if any, against you and mail you a copy of such verification or judgment. Furthermore, upon your written request within said thirty-day period, this office shall provide you with the name and address of the original creditor, if different from the current creditor.

Please contact this office to discuss repayment with one of our non-attorney account representatives.

Sincerely,

ZWICKER & ASSOCIATES, P.C.

¹ This firm is a debt collector.
² This firm is attempting to collect a debt and any information obtained will be used for that purpose.
³ Important notices appear on the back of this letter. Please read them as they may affect your rights.
⁴ Colorado residents: please read important notice on the back of this letter.

PLEASE SEND ALL PAYMENTS AND CORRESPONDENCE TO THE ADDRESS BELOW

Zwicker & Associates P.C. ◆ 80 Minuteman Rd ◆ Andover, Massachusetts 01810-1008
Tel: 877-210-5331 ◆ NY City Residents Only: (877) 368-4531



IMPORTANT NOTICES

OFFICE HOURS: Monday through Friday 8:00 AM – 9:00 PM and Saturday 8:00 AM – 1:00 PM. (All times are Eastern).

We are required under state law to notify consumers of the following rights. This list does not contain a complete list of the rights consumers have under state and federal law.

California – The state Rosenthal Fair Debt Collection Practices Act and the federal Fair Debt Collection Practices Act require that, except under unusual circumstances, collectors may not contact you before 8 a.m. or after 9 p.m. They may not harass you by using threats of violence or arrest or by using obscene language. Collectors may not use false or misleading statements or call you at work if they know or have reason to know that you may not receive personal calls at work. For the most part, collectors may not tell another person, other than your attorney or spouse, about your debt. Collectors may contact another person to confirm your location or enforce a judgment. For more information about debt collection activities, you may contact the Federal Trade Commission at 1-877-FTC-HELP or www.ftc.gov.

California/Utah -- As required by law, you are hereby notified that a negative credit report reflecting on your credit record may be submitted to a credit reporting agency if you fail to fulfill the terms of your credit obligations.

Colorado - The following language is required by Colorado state law to be contained in the initial debt collection letter sent to Colorado residents:

FOR INFORMATION ABOUT THE COLORADO FAIR DEBT COLLECTION PRACTICES ACT, SEE WWW.COLORADOATTORNEYGENERAL.GOV/CA. A CONSUMER HAS THE RIGHT TO REQUEST IN WRITING THAT A DEBT COLLECTOR OR COLLECTION AGENCY CEASE FURTHER COMMUNICATION WITH THE CONSUMER. A WRITTEN REQUEST TO CEASE COMMUNICATION WILL NOT PROHIBIT THE DEBT COLLECTOR OR COLLECTION AGENCY FROM TAKING ANY OTHER ACTION AUTHORIZED BY LAW TO COLLECT THE DEBT.

Colorado residents may contact our office by telephone at 800-370-2251 during the office hours stated above.

Maine – Maine residents may contact our office by telephone at 800-370-2251 during the office hours stated above.

Massachusetts – Massachusetts residents may contact our office by telephone at 800-370-2251 during the office hours stated above. The business address is: 80 Minuteman Road, Andover, Massachusetts 01810-1008. Massachusetts Law requires that we inform you:

NOTICE OF IMPORTANT RIGHTS OF MASSACHUSETTS RESIDENTS

You have the right to make a written or oral request that telephone calls regarding your debt not be made to you at your place of employment. Any such oral request will be valid for only ten days unless you provide written confirmation of the request postmarked or delivered within seven days of such request. You may terminate this request by writing to the debt collector.

To all consumers: Federal law or other state laws may also provide you with similar or even greater rights.

Authorizing us by phone to set up payments on your account

If you and this firm agree that you can make a series of monthly payments on your account in specified amounts, you can authorize this firm by phone to initiate those payments electronically from your bank account. By (1) calling us at 800-370-2251 (NY City Residents Only Call 877-368-4531) or taking a call from us; (2) specifying the amounts and dates of payments which you would like to make; (3) identifying the bank account of yours which you wish to use to make the payments; and (4) electronically signing this Authorization, you authorize us to initiate payments from your account in the amounts and on the dates that you specify. You understand that your bank may charge you a fee for any unsuccessful payment and that we have no liability for any such fee. **YOU ARE NOT REQUIRED TO ARRANGE FOR OR AUTHORIZE ANY PAYMENTS OF THIS TYPE.** If you choose to provide this authorization, you can cancel it by calling us toll free at 877-220-6665 at least three business days before the day on which you want the cancellation to be effective.

