COMMONWEALTH OF MASSACHUSETTS

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December 13, 2018

Suzanne M. Scibilia, Esq.
Halloran Sage
213 Court Street, Suite 205
Middletown, CT 06457

Dear Ms. Scibilia:

This letter is in response to your October 12, 2018 correspondence to the Division of Banks (the "Division"), on behalf of Twin Oaks Software Development, Inc. ("Twin Oaks") relative to whether a debt collector license is required in order for Twin Oaks to conduct its operations in Massachusetts.

Your correspondence provides a description of the activities in which Twin Oaks engages. According to your correspondence, Twin Oaks provides software licensing, management reporting, and recurring payment processing services for health club clients. Of particular relevance to Twin Oaks' inquiry, Twin Oaks provides the recurring payment processing services for health club clients with respect to the health clubs' membership accounts. The Dues Processing Agreement entered into between Twin Oaks and its health club clients governs the provision of these payment processing services. Pursuant to this agreement, Twin Oaks processes electronic payments as directed by its health club client for dues owed to the health club by its members as provided by membership agreements entered into between the health club and its members. In particular, the Dues Processing Agreement specifies that a member's account will not be submitted to Twin Oaks for billing if the member's obligation to pay health club dues is "then in default, either under such member's membership agreement with [the health club], or by law." In addition to these payment processing services for dues, for some of its clients, Twin Oaks also provides two additional types of services: (1) services encompassing reminder notices or calls related to members' payments which are declined or returned, but not in default ("Member Services"); and (2) "Collection Services," which includes additional reminder notices and/or calls related to members' payments that remain unpaid after the initial communications. Both types of these services are add-ons to the underlying payment processing services that Twin Oaks provides pursuant to the Dues Processing Agreement. Accordingly, a health club member would only be contacted by Twin Oaks regarding the member's defaulted account where Twin Oaks also provides the payment processing services for the account. As such, pursuant to the Dues Process Agreement, such an account would only have been submitted to Twin Oaks for payment processing at a time when the account was not in default, either under the membership agreement or law.

In Massachusetts, debt collection and loan servicing are governed under the provisions of General Laws chapter 93, sections 24 through 28, inclusive, and 209 CMR 18.00, *et seq*. Under section 24A(a) of chapter 93, "no person may directly or indirectly engage in the business of a debt collector . . . without first obtaining from the commissioner a license to carry on the business . . ." Pursuant to G. L. c. 93, § 24, "debt collector" is defined, in pertinent part, as:

> [A]ny person who uses an instrumentality of interstate commerce or the mails in any business the principal purposes of which is the collection of a debt, or who regularly collects or attempts to collect, directly or indirectly, a debt owed or due or asserted to be owed or due another.

Massachusetts law, along with its implementing regulation, also expressly exclude certain categories of persons from the definition of "debt collector." G. L. c. 93, § 24; 209 CMR. 18.02. In particular, the relevant statute and regulation exclude from the definition of debt collector:

> . . .
>
> (f) a person collecting or attempting to collect a debt owed or due or asserted to be owed or due another to the extent the activity (i) is incidental to a bona fide fiduciary obligation or a bona fide escrow arrangement; (ii) concerns a debt which was originated by the person; *(iii) concerns a debt which was not in default at the time it was obtained by the person*; or (iv) concerns a debt obtained by the person as a secured party in a commercial credit transaction involving the creditor;

(emphasis added).

Notably, the current language of the Massachusetts debt collection statute reflects the Massachusetts legislature's 2003 amendments to conform the language of the Massachusetts statute to that of the federal Fair Debt Collection Practices Act (FDCPA), with a few exceptions. *See* 15 U.S.C. 1692 *et seq*. Indeed, the definition of "debt collector" under Massachusetts law, including the exemption set forth above, is identical to the language of the accompanying section of the FDCPA. *See* 15 U.S.C. §1692a(6)(F)(iii).[1] Consistent with this approach, the Division of Banks, as well as Massachusetts courts, have stated that the interpretation of the Massachusetts debt collection law will be guided by the interpretation of the FDCPA. *See* Division Opinion 05-052; *see also Midland Funding v. Juba*, 2017 Mass. App. Div. 31, 33 (2017).

As noted in your correspondence, the United States Court of Appeals for the First Circuit has had occasion to review the decision of the United States District Court for the District of Rhode Island interpreting the exemption from the definition of "debt collector" set forth in 15 U.S.C. 1692a(6)(F)(iii) as specifically applied to Twin Oaks' business model. *See Laccinole v. Twin Oaks Software Dev., Inc.*, No. 14-1705 (1st. Cir. April 27, 2015). In particular, the District Court observed:

> The law is settled that Twin Oaks "obtained" [plaintiff's] debt when it commenced processing in January 2009 pursuant to the terms of the 2005 Dues Processing

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[1] The definition of "debt collector under 15 U.S.C. § 1692a(6)(F) specifically excludes:

> any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity (i) is incidental to a bona fide fiduciary obligation or a bona fide escrow arrangement; (ii) concerns a debt which was originated by such person; (iii) concerns a debt which was not in default at the time it was obtained by such person; or (iv) concerns a debt obtained by such person as a secured party in a commercial credit transaction involving the creditor.

> Agreement, which gave it the right not only to process, but also to send reminder notices and to communicate directly with members about periodic payments that had been declined. Because it is undisputed that the amount owed by [plaintiff] for his membership dues was not in default at the time Twin Oaks "obtained" his account for processing, Twin Oaks was not a debt collector under either FDCPA or RI-FDCPA at any time conceivably relevant to this litigation.

Laccinole v. Twin Oaks Software Dev., Inc., 2014 WL 2440400 at *10 (D. R.I. May 30, 2014) (internal citations omitted). As noted in your correspondence, the United States Court of Appeals for the First Circuit affirmed the District Court's interpretation, stating "[i]n our view, [plaintiff's] claims fail regardless because, per 15 U.S.C.A. § 1692a(6)(F)(iii), Twin Oaks did not act as a 'debt collector' for purposes of the transactions described in the complaint." As you further emphasize, the First Circuit is not alone in its interpretation of this provision of the FDCPA. *See Alamo v. ABC Fin'l Servs., Inc.*, 2011 WL 221766 at *5-6 (E.D. Pa. Jan. 20, 2011); *Pulawa v. Fed. Recovery Servs., Inc.*, 2006 WL 1153745 at *6-7 (D. Haw. May 1, 2006); *see also Obdusky v. Wells Fargo*, 879 F.3d 1216, 1219 (10th Cir. 2018) (noting that Senate report within FDCPA legislative history expresses clear intent to exclude "mortgage service companies and others who service outstanding debts for others, so long as the debts were not default when taken for servicing"); *Garner v. Claimassist, LLC*, 2018 U.S. Dist. LEXIS 134179 at *19-25 (D. Md. Aug. 9, 2018).

In light of the foregoing, it is the Division's position that Twin Oaks is not a "debt collector" for purposes of G. L. c. 93, §§ 24 - 28 or 209 CMR 18.00 *et seq* and is therefore not required to be licensed as a debt collector with the Division. Please be advised, however, that Twin Oaks may be subject to the Attorney General's debt collection regulation, 940 CMR 7.00 *et seq*. The conclusions reached in this letter are based solely on the facts presented. Fact patterns which vary from that presented may result in a different position statement by the Division.

Sincerely,

Merrily S. Gerrish
Acting Commissioner of Banks
and General Counsel

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