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{{ opposing\_party.name }},

PLAINTIFF,

**DEFENDANT’S MOTION TO DISSOLVE OR STAY THE ORDER ALLOWING GARNISHMENT OF {{ user.pronoun\_possessive(“WAGES”) }}**

v.

{{user.name.full() }},

DEFENDANT,

And

{{ trustee.name }}

TRUSTEE

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Defendant {{ client.name.full() }} (“Defendant”) moves this Honorable Court to vacate or, in the alternative, stay the {{ judgment\_entry\_date }} order allowing garnishment of {{ user.pronoun\_possessive(‘wages’) }}. The COVID-19 pandemic has created extraordinary circumstances during which all Massachusetts residents, including Defendant need access to all their income for essential items like food, medicine, housing, and transportation. Moreover, even if we were not in the midst of a global pandemic, the order should be vacated because

Defendant, {% if “lack of notice” in defenses %}. who did not have notice of the original hearing on the garnishment,{% endif %} has {{ length\_defenses }}valid —{{ defenses\_comma\_and\_list }}defenses. Because of the exigent circumstances of the pandemic, the Defendant requests that the Court either vacate or stay the garnishment order without holding a hearing on this motion. In the alternative, if the Court requires a hearing, the Defendant requests that the Court hold a phone or videoconference hearing as soon as possible consistent with Boston Municipal Court Standing Court Order 4-20, which permits consideration of non-emergency matters.

In support of this Motion, the Defendant states:

1. On or about {{ judgment\_entry\_date }}, Plaintiff {{ opposing\_party.name }} (“Plaintiff”) commenced this trustee process action against Defendant and {{ user.pronoun\_possessive(“wages”) }} employer {{ trustee.name }}. The suit sought to collect {{ original\_judgment.amount }} based on a judgment (the “Judgment”) entered against Defendant in {{ original\_judgment.court }} Court on {{ original\_judgment.date }}.
2. On {{ trustee\_process\_motion.grant\_date }}, the Court granted Plaintiff’s {% if not trustee\_process\_motion.opposed %} unopposed {% endif %} motion for attachment by trustee process. The court {% if trustee\_process\_motion.court\_ordered\_specific\_garnishment\_amount %} ordered {{ trustee\_process\_motion.garnishment\_amount }} be garnished each week. {% else %} did not specify how much wages could be garnished. {% endif %}

**The Wage attachment should be dissolved or stayed because of the extraordinary circumstances of the pandemic**

1. The Court should vacate and dissolve (or in the alternative, stay) the attachment order because the COVID-19 pandemic has created extraordinary circumstances so as to make any wage garnishment inappropriate.
2. Under the statutes and rules that govern trustee process actions, the Court has discretion to deny a creditor’s motion to attach wages. Such discretion is evidenced in Rule 4.2(c), which states that an order approving trustee process “*may* be entered” only after certain steps are taken. The use of such permissive language indicates that “authorization and discretion” was intended. *Dowling v. Bd. of Assessors of City of Bos*., 268 Mass. 480, 488–89 (1929). In addition, under its jurisdictional statute, this court has broad equitable powers and jurisdiction for the purposes of the “hearing and disposition” of civil actions for money damages like this one. G.L. c. 218, § 19C.
3. The Court should exercise such discretion and equitable powers because of the extraordinary circumstances which the COVID-19 pandemic presets.
4. As Governor Baker declared in his Executive Order declaring the State of Emergency to Respond to COVID-19 on March 10, 2020, “the worldwide outbreak of COVID-19 and the effects of its extreme risk of person-to-person transmission throughout the United States and the Commonwealth significantly affect the *life and health of our people, as well as the economy, and is a disaster that impacts the health, security, and safety of the public*[.]” Executive Order No. 591: Declaration of a State of Emergency to Respond to COVID-19 (emphasis added).
5. As the Executive Order and subsequent ones have highlighted, COVID-19 has resulted in significant economic impacts on residents of Massachusetts, including loss of income and wages. The pandemic threatens to undermine the financial and housing security of residents of the Commonwealth and individuals need any available funds for essential items like food, medicine, housing, and transportation.
6. As a result, the Court should use its discretion and equitable powers vacate and dissolve the order allowing the garnishment of Defendant’s wages or, in the alternative, stay it.
7. Moreover, even if we were not in the midst of a global pandemic, the order should be stayed or dissolved because Defendant, {% if “lack of notice” in defenses %} who did not have notice of the original hearing on the motion to allow trustee process,

{% endif %} has {{ length\_defenses }} valid defenses to this action—{{ defenses\_comma\_and\_list }}.

{%p if “reduction in income” in defenses %}

**Reduction in income**

1. The Court should dissolve the order because Defendant’s income has been reduced due to the COVID-19 pandemic and all of {{ user.pronoun\_possessive(“wages”) }} are exempt from collection now.
2. G.L. c. 246, § 28, the statute that governs trustee process actions, lays out a wage exemption of the higher of 50 times the greater of the federal or the Massachusetts hourly minimum wage or 85 percent of the debtor’s gross wages.[[1]](#footnote-1)
3. The minimum wage in Massachusetts, as of January 1, 2020, is $12.75 per hour. St. 2018, c. 121 (An Act Relative to Minimum Wage, Paid Family Medical Leave and the Sales Tax Holiday). As a result, “50 times . . . the Massachusetts hourly minimum wage for each week” is $637.50.
4. Defendant’s income has been reduced as a result of the pandemic. Her gross weekly wages are now {{ jobs\_total }}. As this is less than $637.50, {{ user.pronoun\_possessive(“income”) }} is now entirely exempt from collection.

{%p endif %}

{%p if “no non-exempt income” in defenses %}

**No non-exempt income**

1. Under the statutes that govern this proceeding, the Court may only order an attachment of wages if, after applying various statutory exemptions, including those for wages, rent, and utilities, a debtor has non-exempt income left to garnish. After applying such exemptions, Defendant does not have any non-exempt income left to be garnished.
2. G.L. c. 246, § 28, the statute that governs trustee process actions, lays out a wage exemption of the higher of eighty five percent of gross wages or 50 times the greater of the federal or Massachusetts hourly minimum wage.[[2]](#footnote-2) This amount cannot be garnished.
3. The minimum wage in Massachusetts, as of January 1, 2020, is $12.75 per hour. St. 2018, c. 121 (An Act Relative to Minimum Wage, Paid Family Medical Leave and the Sales Tax Holiday). As a result, “50 times . . . the Massachusetts hourly minimum wage for each week” is $637.50.
4. In addition, G.L. c. 223, § 42, dictates that property is exempt from being taken on execution under G.L. c. 235, § 34 cannot be subject to attachment in a trustee process action:

**All real and personal property liable to be taken on execution, except** such personal property as, from its nature or situation, has been considered as exempt according to the principles of the common law as adopted and practiced in the commonwealth, or **which is specifically exempt from execution under section thirty-four of chapter two hundred and thirty-five**, and except as provided in the four following sections, may be attached upon a writ of attachment in any action in which the debt or damages are recoverable

G.L. 223, § 42 (emphasis added); *see also Jordan v. Lavin*, 319 Mass. 362, 366 (Mass. 1946) (“Unless a chattel could ultimately be seized on the execution, and sold, it would be futile and therefore legally impossible to attach it by trustee process.”).

1. Pursuant to G.L. c. 235, § 34, the following assets of the debtor are among those that are “exempt from seizure on execution” and therefore, because of G.L. c. 223, § 42, are also exempt from attachment in a trustee process action:

First . . . the amount each month, not exceeding $500, reasonably necessary to pay for fuel, heat, refrigeration, water, hot water and light for the debtor and the debtor's family;

. . .

Fourteenth, Estates of homestead as defined in chapter 188 or, in lieu thereof, the amount of money each rental period, not exceeding $2,500 per month, necessary to pay the rent for the dwelling unit occupied by the debtor and the debtor's family

. . .

Fifteenth, $2,500 in cash or savings or other deposits in a banking or investment institution, wages equal to the greater of 85 per cent of the debtor’s gross wages or 50 times the greater of the federal or the Massachusetts hourly minimum wage for each week or portion thereof and the full amount owing or paid to a person as public assistance[.]

1. In other words, in addition to reiterating the wage exemption codified at G.L. c. 246, § 28, G.L. c. 235, § 34 also includes a series of other exemptions, including a rental exemption of up to $2,500 per month and a utilities exemption (to pay for fuel, heat, refrigeration, water, hot water and light for the debtor and the debtor’s family) of up to $500 a month. G.L. c. 245, § 34 (fourteenth), (first).
2. There is an “and” between the last two items in G.L. c. 245, § 34, clearly indicating that the various exemptions in the statute are not mutually exclusive and can be claimed cumulatively. *See In re Faro*, No. 09–16896–FJB, 2010 WL 2787850, \*2 (Bankr. D. Mass. July 13, 2010) (“The court . . . reads § 34 to permit a debtor to claim any and all listed items for which he or she may qualify, even where one is undesignated cash and the other is cash for a designated purpose, and that paragraph Fifteenth is not a limit on cash exemptible under the statute as a whole.”); 1A Sutherland Statutory Construction § 21:14 (7th ed.) (“Statutory phrases separated by the word ‘and’ are usually interpreted in the conjunctive.”).
3. The exemption statutes codified at G.L. c. 235, § 34 and G.L. c. 246, § 28 may not be deviated from, and no discretion can be exercised to adjust the amounts that they protect from collection. *See* G.L. c. 235 § 34 (“The following property of the debtor *shall* be exempt from seizure on execution . . . .” (emphasis added)); G.L. c. 246, § 28 (“*shall* be reserved in the hands of the trustee and *shall* be exempt from such attachment” (emphasis added)); *Com. v. Cook*, 426 Mass. 174, 181 (1997) (discussing and following “the general rule of viewing ‘shall’ as mandatory . . . .”). Moreover, enforcement of the exemptions statutes is important because Massachusetts and other states have enacted exemption statutes to ensure that debtors do not become public charges due to a privately incurred debt, and out of a recognition that certain property should be preserved in a debtor’s hands regardless of the debtor’s financial condition. *See* *Shamban v. Masidlover*, 429 Mass. 50, 53 (Mass. 1999) (discussing these policy considerations).
4. In this case, when you combine the {{ defenses\_comma\_and\_list }}, Defendant’s wages are fully exempt from attachment. Defendant earns {{ jobs\_total }} a week, slightly more than 50 times the Massachusetts hourly minimum wage for each week” ($637.50). Thus, only fifteen percent of {{ user.pronoun\_possessive(“gross wages”) }} or {{ jobs\_amount\_not\_exempt }} is not exempt from collection under the wage exemption. In addition, Defendant is eligible for other exemptions under G.L. c. 235, § 34 which render the other fifteen percent of {{ user.pronoun\_possessive(“income”) }} exempt from garnishment: a rental exemption of up to $2,500 a month and a utility exemption of up to $500 a month.
5. Defendant pays {{ user\_rent }} a month in rent and {{ user\_utilities }} a month in utilities, which are within the amounts which may be exempted under G.L. c. 235, § 34. In addition, they amount to {{ weekly\_rent }} a week in rent and {{ weekly\_utilities }} a week in utilities, for a total of {{ weekly\_utilities\_and\_rent }} or more than 15 percent of Defendant’s wages ({{ jobs\_amount\_not\_exempt }}).Thus, the entire 15% of Defendant’s income which was outside of the wage exemption should be exempted under the rent and utilities exemptions.

{%p endif %}

{%p if “failure to prove right to collect on the judgment” in defenses %}

**Failure to Prove Right to Collect on the Judgment (if Plaintiff is a post-judgment assignee)**

1. {% if length\_defenses > 1 %} Furthermore, {% endif %} Plaintiff, a purported post-judgment assignee, has failed to demonstrate that it has a right to collect on the judgment. It is axiomatic that as an alleged assignee, Plaintiff must prove not only that the debt is valid, but also that the Plaintiff has a valid debt assignment. *Norfolk* *Fin. Corp. v. Mazard,* 2009 Mass. App. Div. 255, 258 (2009). Plaintiff only submitted a generic bill of sale to the Court without any information concerning Defendant or the Judgment. However, a plaintiff cannot solely rely on generic bills of sale to prove its assignment to a specific account, and the Bill of Sale must be accompanied by evidence that a particular account was listed as one of the accounts assigned in the attachment to the bill of sale. *Kimhow v. Rawji*, 2012 Mass. App. Div. 48, 49 (2012); *see also Mazard*, 2009 Mass. App. Div. at 258 (rejecting generic bills of sales without identification of the relevant account and without any schedule of accounts included). Thus, the Court should vacate the order, as it was inappropriate to allow trustee process without proof that Plaintiff indeed owns the right to collect on the Judgment.

{%p endif %}

{%p if “noncompliance with rule” in defenses %}

**Noncompliance with Rule 8.1**

1. The Court should dismiss this action because Plaintiff has failed to comply with Mass. R. Civ. P. 8.1. Rule 8.1 requires that in any action “where the plaintiff seeks to collect a debt incurred pursuant to a revolving credit agreement[,]” the plaintiff must file other documents simultaneously with its complaint. Specifically, Plaintiff must file: (1) an affidavit disclosing certain information regarding the debt; (2) an affidavit providing documentation concerning establishing the existence, amount, and terms and conditions applicable to the debt; (3) an affidavit regarding address verification; and (4) a statute of limitations certification. Mass. R. Civ. P. 8.1(c)–(f).
2. Despite the fact that this is clearly an action “where the plaintiff seeks to collect a debt incurred pursuant to a revolving credit agreement[,]” Plaintiff has not complied with any portion of Rule 8.1. In fact, it did not include a single one of the affidavits required by the rule. While Plaintiff may try to argue that because this is a trustee process action rather than an original collection action, this is a distinction without significance. The rule does not in any way distinguish between types of collection actions and it is plain that a trustee process action where the underlying judgment is based on a revolving agreement is also an action to collect a debt incurred pursuant to a revolving credit agreement. In fact, in a recent decision, the Boston Municipal Court dismissed a trustee process case based on the plaintiff’s non-compliance with Rule 8.1. *See LVNV Funding v. Gillis*, 1901CV000020 (BMC Central Feb. 2, 2012), Order on Motion and Docket Sheet attached hereto as Exhibit A.

{%p endif %}

**CONCLUSION**

Thus, Defendant requests that the Court vacate and dissolve its order allowing attachment of {{ user.pronoun\_possessive(“wages”) }} or in the alternative stay the garnishment order without a hearing. In the alternative, should the Court require a hearing, {{ user.pronoun\_subjective() }} requests that the Court hold a phone or videoconference hearing as soon possible consistent with Standing Court Order 4-20, which permits consideration of non-emergency matters.

WHEREFORE, Defendant respectfully requests that the Court

1. Vacate or in the alternative stay the order allowing attachment of {{ user.pronoun\_possessive(“wages”) }} without hearing;

2. If deemed necessary, schedule this matter for a phone or videoconference hearing consistent with Standing Court Order 4-20; and

3. Grant such other relief this Honorable Court shall deem just.

Respectfully Submitted,

DEFENDANT

{{ user.signature }}

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

{{ user.name.full() }}  
{{ user.address.address }}

{{ user.address.city }}, {{ user.address.state }} {{ client.address.zip }}

{{ user.phone\_number }}  
 {{ user.email }}

Dated: {{ format\_date(today()) }}

*Prepared with the assistance of legal counsel*

1. The statute states in pertinent part that:

   If wages for personal labor or personal services of a defendant are attached for a debt or claim, an amount not exceeding the greater of 85 per cent of the debtor’s gross wages or 50 times the greater of the federal or the Massachusetts hourly minimum wage for each week or portion thereof out of the wages then due to the defendant for labor performed or services rendered during each week for which such wages were earned but not paid shall be reserved in the hands of the trustee and shall be exempt from such attachment. . . . The amount reserved under this section shall be paid by the trustee to the defendant in the same manner and at the same time as such amount would have been paid if no such attachment had been made.

   G.L. c. 246, § 28. [↑](#footnote-ref-1)
2. The statute states in pertinent part that:

   If wages for personal labor or personal services of a defendant are attached for a debt or claim, an amount not exceeding the greater of 85 per cent of the debtor’s gross wages or 50 times the greater of the federal or the Massachusetts hourly minimum wage for each week or portion thereof out of the wages then due to the defendant for labor performed or services rendered during each week for which such wages were earned but not paid shall be reserved in the hands of the trustee and shall be exempt from such attachment. . . . The amount reserved under this section shall be paid by the trustee to the defendant in the same manner and at the same time as such amount would have been paid if no such attachment had been made.

   G.L. c. 246, § 28. [↑](#footnote-ref-2)