[ORAL ARGUMENT REQUESTED]

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Elizabeth Lupia v. Medicredit, Inc.	No. 20-1294

On Appeal from the United States District Court for the District of Colorado
The Honorable Robert E. Blackburn, District Judge
District Court Case No. 1:19-CV-01209-REB-KMT

APPELLANT'S OPENING BRIEF

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I. SUMMARY OF ARGUMENT

The District Court committed at least three reversible errors: (1) entered summary judgment *sua sponte* against Defendant-Appellant Medicredit, Inc. ("Medicredit") on grounds Plaintiff-Appellee Elizabeth Lupia ("Plaintiff-Appellee") did not raise in her Motion for Summary Judgment; (2) denied Medicredit's Motion for Summary Judgment and granted Plaintiff-Appellee's Motion for Summary Judgment as to Medicredit's bona fide error defense; and (3) denied Medicredit's Motion to Partially Revise Order Re: Cross-Motions for Summary Judgment Pursuant to F.R.C.P. 54(b) or, in the Alternative, for Reconsideration (the "Motion for Reconsideration").

First, the District Court erred by entering summary judgment *sua sponte* against Medicredit on its bona fide error defense because it did so on grounds that Plaintiff-Appellee did not raise and failed to give Medicredit notice and an opportunity to respond before issuing its ruling. Second, on the merits of its decision concerning Medicredit's bona fide error defense, the District Court erred because Medicredit presented sufficient evidence to support that defense and because all of the authority directly on point holds that a three day mail processing time is reasonable. Third, the District Court erred when it denied Medicredit's Motion for Reconsideration for these same reasons and for the additional reason that it failed to consider whether Plaintiff-

Appellee had conceded the reasonableness of Medicredit's mail processing procedures in failing to rebut Medicredit's summary judgment evidence and argument concerning that point. For all of these reasons, this Court should reverse the District Court's *sua sponte* entry of summary judgment in Plaintiff's favor on Medicredit's bona fide error defense and her claims under 15 U.S.C. §§ 1692g(b) & 1692c(c), the District Court's denial of Medicredit's Motion for Summary Judgment on those same issues, and the District Court's denial of Medicredit's Motion for Reconsideration.

II. STATEMENT OF PRIOR OR RELATED APPEALS

There are no prior or related appeals.

III. STATEMENT OF JURISDICTION

The District Court had subject matter jurisdiction under 28 U.S.C. § 1331 (federal question) because Plaintiff brought each of her four claims under the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692a, *et seq*. (the "FDCPA").

This Court has appellate jurisdiction under 28 U.S.C. § 1291. A final judgment disposing of all claims for relief entered on August 7, 2020. *Appx.*, pp. 329–30.

IV. ISSUES PRESENTED

1. Whether the District Court erred in granting Plaintiff-Appellee summary judgment as to Medicredit's bona fide error defense to Plaintiff-Appellee's claims under 15 U.S.C. §§ 1692g(b) & 1692c(c) by entering summary judgment, *sua sponte*,

in her favor on grounds Plaintiff-Appellee did not raise and when Plaintiff-Appellee did not show facts concerning this defense in her Motion for Summary Judgment.

2. Whether the District Court erred in denying Medicredit's bona fide error defense under 15 U.S.C. § 1692k(c) to Plaintiff-Appellee's claims under 15 U.S.C. §§ 1692g(b) & 1692c(c) when it was undisputed that Medicredit's lone call to Plaintiff-Appellee was made while Medicredit was processing Plaintiff-Appellee's letter and that phone call occurred less than 24 hours after Medicredit received the letter.

3. Whether the District Court erred in denying Medicredit's Motion for Reconsideration when the District Court granted summary judgment in favor of Plaintiff-Appellee on grounds she did not raise and failed to address whether Plaintiff-Appellee conceded the reasonableness of Medicredit's mail processing procedures.

V. STATEMENT OF THE CASE

A. Facts

The facts of this case relevant on appeal were largely undisputed. Plaintiff-Appellee's claims arise from Medicredit's attempts to collect a debt Plaintiff-Appellee incurred to St. Francis Medical Center ("SFMC") in Colorado Springs for medical treatment she received there on April 5, 2017 (the "Debt").[1] *Appx*., pp. 10–11 (¶¶ 19–

1 The specifics of SFMC's billing of Plaintiff-Appellee are not relevant to this appeal as the District Court found that Medicredit did not violate the FDCPA merely by trying to collect that bill and issues related to that conclusion are not presented on

24). After Plaintiff-Appellee did not pay the balance bill SFMC sent her once it applied a partial payment from Liberty Health Share ("LHS"), SFMC placed the debt with Medicredit for collection on April 19, 2018. *Appx*., p. 271.

One week after SFMC placed the account with Medicredit, Medicredit sent Plaintiff-Appellee its initial notice as required under the FDCPA.[2] *Appx*., p. 271. After receiving this initial notice, Plaintiff-Appellee mailed Medicredit a letter by First Class Mail dated May 1, 2018, purporting to dispute the Debt (the "Dispute Letter"). *Appx*., pp. 107–08, 271–72. The Dispute Letter was stamped received by Medicredit on May 7, 2018. *Appx*., p. 272. Medicredit promptly began processing the Dispute Letter and the Dispute Letter was logged into Medicredit's system on May 10, 2018. *Appx*., pp. 46 (¶ 21), 272.

While Medicredit was processing the Dispute Letter, it placed one call to Plaintiff on May 8, 2018, at 9:24 a.m. Mountain Standard Time (the "May 8 Call"). *Appx*., pp. 47 (¶ 22), 147, 272. Plaintiff did not answer this call. *Appx*., pp. 47 (¶ 22), 272. Medicredit made no further calls to Plaintiff after May 8, 2018. *Appx*., pp. 47 (¶ 27), 97 (¶ 16), 106.

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appeal. *Appx*., pp. 283–88. As such, Medicredit will not detail the events that leading to SFMC's placement of Plaintiff-Appellee's account with Medicredit for collection.

2 Plaintiff did not claim that Medicredit's initial notice was defective. Therefore, Medicredit will not detail the contents of its initial notice to Plaintiff-Appellee as they are not relevant.

At the time it received the Dispute Letter, Medicredit maintained procedures for processing mail, including dispute letters, to avoid contacting a debtor after receiving a letter from him or her. *Appx.*, pp. 96 (¶ 12), 272. As is relevant to the Dispute Letter, non-certified letters are received at Medicredit's P.O. Box in Creve Couer, Missouri. *Appx.*, 96 (¶ 12). Once picked up from that P.O. Box, non-certified letters are taken to Medicredit's nearby office for processing and forwarded to its compliance division. *Appx.*, 96 (¶ 12). Medicredit's compliance division then uploads letters like the Dispute Letter into its electronic system and places a hold on the relevant account or accounts to stop further collection activities. *Appx.*, 96 (¶ 12).

Medicredit generally requires three business days to process any given piece of mail due to the large volume of mail it receives daily.[3] *Appx.*, p. 297 (¶ 8). Specifically, in May of 2018, when Medicredit received the Dispute Letter, it received an average of 393 pieces of mail per day at the P.O. Box where the Dispute Letter was delivered. *Appx.*, p. 296 (¶ 3). Across all of its P.O. Boxes, Medicredit received between approximately 1,700 and 2,200 pieces of mail per day. *Appx.*, p. 296 (¶ 4). Of this total volume, approximately 80 percent is payments.

The remaining 20 percent (340-440 pieces of mail daily) is correspondence

3 Medicredit presented all facts stated in this paragraph and the following paragraph in a declaration submitted as an exhibit to its Motion for Reconsideration. *Appx.*, pp. 302–03.

requiring manual review to determine if the letter is a cease and desist letter or a letter from an attorney. *Appx*., p. 302 (¶ 5). Further, Medicredit sorts all incoming mail that is not a payment into three subcategories: (1) return mail; (2) bankruptcy; and (3) correspondence. *Appx*., p. 303 (¶ 6). Letters like the Dispute Letter are sorted into category (3). *Appx*., p. 303 (¶ 7).

B. Course of Proceedings

Plaintiff-Appellee filed suit on April 24, 2019. *Appx*., pp. 7–28. Her Complaint asserted four claims under the FDCPA. *Appx*., pp. 12–17. Only the first two of Plaintiff-Appellee's claims are relevant to this appeal, which asserted the following: (1) Medicredit violated the FDCPA, specifically 15 U.S.C. § 1692g(b), by placing the May 8 Call; and (2) Medicredit also violated 15 U.S.C. § 1692c(c) by placing the May 8 Call. *Appx*., 12–14.

After the close of discovery, both parties filed competing motions for summary judgment. *Appx*., pp. 42–62, 112–30. Of note, Plaintiff-Appellee sought summary judgment in her favor on all of her claims and on Medicredit's bona fide error affirmative defense under 15 U.S.C. § 1692k(c). *Appx*., pp. 122–25. In seeking summary judgment on this bona fide error defense, however, Plaintiff did not present facts or argue that Medicredit's mail processing was not reasonably adapted to prevent the May 8 Call. *Appx*., pp. 122–25.

The District Court ruled on these cross-motions for summary judgment in its Order re: Cross-Motions for Summary Judgment dated April 13, 2020 (the "MSJ Order"). *Appx*., pp. 268–288. The Court granted in part and denied in part Medicredit's Motion for Summary Judgment and similarly granted in part and denied in part Plaintiff-Appellee's Motion for Summary Judgment. *Appx*., p. 287.

As is relevant to this appeal, the District Court denied that part of Medicredit's Motion for Summary Judgment concerning Plaintiff-Appellee's claim under 15 U.S.C. §§ 1692g(b) & 1692c(c) and granted that portion of Plaintiff-Appellee's Motion for Summary Judgment related to those same claims and Medicredit's bona fide error defense thereto. *Appx*., pp. 276–83, 287–88. The District Court granted Plaintiff-Appellee summary judgment on Medicredit's bona fide error defense on the ground that it found Medicredit's three-day mail processing time not to be reasonably adapted to prevent the May 8 Call despite the fact Plaintiff-Appellee never argued this point and did not present any evidence or facts on this point in her Motion for Summary Judgment. *Compare Appx.*, pp. 122–25 *and Appx.*, pp. 281–83.

Medicredit thereafter filed its Motion for Reconsideration. *Appx.*, p. 289. After the Motion for Reconsideration was fully briefed, the District Court denied the motion. *Appx*., p. 323.

VI. ARGUMENT

A. The District Court erred in granting Plaintiff-Appellee summary judgment on Medicredit's bona fide error defense because it entered summary judgment, *sua sponte*, on grounds not raised by Plaintiff-Appellee and did not call for additional evidence and briefing.

1. Standard of Review and Preservation

This Court reviews the "grant or denial of summary judgment de novo, applying the same standard of review as the district court." *In re Rumsey Land Co., LLC*, 944 F.3d 1259, 1270 (10th Cir. 2019). Summary judgment is proper only when "the movant shows there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Id*. "There is a genuine issue of material fact if a rational jury could find in favor of the nonmoving party on the evidence presented." *Id*.

The moving party "bears the initial burden of making a prima facie demonstration of the absence of a genuine issue of material fact..." *Id*. To carry this burden, the moving party must show "that is, point[] out to the district court—that there is an absence of evidence to support the nonmoving party's case." *Id*. at 1271. The nonmoving party must then "set forth specific facts showing that there is a genuine issue for trial." *Id*.

Medicredit preserved this issue by filing its summary judgment motion on February 18, 2020, *Appx.*, pp. 42–111, and responding to Plaintiff's summary

judgment on March 13, 2020, pp. 188–245. The District Court ruled on these summary judgment motions on April 13, 2020. *Appx*., pp. 268–88.

2. Argument

When a Court, *sua sponte*, is going to enter summary judgment on a ground not raised by the movant, it must identify "'for the parties material facts that may not be genuinely in dispute.'" *See Harlas v. Barn, LLC*, 2020 WL 1875143, at *1 (D.Colo. Apr. 15, 2020) (quoting *Arlin Geophysical v. U.S.*, 696 F. App'x. 362, 370 (10th Cir. 2017)). Because "the practice of granting summary judgment sua sponte is not favored", it will be affirmed only "'if the losing party was on notice that she had to come forward with all her evidence,' and no prejudice would result from a lack of notice." *See Harlas*, 2020 WL 1875143, at *1; *see also A.M. v. Holmes*, 830 F.3d 1123, 1138 (10th Cir. 2016); *and* Fed. R. Civ. P. 56(f) (requiring "notice and a reasonable time to respond" in order for the court to grant summary judgment "on grounds not raised by a party").

To "establish the requisite prejudice, the losing party must, at the least, identify for the appellate court what additional arguments [it] could have made or evidence [it] could have produced or relied on to undermine the district court's ruling." *Oldham v. O.K. Farms, Inc.*, 871 F.3d 1147, 1151 (10th Cir. 2017). When prejudice is shown, reversal of the *sua sponte* summary judgment is warranted. *See id*. at 1150 ("If such

prejudice is shown, however, then we will reverse.").

Here, just as in *Oldham*, the District Court gave no notice that it intended to grant Plaintiff-Appellee summary judgment on Medicredit's bona fide error defense on a ground Plaintiff-Appellee did not raise. *See id* (finding lack of notice because the moving party did not raise the argument on which the district court based its *sua sponte* summary judgment); *see also Tabura v. Kellogg USA*, 880 F.3d 544, 558 (10th Cir. 2018) (finding lack of notice and overturning *sua sponte* summary judgment because the plaintiffs' summary judgment argument concerning the defendant's affirmative defense was "expressly in light of the fact that" the defendant would bear the burden of proof at trial). The District Court, also like in *Oldham*, did not provide Medicredit any opportunity to respond to the decision to enter summary judgment in Plaintiff-Appellee's favor on grounds she did not raise.

That is, although Plaintiff-Appellee sought summary judgment on Medicredit's bona fide error defense, her request was not based on any facts or argument that Medicredit's three-day mail processing time was in any way not reasonably adapted to avoid the May 8 Call. *Appx.*, pp. 122–25. That is, while Medicredit had the burden of proof at trial on its bona fide error defense, at the summary judgment stage Plaintiff-Appellee was still required to make a prima facie demonstration of the absence of a genuine issue of material fact..." *Rumsey*, 944 F.3d at 1270. Plaintiff-Appellee did

not do so as she did not cite any facts or raise any arguments in her Motion for Summary Judgment that Medicredit's mail processing time was unreasonable. Instead, all that Plaintiff-Appellee argued in her Motion for Summary Judgment as to Medicredit's bona fide error defense is that Medicredit had produced insufficient information in discovery. *Appx.*, 125. Medicredit thus was not on notice that the District Court may enter summary judgment on the ground that its mail processing procedures were not reasonable. *See Tabura*, 880 F.3d at 558.

Further, in response to Medicredit's earlier-filed Motion for Summary Judgment, Plaintiff-Appellee again did not argue that Medicredit's bona fide error defense failed on the grounds that its processing time was not reasonably adapted; instead, Plaintiff-Appellee simply incorporated the same argument noted above that she raised in her Motion for Summary Judgment. *Appx.*, p. 179. Notably, Plaintiff-Appellee failed to raise any substantive argument on the merits in response to Medicredit's Motion for Summary Judgment despite the fact that Medicredit detailed the following facts, which the District Court accepted as true (*Appx.*, pp. 272, 281–83) in the declaration of its Senior Vice President, Don Wright:

- Medicredit receives all non-certified letters at its P.O. box near its office in Creve Coeur, Missouri;
- Once a non-certified mail is picked up and processed, it is forwarded to

Medicredit's compliance division, which then places a hold on any relevant account(s);

- Medicredit promptly began processing the Dispute Letter but due to the volume of mail Medicredit receives, it required three business days to do so.

Appx., pp. 96–97.

As such, Medicredit received no notice (or reasonable opportunity to respond) that the Court would enter summary judgment in Plaintiff-Appellee's favor on Medicredit's bona fide error defense on the grounds that its mail processing procedures were not reasonably adapted to avoid the May 8 Call. The District Court, however, considered all the facts, evidence, and arguments Medicredit submitted on this issue with its Motion for Summary Judgment and, instead of simply denying Medicredit's request for summary judgment in its favor on its bona fide error defense, entered summary judgment against Medicredit without calling for additional evidence or briefing as required by Fed. R. Civ. P. 56(f). *Appx.*, pp. 281–83; *see also Oldham*, 871 F.3d at 1150 ("The rules of civil procedure permit a district court to grant a summary judgment motion 'on grounds not raised by a party,' but only 'after giving notice and a reasonable opportunity to respond.'") (emphasis added).

The District Court's decision to enter summary judgment against Medicredit on

a ground Plaintiff-Appellee did not raise also prejudiced Medicredit. Specifically, had Plaintiff-Appellee raised the issue of the reasonableness of Medicredit's mail processing or had the District Court raised that issue and allowed additional briefing, Medicredit would have and could have provided additional detail concerning why it's mail processing typically takes three business days. In fact, Medicredit did present exactly that evidence when it filed its Motion for Reconsideration. *Appx.*, pp. 289–303. This prejudice is all the more salient because, in response to Medicredit's statement of undisputed material facts in its Motion for Summary Judgment, Plaintiff-Appellee did not, as required by Fed. R. Civ. P. 56(c)(1), admit or deny, with citations to particular materials in the record, any of the facts and evidence Medicredit presented concerning its mail processing procedures. *Compare App'x.*, pp. 46–48 *and App'x.*, pp. 171–86. Because Plaintiff-Appellee failed to do so, she admitted all facts as set forth in Medicredit's Motion for Summary Judgment. *See Cross v. The Home Depot*, 390 F.3d 1283, 1290 (10th Cir. 2004). Medicredit thus had no reason to believe that it needed to present further evidence than that which it had already presented. Thus, in failing to provide Medicredit notice and an opportunity to respond to its decision to enter summary judgment against it on grounds Plaintiff-Appellee did not raise, the District Court prejudiced Medicredit.

In short, because the District Court did not give Medicredit notice and

opportunity to respond, it had only two options permitted under Fed. R. Civ. P. 56 for resolving Plaintiff-Appellee's Motion for Summary Judgment as to Medicredit's bona fide error defense: (1) call for additional briefing; or (2) deny both Medicredit's and Plaintiff-Appellee's Motion for Summary Judgment and allow the issue of Medicredit's bona fide error defense to proceed to trial because the evidence of Medicredit's mail processing procedures and the volume of mail received created, at a minimum, a fact dispute. *See Oldham*, 871 F.3d at 1150. In failing to proceed with either of these two options the District Court erred when it entered summary judgment against Medicredit on its bona fide error defense on grounds Plaintiff-Appellee did not raise. Accordingly, this Court should reverse the District Court's grant of summary judgment in Plaintiff-Appellee's favor on Medicredit's bona fide error defense and instruct the District Court to hold a trial on that defense.

B. The District Court erred when it granted Plaintiff-Appellee's Motion for Summary Judgment and denied Medicredit's Motion for Summary Judgment concerning its bona fide error defense because it was undisputed that the only call Medicredit made to Plaintiff-Appellee after receiving her Dispute Letter occurred less than twenty-four hours after delivery and while Medicredit was processing that letter

1. Standard of Review and Preservation

As with section VI.A, above, the same *de novo* standard of review applies to the grant of Plaintiff-Appellee's Motion for Summary Judgment and the denial of Medicredit's Motion for Summary Judgment. *Rumsey*, 944 F.3d at 1270. The same

preservation issues discussed in section VI.A above also apply.

2. Argument

Even if the District Court did not err procedurally in entering summary judgment against Medicredit on its bona fide error defense, it erred on the merits of that decision, both in granting Plaintiff-Appellee summary judgment and denying Medicredit's request for summary judgment. In other words, the District Court erred when it concluded that Medicredit's mail processing system was not reasonably adapted to avoid the May 8 Call.

A debt collector cannot be held liable under the FDCPA "if [it] shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error." 15 U.S.C. § 1692k(c). To establish the bona fide error defense under the FDCPA, the debt collector must show that the alleged violation was: (1) unintentional; (2) a bona fide error; and (3) made despite the maintenance of procedures reasonably adapted to avoid the error. *See Johnson v. Riddle*, 443 F.3d 723, 727 (10th Cir. 2006). An alleged FDCPA violation is intentional only where the debt collector has a subjective, specific intent to violate the FDCPA. *See id*. at 728.

Whether an error is bona fide is an objective analysis that requires the court to determine whether the unintentional violation was reasonable. *See id*. at 729. That is,

an error is bona fide if made in good faith, "that is, a genuine mistake as opposed to a contrived mistake." *Kort v. Diversified Collection Servs.*, 394 F.3d 530, 538 (7th Cir. 2005). Finally, in analyzing the third element of whether the procedures are reasonably adapted to avoid the error, the court first determines whether the debt collector actually employed or implemented the procedures and then whether those procedures are "reasonably adapted." *Johnson*, 442 F.3d at 729.

This third element—whether Medicredit maintained procedures reasonably adapted to avoid placing the May 8 Call after receiving the Dispute Letter—is the only aspect of Medicredit's bona fide error relevant on appeal.[4] Specifically, the District Court erred in finding that Medicredit's mail processing procedures were not reasonably adapted to avoid the May 8 Call because the processing took three days.

Although neither this Court nor the District Court has previously addressed the reasonableness of the length of time debt collectors take to process letters like the Dispute Letter, courts in various other jurisdictions have squarely addressed that issue and routinely held that mail processing times of three business days or more are reasonable. For instance, in *Gebhardt v. LJ Ross Associates, Inc.*, the District of New Jersey addressed a 79 hour (three days and seven hours) mail processing time. *See*

4 The District Court correctly found that Medicredit did not have a subjective intent to violate the FDCPA and its placement of the May 8 Call was the result of a genuine mistake. *Appx.*, p. 282.

Gebhardt v. LJ Ross Assocs., Inc., 2017 WL 2562106, at *1 (D. N.J. June 12, 2017). In *Gebhardt*, the debt collector received a cease-and-desist letter from the debtor's attorney on September 11, 2014, at 9:58 a.m. *See id*. The debt collector then made a call to the debtor at 10:10 a.m. that same day. *See id*. Then, over 72 hours after receiving the cease and desist letter, the debt collector "processed the letter on September 14, 2014 at 5:07 p.m., and updated Plaintiff's account in the computer system, indicating that he was represented by counsel and that all [debt collector] employees were to cease communications with him." *Id*.

Further, the debt collector in *Gebhardt* processed its incoming mail in the following manner:

> All incoming mail...is forwarded to [the debt collector's] Client Services depart, which reviews and processes the 'voluminous amounts of written correspondence' the company receives daily. The Department reviews correspondence in the order that it is received. When notification is received, either of legal representation or to cease communication, [the debt collector] stops communicating with the consumer who sent the correspondence. Additionally, [the debt collector] will commence an account investigation, close the account, or request additional information from the consumer or consumer's counsel, depending on the information contained in the correspondence.
>
> When [the debt collector] receives notification that a consumer has retained legal representation, the employee processing the correspondence must update the consumer's account disposition code in the computer system to '3ATY.' All further communications then must be sent to counsel, rather than the consumer. When an account has the designation '3ATY,' 'the account system is programmed to prevent further calls being made to a consumer."

Id. at *5 (internal citations omitted).

Based on these facts, the court in *Gebhardt* concluded that "by a preponderance of evidence, [the debt collector] has demonstrated that it had reasonably adapted procedures to prevent an error from occurring." *Id*. The *Gebhardt* court specifically noted that the debt collector "detailed policies explaining how correspondence is received, reviewed, and processed by its employees." *Id*. Notably, the court in *Gebhardt* rejected the plaintiff's argument that the debt collector could have processed the mail more expeditiously by "receiving mail onsite instead of using a P.O. Box, picking up the mail in the morning and immediately opening it to scan for cease communication requests, or ceasing all debt collection calls until all mail is reviewed." *Id*. at *6. But as the *Gebhardt* court noted, the "FDCPA . . . 'does not require debt collectors to take every conceivable precaution to avoid errors; rather, it only requires reasonable precaution.'" *Id*. (quoting *Parker v. Pressler & Pressler*, 650 F. Supp. 2d 326, 343 (D. N.J. 2009) (quoting *Kort*, 394 F.3d at 539)).

Moreover, the *Gebhardt* court did not take issue with why mail processing took more than 72 hours. *See id*. at *5–*6. Indeed, the court there noted it had "previously explained that a 'processing delay' between receipt of a cease all communications letter and entry of that information into the computer system does not necessarily mean that the debt collector did not have in place 'procedures reasonably adapted to

avoid an erroneous communication with consumers.'" *Id*. at *5. The court went on to explain that "it is inherently unreasonable to expect that [the debt collector] have the ability to instantaneously update its records upon receipt of a cease communications letter without there being some time to process the request" and that "a prohibited communication one day after the receipt of a notification, while the notice was still being processed, [is] insufficient to defeat a bona fide error defense." *Id*. (citing several cases) (emphasis added).

Here, just as the debt collector in *Gebhardt*, Medicredit adduced evidence that it processes all of its voluminous incoming mail and forwards it to its compliance department who are then to place a hold in Medicredit's system to prevent further calls to a debtor who sends it a dispute letter. *Appx*., pp. 96–97 (¶¶ 12–15). Medicredit further presented evidence, much like the *Gebhardt* debt collector, that it followed this procedure with respect to Plaintiff-Appellee's Dispute Letter and placed no further calls to Plaintiff-Appellee after it logged the Dispute Letter. *Appx*., pp. 96–97 (¶¶ 13–14, 16–17).

This Court should thus hold that the District Court erred when it determined that Medicredit's mail processing procedures were not reasonably adapted to prevent the May 8 Call. Again, just as in *Gebhardt*, Medicredit "detailed policies explaining how correspondence is received, reviewed, and processed by its employees." Further,

the District Court's suggestion that Medicredit should have and could have processed the Dispute Letter in one day or less after receipt to actually stop the May 8 Call is "inherently unreasonable." As the *Gebhardt* court rightly and persuasively stated, the mere fact that a processing delay for mail exists "does not necessarily mean that the debt collector did not have in place 'procedures reasonably adapted to avoid'" the error. *Gebhardt*, 2017 WL 2562106, at *5; *see also Rush v. Portfolio Recovery Assocs. LLC*, 977 F. Supp. 2d 414, 440 (D. N.J. 2013) ("This one-day 'processing' delay...does not undermine my previous conclusions that [the defendant] had in place procedures reasonably adapted to avoid an erroneous communication..."). And even if it is theoretically possible that Medicredit could have done more to process the Dispute Letter faster, the FDCPA simply does not require it to do so; it requires only that Medicredit take reasonable steps. *See id*. at *6.

The Northern District of Alabama has also reached the same conclusion as to a three day mail processing time. In *Isaac v. RMB, Inc.*, the evidence was that the debt collector received a dispute letter on August 1 from the debtors that disputed the debt. *See Isaac v. RMB, Inc.*, 2014 WL 3566069, at *13 (N.D. Ala. July 18, 2014). The debt collector made no further calls to the debtors "after August 4, when their number was added to a 'do not call' list maintained by" the debt collector. *See id*. Based on this evidence the *Isaac* court concluded "any calls made through August 4 were

nothing more than *bona fide* errors corrected as soon as discovered." *Id*. (italics in original).

Notably, neither the District Court nor Plaintiff-Appellee cited any cases holding that a mail processing time of three days is not reasonably adapted to prevent prohibited calls to a debtor. This lack of citation is likely because, as undersigned's research has revealed, no such case exists. In other words, all courts to address the issue appear to have uniformly held that mail processing time of three days (and even more)[5] are reasonable and thus the bona fide error defense applies to any calls made during that mail processing.

In neither her response to Medicredit's Motion for Summary Judgment or her Motion for Summary Judgment did Plaintiff-Appellee argue or present any evidence that a three day mail processing time was unreasonable and thus conceded the point. *See Coffey v. Healthtrust, Inc.*, 955 F.2d 1388, 1393 (10th Cir. 1992) *and Perez v. El Tequila, LLC*, 847 F.3d 1247, 1254 (10th Cir. 2017). This lack of argument or evidence in Plaintiff-Appellee's Motion for Summary Judgment is especially notable because, although Medicredit has the burden of proof on its bona fide error defense, Plaintiff-Appellee was required, in the first instance, to make "a prima facie demonstration of the absence of a genuine issue of material fact..." *Rumsey*, 944 F.3d

5 *See Isaac v. RMB Inc.*, 604 F. App'x. 818, 820 (11th Cir. 2015).

at 1270. Plaintiff-Appellee failed to meet this burden because she did not present any evidence or argument in her Motion for Summary Judgment concerning the reasonableness of Medicredit's mail processing time. The Court was, therefore, without any basis to enter summary judgment in Plaintiff-Appellee's favor.[6]

Similarly, as noted above, Plaintiff-Appellee failed to admit or deny, with citation to specific record evidence, any of the facts or evidence Medicredit presented regard its mail processing procedures. Plaintiff-Appellee is thus deemed to have admitted those facts such that no fact dispute existed. *See Cross*, 390 F.3d at 1290. Thus, because Plaintiff-Appellee failed to both present any legal argument or evidence in response to Medicredit's Motion for Summary Judgment and thus conceded Medicredit's position, the District Court erred in denying Medicredit's Motion for Summary Judgment.

In sum, to bring the law of this Circuit in line with the law in other jurisdictions, this Court should hold that Medicredit's May 8 Call to Plaintiff-Appellee was the result of a bona fide error, reverse the District Court's grant of summary judgment in

6 In fact, as argued in detail in section VI.A above, because Plaintiff-Appellee failed to carry her burden on summary judgment and because Medicredit presented facts and argument concerning its mail processing in its Motion for Summary Judgment, if the District Court did not agree that Medicredit was entitled to summary judgment on its bona fide error defense, its only option was simply to deny summary judgment to both parties and send the issue of Medicredit's bona fide error defense to the jury at trial.

Plaintiff-Appellee's favor and denial of Medicredit's Motion for Summary Judgment, and remand with instructions to enter summary judgment in Medicredit's favor on its bona fide error defense and Counts I and II of Plaintiff-Appellee's Complaint.

C. The District Court erred in denying Medicredit's Motion for Reconsideration because it misapprehended the facts and law

1. Standard of Review and Preservation

The standard of review applicable to review of a denial of a motion for reconsideration "depends on the nature of the underlying decision." *Johnson v. Thompson*, 971 F.2d 1487, 1489 (10th Cir. 1992). When the "motion was for reconsideration of summary judgment", the standard is *de novo* review. *See id*.

Medicredit preserved this issue by filing its motion for reconsideration on May 1, 2020. *Appx.*, pp. 289–303. The District Court denied Medicredit's motion for reconsideration on June 10, 2020. *Appx*., pp. 323–28.

2. Argument

The District Court also committed reversible error when it denied Medicredit's Motion for Reconsideration. As this Court has held:

> Grounds warranting a motion to reconsider include (1) an intervening change in the controlling law; (2) new evidence previously unavailable; and (3) the need to correct clear error or prevent manifest injustice. Thus, a motion for reconsideration is appropriate where the court has misapprehended the facts, a party's position, or the controlling law. It is not appropriate to revisit issues already addressed or advance arguments that could have been raised in prior briefing.

Hayes v. Skywest Airlines, Inc., 2017 WL 6550692, at *1 (D. Colo. Aug. 23, 2017) (quoting *Servants of the Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000)). Here, Medicredit brought its Motion for Reconsideration on ground (3), the "need to correct clear error or prevent manifest injustice." That is, it argued that the District Court "misapprehended the facts, [Medicredit's] position, [and] the controlling law."

The District Court erred in three ways when it denied Medicredit's Motion for Reconsideration: (1) by deciding it properly entered summary judgment *sua sponte* in favor of Plaintiff-Appellee on grounds she did not raise; (2) the District Court failed to address that the May 8 Call took place approximately only day after delivery of the Dispute Letter; and (3) it failed to address whether Plaintiff conceded the reasonableness of Medicredit's mail processing time.

Medicredit has already detailed why the District Court erred in entering summary judgment *sua sponte* in Plaintiff-Appellee's favor in section VI.A above and will not repeat that here. Instead, because the standard of review for both that issue and this issue are the same, Medicredit incorporates all arguments made in section VI.A above as if made fully here. Similarly, Medicredit has also addressed in section VI.B why its three day mail processing time was reasonable. With respect to the second way in which the District Court erred in denying Medicredit's Motion for Reconsideration, Medicredit also incorporates all arguments made in section VI.B

above as if made fully here.

Beyond erring in not reconsidering its *sua sponte* entry of summary judgment in Plaintiff-Appellee's favor and its error in not reconsidering its decision on the merits, the District Court also erred in failing to address whether Plaintiff-Appellee conceded the reasonableness of Medicredit's mail processing time by failing to respond to Medicredit evidence and argument in its Motion for Summary Judgment.

Medicredit argued in its Motion for Summary Judgment, with citation to specific record evidence and persuasive authority directly on point, that its mail processing time was reasonable. *Appx*., pp. 46–47, 58–60. In response, Plaintiff-Appellee offered no counterargument or counter-evidence.[7] *Appx*., pp. 171–86. In failing to raise any counterarguments or counter-evidence in response to Medicredit's Motion for Summary Judgment, Plaintiff-Appellee conceded that Medicredit's mail processing was reasonable. *Coffey*, 955 F.2d at 1393 *and Perez*, 847 F.3d at 1254.

In its Order denying Medicredit's Motion for Reconsideration, however, the District Court makes no mention of whether Plaintiff conceded this point. *Appx*., pp. 323–28. The law in this Circuit is clear: a party's "failure to rebut the argument raised by defendants in their motion for summary judgment is fatal to [her] attempt to

7 Instead of directly responding to the points Medicredit raised in its Motion for Summary Judgment, Plaintiff-Appellee simply incorporated her arguments from her Motion for Summary Judgment. *Appx*., p. 179.

raise and rebut such arguments..." *Coffey*, F.2d at 1393. Again, Plaintiff-Appellee failed to rebut Medicredit's arguments in its Motion for Summary Judgment concerning its bona fide error defense and thus the District Court erred in denying Medicredit's Motion for Reconsideration. Therefore, this Court should reverse the District Court's denial of Medicredit's Motion for Reconsideration.

VII. CONCLUSION

For all of the above reasons, Medicredit requests that this Court reverse the District Court's *sua sponte* entry of summary judgment against it on its bona fide error defense, the District Court's partial denial of Medicredit's Motion for Summary Judgment as to its bona fide error defense, and the District Court's denial of Medicredit's Motion for Reconsideration. The District Court erred in entering summary judgment *sua sponte* against Medicredit on its bona fide error defense because it did so on grounds that Plaintiff-Appellee did not raise and without giving Medicredit notice and an opportunity to respond. The District Court also erred on the merits of its decision concerning Medicredit's bona fide error defense as Medicredit presented ample evidence of its mail processing procedures and the courts that have addressed the issue have uniformly held that a three day or more processing time is reasonable. Finally, as to Medicredit's Motion for Reconsideration, the District Court erred for the same reasons as well as the fact that it failed to consider whether Plaintiff

conceded that Medicredit's mail processing was reasonably adapted to avoid the May 8 Call.

REQUEST FOR ORAL ARGUMENT

Medicredit requests oral argument as it believes argument to be necessary to assist the Court in understanding the relevant precedents and answer any questions the Court may have.

Dated this 12th day of October, 2020.

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CERTIFICATE OF SERVICE

I, Jacob F. Hollars, hereby certify that on October 12, 2020, I served a copy of the foregoing **APPELLANT'S OPENING BRIEF** by first class mail, postage prepaid, and through the Court's electronic-filing system to:

Amorette C. Rinklieb
Russell S. Thompson IV
Counsel for Plaintiff-Appellee

s/ *Jacob Hollars*
Jacob Hollars, Esq.

CERTIFICATE OF COMPLIANCE

Certificate of Compliance With Type-Volume Limit, Typeface Requirements and Type Style Requirements

1. This document complies with the word limit of Fed. R. App. P. 32(a)(7)(B) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f):

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Dated this 12th of October, 2020.

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CERTIFICATE OF PRIVACY REDACTIONS

I, Jacob Hollars (attorney for Appellant), hereby certify on October 12, 2020, all required privacy redactions have been made to the attached brief.

s/ *Jacob Hollars*
Jacob Hollars, Esq.

CERTIFICATE OF SUBMITTED COPIES

I, Jacob Hollars (attorney for Appellant), hereby certify on October 12, 2020, that all hard copies to be submitted to the court will be exact copies of the version submitted electronically.

s/ *Jacob Hollars*
Jacob Hollars, Esq.

CERTIFICATE OF VIRUS SCANNING

I, Jacob Hollars (attorney for Appellant), hereby certify on October 12, 2020, that the electronic submission was scanned for viruses with the most recent version of a commercial virus scanning program.

s/ *Jacob Hollars*
Jacob Hollars, Esq.

ATTACHMENTS OF PERTINENT FINDINGS, CONCLUSIONS AND ORDERS, PURSUANT TO 10TH CIR. R. 28.2(A)

Attachment A ..... Order on Cross- Order re: Cross-Motions for Summary Judgment, dated April 13, 2020

Attachment B ..... Order Denying Motion for Reconsideration, dated June 10, 2020

Attachment C ..... Final Judgment dated August 7, 2020

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Robert E. Blackburn

Civil Action No. 19-cv-01209-REB-KMT

ELIZABETH LUPIA,

Plaintiff,

v.

MEDICREDIT, INC.,

Defendant.

ORDER RE: CROSS-MOTIONS FOR SUMMARY JUDGMENT

Blackburn, J.

The matters before me are (1) **Defendant Medicredit, Inc.'s Motion for Summary Judgment** [#20],[1] filed February 18, 2020;(2) **Plaintiff's Motion for Summary Judgment** [#22], filed February 21, 2020; and (3) **Plaintiff's Motion for Leave To File Surreply or, in the Alternative, for Leave To Supplement Her Response to Defendant's Motion for Summary Judgment** [#28], filed April 1, 2020. As expatiated below, I grant defendant's motion in part and deny it in part and grant plaintiff's summary judgment motion in part and deny it in part. I deny plaintiff's motion to file a surreply as moot.

I. JURISDICTION

I have jurisdiction over this matter under 15 U.S.C. § 1692k(d) (Fair Debt Collection Practices Act) and 28 U.S.C. §1331 (federal question).

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[1] "[#20]" is an example of the convention I use to identify the docket number assigned to a specific paper by the court's case management and electronic case filing system (CM/ECF). I use this convention throughout this order.

Attachment A

II. STANDARD OF REVIEW

Summary judgment is proper when there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. **FED. R. CIV. P.** 56(a); ***Celotex Corp. v. Catrett***, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). A dispute is "genuine" if the issue could be resolved in favor of either party. ***Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.***, 475 U.S. 574, 586, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986); ***Farthing v. City of Shawnee***, 39 F.3d 1131, 1135 (10th Cir. 1994). A fact is "material" if it might reasonably affect the outcome of the case. ***Anderson v. Liberty Lobby, Inc.***, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986); ***Farthing***, 39 F.3d at 1134.

A party who does not have the burden of proof at trial must show the absence of a genuine fact issue. ***Concrete Works, Inc. v. City & County of Denver***, 36 F.3d 1513, 1517 (10th Cir. 1994), ***cert. denied***, 115 S.Ct. 1315 (1995). By contrast, a movant who bears the burden of proof must submit evidence to establish every essential element of its claim or affirmative defense. ***See In re Ribozyme Pharmaceuticals, Inc. Securities Litigation***, 209 F.Supp.2d 1106, 1111 (D. Colo. 2002).[2] In either case, once the motion has been properly supported, the burden shifts to the nonmovant to show, by tendering depositions, affidavits, and other competent evidence, that summary judgment is not proper. ***Concrete Works***, 36 F.3d at 1518. All the evidence must be viewed in the light most favorable to the party opposing the

[2] The mere fact that both plaintiff and defendant have filed motions for summary judgment does not necessarily indicate summary judgment is proper. ***See Atlantic Richfield Co. v. Farm Credit Bank of Wichita***, 226 F.3d 1138, 1148 (10th Cir. 2000). ***See also Buell Cabinet Co. v. Sudduth***, 608 F.2d 431, 433 (10th Cir. 1979) ("Cross-motions for summary judgment are to be treated separately; the denial of one does not require the grant of another.").

motion. ***Simms v. Oklahoma ex rel Department of Mental Health and Substance Abuse Services***, 165 F.3d 1321, 1326 (10th Cir.), ***cert. denied***, 120 S.Ct. 53 (1999).

III. ANALYSIS

This case arises under the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. §1692. On April 5, 2017, plaintiff Elizabeth Lupia sought medical services from St. Francis Medical Center ("SFMC" or "the hospital") in Colorado Springs, Colorado. Ms. Lupia acknowledges she knew SFMC was not an in-network provider for her health insurer, Liberty Health Share ("LHS" or "the insurer").[3] On admission to SFMC, Ms. Lupia signed a Hospital Services Agreement, by which she acknowledged, *inter alia*,

> I understand that there is no guarantee of reimbursement or payment from any insurance company or other payor. I acknowledge full financial responsibility for, and agree to pay, all charges of the Hospital and of physicians rendering services not otherwise paid by my health insurance of other payor. Estimated patient responsibility is due at the time of service or following the medical screening exam. Any remaining charges are due and payable upon receipt of the bill.

(**Def. Motion App.**, Exh. B ¶ 6 at 1.)

After Ms. Lupia was seen at SFMC, the hospital submitted a bill for services rendered to her for $21,893.61. In July 2017, LHS tendered a check to SFMC in the amount of $7,154.36. On the back of that check, above the indorsement line, is printed the following:

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[3] LHS is not a traditional health insurance provider. As described in the **Complaint** ([#1], filed April 24, 2019), LHS is "healthcare sharing ministry wherein members make monthly contributions which are then used to pay for the medical expenses of other members in need." ***Id***. ¶ 18. ***See also*** healthinsurance.org, *What is a health care sharing ministry?* (available at: https://www.healthinsurance.org/glossary/health-care-sharing-ministry/) (last accessed April 10, 2020) ("Health care sharing ministries are non-insurance entities in which members share a common set of ethical or religious beliefs and share medical expenses among members in accordance with those beliefs.") (citation and internal quotation marks omitted).

> PAYMENT IS TENDERED ON BEHALF OF THE COST SHARING MINISTRY MEMBER IN FULL SETTLEMENT OF ALL CHARGES FOR FACILITY MEDICAL BILLS SUBMITTED ON THE STATED ACCOUNT.

(***Id.***, Exh. C at 2.) Also included was an explanation of benefits, which states, in relevant part,

> Any medical expense from the program is tendered in full and final satisfaction of charges for medical services and treatment rendered, and deposit by recipient shall constitute and evidence accord and satisfaction of any discrepancy between expenses hereby paid and amounts charged for such services and treatment.

(***Id.***, Exh. C. at 3.) Just below this statement, the document stated "Member Responsibility: $0.00." (***Id.***)

SFMC applied this payment to Ms. Lupia's outstanding account, and in September 2017, sent Ms. Lupia a bill for the balance on the original amount, that is, $14,739.25. Believing she owed nothing further, Ms. Lupia refused to pay this bill. Disagreeing with Ms. Lupia's assessment of her liability, on April 19, 2018, SFMC assigned the account to defendant Medicredit, Inc., for collection. This lawsuit arises from those collection efforts.

On April 25, 2018, Medicredit sent Ms. Lupia a notice informing her the debt had been assigned to Medicredit for collection, outlining her options for resolution of the account, and advising that if she failed to dispute the validity of the debt within 30 days, Medicredit would assume the debt was valid. (***Id.***, Exh. G at 1.) In response, Ms. Lupia sent Medicredit a letter in which she disputed the validity of the debt "or any portion thereof." She stated her position that SFMC's deposit of the check constituted acceptance of the amount tendered by LHS as full payment of the debt and demanded

all further telephone communication cease.[4] However, she expressly invited further "written confirmation of [Medicredit's] actions to correct/rectify this matter," and said she "look[ed] forward to [Medicredit's] written response." That letter, dated May 1, was postmarked on May 2 (***Id.***, Exh. I.)

The letter was stamped "received" by Medicredit on May 7. However, due to the way in which the company processes non-certified mail such as Ms. Lupia's letter, it was not actually logged into Medicredit's system until May 10.[5] Medicredit therefore placed a call to Ms. Lupia regarding the debt on May 8. Ms. Lupia did not answer that call, and Medicredit left a voice mail.

Once Ms. Lupia's letter was logged, Medicredit sent her a letter, dated May 16, 2018, acknowledging receipt of her dispute and advising that the company was "investigating the matter." The letter indicated "This communication is from a debt collector," referenced Ms. Lupia's account number, stated the "Balance Due on File" of $14,739.25, and invited Ms. Lupia to "contact our office" "[i]f [she had] any questions or concerns regarding the matter." Nevertheless, the letter also affirmed "[t]here is no additional information or action needed from you at this time." (***Id.***, Exh. J.)

These two contacts – the May 8 phone call and the May 16 letter – form the basis of all four counts brought in this lawsuit. For the reasons that follow, I find and conclude that Ms. Lupia is entitled to summary judgment on her claims under 15 U.S.C. §§ 1692g(b) and 1692c(c) insofar as those claims are premised on the May 8 phone

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[4] Medicredit attempted to contact Ms. Lupia by phone on April 30, 2018, but she did not answer.

[5] Medicredit states that non-certified letters are received at a PO box at the post office near its offices in Creve Couer, Missouri. Such mail is then retrieved from the post office and forwarded to Medicredit's compliance division, which in turn places a hold on any account where the debtor has requested no further contact.

call. As to all other claims raised herein, however, Medicredit is entitled to summary judgment.

A. STANDING

I begin by addressing Medicredit's suggestion that Ms. Lupia lacks standing to bring any claim related to the May 8 phone call because she suffered no actual damages . Until recently, the issue appeared well-settled. The Tenth Circuit has long recognized that the FDCPA creates statutory legal rights to be free from certain abusive debt collection practices, ***Johnson v. Riddle***, 305 F.3d 1107, 1117 (10th Cir. 2002), and affirmed that a plaintiff whose rights under the Act are violated has suffered injury-in-fact and otherwise meets the requirements of constitutional standing, ***Robey v. Shapiro, Marianos & Cejda, L.L.C.***, 434 F.3d 1208, 1212 (10th Cir. 2006).

However, in ***Spokeo, Inc. v. Robins***, – U.S. –, 136 S.Ct. 1540, 194 L.Ed.2d 365 (2016), the Supreme Court held that a plaintiff does not "automatically satisf[y] the injury-in-fact requirement whenever a statute grants [her] a statutory right and purports to authorize [her] to sue to vindicate that right." ***Spokeo***, 136 S.Ct. at 1549. To recover for such intangible harms, a plaintiff must show "a concrete injury even in the context of a statutory violation." ***Id. See also Summers v. Earth Island Institute,*** 555 U.S. 488, 496, 129 S.Ct. 1142, 1151, 173 L.Ed.2d 1 (2009) ("[D]eprivation of a procedural right without some concrete interest that is affected by the deprivation – a procedural right *in vacuo* – is insufficient to create Article III standing."). "A 'concrete' injury must be 'de facto'; that is, it must actually exist;" it must be "'real,' not "abstract." ***Spokeo***, 136 S.Ct. at 1548. When a procedural right protects a concrete interest, a violation of that right may create a sufficient "risk of real harm" to the underlying interest to "satisfy the

requirement of concreteness." ***Id.*** at 1549. Courts thus understand ***Spokeo*** "to instruct that an alleged procedural violation . . . manifest[s] concrete injury" if the violation actually harms or presents a material risk of harm to the underlying concrete interest. ***Strubel v.Comenity Bank***, 842 F.3d 181, 190 (2nd Cir. 2016).

To assess whether an intangible harm constitutes an injury in fact, ***Spokeo*** directs courts to consider two factors. First, due deference should be given to the judgment of Congress in having "identif[ied] and elevat[ed]" an intangible harm as worthy of statutory protection. "Congress is well positioned to identify intangible harms that meet minimum Article III requirements" and "its judgment is . . . instructive and important." ***Spokeo***, 136 S.Ct at 1549. Second, because the Article III case-or-controversy requirement "is grounded in historical practice," the court should consider "whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts." ***Id.***

Although the Tenth Circuit has yet to confront this question, numerous other federal courts have found alleged violations of various rights guaranteed by the FDCPA to constitute injury-in-fact. ***See St. Pierre v. Retrieval-Masters Creditors Bureau***, 898 F.3d 351, 357-58 (3rd Cir. 2018); ***Macy v. GC Services Limited Partnership***, 897 F.3d 747, 757 (6th Cir. 2018)***; Cohen v. Rosicki, Rosicki & Associates, P.C.***, 897 F.3d 75, 81 (2nd Cir. 2018); ***Church v. Accretive Health, Inc***., 654 Fed. Appx. 990, 994-95 & n.2 (11th Cir. July 6, 2016). ***Cf. Casillas v. Madison Avenue Associates, Inc***., 926 F.3d 329, 339 (7th Cir. 2019) Several district courts in this circuit have done likewise. ***See Cooper v. Stephen Bruce & Associates***, 2019 WL 97826 at *4 (W.D. Okla. Jan. 3,

2019); ***Irvine v. I.C. Systems, Inc.***, 198 F.Supp.3d 1232, 1236 (D. Colo. 2016).

I have little trouble in finding that Ms. Lupia has asserted the violation of concrete rights the violation of which carries a real risk of harm to her interests, and thus that she has standing to pursue her claims. As aptly noted by the Second Circuit in ***Cohen***, "Congress enacted the FDCPA to protect against the abusive debt collection practices likely to disrupt a debtor's life;"

> Sections 1692e and 1692g further this purpose: the former secures a consumer's right to be free from false, deceptive, or misleading practices by debt collectors, and the latter requires a debt collector who solicits payment from a consumer to provide the consumer with a detailed validation notice so that he may confirm that he indeed owes the debt and its amount before paying it[.]

Cohen, 897 F.3d at 96 (internal citations and quotation marks omitted). ***See also Macy***, 897 F.3d at 757 ("The aim of § 1692g is to provide a period for the recipient of a collection letter to consider her options. It is also to make the rights and obligations of a potentially hapless debtor as pellucid as possible.") (citation and internal quotation marks omitted). These sections thus protect consumers from, for instance, paying a debt which is not in fact owed, as well as from being subjected to abusive communications from debt collectors when liability has not been confirmed. Congress has recognized there is real risk of harm in allowing such practices to go unchecked. That interest is sufficiently concrete to confer standing.

Similarly, as regards section 1692c(c) of the FDCPA, "receiving a prohibited debt communication constitutes a real injury in and of itself." ***Swike v. Med-1 Solutions, LLC***, 2017 WL 4099307 at *4 (S.D. Ind. Sept. 15, 2017). In enacting the FDCPA, Congress recognized the real risk of mental distress that can accompany abusive debt

collection practices. ***See Demarais v. Gurstel Chargo, P.A.***, 869 F.3d 685, 692 (8th Cir. 2017); ***Schultz v. Southwest Credit Systems, LP***, 2017 WL 11457912 at *6 (N.D. Iowa Oct. 13, 2017) (violation of consumer's "statutory right to be free from abusive attempts to collect on debt" "creates the risk of real, concrete harms"). Moreover, from a historical perspective, Ms. Lupia's claims under section 1692c(c) plainly are akin to a common law claim for invasion of privacy, most particularly that branch of the tort that protects individuals from unreasonable intrusion on their seclusion. ***See* RESTATEMENT (SECOND) OF TORTS** § 652A(2)(a). The risk that those interests will be harmed by the practices made illegal under the FDCPA is sufficiently real and concrete to satisfy the injury-in-fact requirement of standing.

For these reasons, I find and conclude that Ms. Lupia has asserted sufficiently concrete injuries-in-fact and has standing to pursue these claims. I thus turn to those substantive matters.

B. COUNTS I & II: 15 U.S.C. §§ 1692g(b) & 1692c(c)

To state a claim for relief under the FDCPA, Ms. Lupia must prove four essential elements: (1) that she is a "consumer," 15 U.S.C. § 1692a(3); (2) that the debt in question arises out of a transaction entered primarily for personal, family, or household purposes, 15 U.S.C. § 1692a(5); (3) that Medicredit is a "debt collector," 15 U.S.C. § 1692a(6); and (4) that Medicredit violated, by act or omission, a provision of the FDCPA. ***Rhodes v. Olson Associates, P.C.***, 83 F.Supp.3d 1096, 1103 (D. Colo. 2015). Medicredit does not seriously dispute that Ms. Lupia can prove the first three of these essential elements. Instead, the only issue in this case is whether the summary

judgment evidence is sufficient to establish the various violations of the FDCPA alleged by Ms. Lupia.

Counts I and II of the complaint allege Medicredit violated sections1692g(b) and 1692c(c) of the FDCPA, respectively, by continuing to contact Ms. Lupia about the debt after receiving her written dispute. Under section 1692g(b),

> if the consumer notifies the debt collector in writing . . . that the debt, or any portion thereof, is disputed . . . the debt collector shall cease collection of the debt, or any disputed portion thereof, until the debt collector obtains verification of the debt or a copy of a judgment . . . and a copy of such verification or judgment . . . is mailed to the consumer by the debt collector.

15 U.S.C. §1692g(b).[6] Section 1962c(c) of the FDCPA, provides, in relevant part,

> If a consumer notifies a debt collector in writing that the consumer refuses to pay a debt or that the consumer wishes the debt collector to cease further communication with the consumer, the debt collector shall not communicate further with the consumer with respect to such debt.

15 U.S.C. § 1692c(c). The relevant question thus is whether Medicredit ceased "collection of the debt," in the case of section 1692g(b), and/or ceased communication "with respect to" the debt, in the case of section 1692c(c), after receiving Ms. Lupia's dispute.

A prerequisite of liability under section 1692g(b) is that the communication constitute an attempt to collect a debt. ***See Parker v. Midland Credit Management., Inc***., 874 F.Supp.2d 1353, 1358 (M.D. Fla. 2012) (letter which was merely informational

[6] There is neither evidence nor argument here that Medicredit provided Ms. Lupia with verification of the debt. Nevertheless, "a debt collector can simply cease collection efforts if it does not wish to make a verification." ***Maynard v. Cannon***, 401 Fed. Appx. 389, 397 (10th Cir. Nov. 10, 2010)

was "not a communication in connection with debt collection"). Ms. Lupia insists that because the May 16 letter states the "Balance Due on File" and the account number and invites Ms. Lupia to call with any questions,[7] the "least sophisticated consumer" would not clearly understand that Medicredit was not seeking to collect the debt. ***Ferree v. Marianos***, 1997 WL 687693 at *1 (10th Cir. Nov. 3, 1997) (under the FDCPA, "the test is how the least sophisticated consumer – one not having the astuteness of a 'Philadelphia lawyer' or even the sophistication of the average, everyday, common consumer – understands the notice he or she receives").[8]

I am not persuaded. Although Ms. Lupia implies the letter is fatally flawed for failing to include a specific advisement that it is not an attempt to collect a debt, nothing in the FDCPA or the cases interpreting it presumptively requires such language be included. Nor does the least sophisticated consumer standard absolve a consumer from being required to consider the entirety of the communication she receives. Even "the least sophisticated consumer can be presumed to possess a rudimentary amount of information about the world and a willingness to read a collection notice with some care." ***Id.*** (quoting ***Clomon v. Jackson***, 988 F.2d 1314, 1319 (2nd Cir. 1993)) (internal

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[7] Although Ms. Lupia also points to the letter's inclusion of the advisement that "This communication is from a debt collector," such a statement is required by law, as her counsel surely must know. ***See*** 15 U.S.C. §1692e(11); ***Garrett v. BNC Mortgage, Inc***., 929 F.Supp.2d 1120, 1127 n.6 (D. Colo. 2013) (noting it is misleading *per se* for debt collector to fail to include such an advisement in its initial written communication with the consumer).

[8] Most courts employ the least sophisticated consumer test in analyzing FDCPA claims. ***See Hamilton v. Capio Partners, LLC***, 237 F.Supp.3d 1109, 1113 (D. Colo. 2017). Although the Tenth Circuit has applied this test in two cases, ***see Fouts v. Express Recovery Services, Inc.***, 602 Fed .Appx. 417, 421 (10th Cir. Feb, 3, 2015); ***Ferree***, 129 F.3d 130 at *1, it has never definitively addressed whether the standard applies in FDCPA cases, ***see Hamilton***, 237 F.Supp.3d at 1113. The Supreme Court has not found occasion to resolve the issue definitively either. ***Sheriff v. Gillie***, – U.S. –,136 S.Ct. 1594, 1602, 194 L.Ed.2d 625 (2016).

quotation marks omitted). ***See also Kalebaugh v. Berman & Rabin, P.A.***, 43 F.Supp.3d 1215, 1220 (D. Kan. 2014) ("[W]hile the least sophisticated consumer test protects the naïve and credulous, the courts apply this standard in a way that also protects debt collectors against liability for unreasonable misinterpretations of collection notices.") (citation and internal quotation marks omitted).

Here, the May 16 letter advised Ms. Lupia that Medicredit had "received your dispute in regard to your account with [SFMC] and [was] currently investigating the matter." Although the letter did invite Ms. Lupia to call with any questions, it specifically stated that "[t]here is not additional information or action needed from you at this time." (**Def. Motion App.**, Exh. J.) Payment was not demanded and no payment terms or deadlines were stated. ***See Parker***, 874 F.Supp.2d at 1358. Not even a wholly unsophisticated consumer could believe she was being asked to pay a debt when the letter is read in whole and in context, especially not when that consumer already had contested the validity of that debt and invited the debt collector to contact her in writing regarding its efforts to resolve the dispute. ***See Ferree***, 1997 WL 687693 at *1; ***Goodman v. Asset Acceptance LLC***, – F.Supp.3d –, 2019 WL 7037482 at *4 (D. Colo. Dec. 20, 2019).

As for Ms. Lupia's claims under section 1692c(c), although the May 16 letter arguably was a communication about the debt, ***see*** 15 U.S.C. § 1692a(2) ("communication" is the "conveying of information regarding a debt directly or indirectly to any person through any medium"), Ms. Lupia's May 1 letter expressly invited Medicredit to send "written confirmation of your actions to correct/rectify this matter."

(**Def. Motion App.**, Exh. I at 2.) The May 16 letter plainly was responsive to that request. Nothing in the FDCPA allows a consumer to invite communication from a debt collector and then recover damages when the debt collector responds within the boundaries of the authorized communication. For these reasons, Medicredit is entitled to summary judgment on Counts I and II insofar as they are premised on the May 16 letter.

As for the May 8 phone call, however, I find and conclude that Medicredit did violate these provisions of the FDCPA. As the May 8 call plainly was an attempt to collect the debt, the only real issue is whether Medicredit can be deemed to have received Ms. Lupia's May 1 letter requesting Medicredit cease further telephone communications at the time it made that call. Both section 1692g(b) and 1692c(c) require a debt collector to cease all collection activity once the consumer "notifies" the debt collector of her desire to receive no further communication. As noted above, although the May 1 letter was marked "Received" on May 7, because of the way in which Medicredit processes its non-certified mail, it was not logged into Medicredit's system, and thus did not become effective to place a hold on Ms. Lupia's account, until May 10.

"Because the FDCPA . . . is a remedial statute, it should be construed liberally in favor of the consumer." ***Johnson***, 305 F.3d at 1117. In light of that directive, I must conclude that Medicredit received notice of the dispute on May 7. In general, where the date of receipt of mail is disputed, there is a rebuttable presumption that an item placed in the mail is received within five days. ***Lozano v. Ashcroft***, 258 F.3d 1160, 1165 (10th

Cir. 2001). Thus, having placed her letter in the mail on May 2, Ms. Lupia could reasonably expect it would be received, as indeed it was, by May 7.

Moreover, May 7, 2018, was a Monday; May 10 was a Thursday. This therefore is not an instance where mail was received late on a Friday without an opportunity to log it until the next business day, and Medicredit offers nothing to explain the rather substantial lapse of time between when the letter was marked received and when it was logged. Medicredit certainly is entitled to handle its mail in any way it deems fit, but it also must bear the risk that those procedures may be inadequate in a given instance. I thus find and conclude that the May 1 letter was received by Medicredit on May 7. The May 8 call therefore violated the FDCPA.

Medicredit claims that even if the May 8 call violated the FDCPA, the violation is excusable under the bona fide error defense. Under the FDCPA,

> [a] debt collector may not be held liable in any action brought under this subchapter if the debt collector shows by a preponderance of the evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.

15 U.S.C. § 1692k(c). To prove this affirmative defense, Medicredit must establish that its violation was "(1) unintentional, (2) a bona fide error, and (3) made despite the maintenance of procedures reasonably adapted to avoid the violation." ***Johnson***, 305 F.3d at 1121 (internal quotation marks omitted).

The first prong of this test is subjective. ***Johnson v. Riddle***, 443 F.3d 723, 728 (10th Cir. 2006). "[A] violation is unintentional for purposes of the FDCPA's bona fide error defense if the debt collector can establish the lack of specific intent to violate the

Act." ***Id***. Whether a debt collector's assertion that it did not intend to violate the law is credible may be informed by consideration of the other two, objective prongs of the test. ***Id.*** at 728-29 ("[T]he extent to which [a debt collector] should have objectively realized that his actions were in violation of law may be inferentially probative of the subjective intentional nature of that violation."). The second, bona fide error element "serves to impose an objective standard of reasonableness upon the asserted unintentional violation." ***Id.*** at 729 (citation and internal quotation marks omitted). "An error is bona fide if it was made in good faith – that is, a genuine mistake, as opposed to a contrived mistake."[9] ***Reynolds v. Collectioncenter, Inc***., 2016 WL 759215 at *5 (D. Colo. Feb. 26, 2016) (citation and internal quotation marks omitted). The final element of the test regarding procedures "involves a two-step inquiry: first, whether the debt collector 'maintained' – i.e., actually employed or implemented – procedures to avoid errors; and, second, whether the procedures were 'reasonably adapted' to avoid the specific error at issue." ***Johnson***, 443 F.3d at 729.

There seems to be no genuine dispute of material fact that Medicredit did not subjectively intend to violate the FDCPA in placing the May 8 call and that its mistake in doing so was genuine. Nevertheless, and although it maintained procedures designed

[9] Citing law from outside this circuit, Ms. Lupia suggests only clerical errors constitute bona fide errors under this prong. While that interpretation prevails elsewhere, it is not the law in this circuit. ***Johnson***, 305 F.3d at 1123. While counsel is certainly free to argue that the law should be otherwise, "officers of our court have an unfailing duty to bring to our attention the most relevant precedent that bears on the case at hand – both good and bad – of which they are aware." ***In re Murray***, 586 Fed. Appx. 477, 482 n.1 (10th Cir. Nov. 18, 2014) (citation and internal quotation marks omitted). ***See also Hill v. Norfolk & Western Railway Co.***, 814 F.2d 1192, 1198 (7th Cir.1987) ("The ostrich-like tactic of pretending that potentially dispositive authority against a litigant's contention does not exist is as unprofessional as it is pointless."); ***Wallic v. Owens-Corning Fiberglass Corp***., 40 F.Supp.2d 1185, 1190 (D. Colo. 1999) ("[A]n attorney has an ethical responsibility . . . to be honest with the court.").

to avoid calling debtors who had requested not to be contacted, it has failed to establish that those procedures were reasonably adapted to avoid the error that occurred in this case. Specifically, no reasonable jury could find a procedure which inexplicably allows a three-day lag between receipt of a debtor's dispute and logging that dispute into the system so that it is recognized and honored to be reasonably adapted to prevent unauthorized contact with the debtor. Accordingly, Ms. Lupia is entitled to summary judgment on this aspect of her claims under sections 1692g(b) and 1692c(c).

C. COUNTS III & IV: 15 U.S.C. § 1692e(2)(A) & e(10)

In Counts III and IV, Ms. Lupia alleges Medicredit violated section 1692e of the FDCPA. This section provides generally that "[a] debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt." 15 U.S.C. § 1692e. It is a violation of this section to falsely represent "the character, amount, or legal status of any debt," ***id.*** § 1692e(2)(A), or to use "any false representation or deceptive means to collect or attempt to collect any debt," ***id.*** § 1692e(10). Ms. Lupia claims Medicredit violated these provisions by asserting that she owed a debt which had been satisfied in full.

More specifically, Ms. Lupia maintains that SFMC accepted LHS's check as full payment for the debt, and thus an accord and satisfaction was reached, absolving her of liability for further payments. "An accord is a contract under which an obligee promises to accept a stated performance in satisfaction of the obligor's existing duty. Performance of the accord discharges the original duty." ***R.A. Reither Construction, Inc. v. Wheatland Rural Electric Association***, 680 P.2d 1342, 1344 (Colo. App.

1984). ***See also F.D.I.C. v. Inhofe***, 16 F.3d 371, 374 (10th Cir. 1994) ("Accord and satisfaction, then, is the substitution of another agreement between the parties in satisfaction of the former one, and an execution of the latter agreement."). Whether the elements of an accord and satisfaction are present is a question of fact. ***See Federal Lumber Co. v. Wheeler***, 643 P.2d 31, 37 (Colo.1981).

Under Colorado law, whether acceptance of a negotiable instrument[10] constitutes an accord and satisfaction is governed by article 3 of Colorado's Uniform Commercial Code. ***See*** §§4-3-102(a) & 4-3-104, C.R.S.[11] Specifically, section 4-3-311 provides, in relevant part,

> If a person against whom a claim is asserted proves that (I) that person in good faith tendered an instrument to the claimant as full satisfaction of the claim, (ii) the amount of the claim was unliquidated or subject to a bona fide dispute, and (iii) the claimant obtained payment of the instrument,

§4-3-311(a), C.R.S. "[T]he claim is discharged if the person against whom the claim is asserted proves that the instrument or an accompanying written communication contained a conspicuous statement to the effect that the instrument was tendered as full satisfaction of the claim." §4-3-311(b), C.R.S. The burden is on Ms. Lupia to prove that an accord and satisfaction was reached. ***See*** §4-3-311, C.R.S., cmt. 4.

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[10] "A check is a negotiable instrument." ***Georg v. Metro Fixtures Contractors, Inc.***,178 P.3d 1209, 1212 (Colo. 2008).

[11] It is not clear whether, in analyzing the question of accord and satisfaction, the court should look to state law or federal common law, and the parties do not address the issue directly. However, the common law elements of accord and satisfaction have been codified in the Uniform Commercial Code. ***Curtin v. United Airlines, Inc.***, 120 F.Supp 2d 73, 76 (D.D.C. 2000), ***aff'd***, 275 F.3d 88 (D.C. Cir. 2001), which Colorado has adopted. Moreover, the elements under both rubrics track closely in any event. ***See Valley Asphalt, Inc. v. Stimpel Wiebelhaus Associates***, 3 Fed. Appx. 838, 839-40 (10th Cir. Feb. 5, 2001) (elements of accord and satisfaction are "(1) a bona fide dispute over an unliquidated claim amount; (2) a check tendered in full settlement of the claimed amount; and (3) acceptance of the payment."). I thus do not resolve this issue but note merely that the result would be the same in either case.

Medicredit claims Ms. Lupia cannot meet the first requirement: that the check was tendered in good faith. I agree. Under the UCC, "'[g]ood faith' means honesty in fact and the observance of reasonable commercial standards of fair dealing." § 4-3-103(a)(4), C.R.S. The comments to section 4-3-311 posit as an example of a lack of good faith

> the practice of some business debtors in routinely printing full satisfaction language on their check stocks so that all or a large part of the debts of the debtor are paid by checks bearing the full satisfaction language, whether or not there is any dispute with the creditor. Under such a practice the claimant cannot be sure whether a tender in full satisfaction is or is not being made. Use of a check on which full satisfaction language was affixed routinely pursuant to such a business practice may prevent an accord and satisfaction on the ground that the check was not tendered in good faith under subsection (a)(I).

§4-3-311, C.R.S., cmt. 4.

Although it is not clear that the inclusion of accord and satisfaction language on its checks was LHS's standard business practice, the language plainly appears to be pre-printed on the check, suggesting such may be the case. Therefore, it is some evidence of a lack of good faith. However, Ms. Lupia, whose burden of proof it is to show good faith, offers nothing to countermand this suggestion. She does not show, for instance, that LHS included this endorsement only on checks where it had a bona fide dispute about the amount of payment, or indeed offer any evidence suggesting how LHS concluded that the submitted charges were not fully compensable. That Ms. Lupia at the time of her admission to SFMC signed an agreement wherein she "acknowledge[d] full financial responsibility for, and agree[d] to pay, all charges . . . not otherwise paid by my health insurance" also weighs against a finding of good faith,

which Ms. Lupia has not rebutted with any competent evidence.

For similar reasons, Ms. Lupia also has failed to adduce evidence to suggest that the dispute over the amount of the debt was bona fide. Although the term "bona fide dispute" is not defined in the statute, the Latin phrase "bona fide" literally means "in or with good faith." **BLACK'S LAW DICTIONARY** at 177 (6th ed.1990).[12] Ms. Lupia has failed to adduce any evidence to substantiate a finding that LHS's payment of barely one-third of the cost of services rendered to Ms. Lupia by SFMC was based on a good faith dispute as to the reasonable value of those services.

As Medicredit notes, Colorado allows the practice of balance billing where, as here, the patient intentionally seeks treatment from an out-of-network provider. §§10-16-704(2)(f)(I) & (3)(a)(IV), C.R.S. In addition, Ms. Lupia expressly agreed to pay any balance not covered by insurance. Because Ms. Lupia has failed to establish that LHS's partial payment constituted an accord and satisfaction, it was not inappropriate for SFMC to bill her for the difference between what LHS paid and the full cost of the services rendered. By extension, it was not false for Medicredit, on behalf of SFMC, to state that Ms. Lupia owed that debt.[13] Accordingly, Medicredit is entitled to summary judgment as to Counts III and IV.

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[12] In the context of bankruptcy law, a dispute is bona fide where "there is an objective basis for either a factual or a legal dispute as to the validity of debt." ***Bartmann v. Maverick Tube Corp.***, 853 F.2d 1540, 1544 (10th Cir. 1988).

[13] Given my resolution of this issue, I do not consider Medicredit's defense that it was entitled to rely on the information provided to it by SFMC.

IV. ORDERS

For these reasons, Medicredit is entitled to summary judgment on Counts III and IV in their entirety, as well as that aspect of Counts I and II which is premised on the May 16 letter. Ms. Lupia is entitled to summary judgment on that aspect of Counts I and II premised on the May 8 phone call. Because Ms. Lupia did not seek summary judgment on the issue of damages, that matter remains for trial to a jury.

THEREFORE, IT IS ORDERED as follows:

1. That **Defendant Medicredit, Inc.'s Motion for Summary Judgment** [#20], filed February 18, 2020, is granted in part and denied in part, as follows:

    a. That the motion is granted as to Counts I and II insofar as those claims are premised on the May 16 letter, and that aspect of those claims is dismissed with prejudice;

    b. That the motion is granted further as to Counts III and IV, and those claims are dismissed with prejudice; and

    c. That the motion is denied in all other respects;

2. That **Plaintiff's Motion for Summary Judgment** [#22], filed February 21, 2020, is granted in part and denied in part as follows:

    a. That the motion is granted as to Counts I and II insofar as those claims are premised on the May 8 phone call; and

    b. That the motion is denied in all other respects;

3. That **Plaintiff's Motion for Leave To File Surreply or, in the Alternative, for Leave To Supplement Her Response to Defendant's Motion for Summary**

Judgment [#28], filed April 1, 2020, is denied as moot;

4. That at the time judgment enters, judgment shall enter on behalf of plaintiff, Elizabeth Lupia, against defendant, Medicredit, Inc., on Counts I and II insofar as those claims are premised on the May 8 phone call; and

5. That at the time judgment enters, judgment with prejudice shall enter on behalf of defendant, Medicredit, Inc., against plaintiff, Elizabeth Lupia, as to Counts I and II insofar as those claims are premised on the May 16 letter, and as to Counts III and IV in their entirety.

Dated April 13, 2020, at Denver, Colorado.

BY THE COURT:

Robert E. Blackburn
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Robert E. Blackburn

Civil Action No. 19-cv-01029-REB-KMT

ELIZABETH LUPIA,

Plaintiff,

v.

MEDICREDIT, INC.,

Defendant.

ORDER DENYING MOTION TO RECONSIDER

Blackburn, J.

The matter before me is **Defendant Medicredit, Inc.'s Motion To Partially Revise Order: Cross-Motions for Summary Judgment Pursuant to F.R.C.P. 54(b) or, in the Alternative, for Reconsideration** [#32],[1] filed May 1, 2020. I deny the motion.

Although the Federal Rules of Civil Procedure do not specifically provide for motions to reconsider interlocutory orders prior to judgment, a district court remains free to reconsider its prior rulings under any standard of review it chooses. ***Moses H. Cone Memorial Hospital v. Mercury Construction Corp***., 460 U.S. 1, 12, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983) ("[E]very order short of a final decree is subject to reopening at the discretion of the district judge."); ***Been v. O.K. Industries***, 495 F.3d 1217,1225 (10th Cir.

[1] "[#32]" is an example of the convention I use to identify the docket number assigned to a specific paper by the court's case management and electronic case filing system (CM/ECF). I use this convention throughout this order.

Attachment B

2007) ("[D]istrict courts generally remain free to reconsider their earlier interlocutory orders."); ***XTO Energy, Inc. v. ATD, LLC***, 189 F.Supp.3d 1174, 1190 (D.N.M. 2016) (Rule 54(b) "puts no limit or governing standard on the district court's ability" to reconsider non-final orders).

Like other courts in this district, ***see Petrie v. GoSmith, Inc***., 2020 WL 376502 at *2 (D. Colo. Jan. 23, 2020) (citing cases), this court has consistently applied the standards of Rule 59(e) to such motions, ***see, e.g.***, ***Hayes v. SkyWest Airlines, Inc***., 2017 WL 6550692 at *1 (D. Colo. Aug. 23, 2017); ***Carbajal v. Morrissey***, 2014 WL 12914736 at *1 (D. Colo. Jan. 13, 2014). Under that rubric, the bases for granting such a motion are extremely limited:

> Grounds warranting a motion to reconsider include (1) an intervening change in the controlling law, (2) new evidence previously unavailable, and (3) the need to correct clear error or prevent manifest injustice. Thus, a motion for reconsideration is appropriate where the court has misapprehended the facts, a party's position, or the controlling law.

Servants of the Paraclete v. Does, 204 F.3d 1005, 1012 (10th Cir. 2000) (citations omitted). Although Medicredit does not specify which of these bases warrant reconsideration of the court's summary judgment order in this case, none are applicable.

In rejecting its bona fide error defense, I found Medicredit had failed to prove it maintained procedures "reasonably adapted" to prevent the error which led Medicredit to call Ms. Lupia after receiving her written request not to be contacted in that way, in violation of the Fair Debt Collection Practices Ac. (***See* Order Re: Cross-Motions for**

Summary Judgment at 14-15 [#30], filed April 13, 2020 [hereinafter "**Order**"].) Medicredit appears to be under the impression that Ms. Lupia was obliged to contest the reasonableness of its mail handling procedures and, because she allegedly did not, she conceded the point.[2]

This argument evidences a profound misunderstanding of the burden of proof. As I noted in my order, the assertion of a bona fide error is an affirmative defense. (***See id.*** at 14 (citing ***Johnson v. Riddle***, 305 F.3d 1107, 1121 (10th Cir. 2002).) It therefore was incumbent on Medicredit to prove all essential elements of this affirmative defense, regardless whether Ms. Lupia contested them.[3] ***See Patterson v. New York***, 432 U.S. 197, 202, 97 S.Ct. 2319, 2323, 53 L.Ed.2d 281 (1977) ("[A]t common law the burden of proving . . . affirmative defenses indeed, 'all . . . circumstances of justification, excuse or alleviation' rested on the defendant.") (quoting 4 W. Blackstone, Commentaries M. Foster, Crown Law 255 (1762)); ***Martinez v. Naranjo***, 328 F.R.D. 581, 594 (D.N.M. 2018) ("[T]he burden for establishing affirmative defenses . . . generally lies on the defendant.") (citation and internal quotation marks omitted). "This common-law rule accords with the general evidentiary rule that 'the burdens of producing evidence and of

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[2] Attempting to show inconsistency in my determinations, Medicredit suggests that elsewhere, I found Ms. Lupia "effectively conceded" a point by failing to respond to it. That is not what occurred, and in fact, the example actually proves the opposite of that for which Medicredit cites it. For what I actually concluded was that Ms. Lupia failed to present sufficient evidence to prove an accord and satisfaction had been reached, a question on which I noted she bore the burden of proof. (***See* Order** at 17-19.)

[3] It also is wrong as a matter of fact to suggest Ms. Lupia did not contest Medicredit's assertion of this defense, and in particular its assertion that it employed procedures reasonably adapted to prevent the type of error that led to the May 8 phone call. Indeed, Ms. Lupia insisted Medicredit failed to provide any information in response to discovery regarding its mail handling procedures and thus should be foreclosed from proving up the defense at all. (***See* Plaintiff's Motion for Summary Judgment** at 13-14 & Exh. F at 9-10, 16 [#22], filed February 21, 2020; **Plaintiff's Response in Opposition to Defendant's Motion for Summary Judgment** at 9 [#24], filed March 10, 2020 .)

persuasion with regard to any given issue are both generally allocated to the same party.'" ***Dixon v. United States***, 548 U.S. 1, 8, 126 S.Ct. 2437, 2443, 165 L.Ed.2d 299 (2006) (quoting 2 J. Strong, **McCormick on Evidence** § 337, p. 415 (5th ed. 1999)).

Medicredit failed to meet that burden. I summarized the totality of Medicredit's evidence regarding its mail handling procedures in my order:

> Medicredit states that non-certified letters are received at a PO box at the post office near its offices in Creve Couer, Missouri. Such mail is then retrieved from the post office and forwarded to Medicredit's compliance division, which in turn places a hold on any account where the debtor has requested no further contact.

(**Order** at 5 n.5.) I found this evidence insufficient to meet Medicredit's burden of proving that its procedures were reasonably adapted to prevent errors. In particular, I noted that "Medicredit offer[ed] nothing to explain the rather substantial lapse of time between when the letter was marked received and when it was logged" (***id.*** at 14),[4] and thus concluded that "no reasonable jury could find a procedure which i*nexplicably* allows a three-day lag between receipt of a debtor's dispute and logging that dispute into the system so that it is recognized and honored to be reasonably adapted to prevent unauthorized contact with the debtor" (***id.*** at 16 (emphasis added)).

Although Medicredit now attempts to flesh out its evidentiary presentation (***see* Motion App.**, Exh. A), its evidence comes too late. A motion for reconsideration is not intended to allow party "to revisit issues already addressed or advance arguments that could have been raised in prior briefing," ***Servants of the Paraclete***, 204 F.3d at 1012,

[4] I noted also that the lapse could not be explained by, for example, an intervening weekend, which might have accounted for the failure to log the letter more promptly. (***See* Order** at 14.)

and clearly this evidence is not new and could have been presented previously, ***see Equal Employment Opportunity Commission v. Foothills Title Guaranty Co.***, 1992 WL 43492 at *2 (10th Cir. March 2, 1992) ("A trial court need not entertain new arguments or evidence on a motion for reconsideration. Motions for reconsideration . . . cannot in any case be employed as a vehicle to introduce new evidence that could have been adduced during pendency of the summary judgment motion.") (internal citations, emphasis, and quotation marks omitted).

Moreover, the mere fact that Medicredit made the phone call less than a full day after receiving Ms. Lupia's letter is of no consequence given its failure to substantiate its defense. Assuming *arguendo* Medicredit is correct that no reasonable procedure could have prevented the error, it was still incumbent on Medicredit to prove the procedures it did maintain were reasonably adapted to avoid errors. Nothing in the district court's decision in ***Gebhardt v. LJ Ross Associates, Inc***., 2017 WL 2562106 (D.N.J. June 12, 2017), on which Medicredit places so much reliance, is to the contrary. Although the district court there noted that a "processing delay"would not necessarily defeat a bona fide error defense,[5] the defendant provided copious detail as to its mail processing procedures, both in general and with respect to the particular no-contact letter at issue. ***See id***. at *1, *5. ***Cf. Agostino v. Quest Diagnostics, Inc.***, 2011 WL 5410667 at *4 (D.N.J. Nov. 3, 2011) (defendants' "bare assertion that they have 'reasonable and industry accepted procedures for debtor validation'" insufficient to support bona fide

[5] The collection call in that case was made barely ten minutes after the debtor's non-contact request was picked up by an employee for the defendant, although the request was not processed for three more days. ***Gebhardt***., 2017 WL 2562106 at *1.

error defense; defendants' assertion was "devoid of any specificity regarding what those industry accepted procedures actually are, or how they are reasonably adapted to avoid the specific error at issue of collecting unlawful fees") (internal citation omitted), ***aff'd***, 767 F.3d 175 (3rd Cir. 2014). Having failed to meet its burden to establish in the first instance that it maintained procedures reasonably adapted to prevent errors, Medicredit cannot now claim the benefit of a processing delay argument.

Accordingly, Medicredit has failed to show that the court committed a clear error of fact or law, misunderstood the evidence or the parties' arguments, or otherwise erred in any manner warranting reconsideration of the summary judgment order. Thus, its motion will be denied.

THEREFORE, IT IS ORDERED that **Defendant Medicredit, Inc.'s Motion To Partially Revise Order: Cross-Motions for Summary Judgment Pursuant to F.R.C.P. 54(b) or, in the Alternative, for Reconsideration** [#32], filed May 1, 2020, is denied.

Dated June 10, 2020, at Denver, Colorado.

BY THE COURT:

Robert E. Blackburn
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No 19-cv-1209-REB-KMT

ELIZABETH LUPIA,

Plaintiff,

v.

MEDICREDIT, INC.,

Defendant.

FINAL JUDGMENT

In accordance with the orders filed during the pendency of this case, and pursuant to Fed. R. Civ. P. 58(a), the following Final Judgment is hereby entered.

Pursuant to the Order for Judgment [ECF 38] entered by United States District Judge Robert E. Blackburn on August 6, 2020, it is

ORDERED that, in accordance with the Court's Order Re: Cross-Motions for Summary Judgment [ECF 30], ¶ 4 at 21, judgment is entered on behalf of plaintiff, Elizabeth Lupia, and against defendant, Medicredit, Inc., on Counts I and II insofar as those claims are premised on the May 8 phone call. It is

FURTHER ORDERED that, in accordance with the Court's Order Re: Cross-Motions for Summary Judgment [ECF 30], ¶ 5 at 21, judgment with prejudice is entered on behalf of defendant, Medicredit, Inc., and against plaintiff, Elizabeth Lupia, as to Count I and II insofar as those claims are premised on the May 16 letter, and as to Counts III and IV in their entirety. It is

Attachment C

FURTHER ORDERED that Ms. Lupia is awarded $1,000 in damages as stipulated by the parties in their Stipulation as to the Amount of Damages with Respect to the Claims on Which the Court Granted Plaintiff Summary Judgment [ECF 37-1]. It is

FURTHER ORDERED that post-judgment interest shall accrue at the rate of 0.13 percent from the date of judgment. It is

FURTHER ORDERED that plaintiff is awarded her costs, to be taxed by the clerk in the time and manner required under Fed. R. Civ. P. 54(d)(1) and D.C.COLO.LCivR 54.1.

This case will be closed.

DATED August 7, 2020, at Denver, Colorado.

FOR THE COURT:

Jeffrey P. Colwell, Clerk

By: s/L.Roberson
L. Roberson
Deputy Clerk

Attachment C