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6 IN THE UNITED STATES DISTRICT COURT  
7 FOR THE DISTRICT OF ARIZONA  
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9 Joanna F. Mavris,

10 Plaintiff,

11 v.

12 RSI Enterprises Incorporated,

13 Defendant.

No. CV-14-01058-PHX-NVW

**ORDER**

14 Before the Court are Defendant's Motion for Summary Judgment, or  
15 Alternatively, Summary Adjudication (Doc. 41), the Response (Doc. 49), and the Reply  
16 (Doc. 53). For the reasons that follow, the Motion will be denied.  
17

18 **I. BACKGROUND**

19 On two occasions in December 2012, Plaintiff Joanna F. Mavris received  
20 emergency room treatment at a hospital operated by Scottsdale Healthcare. Doc. 45-1 at  
21 6-7. The hospital created separate billing accounts for these two visits, one ending in  
22 0028 ("0028 account") and the other ending in 0403 ("0403 account"). Doc. 41 at 6.  
23 Because Mavris was uninsured, she did not pay the hospital at the time of her treatment,  
24 and she has not submitted payment since. *Id.* Scottsdale Healthcare assigned the 0028  
25 account and the 0403 account to Defendant RSI Enterprises Incorporated ("RSI") on  
26 January 14, 2013, and January 15, 2013, respectively, for collection efforts. Doc. 44 at 2.  
27 The day after referring each account, Scottsdale Healthcare sent Mavris a billing invoice  
28 on its own letterhead, but prepared by RSI. *Id.* at 2-3. Sometime around late January

1 2013, Mavis asked Scottsdale Healthcare for financial assistance in paying down her  
2 debts. Doc. 45-1 at 7-8. She submitted the requisite paperwork on March 4, 2013, which  
3 RSI claims “extend[ed] the time [Mavis] ha[d] to pay [her] account.” Doc. 53 at 5; Doc.  
4 43 at 3.<sup>1</sup> Scottsdale Healthcare denied the requests for “financial aid” in letters dated  
5 April 22, 2013, and May 10, 2013. Doc. 44 at 2. RSI’s “collection notes” for the 0028  
6 account show an entry dated March 8, 2013, that reads “CANCELLED-CAN 4062.64”; a  
7 May 16, 2013 notation indicates “ACCT REACTIVATED PER NEW BIS FILE.” Doc.  
8 44 at 2; Doc. 44-1 at 4. The 0403 account’s collection notes show similar entries made  
9 on March 8, 2013, and April 18, 2013. Doc. 44 at 2; Doc. 44-2 at 4.

10 Mavis received a letter on Scottsdale Healthcare letterhead, dated May 23, 2013,  
11 prepared by RSI, notifying her that the 0028 and 0403 accounts “remain[ed] unresolved”  
12 and requesting that she submit payment to Scottsdale Healthcare. Doc. 51-5 at 2. A June  
13 20, 2013 letter, also on Scottsdale Healthcare letterhead, informed Mavis that the two  
14 accounts were “now seriously past due.” Doc. 51-6 at 2. “If this account is not paid in  
15 full, or if suitable arrangements for payment have not been made within 30 days,” the  
16 June 20 letter reads, “this account will be turned over to an outside collection agency for  
17 collection.” *Id.* The letter also states, “THIS IS YOUR FINAL OPPORTUNITY TO  
18 RESOLVE YOUR ACCOUNT BEFORE IT IS PLACED WITH A COLLECTION  
19 AGENCY.” *Id.* (emphasis in original). Both letters are signed “Sincerely, Scottsdale  
20 Healthcare”; neither gives any indication that it was prepared and mailed by RSI, rather  
21 than Scottsdale Healthcare. *See* Doc. 51-5, 51-6. A month later, on July 18, 2013, RSI  
22 sent Mavis another letter regarding the 0403 account—this time on its own letterhead—  
23 that begins, “Scottsdale Healthcare assigned this balance to RSI Enterprises, Inc. for pre-  
24 collection efforts ... . If payment in full is not received or contact established with  
25 Scottsdale Healthcare within 30 days you may be sent to a third-party collections

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27 <sup>1</sup> The source for this date, as well as several others cited in the parties’ briefing, is  
28 an email attached to Mavis’ Response (Doc. 51-4), the provenance of which is unclear.  
Accordingly, this correspondence has only minimal probative value, and it is therefore  
unclear whether Mavis’ accounts remained with RSI immediately following March 4,  
2013, and, if they did, how long they lay in a state of dormancy.

1 company.” Doc. 51-7 at 2. Lower down, the letter contains the following warning:  
2 **“This communication is from a debt collector. This is an attempt to collect a debt.**  
3 **Any information obtained will be used for that purpose.”** *Id.* (emphasis in original).  
4 In two separate locations, the letter instructs Mavis to send all payments and  
5 correspondence to Scottsdale Healthcare. *Id.* A substantially identical letter concerning  
6 the 0028 account followed on August 15, 2013. *See* Doc. 51-8.

7 The next day, Scottsdale Healthcare “recall[ed]” the 0403 account from RSI,  
8 which then “cancelled” the account and “returned” it to Scottsdale Healthcare. Doc. 44 at  
9 3. RSI’s collection notes for this date reflect entries reading “ACCOUNT CANCELLED  
10 AND RETURNED FOR BAD DEBT PER DAILY TRANS FILE” and “CANCELLED-  
11 CNR 3394.83.” Doc. 44-2 at 8. Scottsdale Healthcare internally deemed that account to  
12 be in default and two weeks later, on August 30, 2013, referred it to West Asset  
13 Management, a “third-party debt collector.” Doc. 41 at 8; Doc. 43 at 4. After attempting  
14 for a month to collect Mavis’ debt, West Asset Management returned the 0403 account  
15 to Scottsdale Healthcare on October 3, 2013. Doc. 43 at 4.

16 Similarly, Scottsdale Healthcare declared the 0028 account to be in default and  
17 recalled it from RSI on September 13, 2013, then referred it to West Asset Management  
18 on September 27, 2013. Doc. 43 at 4. On RSI’s collection notes for the 0028 account,  
19 two September 13, 2013 entries read “ACCOUNT CANCELLED AND RETURNED  
20 FOR BAD DEBT PER DAILY TRANS FILE” and “CANCELLED-CNR 4062.64.”  
21 Doc. 44-1 at 7. The account was returned to Scottsdale Healthcare in January 2014 after  
22 unsuccessful attempts to collect the debt from Mavis. Doc. 43 at 4.

23 Mavis filed this putative class action on May 16, 2014, seeking statutory and  
24 actual damages, on behalf of herself and other members of the proposed class, under the  
25 Fair Debt Collection Practices Act (“FDCPA”), 15 U.S.C. § 1692 et seq. Although the  
26 substance of Mavis’ claims is not pertinent to this Motion, her allegations provide  
27 context helpful to understanding her dispute with RSI. The first of the Complaint’s (Doc.  
28 1) three causes of action alleges a violation of 15 U.S.C. § 1692g(b). Under § 1692g(a),

1 “[w]ithin five days after the initial communication with a consumer in connection with  
2 the collection of any debt, a debt collector shall” provide the consumer a “written notice”  
3 that contains:

- 4 (1) the amount of the debt;
- 5 (2) the name of the creditor to whom the debt is owed;
- 6 (3) a statement that unless the consumer, within thirty days after receipt of the  
7 notice, disputes the validity of the debt, or any portion thereof, the debt will be  
8 assumed to be valid by the debt collector;
- 9 (4) a statement that if the consumer notifies the debt collector in writing within  
10 the thirty-day period that the debt, or any portion thereof, is disputed, the debt  
11 collector will obtain verification of the debt or a copy of a judgment against the  
12 consumer and a copy of such verification or judgment will be mailed to the  
13 consumer by the debt collector; and
- 14 (5) a statement that, upon the consumer’s written request within the thirty-day  
15 period, the debt collector will provide the consumer with the name and address of  
16 the original creditor, if different from the current creditor.

15 Section 1692g(b) provides, in turn, that “[a]ny collection activities and communication  
16 during the 30-day period may not overshadow or be inconsistent with the disclosure of  
17 the consumer’s right to dispute the debt or request the name and address of the original  
18 creditor.”

19 According to Mavis, RSI’s July 18, 2013 and August 15, 2013 letters—which  
20 were written on RSI’s own letterhead and which contain the § 1692g(a) disclosures—  
21 were “ineffective and overshadowed and contradicted the statutory notice” in two ways.  
22 Doc. 1 at 11. First, those letters “directed [Mavis] to send all correspondence not to  
23 [RSI], but to [Scottsdale Healthcare],” notwithstanding the statute’s requirement that “all  
24 disputes and verification requests must be made to the debt collector, not to a third party,  
25 to be effective.” *Id.* at 11-12. Second, the letters allegedly demanded payment be made  
26 “within 30 days” of the dates they were sent, *id.* at 12, even though the statute permits  
27 consumers to inform a debt collector of a dispute “within thirty days *after receipt* of the  
28 notice,” 15 U.S.C. § 1692g(a)(3) (emphasis added). The Complaint alleges that the

1 “effect of the July 18, 2013 and August 15, 2013 communications was to cause the least-  
2 sophisticated consumer to waive, or not assert, the rights afforded under 15 U.S.C.  
3 § 1692g.” Doc. 1 at 12.

4 In her second cause of action, Mavris alleges RSI ran afoul of 15 U.S.C.  
5 § 1692e(2)(A), which prohibits a “debt collector” from “us[ing] any false, deceptive, or  
6 misleading representation or means in connection with the collection of any debt,” such  
7 as the “false representation” of “the character, amount, or legal status of any debt.” RSI  
8 allegedly violated this provision in its July 18, 2013 and August 15, 2013 letters when it  
9 warned Mavris that her account might be sent to a “third-party collections company” if  
10 she did not submit payment within thirty days. *E.g.*, Doc. 51-7 at 2. Because RSI is itself  
11 a “debt collections company,” Mavris argues, those letters misleadingly suggested her  
12 accounts had not already been forwarded to a debt collector. Doc. 1 at 13.

13 Mavris’ third cause of action piggybacks off of her second. Section 1692e  
14 provides a non-exhaustive list of types of conduct that violate the ban on using “any false,  
15 deceptive, or misleading representation or means in connection with the collection of any  
16 debt.” 15 U.S.C. § 1692e. Among the proscribed categories of conduct is a catchall  
17 prohibiting the “use of any false representation or deceptive means to collect or attempt  
18 to collect any debt or to obtain information concerning a consumer.” *Id.* § 1692e(10).  
19 Mavris maintains that “[RSI’s] July 18, 2013 and August 15, 2013 communications urged  
20 [Mavris] to take action before her accounts were sent to a third-party debt collections  
21 company, even though her accounts were already placed with [RSI]—a third-party  
22 collections company.” Doc. 1 at 14. The “misleading” nature of these letters allegedly  
23 renders them in violation of 15 U.S.C. § 1692e(10). *Id.*

24 At their August 2014 scheduling conference, the parties agreed to stay discovery  
25 on the question of class certification until after resolution of any dispositive motions  
26 regarding Mavris’ individual case. RSI filed the instant summary judgment motion on  
27 November 14, 2014.

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1       **II.    LEGAL STANDARD**

2           A motion for summary judgment tests whether the opposing party has sufficient  
3 evidence to merit a trial. At its core it questions whether sufficient evidence exists from  
4 which a reasonable jury could find in favor of the party opposing the motion. Summary  
5 judgment should be granted if the evidence reveals no genuine dispute about any material  
6 fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a).

7           A material fact is one that might affect the outcome of the suit under the governing  
8 law, and a factual issue is genuine “if the evidence is such that a reasonable jury could return  
9 a verdict for the nonmoving party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248  
10 (1986). The nonmoving party must produce evidence to support its claim or defense by  
11 more than simply showing “there is some metaphysical doubt as to the material facts.”  
12 *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). The Court  
13 must view the evidence in the light most favorable to the nonmoving party, must not weigh  
14 the evidence or assess its credibility, and must draw all justifiable inferences in favor of the  
15 nonmoving party. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000);  
16 *Anderson*, 477 U.S. at 255. Where the record, taken as a whole, could not lead a rational  
17 trier of fact to find for the nonmoving party, there is no genuine issue for trial. *Matsushita*,  
18 475 U.S. at 587.

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20       **III.   ANALYSIS**

21           RSI’s sole contention in its Motion is that it is not subject to the FDCPA because,  
22 at all times relevant to this action, it did not qualify as a “debt collector” for purposes of  
23 the FDCPA. The FDCPA defines “debt collector” as “any person who uses any  
24 instrumentality of interstate commerce or the mails in any business the principal purpose  
25 of which is the collection of any debts, or who regularly collects or attempts to collect,  
26 directly or indirectly, debts owed or due or asserted to be owed or due another.” 15  
27 U.S.C. § 1692a(6). Exempted from this definition, however, is “any person collecting or  
28 attempting to collect any debt owed or due or asserted to be owed or due another to the

1 extent such activity ... (iii) concerns a debt which was not in default at the time it was  
2 obtained by such person.” *Id.* § 1692a(6)(F)(iii).<sup>2</sup> RSI argues that Mavris’ debt was not  
3 “in default” at the time RSI acquired it, and therefore RSI is not a debt collector and not  
4 subject to liability under the FDCPA.

5 “Although the [FDCPA] does not define ‘in default,’ courts interpreting §  
6 1692a(6)(F)(iii) look to any underlying contracts and applicable law governing the debt at  
7 issue.” *De Dios v. Int’l Realty & RC Invs.*, 641 F.3d 1071, 1074 (9th Cir. 2011). In other  
8 words, “[w]hether a debt is in default is generally controlled by the terms of the contract  
9 creating the indebtedness and applicable state law.” *Id.* (quoting, in parenthetical, Fed.  
10 Trade Comm’n, Advisory Op. n.2 (April 25, 1989)) (internal quotation marks omitted).  
11 In addition, the FDCPA’s “legislative history is consistent with construing ‘in default’ to  
12 mean a debt that is at least delinquent, and sometimes more than overdue.” *Id.* at 1075  
13 n.3 (citations omitted).

14 In this case, both parties agree that no contract between Mavris and Scottsdale  
15 Healthcare spells out exactly when or under what conditions her debts would go into  
16 default. Doc. 41 at 12; Doc. 49 at 14. Arizona law does not appear to provide a clear  
17 definition of “in default” or a test for determining when a debtor has defaulted. The  
18 Court is therefore left to apply a “case-by-case approach to determining when a debt is  
19 ‘in default.’” *Natividad v. Wells Fargo Bank, N.A.*, No.: 3:12-cv-03646 JSC, 2013 U.S.  
20 Dist. LEXIS 74067, at \*13 (N.D. Cal. May 24, 2013) (citing *De Dios*, 641 F.3d at 1075  
21 n.3). In several cases, courts have filled this void by holding that a determination of  
22 default turns on “the ‘state of mind’ of the creditor,” i.e., whether the creditor considers  
23 the debt to be in default or not. *Roberts v. NRA Grp., LLC*, NO. 3:11-2029, 2012 U.S.  
24 Dist. LEXIS 113021, at \*17 (M.D. Pa. Aug. 10, 2012). Other courts have adopted a  
25 much more expansive reading, finding that, at least in certain circumstances, “default”

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27 <sup>2</sup> This exemption places the factoring of accounts receivable outside the scope of  
28 the FDCPA, thereby leaving a factor in the same position as the original creditor, had the  
creditor not sold his accounts receivable to the factor. By excusing factors from  
compliance with these regulations, the FDCPA respects a common method of business  
financing.



1 should be interpreted according to its “dictionary definition”—namely, “[t]he omission or  
2 failure to perform a legal or contractual duty; esp., the failure to pay a debt when due.”  
3 *Magee v. AllianceOne, Ltd.*, 487 F. Supp. 2d 1024, 1027-28 (S.D. Ind. 2007) (alteration  
4 in original) (quoting Black’s Law Dictionary (7th ed. 1999)). On this view, a debt could  
5 be in default just one day after the debtor misses a payment.

6 Neither alternative is particularly appealing. Although this case does not present  
7 such facts, the former interpretation would in some cases undermine the FDCPA’s stated  
8 intent to “to eliminate abusive debt collection practices by debt collectors.” 15 U.S.C. §  
9 1692(e). “For example, because 15 U.S.C. § 1692a(6)(F)(iii) looks at whether the loan  
10 was in default at the time it was ‘obtained’ by the person involved in the collection  
11 activity, and not whether it is in default at the time the collection activity takes place, [a  
12 creditor] could [refer] [a debtor’s] account to [a third party] for collection one day and  
13 declare[] her account to be in default the next, thereby allowing [the third party] to  
14 engage in collection practices that are prohibited by the FDCPA (because the loan was  
15 not in default when [the third party] ‘obtained’ it) and at the same time giving [the  
16 creditor] the ‘rights upon default’ afforded it under” a written agreement between the  
17 creditor and the debtor. *Magee*, 487 F. Supp. 2d at 1028. Conversely, “the FDCPA’s  
18 broad, pro-debtor objectives would not be served if [courts] adopted [the] argument that  
19 default occurs immediately after payment becomes due.” *Alibrandi v. Fin. Outsourcing*  
20 *Servs.*, 333 F.3d 82, 87 (2d Cir. 2003) (per curiam). That argument would “expos[e]  
21 debtors to the sort of adverse measures, such as acceleration, repossession, increased  
22 interest rates, and negative reports to credit bureaus, from which the [FDCPA] intended  
23 to afford debtors a measure of protection.” *Id.* At oral argument, counsel for Mavris  
24 disclaimed reliance on this counterintuitive “day one” theory.

25 Fortunately, the Ninth Circuit’s resolution of a related textual ambiguity in the  
26 FDCPA points toward a third option. “The FDCPA precludes debt collectors from  
27 implementing unlawful debt collection tactics against consumers. Consequently, the  
28 [FDCPA] applies to consumer debts and not business loans.” *Slenk v. Transworld Sys.*,



1 236 F.3d 1072, 1074 (9th Cir. 2001) (alteration in original) (citation and internal  
2 quotation marks omitted). “The FDCPA defines a consumer debt as, ‘any obligation or  
3 alleged obligation of a consumer to pay money arising out of a transaction in which the . .  
4 . property . . . which [is] the subject of the transaction [is] primarily for personal, family,  
5 or household purposes.’” *Id.* (alterations in original) (quoting 15 U.S.C. § 1692a(5)).  
6 But the FDCPA offers no guidance on precisely which purposes are of a “personal,  
7 family, or household” nature. In many cases, the proper classification is obvious. In  
8 others, however, uncertain or conflicting facts can pull in opposite directions. *See, e.g.,*  
9 *Smith v. Progressive Fin. Servs.*, Civ. No. 6:12-cv-1704-MC, 2013 U.S. Dist. LEXIS  
10 108744, at \*4-10 (D. Or. Aug. 1, 2013) (determining plaintiff’s debt, incurred to finance  
11 education at flight school, was personal in nature, even though degree or certificate could  
12 allow her to enter the field of aviation “in pursuit of profit”).

13         Instead of laying down a bright-line rule about when debts are made for personal,  
14 family or household reasons, the Ninth Circuit plugged this gap by adopting a functional,  
15 all-things-considered analysis. “We have found it necessary when classifying a loan,” the  
16 court wrote in *Slenk*, “to examine the transaction as a whole, paying particular attention  
17 to the purpose for which the credit was extended in order to determine whether [the]  
18 transaction was primarily consumer or commercial in nature. In making this  
19 determination, we have elevated substance over form, holding that neither the lender’s  
20 motives nor the fashion in which the loan is memorialized are dispositive of this inquiry.  
21 We must therefore look to the substance of the transaction and the borrower’s purpose in  
22 obtaining the loan, rather than the form alone.” 236 F.3d at 1075 (alteration in original)  
23 (citations and internal quotation marks omitted).

24         Though not directly analogous to the “in default” inquiry, the *Slenk* consumer-  
25 commercial framework provides a useful model for resolving RSI’s Motion. Here, rather  
26 than the purpose for which the credit was extended, the guiding principle of the analysis  
27 would be the status of the debt, viewed objectively in light of all the circumstances. That  
28 is, at the time a third party obtains a debt for collection, would a reasonable person in the

1 debtor's position believe that the creditor viewed the debt as being in default? Like the  
2 *Slenk* approach, this framework would balance a variety of different factors, none of  
3 which would necessarily be dispositive in a given case. The relevant factors might  
4 include the number of times a creditor has requested payment, the time that has elapsed  
5 since the first request, the urgency of the language used in those requests, the debtor's  
6 knowledge that she has been referred to a third party, the creditor's internal policies, any  
7 representations made by or on behalf of the creditor—either publicly or to a specific  
8 debtor—about how it collects debts, and apparent attempts by the creditor or third party  
9 to circumvent the FDCPA's consumer protections. This list is not exhaustive; it  
10 necessarily captures only a subset of the factors that could impact objective perceptions  
11 of default in any given case.

12 This balancing approach is not without its weaknesses. For one, it fails to provide  
13 the certainty and predictability that would enable creditors and collection agencies to run  
14 close to the line in complying with their legal obligations. Nor does it ensure, in every  
15 case, that debtors will know when they have redress for abusive debt collection practices.  
16 Different sets of facts will lend themselves to different analyses, with some factors  
17 receiving more or less weight than they might under other circumstances. But this risk is  
18 inherent in any balancing test or “reasonableness” standard, both of which are common  
19 features of American law. More important, the functional, multi-factor test outlined  
20 above better serves the broad purpose of the FDCPA—i.e., “to protect vulnerable and  
21 unsophisticated debtors from abuse, harassment, and deceptive collection practices,”  
22 *Guerrero v. RJM Acquisitions LLC*, 499 F.3d 926, 938 (9th Cir. 2007) (per curiam)  
23 (citations omitted)—than RSI's alternative that a debt is in default when the creditor says  
24 so. Referring a debt to a debt collector heightens the potential for abuse, and a debtor's  
25 ability to protect herself from that abuse must turn on something more than a creditor's  
26 decision—made according to rules or criteria of which the debtor may have no  
27 knowledge—to declare a debt in default. The FDCPA's statutory protections would be of  
28 little value if a debtor, unable to rely on statements ostensibly made by the creditor, had

1 to guess at whether the creditor had privately declared her debt in default. Just as the  
2 lender’s “motives” are not “dispositive” of whether a debt is consumer or commercial in  
3 nature, *see Slenk*, 236 F.3d at 1075, the lender’s subjective choice that the debtor has not  
4 defaulted cannot be dispositive of whether default has in fact occurred. If it were,  
5 debtors’ access to FDCPA protections would be subject to the whim of creditors, who  
6 could leave debtors completely in the dark about when, if ever, those protections  
7 commence. Objective indicia of a creditor’s treatment of a debt are entitled to greater  
8 weight.

9         The balancing approach also suffers from a related, more fundamental flaw. Just  
10 as a debtor cannot know whether a creditor considers a debt in default unless informed by  
11 the creditor, she also cannot know when a creditor has transferred a debt to a third party  
12 unless informed by either the creditor or the third party. In other words, even if a debtor  
13 has reasonable grounds to believe a creditor views a debt as in default, she will be unable  
14 to assert her FDCPA rights unless she also knows that 1) the creditor has transferred the  
15 debt to a third party, and 2) that transfer occurred *after* the creditor began treating the  
16 debt as in default. But unless the creditor or third party informs the debtor of the date of  
17 the transfer—which does not appear to be statutorily required—the debtor may be unable  
18 to obtain the necessary information. As a result, a creditor can manipulate the FDCPA’s  
19 definition of “debt collector” so as to free debt-collection efforts from the FDCPA’s  
20 numerous pro-debtor provisions. For example, if a creditor transfers a debt, nominally  
21 but not in economic substance, to a third party on the day after payment becomes due—  
22 that is, before a reasonable debtor could believe that the creditor views the debt as in  
23 default—that third party would be free to seek payment from the debtor without abiding  
24 by the anti-abuse and anti-harassment rules imposed by the FDCPA.

25         The balancing test described above does nothing to prevent such abuses. But  
26 neither do RSI’s “state of mind” approach or any other judicially sanctioned approach of  
27 which the Court is aware. Perhaps for this reason, the Federal Trade Commission, in “its  
28 March 2001 annual report on the FDCPA, ... formally recommended that Congress

1 amend § 1692a(6)(F)(iii) ‘so that its applicability will depend upon the nature of the  
2 overall business conducted by the party to be exempted rather than the status of  
3 individual obligations when the party obtained them.’” *Alibrandi*, 333 F.3d at 86  
4 (citation omitted). But the statute remains unchanged, and until Congress amends the  
5 FDCPA, the *Slenk*-like balancing analysis appears to be the most prudent way of  
6 determining whether a debt is in default. Unlike the “state of mind” or “day one”  
7 frameworks, the balancing analysis allows for broad and contextual consideration of the  
8 circumstances in a manner that promotes the FDCPA’s stated goal of “eliminat[ing]  
9 abusive debt collection practices by debt collectors” and “insur[ing] that those debt  
10 collectors who refrain from using abusive debt collection practices are not competitively  
11 disadvantaged.” 15 U.S.C. § 1692(e).

12 The Court need not sketch out the precise contours or boundaries of that analysis.  
13 Although there may be future cases in which the malleability of the balancing analysis  
14 becomes problematic, this case presents facts that render application of the analysis  
15 straightforward.

16 RSI devotes most of its briefing to proving Scottsdale Healthcare did not consider  
17 Mavis’ debts to be in default at the time RSI obtained them. RSI has submitted a  
18 Declaration (Doc. 43) signed by Jerry Byrd, Scottsdale Healthcare’s System Director for  
19 Medicare and Government Payers and Billing, who attests that Scottsdale Healthcare  
20 sends all of its “self-pay” accounts—those with remaining balances after treatment is  
21 complete—to RSI. Doc. 43 at 2-3. According to Byrd, Scottsdale Healthcare’s accounts  
22 remain with RSI for “approximately 120 days,” at which point accounts that “do not  
23 warrant additional time” are recalled by Scottsdale Healthcare. *Id.* at 3-4. It is only at  
24 this point that Scottsdale Healthcare declares those accounts to be in default and forwards  
25 them to West Asset Management, “a third-party debt collector.” *Id.* at 4. But when a  
26 patient submits an application for financial assistance, as Mavis did, that patient “will be  
27 given additional time before declaring the account in default.” *Id.* at 3. Therefore, Byrd  
28 explains, in the eyes of Scottsdale Healthcare, Mavis’ accounts “were not in default at

1 any time while they were being serviced by RSI.” *Id.* at 4. RSI’s Executive Vice  
2 President and Chief Operating Officer, who is partly responsible for maintaining the  
3 company’s relationship with Scottsdale Healthcare, has also signed a Declaration (Doc.  
4 46) asserting that Scottsdale Healthcare did not view Mavis’ accounts as being in default  
5 when RSI obtained them. Doc. 46 at 2-3.

6 Nevertheless, Mavis attaches a copy of what she describes as Scottsdale  
7 Healthcare’s “publicly available billing policies,” in the form of a document titled  
8 “Patient Financial Responsibilities Statement.” Doc. 49 at 14. The “Nonpayment”  
9 section of that document informs potential patients: “If your account is over 90 days past  
10 due, you will receive a letter stating that you have 10 days to pay your account in full. ...  
11 Please be aware that if a balance remains unpaid, we may refer your account to a  
12 collection agency.” Doc. 51-10 at 2. Similarly, a “Financial Policy” form submitted by  
13 Mavis asks Scottsdale Healthcare patients to sign their name to the following statement:  
14 “I understand if my account is not paid in full within 90 days, I may be turned over to a  
15 collection agency for further processing.” Doc. 51-11 at 2. These documents suggest  
16 that after ninety days, Scottsdale Healthcare may consider unpaid debts to be potentially  
17 assignable to a “collection agency”—in other words, “in default.” In its Reply, RSI  
18 disputes the relevance of these policies on the grounds that Mavis, who “was admitted to  
19 Scottsdale Healthcare’s emergency room,” obtained “both policies from Scottsdale  
20 Healthcare’s primary care medical providers” and has “offer[ed] no evidence that  
21 Scottsdale Healthcare’s primary care financial policies have any application to her ER  
22 treatment.” Doc. 53 at 5 (emphasis in original). At oral argument, counsel for RSI  
23 conceded that he could not state definitively that the policies do not apply to emergency  
24 room treatment. He also conceded that Scottsdale Healthcare’s 120-day policy is a  
25 “general guideline,” not a hard and fast rule, and that it is “fluid” but “not entirely  
26 subjective.”

27 Even if the “Patient Financial Responsibilities Statement” and “Financial Policy”  
28 do apply to emergency room care, RSI argues, Mavis’ March 4, 2013 request for

1 financial assistance tolled the default period, with the result that fewer than ninety days  
2 had passed when Scottsdale Healthcare “reassigned” Mavris’ accounts to RSI in April  
3 and May 2013. RSI further argues that because “Scottsdale Healthcare does not send  
4 billing invoices on accounts referred to RSI,” *see* Doc. 46 at 2, no demand for payment  
5 had been made to Mavris at the time RSI obtained her accounts in January 2013. Doc. 41  
6 at 10. Therefore, the argument goes, those accounts could not possibly have been in  
7 default when acquired by RSI.

8 Deciding this knotty factual issue is unnecessary to resolving RSI’s Motion. As  
9 explained above, a creditor’s “state of mind” is not wholly irrelevant to determining  
10 whether a debt is in default, but it is far from the most important consideration.  
11 Significantly more relevant are objective indicators of the debt’s status, as of the date it  
12 was obtained by a third party. In this case, those indicators decisively establish that RSI  
13 and Scottsdale Healthcare deliberately attempted to lead Mavris into believing her  
14 accounts were in default.

15 Acting through RSI, Scottsdale Healthcare sent Mavris a letter on the hospital’s  
16 letterhead, dated June 20, 2013, warning her that her accounts would “be turned over to  
17 an outside collection agency for collection” if she did not make payment within thirty  
18 days. Doc. 51-6 at 2. On July 18, 2013, almost exactly thirty days later, RSI sent another  
19 letter—this time on its own letterhead—that informed Mavris “Scottsdale Healthcare  
20 [had] assigned [her] balance to RSI Enterprises, Inc. for pre-collection efforts” on the  
21 0403 account. Doc. 51-7 at 2. That letter requested payment and proclaimed, in bold  
22 writing, “**This communication is from a debt collector. This is an attempt to collect a**  
23 **debt. Any information obtained will be used for that purpose.**” *Id.* (emphasis in  
24 original). In addition, the letter included the disclosures mandated by § 1692g(a), which  
25 explain to debtors their right to dispute the validity of a debt. *See id.* While this latter  
26 fact may not by itself render RSI a debt collector for FDCPA purposes, *see Stamper v.*  
27 *Wilson & Assocs., P.L.L.C.*, No. 3:09-cv-270, 2010 U.S. Dist. LEXIS 31770, at \*23 (E.D.  
28 Tenn. Mar. 31, 2010) (“The fact that FDCPA disclaimers were sent in connection with a

1 non-judicial foreclosure proceeding does not automatically transform the defendants into  
2 ‘debt collectors.’”), it provides a further basis on which a reasonable, objective person  
3 could conclude that Scottsdale Healthcare was treating Mavris’ debt as being in default.

4 In fact, counsel for RSI admitted during oral argument that the purpose of the June  
5 and July letters was to “scare” or “motivate” Mavris into making prompt payment. By  
6 creating the impression that Scottsdale Healthcare had stepped up its collection efforts  
7 through resort to an outside party, the letters attempted to encourage payment before that  
8 outside party began using potentially more heavy-handed tactics. The fact that the July  
9 18 letter threatens to send Mavris “to a third-party collections company” if “payment in  
10 full is not received ... within 30 days,” Doc. 51-7 at 2, does not undermine the conclusion  
11 that the two letters were intended to create the appearance of referral. Under the *Slenk-*  
12 *like* balancing analysis, the June and July letters would have fully justified Mavris in  
13 believing that Scottsdale Healthcare considered her accounts to be in default at the time it  
14 claimed to transfer them to RSI.

15 RSI’s counsel acknowledged at oral argument that Scottsdale Healthcare’s  
16 “assignment” of Mavris’ accounts to RSI was without economic substance. Scottsdale  
17 Healthcare retained ownership of the accounts at all times, and RSI was paid to act as an  
18 agent, in much the same way the hospital might pay one of its own employees if it  
19 handled bill collection internally. RSI acted at the request, and under the control, of  
20 Scottsdale Healthcare. For purposes of determining when RSI “obtained” Mavris’  
21 accounts from Scottsdale Healthcare, the distinction between the two entities was more  
22 theoretical than substantive. On the facts of this case, it would therefore be inequitable—  
23 and at cross-purposes with the FDCPA—to permit RSI to deny debt-collector status on  
24 the grounds that it obtained Mavris’ accounts in January 2013. A third party will not  
25 necessarily fail to “obtain” a debt every time a transfer from the creditor is without  
26 economic substance, as was the case here. Indeed, many courts treat such transfers as  
27 marking the date on which a debt is “obtained.” *See, e.g., Alibrandi*, 333 F.3d at 83-84,  
28 87-88 (assuming third party had obtained debt where debt could eventually be “recalled”



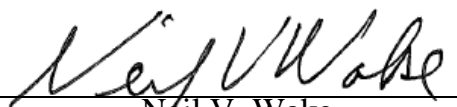
1 by creditor and all communications with debtor had to be “preapproved” by creditor).  
2 But where, as here, a creditor and third party have intentionally misled a debtor into  
3 believing a debt will be transferred because of default, the third party cannot evade its  
4 FDCPA obligations by pointing to a previous, undisclosed transfer that supposedly  
5 defeats its plain representations to the debtor.

6 Other factors also weigh in favor of finding that Mavis’ debts were in default.  
7 Even if, as RSI contends, no demand for payment was made before mid-January 2013,  
8 over six months had passed by the time Mavis received RSI’s July 18 letter. In that  
9 time, Mavis had received two other letters demanding payment, one of which described  
10 her accounts as “now seriously past due.” Doc. 51-6 at 2. Scottsdale Healthcare may  
11 well have viewed Mavis’ accounts as being “on hold” for up to two months of that  
12 period, but if it did, RSI has produced no evidence that that information was  
13 communicated to Mavis. And even if Mavis was aware of Scottsdale Healthcare’s  
14 expectations, her accounts were “reactivated” more than two months before she received  
15 the July 18 letter. In light of these facts, the most sensible way to interpret that letter is as  
16 a notification that Scottsdale Healthcare considered Mavis’ accounts to be in default.

17 At trial, RSI is free to argue that it does not qualify as a debt collector because  
18 Mavis’ debts were not “in default” at the time RSI obtained them. The evidence  
19 suggests RSI is unlikely to prevail on that theory. But at the very least, RSI has failed to  
20 show the absence of a genuine dispute regarding its debt-collector status.

21 IT IS THEREFORE ORDERED that Defendant RSI Enterprises, Inc.’s Motion for  
22 Summary Judgment, or Alternatively, Summary Adjudication (Doc. 41) is denied.

23 Dated this 19th day of February, 2015.

24   
25 \_\_\_\_\_  
26 Neil V. Wake  
27 United States District Judge  
28