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IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA 19-0357

CHERYL BRATTON, individually and on behalf of a class of similarly situated Montanans,

Plaintiffs/Appellants,

v.

SISTERS OF CHARITY OF LEAVENWORTH HEALTH SYSTEM, INC. d/b/a SCL HEALTH,

Defendant/Appellee.

DEFENDANT/APPELLEE SISTERS OF CHARITY OF LEAVENWORTH HEALTH SYSTEM, INC.'S ANSWER BRIEF

On Appeal from the Thirteenth Judicial District Court,
Yellowstone County, Montana
Cause No. DV 18-1609
Honorable Gregory R. Todd

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TABLE OF CONTENTS

Page

STATEMENT OF THE ISSUES 1

STATEMENT OF THE CASE 1

STATEMENT OF FACTS 4

I. SCL HEALTH'S PATIENT REFUND CARD PROGRAM 4

II. BRATTON'S CLAIMS 8

STANDARD OF REVIEW 9

SUMMARY OF ARGUMENT 9

ARGUMENT 13

I. BRATTON IS NOT ENTITLED TO A DECLARATION THAT SCL HEALTH'S PATIENT REFUND CARD PROGRAM VIOLATES SECTION 28-1-1002 13

A. Bratton did not ask for a Declaration that the Patient Refund Card Program Violates Section 28-1-1002 from the District Court 13

B. SCL Health's Patient Refund Card Program Does Not Violate Section 28-1-1002 15

1. The method by which SCL Health chooses to issue payment does not implicate Section 28-1-1002. 16

2. Bratton's arguments do not show that SCL Health transferred its payment obligation. 19

TABLE OF CONTENTS (cont.)

Page

3. Section 28-1-1002 does not preclude delegating performance of a payment obligation without the beneficiary's consent. 21

4. Neither *Skinner* nor *AICCO* support Bratton's position. 24

II. THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT ON EACH OF BRATTON'S CAUSES OF ACTION 26

A. Bratton's Unjust Enrichment and Constructive Trust Claims Fail Because SCL Health Has Not Unjustly Retained Any Benefit She Conferred 26

B. Bratton's MCPA Claim Fails as a Matter of Law Because She Has Not Sustained an "Ascertainable Loss of Money or Property" 28

1. The Patient Refund Card Program is not an unfair or deceptive business practice. 29

2. Bratton cannot prove an ascertainable loss merely by alleging an unfair or deceptive practice. 31

C. Bratton's Claim for Money Had and Received Fails Because SCL Health Refunded Her Money 34

D. Bratton Is Not Entitled to Any Declaratory Relief 36

III. SCL HEALTH WAS NOT REQUIRED TO OBTAIN PREAPPROVAL FOR ITS CHOSEN METHOD OF ISSUING REFUNDS 38

CONCLUSION 43

CERTIFICATE OF COMPLIANCE 44

TABLE OF AUTHORITIES

Page(s)

Cases

Aces Wired, Inc. v. Gametronics, Inc.,
No. A-07-CA-768-LY, 2007 WL 5124986 41

AICCO, Inc. v. Ins. Co. of N. Am.,
90 Cal. App. 4th 579 (Cal. Ct. App. 2001) 24-25

Donovan v. McDevitt,
36 Mont. 61, 92 P. 49 (1907) 35

Frandson v. Oasis Petroleum N. Am., LLC,
870 F. Supp. 2d 726 (D.N.D. 2012) 40

Giddings v. State,
2016 MT 139N, ¶ 14, 384 Mont. 553..13

Graham-Rogers v. Wells Fargo Bank, N.A.,
2019 MT 226, ¶ 12, 397 Mont. 262, 449 P.3d 798 9

Headrick v. Rockwell Int'l Corp.,
24 F.3d 1272 (10th Cir. 1994).. 22, 36

Herigstad v. Hardrock Oil Co.,
101 Mont. 22, 52 P.2d 171 (1935) 22

In re Dewar,
169 Mont. 437, 548 P.2d 149 (1976) 37

Johnson v. Bank of N.Y. Mellon,
Civ. No. 13-2207 (DSD/JSM), 2014 WL 129640
(D. Minn. Jan. 14, 2014)...37

Kintner v. Harr,
146 Mont. 461, 408 P.2d 487 (1965) 22

TABLE OF AUTHORITIES (cont.)

Page(s)

Cases

Larobina v. Wells Fargo Bank, N.A.,
No. 3:10-cv-01279 (MPS), 2014 WL 3419534
(D. Conn. July 10, 2014) 33-34

McFarland v. Stillwater Cty.,
109 Mont. 544, 98 P.2d 321 (1940) 35

Mont. Envtl. Info. Ctr. v. Dep't of Envtl. Quality,
2019 MT 213, ¶ 18, 397 Mont. 161, __ P.3d __. 9

N. Cheyenne Tribe v. Roman Catholic Church,
2013 MT 24, ¶ 39, 368 Mont. 330, 296 P.3d 450 26

Pearson v. Philip Morris, Inc.,
361 P.3d 3 (Or. 2015) 33

PNC Bank, N.A. v. Wilson,
No. CV 14-80-BU-DWM-JCL, 2016 WL 3033535
(D. Mont. Apr. 28, 2016)...33

Rossi v. Proctor & Gamble Co.,
Civ. No. 11-7238 (JLL), 2014 WL 11462439..42

Skinner v. Scholes,
229 N.W. 114 (N.D. 1930) 24

State v. Adgerson,
2003 MT 284, ¶ 12, 318 Mont. 22, 78 P.3d 850 13

Sys. Council EM-3 v. AT & T Corp.,
972 F. Supp. 21 (D.D.C. 1997) 23

Sys. Council EM-3 v. AT&T Corp.,
159 F.3d 1376 (D.C. Cir. 1998). 23

TABLE OF AUTHORITIES (cont.)

Page(s)

Cases

Ternes v. State Farm Fire & Cas. Co.,
2011 MT 156, ¶ 36, 361 Mont. 129, 257 P.3d 352 32

Thiedemann v. Mercedes-Benz USA, LLC,
872 A.2d 783 (N.J. 2005) 33

W. Mont. Water Users Ass'n, LLC v. Mission Irrigation Dist.,
2013 MT 92, ¶ 39, 369 Mont. 457, 299 P.3d 346 34

Statutes

19 Del. Admin. Code § 1324 (2019) 42

31 U.S.C. § 5103 39

42 U.S.C. § 1320d-8 3

7 Pa. Cons. Stat. § 6121.1 42

Ariz. Rev. Stat. § 23-351(D)(5), ...42

Colo. Rev. Stat. § 8-4-102(2.5) 42

Mont. Code Ann. § 28-1-101(1). 16

Mont. Code Ann. § 30-14-133(1) 12, 28, 32, 34

Mont. Code Ann. § 70-9-803(q) 7

Mont. Code Ann. § 72-38-123 26

Montana Code Annotated § 28-1-1002 ....2, 4, 10-17, 19, 21-25, 27, 29, 36, 38, 43

TABLE OF AUTHORITIES (cont.)

Page(s)

Other Authorities

www.allpointnetwork.com/locator.aspx 6

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58 SMU L. Rev. 1253, 1257-59 (Fall 2005) 17-18

Mont. Dep’t of Pub. Health & Human Servs.,
Child Support Enforcement Div., Payment Information,
https://dphhs.mt.gov/CSED/payment 42

Nat'l Consumer Law Ctr., Consumer Banking & Payments Law
§ 7.1.7.4 (4th ed. 2009)...18

Restatement (Second) of Contracts § 249 (Am. Law Inst. 1981) 12, 39-41

Restatement (Second) of Contracts § 318(1)-(3)
(Am. Law Inst. 1981) 21-22, 36

STATEMENT OF THE ISSUES

Where the undisputed evidence proves that Sisters of Charity of Leavenworth Health System, Inc. d/b/a SCL Health ("SCL Health") refunded Cheryl Bratton's ("Bratton") money, did the District Court err by granting summary judgment on all of her claims, each of which requires a showing that SCL Health retained or withheld her funds?

STATEMENT OF THE CASE

This lawsuit is about Appellant Cheryl Bratton's subjective preference for receiving refunds through paper checks instead of prepaid debit cards, which are the fastest-growing payment method in the United States and the method by which thousands of private businesses and government entities disburse funds to consumers. (*See* Br. *Amici Curiae* Mont. Bankers Ass'n, Am. Bankers Ass'n, & Consumer Bankers Ass'n ("Bankers Br.") 2-3, 8-14, Nov. 25, 2019; Argument at 13, *infra*.) Here, SCL Health refunded Bratton $27.75 through two prepaid Mastercard debit cards issued by Bank of America. Bratton could have exchanged those cards for cash or otherwise used them at thousands of locations, and without incurring any fees. She also could have requested a paper check in lieu of her prepaid debit cards, and at no cost. She chose not to exercise either option.

Instead, dissatisfied with SCL Health's "silly" and "inconvenien[t]" refund method, Bratton brought this lawsuit, claiming before the District Court that SCL Health did not refund her money because prepaid debit cards are not the equivalent of cash or legal tender and are inherently less valuable than paper checks. (*See* Case Register Rpt. ("CRR") 52 at 14, 16; CRR 25 at 5-9; CRR 35 at 4-11; CRR 49.001, Ex. E at 29:16-18, 77:12-17.) Bratton has largely abandoned that contention, conceding she received a refund that is, essentially, useable money. (*See* Appellant's Opening Br. 33, Oct. 3, 2019 ("Appellant's Br.").) Now on appeal, Bratton claims that SCL Health's chosen refund method injured her by purportedly "forc[ing]" her to "deal" with or otherwise "accept performance from Bank of America," which she mistakenly argues is a violation of Montana Code Annotated § 28-1-1002 ("Section 28-1-1002"). (Appellant's Br. 2, 5.)

Regardless of which theory she advances, Bratton cannot show that she or any other cardholder has been harmed by SCL Health's chosen refund method. There is no evidence that Bratton or any other cardholder has been unable to access the full amounts refunded to them. Instead, Bratton manufactures a false barrier by claiming she and other cardholders cannot access their refunded money without agreeing to Bank of America's cardholder agreement, to which she (and, by purported extension, others) supposedly

objects. But Bratton never read the cardholder agreement, and her husband affirmatively disclaimed any objection to it. (CRR 49.01, Ex. E at 57:12-58:1; CRR 49.01, Ex. F at 27:9-18.) Moreover, cardholders may request and obtain a check for the amount of their refunds without activating their cards and, thus, consenting to the cardholder agreement. (CRR 13, Ex. B at 3, ¶ 7.)

Bratton's alternative theories of harm fare no better. SCL Health does not, as Bratton claims, "divulge its patients' federally-protected information" to Bank of America. (Appellant's Br. 2; *see also id.* 10-11 (citing the Health Insurance Portability and Accountability Act ("HIPAA")).) SCL Health's disclosure of the refund recipient's name, contact information, and refund amount to Bank of America is not prohibited by HIPAA. Recognizing that financial institutions must use certain information to process payments on behalf of healthcare providers, Congress expressly provided that HIPAA does not apply to such financial activities. *See* 42 U.S.C. § 1320d-8.[1] Nor does the fact that SCL Health processes refund payments through Bank of America produce any real or theoretical harm to patients. That process does not transfer

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[1] Section 1320d-8 expressly provides that it "this part . . . shall not apply to . . . [t]he use or disclosure of information by [a financial institution] for authorizing, processing, clearing, settling, billing, transferring, reconciling or collecting, a payment for, or related to, . . . health care, where such payment is made by any means, including a credit, debit, or other payment card, an account, check, or electronic funds transfer."

the burden of SCL Health's payment obligation any more than if it had sent Bratton a paper check. In either scenario, SCL Health must rely on intermediary banks to actually pay Bratton; that is simply how commerce works. (*See* Bankers Br. 2, 4-8.)

In the end, this case is not about the failure to refund Bratton's money or the purportedly nonconsensual transfer of a legal obligation, neither of which occurred here. Instead, it is about the perceived inconvenience that Bratton subjectively attributes to prepaid debit cards. That alleged inconvenience is insufficient to support a viable legal claim. Aside from her misguided reliance on Section 28-1-1002, Bratton cites no authority requiring SCL Health—or any other entity—to obtain its customers' prior consent to the specific method it uses to pay a refund. That is because there is none. The District Court, thus, correctly granted summary judgment for SCL Health on each of Bratton's causes of action. Simply put, the fact that SCL Health refunded Bratton's money precludes her from proving the requisite elements of her claims, regardless of whether she consented to the way SCL Health refunded her.

STATEMENT OF FACTS

I. SCL HEALTH'S PATIENT REFUND CARD PROGRAM

Since January 2015, SCL Health has refunded patients through prepaid Mastercard debit cards issued by Bank of America (the "Patient Refund Card

Program”). (CRR 13, Ex. A at 2, ¶ 3.) When SCL Health determines a refund should be issued to a patient or guarantor, it communicates the refund amount and the refund recipient’s name and contact information to Bank of America. (*Id.* ¶ 5.) Bank of America then debits the appropriate amount of funds from SCL Health’s depository account, creates and loads a prepaid debit card with the refund amount (the “Patient Refund Card”), and sends the Patient Refund Card to the refund recipient. (CRR 13, Ex. B at 2, ¶ 3.) Funds associated with the Patient Refund Card are not held in SCL Health’s depository account but, instead, in a separate account that allows the cardholder to spend up to the full balance of the card. (*Id.*) Except during the initial 14-day period after the card is issued, SCL Health does not have control of or access to funds that have been debited from its depository account and loaded onto Patient Refund Cards.[2] (CRR 13, Ex. B at 2, ¶ 4; CRR 13, Ex. A at 2, ¶ 6.)

The Patient Refund Card is sent to cardholders attached to a piece of card stock called a “card carrier,” which bears Bank of America’s and SCL Health’s logos and states that the recipient is receiving a “Patient Refund Card.” (CRR 13, Ex. B at 2, ¶ 5.) The card carrier provides information on how to activate

[2] During the initial 14-day period after issuance of the Patient Refund Card, SCL Health retains the ability to have Bank of America unload an account in the event of a mistaken payment or debit. (CRR 13, Ex. B at 2, ¶ 4.)

and use the card without incurring fees, as well as Bank of America customer-service numbers to call if the recipient has any questions about the card. (*Id.*)

The Patient Refund Card provides patients and guarantors flexibility in accessing their refunded money. As the card carrier explains, cardholders may exchange the Patient Refund Card for cash at <u>any</u> bank or credit union that accepts Mastercard (not just Bank of America branches) without being charged any fees. (CRR 13, Ex. B at 2-3, ¶ 6.) Cardholders may also receive cash from any Allpoint ATM without being charged any fees. (*Id.*) There are approximately 40,000 Allpoint Surcharge-Free ATMs in the United States (and 55,000 worldwide), including 94 in Montana. (*Id.*) The surcharge-free ATMs are located at convenient locations, such as Target, Albertson's, Walgreens, Costco, etc. (*id.*), and may be located by cardholders through an online search engine.[3] Further, the Patient Refund Card may be used (again, with no fees) at any point-of-sale location—including online—that accepts Mastercard. (*Id.*)

At present, Patient Refund Cards are issued with a three-year expiration period. (CRR 13, Ex. B. at 3, ¶ 8.) Upon card expiration, the Patient Refund Card can no longer be used to perform transactions. (*Id.*) For Montana residents, any outstanding balance on an expired Patient Refund Card remains

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[3] *See* Allpoint ATM Locator, www.allpointnetwork.com/locator.aspx (last visited Apr. 23, 2019).

until the balance becomes eligible for escheatment to the State of Montana in accordance with its law on unclaimed property.[4] (*Id.*) No unclaimed funds are retained by SCL Health or Bank of America; rather, such funds are escheated to the State of Montana in accordance with state law. (CRR 13, Ex. A at 4, ¶ 6; CRR 13, Ex. B at 3-4, ¶ 9.)

If the recipient does not want to use the Patient Refund Card and would prefer to receive a paper check, a check will be issued free of charge to the cardholder upon his or her request. (CRR 13, Ex. A at 3, ¶ 9; CRR 13, Ex. B at 3, ¶ 7.) Bank of America's standard policy is that cardholders may request and obtain a check for the balance of their Patient Refund Cards without activating the card. (CRR 37, Ex. C at 40:6-9 ("Q: When a cardholder requests a check from Bank of America, do they need to activate their card first? A: They do not.").) Consistent with this policy, Bank of America's data shows 194 instances in which SCL Health cardholders in Montana requested and were issued checks for the balance of their Patient Refund Cards <u>without</u> activating those cards. (CRR 37, Ex. E at 2, ¶ 4.)

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[4] The required dormancy period under Montana law is five years. *See* Mont. Code Ann. § 70-9-803(q).

II. BRATTON'S CLAIMS

Bratton received two Patient Refund Cards (for $12.75 and $15.00) in connection with services provided by SCL Health. (App. Appellant's Opening Br. 57-58, ¶¶ 11:24-12:6, Oct. 3, 2019 ("App.").) Bratton's husband activated one of the Patient Refund Cards for her (the $12.75 card); the other card (the $15.00 card) was never activated. (CRR 49.01, Ex. F at 11-12, 25; CRR 13, Ex. B at 4, ¶¶ 10-11.) Neither card has expired. (CRR 13, Ex. B at 4, ¶¶ 10-11.)

Though both Patient Refund Cards were freely available for Bratton's use, she admits she never attempted to use either card, has not incurred any fees, and has no basis for disputing that cardholders may access their money in various ways without incurring fees. (CRR 49.01, Ex. E at 71:20-72:2, 75:16-77:11; CRR 37, Ex. D at 11, Resp. Req. Admis. No. 10.) Further, though Bratton complains about having to "activate" the Patient Refund Cards because that would require consent to Bank of America's cardholder agreement, she admits she never read the cardholder agreement (and that she has never objected to a cardholder agreement in the past). (CRR 49.01, Ex. E at 57:12-58:1.) Instead, she gave the cardholder agreement to her husband, who in turn disclaimed any objection to it. (CRR 49.01, Ex. E at 57:24-58:1; CRR 49.01, Ex. F at 27:14-18.)

Bratton admits she did not contact Bank of America or SCL Health to request a check before filing this lawsuit, though she could have obtained one free of charge (and without activating her cards). (CRR 37, Ex. D at 9-10, Resp. Req. Admis. Nos. 1-2, 5-6.) Bratton, however, requested a check for the balance of her Patient Refund Cards during her deposition, and a check for those amounts was issued to her. (CRR 49.01, Ex. E at 97:16-20; CRR 49.01, Ex. H at 2, ¶ 3.)

STANDARD OF REVIEW

This Court reviews a district court's grant of summary judgment de novo, applying the same standard as the district court. *Graham-Rogers v. Wells Fargo Bank, N.A.*, 2019 MT 226, ¶ 12, 397 Mont. 262, 449 P.3d 798. "Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Mont. Envtl. Info. Ctr. v. Dep't of Envtl. Quality*, 2019 MT 213, ¶ 18, 397 Mont. 161, __ P.3d __. The Court, however, must consider the evidence in the light most favorable to the party opposing summary judgment, and draw all reasonable inferences in its favor. *Graham-Rogers*, ¶ 12.

SUMMARY OF ARGUMENT

The Court should affirm the District Court's summary judgment order for the following reasons:

1. Bratton's request for a declaratory judgment that SCL Health's Patient Refund Card Program violates Section 28-1-1002 is both procedurally and substantively defective. Bratton waived any claim for such a declaration because she did not request such a declaration from the District Court. She cannot obtain on appeal relief she never requested below.

Her new request also fails on its merits. First and foremost, SCL Health's choice of payment mechanism does not implicate Section 28-1-1002. All SCL Health did was instruct its bank to pay Bratton through a recognized payment device. That act is no different than issuing Bratton a paper check, which is itself a written instruction to a bank to pay the payee. Thus, regardless of what payment method SCL Health uses, it remains the payer, and the bank acts solely as a financial institution whose involvement is necessary to move payment from payer to payee. Bratton cites no authority holding that this everyday process transfers the legal burden of the underlying payment obligation to the intermediary bank(s) that facilitates payment.

Second, Bratton has not identified anything unique about prepaid debit cards or SCL Health's treatment of its refund obligation that would render Section 28-1-1002 applicable. SCL Health has never "disclaimed liability" for its refund obligation but, instead, maintains that it performed that obligation by providing Bratton her Patient Refund Cards. As it acknowledged before the

District Court, SCL Health has at all times remained the party liable to Bratton and other patients for fulfilling its refund obligation. Further, neither Bank of America's cardholder agreement nor SCL Health's "relinquish[ment] [of] any control over patient refund money" alters the relationship between SCL Health and Bratton (or any other patient). (*See* Appellant's Br. 18.) Again, SCL Health remains the debtor, and Bratton the creditor; Section 28-1-1002 is, therefore, inapplicable because SCL Health's refund obligation was never transferred. And, contrary to Bratton's misguided understanding of the law, even if SCL Health's reliance on Bank of America to facilitate payment to Bratton were akin to delegating the performance of that obligation, that delegation is lawful, even without her consent.

2. The District Court properly granted summary judgment on each of Bratton's causes of action, and that order should be affirmed. SCL Health refunded Bratton's money in a manner that provided Bratton full access to the value of her refund. That fact alone defeats each of Bratton's claims as a matter of law. Her claim for unjust enrichment, and by extension for imposition of an equitable constructive trust, fails because she cannot prove that SCL Health unjustly retained the benefit she conferred (her payment of $27.75 for healthcare services) when it returned the value of that benefit by refunding her money. Her Montana Consumer Protection Act ("MCPA') claim fails for

substantially the same reason: she cannot prove she sustained an "ascertainable loss of money or property" because SCL Health refunded her money, meaning she has not sustained any pecuniary loss. *See* Mont. Code Ann. § 30-14-133(1) (emphasis added). Bratton's claim for money had and received likewise fails because SCL Health paid any money that was rightfully hers by refunding her money. And her claim for declaratory judgment—both old and new—is inherently doomed because she cannot articulate any valid legal basis for the relief she requests. Finally, Bratton's latest incarnation of what has a been a continually evolving theory of harm—now, SCL Health's alleged violation of Section 28-1-1002—does not save her claims because that statute is inapplicable and has not been violated.

3. The District Court correctly determined that SCL Health was not required to obtain Bratton's consent to provide her refund in the form of a prepaid debit card. Absent a contractual promise to make payment in a specified form or an express demand for payment in legal tender, the Restatement of Contracts allows debtors to discharge payment obligations through "any manner current in the ordinary course of business." Restatement (Second) of Contracts § 249 (Am. Law Inst. 1981) (emphasis added). As the fastest-growing means of payment in the United States, and a highly-used means of disbursing funds to consumers by both private businesses and government entities, prepaid debit

cards are unquestionably a manner of payment "current in the ordinary course of business." *See id.* Consequently, the District Court correctly determined that SCL Health refunded Bratton's money.

ARGUMENT

I. BRATTON IS NOT ENTITLED TO A DECLARATION THAT SCL HEALTH'S PATIENT REFUND CARD PROGRAM VIOLATES SECTION 28-1-1002

A. Bratton did not ask for a Declaration that the Patient Refund Card Program Violates Section 28-1-1002 from the District Court

Bratton claims she is entitled to a declaratory judgment stating the Patient Refund Card Program violates Section 28-1-1002, but she did not request any such declaration from the District Court. Thus, she waived this claim by failing to raise it in the proceedings below. *See Giddings v. State*, 2016 MT 139N, ¶ 14, 384 Mont. 553 (slip copy) ("We generally will not address issues raised for the first time on appeal."); *State v. Adgerson*, 2003 MT 284, ¶ 12, 318 Mont. 22, 78 P.3d 850 ("A party may not raise new arguments or change its legal theory on appeal, because it is fundamentally unfair to fault the trial court for failing to rule on an issue it was never given the opportunity to consider.").

Neither Bratton's First Amended Complaint nor her summary judgment briefing included a request for a declaration that the Patient Refund Card Program violates Section 28-1-1002. That Statute provides that "[t]he burden of

an obligation may be transferred with the consent of the party entitled to its benefits, but not otherwise . . . .” Mont. Code Ann. § 28-1-1002. In her First Amended Complaint, however, Bratton asked only for a declaratory judgment stating that the Patient Refund Card Program “fails to comport with equity” and that SCL Health “should be enjoined from continuing to give patient refund money to Bank of America for issuance of stored value cards without the patients’ knowledge or consent.” (CRR 28 at 7, ¶ 30.) Similarly, at summary judgment, Bratton argued only for declarations that: (1) Patient Refund Cards are “not the equivalent of cash”; (2) SCL Health “cannot give patients’ money to Bank of America absent prior consent”; (3) SCL Health is legally obligated to refund Bratton’s money; and (4) SCL Health cannot force Bratton to contract with Bank of America or “otherwise deal with Bank of America in order to receive her refund.” (CRR 35 at 13.)

These requests are substantively different than asking for a declaration that the Patient Refund Program violates a specific statute, particularly when Bratton has abandoned her primary theory below—that SCL Health had converted her money by “giv[ing] [it] to Bank of America” without her consent. (CRR 25 at 10-11, 13; *accord* CRR 35 at 13.) Thus, under well-established Montana law, Bratton waived any claim for a declaration concerning Section 28-1-1002 by failing to request that declaration below. The District Court’s

grant of summary judgment on Bratton's declaratory judgment claim should be affirmed on this basis alone.

B. SCL Health's Patient Refund Card Program Does Not Violate Section 28-1-1002

Even if the Court were to find that Bratton properly raised a declaratory judgment claim under Section 28-1-1002, that claim still fails on its merits. As an initial matter, she does not cite any legal authority applying that statute (or the principles underlying it) to a payer's use of a bank to facilitate payment through a recognized and federally-regulated payment device. The absence of such authority is unsurprising given the unique and essential role of banks in commerce.

Moreover, Bratton's argument is both factually and legally incorrect. Her assertion that SCL Health "transferred its obligation" and "disclaimed liability" for her refund mischaracterizes the facts, while her claim that Section 28-1-1002 mandates "direct performance" or "direct payment" from SCL Health is legally wrong. Even if SCL Health were deemed to have delegated performance of its refund obligation by relying on Bank of America to facilitate payment (it did not), that delegation would still be permissible even without Bratton's consent.

1. The method by which SCL Health chooses to issue payment does not implicate Section 28-1-1002.

Section 28-1-1002 limits an obligor's ability to transfer "the burden of [its] obligation," which is defined as "a legal duty by which a person is bound to do or not do a certain thing." Mont. Code Ann. § 28-1-101(1). Here, that legal duty is to refund Bratton, which is solely an obligation to deliver money. But as the statute makes clear, how that obligation is performed—that is, the method of payment—is not the subject of the Section 28-1-1002 because it is not the obligation itself. *See id.* 28-1-101(2) ("Performance of an obligation for the delivery of money only is called payment.").

Consequently, SCL Health's provision of refunds through Patient Refund Cards does not implicate Section 28-1-1002 any more than would its issuance of refunds by check or some other commonly used means of payment. Modern commerce, including the performance of payment obligations, necessarily flows through banks and other financial institutions, regardless of the method of payment. Personal checks must be deposited or cashed, and that process involves performance by both the payer's and the payee's banks. (*See* Bankers Br. 4-7.) The same is true of wire transfers or other forms of electronic

payment.[5] Consequently, if Bratton's position were correct, a violation of Section 28-1-1002 would occur nearly any time a monetary obligation was paid. (*See* Bankers Br. 4-8.)

Clearly, however, these everyday transactions do not violate Section 28-1-1002. The reason is simple: they do not create a transfer of the debtor's underlying legal obligation. Indeed, use of a bank to facilitate payment is no different than using the United States Postal Service to deliver a check in satisfaction of a payment obligation. In either case, the debtor retains the underlying payment obligation and remains the performing party, despite having to rely on a financial institution or the postal service to facilitate the debtor's performance.

Likewise, here, Patient Refund Cards are merely the means by which SCL Health chose to perform its payment obligation. It did not transfer or assign that obligation to Bank of America; nor did it pay Bratton's refund to Bank of America, as Bratton argues. (*See* Appellant's Br. 23.) Instead, SCL Health instructed its bank to issue a proper payment device to satisfy its own debt obligation. That process, like other forms of payment, required Bank of

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[5] *See generally* James Steven Rogers, *The New Old Law of Electronic Money*, 58 SMU L. Rev. 1253, 1257-59 (Fall 2005) (describing the process of wire transfers and electronic payment systems).

America to debit the refund amount from SCL Health's account and credit it to Bratton's Patient Refund Cards, just as payment on a personal check would require the transfer of bank credit from SCL Health's bank to Bratton's bank.[6] Bratton rightly assumes that the latter transaction would not constitute a transfer of SCL Health's payment obligation—either to its own bank or to Bratton's—and there is no rational basis for treating payment through prepaid debit cards any differently. Indeed, even the National Consumer Law Center (which appears here as *amicus curiae* in support of Bratton's position) has advised that "courts may . . . analogize stored value cards to cashier's checks, traveler's checks, credit cards, or ordinary checks" for "purposes of finding an applicable legal approach." Nat'l Consumer Law Ctr., Consumer Banking & Payments Law § 7.1.7.4 (4th ed. 2009) (included in the record at CRR 37, Ex. H).

The bottom line is this: prepaid debit cards differ from other payment forms in some respects, but the basic character of the transaction, and the bank's role in it, is the same. Regardless of whether payment is made by personal check or prepaid debit card, the bank's obligation is still that of a financial institution that must transfer funds at its customer's instruction. The underlying payment obligation, and the burden of liability that comes with it, remains the

[6] Rogers, *supra* n.5, at 1257-58 (describing check system as the transfer of bank credit).

debtor's. Thus, the means by which a debtor makes payment—whether by check, wire transfer, prepaid debit card, etc.—does not transfer the "burden" of the debtor's obligation, and it therefore does not implicate Section 28-1-1002. (*See* Bankers Br. 4-8.)

2. Bratton's arguments do not show that SCL Health transferred its payment obligation.

Bratton argues that SCL Health improperly transferred its refund obligation to Bank of America because it relied on that bank to effectuate payment, relinquished control over the refunded money once Bank of America issued the Patient Refund Cards, and then purportedly disclaimed any liability for refunding Bratton. These arguments are meritless.

SCL Health neither assigned its refund obligation to Bank of America nor disclaimed liability for the underlying obligation itself. SCL Health retains—and has expressly acknowledged that it retains—that legal obligation. (*See* Tr. Proceedings 28:9-13, May 30, 2019 ("Hr'g Tr."); *id.* 43:19-20 (reflecting Bratton's recognition that SCL Health "acknowledge[s] that they owe the money").) Its position, adopted by the District Court, is simply that it performed its obligation by paying Bratton through Patient Refund Cards. (*See, e.g.*, CRR 52 at 9, 14.)

That SCL Health relinquishes control of funds loaded onto Patient Refund Cards, or that Bank of America performs certain functions in facilitating payment to cardholders, is irrelevant. Those facts do not alter the relationship between SCL Health and its patients; thus, they have no bearing on whether SCL Health transferred its refund obligation to Bank of America. If, for some reason, a Patient Refund Card was defective and could not be used to access the refunded money—a circumstance Bratton does not allege and for which there is no evidence—SCL Health would retain the legal obligation to pay that patient the refund.

Bratton's reliance on the existence of Bank of America's cardholder agreement is similarly misplaced. That agreement, too, does not affect the relationship between Bratton and SCL Health; nor does it purport to shift any liability for SCL Health's payment obligation to Bank of America. Moreover, Bratton was not required to consent to Bank of America's cardholder agreement to access her funds—she could (and eventually did) obtain a check in lieu of her Patient Refund Cards at no cost and without activating them. (*See* Statement of Facts ("Facts") at 4.)

3. Section 28-1-1002 does not preclude delegating performance of a payment obligation without the beneficiary's consent.

Bratton's argument suffers from an additional fatal flaw: she incorrectly assumes that Section 28-1-1002 prohibits the nonconsensual delegation of contractual performance. It does not. Section 28-1-1002 speaks only to transferring the "burden of an obligation," meaning the legal responsibility for performing the obligation. It neither addresses nor precludes delegating the act of performance itself, which is distinct from the burden of (or liability for) that performance.

Basic principles of contract law and Montana Supreme Court precedent confirm this interpretation of Section 28-1-1002. That statute codifies the following widely-recognized rule of contract law: an obligor can properly delegate the performance of his duty to another, even without the beneficiary's consent, unless the delegation is contrary to public policy or a contractual promise; but, without the beneficiary's consent, that delegation does not discharge the obligor's duty or liability to the beneficiary. *See* Restatement (Second) of Contracts § 318(1), (3) (Am. Law Inst. 1981). Stated differently,

performance of contractual duties is freely delegable,[7] but the delegating obligor "remains liable as surety unless the obligee consents to the delegation." *Headrick v. Rockwell Int'l Corp.*, 24 F.3d 1272, 1278 (10th Cir. 1994) (citing Restatement (Second) of Contracts §§ 318, 329).

This Court has recognized this rule's applicability in Montana and that it is consistent with the mandate of Section 28-1-1002:

> It has sometimes been said that the effect of an assignment is to make the lessee a surety for the assignee. This follows from the general rule, heeded in this jurisdiction, that an assignee who assumes the obligations of the contract becomes primarily liable for their discharge, but the assignor remains secondarily liable . . . . Thus, in effect, as between the lessor and the lessee, who has assigned his rights under the lease and relieved himself of the obligations by having the assignee assume them, the lessee, nevertheless, remains an obligor to his lessor to whom the lessor may look for the payment of rent. The burden of the obligation can be transferred only with the consent of the party entitled to its benefit. R.C.M.1947, § 58-301.

Kintner v. Harr, 146 Mont. 461, 479, 408 P.2d 487, 497 (1965); *accord* *Herigstad v. Hardrock Oil Co.*, 101 Mont. 22, 37, 52 P.2d 171, 175-76 (1935)

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[7] The exception to this rule concerns contractual duties that call for the exercise of personal skill, unique ability, judgment, or discretion, or those that a party has agreed to personally perform. *See* Restatement (Second) of Contracts § 318(2) ("Unless otherwise agreed, a promise requires performance by a particular person only to the extent that the obligee has a substantial interest in having that person perform or control the acts promised."); *see also id.* cmt. c ("The principal exceptions relate to contracts for personal services and to contracts for the exercise of personal skill or discretion."). Payment of a run-of-the-mill monetary obligation does not fall within this exception.

("[W]hatever the rule may be elsewhere, in this jurisdiction, while the assignment of a contract does not relieve the assignor from liability, an assignee who assumes the obligations of the contract becomes primarily liable for their discharge, and the assignor remains but secondarily liable . . . .").

This authority contradicts the entire premise of Bratton's arguments—that she is legally entitled to "direct performance" from SCL Health under Section 28-1-1002—and, thus, shows unequivocally that her position is wrong. Even if SCL Health is deemed to have delegated performance of its refund obligation to Bank of America (which it did not), that delegation is permissible under Section 28-1-1002, even without Bratton's consent. Bratton does not claim that SCL Health assigned a contractual duty of personal performance. And, aside from her misguided arguments about Section 28-1-1002, she does not identify any public policy rationale for precluding SCL Health from delegating performance of its payment obligation (which it did not do in any event). Thus, "there can be no claim of injury by the simple fact of delegation"—which is the only injury Bratton claims. *See Sys. Council EM-3 v. AT & T Corp.*, 972 F. Supp. 21, 40 n.37 (D.D.C. 1997), *aff'd sub nom. Sys. Council EM-3 v. AT&T Corp.*, 159 F.3d 1376 (D.C. Cir. 1998).

Consequently, that Bratton has to "deal" with Bank of America or, as she mischaracterizes it, "accept performance by Bank of America" in the form of

either a Bank of America-issued check or a Patient Refund Card (Appellant's Br. 37) does not establish an injury or a cause of action under Section 28-1-1002.

4. Neither *Skinner* nor *AICCO* support Bratton's position.

Bratton cites cases from North Dakota and California to support her argument that SCL Health violated Section 28-1-1002 by relying on Bank of America to facilitate payment of her refund. (Appellant's Br. 24-29 (citing *Skinner v. Scholes,* 229 N.W. 114 (N.D. 1930), and *AICCO, Inc. v. Ins. Co. of N. Am.*, 90 Cal. App. 4th 579 (Cal. Ct. App. 2001)).) Bratton's reliance on both authorities is misplaced, as neither *Skinner* nor *AICCO* addresses the rule stated in Section 28-1-1002 in the context of payment of a monetary obligation. Thus, neither case establishes the position Bratton advances: that SCL Health transferred the legal burden of its debt obligation by refunding Bratton through a recognized payment device that, like other payment instruments, requires the use of one or more intermediary banks.

In any event, both cases are materially distinguishable due to the existence of facts not present here. *Skinner* involved the assignment of a land contract in which the original obligor agreed to provide a deed with personal covenants, which the court construed as a promise by the obligor "to perform itself." 229 N.W. at 116-17. While the court recognized performance by a third

party would be acceptable if it "compli[ed] with the terms of the contract," it concluded that the offer of such performance did not, in fact, comply with the contract because the obligor had promised to personally perform. *Id.* Here, by contrast, SCL Health did not assign (or even delegate) any contractual or quasi-contractual duty to Bank of America but, rather, performed its payment obligation by instructing its bank to pay Bratton through a recognized payment device, just as it would by issuing Bratton a personal check.

AICCO, a decision from California's intermediate appeals court, involved the "transfer[]" of an insurance company's obligations under an entire class of insurance policies. 90 Cal. App. 4th at 584-85. The plaintiffs alleged that Insurance Company of North America ("INA"), the original insurer, affirmatively disclaimed any and all liability under the transferred policies (primary and secondary) and contended that policyholders had no recourse against it in the event of nonperformance or default by the party to whom it had transferred those policies. *Id.* at 585, 591. Accepting those allegations as true, the *AICCO* court concluded the plaintiffs had alleged a violation of California's equivalent of Section 28-1-1002. *Id.* at 589, 591. But, here, SCL Health has never disclaimed liability for its payment obligation; it maintains only that it has performed that obligation by providing Bratton her Patient Refund Cards.

II. THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT ON EACH OF BRATTON'S CAUSES OF ACTION

A. Bratton's Unjust Enrichment and Constructive Trust Claims Fail Because SCL Health Has Not Unjustly Retained Any Benefit She Conferred

The District Court granted SCL Health summary judgment on Bratton's unjust enrichment and constructive trust claims because she cannot prove that SCL Health retained the benefit she conferred without paying its value, an essential element of her claims.[8] This decision was correct. As the District Court recognized, the fact that Bratton received and has access to her refunds—either through use of her Patient Refund Card or by requesting a check—defeats her claims. (*See* CRR 52, pp. 12-13.)

To prove unjust enrichment, Bratton must show she conferred a benefit on SCL Health and that SCL Health retained that benefit (i.e., her payment of $27.75 for healthcare services) under circumstances that would make it inequitable "to retain the benefit without payment of its value." *See N. Cheyenne Tribe v. Roman Catholic*, ¶ 36. Here, however, SCL Health has not

[8] Although Bratton asserted a separate cause of action for an equitable constructive trust, the imposition of such a trust is best characterized as a "remedy to rectify the unjust enrichment of a party." *See N. Cheyenne Tribe v. Roman Catholic Church*, 2013 MT 24, ¶ 39, 368 Mont. 330, 296 P.3d 450. To establish an equitable right to a constructive trust, a plaintiff must first establish that a defendant has been unjustly enriched. *See* Mont. Code Ann. § 72-38-123.

unjustly retained the benefit Bratton conferred because it repaid her the value of that benefit in the form of Patient Refund Cards. Thus, SCL Health has not retained the benefit Bratton conferred without paying its value.

Bratton's analysis ignores this critical element of her unjust enrichment claim. That SCL Health may retain other benefits she did not confer, like certain costs savings, is irrelevant. What matters is that SCL Health paid Bratton the value of the benefit she did confer. Bratton cites no authority suggesting she (or the putative class) is entitled to the value of benefits SCL Health obtains by improving its business practices to reduce the internal costs of providing refunds, particularly when it is undisputed that SCL Health refunded Bratton's money.

On appeal, Bratton argues that SCL Health is unjustly enriched despite having repaid her the benefit she conferred because the manner in which it paid her purportedly violates Section 28-1-1002.[9] (Appellant's Br. 41-42.) But there

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[9] Notably, Bratton did not raise this theory of unjust enrichment before the District Court. Instead, Bratton argued that SCL Health was unjustly enriched because it converted Bratton's refund money "by giving [that money] to Bank of America without [her] consent." (CRR 25 at 16; *accord* CRR 28 at 6, ¶ 22 (alleging, as part of her unjust enrichment claim, that SCL Health "wrongfully converted funds from [Bratton]"); Hr'g Tr. 35:20-23.) Bratton, however, does not appeal the District Court's grant of summary judgment on her conversion claim; thus, there is no dispute that SCL Health did not convert any funds belonging to Bratton.

is nothing inherently wrongful about the Patient Refund Card Program, regardless of whether patients consent to receive refunds in the form of prepaid debit cards issued by Bank of America. (*See* Argument, *supra*.) The Patient Refund Program does not violate Montana law; nor is SCL Health required to obtain its patients' consent to the method by which it chooses to issue refunds.

Accordingly, the District Court's grant of summary judgment on Bratton's unjust enrichment and constructive trust claims should be affirmed.

B. Bratton's MCPA Claim Fails as a Matter of Law Because She Has Not Sustained an "Ascertainable Loss of Money or Property"

The District Court correctly granted summary judgment on Bratton's MCPA claim because she did not sustain an "ascertainable loss of money or property," as a result of any allegedly unfair or deceptive practice. *See* Mont. Code Ann. § 30-14-133(1). It is undisputed that Bratton received two Patient Refund Cards for a total refund of $27.75. (*See* Appellant's Br. 12.) Bratton's husband activated one of her Patient Refund Cards, and she admits she could have activated the other. (Facts § II.) Bratton does not dispute the many ways in which she can use those cards in commerce or otherwise retrieve, in either cash or check, each card's balance. (*Id.*) Nor does she dispute that she could—and eventually did—obtain a check for the amount of her refunds. (*Id.*) Bratton,

therefore, has not sustained any actual loss of “money or property.” *See* Mont. Code Ann. § 30-14-133(1).

Bratton offers no valid basis for reversing the District Court’s summary judgment order on her MCPA claim. On appeal, she no longer claims she sustained an ascertainable loss because she did not receive her refunds, as she previously argued. (*See* CRR 25 at 18.) That alone dooms her claim, as she concedes she received her refund and, thus, sustained no pecuniary loss. Instead, she now claims her ascertainable loss is the $27.75 she admittedly received because, according to Bratton, SCL Health “force[d]” her to accept payment from Bank of America. (Appellant’s Br. 22, 46.) Bratton, thus, claims her “ascertainable loss” is not the money owed to her but the supposedly illegal practice itself. This theory fails for two reasons: (1) SCL Health’s Patient Refund Card Program is not an unfair or deceptive business practice; and (2) Bratton’s theory contravenes the express statutory requirements for a private MCPA claim by nullifying the ascertainable-loss requirement.

1. The Patient Refund Card Program is not an unfair or deceptive business practice.

Bratton’s primary argument—that SCL Health’s Patient Refund Program is unfair and deceptive because it violates Section 28-1-1002—fails on its merits. The Patient Refund Card Program does not violate Section 28-1-1002,

regardless of whether Bratton consented to receiving her refund in the form of a prepaid debit card. (*See* Argument § II.B.) Nor is Bratton (or any other patient) legally entitled to "direct payment" of her refund from SCL Health—though that is essentially what she received. (*Id.* § II.C.3; Bankers Br. 7-8.) Montana law does not preclude SCL Health from using a bank to issue payment to Bratton, even if payment comes directly from that bank. That remains true even if SCL Health is deemed to have delegated performance of its repayment obligation as a result (which it has not). (Argument § II.C.) It logically follows that SCL Health was not required to inform Bratton (or any other patient) that it would provide refunds through Patient Refund Cards administered by Bank of America. (*Cf.* Appellant's Br. 45.)

Bratton's secondary argument—that she must consent to Bank of America's cardholder agreement to access her refund—is factually meritless. (*See* Appellant's Br. 46.) Bank of America's standard policy is that cardholders may obtain a check for the balance of their Patient Refund Cards without activating them. (*See* Facts.) Bratton offers no evidence that her experience was inconsistent with this standard policy. Bratton admits she did not even try to obtain a check from Bank of America or SCL Health before filing this lawsuits. (Facts.) Moreover, SCL Health arranged to have Bank of America issue Bratton a check for the balance of her Patient Refund Cards—one of which she did not

activate—through normal business channels once she requested one. (Facts.) Thus, there is no evidence that Bratton was unable to request a check without activating her cards; nor is there a genuine fact dispute on this issue.

Nonetheless, Bratton attempts to manufacture a fact dispute by having her daughter and her attorney's wife, Meagen Heenan, submit an affidavit in which Ms. Heenan states that, when calling Bank of America, she was unable to reach a live person without activating her card. (App. at 63-64.) This evidence is irrelevant, as it does not pertain to Bratton's own experience. Ms. Heenan's affidavit provides, at most, evidence that she had difficulty requesting a check and, thus, that individual experiences may vary. But extrapolating from this evidence that Bratton cannot obtain a check without activating her Patient Refund Cards—when the record shows that a check was issued to her for the balance of the card she did not activate—amounts to nothing more than baseless speculation that is contradicted by the record. That speculation is insufficient to create a genuine dispute of fact.

2. Bratton cannot prove an ascertainable loss merely by alleging an unfair or deceptive practice.

Even if Bratton could somehow create a fact issue as to whether SCL Health's Patient Refund Card Program qualifies as an unfair and deceptive practice, her attempt to prove she sustained an "ascertainable loss" under the

MCPA still fails. Bratton's argument—that she can show such a loss by proving the purported illegality of SCL Health's refund practices—dispenses entirely with the Act's ascertainable-loss requirement by conflating it with the unfair-practices element of her claim. There is no legal support for this theory.

The MCPA is clear: to bring a private action under the Act, a consumer must prove, as a threshold matter, that he or she suffered an "ascertainable loss of money or property," and that loss must be "a result of . . . [a] practice declared unlawful" by the Act. Mont. Code Ann. § 30-14-133(1); *accord Ternes v. State Farm Fire & Cas. Co.*, 2011 MT 156, ¶ 36, 361 Mont. 129, 257 P.3d 352 ("[O]nly those individuals who suffer ascertainable damages may bring an individual complaint under the MCPA."). Thus, the ascertainable-loss requirement is a distinct element of a private plaintiff's MCPA claim, and one that reflects an intentional limitation on the class of persons eligible to recover damages for MCPA violations.

Judicial authority confirms this interpretation of the ascertainable-loss requirement. Courts have repeatedly concluded that an "ascertainable loss" is an "identifiable," "measurable," or "objectively verifiable" loss, and that it must be

a loss of <u>money or property</u>.[10] A "loss of some other kind"—such as physical injury, emotional distress, or the mere deprivation of legal or statutory rights—does not satisfy the statutory requirement. *See Pearson*, 361 P.3d at 22-23; *Larobina*, 2014 WL 3419534, at *3 ("Like emotional distress, the deprivation of a statutory right, by itself, does not result in a loss of money or property that is 'measurable,' even if imprecisely.").

Here, however, Bratton cannot show any such identifiable pecuniary loss. Instead, she claims harm from the alleged fact that, as she puts it, "she cannot obtain [her refund] from SCL Health" and, thus, permitting SCL Health's refund practice "would obliterate her legal right to collect from SCL Health." (Appellant's Br. 46, 47.) Setting aside the fact that Bratton has no legal right to direct payment from SCL Health (*see* Argument §I.B.3), her theory contradicts

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[10] *PNC Bank, N.A. v. Wilson*, No. CV 14-80-BU-DWM-JCL, 2016 WL 3033535, at *7 (D. Mont. Apr. 28, 2016) ("The [MCPA] clearly requires an 'ascertainable loss'—an identifiable loss."), *vacated in part on other grounds*, 2017 WL 5186378 (D. Mont. Oct. 20, 2017); *Larobina v. Wells Fargo Bank, N.A.*, No. 3:10-cv-01279 (MPS), 2014 WL 3419534, at *3 (D. Conn. July 10, 2014) (an "ascertainable loss of money or property" under Connecticut's consumer protection statute is "a loss of money or property that is 'measurable,' even if imprecisely"); *Pearson v. Philip Morris, Inc.*, 361 P.3d 3, 22-23 (Or. 2015) (interpreting "ascertainable loss" under Oregon's statute to mean that "the loss must be objectively verifiable" and "specifically of 'money or property, real or personal'" (quoting Or. Rev. Stat. § 646.638(1)); *Thiedemann v. Mercedes-Benz USA, LLC*, 872 A.2d 783, 793 (N.J. 2005) ("The certainty implicit in the concept of an 'ascertainable' loss is that it is quantifiable or measurable.").

the express language and intent of the MCPA itself. A violation of her purported legal right to direct payment from SCL Health does not amount to an "ascertainable loss of money or property"—particularly when it is undisputed that Bratton has the money at issue. *See* Mont. Code Ann. § 30-14-133(1). Holding otherwise would violate basic principles of statutory construction by rendering that express requirement meaningless. *See W. Mont. Water Users Ass'n, LLC v. Mission Irrigation Dist.*, 2013 MT 92, ¶ 39, 369 Mont. 457, 299 P.3d 346 ("We seek to avoid any statutory interpretation that would render meaningless any statute, or section thereof, and not give effect to the statute."); *see also Larobina*, 2014 WL 3419534, at *3 (rejecting argument that "the deprivation of . . . rights under the [Connecticut Consumer Protection Act], by itself, constitutes an ascertainable loss" because the "ascertainable loss requirement would be transformed into a trivial 'threshold barrier' . . . if any deprivation of legal rights satisfied the test").

The District Court, therefore, properly granted summary judgment on Bratton's MCPA claim, and this Court should affirm that order.

C. Bratton's Claim for Money Had and Received Fails Because SCL Health Refunded Her Money

The District Court also properly granted summary judgment on Bratton's claim for money had and received. That claim rests on the premise that the

defendant received money to be paid to the plaintiff or to which the plaintiff is legally entitled, and the defendant failed to pay or return that money to the plaintiff. *See, e.g.*, *McFarland v. Stillwater Cty.*, 109 Mont. 544, 98 P.2d 321, 323 (1940); *Donovan v. McDevitt*, 36 Mont. 61, 62-63, 92 P. 49, 49-50 (1907). Here, however, the undisputed evidence proves that SCL Health refunded Bratton the $27.75 she mistakenly paid to SCL Health. Bratton admits she received two Patient Refund Cards representing a total refund of $27.75. (Appellant's Br. 12.) She also concedes that her Patient Refund Cards are the functional equivalent of money. (*See* Appellant's Br. 33.) Further, Bank of America issued Bratton a check for the total amount of her refunds after she requested one during her deposition. (Facts.) Thus, there is no legitimate dispute that Bratton received the money she claims she is owed.

Nonetheless, Bratton once again claims the District Court erred because SCL Health did not "return[] the money to Bratton" but, instead, "paid it to Bank of America," so that she must "obtain her money from Bank of America or not at all." (Appellant's Br. 48.) That argument fails to establish her claim for money had and received for the same reasons it fails to establish critical elements of her other causes of action—SCL Health's Patient Refund Cards constitute payment of SCL Health's debt by SCL Health, just as payment by a check would. (*See* Argument; Bankers Br. 4-8.)

Moreover, even if Patient Refund Cards somehow did not qualify as direct payment from SCL Health, payment by Bank of America would still discharge any debt obligation SCL Health owed. The basic contract-law principles discussed above in Section I.B—which are consistent with Section 28-1-1002—dictate that once a party to whom performance is delegated has performed the obligation, "the [obligor's] duty is discharged, and [the] obligor owes [the] obligee nothing." *See Headrick,* 24 F.3d at 1278 (10th Cir. 1994) (internal quotation marks omitted). The Restatement (Second) of Contracts confirms this rule with the following apt illustration: "A owes B $100, and asks C to pay B. Payment or tender to B by C <u>has the effect of payment or tender by A</u>." Restatement (Second) of Contracts § 318 cmt. a, illus. 1 (emphasis added). Thus, the inconvenience Bratton perceives from having to, as she puts is, "obtain her money from Bank of America" is legally insufficient to establish any failure to refund her money.

Accordingly, because the undisputed facts disprove any claim for money had and received, the Court should affirm the District Court's grant of summary judgment on that claim.

D. Bratton Is Not Entitled to Any Declaratory Relief

Finally, the District Court properly granted summary judgment for SCL Health on the declaratory judgment claim Bratton pled in her complaint. There,

Bratton sought a declaratory judgment that SCL Health's Patient Refund Card Program "fails to comport with equity" and that SCL Health be enjoined from issuing refunds under that program. (CRR 28, p. 7; see also App. 27.) In support of that claim, Bratton alleged that "SCL Health has taken and refuses to return [Bratton] and the [putative] class's refund money, and has instead given it to Bank of America without their consent." (*Id.*) Thus, as pled, her declaratory judgment claim rests on the same untenable assumption that underlies her other claims, i.e., that she has been deprived of money to which she has full access.

Consequently, Bratton's declaratory judgment claim fails along with all of her other causes of action: she offers no legal basis for the relief she seeks. Montana's Declaratory Judgment Act does not provide any substantive legal right; instead, it provides only "a remedy that declares the rights and duties of the parties." *In re Dewar*, 169 Mont. 437, 444, 548 P.2d 149, 153 (1976). Thus, to succeed on that claim, Bratton must first establish a substantive legal basis for the relief she requests. *See, e.g.*, *Johnson v. Bank of N.Y. Mellon*, Civ. No. 13-2207 (DSD/JSM), 2014 WL 129640, at *4 (D. Minn. Jan. 14, 2014) ("A claim for declaratory judgment must be supported by a substantive legal right. Having failed to state a substantive claim, the [Complaint] also fails to state a claim for a declaratory judgment." (internal quotation marks and citations omitted)).

Here, Bratton has not stated any substantive claim (because she cannot). Bratton is not entitled to any declaration that SCL Health violated Section 28-1-1002 because (1) she waived that claim by failing to assert it in her complaint and (2) SCL Health's actions did not, in fact, violate that statute. (*See* Argument.) Nor does Bratton articulate any other valid legal basis for the relief she requests now, or that which she requested before the District Court. Accordingly, SCL Health is entitled to summary judgment on Bratton's claim for declaratory judgment, and the District Court did not err in granting its motion for summary judgment as to that claim.

III. SCL HEALTH WAS NOT REQUIRED TO OBTAIN PREAPPROVAL FOR ITS CHOSEN METHOD OF ISSUING REFUNDS

Though Bratton focuses her consent-related arguments on Section 28-1-1002, her supporting *amici* argue more broadly that consumer consent is (or should be) required "under all circumstances" because otherwise businesses may resort to "exotic" and "unreasonable" refund methods. (Br. of *Amici Curiae* Mont. Legal Servs., Nat'l Consumer Law Ctr., & Nat'l Ass'n of Consumer Law Advocates in Supp. of Appellant's Appeal ("Pl. Amici Br.") 13.) Whatever the merits of that claim as to some hypothetical refund method, it has no bearing on Bratton's ability to prove the elements of her claims under the circumstances of this case for the reasons discussed above.

More importantly, however, neither Bratton nor her *amici* offer any valid legal basis for requiring businesses to obtain their customers' prior consent to their chosen refund method, particularly when, as here, the method chosen is a common means of payment in everyday commerce. Nor do they provide any authority mandating that SCL Health (or any other business) issue refunds by check or, as Bratton previously argued and her *amici* suggests, with legal tender (which is limited to dollars, coins, and Federal reserve notes, *see* 31 U.S.C. § 5103).

To the contrary, existing and well-settled principles of contract law counsel otherwise, as the District Court recognized. (*See* CR 52, p. 10 (citing Restatement (Second) of Contracts § 249).) The Restatement of Contracts provides:

> Where the payment or offer of payment of money is made a condition of an obligor's duty, payment or offer of payment <u>in any manner current in the ordinary course of business</u> satisfies the requirement unless the obligee demands payment in legal tender and gives any extension of time reasonably necessary to procure it.

Restatement (Second) of Contracts § 249 (Am. Law Inst. 1981) (emphasis added). This rule is built on the recognition that monetary obligations are widely satisfied in everyday commerce by alternative means—personal or cashier's check, wire transfer, credit card, etc.—so, as a practical matter, "use of one of these other methods of payment is sufficient to satisfy a monetary

obligation." *Frandson v. Oasis Petroleum N. Am., LLC*, 870 F. Supp. 2d 726, 731 (D.N.D. 2012); *accord* Restatement (Second) of Contracts § 249 cmt. a ("[M]oney claims are so generally paid by means other than legal tender that, absent a specific demand, the debtor is not likely to suppose that an insistence on legal tender is the reason behind a refusal to accept payment . . . by check or in some other manner current in the ordinary course of business."). Thus, as Bratton never demanded legal tender and SCL Health never promised to provide refunds through any specified means, it was free to satisfy its refund obligation through any commercially reasonable manner (i.e., "current in the ordinary course of business").

That is precisely what SCL Health did by providing Bratton her Patient Refund Cards. As regulated and commonly-accepted payment devices, prepaid

debit cards are a sufficient method of refunding Bratton's money.[11] The undisputed evidence demonstrates that SCL Health's Patient Refund Cards are widely accepted by merchants for the purchase of goods and services, may be cashed out or deposited without incurring fees, and may be exchanged at no cost for a check in the amount of the card's balance. (*See* Facts § I; CRR 37, Ex. G at 40:6-41:16.) Even Bratton concedes that prepaid debit cards represent "money in[] a different form" and may be used like cash or other payment devices. (Appellant's Br. 33.)

There is, in other words, no basis for finding that prepaid debit cards in general, and Patient Refund Cards in particular, are not "current in the normal course of business." Restatement (Second) of Contracts § 249. To the contrary,

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[11] Though Bratton does not challenge the District Court's conclusion that SCL Health refunded her money (and, thus, performed its repayment obligation), her *amici* urge the Court to reject this conclusion because prepaid debit cards do not meet the strict legal definitions of "money," "currency," or "legal tender," are inferior to cash or checks, and do not qualify as "payment" of Bratton's refund. Pl. Amici Br. 15-21. This argument is the epitome of form over function, as it ignores the reality of modern commerce. Though not technically money or legal tender, prepaid debit cards function just like money (in the same way other non-money payment devices, like checks or credit cards, also function as money), and they are a commonly recognized substitute for legal tender in today's economy. (*See* Bankers Br. 8-14.) *Cf. Aces Wired, Inc. v. Gametronics, Inc.*, No. A-07-CA-768-LY, 2007 WL 5124986, at *11 (W.D. Tex. Sept. 24, 2007) (stating that a "stored-value card, like a gift certificate, is a money equivalent and does not constitute a 'noncash merchandise prize'" (emphasis added)).

prepaid debit cards are widely regarded as acceptable tools for disbursing private funds and government benefits to consumers. For example:

- Federal and state government offices "disbursed <u>$144 billion</u> through prepaid cards in 2017." Bd. of Governors of the Fed. Reserve Sys., Report to the Congress on Government-Administered General-Use Prepaid Cards 1 (Aug. 2018) (emphasis added).

- State authorities—including Montana—disburse government benefits through prepaid debit cards. *See, e.g.*, Mont. Dep't of Pub. Health & Human Servs., Child Support Enforcement Div., Payment Information, https://dphhs.mt.gov/CSED/payment (last visited Nov. 22, 2019) ("Payments are issued electronically by direct deposit . . . or to a U.S. Bank ReliaCard® Visa® prepaid debit card. You can choose direct deposit or ReliaCard®. If you do not make a choice payments automatically go on the card.").

- Prepaid debit cards are considered a "beneficial and acceptable . . . form of wage payment" in many jurisdictions. 19 Del. Admin. Code § 1324 (2019); *see also* 7 Pa. Cons. Stat. § 6121.1 (authorizing payment of wages and salaries through payroll card accounts); Ariz. Rev. Stat. § 23-351(D)(5), (H) (same); Colo. Rev. Stat. § 8-4-102(2.5) (same).

- Courts have approved the use of prepaid debit cards for the disbursement of class-action settlement funds. *See Rossi v. Proctor & Gamble Co.*, Civ. No. 11-7238 (JLL), 2014 WL 11462439, at *1 (D.N.J. May 20, 2014) (recognizing court-approved settlement in which defendant agreed to refund class members "the purchase price of $4.00 in the form of a Citibank prepaid debit card").

Accordingly, the District Court correctly cited to the Restatement of Contracts as support for its conclusion that "SCL Health did not need [Bratton's] consent to have its bank send [her] a Patient Refund Card," as prepaid debit cards are unquestionably a method of payment "current in the ordinary course of business." (CR 52 at 10 (quoting Restatement (Second) of Contracts § 249).)

CONCLUSION

The District Court properly granted summary judgment for SCL Health on each of Bratton's causes of action because SCL Health refunded her money through a commonly-used and widely-accepted payment device. Bratton's latest theory—that SCL Health somehow violated Section 28-1-1002 by choosing to provide refunds through prepaid debit cards—fails to save her claims. That statute does not apply because SCL Health's choice of payment method does not transfer the legal burden of its payment obligation to any bank. Accordingly, the Court should affirm the District Court's summary judgment order.

DATED this 25th day of November, 2019.

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CERTIFICATE OF COMPLIANCE

Pursuant to Montana Rule of Appellate Procedure 11(4)(e), I certify that this Brief is printed with proportionately spaced Times New Roman text typeface of 14 points; is double-spaced; and the word count, calculated by Microsoft Office Word 2016 is 9,038 words, excluding Certificate of Service and Certificate of Compliance.

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