IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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BARBARA TESCH,

OPINION and ORDER

Plaintiff,

12-cv-273-bbc

v.

ONEMAIN FINANCIAL, INC. f/k/a CITIFINANCIAL, INC., BENEFICIAL FINANCIAL I, INC. successor by merger to BENEFICIAL WISCONSIN, INC., and U.S. BANK NATIONAL ASSOCIATION ND,

Defendants.

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Plaintiff Barbara Tesch brought this lawsuit under the Fair Credit Reporting Act, 15 U.S.C. §§ 1681-1681u, against several banks. She alleges that each of them failed to conduct a reasonable investigation when she disputed information in her credit report, in violation of 15 U.S.C. § 1681s-2(b). Plaintiff's claim against OneMain Financial, Inc. has been stayed pending arbitration, dkt. #35; plaintiff has settled her claim against Beneficial Financial I, Inc. and the court is awaiting a stipulation of dismissal. Dkt. #132. Plaintiff's remaining claim against defendant U.S. Bank National Association ND is before the court on that defendant's motion for summary judgment. Dkt. #40. Also before the court is plaintiff's motion to seal various documents that defendant U.S. Bank filed with its summary judgment motion and to sanction that defendant for disclosing plaintiff's personal

information. Dkt. #47. (Because defendant U.S. Bank is the only defendant relevant to both motions, I will refer to it simply as "defendant" for the remainder of the opinion.)

I am granting plaintiff's motion to seal and awarding attorney fees relating to that motion. I am also granting defendant's motion for summary judgment because plaintiff has failed to prove damages for any violations defendant may have committed.

From the parties' proposed findings of fact and the record, I find that the following facts are undisputed.

UNDISPUTED FACTS

After a divorce in 2003, plaintiff Barbara Tesch was left with a significant amount of debt. In 2008 she filed a petition in Wisconsin state court to amortize her debts under chapter 128 of the Wisconsin Statutes. (Other than what is discussed below, the parties did not describe the content of those proceedings.)

At the time she filed the petition, plaintiff had a credit card account with defendant U.S. Bank National Association ND. Defendant listed the account as current and being paid according to terms. An employee of defendant in the bankruptcy department filed a proof of claim form in the chapter 128 proceeding, identifying the amount plaintiff owed as $4731.70.

In April 2011, plaintiff finished making her payments to the trustee and the court dismissed the chapter 128 proceeding. On April 15, 2011, another employee of defendant in the bankruptcy department, Maria Thompson, received a court order stating that

plaintiff's chapter 128 proceeding was dismissed and her debt to defendant had been "paid in full." Thompson updated the status of plaintiff's account with the code "998," which means that the consumer is free of debt.

On June 27, 2011, plaintiff ran a credit report for herself. There were at least 11 negative accounts on the report, including several charge off and collection accounts. With respect to plaintiff's account with defendant, Experian and TransUnion were both reporting a $100 balance. Equifax's report stated only, "contact member for status." After reviewing the report, plaintiff sent a letter to the credit reporting agencies in which she disputed their information about her account with defendant. Plaintiff wrote that the account "was paid in full by Susan A. Schuelke, Court Trustee, LLC on behalf of Barbara Tesch."

On June 30, 2011, TransUnion notified defendant that plaintiff disputed the information about her account. (The parties do not propose any findings of fact about particular disputed information identified by TransUnion.) Defendant assigned the inquiry to Tifini Williams. (The parties do not describe in their proposed findings of fact the efforts Williams took to verify the information or even what information she verified.) On July 8, 2011, Williams reported to TransUnion that the information was accurate.

On July 5, 2011, Equifax notified defendant that plaintiff disputed the $100 balance and claimed that the account was closed. Defendant assigned the inquiry to Earl Bonner, an account processor for defendant in St. Louis, Missouri. Bonner reviewed plaintiff's file, including notes about a "wis. ch. 128 filing" and a creditor's meeting to consider plaintiff's amortization plan and to determine which claims were to be covered by the plan. In

addition, the notes indicated that defendant had received an order dismissing the chapter 128 proceedings and declaring all debts paid in full.

Because Bonner did not know what a chapter 128 proceeding was, he called defendant's bankruptcy department in Cincinnati, Ohio for assistance and spoke to Josh Clark, also an account processor. The bankruptcy department is responsible for handling accounts that are included in a consumer's chapter 128 proceeding. Although Bonner tried to ask Clark whether a chapter 128 proceeding and a bankruptcy are the same thing, Clark misunderstood his question as asking about the accuracy of defendant's account codes. As a result, Clark's answer led Bonner to update plaintiff's account information on July 7, 2011, to reflect that her account was "discharged in Chapter 7 bankruptcy." On July 12, defendant notified plaintiff about its investigation. (The parties do not explain how defendant notified her or what the notice said.)

On July 18, 2011, defendant received an inquiry from Experian about plaintiff's account. (The parties do not say what prompted the inquiry.) The inquiry stated, "Customer states inaccurate information" and "report states the account with US Bank is a 'Charge Off,' this is erroneous information." After reviewing his notes from the week before, Bonner determined that the account information was correct.

In a letter dated July 18 that plaintiff sent to defendant and the credit reporting agencies, plaintiff wrote that her chapter 128 proceeding should not be reported as a bankruptcy. Defendant did not receive this letter. (The parties do not say what prompted plaintiff to write the letter. Presumably, she ran another credit report after defendant

updated her account information to include the reference to a bankruptcy.)

Defendant received another inquiry from TransUnion. (The parties do not say when defendant received the inquiry, but a document defendant cites is dated August 5, 2011. Dkt. #44-4, Bonner Dep., exh. B.) According to the inquiry, plaintiff had stated that her "account was reaffirmed or not included in a bankruptcy" and "not involved in litigation." Bonner reviewed his notes again and determined that the account information was correct. It was not uncommon for Bonner to see several inquiries from different agencies around the same time because a consumer may notify each agency about the same dispute.

Approximately one month later, the bankruptcy and "charged off" references were removed from plaintiff's account. (The parties do not explain how this occurred, except to say that it was a result of the "automatic tapes." Dft.'s PFOF ¶ 46, dkt. #46.) At that time, the credit reporting agencies began reporting the account "as having been paid current." Id. According to plaintiff's November 2011 credit report, her account with defendant was "current closed." Although the account information continued to include references to a "bankruptcy," the section of the report called "Bankruptcy and Court Judgments" was empty. (The parties do not explain why the report continued to refer a bankruptcy even though defendant was no longer furnishing that information.) The November 2011 report listed eight potentially negative accounts, two of which involved collection agencies.

In December 2011 plaintiff applied for a loan from Springleaf Financial. Springleaf approved the loan, but it noted that plaintiff's credit score was higher than only 22 percent of other customers and that a customer's credit score can affect "how much you will pay for

that loan." In a section called "key factors that adversely affected your credit score," Springleaf listed the following: serious delinquency, derogatory public record, or collection filed, delinquency date too recent (or unknown), recent derogatory public record or collection, frequent delinquency, too many recent credit checks (or recent application).

In May 2012 defendant stopped reporting plaintiff's account to credit reporting agencies. In July 2012, plaintiff receive a lower interest rate from Springleaf.

OPINION

A. Plaintiff's Motion to Seal and for Sanctions

Four days after defendant filed its motion for summary judgment, plaintiff filed a motion to seal defendant's submissions on the ground that they contained plaintiff's personal information, including her social security number and account numbers. Dkt. #47. In addition, she asked for sanctions ($20,000 and credit monitoring) on the ground that defendant recklessly violated both Fed. R. Civ. P. 5.2 and the protective order in this case by failing to file this information under seal. The same day, defendant joined plaintiff's request to seal the documents. Dkt. #49. The following morning, I directed the clerk of court to seal all of defendant's summary judgment submissions pending resolution of this motion. Dkt. #50. In its response brief, defendant says that it agrees with plaintiff that it should have redacted plaintiff's personal information before filing its summary judgment motion. In addition, it offers to pay for 12 months of credit monitoring for plaintiff. However, it argues that any additional sanction is not warranted because its actions were

inadvertent.

Defendant has little excuse for failing to take greater care in protecting sensitive information. However, it is certainly not the first time that a party has made the same mistake and sanctions are not required in every case, particularly when it is the first offense. E.g., Brunson v. Howard County Board of Education, 2013 WL 388985, *2 n.7 (D. Md. 2013) ("The defendants' exhibits to their summary judgment motion contain numerous unredacted references to A.S.'s full name and Brunson's social security number in violation of Fed. R. Civ. P. 5.2(a) and the Court's Privacy Policy (Nov. 10, 2004). Brunson's exhibits also contain A.S.'s unredacted name. The Court cautions the parties that they risk sanctions for continued failure to redact."); Ameriprise Financial Services, Inc. v. Koenig, 2012 WL 379940, *8 n.9 (D.N.J. 2012) (denying motion for sanctions because "[t]he failure to redact certain private information was rectified by the filing of a motion to seal"); Richards v. Great Western Insurance Co., 2012 WL 695991, *12 (D. Minn. 2012) ("Given the quick response of [defendant] once apprised of the error, the Court concludes that sanctions are not appropriate."); Butler v. United Healthcare of Tenn., Inc., 2011 WL 3300674, *8-9 (E.D. Tenn. 2011) (denying motion for sanctions because "the Court quickly sealed those documents to avoid any public disclosure").

Plaintiff cites Allstate Insurance Co. v. Linea Latina De Accidentes, Inc., 2010 WL 5014386, *2 (D. Minn. 2010), but in that case the court concluded that a sanction was appropriate because the party in that case allowed months to go by without taking any action. In this case, defendant's conduct was inadvertent, it was the first time defendant

made the mistake, the mistake was corrected quickly and defendant has offered to pay for 12 months of credit monitoring, so the only appropriate additional sanction is plaintiff's cost in bringing the motion to seal. Reed v. AMCO Insurance Co., 2012 WL 846475, *3 (D. Nev. 2012).

Accordingly, I am granting plaintiff's motion in part. I will direct defendant to file redacted copies of its summary judgment filings and give plaintiff an opportunity to file a motion for fees.

B. Defendant's Motion for Summary Judgment

Plaintiff's sole claim against defendant is that it violated 15 U.S.C. § 1681s-2(b), which requires furnishers of credit information to conduct an investigation when they receive notice of a dispute from a credit reporting agency. Although the language of the statute does not expressly require it, I have concluded in previous cases that the statute should be read as requiring a reasonable investigation. Scheel-Baggs v. Bank of America, 575 F. Supp. 2d 1031, 1039 (W.D. Wis. 2008); McKeown v. Sears Roebuck & Co., 335 F. Supp. 2d 917, 936 (W.D. Wis. 2004); Kronstedt v. Equifax, No. 01-C-52-C, 2001 WL 34124783, *16 (W.D. Wis. Dec. 14, 2001). See also Westra v. Credit Control of Pinellas, 409 F.3d 825, 827 (7th Cir. 2005) (assuming without discussion that § 1681s-2 requires "reasonable" investigation). No party challenges that conclusion in this case.

Plaintiff does not identify in her summary judgment brief or her complaint the precise contours of her claim. However, the only argument she develops is that defendant violated

§ 1681s-2(b) by failing to conduct a reasonable investigation to determine whether her debt was discharged as part of a "Chapter 7 bankruptcy."

Plaintiff seeks three types of damages in this case: (1) economic loss; (2) emotional distress; and (3) punitive. Damages for economic loss and emotional distress qualify as "actual damages" that may be awarded under 15 U.S.C. § 1681*o*. Scheel-Baggs v. Bank of America, 575 F. Supp. 2d 1031, 1042-43 (W.D. Wis. 2008) (citing Cousin v. Trans Union Corp., 246 F.3d 359, 369 n.15 (5th Cir. 2001); Guimond v. Trans Union Credit Information Co., 45 F.3d 1329, 1333 (9th Cir. 1995); Kronstedt v. Equifax, No. 01–C–52–C, 2001 WL 34124783, *10 (W.D. Wis. Dec. 14, 2001)). A plaintiff may recover punitive damages if she can show that a defendant willfully failed to comply with the Fair Credit Reporting Act. 15 U.S.C. § 1681n(a).

Plaintiff acknowledges that she must prove her entitlement to at least one of these three types of damages to sustain her claim. Plt.'s Br., dkt. #88, at 1. Because I conclude that plaintiff has not made such a showing, it is unnecessary to decide whether defendant violated § 1681s-2.

1. Economic loss

The only economic loss plaintiff claims is that she paid a higher interest rate in December 2011 (while her credit report still included references to a "bankruptcy") than in July 2012 (after defendant stopped reporting the account). Although it is undisputed that defendant had removed the bankruptcy notation from plaintiff's account before December

2011, defendant does not argue that it cannot be held liable for the reference to a bankruptcy on her credit report at that time, so I do not consider that question.

The problem with this claim is that plaintiff has not adduced sufficient evidence to support a causal connection between her account with defendant and any interest rate she paid. Scheel-Baggs, 575 F. Supp. 2d at 1043 (plaintiff must show that inaccurate information was "substantial factor" in causing economic injury); Anderson v. Trans Union, LLC, 345 F. Supp. 2d 963, 975 (W.D. Wis. 2004) (same). Accord Philbin v. Trans Union Corp., 101 F.3d 957, 968 (3d Cir. 1996). Plaintiff cites a document from the creditor informing her that her low credit score may have affected her terms, arguing that "[i]t could be that 'Chapter 7 bankruptcy' is subsumed within 'Serious Delinquency, derogatory public record, or collection filed' in Springleaf's description as to how Plaintiff's credit score was adversely impacted." Plt.'s Resp. to Dft.'s PFOF ¶ 52, dkt. #86. However, she identifies no reason to believe that is the case; she is simply speculating, which is not sufficient to defeat a motion for summary judgment. Brown v. Advocate South Suburban Hospital, 700 F.3d 1101, 1104 (7th Cir. 2012); Lewis v. Mills, 677 F.3d 324, 331-32 (7th Cir. 2012). The section of plaintiff's credit report called "Bankruptcy and Court Judgments" was blank. The only reference to a "bankruptcy" was in the comments section for relating to her account with defendant. Particularly because plaintiff had so many negative items on her credit report that were unrelated to the bankruptcy, it would not be reasonable to infer without more specific evidence that the comments on her report played a part. She also cites no evidence showing why she received a lower interest rate in July 2012 or even whether her

credit score had improved during the relevant time.

Even if I assume that the mention of a bankruptcy could have an adverse impact on a credit score, plaintiff does not identify any reason to believe that the effect of a chapter 128 proceeding would be any different. After all, chapter 128 proceedings are simply "a state law alternative to federal bankruptcy." BNP Paribas v. Olsen's Mill, Inc., 2011 WI 61, ¶ 39, 335 Wis. 2d 427, 442, 799 N.W.2d 792, 800. Although defendant argues in its opening brief that a chapter 128 proceeding is "a state court equivalent of a bankruptcy," dkt. #51 at 12, plaintiff never attempts to explain why a creditor or credit reporting agency would be likely to view one more favorably than the other. In the absence of evidence of causation, I must grant defendant's motion for summary judgment as to plaintiff's damages for economic loss.

2. Emotional distress

With respect to her alleged damages for emotional distress, plaintiff relies entirely on her own testimony. As defendant points out, that testimony is focused on the difficulties plaintiff faced because of all of her debt and overall poor financial condition. Plt.'s Dep., dkt. #66 at 114-15, 130, 145-46. With respect to the references to a "bankruptcy" on her credit report in particular, plaintiff points to a few statements that she "lost control of [her] life," "felt helpless" and that she was "shocked" and "frustrat[ed]." Id. at 126, 131.

The court of appeals has made it clear that a plaintiff's "conclusory statements about her emotional distress" are not sufficient to defeat a motion for summary judgment.

Ruffin-Thompkins v. Experian Information Solutions, Inc., 422 F.3d 603, 610 (7th Cir. 2005). Rather, "when the injured party's own testimony is the only proof of emotional damages, he must explain the circumstances of his injury in reasonable detail." Denius v. Dunlap, 330 F.3d 919, 929 (7th Cir. 2003). See also Sarver v. Experian Information Solutions, 390 F.3d 969, 971 (7th Cir. 2004) ("We have maintained a strict standard for a finding of emotional damage because they are so easy to manufacture.") (internal quotations omitted).

In this case, plaintiff did not explain the circumstances of her injury in reasonable detail. She did not discuss symptoms she experienced or any concrete harm she suffered. Rather, her testimony is indistinguishable from testimony that courts in other cases have found to be insufficient as a matter of law. Bagby v. Experian Information Solutions, Inc., 162 Fed. Appx. 600, 605 (7th Cir. 2006) (testimony that plaintiff "stress[es]," gets tension headaches and clashes with her fiancé not sufficient); Wantz v. Experian Information Solutions, 386 F.3d 829, 834 (7th Cir. 2004) (testimony that plaintiff was "humiliated and embarrassed," that it is "mentally and emotionally distressful when dealing with credit reporting agencies" and that it is "embarrassing to go somewhere and have them check your credit report and see all that stuff on there"); Cousin v. TransUnion Corp., 246 F.3d 359, 371 (5th Cir. 2001) (testimony that plaintiff was "very upset" and "angry" was insufficient); Konter v. CSC Credit Services, Inc., 606 F. Supp. 2d 960, 969 (W.D. Wis. 2009) (testimony that plaintiff was "irritable, angry, anxious, depressed and fearful"). Accordingly, I am granting defendant's summary judgment motion as to plaintiff's claim for emotional

distress as well.

3. Punitive damages

To recover punitive damages, plaintiff must show that defendant knowingly or recklessly violated her rights, or, in other words, that defendant knew of an "unjustifiably high" risk that a violation would occur or should have known of such a risk because it was obvious. Safeco Insurance Co. of America v. Burr, 551 U.S. 47 (2007). A "merely careless" application of the law's requirements is not sufficient. Id. at 69. Plaintiff relies on two facts in an attempt to satisfy this standard: (1) with respect to the last two disputes he received, Bonner relied on his own notes instead of conducting a new investigation; and (2) defendant did not train employees such as Bonner on what a chapter 128 proceeding is.

With respect to Bonner, plaintiff says that his failure to reinvestigate her dispute and instead rely on his notes was an obvious violation of 15 U.S.C. § 1681s-2(b)(1)(E), which requires a furnisher to "modify," "delete" or "block" an item of information that is "found to be inaccurate or incomplete or cannot be verified after any reinvestigation." However, this provision does not require a furnisher to conduct a new investigation every time the same account information is disputed. Rather, it explains what to do once information is determined to be wrong or "cannot be verified." This provision is simply inapplicable to this case because Bonner never determined that the information was wrong or unable to be verified.

Plaintiff also argues that furnishers should conduct a new investigation for each

inquiry they receive, even if it seems duplicative of a previous inquiry, because furnishers should assume that the credit report agency would not forward a dispute unless it "believes that the dispute is worth investigating." Plt.'s Br., dkt. #88, at 11. She cites 15 U.S.C. § 1681i(a)(3)(A), which allows credit report agencies to "terminate a reinvestigation of information disputed by a consumer . . . if the agency reasonably determines that the dispute by the consumer is frivolous or irrelevant."

This argument is not persuasive for two reasons. First, § 1681i(a)(3)(A) permits credit report agencies to terminate certain investigations, but it does not require them to do so. Plaintiff cites no evidence that defendant had an understanding with any of the credit reporting agencies that the agency would forward only those inquiries it believed should be investigated again. Second, even if that was the agencies' practice, this would not make any failure by defendant to conduct a new investigation a knowing or reckless violation of the law. Particularly because it is undisputed that defendant often receives multiple inquiries from different credit report agencies about the same dispute, defendant is entitled to make its own determination regarding the need for additional investigation.

As I explained in Scheel-Baggs, 575 F. Supp. 2d at 1042, the reasonableness of a furnisher's investigation depends on context, including the information the furnisher receives about the dispute. The first inquiry at issue stated, "Customer states inaccurate information" and "report states the account with US Bank is a 'Charge Off,' this is erroneous information." Thus, the only information Bonner had was that plaintiff believed that the account should not be listed as a "charge off." However, Bonner had just investigated that

issue a few days earlier and had relied on information he received from the bankruptcy department to determine that plaintiff's account was accurate. The inquiry included no new information that would call the previous determination into doubt.

The next inquiry concerned a statement that plaintiff's "account was reaffirmed or not included in a bankruptcy." Although that may have been a more direct challenge to a conclusion that plaintiff had declared bankruptcy, it still provided Bonner no specific information showing that there was any difference between "bankruptcy" and "chapter 128 proceeding." Without such information, it would not be obvious that he should question what he believed to be the bankruptcy department's previous determination. Because Bonner often received multiple inquiries about the same dispute, that would not have been an independent reason to be suspicious.

Plaintiff says that it was reckless for Bonner to rely on information he received from the bankruptcy department because Bonner "did not even know" the person who answered his questions. Plt.'s Br., dkt. #88, at 11. This argument makes little sense. In a large company, one employee relies on the opinion of an another employee, not because they have a personal relationship, but because the company has identified the employee as someone with expertise in a particular area. I cannot conclude that a violation of the Fair Credit Reporting Act is "willful" simply because a company engages in information sharing across different offices and departments.

Plaintiff's second argument, that defendant recklessly violated the law by failing to train its dispute investigators about chapter 128, is a nonstarter. Plaintiff does not cite any

provisions in the Fair Credit Reporting Act that require a particular type or amount of training. Rather, the question in this case is whether defendant conducted a reasonable investigation.

That is not to say that training is irrelevant; a failure to train an employee on a particular matter may affect what constitutes a reasonable investigation. For example, if an employee does not have personal knowledge of a particular issue, he will have to get that information from someone who does. But that is exactly what happened in this case. Defendant's procedures instructed Bonner to seek assistance from others in the company when he did not have the knowledge to resolve the issue himself. The reason for Bonner's mistake was not that he failed to "do enough" to investigate but that there was a miscommunication between Bonner and the bankruptcy department. There is always a risk that an employee may ask the wrong question or misunderstand the answer, but there is also a risk that any training provided will lead to mistakes as well. Even if I assume that training each employee would lead to fewer mistakes than relying on a smaller number of experts, no reasonable jury could find that defendant's choice demonstrates a reckless disregard for the law.

Because plaintiff has failed to show that there are any genuine issues of material fact remaining with respect to any of her claims for damages, I am granting defendant's motion for summary judgment in full.

C. Defendant OneMain Financial

One final matter needs to be addressed. In an order dated August 24, 2012, I stayed plaintiff's claim against defendant OneMain Financial so that plaintiff could pursue that claim in arbitration. I directed the parties "to file with the court an update regarding the status of the arbitration every 90 days." Dkt. #35. That 90 days passed in November, but the parties never filed an update with the court. I will give them another opportunity to file an update on the status of the arbitration proceedings. If they fail to respond, I will dismiss the claim as to defendant OneMain Financial. If the arbitration is still pending, the parties should explain how they want to proceed and, in particular, whether the court should enter judgment under Fed. R. Civ. P. 54 so that plaintiff can appeal her claim against defendant U.S. Bank. If the parties want the court to enter a Rule 54 judgment as to plaintiff's claim against U.S. Bank, the parties should show in their response that the standard for entering such a judgment has been met in this case.

ORDER

IT IS ORDERED that

1. Plaintiff Barbara Tesch's motion to seal and for sanctions against defendant U.S. Bank National Association ND, dkt. #47, is GRANTED IN PART. Docket entry nos. 40-46 shall remain sealed. Defendant U.S. Bank may have until February 25, 2013, to file copies of those submissions with any social security numbers, account numbers or birth dates redacted.

2. Plaintiff may have until March 4, 2013, to file a motion for fees related to her

motion to seal. Plaintiff may include the cost of 12 months of credit monitoring if defendant U.S. Bank has not already paid for that. Defendant may have until March 8, 2013 to respond; plaintiff may have until March 11, 2013, to file a reply (if she believes a reply is necessary). Before filing her motion, plaintiff should attempt to obtain a stipulation on fees with defendant.

3. Defendant U.S. Bank's motion for summary judgment is GRANTED.

4. Plaintiff and defendant OneMain Financial, Inc. may have until February 25, 2013, to update the court on the status of their arbitration. If they fail to respond, I will construe that silence as a voluntary dismissal with prejudice of plaintiff's claim against defendant OneMain.

5. Plaintiff and defendant Beneficial Financial I, Inc. may have until February 25, 2013, to file a stipulation of dismissal. If the parties do not respond by then, the court will enter its standard order of dismissal with respect to that claim.

Entered this 19th day of February, 2013.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge