IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

KIMBERLY FRAEDRICH KRONSTEDT,

Plaintiff,

OPINION AND ORDER

v.

01-C-0052-C

EQUIFAX, CSC OF WISCONSIN and FIRST TENNESSEE BANK NATIONAL ASSOCIATION,

Defendants.

This is a civil action for damages brought pursuant to the Fair Credit Reporting Act, 15 U.S.C. §§ 1681-1681u, and state common law. Jurisdiction is present pursuant to 18 U.S.C. §§ 1331 and 1367. This case arises indirectly out of the criminal conduct of an individual who obtained plaintiff Kimberly Kronstedt's name, social security number and other identifying information and used the information in 1998 to obtain loans in plaintiff's name at various banks in the Tennessee area, including defendant First Tennessee Bank National Association.[1] When the imposter defaulted on the loans, the banks reported this to the various credit reporting agencies, who included the negative information on plaintiff's

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[1]Defendant First Tennessee Bank National Association asserts that it has been improperly named in this lawsuit as First Tennessee Bank. I have construed this assertion as a motion to amend the caption, which I have granted.

credit history. Plaintiff discovered that she had been the victim of identity theft when her application for a construction loan was denied in May 1999.

Plaintiff has sued because of alleged difficulties she encountered in the six months she spent attempting to correct her credit information. Plaintiff contends that defendants First Tennessee Bank National Association and CSC of Wisconsin, a credit reporting agency, willfully and negligently violated the Fair Credit Reporting Act by failing to take appropriate steps to report her credit history accurately and that they defamed her by publishing negative credit information they knew to be false. Plaintiff contends that she suffered out-of-pocket losses, emotional distress and damage to her reputation as a result of defendants' actions.

Before the court are motions for summary judgment brought by defendants CSC and First Tennessee. Both defendants contend that plaintiff has failed to adduce evidence from which a finder of fact could conclude that defendants violated the duties prescribed by the Fair Credit Reporting Act. Alternatively, defendants contend that plaintiff has failed to establish sufficient evidence of actual damages. As for plaintiff's state law defamation claims, defendants contend that plaintiff has failed to make the showing of malice that is required by the act's qualified immunity provision, 18 U.S.C. § 1681h(e).

The motion of defendant CSC will be granted in part and denied in part. Plaintiff has failed to adduce any evidence to show that CSC's investigation of her dispute regarding the fraudulent First Tennessee account was unreasonable or that CSC defamed her when it reported the account as in dispute. However, a genuine dispute of fact exists regarding

whether CSC was responsible for the derogatory First Tennessee account information that reappeared on plaintiff's credit report in October 1999. Plaintiff has adduced sufficient evidence of actual damages to survive summary judgment. Accordingly, plaintiff will be allowed to go forward on her Fair Credit Reporting Act and defamation claims with respect to this issue.

The motion of defendant First Tennessee will be granted in part and denied in part. Summary judgment will be granted on plaintiff's claim that First Tennessee defamed her when it reported the fraudulent account as belonging to her from February to July 1999 and on her claim that the bank violated the Fair Credit Reporting Act when it reported in July 1999 that the account was under investigation for fraud. However, a genuine dispute of fact exists regarding whether defendant First Tennessee conducted a reasonable investigation under § 1681s-2 of the act when it learned in June 1999 that plaintiff was disputing that the fraudulent account was hers. Further, a genuine dispute of fact exists regarding whether First Tennessee was responsible for the derogatory account information reappearing on plaintiff's credit record in October 1999. Because I conclude that § 1681h(e)'s malice requirement does not apply to this claim, plaintiff may go to trial on her defamation claim with respect to the October 1999 communication.

Two preliminary matters deserve mention before I set out the facts. On November 16, 2001, attorneys for defendant First Tennessee submitted a letter in which they objected to plaintiff's Amended Proposed Findings of Fact on the ground that plaintiff had failed to

comply with this court's procedures to be followed on summary judgment. First Tennessee's attorneys attached additional evidence to their letter, asserting that plaintiff had included in her amended proposed findings "new" facts to which defendant First Tennessee had not had the opportunity to respond. Because there is no substance to the allegations made by First Tennessee in its letter, I have disregarded the letter and the additional evidence attached thereto. Plaintiff's amended proposed findings of fact comply with this court's rules on summary judgment. Contrary to First Tennessee's assertion, plaintiff's amended proposals do not contain any "new" facts that were not in her original proposed findings; the amended findings do nothing more than correct an error in the paragraph numbering on the original. Defendant First Tennessee's portrayal of the plaintiff's amended proposed findings of fact as somehow confusing the issues for trial is a poorly disguised attempt to reargue its case. Even worse, it demonstrates a remarkable lack of candor with this court.

Second, rather ironically, defendant First Tennessee has violated this court's procedures on summary judgment by referring to facts in its brief that are not the subject of any proposed finding of fact. Specifically, defendant First Tennessee refers in its briefs to an affidavit from Richard Dean, an individual named as an expert for First Tennessee with respect to whether it complied with the requirements of the Fair Credit Reporting Act, although Deans's testimony was never the subject of a proposed finding of fact or response to a proposed finding of fact. Accordingly, the testimony will be disregarded.

From the parties' proposed findings of fact and the record, I find the following facts to be undisputed for the purposes of summary judgment.

FACTS

I. THE PARTIES

Plaintiff is a resident of Wisconsin. Defendant CSC Credit Services, Inc. is a Texas corporation registered to do business in Wisconsin. (The named defendant in this case, CSC of Wisconsin, is a trade name of CSC Credit Services, Inc. and is not a separate entity.) Defendant CSC is a consumer credit reporting agency, as that term is defined in the Fair Credit Reporting Act, 15 U.S.C. § 1681a(f). As a consumer credit reporting agency, CSC makes credit information available to parties engaged in credit-related transactions. CSC functions as a conduit: it does not originate or create any credit information and it does not make loans or credit decisions.

Defendant First Tennessee Bank National Association is a foreign corporation that is not incorporated under the laws of the state of Wisconsin and does not maintain a principal place of business in Wisconsin. Defendant First Tennessee furnishes credit information to credit reporting agencies.

CSC has a contractual relationship with defendant Equifax that allows it to have access to a shared credit reporting database that Equifax possesses and maintains. (Defendant Equifax, like CSC, is a consumer reporting agency. The allegedly unlawful

actions taken by Equifax are not a subject of this motion.) CSC owns the credit reports relating to consumers in certain areas of the country, including Wisconsin, and is responsible for compiling such reports and investigating disputes with respect to such reports. Equifax owns the credit reports relating to consumers in certain other areas of the country and is responsible for compiling such reports and investigating disputes with respect to such reports.

Through its relationship with Equifax, CSC has access to a storehouse of credit information. This information consists of credit information reported by credit grantors called "tradelines." A tradeline will include information such as account number, account status and balance information. When reporting a tradeline, credit grantors will also provide information that identifies the consumer associated with the tradeline.

II. CSC'S DISPUTE RESOLUTION PROCEDURES

CSC has procedures that it follows when a consumer disputes information that CSC provides on a report. When CSC receives a dispute from a consumer, it will investigate the dispute by contacting the creditor who is reporting the disputed information. CSC contacts the creditor via a Consumer Dispute Verification or Automated Consumer Dispute Verification form. If the creditor verifies that the reported information is correct, CSC updates the information on the consumer's credit report and notifies the consumer of that fact. If the creditor reports that the information is inaccurate or can no longer be verified

or if the creditor does not respond to the Consumer Dispute Verification form within the required time, CSC deletes the information from the consumer's credit report and notifies the consumer of that fact. CSC always provides the consumer with the opportunity to have a statement regarding the information inserted into the credit report in accordance with 15 U.S.C. § 1681i(b). CSC may also use additional procedures depending on the precise dispute involved and the circumstances of the case.

When CSC learns from a creditor that the creditor is investigating an account for fraud, CSC does one of three things to the consumer's credit report: deletes the tradeline in its entirety; leaves the tradeline on the account but deletes the derogatory information and adds the form response "dispute– resolution pending;" or leaves the tradeline including all the derogatory information on the report and notes that the consumer is disputing the account. CSC may delete the tradeline in its entirety even though the creditor did not instruct it to do so.

III. PLAINTIFF'S DISCOVERY OF IDENTITY THEFT

In February 1999, FBI Special Agent Timothy Reece began investigating an individual named Jodi Lehman. The FBI suspected that Lehman had been responsible for submitting fraudulent loan applications in plaintiff's name to various banks in the Nashville area, including First Tennessee National Bank. As part of his investigation, Reece contacted Ashlea Webb, an employee at First Tennessee, in February and March 1999, and obtained

from her the loan application and other documents regarding a December 1998 loan that the bank had issued in plaintiff's name.

First Tennessee began its own investigation of the account in March 1999. Notes from First Tennessee's collection department include the following:

3/17/99	[loan officer] called back said this is fraud was a loan by phone [maker] is in jail also has another loan told me to call Ashley . . . to get more info
3/18/99	Ashley [called] back and said that maker has 3 assumed names, had ID, pay stubs and everything to get the loan, she was a school teacher in Ohio but is in custody now, she has done this with several banks . . .
3/18/99	Putting out this is fraud
3/18/99	Kick out, is a fraud
4/29/99	fraud
5/17/99	Account is being checked for fraud
6/3/99	Passing and putting out fraud can't work
7/14/99	Mike [called] from [credit] inq about fraud on account per notes being checked for fraud

In May 1999, plaintiff discovered that she had been the victim of identity theft when she and her then fiancé, Keith Kronstedt, applied for a loan at River Cities Bank to finance the construction of their new home. Associated Mortgage, Inc., the company underwriting the loan, obtained a credit report showing information reported from three credit reporting agencies: Trans Union, Experian and Equifax. The merged credit report listed seven

delinquent accounts as belonging to plaintiff, including one being reported by defendant First Tennessee. As a result of the derogatory credit information – the most damaging of which was the delinquency reported by First Tennessee – Associated Mortgage would not approve plaintiff as a co-borrower on the construction loan. However, Keith Kronstedt was able to obtain the construction loan in his name on the terms the couple had been seeking.

After her loan application was denied, plaintiff tried to uncover what had happened to her and to correct the problems on her credit report. Eventually plaintiff tracked down Special Agent Reece, who informed her that she had been the victim of identity theft by Lehman. Plaintiff also contacted the three major credit reporting agencies, Trans Union, Equifax and Experian, and requested copies of her credit reports.

IV. DEFENDANTS' RESPONSES TO PLAINTIFF'S DISPUTE ABOUT CREDIT REPORT

On June 3, 1999, defendant First Tennessee received an Automated Consumer Dispute Verification from Experian. The form stated that Kronstedt "states that this account is mixed up with someone else" and asked First Tennessee to "provide complete ID." First Tennessee responded by looking up the account information maintained internally on its computers. After seeing that the name and social security number on the account matched the information provided by Experian, First Tennessee verified that the account belonged to plaintiff and sent that information to Trans Union, Experian and Equifax.

Equifax sent plaintiff a copy of her credit report dated June 16, 1999. The report indicated that it had been produced by CSC. The credit report listed five bank accounts that Lehman had obtained in plaintiff's name, including First Tennessee Bank.

Sometime in June 1999, plaintiff contacted First Tennessee about the information that was being reported on her credit report. Also, on July 2, 1999, plaintiff's attorney sent a letter to CSC about plaintiff's credit report. The letter included an affidavit from plaintiff in which she averred that loan accounts at five banks had been opened fraudulently by another person. This was the first time that either plaintiff or her attorney had communicated with CSC.

In the July 2, 1999 letter, plaintiff's attorney informed CSC that plaintiff had been the victim of fraud and asked that the following bank accounts be deleted from plaintiff's credit history: Nationsbank Tennessee, First Tennessee Bank, Regions Bank, Suntrust Bank Nashville and Amsouth Bank. Before receiving the letter, CSC had no reason to suspect that these accounts had been opened fraudulently in plaintiff's name. Plaintiff's attorney mailed a copy of the letter and the affidavit to First Tennessee Bank.

After receiving the letter from plaintiff's attorney, CSC added a fraud alert statement to plaintiff's credit report. The fraud alert included plaintiff's phone number and read in part as follows:

> *** Fraud alert *** Fraudulent applications may be submitted in my name using correct personal information / / If you access this file, please verify with me, personally, that it is legitimate

Dep. of Janice Fogelman, dkt. #71, ex. 7. CSC also began investigating the accounts about which plaintiff had complained. CSC sent Consumer Dispute Verification forms to Amsouth Bank, Regions Bank, Suntrust Bank Nashville and First Tennessee. It sent an Automated Consumer Dispute Verification form to First Tennessee Bank, which First Tennessee received on July 14, 1999. CSC did not address the Nationsbank Tennessee account because it did not appear on plaintiff's CSC credit report.

CSC did not receive responses from Regions Bank or Suntrust Bank Nashville. Pursuant to its dispute resolution procedures, CSC deleted these accounts from plaintiff's credit report. Amsouth Bank responded to CSC's Consumer Dispute Verification form by verifying the account as fraudulent and directing CSC to delete the tradeline. CSC complied with Amsouth's request and deleted the tradeline from plaintiff's credit report.

First Tennessee received the Automated Consumer Dispute Verification form from CSC on July 14, 1999. In response to the form, an employee from First Tennessee Bank's credit inquiry department called the bank's collection department, which informed the employee that plaintiff's account was being investigated for fraud. On its response to the dispute verification form, defendant First Tennessee's credit department informed CSC that it had verified that it had an account with the same name as plaintiff and the same former address and social security number. First Tennessee indicated that the account was being investigated for fraud.

CSC interpreted this response to mean that First Tennessee's investigation was not complete and that the bank did not know whether the account was fraudulent. Pursuant to its policies, CSC left the name "First Tennessee Bank" on plaintiff's credit report, but deleted all other information about the account, including information that the account was delinquent, the outstanding balance of the account and the rating of the account. CSC also added the notation "dispute–resolution pending" to the account.

On or about November 11, 1999, plaintiff and Kronstedt sought to convert Kronstedt's construction loan into a home mortgage. As they had done with the construction loan, plaintiff and Kronstedt applied for a mortgage through Susan Ruesch at River Cities Bank. Ruesch contacted Associated Mortgage, Inc. to underwrite the loan application. Associated Mortgage obtained a merged credit report that it showed to Ruesch that contained information from the combined credit reports of Trans Union, Experian and Equifax. The report included the complete tradeline information about the First Tennessee account, including the outstanding balance and a history of delinquent payments, but omitted any indication that the account was in dispute or under investigation for fraud. The First Tennessee tradeline indicated that report indicated that the First Tennessee Bank information had been reported by Equifax in October 1999. Although this information reflected negatively on plaintiff's creditworthiness, Associated Mortgaged approved a loan in plaintiff's and Kronstedt's names. However, plaintiff chose to have her name taken off the loan application.

On November 18, 1999, plaintiff called CSC and talked to Carolyn Johnson in the legal department regarding the First Tennessee Bank information on her credit report. In response to plaintiff's phone call, Johnson directed staff to remove the entire First Tennessee Bank notation from plaintiff's credit report. CSC staff complied with Johnson's request and the First Tennessee Bank tradeline was deleted from plaintiff's credit report on November 19, 1999.

DISPUTED FACTS

A material dispute of fact exists regarding which of the defendants, CSC or First Tennessee, was responsible for the First Tennessee Bank information reappearing on plaintiff's CSC credit report in October 1999.

OPINION

I. SUMMARY JUDGMENT STANDARD

To prevail on a motion for summary judgment, the moving party must show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Indiana Grocery, Inc. v. Super Valu Stores, Inc., 864 F.2d 1409, 1412 (7th Cir. 1989). When the moving party succeeds in showing the absence of a genuine issue as to any material fact, the opposing party must set forth specific facts showing that there is a genuine

issue for trial. Fed. R. Civ. P. 56(e); Matsushita Electric Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986); Bank Leumi Le-Israel, B.M. v. Lee, 928 F.2d 232, 236 (7th Cir. 1991). The opposing party cannot rest on the pleadings alone, but must designate specific facts in affidavits, depositions, answers to interrogatories or admissions that establish that there is a genuine issue for trial. Celotex, 477 U.S. at 324.

II. FAIR CREDIT REPORTING ACT CLAIMS

A. Claims Against CSC

The Fair Credit Reporting Act creates a private right of action against consumer reporting agencies for the negligent or willful violation of any duty imposed under the statute. See 15 U.S.C. §§ 1681o (negligent violations) and 1681n (willful violations); Henson v. CSC Credit Services, 29 F.3d 280, 284 (7th Cir. 1994). A consumer reporting agency that violates the provisions of the act negligently may be liable to the consumer for actual damages, costs and attorney's fees. 15 U.S.C. § 1681o. A consumer reporting agency that violates the statute willfully may be liable for punitive damages as well. 15 U.S.C. § 1681n.

Under the act, a consumer reporting agency is required to follow "reasonable procedures to assure maximum possible accuracy" of the information contained in a consumer's credit report. 15 U.S.C. § 1681e(b). Thus, a consumer reporting agency will not be liable under the Fair Credit Reporting Act if it reported inaccurate information on a

consumer's credit report, so long as the agency followed reasonable procedures to assure the "maximum possible accuracy" of its reports. See Henson, 29 F.3d at 284. Under this provision, a credit reporting agency is not liable for reporting inaccurate information obtained from a presumptively reliable source, such as a court's Judgment Docket, absent notice from the consumer that the information is inaccurate. Id., 29 F.3d at 285.

However, once a consumer notifies the consumer reporting agency that there is an error on her credit report, the agency is obligated under § 1681i to conduct a more thorough investigation. Section 1681i states in relevant part:

> If the completeness or accuracy of any item of information contained in a consumer's file at a consumer reporting agency is disputed by the consumer and the consumer notifies the agency directly of such dispute, the agency shall reinvestigate free of charge and record the current status of the disputed information, or delete the item from the file in accordance with paragraph (5), before the end of the 30-day period beginning on the date on which the agency receives the notice of the dispute from the consumer.

15 U.S.C. § 1681i(a).

Depending on the circumstances, a credit reporting agency that receives notice of a dispute may be required to verify the accuracy of its initial source of information. Henson, 29 F.3d at 287; see also Cahlin v. General Motors Acceptance Corp., 936 F.2d 1151, 1160 (11th Cir. 1991) ("A [§ 1681i(a)] claim is properly raised when a particular credit report contains a factual deficiency or error that could have been remedied by uncovering additional facts that provide a more accurate representation about a particular entry."). Two relevant factors are "whether the consumer has alerted the reporting agency to the possibility

that the source may be unreliable or the reporting agency itself knows or should know that the source is unreliable" and "the cost of verifying the accuracy of the source versus the possible harm inaccurately reported information may cause the consumer." Id. Whatever considerations exist, it is for "the trier of fact [to] weigh the[se] factors in deciding whether [the defendant] violated the provisions of section 1681i." Id.

Plaintiff contends that two actions taken by CSC violated the Fair Credit Reporting Act. First, plaintiff contends that CSC acted unreasonably when it reported the First Tennessee account as "dispute–resolution pending" instead of deleting the First Tennessee Bank tradeline in its entirety after she informed CSC that she was disputing the account. Second, she contends that CSC should have prevented the derogatory information associated with the tradeline from reappearing on her report in October 1999. (Plaintiff does not seem to be challenging CSC's reporting of the First Tennessee Bank account information *before* she notified it in July 1999 that she was disputing the information. In any case, because plaintiff has not adduced any evidence to suggest that CSC had any reason to question the accuracy of First Tennessee's credit information before July 1999, CSC would be entitled to summary judgment on this claim. See Henson, 29 F.3d at 286 (absent notice from consumer of error in consumer's credit report, credit reporting agency that relies on accuracy of public court documents in preparing credit report not liable under § 1681e(b)).)

1. CSC's reporting of disputed account

Plaintiff contends that in light of all the information CSC had, including the letter from her attorney, her affidavit and the fact that one of the other banks had verified the account opened in her name as fraudulent, it should have deleted the First Tennessee account information in its entirety instead of merely suppressing the derogatory information and adding a notation stating "dispute–resolution pending." Plaintiff contends that by simply "parrot[ing] the creditor's response" and "refusing to acknowledge [her] sworn testimony that the account was fraudulent," CSC abdicated its duty under § 1681e(b) to follow reasonable procedures to maintain maximum possible accuracy. Although plaintiff has not alleged a separate claim under § 1681i(a), she contends as part of her § 1681e(b) claim that CSC violated § 1681i(a)(4), which requires the consumer reporting agency to "review and consider all relevant information submitted by the consumer" in investigating a consumer dispute.

As an initial matter, I note that because plaintiff's claim involves the steps taken by CSC after she informed it that she disputed the accuracy of the First Tennessee Bank account information, it actually states a claim arising under § 1681i(a) rather than under § 1681e(b). See Henson, 29 F.3d at 286; Cahlin, 936 F.2d at 1160 (distinguishing between duties imposed by § 1681e(b) and § 1681i). Because § 1681i provides its own set of procedures for reinvestigating disputed information, it is debatable whether § 1681e(b)'s "maximum possible accuracy" standard applies to reinvestigation procedures. See Swoager

v. Credit Bureau of Greater St. Petersburg, 608 F. Supp. 972, 975 (M.D. Fla. 1985) (because "the functions of § 1681e(b) and § 1681i are dissimilar . . . it would be incongruous to engraft the maximum accuracy dictates of the former into the context of reinvestigation and grievance procedures governed by the latter"); Grenier v. Equifax Credit Information Services, 892 F. Supp. 57, 59 (D. Conn. 1995) (same). But see Cahlin, 936 F.2d at 1160 (Section 1681i claim properly raised when credit report contains factual deficiency or error that could have been remedied by uncovering additional facts that provide "a *more accurate* representation about a particular entry") (emphasis added). However, because defendant has not challenged the propriety of applying § 1681e(b)'s standard to plaintiff's allegations, I will assume that § 1681e(b)'s "maximum possible accuracy" standard applies.

Even with the benefit of the maximum possible accuracy standard, plaintiff's first claim cannot survive defendant CSC's motion for summary judgment. Although the "reasonableness" of a defendant's procedures is typically a fact question that must be resolved by the jury, summary judgment is proper if the reasonableness of the defendant's procedures is "beyond question." Crabill v. Trans Union, L.L.C., 259 F.3d 662, 664 (7th Cir. 2001). This is such a case. Plaintiff does not contend that there were any additional facts that CSC could have uncovered, that the means it used to investigate her complaint were unreasonable or that she notified CSC that First Tennessee was an unreliable source. Plaintiff asserts that CSC failed to review and consider all the information she submitted, but she offers no facts to support that assertion. What plaintiff really challenges is CSC's

response to her dispute in light of the information it had. She is arguing that it was unreasonable for CSC to have left the First Tennessee tradeline on her credit report *at all* given the information she had provided. Plaintiff argues that whether it is was reasonable for CSC to have left the tradeline on the credit report rather than deleting it completely is a question for the jury.

I disagree. The Fair Credit Reporting Act does not go that far. As the court explained in Cahlin, 936 F.2d at 1158,

> Although a credit reporting agency has a duty to make a reasonable effort to report "accurate" information on a consumer's credit history, it has no duty to report only that information which is favorable or beneficial to the consumer. Congress enacted Fair Credit Reporting Act with the goals of ensuring that such agencies imposed procedures that were not only "fair and equitable to the consumer," but that also met the "needs of commerce" for accurate credit reporting. Indeed, the very economic purpose for credit reporting companies would be significantly vitiated if they shaded every credit history in their files in the best possible light for the consumer. Thus, the standard of accuracy embodied in section [15 U.S.C. § 1681e(b)] is an objective measure that should be interpreted in an evenhanded manner toward the interests of both consumers and potential creditors in fair and accurate credit reporting.

(Footnote omitted).

With respect to disputed accounts, the court noted that consumers who dispute how a particular dispute is characterized or interpreted on their credit report are not without a remedy: under § 1681i(b), they may file a statement as to their version of the dispute. Id. at n. 23. "In this way, potential creditors have both sides of the story and can reach an

independent determination of how to treat a specific, disputed account." Id. (citation omitted).

Aside from her own assertion that CSC should have simply taken her at her word and ignored First Tennessee's response regarding the First Tennessee account, plaintiff has adduced no evidence from which a trier of fact could conclude that it was unreasonable for CSC to respond as it did to her dispute regarding the First Tennessee account. CSC complied with its duty to reinvestigate and notified First Tennessee of the dispute. First Tennessee reported back to CSC that plaintiff's account was being investigated for fraud. CSC interpreted First Tennessee's response as meaning that it could not verify the derogatory account information, so it suppressed that information from plaintiff's credit report and added a notation that the account was in dispute. CSC also placed plaintiff's statement regarding the dispute on file. The Fair Credit Reporting Act did not require CSC to do more. Summary judgment will be granted to CSC on this claim.

2. Reappearance of derogatory information on credit report

Plaintiff also contends that defendant CSC violated the Fair Credit Reporting Act when it allowed the derogatory information concerning the First Tennessee Bank account to reappear on her credit report from mid-October 1999 until it was deleted on November 19, 1999. At least one court has found that "[a]llowing inaccurate information back onto a credit report after deleting it because it is inaccurate is negligent." Stevenson v. TRW Inc.,

987 F.2d 288, 293 (5th Cir. 1993). See also Philbin v. Trans Union Corp., 101 F.3d 957, 965-66 (3d Cir. 1996) (plaintiff produced sufficient evidence to survive summary judgment on issue of reasonable procedures merely by demonstrating that there were inaccuracies in credit report). In its brief in support of its motion for summary judgment, defendant CSC does not attempt to deny that the information was inaccurate or that it may have been responsible for its reappearance on plaintiff's credit history, but contends that it is entitled to judgment as a matter of law because plaintiff has insufficient evidence of actual damages.

3. Actual damages

Actual damages for Fair Credit Reporting Act violations may include out-of-pocket losses, damages for injury to reputation and creditworthiness and for humiliation or mental distress. Cousin v. Trans Union Corp., 246 F.3d 359, 376 (5th Cir. 2001). In order to obtain an award of "actual damages," a plaintiff must present evidence showing a "causal relation between the violation of the statute and the loss of credit, or some other harm . . .". Crabill, 259 F.3d at 664. Defendant CSC contends that plaintiff cannot recover actual damages absent a showing that she was denied credit as a result of any conduct by CSC.

I agree with defendant CSC that plaintiff has adduced no evidence to show that she was denied credit as result of credit information provided by CSC. The evidence indicates that the only time plaintiff was denied credit on the basis of information that might have come from CSC was in May 1999, before plaintiff notified CSC that she had been the victim

of identity theft. As noted previously, CSC is not liable for the May 1999 denial because it had no notice that the First Tennessee loan was disputed at that time. Plaintiff alleges that, as a result of information reported by CSC, she was denied credit a second time by Associated Mortgage in November 1999 when she and her fiancé attempted to convert his construction loan into a joint mortgage. However, plaintiff's own witness averred that this was not the case: Associated Mortgage approved plaintiff's loan application. See Aff. of Kay Bader, dkt. # 67, ¶ 30. Further, there is no evidence to support plaintiff's assertion that she was approved at a less favorable rate of interest. In short, there is simply no evidence to show that plaintiff was denied credit or suffered a negative credit action because of an inaccurate credit report prepared by CSC.

That said, courts interpreting the Fair Credit Reporting Act have held that a plaintiff may recover actual damages for emotional distress and loss of reputation even absent the denial of credit. See 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). Although defendant CSC maintains that the Seventh Circuit repudiated this view in Crabill, I cannot find support for defendant's assertion in the court's opinion. The court did not limit recovery to those cases involving a denial of credit, but included those in which the plaintiff could show a causal relation between the violation of the statute and "some other harm," leaving open the possibility that the phrase "some other harm" could encompass emotional distress. Although the court declared in Crabill that plaintiff had "no

compensatory damages," there is no indication that Crabill had asserted a claim of emotional distress. See Crabill, 259 F.3d at 664. Thus, it appears to be an open question in this circuit whether a plaintiff may recover actual damages for emotional distress in the absence of a denial of credit.

I agree with those courts that have concluded that a denial of credit is not a necessary prerequisite for a § 1681e(b) claim. Defendant CSC argues that even so, plaintiff's evidence of emotional distress is plainly insufficient to support an award of damages. Defendant points out that even though plaintiff contends that she sought counseling to deal with emotions resulting from her efforts to clear her credit report, she has not offered any testimony from her counselors to support her claims and she admitted that she did not tell them about CSC or credit reporting agencies generally. Defendant argues that in the absence of such testimony or medical evidence, plaintiff's uncorroborated testimony regarding her emotional distress is insufficient to support her claim.

Defendant CSC compares this case to Cousin, in which the Court of Appeals for the Fifth Circuit vacated the jury's award of $50,000 in compensatory damages on the ground that plaintiff's testimony of mental distress was insufficient. In that Fair Credit Reporting Act case, plaintiff's brother used plaintiff's personal identifying information to obtain two car loans on which he subsequently defaulted, causing damage to plaintiff's credit history. After concluding that plaintiff could not recover for emotional distress resulting from a credit denial absent evidence that the denial was based upon a Trans Union credit report, the court

found that the only distress for which plaintiff could recover related to his reaction when he saw his inaccurate Trans Union credit reports on two separate occasions. With respect to the first occasion, plaintiff testified that he felt "very upset, angry" and as if the company had not listened to him. Cousin, 246 F.3d at 371. As for the second occasion, plaintiff testified that he felt

> real frustrated, real irritated to know that this information was continuing to be reported over and over again. I already told them that it was not me. I wanted to say that it was a feeling of like being in jail knowing that I–I mean, I didn't do this. I'm not guilty, but I was continuing to be punished for it.

Id. at n. 17.

In concluding that this testimony was insufficient to sustain the jury's award of actual damages, the court referred to Carey v. Piphus, 435 U.S. 247 (1978), in which the Supreme Court held that a jury's award for emotional distress in a case brought under 42 U.S.C. § 1983 must be supported by evidence of genuine injury, such as evidence of the injured party's conduct and observations of others. See Cousin, 246 F.3d at 371 (citing Carey, 435 U.S. at 264 n. 20). Applying Carey's holding in Cousin, the court noted that a plaintiff bringing a federal claim for emotional distress must prove damages with "a degree of specificity which may include corroborating testimony or medical or psychological evidence in support of the damage award." Cousin, 246 F.3d at 371 (quoting Patterson v. P.H.P. Healthcare Corp., 90 F. 3d 927, 938 (5th Cir. 1996)).

In the instant case, plaintiff testified at her deposition as follows regarding the emotional distress she experienced when she learned that the derogatory First Tennessee Bank account information had been re-reported:

> [T]he fact that CSC was contacted several times and requested, you know, that that derogatory information be removed and still in November of '99 is reporting that information, you know. Like I said before, at that time how many more credit reports do you have to request? How many more phone calls do you have to make? How many more documents from an attorney do you have to send to get this cleared up?
>
> I can't even explain in words how it feels. Unless it happens to you, you just don't understand the frustration. It's like somebody throwing you in jail and telling you you committed a crime that you didn't commit, and even though there is proof that it's not you.
>
> The FBI agent knows it's not you, all the banks know it's not you, yet they don't care. They won't remove it. They will leave you sit there. They don't care that you can't move on with your life or afraid to go apply for a loan.
>
> The fact that it carried out as long as it did through December, in my opinion it shouldn't have gone that far, it should have been taken care of at the end of July.

Dep. of Pltf., July 25, 2001, dkt. #56 at 135-36.

Although I agree with defendant CSC that the evidence of plaintiff's emotional distress is not significantly greater than that provided by the plaintiff in Cousin, I nonetheless conclude that it is sufficient to survive defendant's motion for summary judgment. Although the Court of Appeals for the Seventh Circuit has extended Carey's "genuine injury" requirement beyond the procedural due process context, it has rejected the proposition that "an injured person's testimony can never be sufficient by itself, or in conjunction with the circumstances of the particular case, to establish damages for emotional

distress." United States v. Balistreri, 981 F.2d 916, 932 (7th Cir. 1992) (citations omitted). Rather, the court has held that the injured party's testimony alone may be sufficient to establish emotional distress, so long as the injured party "reasonably and sufficiently explain[s] the circumstances of his injury and [does] not resort to mere conclusory statements." Id. at 931-23 (quoting Biggs v. Village of Dupo, 892 F. 2d 1298, 1304 (7th Cir. 1990) (in turn quoting Rakovich v. Wade, 819 F. 2d 1393, 1399 n. 6 (7th Cir. 1987), vacated on other grounds, 850 F. 2d 1180 (1988))). Whether the evidence of emotional distress is sufficient to support an award of damages will also depend on the circumstances of the act that allegedly caused that distress: "[t]he more inherently degrading or humiliating the defendant's action is, the more reasonable it is to infer that a person would suffer humiliation or distress from that action; consequently, somewhat more conclusory evidence of emotional distress will be acceptable to support an award for emotional distress." Id. at 932.

In Balistreri, 981 F. 2d 916, the court declined to overturn the jury's award of $2,000 to each plaintiff for emotional distress. The plaintiffs were testers who assisted the government in building a case of housing discrimination against the defendant. The only evidence of emotional distress came from the testers themselves, who testified generally about being upset, humiliated, embarrassed or shamed. Although the court acknowledged that this evidence was not strong, it upheld the jury's award, reasoning that the jury was "in the best position to evaluate both the humiliation inherent in the circumstances and the

witness's explanation of his injury. Moreover, the jury is able to examine the witness personally; a jury may glean as much if not more about a witness's emotional state from the witness's demeanor than from his attempts to explain the nature of his injury in words." Id. at 933.

Although it is difficult to conceive how having inaccurate and derogatory credit information on one's credit report could be as degrading or humiliating as being the victim of race or sex discrimination, I share the view that evaluation of plaintiff's emotional distress claim is a task best left for the jury. In addition to the testimony quoted above, plaintiff testified that the difficulties she encountered in restoring her credit report exacerbated the distress she felt as a result of the identity theft, made her reluctant to apply for credit and made her less trusting of people. Although it is not clear how much of this distress was related specifically to the re-publication of the derogatory information on her credit report in October 1999, when the evidence is viewed in the light most favorable to plaintiff, it is sufficient to overcome defendant CSC's motion for summary judgment.

Furthermore, plaintiff has alleged other actual damages in addition to emotional distress. Specifically, plaintiff contends that she took four days off work in order to meet with lawyers and make telephone calls in order to clear up her credit history. These damages are compensable. However, plaintiff will have to prove that any damages claimed for time off work resulted specifically from the reappearance of the derogatory First Tennessee Bank information on her credit report.

Plaintiff also claims damages for prelitigation attorneys fees that are owed to the lawyer who contacted CSC when she learned of her negative credit history, but these are not compensable. "Actual damages" may include out-of-pocket expenses for attorney fees incurred by a plaintiff prior to litigation of his Fair Credit Reporting Act claims so long as the lawyer's services were employed to remedy a violation of the law. Casella v. Equifax Credit Information Services, 56 F.3d 469, 475 (2d Cir. 1995). Here, the fees that plaintiff contends she owes her previous attorney are for drafting a letter and an affidavit that he mailed to CSC to inform it of the inaccurate information on plaintiff's credit report. As noted previously, CSC was not violating the law at the time. Accordingly, plaintiff cannot recover her prelitigation attorney fees. Moreover, any statutory attorney fees that plaintiff may be awarded if she succeeds at trial are not actual damages. See Crabill, 259 F.3d at 664-66.

One final word on damages. CSC contends that it is not responsible for any damages resulting from the derogatory information that appeared on plaintiff's November 1999 credit report because the merged report obtained by Associated Mortgage from Informative Research cited Equifax as the source of the First Tennessee Bank information. However, defendant CSC does not dispute that it exchanges information with Equifax and that it is responsible for compiling reports about Wisconsin consumers. Furthermore, plaintiff testified in her deposition that when she would request a credit report from Equifax, she would receive a report from CSC instead. Finally, it is undisputed that CSC was reporting

the derogatory information on its data systems when plaintiff contacted it on November 18, 1999. Viewing this evidence in the light most favorable to plaintiff, it supports an inference that CSC provided the information that Equifax subsequently reported to Informative Research. However, plaintiff will bear the burden at trial to present facts showing that CSC was the source of information attributed to Equifax.

4. Punitive and statutory damages

Even if plaintiff is not entitled to any "actual damages," she may be entitled to punitive damages if she can show that CSC willfully failed to comply with the Fair Credit Reporting Act. See Casella, 56 F.3d at 476; 15 U.S.C. § 1681n(2). The act provides that a consumer who can show willful noncompliance can recover statutory damages of not less than $100 and not more than $1,000. § 1681n(a)(1)(A). To show willful noncompliance, a plaintiff must show that the defendant "knowingly and intentionally committed an act in conscious disregard for the rights of others." Pinner v. Schmidt, 805 F.2d 1258, 1263 (5th Cir. 1986); Dalton, 257 F.3d 409; Philbin, 101 F.3d at 970. Although a showing of malice or evil motive is not required to prove willfulness under the act, courts have held that to justify an award of punitive damages, a defendant's actions must be on the same order as willful concealments or misrepresentations. Cushman v. Trans Union Corp., 115 F.3d 220, 226-27(3rd Cir. 1997); Stevenson v. TRW, Inc., 987 F.2d 288, 294 (5th Cir. 1993).

Assuming for the purposes of deciding CSC's motion for summary judgment that CSC was responsible for the derogatory information reappearing on plaintiff's credit report in October 1999, plaintiff has adduced no evidence from which a jury could conclude that CSC's actions were willful. As proof of CSC's culpability, plaintiff has adduced nothing more than the fact that the derogatory information reappeared on her credit report. Although this may be sufficient to establish negligence under a *res ipsa loquitur* theory, see Philbin, 101 F.3d at 965, it falls far short of the showing plaintiff must make to establish that CSC acted in conscious disregard for her rights. Further, when plaintiff contacted CSC about the reappearance of the information, CSC remedied the error immediately. There is simply no evidence of any willful misrepresentation, concealment or intentional disregard for plaintiff's rights on the part of CSC. Accordingly, summary judgment on plaintiff's punitive and statutory damages claim is appropriate.

B. Claims Against First Tennessee

Plaintiff contends that two actions taken by First Tennessee violated the Fair Credit Reporting Act. First, plaintiff contends that First Tennessee failed to conduct a reasonable investigation of the disputed account when it received the Consumer Dispute Verification form from Experian in June 1999. Second, she contends that First Tennessee acted unreasonably in July 1999 when it informed CSC that the account that had been opened in

her name was under investigation for fraud without instructing CSC to delete the tradeline entirely.

Before addressing the merits of plaintiff's claims against First Tennessee, I will address First Tennessee's contention that plaintiff's claims against it must be dismissed for lack of personal jurisdiction and improper venue. I agree with plaintiff that defendant has waived its right to assert these defenses by failing to include them in its answer. See Fed. R. Civ. P. 12(h)(1) ("A defense of lack of jurisdiction over the person [or] improper venue . . . is waived . . . if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course.").

Defendant First Tennessee points to its fourth affirmative defense in its amended answer as proof that it asserted the defense of lack of personal jurisdiction. In that paragraph, defendant asserted: "Service of process upon these answering defendants may have been legally insufficient, such as to deprive this court of jurisdiction." Def. First Tennessee's Amended Answer, dkt. #34, at 2, ¶ 4. It is disingenuous for First Tennessee to contend that this statement raises a lack of personal jurisdiction defense. The plain reading of this statement is that defendant was asserting the defense of insufficiency of service of process. Although improper service may result in the court's lacking jurisdiction over the person, that defense is different from First Tennessee's contention in its brief that personal jurisdiction over it does not exist under Wisconsin's long-arm statute. Fed. R. Civ. P. 12(b) contemplates that the defenses of insufficiency of service of process and lack of jurisdiction

over the person are different defenses that should be pleaded separately. See also Fed. R. Civ. P. 10(b) ("each defense other than denials shall be stated in a separate count or defense whenever a separation facilitates the clear presentation of the matters set forth"). First Tennessee either ignored these rules, or, more likely, did not intend to raise the defenses of lack of personal jurisdiction and improper venue. In either case, defendant has waived its right to assert these defenses now.

Defendant also contends that I should apply the holding of the federal district courts in Tennessee and find that plaintiff may not bring a private cause of action to enforce 15 U.S.C. § 1681s-2(b). See Carney v. Experian Info. Solutions, Inc., 57 F. Supp. 2d 496 (W.D. Tenn. 1999). This contention is frivolous. This court is not bound by another federal district court's interpretation of federal law on a claim arising under this court's federal question jurisdiction. Further, there is not a shred of support in the record for defendant's contention that plaintiff has conceded that Tennessee law should apply.

1. First Tennessee's investigation on June 3, 1999

In 1996, Congress amended the Fair Credit Reporting Act to impose duties upon persons, like defendant First Tennessee, who furnish information to credit reporting agencies. See 15 U.S.C. § 1681s-2. Upon notice of a dispute from a credit reporting agency, § 1681s-2(b)(1) of the act requires the entity furnishing the information to conduct an investigation regarding the dispute and to report its findings accordingly:

> After receiving notice pursuant to section 1681i(a)(2) of this title of a dispute with regard to the completeness or accuracy of any information provided by a person to a consumer reporting agency, the person shall -
>
> (A) conduct an investigation with respect to disputed information;
>
> (B) review all relevant information provided by the consumer reporting agency pursuant to section 1681i(a)(2);
>
> (C) report the results of the investigation to the consumer reporting agency; and
>
> (D) if the investigation finds that the information is incomplete or inaccurate, report those results to all other consumer reporting agencies to which the person furnished the information. . . .

15 U.S.C. § 1681s-2(b)(1). The duties imposed on providers of information under § 1681s-2(b) arise only after the entity furnishing the information receives notice from a consumer reporting agency that a consumer is disputing credit information. Aside from the Carney decision, discussed above, nearly all courts considering this provision have concluded that a consumer may bring a cause of action against an entity furnishing information for a violation of this subsection. See, e.g., Thomasson v. Bank One, Louisiana, N.A., 137 F. Supp. 2d 721, 723 (E. D. La. 2001); Whitesides v. Equifax Credit Info. Serv., Inc., 125 F. Supp. 2d 807, 812 (W.D. La. 2000); Dornhecker v. Ameritech Corp., 99 F. Supp. 2d 918, 926-27 (N.D. Ill. 2000) and cases cited in plaintiff's brief, dkt. #61, at 6-7.

The parties dispute whether the investigation under § 1681s-2(b)(1) must satisfy any particular standard or whether it is enough that the entity simply conduct *some* sort of investigation, no matter how minimal. Apparently, only one other court has considered this

question. In Bruce v. First U.S.A. Bank, 103 F. Supp. 2d 1135 (E.D. Mo. 2000), the court concluded that the investigation under § 1681s-2(b) must be reasonable. In reaching this conclusion, the court noted that § 1681s-2(b)'s investigation requirement for entities furnishing credit information is analogous to the reinvestigation requirement imposed upon credit reporting agencies under § 1681i(a), which courts have interpreted as imposing a duty to conduct a reasonable reinvestigation. Id. at 1143.

I agree that § 1681s-2(b)(1) imposes a duty upon entities that furnish information to conduct a reasonable investigation after receiving notice from a credit reporting agency that a consumer disputes the completeness or accuracy of an item on her credit report. Although defendant First Tennessee argues that such a conclusion is inconsistent with the plain language of the statute, defendant does not disagree with the court's conclusion in Bruce that § 1681s-2(b) is analogous to § 1681i(a), which courts have interpreted as imposing a reasonableness requirement despite the lack of such language in that provision. Indeed, the conclusion that an investigation under § 1681s-2(b)(1) must be reasonable seems manifest in light of § 1681o, which allows a consumer to recover damages from "[a]ny person who is negligent in failing to comply with any requirement imposed under this subchapter." 15 U.S.C. § 1681o(a).

Applying the reasonable investigation standard, I conclude that genuine issues of material fact exist as to whether defendant First Tennessee conducted a reasonable investigation into plaintiff's dispute as required by § 1681s-2(b)(1). It is undisputed that,

by the time First Tennessee received the first Consumer Dispute Verification form on June 3, 1999, it had knowledge that the account in plaintiff's name might be fraudulent. In February and March 1999, FBI Special Agent Reece had spoken to Ashlea Webb in First Tennessee's credit department and had obtained documents from her pertaining to the account in plaintiff's name. Even though Agent Reece's affidavit provides no information about the substance of the conversations he had with Webb, when the evidence is viewed in the light most favorable to plaintiff it supports an inference that, at a minimum, he told her who he was and that he was investigating the account for suspected fraud. (Reece's affidavit does not support plaintiff's contention that he informed Webb that the account was in fact fraudulent. See dkt. #66, ¶¶ 12-16.) Furthermore, the notes from First Tennessee's collection department indicate that, as of March 1999, it had information indicating that the account was fraudulent. Also undisputed is the fact that First Tennessee's credit inquiry department interpreted the June 3, 1999 Consumer Dispute Verification form from Experian as a request for confirmation of account information to which it responded by verifying that the name and social security number on the account matched the information provided by Experian. The credit department retrieved its account information from an internal database that did not include any of the notes entered by the collection department or any other indication that the account might be fraudulent.

First Tennessee argues that its investigation in response to the June 3, 1999 Consumer Dispute Verification form could not have been unreasonable because it was

simply doing what Experian had asked it to do, which was to confirm that its identifying information about the maker of the account matched the information that Experian had. However, a rational jury could conclude that First Tennessee's failure to inquire further about the status of the account was unreasonable in light of the fact that Experian stated on the Consumer Dispute Verification form that plaintiff was claiming that the account was not hers and had been mixed up with another person's. In addition, a rational jury could conclude that it was unreasonable for First Tennessee to have maintained a system in which there was no cross-communication between the collection department and the credit inquiry department, and in which information obtained by the collection department indicating that an account was suspected of being fraudulent was maintained separately from the data available to the credit department when responding to a Consumer Dispute Verification form. Therefore, it would be inappropriate to grant summary judgment against plaintiff on her claim that defendant First Tennessee did not conduct a reasonable investigation in response to the Consumer Dispute Verification form on June 3, 1999.

2. First Tennessee's investigation on July 14, 1999

I will grant summary judgment against plaintiff on her claim that First Tennessee conducted an unreasonable second investigation, after it received the Consumer Dispute Verification form from CSC on July 14, 1999. As with her claim against CSC, plaintiff contends that it was unreasonable for defendant First Tennessee to report anything more

than that the tradeline for the fraudulent account should be deleted in light of the information it had, which included the phone calls from Special Agent Reece, the letter from plaintiff's attorney and plaintiff's affidavit. As "evidence" that this was unreasonable, plaintiff points out that one of the other banks that responded to the Consumer Dispute Verification form verified that the account opened in plaintiff's name was fraudulent and instructed CSC to delete the entire tradeline.

Like her reinvestigation claim against CSC, plaintiff's claim that First Tennessee should have instructed CSC to delete the entire account tradeline pushes the Fair Credit Reporting Act too far. Notably, plaintiff presents no evidence to show that First Tennessee was not investigating the account for fraud on July 14, 1999. In fact, although plaintiff contends that First Tennessee's investigation was unreasonable, she presents no evidence regarding what steps First Tennessee was or was not taking to investigate the account. The essence of her claim is that First Tennessee's investigation *should* have been complete in light of the information it had. But there is nothing in the Fair Credit Reporting Act that specifies a time frame within which a creditor must complete its internal fraud investigations or that tells a creditor how to conduct its internal fraud investigations. The act merely requires entities furnishing information to conduct a reasonable investigation when notified by a consumer reporting agency of a consumer dispute and to notify the consumer reporting agencies if they determine from their investigation that the information they had previously reported was incomplete or inaccurate. First Tennessee reported that it was in the process

of investigating the account for fraud, or in other words, that it had not yet completed its investigation of the account. The fact that another bank may have had different internal policies that allowed it to reach a different conclusion about the account opened in plaintiff's name is irrelevant. In the absence of any evidence that First Tennessee was not investigating the account or that the steps it was taking were unreasonable, summary judgment must be granted to First Tennessee on this claim.

3. Actual damages

Defendant First Tennessee contends that even if plaintiff is allowed to proceed on all or part of her claims, summary judgment is proper because she has not suffered damages as a result of any conduct by First Tennessee. Like CSC, defendant First Tennessee contends that plaintiff suffered no financial loss, her claim of emotional distress is unsubstantiated and her claim of lost time from work is *de minimis*.

For the reasons discussed above with respect to plaintiff's claims against CSC, I conclude that plaintiff has adduced sufficient evidence of actual damages to survive First Tennessee's motion for summary judgment. I agree with defendant that even if liability is found, plaintiff's damages are likely to be minimal: plaintiff can recover only those damages that were caused by First Tennessee's failure to conduct a reasonable investigation with respect to the June 3, 1999 Consumer Dispute Verification form from Experian. This limits damages to those that were incurred during the time period between June 3 and July 14,

1999. Although defendant First Tennessee contends that such damages are *de minimis* and therefore not compensable, it does not cite any case to support its proposition that actual damages must meet some minimum threshold in order to be recoverable and my independent research has discovered none.

4. Punitive damages

Summary judgment will be granted with respect to plaintiff's claim for punitive damages against First Tennessee. Plaintiff has adduced insufficient evidence from which a jury could infer that in responding to the Consumer Dispute Verification form from Experian, First Tennessee knowingly and intentionally committed an act in conscious disregard for plaintiff's rights. At most, plaintiff has produced evidence showing that First Tennessee had inadequate procedures in place to ensure that its credit inquiry department was informed that an account was under investigation by another department. Because there is no evidence in the record to suggest that anyone at First Tennessee intentionally misrepresented the status of the disputed account, plaintiff's punitive damages claim must be dismissed.

III. DEFAMATION CLAIMS

Plaintiff's complaint alleges common law claims of defamation by both defendants. Defendants contend that plaintiff's state law defamation claims are preempted by §

1681h(e). Plaintiff contends that defendant CSC waived its right to challenge the defamation claim by failing to raise the issue until its reply brief. I agree. It is well-settled that failure to raise an issue until the reply constitutes a waiver. See Holman v. Indiana, 211 F.3d 399, 405 n. 5 (7th Cir. 2000). However, because it is clear from the evidence adduced by the parties that plaintiff cannot prevail at trial on her claim that defendant CSC defamed her when it reported the First Tennessee account as "disputed" in July 1999, I will grant summary judgment to defendant CSC on this issue on my own motion. This is not unfair to plaintiff: plaintiff addressed the issue on the merits in her brief in response to defendant First Tennessee and in her objection to defendant CSC's failure to raise the issue until its reply.

Plaintiff contends that defendant First Tennessee defamed her when it reported to the credit reporting agencies from February to July 1999 that plaintiff had opened an account with the bank. She also contends that the bank defamed her when it reported again in October 1999 that the disputed account belonged to her. As for defendant CSC, I presume that plaintiff's defamation claims are based upon the same conduct as the Fair Credit Reporting Act claims, namely, that CSC defamed her by reporting the First Tennessee account as "disputed" in July 1999 and by re-publishing the derogatory account information in October 1999.

Section 1681h(e) of the Fair Credit Reporting Act states as follows:

> Except as provided in sections 1681n and 1681o of this title, no consumer may bring any action or proceeding in the nature of defamation, invasion of privacy, or negligence with respect to the reporting of information against any consumer reporting agency, any user of information, or any person who furnishes information to a consumer reporting agency, based on information disclosed pursuant to section 1681g, 1681h, or 1681m of this title, or based on information disclosed by a user of a consumer report to or for a consumer against who the user has taken adverse action, based in whole or in part on the report except as to false information furnished with malice or willful intent to injure such consumer.

Courts have interpreted this section as providing consumer reporting agencies and entities furnishing information with immunity from common law defamation actions unless the defendant furnished false information with malice or willful intent to injure. See, e.g., Cushman v. Trans Union Corp., 115 F.3d 220, 229 (3rd Cir. 1997); Bloom v. I.C. Sys., Inc., 972 F.2d 1067, 1069 (9th Cir. 1992); Thornton v. Equifax, Inc., 619 F.2d 700, 703 (8th Cir. 1980); Bruce, 103 F. Supp. 2d at 1145. However, the immunity provision, which Congress intended to provide a "quid pro quo" for statutorily required disclosures, applies only to claims "based on information disclosed pursuant to 1681g, 1681h or 1681m." Whitesides v. Equifax Credit Information Services, Inc., 125 F. Supp. 2d 807, 811 (W.D. La. 2000); McAnly v. Middleton and Reutlinger, P.S.C., 77 F. Supp. 2d 810, 814 (W.D. Ky. 1999); Retail Credit Co. v. Dade County, 393 F. Supp. 577 (D.C. Fla. 1975) (quoting Sen. Proxmire in colloquy with Sen. Javits, 115 Cong. Rec. 13908 (November 6, 1969)). Section 1681g describes the nature of the information that a consumer reporting agency must

provide to a consumer upon request; § 1681h specifies the conditions under which the disclosures must be made; and § 1681m requires a person who uses a credit report or other credit information as a basis for taking adverse action against a consumer to disclose to the consumer the source of the adverse credit information.

Thus, whether § 1681h(e) applies depends upon how the plaintiff obtained the purportedly defamatory information. See Hood v. Dun & Bradstreet, Inc., 486 F.2d 25, 32 (5th Cir. 1973) ("(T)he Act does not preclude an action at common law except where information that would give rise to a cause of action is obtained by the complainant pursuant to the provisions of the Act."); 16 C.F.R. App. to Pt. 600–FTC Commentary on the Fair Credit Reporting Act, § 610–Conditions of Disclosure, ¶ 6 ("The privilege extended by subsection [1681h(e)] does not apply to an action brought by a consumer if the action is based on information not disclosed pursuant to sections [1681g, 1681h or 1681m].") If a consumer obtains information independently of agency or user disclosures, the qualified immunity provision does not apply.

A. Claims Against First Tennessee

1. First Tennessee's reporting of fraudulent account from February to July 1994

Applying this understanding of the immunity provision to plaintiff's defamation claims against First Tennessee, I conclude that the provision applies only to plaintiff's claim regarding First Tennessee's reporting of the fraudulent account to the credit reporting

agencies from February to mid-July 1999. Plaintiff learned that First Tennessee was reporting the fraudulent account when her lender disclosed a copy of her credit report in connection with the denial of credit in May 1999. Because this was a disclosure under § 1681m(a), the immunity provision applies. See § 1681m(a) (person taking adverse action against consumer because of information contained in consumer report must inform consumer of adverse action, source of information and right to obtain copy of credit report from consumer reporting agency).

Citing Whitesides, plaintiff contends that the immunity provision does not apply to communications between entities furnishing credit information and credit reporting agencies. See Whitesides, 125 F. Supp. 2d at 811 (finding that bank was not covered by § 1681h(e) because it was not consumer reporting agency and did not take adverse action against plaintiff on basis of her consumer report). However, § 1681h(e) states explicitly that it protects "any person who furnishes information to a consumer reporting agency" from defamation actions based on information disclosed pursuant to the act absent a showing of malice or willful intent. Having reviewed the court's opinion in Whitesides, I conclude that the court's interpretation of the statute in that case is inconsistent with the statute's plain reading and would deny those who furnish information to consumer reporting agencies the protection that Congress intended. Accordingly, I decline to follow it.

In order to prove her defamation claim, plaintiff will have to prove that First Tennessee reported the information with malice or willful intent to injure. Plaintiff cannot

make this showing. Although the Fair Credit Reporting Act does not define the terms "malice or willful intent," courts considering the issue have adopted the definitions that apply to these terms in libel law. Thornton, 619 F. 2d at 705. A statement will be deemed to have been made with malice if made "with knowledge that it was false or with reckless disregard of whether it was false or not." Id. I have already found that plaintiff has adduced insufficient evidence of willfulness to survive First Tennessee's motion for summary judgment on the issue of punitive damages. Because the showing of malice or willful intent to injure under § 1681h(e) is a higher standard of proof than the willfulness required for punitive damages under § 1681n, see id. at 706, plaintiff's defamation claim with respect to First Tennessee's reporting of the fraudulent account from February to July 1999 must fail.

2. First Tennessee's re-reporting of account information in October 1999

Plaintiff contends that First Tennessee defamed her when it re-reported the derogatory information to CSC in connection with the account in plaintiff's name.[2] Before addressing the merits of this claim, I must address First Tennessee's contention that the evidence propounded by plaintiff does not create a genuine dispute of fact regarding whether

[2]Although this claim would also appear to state a claim under § 1681s-2(a) of the Fair Credit Reporting Act, which requires entities furnishing information to provide accurate information to consumer reporting agencies, private individuals may not bring a cause of action for an alleged violation of this subsection. See § 1681s-2(d) (granting federal and state officials exclusive authority to enforce § 1681s-2(a)). Presumably, this is why plaintiff did not include this claim among her Fair Credit Reporting Act claims.

First Tennessee re-reported the information. As support for her contention that First Tennessee may have been responsible, plaintiff cites the deposition of Janice Fogelman, who testified as a witness on behalf of CSC with respect to its policies and procedures regarding entering data and updates on investigations of fraudulent accounts. From her review of printed copies of electronic data maintained on CSC's database, Fogelman concluded that the reason the derogatory account information reappeared on plaintiff's credit report in October 1999 was because someone at one of Equifax's affiliates had entered the information manually at the direction of First Tennessee Bank.

Defendant First Tennessee labels Fogelman's testimony "sheer speculation" and denies that a material dispute of fact exists with respect to whether it re-reported the derogatory account information. As proof that it could not have re-reported the information, defendant First Tennessee cites an affidavit from Arthur J. Barnett, who is the vice president of information systems and investment banking for First Tennessee and is one of defendant's named experts in this case. In his affidavit, Barnett avers that "zero electronic information was sent via metrotape by First Tennessee Bank National Association to any credit reporting agency" after June of 1999 regarding the loan identified as belonging to plaintiff. Aff. of Arthur Barnett, dkt. #40 at ¶ 4.

Although I agree that plaintiff's evidence is not overwhelming, it is sufficient to allow a jury to conclude that First Tennessee re-reported the information. Fogelman drew her conclusion about how the information had reappeared by looking at various codes on

plaintiff's credit data and from her knowledge of credit information reporting procedures. See Dep. of Janice Fogelman, Oct. 11, 2001, dkt. #71, at122-129. This evidence would be admissible at trial. Further, Barnett's affidavit does not refute Fogelman's testimony because Fogelman testified that the derogatory information had *not* been submitted by electronic tape but appeared to have been entered manually. Accordingly, a triable issue of fact exists on this issue.

Section § 1681h(e) does not apply to plaintiff's defamation claim based on First Tennessee's alleged re-reporting of the derogatory account information in October 1999. Plaintiff learned that the derogatory information was being re-reported when her mortgage company showed her a copy of her credit report when she applied for a loan in November 1999. Because plaintiff did not request a copy of her credit report on her own, this was not a disclosure pursuant to § 1681g or § 1681h. Further, this was not a disclosure under § 1681m because the mortgage company did not take any adverse action against plaintiff; as noted previously, Associated Mortgage approved her loan application. Therefore, because the disclosure of plaintiff's credit report was not made pursuant to the Fair Credit Reporting Act's mandatory disclosure provisions, § 1681h(e) does not apply and plaintiff may bring her defamation claim without proving malice.

In Wisconsin, the elements of a defamatory communication are: (1) a false statement; (2) communicated by speech, conduct, or in writing to a third person; (3) that is unprivileged and tends to harm one's reputation so as to lower that person in the estimation

of the community or deters others from associating or dealing with the person. Torgerson v. Journal Sentinel, Inc., 210 Wis. 2d 524, 534, 563 N.W. 2d 472, 477 (1997); Wis. JI-Civil 2500 at 1 (1993) and 2501 at 1 (1991). Whether a communication is capable of a defamatory meaning is a question of law for the court. Lathan v. Journal Co., 30 Wis.2d 146, 153, 140 N.W.2d 417 (1966); Wis. JI-Civil 2500 at 4. The legal standard for determining whether a statement is capable of conveying a defamatory meaning is whether the language is reasonably capable of conveying a defamatory meaning to the ordinary mind and whether the meaning ascribed by the plaintiff is a natural and proper one. Wis. JI-Civil 2500 at 5. "[T]he words must be reasonably interpreted and must be construed in the plain and popular sense in which they would naturally be understood in the context in which they were used and under the circumstances they were uttered." Frinzi v. Hanson, 30 Wis. 2d 271, 276, 140 N.W. 2d 259 (1966).

If the court rules that the communication is capable of a defamatory meaning, the case goes to the jury "to determine whether [the] communication . . . was so understood by its recipient." Bauer v. Murphy, 191 Wis. 2d 517, 523, 530 N.W. 2d 1, 3 (Ct. App. 1995) (quoting Hoan v. Journal Co., 238 Wis. 311, 329, 298 N.W. 228, 236 (1941)). This is so even if the plaintiff has not alleged or proved special damages. Martin v. Outboard Marine Corp., 15 Wis. 2d 452, 460-461, 113 N.W.2d 135, 139 (1962) (adopting Restatement of Torts on Defamation, § 569)); Wis. JI-Civil 2500 at 15.

I conclude that plaintiff has adduced enough evidence to survive defendant's motion for summary judgment on this defamation claim. Defendant First Tennessee has not disputed that the derogatory account information attributed to plaintiff was false. Furthermore, the information was published to a third party, CSC, who in turn provided it to Associated Mortgage. Finally, the information was capable of conveying a defamatory meaning and could tend to harm plaintiff's reputation, especially in the credit-granting community. Although there is little evidence in the record to suggest that plaintiff's reputation was *actually* harmed as a result of the re-reporting of the derogatory First Tennessee tradeline information on her credit report, (according to plaintiff, Ruesch at River Cities Bank believed that the delinquent bank accounts on plaintiff's credit report were not plaintiff's, see dkt. #56 at 95, 120-122), Wisconsin law provides that this is a matter to be determined by the jury. Accordingly, defendant First Tennessee's motion for summary judgment on this claim will be denied.

B. Claims Against CSC

1. Characterization of First Tennessee account from July - October 1999

Plaintiff contends that CSC defamed her by designating the First Tennessee account as disputed instead of deleting it in its entirety. Plaintiff learned of CSC's characterization of the account when CSC provided her with the results of its reinvestigation, as required by

§ 1681i(a)(6)(B). Because this was not a disclosure pursuant to § 1681g, § 1681h or § 1681m, the qualified immunity provision does not apply.

Nonetheless, even if she is not required to prove malice, plaintiff cannot prevail on her defamation claim because there is no evidence that CSC ever published the information to a third party. Without evidence that any third party ever saw her credit report with the "dispute–resolution pending" notation on it, plaintiff cannot establish an essential element of her defamation claim.

2. CSC's re-publication of derogatory account information in October 1999

Finally, plaintiff contends CSC defamed her by re-publishing the derogatory information about the First Tennessee account with no mention of the fraud. As found previously with respect to plaintiff's claim against First Tennessee, plaintiff need not make the showing of malice required by § 1681h(e) with respect to this claim because it does not involve a disclosure covered by that subsection. Further, for the reasons stated with respect to plaintiff's defamation claim against First Tennessee, defendant CSC is not entitled to summary judgment on this portion of plaintiff's defamation claim.

ORDER

IT IS ORDERED that the motion of defendant CSC of Wisconsin for summary judgment is GRANTED IN PART and DENIED IN PART and the motion of defendant First Tennessee Bank National Association for summary judgment is GRANTED IN PART and DENIED IN PART. The following claims of plaintiff are DISMISSED:

1. Fair Credit Reporting Act claim against defendant CSC for reporting the fraudulent account as "dispute–resolution pending";

2. Fair Credit Reporting Act claim against defendant First Tennessee for reporting the fraudulent account as being investigated for fraud;

3. State common law claim for defamation against defendant CSC for reporting account as "dispute–resolution pending"; and

4. State common law claim for defamation against defendant First Tennessee for reporting the fraudulent account as belonging to plaintiff from February to July 1999.

Plaintiff is allowed to go forward on the following claims:

1. Fair Credit Reporting Act claim against defendant CSC for re-publication of derogatory account information in October 1999;

2. Fair Credit Reporting Act claim against defendant First Tennessee for reporting the fraudulent account as belonging to plaintiff from February to July 1999;

3. State law defamation claim against defendant CSC for re-publication of the derogatory account information in October 1999; and

4. State law defamation claim against defendant First Tennessee for re-reporting the derogatory account information in October 1999.

Entered this 14th day of December, 2001.

BY THE COURT:

BARBARA B. CRABB
District Judge