IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

KIM BROWN, Plaintiff, vs. WAL-MART STORES INC.; EXXON MOBILE CORPORATION; GE MONEY BANK; CITIBANK (SOUTH DAKOTA), N.A.; CITIGROUP INC.; GENERAL ELECTRIC COMPANY; MIDLAND FUNDING LLC; MIDLAND CREDIT MANAGEMENT, INC.; ENCORE CAPITAL GROUP, INC.; LVNV FUNDING, LLC; AIS SERVICES, LLC; TRANS UNION LLC; EXPERIAN INFORMATION SOLUTIONS, INC.; and EQUIFAX INC., Defendants.	)	No.2:09-CV-2148V

ORDER GRANTING DEFENDANTS'
RULE 12(b)(6) MOTIONS TO DISMISS

The plaintiff, Kim Brown, proceeding *pro se*, has filed suit against fourteen separate defendants asserting violations of the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. §§ 1681 – 1681u, and the Tennessee Consumer Protection Act ("TCPA"), Tenn. Code Ann. §§ 47-18-101 to -121, plus eleven state law claims for negligence, intentional infliction of emotional distress, negligent infliction of emotional distress, malicious falsehood, false light, fraud and fraudulent misrepresentation, failure to affirm identity, issuing of a false credit report, negligent enablement of imposter/fraud, malicious interference with a business relationship, and

defamation. Before the court are three related motions: (1) the January 22, 2010 motion of defendant, AIS Services, LLC ("AIS"), to dismiss all claims filed against it, (Doc. No. 93); (2) the February 5, 2010 motion of defendant, LVNV Funding, LLC ("LVNV"), to dismiss all claims filed against it, (Doc. No. 100); and (3) the February 5, 2010 motion of defendants, Wal-Mart Stores, Inc. ("Wal-Mart"), ExxonMobil Corporation ("Exxon"), Citibank (South Dakota), N.A. ("Citibank"), Citigroup, Inc. ("Citigroup"), General Electric Company ("G.E."), and GE Money Bank ("GE Money"), to dismiss, with prejudice and without leave to amend, all claims filed against them, except for the claim under § 1681s-2(b) of the FCRA. (Doc. No. 103). On May 3, 2010, the court granted the motion of defendants Midland Funding, LLC ("Midland Funding"), Midland Credit Management, Inc. ("Midland Credit"), and Encore Capital Group, Inc. ("Encore"), to join in the motion to dismiss filed by defendant LVNV and the combined motion to dismiss filed by defendants Wal-Mart, Exxon, Citibank, Citigroup, G.E., and G.E. Money. (Doc. No. 131.)[1]

[1] Defendants Trans Union, LLC ("Trans Union"), Experian, PLC ("Experian"), and Equifax, Inc. ("Equifax") have not moved to dismiss Brown's Second Amended Complaint but instead have entered answers denying all his allegations and raising certain affirmative defenses. (*See* Doc. No. 65, Ans. of Def. Equifax; Doc. No. 67, Ans. of Def. Trans Union; and Doc. No. 91, Ans. of Def. Experian.)

The moving defendants seek dismissal pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.[2] The moving defendants argue that Brown has failed to state claims under the FCRA, except for the claim under § 1681s-2(b) of the FCRA, that the FCRA preempts certain of Brown's state law claims, and that Brown has failed to state claims for his Tennessee state law claims not preempted. Brown filed timely responses in opposition to all three motions. (Doc. Nos. 95, 121, 122.) The parties have consented to the jurisdiction of the United States Magistrate Judge, including entry of judgment, pursuant to 28 U.S.C. § 636(c). For the reasons set forth below, the defendants' motions are hereby granted.

I. PROCEDURAL AND FACTUAL BACKGROUND

On February 10, 2009, Brown, a Tennessee resident, filed a *pro se* complaint in Tennessee state court against Wal-Mart and Exxon seeking damages for emotional distress, the filing of a false credit report, negligence, and malicious interference with business relationships. Wal-Mart and Exxon timely removed the action to this court. After removal, Brown filed an amended complaint against those two defendants adding a claim for harassment and requesting both injunctive relief and a total of five hundred and fifty million dollars ($550,000,000.00) in compensatory and

[2] In its motion for dismissal, AIS seeks relief pursuant to Rule 8(a)(2). Because AIS seeks dismissal due to Brown's failure to state a claim upon which the court may grant relief, the court will treat the motion as a motion brought under Rule 12(b)(6).

punitive damages.[3] (Doc. No. 9.) Both Wal-Mart and Exxon filed answers denying Brown's claims. (Doc. Nos. 14, 15.) The court then granted Brown leave to add new parties and additional counts. (Doc. No. 44.)

Brown filed his Second Amended Complaint on November 23, 2009, adding claims under both the FCRA and TCPA and other state law claims. (Doc. No. 45.) Brown also added twelve additional defendants: G.E. Money, Citibank, Citigroup, G.E., Midland Funding, Midland Credit, Encore, LVNV, AIS, Trans Union, Experian, and Equifax. (*Id.*) Brown's Second Amended Complaint is 45 pages long, consists of 150 paragraphs, and includes thirteen separate causes of action. In his Second Amended Complaint, Brown asserts five of the thirteen causes of actions against all fourteen defendants: intentional infliction of emotional distress (First Cause of Action); negligent infliction of emotional distress (Second Cause of Action); malicious falsehood (Third Cause of Action); false light (Fourth Cause of Action); and defamation (Thirteenth Cause of Action). Brown asserts the remaining eight causes of action against nine of the defendants, i.e., all defendants except Midland Funding, Midland Credit, Encore, LVNV and AIS: FCRA (Fifth Cause of Action); Unfair and Deceptive Business Practices (Sixth Cause of

[3] In his first amended complaint, Brown specifically requested "judgment in the sum of two hundred million dollars and three hundred fifty million dollars in punitive [damages]." (Pl.'s 1st Am. Compl. 11.)

Action); Fraud/Fraudulent Representations (Seventh Cause of Action); Failure to Confirm Identity (Eighth Cause of Action); Issuing a False Credit Report (Ninth Cause of Action); Negligence (Tenth Cause of Action); Negligent Enablement of Identity/Imposter Fraud (Eleventh Cause of Action); and Malicious Interference with Business Relations (Twelfth Cause of Action).

Brown's Second Amended Complaint sets forth the following relevant, non-conclusory factual allegations. On or about October 6, 2008, Brown received a bill in the mail from Midland Credit requesting payment on a delinquent account in his name with a balance due of $732.79. (Pl.'s Sec. Am. Compl. ¶ 17; Ex. 1.) Upon inquiry, Brown discovered that the account was in reference to a Wal-Mart credit card, which he did not open. (*Id.* ¶ 18.) Brown immediately alerted Midland Credit, who referred him to Wal-Mart. (*Id.* ¶¶ 18-19.) Brown then contacted Wal-Mart, who informed him the account had been opened over the internet sometime in 2005 using his name, a social security number similar to his, an address at 2771 Mojave Place, Memphis, TN, at which Brown claims he has never resided, and an original credit limit of four hundred ($400) dollars. (*Id.* ¶¶ 20-23; Ex. 3.) After speaking with Wal-Mart, Brown checked his credit report and discovered a similar unauthorized account with Exxon. (*Id.* ¶ 26.) Brown contacted LVNV (the collection agency holding the Exxon card account) and discovered the Exxon account was opened around the same time as the

Wal-Mart account using the same information and had a balance due of two hundred fifty-seven ($257.00) dollars. (*Id.* ¶¶ 23, 26; Ex. 3.) Since learning of the errors, Brown claims to have contacted Wal-Mart, Exxon, Experian, TransUnion, Equifax, and their agents on multiple occasions to correct the error to no avail. (*Id.* ¶¶ 80-82.)

Brown alleges that the defendants' failure to implement proper preventative measures in issuing credit cards caused him to become the victim of identity theft at the hands of an unknown imposter. Specifically, Brown claims the defendants' practices of partially matching social security numbers when approving new customers allowed the imposter to falsely obtain and use credit cards in his name, thus damaging his credit score. Brown also claims that the defendants' practice of reporting variations of his social security numbers on credit reports has damaged his credit. Moreover, Brown asserts the defendant companies' refusal to remedy their erroneous actions has damaged his ability to obtain a loan or line of credit and has caused him to suffer mental and emotional distress, pain and suffering, and financial injury. *(Id.* ¶¶ 29, 37, 41, 48 57, 70.) Specifically, Brown claims that he could have earned over 20 million dollars in one to two years and up to 200 million dollars in three years in a business he had planned as a concert promoter

but for his bad credit which prohibited him from obtaining the necessary financing.[4] (*Id.* ¶¶ 55, 58-60, 78.)

In his Second Amended Complaint, Brown alleges the following: (1) defendants Wal-mart and Exxon are companies doing business with consumers, i.e., retail operations which issue credit cards to individuals doing business with them; (2) defendants G.E. Money, Citibank, Citigroup, and G.E. are agents or servants of Wal-Mart and Exxon; (3) defendants Midland Funding, Midland Credit, Encore, LVNV, and AIS are debt collectors, affiliated companies, and agents of Wal-Mart and Exxon; and (4) defendants Trans Union, Experian, and Equifax are consumer credit reporting agencies.[5] (*Id.* ¶¶ 14, 15, 16.)

III. STANDARD OF REVIEW

A court may grant a motion to dismiss for failure to state a claim upon which relief can be granted. FED. R. CIV. P. 12(b)(6). Rule 8(a)(2) states that, at a minimum, a pleading should contain "a short and plain statement of the claim showing that the pleader is entitled to relief." In *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), the Supreme Court reiterated that in the face of a motion brought pursuant to Rule 12(b)(6), a complaint need not

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[4] According to Exhibit 5, Brown is employed by the Memphis City School system.

[5] In their answers, Trans Union and Experian admit that they are credit reporting agencies as defined in the FCRA. Equifax denies it is a credit reporting agency as defined in the FCRA.

contain “detailed factual allegations,” but must present something more than “labels . . . conclusions, and a formulaic recitation of the elements of a cause of action.” *Id.*, at 555. Although “a judge must accept as true all of the factual allegations contained in the complaint, *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam), courts are not bound to accept conclusory allegations as true, *Twombly*, 550 U.S. at 555 (citing *Papasan v. Allain*, 478 U.S. 265 (1986)). The factual allegations in a complaint must “be enough to raise a right to relief above the speculative level . . . on the assumption that all the allegations in the complaint are true (even if doubtful in fact).” *Id.* at 555-56 (citations omitted).

Under this standard, only a claim which is “plausible on its face” will survive dismissal. *Id.*, at 570; *Tam Travel, Inc. v. Delta Airlines, Inc.*, 583 F.3d 896, 903 (6th cir. 2009). “The plausibility standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted lawfully.” *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009). Determining whether a complaint states a facially plausible claim is a “context-specific task” requiring a trial court to “draw on its judicial experience and common sense.” *Id.*, 129 S. Ct. at 1950.

Pro se complaints must be construed liberally. *Erickson*, 551 U.S. at 94. A *pro se* litigant’s complaint, “‘however inartfully

pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers.'" *Id.* (quoting *Estelle v. Gamble*, 429 U.S. 97, 106 (1976)). But, courts must place certain limits on the lenient treatment given to *pro se* litigants who are not "'automatically entitled to take every case to trial.'" *Farah v. Wellington*, 295 F. App'x 743, 748 (6th Cir. 2008) (quoting *Pilgrim v. Littlefield*, 92 F.3d 413, 416 (6th Cir. 1996)). Every litigant's complaint "'must contain either direct or inferential allegations respecting all material elements to sustain a recovery under some viable legal theory.'" *Tam Travel*, 583 F.3d at 903 (quoting *Edison v. State of Tenn. Dep't of Children's Servs.*, 510 F.3d 631, 634 (6th Cir. 2007)). In short, *pro se* litigants must comply with the pleadings standards set forth in both *Twombly* and *Iqbal* to survive a motion to dismiss.

IV. ANALYSIS

A. Brown's Fair Credit Reporting Act Claim (Fifth Cause of Action)

Brown asserts claims under the FCRA against nine of the defendants: Wal-Mart, Exxon, G.E., G.E. Money, Citibank, Citigroup, Trans Union, Experian, and Equifax. Brown asserts that these nine defendants' methods of verifying new customer information were severely flawed and that the defendants continued to use their flawed processes despite knowing of its dangers. Brown also alleges in conclusory fashion that these defendants engaged in the "partial matching" of social security numbers in the course of

reporting information, as opposed to matching these numbers in their entirety, because they valued speed over accuracy and that this practice lacks sufficient safeguards to prevent harm. In addition, he alleges that after he notified the credit reporting bureaus and the companies of the inaccuracies in his credit report, they failed to conduct a proper investigation and remove the incorrect information from his credit report in accordance with 15 U.S.C. § 1681s-2(b). Due to the defendants' failures, Brown claims to have suffered financial loss as well as mental injuries including stress, anxiety, insomnia, and depression.

The defendants assert that the FCRA preempts some of Brown's state law claims. The court will first determine whether and to what extent Brown has stated a claim under the FCRA and then will address the question of preemption.

1. *Brown's FCRA Claims under § 1681s-2(a)&(b)*

The FCRA places obligations on three distinct types of entities involved in consumer credit: consumer reporting agencies,[6]

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[6] Under the FCRA, a consumer reporting agency is defined as:

> any person which for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purposes of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.

15 U.S.C. § 1681a(f). The term "consumer report" is defined by the FCRA and specifically excludes "any report containing information

users of consumer reports, and furnishers of information to consumer reporting agencies. Any person who either willfully or negligently violates the FCRA is subject to civil liability for those actions. *See* 15 U.S.C. §§ 1681n, 1681o. Here, Brown has sued three defendants he alleges are consumer reporting agencies - Transunion, Experian, and Equifax - none of which have filed motions to dismiss. Brown has not sued any users of consumer reports. Although the term "furnisher of information" is not defined within the FCRA, common sense dictates that the term would encompass entities such as defendants Wal-Mart, Exxon, G.E., G.E. Money, Citibank, and Citigroup which transmit information concerning particular debts owed by particular consumers to consumer reporting agencies such as Experian, Equifax, and Trans Union.[7]

The specific requirements with which furnishers of information must comply are listed in 15 U.S.C. § 1681s-2. Section 1681s-2 of the FCRA is entitled: "Responsibilities of furnishers of information to consumer reporting agencies." That section identifies two duties imposed upon furnishers of information: the

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solely as to transactions or experiences between the consumer and the person making the report." 15 U.S.C. § 1681a(d)(2)(A)(I).

[7] In addition, Brown has sued three debt collection companies - Midland Credit, LVNV, and AIS along with the parent company and an affiliated company of Midland Credit, Encore and Midland Funding. All these defendants would be characterized as furnishers of information although Brown does not assert a claim under the FCRA against these defendants.

duty to provide accurate information [§ 1681s-2(a)] and the duty to undertake an investigation upon receipt of notice of a dispute from a consumer reporting agency [§ 1681s-2(b)].

Brown specifically identifies § 1681s-2(b) as a basis for his claims under the FCRA along with "any other applicable provisions under FCRA." To the extent Brown relies on "any other applicable provisions under FCRA," Brown's complaint could be fairly read to allege a claim under § 1681s-2(a) which governs the supply of accurate information. Because the FCRA limits enforcement of § 1681s-2(a) exclusively to certain federal and/or state officers, any and all such claims under § 1681s-2(a) are dismissed for lack of standing. *See* 15 U.S.C. § 1681s-2(d); *Carney v. Experian Info. Solutions*, 57 F. Supp. 2d 496, 501-02 (W.D. Tenn. 1999).

Under § 1681s-2(b), upon receipt of notice from a consumer reporting agency that furnished information is disputed, the furnisher of the information is required to: (1) investigate the disputed information; (2) review all of the relevant information provided to it by the consumer reporting agency; (3) report the results of its investigation to the agency; and (4) report the results to all other agencies to which the information was originally furnished if an inaccuracy or an incompleteness is discovered. *Carney v. Experian Info. Solutions*, 57 F. Supp. 2d 496, 502 (W.D. Tenn. 1999); 15 U.S.C. § 1681s-2(b)(1)(A)-(D).

In *Carney*, an earlier opinion of this court involving the FCRA, the court held that § 1681s-2(b) does not confer a private right of action on an individual consumer such as Brown. The majority of courts which have addressed the issue since the court's ruling in *Carney,* however, have found that consumers do possess a private right of action under § 1681s-2(b). *See Nelson v. Chase Manhattan Mortgage Corp.*, 282 F.3d 1057, 1059-60 (9th Cir. 2002)(holding that § 1682s-2(b) creates a cause of action by a consumer against a furnisher of credit information); *Dimezza v. First USA Bank, Inc.*, 103 F. Supp. 2d 1296, 1299-1301 (D.N.M. 2000); *Ayers v. Equifax Info. Servs.*, No. 3:03CV551, 2003 WL 23142201, 2003 U.S. Dist. LEXIS 23271, at *11 n.6 (E.D. Va. Dec. 16, 2003) (listing other cases in agreement). The majority view's rationale can be summarized as follows:

> The civil liability sections, 15 U.S.C. § 1681n and 1681o, explicitly provide a private right of action for consumers wishing to enforce any provision of the Fair Credit Reporting Act against "any person" who either "willfully fails to comply" or is "negligent in failing to comply." Absent any explicit limitation, the plain language of 15 U.S. C. §§ 1681n, 1681o, 1681s-2(b) and (c) provide a private right of action for a consumer against furnishers of information who have willfully or negligently failed to perform their duties upon notice of a dispute. Furthermore, the negative inference of explicitly precluding a consumer's right of action for violations of § 1681s-2(a) is that they are preserved in § 1681-2(b). Accordingly, the plain language of the Fair Credit Reporting Act compels the conclusion that there is a private right of action for consumers to enforce the investigation and reporting duties imposed on furnishers of information.

Dimezza, 103 F. Supp.2d at 1300.

The Sixth Circuit has not yet addressed the issue of whether §1681s-2(b) creates a private cause of action. *See Downs v. Clayton Homes, Inc*., 88 F. App'x 851, 853-54 (6th Cir. 2004) (unpublished) (assuming that a private right of action exists under § 1681s-2(b) but noting that the plaintiffs had failed to allege the requisite facts to state a claim under this subsection). After considering the rationale of the Ninth Circuit and the reasoning of the majority of the other federal courts which have addressed the issue since this court's opinion in *Carney*, this court now joins the majority and holds that § 1681s-2(b) confers a private right of action on a consumer.

Here, Brown alleges that he informed all three major credit reporting agencies of the errors on his credit report. At this stage in the litigation, this claim alone is sufficient to trigger the investigatory requirements placed on furnishers of information. *See Jamarillo* v. Experian Info. Solutions, Inc., 155 F. Supp. 2d 356, 363 (E.D. Pa. 2001)(finding plaintiff's claims that he informed the consumer reporting agency sufficient pending discovery since plaintiff could not know at that stage of the litigation whether the consumer reporting agency actually notified the furnisher of information of the dispute). Brown has also alleged the furnisher of information defendants named in this count failed to properly investigate his claim or report their results to the consumer reporting agencies, which he claims to be the cause of his

poor credit score. Because none of the defendants named in this count have moved to dismiss Brown's claims under § 1681s-2(b)of the FCRA, the court makes no determination at this time as to whether Brown has sufficiently pled facts supporting his claim under the *Iqbal* standard. *See Eller v. Experian Informtion Solutions, Inc.,* No. 09-cv-00040-MSK-KMT, 2009 WL 2601370 *3, 2009 U.S. Dist. LEXIS 74583 (D. Colo. Aug. 20, 2009)(finding plaintiff's FCRA claim failed under *Iqbal* pleading standard).

2. *Preemption of Brown's State Law Claims*

The moving defendants argue that the FCRA preempts some of Brown's state law claims. In opposition, Brown argues that the FCRA does not preempt his state law claims because he has sufficiently pled willfulness on the part the defendants.

The FCRA contains two preemption provisions: 15 U.S.C. §§ 1681h(e) and 1681t(b)(1)(F). Section 1681h(e), which is also known as a qualified immunity statute, was the only preemption provision in the original act dealing with preemption of state law claims. Section 1681 is entitled "Conditions and Form of Disclosures to Consumers." Subparagraph (e) provides:

> Limitation of Liability.
>
> 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 whom 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*.

15 U.S.C. § 1681h(e) (emphasis added). In 1996, Congress amended the FCRA and added § 1681t(b)(1)(F), an additional provision preempting state law, without repealing or amending the original preemption provision. Section 1681t is entitled "Relation to State Law." Section 1681t(b)(1)(F) provides in relevant part:

> (b) General exceptions
>
> No requirement or prohibition may be imposed under the laws of any State - -
>
> (1) with respect to any subject matter regulated under . . .
>
> (F) section 1681s-2 of this title, relating to the responsibilities of persons who furnish information to consumer reporting agencies, except that this paragraph shall not apply - -
>
> (i) with respect to section 54A(a) of chapter 93 of the Massachusetts Annotated Laws (as in effect on September 30, 1996); or (ii) with respect to section 1785.25(a) of the California Civil Code (as in effect on September 30, 1996).

Id.

No circuit court has decided how these two preemption clauses in the FCRA interact but several district courts have addressed the issue resulting in different, conflicting interpretative approaches. *See Gorman v. Wolpoff & Abramson, LLP*, 584 F.3d 1147, 1165-67 (9th Cir. 2009) (discussing the differing approaches taken

by the district courts in interpreting the two provisions but declining to decide the issue because the plaintiff failed to state a claim under state law regardless of whether his state law claims were preempted); *and Beyer v. Firststar Bank, N.A.*, 447 F.3d 1106, 1108 (8th Cir. 2006) (declining to address the issue of preemption but noting the disagreement among the districts). *But see* discussion of *Premium Mortgage Corp. v. Equifax, Inc*., 583 F.3d 103 (2nd Cir. 2009)(*infra* pp. 22-24).

District courts addressing the issue have developed three distinctive approaches to reconciling the two preemption provisions: (1) total preemption; (2) temporal preemption; and (3) statutory preemption. *See Manno v. Am. Gen. Fin. Co.*, 439 F. Supp. 2d 418, 424-25 (E.D. Pa. 2006)(summarizing the three major approaches, adopting the statutory approach, and granting summary judgment as to plaintiff's claim under Pennsylvania's consumer protection act, but denying summary judgment as to plaintiff's defamation claim). Under the total preemption approach, courts interpret § 1681t(b)(1)(F) broadly to preempt all state law claims, including both those that stem from state statutes and those arising under state common law, against furnishers of information "with respect to any subject matter related to § 1681s-2," thus effectively repealing the earlier preemption provision, 1681h(e), and eliminating any state tort claims against furnishers of credit information. *See Jamarillo v. Experian Info. Solutions, Inc.,* 155

F. Supp. 2d 356, 361 (E.D. Pa. 2001) (adopting total preemption approach and dismissing plaintiff's claims under the Pennsylvania Consumer Protection Act and state law claim for defamation). *See also Manno*, 439 F. Supp. 2d at 424 n.10 (collecting cases in which total preemption approach was followed). Courts adopting the temporal approach look to whether the cause of action arises before or after a furnisher of information receives notice of a dispute from a consumer reporting agency; causes of action arising before notice is received are governed by § 1681h(e) and those arising after are governed by § 1681t(b)(1)(F).[8] *See Stafford v. Cross Country Bank*, 262 F. Supp. 2d 776, 783-84 (W.D. Ky. 2003) (adopting temporal approach, dismissing plaintiff's state law claims for defamation and slander, and retaining plaintiff's claims under Kentucky's consumer protection act, but limiting the consumer

[8] The court notes the disagreement among courts adopting the temporal approach concerning whether notice of a dispute must come through the consumer reporting agency in order to trigger the furnisher of information's responsibilities. *Compare Woltersdorf v. Pentagon Fed. Credit Union*, 320 F. Supp. 2d 1222, 1226 (N.D. Ala. 2004) ("But, the absolute bar of the newer § 1681t(b)(1)(F) applies only *after* a *consumer reporting agency* notifies the furnisher of credit information of a consumer dispute.") (emphasis in original), *with Ryder v. Washington Mut. Bank, FA*, 371 F. Supp. 2d 152, 155 (D. Conn. 2005) ("'[N]otice may be received from the . . . credit reporting agency or from the consumer himself.'" (quoting *Kane v. Guar. Residential Lending, Inc.*, No. 04-CV-4847 (ERK), 2005 U.S. Dist. LEXIS 17052, 2005 WL 1153623, at *8 (E.D.N.Y. May 16, 2005))). *But see Downs*, 88 F. App'x at 853-54 (noting that plaintiffs must show the furnisher received notice of the dispute from a consumer reporting agency, and not the plaintiff). This distinction is inconsequential to the court's assessment of Brown's claims at this time, however, as the court chooses not to adopt the temporal approach.

protection act claim to actions taken by the bank before it knew or had reason to know the information in its possession was inaccurate). *See also Manno*, 439 F. Supp. 2d at 425 n.11 (collecting cases in which the temporal approach was followed). Finally, under the statutory approach, § 1681t(b)(1)(F) only preempts state law claims based on state statutes that relate to the furnishing of credit information, leaving § 1681h(e) to preempt tort claims arising under state common law. *See Wolfe v. MBNA America Bank*, 485 F. Supp. 2d 874, 886 (W.D. Tenn. 2007) (adopting statutory approach and finding plaintiff's negligence and gross negligence claims preempted but finding libel claim and claim under Tennessee's consumer protection act not preempted);[9] *Pinckney v. SLM Fin. Corp.*, 433 F. Supp. 2d 1316, 1321 (N.D. Ga. 2005); *McCloud v. Homeside Lending*, 309 F. Supp. 2d 1335, 1341 (N.D. Ala. 2004). *See also Manno*, 439 F. Supp. 2d at 425 n.12 (collecting cases in which the statutory approach was followed).

The court, however, finds these approaches unnecessary in this case in light of the plain language of the two provisions. The

[9] *Wolfe* recognized a fourth approach adopted by the Middle District of Tennessee in *Westbrooks v. Fifth Third Bank*, No. 3:05-0664, 2005 WL 3240614 (M.D. Tenn. Nov. 30, 2005) as follows: "All state law claims that do not allege willfulness are preempted by § 1681h(e) and any surviving claims alleging willfulness are preempted under § 1681t(b)(1)(F) if they involve a subject-matter regulated under § 1681s-2." *Id.* at *6. Applying this approach, the court held that plaintiff's defamation claim and Tennessee Consumer Protection Act claim were preempted under § 1681t(b)(1)(F) because it pertains to subject matter regulated under § 1681s-2.

court sees no reason to analyze an interplay between §§ 1681h(e) and 1681t(b)(1)(F) because Brown's claims against the moving defendants do not implicate the former provision. *See Knudson v. Wachovia Bank, N.A.*, 513 F. Supp. 2d 1255, 1260 (N.D. Ala. 2007) (noting that courts should "not undertake to resolve a theoretical conflict between statutes unless the statute, which allegedly causes the conflict with the other, unambiguous statute (sic) applies in the case"); *see also Abbet v. Bank of America*, No. 3:04-CV-01102-WKW-VPM, 2006 WL 581193, 2006 U.S. Dist. LEXIS 12649, at *17-18 (M.D. Ala. March 8, 2006).

Section 1681t(b)(1)(F) expressly preempts all state law claims "with respect to any subject matter related to § 1681s-2." *Knudson*, 513 F. Supp. 2d at 1260. By contrast, § 1681h(e) deals with claims "based on information disclosed pursuant to section 1681g, 1681h, or 1681m of [the FCRA], or based on information disclosed by a user of a consumer report to or for a consumer against whom the user has taken adverse action, based in whole or in part on the report . . . ." Sections 1681g and 1681h set out requirements of consumer reporting agencies in their disclosures to consumers. Section 1681m applies to users of information who take adverse action against the consumer based on information contained in a consumer report and sets forth the duties of the users of information. Thus, § 1681h(e) deals with actions taken by either consumer reporting agencies covered by §§ 1681g and 1681h or users

of consumer reports covered by § 1681m, and not the actions of furnishers of information, which are strictly governed by § 1681s-2.

Here, Brown has not alleged that defendants Wal-Mart, Exxon, G.E., G.E. Money, Citibank, Citigroup, Encore, Midland Credit or Midland Funding qualify as "consumer reporting agencies"[10] under the FCRA, nor that they have taken any "adverse action"[11] against him. Rather, Brown alleges that defendants Wal-Mart and Exxon extended credit to an imposter in his name without his permission and that Wal-Mart, Exxon, G.E., G.E. Money, Citibank, Citigroup, Encore, Midland Credit and Midland Funding have all continued to improperly report the now delinquent accounts as Brown's own debts despite

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[10] The statutory definition of consumer reporting agency under the FCRA requires being in the business of "assembling or evaluating consumer credit information." 15 U.S.C. § 1681a(f). "'This implies a function which involves more than receipt and retransmission of information identifying a particular debt.'" *Carney*, 57 F. Supp. 2d at 501 (quoting *DiGianni v. Stern's*, 26 F.3d 346, 349 (2d Cir. 1994)). "Retailers . . . that merely furnish information to consumer reporting agencies based on their experience with consumers are not consumer reporting agencies within the meaning of the FCRA." *DiGianni*, 26 F.3d at 348. *See, e.g., Rush v. Macy's New York, Inc.*, 775 F.2d 1554, 1557 (11th Cir. 1985); *Myles v. General Motors Acceptance Corp.*, No. Civ. A. 97-2030, 1998 WL 299958, at *5 (E.D. La. June 4, 1999); *Lema v. Citibank (S.D.), N.A.*, 935 F. Supp. 695, 697 (D. Md. 1996).

[11] The FCRA defines "adverse action" generally as "any action taken . . . that is adverse to the interests of a consumer." 15 U.S.C. § 1681a(k). Adverse actions include the denial of insurance coverage or an increased rate or otherwise unfavorable change in the terms of an insurance policy, *SafeCo Ins. Co. of Am. v. Burr*, 551 U.S. 47, 53 (2007); 15 U.S.C. § 1681a(k)(1)(B)(I), or the repossession of a vehicle, *Cannon v. Metro Ford, Inc.*, 242 F. Supp. 2d 1322, 1331-32 (S.D. Fla. 2002).

being informed otherwise, actions which fall solely under the purview of § 1681s-2. Because Brown has not alleged claims against the moving defendants that fall within the categories of actions identified in §1681h(e), that is, information disclosed under §§ 1681g, 1681h, or 1681m, §1681h(e) is thus inapplicable to these defendants at this time. *See Knudson,* 513 F. Supp. 2d at 1260.

The court must therefore determine if Brown's state law claims are preempted under § 1681t(b)(1)(F). Statutory interpretation begins with the plain language of a statute. *Carter v. Welles-Bowen Realty, Inc.*, 553 F.3d 979, 986 (6th Cir. 2009); *Knudson*, 513 F. Supp. 2d at 1259 (citing *Albernaz v. United States*, 450 U.S. 333, 336 (1981)). The plain language of § 1681t(b)(1)(F) clearly preempts state laws dealing with the responsibilities of furnishers of information which are covered by § 1681s-2. The critical issue is what is meant by "state law"?

The Second Circuit Court of Appeals recently addressed this issue in connection with a similar preemption provision of the FCRA. In *Premium Mortgage Corp. v. Equifax, Inc.*, 583 F.3d 103 (2nd Cir. 2009), a mortgage lender brought a putative class action suit against several consumer reporting agencies for the agencies' practice of permitting purchases by third-party lenders of pre-screened consumer reports containing special information known as

"trigger leads."[12] *Id.* at 105. The plaintiff claimed the trigger leads were proprietary customer information and filed suit alleging nine state-law claims, including misappropriation of trade secrets, fraud, unfair competition, tortious interference [with business and contractual relations], and unjust enrichment. *Id.* The district court, however, dismissed the plaintiff's claims holding that the FCRA expressly preempted each of the plaintiff's state law claims. *Id.* at 106.

On appeal, the Second Circuit affirmed the district court's dismissal on preemption grounds. The preemption provision which the Second Circuit analyzed in that case, subparagraph A of Section 1681t(b)(1), provided that, "'No requirement or prohibition may be imposed under the laws of any State . . . with respect to *any subject matter* regulated under . . . *subsection (c) or (e) of section 1681b* of this title, *relating to* the prescreening of consumer reports . . . ." *Id.* at 106 (quoting 15 U.S.C. § 1681t(b)(1)(A)) (alteration in original). In holding that § 1681t(b)(1)(A) preempted the plaintiff's state law claims for misappropriation of trade secrets, unfair competition, and unjust enrishment, the Second Circuit dismissed the plaintiff's argument

[12] According to the Second Circuit, "trigger leads" are "generated during the process by which mortgage brokers . . . evaluate consumer loan applications," and generally contain information which indicate that a particular consumer has "'expressed a desire [to] a mortgage bank' to obtain a loan." *Premium Mortgage*, 583 F.3d at 105.

that the preemption provision at issue was only directed at state statutory claims. *See id.* ("Plaintiff's distinction between statutory and common-law claims under this section of the FCRA's express preemption provision is likewise unpersuasive."). Instead, the court noted that "'[t]he phrase '[n]o requirement or prohibition' sweeps broadly and suggests no distinction between positive enactments and common law; to the contrary, those words easily encompass obligations that take the form of common-law rules.'" *Id.* (quoting *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 521 (1992)(plurality opinion).

The Second Circuit's reasoning in *Premium Mortgage* is directly applicable here. The preemption provision at issue in *Premium Mortgage* is the same preemption provision at issue in this case, with the only difference being the subparagraph of the provision referenced. *See e.g.*, 15 U.S.C. § 1681t(b)(1)(A) (referencing §§ 1681b(c) & (e)), *and* 15 U.S.C. § 1681t(b)(1)(F) (referencing § 1681s-2).

This court therefore draws no distinction between state claims based on the common law and those created by statute and holds that both are expressly are preempted by the plain language of § 1681t(b)(1)(F).[13] This is because "[t]here is no ambiguity in §

[13] The court realizes that the end result as to furnishers of credit information is the same as the total preemption approach but that the rationale for reaching the result differs.

The court also declines to add a temporal trigger to the preemptive effect of the § 1681t(b)(1)(F) where the statute itself

1681t(b)(1)(F) on its face." *Knudson*, 513 F. Supp. 2d at 1259. "[Section] 1681t(b)(1)(F) does not allow for state law prohibitions or requirements which relate to the responsibilities of furnishers of information to consumer reporting agencies." *Id.* Applying the plain language of § 1681t(b)(1)(F), the FCRA preempts all of plaintiff's state law claims which are factually based on subject matter regulated under § 1681s-2, which includes the duty of furnishers of information to provide accurate information as well as their duty to conduct an investigation and correct reporting errors. *See* 15 U.S.C. §§ 1681s-2(a), (b).[14]

B. Brown's State Law Claims

As to Brown's state law claims, the defendants argue that these claims must be dismissed because they are preempted by the FCRA or because Brown has failed to establish the elements of those claims. In assessing claims which arise under state law, the court

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contains none. Section 1681s-2 covers a furnisher of information's conduct both before the furnisher has received notice of a dispute, *see* § 1681s-2(a), and after, *see* § 1681s-2(b); *Wolfe*, 485 F. Supp. 2d at 885. In addition, the court noted in *Wolfe*, "the temporal approach's . . . preservation of § 1681h(e) [is] disingenuous since any claim relating to the furnishing of credit information that avoids preemption under § 1681h(e) will ultimately be preempted by § 1681t(b)(1)(F)." *Id.* at 885 (Donald, J.).

[14] As the court stated above, Brown is not authorized to bring a claim under § 1681s-2(a). Thus, all of Brown's claims are dismissed to the extent that Brown attempts to bring any claim, either under state law or the FCRA, which would be covered by § 1681s-2(a).

will apply the laws of the forum state of Tennessee. *See Uhl v. Komatsu Forklift Co.*, 512 F.3d 294, 302 (6th Cir. 2008).

1. *Intentional Infliction of Emotional Distress (First Cause of Action)*

For his First Cause of Action, (Sec. Am. Compl. ¶¶ 87-92), Brown claims generally that the reckless, intentional, extreme, and outrageous actions of all the defendants have caused him to suffer from "great stress, depression, humiliation, insomnia, and great mental anguish." (Sec. Am. Compl. ¶¶ 88, 90.) Specifically, Brown alleges that the defendants, particularly Experian, listed variations in his social security number; that the defendants, including specifically Walmart, Exxon and their agents, issued credit cards over the internet to an unknown individual without requiring any identification; and that the defendants Walmart, Exxon, Ge Money Bank, GE, Citigoup, and the consumer reporting agencies engaged in partial matching of social security numbers making it easy for imposters to get credit. (*Id*. ¶¶ 88-91.) Brown contends that these defendants and their agents acted in an outrageous, reckless, and wanton manner in their approach to his situation.

As to the furnishers of information defendants, i.e, Wal-Mart, Exxon, G.E., G.E. Money, Citibank, Citigroup, Encore, Midland Credit, Midland Funding, LVNV, and AIS, to the extent Brown's state law claim for intentional infliction of emotional distress is based on either providing false credit information or the failure of

these defendants to conduct a proper investigation and correct reporting errors, it is preempted by 15 U.S.C. ¶ 1681t(b)(1)(F)and dismissed as to the movants. Although the credit reporting agencies have not filed motions to dismiss, Brown's claims of intentional infliction of emotional distress against the credit reporting agencies would also be preempted by the FCRA. Because of the grant of qualified immunity in § 1681h(e), credit reporting agencies can be liable only for false information furnished with malice or willful intent to injure. Brown's assertion of malice and willful intent are not more than mere bald conclusions of law and are devoid of any actual averments of fact. Therefore, the court *sua sponte* dismisses his claims against the credit reporting agencies for failure to meet the pleading standard set forth by *Twombly* and *Iqbal*.[15]

To the extent Brown's state law claim for intentional infliction of emotional distress is based on failure to properly verify the identity of the imposter who obtained credit in his name, failure to adequately protect Brown from identity theft, or debt collection activity both before and after being informed of the error, these allegations fall outside of the conduct covered by the FCRA and are not preempted. *See Hutchison v. Del. Sav. Bank*

[15] In the interests of judicial economy, district courts may, in their discretion, *sua sponte* dismiss those claims which will ultimately fail as a matter of law. *Gonzalez-Gonzalez v. United States*, 257 F.3d 31, 37 (1st Cir. 2001); *Tegg Corp. v. Beckstorm Elec. Co.*, 650 F. Supp. 2d 413, 428 n.14 (W.D. Pa. 2008).

FSB, 410 F. Supp. 2d 374, 385 (D.N.J. 2006) (citing *Dornhecker v. Ameritech Corp.*, 99 F. Supp. 2d 918, 931 (N.D. Ill. 2000)).

To establish a claim of intentional infliction of emotional distress in Tennessee, Brown must plead and prove three essential elements: (1) the conduct alleged was either intentional or reckless; (2) the alleged conduct is so outrageous that it is not tolerated by civilized society; and (3) the alleged conduct resulted in serious mental injury.[16] *Bain v. Wells*, 936 S.W.2d 618, 622 (Tenn. 1997); *see also Aedlin v. Allied Inv. Co.*, 217 Tenn. 469, 398 S.W.2d 270, 274 (Tenn. 1966). The standard for outrageous conduct is particularly high and stands as a significant guard against frivolous recoveries. *Doe 1 v. Roman Catholic Diocese of Nashville*, 154 S.W.3d 22, 39 (Tenn. 2005). Courts will not hold a defendant liable for "'mere insults, indignities, threats, annoyances, petty oppression or other trivialities.'" *MacDermid v. Discover Fin. Servs., LLC*, 342 F. App'x 138, 143 (6th Cir. 2009) (unpublished) (citing *Bain*, 936 S.W.2d at 622). Rather, "[t]o qualify as outrageous, conduct must be so outrageous in character, and so extreme in degree, as to go beyond all bounds of decency, and to be regarded as atrocious, and utterly intolerable in a

[16] In Tennessee, the tort of intentional infliction of emotional distress is commonly referred to as "outrageous conduct." *MacDermid v. Discover Fin. Servs., LLC*, 488 F.3d 721, 729 (6th Cir. 2007) (citing *Bain*, 936 S.W.2d at 622 n.3). The elements are the same for both causes of action. *Id.*

civilized community." *Doe 1*, 154 S.W.3d at 39 (internal quotations omitted).

Applying this standard, the court finds that Brown fails to state a claim of intentional infliction of emotional distress against any of the defendants. Taking Brown's non-conclusory factual allegations as true, none of the defendants' alleged conduct meets the standard for outrageousness articulated by Tennessee courts that have addressed the issue. Accordingly, Brown's claim for intentional infliction of emotional distress is dismissed as to all defendants.

2. *Negligent Infliction of Emotional Distress (Second Cause of Action)*

In his Second Cause of Action, (Sec. Am. Compl. ¶¶ 93-98), Brown alleges in general that all of the defendants are liable for negligent infliction of emotional distress based on their "reckless behavior" and their attempts at collecting the debt. (*Id.* ¶¶ 94, 97.) As to particular defendants, Brown claims Wal-Mart, Exxon, G.E., G.E. Money, Citibank, and Citigroup, failed to verify the identity of the imposter before issuing credit (*Id*. ¶ 95) and Experian reported variations in his social security number (*Id*. ¶ 94). As to the furnishers of information defendants, i.e, Wal-Mart, Exxon, G.E., G.E. Money, Citibank, Citigroup, Encore, Midland Credit, Midland Funding, LVNV, and AIS, to the extent Brown's state law claim for negligent infliction of emotional distress is based on either providing false credit information or the failure of

these defendants to conduct a proper investigation and correct reporting errors, it is preempted by 15 U.S.C.§ 1681t(b)(1)(F)and dismissed as to the movants.[17] To the extent Brown's state law claim for negligent infliction of emotional distress is based on failure to properly verify the identity of the imposter who obtained credit in his name, failure to adequately protect Brown from identity theft, or debt collection activity, these allegations fall outside of the conduct covered by the FCRA and are not preempted.

In Tennessee, all such claims are analyzed under general negligence principles, *see Camper v. Minor*, 915 S.W.2d 437, 446 (Tenn. 1996), and plaintiffs are therefore required to establish: (1) duty; (2) breach of duty; (3) injury or loss; (4) causation in fact; and (5) proximate causation, *Lourcey v. Estate of Scarlett*, 146 S.W.3d 48, 52 (Tenn. 2004) (citing *Camper*, 915 S.W.2d at 446). Absent physical injury, a plaintiff must show the existence of a "serious or severe emotional injury" and must support that showing through expert medical or scientific evidence. *Ramsey v. Beavers*, 931 S.W.2d 527, 531-32 (Tenn. 1996). "A serious or severe

[17] Although the credit reporting agencies have not filed motions to dismiss, Brown's claim of negligent infliction of emotional distress against the credit reporting agencies would also be preempted by the FCRA. Because of the grant of qualified immunity in § 1681h(e), credit reporting agencies can be liable only for false information furnished with malice or willful intent to injure. Therefore, in the interest of judicial economy, the court dismisses Brown's claims against the credit reporting agencies.

emotional injury occurs where a reasonable person, normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case." *Erskin v. Bartee*, 262 S.W.3d 727, 735 n.21 (Tenn. 2007); *Camper*, 915 S.W.2d at 446 (internal quotations omitted).

Here, Brown has failed to state a facially plausible claim for negligent infliction of emotional distress. Tennessee courts generally limit recovery for claims of negligent infliction of emotional distress to cases in which "the plaintiff has suffered emotional injuries as a result of the death or injury of a third person." *Love-Sawyer v. Equifax, Inc.*, No. 3:09-0647, 2009 WL 3169679, 2009 U.S. Dist. LEXIS 89199, at *12 (M.D. Tenn. Sept. 28, 2009)(citing *Erskin*, 262 S.W.3d at 740)). Brown has not cited any type of physical injury or death of a third person, nor has he alleged any other type of emotional injury as a result of the defendants' conduct which the court could find so serious or severe as to permit his claim for negligent infliction of emotional distress to survive dismissal. Accordingly, Brown's claim for negligent infliction of emotional distress is dismissed as to all defendants.

3. *Malicious Falsehood (Third Cause of Action) and Defamation (Thirteenth Cause of Action)*

For his Third Cause of Action (Sec. Am. Compl. ¶¶ 99-103) and his Thirteenth Cause of Action, (*Id*. ¶¶ 146-150), Brown asserts claims for malicious falsehood and defamation against all the

defendants. For his claim of malicious falsehood, Brown alleges that all the defendants, specifically the consumer credit reporting agencies, recklessly and maliciously published a false credit statement over the internet which caused him financial harm, including loss of income, denial of several bank loans, increases in insurance premiums, continuous loss of money, and loss of business opportunity. (*Id*. ¶¶ 100-103.) For his claim of defamation, Brown broadly alleges that the defendants maliciously and intentionally with reckless disregard for the truth published a false statement that Brown was delinquent on debts which has caused him to suffer great mental anguish, depression, stress, humiliation, shame, embarrassment and financial injury. (*Id*. ¶¶ 147-150.)

The furnishers of information defendants first argue that Brown's claims are preempted by the FCRA. Because both of these claims are based on a furnisher of information's duty to provide accurate information, conduct which is covered under § 1681s-2, these claims are preempted by § 1681(b)(1)(F) of the FCRA.[18]

[18] Although the credit reporting agencies have not filed motions to dismiss, Brown's claims of malicious falsehood and defamation against the credit reporting agencies would also be preempted by the FCRA. Because of the grant of qualified immunity in § 1681h(e), credit reporting agencies can be liable only for false information furnished with malice or with willful intent to injure. Brown's claim for malicious falsehood and defamation do not sufficiently allege malice or willful intent to injure. *See* nn.15 & 17. Therefore, in the interest of judicial economy, the court dismisses Brown's claims against the credit reporting agencies.

Regardless of whether they are preempted, both claims fail as a matter of law. First and foremost, Brown fails to state a claim for malicious falsehood under Tennessee law because Tennessee does not recognize the tort of malicious falsehood. In his responses to the motions to dismiss, Brown argues that this cause of action should be interpreted as pleading injurious falsehood, which is recognized in Tennessee. Even if the court treats Brown's claim as one for injurious falsehood, it still fails.

In *Wagner v. Fleming*, 139 S.W. 3d 295, 302 (Tenn. Ct. App. 2004), the Tennessee court of appeals, relying on Restatement (Second) of Torts, laid out the elements of a claim for injurious falsehood in Tennessee:

> In order to establish a claim for injurious falsehood, a plaintiff must establish the following: One who publishes a false statement harmful to the interests of another is subject to liability for pecuniary loss resulting to the other if (a) he intends for publication of the statement to result in harm to interests of the other having a pecuniary value, or either recognizes or should recognize that it is likely to do so, and (b) he knows that the statement is false or acts in reckless disregard of its truth or falsity.

Id. The pecuniary loss must result directly and immediately from the conduct; consequential damages are not recoverable. RESTATEMENT (SECOND) OF TORTS § 633, cmt. g. Brown fails to allege any pecuniary loss; at best he alleges consequential damages which are not recoverable. Accordingly, Brown fails to state a claim for injurious falsehood.

Even if malicious falsehood were recognized as a tort in Tennessee, its elements are the same as defamation except that it is committed with malice, and Brown's defamation claim fails as well. To establish a prima facie case of defamation in Tennessee, the plaintiff must establish that : (1) a party published a statement; (2) with knowledge that the statement is false and defaming to the other; or (3) with reckless disregard for the truth of the statement or with negligence in failing to ascertain the truth of the statement." *Sullivan v. Baptist Memorial Hosp.*, 995 S.W.2d 569, 571 (Tenn. 1999).

Brown's allegations that the defendants maliciously and intentionally defamed him are conclusory. His Second Amended Complaint does not set forth any factual basis for his conclusion that the defendants purposefully conducted themselves with intent to injure. There are no factual allegations that the credit reporting agencies had any reason to know that the debts were invalid.

Thus, Brown's claims of malicious falsehood and defamation do not meet the *Iqbal* pleading standard and are therefore dismissed as to all the defendants.

4. *False Light (Fourth Cause of Action)*

For his Fourth Cause of Action, (Sec. Am. Compl. ¶¶ 104-107), Brown broadly alleges a claim of "false light" against all the defendants based on the defendants' "publication that has cast Mr.

Brown in a false light before the public," that is, "delinquencies showing on his credit report." (*Id*. ¶ 105.)

The Tennessee Supreme Court recognized the tort of "false light invasion of privacy" in *West v. Media Gen. Convergence, Inc.*, 53 S.W.3d 640, 643–44 (Tenn. 2001), and referenced the Restatement (Second)of Torts for its prima facie elements, stating:

> One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if (a) the false light in which the other was placed would be highly offensive to a reasonable person, and (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

Id., at 643–44 (quoting RESTATEMENT (SECOND) OF TORTS § 652E). Though the Restatement uses the actual malice standard for all false light claims, the *West* court ruled that a simple negligence standard was appropriate for false light claims brought by private plaintiffs about matters of private concern. *West*, 53 S.W.3d at 644 (distinguishing false light claims when the plaintiff is a public official or figure). The court went on to explain that, where a plaintiff pleads in the alternative, and brings a claim for both false light and defamation, the plaintiff may have "only one recovery of his damages" where "more than one invasion of privacy is claimed based on a single act or series of acts." *Id.* at 647 n. 2 (quoting RESTATEMENT (SECOND) OF TORTS § 652E, cmt. b).

The court need not determine whether Brown has sufficiently pled a false light claim under Tennessee law because Brown's fale light claims are preempted by the FCRA.

As stated above, Brown's false light claim is based on the defendants' alleged publication of false information concerning Brown as well as their alleged publication of a false credit report. Because both of these claims are based on a furnisher of information's duty to provide accurate information, conduct which is covered under § 1681s-2, these claims against the furnishers of information defendants are preempted by § 1681(b)(1)(F) of the FCRA. In addition, because of the grant of qualified immunity in § 1681h(e), credit reporting agencies can be liable only for false information furnished with malice or willful intent to injure. Brown's claim for false light does not sufficiently allege malice or willful intent to injure as previously discussed. Although the credit reporting agencies have not filed motions to dismiss, Brown's claims of false light against the credit reporting agencies would also be preempted by the FCRA, and the court will therefore dismiss this claim in the interests of judicial economy. Accordingly, Brown's claim for false light is dismissed as to all defendants.

6. *Unfair and Deceptive Business Practices (Sixth Cause of Action)*

For his Sixth Cause of Action, (Sec. Am. Compl. ¶¶ 116-119), Brown broadly alleges a claim of "unfair and deceptive business practices against defendants Wal-Mart, Exxon, G.E., G.E. Money, Citibank, Citigroup, Trans Union, Experian, and Equifax. As to Wal-Mart, Exxon, G.E., G.E. Money, Citibank, and Citigroup, Brown claims that through the practice of partial matching of social security numbers, these defendants "unfairly allow anyone to receive credit over the internet without properly verifying [that] the person they are issuing credit to is actually that person and not an imposter." (Sec. Am. Compl. ¶ 118.) As to Trans Union, Experian, and Equifax, Brown asserts generally that these defendants' unfair business practices of recognizing variations in social security numbers have caused him "great mental and physical anguish and injury" and that he has "suffered loss and injury as a result". (*Id.* ¶ 119.)

As defendants Wal-Mart, Exxon, G.E., G.E. Money, Citibank, and Citigroup point out in their motion to dismiss, Brown's claim of unfair and deceptive business practices is actually one under the TCPA, which provides that "unfair or deceptive acts or practices affecting the conduct of any trade or commerce constitute unlawful acts or practices." TENN. CODE ANN. § 47-18-104(a). These defendants first argue that Brown's claims are preempted by the FCRA. The court agrees to

the extent that Brown's claims are based on conduct covered under § 1681s-2. Because Brown has alleged conduct not covered by that section, the court must address whether those allegations state a claim under the TCPA.

To establish a cause of action for violation of the TCPA, a plaintiff must plead: (1) the defendant engaged in unlawful conduct under the TCPA, which (2) caused an "ascertainable loss of money or property, real, personal, or mixed, or any other article, commodity, or thing of value wherever situated." *Tucker v. Sierra Builders*, 180 S.W.3d 109, 115 (Tenn. Ct. App. 2005) (quoting TENN. CODE ANN. § 47-18-109(a)(1)). If the injured party can prove the unlawful act or practice was undertaken willfully or knowingly, then the court may award treble damages. *See* Tenn. Code Ann. § 47-18-109(a)(3).

Brown has failed to plead that the defendants engaged in unlawful conduct. Brown does not allege that the defendants' practice of accepting credit applications over the internet was unlawful. In *MacDermid v. Discover Financial Services*, 488 F.3d 732 (6th Cir. 2007), the Sixth Circuit held that the defendant's processing of credit applications over the internet expressly complied with state and federal law, and therefore was not unfair or deceptive as a matter of law.

Id., at 732. Brown has not pled that the defendants' alleged conduct violated any state or federal law.

In addition, Brown has failed to allege "ascertainable" damages as required by the statute. The TCPA does not provide a cause of action for mental or physical injury. *See Waggin' Train, LLC v. Normerica, Inc.*, No. 1:09-cv-01093, 2010 WL 145776, 2010 U.S. Dist. LEXIS 1613, at *10 (W.D. Tenn. Jan. 8, 2010) (noting the TCPA unambiguously requires plaintiffs to show actual damages in the nature of money, property, or another thing of value). The district court in *Waggin' Train* noted that the requirement for monetary damages differentiates the TCPA from the consumer protection acts of other neighboring states. *See id.*, 2010 U.S. Dist. LEXIS 1613, at *10 n.3 (noting that similar statutes in both Virginia and Georgia require only that the plaintiff suffer a "loss," VA. CODE ANN. § 59.1-204(A), or "injury or damages," GA. CODE ANN. § 10-1-399(a)). Furthermore, the alleged monetary injury "must be more than trivial or speculative." *Tucker*, 180 S.W.3d at 117.

Brown claims only that defendants' unfair and deceptive business practices have "greatly damaged" him and caused him to suffer "great mental and physical injury" and "loss and injury." (Sec. Am. Compl. ¶¶ 118-19.) Such conjectural injuries are clearly insufficient to satisfy plaintiff's

burden under the TCPA and fail to satisfy the pleading requirements set forth by the Supreme Court in *Iqbal*. Accordingly, Brown's claim for unfair and deceptive business practices is dismissed against all defendants.

7. *Fraud/Fraudulent Representation (Seventh Cause of Action)*

For his Seventh Cause of Action, Brown brings a claim for fraud and fraudulent representation against defendants Wal-Mart, Exxon, G.E., G.E. Money, Citibank, Citigroup, Trans Union, Experian, and Equifax. (Sec. Am. Compl. ¶¶ 120-125.) Brown alleges that these defendants committed fraud or made fraudulent representations by intentionally misrepresenting "a material fact concerning [plaintiff]," by allowing an imposter to obtain credit in Brown's name "with a completely bogus number, by communicating to others falsely that there were variations in Brown's social security number." (*Id*. ¶¶ 121-123.).

Defendants Wal-Mart, Exxon, G.E., G.E. Money, Citibank, and Citigroup move to dismiss arguing that Brown's fraud claim is preempted by the FCRA and that Brown failed to adequately plead the essential elements of fraud. As to the furnishers of information defendants, i.e, Wal-Mart, Exxon, G.E., G.E. Money, Citibank, Citigroup, to the extent Brown's state law claim for fraud is based on either providing false credit information or the failure of these defendants to conduct a

proper investigation and correct reporting errors, it is preempted by 15 U.S.C.§ 1681t(b)(1)(F) and dismissed as to the movants.[19]

Regardless of preemption, Brown fails to satisfy the pleading standard for fraud and to plead the essential elements of fraud. The Federal Rules of Civil Procedure require parties alleging fraud to state with particularity the circumstances which constitute the fraud, but allow the plaintiff to allege generally "conditions of a person's mind" such as "[m]alice, intent, [or] knowledge." FED R. CIV. P. 9(b). Rule 9 requires plaintiffs to "allege the time, place, and content of the alleged misrepresentation on which he or she relied; the fraudulent scheme; the fraudulent intent of the defendants; and the injury resulting from the fraud." *Yuhasz v. Brush Wellman, Inc.*, 341 F.3d 559, 563 (6th Cir. 2003) (internal quotation omitted). Brown's claim is not stated with the sufficient particularity. Brown generally claims that the defendants "intentionally misrepresented a

[19] As to the credit reporting agencies, Brown's fraud claim is preempted by 15 U.S.C.§ 1681h(e) as a state law claim in the nature of defamation and invasion of privacy that does not sufficiently allege malice or willful intent to injure. Brown's allegations that the defendants maliciously and intentionally misrepresented a material fact and misled other businesses are conclusory and do not meet the *Iqbal* pleading standard. Therefore, in the interest of judicial economy, the court dismisses Brown's claims against the credit reporting agencies.

material fact." Such a broad assertion clearly fails to satisfy the requirements of Rule 9.

Moreover, to state a claim for fraudulent representation in Tennessee, a plaintiff must show that:

> (1) the defendant made a representation of an existing or past fact; (2) the representation was false when made; (3) the representation was in regard to a material fact; (4) the false representation was made either knowingly or without belief in its truth or recklessly; (5) plaintiff reasonably relied on the misrepresented material fact; and (6) plaintiff suffered damage as a result of the misrepresentation.

Metro. Gov't of Nashville & Davidson County v. McKinney, 852 S.W.2d 233, 237 (Tenn. Ct. App. 1992) (citing *Graham v. First Am. Nat'l Bank*, 594 S.W.2d 723, 725 (Tenn. Ct. App. 1979)). To state a claim of fraud, a plaintiff must allege facts showing a defendant's intent to deceive concerning a material matter. *Menuskin v. Williams*, 145 F.3d 755 (6th Cir. 1998) (citing *Wilder v. Tenn. Farmers Mut. Ins. Co.*, 912 S.W.2d 722, 726 (Tenn. Ct. App. 1995)).

Brown fails to state a prima facie case for fraud. He has failed to allege that any defendants made a statement of fact which the defendant knew to be false when made and on which he relied, justifiably or otherwise. Without this essential element, Brown's claim for fraud fails as a matter of law. Accordingly, Brown's claim for fraud/fraudulent

representation is dismissed for failure to state a claim against all the defendants.

8. *Failure to Affirm Identity* (*Eighth Cause of Action), Negligence (Tenth Cause of Action), Negligent Enablement of Identity/Imposter Fraud (Eleventh Cause of Action)*

For Brown's Eighth, Tenth, and Eleventh Causes of Action, Brown alleges claims for failure to affirm identity,(Sec. Am. Compl. ¶¶ 126-128), negligence,(*Id*. ¶¶ 132-135), and negligent enablement, (*Id*. ¶¶ 136-140), against defendants Wal-Mart, Exxon, G.E., G.E. Money, Citibank, Citigroup, Trans Union, Experian, and Equifax. These claims are indistinguishable as all are essentially claims for negligence. Brown alleges defendants Wal-Mart, Exxon, G.E., G.E. Money, Citibank, Citigroup, Trans Union, Experian, and Equifax were negligent in failing to affirm the identity of the imposter who opened credit cards in his name and in failing to implement procedures to protect against identity theft. Defendants Wal-Mart, Exxon, G.E., G.E. Money, Citibank, and Citigroup move to dismiss Brown's claims because Brown was not a customer and was therefore owed no duty of care to prevent identity theft.

"To prevail on a negligence claim, a plaintiff must establish (1) a duty of care owed by the defendant to the plaintiff; (2) conduct by the defendant falling below the standard of care amounting to a breach of that duty; (3) an

injury or loss; (4) causation in fact; and (5) proximate or legal cause." *Satterfield v. Breeding Insulation Co.*, 266 S.W.3d 347, 355 (Tenn. 2008) (citing *Naifeh v. Valley Forge Life Ins. Co.*, 204 S.W.3d 758, 771 (Tenn. 2006)); *Draper v. Westerfield*, 181 S.W.3d 283, 290 (Tenn. 2005). Whether a defendant owes a duty is a question of law and it is therefore a proper decision for the court. *Bradshaw v. Daniel*, 854 S.W.2d 865, 869 (Tenn. 1993). The duty owed in all cases is one of "reasonable care under all of the circumstances." *West v. E. Tenn. Pioneer Oil Co.*, 172 S.W.3d 545, 550 (Tenn. 2005) (citing *Doe v. Linder Const. Co.*, 845 S.W.2d 173, 177 (Tenn. 1992)). At all times, individuals and organizations have a duty to "refrain from engaging in *affirmative acts* that a reasonable person should recognize as involving an unreasonable risk of an invasion of an interest of another or acts which involve an unreasonable risk of harm to another." *Satterfield*, 266 S.W.3d at 355 (internal quotations omitted) (emphasis added).

Tennessee courts distinguish between *misfeasance* or affirmative acts and *nonfeasance*, which can be adequately characterized as inaction or the failure to act on another's behalf. *Hagen v. U-Haul Co.*, 613 F. Supp. 2d 986, 992 (W.D. Tenn. 2009) (citing *Satterfield*, 266 S.W.3d at 355-56). As the court in *Hagen* noted, Tennessee courts have generally

imposed a duty for misfeasance but not for nonfeasance. *Id.*, 613 F. Supp. 2d at 992; *see, e.g., Burroughs v. Magee*, 118 S.W.3d 323, 328 (Tenn. 2003); *Newton v. Tinsley*, 970 S.W.2d 490, 492 (Tenn. Ct. App. 1997). Exceptions to the general rule arise only in cases where a special relationship exists between the defendant and the person who is foreseeably at risk, thereby creating an affirmative duty to protect the endangered person. *Satterfield*, 266 S.W.3d 360.

Tennessee courts determine "whether a defendant owed an affirmative duty to act for the protection of another" by considering primarily "whether public policy and foreseeability favor recognizing a special relationship." *Biscan v. Brown*, 160 S.W.3d 462, 480 (Tenn. 2005). Other factors which the courts consider include:

> the possible magnitude of the potential harm or injury; the importance or social value of the activity engaged in by defendant; the usefulness of the conduct to defendant; the feasibility of alternative, safer conduct and the relative costs and burdens associated with that conduct; and the relative safety of alternative conduct.

Id. (citing *McCall v. Wilder*, S.W.2d 150, 153 (Tenn. 1995)). The balancing of these factors represents Tennessee courts' attempts to "align the imposition of a duty with 'society's contemporary policies and social requirements concerning the right of individuals and the general public to be protected

from another's act or conduct.'" *Id.* (quoting *Bradshaw v. Daniel*, 854 S.W.2d 865, 870 (Tenn. 1993)).

In *Wolfe v. MBNA America Bank*, another court in this district imposed a duty to "implement reasonable cost-effective certification methods that can prevent criminals, in some instances, from obtaining a credit card with a stolen identity." *Id.*, 485 F. Supp. 2d at 882. In so holding, the court recognized that no Tennessee court had addressed the specific issue of duty in this context. Because no Tennessee authority existed, the court looked instead to a South Carolina Supreme Court case, *Huggins v. Citibank, N.A.*, 255 S.C. 329, 585 S.E.2d 275 (S.C. 2003), which had analyzed the issue and found no duty to protect a non-customer. *Wolfe*, 485 F. Supp. 2d at 881 (citing *Huggins*, 585 S.E.2d at 277). In rejecting the decision of the South Carolina Supreme Court in *Huggins*, the *Wolfe* court rested its decision on what it determined to be the foreseeability of the alleged harm, that being the "alarming increase in identity theft in recent years." *Id.* at 882. The court concluded that identity theft was both "foreseeable and preventable" by the credit card companies and commercial banks in the first instance. *Id.*

Despite the decision of the court in *Wolfe*, this court declines to impose on credit card issuers a common law duty to

protect non-customers from identity theft.[20] Numerous other courts examining this issue have declined to impose a duty on credit card issuing companies to protect non-customers from the criminal acts of third parties due to the absence of a special relationship between the company and the non-customer. *See Fargis v. American Exp. Travel Related Servs.*, No. 1:07-1507-MBS, 2009 WL 102537, 2009 U.S. Dist. LEXIS 2398, at *8 (D.S.C. Jan. 12, 2009); *Robinson v. Equifax Info. Servs.*, No. CV-040229-RP, 2005 WL 1712479, at *9, (S.D. Ala. July 22, 2005); *Smith v. Citibank (South Dakota) N.A.*, No. 00-0587-CV-W-1-ECF, 2001 WL 34079057, 2001 U.S. Dist. LEXIS 25047, at *6 (W.D. Mo. Oct. 3, 2001); *Huggins*, 585 S.E.2d at 276; *Polzer v. TRW, Inc.*, 256 A.D.2d 248, 248 (N.Y. App. Div. 1998). *See also Piscitelli v. Classic Residence by Hyatt*, 973 A.2d 948, 966-67 (N.J. Super. A.D. 2009) (declining to create a duty to verify the identity of all applicants despite the acknowledgment that risk was foreseeable due to the potentially prohibitive costs of investigation). In addition,

[20] Decisions of fellow district courts, while they may be persuasive, are not binding upon this court. *See Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 431 n.10 (1996) (commenting that each district judge "sits alone and renders decisions not binding on the others"); *see also Threadgill v. Armstrong World Indus., Inc.*, 928 F.2d 1366, 1371 (3d Cir. 1991). Indeed, each district judge's opinion is entitled only to "whatever weight their intrinsic reasoning warrants." *Johnson v. Town of Trail Creek*, 771 F. Supp. 271, 274 (N.D. Ind. 1991).

circuit courts examining a bank's duty to non-customers have also refused to find such a duty. *Greer v. Honda Mfg. of Ala.*, 280 F. App'x 808, 813 (11th Cir. 2008); *Condor v. Union Planters Bank*, 384 F.3d 397, 399-400 (7th Cir. 2004); *Eisenberg v. Wachovia Bank, N.A.*, 301 F.3d 220, 226 (4th Cir. 2002).

Even if the court were inclined to recognize a duty to protect a non-customer, it would be improper for the court to impose such a duty on these defendants in the absence of Tennessee authority due to the well established rule that district courts sitting in diversity should refrain from expanding the common law of the state in which they sit. *Noonan v. Staples, Inc.*, 556 F.3d 20, 27-28 (1st Cir. 2009) (citing *Gill v. Gulfstream Park Racing Ass'n, Inc.*, 339 F.3d 391, 402 (1st Cir. 2005); *see also Garland v. Herrin*, 724 F.2d 16, 20 (2nd Cir. 1983) ("A federal court should not make . . . a policy-based extension of state law, a development better left to the state's own courts or its legislature."). In light of the intense public policy inquiry involved in the creation of a new legal duty, the court declines to stray from this well-accepted cannon of judicial restraint. Because the court finds that no duty exists, Brown cannot establish a prima facie case for negligence. Accordingly, Brown's claims of failure to affirm identity, negligence, and negligent

enablement of imposter are dismissed against all defendants for failure to state a claim.

9. *Issuing a False Credit Report (Ninth Cause of Action)*

For his Ninth Cause of Action, (Sec. Am. Compl. ¶¶ 129-131), Brown alleges a claim against defendants Wal-Mart, Exxon, G.E., G.E. Money, Citibank, Citigroup, Trans Union, Experian, and Equifax for issuing a false credit report. Brown alleges that these defendants have violated the FCRA by failing to remove disputed items after notice and investigation.

The court is not aware of a cause of action under Tennessee law for issuing a false credit report, and Brown has not cited any authority for such a claim. This state law claim is in essence a claim under the FCRA. As such, it is preempted by the FCRA. Brown cannot plead around preemption by styling the claim as a state common law action. Accordingly, Brown's claim for issuing a false credit report is dismissed against all the defendants for failure to state a claim.

10. *Malicious Interference with a Business Relationship (Twelfth Cause of Action)*

For his Twelfth Cause of Action, Brown broadly alleges a claim of Malicious Interference with Business Relationships against defendants Wal-Mart, Exxon, G.E., G.E. Money,

Citibank, Citigroup, Trans Union, Experian, and Equifax. Sec. Am. Compl. ¶¶ 141-145). Brown alleges that he tried to get loans from several banks for the establishment of his businesses but was turned down after the banks obtained credit reports on him that included false information about the bogus credit cards. Brown claims that the defendants intentionally interfered with his business arrangements by issuing the false credit report.

The Tennessee Supreme Court recently adopted the tort of intentional interference with a business relationship in *Trau-Med of Am., Inc. v. Allstate Ins. Co.*, 71 S.W.3d 691, 701 (Tenn. 2002). In order to state a claim for intentional interference with business a relationship, the plaintiff must show: "(1) an existing business relationship with specific third parties or a prospective relationship with an identifiable class of third persons; (2) the defendant's knowledge of that relationship and not a mere awareness of the plaintiff's business dealings with others in general; (3) the defendant's intent to cause the breach or termination of the business relationship; (4) the defendant's improper motive or improper means; and finally, (5) damages resulting from the tortious interference." *Id.*

Brown fails to allege the prima facie elements of a claim for tortious interference with a business relationship.

First, Brown fails to allege that the defendants had any knowledge of his alleged prospective business arrangements with musicians or any banks. Second, he does not allege any factual basis for an allegation that the defendants intended to interfere with his business relationships. Under *Twombly* and *Iqbal*, Brown had to plead sufficient facts to make it facially plausible that the defendants had knowledge of his existing or potential business relationships with identifiable and specific third parties. His claim that defendants "intentionally interfered" is entirely conclusory and thus fails to meet the pleading standard. Accordingly, Brown's claim for malicious interference with business relationships is dismissed against all defendants for failure to state a claim.

V. CONCLUSION

For the foregoing reasons, all of Brown's state law claims are dismissed against all the defendants with prejudice and without leave to amend. To the extent Brown's claim for violation of the FCRA is based on § 1681s-2(a), it too is dismissed. Brown's claim for violation of the FCRA against Wal-Mart, Exxon, G.E., G.E. Money, Citibank, Citigroup, Trans Union, Experian, and Equifax, particularly Brown's claim under § 1681s-2(b) of the FCRA, remains. Because all of the claims brought against Midland Funding, Midland Credit, Encore, LVNV,

and AIS have been dismissed in their entirety, Brown's lawsuit against those defendants is dismissed with prejudice.

The stay of discovery is hereby lifted. Rule 26(a)(1)disclosures are due within 30 days of the date of this order.

IT IS SO ORDERED this 2nd of July, 2010.

s/ Diane K. Vescovo
DIANE K. VESCOVO
UNITED STATES MAGISTRATE JUDGE