

Case No. 08-6428

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CHERYL BEAUDRY,
Plaintiff-Appellant

v.

TELECHECK SERVICES, INC., *et al.*,
Defendants-Appellees.

On Appeal from the United States District Court
for the Middle District of Tennessee at Nashville

BRIEF OF APPELLEES

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Oral Argument Requested

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

**Disclosure of Corporate Affiliations
and Financial Interest**

Sixth Circuit

Case Number: 08-6428

Case Name: Beaudry v. TeleCheck Services, Inc., *et al.*

Name of counsel: Wallace W. Dietz, David R. Esquivel, and Stephen J. Jasper

Pursuant to 6th Cir. R. 26.1, TeleCheck Services, Inc., TeleCheck International, Inc., and First Data Corporation make the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No. TeleCheck Services, Inc. is a wholly owned subsidiary of TeleCheck International, Inc. TeleCheck International, Inc.'s parent corporation is First Data Corporation. Prior to 2007, First Data Corporation was a publicly held corporation that owned 10% or more of TeleCheck International, Inc.'s stock. At this time, First Data Corporation is a privately owned corporation.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

CERTIFICATE OF SERVICE

I certify that on March 25, 2009 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users, or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/Wallace W. Dietz

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Because of the nature of the facts and law at issue, Defendants believe the Court would benefit from hearing oral argument.

STATEMENT OF THE ISSUES

1. Did the district court properly dismiss Plaintiff's Complaint for failing to state a claim upon which relief can be granted when Plaintiff claimed Defendants violated 15 U.S.C. § 1681e(b) but failed to allege she suffered any injury or adverse impact resulting from Defendants' conduct?

2. Although it is unnecessary to resolve the second issue on appeal given the district court's proper determination that Plaintiff failed to state a claim upon which relief can be granted, to the extent this Court determines otherwise, did the district court properly determine that Plaintiff, as a private litigant, cannot receive injunctive or declaratory relief under the Fair Credit Reporting Act?

STATEMENT OF THE CASE

Plaintiff Cheryl Beaudry filed a complaint in the United States District Court for the Middle District of Tennessee against Defendants TeleCheck Services, Inc., TeleCheck International, Inc., and First Data Corporation (hereafter, collectively referred to as "TeleCheck"). *Record Entry No. 1, Compl.* Plaintiff's Complaint alleged TeleCheck violated the Fair Credit Reporting Act ("FCRA") by failing to comply with the requirements provided in 15 U.S.C. § 1681e(b). *See Record Entry No. 1, Compl., ¶¶ 1-4, 6-7, 93-94, 96.*

TeleCheck filed a motion pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure to dismiss Plaintiff's Complaint for failing to state a claim upon

which relief can be granted. *Record Entry No. 10, Defs. ' Mot. to Dismiss.*

TeleCheck argued that Plaintiff failed to state an essential element of her claims because she did not allege she suffered any injury as a result of TeleCheck's conduct. *Record Entry No. 10, Defs. ' Mot. to Dismiss; Record Entry No. 11, Mem. of Law in Supp. of Defs. ' Mot. to Dismiss, pp. 1-2, 4-13.* Plaintiff responded to TeleCheck's Motion to Dismiss and, in her response, argued that her request for an injunction and declaratory judgment relieved her of the burden of asserting or proving an injury as an essential element of her claims. *Record Entry No. 22, Pl. 's Resp. to Defs. ' Mot. to Dismiss, pp. 2, 8, 10.*

The district court granted TeleCheck's Motion to Dismiss. *Record Entry No. 36, Order.* The district court determined that, because Plaintiff had not alleged any injury, she had failed to state an essential element of her claims. *Record Entry No. 35, Memo., pp. 6-10.* In addition, the district court determined the FCRA does not provide injunctive or declaratory relief to private litigants. *Record Entry No. 35, Memo., pp. 10-12.*

Rather than immediately dismissing Plaintiff's claims, the district court allowed Ms. Beaudry 45 days to amend her Complaint to assert an allegation of injury or to substitute a plaintiff who could assert an allegation of injury. *Record Entry No. 36, Order.* During that 45-day period, Plaintiff filed a motion requesting the district court to certify for an interlocutory appeal its Order dismissing

Plaintiff's claims. *Record Entry No. 37, Pl. 's Mot. to Certify the June 10, 2008 Order for Interlocutory Appeal and to Stay Proceedings.* The district court denied that request but granted Plaintiff an additional 30 days to amend her Complaint. *Record Entry No. 41, Memo.;* *Record Entry No. 42, Order.* Plaintiff allowed the 30-day period to lapse and has now filed this appeal. *Record Entry No. 43, Notice of Appeal.*

STATEMENT OF THE FACTS

TeleCheck provides check verification services to merchants and account opening services to financial institutions. *See Record Entry No. 1, Compl., ¶¶ 26-27.*¹ TeleCheck uses its proprietary database and risk modeling system to provide those services. *See Record Entry No. 1, Compl., ¶¶ 21-22, 24.* Plaintiff claims she has presented checks or electronic funds transfers to businesses utilizing TeleCheck's services or to banks utilizing TeleCheck's account services. *See Record Entry No. 1, Compl., ¶ 59.*

After the State of Tennessee modified its driver's license numbering system from an eight-digit to a nine-digit format in February 2002, TeleCheck allegedly failed to follow reasonable procedures to assure Plaintiff's old driver's license number was associated with her new nine-digit driver's license number in TeleCheck's databases, systems, and files. *See Record Entry No. 1, Compl., ¶ 60.*

¹ For purposes of this Court's review of the dismissal of Plaintiff's Complaint, TeleCheck accepts as true the factual allegations pled in the Complaint.

As a result, Plaintiff asserts that on the first occasion her new driver's license number was entered as an identifier into TeleCheck's system, she appeared as a first-time check writer. *See Record Entry No. 1, Compl.*, ¶ 60. Plaintiff claims this resulted in inaccurate reports and that TeleCheck's alleged failure to follow reasonable procedures to assure maximum possible accuracy of information in reports constitutes a violation of 15 U.S.C. § 1681e(b). *See Record Entry No. 1, Compl.*, ¶¶ 1-4, 6-7, 93-94, 96.

Plaintiff has not suffered any injury or adverse impact as a result of TeleCheck's allegedly inaccurate reports. Plaintiff has not, for instance, had a check rejected or any other transaction terminated as a result of a TeleCheck recommendation to a merchant or bank. Plaintiff has also never suffered any harm with respect to the availability of credit based on a recommendation TeleCheck provided. In fact, Plaintiff's Complaint is devoid of any allegation of injury whatsoever. *Record Entry No. 35, Memo.*, pp. 7-8.

SUMMARY OF ARGUMENT

This Court should affirm the district court's dismissal of Plaintiff's claims. The only FCRA violation alleged in Plaintiff's Complaint relates to TeleCheck's obligations under 15 U.S.C. § 1681e(b), which requires consumer reporting agencies to "follow reasonable procedures to assure maximum possible accuracy" when preparing consumer reports. This Court has already established that, to

succeed on a claim brought under § 1681e(b), a plaintiff must prove she suffered some injury or adverse impact as a result of a defendant's conduct. This requirement has also been repeatedly recognized by district courts in the Sixth Circuit and in federal courts across the country. Nevertheless, Plaintiff's Complaint contains no allegations regarding any injury Plaintiff suffered as a result of TeleCheck's conduct. Because of this, Plaintiff failed to state a claim against TeleCheck upon which relief can be granted, and the district court properly dismissed her Complaint.

Plaintiff's arguments to the contrary are primarily based on her theory that the precedent from this Circuit and elsewhere does not apply to her claims against TeleCheck because her Complaint includes a request for statutory damages. This argument, however, improperly confuses the distinct concepts of the elements a plaintiff must establish to succeed on a claim with the remedies that are available if a claim is proven. In this case, Plaintiff has not pled the essential elements of her § 1681e(b) claims. Her request for relief by way of statutory damages, therefore, is irrelevant and certainly does not excuse her failure to properly plead her claims. Consequently, the district court correctly determined that the well-established elements of a § 1681e(b) claim – including the requirement that a plaintiff suffer some injury as a result of a defendant's conduct – applied to Plaintiff's claims, regardless of the remedies she sought in her Complaint.

Plaintiff also contends that decisions from other circuits involving provisions of the FCRA not involved in this case support her theory that she is not required to prove injury as an essential element of her claims. Those decisions from other circuits regarding other FCRA provisions have nothing to do with the elements Plaintiff must plead and prove to succeed on her § 1681e(b) claims. Those decisions certainly do not contradict or undermine the numerous decisions from this Circuit and from courts across the country that are directly on point, holding injury is an essential element of a claim under § 1681e(b).

The district court also specifically dismissed Plaintiff's requests for injunctive and declaratory relief. As the district court recognized in its subsequent ruling on Plaintiff's motion for an interlocutory appeal, this separate ruling on Plaintiff's request for equitable relief was unnecessary given the court's dismissal of Plaintiff's Complaint for having failed to state a claim. Despite this, and in light of Plaintiff's argument that her Complaint could not be dismissed because she had requested injunctive and declaratory relief, the district court addressed the issue and correctly determined private litigants like Plaintiff cannot receive injunctive or declaratory relief on claims brought under the FCRA.

This Court need not consider this issue on appeal because Plaintiff's failure to adequately plead a claim makes any determination as to what relief she might have been able to recover, equitable or otherwise, moot. If this Court decides to

address the issue, however, it should affirm the district court's determination that injunctive and declaratory relief are not available to private plaintiffs under the FCRA. Although the Sixth Circuit has not yet addressed this issue, those courts that have considered the issue – including at least two district courts within the Sixth Circuit – have overwhelmingly determined the FCRA's remedial provisions do not allow injunctive or declaratory relief in private causes of action because Congress has accorded that relief solely to the Federal Trade Commission ("FTC"). Accordingly, if the Court decides to address the issue, the district court's dismissal of Plaintiff's requests for injunctive and declaratory relief should be affirmed.

STANDARD OF REVIEW

The Sixth Circuit reviews a district court's grant of a motion to dismiss pursuant to a *de novo* standard of review. *See Weiner v. Klais & Co.*, 108 F.3d 86, 88 (6th Cir. 1997). When applying that standard, this Court's review is essentially the same as the district court initially reviewing a complaint to determine whether a claim has been adequately pled. *See id.*

ARGUMENT

I. THE DISTRICT COURT PROPERLY DISMISSED PLAINTIFF'S COMPLAINT FOR FAILING TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

The allegations in Plaintiff's Complaint all relate to a claim that TeleCheck failed to comply with the requirements of the FCRA set forth in 15 U.S.C. § 1681e(b). While the Complaint suggests TeleCheck's violations include, but are "not limited to," violations of 15 U.S.C. § 1681e(b), the allegations in the Complaint are, in fact, limited to claims that TeleCheck has not used "reasonable procedures to assure the maximum possible accuracy of the information" contained in consumer reports. *See Record Entry No. 1, Compl.*, ¶¶ 1-4, 6-7, 93-94, 96. Accordingly, and as stated in Plaintiff's brief to this Court, the only claims alleged in Plaintiff's Complaint are brought pursuant to 15 U.S.C. § 1681e(b). *See Br. of Appellant*, p. 3.

As the district court recognized, in the Sixth Circuit it is established that a plaintiff must prove she suffered some discernable injury as an essential element of proving a § 1681e(b) claim. *See Record No. 35, Memo.*, p. 7. In this case, Plaintiff has failed to assert that essential element of her claims and, therefore, has failed to state a claim upon which relief can be granted.

A. Injury is a required element of a 15 U.S.C. § 1681e(b) claim.

Federal courts in the Sixth Circuit have made clear that a plaintiff cannot succeed on a claim brought under 15 U.S.C. § 1681e(b) unless she proves each of the following elements: (1) a defendant reported inaccurate information about the plaintiff; (2) the defendant either negligently or willfully failed to follow reasonable procedures to assure maximum possible accuracy of the information about the plaintiff; (3) *the plaintiff was injured*; and (4) the defendant's conduct was the proximate cause of the plaintiff's injury. *Nelski v. Trans Union, LLC*, 86 F. App'x 840, 844 (6th Cir. 2004); *see also Currier v. Transunion Credit Info. Co.*, 2008 WL 795738, at *4 (E.D. Mich. Mar. 25, 2008); *Holmes v. TeleCheck Int'l, Inc.*, 556 F. Supp. 2d 819, 830-31 (M.D. Tenn. 2008); *Breed v. Nationwide Ins. Co.*, 2007 WL 1408212, at *1 (W.D. Ky. May 8, 2007); *Garrett v. Trans Union, L.L.C.*, 2006 WL 2850499, at *13 (S.D. Ohio Sept. 29, 2006) (finding that a plaintiff must prove these "well established elements" to sustain a claim under § 1681e(b)); *Sciria v. Huntington Bank*, 2005 WL 3262954, at *3 (N.D. Ohio Dec. 1, 2005).

Accordingly, to maintain a FCRA claim under § 1681e(b), a plaintiff must show she was injured as a result of a defendant's allegedly inaccurate report. *See Johnson v. Equifax, Inc.*, 2007 WL 1589536, at *5 (S.D. Ala. May 31, 2007); *see also Breed*, 2007 WL 1408212, at *3 (stating that, to establish liability under §

1681e(b), the plaintiff was required to show an inaccurate entry on his credit report was a substantial factor in bringing about the denial of credit). This requirement is essential to a claim under § 1681e(b) because the FCRA does not impose “strict liability for errors or provide a means for merely correcting an erroneous report.” *Pettus v. TRW Consumer Credit Serv.*, 879 F. Supp. 695, 697 (W.D. Tex. 1994).

Simply put, an injury resulting from an allegedly inaccurate report is an “essential element” of a claim under § 1681e(b). *See Pettus*, 879 F. Supp. at 697-98; *see also George v. Equifax Mortgage Servs.*, 2008 WL 4425299, at *7 (E.D.N.Y. Sept. 30, 2008); *Garrett*, 2006 WL 2850499, at *13-14. Furthermore, it is a plaintiff’s burden to establish the existence of this essential element. *See Jackson v. Equifax Info. Servs., LLC*, 167 F. App’x 144, 146 (11th Cir. 2006). If a plaintiff fails to satisfy this burden, her claim must be dismissed. *See, e.g., Sternaman v. Experian Info. Solutions, Inc.*, 2001 WL 1478662, at *3-4 (D. Minn. Nov. 19, 2001); *Whelan v. Trans Union Credit Reporting Agency*, 862 F. Supp. 824, 832 (E.D.N.Y. 1994).

For example, in *Garrett v. Trans Union, L.L.C.*, the United States District Court for the Southern District of Ohio dismissed a plaintiff’s claims under § 1681e(b) because, even if there were inaccuracies in the credit report issued by the defendant in that case, the plaintiff had not shown he had suffered any injury as a result of those inaccuracies. *Garrett*, 2006 WL 2850499, at *14. In fact, the court

noted that, not only had the plaintiff not been denied any credit, the plaintiff had actually received offers of credit following the allegedly inaccurate report. *Id.* As a result, the court found the plaintiff had not suffered any injury resulting from the alleged inaccuracies in his credit report and dismissed the plaintiff's claims under § 1681e(b). *See id.*²

Similarly, in *Pettus v. TRW Consumer Credit Service*, the District Court for the Western District of Texas dismissed a plaintiff's § 1681e(b) claim because the plaintiff had failed to prove he had suffered any injury as a result of credit reports issued by the defendants. *Pettus*, 879 F. Supp. at 698. The court noted the plaintiff had not experienced any credit denials, nor had he been denied any employment, as a result of the alleged inaccuracies in credit reports. *Id.* Even though the plaintiff had submitted some evidence that there were, in fact, inaccuracies in the reports, his failure to demonstrate he was injured by those inaccuracies was fatal to his claim. *Id.*

The Eleventh Circuit has also dismissed § 1681e(b) claims due to a failure to show an injury caused by allegedly inaccurate reports. *See Cahlin v. Gen. Motors Acceptance Corp.*, 936 F.2d 1151, 1160-61 (11th Cir. 1991). In *Cahlin*, the court

² In her brief to this Court, Plaintiff attempts to limit the holding in *Garrett* to a finding that the plaintiff "could not receive actual damages." *See Br. of Appellant*, p. 33. While it is true that the court in *Garrett* found the plaintiff had not proven and could not receive actual damages, the court also found, because the plaintiff "experienced no denials of credit," he entirely failed to state a claim for a violation of § 1681e(b). *See Garrett*, 2006 WL 2850499, at *14, *16.

found the plaintiff had not shown an allegedly inaccurate report contributed to the denial of a bank loan. *See id.* As a result, the plaintiff had “utterly failed” to produce evidence “tending to show that he was damaged as a result of an allegedly inaccurate [] credit report.” *Id.* at 1160. The court, therefore, upheld the trial court’s dismissal of the plaintiff’s claim. *See id.* at 1160-61.

The same analysis has been applied in decisions from courts across the country. *See, e.g., Jackson*, 167 F. App’x at 146 (affirming grant of summary judgment because the plaintiff “failed to produce any evidence indicating that he was damaged as a result of an allegedly inaccurate Equifax report”); *Birmingham v. Equifax, Inc.*, 2009 WL 194985, at *2 (D. Utah Jan. 26, 2009) (granting summary judgment because the plaintiff failed to provide evidence that he suffered any injury or that the defendant caused his alleged injury); *Collins v. Experian Credit Reporting Serv.*, 494 F. Supp. 2d 127, 134-36 (D. Conn. 2007) (granting the defendants’ motions for summary judgment because the plaintiff had failed to provide any evidence supporting his claim that the allegedly inaccurate report was the proximate cause of any injury he suffered); *Johnson*, 2007 WL 1589536, at *5-6 (same); *Jordan v. Trans Union LLC*, 2006 WL 1663324, at *6 (N.D. Ga. June 12, 2006) (granting summary judgment because the plaintiff did not demonstrate the defendant’s allegedly inaccurate report caused him any harm or that his credit denials were based on the defendant’s report); *Davis v. Equifax Info. Servs., LLC*,

346 F. Supp. 2d 1164, 1171, 1174 (N.D. Ala. 2004) (same); *Sternaman*, 2001 WL 1478662, at *3-4 (same); *Whelan*, 862 F. Supp. at 829, 832 (E.D.N.Y. 1994) (same); *Neptune v. Trans Union Corp.*, 1993 WL 505601, at *1-2 (E.D. Pa. Dec. 8, 1993) (same). As these decisions make clear, if a plaintiff fails to establish she suffered an injury as a result of an allegedly inaccurate report, her § 1681e(b) claim must be dismissed.

In this case, not only has Plaintiff failed to plead she suffered an injury as a result of TeleCheck's allegedly inaccurate reports, she has failed to plead she suffered any injury at all. Plaintiff's Complaint is devoid, for instance, of any claim that she has ever had a check declined or other transaction terminated as a result of a TeleCheck recommendation. Plaintiff's Complaint is also without a claim that she suffered any other discernable harm with respect to the availability of credit based on a TeleCheck recommendation. In short, Plaintiff has not alleged she suffered any adverse impact as a result of the inaccuracies she claims exist in TeleCheck's system. *See Record No. 8, Memo., p. 8.*

Plaintiff simply contends TeleCheck's system is inaccurate and that, even though those alleged inaccuracies had no impact on her, she is entitled to bring a claim under 15 U.S.C. § 1681e(b). *See Br. of Appellant, pp. 34, 36.* This is not the law in the Sixth Circuit or in any other circuit. The FCRA does not give a private litigant the right to bring a lawsuit for the purpose of "merely correcting an

erroneous report.” *Pettus*, 879 F. Supp. at 697. Rather, it provides a remedy only to those consumers who are “actually damaged” by a failure to comply with § 1681e(b)’s requirements. *Johnson*, 2007 WL 1589536, at *5. Having suffered no injury, Plaintiff’s bare allegations that TeleCheck’s system is inaccurate are insufficient to state a claim under § 1681e(b). *See Garrett*, 2006 WL 2850499, at *14. The district court, therefore, correctly dismissed Plaintiff’s Complaint.

B. Plaintiff’s attempts to distinguish the authority the district court relied upon in dismissing her Complaint are without merit.

Plaintiff suggests none of the cases upon which the district court relied are applicable to the present case. *See Br. of Appellant*, pp. 31-34. Plaintiff’s attempts to avoid the clear import of the controlling cases, however, are without merit. The decisions upon which the district court relied – especially this Court’s decision in *Nelski v. Trans Union, LLC*, 86 F. App’x 840 (6th Cir. 2004) – clearly require an injury to be proven as an essential element of a § 1681e(b) claim and directly apply to Plaintiff’s claims against TeleCheck. Plaintiff’s attempts to avoid this conclusion are unconvincing.

1. Plaintiff’s attempts to distinguish *Nelski* are without merit.

As the district court noted, this Court’s decision in *Nelski v. Trans Union* established that proof of harm or injury is one of the four essential elements a plaintiff must prove to succeed on a § 1681e(b) claim. *See Record No. 35, Memo.*,

pp. 7-8. Plaintiff seeks to avoid this plain reading of *Nelski* in three equally unconvincing ways.

First, Plaintiff attempts to diminish the significance of the *Nelski* decision by emphasizing that the ultimately determinative issue in *Nelski* was whether the plaintiff in that case had proven the defendant's procedures to be unreasonable, not whether the plaintiff had demonstrated injury resulting from the defendant's conduct. *See* Br. of Appellant, pp. 31-32. While Plaintiff is correct that the focus of this Court's analysis in *Nelski* was on the reasonableness of the defendant's procedures at issue in that case, that does nothing to change the fact that, in arriving at its discussion of the reasonableness element, the Sixth Circuit expressly and unequivocally listed a discernable injury as one of the four mandatory elements of a claim under § 1681e(b).

Moreover, *Nelski*'s discussion of the facts at issue in that case confirms that injury is an essential element of a § 1681e(b) claim. After listing the essential elements of a § 1681e(b) claim, the *Nelski* Court stated that the defendant in that case did not dispute the plaintiff had demonstrated an injury and was only disputing the claimed unreasonableness of the defendant's procedures. *See Nelski*, 86 F. App'x at 844. Thus, the reasonableness of those procedures was the only issue this Court needed to resolve in that case. The plain implication from *Nelski* is that if the defendant had disputed whether the plaintiff suffered an injury, the

Court would have evaluated and resolved the dispute over that essential element of the plaintiff's claim as well. *See Record No. 41, Memo., p. 7.*

In her second attempt to distinguish *Nelski*, Plaintiff emphasizes that there is “no indication” the plaintiff in *Nelski* sought statutory damages. *See Br. of Appellant, p. 32.* This argument is equally unpersuasive. As the district court stated in its decision dismissing Plaintiff's Complaint, when setting forth the necessary elements of a § 1681e(b) claim, the *Nelski* Court did not discuss or even consider the relief requested by the plaintiff because the remedies sought do not dictate the elements a plaintiff must prove to show a violation of § 1681e(b). *See Record No. 35, Memo., p. 10.* Indeed, the issue of whether statutory damages or any other remedies are available does not arise unless a plaintiff proves there has been an actionable violation of the FCRA. *See Currier, 2008 WL 795738, at *6* (finding that, because the plaintiff had failed to show the defendant committed a violation of § 1681e(b), either negligently or willfully, the court was not required to address the presence or extent of the plaintiff's damages); *Cavin v. Home Loan Ctr., Inc.*, 236 F.R.D. 387, 393 (N.D. Ill. 2006) (“Since the plaintiff could not establish her underlying FCRA claim under 1681i because she could not prove actual pecuniary harm, her claim for statutory damages failed.”). Consequently, Plaintiff's argument that the essential elements set forth in *Nelski* do not apply to

her claim because the plaintiff in that case, presumably, did not seek statutory damages, fails both as a matter of law and logic.

For similar reasons, Plaintiff's third and final argument that *Nelski* does not apply to her § 1681e(b) claims also fails. Plaintiff suggests *Nelski* is inapplicable because *Nelski* relies on cases decided prior to the FCRA amendments that made statutory damages available. *See* Br. of Appellant, pp. 32. Once again, and as the district court stated, the availability of statutory damages for a plaintiff who proves a willful FCRA violation simply has no effect on the elements a plaintiff must establish to prove a FCRA violation in the first place. *See Record No. 35, Memo., pp. 9-10; see also Record No. 41, Memo., pp. 7-8.*

Furthermore, *Nelski* was decided eight years after the amendments making statutory damages available took effect and, in that decision, the Sixth Circuit set forth the same basic four elements of a § 1681e(b) claim that have been recognized in the Sixth Circuit and courts across the country for years. It is difficult to understand how Plaintiff can claim *Nelski*, which in no uncertain terms sets forth the essential elements of a § 1681e(b) claim and which is consistent with decisions by courts across the country, is somehow not the law of this Circuit and "inapplicable" to this case simply because it relies on longstanding precedent.

Contrary to Plaintiff's argument, *Nelski* is the established law of this Circuit on the precise issue before this Court. As discussed above, the *Nelski* decision

states, without qualification, “to assert a claim under § 1681e(b)” a plaintiff must prove four essential elements, including some discernable injury as a result of a defendant’s conduct. *See* 86 F. App’x at 844. The *Nelski* Court found the plaintiff in that case failed to satisfy one of those essential elements and granted summary judgment dismissing the plaintiff’s claims. *See id.* at 844-47. As Plaintiff points out, the *Nelski* court dismissed the plaintiff’s claims without ever addressing the issue of damages. *See* Br. of Appellant, p. 31. The plaintiff in that case had “failed to establish a violation of § 1681e(b), much less a negligent or willful one.” *Nelski*, 86 F. App’x at 847. The issue of damages, therefore, was irrelevant.

The same analysis applies in this case. Because Plaintiff’s Complaint fails to allege an injury, she has failed to adequately plead a claim that TeleCheck committed a violation of § 1681e(b) at all, “much less a negligent or willful one.” The district court, therefore, was correct in dismissing Plaintiff’s Complaint without any consideration for and without regard to the remedies that might have been available if Plaintiff had stated a viable claim.

2. Plaintiff’s attempts to distinguish the other cases upon which the district court relied are without merit.

Plaintiff suggests each of the other cases the district court relied upon in granting Defendants’ Motion to Dismiss do not actually support the district court’s decision for at least one of the following three reasons: (1) the cases involved plaintiffs who sought actual damages, rather than statutory damages, (2) the cases

were decided before the FCRA was amended to allow plaintiffs to recover statutory damages for willful violations, or (3) the cases were decided after the amendment but relied upon cases decided prior to the amendment. *See* Br. of Appellant, pp. 32-33. None of these attempts to distinguish the cases supporting the district court's decision have any merit.

As an initial matter, it is worth noting that even Plaintiff's broadly drawn categories of purported distinctions do not encompass each of the cases upon which the district court relied. For example, the district court relied upon the recent decision in *Holmes v. TeleCheck International, Inc.*, 556 F. Supp. 2d 819 (M.D. Tenn. 2008) as additional support for its determination that, under *Nelski*, "proof of harm or injury is one of four essential elements of an FCRA claim, regardless of whether the plaintiff alleges there was a willful violation." *Record No. 35, Memo., pp. 8-9*. In *Holmes*, the plaintiff requested statutory damages as part of the relief she sought based on her allegation that the defendants willfully violated § 1681e(b). *See Holmes*, 556 F. Supp. 2d at 824. The *Holmes* case was decided in 2008 – twelve years after the FCRA was amended to allow for the possibility of recovering statutory damages – and relied on *Nelski* for its recitation of the four essential elements of a § 1681e(b) claim. *See id.* at 830-31. Accordingly, the factors Plaintiff contends distinguish each of the cases upon which the district court relied do not, in fact, apply to each of those cases.

More importantly, none of Plaintiff's purported distinctions successfully establish that the cases upon which the district court relied do not apply to this case. First, Plaintiff's suggestion that some of the cases can be distinguished because the plaintiffs in those cases sought actual damages rather than statutory damages is completely without basis. As discussed more fully below, the remedies available to or sought by a plaintiff simply do not dictate the elements a plaintiff must prove in order to show a violation of § 1681e(b). The attempt to distinguish the cases based on the remedies sought by the plaintiffs, therefore, is without merit.

Plaintiff's argument that the cases the district court relied upon are distinguishable because they were decided prior to the FCRA amendment allowing for the possibility of statutory damages is similarly unpersuasive. Plaintiff's argument again incorrectly presumes that the remedies available to a plaintiff who successfully proves a claim dictate the elements that must be established to prove a claim in the first place.

Plaintiff's attempt to cast off as "old law" the Western District of Texas' decision in *Pettus* simply because it was decided prior to the FCRA amendments, *see* Br. of Appellant, p. 34, exemplifies the error in Plaintiff's reasoning. In *Pettus*, the Court held that an injury is an "essential element" of proving a violation of § 1681e(b). *See Pettus*, 879 F. Supp. at 697-98. This finding is wholly unrelated to

the issue addressed by the FCRA amendments – the remedies available once a willful violation has been shown.

The flaw in Plaintiff's reasoning is even clearer with regard to her suggestion that the cases the district court relied upon that were themselves decided after the FCRA amendments, but that cite pre-amendment case law, are distinguishable from this case on that basis. For example, Plaintiff attempts to distinguish the District Court for the Western District of Kentucky's decision in *Breed v. Nationwide Insurance Co.*, 2007 WL 1408212 (W.D. Ky. May 8, 2007), in part, on the basis that *Breed* relied upon two pre-amendment cases when setting forth the four essential elements of a § 1681e(b) claim. *See* Br. of Appellant, p. 33. The *Breed* decision, however, was issued eleven years after the FCRA amendments took place and sets forth the same well-established elements of a § 1681e(b) claim, including the requirement that a plaintiff must show she suffered an injury as a result of a defendant's conduct. *See Breed*, 2007 WL 1408212, at *1. Furthermore, and in addition to setting forth the four essential elements, the *Breed* Court expressly stated, to establish liability under § 1681e(b), a plaintiff "must show that an inaccurate entry on his credit report was a 'substantial factor' in bringing about the denial of credit" and relied upon a decision from 2005 for that statement of the law. *See id.* at *3 (citing *Enwonwu v. Trans Union, LLC*, 364 F. Supp. 2d 1361, 1366 (N.D. Ga. 2005)).

Plaintiff's attempts to distinguish the cases the district court relied upon reach their most unbelievable extreme when she attempts to distinguish the District Court for the Eastern District of Michigan's decision in *Currier v. Transunion Credit Information Co.*, 2008 WL 795738 (E.D. Mich. Mar. 25, 2008) on the basis that *Currier* relies upon this Court's decision in *Nelski* for a statement of the essential elements of a § 1681e(b) claim. Plaintiff suggests the *Currier* Court's reliance on *Nelski* distinguishes *Currier* because *Nelski* is "inapplicable to the case at bar." See Br. of Appellant, p. 34.

Far from being inapplicable, *Nelski* is the most recent statement of this Court on the very issue that controls the outcome of this case – the elements a plaintiff must establish to prove a § 1681e(b) claim. As the district court correctly determined, Plaintiff failed to plead those essential elements and, therefore, failed to state a claim upon which relief can be granted.

C. The relief Plaintiff requested does not change the elements she must plead to state a § 1681e(b) claim.

The contention at the center of Plaintiff's arguments is that the remedies she requests relieve her of the obligation of pleading she suffered an injury as a result of TeleCheck's conduct. Specifically, Plaintiff contends her requests for statutory damages and equitable relief in the form of an injunction or declaratory judgment make it unnecessary for her to plead an injury. See, e.g., Br. of Appellant, pp. 17-

20, 30-37. Plaintiff's arguments that the relief she requests can displace one of the essential elements of her claims, however, are entirely without merit.

1. Plaintiff's request for statutory damages does not relieve her of the burden of pleading or proving the essential elements of her claims.

Although statutory damages are an available remedy for a plaintiff who proves a willful violation of the FCRA, the availability of that remedy does not relieve a plaintiff of her initial burden of proving the essential elements of her FCRA claim. If a plaintiff establishes the elements necessary to prove a violation, the next step is to consider whether the violation was negligent or willful, and if willful, statutory damages are an available remedy. If a violation is not shown, however, a plaintiff never gets to the second step of the analysis. *See Cavin*, 236 F.R.D. at 393 ("Since the plaintiff could not establish her underlying FCRA claim under 1681i because she could not prove actual pecuniary harm, her claim for statutory damages failed."); *see also Currier*, 2008 WL 795738, at *6. This is precisely the situation in the present case.

Against this point, Plaintiff argues that requiring injury as an element of a § 1681e(b) claim renders the availability of statutory damages meaningless because, in Plaintiff's opinion, the FCRA allows for the possibility of statutory damages to encourage private enforcement "in situations where consumers may suffer no or little actual harm or damages." Br. of Appellant, pp. 17, 30-31. As the district

court noted, Plaintiff cites no authority for this proposition. *See Record Entry No. 35, Memo., p. 9 n. 3.* Further, it is at least as likely that the availability of statutory damages is intended to compensate a plaintiff who has been injured but whose actual damages are hard to prove, hard to quantify, or are relatively small. *In re Trans Union Corp. Privacy Litig.*, 211 F.R.D. 328, 342 (N.D. Ill. 2002) (“[T]he statutory damage provision acts as compensation, and is not punitive.”).

Finally, Plaintiff’s suggestion that private enforcement is necessary to ensure FCRA compliance is without merit because the FTC is expressly authorized to enforce the FCRA provisions. *See Kekich v. Travelers Indemnity Co.*, 64 F.R.D. 660, 668 (W.D. Pa. 1974) (“Given the fact that the FTC has the express power to enforce compliance . . . there appears to be no reason for a private attorney general, an office which the plaintiff seems to have assumed.”).

The two Northern District of Illinois decisions Plaintiff quotes for her contention that “statutory damages are an alternative remedy to actual damages” and, because of that, “a plaintiff does not have to prove actual injury or harm in order to get statutory damages” also do nothing to support Plaintiff’s arguments in this case. *See Br. of Appellant*, p. 18 (quoting *Tremble v. Town & Country Credit Corp.*, 2006 WL 163140, at *5 (N.D. Ill. Jan. 18, 2006) and *Murray v. New Cingular Wireless Servs.*, 232 F.R.D. 295, 302 (N.D. Ill. 2005)). Importantly, neither of the cases involved an allegation that the defendants violated § 1681e(b).

Instead, both cases involved allegations that the defendants violated § 1681b. *See Tremble*, 2006 WL 163140, at *1; *Murray*, 232 F.R.D. at 297-98.

As discussed below, the Seventh Circuit has consistently held that a plaintiff need not prove an injury to succeed on a § 1681b claim. *See Cavin*, 236 F.R.D. at 393. Consequently, in the cases Plaintiff quotes, the district courts within the Seventh Circuit had no difficulty finding the plaintiffs were “not required to prove recoverable actual damages *in order to show a violation of § 1681b* or to obtain statutory damages” based on a showing of a willful violation of § 1681b. *Tremble*, 2006 WL 163140, at *5 (emphasis added); *see also Murray*, 232 F.R.D. at 302-03. Those decisions, however, expressly recognize that an injury is an essential element of claims under other FCRA provisions, and a plaintiff bringing a claim under those provisions could not succeed on her claim without a showing of injury. *See Murray*, 232 F.R.D. at 303 (explaining that, in the Seventh Circuit, proof of an injury is an essential element of a claim under § 1681i(a)(1)(A), but not under § 1681b). Accordingly, even the cases Plaintiff relies upon recognize that, if injury is an essential element of a plaintiff’s particular FCRA claim, a plaintiff must establish she suffered an actual injury in order to state a claim, regardless of whether she seeks actual or statutory damages. *See Cavin*, 236 F.R.D. at 393.

As already discussed, the courts in the Sixth Circuit and across the country have consistently held that a violation of § 1681e(b) takes place only when a

plaintiff suffered some discernable injury as a result of a defendant's conduct. *See Nelski*, 86 F. App'x at 844; *Cahlin*, 936 F.2d at 1160-61; *Holmes*, 556 F. Supp. 2d at 830-31; *Johnson*, 2007 WL 1589536, at *3, *5; *Breed*, 2007 WL 1408212, at *1, *3; *Garrett*, 2006 WL 2850499, at *13-14. Consequently, an injury is an essential element of Plaintiff's § 1681e(b) claims against TeleCheck, regardless of whether Plaintiff seeks statutory damages. *See Nelski*, 86 F. App'x at 844, 847; *Johnson*, 2007 WL 1589536, at *6 (dismissing the plaintiff's claims that the defendants ***negligently and willfully*** violated § 1681e(b) because the plaintiff failed to establish the defendants' inaccuracies caused her any injury).

This precise conclusion was reached in *Holmes v. TeleCheck International, Inc.*, where the district court recognized that the elements of a § 1681e(b) claim as articulated in *Nelski* controlled its analysis of the plaintiff's claims, even though the plaintiff in that case sought statutory damages. *See Holmes*, 556 F. Supp. 2d at 830-31. In fact, during the trial conducted in the *Holmes* case, the court instructed the jury that an injury was one of the four essential elements of the plaintiff's claims that the defendants violated § 1681e(b) with regard to both the plaintiff's negligence and willfulness claims. *See Record Entry No. 35, Memo., p. 9 n. 2; Record Entry No. 32, Notice of Filing Supplemental Authority, p. 2, Exhs B & C.*

In short, and as the district court stated in dismissing Plaintiff's claims, the determinations of whether a plaintiff has proven an underlying FCRA claim and

the remedies available to a plaintiff who has successfully proven a claim “are separate and distinct.”³ *Record No. 35, Memo., p. 10*. Without establishing an injury, Plaintiff has simply not proven a claim for a violation of § 1681e(b) and never proceeds to the issue of what relief may have been available if she had proven such a claim. There is no merit, therefore, to Plaintiff’s argument that her request for statutory damages relieves her of the burden of pleading and proving the essential elements of her claims.

2. Plaintiff’s request for an injunction or declaratory judgment does not relieve her of the burden of pleading or proving the essential elements of her claims.

Plaintiff also argues that, even if this Court finds she has not stated a claim sufficient to receive statutory damages, she is still entitled to receive injunctive and declaratory relief. *See Br. of Appellant, p. 37*. This argument is without merit for at least two reasons. First, Plaintiff’s argument again confuses the remedies available under the FCRA once a violation has been proven with the elements essential to show a violation of § 1681e(b) in the first place. Because Plaintiff has

³ Plaintiff’s failure to appreciate this distinction is apparent in her repeated mischaracterizations of the district court’s holding in this case. Plaintiff suggests the district court held that to recover statutory damages on a § 1681e(b) claim, a plaintiff must prove “an actual injury and actual damages.” *See Br. of Appellant, pp. 30-31*. This is incorrect. The district court held that, to prove a § 1681e(b) claim, a plaintiff must establish she suffered an injury. *See Record Entry No. 35, Memo., p. 10*. A plaintiff is not, however, required to prove actual damages as an essential element of her claim because the issue of damages or other relief available to a plaintiff only arises if the essential elements of her claim have been proven.

not pled the essential elements of her claims, she is not entitled to receive any relief, equitable or otherwise.

Secondly, as discussed in Section II below, the federal courts that have addressed the issue, including district courts in the Sixth Circuit, have repeatedly held that private litigants like Plaintiff cannot receive injunctive or declaratory relief under the FCRA, even if they successfully prove an underlying claim. *See, e.g., Washington v. CSC Credit Servs., Inc.*, 199 F.3d 263, 268 (5th Cir. 2000) (“Congress vested the power to obtain injunctive relief solely with the FTC.”); *Birmingham*, 2009 WL 194985, at *1; *Holmes*, 556 F. Supp. 2d at 848; *Young v. HSBC Mortgage Servs., Inc.*, 2007 WL 2083680, at *1-2 (E.D. Mo. July 13, 2007); *Campos v. Choicepoint Inc.*, 237 F.R.D. 478, 482 n.8 (N.D. Ga. 2006); *Thompson v. Homecomings Fin.*, 2005 WL 3534234, at *4 (N.D. Tex. Dec. 19, 2005); *Howard v. Blue Ridge Bank*, 371 F. Supp. 2d 1139, 1145 (N.D. Cal. 2005); *Bumgardner v. Lite Cellular, Inc.*, 996 F. Supp. 525, 527 (E.D. Va. 1998). As the authorities make clear, “courts that have considered this same issue have overwhelmingly concluded that the FCRA precludes private litigants from seeking equitable relief.” *Owner-Operator Indep. Driver Ass’n v. USIS Commercial Servs., Inc.*, 410 F. Supp. 2d 1005, 1007 (D. Colo. 2005).

In light of this authority, Plaintiff's suggestion that she is not required to allege an injury because she seeks equitable relief – relief she cannot receive under the FCRA even if she had pled and proven her claims – is entirely without merit.

D. Plaintiff's reliance on cases from other jurisdictions regarding other FCRA violations is misplaced.

In her brief, Plaintiff discusses several decisions from other jurisdictions applying sections of the FCRA that are not at issue in this case to suggest that an injury is not an essential element of her § 1681e(b) claims. *See* Br. of Appellant, pp. 20-30. None of the decisions discussed in Plaintiff's brief support her arguments.

1. *Ashby v. Farmers Insurance Co. of Oregon* does not support Plaintiff's arguments.

Plaintiff erroneously contends the Oregon District Court's decision in *Ashby v. Farmers Insurance Co. of Oregon* supports her position that no injury must be proven to state a claim under § 1681e(b). *See* Br. of Appellant, pp. 21-22. In *Ashby*, the court granted class certification for a claim brought under 15 U.S.C. § 1681m(a)(1), which sets forth notice requirements for, among other things, increases in insurance premiums. 2004 WL 2359968, at *1, *9 (D. Or. Oct. 18, 2004). Obviously, the decision to grant class certification under this separate section of the FCRA has no relevance with regard to the elements Plaintiff must allege to state a viable claim under § 1681e(b).

Furthermore, the statements from *Ashby* that Plaintiff quotes in her Brief do no more than recognize that, *if a plaintiff proves a willful violation of the FCRA*, she can recover statutory damages. *See id.* at *5, * 8; *see also* Br. of Appellant, pp. 21-22. This is consistent with the district court's decision in this case. The district court did not find that statutory damages are not available if a willful violation is shown. The district court determined that, by failing to plead an essential element of her claims, Plaintiff failed to state a claim that TeleCheck violated § 1681e(b) at all, either willfully or negligently. *See Record Entry No. 35, Memo., pp. 8-10; Record Entry No. 41, Memo., pp. 6-8.* The *Ashby* Court's recognition that statutory damages are available for willful violations does not contradict this determination and certainly does not support Plaintiff's claim that injury is not an essential element of a § 1681e(b) violation.

2. The "firm offer of credit" cases do not support Plaintiff's arguments.

The majority of the cases Plaintiff relies upon in support of her argument involved claims that a defendant violated 15 U.S.C. § 1681b by impermissibly obtaining the plaintiffs' credit reports without making firm offers of credit. *See* Br. of Appellant, pp. 23-26. Again, these cases discussed a completely separate section of the FCRA than the one Plaintiff alleges TeleCheck violated and, as a result, are wholly inapposite to this case.

Accordingly, even though some of the cases Plaintiff relies upon found that an injury is not an essential element of a violation of § 1681b,⁴ the findings in those cases are not relevant to whether an injury is an essential element of a claim under § 1681e(b). In fact, the cases Plaintiff relies upon expressly recognize that whether an injury is an essential element of a FCRA claim depends on the specific provision a plaintiff claims to have been violated. In *Cavin v. Home Loan Center, Inc.*, for instance, the District Court for the Northern District of Illinois carefully distinguished its holding that an injury is not an essential element of a § 1681b claim from a prior Seventh Circuit decision finding an injury was an essential element of a claim under § 1681i. *See* 236 F.R.D. 387, 393 (N.D. Ill. 2006).

At most, the “firm offer of credit” cases on which Plaintiff relies stand for the proposition that, at least in the Seventh Circuit, a plaintiff does not have to prove an injury to show an actionable violation of § 1681b. *See In re H & R Block Mortgage Corp., Prescreening Litig.*, 2007 WL 325351, at *3 (N.D. Ind. Jan. 30, 2007) (finding proof of injury not required under § 1681b but recognizing authority that injury is a required element of a § 1681i claim); *Klutho v. Home Loan Ctr., Inc.*, 486 F. Supp. 2d 957, 963 (E.D. Mo. 2006) (relying on Seventh

⁴ At least two of the cases Plaintiff relies upon have no apparent relation to Plaintiff’s arguments. *Murray v. Sunrise Chevrolet, Inc.* finds the availability of statutory damages does not prohibit class certification, 2006 WL 862886, at *5 (N.D. Ill. Mar. 30, 2006), and *Kudlicki v. Farragut Financial Corp.* simply finds the violation of § 1681b at issue in that case was willful. 2006 WL 927281, at *2-3 (N.D. Ill. Jan. 20, 2006).

Circuit decisions for the same point). These cases do not stand for the proposition that an injury is not an essential element of other FCRA violations, and certainly do not suggest proof of injury is unnecessary when establishing a violation of § 1681e(b).

3. The remaining cases upon which Plaintiff relies do not support her arguments.

In addition to the cases already discussed, Plaintiff relies on only two other cases – *Soualian v. Int’l Coffee & Tea, LLC*, 2007 WL 4877903 (C.D. Cal. May 22, 2007) and *Gillespie v. Equifax Information Services, LLC*, 2008 WL 4614327 (N.D. Ill. Oct. 15, 2008) – for her argument that injury is not an essential element of her § 1681e(b) claims. *See* Br. of Appellant, pp. 26-30. Neither of these cases supports Plaintiff’s argument.

In *Soualian*, the Central District of California addressed whether a plaintiff must prove an injury to succeed on her claim that a defendant violated § 1681c(g) of the Fair and Accurate Credit Transactions Act by failing to truncate credit card numbers or expiration dates on receipts. *Soualian*, 2007 WL 4877903, at *1, *3. In resolving that issue, the court determined the plaintiff did not have to prove an injury “to recover for Defendant’s alleged violations *of Section 1681c(g)*.” *Id.* at *3 (emphasis added). This holding from a California district court regarding what must be shown to recover on a claim under 15 U.S.C. § 1681c(g) provides no

support for Plaintiff's argument that she is not required to prove an injury to succeed on a § 1681e(b) claim.

Plaintiff's reliance on the Northern District of Illinois' *Gillespie* decision is even less persuasive. The *Gillespie* court simply determined it was not required to deny class certification based on the class representatives' decision to seek statutory damages if successful on their underlying claims. See *Gillespie*, 2008 WL 4614327, at *5. This determination obviously has no bearing on Plaintiff's argument that she is not required to plead an injury as part of her § 1681e(b) claim.

E. Plaintiff's argument that there is "no rational basis" for requiring an injury as an essential element of a § 1681e(b) claim is without merit.

Plaintiff suggests there is "no rational basis" for requiring proof of an injury to establish a § 1681e(b) claim when, at least in some circuits, injury is not a required element to prove claims under other FCRA provisions. See Br. of Appellant, p. 30. This argument is simply incorrect.

First, as discussed above, even the cases Plaintiff relies upon recognize injury is an essential element of some FCRA claims but not of others. See, e.g., *In re H & R Block Mortgage*, 2007 WL 325351, at *3 (finding proof of injury not required in a claim under § 1681b but recognizing authority that injury is a required element of a claim under § 1681i). Furthermore, there is no indication that the Sixth Circuit would, if presented with the appropriate case, agree with the

decisions of the other courts that injury is not an essential element of the FCRA claims at issue in the cases on which Plaintiff relies.

Finally, if Plaintiff is looking for a rational basis for requiring an injury for a § 1681e(b) claim, one rationale is apparent from the language of the statute itself. 15 U.S.C. § 1681e(b) requires “*reasonable* procedures to assure maximum possible accuracy” when preparing consumer reports. (emphasis added). The obligation of “reasonableness” in procedures distinguishes an agency’s obligations under § 1681e(b) from an agency’s obligations under the other FCRA provisions discussed in Plaintiff’s brief. For example, under 15 U.S.C. § 1681b, an agency is forbidden to impermissibly obtain a consumer’s credit reports without making a firm offer of credit, and under 15 U.S.C. § 1681c(g) a merchant is forbidden to print more than the last five digits of a credit card number or a credit card expiration date on any receipt provided to a customer. Given these flat prohibitions on certain specifically identified conduct, it is understandable that a court might determine an injury is not an essential element of a claim under § 1681b or § 1681c(g).

15 U.S.C. § 1681e(b), on the other hand, does not prohibit any specifically identified conduct. Rather, it imposes the standard of care of “reasonableness” in procedures and, in so doing, requires a finding of negligence on the part of agencies before liability can arise. *See Dickens v. Trans Union Corp.*, 18 F. App’x

315, 317 (6th Cir. 2001) (noting that the standard of conduct for imposing liability under § 1681e(b) is “what a reasonably prudent person would do under the circumstances”). As with any traditional allegation of negligence, liability does not arise unless a plaintiff proves unreasonable conduct on the part of a defendant and that the plaintiff was injured as a proximate result of the defendant’s unreasonable conduct. *See, e.g., Power & Tel. Supply Co. v. SunTrust Banks, Inc.*, 447 F.3d 923, 932 (6th Cir. 2006). The law simply does not allow an uninjured bystander to haul a defendant into court on a negligence claim to question the reasonableness of the defendant’s behavior.

For this same reason, courts have repeatedly recognized that § 1681e(b) does not “impose strict liability for errors or provide a means for merely correcting an erroneous report.” *Pettus*, 879 F. Supp. at 697; *see also Nelski*, 86 F. App’x at 844. Accordingly, liability under § 1681e(b) does not arise solely because an agency provides an inaccurate report. *See Currier*, 2008 WL 795738, at *4 (noting that § 1681e(b) does not “impose strict liability for inaccurate entries in consumer reports”); *Johnson*, 2007 WL 1589536, at *4 (“[T]he FCRA does not require error free consumer reports.”). Liability also does not arise where an agency’s procedures are unreasonable, but its reports are accurate. *See Collins*, 494 F. Supp. 2d at 135 (noting that, under § 1681e(b), “the threshold question is whether the challenged credit information is accurate”); *Garrett*, 2006 WL 2850499, at *14.

Likewise, there can be no liability under § 1681e(b) unless a plaintiff was injured in some discernable way by an inaccurate report. *See Breed*, 2007 WL 1408212, at *3 (stating that, to establish liability under § 1681e(b), the plaintiff was required to show that an inaccurate entry on his credit report was a substantial factor in bringing about the denial of credit).

It is only when each of these elements is present – an inaccurate report, unreasonable conduct, an injury, and causation between the conduct and the injury – that it is appropriate under the express language of the statute to subject an agency to liability under § 1681e(b). *See Nelski*, 86 F. App'x at 844. To hold otherwise would allow an uninjured plaintiff to mount a freestanding challenge to the reasonableness of a defendant's procedures and would allow the kind of strict liability application of § 1681e(b) that has been repeatedly rejected by the courts.

In fact, the definition Plaintiff proposes for the class of plaintiffs in this case provides a strong example of why an injury is essential to state a claim under § 1681e(b). According to Plaintiff, the class should consist of “all individuals” who held “a Tennessee driver license that was changed from an eight-digit to a nine-digit number, consisting of the addition of a ‘0’ as the first digit of the nine-digit number.” *Record Entry No. 1, Compl.*, ¶ 62. This definition would encompass the majority of adult residents of Tennessee, regardless of whether they had suffered any injury as a result of TeleCheck's services or, even, had ever presented a check

to a merchant or bank that used TeleCheck's services. Under Plaintiff's proposed class, anyone holding a Tennessee driver's license in 2002 – when the change from eight-digit to nine-digit numbers took place – could state a claim for statutory damages under § 1681e(b) solely because both their eight-digit and nine-digit number might be present in TeleCheck's database. The requirement that an injury must be proven as an essential element of a § 1681e(b) claim prevents such an absurd and unintended application of the FCRA.

In sum, § 1681e(b) does not encourage each and every uninjured person motivated by the possibility of receiving statutory damages to file a claim against a credit reporting agency suggesting the agency may be able to use different procedures to ensure the accuracy of information in their reports. That is precisely what Plaintiff has attempted to do in this case. Plaintiff's Complaint does not plead she suffered any injury or adverse impact as a result of TeleCheck's allegedly unreasonable conduct nor, indeed, that she has suffered any injury at all. Accordingly, Plaintiff failed to allege an essential element of her claims, and the district court correctly dismissed her Complaint.

II. IF THIS COURT DECIDES TO ADDRESS THE ISSUE, THE DISTRICT COURT'S DETERMINATION THAT PLAINTIFF CANNOT RECOVER INJUNCTIVE OR DECLARATORY RELIEF SHOULD BE AFFIRMED.

TeleCheck's Motion to Dismiss did not address whether Plaintiff could recover equitable relief if she had properly stated a claim. *Record Entry No. 10*,

Defs. ' Mot. to Dismiss. TeleCheck's Motion focused on the fact that Plaintiff's Complaint should be dismissed in its entirety, regardless of the various remedies Plaintiff requested. *Record Entry No. 10, Defs. ' Mot. to Dismiss.* Nevertheless, through a variety of filings, Plaintiff forced the issue of her potential entitlement to injunctive or declaratory relief on the district court. *See Record Entry No. 22, Pl. 's Resp. to Defs. ' Mot. to Dismiss, pp. 2, 8, 10; Record Entry No. 27, Pl. 's Mot. to Strike Portions of Defs. ' Reply or Alternatively, Mot. for Leave to File Surreply, pp. 1-2; Record Entry No. 28, Defs. ' Mem. in Opp'n to Pl. 's Mot. to Strike Portions of Defs. ' Reply or Alternatively, Mot. for Leave to File Surreply, pp. 1-2; Record Entry No. 30, Pl. 's Surreply to Defs. ' Mot. to Dismiss.* As a result, the district court ultimately and correctly determined that injunctive and declaratory relief are not available under the FCRA to private litigants like Plaintiff. *Record Entry No. 35, Memo., pp. 10-12; Record Entry No. 36, Order.*

On appeal, Plaintiff asks this Court to reverse the district court's decision. This Court should deny Plaintiff's request for two reasons. First, Plaintiff's failure to state a claim renders any determination as to her potential right to equitable relief moot. Second, if this Court decides to address the issue, the district court's decision should be affirmed because injunctive and declaratory relief are not available in private causes of action brought pursuant to the FCRA.

- A. It is unnecessary to address the district court's determination that injunctive and declaratory relief are not available to Plaintiff.

The district court's Order granting TeleCheck's Motion to Dismiss is based on Plaintiff's failure to plead an essential element of her claims under § 1681e(b). Because Plaintiff did not plead the essential elements of her claims, she failed to state a claim upon which relief could be granted, and the district court dismissed her Complaint. This same analysis applies regardless of whether declaratory and injunctive relief are remedies available to a plaintiff who, unlike Plaintiff in this case, sufficiently pleads a FCRA claim.

Because of this, and because the district court correctly determined Plaintiff failed to state a claim upon which relief can be granted, this Court should decline to consider whether Plaintiff might have been able to receive injunctive or equitable relief if she had stated a claim. *See Arber v. Essex Wire Corp.*, 490 F.2d 414, 416, 424 (6th Cir. 1974) (declining to consider the district court's ruling on the affirmative defense of laches after having already determined the plaintiff failed to prove a state law or federal securities violation).

- B. If this Court decides to consider the issue, it should affirm the district court's determination that Plaintiff is not entitled to injunctive or declaratory relief.

Although federal district courts generally have inherent power to issue equitable relief, Congress can limit that power with respect to a particular statute. *See Califano v. Yamasaki*, 442 U.S. 682, 705 (1979). Such a limitation must be

provided by the statute itself. Under the FCRA, Congress has expressly granted the authority to seek injunctive relief to administrative bodies, primarily the FTC. Furthermore, the FCRA provisions establishing private rights of action for consumers expressly delineate the forms of relief available to consumers. *See* 15 U.S.C. § 1681n, 1681o. As the vast majority of courts to consider this issue have held, the FCRA remedial scheme “clearly and unambiguously limit[s] the court’s equity jurisdiction” in actions brought by consumers. *See, e.g., Washington v. CSC Credit Services, Inc.*, 199 F.3d 263, 268 (5th Cir. 2000) (quoting *Sierra Club, Lone Star Chapter v. FDIC*, 992 F.2d 545, 548 (5th Cir. 1993)), *cert. denied* 530 U.S. 1261 (2000).

At this time, the Fifth Circuit is the only circuit court to have addressed this issue. In *Washington v. CSC Credit Services, Inc.*, the Fifth Circuit held that “Congress vested the power to obtain injunctive relief solely with the FTC” and, therefore, equitable remedies are not available to private FCRA litigants.⁵ *Washington*, 199 F.3d at 268-69.

As the district court’s decision in this case recognized, *Washington* has become the leading authority on this issue and has been overwhelmingly followed by courts across the country. *See Record Entry No. 35, Memo., pp. 11-12; see also Record Entry No. 41, Memo., pp. 6-9.* Although this Court has not yet addressed

⁵ This is subject to a narrow exception provided in 15 U.S.C. § 1681u that is discussed below.

the issue, at least two district courts in the Sixth Circuit have, and those courts agreed with *Washington* that injunctive and declaratory relief are not available to private litigants under the FCRA. *See Holmes*, 556 F. Supp. 2d at 848; *Presley v. Equifax Credit Info. Servs., Inc.*, 2006 WL 2457978, at *1 (E.D. Ky. Aug. 21, 2006). Accordingly, and as discussed further below, the district court correctly determined that injunctive and declaratory relief are not available to Plaintiff.

1. Injunctive relief is not available to private litigants bringing claims under the FCRA.

The FCRA provisions setting forth the remedies generally available in private rights of action do not include any injunctive or other forms of equitable relief. *See* 15 U.S.C. § 1681n, 1681o. Instead, the FCRA statutory scheme expressly directs that administrative regulators, primarily the FTC, have the authority to seek injunctive relief for noncompliance with the FCRA provisions. *See* 15 U.S.C. § 1681s(a)(1) (“Compliance with the requirements imposed under this title shall be enforced under the Federal Trade Commission Act by the Federal Trade Commission with respect to consumer reporting agencies and all other persons subject thereto . . .”). Granting this authority to the FTC makes sense because the FCRA is not only a remedial statutory scheme, but also a technical and complicated one. Congress chose to provide injunctive authority to federal regulators who have the expertise to ensure both requisite and reasonable FCRA compliance. For instance, the FTC is not required to seek an injunction

immediately but may compel parties to “cease and desist” from noncompliant acts without resorting to litigation. *See* 15 U.S.C. § 45.

Under specific provisions of the FCRA not at issue in this case, Congress has, nevertheless, created a private right of action for injunctive relief. For example, under 15 U.S.C. § 1681u, reporting agencies are required to disclose certain consumer information to the FBI for specific counterintelligence purposes. To guard against abuse, 15 U.S.C. § 1681u creates specific remedies available to consumers who prove such information was improperly obtained. These specific remedies include the right to injunctive relief. 15 U.S.C. § 1681u(m). Based on the availability of injunctive relief for those specific violations, courts have determined that, “where Congress intended to allow private injunctive relief under the FCRA, it expressly stated that this relief was available” within the statutory text. *See Washington*, 199 F.3d at 269.

Further, the exclusion of injunctive or equitable relief from the general remedies available to a private litigant under the FCRA leads to the “necessary and inescapable inference” that the statute “restricts the court’s jurisdiction in equity.” *Cf. Amoco Prod. Co. v. Gambell*, 480 U.S. 531, 542 (1987). As the Court of Appeals for the Fifth Circuit held in *Washington*, the “affirmative grant of power to the FTC to pursue injunctive relief, coupled with the absence of a similar grant to private litigants when they are expressly granted the right to obtain damages and

other relief, persuasively demonstrates that Congress vested the power to obtain injunctive relief solely with the FTC.” *Washington*, 199 F.3d at 268; *see also In re Trans Union Corp. Privacy Litig.*, 211 F.R.D. at 339-40.

The Fifth Circuit’s decision in *Washington* has been overwhelmingly confirmed by the federal district courts that have subsequently decided the issue, including district courts within the Sixth Circuit. *See, e.g., Birmingham*, 2009 WL 194985, at *1 (“injunctions are not available to consumers under the FCRA”); *Holmes*, 556 F. Supp. 2d at 848 (finding “the better view is that injunctive relief is not available to private litigants under the FCRA”); *Young*, 2007 WL 2083680, at *1 (“It has been well settled that injunctive relief is not available to private plaintiffs under the FCRA.”); *Presley*, 2006 WL 2457978, at *1; *Campos*, 237 F.R.D. at 482 n.8 (“There is no private right of action for injunctive relief under the FCRA.”); *Thompson*, 2005 WL 3534234, at *4 (“Private litigants may not seek injunctive or equitable relief against a consumer reporting agency.”); *White v. First Am. Registry, Inc.*, 378 F. Supp. 2d 419, 424 (S.D.N.Y. 2005); *Howard*, 371 F. Supp. 2d at 1145 (“The Court considers the express inclusion of injunctive relief in certain provisions of the FCRA and its omission from the provisions creating plaintiff’s cause of action to be a sufficiently ‘clear command’ from Congress that injunctive relief is not available to plaintiff.”); *Owner-Operator Indep. Driver Ass’n*, 410 F. Supp. 2d at 1007 (noting that the courts that have considered this

issue have “overwhelmingly concluded that the FCRA precludes private litigants from seeking equitable relief”); *Anderson v. Capital One Bank*, 224 F.R.D. 444, 448 (W.D. Wis. 2004); *see also, e.g., Bumgardner*, 996 F. Supp. at 527 (concluding that “Congress did not intend injunctive relief as a remedy”); *Ditty v. CheckRite Ltd.*, 973 F. Supp. 1320, 1338 (D. Utah 1997) (similar); *Mangio v. Equifax, Inc.*, 887 F. Supp. 283, 284-85 (S.D. Fla. 1995) (similar); *Kekich*, 64 F.R.D. at 668 (similar).

In light of this overwhelming and well-reasoned authority, the district court was correct to determine Plaintiff could not recover equitable relief, even if she had stated a claim under § 1681e(b). If this Court decides to address the issue, it should affirm the district court’s holding that injunctive relief is not available to private litigants like Plaintiff.

2. Plaintiff’s suggestion that other circuits have allowed injunctive relief in private causes of action under the FCRA is unpersuasive.

In an attempt to give the appearance of a split in the circuits regarding whether injunctive relief is available to a private litigant under the FCRA, Plaintiff claims the Ninth Circuit and Seventh Circuit have both recognized a private litigant’s right to such relief. *See* Br. of Appellant, pp. 46-49. Plaintiff’s arguments are without merit.

Plaintiff cites to the 1974 case of *Greenway v. Information Dynamics, Ltd.* from the United States District Court of Arizona for her argument that the Ninth Circuit has recognized a private litigant's right to injunctive relief under the FCRA. *See* Br. of Appellant, pp. 46-47. Although Plaintiff is correct that the *Greenway* decision did grant the plaintiff in that case a preliminary injunction against the defendant's alleged violations of § 1681b, the Court did not address or provide any discussion concerning whether a private right of action for declaratory or injunctive relief exists under the FCRA. *See Greenway*, 399 F. Supp. 1092, 1096-97 (D. Ariz. 1974); *see also Howard*, 371 F. Supp. 2d at 1145 n.5. Furthermore, as the district court in this case recognized, the *Greenway* decision was decided more than 25 years before the Fifth Circuit's decision in *Washington* that, as discussed above, has been followed across the country for the proposition that equitable relief is not available to private FCRA litigants. *See Record No. 41, Memo., p. 10.* Accordingly, the *Greenway* decision is hardly sufficient to show there is a split in the circuits regarding a private litigant's right to injunctive relief, especially in light of the overwhelming weight of recent authority from district courts across the country – including within the Sixth Circuit – to the contrary.

Similarly unpersuasive is Plaintiff's reliance on the *Crabill v. Trans Union, LLC* decision to suggest the Seventh Circuit recognizes the availability of injunctive relief. *See* Br. of Appellant, p. 47. In the *Crabill* decision, the Court

simply identified an injunction as an example of a remedy the plaintiff in that case could possibly obtain. *See Crabill*, 259 F.3d 662, 664 (7th Cir. 2001). The plaintiff in *Crabill* neither sought injunctive relief, nor did the Court discuss whether declaratory or injunctive relief was actually available to the plaintiff. The passing reference to injunctive relief in *Crabill* is not sufficient to suggest there is uncertainty in the circuits on this now-settled issue. *See Holmes*, 556 F. Supp. 2d at 848 (noting that *Crabill* does not address the issue of whether injunctive relief is available “in any meaningful way”).

3. Declaratory relief is not available to private litigants bringing claims under the FCRA.

Plaintiff also argues that, even if she is not entitled to injunctive relief, she is still entitled to declaratory relief. *See Br. of Appellant*, pp. 51-52. Courts have routinely rejected similar attempts to circumvent the unavailability of injunctive relief under the FCRA. As the Court of Appeals for the Fifth Circuit held in *Washington*, permitting plaintiffs to seek declaratory relief “would frustrate the FCRA’s limitation of injunctive relief to the FTC.” *Washington*, 199 F.3d at 269 (“Unable to obtain injunctive relief directly, consumers could attempt to obtain it indirectly by obtaining declaratory relief solely for the purpose of later prompting the FTC to move for injunctive relief.”).

The Sixth Circuit has not ruled directly on this question. It has, however, expressed its view on the use of declaratory relief as a way to avoid a prohibition

against injunctive relief. *See Martingale, LLC v. Louisville*, 361 F.3d 297 (6th Cir. 2004). In *Martingale*, the plaintiffs sought a declaratory judgment to prohibit the City of Louisville from proceeding with a state court condemnation action. *See id.* at 300. This Court affirmed summary judgment for the city on the grounds that declaratory relief would, in practical effect, constitute an injunction in violation of the Anti-Injunction Act. *See id.* at 303-05. The Court observed that the plaintiffs' "ultimate goal is to halt the state court condemnation proceedings, a result that either an injunction or a declaratory judgment would accomplish equally well." *Id.* at 303. The court held that where "declaratory relief would have the same practical effect as an injunction, the Anti-Injunction Act precludes the court from granting a declaratory judgment." *Id.* In this case, as in *Martingale*, allowing Plaintiff to receive declaratory relief would have the same practical effect as an injunction, which is not a remedy available to Plaintiff under the FCRA.

Furthermore, numerous courts have determined that authorizing declaratory relief in private actions would displace the role Congress established for the FTC related to the FCRA. *See Gelman v. State Farm Mutual Auto. Ins. Co.*, 2007 WL 2306578, at *9 (E.D. Pa. Aug. 9, 2007) ("Declaratory or injunctive relief is not available to private plaintiff, though the Federal Trade Commission can obtain such relief pursuant to 15 U.S.C. § 1681s."); *Hogan v. PMI Mortgage Ins. Co.*, 2006 WL 1310461, at *3 (N.D. Cal. May 12, 2006) ("declaratory and injunctive

relief are not available to private litigants under the FCRA”); *White*, 378 F. Supp. 2d at 424.

In short, Plaintiff misperceives the nature of private actions under the FCRA. “The plain language of the statute authorizes district courts to enforce only ‘liability’ of a credit agency to an individual and does not instruct district courts to insure ‘compliance.’” *Jones v. Sonic Auto., Inc.*, 391 F. Supp. 2d 1064, 1066 (M.D. Ala. 2005); *see also Varricchio v. Capital One Serv., Inc.*, 2007 WL 917226, at *2 (S.D. Fla. Mar. 23, 2007). In this case, Plaintiff has sought an injunction and declaratory relief to effect “programmatic” change in TeleCheck’s check verification system. *See* Br. of Appellant, pp. 50-51. Congress has reserved that kind of regulatory function exclusively to government regulators. Accordingly, Plaintiff has no right to the declaratory or injunctive relief she requested in her Complaint. The district court, therefore, properly dismissed Plaintiff’s requests for injunctive and declaratory relief.

CONCLUSION

For the foregoing reasons, the judgment of the district court dismissing Plaintiff’s claims in their entirety should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned certifies this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B).

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s/ Wallace W. Dietz

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Brief of Appellees with the Clerk of the Court by using the CM/ECF system on this 25th day of March, 2009, which will cause notice of electronic filing to be sent to the following:

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**APPELLEES' DESIGNATION OF RELEVANT
DISTRICT COURT DOCUMENTS**

RECORD ENTRY NO.	DESCRIPTION OF DOCUMENT	DATE FILED
1	Complaint	Aug. 17, 2007
10	Defendants' Motion to Dismiss	Oct. 15, 2007
11	Memorandum of Law in Support of Defendants' Motion to Dismiss	Oct. 15, 2007
22	Plaintiff's Response to Defendants' Motion to Dismiss	Nov. 5, 2007
26	Defendants' Reply in Support of Its Motion to Dismiss	Nov. 16, 2007
27	Plaintiff's Motion to Strike Portions of Defendants' Reply or Alternatively, Motion for Leave to File Surreply	Nov. 19, 2007
28	Defendants' Memorandum in Opposition to Plaintiff's Motion to Strike Portions of Defendants' Reply or Alternatively, Motion for Leave to File Surreply	Nov. 20, 2007
30	Plaintiff's Surreply to Defendants' Motion to Dismiss	Nov. 26, 2007
32	Notice of Filing Supplemental Authority and Exhibits	March 5, 2008
35	District Court Memorandum Ruling on Defendants' Motion to Dismiss	June 6, 2008
36	District Court Order Ruling on Defendants' Motion to Dismiss	June 6, 2008
41	District Court Memorandum Ruling on Plaintiff's Motion to Certify Dismissal for Interlocutory Appeal	Oct. 23, 2008
42	District Court Order Ruling on Plaintiff's Motion to Certify Dismissal for Interlocutory Appeal	Oct. 23, 2008
43	Notice of Appeal	Nov. 21, 2008