Appeal No. 17-3795

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

TAMMY TURNER,

Plaintiff-Appellant,

v.

EXPERIAN INFORMATION SOLUTIONS, INC.,

Defendant-Appellee.

On Appeal From The United States District Court
For The Northern District of Ohio
Case No. 3:16-cv-00630

BRIEF OF APPELLEE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and 6 Cir. R. 26.1, Experian Information Solutions, Inc., makes the following disclosures:

1. Is said party a subsidiary or affiliate of a publicly owned corporation?

Yes. Experian plc owns 100% of Experian Information Solutions, Inc. Experian plc is registered as a public company in Jersey, Channel Islands, and is publicly traded on the London Stock Exchange.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome?

Yes. Experian plc has such an interest due to its ownership of Experian Information Solutions, Inc.

/s/ Emmett. E. Robinson
Counsel for Defendant-Appellee
Experian Information Solutions, Inc.

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JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction under 28 U.S.C. § 1331 and 15 U.S.C. § 1681p because this action arose under the laws of the United States. This Court has jurisdiction pursuant to 28 U.S.C. § 1291. On June 30, 2017, the district court entered its final judgment. Turner filed a timely notice of appeal on July 27, 2017.

STATEMENT OF THE ISSUES

1. Whether a plaintiff can assert a failure-to-reinvestigate claim under the Fair Credit Reporting Act, 15 U.S.C. §1681i, when the defendant consumer reporting agency was not notified of any dispute as to the now-claimed inaccuracies in the consumer's credit file.

2. Whether a third-party corporation's attempt to dispute information in a consumer's credit file—without involvement by the consumer in creating the dispute or in notifying the credit reporting agency of the dispute—triggers a duty to reinvestigate that by statute arises only when information is disputed "by the consumer" and "the consumer notifies the agency directly" of the dispute, 15 U.S.C. § 1681i(a).

3. Whether a consumer can claim "actual damages" from an alleged failure to reinvestigate disputed information, when the only alleged inaccuracies in her credit file were not raised in any dispute and therefore would not have been addressed by any reinvestigation, and where those alleged inaccuracies in any event were trivial and plaintiff has identified no way in which they were harmful.

4. Whether the rule of *Safeco Insurance Co. of America v. Burr*, 551 U.S. 47 (2007)—that a willful violation of the Fair Credit Reporting Act requires proof that the defendant violated clearly established law—permits willfulness liability for failure to reinvestigate a dispute received from a third party, when the applicable

statute requires a dispute "by the consumer" of which the consumer "notifies the agency directly," and a number of authorities hold that a consumer reporting agency's duty to reinvestigate is *not* triggered under such circumstances.

INTRODUCTION

Plaintiff Tammy Turner's sole allegation of a violation of the Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681 *et seq.*, relates to how defendant Experian, a credit reporting agency (CRA), responded to a letter—purporting to dispute the accuracy of items on her consumer report—that the third party credit repair organization Go Clean Credit, not Turner herself, prepared and sent to Experian. Because the FCRA requires CRAs to conduct a reinvestigation only when information is disputed "by the consumer" and "the consumer notifies the agency directly" of the dispute, 15 U.S.C. § 1681i(a), and the letter at issue appeared to come from a third party, Experian reached out to Turner and asked her to contact Experian directly if she wished to initiate a dispute. Instead of doing so, Turner filed this lawsuit, claiming that the FCRA required Experian to conduct a reinvestigation despite the fact that she never personally submitted a dispute to Experian. The district court granted summary judgment in Experian's favor.

On appeal, Turner continues to assert that the FCRA required Experian to reinvestigate the items challenged by Go Clean Credit, but she has abandoned her claims that any of the challenged items were inaccurate. She does claim two new purported inaccuracies that were not raised in the letter sent by Go Clean Credit—which she asserted for the first time in her summary judgment briefs—but she

makes no claim that Go Clean Credit (let alone that she personally) ever disputed them with Experian.

STATEMENT OF THE CASE

A. Statutory Background

To meet the commercial need for credit reporting while ensuring fairness to consumers, Congress in the FCRA required CRAs to "adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information." 15 U.S.C. § 1681(b). The FCRA established methods to promote the reliability of credit reporting, including by giving consumers a reliable way to dispute derogatory accounts in their credit reports. Report of the Committee on Banking and Currency, Sen. Rep No. 91-517, at 3 (1969).

Among other things, the FCRA requires CRAs to establish and maintain reasonable procedures to ensure the accuracy of consumer reports. 15 U.S.C. § 1681e(b). It also gives consumers the ability to trigger a "reinvestigation" of information they dispute. Under 15 U.S.C. § 1681i, if the consumer "notifies the [CRA] directly, or indirectly through a reseller [of consumer report information]," of a dispute over information in the consumer's credit file, the CRA must reinvestigate that information—typically by checking with the furnisher of the information—within 30 days.

The important role played by credit reporting gave rise to a cottage industry of so-called "credit repair organizations" (CROs)—companies that promised to fix consumers' negative credit records. Concerned that CROs too often "inappropriately led consumers to believe that adverse information in consumer reports can be deleted or modified regardless of the accuracy of the information," Congress enacted the Credit Repair Organizations Act (CROA) to combat "credit repair fraud." The Consumer Reporting Reform Act of 1994, Sen. Rep. 103-209, at 5 (1993). Congress noted that "credit repair organizations that succeed in having accurate information deleted from the consumer's report often do so by abusing the reinvestigation system," for example by "lodging protest after protest until the agency is unable to verify the information." *Id.* The CROA sought to curtail those activities by regulating the advertising and billing practices of companies that held out the promise that they could help a consumer with accurate, but negative, credit information "go clean."

B. Factual Background

***Experian's Procedures*.** Experian is a consumer reporting agency. (Joint Statement of Undisputed Material Facts ("JSF"), RE 21, Page ID # 119, ¶ 2.) It does not originate or create credit information, but rather stores data supplied by "furnishers" who engage in credit transactions with consumers. (2/6/17 Declaration of Mary Methvin ("2/16/17 Methvin Decl."), RE 30-2, Page ID # 578,

¶ 4.) Furnishers report trade lines to Experian consisting of individual credit account data such as account number, status, and balance as well as certain identifying information used to match particular accounts to the appropriate consumer. (*Id.*) Experian provides a consumer's credit information only upon request and only to the consumer or to subscribers authorized by law to receive it. (*Id.*, ¶ 5.)

Experian has developed extensive procedures designed to assure the maximum possible accuracy of the credit information that it reports. (*Id.*, Page ID ## 579-580, ¶¶ 6-15.) For example, it provides consumers with easy and secure access to their consumer disclosures and multiple means to dispute items in their credit files. (*Id.*, ¶ 9.) Consumers can initiate a dispute free of charge by telephone, by mail, by visiting Experian's secure website, or in person at an Experian Personal Visit Office. (*Id.*)

When Experian receives a dispute from a consumer, it typically conducts a reinvestigation by contacting the furnisher who was the source of the information, describing the nature of the dispute, and requesting that the furnisher verify or modify the information as appropriate. (*Id.*, ¶¶ 10-12.) Experian then sends the consumer a summary reflecting the results of the reinvestigation and describing the options available if the consumer disagrees with those results. (*Id.*, ¶ 13.) Given its obligation to safeguard consumers' confidential credit information, Experian

must be reasonably sure that the correspondence it receives actually comes from the consumer whose credit information is involved. (*Id.*, ¶¶ 16-17.)

The Go Clean Credit Letter and Experian's Response. On July 6, 2015, Experian received a letter dated June 29, 2015, purportedly sent by Turner (the "Letter"). (Dispute Letter, RE 21-5, Page ID ## 193-195.) The Letter displayed certain characteristics indicating that it was not sent by Turner. (*See* JSF, RE 21, Page ID # 122, ¶¶ 29-32.)

On July 10, 2015, Experian mailed a response letter to Turner (the "Response"), notifying her that "[Experian] received a suspicious request in the mail regarding your personal credit report and determined that it was not sent by you." (*Id.*, ¶¶ 25-26.) Experian did not refuse to conduct a reinvestigation. (*Id.*, ¶¶ 26-27.) Instead, Experian asked Turner to contact it directly, either by telephone or via the Internet, if she wished to make a dispute. (*Id.*) Turner did not contact Experian after receiving the Response, even though she admits she could have done so. (*Id.*, ¶ 28; 11/18/16 Deposition of Tammy Turner ("Turner Dep."), RE 21-1, Page ID # 148.)

The Letter, in fact, was not sent by Turner. It was sent by a "credit repair organization" called Go Clean Credit. Go Clean Credit drafted the Letter, chose which trade lines to dispute in the Letter and why to dispute them, and mailed the Letter to Experian. (JSF, RE 21, Page ID ## 119, 121, ¶¶ 3, 19-21.)

Turner did not draft the Letter, choose the language used in it, or personally sign the Letter. (*Id.*, Page ID # 120, ¶¶ 14-16.) The Letter contains an electronic signature, part of which is cut off at the bottom; Turner did not place her electronic signature on the Letter.[1] (*Id.*, ¶ 17.) Nor did she mail the Letter to Experian. (*Id.*, Page ID # 121, ¶ 18.) Turner never saw the Letter before Go Clean Credit sent it to Experian. (*Id.*, ¶ 22.)

Go Clean Credit had no documentation to corroborate the claims it made in the Letter, and the Letter included no attachments to substantiate those claims. (*Id.*, ¶¶ 23-24.) All Go Clean Credit had was a copy of Turner's credit report—obtained from a third party—which reflected the credit data and scores being reported by Experian, Equifax, and Trans Union as of June 17, 2015.[2] (*Id.*, Page ID # 119, ¶ 7.) Indeed, Go Clean Credit was not able—and did not try—to determine whether the disputed accounts were being reported inaccurately. (Svendsen Dep., RE 21-2, Page ID # 177.)

Go Clean Credit simply "flagged each derogatory account on the report," and followed its normal practice of disputing derogatory accounts with late

[1] Turner allegedly granted Go Clean Credit a limited power of attorney, but the Letter—which attempted to conceal that it had been sent by Go Clean Credit—said nothing about that.

[2] As of June 2015, compared to Equifax and Trans Union, Turner's highest credit score was with Experian. (12/19/16 Deposition of Justin Svendsen ("Svendsen Dep."), RE 21-2, Page ID # 170.)

payments "as a matter of course," with no regard to whether the information was accurate. (JSF, RE 21, Page ID ## 120, 126, ¶¶ 9, 57.) It then inundated all three major CRAs and Turner's creditors with dozens of letters purporting to dispute the same accounts but for different reasons in an effort to make "something stick." (*Id.*, Page ID ## 126-127, ¶¶ 58-59.) In fact, Go Clean Credit's representative testified that it is Go Clean Credit's practice to send iterative letters to CRAs disputing the same derogatory account for multiple, different reasons; Go Clean Credit stops sending dispute letters only when it has exhausted all possible rationales. (*Id.*, ¶ 59.)

The Letter claimed that nine derogatory accounts in Turner's credit file contained inaccurate information. (*Id.*, Page ID ## 122-123, ¶¶ 33-24.) That was not true. One account—a CBNA charge card—was not even mentioned in the complaint, and Turner admitted that Experian accurately reported the status of that account. (*Id.*, ¶ 35.) Two other accounts—a Chase credit card and a Comenity Bank charge card—were referenced in the complaint, but Turner later conceded that Experian accurately reported the status of those accounts. (*Id.*, ¶ 36.) As to the six remaining accounts, Turner—as described below—subsequently abandoned her claims of inaccuracy.

Turner's Alleged Emotional Distress. Turner did not incur, and does not claim damages for, any actual monetary or out-of-pocket losses. (*Id.*, Page ID #

127, ¶ 61.) She was not denied credit at any time between July 2015 and the present due to information appearing on her Experian credit report.[3] (*Id.*, ¶ 60.) She only claimed "actual damages in the forms of emotional distress, mental anguish, suffering, humiliation and embarrassment." (*Id.*, Page ID # 128, ¶ 62.)

The alleged emotional distress, however, resulted from a conversation Turner had in early 2015, *before* Go Clean Credit sent the Letter to Experian. According to Turner, she and her husband met with a mortgage broker whose name she does not recall, and she "was advised by the mortgage broker that it would be challenging to obtain a mortgage." (Turner Dep., RE 21-1, Page ID ## 157-159.)

Not only did that alleged conversation precede the Letter from Go Clean Credit, but there also is no evidence that the mortgage broker was referring to—or had even seen—Turner's Experian credit report. What *is* established, however, is that Wells Fargo had foreclosed on a home owned by Turner in May 2010. (JSF, RE 21, Page ID # 128, ¶ 63.) That foreclosure was reported by Experian, Equifax, and Trans Union; Turner does not contest the accuracy of the reported foreclosure. (*Id.*) She also conceded the existence of

[3] To the contrary, between the time that Go Clean Credit sent the Letter to Experian and the date she filed her complaint, Turner was approved for a car loan and bought a car. (Turner Dep., RE 21-1, Page ID # 157.)

other stressors in her life, as she had recently been through a divorce and experienced some "financial issues." (Turner Dep., RE 21-1, Page ID # 136.)

By late 2016, Turner applied for and was approved for a mortgage loan and was in the process of buying a house. (*Id.*)

The Litigation Below. On February 10, 2016, Turner filed a complaint against Experian, alleging both negligent and willful violations of the FCRA and listing eight accounts that she alleged were inaccurately depicted on her consumer report. (Complaint, RE 1-1, Page ID ## 7-12.)

Turner's case was one of twenty-six parallel suits filed by her counsel in the Northern District of Ohio and consolidated for pretrial proceedings before Judge Jack Zouhary because they presented common legal and factual issues. Seven of the cases subsequently settled and, of the remaining cases, counsel for the parties selected this as the bellwether. (Order, RE 10, Page ID ## 46-47.) The other eighteen cases were then stayed while discovery proceeded in this case. (*Id.*)

Once fact discovery was completed, the parties cross-moved for summary judgment. At that point, Turner abandoned each and every inaccuracy alleged in her complaint. None of them was mentioned anywhere in Turner's motion for summary judgment. (*See generally* Turner's Motion for Summary Judgment, RE 28, Page ID ## 303-329.) Moreover, in her opposition to Experian's motion for summary judgment, Turner failed to address any of Experian's arguments as to

why the information referenced in her complaint was accurate. (*See generally* Turner's Opposition to Experian's Motion for Summary Judgment, RE 31, Page ID ## 596-621.)

Of the nine derogatory credit items disputed in the Letter and the eight derogatory credit items referenced in the complaint, none of them remain at issue in this case:

- One item, an alleged late payment on a CBNA charge card, was not referenced in the complaint because Turner no longer disputes its accuracy. (JSF, RE 21, Page ID # 123, ¶ 35.)
- Turner conceded the accuracy of Experian's reporting as to two additional once-disputed items, relating to a Chase credit card and a Comenity Bank charge card. (*Id.*, ¶ 36.)
- The district court found that Turner had "abandoned" her dispute with respect to alleged late payments on her Bank of the West, Macy's, and Kohl's accounts.[4] (Memorandum Opinion and Order, RE 35, Page ID # 855.) Turner has not challenged that holding on appeal.

[4] Between July and December 2015, Experian and/or the two other major CRAs reinvestigated the Bank of the West account fifteen times, the Macy's account six times, and the Kohl's account six times. (2/16/17 Methvin Decl., RE 30-2, Page ID ## 581-583, ¶¶ 23-37.) Each time, the furnishers confirmed the accuracy of the late payments as reported. *Id.* Turner did not address Experian's arguments about the accuracy of these accounts in her summary judgment briefs.

- The district court likewise found that Turner "abandoned" her dispute that she purportedly did not recognize two Capital One accounts (Memorandum Opinion and Order, RE 35, Page ID # 855), and she has not challenged that holding on appeal.[5]
- Finally, the district court rejected Turner's contention that Experian was reporting "obsolete" information about a missed payment on a Chase auto loan. (*Id.*, Page ID # 854.) Such information becomes "obsolete" under the FCRA after seven years, and it had only been six years since the late payment. (JSF, RE 21, Page ID # 125-26, ¶¶ 48-51.) Turner has not challenged that holding on appeal.[6]

Instead, Turner's motion for summary judgment raised two *new* alleged inaccuracies relating to her Bank of the West account. First, she complained about a discrepancy between the "Date opened" field, which indicated that she opened her account in December 2013, and the "First reported" field, which showed the account as first reported a month earlier, in November 2013. Second, she complained about a "ND" (No Data) code in the "Payment history" grid for the

[5] Turner admitted at her deposition that both accounts were hers. (JSF, RE 21, Page ID # 126, ¶ 55.) She failed to mention these accounts in her summary judgment briefs.

[6] Go Clean Credit's representative admitted at his deposition that the late payment Experian reported on this account was *not* obsolete. (JSF, RE 21, Page ID ## 125-126, ¶¶ 50-51.) Once again, Turner failed to mention this account in her summary judgment briefs.

month of September 2015, alleging it should instead have read "OK."[7] These details, which reflect what Bank of the West reported to Experian, had no adverse effect on Turner's credit standing and she did not allege any negative impact. (2/17/17 Declaration of Mary Methvin, RE 33-1, Page ID ## 831-832, ¶¶ 12-16.)

Turner did not identify these two alleged inaccuracies in her complaint, in her interrogatory responses, at her deposition, or at any other point during discovery. (*See generally* Complaint, RE 1-1, Page ID ## 7-12; Turner's Responses to Experian's First Set of Interrogatories, RE 30-3, Page ID # 592.) She raised them for the first time at summary judgment.

The District Court's Opinion. The district court granted Experian's motion for summary judgment. It held that Turner's reasonable procedures claim under § 1681e(b) failed because she could not meet any of the elements of that claim. First, the court found no evidence of any inaccuracy—Turner either had conceded the accuracy of or abandoned her claims with respect to each inaccuracy alleged in the complaint—and the "two new inaccuracies" she raised at summary judgment were not "cognizable inaccuracies." (Memorandum Opinion and Order, RE 35, Page ID ## 853-856.) Second, the court found that Experian's suspicious mail policy "aims to confirm the identity of the person contacting [Experian]" and is

[7] Although the Letter did reference the Bank of the West account, the only claim was an entirely different one—that Experian purportedly had inaccurately listed late payments on that account—which Turner later abandoned.

"reasonable." (*Id.*, Page ID ## 857-859.) It also noted that Turner's allegations did not raise a traditional § 1681e(b) claim—§ 1681e(b) is concerned with the preparation of consumer reports, not reinvestigation—and that Experian's policy was in keeping with a core purpose of the FCRA: maintaining the "confidentiality" of consumer information. (*Id.*) Finally, the court found no evidence upon which a jury could conclude that an inaccuracy on Turner's credit report proximately caused her alleged emotional distress. (*Id.*, Page ID ## 859-860.)

Similarly, the district court held that Turner's failure to reinvestigate claim under § 1681i failed because she had not contacted Experian "directly" to notify it of her dispute, as the FCRA required. (*Id.*, Page ID ## 862-864.) After analyzing the text and agency interpretations of the reinvestigation provision, the court noted that "Turner does not cite, nor has this Court found, a case that affirmatively allows a CRO to notify CRAs of disputes on behalf of consumers." (*Id.*) It also ruled that the reinvestigation provision, like the reasonable procedures provision, requires proof of an inaccuracy on a plaintiff's credit report, which Turner could not show, and that she otherwise "failed to present any evidence of damages." (*Id.*, Page ID ## 860-861.)

In summarizing its opinion, the district court stated that the "bottom line" is that "the purpose of FCRA is to protect consumers from false information and hold CRAs accountable for the accuracy of their reports," but that "there was nothing

wrong with either Turner's credit report or Experian's procedures, and thus Turner has suffered no injury." (*Id.*, Page ID # 865.) This appeal followed.[8]

[8] In a similar proceeding pending in the District of Arizona—involving the same plaintiff's counsel and the same CRO—more than two dozen cases raising the same issues were consolidated and a bellwether case was chosen. Like Judge Zouhary in this case, Judge G. Murray Snow granted summary judgment to Experian in the Arizona action. *In re Experian Information Solutions, Inc.*, No. CV-15-01212, 2017 WL 3559007 (D. Ariz. Aug. 17, 2017).

SUMMARY OF THE ARGUMENT

The district court properly granted summary judgment dismissing Turner's claim under the FCRA's "reasonable reinvestigation" provision, 15 U.S.C. § 1681i, for multiple independent reasons. First, Turner no longer contends that any of the disputes raised in the letter from Go Clean Credit were valid, making her complaints about Experian's failure to reinvestigate those now-abandoned disputes irrelevant. Although Turner's summary judgment briefs raised new challenges to *different* information, it is well settled that a party cannot raise new theories on summary judgment. In any event, these new disputes were not raised in the Go Clean Credit dispute letter, and a CRA is not obligated to reinvestigate disputes of which it is not notified.

Second, the district court correctly held that the FCRA imposes no obligation on a CRA to reinvestigate disputes received from third parties. Section 1681i requires a reinvestigation only when information is "disputed by the consumer and the consumer notifies the agency directly" of her dispute, and both case law and regulatory guidance confirm the correctness of Experian's approach in insisting on contacting the consumer directly before launching a reinvestigation of the consumer's file based on a communication from a third party.

Third, a claim under § 1681i requires a plaintiff to show that the alleged violation resulted in an inaccuracy in her consumer report. Turner's inability to show such an inaccuracy is fatal to her claim.

Fourth, Turner's claim was properly dismissed due to her inability to satisfy the elements of either a negligent or willful violation of the FCRA, 15 U.S.C. §§ 1681o, 1681n. Her negligence claim fails because of her failure to make the required showing under § 1681o of "actual damages." She cannot have suffered such damages from Experian's failure to reinvestigate the Go Clean Credit letter, because the only inaccuracies she claims were not raised in that letter. Moreover, those alleged inaccuracies are trivial, and Turner made no showing of any way in which they harmed her. Turner's willfulness claim fails because *Safeco Insurance Co. of America v. Burr*, 551 U.S. 47 (2007), requires a violation of a clearly established FCRA requirement, and there was no clearly established obligation for CRAs to reinvestigate in response to disputes received from third parties.

Finally, the district court also properly granted summary judgment dismissing Turner's "reasonable procedures" claim under 15 U.S.C. § 1681e(b). That general provision cannot be used to impose a reinvestigation obligation that the provision specifically governing reinvestigations—§ 1681i—does not require. Moreover, under § 1681e(b), just like under § 1681i, (1) Turner's failure to show an inaccuracy in her report is fatal to her claim; (2) her inability to show actual

damages defeats her negligence claim; and (3) her inability to satisfy *Safeco* is fatal to her willfulness claim.

The judgment of the District Court should be affirmed.

STANDARD OF REVIEW

This Court reviews summary judgment determinations *de novo*. *Williams v. Mehra*, 186 F.3d 685, 689 (6th Cir. 1999) (en banc). Summary judgment must be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). The "mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). Entry of summary judgment is proper, therefore, "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986) ("a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial").

ARGUMENT

Turner's entire claim—under both 15 U.S.C. § 1681e(b) and 15 U.S.C. § 1681i—is based on the contention that Experian violated the FCRA by failing to reinvestigate the disputes in the Go Clean Credit letter. *See, e.g.*, Appellant's Br. at 11-12. However, she abandoned *all* of the disputes asserted in that letter; the only inaccuracies she currently claims—claims that the district court also properly rejected—are new ones that were *not* raised in the letter and were first asserted in her summary judgment briefs. The FCRA does not require a CRA to reinvestigate disputes about which it is not notified; a consumer therefore cannot bring a claim for failure to reinvestigate unless she has notified the CRA of what she disputes. In addition, given Turner's abandonment of the disputes in the letter, Experian's alleged failure to reinvestigate those disputes cannot have resulted in any inaccuracy in her consumer report and cannot have caused her any harm.

Regardless, the FCRA did not require Experian to reinvestigate based on a letter received from a credit repair organization. The FCRA requires a CRA to reinvestigate only when "the consumer" notifies it of a dispute "directly." As courts and regulators have reasoned, this obligation does not apply to a dispute sent by a third party. For this reason, too, Turner's claims fail.

I. THE DISTRICT COURT PROPERLY DISMISSED TURNER'S REINVESTIGATION CLAIM UNDER 15 U.S.C. § 1681i.

The district court correctly granted summary judgment on Turner's claim under the FCRA's reinvestigation provision, 15 U.S.C. § 1681i, for the reasons given by that court and multiple others. *See Boler v. Earley*, 865 F.3d 391, 414 (6th Cir. 2017) ("[w]e may affirm the district court on any basis supported in the record").

A. Experian Could Not, And Had No Obligation To, Reinvestigate Disputes About Which It Was Never Notified.

After abandoning all of the disputes asserted in Go Clean Credit's letter, Turner now complains only of two purported inaccuracies in Experian's credit reporting, neither of which was ever conveyed to Experian. Those allegations provide no basis for a reinvestigation claim, because a CRA has no obligation to reinvestigate disputes about which it was never notified. This deficiency, standing alone, is fatal to Turner's claim.

1. The FCRA imposes no obligation on a CRA to reinvestigate alleged reporting errors of which it is not notified.

The FCRA requires a CRA to reinvestigate only "if the completeness or accuracy of any item of information contained in a consumer's file . . . is disputed by the consumer and the consumer *notifies the agency* directly, or indirectly through a reseller, *of such dispute*." 15 U.S.C. § 1681i(a)(1)(A) (emphasis added). A CRA cannot possibly reinvestigate alleged disputes that it is unaware of, nor is it

required to. Moreover, the duty to reinvestigate is limited to what is disputed: the CRA must "conduct a reasonable reinvestigation to determine whether the *disputed information* is inaccurate." *Id.* (emphasis added).

Consistent with this plain statutory language, courts have held that "to trigger a credit reporting agency's duty under the FCRA to investigate a claim of inaccurate information, a consumer must notify the agency of the purported reporting error." *Herisko v. Bank of Am.*, 367 F. App'x 793, 794 (9th Cir. 2010); *Casella v. Equifax Credit Info. Servs.*, 56 F.3d 469, 474 (2d Cir. 1995)(same); *see also Spence v. TRW, Inc.*, 92 F.3d 380, 383 (6th Cir. 1996) (per curiam) (consumer's failure to convey information to CRA as contemplated by § 1681i was "fatal" to his FCRA claim).

As one court aptly explained:

> [I]f a consumer later sues a CRA for a violation of its reinvestigation duty under § 1681i(a), he or she may only sue based on alleged violations of which the consumer provided notice to the CRA. If the consumer raises additional alleged violations in his or her lawsuit for which the consumer had not previously provided notice of the dispute to the CRA, those claims must be dismissed.

Petty v. Equifax Info. Servs., LLC, No. 10-694, 2010 WL 4183542, at *3 (D. Md. Oct. 25, 2010).

Simply put, alleged inaccuracies of which the CRA is not notified do not trigger any duty to reinvestigate, and cannot be the basis of a claimed violation of § 1681i.

2. The dispute letter made no mention of the purported inaccuracies on which Turner now relies.

Turner either abandoned or explicitly conceded (or both) every purported inaccuracy raised in Go Clean Credit's letter to Experian. The only inaccuracies Turner *now* claims are two new ones asserted for the first time in her summary judgment briefs: (1) that Experian reported her Bank of the West account as being opened in November 2013, rather than December 2013; and (2) that Experian reported "ND" (no data) for September 2015 on this account, when Turner believes it should have been reported as "OK." *See* Appellant's Br. at 30-34.

The letter that Go Clean Credit sent to Experian did not raise either of these purported inaccuracies. (Dispute Letter, RE 21-5, Page ID ## 193-194.) Rather, the only reference to Turner's Bank of the West account was the entirely different (and since abandoned) claim that Experian erred in reporting that Turner had made late payments on the account. *Id.* Nothing in the letter so much as hinted at the inaccuracies Turner now claims, let alone gave Experian any basis on which to reinvestigate them. Indeed, one of the purported inaccuracies on which Turner now relies did not even exist at the time of the June 2015 Go Clean Credit letter, as it relates to Turner's account status several months later, in September 2015.

Again, the Go Clean Credit letter did not notify Experian of any dispute about the only items that remain at issue in this case. Experian had no obligation

to reinvestigate a dispute about which it received no notice, and, thus, Turner's claim under 15 U.S.C. § 1681i must fail.

Moreover, as this Court and others have recognized, a plaintiff may not raise new theories for the first time at the summary judgment stage. *Bridgeport Music, Inc. v. WM Music Corp.*, 508 F.3d 394, 400 (6th Cir. 2007) (a plaintiff may not "expand its claims to assert new theories" in response to summary judgment); *Tucker v. Union of Needletrades, Indus. & Textile Emp.*, 407 F.3d 784, 788 (6th Cir. 2005) (same); *Midland Funding LLC v. Brent*, 644 F. Supp. 2d 961, 974-75 (N.D. Ohio 2009) ("issues cannot be first raised in motions for summary judgment"). That is precisely what Turner attempted to do. While the district court did not dismiss her claims on that basis, it is an alternative ground upon which the district court should be affirmed. *See Russ' Kwik Car Wash, Inc. v. Marathon Petroleum Co.*, 772 F.2d 214, 216 (6th Cir. 1985) (per curiam) ("A decision below must be affirmed if correct for any reason, including a reason not considered by the lower court.")

B. The FCRA Does Not Require Reinvestigation Of Disputes Received From A Third Party Rather Than From The Consumer.

The district court's judgment also should be affirmed because, as the court correctly held, the reinvestigation obligation of § 1681i applies only to disputes received directly from a consumer, and not to those sent by a third party like a credit repair organization. Under § 1681i, an obligation to reinvestigate is

triggered only "if the completeness or accuracy of any item of information contained in a consumer's file at a consumer reporting agency is disputed *by the consumer* and *the consumer notifies the agency directly*, or indirectly through a reseller." § 1681i(a)(1)(A) (emphasis added). In this case, the dispute letter was prepared and sent by Go Clean Credit, not by the "consumer," let alone "directly" by the consumer.[9] That straightforward reading of the statute disposes of Turner's reasonable-reinvestigation claim.

1. The FCRA's text and structure bar claims based on Go Clean Credit's letter.

"In interpreting a statute," a court must "begin with its text." *Binno v. Am. Bar Ass'n*, 826 F.3d 338, 346 (6th Cir. 2016), *cert. denied*, 137 S. Ct. 1375 (2017). The text of 1681i precludes Turner's claim in two ways: (1) it requires that the relevant information be disputed "by the consumer" whose "file" is at issue, and (2) that "the consumer" notify the CRA "directly, or indirectly through a reseller." 15 U.S.C. § 1681i(a)(1)(A).

First, Turner's information was not disputed "by the consumer." The dispute letter was crafted and sent by a third party credit repair organization; the consumer—Turner—had no role in drafting or sending the letter. *See, e.g.*, *Klotz v.*

[9] It is undisputed that Go Clean Credit is neither a "consumer" as defined in 15 U.S.C. § 1681a(c) nor a "reseller" as defined in 15 U.S.C. § 1681a(u). (JSF, RE 21, Page ID # 119, ¶¶ 4-5.)

Trans Union, LLC, No. 05-4580, 2008 WL 2758445, at *4 (E.D. Pa. July 16, 2008) (disputes drafted by CRO and mailed by consumer to CRA were not "by" the consumer who had "nothing to do with the disputes as drafted" and just "signed and sent them"). Needless to say, Go Clean Credit was not the consumer whose credit file information was at issue. Indeed, a credit repair organization *cannot* be a "consumer" under the FCRA, which provides that "'consumer' means an individual." 15 U.S.C. § 1681a(c). Turner admits that Go Clean Credit is *not* a "consumer." (JSF, RE 21, Page ID #119, ¶ 4.)

Second, even if the letter could somehow be characterized—despite Turner's lack of involvement—as "by the consumer," it plainly did not satisfy the second requirement that "the consumer notif[y] the agency *directly*." 15 U.S.C. § 1681i(a)(1)(A) (emphasis added.) The word "direct" means "tak[ing] effect without intermediate instrumentality," Oxford English Dictionary 702 (2d ed. 1989), or "stemming immediately from a source." Webster's Third New International Dictionary 640 (1981); *accord* New Oxford American Dictionary 483 (2001) ("without intervening factors or intermediaries"). Accordingly, it is only when "the consumer notifies the agency" *herself*, with no intermediaries, or "through a reseller," that the reinvestigation obligation is triggered. 15 U.S.C. § 1681i(a)(1)(A).

A notice drafted and sent to a CRA by a CRO is, by definition, not "direct." *In re Experian Info. Sol., Inc.*, No. 05-01212, 2017 WL 3559007, at *6 (D. Ariz. Aug. 17, 2017) (there is "no duty to reinvestigate" dispute submitted by CRO); *Whelan v. Trans Union Credit Reporting Agency*, 862 F. Supp. 824, 833 (E.D.N.Y. 1994) ("FCRA requires that the information be conveyed *by the consumer* directly to the credit reporting agency"); *see also Wiggins v. Equifax Servs., Inc.*, 848 F. Supp. 213, 220 (D.D.C. 1993) ("[i]t is also disputed whether Mr. Wiggins, in fact, complained about the accuracy of the report directly to ESI, a requirement for liability under § 1681i(a)").

The plain meaning of "directly" is reinforced by the statute's reference to resellers. The statute spells out two ways a consumer may "notify" an agency of disputed information: "directly," or "indirectly *through a reseller*." 15 U.S.C. § 1681i(a)(1)(A) (emphasis added). The word "reseller" is a defined term that does not encompass CROs; Turner admits that Go Clean Credit is *not* a "reseller." (JSF, RE 21, Page ID# 119, ¶ 5.) Congress' decision to use a defined term to specify who may provide notice on behalf of a consumer "indirectly" excludes the possibility that other third parties may do so.

Furthermore, the text of the reinvestigation provision is not "interpret[ed] . . . in a vacuum." *Abramski v. United States*, 134 S. Ct. 2259, 2267 (2014). The district court's understanding of the text is the only interpretation consistent with

"the statutory context, structure, history, and purpose" of the FCRA. *Id.* (internal citation omitted). When Congress *did* intend to provide for action to be taken on behalf of a consumer, it did so expressly. For example, the section dealing with identity theft prevention directs CRAs to respond to the consumer's allegation that their identity has been stolen "[u]pon the *direct* request of a consumer, *or an individual acting on behalf of or as a personal representative of a consumer*." 15 U.S.C. § 1681c-1(a)(1) (emphasis added); *accord id.* § 1681c-1(b)(1) (identical quoted language); *id.* § 1681c-1(c) (imposing duties "[u]pon the *direct* request of an active duty military consumer, *or an individual acting on behalf of or as a personal representative of an active duty military consumer*" (emphases added)). The absence of such language from § 1681i confirms that "directly" in § 1681i means just what it says—"directly." *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 544 (2012) ("Where Congress uses certain language in one part of a statute and different language in another, it is generally presumed that Congress acts intentionally.").

If Congress understood references to "direct request[s]" by a consumer as including actions by third parties *for* the consumer, there would have been no reason for § 1681c-1 to repeatedly include express language providing for action by others on the consumer's behalf. This strongly supports the conclusion that the FCRA's reference to a "direct" communication, without additional language, does

not include communications from a third party. Because "there is a natural presumption that identical words used in different parts of the same act are intended to have the same meaning," *see Atl. Cleaners & Dyers v. United States*, 286 U.S. 427, 433 (1932), § 1681c-1 reaffirms that a consumer does not "directly" notify a CRA of her dispute under § 1681i (a)(1)(A) when a third party entity prepares and submits the dispute.

Finally, the plain import of the text and structure fits with the interpretation given to the statute by the Federal Trade Commission ("FTC") while it was charged with administering the FCRA. Since at least its 1990 Commentary on the FCRA, the FTC made clear that there is no obligation to reinvestigate disputes raised by a third party. Turner contends that this FTC interpretation was "abolished," but that is incorrect. (Appellant's Br. at 19.) To the contrary, the 1990 Commentary was supplanted by a 2011 Staff Report, which is even clearer in explaining that third-party disputes need not be reinvestigated:

> A CRA need not investigate a dispute about a consumer's file raised by a third party—such as a 'credit repair organization' denned [*sic*] in 15 U.S.C. § 1679a(3)—because the obligation under this section arises only where file information is disputed 'by the consumer' who notifies the agency 'directly' of such dispute. A CRA is not required to respond to a dispute of information that the consumer merely conveys to others . . . .

Federal Trade Commission, *40 Years of Experience With the Fair Credit Reporting Act*, 2011 WL 3020575, at *70 (2011). The 2011 Staff Report is the FTC's "new

commentary on the FCRA." *Moran v. Screening Pros, LLC*, No. 2:12-cv-05808, 2012 WL 10655745, at *2 (C.D. Cal. Nov. 20, 2012).

This FTC guidance could not be clearer, and its persuasive force cannot be undermined, as Turner suggests, simply by pointing out that the CFPB took over the administration of the FCRA in 2010. The FTC's interpretation, though not binding, represents the reasoned judgment of an agency that developed substantial expertise in interpreting and applying the FCRA while it exercised enforcement authority under that statute for forty years. Given that this FTC interpretation has never been superseded by new or conflicting guidance, it does not matter that administration of the statute has been shifted to a new agency. "[R]ulings, interpretations and opinions" of an agency, even when not controlling, "do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). Because the FTC's interpretation gives effect to the plain language of the FCRA's text, the district court was correct to rely on it as persuasive authority. *See Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 70 (2007) (relying on an FTC interpretation of the FCRA as "authoritative guidance").

2. Turner's counter-arguments are unfounded and provide no basis for departing from the plain language of § 1681i.

Turner urges this Court to depart from the plain language of § 1681i based on what she claims are implications from other statutory provisions. These arguments, however, are uniformly without merit.

First, Turner asserts that CROs are "a creation of CROA" and that there would be no point in Congress regulating them "if consumers [were] not permitted to use [credit repair organizations] to assist them in improving their credit standing." (Appellant's Br. at 23.) But that has it exactly backwards. Congress passed the CROA to address the harms being caused by CROs. *See* 15 U.S.C. § 1679(b) (listing among the purposes of the statute "protect[ing] the public from unfair or deceptive advertising and business practices by credit repair organizations"). Contrary to Turner's selective and misleading quotation of the CROA, Congress did not "recognize" that credit repair organizations "serve[] the vital interest of consumers in establishing and maintaining their credit worthiness." (Appellant's Br. at 24.) What Congress recognized is that consumers, driven by their desire to rehabilitate their credit, might be duped into hiring companies that engage in deceptive practices. *See* 15 U.S.C. § 1679(a) (explaining that because "Consumers have a vital interest in . . . their credit worthiness . . . consumers who have experienced credit problems may seek assistance from credit repair organizations" and that "[c]ertain advertising and business practices of" credit

repair organizations "have worked a financial hardship upon consumers"). That Congress acted to mitigate the harm these companies cause does not suggest a congressional *endorsement* of their services.

In fact, § 1681i's exclusion of third party disputes reflects the concerns that motivated *both* the FCRA and the CROA. In passing the CROA, Congress expressly recognized the harmful effects of CRO abuses of the dispute process:

> [C]redit repair businesses, through advertisements and oral representations, lead consumers to believe that adverse information in their consumer reports can be deleted or modified regardless of its accuracy. . . . Where credit repair clinics do succeed . . . they often do so through abuse of the reinvestigation procedures. . . . [C]onsumer reporting agencies must generally delete information that cannot be verified within 30 days of receiving notice of the dispute. Credit repair clinics take advantage of this provision by inundating consumer reporting agencies with so many challenges to consumer reports that the reinvestigation system breaks down, and the adverse, but accurate, information is deleted.

F.T.C. v. Gill, 265 F.3d 944, 949 (9th Cir. 2001) (quoting H.R. Rep. No. 103-486 (1994)); *accord* Ann. M. Grefe, FTC v. Gill*: A Step Toward Deterring Illegal Practices of Credit Repair Organizations*, 15 Loy. Consumer L. Rev. 57, 59 (2002) ("CROs would inundate the credit bureaus with dispute letters, triggering an overwhelming number of investigations under the FCRA. These tactics were effective because credit bureaus must remove any legitimately challenged item that they cannot verify within thirty days. Thus, even accurate items were often deleted until they could be verified.") (internal citations omitted).

Such abusive practices—not unlike the tactics employed by Go Clean Credit—substantially interfere with the purpose of CRAs: to accurately report positive *and* negative credit information regarding consumers. *See Carvalho v. Equifax Info. Servs., LLC*, 629 F.3d 876, 892 (9th Cir. 2010) ("The very economic purpose for credit reporting companies would be significantly vitiated if they shaded every credit history in their files in the best possible light for the consumer.") (internal quotation marks omitted) (alteration in original). Thus, it is no surprise that the FCRA requires CRAs to investigate a dispute when a consumer submits that dispute directly but not when a CRO purports to do so on the consumer's behalf. *See Klotz*, 2008 WL 2758445, at *4 ("the consumer"—not the CRO—"is in a position to know whether the information is correct").

Turner also contends, relying on a statutory provision that addresses disputes with *furnishers*—that the words "'direct' and 'indirect' as used in the FCRA focus on the person receiving the dispute rather than the person who sent the dispute." (Appellant's Br. at 21 (quoting §§ 1681i and 1681s-2, and citing 12 C.F.R. § 1022.43.)) As the district court explained, however, the provision dealing with disputes with furnishers, like § 1681i, directs that "[a] *consumer* who seeks to dispute the accuracy of information *shall provide a dispute notice directly* to [the furnisher]." 15 U.S.C. § 1681s-2(a)(8)(D); *see also* § 1681s-2(a)(8)(E) (describing

procedures furnishers must follow "[a]fter receiving a notice of dispute *from a consumer*"). That is perfectly consistent with 15 U.S.C. § 1681i(a)(1)(A).

The CFPB regulation cited by Turner is even more directly counter to her position. It provides that "[a] furnisher is required to investigate a direct dispute only if *a consumer* submits a dispute notice to the furnisher," and that a furnisher is *not* required to respond if "[t]he furnisher has a reasonable belief that" a dispute letter has been "submitted by, is prepared on behalf of the consumer by, or is submitted on a form supplied to the consumer by, a credit repair organization." 12 C.F.R. § 1022.43 (emphasis added). In other words, the CFPB's interpretation of the consumer-furnisher dispute provisions parallels the district court's interpretation of 15 U.S.C. § 1681i(a)(1)(A). A CRA's "reasonable belie[f]" that a credit repair organization was involved, even if the consumer submits the form herself, excuses the CRA from responding.

Finally, Turner argues that the FCRA's provision authorizing consumer-to-furnisher disputes explicitly excludes disputes "submitted by . . . a credit repair organization," § 1681s-2(a)(8)(G), whereas § 1681i does not. (Appellant's Br. at 25.) Accordingly, she claims, Congress must have tacitly intended to allow credit repair organizations to participate in consumer-to-CRA disputes. This contention fails to appreciate either the history or the structure of the FCRA.

Unlike the CRA reinvestigation provision of § 1681i, which has existed since the original 1970 enactment of the FCRA—long before the advent and proliferation of CROs—the right of consumers to dispute information directly with a *furnisher* was not added to the FCRA until 2003. *See* Fair and Accurate Credit Transactions Act of 2003, § 312, Pub. L. No. 108–159, 117 Stat. 1952 (2003). By that time, Congress was well aware of the problems posed by CROs, so it is not surprising that Congress chose to expressly address and exclude them in § 1681s-2. Congress' inclusion of such an express provision in the *new* furnisher reinvestigation provision raises no expectation that Congress would see a need to amend the *existing* CRA reinvestigation provisions—which had never been interpreted to permit disputes from CROs, and which the FTC had long said excluded CRO-initiated disputes. Indeed, in light of this established understanding, and Congress' attention in § 1681s-2 to the issue of CRO-submitted disputes, it is telling that Congress did nothing to suggest that it intended, for the first time, to authorize CRO-submitted disputes under § 1681i.

The one relevant change to § 1681i that Congress *did* make in 2003 further confirms this point. Prior to 2003, § 1681i contained no provision for anything other than "the consumer notif[ying] the agency directly." Section 316 of the 2003 legislation added a single exception to that direct notification requirement: notification by the consumer "indirectly through a reseller." Had Congress

intended to authorize disputes submitted by a CRO—particularly in light of its attention to such disputes in § 1681s-2—it surely would not have limited "indirect" submission to resellers, and would not have retained the language in §1681i requiring that the dispute be "by the consumer" and that "the consumer" notify the CRA "directly" of such dispute.[10]

Because Turner did not directly notify Experian of any dispute, the district court properly granted summary judgment dismissing her claim.

C. Turner Cannot Satisfy The Requirement That She Establish An Inaccuracy In Her Consumer Report.

The district court also correctly granted summary judgment on the ground that Turner failed to show an inaccuracy in her consumer report.

This Court has never decided whether an inaccuracy is a necessary element of a claim under § 1681i, but the great weight of authority holds that an inaccuracy *is* a necessary element of such a claim. *E.g.*, *DeAndrade v. Trans Union LLC*, 523 F.3d 61, 67 (1st Cir. 2008) ("[T]he weight of authority in other circuits indicates

[10] Nor does the fact that Experian accepts disputes from attorneys or those with valid powers of attorney indicate that its procedure is "arbitrary." (Appellant's Br. at 24.) In those instances, Experian voluntarily goes beyond what the law requires because the third parties actually identify themselves as the consumers' representatives and present proof that they have legal authority to act on behalf of the consumers. Turner protests that her contract with Go Clean Credit includes a limited power of attorney clause (*id.* at 6), but Go Clean Credit never presented the power of attorney to Experian. In any event, a power of attorney would not have turned Go Clean Credit's letter into a "direct" consumer dispute as required by § 1681i.

that without a showing that the reported information was in fact inaccurate, a claim brought under § 1681i must fail."); *Wright v. Experian Info. Sols., Inc.*, 805 F.3d 1232, 1242 (10th Cir. 2015) ("To prevail on a § 1681i(a) claim . . . plaintiffs must prove . . . inaccuracy of the report"); *Carvalho*, 629 F.3d at 890 ("plaintiff filing suit under section 1681i must make a prima facie showing of inaccurate reporting").[11] This requirement makes sense, because a consumer cannot be harmed by a failure to reinvestigate and correct her consumer report unless there is an inaccuracy that requires correction.[12]

As demonstrated above, Turner abandoned each and every purported inaccuracy that was disputed in the Go Clean Credit letter—*i.e.*, she no longer claims that any of the disputed items were inaccurate and required correction. Turner's inability to establish that any of the disputed items were inaccurate is an independent ground for the judgment against her.

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[11] *See also Kuehling v. Trans Union, LLC*, 137 F. App'x 904, 908 (7th Cir. 2005) (same); *Cahlin v. Gen. Motors Acceptance Corps*., 936 F.2d 1151, 1160 (11th Cir. 1991) (same); *Schweitzer v, Equifax Info. Sol., LLC*, 441 F. App'x 896, 904 n.9 (3d Cir. 2011) (per curiam) ("summary judgment was properly granted in favor of Equifax" on a reasonable reinvestigation claim "because . . . there is no genuine issue of material fact as to the accuracy of those accounts").

[12] Without deciding the issue, this Court has reasoned that, in the context of § 1681i, "damages would be almost impossible to prove without [an inaccuracy]." *Salei v. Am. Express Travel Related Servs. Co., Inc.*, 134 F.3d 372, at *3 (6th Cir. 1997) (unpublished table decision).

D. Turner Suffered No "Actual Damages," And Therefore Failed To Establish A Negligent Violation Of The FCRA.

To succeed on a claim for a negligent violation of the FCRA, a plaintiff must show evidence of "actual damages." 15 U.S.C. § 1681o. "In order to recover actual damages, a plaintiff must show that the violation of the statute *caused* the loss of credit or some other harm." *Bach v. First Union Nat'l Bank*, 149 F. App'x 354, 360–61 (6th Cir. 2005) (emphasis added). It is clear on the record that Turner suffered no such damages.

To begin with, the violation Turner claims—Experian's failure to reinvestigate in response to the June 2015 Go Clean Credit letter—cannot even arguably have caused her any harm. She alleges only two trivial inaccuracies—neither of which supports any possible claim of damages.

One of the alleged inaccuracies—the listing of September 2015 on her Bank of the West account as "ND" (no data)—arose months *after* the Go Clean Credit letter was sent. A reinvestigation in response to the June 2015 letter could not possibly have corrected a purported error that did not arise until months later. The failure to reinvestigate, therefore, had no effect and cannot have harmed Turner in

any way. Nor does Turner offer any theory on which this alleged inaccuracy harmed her.[13]

The other purported inaccuracy—listing the Bank of the West account as "first reported" in November 2013 instead of December 2013—equally cannot have caused any actual damages, for multiple reasons. First, the issue was not mentioned in the dispute letter, so a reinvestigation would not have affected Experian's reporting of it. Second, the one month difference in the "first reported" date is trivial on its face, and Turner offers no theory—let alone evidence—of any way in which it hurt her credit or caused her (or even hypothetically could have caused her) any harm.

Turner admits that she did not incur any actual monetary or out-of-pocket losses. (JSF, RE 21, Page ID # 127, ¶ 61.) She also concedes that she was not denied credit due to information appearing on her Experian credit report. *Id.* ¶ 60. She claims only that Experian's actions caused "other harm" in the form of emotional distress, *id.* ¶ 62, but she cannot support that claim.

This Court has held that to recover damages for emotional distress, a plaintiff may "not rely on mere conclusory statements." *Bach*, 149 F. App'x at 361. And other courts have imposed a "strict standard" for recovering under the

[13] To the contrary, the undisputed evidence demonstrates that Experian accurately reported this item. (2/17/17 Declaration of Mary Methvin, RE 33-1, Page ID ## 831-832, ¶¶ 14-16.)

FCRA on claims of emotional distress alone "because" such claims "are so easy to manufacture." *Sarver v. Experian Info. Solutions*, 390 F.3d 969, 971 (7th Cir. 2004). Emotional distress claims require "a degree of specificity and must be supported by evidence of genuine injury, such as the observations of others, corroborating testimony, or medical or psychological evidence." *Bacharach v. Suntrust Mortg. Inc.*, 827 F.3d 432, 436 (5th Cir. 2016) (per curiam) (internal citations omitted). There also must be evidence that the alleged emotional distress was "proximately caused" by inaccurate information reported by the CRA. *Garrett v. Trans Union, L.L.C.*, No. 2:04-cv-00582, 2006 WL 2850499, at *11 (S.D. Ohio Sept. 29, 2006). There is no such evidence here.

Even assuming that Turner's conclusory claims of emotional distress—for which she submitted no medical support—can be credited, the district court correctly held that Turner failed to establish that Experian's actions were the proximate cause of any distress she suffered. Turner's testimony about the source of her emotional distress did not add up to a claim against Experian. She claims that she suffered emotional distress due to a conversation she had in "early 2015" with an unnamed mortgage broker who advised her "that it would be challenging to obtain a mortgage." (Mot. for Summ. J. at 19, RE 28, Page ID # 328.) In addition to being hearsay, that supposed conversation could not connect anything Experian did to Turner's alleged injuries for three reasons.

First, there is no evidence that the broker had ever even seen Turner's credit report. *See Casella*, 56 F.3d at 475 (emotional distress damages are not recoverable absent a showing that a third party learned of derogatory, inaccurate information in plaintiff's credit report). Nor is there any evidence that the unnamed broker was *referring* to Turner's credit report when he allegedly made that comment, instead of, for instance, Turner's 2010 mortgage default and foreclosure. Turner's anecdote thus fails on its face to connect Experian to her emotional distress.

Second, even assuming that the broker had made his remark on the basis of Turner's Experian report, the timing is wrong. Turner testified that the conversation took place in "early 2015." Go Clean Credit sent its dispute letter to Experian in late June 2015. That letter, and Experian's response to it, form the basis of this case. But June is not "early" in the year. So Turner's testimony means that the cause of her emotional distress *predated* the letter. In other words, the incident that supposedly set off the entire sweep of negative feelings and psychological ailments Turner claims she suffered, took place *before* the violations she asserted in her complaint.

Third, it is utterly implausible that the trivial purported inaccuracies now claimed by Turner would have influenced a broker's assessment of Turner's prospects, particularly as compared with Turner's undisputed record of derogatory

credit history—much of which she noted in her complaint and no longer contests. *See Casella*, 56 F.3d at 475 (refusing to find causation where "[n]o rational trier of fact could infer from this record that any potential creditor or other person in appellant's community learned of any *harmful information* from appellees") (emphasis added). And it is even harder to believe that she suffered "humiliation" because of it.

In short, even if Turner could establish a violation of § 1681i—and she cannot—her inability to establish any actual damages is fatal to her claim for a negligent violation of the FCRA.

E. Turner's Failure To Establish A Violation Of Any Clearly Established Requirement Of § 1681i Is Fatal To Her Claim For A Willful Violation Of The FCRA.

Because Turner cannot establish *any* violation of § 1681i, she plainly cannot establish a "willful" violation of that provision under 15 U.S.C. § 1681n. Moreover, even if Turner *had* established a negligent violation, her willfulness claim would have to be dismissed for failure to meet the strict requirement that the plaintiff show a violation of a clearly established FCRA requirement.

The Supreme Court's decision in *Safeco Insurance Co. of America v. Burr*, 551 U.S. 47 (2007), established a safe harbor from the FCRA's potentially ruinous statutory damages, ensuring that only especially egregious, obvious violations will be deemed willful. *Safeco* held that willfulness liability under the FCRA requires

more than a merely "erroneous" reading of the statute—it requires conduct so plainly unlawful that it was "'objectively unreasonable' in light of 'legal rules that were "*clearly established*" at the time.'" *Fuges v. Sw. Fin. Servs., Ltd.*, 707 F.3d 241, 249 (3d Cir. 2012) (emphasis added) (quoting *Safeco*, 551 U.S. at 69–70 (internal quotation marks omitted)).

Safeco itself makes clear that this "clearly established" test sets a very high bar for willfulness liability: even federal district court case law and informal agency guidance do not suffice to make an FCRA interpretation "clearly established" under *Safeco*; rather, only "courts of appeals" authority, "authoritative guidance" from the FTC, or statutory language that is "pellucid" satisfy this test. 551 U.S. at 70. Accordingly, unless the defendant's alleged conduct would not have been lawful under any interpretation of the FCRA that "could reasonably have found support in the courts," the defendant is entitled to summary judgment dismissing the willfulness claim. *Id.* at 70 n.20.

This standard thus protects misreadings of the FCRA so long as they are "objectively reasonable," much the same way that qualified immunity protects officials from liability if their "action[s] w[ere] reasonable in light of legal rules that were 'clearly established' at the time." *Safeco*, 551 U.S. at 70 (citing and describing *Saucier v. Katz*, 533 U.S. 194, 202 (2001)). And there are "numerous . . . cases in which courts have applied *Safeco* and declined to hold

defendants liable absent evidence of a reckless approach to FCRA compliance." *Fuges*, 707 F.3d at 254.

Turner does not even contend there is authority that clearly established an obligation for CRAs to launch reinvestigations in response to disputes received from third parties, or that the language of § 1681i is "pellucid" in imposing such a requirement. Nor would any such contention be tenable. Accordingly, Turner's willfulness claim was properly dismissed.

II. THE DISTRICT COURT PROPERLY DISMISSED TURNER'S REASONABLE-PROCEDURES CLAIM UNDER 15 U.S.C. § 1681e(b).

The failure of Turner's reinvestigation claim under § 1681i necessarily disposes of her "reasonable procedures" claim under § 1681e(b). The only purported violation Turner claims is Experian's failure to reinvestigate upon receiving the Go Clean Credit letter—an issue squarely governed by the reinvestigation provision of § 1681i. Because "[i]t is a commonplace of statutory construction that the specific governs the general," *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012) (quotation and alteration marks omitted), the general "reasonable procedures" provision of § 1681e(b) cannot be used to create a reinvestigation obligation that the specifically-applicable provision of § 1681i does not require. *See, e.g.*, *DeAndrade*, 523 F.3d at 66 n.10 (noting that "courts have been careful to draw distinctions between the burdens imposed by § 1681e(b) and § 1681(i)"); *In re Experian Info. Sols., Inc*., 2017 WL 3559007, at *7

(holding that "allegations of deficient reinvestigation procedures alone do not support a claim under § 1681e(b)."); *Grigoryan v. Experian Info. Sols., Inc*., 84 F. Supp. 3d 1044, 1070–71 (C.D. Cal. 2014) ("evidence of inadequacies in defendants' reinvestigation procedures under § 1681i . . . is not probative of [whether] defendants have violated § 1681e(b)").

Even if this were not the case, Turner's § 1681e(b) claim would fail. Multiple courts have held that it is reasonable for a CRA to make sure that it is communicating with the consumer herself when responding to a dispute, instead of risking sending confidential information to an unknown entity. *See Birmingham v. Experian Info. Sols., Inc.*, 633 F.3d 1006, 1012 (10th Cir. 2011) ("Experian's response . . . was appropriate; it asked for additional identifying information to be sure it was being contacted by the consumer himself"); *Anderson v. Trans Union*, 405 F. Supp. 2d 977, 984 (W.D. Wis. 2005) (holding that a procedure for confirming consumer's social security number was reasonable to "insure both the accuracy *and* confidentiality of plaintiff's credit information").

Moreover, as with her claim under § 1681i, Turner's inability to establish an inaccuracy is fatal to her § 1681e(b) claim;[14] her inability to establish actual damages defeats her negligence claim, and her inability to establish a violation of a

[14] A "showing of inaccuracy is an essential element of a claim under [§ 1681e(b)]." *Spence*, 92 F.3d at 383.

clearly established requirement is fatal to her claim of a willful violation. For the same reasons explained with respect to 1681i, Turner has established no inaccuracy. In addition, she suffered no actual damages from Experian's alleged failure to reinvestigate, because (1) the inaccuracies Turner alleges were not raised in the Go Clean Credit letter and, thus, a reinvestigation could not have corrected them, and (2) in any event, there is no evidence that these trivial alleged inaccuracies harmed Turner in any way. *See* Point I(C), *supra*.

Likewise, because there was no clearly established requirement to reinvestigate a dispute sent by a third party, *Safeco* requires dismissal of Turner's claim for a willful violation of the FCRA. *See* Point I(D), *supra*.

CONCLUSION

For the foregoing reasons, the district court's June 30, 2017 Memorandum Opinion and Order granting summary judgment to Experian should be AFFIRMED.

Dated: November 27, 2017

Respectfully submitted,

/s/ Emmett E. Robinson

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 10,618 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). As permitted by Fed. R. App. P. 32(g)(1), I have relied on the word count of Microsoft Word in preparing this certificate.

I also hereby certify that this brief complies with the typeface and type-style requirements of Fed. R. App. P. 32(a)(5)-(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2016 with 14 point Times New Roman font.

Dated: November 27, 2017

/s/ Emmett E. Robinson

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CERTIFICATE OF SERVICE

I hereby certify that on November 27, 2017, I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Sixth Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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ADDENDUM

The following table contains the designation of relevant district court documents as required by 6 Cir. R. 28(b)(1)(A)(i) and 6 Cir. R. 30(g).

Docket Entry No.	Page ID #	Description
RE # 1-1	7-12	Complaint filed by Turner
RE # 5	22-30	Answer and Affirmative Defenses filed by Experian
RE # 6	31-32	Order of Consolidation
RE # 10	46-48	Order
RE # 18	114	Corrected Order
RE # 20	117-118	Marginal Entry Order
RE # 21	119-221	Joint Statement of Undisputed Material Facts (including exhibits)
RE # 27	301-302	Marginal Entry Order
RE # 28	303-441	Motion for Summary Judgment filed by Turner (including exhibits)
RE # 30	549-595	Motion for Summary Judgment filed by Experian (including exhibits)
RE #31	596-792	Memorandum in Opposition to Experian's Motion for Summary Judgment filed by Turner (including exhibits)
RE # 33	804-833	Memorandum in Opposition to Turner's Motion for Summary Judgment filed by Experian (including exhibits)
RE # 35	850-865	Memorandum Opinion and Order
RE # 36	866	Judgment Entry
RE # 37	867	Order
RE # 38	868	Notice of Appeal
RE # 39	869-870	Joint Status Report