NO. 12-50007

In the United States Court of Appeals for the Fifth Circuit

JEFFERY SMITH,
Plaintiff – Appellee

v.

SANTANDER CONSUMER USA, INC.,

Defendant – Appellant

On Appeal from the United States District Court
For the Western District of Texas, Austin Division
Civil Action No. 1:10-cv-00202-LY

APPELLEE'S BRIEF

Respectfully submitted
Dennis Dean McCarty
Attorney at Law
Mississippi Bar No. 102733
P.O. Box 54172
Hurst, TX 76054
Erik Faries
Mississippi Bar No. 103209
645 Lakeland East Drive, Suite 102
Flowood, MS 39232

ORAL ARGUMENT NOT REQUESTED

ATTORNEYS FOR APPELLEE
JEFFERY SMITH

CERTIFICATE OF INTERESTED PERSONS

(1) Cause No. 12-50007, *Jeffery Smith, Plaintiff – Appellee v. Santander Consumer USA, Inc., Defendant –Appellant*, on appeal from the United States District Court for the Western District of Texas, Austin Division, Cause No. 1:10-cv-00202-LY.

(2) The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualifications of recusal.

Person and Entities	**Connection and Interest**
1. Jeffery Smith	Plaintiff – Appellee
2. Dennis Dean McCarty	Counsel – Appellee
3. Phong Le	Counsel – Appellee
4. Gregory Faries	Counsel – Appellee
5. Santander Consumer USA, Inc.	Defendant – Appellant
6. Gino J. Rossini Frank Alvarez Brent Martinelli Hermes Sargent Bates, LLP	Counsel - Appellant

/s/Dennis McCarty
Dennis Dean McCarty
Attorney of Record for Appellee
Jeffery Smith

STATEMENT AGAINST ORAL ARGUMENT

Smith is not requesting oral argument. Santander is arguing that documents were admitted into evidence that were not properly authenticated, even though Santander admitted half of the documents they complain about for their own evidence, as well as Smith having valid case law, within this circuit, that the Trial Judge read and ruled in favor for Smith. Santander also argues scintilla of evidence through out most of their argument, a doctrine that Federal Courts do not recognize. Santander also argues mitigation of damages, however Santander did not properly prove up the actual amount of damages that Smith could have mitigated, which is required to get mitigation of damages. Plus, the jury heard Santander's mitigation argument and considered their argument when making their determination on damages. The documents, as well as all of the evidence speak for themselves. Smith does not want to run up attorney's fees unless it is completely necessary.

TABLE OF CONTENTS

Certificate of Interested Persons………………………………………… 1

Statement of Regarding Oral Argument……………………………….2

Table of Authorities……………………………………………………4

Jurisdictional Statement……………………………………………….6

Statement of Issues Presented for Review……………………………..7

Statement of the Case…………………………………………………..7

Statement of Facts………………………………………………………9

Standard of Review……………………………………………………14

Summary of the Argument…………………………………………….18

Argument and Authorities……………………………………………..19

Conclusion……………………………………………………………..67

Certificates of Service…………………………………………………69

Certificate of Compliance with Rule 32(a)……………………………70

TABLE OF AUTHORITIES

Action v. Bank One Corp.,
293 F. Supp. 2d 1092(D. Ariz. 2003). ………………………………… 46

American Fidelity & Casualty Co. v. Drexler,
5 Cir., 1955, 220 F.2d 930, 932-933……………………………21, 29, 34

Austin Hill Country Realty,
948 S.W.2d at 300……………………………………………22, 23, 48, 49

Ballew v. Cont'l Airlines, 668 F.3d 777, 781 (5th Cir. 2012)………………7

Beyene v. Coleman Sec. Services, Inc.,
854 F.2d 1179, 1182 (9th Cir.1988)……………………………………..57

Broken Spoke Club, Inc. v. Butler,
No. 02–02–00116–CV, 2004 WL 1858119, at *2–3 (Tex.App.-Fort Worth Aug. 19, 2004, no pet.) (mem. op.)……………………………23, 49

Callahan & Gauntlett v. Dearborn Ins. Co.,
980 F.2d 736 (9th Cir. 1992) ……………………………………56, 58, 61

Cole Chem. & Distrib., Inc. v. Gowing,
228 S.W.3d 684, 688 (Tex.App.-Houston [14th Dist.] 2005, no pet.)…………………………………………………....22,23,48,49,57

Continental Casualty Co. v. Holmes,
5 Cir., 1959, 266 F.2d 269……………………………………….20, 28, 34

Dick v. New York Life Ins. Co.,
1959, 359 U.S. 437, 79 S.Ct. 921, 3 L.Ed.2d 935……………….20, 28, 34

Dietz v. Garske,
406 Fed. App'x 863, 864 (5th Cir. 2010)……………………29, 34, 40, 54

Fischl v. GMAC,
708 f.2d 143 (5th Cir. 1983)…………………………………….……47

Hoppenstein Properties, Inc. v. Schober,
329 S.W.3d 846, 849-50 (Tex. App.--Fort Worth 2010, no pet.)…22, 48

Isaacs v. Am. Petrofina,
368 F.2d 193, 195-96 (5th Cir. 1966)………………………….20, 28, 33

Jones v. Wal-Mart Stores, Inc.,
870 F.2d 982, 987 (5th Cir. 1989)………………………..……29, 34, 40, 54

Lehman Bros. Holdings, Inc. v. Cornerstone Mortg. Co.,
CIV.A. H-09-0672, 2011 WL 649139 (S.D. Tex. Feb. 10, 2011).55, 58, 61

L.P. v. Nejemie Alter,
M.D., P.A., No. 13–08–00173–CV, 2009 WL 1026603, at *3 (Tex.App.- Corpus Christi Apr. 16, 2009, no pet.). ………………………………23, 49

Michalic v. Cleveland Tankers, Inc.,
364 U.S. 325, 330, 81 S.Ct. 6, 11, 5 L.Ed.2d 20 (1960)..27, 32, 42, 45, 47

Morris v. Credit Bureau of Cincinnati,
563 F. Supp. 962 (S.D Ohio 1983)……………………………………..47

Movible Offshore Co. v. Ousley,
346 F.2d 870, 874 (5th Cir. 1965)………………………26, 32, 42, 45, 47

Purer & Company v. Aktiebolaget Addo,
410 F.2d 871, 876 (9th Cir.1969), *cert. denied,* 396 U.S. 834 (1969)….56

Reuter v. Eastern Air Lines,
5 Cir., 1955, 226 F.2d 443………………………………………………20, 28

Revlon, Inc. v. Buchanan,
271 F.2d 795, 800 (5th Cir., 1959)……………………………..20, 28, 34

Thomas v. Gulf Coast Credit Servs.,
214 F. Supp. 2d 1228(M.D. Ala. 2002)………………………………...46

United States v. Dibble,
429 F.2d 598, 602 (9th Cir.1970)………………………………………57

United States v. Carroll,
2000 WL 45870, at *3 (E.D.La. Jan.20, 2000)…………….17, 55, 56, 59

United States v. Arce,
997 F.2d 1123, 1128 (5th Cir.1993)………………………17, 55, 56, 59

United States v. Jackson,
625 F.3d 875, 881 (5th Cir.2010)…………………………17, 18, 55, 59

Wells v. Warren Company,
328 F.2d 666, 668, 669 (5th Cir. 1964)……………………………21, 28

White v. Imperial Adjustment Corp.,
2002 WL 1809084 (E.D. La. Aug. 6, 2002), *aff'd on other grounds*, 75 Fed. Appx. 972 (5th Cir. 2003) (unpublished) …………………………41

White v. New York Life Ins. Co.,
145 F.2d 504, 509 (5th Cir. 1944)………………………20, 24, 28, 30, 34

Wright v. Paramount-Richards Theatres,
5 Cir., 1952, 198 F.2d 303…………………..…………………20, 28, 34

Fed. R. Evid. 703……………………………………………..62, 63, 66, 67
Fed. R. Evid. 705……………………………………………..62, 63, 66, 67
Fed. R. Evid. 901……………………………………………..17, 56, 59, 64
Fed. R. Evid. 807…………………………………………….……….64, 66

Fed. R. App. P. 32(a)(5) ……………………………………………70
Fed. R. App. P. 32(a)(6)…………………………………………..70

JURSIDICTIONAL STATEMENT

This appeal arises from an order denying Appellant's Rule 50 Motion entered by the district court on August 23, 2011, and from Final Judgment entered by the district court on November 29, 2011. This Court has

jurisdiction under 28 U.S.C. § 1291. *See Ballew v. Cont'l Airlines*, 668 F.3d 777, 781 (5th Cir. 2012).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the district court err in denying Santander's Rule 50 motions and entering judgment awarding actual damages of $20,427.50 on the jury's verdict, and whether Jeffery Smith properly mitigated his damages?

2. Additionally, did the district court err in admitting hearsay testimony contained in nine letters and did Jeffery Smith properly authenticate the nine letters?

STATEMENT OF THE CASE

This case is before the Court upon appeal from a judgment of the district court entered on November 29, 2011.

Santander argues that documents were admitted in error, that Smith didn't prove a scintilla of evidence of damages, and Smith didn't mitigate his damages.

Santander argues that Plaintiff's exhibit PX 9, 10, 12, 20, 21, 22, 23, 34, and 35 was admitted in error however Santander admitted half of those documents into evidence for their own case. Santander admitted Defendant's exhibit DX 8, 9, 10, 12, 13. Not only did Santander admit the same documents into evidence but Smith also had valid case law from within this circuit that was given to the District Court during the trial and was determined to be rule case law and therefore the District Court properly let

the evidence in. Santander also argues scintilla of evidence through out most of their argument, a doctrine that Federal Courts do not recognize, which Smith easily proved. Santander also argues mitigation of damages, however Santander did not properly prove up the actual amount of damages that Smith could have mitigated, which is required to get mitigation of damages. Plus, the jury heard Santander's mitigation argument and considered their argument when making their determination on damages.

Santander damaged Smith by their actions and conduct, Smith received damages from the jury, the documents were properly authenticated and admitted into evidence, Santander did not properly prove up mitigation, and even so, the jury heard their argument and used it in their determination, scintilla of evidence is not recognized in Federal Courts, and even if it was, Smith easily met that burden.

After Smith rested, Santander moved for judgment as a matter of law under Rule 50(a) of the Federal Rules of Civil Procedure, which the District Court denied in part. The jury entered its verdict on August 3, 2011 awarding $20,437.50 in damages. Santander moved for judgment as matter of law under Rule 50(b), which the District Court denied. After the District Court entered judgment on November 29, 2011, Santander then appealed to this court.

STATEMENT OF FACTS

I. Financed by Triad Financial Corporation, Jeffery Smith bought a Dodge Dakota in 1999, which was totaled the same year.

Jeffery Smith, the plaintiff and Appellee, (hereinafter “Smith”) purchased a Dodge Dakota in February 1999, which was financed by Triad Financial Corporation. While making payments on the note to Triad Financial Corporation, Smith was involved in a severe accident in May 1999 that left the Doge Dakota totaled. Smith’s insurance covered much of the cost of the Dodge Dakota.

Unfortunately for Mr. Smith, the insurance proceeds didn't cover the amount that was due on the vehicle, leaving a deficiency balance of approximately $4,565. In June 1999, Triad Financial Corporation sent a demand letter to Smith demanding payment. Smith did not hear from Triad Financial Corporation again nor see the debt reported on his credit report until December 2009.

II. Smith’s account was re-aged and reported to Transunion in December 2009.

For the past 14 years, Smith has been employed by Waterloo Ice House. Over the years, Smith had started using his credit cards to purchase equipment and set up new store fronts for Waterloo Ice House. Smith’s

credit cards provided a great service to Waterloo Ice House, since Waterloo Ice House could just reimburse Smith for his credit card bills, rather than dealing with the morass of cutting checks, monitoring accounts, and disturbing funds. And most important, since Smith was able to avoid this morass, he was able to complete jobs faster than the other employees at Waterloo Ice House. In fact, because of Smith's ability to use his credit cards for Waterloo Ice House, Smith became an invaluable employee.

Because of the need for his credit cards to perform his job, Smith purchased a credit monitoring service through Bank of America. In December 2009, Bank or America emailed him to inform him that derogatory information had been reported on his Transunion credit report. Smith's Transunion credit score of 778, as reported in October 2009, dropped to 652 in December 2009.

Soon after, Smith's credit limit on his credit cards was lower by a considerable amount. Total, Smith's credit limit was reduced by $37,000, which was about 65% of his available credit. All of this occurred, because Santander decided to re-age Smith's account that was nearly 10 years old and report it to Transunion.

III. Smith desperately tried to resolve this dispute by the most reasonable means available.

Smith filed several disputes with Transunion as well as contacting Santander.

Upon contacting a Santander representative, Smith was informed of Santander's purchase of Triad Financial and Santander's reporting of old Triad Financial debt. Realizing the debt more than exceed the seven year period for collection, Smith asked that the information be removed from his credit report. Santander's representative simply replied, "[w]e won't remove it." Trying to further push his case, Smith told the Santander's representative that the debt was "over seven years old" and asked how Santander could collect a debt that was over sever years old.

The Santander's representative replied that, "[I]'ve had this question several times from customers." The Santander's representative continued to give an incoherent answer that ended simply with "[b]ut, you know, you're more than welcome to, you know, contact an attorney and get in contact with them and find out what it is you can do."

IV. Despite Smith's efforts to have Santander's report removed from his credit report, the deletion did nothing, but to stem some of the bleeding.

The second Santander reported the derogatory information to Transunion the damage was done. Thus, Smith was left with no other option,

but to slowly rebuild his credit by paying his bills and avoiding any possibly of maxing out his credit cards.

Smith was forced to adjust his spending habits to try to get his credit score back. With this in mind, Smith has been forced to rearrange how he lives his life. He could not depend on his credit cards to help his family or spend vacation time as he would wish with his family. Additionally, the most devastating, Smith no longer has the high credit limit that allowed him to perform his job like he could before the reporting of the derogatory information. He has lost two or perhaps three opportunities to work on projects at his job with the potential for a bonus of $5,000 per each project. But, the problems did not stop.

Before the reporting of the derogatory information, Smith attempted to refinance his house. He was told he could refinance his house at 5.25%. But, because of his perfect credit score, the bank told him to wait, because interest rates would drop at the end of the year and he could get an opportunity to refinance at a lower rate. After the reporting of the derogatory information, Smith was forced to refinance at 5.5%. If he had refinance with his previous credit score, Smith could have refinanced at 5% on his $185,000 home.

After the shock of the refinance of his house, Smith realized he could not afford a new car with a higher interest, since he needed to restrict his spending in the event he needed to spend what little credit he had left. But the choice to forgo a purchase of a car was not without its own repercussions. Smith's car has broken down on two occasions. As a result of the break downs, Smith has to replace the transmission for $1,500 and the radiator for about $700.

Beyond the troubles with financing and lack of credit, Smith has also had to deal with the fact his credit score will never be what it once was. Credit scores are priceless numbers that take years to cultivate and keep. With Smith losing his stellar credit score, he will likely never receive his credit limits back. And as Eddie Johansson, Smith's expert, testified in court, Smith will probably never receive his credit limit of $16,000 back from Bank of America.

Additionally, since the 18 months when Santander furnished derogatory information to Transunion, Eddie Johansson testified that Smith's credit limits had not increased. Further, because Santander's act of furnishing derogatory information to Transunion that should have never been reported, Eddie Johansson testified that Smith is being hurt today and will be hurt next year and perhaps even hurt five years later. In closing, all of

these events could have easily been avoided, if Santander had simply not furnished the ten year old Triad debt to the Transunion.

V. With no other viable options, Smith filed suit against Santander.

Smith filed suit in March 2010 against Santander and Transunion, bringing cause of actions for violations of the Fair Credit Reporting Act (FCRA) and Fair Debt Collection Act (FDCA) and common-law defamation. The case was tried by jury on August 1-3, 2011. As Smith rested, Santander moved for judgment as a matter of law under Rule 50(a) of the Federal Rules of Civil Procedure, seeking dismissal of each of Smith's Claims. The district court granted Santander's Rule 50(a) motion with respect to Smith's FDCA claim only, and submitted Smith's FDCA and defamation claims to the jury.

The jury found that Santander negligently failed to comply with the Fair Credit Reporting Act by failing to promptly investigate Smith's credit dispute with Santander and correct the information Santander furnished to Transunion. The jury found actual damages in the amount of $20,437.50.

Santander renewed its Rule 50 motion in writing after trial. The district court denied Santander's Rule 50(b) motion and entered judgment on the verdict. Santander appealed to this Court.

STANDARD OF REVIEW

This Court reviews de novo a district court's denial of a motion for judgment as a matter of law under Rule 50, applying the same standard as the district court. *Goodner v. Hyundai Motor Co.,* 650 F.3d 1034, 1039 (5th Cir. 2011) (citing *Travelers Cas. & Sur. Co. of Am. V. Ernst & Young LLP*, 542 F.3d 475, 481 (5th Cir. 2008). "Judgment as a matter of law is proper on an issue if `there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue.'" *Satcher v. Honda Motor* Co., 52 F.3d 1311, 1316 (5th Cir.1995) (quoting Fed.R.Civ.P. 50(a)). When reviewing the denial of a motion for judgment as a matter of law, we will uphold a jury verdict unless the facts and inferences point so strongly and so overwhelmingly in favor of one party that reasonable men could not arrive at any verdict to the contrary. *See id*. We are bound to view the evidence and all reasonable inferences in the light most favorable to the jury's determination. *See Dention v. Morgan*, 136 F.3d 1038, 1044 (quoting *Rideau v. Parkem Indus. Servs.,* 917 F.2d 892, 897 (5th Cir. 1990). Although we might have reached a different conclusion if we had been the trier of fact, we are not free to reweigh the evidence or to reevaluate the credibility of witnesses. *See Id.* "We must not substitute for the jury's reasonable factual inferences other inferences that we may regard as more reasonable." *Id.* When considering Rule 50 motions, a court should consider

all of the evidence in the light most favorable to the party opposed to the motion. *Goodner,* 650 F.3d 1034, 1040; *Mosley v. Excel Crop*., 109 F.3d 1006, 1008-09 (5th Cir. 1997).

Under this Standard, the district court ruled correctly with it denied Santander's Rule 50 motion and entering judgment, because the Judge viewed that a reasonable men and women could arrive at different verdicts. Further, the Judge applied the right by allowing the jury to decide the evidence presented, rather than coming to his on conclusion as to what the judgment should be. Accordingly, Jeffery Smith prays that this court affirm the lower Court's decision as to Santander's Rule 50 motion.

STANDARD OF REVIEW TO ADMIT OR EXCLUDE EVIDENCE

The Court reviews a district Court's decision to admit or exclude evidence for abuse of discretion. *Paz v. Brush Engineered Materials Inc.*, 555 F.3d 383, 387 (5th Cir. 2009); *Compaq Computer Corp. v. Ergonome Inc.*, 387 F.3d 403, 408 (5th Cir. 2004). A trial court abuses its discretion when its ruling is based on an erroneous view of the law or clearly erroneous assessment of the evidence. *Knight v. Kirby Inland Marine Inc.*, 482 F.3d 347, 351 (5th Cir. 2007) *Bocanegra v. Vicmar Servs., Inc.,* 320 F.3d 581, 584 (5th Cir. 2003). If the Court finds an abuse of discretion in admitting or excluding evidence, it will "review the error under the harmless error

doctrine, affirming the judgment, unless the ruling affected substantial rights of the complaining party." *Knight,* 482 F.3d at 351 (quoting *Bocanegra*, 320 F.3d at 584).

"The Fifth Circuit does not require conclusive proof of authenticity before allowing the admission of disputed of evidence…[Rule 901] merely requires some evidence which is sufficient to support a finding that the evidence in question is what is proponent claims it to be." *See United States v. Jackson,* 625 F.3d 875, 881 (5th Cir. 2010) Federal Rule of Evidence 901(b) lists nonexclusive examples of appropriate methods of authentication, including (1) the testimony of a witness with knowledge. "A document may be authenticated with circumstantial evidence, 'including the document's own distinctive characteristics and the circumstances surrounding its discovery.'" *Carroll,* 2000 WL 45870, at *3 (Citing *Arce*, 997 F.2d at 1128).

"Where circumstances indicate that the record are trustworthy, the party seeking to introduce them does not have to present the testimony of the party who kept the record or supervised its preparation." (quoting *United States v. Veytia-Bravo,* 603 F.2d 1187, 1191-92 (Fth Cir. 1979) *See Falk v. Axiam Inc.*, 944 F.Supp. 542, 546 (S.D. Tex 1996) "There is no requirement that the witness who lays foundation be the author of the record or be able to personally attest to its accuracy. *See United States v. Jackson*, g25 F3d 875,

882 (5th Cir. 2010.) Accordingly, Jeffery Smith respectfully requests that the Court affirm the District Court's holding on the admissions of the letters.

SUMMARY OF THE ARGUMENT

Santander's appeal fails for the following reasons; Santander argues that Smith didn't prove his damages beyond a scintilla of evidence, that doctrine is not recognized in the Federal Courts as argued within Smith's response. Santander then argues that Smith didn't mitigate his damages; however, as the case law states, Santander is required to prove during the trial the actual amount of damages that Smith could have mitigated if he were to act. Santander did not prove any amount that could have been mitigated. Plus, the jury heard Santander's mitigation argument and considered their argument when making their determination on damages. Therefore, their argument fails.

Santander further argues that documents were admitted in error. They argue Plaintiff's exhibits PX 9, 10, 12, 20, 21, 22, 23, 34, and 35 were admitted in error. However, Santander admitted half of those documents into evidence for their own case. Santander admitted exhibits DX 8, 9, 10, 12, 13. Not only did Santander admit the same documents into evidence, but Smith also had valid case law from within this circuit that determined that the District Court had authority to admit the evidence.

Smith proved that Santander injured Smith, by their actions and conduct, to a jury that he was damaged and the jury awarded him $20,437.50. The jury did not distinguish how they awarded the damages to each of Smith's claims. Santander is guessing when they argued that the jury got the verdict wrong for each of Smith's claims; because, Santander never polled the jury and have no idea on how much if any at all the jury gave Smith for each injury.

ARGUMENT AND AUTHORITIES

In Santander's opening arguing statement, they argue two doctrines, one of the doctrines isn't recognized in Federal Courts and the other will fail because they didn't properly argue it in the District Court. Santander argues that "Smith failed to present more than a scintilla of evidence" *please see Brief of Appellant, Santander* at 12-14. Santander further argues within the same section of their argument and authorities that Smith's FCRA cause of action fails as a matter of law because Smith didn't mitigate his damages. The major problem with Santander's argument is that Federal Courts do not follow or recognize that doctrine of "scintilla of evidence". *Please see White v. New York Life Ins. Co*., 145 F.2d 504, 509 (5th Cir. 1944)(The rule of practice to the effect that a mere scintilla of evidence is sufficient to

require submission to the jury has never obtained in the Federal courts.). Even though Smith clearly and easily met that standard, however, Federal Courts apply a different standard that is even easier to satisfy. *Please see Isaacs v. Am. Petrofina*, 368 F.2d 193, 195-96 (5th Cir. 1966)'The quantity and quality of proof necessary to make out a case for submission to a jury in a federal court are determined by the Seventh Amendment to the Constitution of the United States, the Federal Rules of Civil Procedure, and the decisions of the courts of the United States. *White v. New York Life Ins. Co.*, 5 Cir., 1944, 145 F.2d 504; *Wright v. Paramount-Richards Theatres*, 5 Cir., 1952, 198 F.2d 303; *Reuter v. Eastern Air Lines*, 5 Cir., 1955, 226 F.2d 443; and *Continental Casualty Co. v. Holmes*, 5 Cir., 1959, 266 F.2d 269; and cf. *Dick v. New York Life Ins. Co*., 1959, 359 U.S. 437, 79 S.Ct. 921, 3 L.Ed.2d 935.' *Revlon, Inc. v. Buchanan*, 271 F.2d 795, 800 (5th Cir., 1959).'It is the function of the jury, not the court, to weigh and evaluate the evidence on both sides of a contested question. If there is a conflict in the evidence, the jury must resolve such conflict. * * * If the state of the evidence is such that it presents no conflict, nevertheless, if reasonable minds may draw conflicting or contrary inferences from the same evidence requiring different verdicts, it is for the jury to determine which is the correct inference. For the purpose of this opinion, we must accept as true the

credible evidence adduced by the Plaintiff Wells (citing many cases).' *Wells v. Warren Company*, 328 F.2d 666, 668, 669 (5th Cir. 1964).'The evidence must be viewed in the light most favorable to the plaintiff, giving the plaintiff the benefit of every inference favorable to him ***196** which may be fairly drawn. It is not for the court to weigh the conflicting evidence or to judge the credibility of witnesses. Whenever the evidence is such that fair-minded men may draw different inferences there from, and reasonably disagree as to what the verdict should be, the matter is one for the jury.' *American Fidelity & Casualty Co. v. Drexler*, 5 Cir., 1955, 220 F.2d 930, 932-933.

Most, if not all of the evidence between Smith and Santander contradicted each other and reasonable mind could definitely differ.

The other issue within Santander's Argument and Authorities section was that Smith didn't mitigate his damages. Smith has already argued this issue in Smith's response to Santander's 50(b) motion, Santander argued throughout the entire trial as well as most of their appellant brief that Smith should have mitigated his damages. This argument failed in Santander's Renewed Motion for Judgment as a Matter of Law, [50(b) motion] for two (2) reasons. First, Santander didn't properly argue mitigation of damages during trial to have the District Court or the Fifth Circuit recognize their

argument. Santander isn't entitled to any reduction in damages for lack of mitigation as argued by Santander because Santander didn't prove during the trial the amount that Smith could have mitigated, therefore Santander is not allowed any mitigation of damages and the District Court properly denied Santander's 50(b) motion and their current mitigation of damages argument in front of this Court should fail as well for their lack of proving any amounts that could have been mitigated as required. Santander still hasn't proved any amounts that could have been mitigated. *Please see Hoppenstein Properties, Inc. v. Schober*, 329 S.W.3d 846, 849-50 (Tex. App.--Fort Worth 2010, no pet.)the tenant properly bears the burden of proof to demonstrate that the landlord has failed to mitigate damages and the amount by which the landlord could have reduced its damages. *Austin Hill Country Realty,* 948 S.W.2d at 300. A defendant is not entitled to any reduction in the amount of damages if it does not prove the amount of damages that could have been avoided. ***850** *Cole Chem. & Distrib., Inc. v. Gowing,* 228 S.W.3d 684, 688 (Tex.App.-Houston [14th Dist.] 2005, no pet.); *Broken Spoke Club, Inc. v. Butler,* No. 02–02–00116–CV, 2004 WL 1858119, at *2–3 (Tex.App.-Fort Worth Aug. 19, 2004, no pet.) (mem. op.). The policy underlying mitigation is to avoid waste rather than penalize the mitigating party for not doing enough. *See Austin Hill Country Realty,* 948

S.W.2d at 298–99; *MOB 90 of Tex., L.P. v. Nejemie Alter, M.D., P.A.,* No. 13–08–00173–CV, 2009 WL 1026603, at *3 (Tex.App.-Corpus Christi Apr. 16, 2009, no pet.). Because Santander didn't prove the amount that Smith could have mitigated they are not entitled to any mitigation of damages as ruled on in *Cole Chem. & Distrib., Inc.,*

The second reason Santander's mitigation argument fails is because the jury did hear Santander's repeated arguments throughout the entire trial, including their opening statement, *please see* USCA5 761, as well as the jury instruction, *please see* USCA5 1036-1037, regarding the mitigation issue, the jury could have returned a much higher damage award if not for Santander arguing mitigation all through the course of the trial. Santander will never know because Santander didn't interview the jury. Because Santander never polled the jury, Santander is only speculating if the jury applied their mitigation argument and to what damages they applied it to, fact is Santander has no idea if the jury applied the mitigation doctrine and if so, how much. To penalize Smith twice by reducing or completely eliminating his damages a second time would be grossly unfair and highly prejudicial to Smith. The jury heard Santander's argument and determined that Smith was injured and used any mitigation argument in their determination of a monetary award for Smith. Santander argued so strongly

during trial that Smith didn't mitigate his damages but conveniently failed to discuss their lack of mitigating their liability. It took five (5) months after being notified of their reporting which three (3) months was after a lawsuit was filed, in that time, Smith's damages cumulated. Santander has argued in their Rule 50(b) motion that Smith should be completely barred from recovery because of any mitigation issue, when in reality, not only is not a bar to recovery but Santander isn't even entitled to any reduction in damages because he didn't prove that amount that could have been mitigated.

I. SANTANDER ARGUES: SMITHS FCRA CLAIM REQUIRES, BUT LACKS, ACTUAL DAMAGES

Again, Santander is arguing the "scintilla of evidence" rule, a doctrine that isn't recognized in Federal Courts, *please see Brief of Appelleant Santander* at 14, that " Smith failed to produce more than a scintilla of evidence as the existence of any actual damages and Smith failed to produce more than a scintilla of evidence as to the existence that Santander caused his actual damages". Please see *White v. New York Life Ins. Co*., 145 F.2d 504, 509 (5th Cir. 1944)(The rule of practice to the effect that a mere scintilla of evidence is sufficient to require submission to the jury has never obtained in the Federal courts.). However, in the event this Court recognizes the doctrine, Smith more than proved his actual damages. Smith testified and proved that due to Santander's reporting, Smith lost $37,500, *please see*

USCA5 777, in credit availability when immediately after Santander's illegal reporting, Smith had multiple credit cards from various lending institutions radically reduce or out right cancel his credit limits. Smith introduced physical evidence of Bank of America's (herein after BOA) four (4) letters to Smith stating that BOA was reducing Smith's credit limits. One letter from BOA dated 12/7/09 reduced Smith's credit from 14,500 to $500, *please see* USCA5 771, because of a recent serious delinquency. PX 20. Another letter for BOA dated 12/7/09 on a different account stating they were reducing Smith's credit limit from $11,500.00 to $500 because of a recent serious delinquency. PX 21. One letter from BOA dated 12/21/09 stating they were reducing Smith's credit limit from $11,000 to $7,000. PX 22; RE: Tab A. Smith also testified of lost work projects that cost him $15,000.00, Smith paid .25% higher interest rate on his refinance of his home of $179,000 over the course of 30 years because of Santander's reporting, even Santander's own expert testified that it would cost approximately $5,000 to get a home of that amount refinanced, *please see* USCA5 990, even if that $5,000 is rolled into the note of the house, $185,000 note over 30 years would make that same $5,000.00 grow into several thousand more dollars added to the overall amount, costing it a lot more than $5,000.00. Smith's direct testimony is as solid if not more than

physical evidence. The jury instruction states, "the law makes no distinctions between direct and circumstantial evidence, but simply requires that you find the facts from a preponderance of all the evidence, both direct and circumstantial." The key sentence is that the jury must view circumstantial evidence the same as direct evidence. Santander argues that Smith didn't provide any documentation, strained relationships or problems at work. If fact, Smith testified regarding all of those issues. Even if the court views that Smith's testimony is circumstantial that he lost out on projects and therefore income from work, that evidence must be weighed and viewed with the same validity of direct evidence, it is up to the jury to determine the facts from such testimony, which they heard and considered from Smith testimony. The Fifth Circuit also ruled on the strong validity of circumstantial evidence, *Movible Offshore Co. v. Ousley*, 346 F.2d 870, 874 (5th Cir. 1965), " As the Supreme Court has repeatedly stated: 'Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence.'(quoting)*Michalic v. Cleveland Tankers, Inc*., 364 U.S. 325, 330, 81 S.Ct. 6, 11, 5 L.Ed.2d 20 (1960). Smith testified that he had problems at work and lost out on income because of the reduced credit availability, as well as the testimony and direct

evidence that Smith lost $37,500 in available credit, directly related to the inaccurate credit reporting of the Santander.

Even Santander's own expert testified that when Smith received a letter from Bank of America stating that they were reducing his credit because of a recent serious delinquency, please see USCA5 971-972. Santander's own expert went further, when asked if "is it in your opinion that they reduced his credit availability because of this recent charge-off? Santander's expert responded with, "It appears that way on that particular credit card, yes". Please see USCA5 972. Smith receive two of those letters from BOA stating that they were reducing his credit because of that same statement, one reduced his credit $14,000.00 and the other reduced his credit $11,500.00.

As previously argued, Santander is arguing the wrong doctrine with scintilla of evidence, the real standard used by Federal Courts is if there is a conflict of evidence then the jury must hear it and even if there is no conflict of evidence reasonable minds could draw different inferences. Please see *Isaacs v. Am. Petrofina*, 368 F.2d 193, 195-96 (5th Cir. 1966)'The quantity and quality of proof necessary to make out a case for submission to a jury in a federal court are determined by the Seventh Amendment to the Constitution of the United States, the Federal Rules of Civil Procedure, and

the decisions of the courts of the United States. *White v. New York Life Ins. Co.,* 5 Cir., 1944, 145 F.2d 504; *Wright v. Paramount-Richards Theatres*, 5 Cir., 1952, 198 F.2d 303; *Reuter v. Eastern Air Lines*, 5 Cir., 1955, 226 F.2d 443; and *Continental Casualty Co. v. Holmes*, 5 Cir., 1959, 266 F.2d 269; and cf. *Dick v. New York Life Ins. Co*., 1959, 359 U.S. 437, 79 S.Ct. 921, 3 L.Ed.2d 935.' *Revlon, Inc. v. Buchanan*, 271 F.2d 795, 800 (5th Cir., 1959).'It is the function of the jury, not the court, to weigh and evaluate the evidence on both sides of a contested question. If there is a conflict in the evidence, the jury must resolve such conflict. * * * If the state of the evidence is such that it presents no conflict, nevertheless, if reasonable minds may draw conflicting or contrary inferences from the same evidence requiring different verdicts, it is for the jury to determine which is the correct inference. For the purpose of this opinion, we must accept as true the credible evidence adduced by the Plaintiff Wells (citing many cases).' *Wells v. Warren Company*, 328 F.2d 666, 668, 669 (5th Cir. 1964).'The evidence must be viewed in the light most favorable to the plaintiff, giving the plaintiff the benefit of every inference favorable to him ***196** which may be fairly drawn. It is not for the court to weigh the conflicting evidence or to judge the credibility of witnesses. Whenever the evidence is such that fair-minded men may draw different inferences there from, and reasonably

disagree as to what the verdict should be, the matter is one for the jury.' *American Fidelity & Casualty Co. v. Drexler*, 5 Cir., 1955, 220 F.2d 930, 932-933.

Smith introduced both direct and circumstantial evidence of damages that more than satisfy the $20,437.50 that the jury awarded Smith. The standard of review for Santander to have the jury verdict overturned is extremely high because the Court has to view the evidence and any reasonable inferences in the light most favorable to the jury's determination, disregarding its verdict only if the evidence is so strong that a reasonable person could not have found as the jury did. *Please see Jones v. Wal-Mart Stores, Inc.,* 870 F.2d 982, 987 (5th Cir. 1989); *Dietz v. Garske,* 406 Fed. App'x 863, 864 (5th Cir. 2010). Santander has not met their burden.

II. SANTANDER ARGUES: "SMITH'S CLAIM FOR ACTUAL DAMAGES WAS NOT SUPPORTED BY THE EVIDENCE

Again, Santander is arguing the "scintilla of evidence" rule, a doctrine that isn't recognized in Federal Courts, *please see Brief of Appellant* at p. 16, that "A mere scintilla of evidence as to an essential element is not sufficient to present a question for the jury" and "Because no more than a scintilla of evidence supports Smith's recovery of damages from Santander". Please see *White v. New York Life Ins. Co*., 145 F.2d 504, 509 (5th Cir. 1944).

However, in the event this Court recognizes the doctrine, Smith more than proved his actual damages.

As Smith has argued, Smith testified and proved that due to Santander's reporting, Smith lost $37,500 in credit availability, *please see* USCA5 777, when immediately after Santander's illegal reporting, Smith had multiple credit cards from various lending institutions radically reduce or out right cancel his credit limits. Smith introduced physical evidence of Bank of America's letter to Smith stating that Bank of America was reducing Smith's account from 14,500 to $500, *please see* USCA5 766, 771, because of a serious delinquency. Smith also testified that he lost two or three work projects that cost him $5,000.00 per project, please see UDCA5 797, Smith paid .25% higher interest rate on his refinance of his home of $185,000 over the course of 30 years because of Santander's reporting, *please see* USCA5 800, 802, even Santander's own expert testified that it would cost approximately $5,000 to get a home of that amount refinanced, *please see* USCA5 990, Santander's own expert witness testified that the $5,000.00 it would cost to refinance could be rolled into the note of the house, *please see* USCA5 990. If Smith rolled that $5,000.00 into a $185,000 note over 30 years would make that same $5,000.00 grow into several thousand more dollars added to the overall amount, costing it a lot

more than $5,000.00. Santander's argument as well as their experts argument that there is no money out of pocket for Smith because could roll it into the note is disingenuous and misplaced at best. Smith's direct testimony is as solid if not more than physical evidence. Even the jury charge regarding the types of evidence, "one is direct" and the other is "indirect-circumstantial evidence-the proof of circumstances that tend to prove or disprove the existence or nonexistence of certain other facts. In the jury charge it states, "the law makes no distinctions between direct and circumstantial evidence, but simply requires that you find the facts from a preponderance of all the evidence, both direct and circumstantial." The key sentence is that the jury must view circumstantial evidence the same as direct evidence. Santander argues that Smith didn't provide any documentation, strained relationships or problems at work. If fact, Smith testified regarding all of those issues. Even if the court views that Smith's testimony is circumstantial that he lost out on projects and therefore income from work, that evidence must be weighed and viewed with the same validity of direct evidence, it is up to the jury to determine the facts from such testimony, which they heard and considered from Smith's testimony. The Fifth Circuit also ruled on the strong validity of circumstantial evidence, *Movible Offshore Co. v. Ousley*, 346 F.2d 870, 874 (5th Cir. 1965), " As the

Supreme Court has repeatedly stated: 'Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence.'(quoating)*Michalic v. Cleveland Tankers, Inc*., 364 U.S. 325, 330, 81 S.Ct. 6, 11, 5 L.Ed.2d 20 (1960). Smith testified that he did not take family trips as to not run up a higher percentage of debt on his lowered limits that would in turn lower his credit score, that his family relationships suffered because he could not provide for them as he once did, had problems at work and lost out on income because of the reduced credit availability, as well as the testimony and direct evidence that Smith lost $37,500 in available credit, directly related to the inaccurate credit reporting of the Santander.

Even Santander's own expert testified that when Smith received a letter from Bank of America stating that they were reducing his credit because of a serious delinquency and when Santander's expert was asked, " So after reading that letter from Bank of America, is it in your opinion that they reduced his credit availability because of this recent charge-off? *Please see* USCA5 972. Santander's expert responded, "it appears that way on that particular card, yes." *Please see* USCA5 972. Santander's own expert admitted that Smith lost the credit on that card because of Santander. Santander was not just reporting a small ding on Smith credit report, they

reported a charge-off which was extremely serious. Santander's own expert was asked if a charge-off was a pretty bad reporting item, she responded with, "I would think so, yes." *Please see* USCA5 971.

Smith had two letters that stated they were reducing his credit because of recent serious delinquency, just as their expert read that it appeared that Santander caused the reduction, one account had a reduction of $13,500.00 and the other had a reduction of $11,000.00. RE: Tab A; PX20, PX 21. Santander's argument that there was no evidence supporting the damages or that Santander's actions wasn't the cause of Smiths damages must fail.

As previously argued, Santander is arguing the wrong doctrine with scintilla of evidence, the real standard used by Federal Courts is if there is a conflict of evidence then the jury must hear it and even if there is no conflict of evidence reasonable minds could draw different inferences. Please see *Isaacs v. Am. Petrofina*, 368 F.2d 193, 195-96 (5th Cir. 1966)'The quantity and quality of proof necessary to make out a case for submission to a jury in a federal court are determined by the Seventh Amendment to the Constitution of the United States, the Federal Rules of Civil Procedure, and the decisions of the courts of the United States. White v. New York Life Ins. Co., 5 Cir., 1944, 145 F.2d 504; *Wright v. Paramount-Richards Theatres*, 5 Cir., 1952, 198 F.2d 303; *Reuter v. Eastern Air Lines*, 5 Cir., 1955, 226 F.2d

443; and *Continental Casualty Co. v. Holmes*, 5 Cir., 1959, 266 F.2d 269; and cf. Dick v. New York Life Ins. Co., 1959, 359 U.S. 437, 79 S.Ct. 921, 3 L.Ed.2d 935.' *Revlon, Inc. v. Buchanan*, 271 F.2d 795, 800 (5th Cir., 1959); *American Fidelity & Casualty Co. v. Drexler*, 5 Cir., 1955, 220 F.2d 930, 932-933.

Smith introduced both direct and circumstantial evidence of damages that more than satisfy the $20,437.50 that the jury awarded Smith. The standard of review for Santander to have the jury verdict overturned is extremely high because the Court has to view the evidence and any reasonable inferences in the light most favorable to the jury's determination, disregarding its verdict only if the evidence is so strong that a reasonable person could not have found as the jury did. *Please see Jones v. Wal-Mart Stores, Inc.,* 870 F.2d 982, 987 (5th Cir. 1989); *Dietz v. Garske,* 406 Fed. App'x 863, 864 (5th Cir. 2010). Santander has not met their burden.

A. SANTANDER'S ARGUMENT: NO EVIDENCE SANTANDER CAUSED SMITH'S ALLEGED REDUCTION IN CREDIT LIMITS.

Smith called Edwin Johansson, a credit analyst and an expert in credit reporting, he testified that the sole reason why Smith experienced massive credit reductions and credit cancellations was because of Santander's reporting a charge-off on Smith's credit report. The Bank of America letter dated 12/17/2009 stated that the reason for the massive reduction of credit

was due to a serious delinquency. Smith received that letter within a few days of Santander's reporting. Santander's reporting was not a simple 30 day late ding that a lot of consumers might be hit with for overlooking a bill, this was a "charge-off", an absolute killer of credit scores. Santander's reporting was the only serious delinquency on Smiths credit report. As Mr. Johansson testified, once one creditor gets wind that another has cancelled or reduced their credit line, then all the creditors start to look into the consumer to see if there is problem. In Smith's case, his creditors started pulling inquiries from his credit report and started pulling their credit as well. It's a domino effect, not to mention once a creditor sees that glaring "charge-off" on the credit report, that is more than enough to pull their credit lines based on the "charge-off" all to itself. The loss of 126 points on a credit report is absolutely devastating on a credit report. Once a bank credit card takes your credit limits, they don't give it back once your score goes up, as Mr. Johansson testified, that in this business environment today, it would be almost impossible to increase his credit limits after having them slashed. *Please see* USCA5 891.

Santander argues that Experian and Equifax were not impacted at all, *please see Brief of Appellant, Santander* at 16, there is a very good reason for that, its because Experian and Equifax decided not to report Santander's

account. Santander argues in this appeal as well as testifying that they deleted on or about May 2010 and that Smith's credit score bounced back to excellent rating once Santander deleted 4 months after Smith's last dispute with them, so Smith wasn't damaged. There are a number of problems with that argument. The damage was already done to Smith, once Santander decided to illegally report the information on Smiths credit report they started a process that can't be reversed quickly. Once Bank of America reduced Smith's credit availability , it would take years to get back or possibly will never get it back. It triggers other banks to look closer at Smith's credit and they reduced or cancelled it as well.

Santander's attempted to argue in their appeal that Smith's expert Mr. Johansson's testified that Smith lost his credit availability because of a "credit crunch" in the economy is completely misapplied on all levels. In a way, however, Santander proved Smith's point, when creditors were given a good reason to retract or cancel credit, they would. Smith has incredible credit and outstanding credit scores until Santander illegally reported the inaccurate "charge-off" on Smith's credit report. That was the spark that ignited the credit fire storm. Once the creditors, who were on heighted alert as it was, were informed of Santander's reporting, they immediately started cancelling and reducing Smith's accounts. Smith has incredible credit and

credit scores until Santander alone and singlehandedly ruined. It is not a quick fix as Santander attempted to argue, Mr. Johansson testified that it is the hardest in 10 years to get credit and in this business environment, Smith might never get that credit back, *please see* USCA5 891. Santander argues in their appeal that BoA lowered his credit limit on two separate cards based on the way he had been using his credit without any mention of the reported serious delinquency, that is absolutely not true, Smith introduced a letter from BoA that specifically stated that the reduction was because of a "serious delinquency", even Santander's own expert testified that when Smith received a letter from BoA stating that they were reducing his credit because of a serious delinquency and when Santander's expert was asked, " So after reading that letter from Bank of America, is it in your opinion that they reduced his credit availability because of this recent charge-off? *Please see* USCA5 972. Santander's expert responded, "it appears that way on that particular card, yes." *Please see* USCA5 972. Smith had several cards with BoA and they all reduced their credit lines at the exact same time and date that Smith received his letter stating the reason they were reducing his credit line was because of a "serious delinquency".

Santander further argues that there was no evidence of Smith's credit limit being lowered because it was supported by unauthenticated documents

and hearsay. Smith was successful in getting the documents at issue admitted and the district court was correct in allowing them because Smith presented to the Court valid case law that is argued within this brief, that the documents should be admitted. It would have been error for the Court not to have admitted them. Smith had intimate knowledge of these letters and could self authenticated them. Plus, Santander admitted half of the documents they are complaining about themselves, which is also argued in greater detail within this brief

Santander also argues that the letters reducing Smith's credit limits don't mention Santander by name so they are arguing, it was me that did it, however, in the two BoA letters, both dated December 17, 2009, RE: Tab A ;PX 20-21. BoA gave the reason for the reduction and it was for a "serious delinquency", and even Santander's expert testified that it appeared that Santander was the reason for those reductions in credit.

Santander mistakenly argues that there is no evidence that if Smith would have reached out to the credit card companies that they would be unwilling or unable to raise Smith's limits back. Mr. Johansson, Smith's expert testified that Smith might never get those credit limits back because during this business environment, creditors are not giving out credit easily. Once gone, its gone.

During the trial, Smith played a recorded conversation with Santander and Santander informed Smith that they were "not going to delete" and that he would have to "get an attorney", even after Smith informed the Santander employee that it the reporting was illegal because of its age. *Please see* PX 1. Smith filed his lawsuit March 2010 and Santander admitted in the trial that they did not delete until May 2010, if it wasn't for this litigation, Santander would be still reporting on Smith's credit report. Santander admitted to Smith that they were not going to delete this account.

Smith testified that he didn't use his remaining $22,000 because the higher debt percentage you put on a credit card against its limit will in turn drive your credit score down. Smith attempted to stop using his credit and not use up his limits so as to increase his credit score. Smith was mitigating his damages by attempting to get his score and credit limits back up on his own. *Please see* USCA5 798.

Santander argued that Smith applied for and received one credit card after January 2010 so that Smith wasn't that damaged. Because of Santander's action, Smith had a reduction of $37,500.

Santander is attempting to reargue the merits of the case to this Court and to get the jury verdict overturned. The standard of review for Santander to have the jury verdict overturned is extremely high because the Court has

to view the evidence and any reasonable inferences in the light most favorable to the jury's determination, disregarding its verdict only if the evidence is so strong that a reasonable person could not have found as the jury did. *Please see Jones v. Wal-Mart Stores, Inc.,* 870 F.2d 982, 987 (5th Cir. 1989); *Dietz v. Garske,* 406 Fed. App'x 863, 864 (5th Cir. 2010). Santander has not met their burden.

B. SANTANDER ARGUES: NO EVIDENCE SANTANDER CAUSED ALLEGED INJURY TO SMITH'S JOB PERFORMANCE OR EARNINGS

Smith did testify that he worked for Waterloo Ice House Restaurant Group and he would use his personal cards to buy and purchase products for job projects he would work on and the company would pay him back. This process saved Smith several weeks per purchase because he could purchase an item to complete a job project that would take weeks for the company to get a check request and to issue a check. Because of Smith's high credit availability, this gave Smith a large competitive advantage over his peers because he could buy the product much faster and complete projects much faster, Smith would get more projects and more profitable projects than his peers. When Smith's credit was reduced, Smith no longer had that competitive edge over his peers and therefore he received few projects, which he was paid bonuses of $5,000.00 for each project, therefore

reduction in his bonus money and that he missed out on two or three, *please see* USCA5 795-797.

Santander argues that the company never gave Smith negative comments regarding his work but when Smith couldn't get the work out as fast as he did when he had larger amounts of credit than he could when he had his credit reduced and since he was paid bonuses per project, then by simple addition, Smith lost out of projects therefore costing him $5,000 per project, Smith testified that he lost out on 3 projects. The Santander argues that Smith didn't provide any documentation of problems at work. If fact, Smith testified regarding lost projects due to reduced credit. Even if the court views that Smith's testimony is circumstantial that he lost out on projects and therefore income from work, that evidence must be weighed and viewed with the same validity of direct evidence, it is up to the jury to determine the facts from such testimony, which they heard and considered from Smith's testimony. The Fifth Circuit also ruled on the strong validity of circumstantial evidence, *Movible Offshore Co. v. Ousley*, 346 F.2d 870, 874 (5th Cir. 1965), " As the Supreme Court has repeatedly stated: 'Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence.'(quoating)*Michalic v. Cleveland Tankers, Inc*., 364 U.S. 325, 330, 81 S.Ct. 6, 11, 5 L.Ed.2d 20

(1960). Smith testified that he had problems at work and lost out on income because of the reduced credit availability, as well as the testimony and direct evidence that Smith lost $37,500 in available credit, directly related to the inaccurate credit reporting of Santander.

Santander argues that Smith could have used his $22,000 of credit left for his job but as Smith was attempting to mitigate his damages by trying to increase his credit scores. If Smith would have maxed out his credit cards then his credit scores would have been further damaged.

Because Santander never polled the jury, Santander is only speculating on what the damages the jury awarded Smith for, in fact, the jury might not have given Smith any damages for loss of work projects. Fact is, Santander is simply guessing that the jury may have given Smith damages for work projects lost and therefore has not met their burden.

C. SANTANDER ARGUES: NO EVIDENCE SANTANDER CAUSED ALLEGED INJURY TO SMITH'S SPENDING HABITS, STANDARD OF LIVING, OR FAMILY RELATIONSHIPS

Smith called an expert witness, a credit analyst that testified that it was Santander's conduct that caused Smith's credit limit reductions. Fact is, the closer a consumer is to "maxing" out their credit limits, the lower they drive down their score. Smith testified that he stopped using the credit limits

he had because it would “impact my credit score worse” USCA5 798. Smith also testified that “I just opted to really not use any credit cards so I can try and repair my credit score.” USCA 798. Smith testified that he did attempt to mitigate his damages by attempting self help to increase his credit score on this own.

Smith testified regarding all of those issues. Even if the court views that Smith’s testimony is circumstantial that evidence must be weighed and viewed with the same validity of direct evidence, it is up to the jury to determine the facts from such testimony, which they heard and considered from Plaintiff testimony. The Fifth Circuit also ruled on the strong validity of circumstantial evidence, *Movible Offshore Co. v. Ousley*, 346 F.2d 870, 874 (5th Cir. 1965), “ As the Supreme Court has repeatedly stated: ‘Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence.’(quoating)*Michalic v. Cleveland Tankers, Inc*., 364 U.S. 325, 330, 81 S.Ct. 6, 11, 5 L.Ed.2d 20 (1960).

Because of Santander’s actions, Smith’s credit spending habits and standard of living was reduced.

Because Santander never polled the jury, Santander is only speculating to the amount if any the jury awarded Smith for injury to this

issue, fact is Santander has no idea if the jury awarded any amount of money whatsoever for this. Fact is, Santander is simply guessing that the jury might have awarded Smith monetary damages on this issue, Santander's argument is not enough to say if the jury did or did not award money for this and if so, how much? Santander did not meet their burden.

D. SANTANDER ARGUES: NO EVIDENCE SANTANDER CAUSED ALLEGED INJURY THROUGH SMITH'S MORTGAGE REFINANCING.

Smith called an expert witness, a credit analyst that testified that it was Santander's conduct that caused Smith's credit scores to be lowered. The lower the credit score the higher interest rate a consumer has to pay on a home mortgage, refinance or any other credit that the consumer is wanting to apply for. Smith entered into evidence that Smith had looked into would have qualified for a loan interest rate at 5.25% on a $185,000.00 loan. USCA5 800, 802, 826. Smith did not finance at that time because he felt that interest rates were on their way down and felt like he could refinance it a few months later as low as perhaps 5.0%. Smith could not imagine at that time that Santander was going to hit him with a "charge off" on an account from 10 years prior.

Even Santander's own expert testified that she felt it would cost approximately $5,000.00 to refinance Smith's mortgage. USCA5 990.

Smith testified regarding all of those issues. Even if the court views that Smith's testimony is circumstantial that evidence must be weighed and viewed with the same validity of direct evidence, it is up to the jury to determine the facts from such testimony, which they heard and considered from Smith's testimony. The Fifth Circuit also ruled on the strong validity of circumstantial evidence, *Movible Offshore Co. v. Ousley*, 346 F.2d 870, 874 (5th Cir. 1965), " As the Supreme Court has repeatedly stated: 'Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence.'(quoating)*Michalic v. Cleveland Tankers, Inc*., 364 U.S. 325, 330, 81 S.Ct. 6, 11, 5 L.Ed.2d 20 (1960).

Because Santander never polled the jury, Santander is only speculating to the amount if any the jury awarded Smith for injury to this issue, fact is Santander has no idea if the jury awarded any amount of money whatsoever for this. Fact is, Santander is simply guessing that the jury might have awarded Smith monetary damages on this issue, Santander's argument is not enough to say if the jury did or did not award money for this and if so, how much? Santander did not meet their burden.

E. SANTANDER ARGUES: NO EVIDENCE SANTANDER CAUSED EMOTIONAL DISTRESS, MENTAL ANGUISH, HUMILIATION, ANXIETY, OR DAMAGE TO REPUTATION.

Smith testified that he was experiencing loss of sleep, anxiety, stress, and loss of concentration, that his "emotional distress bleeds over to work and that he experience "weight loss" when he found out about what Santander did to him. USCA5 798-799; *see* USCA5 803-804. Courts have ruled that consumers can recover for loss of sleep, nervousness, frustration, and mental anguish over the consumer report for FCRA violations, *please see Thomas v. Gulf Coast Credit Servs*., 214 F. Supp. 2d 1228(M.D. Ala. 2002)(plaintiff may recover for emotional distress but must show objective physical manifestations; changes in complexion and demeanor are sufficient); see also *Action v. Bank One Corp.*, 293 F. Supp. 2d 1092(D. Ariz. 2003). Courts have ruled that consumers can recover for injury to reputation, family, work, and sense of well-being for FCRA violations, *please see White v. Imperial Adjustment Corp.,* 2002 WL 1809084 (E.D. La. Aug. 6, 2002), *aff'd on other grounds*, 75 Fed. Appx. 972 (5th Cir. 2003) (unpublished) (noting that damages for injury to reputation and creditworthiness are available even without proof of pecuniary damages); see also *Morris v. Credit Bureau of Cincinnati*, 563 F. Supp. 962 (S.D Ohio 1983). Several Courts have ruled that consumers can recover for Humiliation, embarrassment, and mental distress under FCRA violations, please see *Fischl v. GMAC,* 708 f.2d 143 (5th Cir. 1983)

Smith testified regarding all of those issues. Even if the court views that Plaintiff's testimony is circumstantial that evidence must be weighed and viewed with the same validity of direct evidence, it is up to the jury to determine the facts from such testimony, which they heard and considered from Plaintiff testimony. The Fifth Circuit also ruled on the strong validity of circumstantial evidence, *Movible Offshore Co. v. Ousley*, 346 F.2d 870, 874 (5th Cir. 1965), " As the Supreme Court has repeatedly stated: 'Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence.'(quoating)*Michalic v. Cleveland Tankers, Inc*., 364 U.S. 325, 330, 81 S.Ct. 6, 11, 5 L.Ed.2d 20 (1960).

Because Santander never polled the jury, Santander is only speculating to the amount if any the jury awarded Smith for injury to this issue, fact is Santander has no idea if the jury awarded any amount of money whatsoever for this. Fact is, Santander is simply guessing that the jury might have awarded Smith monetary damages on this issue, Santander's argument is not enough to say if the jury did or did not award money for this and if so, how much? Santander did not meet their burden.

F. SANTANDER ARGUES: IN THE ALTERNATIVE, NO EVIDENCE OF SMITH'S REASONABLE MITIGATION OF DAMAGES

As Smith previously argued in his response to Santander's Renewed Motion for Judgment as a Matter of Law (Rule 50(b) motion). Santander heavily argued at adnauseam that Smith didn't mitigate his damages, the jury heard that argument and used it in their calculation of damages.

In fact, Santander wasn't entitled to any reduction in damages because Santander didn't prove how much Plaintiff could have mitigated therefore not allowed any mitigation of damages. *Please see Hoppenstein Properties, Inc. v. Schober*, 329 S.W.3d 846, 849-50 (Tex. App.--Fort Worth 2010, no pet.)the tenant properly bears the burden of proof to demonstrate that the landlord has failed to mitigate damages and the amount by which the landlord could have reduced its damages. *Austin Hill Country Realty,* 948 S.W.2d at 300. A defendant is not entitled to any reduction in the amount of damages if it does not prove the amount of damages that could have been avoided. ***850** *Cole Chem. & Distrib., Inc. v. Gowing,* 228 S.W.3d 684, 688 (Tex.App.-Houston [14th Dist.] 2005, no pet.); *Broken Spoke Club, Inc. v. Butler,* No. 02–02–00116–CV, 2004 WL 1858119, at *2–3 (Tex.App.-Fort Worth Aug. 19, 2004, no pet.) (mem. op.). The policy underlying mitigation is to avoid waste rather than penalize the mitigating party for not doing enough. *See Austin Hill Country Realty,* 948 S.W.2d at 298–99; *MOB 90 of*

Tex., L.P. v. Nejemie Alter, M.D., P.A., No. 13–08–00173–CV, 2009 WL 1026603, at *3 (Tex.App.-Corpus Christi Apr. 16, 2009, no pet.)

Because Santander didn't prove the amount that Smith could have mitigated and therefore Santander is not entitled to any mitigation of damages as ruled on in *Cole Chem. & Distrib., Inc.,* however, the jury did hear his arguments and could have returned a much higher damage award if not for Santander's arguing mitigation all through the course of the trial. Santander will never know because Santander didn't interview the jury. The jury heard his argument and determined that Smith was injured and used any mitigation argument in their determination of a monetary award for Smith. Santander argued so strongly during trial that Smith didn't mitigate his damages but conveniently failed to discuss their lack of mitigating their liability. It took five (5) months after being notified of their reporting which three (3) months was after a lawsuit was filed, in that time, Plaintiff's damages cumulated. Santander has argued in his Rule 50(b) motion that Smith should be completely barred from recovery because of any mitigation issue, when in reality, not only is not a bar to recovery but Santander isn't even entitled to any reduction in damages because he didn't prove that amount that could have been mitigated.

Santander in their appellant brief made Smith's argument, Santander points out that the jury was instructed to take mitigation of damages into their consideration. Santander has not proved that the jury didn't take the mitigation of damages into their consideration, the jury could have ruled with a much larger verdict than they did if it wasn't for Santander's mitigation argument at trial as well as the jury instruction.

Because Santander never polled the jury, Santander is only speculating if the jury applied their mitigation argument and to what damages they applied it to, fact is Santander has no idea if the jury applied the mitigation doctrine and if so, how much. To penalize Smith twice by reducing or completely eliminating his damages a second time would be grossly unfair and highly prejudicial to Smith. The jury heard Santander's argument and determined that Smith was injured and used any mitigation argument in their determination of a monetary award for Plaintiff.
Fact is, Santander is simply guessing that the jury didn't properly use Santander's mitigation argument and the jury instruction into their consideration when they determined monetary damages, therefore has not met their burden.

1. SANTANDER ARGUES: NO EVIDENCE OF REASONABLE MITIGATION REGARDING SMITH'S CREDIT LIMITS AND CHOICE NOT TO USE CREDIT.

Santander is again arguing mitigation of damages, which they are not entitled to because of Smith previous argument that Santander did not prove the actual amount that Smith could have mitigated, so therefore Santander is not entitled to their mitigation of damages argument. Plus, Santander did not poll the jury and has no idea if the jury took mitigation of damages into their consideration when they determined damages. The jury heard Santander's argument of mitigation of damages all throughout the trial as well as the jury instruction, they jury had that information and used it when they awarded damages. Santander is clearly guessing and that will not satisfy their high burden.

Santander also argues that Smith didn't mitigate his damages because he chose not to use his credit. As Smith testified, Smith didn't want to rack up debt on the remaining credit limits because the higher debt percentage to credit limit consumers have, the more it will lower credit scores and at that time Smith was doing everything he could to get his credit scores up. Ironically, Smith's actions to help himself increase his credit scores by not putting debt and using up his credit limits is mitigating his damages. Smith has had balances of $11,000 and Santander also mentions that Smith had only $22,000 left in credit limits, with Santander's own argument, Smith would have had a 50% debt to credit limit percentage, that would have

negatively effected Smith's credit score. Smith was attempting to mitigate his damages by attempting to stop his credit score from declining any further. Smith also testified that he didn't want to use up his credit limits with trips incase of an emergency and needed fast access to credit. *Please see* USCA5 798, 853. Smith lived in fear that he had to save and keep the remaining credit incase if something happened that required fast cash, especially with an aging vehicle that kept breaking down.

Because Santander never polled the jury, Santander is only speculating if the jury applied their mitigation argument and to what damages they applied it to, fact is Santander has no idea if the jury applied the mitigation doctrine and if so, how much. To penalize Smith twice by reducing or completely eliminating his damages a second time would be grossly unfair and highly prejudicial to Smith. The jury heard Santander's argument and determined that Smith was injured and used any mitigation argument in their determination of a monetary award for Plaintiff.
Fact is, Santander is simply guessing that the jury didn't properly use Santander's mitigation argument and the jury instruction into their consideration when they determined monetary damages, therefore has not met their burden.

2. SANTANDER ARGUES: NO EVIDENCE OF REASONABLE MITIGATION REGARDING SMITH'S MORTGAGE REFINANCING.

Again, Santander argues two doctrines, mitigation of damages and scintilla of evidence. One doctrine, mitigation of damages, they didn't prove in the district court, which is required for their argument, please see and the other, scintilla of evidence, isn't even recognized in Federal Courts.

Santander argues that Smith chose to refinance in April 2010 knowing that the his credit score was lowered. Smith testified that he felt that interest rates were on the way up. USCA5 801. Smith can not see into the future, nor can Santander and for Santander to argue that Smith should have waited until his "credit was repaired in May 2010" is asking Smith to look into the future and know what interest rates was going to go to in the upcoming months. Nobody has that answer, because Smith wanted to get on with an interest rate lower than what he thought it would be in the coming months is attempting to mitigate his damages.

Santander goes so far in this argument that they state "the district court's judgment should be reversed and judgment rendered in Santander's favor. That burden is extremely high the standard of review for Santander to have the jury verdict overturned is extremely high because the Court has to view the evidence and any reasonable inferences in the light most favorable

to the jury's determination, disregarding its verdict only if the evidence is so strong that a reasonable person could not have found as the jury did. *Please see Jones v. Wal-Mart Stores, Inc.,* 870 F.2d 982, 987 (5th Cir. 1989); *Dietz v. Garske,* 406 Fed. App'x 863, 864 (5th Cir. 2010). Santander has not presented any such evidence, therefore Santander has not met their burden.

III. SANTANDER ARGUES: ERROR IN ADMITTING EVIDENCE

Santander argues that PX 9, 10, 12, 20, 21, 22, 23, 34, and 35; was admitted in error. RE: Tab A This argument is disingenuous at best because what Santander failed to argue in their brief to this Court that Santander themselves admitted at the beginning of trial half of those documents. Santander admitted the exact same documents for PX 9, 10, 12, 22, 23. Please see RE: Tab B;DX 8, 9, 10, 12, 13. Those documents are as follows, PX 9 & DX 8 are both Trans Union's results to Smith from his first dispute. PX 10 & DX 9 are both Trans Union's results to Smith from his second dispute. PX 12 & DX 10 are both Trans Union's results to Smith from his third dispute. PX 22 & DX 12 are both Bank of America's letter to Smith dated December 21, 2009. PX 23 & DX 13 are both Bank of America's letter to Smith dated December 21, 2009. These documents were admitted by Santander into evidence. It is totally inconceivable how the documents were valid enough for Santander at the beginning of trial but now that they

were used against them, Santander argues that the documents are on the level of fakes. Santander is objecting to their own evidence which does not make any sense.

Santander argues that the District Court erred in admitting Smith's Exhibits 9,10, 12, 20, 21, 22, 23, 34, and 35. The documents in question were properly admitted based on two (2) valid and on point case law, with rule of law highlighted for the District Court to review, one of which directly quoting the Fifth Circuit, that Smith presented to the Judge. The first case Smith presented to the District Court was *Lehman Bros. Holdings, Inc. v. Cornerstone Mortg. Co.,* CIV.A. H-09-0672, 2011 WL 649139 (S.D. Tex. Feb. 10, 2011)("The standard for authenticating evidence is low and may be satisfied 'by evidence sufficient to support a finding that the matter in question is what its proponent claims.' " *United States v. Carroll,* 2000 WL 45870, at *3 (E.D.La. Jan.20, 2000) (quoting *United States v. Arce,* 997 F.2d 1123, 1128 (5th Cir.1993); *see also United States v. Jackson,* 625 F.3d 875, 881 (5th Cir.2010) ("[The Fifth Circuit does not require conclusive proof of authenticity before allowing the admission of disputed evidence.... [Rule 901] merely requires some evidence which is sufficient to support a finding that the evidence in question is what its proponent claims it to be."). Federal Rule of Evidence 901(b) lists nonexclusive examples of appropriate methods

of authentication, including (1) the testimony of a witness with knowledge; (2) nonexpert opinion on handwriting; (3) comparison by the trier of fact or expert witness; and (4) distinctive characteristics, appearance, contents and the like. *See* Fed. R. Ev. 901(b). “A document may be authenticated with circumstantial evidence, ‘including the document's own distinctive characteristics and the circumstances surrounding its discovery.’ ” *Carroll,* 2000 WL 45870, at *3 (citing *Arce,* 997 F.2d at 1128).) The second case that Smith presented to the District Court, with high lighted rule of law and referencing others cases was *Callahan & Gauntlett v. Dearborn Ins. Co.*, 980 F.2d 736 (9th Cir. 1992)(Littlefield obviously could authenticate the letters he wrote; the letters written in reply are self-authenticating. *Purer & Company v. Aktiebolaget Addo,* 410 F.2d 871, 876 (9th Cir.1969), *cert. denied,* 396 U.S. 834 (1969). Furthermore, the Littlefield declaration did not lack foundation. This circuit has held that “[t]he foundation is laid for receiving a document in evidence by the testimony of a witness with personal knowledge of the facts who attests to the identity and due execution of the document and, where appropriate, its delivery.” *United States v. Dibble,* 429 F.2d 598, 602 (9th Cir.1970); *see also Beyene v. Coleman Sec. Services, Inc.,* 854 F.2d 1179, 1182 (9th Cir.1988). Littlefield laid a proper foundation in his declaration. There is no error here.)

In the Smith trial, Smith testified that he received four (4) letters from Bank of America, two (2) of the letters, both dated December 17, 2009, days from Santander's reporting, stated the reasons that contributed to this decision are as follows: Serious delinquency. The letter goes on to state that "Time since delinquency is too recent or unknown". The standard that is recognized by the Fifth Circuit to self authenticate a document is that they have some evidence that the evidence is what it states to be. Smith had been getting letters and statements from Bank of America as well as the Sears documents that Santander has taken issue with. Smith doesn't just have some knowledge of this documents, Smith has intimate knowledge that these documents are what they state they are. Smith testified that he received this letters from Bank of America and Sears.

Santander also has an issue with responses Trans Union responses to his disputes.

The Trans Union responses were sent to Smith directly from Trans Union as a result of Smith's dispute with them, making those documents self-authenticating as well has Smith having some knowledge of the documents since he himself disputed the account. Please see *Callahan & Gauntlett v. Dearborn Ins. Co.,* 980 F.2d 736 (9th Cir. 1992); and *Lehman Bros.*

Holdings, Inc. v. Cornerstone Mortg. Co., CIV.A. H-09-0672, 2011 WL 649139 (S.D. Tex. Feb. 10, 2011)

A: STANDARD OF REVIEW

The Court reviews a district Court's decision to admit or exclude evidence for abuse of discretion. *Paz v. Brush Engineered Materials Inc.*, 555 F.3d 383, 387 (5th Cir. 2009); *Compaq Computer Corp. v. Ergonome Inc.*, 387 F.3d 403, 408 (5th Cir. 2004). A trial court abuses its discretion when its ruling is based on an erroneous view of the law or clearly erroneous assessment of the evidence. *Knight v. Kirby Inland Marine Inc.*, 482 F.3d 347, 351 (5th Cir. 2007) *Bocanegra v. Vicmar Servs., Inc.,* 320 F.3d 581, 584 (5th Cir. 2003). If the Court finds an abuse of discretion in admitting or excluding evidence, it will "review the error under the harmless error doctrine, affirming the judgment, unless the ruling affected substantial rights of the complaining party." *Knight,* 482 F.3d at 351 (quoting *Bocanegra*, 320 F.3d at 584).

"The Fifth Circuit does not require conclusive proof of authenticity before allowing the admission of disputed of evidence…[Rule 901] merely requires some evidence which is sufficient to support a finding that the evidence in question is what is proponent claims it to be." *See United States v. Jackson,* 625 F.3d 875, 881 (5th Cir. 2010) Federal Rule of Evidence

901(b) lists nonexclusive examples of appropriate methods of authentication, including (1) the testimony of a witness with knowledge. "A document may be authenticated with circumstantial evidence, 'including the document's own distinctive characteristics and the circumstances surrounding its discovery.'" *Carroll,* 2000 WL 45870, at *3 (Citing *Arce*, 997 F.2d at 1128).

"Where circumstances indicate that the record are trustworthy, the party seeking to introduce them does not have to present the testimony of the party who kept the record or supervised its preparation." (quoting *United States v. Veytia-Bravo,* 603 F.2d 1187, 1191-92 (Fth Cir. 1979) *See Falk v. Axiam Inc.*, 944 F.Supp. 542, 546 (S.D. Tex 1996) "There is no requirement that the witness who lays foundation be the author of the record or be able to personally attest to its accuracy. *See United States v. Jackson*, g25 F3d 875, 882 (5th Cir. 2010.) Accordingly, Jeffery Smith respectfully requests that the Court affirm the District Court's holding on the admissions of the letters.

B. SANTANDER ARGUES: THE NINE EXHIBITS AT ISSUE WERE NEITHER AUTHENTICATED OR SELF-AUTHENTICATING AND, THUS, ADMITTED IN ERROR.

Santander argues that PX 9, 10, 12, 20, 21, 22, 23, 34, and 35 was admitted in error. This argument is disingenuous at best because what Santander failed to argue in their brief to this Court that Santander themselves admitted

at the beginning of trial half of those documents. Santander admitted the exact same documents for PX 9, 10, 12, 22, 23. *Please see* RE: Tab A&B;DX 8, 9, 10, 12, 13. Those documents are as follows, PX 9 & DX 8 are both Trans Union's results to Smith from his first dispute. PX 10 & DX 9 are both Trans Union's results to Smith from his second dispute. PX 12 & DX 10 are both Trans Union's results to Smith from his third dispute. PX 22 & DX 12 are both Bank of America's letter to Smith dated December 21, 2009. PX 23 & DX 13 are both Bank of America's letter to Smith dated December 21, 2009. These documents were admitted by Santander into evidence. It is totally inconceivable how the documents were valid enough for Santander at the beginning of trial but now that they were used against them, Santander argues that the documents are on the level of fakes. Santander is objecting to their own evidence which does not make any sense.

As Smith argues above under Roman Numeral III, that Smith received the Bank of America and Sears letter and statements directly for the banks and mailed directly to Smith, Smith received the Trans Union results, mailed directly to Smith, after Smith personally disputed the Santander account. As the case law given to the District Court during the trial as well as argued here, *please see Callahan & Gauntlett v. Dearborn Ins. Co.,* 980 F.2d 736 (9th Cir. 1992); and *Lehman Bros. Holdings, Inc. v. Cornerstone Mortg.*

Co., CIV.A. H-09-0672, 2011 WL 649139 (S.D. Tex. Feb. 10, 2011), those documents are self-authenticating. Smith doesn't just have some knowledge of the documents, Smith as intimate knowledge of documents. Smith had been receiving letters and statement from Bank of America for years, Smith knows what a letter from Bank of America should and does look like and this was that letter, plus it had all of Smith's account information on the letter. This was not the first time Bank of America sent Smith correspondence, in fact Bank of America has sent Smith hundreds if not thousands of correspondence and it all was actually from Bank of America, just as this letter. Smith satisfied his burden with the case law and his testimony of what this letter was and these documents were properly admitted.

Smith also testified that he personally disputed Santander's account and received the results of his dispute directly from Trans Union and the results were mailed to his residence. Smith has an intimate knowledge of the contents of this dispute as well as the results that were mailed back to Smith.

Santander was given those cases during trial but has conveniently failed to mention them in their argument, Santander's argument makes it sound like the District Court just randomly and arbitrarily ruled that the documents should come in. With the case law presented in the District

Court, that Santander was given, Santander is attempting to lead this Court that the District Court admitted this evidence out of the blue. The only doctrine that Santander is arguing only the reply rule when Santander knew that the Fifth Circuit has other standards regarding authentication of documents. Santander gives this Court out of Circuit case law even though Santander was given Fifth Circuit case law and rules during the trial as well as in Smith's response to Santander's Renewed Motion for Judgment as a Matter of Law.

Plus, the Bank of America letters were read to the jury by both Smith's Expert as well as Santander's expert, *please see* USCA5 897, 972. Experts can use documents, even if unauthenticated or hearsay into their opinion and use that information while testifying. Fed. R. Evid. 703 & 705.

The District Court did not abuse its discretion by admitted this documents. Smith presented valid, relevant on-point case law and the Judge made a proper decision to admit the evidence, not only was the decision correct but it would have been an abuse of discretion to not allow it based on the case law given to the Court. Plus, both experts read the Bank of America letters to the jury during the trial which the Fed. R. Evid 703 & 705 allows.

C. SANTANDER ARGUES: THE TESTIMONY AT ISSUE WAS HEARSAY AND, THUS ADMITTED IN ERROR.

Santander argues that PX 9, 10, 12, 20, 21, 22, 23, 34, and 35 was admitted in error. This argument is disingenuous at best because what Santander failed to argue in their brief to this Court that Santander themselves admitted at the beginning of trial half of those documents. Santander admitted the exact same documents for PX 9, 10, 12, 22, 23. *Please see* RE: Tab ;DX 8, 9, 10, 12, 13. Those documents are as follows, PX 9 & DX 8 are both Trans Union's results to Smith from his first dispute. PX 10 & DX 9 are both Trans Union's results to Smith from his second dispute. PX 12 & DX 10 are both Trans Union's results to Smith from his third dispute. PX 22 & DX 12 are both Bank of America's letter to Smith dated December 21, 2009. PX 23 & DX 13 are both Bank of America's letter to Smith dated December 21, 2009. These documents were admitted by Santander into evidence. It is totally inconceivable how the documents were valid enough for Santander at the beginning of trial but now that they were used against them, Santander argues that the documents are on the level of fakes. Santander is objecting to their own evidence which does not make any sense.

The other two Bank of America documents are extremely similar to the two that Santander admitted into evidence but four (4) days prior and with more incriminating verbiage to Santander, stating that the reduction to Smith's credit limit was due to a recent serious delinquency. Other than the

date and statements that it was due to a recent delinquency, the letters are extremely similar.

Santander also cherry picked and gave a misconstrued version the Trial Judge's analysis of how he determined the hearsay issue regarding Fed. R. Evid. 807. The District Court gave an deep analysis of each and every clause within the Fed. R. Evid. 807 and how it directly related to Fed. R. Evid. 901. USCA5 921-924

Santander first argues that the District Court didn't do an analysis of what "reasonable efforts" Smith could or should have undertaken to obtain the evidence in proper form. That argument is not accurate of the District Court's ruling. The District Court stated that Fed. R. Evid. 807 Clause B was satisfied because "These were letters that were mailed directly from the party at issue from presumably a remote are from the Plaintiff's address. And it certainly is more reasonable than not that he can use them what he actually received." Usca5 922. The District Court determined that receiving the letters at home is a proper form of receiving them, especially due to the fact that the District Court found

> "no reasonable objection or doubt as to the authenticity of those exhibits. I have seen nothing in going back through the pleading in this case and what has occurred in this case, and I do not have anything that isn't—that indicates to me that those exhibits are not legitimate exhibits and are done in the normal course of business."

USCA5 923

Santander is attempting to twist the District Court's words by taking the second sentence of a complete paragraph out of context making it sound like the District Court is applying a "more reasonable than not standard". *please see Brief of Appellant, Santander* at 47. That is not what the District Court was stating, all the statement was is that the District Court recognized that these letters were mailed to his house directly from the party as issue and its reasonable that Smith can use them what he actually received. Plus, as stated, it is disingenuous that Santander is arguing this issue because Santander themselves admitted more then half of the same documents into their own evidence.

Fact is the District Court saw the evidence and believed the documents to be what Smith stated them to be and also found that Fed. R. Evid 807 was completely satisfied. Santander argues that if it isn't in a business record then it can't be admitted, that argument is contrary to how the Fifth Circuit as ruled.

Plus, even if this Court rules that it was hearsay, both experts read the Bank of America documents into evidence in front of the jury. Both Santander's expert and Smith's expert testified as to what PX 20 & 21 contained.

USCA5 897, 972; Fed. R. Evid. 703 & 705. Even if this Court deems the evidence as hearsay, it would be harmless because both parties' experts testified as to what contained within PX 20 & 21 and without the objection of Santander, and as previously argued, Santander admitted the other documents in contention into their own evidence, with the only exceptions PX 34 & 35 which Smith did not heavily rely on as Smith did the other documents.

Santander argued that the District Court improperly found that Clause C was satisfied because the District Court found that "no reasonable objection or doubt as to the authenticity of those exhibits", USCA 923, over Santander's constant objection. Santander argues that just because they objected that it was a reasonable objection, actually, their objection was contrary to how the Fifth Circuit has ruled, making their objection unreasonable.

The District Court did not error in admitting Smith's exhibits, especially since Santander had already admitted half of them on their own.

D. SANTANDER ARGUES: THE DISTRICT COURT'S ERROR IN ADMITTED THESE NINE EXHIBITS WAS NOT HARMLESS AND THE (sic)THEREFORE JUDGMENT MUST BE REVERSED.

As Smith argued in paragraph C, immediately above, this argument is disingenuous at best since Santander admitted half of them in as their own

exhibits. The documents were good enough for Santander at the beginning of trial but once they were used against Santander, they now claim they are not good enough for trial.

In the alternative, if this Court deems that they should not have been admitted, the documents are still harmless because both experts testified the contents what was in most of those documents, especially PX 20 & 21, the experts read directly from those two letters without any objection from Santander. USCA5 897, 972; Fed. R. Evid 703 & 705.

Santander's request to reverse the jury's damage award carries a high burden, a burden they did not carry.

V. CONCLUSION

For the foregoing reasons, Smith respectfully requests that the Court affirm the jury verdict, the Court's order of August 23, 2011 and judgment of November 29, 2011 and render judgment in Smith's favor and reject Santander's appeal in its entirety.

Respectfully submitted

/s/Dennis McCarty

By: Dennis McCarty

Dennis Dean McCarty
Attorney at Law
Mississippi Bar No. 102733
P.O. Box 54172
Hurst, TX 76054
Erik Faries
Mississippi Bar No. 103209
645 Lakeland East Drive, Suite 102
Flowood, MS 39232

ATTORNEYS FOR APPELLEE
JEFFERY SMITH

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of June, 2012, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

Gino Rossini
State Bar No. 24007953
Frank Alvariz
State Bar No. 00796122
Brent Martinelli
State Bar No. 24037037
Hermes Sargent Bates, L.L.P.
901 Main Street, Suite 5200 Dallas, Texas 75202
(214) 749-6000
(214) 749-6100 (fax)
ATTORNEY FOR DEFENDANT SANTANDER CONSUMER USA, INC.

Dated: June 13, 2012

Respectfully submitted,

/s/ Dennis McCarty______________

Dennis McCarty
ATTORNEY FOR JEFFERY SMITH
Mississippi Bar No. 102733
P.O. Box 54172
Hurst, TX., 76054
Telephone: 817-704-3375
Fax (817) 887-5069
dmccartylaw@att.net

CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contain 13,981 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using **Microsoft Word 2008 in 14 point, Time New Roman Font.**

/S/Dennis Dean McCarty
Dennis Dean McCarty
Attorney for Appellee

Dated: June 13, 2012