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

APPELLANT'S BRIEF

ORAL ARGUMENT REQUESTED

Respectfully submitted,
GINO J. ROSSINI
State Bar No. 24007953
FRANK ALVAREZ
State Bar No. 00796122
BRENT W. MARTINELLI
State Bar No. 24037037

HERMES SARGENT BATES, LLP
901 Main Street, Suite 5200
Dallas, Texas 75202
Telephone: 214.749.6000
Telecopier: 214.749.6100

ATTORNEYS FOR APPELLANT
SANTANDER CONSUMER USA, INC.

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 disqualification or recusal.

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

Gino J. Rossini

Gino J. Rossini
Attorney of Record for Appellant
Santander Consumer USA, Inc.

STATEMENT REGARDING ORAL ARGUMENT

This case raises issues regarding the sufficiency of evidence to support an actual damages award for violation of the Fair Credit Reporting Act, and the district court's admission of non-authenticated hearsay testimony in support of actual damages. Appellee Jeffery Smith claimed actual damages in the form of an alleged reduction of credit limits, inability to finance the purchase of a car, less favorable terms on his mortgage refinancing, and various types of emotional distress. But there is no evidence that Santander caused the reduction of Smith's credit limits or caused Smith not to use the credit he had available to him, which was more than adequate to meet all of his purchasing needs. There is no evidence that Smith even attempted to finance the purchase of a new car. There is no evidence that Santander caused Smith to receive a lower rate on his mortgage refinancing or to even seek refinancing, and there is no evidence Santander prevented Smith from reasonably mitigating his damages by refinancing later and on more favorable terms after his Santander debt was deleted and his credit returned to an "excellent" rating. Finally, there is no evidence that Smith suffered compensable emotional distress or that his distress was caused by Santander. Alternatively, the district court erred by admitting non-authenticated hearsay testimony that was essential to support Smith's actual damages. Santander submits that oral argument would be helpful in analyzing these issues.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other

JURISDICTIONAL 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. RE: Tab A,[1] USCA5 594-595[2] (Final Judgment); RE: Tab B, USCA5 577 (Order). 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 $20,437.50 on the jury's verdict when there is no legally sufficient evidentiary basis for a reasonable jury to find as the jury did in awarding those damages, based on the lack of evidence of the existence of actual damages, their cause by Santander, and Smith's failure to undertake reasonable mitigation efforts?

2. In the alternative, did the district court err in admitting hearsay testimony contained in nine separate letters that Smith failed to properly authenticate when the admission of these nine letters affected Santander's substantial rights because the letters constituted essential evidence in support of Smith's actual damages?

[1] Appellant's Record Excerpts will be cited "RE: Tab ___."

[2] The record on appeal will be cited "USCA5 ___."

STATEMENT OF THE CASE

This appeal will determine whether evidence presented at trial was sufficient to support judgment based on the jury's verdict awarding actual damages to Smith for a violation of the Fair Credit Reporting Act (FCRA or Act). Santander challenges the existence of recoverable damages, Santander's cause of those damages, if any, and Smith's mitigation of damages, if any. Santander also challenges the district court's erroneous admission of non-authenticated hearsay testimony essential to support Smith's damages.

During trial, the district court admitted Plaintiffs' Exhibits 9, 10, 12, 20, 21, 22, 23, 34, and 35 over Santander's timely objections as to hearsay and the authenticity of the documents. *See* RE: Tab C (PX 9, 10, 12, 20, 21, 22, 23, 34, 35); USCA5 786-788 (PX 9), 790 (PX 10), 791-792 (PX 12), 766-770 (PX 20), 770-772 (PX 21), 773-774 (PX 22), 774 (PX 23), 775-776 (PX 34), 776-777 (PX 35), 921.

When 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.[3] USCA5 991-1000. The jury entered its verdict on August 3, 2011, awarding $20,437.50 in damages. RE: Tab D, USCA5 506-521 (Verdict).

[3] The district court granted Santander's Rule 50(a) motion with respect to claims brought by Smith under the Fair Debt Collection Practices Act and granted judgment for Santander on those claims. USCA5 999-1000.

Santander then moved for judgment as a matter of law under Rule 50(b) of the Federal Rules of Civil Procedure, which the district court denied. USCA5 530-536 (Rule 50(b) Motion); RE: Tab B, USCA5 577 (Order). The district court entered judgment on the verdict on November 29, 2011. RE: Tab A, USCA5 594-595 (Final Judgment). Santander appealed to this Court. RE: Tab E, USCA5 621-623 (Notice of Appeal).[4]

STATEMENT OF FACTS

I. THE ORIGIN OF SMITH'S DEBT WITH TRIAD

Appellee Jeffery Smith (Smith) financed the purchase of an automobile in April 1999 through Triad Financial Corporation. USCA5 948; *see* USCA5 685. Soon after, the automobile was totaled in a wreck. USCA5 949. Smith's insurance company paid on the claim and Triad received the funds, but they did not cover the loan balance and a deficiency balance remained. *Id.* In 1999, the balance on Smith's account remained approximately $4,500. *Id.* Triad attempted to collect from Smith but was not successful. *Id.* Smith told Triad that he was not paying on the account because it would only harm his credit by "four points." USCA5 950.

[4] On February 13, 2012, the district court denied Smith's *Motion to Reconsider the Jury Verdict and/or Nunc Pro Tunc to Correct Error and Amend the Final Judgment*, and Santander's notice of appeal became effective. USCA5 1074-1077; *see* FED. R. APP. P. 4(a)(4)(B)(i).

II. SANTANDER'S ACQUISITION OF TRIAD AND SMITH'S DEBT WITH TRIAD

Santander is in the business of loaning money to consumers for the purchase of automobiles. USCA5 947. It is not in the business of collecting debts. USCA5 946. Santander acquired Triad Financial (Triad) in 2009, including its trade name, physical address, and its credit assets and liabilities. USCA5 937, 951. Smith's debt was part of the larger transaction of Santander's acquisition of Triad. USCA5 937, 951. After it purchased Triad, Santander began servicing the loans formerly held by Triad. USCA5 950. Transition in servicing the loans entailed mapping information over from the format kept by Triad into Santander's system, meaning that every field and term in Triad's system was mapped over to a corresponding field and term in Santander's system. USCA5 950-951.

As part of the conversion of Triad accounts, Santander re-aged Smith's account and reported it to TransUnion in December 2009. USCA5 933, 951. Santander reported Smith's debt due a coding mistake made during conversion. USCA5 927, 958.

III. SMITH'S VARIOUS DISPUTES CONCERNING HIS DEBT WITH SANTANDER AND SANTANDER'S INVESTIGATION AND RESPONSE

Smith disputed his account with Santander four times, three times with TransUnion and once directly with a Santander customer service operator by telephone. USCA5 926-929, 951-953, 956-957. First, in December 2009 Smith disputed the account through TransUnion, claiming that the account was not his;

Santander verified that it was. *Id.*; USCA5 951-952. Second, Smith called a customer service representative at Santander and told her that the account was over seven years old and should not be reported. USCA5 927-928, 952, 956-957. Third, in January 2010 Smith disputed the date or days of delinquency through TransUnion; Santander verified that the date of delinquency was accurate. USCA5 926-927,953. Fourth, Smith contacted TransUnion and complained that the account was over seven years old and should not be reported. USCA5 928-929.

After an investigation into this last dispute, Santander confirmed that Smith's account was over seven years old and, in May 2010, reported to TransUnion that the account should be deleted. USCA5 888-889, 929, 934. Santander's investigation was particularly complex and took longer than usual because of extra time involved to review how Smith's account, among many, was converted into Santander's system from Triad's. USCA5 932, 944.

Santander did not call or write Smith seeking payment or otherwise contact Smith to make demand on the debt at any time before or after the debt was reported to TransUnion in December 2009. *See* USCA5 849-850, 956. The only communication between Smith and Santander was when Smith originated one telephone call in which he talked to a customer service representative. USCA5 832-833, 848-849. During this conversation, Smith did not ask to speak with

anyone else, such as a manager or someone in Santander's legal or credit reporting department. USCA5 832-833, 848-849.

IV. SMITH'S SUIT AGAINST SANTANDER

Smith filed suit in March 2010 against Santander and TransUnion,[5] bringing causes of action for violations of the Fair Credit Reporting Act (FCRA) and Fair Debt Collection Act (FDCA) and common-law defamation. USCA5 14-29. The case was tried to a 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. USCA5 991-993; *see* FED. R. CIV. P. 50(a). The district court granted Santander's Rule 50(a) motion with respect to Smith's FDCA claim only, USCA5 999-1000, and submitted Smith's FDCA and defamation claims to the jury. *See* USCA5 506-521, 1030, 1032-1033, 1039-1048.

Smith claimed and 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. RE: Tab D, USCA5 506-507, 514-515; 15 U.S.C. §§1681s-2(b)(1)(A) & (E). The jury found actual damages in the amount of $20,437.50. RE: Tab D, USCA5 506-515.

[5] On October 6, 2010, the district court dismissed all claims and causes of action against TransUnion with prejudice. USCA5 147.

Santander renewed its Rule 50 motion in writing after trial. USCA5 523-528; *see* FED. R. CIV. P. 50(b). The district court denied Santander's Rule 50(b) motion, RE: Tab B, USCA5 577 (Order), and entered judgment on the verdict. RE: Tab A, USCA5 594-595 (Final Judgment). Santander appealed to this Court. RE: Tab F, USCA5 621-623 (Notice of Appeal).[6] *See* Fed. R. App. P. 4(a)(4)(B)(i).

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)). In order to survive a Rule 50 motion, "the party opposing the motion must at least establish a conflict in substantial evidence on each essential element of their claim." *Anthony v. Chevron USA, Inc*., 284 F.3d 578, 583 (5th Cir. 2002). The jury verdict should be upheld unless there is no legally sufficient evidentiary basis for a reasonable jury to find as the jury did. *Goodner*, 650 F.3d at 1039-1040 (5th Cir. 2011); *Foradori v. Harris*, 523 F.3d 477, 485 (5th Cir. 2008); *see* FED. R. CIV. P. 50(a)(1). Thus, a court renders judgment as a matter of law when a

[6] On February 13, 2012, Santander's notice of appeal became effective when the district court denied Smith's *Motion to Reconsider the Jury Verdict and/or Nunc Pro Tunc to Correct Error and Amend the Final Judgment*. USCA5 1074-1077; *see* FED. R. APP. P. 4(a)(4)(B)(i).

reasonable jury does not have a legally sufficient evidentiary basis to find for a party on an issue on which the party has been fully heard. FED. R. CIV. P. 50(a)(l), (b); *Wallace v. Methodist Hosp., Sys*., 271 F.3d 212, 218-219 (5th Cir. 2001). 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 Corp.*, 109 F.3d 1006, 1008-09 (5th Cir. 1997).

Under this standard, the district court erred by denying Santander's Rule 50 motion and entering judgment because the evidence is legally insufficient to support the verdict damages award rendered by the jury. *See* FED. R. CIV. P. 50(a)(l); *Greenwood v. Societe Francaise De*, 111 F.3d 1239, 1246 (5th Cir. 1997); *Fox v. T-H Cont'l, L.P.*, 78 F.3d 409, 413 (8th Cir. 1996); *see also Hunter v. Knoll Rig & Equip. Mfg. Co.* 70 F.3d 803, 805 (5th Cir. 1995) (holding a mere scintilla of evidence is not sufficient to present a question for the jury). Accordingly, Santander prays that this Court vacate the district court's judgment, reverse the district court's denial of Santander's Rule 50 motion, and render judgment in Santander's favor denying Smith recovery.

SUMMARY OF THE ARGUMENT

The district court erred by denying Santander's motion for judgment as a matter of law and entering judgment in Smith's favor because the evidence is legally insufficient to support the jury's verdict. In particular, there is no more

than a scintilla of evidence that Smith suffered actual damages caused by Santander's FCRA violation and Smith failed to mitigate his damages, if any. Alternatively, the district court erroneously admitted hearsay testimony that was not properly authenticated, testimony which was essential to support Smith's claim for actual damages. This error mandates reversal of the district court's judgment because it affected Santander's substantial rights by causing the rendition of an erroneous damages award.

The jury found that Santander violated the FCRA by failing to promptly investigate Smith's credit dispute with Santander and correct the information Santander furnished to TransUnion. RE: Tab D, USCA5 506-507, 514-515. Santander reported the debt in December 2009 and corrected the error by deleting the debt in May 2010. Smith sought actual and compensatory damages but Smith failed to present evidence to support an award of such damages. Moreover, Smith failed to present evidence refuting testimony that he failed to mitigate his damages.

Smith attempted to support compensatory damages by arguing the following were caused by Santander's FCRA violation: decreased credit limits, missed family trips, loss of bonuses, humiliation at work, mental anguish, stress, reputational damage, and strained relationships with his mother and brother. Most of Smith's alleged damages arguably flow from his reduced spending from December 2009 onward, but Smith's reduction in spending was caused by his own

choice, not any reduction in credit, because even Smith's lowered credit limits were sufficient to fund his spending. And there is no evidence that Santander caused Smith's reduction in credit in the first instance.

Moreover, Smith presented no evidence of any strained relationship with either his mother or brother which would support any damages based upon mental or emotional distress. While Smith alleges to have missed two family trips, he was unable to provide documents or credible evidence to show the trips were actually planned or booked, purchases were attempted but denied, or that these trips were cancelled as a result of anything Santander did. The evidence shows that Smith's reduced credit was more than ample to fund the trips regardless.

There was no evidence presented by Smith that reflected lost work assignments, loss of bonus payments, or complaints at work regarding the speed or manner in which he completed projects. There was no evidence presented by Smith that anyone at work thought differently of him because of any issue Smith perceived to exist with his credit. Furthermore, Smith admitted to not having any actual injury to support his mental anguish claim; he conceded that he has not seen any medical provider, counselor, preacher, or mental health professional, or obtained any prescription medication.

Even if this Court somehow finds that Smith presented more than a mere scintilla of evidence in support of his claims, there was no evidence presented by

Smith to refute the evidence that Smith failed to reasonably mitigate his damages. Indeed, had Smith made reasonable mitigation efforts all of his damages, if any, would have been avoided. At the time of trial, Smith had made no effort to secure increased lines of credit even though his credit score with TransUnion was "excellent": as early as June 2010. Smith also never sought assistance or attempt to refinance his home mortgage after his credit returned to an "excellent" rating or to investigate or inquire into the purchase of a replacement vehicle. Most telling is that, despite having approximately $22,000 in available credit throughout the period at issue, Smith failed to use it. In short, rather than reasonably mitigating his damages Smith sat idly by.

In the alternative, should this Court determine that Smith's actual damages are supported by the evidence, which they are not, evidence critical to Smith's damages claims was admitted improperly. The district court erred by admitting hearsay testimony in the form of letters from non-parties that were not properly authenticated. These letters purportedly show that Bank of America (BoA) and Sears reduced Smith's credit limits on a number of personal credit cards, and that TransUnion responded to Smith's various disputes regarding his debt with Santander. Smith failed to authenticate these communications thorough testimony from BoA, Sears, and TransUnion, either through business records affidavits or

otherwise. Smith merely testified that he received them. But testifying that a letter was received is not sufficient to establish its admissibility for all purposes.

Underlying the district court's flawed reasoning as to both hearsay and authentication was the premise that the letters must be reliable because Santander did nothing to disprove their reliability. This reasoning impermissibly shifts the burden to Santander to establish the letters' unreliability when the burden properly should have remained with Smith to show their reliability. The district court's faulty reasoning would logically require every party to undertake the burden and expense of proving up their opponents' evidence, lest they suffer the penalty of having the evidence admitted by default even when their opponent chooses not to undertake reasonable steps to authenticate its own evidence. The district court abused its discretion in admitting these letters and the judgment should be reversed because the letters were critical to establishing Smith's damages, if any, and thus their admission affected Santander's substantial rights.

ARGUMENT AND AUTHORITIES

Smith failed to present more than a scintilla of evidence that Santander caused any of his claimed actual damages and the evidence shows Smith failed to reasonably mitigate his damages. Thus Smith had no damages, caused by Santander or otherwise, and had Smith taken reasonable mitigation efforts he would not have suffered any damages regardless. For these reasons, Smith's

FCRA cause of action fails as a matter of law for lack of more than a scintilla of evidence establishing damages. Alternatively, any damages Smith may have established rely on inadmissible hearsay evidence that was improperly admitted by the district court. Had the district court not abused its discretion, the challenged evidence would have been excluded and there would have been no rational basis upon which the jury could award Smith damages. Accordingly, judgment against Santander should be reversed and judgment rendered in Santander's favor.

I. SMITH'S FCRA CLAIM REQUIRES, BUT LACKS, ACTUAL DAMAGES

Any person who is negligent in failing to comply with a requirement of the FCRA is liable for actual damages sustained by the consumer. 15 U.S.C. § 1681o(a). To recover actual damages based on negligent noncompliance with the FCRA, the plaintiff has the burden of establishing actual damages.[7] *Cousin v. TransUnion Corp.*, 246 F.3d 359, 369 (5th Cir. 2001); *see Cahlin v. Gen. Motors Acceptance Corp.*, 936 F.2d 1151, 1160-61 (11th Cir. 1991) (declining to address "the substance of Cahlin's FCRA claims against TRW because we find that he has utterly failed to produce any evidence tending to show that he was damaged as a result of an allegedly inaccurate TRW credit report" because there was no evidence

[7] In the absence of actual damages, a consumer may still recover punitive or statutory damages under section 1681n, but only if the consumer shows that the defendant "willfully failed to comply" with the FCRA. 15 U.S.C. § 1681n. Here, the jury found that Santander had not willfully failed to comply with the Act, and thus punitive or statutory damages were not available. RE: Tab D, USCA5 506-521 (Verdict).

"that allegedly inaccurate information on that report was the cause of Cahlin's denial of credit"); *see also Pettus v. TRW Consumer Credit Service*, 879 F. Supp. 695, 697-98 (W.D. Tex. 1994) (citing *Hyde v. Hibernia Nat'l Bank in Jefferson Parish*, 861 F.2d 446, 448 (5th Cir. 1988)) ("[T]he FCRA provides a remedy for consumers who are actually damaged by a failure to comply with the Act's requirements. . . . [P]roof of damage is an essential element of an action under the FCRA."). Even if actual damages are established by the evidence, the consumer also has the burden of proving that the damages were caused by the defendant's negligence. *Morris v. Trans Union LLC*, 420 F. Supp. 2d 733, 750 (S.D. Tex. 2005); *see Crabill v. Trans Union, L.L.C.*, 259 F.3d 662, 664 (7th Cir. 2001); *Philbin v. Trans Union Corp.*, 101 F.3d 957, 969 (3d Cir. 1996); *Cahlin*, 936 F.2d 1161.

In this case, Smith's FCRA claim against Santander must fail as a matter of law for two reasons: Smith failed to produce more than a scintilla of evidence as to the existence of any actual damages, and Smith failed to produce more than a scintilla of evidence that Santander caused his actual damages, if any.

II. SMITH'S CLAIM FOR ACTUAL DAMAGES WAS NOT SUPPORTED BY THE EVIDENCE

Here, the jury awarded $20,437.50 in actual damages and the district court awarded the same amount of actual damages in its judgment. RE: Tab D, USCA5

507, 515 (Verdict); RE: Tab A, USCA5 594-595 (Judgment). The damages award was not supported by the evidence, as demonstrated below.

Based on his pleadings, Smith sought actual damages on his FCRA claim, among other relief.[8] USCA5 28. Smith claimed actual damages as a result of his lowered credit score and lowered credit limits, based on various purchases that he did not make including family trips, an automobile, groceries, medicine, and purchases that Smith alleged were needed at work to ensure his job performance. Smith further alleged that these forgone expenditures would have only been possible through the use of credit, not cash, and that his family relationships, living standards, job performance, and bonus pay were all negatively impacted as a result. Additionally, Smith claims that he received a less favorable interest rate when he refinanced his mortgage in April 2010 based upon his lowered credit score and that he experienced damage to his reputation and mental anguish including humiliation, mental distress, emotional distress, anxiety, and embarrassment. Smith failed, however, to present evidence to support the existence of any of these damages. Moreover, there is no evidence that Santander's negligence caused these damages even if they had been established, which they were not.

[8] Smith also pleaded for statutory damages on his FCRA claim. USCA5 28. However, at Smith's request the district court decided that the determination of statutory damages, if any, would be taken up by the court. USCA5 920. The district court did not award statutory damages. USCA5 594-595.

A mere scintilla of evidence as to an essential element is not sufficient to present a question for the jury. *Hunter v. Knoll Rig & Equip. Mfg. Co.*, 70 F.3d 803, 805 (5th Cir. 1995) (citing Rule 50(a)(1) of the Federal Rules of Civil Procedure). Because no more than a scintilla of evidence supports Smith's recovery of damages from Santander, Smith failed to present sufficient evidence to support the jury's award.

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

Smith claimed that various alleged damages resulted from a reduced credit score with one credit reporting agency, TransUnion, which was caused by Santander's improper reporting of his debt to TransUnion in December 2009.[9] Smith testified that his TransUnion credit score went from 778 in October 2009 to 652 in late 2009, a reduction of 126 points. USCA5 764-765. Smith concedes that his credit score as reported by two other services, Experian and Equifax, were not impacted at all. *See id.*

Smith admitted that Santander later deleted its account and that his TransUnion credit score rose to 726 as early as June 2010. USCA5 809-810, 811-812. Indeed, Smith conceded that his June 2010 TransUnion credit rating of 726 was classified as "excellent." USCA5 856-857. Moreover, in June 2010 Smith's

[9] Smith cited the FCRA's provision that debt older than 7 years may not be reported. *See* USCA5 752 (argument from Smith's counsel), 1031 (Charge).

TransUnion credit score was equivalent his credit score with Experian and Equifax, two credit reporting agencies to which Santander never reported his debt. *See* PX 12 (showing TransUnion at 726, Experian at 726, and Equifax at 717). Thus, it is undisputed that any damage to Smith's credit score was only through one agency, TransUnion, only lasted for a maximum of six months, and Smith's TransUnion credit score was "excellent" thereafter.[10] *See* USCA5 856-857.

Although his TransUnion credit score was lowered only temporarily, Smith claimed that his lower credit score triggered lowered credit limits on many of his multiple personal credit card accounts. *See* USCA5 812. According to Smith, his aggregate credit limit was reduced cards by $37,500 across five different personal credit cards within one month of Santander's reporting of his debt in December 2009. USCA5 777, 830. Specifically, Smith testified that the aggregate credit limit on his four Bank of America (BoA) accounts and one Sears account went from $58,500 to $22,000.[11] *See* UCSA5 766-777.

[10] Uncontroverted evidence establishes that Santander reported the debt to TransUnion in December 2009, USCA5 933, 951, and deleted the debt in May 2010. USCA5 888-889, 929, 934.

[11] Smith variously testified that the amount of his reduced credit was $22,000 and $21,000. Smith also testified that he had a Home Depot card with a credit limit of $10,000 that "was canceled," USCA5 775, but Smith failed to testify as to who canceled the account or why. *Id.* Smith does not include this $10,000 in alleged reduced credit within the $37,500 figure that he represents was the aggregate amount his credit was reduced due to Santander. *Id.*

Smith's own retained expert, Edwin Johansson, testified that at that time Smith's credit limits were lowered there was a "credit crunch" in the economy and creditors were looking for reasons to lower credit they had previously offered. USCA5 887. Johansson conceded that "a lot of people" were having their credit lowered at that time, not just Smith. *Id.* Similarly, Santander's expert, Helen Reynolds, explained that banks at the time needed to shore up the amount of credit they were extending and therefore lowered people's credit card limits. USCA5 969-970. Reynolds also testified that, with credit limits lowered, a consumers' credit scores would be lowered too if the consumers were spending at or near their new limit. *Id.* Smith appears to have been just such a consumer, because BoA purportedly lowered his credit limit on two separate cards based on the way he had been using his credit in the past and without mention of any reported delinquency. USCA5 972-973, 979-980, 983.

Smith testified that, as a result of his lowered credit limits, he chose not to use his $22,000 in credit very much. USCA5 830-831. According to Smith, this in turn impacted his job performance, standard of living, and family relationships. Smith also stated that his lowered credit limits prevent him from "feeling normal" and "taking care of things that I was taking care of before." USCA5 812-813.

There is no evidence that Smith's credit limit was lowered, because Smith's contention in this regard was supported only by unauthenticated documents and

hearsay that the district court admitted in error and over Santander's express objections, as discussed below. Even assuming that the disputed exhibits were properly admitted, there is no evidence that Santander or Santander's negligent investigation of Smith's debt was the cause.

Smith conceded, and the improperly admitted exhibits confirm, that his personal credit card companies never referenced or named Santander when they informed him that they were lowering his credit limits. *See* USCA5 814-815; *see also* PX 20-24, 35. Moreover, two of the letters he received from BoA mentioned that BoA lowered his credit on two separate accounts after reviewing Smith's historical use of credit and the "economic trends of [Smith's] credit report." USCA5 814-815, PX 22-23. Even though two other letters from BoA referenced a "delinquency" that Smith claims was due to Santander's reporting of old debt from Triad, PX 20-21, it is undisputed that no credit card company mentioned Santander's name as the cause of Smith's lower credit limit.

There is also no evidence that, after Santander deleted Smith's account in May 2010, Smith's credit card companies were unwilling or unable to raise Smith's credit limits back to their pre-December 2009 levels. Indeed, Smith himself testified that he chose not to reach out to his creditors and seek an increase

in his credit limits after he knew the Santander debt was removed.[12] USCA5 831-832. Thus, there is no evidence that Santander kept Smith's credit limits at $22,000. There is only evidence that Smith voluntarily chose not to use his available credit or seek additional credit. This constitutes no evidence that Santander caused any damages. *See Ladner v. Equifax Credit Info. Servs.*, 828 F. Supp. 427, 432 (S.D. Miss. 1993) ("[T]here is no evidence before this Court as to why Ms. Ladner did not attempt to acquire a loan once the report had been amended nor what the results were if she did attempt to acquire a loan after bringing the inaccuracies to the defendant's attention.).

In addition, there is no evidence that Smith was ever harmed by the reduction of his credit to $22,000 because Smith never used his remaining $22,000 in credit regardless. USCA5 830-831. Finally, and perhaps most tellingly, Smith admitted that after January 2010 he applied for and received a new retail credit card. USCA5 857-858. Smith did not allege that the terms offered on this new card were negatively impacted by Santander and he did not even recall the interest rate he received. *Id.* Thus, it is not disputed that at least one creditor deemed

[12] Smith testified that he chose not to seek additional credit in June 2010 or thereafter, even knowing that his TransUnion credit score had returned to the pre-December 2009 level of "excellent," because he did not "want to ask and get denied and affect my credit score." USCA5 831-832. There is no evidence that Smith would have been denied or that such a request would have impacted his credit score regardless. Indeed, Smith admitted that he applied for and received an additional consumer credit card after January 2010, through a men's clothing retailer. USCA5 857-858.

Smith creditworthy and gave him new credit after Santander's reporting of Smith's debt. USCA5 985-986.

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

Smith claimed that his lowered credit limits caused damage to his job performance and that his poorer job performance resulted in lost bonus opportunities. Smith worked for a restaurant chain, Waterloo Ice House Restaurant Group, as a supervisor responsible for scouting new locations, building new restaurants, and hiring and training new employees to staff those restaurants as they opened. USCA5 816. Smith alleged that he had previously used his personal credit cards to make purchases on the job to speed completion of his projects when opening new restaurants, expenditures that his employer would then reimburse later. USCA5 795-797. After Santander reported Smith's debt to TransUnion in December 2009, Smith testified that he stopped using his personal credit for work but instead submitted check requests to obtain funds from his employer before he made the purchases, slowing down the time it took him to finish projects. USCA5 796-797. Moreover, Smith testified that this change caused him to loose competitive advantage over his peers because he was no longer able to complete projects faster than they were. USCA5 796-797. Smith also testified that his reputation at work was affected because he used to have a reputation of "getting

jobs done much faster than I've been able to now, and people just don't come to me for projects anymore." USCA5 803.

Smith testified that he is "sure" this change in ability to complete projects quickly affected the way his boss "viewed" him, *id.*, and that he was passed over on "two or three project" assignments as a result. USCA5 796-797. Smith also testified that he lost "up to" $5,000 in bonus compensation for each project he was not assigned. *Id*,; USCA5 854.

Smith reviewed his employment records at trial and conceded that they contained no negative comments regarding his work performance. USCA5 816-817, 824. Moreover, Smith conceded that his gross pay per pay period never decreased, USCA5 823, and that he continued to receive bonuses throughout the period in question, from December 2009 onward. USCA5 824. As reported by his employer, and as Smith himself conceded, Smith received a total of $6,724.65 in bonus monies in 2010 as part of his total 2010 earnings of $69,724.73. USCA5 822; DX24 (payroll record, bates 00033). Smith further conceded that his gross income never decreased. USCA5 841-842. And, although Smith complained that he did not get any raise in 2010, he offered no evidence as to why. Specifically, Smith did not testify whether anyone at his company received a raise in 2010 or whether and to what extent the economic downturn impacted his employer's business and ability to give raises at all. Smith also offered no testimony that his

employer, Waterloo Ice House Restaurant Group, was even building any new restaurants in 2010 given economic conditions at the time.

Belying his claim for damages, Smith presented no evidence to substantiate that he even missed out on any project assignments at all or that others were given projects that otherwise would have gone to him. Nor did Smith provide any evidence that his bonus compensation was negatively impacted. Smith himself concedes that there are no documented complaints or discussions—with supervisors, co-workers, customers, or anyone—regarding the speed or timeliness with which Smith completed his assigned projects or any perceived change in Smith no longer making job-related purchases on his personal credit cards. USCA5 841-842. And although Smith testified he was "sure" that he was "viewed" differently at work, he recounted no specific conversation or action in which such a view was expressed. Simply put, there is no evidence that anyone thought differently, much less negatively, regarding Smith's job performance or that anyone perceived any change at all in the speed or timeliness by which Smith completed projects after December 2009.

Even if there were evidence that Smith's job performance had been impacted negatively, although there is not, there is no evidence of the reasons why his employer gave Smith bonuses as it did, and there is no evidence that either

Santander or Smith's credit limits directly or indirectly caused of any compensation- or work-related decision made by Smith's employer.

Moreover, even if Smith's credit usage habits impacted his job performance or take-home pay, which they did not, Smith was the cause and not Santander. Smith testified that he was free to use $22,000 in credit throughout this whole time period but chose not to. USCA5 830-831. And there is no evidence that Smith's $22,000 in credit was somehow inadequate to meet his needs. Indeed, Smith testified that the largest credit balance Smith carried for work-related expenses was in the amount of $11,000, USCA5 847, and Smith's remaining $22,000 in credit would have accommodated those purchases going forward. Given all this evidence, it is disingenuous of Smith to testify that his own personal choices as to how he would use his credit impacted his job performance at all. But this Court need not make any type of credibility determination to examine the record and conclude that there is not more than a scintilla of evidence that Santander caused Smith any damage with respect to his job performance or purported lost earnings.

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

Even though Smith's salary was never reduced and his TransUnion credit score had recovered soon after Santander deleted its account, Smith testified at trial that he now "pretty much" uses cash for all of his purchases going forward, "radically" lowering his standard of living. USCA5 797-798. According to Smith,

"I'm not living like I was before. I don't really spend money." *Id.* However, there is no evidence that Smith's lack of spending is or was ever caused by Santander. Indeed, in light of evidence that Smith's salary never decreased, there is no evidence that Smith's reduction in personal credit card limits impacted Smith's spending habits al all. The only evidence regarding Smith's spending is that he chose not to use credit and that the credit he had available was more than adequate to meet his spending needs had he chosen to use it.

Smith said that his lack of spending affected his relationships with his friends and family. USCA5 803-804. When asked by his attorney why he failed to use his remaining available credit, Smith responded that it may "impact my credit score worse." USCA5 798. According to Smith, "I just opted to really not use any credit cards so I can try and repair my credit score." USCA5 798. Smith also testified that he did not open any new credit card accounts because new accounts may negatively impact his credit score, USCA5 799, but Smith later contradictorily admitted that he applied for and received another credit card after January 2010. USCA5 857-858. Moreover, Smith conceded that his TransUnion credit score was back up to "excellent" in June 2010. USCA5 856-857. Based on all of the foregoing, there simply is no reason and no evidence supporting Smith's decision not to use his available credit from December 2009 onward.

Smith testified that his relationships with his mother and brother also were "a lot more stressful now." USCA5 793, 804. Smith testified that these relationships were injured because he canceled two family trips with his mother and brother and was not able to support them financially at the level he would have liked. USCA5 793-794. Specifically, Smith intended to treat his mother and brother to family trips to Cozumel and Florida and pay for them on his credit card. *Id.*; USCA5 839-840. Smith testified that he had priced the Florida trip at $3,000-$4,000, and the Cozumel trip at $5,000-6,000. USCA5 839-840. Smith chose not to take those trips even knowing that his credit limit at the time was $22,000. USCA5 793, 804, 839-840. Smith also testified that he previously purchased groceries and household items for his mother with his credit cards, including items such as laundry detergent, medicines, car repairs, and the like. USCA5 794-795.

Smith also testified that he "needed" to buy a car after December 2009 but that he did not because his credit was "ruined." USCA5 804. Smith stated that, if he bought a car at the time of trial, in August 2010, his interest rate "definitely" would be higher than it would have been before December 2010. *Id.* Smith also testified that his car required $700 or $800 for a new radiator and $1,500 for transmission repair. USCA5 805. However, Smith conceded that he never attempted to purchase a car or secure financing for such a purpose. USCA5 842. Moreover, Smith did not dispute that his transmission and radiator repair occurred

after his credit score went back up to pre-December 2009 levels, and he admitted that it was his own choice not use his $22,000 in credit to finance those repairs regardless. USCA5 842-843.

In summary, Smith alleges to have foregone spending on family trips, groceries, medications, auto repair, and a new automobile. But Smith did not provide any documents or credible evidence to show that the trips were actually planned or booked, travel-related purchases were attempted but denied, or the trips were cancelled as a result of Smith's lower credit score, lower credit limits, or any conduct by Santander. Smith also failed to provide any documents or credible evidence showing that his automobile purchase was needed or planned, how much a new automobile would have cost, or any efforts to finance a new automobile. Evidence is also lacking regarding alleged foregone purchases of groceries, medications, auto repairs, and the other categories of expenses Smith claims he would have incurred. There is no evidence that Smith's alleged foregone credit usage was anything but a personal choice on his part, not caused by Santander. *See* USCA5 830-831.

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

Smith claimed that Santander caused him damage when he refinanced his home mortgage in April 2010 because he was offered a higher interest rate on the loan due to his credit score. Smith stated that he looked into refinancing his

mortgage with E*Trade in October 2009 and they quoted him a 30-year loan of $172,000 at 5.25%. USCA5 800, 826. Smith did not refinance at that time because he said he was told that rates would go down even lower, perhaps to 5.0%, if he waited. USCA5 800-801. After he learned of Santander's reporting to TransUnion in December 2009, Smith refinanced his mortgage in April 2010 with a 30-year loan of $175,000 at 5.5% from Cornerstone Mortgage. USCA5 801-802, 825, 828. Smith contends that his rate would have been lower than 5.5% but for Santander's FCRA violation.

There is no evidence why Smith refinanced in April 2010, before his TransUnion credit score returned to "excellent." Smith specifically admitted that he learned of the reduction of his credit score in December 2009, before he refinanced his mortgage and that he chose to refinance his mortgage before his dispute with Santander was resolved. USCA5 765, 827-828. Smith also concedes that he knew back in June 2010 that Santander was no longer reporting the debt and that his credit score had gone back up, but he chose not to explore refinancing at that time. USCA5 829-830. Smith's proffered reason for not refinancing starting in June 2010 is that he "just couldn't afford it." USCA5 829-830.

There is no evidence that Smith could not afford mortgage refinancing in June 2010, no evidence that refinancing in June 2010 would have cost him any out-of-pocket expenses or any additional monies over the life of the loan, and no

evidence that he would not have qualified for a lower rate in June 2010 than in April 2010. Indeed, Santander's expert, Helen Reynolds, testified that mortgage interest rates trended downward from April through November 2010, and that Smith could obtain a mortgage with an interest rate of 4.5%, a full percentage point lower than his current 5.5%. USCA5 984-985. Smith never presented any evidence to refute this. Reynolds also testified that mortgage refinancing involves minimal out-of-pocket expenses at most, with the ability to roll costs into the loan. USCA5 990. Thus, costs would have been offset by the savings Smith achieved through a one-point reduction in his interest rate. Smith offered no contention, much less evidence, that he would not have in fact saved money had he chosen to refinance again on better terms after April 2010 or wait to refinance until June 2010.

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

Smith also asserted non-pecuniary damages in the form of "emotional and mental pain and anguish," USCA5 21, including disappointment at not taking his mother and brother on family trips, embarrassment at work due to his inability to be a top performer, and anger at having his credit "ripped away." *See* USCA5 798, 802-804, 840-841. Specifically, Smith testified that he felt "angry," "upset," "confused," and "helpless" at having no access to credit. USCA5 798. In response to leading questions from his attorney, Smith confirmed that he had experienced

loss of sleep, anxiety, stress, and loss of concentration, that his "emotional distress" "bleeds over to work," and that he experienced "weight loss" when he first found out about Santander's reporting of his debt. USCA5 798-799; *see* USCA5 803-804. Smith also testified that he experienced "drinking" "when it first happened." USCA5 803. Smith testified that he was embarrassed explaining to his mother that "there is certain things we can't do that we could do before that I can't provide for her," USCA5 802, and that it was "slightly embarrassing" dealing with his mortgage refinancer in April 2010. USCA5 802-803. Smith also said that he was embarrassed by having to explain to people at work why he was no longer making job-related purchases on his personal credit cards. USCA5 840-841. Smith conceded that he had never seen a medical provider and never undergone any sort of medical treatment on account of his mental anguish. USCA5 834.

None of Smith's mental anguish damages are recoverable because they did not rise to the level of actual injury. In *Carey v. Piphus*, 435 U.S. 247, 98 S. Ct. 1042, 1052, 55 L. Ed. 2d 252 (1978), the Supreme Court required proof of actual injury for compensatory damages to be awarded for mental or emotional distress in an action brought under 42 U.S.C. § 1983. It concluded that a jury's award for emotional distress must be supported by evidence of genuine injury. *Id.* at n.20.

This Court extended *Carey*'s holding and reasoning to other cases involving federal claims for emotional harm in *Patterson v. P.H.P. Healthcare Corp.*, 90

F.3d 927, 938 (5th Cir. 1996). *Patterson* involved a case concerning claims for racial discrimination and retaliatory discharge. *Id.* This Court recognized that, to establish a recoverable intangible loss, *Carey* requires "a degree of specificity which may include corroborating testimony or medical or psychological evidence in support of the damage award." *Id. at 940*. Moreover, the Court has extended this same principle to causes of action based on negligent violation of the FCRA. *Cousin v. Trans Union Corp.*, 246 F.3d 359, 371 (5th Cir. 2001) (addressing testimony from the plaintiff that he felt "very upset," "angry," "like nobody was listening," and "trapped," without any physical injury being claimed).

Although not controlling, another federal court's experience regarding claimed emotional distress following a FCRA violation is instructive. In *McKinley v. CSC Credit Servs.*, the Minnesota district court held that evidence of emotional distress damages was insufficient as a matter of law absent proof of injury even though the plaintiff, McKinley, alleged physical symptoms. No. 05-2340, 2007 U.S. Dist. LEXIS 34528, *17-18 (D. Minn. May 10, 2007) (summary judgment). McKinley testified that his emotional distress manifested through insomnia, distraction, anger, a short temper, and feelings of low self-worth, disappointment, and disillusionment. *Id.* He testified that he has not taken any medication and has not seen any physician, psychologist, or other health care professional for his emotional distress. *Id.* McKinley also provided testimony from his girlfriend,

brother, friend of more than 35 years, and former co-worker who all testified to his anger, frustration, loss of sleep, and distraction allegedly caused by his credit dispute. *Id.* However, the court concluded that McKinley's testimony, and that of his corroborating witnesses, simply did not identify and describe severe emotional distress that warrants an award of actual damages. *Id.* (citing *Forshee v. Waterloo Indus., Inc.*, 178 F.3d 527, 531 (8th Cir. 1999)).

Under this standard, there is no evidence that Smith's feelings have risen to the level of compensable mental anguish or humiliation. Moreover, there is no evidence that Santander is or was the cause of any such feelings even if they were otherwise compensable. As discussed above, Smith testified that his negative feelings (humiliation, emotional distress, embracement, etc.) arose because he did not use his personal credit cards to make purchases that he claimed were needed at home, at work, and for his family. But Smith's decision not to use his credit was his choice and was not caused by Santander. *See* USCA5 830-831. Indeed, the evidence established that Smith's $22,000 in credit was more than ample to accommodate his desired family trips, groceries, medicine, car repairs, and work-related expenditures. Thus, even assuming Smith experienced otherwise compensable mental anguish because of his lack of spending and discussions regarding his lack of spending, there is no evidence that Santander was the cause. Without more than a scintilla of evidence that Smith's feelings of mental anguish

were compensable and no evidence Santander caused them, the evidence does not support any award of mental anguish damages against Santander.

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

Even assuming, in the alternative, that Smith suffered any actual damages and that they were caused by Santander, there is no evidence that Smith undertook reasonable efforts to mitigate those damages. Smith's duty was to take reasonable steps to mitigate damages. *See Gallup v. Omaha Prop. & Cas. Ins. Co.*, 282 Fed. App'x 317, 321-322 (5th Cir. 2008); *Delta S.S. Lines v. Avondale Shipyards, Inc.*, 747 F.2d 995, 1003 (5th Cir. 1984) (citing a plaintiff's duty to mitigate damages upon a maritime loss); *Frosty Land Foods Intern'l, Inc. v. Refrigerated Transp. Co.*, 613 F.2d 1344, 1348 (5th Cir. 1980) (citing a plaintiff's duty to mitigate damages upon a Federal Interstate Commerce Act claim); *see also Schwartz v. NMS Industries*, 575 F.2d 553, 556 (5th Cir. 1978) ("Traditionally, the duty persists as long as damages are suffered and may reasonable be mitigated.") (citing Texas law while sitting in diversity on a contract claim).

As the jury was instructed in this case:

> A person who claims damages resulting from the wrongful act of another has a duty under the law to use reasonable diligence to mitigate; that is, to avoid or minimize these damages. If you find Santander is liable and Smith has suffered damages, **Smith may not recover for any item of damage which he could have avoided through reasonable effort**. If you find by a preponderance of the evidence Smith unreasonably failed to take advantage of an

> opportunity to lessen his damages, you should deny him recovery for those damages which he would have avoided had he taken advantage of the opportunity.
>
> You are the sole judge of whether Smith acted reasonably in avoiding or minimizing his damages. **An injured plaintiff may not sit idly by when presented with an opportunity to reduce his damages**. However, he is not required to exercise unreasonable efforts or incur unreasonable expenses in mitigating his damages. Santander has the burden of proving the damages which Smith could have mitigated. In deciding whether to reduce Smith's damages because of his failure to mitigate, you must weigh all the evidence in light of the particular circumstances of the case, using sound discretion and deciding whether Santander has satisfied its burden of proving that Smith's conduct was not reasonable.

USCA5 1036-1037. Smith did not challenge this instruction.

There is no evidence that Smith undertook reasonable efforts to mitigate his damages, assuming he even had any damages caused by Santander. The only evidence before the jury established that reasonable mitigation efforts were available and would have eliminated all of Smith's actual damages.

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

Smith claimed that various damages resulted from his reduced use of personal credit from December 2009 onward. *See* USCA5 812. According to Smith, his aggregate credit limit was reduced to $22,000. USCA5 777, 830. Smith testified that, as a result of his lowered credit limits, he often chose not to use his remaining $22,000 of credit. USCA5 830-831. Smith stated that this reduced spending in turn impacted his job performance, standard of living, and family

relationships. Smith also stated that his lowered credit limits prevent him from "feeling normal" and "taking care of things that I was taking care of before." USCA5 812-813.

Smith failed to reasonably mitigate his alleged damages by using his $22,000 in remaining credit. Evidence establishes that this remaining credit was more than adequate to meet all of his spending needs at home, with his family, and on the job. For example, on his job Smith testified that his decision not to use personal credit caused him to loose a competitive advantage over his peers. USCA5 796-797. However, the largest account balance he ever carried for work purchases amounted to $11,000, and he could have reasonably made that level of purchases with his remaining $22,000 in credit. *See* USCA5 847-848. As far as Smith's missed family vacations are concerned, by his own testimony they would have cost a total of $8,000-$11,000 USCA5 839-840. Again, Smith chose not to take those trips even knowing that his credit limit at the time was $22,000. USCA5 793, 804, 839-840. Regarding Smith's alleged reduced standard of living and need for car repairs, Smith also had ample credit to make every purchase to which he testified, including $700 or $800 for a radiator and $1,500 for transmission repair. USCA5 805. Finally, regarding Smith's alleged need to buy a car, USCA5 804, Smith admitted that he never even attempted to purchase a car or

talk to anyone about the interest rate he possibly would receive on a car loan. USCA5 842. In other words, all Smith did was sit idly by.

Even assuming that lack of credit capacity was a problem for Smith, which it was not, Smith failed to reasonably mitigate his damages by seeking an increase in his credit limits. Smith conceded that in June 2010 his TransUnion credit score was back up to the same level as Smith's credit score with Experian and Equifax, two credit reporting agencies to which Santander never reported his debt. *See* PX 12 (showing TransUnion at 726, Experian at 726, and Equifax at 717). Smith admitted that in June 2010 his TransUnion credit rating was "excellent." USCA5 856-857. If, as Smith argued, his credit limits were lowered due to a reported delinquency with Santander, Santander's removal of that account would conversely have allowed his credit limits to be raised again if Smith had asked, which he did not. Smith admitted that he chose not to reach out to his creditors and seek an increase in his credit limits after the Santander debt was removed, even though doing so would have been as simple as a telephone call. USCA5 831-832.

And Smith failed to reasonably mitigate his damages by seeking and using additional credit lines. Smith admitted that after January 2010 he applied for and received a new credit card through a men's clothing retailer. USCA5 857-858. Smith did not allege that the terms offered on this new card were negatively impacted by Santander and he did not even recall the interest rate he received. *Id.*

There is no credible reason why Smith could not have used this newly available credit or why Smith could not have easily applied for and received additional cards. *See* USCA5 985-986.

Finally, had Smith reasonably mitigated his damages in the manners outlined above, he would have completely avoided any alleged mental anguish, anxiety, embracement, humiliation, or damage to his reputation allegedly caused by his reduced spending. Smith testified that he was embarrassed when explaining to his mother that "there is certain things we can't do that we could do before that I can't provide for her," USCA5 802, but the evidence establishes that this embarrassment was caused by his choice not to use credit, not by Santander. Smith also said that he was also embarrassed having to explain to people at work that he was not longer making job-related purchases on his personal credit cards as he had in the past, USCA5 840-841, but that also was due to Smith's own choice not to use his credit.

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

Smith also failed to reasonably mitigate damages, if any, he suffered as a result of his April 2010 home mortgage refinancing. Smith chose to refinance in April 2010, knowing that his credit score with TransUnion had been lowered and that his dispute with Santander was unresolved at that time. USCA5 765, 827-828. Smith was unreasonable in refinancing at that time when he easily could have waited to refinance on better terms after his credit was repaired in May 2010.

USCA5 984-985. Additionally, Smith was unreasonable in choosing not to refinance his mortgage yet again after his credit score with TransUnion returned to "excellent" in June 2010. USCA5 984-985. Indeed, the evidence established that he could have refinanced at one percentage point less in interest, had Smith reasonably chosen to either wait or refinance again later in 2010, thus offsetting in savings whatever additional financing and closing costs he may have incurred. USCA5 984-985, 900.

Because there is not more than a scintilla of evidence supporting the award of actual damages against Santander, and actual damages are required to support Smith's FCRA claim against Santander, the district court's judgment should be reversed and judgment rendered in Santander's favor.

III. ERROR IN ADMITTING EVIDENCE

The district court also erred in admitting nine exhibits, Plaintiffs' Exhibits 9, 10, 12, 20, 21, 22, 23, 34, and 35, over Santander's timely objections as to hearsay and authenticity. RE: Tab C; *see* USCA5 786-788 (PX 9), 790 (PX 10), 791-792 (PX 12), 766-770 (PX 20), 770-772 (PX 21), 773-774 (PX 22), 774 (PX 23), 775-776 (PX 34), 776-777 (PX 35), 921 (PX 9, 10, 12, 20-23, 34, 35). These exhibits consist of four letters purportedly from BoA, two statements purportedly from Sears, and three communications purportedly from TransUnion. They were introduced by Smith in an attempt to establish that his credit limits were lowered

and that Santander was the cause. As discussed above, these exhibits do not, in fact, amount to more than a scintilla of evidence that Santander caused Smith's reduction of credit or that Smith's reduction in credit caused him actual damages. In the alternative, the district court erred in admitting these nine exhibits because they are hearsay statements and they were never properly authenticated.

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 a 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).

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

The district court overruled Santander's timely objection as to the authenticity of each of these nine letters, found that they were properly

authenticated under Rule 901(a) of the Federal Rules of Evidence, and admitted them for all purposes. *See* FED. R. EVID. 901(a); RE: Tab C; USCA5 786-788 (PX 9), 790 (PX 10), 791-792 (PX 12), 766-770 (PX 20), 770-772 (PX 21), 773-774 (PX 22), 774 (PX 23), 775-776 (PX 34), 776-777 (PX 35), 921 (PX 9, 10, 12, 20-23, 34, 35). Santander objected that none of these letters had been properly authenticated, and it is undisputed that the letters were not sponsored by their senders or the senders' records custodians. Rather, Smith attempted to sponsor each letter himself, as the recipient.[13] Significantly, none of the nine letters at issue was received by Smith in response to a properly authenticated letter that he had authored.

Rule 901 of the Federal Rules of Evidence provides that "authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what the proponent claims." FED. R. EVID. 901(a); *see McConathy v. Pepper/Seven Up Corp.*, 131 F.3d 558, 562 (5th Cir. 1998). The Court does not require conclusive proof of authenticity, and a district court's decision is reviewed for abuse of discretion. *McConathy*, 131 F.3d at 562; *U.S. v. Jimenez Lopez*, 873 F.2d 769, 772 (5th Cir. 1989); *U.S. v. Scurlock*, 52 F.3d 531, 538 (5th Cir. 1995).

In this case, the district court cited Rule 901(a) and then expressly held:

[13] There is no testimony by Smith that he even received two of the letters, PX 23 and PX 35.

> I fine[d] that Rule 901 is satisfied by the plaintiff's testimony that he received these documents in the manner in which he described. Therefore I will instruct the jury when they come in that Plaintiff's Exhibits 9, 10, 12, 20, 21, 22, 23, 34, and 35 may be considered by the jury for all purposes in this case.

USCA5 924. As the record shows, Smith testified that he received some of the letters at issue, but testimony was not elicited from Smith as to whether he received PX 23 (purportedly from BoA, USCA5 774) or PX 35 (purportedly from Sears, USCA5 776-777).

Contrary to the district court's holding, not every letter is admissible for all purposes simply because the recipient testifies that it was received. This Court has held that "[a] letter is not a self-proving instrument, and proof of some kind tending to show its genuineness is always required. The mere contents of a written communication, purporting to be a particular [person's], are, of themselves, not sufficient evidence of genuineness." *Consol. Grocery Co. v. Hammond*, 175 F. 641, 645 (5th Cir. 1910) (citing 3 WIGMORE ON EVIDENCE, § 2148). Rather, a received letter is self-authenticating only if it satisfies the reply letter rule, which allows that "a letter received in due course through the mails in response to a letter sent by the receiver is presumed to be the letter of the person whose name is signed to it and is thus self-authenticating." *U.S. v. Wolfson*, 322 F. Supp. 798, 812 (D. De. 1971), *aff'd*, 454 F.2d 60 (3d Cir. 1972) (citing *Scofield v. Parlin & Orendorff*

Co., 61 F. 804, 806 (7th Cir. 1894); *Winrel v. U.S.*, 365 F.2d 646, 648 (8th Cir. 1966); *Purer & Co. v. Aktiebolaget Addo*, 410 F.2d 871, 876 (9th Cir. 1969)).

In adopting the reply letter rule this Court held that "**it is necessary for proof to be introduced that the original letter, to which the reply letter in question was responsive, was actually written and mailed**." *Consol. Grocery*, 175 F. at 645 (emphasis added) (cited by *Wolfson*, 322 F. Supp. at 812). More recently, in *Black v. Callahan* the Northern District of Texas followed the reply letter rule. 876 F. Supp. 131, 132 (N.D. Tex. 1995). In doing so, the court cited the Eleventh Circuit's opinion in *U.S. v. Weinstein*, which expressly held that "letters and presumably telegrams are prima facie authentic **if their content is responsive to prior properly admitted communications**." *U.S. v. Weinstein*, 762 F.2d 1522, 1533 (11th Cir. 1985) (emphasis added) (cited in *Black*, 876 F. Supp. at 132).

The nine letters at issue in this case simply cannot be authenticated under the reply letter rule and should not have been admitted. Smith attempted to authenticate the letters by testifying that he received them (at least some of them) at his home address, but Smith failed to establish that any of these letters were responsive to prior properly admitted communications. For example, for the three letters purportedly from TransUnion (PX 9, PX 10, and PX 12) Smith testified that he received them in response to a dispute he raised but no communication of such

dispute by Smith was ever properly authenticated. *See* USCA5 786-788 (PX 9 received by Smith from TransUnion regarding Smith's dispute with Santander), 790-791 (PX 10 by Smith from TransUnion regarding Smith's dispute with Santander), 790-792 (PX 12 by Smith from TransUnion regarding Smith's dispute with Santander). Thus, the district court abused its discretion in admitting the ostensible TransUnion letters absent adequate indicia of reliability as required by the reply letter rule. *See, e.g.*, *Consol. Grocery*, 175 F. at 645; *Weinstein*, 762 F.2d 1522

In addition, the four letters purportedly from BoA (PX 20, PX 21, PX 22, and PX 23) were responsive to nothing, unrequested, and unexpected by Smith. *See* USCA5 767 (PX 20 received by Smith from BoA), 771 (PX 21 received by Smith from BoA), 773 (PX 22 received by Smith from BoA), 774 (PX 23 admitted without testimony from Smith that he had even received it from BoA). Indeed, Smith testified that these four letters advised him that his credit limits were being lowered and were not responsive to Smith. *Id.* Under the reply letter rule these ostensible BoA letters are not authenticated because they lack indicia of reliability associated with a reply to a prior properly authenticated communication. *See Consol. Grocery*, 175 F. at 645; *Weinstein*, 762 F.2d 1522.

Likewise, the two statements purportedly from Sears (PX 34 and PX 35) were not responsive to any communication initiated by Smith and, for that reason

alone, were not properly authenticated. *See* USCA5 775-776 (PX 34 received by Smith from Sears concerning his account), 776-777 (PX 35 admitted without testimony that Smith had received it from Sears). As with the letters purportedly from BoA, there is no evidence that Smith requested these Sears statements and did not authenticate any correspondence to which PX 34 or PX 35 replied. *Id*. Thus, these two statements ostensibly from Sears cannot be authenticated as replies to Smith's earlier communications, and they should not have been admitted. *See Consol. Grocery*, 175 F. at 645; *Weinstein*, 762 F.2d 1522.

The district court abused its discretion by ignoring the requirements of the reply letter rule and admitting these nine letters over Santander's timely objection. Authentication requirements are not mere technicalities; evidence must support a finding that the letters in question are what the proponent claims. *See* FED. R. EVID. 901. Requiring strict adherence the reply letter rule, or requiring that a party prove up letters through admissible testimony from the sender, protects against the danger of fabricated communications.

Moreover, the district court's improper finding puts this and future defendants in the unfortunate position of having to possibly go through the time and expense of proving up an opposing party's documents. Under the district court's faulty reasoning, the only way defendants such as Santander could challenge the authenticity of communications would be to seek admissible

testimony from the sender or a record custodian, as in oral deposition or deposition on written questions. Such non-party testimony would either disprove the authenticity of the document at issue or prove it up on the opposing party's behalf. Regardless, as the party sponsoring admission of the documents, Smith should be required to undergo the effort and expense of proving them up. Santander, in contrast, should not be forced to disprove the authenticity of Smith's documents.

For each of the foregoing reasons, the district court abused its discretion by basing its ruling on a clearly erroneous assessment of the authenticity of the evidence in question. *See Knight*, 482 F.3d at 351; *Bocanegra*, 320 F.3d at 584; FED. R. EVID. 901.

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

The district court overruled Santander's timely hearsay objection to these nine letters (four from BoA, two from Sears, and three from TransUnion), admitting them for all purposes under the residual hearsay exception, Rule 807 of the Federal Rules of Evidence. USCA5 925; FED. R. EVID. 807; *see* RE: Tab C (PX 9, 10, 12, 20, 21, 22, 23, 34, and 35).

There is no credible dispute that these nine letters constitute hearsay, that is, out-of-court statements by the letters' senders to prove the truth of the matters asserted therein regarding Smith's credit limits and credit history. *See* FED. R. EVID. 801(C). Hearsay is generally inadmissible because oath, personal

appearance at trial, and cross-examination are the best mechanisms to ensure truthful and accurate testimony. *See* FED. R. EVID. 802; *Comeaux v. Coil Tubing Servs.*, 172 Fed. App'x 57, 68 (5th Cir. 2006); *Guy v. Crown Equip. Corp.*, 394 F.3d 320, 329 (5th Cir. 2004). Enumerated exceptions to this rule may apply depending upon whether the declarant is available or unavailable to testify at trial. FED. R. EVID. 803 (23 specific exceptions that apply regardless of whether the declarant is available to testify at trial), 804 (5 specific exceptions that only apply if the declarant is unavailable to testify at trial).

The nine exhibits at issue fall within **none of the hearsay exceptions** enumerated in Rules 803 and 804 of the Federal Rules of Evidence. Rather, the district court reached to apply the residual hearsay exception found in Rule 807 of the Federal Rules of Civil Procedure. At the time of trial, Rule 807 read in part:

> A statement specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence that the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

FED. R. EVID. 807.

Congress intended this residual exception to be used only in rare circumstances. *See Cook v. Miss. Dep't of Human Servs.*, 108 Fed. App'x 852, 856 (5th Cir. 2004); *Conoco Inc. v. Dep't of Energy*, 99 F.3d 387, 392 (Fed. Cir.

1996); *Huff v. White Motor Corp.*, 609 F.2d 286, 291 (7th Cir. 1979); *S.E.C. v. First City Fin. Corp., Ltd.*, 890 F.2d 1215, 1225 (D.C. Cir. 1989). The residual hearsay exception was not intended to confer "a broad license" on trial judges "to admit hearsay statements that do not fall within one of the other exceptions." *Conoco*, 99 F.3d at 392.

In this case, the district court erred in admitting the nine letters at issue under the residual hearsay exception because they do not and cannot satisfy the second and third requirements of Rule 807, clauses (B) and (C). *See* FED. R. EVID. 807. Clause (B) requires the statement to be "more probative on the point for which it is offered than any other evidence that the proponent can procure through reasonable efforts." *Id.* The district court wholly failed to undertake any analysis of what "reasonable efforts" Smith could or should have undertaken to obtain the evidence in proper form. *See* USCA5 922. Rather, it is evident that the district court used the wrong standard in rendering the following finding:

> These were letters that were mailed directly from the party at issue from presumably a remote area from the plaintiff's address. And it certainly is more reasonable than not that he can use what he actually received.

USCA5 922.

The "more reasonable than not" standard applied by the district court is incorrect. *See id.* The correct standard, found in Rule 807, requires examination of the reasonableness of efforts to obtain the evidence in another, proper form. *See*

FED. R. EVID. 807. Here, it certainly would have been reasonable for Smith to make the effort to request business record affidavits or other admissible testimony from the letters' respective senders, thus avoiding any hearsay concerns in the event the senders were able to sponsor the exhibits. *See* FED. R. EVID. 803(6). Because Smith could and should have used reasonable efforts to obtain these nine letters from their senders, Rule 807's residual hearsay exception does not apply.

Rule 807 also does not apply for a second, independent reason: Smith failed to satisfy clause (C), which requires that "the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence." FED. R. EVID. 807. The district court found that clause (C) was satisfied because "there is no reasonable objection or doubt as to the authenticity of those exhibits." USCA5 923. But Santander consistently objected to and never conceded the exhibits' authenticity. The district court's finding used the wrong standard by impermissibly shifting to Santander the burden to establish that the exhibits were not reliable, when the burden properly was on Smith to establish that they were reliable. *See, e.g., U.S. v. Sutherland*, 656 F.2d 1181, 1204 n.16 (5th Cir. 1981).

The district court admitted each of the nine letters at issue for all purposes even though they contained hearsay statements regarding Smith's purported credit

limits with BoA and Sears and hearsay statements from TransUnion. *See* RE: Tab C (PX 9, 10, 12, 20, 21, 22, 23, 34, and 35).

For each of the foregoing reasons, the district court abused its discretion by basing its ruling on both an erroneous view of the law and a clearly erroneous assessment of the evidence in light of Rule 901's authenticity requirements and the requirements of Rule 807's residual hearsay exception. *See Knight*, 482 F.3d at 351; *Bocanegra*, 320 F.3d at 584; FED. R. EVID. 807, 901.

D. THE DISTRICT COURT'S ERROR IN ADMITTING THESE NINE EXHIBITS WAS NOT HARMLESS AND THE THEREFORE JUDGMENT MUST BE REVERSED

The district court abused its discretion in two fundamental respects by admitting the nine exhibits at issue over Santander's timely hearsay and authentication objections. These nine exhibits were offered by Smith to establish a reduction in his credit and aspects of his multiple disputes with respect to his Santander account. Without PX 20, PX 21, PX 22, PX 23, PX 34, and PX 35 (the BoA and Sears letters) there is no evidence establishing non-parties' reduction of Smith's credit limits. And without PX 9, PX 10, and PX 12 (the TransUnion letters) there are no exhibits in evidence establishing TransUnion's communications regarding any specific disputes Smith purportedly raised. Without the nine letters at issue, therefore, the jury would have had no basis upon which to render its verdict against Santander and the district court's judgment would have had no basis either. Accordingly, the district court's errors in

admitting this evidence affected Santander's substantial rights and the district court's final judgment and denial of Santander's Rule 50 motion must be reversed. *See Knight*, 482 F.3d at 351 (quoting *Bocanegra*, 320 F.3d at 584).

CONCLUSION

For the foregoing reasons, Santander Consumer USA, Inc., respectfully requests that the Court reverse the decision of the district court, vacate the Court's judgment of November 29, 2011 and order of August 23, 2011, and render judgment in Santander's favor.

Respectfully submitted,
HERMES SARGENT BATES, L.L.P.

Gino J. Rossini

By: Gino J. Rossini

GINO J. ROSSINI
State Bar No. 24007953
FRANK ALVAREZ
State Bar No. 00796122
BRENT W. MARTINELLI
State Bar No. 24037037

HERMES SARGENT BATES, LLP
901 Main Street, Suite 5200
Dallas, Texas 75202
(214) 749-6000 Telephone
(214) 749-6100 Facsimile
gino.rossini@hsblaw.com

ATTORNEYS FOR APPELLANT,
SANTANDER CONSUMER USA, INC.

CERTIFICATE OF SERVICE

The undersigned certifies that on the 11th day of May, 2012, a true and correct copy of the foregoing Appellant's Brief was forwarded via certified mail, return receipt requested to the following counsel of record for the Appellee:

Dennis Dean McCarty
Attorney at Law
Mississippi Bar No. 102733
P O Box 54172
Hurst, TX 76054

Gregory Faries
645 Lakeland East Drive, Suite 102
Flowood, MS 39232

Phong Le
Le Law Firm
6065 Hillcroft. Ste. 405
Houston, TX 77081

Gino J. Rossini
Gino J. Rossini

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 contains 12,145 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 2007 in 14 point, Times New Roman font.**

Gino J. Rossini
Gino J. Rossini
Attorney for Appellant

Dated: May 11, 2010