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 REPLY BRIEF

ORAL ARGUMENT REQUESTED

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I. SUMMARY OF APPELLANT'S REPLY

This appeal challenges the legal sufficiency of the evidence to support the District Court's award of damages to Smith for a violation of the Fair Credit Reporting Act (FCRA or Act), 15 U.S.C. § 1601 *et seq*. Smith's Appellee's Brief advances two principal arguments: that Santander cites to the wrong legal standard when arguing that Smith failed to present more than a scintilla of evidence in support of the judgment's damages award, and that Santander has not met its burden regarding Smith's failure to mitigate damages because Santander did not present evidence of the amount of damages Smith reasonably should have mitigated. Both of Smith's arguments fail. First, this Court and District Courts within this circuit recognize that a judgment based on a jury verdict should not stand if no more than a scintilla of evidence supports it, as cases cited by Santander from 2000 onward establish. Second, the District Court's judgment should be reversed because a reasonable jury could only conclude that Smith failed to reasonably mitigate all of his damages. Smith waived the mitigation argument he now attempts to bring, and, in attempted support of his waived argument, Smith exclusively cites inapplicable Texas landlord-tenant cases.

In addition, throughout Smith's Appellee's Brief he argues that his purported "evidence" that Santander caused his damages is circumstantial and "the jury must view circumstantial evidence the same as direct evidence." Appellee's Brief,

pages 26, 30. First, Smith misstates the law because nowhere—in the District Court's charge, case law or otherwise—is a Federal jury required to treat circumstantial and direct evidence alike. Second, Smith mistakenly characterizes his own conclusory statements and unsupported suppositions as "evidence" when they are not. Moreover, the evidence shows that Smith's economic and non-economic damages, if any, were not caused by Santander but rather Smith's voluntary decision not to use his available credit. Smith's credit limits, though reduced, always were sufficient to make every purchase that Smith alleged was needed. As Smith concedes, "I just opted to really not use any credit cards" "so I can try and repair my credit score." USCA5 798. Belying Smith's response, there is no proof that Smith's decision not to use credit after December 2009 would have repaired his credit. To the contrary, Smith testifies that his credit score went back up to an "excellent" rating shortly after Santander stopped reporting his delinquent account. Thus, Smith had no need to "repair" his credit even if there were proof that his decision to not use his available credit would have done so. Smith stubbornly and voluntarily refused to use his available credit through trial in August 2011 regardless. Smith also disingenuously cites his own expert's conclusory opinion that "Smith might never get that credit back" USCA5 891, but the evidence directly contradicts this opinion because Smith himself concedes that he received additional credit on the one occasion he asked for it after January 2010.

Finally, and in the alternative, the District Court's judgment must be reversed because nine documents critical to the jury's verdict were admitted by the District Court in error over Santander's authenticity and hearsay objections.

II. APPELLANT'S REPLY

A. Smith's purported "Statement of Facts" lacks any citation to the record and should be disregarded for this reason alone.

As an initial matter, Santander requests that the "Statement of Facts" section of Smith's Appellee's Brief, pages 9-14, be disregarded in its entirety because it lacks any citation to the record as required by Rule 28 of the Federal Rules of Appellate Procedure. *See* Appellee's Brief, pages 9-14; FED. R. APP. P. 28(a)(7), (b)(4). Lacking citation to the record, neither the Court nor Santander should be required to review the entire record in search of evidence in support of Smith's otherwise unsupported factual assertions.

B. Smith presented no proof of damages or that Santander caused his damages, if any.

Smith does not and cannot challenge the basic proposition that Smith has the burden of establishing actual damages in order to prevail on his FCRA claim against Santander. *See Cousin v. TransUnion Corp.*, 246 F.3d 359, 369 (5th Cir. 2001); *Cahlin v. Gen. Motors Acceptance Corp.*, 936 F.2d 1151, 1160-61 (11th Cir. 1991); *Hyde v. Hibernia Nat'l Bank*, 861 F.2d 446, 448 (5th Cir. 1988); *Pettus v. TRW Consumer Credit Service*, 879 F. Supp. 695, 697-98 (W.D. Tex. 1994). Moreover, even if Smith's damages were established by the evidence, Smith has

the burden of proving that his damages were caused by Santander'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 at 1161.

In this case, Smith failed to meet these burdens because there is no evidence of Smith's damages and no evidence that his damages, if any, were caused by Santander. The only evidence regarding the causation of Smith's alleged damages is that they were caused, if at all, by Smith's own voluntary decisions regarding how he chose to manage his credit.

Smith claims damage from his alleged inability to make certain purchases on credit. These purchases, Smith alleges, were related to his work, travel, family, and the acquisition of a car. Smith also claims damages from his alleged inability to obtain more favorable terms when he chose to refinance his house in April 2010. Smith alleges economic damages in the form of lost bonuses at work and additional expenses associated with refinancing his mortgage. Smith also alleges non-economic damages in the form of alleged emotional distress, humiliation, anxiety, and damage to his reputation and family relationships.

It is important to note that Smith does not dispute that any damage to his credit score was only through one credit reporting agency, TransUnion. *See* USCA5 856-857. Moreover, Smith concedes that any damage to his credit only

lasted from December 2009 to May 2010. USCA5 888-889, 929, 933, 934, 951. Smith also conceded that his TransUnion credit score was "excellent" from June 2010 onward, after Santander corrected the reporting of his debt. *See* USCA5 856-857. And Smith cannot dispute that, even with his alleged lowered credit limits after December 2009, he had adequate credit to make any and all purchases that he alleges were required for work, travel, family, a car, or otherwise.

Not only did Smith's TransUnion score return to "excellent" but Smith admits he then applied for and obtained additional credit after January 2010—that is, one month after Santander reported his delinquent debt. As Smith testified:

> Q. Underneath TransUnion there's a credit category. What is listed as your credit category as of June of 2010?
> A. Excellent.
> ****
> Q. With that in mind, knowing that credit scores of what they are, you never contacted Bank of America after January of 2010 to ask them to increase your credit score—credit limit, correct?
> A. Yes, sir.
> Q. And as we sit here today, you never applied for any other credit cards, correct, from January of 2010 to the present?
> A. I believe I did. I believe I applied for an Express Card.
> Q. And what happened with that?
> A. It was approved.

USCA5 857-858. Defying reason, after his credit returned to "excellent" Smith failed to use his credit and failed to contact his other credit providers to request that they raise credit limits that they previously had lowered.

It is important to further note the glaring lack of proof to support necessary elements of Smith's damages claim. There is no proof that Santander caused Smith's lower credit score or reduced credit limits in the first place. Even if there were such proof, Smith still has presented no proof whatsoever that he was damaged during the brief period when his credit score with one reporting agency, TransUnion, was lowered. Even with respect to the damages Smith does attribute to Santander, he does not present any evidence, direct or circumstantial, that the damage (that is, the foregone purchases) actually occurred during the period when his TransUnion credit rating was lowered, and if these purchases were only needed after Smith's TransUnion score returned to "excellent" Santander could not possibly have caused any of the damage Smith alleges. And there is no evidence Santander ever caused Smith not to use his existing, adequate credit at any time; the only evidence establishes that Smith voluntarily chose not to make credit purchases from December 2009 through the time of trial, before and after his credit rating returned to "excellent" and after he demonstrated the ability to obtain additional credit. Finally, all of Smith's alleged damages, both economic and non-economic, flowed from his voluntary decision not to make purchases on credit. In summary, Smith's damages allegations are predicated on his inability to use credit to make certain purchases, but his allegations fail because Smith's credit was adequate to make the purchases that Smith alleges were needed.

In his Appellee's Brief, Smith alleges that he did not use any credit whatsoever from December 2009 through the time of trial because he was purportedly trying to "get his score and credit limits back up on his own." Appellee's Brief, page 39 (citing USCA5 798). There is no evidence in support of this proffered rationale. Indeed, Smith's own testimony disproves the notion that Smith's decision not to use credit was made to improve his credit score or increase his credit limits. First, Smith himself fails to identify any reasonable explanation as to why he did not use his available credit:

> Q. What is wrong with using the remaining balances you have?
> A. It affects my credit ratio, **I believe**, in a way to where if I start putting debt on my credit cards it may -- I believe it may impact my credit score worse. So I just opted to really not use any credit cards so I can try and repair my credit score.

USCA5 798 (emphasis added). Smith's subjective "belief" is not proof and cannot support a reasonable jury's conclusion that Santander caused Smith not to make credit purchases. *See id.*; USCA5 831-832; *see also Murray v. Red Kap Indus.*, 124 F.3d 695, 698 (5th Cir. 1997) (discounting an interested witness' conclusory testimony); *Mozingo v. Correct Mfg. Corp.*, 752 F.2d 168, 178 (5th Cir. 1985) (disregarding an interested witness's conclusory statement).

In his Appellee's Brief, Smith also argues that he is damaged by Santander because he likely will not ever be able to increase his aggregate credit limit following Santander's reporting of his debt. Smith claims that "[o]nce Bank of

America reduced Smith's credit availability, it would take years to get back or possibly will never get it back." Appellee's Brief, page 36. Specifically, Smith's expert Edwin Johansson testified:

> Q. How difficult is it to get credit in the business environment today?
> A. Hard. The hardest I've seen in ten years.
> Q. After having—**how hard will it be to increase your credit limits after having them slashed**?
> A. I would say almost impossible. **I don't see it. I don't see you getting it back.**
> Q. Can't get it back?
> A. **I'm not saying you can't. I just don't see it. I don't see it every day.**

USCA5 891. Johansson's "I-don't-see-it-every-day" opinion is no evidence but rather baseless on its face and irrelevant to Smith's particular situation. Conclusory and unsubstantiated opinion such as this is insufficient evidence to support a jury verdict. *See, e.g., Lighting Ballast Control, LLC v. Philips Elecs. N. Am. Corp.*, 814 F. Supp. 2d 665, 680 (N.D. Tex. 2011); *James v. Harris County*, 508 F. Supp. 2d 535, 546 (S.D. Tex. 2007). Finally, Johansson's opinion is conclusively disproven by Smith's own testimony that Smith received additional credit after January 2010. *See* USCA5 857-858.

After Santander's reporting of Smith's delinquent debt, Smith's aggregate credit limits were reduced to $22,000. *See* UCSA5 766-777. Upon cross-examination, Smith confirmed that this reduced credit was more than adequate to meet his spending requirements. For instance:

- **Work-related purchases.** Smith alleged that he needed to make work-related purchases on his own personal credit cards and, by not doing so, he missed bonus opportunities. No proof from his employer substantiates any drop-off in his performance whatsoever, much less any bonus opportunity that even existed much less was lost.[1] Moreover, Smith failed to provide any specific examples of items he needed to purchase for work on credit but did not. Smith admitted, however, that the largest total credit balance he ever carried for work-related expenses totaled $11,000. USCA5 847. Thus Smith's $22,000 in credit would have accommodated all such purchases.

- **Daily purchases for self and family.** Smith alleged that he uses cash for all of his purchases now, "radically" lowering his own standard of living and straining his family relationships. USCA5 793-794, 797-798. Smith failed to provide specific examples of any foregone credit purchases other than generally testifying regarding laundry detergent, medicines, car repairs, and the like. USCA5 794-795. Smith had a $22,000 aggregate credit limit and an annual salary of $56,700. USCA5 822. Thus, Smith's credit would have allowed him to charge up to 38.8 % of his annual salary in any given billing cycle, amply accommodating any purchases for himself or his family.

- **Family travel.** The only other strain on family that Smith alleged was that his relationships with his mother and brother were damaged by his not being able to charge trips with them to Florida and Cozumel. USCA5 793-794, 839-840. Smith priced the Florida trip at $3,000-$4,000 and the Cozumel trip at $5,000-6,000. USCA5 839-840. Smith voluntarily chose not to take those trips even knowing that his credit limit at the time was $22,000, more than enough to accommodate both trips. *See* USCA5 793, 804, 839-840.

- **Auto-related purchases.** Smith also testified that "needed" to buy a car after December 2009 but that he did not because his credit was

[1] Smith worked for a restaurant chain, Waterloo Ice House Restaurant Group, as a supervisor responsible for work associated with opening new restraints, USCA5 816, but Smith failed to provide any testimony or other proof as to how the economic downturn impacted his employer's opening of new restaurants or ability to compensate its employees. Thus, Smith presented no evidence to substantiate that he even missed out on any project assignments or that others were given projects that otherwise would have gone to him.

> "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.* There is no proof of this, given that his credit rating was back up to "excellent" more than one full year before trial and Smith never even attempted to finance a car purchase after December 2009 regardless. USCA5 842. Smith also testified that his car required $700 or $800 for a new radiator and $1,500 for transmission repair. USCA5 805. Viewing Smith's testimony in the most favorable light, his $22,000 in credit was more than adequate to make the repairs he testified were needed. USCA5 842-843.

In summary, if Smith was damaged by not using his available credit he caused this damage, not Santander. Even assuming, without proof, that Santander caused Smith's lower credit rating and credit limits and even assuming, without proof, that Smith was damaged based on his failure to make credit purchases, Smith was the cause of any such damage because his decision not to use credit was made voluntarily and irrespective of Santander's alleged actions or omissions.

Smith likewise was the cause of any damage caused by his voluntary decision to refinance his mortgage in April 2010. After he learned of Santander's reporting to TransUnion in December 2009, Smith chose to refinance his mortgage in April 2010 with a 30-year loan of $175,000 at 5.5% from Cornerstone Mortgage. USCA5 801-802, 825, 828. There is no proof that Smith was required to refinance when he did or that his rate would have been lower in April 2010 than 5.5% but for Santander.

Moreover, Smith presented no evidence of the amount of his damages, if any, associated with his voluntary April 2009 refinancing. Smith questioned Santander's expert, Helen Reynolds, regarding the cost of refinancing, but Reynolds responded "I don't know," contrary to Smith's assertion in his Appellee's Brief that Reynolds' response somehow provided proof of his damages. USCA5 990. Smith provides no proof whatsoever regarding the actual amount of his incurred lender fees upon refinancing in April 2010, no proof of the amount of money he saved over the term of his loan by refinancing, and no proof of the amount of additional money he allegedly would have saved but for Santander. Finally, voluntarily choose not to refinance his mortgage after his credit score returned to "excellent" in June 2010, as discussed in greater detail below.

In summary, Smith failed to present more than a scintilla of evidence that he suffered damages or that Santander caused his damages, if any. To the extent Smith suffered damages, if at all, his damages were caused by his own voluntary decisions and not Santander.

C. Smith's argument regarding the Court's applicable standard has no support in the law, misstates Santander's position, and is irrelevant.

Smith's first and primary argument in support of the District Court's judgment is his contention that Santander's appeal somehow fails because Santander argues that Smith failed to present a scintilla of evidence in support of his FCRA damages. *See* Appellee's Brief, pages 2, 8, 18, 19-20, 24, 27-28, 29, 33-

34, and 53. Specifically, Smith contends that Federal Courts do not recognize this "scintilla of evidence" standard. *Id.* Smith's argument mischaracterizes Santander's position, misconstrues the law, and is irrelevant.

First, Santander clearly sets forth the applicable standard under Rule 50(a) and 50(b). *See* Appellant's Brief, pages 7-8. Included in that standard, 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 v. Hyundai Motor Co.*, 650 F.3d 1034, 1039-1040 (5th Cir. 2011); *Foradori v. Harris*, 523 F.3d 477, 485 (5th Cir. 2008); *Wallace v. Methodist Hosp., Sys*., 271 F.3d 212, 218-219 (5th Cir. 2001); *see* Fed. R. Civ. P. 50(a)(1), (b).

Second, Smith misconstrues the law when he argues that "scintilla of evidence" is a doctrine unrecognized in Federal Courts because the Supreme Court and this Circuit consistently have held that a "mere scintilla" of evidence "is insufficient to present a question for the jury." *Delano-Pyle v. Victoria County*, 302 F.3d 567, 572 (5th Cir. 2002); *see Reeves v. Sanderson Plumbing Prods*., 530 U.S. 133, 149, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000); *Wallace*, 271 F.3d at 219; *see also Hunter v. Knoll Rig & Equip. Mfg. Co.*, 70 F.3d 803, 805, 808 (5th Cir. 1995) ("The Court shall grant a motion for judgment as a matter of law only if there is a complete absence of pleading or proof on an issue material to the claim or defense. However, **a mere scintilla of evidence is not sufficient** to present a

question for the jury.") (emphasis added); *Chollett*, 2011 U.S. Dist. LEXIS 113113, 6-7 ("**There must be more than a mere scintilla of evidence** in the record to render the grant of JMOL inappropriate.") (emphasis added) (citing *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 251 (1986); *Krystek v. Univ. of So. Miss.*, 164 F.3d 251, 255 (5th Cir. 1999)). Tellingly, each of the cases cited by Smith apparently to the contrary is from 1966 and before and, therefore, necessarily fails to address the "scintilla" language expressly set forth in *Hunter* (1995), *Reeves* (2000), *Wallace* (2001), and *Delano-Pyle* (2002).

Third, Smith's argument is not relevant because, whether or not this Court disapproves of the "scintilla of evidence" standard, the District Court's judgment should be reversed in this case regardless. Smith was fully heard on the issue of his FCRA damages and a reasonable jury would not have a legally sufficient evidentiary basis to find for Smith. *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*, 70 F.3d at 805, 808.

D. Smith's alleged emotional distress, reputational, and other non-economic damages lack an evidentiary basis.

In his Appellee's Brief, Smith separately addresses what he claims to be evidence in support of his alleged non-economic damages, including his alleged emotional distress, damage to reputation, "anxiety," and "humiliation." *See, e.g.*, Appellee's Brief, pages 46-47. None of these alleged damages can support the

jury's damages award because they do not rise to the level of actual injury. In *Carey v. Piphus*, 435 U.S. 247, 262 (1978), the Supreme Court 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 in *Patterson v. P.H.P. Healthcare Corp.*, 90 F.3d 927, 938 (5th Cir. 1996) recognizing 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*, 246 F.3d at 371 (addressing testimony from the plaintiff that he felt "very upset," "angry," "like nobody was listening," and "trapped," without actual injury).

Smith argues that consumers can recover for loss of sleep, nervousness, frustration, mental anguish, and injury to reputation "over a consumer report for FCRA violations." Appellee's Brief, pages 46-47. However, under the applicable standard set forth above, there is no evidence that Smith's feelings have risen to the level of compensable mental anguish or humiliation. Smith testified that he felt "[a]ngry, upset, confused, helpless," USCA5 798, and that he lost concentration, took a "sleep aid," and Smith answered "Yes, sir" when his attorney asked if his "emotional distress bleed[s] over to work." Smith also testified that "in the beginning" he experienced weight loss and "drinking." *See* USCA5 799, 803.

Smith's testimony was not supported by any other evidence of humiliation, anxiety, emotional distress, or loss of reputation. This self-interested testimony by Smith is not sufficient to satisfy the legal standard for recoverable emotional distress, or reputational or other non-economic damages. *See Patterson*, 90 F.3d at 938; *Cousin*, 246 F.3d at 371.

Moreover, even assuming Smith's non-economic damages were recoverable, there is no evidence that they were caused by Santander regardless. As discussed above, Smith testified that his reputational damages and feelings (humiliation, emotional distress, embarrassment, 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. Smith's decision not to use his credit was his choice and was not caused by Santander, as discussed above. *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 that Smith experienced otherwise compensable reputational or emotional damages because of his lack of spending there is no evidence that Santander was the cause. Without more than a scintilla of evidence that Smith's alleged feelings of mental anguish or reputational harm were compensable and no evidence Santander caused them, the evidence does not support any award of damages against Santander. *See Goodner*, 650 F.3d at 1039-

1040; *Foradori*, 523 F.3d at 485; *see also* Fed. R. Civ. P. 50(a)(1). Accordingly, the District Court's judgment must be reversed on this basis as well.

E. In the alternative, Smith failed to mitigate his damages.

Smith's second principal argument in support of the District Court's judgment attacks Santander's issue regarding Smith's lack of reasonable mitigation of damages, if any. Even in the unlikely event that the Court finds more than a scintilla of evidence supporting the existence of damages caused by Santander, a reasonable jury would not have a legally sufficient evidentiary basis to find against Santander on the issue of mitigation. *See* Fed. R. Civ. P. 50(a)(l); *Greenwood*, 111 F.3d at 1246; *Hunter*, 70 F.3d at 805, 808. Regarding Smith's alleged damages due to his reduced TransUnion credit score and reduced credit limits, Smith reasonably could and should have obtained additional credit and used the remaining credit that was available to him. Indeed, as discussed in Appellant's Brief and highlighted above, Smith's remaining credit was more than adequate to make every purchase that he himself testified he would have made on credit but for Santander. Regarding Smith's alleged damages due to his April 2009 mortgage refinancing, Smith was unreasonable in voluntarily choosing the timing and terms of his refinancing and in his failure to seek alternate refinancing at more favorable terms after his credit returned to an "excellent" rating.

Smith makes two arguments against mitigation. First, Smith argues that "Santander didn't properly argue mitigation of damages during trial" because "Santander didn't prove during the trial the amount that Smith could have mitigated." Appellee's Brief, pages 22-23, 48-50. This argument misapprehends the law and mischaracterizes Santander's position. Smith cites only inapplicable Texas state landlord-tenant law in support of the proposition that "[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." *Id*. at 22, 48 (citing *Hoppenstein Properties, Inc. v. Schober*, 329 S.W.3d 846, 849-50 (Tex. App.—Fort Worth 2010, no pet.); *Austin Hill Country Realty v. Palisades Plaza*, 948 S.W.2d 293, 299-300 (Tex. 1997); *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. 2-02-116-CV, 2004 Tex. App. LEXIS 7518, 4 (Tex. App.—Fort Worth Aug. 19, 2004, no pet.) (mem. op.); *MOB 90 of Tex., L.P. v. Nejemie Alter, M.D., P.A.*, No. 13-08-173-CV, 2009 Tex. App. LEXIS 2681, 6 (Tex. App.—Corpus Christi Apr. 16, 2009, no pet.) (mem. op.)).

All of the cases Smith cites apply to mitigation under Texas law in a landlord-tenant suit.[2] Smith fails to cite a single case applicable to a Federal statutory cause of action. Moreover, Smith's FCRA claim is governed by the jury

[2] "A landlord has a duty to mitigate damages if a tenant abandons the leased premises in violation of the lease." TEX. PROP. CODE. ANN. §91.006(a) (Vernon 2007).

charge submitted by the District Court and the charge does not provide that Santander cannot obtain any reduction in damages if it does not prove the amount of damages that could have been mitigated. For these reasons, Smith's argument must fail. Additionally, Smith waived this argument by failing to object to the jury charge and failing to move for a directed verdict on Santander's mitigation defense at the close of Santander's case.

Finally, and in the alternative, Smith's argument mischaracterizes Santander's position regardless. Santander argued and the evidence established that Smith could and reasonably should have mitigated the full amount of his economic and non-economic damages, if any. *See, e.g.*, Appellant's Brief, pages 34-37. For instance, had Smith simply used his available credit he would have avoided all alleged damages due to (1) missed bonus opportunities at work, (2) missed family trips, (3) inability to make other purchases for himself and his family, and (4) his alleged emotional distress, mental anguish, humiliation, anxiety, and reputational damage. Likewise, Smith was unreasonable in choosing to refinance in April 2010 and to not refinance after his credit score with TransUnion returned to "excellent" in June 2010. *See* USCA5 984-985. Indeed, the evidence established that he reasonably could and should have refinanced at one percentage point less in interest, had Smith reasonably chosen to either wait or refinance again

later in 2010, thus completely mitigating all of his damages, if any. *See* USCA5 984-985, 900.

Finally, Smith attempts to excuse his lack of mitigation based on the argument that the jury "could have returned a much higher damage award if not for Santander arguing mitigation all through the course of the trial." Appellee's Brief, pages 23, 49. However, there is no legally sufficient evidentiary basis for a reasonable jury to find as the jury did in awarding any damages because all of Smith's damages reasonably should have been mitigated. *See Goodner*, 650 F.3d at 1039-1040; *Foradori*, 523 F.3d at 485; *see also* Fed. R. Civ. P. 50(a)(1). Accordingly, the District Court's judgment must be reversed on this basis alone.

F. Further in the alternative, the District Court's judgment must be reversed based on the District Court's error in admitting hearsay testimony that was not properly authenticated.

Further in the alternative, the district court also erred in admitting nine critical exhibits, Plaintiffs' Exhibits 9, 10, 12, 20, 21, 22, 23, 34, and 35, over Santander's timely objections as to hearsay and authenticity. Smith argues that Santander waived objection because "Santander themselves admitted at the beginning of trial half of those documents." Appellee's Brief, page 54. Smith waived this argument by failing to raise it before the District Court at any time. Moreover, this argument belies the fact that, at trial, Smith and the District Court were keenly aware of Santander's objection to the admission of all of these

documents based on authentication and hearsay grounds, arguing extensively regarding each document. *See* RE: Tab C; *see also* 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). Additionally, Santander never discussed any such defense exhibit with any witness or the jury. Finally, the District Court's own discussions regarding admission of these plaintiff's exhibits makes clear that it neither considered nor relied upon any argument that the documents already had been admitted as defense exhibits.

Smith also argues that Santander mischaracterizes the District Court's reasoning with respect to admission of these nine documents and that case law supports their admission. *See* Appellee's Brief, pages 54-67. Smith urged a version of the "reply letter" doctrine to support the nine documents' authenticity but that doctrine was not satisfied. Smith's own defense of the District Court's reasoning makes clear that the District Court short-circuited its Rule 901 authentication analysis and its Rule 801 hearsay analysis based on the faulty supposition that

> [t]hese 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 (emphasis added). Moreover, the District Court held that the residual hearsay exception was broad enough to encompass these nine documents but failed to undergo a complete analysis under Rule 807. *See* FED. R. EVID. 807(B), (C).

Smith specifically argues that he is able to "self-authenticate" the documents at issue because they came to him from third parties and focuses on two unpublished cases in support, *Lehman Bros. Holdings, Inc. v. Cornerstone Mortg. Co.*, CIV. A. H-09-0672, 2011 U.S. Dist. LEXIS 13306 (S.D. Tex. Feb. 10, 2011) and *Callahan & Gauntlett v. Dearborn Ins. Co.*, No. 91-55137, 1992 U.S. App. LEXIS 32626 (9th Cir. Dec. 2, 1992). *See* Appellee's Brief, page 38. In *Lehman Bros.* the District Court urged that the standard for authenticating evidence under Rule 901(a) is "low," 2011 U.S. Dist. LEXIS 13306, 18, and in *Callahan & Gauntlett* the Ninth Circuit held that the witness "obviously could authenticate the letters he wrote" and "the letters written in reply are self-authenticating." *Callahan & Gauntlett*, 1992 U.S. App. LEXIS 32626, 6.

The case law cited by Smith is inapplicable in this case because the nine documents at issue here do not satisfy the reply letter rule; they were not sent in reply to any authenticated letter from the testifier, Smith. *See U.S. v. Wolfson*, 322 F. Supp. 798, 812 (D. Del. 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 expressly 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 v. Hammond*, 175 F. 641, 645 (5th Cir. 1910) (emphasis added); *see also U.S. v. Wolfson*, 322 F. Supp. 798, 812 (Del. 1909). More recently, in *Black v. Callahan* the Northern District of Texas followed the reply letter rule and noted that "letters and presumably telegrams are prima facie authentic **if their content is responsive to prior properly admitted communications**." 876 F. Supp. 131, 132 (N.D. Tex. 1995) (citing *U.S. v. Weinstein*, 762 F.2d 1522, 1533 (11th Cir. 1985) (emphasis added)).

The nine letters at issue in this case simply were not authenticated under the reply letter rule and should not have been admitted under any other alleged lower standard because Smith failed to establish that any of these letters were responsive to prior, properly admitted communications. *See* USCA5 786-788 (PX 9); 790-791 (PX 10); 790-792 (PX 12); 767 (PX 20); 771 (PX 21); 773 (PX 22); 774 (PX 23); 775-776 (PX 34), 776-777 (PX 35). The District Court therefore abused its discretion in admitting the documents. *See*, *e.g.*, *Consol. Grocery*, 175 F. at 645; *Weinstein*, 762 F.2d 1522.

In his reply brief, Smith failed to even address Santander's argument that the District Court's improper application of the reply letter rule puts this and future

defendants in the unfortunate position of having to undertake the time and expense of proving up an opposing party's documents. As the party sponsoring admission of the documents, Smith should be required to undergo the effort and expense of proving them up. Santander should not be forced to disprove the authenticity of Smith's documents, as the District Court's erroneous ruling would mandate.

Moreover, the District Court commented separate, reversible error by admitting these same nine documents over Santander's hearsay objection, ruling that the documents were admissible under Rule 807's residual hearsay exception:

> 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. Smith does not and cannot dispute that Congress intended this residual exception to be used only rarely. *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). 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 wholly failed to undertake any analysis under Rule 807(B) or (C), even though both must be satisfied for the residual hearsay

exception to apply. *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 District Court did not examine the reasonableness of efforts to obtain the evidence in another, proper form, under clause (B). *See* Fed. R. Evid. 807(B). 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, but he chose not to. *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 because 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, and the District Court used the wrong standard by impermissibly shifting to Santander the burden to establish that the exhibits were not reliable

when it was Smith's burden to establish reliability. *See, e.g., U.S. v. Sutherland*, 656 F.2d 1181, 1204 n.16 (5th Cir. 1981).

In Smith's Appellee's Brief he argues that the nine documents at issue were properly self-authenticating in part because "[a] document may be authenticated with circumstantial evidence, 'including the document's own distinctive characteristics and the circumstances surrounding its discovery.'" But the reply letter rule has not been satisfied through circumstantial evidence or otherwise, and should not be misconstrued as some sort of lower standard. Moreover, Smith sites no case law whatsoever in his discussion of Santander's hearsay objections. *See* Appellee's Brief, pages 63-66. Smith merely argues, without support or analysis, that "receiving the letters at home is a proper form of receiving them." Appellee's Brief, page 64. This assertion does not address the hearsay issue or analyze what reasonable efforts Smith could have made to properly obtain the documents.

Finally, with respect to PX 20 and 21, Smith argues that Santander cannot complain of their admission because experts for both Smith and Santander testified as to their contents. Appellee's Brief, pages 65-66. However, at the time of Smith's expert's testimony the one document he testified regarding, PX 21, had already been admitted over Santander's express and extensive objection. *See* USCA5 770-772, 896. Moreover, Santander's expert did not discuss any plaintiff's exhibit because, when she was asked to read verbiage from a page of

paper, the jury was not told what document was being read and the witness testified that she was unfamiliar with the document. Thus, Santander's expert's recitation of unidentified verbiage that she could not authenticate does not put any plaintiff's exhibit before the jury.

In summary, the District Court abused its discretion by admitting these documents based upon erroneous legal constructions regarding Rule 901's authenticity requirements and Rule 807's residual hearsay exception. *See Knight v. Kirby Inland Marine Inc.*, 482 F.3d 347, 351 (5th Cir. 2007); FED. R. EVID. 807, 901. Moreover, the admission of these nine exhibits was harmful. Without PX 20, PX 21, PX 22, PX 23, PX 34, and PX 35 there is no evidence establishing non-parties' reduction of Smith's credit limits, critical to Smith's claim of damages. Without PX 9, PX 10, and PX 12 there are no exhibits in evidence establishing TransUnion's communications regarding any specific disputes Smith purportedly raised. Without these nine documents, the jury would have had no basis upon which to award damages against Santander. 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 for this reason alone. *See Knight*, 482 F.3d at 351.

III. CONCLUSION

For each of the foregoing reasons, and those discussed in Appellant's Brief, Santander Consumer USA, Inc., respectfully requests that the Court reverse the decision of the District Court, vacate the Judgment of November 29, 2011 and Order of August 23, 2011, and render judgment for Santander.

Respectfully submitted,
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CERTIFICATE OF SERVICE

The undersigned certifies that on the 9th day of July, 2012, a true and correct copy of the foregoing Appellant's Reply Brief was forwarded via certified mail, return receipt requested to the following counsel of record for the Appellee:

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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 6,754 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.**

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Dated: July 9, 2012

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