Opinion issued July 10, 2018

In The

Court of Appeals

For The

First District of Texas

NO. 01-17-00216-CV

CASONDRA K. MOCK AND KARY L. MOCK, Appellants

V.

NATIONAL COLLEGIATE STUDENT LOAN TRUST 2007-4, Appellee

On Appeal from the County Civil Court at Law No. 2
Harris County, Texas
Trial Court Case No. 1070563

MEMORANDUM OPINION

This is an appeal from a final judgment in favor of National Collegiate Student Loan Trust 2007-4 in its suit against Casondra and Kary Mock for breach of a student loan agreement and personal guarantee. In four issues, the Mocks contend that (1) the trial court abused its discretion in admitting an affidavit and

business records proffered by the Trust and excluding two exhibits proffered by the Mocks, (2) there is legally and factually insufficient evidence that the Trust is the assignee of the loan's originator and that the Trust suffered any damages, (3) the Trust did not have standing to sue because the loan's guarantor assumed and paid off the debt after the Mocks defaulted, and (4) the loan is void as a matter of equity.

We suggest a remittitur of damages. Conditioned on the suggestion of remittitur, we affirm the trial court's judgment.

Background

In 2007, Casondra Mock, as borrower, and Kary Mock, as cosignor, took out a student loan from Union Federal Savings Bank to finance Casondra's education at the University of Houston—Clear Lake. Eight years later, in 2015, the Mocks were sued by a Delaware statutory trust,[1] National Collegiate Student Loan Trust 2007-4.[2]

In its original petition, the Trust alleged that it had acquired the note from Union before the Mocks' first payment date, when the loan was still in good standing. The Mocks then defaulted on the loan by failing to make payments as

[1] *See* DEL. CODE tit. 12, §§ 3801–26.

[2] Unlike common law trusts, statutory trusts may sue and be sued. *See* TEX. BUS. & COM. CODE § 9.102 cmt. 11 (statutory trust is juridical entity that may sue and be sued); *cf. Ray Malooly Trust v. Juhl*, 186 S.W.3d 568, 570 (Tex. 2006) (general rule is that suit against common law trust must be brought against trustee).

agreed. The Trust sent the Mocks a letter demanding payment in full, but the Mocks failed to comply. The Trust asserted claims for breach of contract and breach of personal guaranty, seeking damages of $37,086.54 for the unpaid balance and $5,645.37 for accrued and unpaid interest.

The case was tried to the bench. Casondra Mock did not appear at trial. Kary Mock appeared pro se, and the Trust appeared through counsel.

The Trust did not call any live witnesses. Instead, it offered into evidence the affidavit of Graham Hord, a legal case manager for the Trust's loan subservicer, Transworld Systems, Inc., and a number of attached business records. The trial court admitted the affidavit and business records into evidence without objection.

In his affidavit, Hord stated that TSI, as the Trust's subservicer, was the designated custodian of records for the Mocks' education loan. According to Hord, the loan records showed that the Mocks took out a loan; the originator assigned the note to the Trust; and the Mocks subsequently failed to make any payments, causing a default. Hord stated that, as of May 2, 2016, the Mocks owed the principal sum of $37,086.54, together with accrued interest of $5,645.37, for a total amount of $42,731.91.

The attachments to Hord's affidavit included three documents relating to the origination of the loan: (1) a "Loan Request/Credit Agreement," (2) a "Note Disclosure Statement," and (3) a cancelled disbursement check.

The Credit Agreement is signed by Casondra Mock, as borrower, and Kary Mock, as cosignor, and is dated July 3, 2007. It reflects that the Mocks applied for a student loan in the amount of $19,903 from Union under its Astrive Undergraduate Loan program to finance Casondra's education at the University of Houston—Clear Lake for the academic period of July 2007 to September 2007. The Disclosure Statement reflects that a loan amount of $19,903 for Loan No. 05232056 was disbursed to Casondra on July 6, 2007 and that she agreed to make 240 monthly payments of $339.01, beginning on December 5, 2009.[3] The cancelled disbursement check is for the amount of $19,903, drawn from the Astrive Undergraduate Loan program account, and made payable to Casondra and Kary. It is dated July 6, 2007 and endorsed by Casondra.

The attachments to Hord's affidavit also included three documents relating to Union's assignment of the loan through an intermediary to the Trust: (1) a "Pool Supplement," dated September 20, 2007, (2) a redacted copy of Schedule 1 to the Pool Supplement, and (3) a "Deposit and Sale Agreement," also dated September 20, 2007.

[3] The principal amount of the note was $22,237.99 because the total amount disbursed to Casondra included both the amount financed ($19,903) as well as funds to cover the loan origination fee ($2,334.99).

Under the Pool Supplement,[4] Union transferred, sold, and assigned to The National Collegiate Funding, LLC "each UFSB Astrive Confirming Loan described in the attached Schedule 1 (the 'Transferred Loans') . . . ." National Collegiate, in turn, agreed to "sell the Transferred Loans to a Purchaser Trust."

The redacted copy of Schedule 1 to the Pool Supplement contains the information for one of the loans that was pooled for sale. The information shows that the loan was the one made to the Mocks. It identifies the loan by the lender (Union Federal Savings Bank), the marketer (Astrive), the loan number (5232056), the borrower's social security number (matching the social security number provided by Casondra in the Credit Agreement), the funds' distribution date (July 6, 2007), and the total net disbursed ($19,903), among other information.

Under the Deposit and Sale Agreement, National Collegiate sold and assigned to the Trust the student loans pooled under various pool supplements listed on an attached Schedule A. Schedule A to the Deposit and Sale Agreement lists the Pool Supplement under which Union assigned the Mocks' loan to National Collegiate.

Finally, the attachments to Hord's affidavit included four documents related to the repayment history of the loan: (1) a "Loan Financial Activity" report, (2) a

[4] The Pool Supplement was entered into pursuant to and made a part of a Note Purchase Agreement, dated March 26, 2007, between The First Marblehead Corporation and Union Federal Savings Bank.

"Deferment/Forbearance" summary, (3) a "Repayment Schedule," and (4) a "Loan Payment History Report." These documents show that the Mocks were granted one deferment and six forbearances but nevertheless defaulted, causing the Trust to charge off the debt in September 2013.

After the Trust presented its evidence, Kary argued that he should not have to repay the loan because it was wrong for Union to have made the "predatory" loan in the first place. In support of his argument, Kary proffered a publication detailing how certain student loans originated during the same time-period as the Mocks' loan were predatory, unregulated, and immoral. The Trust objected that the publication was not relevant and further objected that, to the extent it was relevant, it was only relevant to provide an excuse for the Mocks' failure to pay, which the Mocks never pleaded as an affirmative defense. The trial court excluded the publication without expressly ruling on either of the Trust's objections.

Kary then proffered a second exhibit, an opinion issued by a federal court, which he claimed was "similar" to this case and showed how there was "dysfunction" in the "loan process" and in "the way these loans were generated." The Trust objected that the opinion was not relevant. The trial court sustained the Trust's objection and excluded the opinion as an exhibit.

The trial court entered judgment for the Trust on both of its claims, awarding it damages against the Mocks in the amount of $37,086.54, plus interest and costs. The Mocks appeal.

Admission and Exclusion of Evidence

In their first issue, the Mocks contend that the trial court abused its discretion in admitting Hord's affidavit and the attached business records because (1) Hord's affidavit contained inadmissible hearsay and failed to properly authenticate the attached business records, and (2) the attached business records, even if properly authenticated, did not fall within the business records exception to the hearsay rule. *See* TEX. R. EVID. 803(6) (business records exception to hearsay rule); TEX. R. EVID. 902(10) (business records affidavit exception to authentication rule).

To preserve error in a trial court's ruling to admit evidence, the complaining party must normally make a timely and specific objection and obtain a ruling from the trial court. TEX. R. APP. P. 33.1(a); TEX. R. EVID. 103(a)(1). Kary Mock did neither. At trial, he did not object that the documents proffered by the Trust contained inadmissible hearsay. Nor did he object that the documents were improperly authenticated.

The Mocks concede as much in their brief. They argue that we should nevertheless credit Kary with having made such objections because the Trust

objected to his evidence. The Mocks provide no authority that would support such a holding, and we are aware of none. We hold that the Mocks waived their objections to Hord's affidavit and the business records attached to it. *See Beard v. Endeavor Nat. Gas, L.P.*, No. 01-08-00180-CV, 2008 WL 5392026, at *6 (Tex. App.—Houston [1st Dist.] Dec. 19, 2008, pet. denied) (mem. op.) (holding that appellant waived hearsay and authentication objections to affidavit and attached business records by failing to obtain ruling in trial court); *Gandara v. JP Morgan Chase Bank*, No. 01-03-00926-CV, 2005 WL 615628, at *3 (Tex. App.—Houston [1st Dist.] Mar. 17, 2005, no pet.) (mem. op.) (same); *see also* TEX. R. EVID. 802 ("Inadmissible hearsay admitted without objection may not be denied probative value merely because it is hearsay.").

The Mocks further contend, in their brief under the issues presented, that the trial court abused its discretion in excluding their two exhibits. *See* TEX. R. APP. P. 38.1(f). In their actual argument, however, the Mocks do not explain why the trial court's ruling excluding their proffered exhibits constituted an abuse of discretion. *See* TEX. R. APP. P. 38.1(i). In fact, their argument wholly omits this part of the issue. And even if the Mocks had adequately briefed this part of the issue, there is no indication in the record that Kary made an offer of proof after the trial court sustained the Trust's objections. *See* TEX. R. EVID. 103(a)(2). We hold that the

Mocks waived their complaint that the trial court abused its discretion in excluding their exhibits.

We overrule the Mocks' first issue.

Sufficiency of Evidence

In their second issue, the Mocks contends that there is legally and factually insufficient evidence that (1) they entered into a student loan contract with Union, (2) Union assigned the loan through an intermediary to the Trust, and (3) the Trust suffered $37,086.54 in damages as a result of the Mocks' default.

A. Standard of review

In a trial to the court in which no findings of fact or conclusions of law are filed, the trial court's judgment implies all findings of fact necessary to support it. *Rosemond v. Al–Lahiq*, 331 S.W.3d 764, 766–67 (Tex. 2011). When, as here, a reporter's record has been filed, the implied findings are not conclusive, and a party may challenge both the legal and factual sufficiency of the evidence supporting those findings. *BMC Software Belg., N.V. v. Marchand*, 83 S.W.3d 789, 795 (Tex. 2002). When legal- and factual-sufficiency issues are raised, the applicable standards of review are the same as those applied to review jury findings. *Roberson v. Robinson*, 768 S.W.2d 280, 281 (Tex. 1989) (per curiam). We affirm the trial court's judgment if it can be upheld on any theory finding support in the evidence. *Rosemond*, 331 S.W.3d at 767.

When a party challenges the legal sufficiency of an adverse finding on which she did not have the burden of proof, she must demonstrate that there is no evidence to support the adverse finding. *Croucher v. Croucher*, 660 S.W.2d 55, 58 (Tex. 1983). We will sustain a legal-sufficiency or no-evidence challenge if the record shows one of the following: (1) a complete absence of evidence of a vital fact, (2) rules of law or evidence bar the court from giving weight to the only evidence offered to prove a vital fact, (3) the evidence offered to prove a vital fact is no more than a scintilla, or (4) the evidence establishes conclusively the opposite of the vital fact. *City of Keller v. Wilson*, 168 S.W.3d 802, 810 (Tex. 2005). In conducting a legal-sufficiency review, a "court must consider evidence in the light most favorable to the verdict, and indulge every reasonable inference that would support it." *Id*. at 822.

If there is more than a scintilla of evidence to support the challenged finding, we must uphold it. *Formosa Plastics Corp. USA v. Presidio Eng'rs & Contractors, Inc*., 960 S.W.2d 41, 48 (Tex. 1998). "[W]hen the evidence offered to prove a vital fact is so weak as to do no more than create a mere surmise or suspicion of its existence, the evidence is no more than a scintilla and, in legal effect, is no evidence." *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 601 (Tex. 2004). However, if the evidence at trial would enable reasonable and fair-minded people to differ in their conclusions, then factfinders must be allowed to do so. *City*

of Keller, 168 S.W.3d at 822; *see King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 751 (Tex. 2003). "A reviewing court cannot substitute its judgment for that of the trier-of-fact, so long as the evidence falls within this zone of reasonable disagreement." *City of Keller*, 168 S.W.3d at 822.

In conducting a factual-sufficiency review, we must consider, weigh, and examine all the evidence that supports or contradicts the factfinder's determination. *See Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 242 (Tex. 2001); *Plas–Tex, Inc. v. U.S. Steel Corp*., 772 S.W.2d 442, 445 (Tex. 1989). We may set aside the verdict only if the evidence is so weak or the finding is so against the great weight and preponderance of the evidence that it is clearly wrong or manifestly unjust. *Pool v. Ford Motor Co*., 715 S.W.2d 629, 635 (Tex. 1986).

B. Formation of student loan contract

The Mocks contend that there is insufficient evidence that they entered into a student loan contract with Union. The Trust responds that the Credit Agreement, Disclosure Statement, and cancelled disbursement check are sufficient evidence of formation of a student loan contract.

"To prevail on a breach of contract claim, a party must establish the following elements: (1) a valid contract existed between the plaintiff and the defendant; (2) the plaintiff tendered performance or was excused from doing so; (3) the defendant breached the terms of the contract; and (4) the plaintiff sustained

damages as a result of the defendant's breach." *West v. Triple B Servs., LLP*, 264 S.W.3d 440, 446 (Tex. App.–Houston [14th Dist.] 2008, no pet.). The elements of a valid contract are: (1) an offer, (2) an acceptance, (3) a meeting of the minds, (4) each party's consent to the terms, and (5) execution and delivery of the contract with the intent that it be mutual and binding. *Beverick v. Koch Power, Inc*., 186 S.W.3d 145, 150 (Tex. App.—Houston [1st Dist.] 2005, pet. denied). When an offer prescribes the manner of acceptance, compliance with those terms is required to create a contract. *Padilla v. LaFrance*, 907 S.W.2d 454, 460 (Tex. 1995). If one party signs a contract, the other party may accept by his acts, conduct, or acquiescence to the terms, making it binding on both parties. *Jones v. Citibank (S.D.), N.A.*, 235 S.W.3d 333, 339 (Tex. App.—Fort Worth, no pet.). To be enforceable, a contract must be sufficiently certain to enable a court to determine the rights and responsibilities of the parties. *Williams v. Unifund CCR Partners Assignee of Citibank*, 264 S.W.3d 231, 236 (Tex. App.—Houston [1st Dist.] 2008, no pet.).

The Credit Agreement shows that, on July 3, 2007, Casondra Mock, as borrower, and Kary Mock, as cosignor, requested a loan in the amount of $19,903 from Union under its Astrive Undergraduate Loan program to finance Casondra's education at the University of Houston—Clear Lake for the academic period of July 2007 to September 2007.

Under the Credit Agreement, the Mocks promised to pay any loan made to them by Union:

> I promise to pay to you the principal sum of the Loan Amount Requested shown on the first page of the Credit Agreement, to the extent it is advanced to me or paid on my behalf, and any Loan Origination Fee . . . .

The Credit Agreement set forth the method by which the Mocks would agree to the terms of any loan offered by Union:

> By signing this Credit Agreement, and submitting it to the Lender, I am requesting that you make this loan to me in an amount equal to the Loan Amount Requested plus any Loan Origination Fee . . . . If you approve this request and agree to make this loan, you will notify me in writing and provide me with a Disclosure Statement, as required by law, at the time the loan proceeds are disbursed. The Disclosure Statement is incorporated herein by reference and made a part hereof. This Disclosure Statement will tell me the amount of the loan which you have approved, the amount of the Loan Origination Fee, and other important information. I will let you know that I agree to the terms of the loan as set forth in this Credit Agreement and in the Disclosure Statement by doing either of the following: (a) endorsing or depositing the check that disburses the loan proceeds; or (b) allowing the loan proceeds to be used by or on behalf of the student Borrower without objection.

And the Credit Agreement set forth the method by which the Mocks could cancel the loan:

> If I am not satisfied with the terms of my loan as disclosed in the Disclosure Statement, I may cancel my loan. To cancel my loan, I will give you a written cancellation notice within ten (10) days after I receive the Disclosure Statement.

The Credit Agreement also addressed deferment periods, terms of repayment, interest, default, and acceleration.

The Disclosure Statement reflects that, on July 6, 2007, Union approved the Mocks' loan request and disbursed to Casondra loan proceeds of $19,903 for Loan No. 05233056. The terms included an origination fee of $2,334.99; interest at 13.876 percent; and 240 payments of $339.01, due on the 5th of each month, beginning on December 5, 2009.

The cancelled disbursement check is evidence that the Mocks agreed to the terms of the loan as set forth in the Credit Agreement and Disclosure Statement by endorsing and depositing the check that disbursed the loan proceeds. There is no evidence that the Mocks ever cancelled or attempted to cancel the loan after depositing the loan proceeds.

Thus, the evidence shows that the Mocks applied for a loan from Union, Union offered them a loan on the terms set forth in the Credit Agreement and Disclosure Statement, and the Mocks accepted the offer by depositing the check.

The Mocks nevertheless argue that the evidence is insufficient to show a valid contract because, although the Credit Agreement contains a promise, the promise was qualified as follows: "I promise to pay to you the principal sum of the Loan Amount Requested shown on the first page of this Credit Agreement, *to the extent it is advanced to me or paid on my behalf*." (Emphasis added.) The Mocks

assert that their promise to pay was "contingent" on the loan being approved and, because Union had not yet approved the application when the Mocks signed it, there could not yet have been a meeting of the minds on the essential terms of the contract, including the amount of the loan and the cost-of-credit terms. They assert that, although the terms do appear on the Disclosure Statement, the Disclosure Statement is dated July 6, 2007, which is three days after July 3, 2007, the date the Credit Agreement was signed. The Mocks contend that, although they signed the Credit Agreement, it does not, without more, constitute a binding contract. We disagree.

The Credit Agreement and Disclosure Statement, taken together, evidence the essential terms of the loan, including the amount of the loan. The Disclosure Statement and cancelled disbursement check both evidence the Mocks' assent to those terms. The Mocks' argument overlooks "well-established law that instruments pertaining to the same transaction may be read together to ascertain the parties' intent, even if the parties executed the instruments at different times and the instruments do not expressly refer to each other." *Fort Worth Indep. Sch. Dist. v. City of Fort Worth*, 22 S.W.3d 831, 840 (Tex. 2000). "In appropriate circumstances, courts may construe all the documents as if they were part of a single, unified instrument." *Id.*

We hold that there is legally and factually sufficient evidence that the Mocks entered into a student loan contract with Union. *See Foster v. Nat'l Collegiate Student Loan Tr. 2007-4*, No. 01-17-00253-CV, 2018 WL 1095760, at *10 (Tex. App.—Houston [1st Dist.] Mar. 1, 2018, no pet.) (mem. op.) (in similar case, holding that credit agreement and note disclosure statement constituted sufficient evidence of valid loan contract).

C. Assignment of note

The Mocks contend that there is insufficient evidence that the Trust acquired their loan. The Trust responds that the Pool Supplement, redacted Schedule 1 to the Pool Supplement, and Deposit and Sale Agreement show that the loan was assigned by Union to National Collegiate and then by National Collegiate to the Trust.

The Pool Supplement, dated September 20, 2007, shows that Union transferred, sold, and assigned to National Collegiate the Astrive student loans listed on an attached Schedule 1 and that National Collegiate agreed to sell those loans to a purchaser trust. The redacted copy of Schedule 1 to the Pool Supplement lists a loan originated by Union, under its Astrive Undergraduate Loan program, in the amount of $19,903 that was disbursed on July 6, 2007 to Casondra, who is identified by the last four digits of her social security number. The Deposit and Sale Agreement, also dated September 20, 2007, shows that National Collegiate

sold and assigned to the Trust the student loans listed on Schedule 1 of each pool supplement listed on an attached Schedule A. Schedule A to the Deposit and Sale Agreement lists the Pool Supplement under which Union assigned the Mocks' loan to National Collegiate. Thus, these three documents show that Union assigned the Mocks' loan to National Collegiate, which, in turn, assigned the loan to the Trust.

We hold that there is sufficient evidence that the Mocks' loan was assigned to the Trust. *See id.* at *7–8 (holding that pool supplement, redacted loan transfer schedule, and deposit and sale agreement constituted sufficient evidence that loan was assigned to trust by originator through intermediary).

D. Damages

1. Interest rate

The Mocks contend that there is insufficient evidence of the loan's interest rate during the term of the loan.

The Credit Agreement in paragraph D discusses in detail how interest on the Mocks' loan was to be calculated throughout its term and provides for capitalization of interest during deferment. Paragraph I also provides for capitalization of interest and fees upon default. The Disclosure Statement states an annual percentage rate of 13.876 percent, with a variable rate, based on the one-month London Interbank Offered Rate (LIBOR) index, published in the "Money Rates" section of the Wall Street Journal (Eastern Edition) on the first business day

of the preceding calendar month. The Loan Financial Activity report lists the amount of "Interest Accrued" each month on the Mocks' loan, through September 4, 2013.

The Mocks provide no evidence and do not contend that the interest rate reflected in these documents is in any way incorrect. Nor do they provide any authority for their argument that the Trust was required to support its claim with calculations supporting each month's interest computation over the life of the loan.

We hold that there is sufficient evidence of the loan's interest rate. *See id.* at *11 (holding that credit agreement, disclosure statement, and loan financial activity report constituted sufficient evidence of loan's interest rate).

2. Acceleration

The Mocks contend that there is insufficient evidence that the maturity of the loan was accelerated.

The Disclosure Statement reflects that the Mocks agreed to pay the loan over a period of 20 years, beginning in December 2009. The Credit Agreement states that, in the event of a default on the loan, the Trust will "have the right to give [the Mocks] notice that the whole outstanding principal balance, accrued interest, and all other amounts payable to [the Trust] under the terms of this Credit Agreement, are due and payable at once . . . ."

"Where the holder of a promissory note has the option to accelerate maturity of the note upon the maker's default, equity demands notice be given of the intent to exercise the option." *Ogden v. Gibraltar Sav. Ass'n*, 640 S.W.2d 232, 233 (Tex. 1982). "The accelerated maturity of a note, which is initially contemplated to extend over a period of months or years, is an extremely harsh remedy." *Allen Sales & Servicenter, Inc. v. Ryan*, 525 S.W.2d 863, 866 (Tex. 1975). A creditor "must give the debtor an opportunity to pay the past due installments before acceleration of the entire indebtedness; therefore, demand for payment of past due installments must be made before exercising the option to accelerate." *Williamson v. Dunlap*, 693 S.W.2d 373, 374 (Tex. 1985). The note holder must also notify the maker both of its intent to accelerate and of the acceleration. *Ogden*, 640 S.W.2d at 233–34.

There is no evidence in the record before us that the Trust provided the Mocks with either of the required notices. The Trust alleged in its petition that, as a prerequisite to acceleration, it served the Mocks with a letter demanding payment in full. However, the demand letter is not part of the record, and pleadings are not evidence. We hold that the evidence is legally and factually insufficient to support the full amount of actual damages awarded. *See Foster*, 2018 WL 1095760, at *11–12 (holding that evidence was insufficient to show acceleration when trust presented no evidence that it provided debtor with notice of acceleration).

When acceleration is invalid, the plaintiff is entitled to judgment against the defendant only "for past due installments plus accumulated interest as provided in the note." *Williamson*, 693 S.W.2d at 374.

The Mocks request that we "reform the judgment to an amount commensurate with the sum of missed installment payments through the date suit was filed, or enter an order providing for remittiture as an alternative vehicle to accomplish a proper adjustment of the amount of contract damages supported by the record as having been caused by breach of contractual duties."

The evidence shows that the sum of all monthly payments due, beginning on December 5, 2009, as stated in the Disclosure Statement, through the date of the filing of suit, November 25, 2015, is $24,408.72.[5]

A court of appeals may suggest a remittitur when there is insufficient evidence to support the full amount of damages awarded but sufficient evidence to support a lesser award. *Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. Nat'l Dev. & Research Corp.*, 299 S.W.3d 106, 124 (Tex. 2009); *see* TEX. R. APP. P. 46.3. If part of a damage verdict lacks sufficient evidentiary support, the proper course is to suggest a remittitur of that part of the verdict, giving the party prevailing in the trial court the option of accepting the remittitur or having the case remanded for a new trial. *Akin, Gump*, 299 S.W.3d at 124.

[5] Calculated as $339.01 in monthly payments over 72 months.

As set out above, the record contains some evidence that breach-of-contract damages exist, but, without evidence of notice of acceleration, the evidence does not support the full amount awarded by the trial court. The evidence does, however, allow us to determine a lesser award. *See ERI Consulting Eng'rs, Inc. v. Swinnea*, 318 S.W.3d 867, 877–78, 880 (Tex. 2010) (holding there was "legally sufficient evidence to prove a lesser, ascertainable amount of lost profits with reasonable certainty" and remanding case to court of appeals to consider suggestion of remittitur). Based on the record, the evidence is legally and factually sufficient to support a lesser damages finding of $24,408.72, which represents the sum of all monthly payments due, beginning on December 5, 2009, as stated in the Disclosure Statement, through the filing of suit on November 25, 2015. *See PNS Stores, Inc. v. Munguia*, 484 S.W.3d 503, 513 (Tex. App.—Houston [14th Dist.] 2016, no pet.) (suggesting remittitur to "the highest amount of actual damages supported by the evidence").

We sustain in part and overrule in part the Mocks' second issue.

Standing

In their third issue, the Mocks argue that the Trust lacked standing to sue because the loan was paid in full by the loan's guarantor, The Education Resources Institute, Inc. According to the Mocks, the last entry in the Loan Financial Activity

report reflects a principal balance of zero dollars, which shows that TERI assumed and paid the debt after the Mocks defaulted. We disagree.

The Loan Financial Activity report reflects that the principal balance decreased to zero when a $37,086.54 "transaction" occurred in September 2013. The Loan Payment History Report reflects that the "transaction" did not refer to TERI paying the debt; rather, it referred to the Trust charging off the debt. The Mocks did not object to this evidence in the trial court, and they did not proffer any evidence showing that, contrary to the reports, the principal balance decreased to zero because the debt was paid by TERI.

We overrule the Mocks' third issue.

Equity

In their fourth issue, the Mocks argue that their loan is void because it is usurious. Specifically, the Mocks argue that their loan is governed in part by Rhode Island law and that under Rhode Island law their loan is usurious and therefore unenforceable as against public policy.

Under Rhode Island law, loans that charge interest at a rate in excess of 21 percent per annum are usurious and void. *NV One, LLC v. Potomac Realty Capital, LLC*, 84 A.3d 800, 805 (R.I. 2014). The annual percentage rate of the Mocks' loan was 13.876 percent. The loan's APR was variable and based in part on the one-month LIBOR rate. The Mocks have presented no evidence that their loan's APR

exceeded 21 percent due to an increase in the one-month LIBOR rate. We hold that the Mocks have failed to show that their loan's interest rate was usurious under Rhode Island law.

We overrule the Mocks' fourth issue.

Conclusion

We conclude that the evidence is insufficient to support the trial court's award of actual damages in the amount of $37,086.54, but the evidence is sufficient to support an award of actual damages in the amount of $24,408.72. Thus, we suggest a remittitur of the actual damages award to $24,408.72. In accordance with Rule 46.3 of the Texas Rules of Appellate Procedure, if the Trust files with this Court, within fifteen days of the date of this opinion, a remittitur to that amount, the trial court's judgment on damages will be modified and affirmed. *See* TEX. R. APP. P. 46.3. If the suggested remittitur is not timely filed, the trial court's judgment will be reversed and the cause remanded for a new trial on liability and damages. *See Rancho La Valencia, Inc. v. Aquaplex, Inc*., 383 S.W.3d 150, 152 (Tex. 2012) (holding that, if party rejects remittitur, court of appeals must remand for new trial on liability and damages).

Harvey Brown
Justice

Panel consists of Chief Justice Radack and Justices Massengale and Brown.