**Opinion issued March 1, 2018**

**In The**

# Court of Appeals

**For The**

# First District of Texas

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**NO. 01-17-00253-CV**

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**LADANTA D. FOSTER, Appellant**

**V.**

**NATIONAL COLLEGIATE STUDENT LOAN TRUST 2007-4, Appellee**

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**On Appeal from the 412th District Court**
**Brazoria County, Texas**
**Trial Court Case No. 84872-CV**

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## MEMORANDUM OPINION

Appellant, Ladanta D. Foster, appeals the trial court's judgment, entered after a bench trial, in favor of appellee, National Collegiate Student Loan Trust 2007-4 ("the Trust"), in its suit against Foster for breach of a student loan agreement. In

two issues, Foster challenges the legal and factual sufficiency of the evidence and contends that the trial court erred in admitting evidence.

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

## Background

In its original petition, the Trust[1] alleged that, in 2007, Foster, a student at Texas Southern University, obtained a student loan from JPMorgan Chase Bank, N.A. ("Chase"). Prior to Foster's first payment date, and at a time while the loan was still in good standing, the note was assigned to the Trust. The Trust, as owner and holder of the note, asserted that Foster had defaulted by not paying as agreed. On December 9, 2015, the Trust sent Foster a letter demanding payment in full, however, Foster did not comply. Subsequently, the Trust brought a breach-of-contract claim against Foster, seeking damages of $45,277.02. Foster answered,

[1] We note that, ordinarily, a trust cannot sue in its own name; rather, a representative must assert claims on behalf of the trust. *Ray Malooly Trust v. Juhl*, 186 S.W.3d 568, 570 (Tex. 2006). Here, however, the Trust is a "Delaware Statutory Trust." A statutory trust is formed by the filing of a record, commonly referred to as a certificate of trust, in a public office pursuant to a statute. TEX. BUS. & COM. CODE ANN. § 9.102; *see, e.g.*, Uniform Statutory Trust Entity Act § 201 (2009); Delaware Statutory Trust Act, DEL. CODE ANN. tit. 12, § 3801 et seq. A statutory trust is a juridical entity, separate from its trustee and beneficial owners, that may sue and be sued, own property, and transact business in its own name. TEX. BUS. & COM. CODE ANN. § 9.102.

generally denying the allegations, filed a verified denial, and asserted various affirmative defenses.

At trial, although no witnesses were called, the Trust moved to admit into evidence, as "Exhibit 1," the "Business Records Affidavit" of Dudley Turner, a Legal Case Manager for Transworld Systems Inc. ("TSI"), who testified, in pertinent part, as follows:

> 1. I am employed by [TSI], the subservicer for [the Trust] pertaining to the educational loan forming the subject matter of this action.
> 2. TSI has been contracted to perform the duties of the Subservicer for [the Trust] by U.S. Bank, National Association, the Special Servicer of [the Trust]. TSI, as the Subservicer of the [Trust], is the designated custodian of records for [Foster's] educational loan. Additionally, TSI maintains the dedicated system of record for electronic transactions pertaining to [Foster's] educational loan, including, but not necessarily limited to, payments, credits, interest accrual and any other transactions that could impact [Foster's] educational loan. . . .
> 3. . . . . As an employee of TSI, I am duly authorized by [the Trust] and U.S. Bank, National Association to make the representations contained in this Affidavit.
> 4. I have access and training on the system of record utilized by TSI to enter and maintain loan account records and documentation concerning [Foster's] educational loan for [the Trust].
> 5. I am familiar with the process by which TSI receives prior account records, including origination records from the time the loan was requested and/or disbursed to [Foster] and/or the student's school on their behalf.
> 6. As custodian of records it is TSI's regularly-conducted business practice to incorporate prior loan records and/or documentation into TSI's business records.

7. I am further competent and authorized to testify regarding this educational loan through personal knowledge of the business records maintained by TSI as custodian of records, including electronic data provided to TSI related to [Foster's] educational loan, and the business records attached to this Affidavit.

8. This lawsuit concerns an unpaid loan owed by [Foster] to [the Trust]. Specifically, [Foster] entered into an educational loan agreement at [Foster's] special instance and request. A loan was extended for [Foster] to use pursuant to the terms of the loan agreements. [Foster] has failed, refused, and/or neglected to pay the balance pursuant to the agreed terms.

9. Educational loan records are created, compiled and recorded as part of regularly conducted business activity at or near the time of the event and from information transmitted from a person with personal knowledge of said event and a business duty to report it, or from information transmitted by a person with personal knowledge of the accounts or events described within the business record. Such records are created, kept, maintained, and relied upon in the course of ordinary and regularly conducted business activity.

10. I have reviewed the educational loan records described in this affidavit regarding account number xxxxx7063-004-PHEA. No payment has been received on this account. After all payments, credits and offsets have been applied, [Foster] owes the principal sum of $45,277.02, together with accrued interest in the amount of $6,179.73, totaling the sum of $51,456.75 as of 11/30/2016. Attached hereto and incorporated within are 31 pages of [the Trust's] business records further described below.

11. Attached hereto and incorporated herein as Exhibits "B" through "G" are 31 pages of [the Trust's] business records. These records are created, compiled and recorded as part of regularly conducted business activity at or near the time of the event and from information transmitted from a person with personal knowledge or said event and a business duty to report it, or from information transmitted by a person with personal knowledge of the account or events described within the business record. Such records are created, kept, maintained, and relied upon in the course of ordinary and regularly conducted business activity . . . .

. . . .

> 13. [Foster] opened an educational loan with [Chase] and funds were disbursed on 5/31/2007. [Foster's] educational loan was then transferred, sold and assigned to National Collegiate Funding LLC, who in turn transferred, sold and assigned [Foster's] educational loan to [the Trust] on 9/20/2007 for valuable consideration, in the course of the securitization process. [Foster's] educational loan was in good standing and not in default on 9/20/2007.

To his affidavit, Turner attached 31 pages of documents, as follows:

Exhibit A is a November 13, 2014 letter from U.S. Bank, as special servicer for the Trust, "confirm[ing]" that TSI is the "dedicated records custodian with respect to all student loans owned by [the Trust]" and is "fully authorized to execute affidavits regarding account documents" and to "provide testimony on behalf of [the Trust]."

Exhibit B is a "Credit Agreement" signed by Foster and a "Note Disclosure Statement." The Credit Agreement, dated May 23, 2007, states that Foster applied for an educational loan of $25,000.00 from Chase. The Note Disclosure Statement reflects that a loan amount of $25,000.00 was disbursed to Foster, or on her behalf, and that she agreed to make 240 monthly payments of $381.45, beginning on July 12, 2009.

Exhibit C contains a "Pool Supplement," "Loan Transfer Schedule," and "Deposit & Sale Agreement," pertaining to Chase's assignment of loans through an intermediary to the Trust.

Exhibit D is a "Loan Financial Activity Report," which reflects the monthly balance and interest accrued on Foster's loan, that she did not make any payments, and a final "Principal Balance" of $43,560.51. Exhibit E is a "Deferment/Forbearance Summary," showing Foster's deferment and forbearance periods. Exhibit F is a "Repayment Schedule." Exhibit G is a "Loan Payment History Report."

Foster objected to the admission of the evidence, and the trial court overruled the objection and admitted the evidence, as follows:

> THE COURT: . . . . Any objection to this business records affidavit?
>
> [Foster]: *Well, the only objection I will make, Your Honor, is that the affiant [Turner] asserts that he is the custodian of records for [TSI] whereas the Plaintiff is [the Trust]. So we would like to see how those are interrelated, if he is representing—if he's custodian of [TSI] what relationship does that bear to [the Trust]? In looking at the affidavit I'm not entirely sure if that's clear. If [the Trust's] counsel wants to point [to] something I may be missing out or that the Court may not see and present any evidence to that. Otherwise, we object to the entire submission of evidence as hearsay.*
>
> THE COURT: Well, of course that's what business records affidavit filed the requisite period of time [sic], it allows hearsay evidence. It's an exception to the hearsay rule.
>
> . . . .
>
> Now what connection does [TSI] have to this transaction?

[The Trust]: Your Honor, TSI, as you can see from the affidavit, is both [the Trust's] designated custodian of records and they also create and maintain the records pertaining to the loan. Proof and confirmation of TSI's capacity as sub servicer can actually be found in Exhibit A which starts on page 7. Actually it just is page 7. As you'll see, there is a letter from U.S. Bank who is the indentured trustee for National Collegiate Student Loan Trust which is a matter of public record and they state that [TSI] is also the record custodian with respect to all student loan accounts. . . .

[Foster]: We would like to see that entered as an exhibit if we could please, just to establish the standing issue. If U.S. Bank is bringing this lawsuit.

THE COURT: Okay.

. . . .

Why don't you do them as Exhibit 2 and 2-A?

[The Trust]: All right. I will do that. So, Your Honor, [the Trust] would like to introduce Exhibit 2 which is the full indenture which is on file with the U.S. Securities and Exchange Commission. Exhibit 2-A as requested is a copy of the excerpt of both the trust agreement and the indenture with highlights that show that U.S. Bank is the indentured trustee for [the Trust].

. . . .

THE COURT: Okay. So you've [Foster] had previous access to this at some point?

[Foster]: I haven't seen it, Your Honor. That doesn't mean it wasn't provided.

THE COURT: I understand. Exhibit 2 and 2-A are admitted. And based upon 2 and 2-A your objection to [the Trust's] *Exhibit 1 is overruled and [the Trust's] Exhibit 1 is admitted*.

[The Trust]: Thank you, Your Honor. Your Honor, if counsel is not going to offer any evidence I would ask they state that fact for the record and then rest.

[Foster]: We do not have any contrary evidence at this time, Your Honor. So we do rest.

(Emphasis added.)

The trial court then rendered a judgment in favor of the Trust on its breach-of-contract claim, awarding it damages against Foster in the amount of $45,277.02, plus interest and costs. The trial court denied Foster's request for findings of fact and conclusions of law as untimely filed and denied her motion for new trial.

## Admission of Evidence

In her first issue, Foster argues that the trial court erred in overruling her hearsay objection and admitting Exhibit 1 under the business-records exception to the hearsay rule because the business-record affiant, Turner, is "not properly qualified to testify as custodian of records." Foster also asserts that the "attached documentary exhibits do not meet the definition of business records." She asserts that the trial court's error resulted in an improper judgment because the Trust did not offer any other evidence to support its breach-of-contract claim.

### A. Standard of Review

Evidentiary rulings are committed to the trial court's sound discretion. *Bay Area Healthcare Grp., Ltd. v. McShane*, 239 S.W.3d 231, 234 (Tex. 2007). A trial

court abuses its discretion if it rules without regard to guiding rules or principles, and we must uphold a trial court's evidentiary ruling if it is supported on any legitimate basis. *Owens–Corning Fiberglas Corp. v. Malone*, 972 S.W.2d 35, 43 (Tex. 1998). We will not reverse a trial court for an erroneous evidentiary ruling unless the error probably caused the rendition of an improper judgment. *Id.*; *see also* TEX. R. APP. P. 44.1; *Interstate Northborough P'ship v. State*, 66 S.W.3d 213, 220 (Tex. 2001). In determining whether the excluded evidence resulted in the rendition of an improper judgment, we review the entire record. *Interstate Northborough P'ship*, 66 S.W.3d at 220. A successful challenge to a trial court's evidentiary ruling ordinarily requires the complaining party to demonstrate that the judgment turns on the particular evidence excluded or admitted. *Id.* We will not reverse a judgment on the basis of erroneously excluded evidence if the evidence is cumulative and not controlling on a material issue dispositive to the case. *Id.*

Hearsay is an out-of-court statement offered in evidence to prove the truth of the matter asserted and is inadmissible unless a statute or rule of exception applies. TEX. R. EVID. 801(d), 802. The proponent of hearsay has the burden to show that the testimony fits within an exception to the general rule. *Volkswagen of Am., Inc. v. Ramirez*, 159 S.W.3d 897, 908 n.5 (Tex. 2004).

Under the business-records exception, evidence that is otherwise inadmissible as hearsay may be admissible if the proponent of the evidence demonstrates that

(1) the record was made at or near the time of the event by, or from information transmitted by, someone with knowledge; (2) the record was kept in the regular course of a regularly conducted business activity; and (3) making the record was a regular practice of that activity. TEX. R. EVID. 803(6); *see In re E.A.K.*, 192 S.W.3d 133, 141 (Tex. App.—Houston [14th Dist.] 2006, pet. denied). These prerequisites to admissibility may be shown by the testimony of the custodian or other qualified witness or by an affidavit that complies with Rule 902(10). TEX. R. EVID. 803(6)(D), 902(10).

Rule 902(10) provides that certain items of evidence are self-authenticating and require no extrinsic evidence of authenticity in order to be admitted, including:

> Business Records Accompanied by Affidavit. The original or a copy of a record that meets the requirements of Rule 803(6) or (7), if the record is accompanied by an affidavit that complies with subparagraph (B) of this rule and any other requirements of law. . . .

TEX. R. EVID. 902(10). Subparagraph (B) provides a sample form of a sufficient affidavit, which enumerates the elements of Rule 803(6), discussed above. *Id.*

**B. Business-Records Affidavit**

Turner, in his affidavit, testified that TSI is the subservicer of the Trust and is the designated custodian of records for Foster's educational loan. Turner states that he is an employee of TSI and is authorized by the Trust to testify regarding Foster's educational loan. Turner stated that he has personal knowledge of the business records maintained by TSI as custodian of records, including electronic data

provided to TSI related to Foster's loan, and the business records attached to his affidavit. The loan records are created, compiled, and recorded as part of regularly conducted business activity, at or near the time of the event and from information transmitted from a person with personal knowledge of said event and a business duty to report it, or from information transmitted by a person with personal knowledge of the accounts or events described within the business record. *See* TEX. R. EVID. 803(6). He also stated that such records are created, kept, maintained, and relied upon in the course of ordinary and regularly conducted business activity. *See id.*

Further, Turner testified that it is TSI's regularly-conducted business practice to incorporate prior loan records and documentation into TSI's business records, and he is familiar with the process by which TSI receives prior account records, including origination records from the time that loans are requested and disbursed. *See Simien v. Unifund CCR Partners*, 321 S.W.3d 235, 240–41 (Tex. App.—Houston [1st Dist.] 2010, no pet.).

With respect to the attached business records, Turner testified that Exhibit A is a "true and correct copy of confirmation of TSI's capacity as Subservicer." Exhibit B is a "true copy of the underlying Credit Agreement/Promissory Note and Note Disclosure Statement" pertaining to Foster's Loan. Exhibit C is a "true and correct copy" of the agreement through which Foster's loan was sold to the Trust, and the exhibit contains a redacted copy of the Schedule of transferred loans

referenced within the Pool Supplement. Exhibit D is a "true copy of the Loan Financial Activity demonstrating the loan balance from disbursement to charge off." Exhibits E is a "true copy of the Deferment/Forbearance Summary." Exhibit F is a "true copy of the Repayment Schedule" associated with Foster's loan. Finally, Exhibit G is a "true copy of the Loan Payment History Report," which demonstrates the damages.

Foster argues that Turner, as a "Legal Case Manager," is not a qualified sponsor of the documents as business-records because he did not testify as the corporate representative of the Trust and did not claim to be a custodian of records. Rather, Turner describes TSI as the subservicer of the Trust. Foster argues that a corporate entity, as opposed to a natural person, cannot qualify as a custodian of records in the context of a business records affidavit because an affidavit must be sworn to by a natural person and the affiant must represent that the facts disclosed therein are true and within the his personal knowledge.

Rule 803(6) does not, however, require that the witness laying the predicate for admission of a document be the creator of the document or even an employee of the same company as the creator. *In re E.A.K.*, 192 S.W.3d at 142; *see* TEX. R. EVID. 803(6). The witness need not have personal knowledge of the information recorded in the document, but need only have knowledge of how the records were prepared, as Turner testified. *In re E.A.K.*, 192 S.W.3d at 142. Rule 902(10) reflects an intent

to allow the admission of an organization's business records without requiring testimony from all of the organization's employees who have personal knowledge of the content of the records. *Kaldis v. U.S. Bank Nat. Ass'n*, 14-11-00607-CV, 2012 WL 3229135, at *3 & n.1 (Tex. App.—Houston [14th Dist.] Aug. 9, 2012, pet. dism'd w.o.j.) (mem. op.).

We conclude that Turner's affidavit complies with Rule 902(10)(B). *See id.*; *see also* TEX. R. EVID. 803(6), 902(10)(B). Thus, the Trust's business records are self-authenticating and require no extrinsic evidence of authenticity to be admitted. *See* TEX. R. EVID. 902.

**C. Business Records**

With respect to the business records attached to Turner's affidavit, Foster, on appeal, argues that "several of the records/documents at issue" and the "various loan origination and loan transfer documents" were not admissible under the business records exception because those documents were not generated by TSI. She asserts that Exhibit A, the Subservicer Certification, is "suspect" and has numerous "trustworthiness issues," i.e., it is not on letterhead, it is not addressed to TSI, it contains names that do not match the names on the governing documents, it conflicts with the indenture, and it is not notarized. She also asserts that "[a]uthentication is an issue with respect to several components of Exhibit 1, including all documents offered for chain-of-title purposes." She also complains about the admission of the

"Numerical Data Exhibits" and "Data Box Exhibit" in Exhibit 1 as "not properly authenticated" and "did not satisfy the multiple requirements applicable to business records." The record does not reflect, however, that Foster raised any of these points in the trial court.

To preserve a complaint for appellate review, a party must state an objection clearly and with sufficient specificity to make the trial court aware of the particular grounds for the complaint. TEX. R. APP. P. 33.1(a); *McKinney v. Nat'l Union Fire Ins. Co.*, 772 S.W.2d 72, 74 (Tex. 1989). A specific objection is one that enables the trial court to understand the precise grounds so as to make an informed ruling and affords the offering party an opportunity to remedy the defect, if possible. *McKinney*, 772 S.W.2d at 74.

As discussed above, the record shows that Foster made a general hearsay objection. "[A] general hearsay objection does not preserve for appeal a challenge to a proper predicate's being made to admit business records." *Rogers v. Dep't of Family & Protective Servs.*, 175 S.W.3d 370, 376 (Tex. App.—Houston [1st Dist.] 2005, pet. dism'd w.o.j.) (holding general hearsay objection did not preserve for appeal challenge to predicate being made to admit business records and declining to address propriety of admitting file); *Clark v. Walker–Kurth Lumber Co.*, 689 S.W.2d 275, 281 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.) (holding that objection to personal knowledge of sponsoring witness to assert business records

exception to hearsay rule did not preserve error asserted on appeal that invoices were not generated at or near the time of the transaction and that appellee failed to lay the proper predicate for introduction of a summary of business records); *see, e.g.*, *In re N.C.M.*, 66 S.W.3d 417, 420 (Tex. App.—Tyler 2001, no pet.) (holding that general hearsay objection to business records was insufficient to inform trial court of specific grounds of objection or to preserve error).

We hold that the trial court did not err in admitting the business-records affidavit.

We overrule the portion of Foster's first issue in which she challenges the affidavit. Foster has waived the remaining portions of her first issue.

**Sufficiency of the Evidence**

In her second issue, Foster asserts that the Trust lacks standing to assert its breach-of-contract claim, and she challenges the legal and factual sufficiency of the evidence to support the Trust's claim as to both liability and damages.

**A. *Standing***

Foster first argues that the evidence does not support that the Trust has standing to assert its breach-of-contract claim.

"Standing is implicit in the concept of subject matter jurisdiction," which is never presumed, cannot be waived, and may be raised for the first time on appeal. *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 443–46 (Tex. 1993);

*Brown v. Mesa Distribs., Inc*., 414 S.W.3d 279, 284 (Tex. App.—Houston [1st Dist.] 2013, no pet.). Whether the trial court has subject matter jurisdiction is a question of law that we review de novo. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004). Without a breach of a legal right belonging to himself, a plaintiff has no standing to litigate. *See Nobles v. Marcus*, 533 S.W.2d 923, 927 (Tex. 1976).

To establish its standing to assert a breach of contract cause of action, a party must prove its privity to the agreement, or that it is a third-party beneficiary. *OAIC Commercial Assets, L.L.C. v. Stonegate Village, L.P*., 234 S.W.3d 726, 738 (Tex. App.—Dallas 2007, pet. denied). For standing purposes, privity is established if the plaintiff proves that the defendant was a party to an enforceable contract with either the plaintiff or a third party who assigned its cause of action to the plaintiff. *Id*. An assignee "stands in the shoes of his assignor." *Sw. Bell Tel. Co. v. Mktg. on Hold Inc*., 308 S.W.3d 909, 920 (Tex. 2010); *see Bosch v. Frost Nat'l Bank*, No. 01-14-00191-CV, 2015 WL 4463666, at *3 (Tex. App.—Houston [1st Dist.] July 21, 2015, no pet.) (mem. op.) ("It is well-settled that the assignee steps into the shoes of the assignor and may assert the same rights as the assignor.").

The record shows that on May 23, 2007, Foster signed a Credit Agreement, requesting from Chase an "Education One" undergraduate loan in the amount of $25,000.00. The Pool Supplement, dated September 20, 2007, shows that Chase

transferred, sold, and assigned to National Collegiate Funding LLC each of the "Transferred Bank One Loans" referenced in the attached schedule and transferred each note and all records and rights relating thereto. The parties agreed that National Collegiate Funding LLC would "in turn . . . sell the Transferred Bank One Loans" to a purchaser trust. The Deposit and Sale Agreement, also dated September 20, 2007, shows that National Collegiate Funding LLC sold, and the Trust purchased, "the student loans listed on Schedule 1 or Schedule 2 to each of the Pool Supplements set forth on Schedule A." Schedule A references the Pool Supplement: "[Chase] (successor to Bank One, N.A.) dated September 20, 2007, for loans that were originated under . . . Education One Loan Program . . . ." A document attached to the Pool Supplement lists a loan originated by Chase, under the "Education One" loan program, in the amount of $25,000.00, disbursed on May 31, 2007 to, or on behalf of, Foster, who is identified by the last four digits of her social security number.

This evidence shows that Foster was a party to a contract with Chase that was later assigned to the Trust. Thus, the Trust, as an assignee, "stands in the shoes of" Chase with respect to Foster's loan and has standing to assert its breach-of-contract claim. *See Sw. Bell Tel. Co.*, 308 S.W.3d at 920; *Bosch*, 2015 WL 4463666, at *3.

**B. *Breach of Contract***

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). 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 also 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 of 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).

"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.) (citing *T.O. Stanley Boot Co. v. Bank of El Paso*, 847 S.W.2d 218, 221 (Tex. 1992)).

Here, the record shows that on May 23, 2007, Foster signed a "Credit Agreement," requesting from Chase an undergraduate loan in the amount of $25,000.00, for the 2007-2008 academic year at Texas Southern University. The Credit Agreement states, in pertinent part:

> A. Promise to Pay.
>
> I promise to pay to your order, upon the terms and conditions of this Credit Agreement, the principal sum of the Loan Amount Requested shown on the first page of this Credit Agreement, to the extent that it is advanced to me or paid on my behalf, and any Loan Origination Fee added to my loan . . . , interest on any unpaid interest added to the Principal Sum, and other charges set forth herein.
>
> B. Loan; Disclosure Statement:
>
> 1. By signing this Credit Agreement and submitting it to you [Chase], I am requesting that you make this loan to me in an amount equal to the Loan Amount Requested . . . .
>
> 2. If you agree to make a loan to me, you will mail me the disbursement check . . . and a statement disclosing certain information about the loan in accordance with the federal Truth-in-Lending Act ("Disclosure Statement"). You have the right to disburse my Disbursement Check through an agent . . . . [T]he Disclosure Statement is part of this Credit Agreement. Upon receipt of the Disclosure Statement, I will review the Disclosure Statement and notify you in writing if I have any questions. My endorsement of the Disbursement Check or allowing the loan proceeds to be sued by or on behalf of the student Borrower without objection will acknowledge receipt of the disclosure statement and my agreement to be legally bound by this Credit Agreement.

> 3. If I am not satisfied with the terms of my loan as disclosed in the Disclosure Statement, I may cancel my loan. . . .

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

Pursuant to the Note Disclosure Statement, Chase, on May 31, 2007, disbursed to Foster, or on her behalf, a loan in the amount of $25,000.00. The terms include an origination fee of $2,624.31, interest at 13.016 percent, and 240 payments of $381.34, due on the 12th of each month, beginning on July 12, 2009. As discussed above, Chase subsequently assigned the loan to the Trust.

The Loan Financial Activity record shows the monthly balance and interest accrued and that Foster did not make any payments on the loan. The final "Principal Balance" on November 20, 2013 was $43,560.51. Foster offered no evidence that she made any payments on the loan.

The evidence shows that a valid contract between the Trust and Foster, pursuant to which Chase loaned to Foster $25,000.00, on the terms stated, and Foster agreed to repay the loan on the terms stated. The evidence further shows that Foster breached the terms of the contract by not paying the loan as agreed, and the Trust sustained damages as a result of Foster's breach. *See West*, 264 S.W.3d at 446.

Foster argues that the evidence is insufficient to show a valid contract because, although the Credit Agreement contains a promise, the promise is qualified as follows: "I promise to pay to your order, upon the terms and conditions of this Credit

Agreement, 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. . . ." Foster asserts that her promise to pay is "contingent" upon the loan being approved and, because Chase had not yet acted on her application, 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. She asserts that, although the terms do appear on the Note Disclosure Statement, it is dated May 31, 2007, which is one week after May 23, 2007, the date that the Credit Agreement was signed. She asserts that, although she did sign the Credit Agreement, this, without more, is insufficient to constitute a binding contract.

As discussed above, the Credit Agreement and Note Disclosure Statement, taken together, evidence the essential terms of the loan, including the amount of the loan, and Foster's assent to the terms. Foster's 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). Courts may construe all the documents as if they were part of a single, unified instrument. *Id.*

Foster next argues that the evidence is insufficient to show that Chase disbursed the loan funds because there is not a cancelled check in evidence. As discussed above, the evidence shows that Chase disbursed $25,000.00 on Foster's behalf. To the extent that Foster claims a failure of consideration, such is an affirmative defense that is waived if not pled. *See* TEX. R. APP. P. 33.1; TEX. R. CIV. P. 94 (providing that "failure of consideration" constitutes affirmative defense that must be specifically pleaded). Because Foster did not plead an affirmative defense of failure of consideration, the issue is waived. *DeClaire v. G & B Mcintosh Family Ltd. P'ship*, 260 S.W.3d 34, 48 (Tex. App.—Houston [1st Dist.] 2008, no pet.) (holding that affirmative defenses not affirmatively pled are waived).

We conclude that there is some evidence to support the trial court's conclusion that Foster breached the student loan agreement and that the Trust suffered damages as a result of the breach. *See Croucher*, 660 S.W.2d at 58 (party challenging legal sufficiency of adverse finding on which she did not have the burden of proof must demonstrate that "no evidence" supports adverse finding); *see also City of Keller*, 168 S.W.3d at 827. We further conclude that the trial court's finding is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and manifestly unjust. *See Pool*, 715 S.W.2d at 635. Accordingly, we hold that legally and factually sufficient evidence supports the trial court's finding as to Foster's liability.

## C. *Amount of Damages*

Foster further argues that the evidence is insufficient to support the amount of damages awarded because (1) there is no evidence of the Trust's calculation of interest on the loan and (2) there is no evidence that the Trust provided Foster notice of its intent to accelerate the debt or of its actual acceleration of the debt. She asserts that, without evidence of a valid acceleration, the Trust can collect only her past due payments, and she requests a remittitur.

### 1. *Interest*

Foster asserts that there is no evidence or insufficient evidence of the Trust's calculation of interest during the term of the loan. In support of her argument, Foster relies on *Williams*. In *Williams*, this Court noted that the material terms of a contract must be agreed upon before a court can enforce the contract, and the interest rate is a material term. 264 S.W.3d at 236; *see T.O. Stanley Boot*, 847 S.W.2d at 221 (holding that interest rate is material term in context of contract to loan money). There, the plaintiff did not produce the parties' actual agreement or any other document establishing the agreed upon terms, including the applicable interest rate or the method for determining the finance charges. *Williams*, 264 S.W.3d at 236. Further, the interest rates in the statements provided by the plaintiff were inconsistent, varying from 5 percent to 22.4 percent, and there was no evidence as to how it calculated the interest rates and finance charges. *Id.*

Here, as discussed above, the evidence includes the Credit Agreement, which, at paragraph D, discusses in detail how interest on Foster's loan was to be calculated throughout the term of the loan and provides for capitalization of interest during deferment. Paragraph I also provides for capitalization of interest and fees upon default. The Note Disclosure Statement states an annual percentage rate of 13.016 percent, with a variable rate, based on the one-month London Interbank Offered Rate, or "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 Foster's loan, through November 20, 2013. Foster provides no authority for her assertion that the Trust was required to support its claim with calculations supporting each month's interest computation over the life of the loan.

2. *Acceleration*

With respect to her assertion that there is no evidence of acceleration, the Disclosure Statement reflects that the Foster agreed to pay the loan over a period of 20 years, beginning in July 2009. The Credit Agreement states that, in the event of a default on the loan, the Trust "will have the right to give [Foster] notice that the whole outstanding principal balance, accrued interest, and all other amounts payable to [the Trust] under the terms of th[e] 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 Foster with either of the required notices. *See id*. 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.

Foster requests that this Court

> 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 remittitur 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 contractural duties.

Foster asserts that the sum of all monthly payments due, beginning on July 12, 2009, as stated in the Note Disclosure Statement, through the date of the filing of suit, January 21, 2016, is $30,134,55.[2]

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, Strauss, Hauer & Feld, L.L.P*., 299 S.W.3d at 124.

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 that evidence was legally insufficient to support amount of lost profit damages awarded by trial court, but that 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

[2] Calculated as $381.45 monthly for 79 months.

suggestion of remittitur). Based on the record, the evidence is legally and factually sufficient to support a lesser damages finding of $30,134.55, which represents the sum of all monthly payments due, beginning on July 12, 2009, as stated in the Note Disclosure Statement, through the filing of suit, on January 21, 2016. *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"). Although Foster suggests that an offset is necessary for "any payments made" or other credits, we note that, not only does the record reflect that she did not make any payments on the loan, she did not plead for an offset. *See Zuniga v. Velasquez*, 274 S.W.3d 770, 774 (Tex. App.—San Antonio 2008, no pet.) (holding that "[t]he right of offset is an affirmative defense which must be pleaded and proved by the party asserting it" or it is waived); *see also* TEX. R. APP. P. 94.

We hold that although there is legally and factually sufficient evidence that Foster breached the loan contract, the evidence is legally and factually insufficient to support the full amount of actual damages awarded.

**Conclusion**

We conclude that the evidence is insufficient to support the trial court's award of actual damages in the amount of $45,277.02, but the evidence is sufficient to support an award of actual damages in the amount of $30,134.55. Thus, we suggest

a remittitur of the actual damages award to $30,134.55. 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 will be 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).

Sherry Radack
Chief Justice

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