IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

LONE STAR STATE BANK OF WEST TEXAS,	§	
	§	
Plaintiff,	§	
	§	
v.	§	2:19-CV-098-Z
	§	
RABO AGRIFINANCE, LLC,	§	
	§	
Defendant.	§	

ORDER

Before the Court is the Report and Recommendation ("R&R") of United States Bankruptcy Judge Robert Jones (ECF No. 11-1), dated March 31, 2022. The R&R recommends this Court grant summary judgment in part on both parties' causes of action concerning construction of their intercreditor agreement ("ICA"). Both parties objected to the R&R. *See* ECF Nos. 12, 15-2. After conducting an independent review of the pleadings, files, and records in this case, the Court **ADOPTS** the R&R in full. The Court **DIRECTS** the United States District Clerk to administratively close this case. Parties must move to reopen this case if further proceedings in the Bankruptcy Court so require.

BACKGROUND

Plaintiff Lone Star State Bank of West Texas ("Plaintiff") and Defendant Rabo Agrifinance, LLC ("Defendant") are creditors of debtors Waggoner Cattle, LLC ("Waggoner Cattle"), Cliff Hanger Cattle, LLC ("Cliff Hanger"), Bugtussle Cattle, LLC ("Bugtussle"), and Circle W of Dimmit, Inc. ("Circle W") (collectively the "Waggoner Entities"). Quint Waggoner formerly owned the Waggoner Entities. This case concerns the priority of liens held by Plaintiff and Defendant against the property of Waggoner Cattle and Cliff Hanger.

Plaintiff, Defendant, Cliff Hanger, and Waggoner Cattle entered an intercreditor agreement effective November 26, 2014. The ICA defines two types of collateral: (1) "Cliff Hanger Collateral"; and (2) "Waggoner Collateral." Adv. Dkt 159-1 at 1–2. As the primary lender to Waggoner Cattle, Plaintiff financed Waggoner Cattle's purchase of Holstein Calves. ECF No. 11-1 at 14. As the primary lender to Cliff Hanger, Defendant financed Cliff Hanger's purchase of Pasture Cattle and Beef Cattle, as well as the purchase of Holstein Calves from Waggoner Cattle.[1] *Id.* Plaintiff had the first-in-time lien against the cattle. *Id.* at 12. By the ICA, Plaintiff subordinated its first-lien position to Defendant's liens against the Cliff Hanger Collateral. *Id.*

On April 9, 2018, Waggoner Entities filed for bankruptcy under Chapter 11 of the Bankruptcy Code. *Id.* at 15. On June 29, 2018, Plaintiff sued Defendant. *Id.* Plaintiff claims Defendant received the sales proceeds of the Cliff Hanger Cattle upon which Plaintiff had a senior lien and Plaintiff's lien was not subordinated under the terms of the ICA. Plaintiff seeks to recover those sales proceeds from Defendant. *Id.* Plaintiff avers that the ICA only subordinated Plaintiff's senior lien over Holstein Cattle transferred to Cliff Hanger, for which Waggoner received "payment in full." *Id.* Defendant denies it collected cattle proceeds from Cliff Hanger that were not subject to liens subordinated under the ICA. *Id.* Additionally, Defendant argues — under the ICA — Cliff Hanger overpaid Waggoner Cattle for certain cattle using Defendant's collateral. Defendant now seeks to recover the value of that collateral from Plaintiff. *Id.* at 15–16.

Both parties moved for summary judgment on their respective constructions of the ICA. *Id.* at 16. Additionally, Plaintiff seeks summary judgment on its causes of action for conversion and attorney's fees and costs, and on Defendant's causes of action for fraud by non-disclosure,

[1] "Pasture Cattle" is cattle sold to third parties directly from the pastures, whereas "Beef Cattle" were raised on pasture until they reached feeder-cattle weight (750–900 pounds) and were taken to a feedyard with the Holstein Cattle until slaughter. ECF No. 11-1 at 10. Holstein cattle are typically raised for the dairy industry. *Id.* at 10, 13.

breach of the ICA, unjust enrichment, and conversion. *Id.* Defendant also seeks summary judgment on Plaintiff's causes of action for conversion, attorney's fees and costs, and fraud. *Id.*

On March 31, 2022, the Bankruptcy Court issued the R&R, recommending this Court grant summary judgment in part on (1) both parties' causes of action for construction of the ICA; (2) Plaintiff's claims for conversion and fraud; (4) Defendant's claims for breach of the ICA, conversion, and unjust enrichment, and fraud by nondisclosure. *See id.* at 73–74. Both parties objected to the R&R. *See* ECF Nos. 12, 15-2.

LEGAL STANDARD

The Court reviews the R&R as it would review the findings, conclusions, and recommendations of a magistrate judge. *See* FED. R. BANKR. P. 9033 advisory committee notes ("This rule, which is modeled on Rule 72 F.R. Civ. P., provides the procedure for objecting to, and for review by, the district court of specific findings and conclusions . . . ."). This review analyzes *de novo* "any portion of the bankruptcy judge's findings of fact or conclusions of law to which specific written objection has been made." FED. R. BANKR. P. 9033(d). In its review, the Court "may accept, reject, or modify the proposed findings of fact or conclusions of law, receive further evidence, or recommit the matter to the bankruptcy judge with instructions." *Id.*

"The best description of the district court's discretion is that it should be at least as broad as that conferred on the district court to determine motions for reconsideration of its own rulings." *Id.* at 852. A court "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). A fact is "material" if its existence or non-existence "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). "[T]he substantive law will identify which facts are material." *Id.* at 248. A genuine issue of material fact exists "if the evidence is such that a reasonable jury could return a verdict for the

nonmoving party." *Id.* The movant must inform the court of the basis of the motion and show from the record that no genuine issue of material fact exists. *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986). "The party opposing summary judgment is required to identify specific evidence in the record and to articulate the precise manner in which that evidence supports his or her claim." *Ragas v. Tenn. Gas Pipeline Co.*, 136 F.3d 455, 458 (5th Cir. 1998).

When reviewing summary-judgment evidence, the court must resolve all reasonable doubts and draw all reasonable inferences in the light most favorable to the non-movant. *Walker v. Sears, Roebuck & Co.*, 853 F.2d 355, 358 (5th Cir. 1988). A court cannot make a credibility determination when considering conflicting evidence or competing inferences. *Anderson*, 477 U.S. at 255. If some evidence supports a disputed allegation, so that "reasonable minds could differ as to the import of the evidence," the court must deny the motion. *Id.* at 250.

ANALYSIS

Parties objected to many parts of the Bankruptcy Court's analysis. The Court addresses each of parties' objections in turn.

A. The Bankruptcy Court Did Not Err by Finding Beef Cattle Constituted Cliff Hanger Collateral

The R&R holds "[t]he definition of Cliff Hanger Collateral is unambiguous, having only one reasonable interpretation — all cattle, whether Holstein or other, are subject to the definition if they meet both the locational and relational conditions." ECF No. 11-1 at 26. The R&R concludes Beef Cattle qualify as Cliff Hanger Collateral "because they meet both the relational and locational conditions — they were owned by Cliff Hanger and were sold from the feedyards." *Id.* at 34.

Plaintiff objects to this holding. Plaintiff argues the R&R does not support the Bankruptcy Court's conclusion that the Beef Cattle satisfied the relational requirement. ECF No. 12 at 3. Specifically, Plaintiff asserts that the R&R "does not include any analysis explaining why

ownership is sufficient to satisfy the relational condition." *Id.* Plaintiff avers that the phrase "Cliff Hanger's operations in the Cliff Hanger Feedyards" refers to the Holstein feeding operation in place when the ICA was entered, and that this operation was inherently different from the subsequent Beef Cattle operations. *Id.* at 3–4. Therefore, only Holstein Cattle can meet the relational requirement "because that is the described operation to which collateral must relate." *Id.* at 4.

By its terms, the ICA is "governed by, and construed in accordance with, the laws of Texas." Adv. Dkt. 159-1 at 4. The Court thus begins its "analysis with the contract's express language." *El Paso Field Servs., L.P. v. MasTec N. Am., Inc.*, 389 S.W.3d 802, 805–06 (Tex. 2012). "The terms used in the [contract] are given their plain, ordinary meaning unless the [contract] itself shows that the parties intended the terms to have a different, technical meaning." *Gonzalez v. Denning*, 394 F.3d 388, 392 (5th Cir. 2004) (per curiam). "If a written contract is so worded that it can be given a definite or certain legal meaning, then it is not ambiguous." *Id.* "A contract is not ambiguous merely because the parties to an agreement proffer conflicting interpretations of a term." *Id.*

The ICA defines "Collateral" as "any and all personal property of Waggoner or Cliff Hanger which is subject to a perfected security interest or lien in favor of any one or more of the creditors to secure all or any portion of the Indebtedness." ECF No. 11-1 at 19. "Waggoner Collateral" is defined as "that portion of the Collateral that is located on the Waggoner Calf Ranch, is related to, or arises from or in connection with Waggoner's operations on the Waggoner Calf Ranch." *Id.* And the ICA defines "Cliff Hanger Collateral" as "that portion of the Collateral that is located in the Cliff Hanger Feedyards, is related to, or arises from or in connection with Cliff Hanger's operations in the Cliff Hanger Feedyards." *Id.*

Construing the ICA to cover only Holstein Cattle contradicts the clear wording of the agreement — which applies to all personal property and thus all cattle regardless of type. ECF 11-1 at 26. The ICA does not reference Holstein Cattle. Beef Cattle were part of Cliff Hanger's operations from acquisition to maturity, were financed by Cliff Hanger using Defendant's loan funds, and were identified as Cliff Hanger assets — including on the Cliff Hanger borrowing base certificates prepared for Defendant. *See* ECF No. 16 at 4. Plaintiff had no connection to, or involvement with, Beef Cattle. *See* ECF Nos. 11-1 at 14; 16 at 2. Plaintiff never financed Beef Cattle. ECF No. 11-1 at 14, 28. And Beef Cattle were not part of Waggoner Cattle's Holstein operation. ECF No. 11-1 at 22.

The Court therefore agrees with the R&R. The definition of Cliff Hanger Collateral "is unambiguous, having only one reasonable interpretation — all cattle, whether Holstein or other, are subject to that definition if they meet both the locational and relational conditions." ECF No. 11-1 at 26. The Court **OVERRULES** Plaintiff's objection.

B. The Bankruptcy Court Did Not Err by Finding the Requirements of "Delivery" and "Payment in Full" Do Not Apply to Beef Cattle

The ICA contained a "Transfer Clause." Adv. Dkt. 159-1 at 2. The Transfer Clause states: "Upon delivery of the Collateral to the Cliff Hanger Feedyards and receipt of payment in full by Waggoner, thereafter all Collateral located in Cliff Hanger Feedyards shall be owned by and in possession of Cliff Hanger and shall be Cliff Hanger Collateral." *Id.* The Transfer Clause is designed to prevent inequity by including important requirements ("delivery" and "payment in full") that Cliff Hanger must satisfy before Plaintiff's first lien against the transferred collateral is subordinated. ECF No. 11-1 at 28. Otherwise, Plaintiff would lose its senior lien position without ever being paid. The ICA does not define "payment in full."

Because Waggoner Cattle is not the seller of the Beef Cattle, the R&R determined the "payment in full" requirement does not apply to Beef Cattle. *Id.* The Bankruptcy Court thought it

clear from the text of the ICA and the circumstances surrounding its formation that the Transfer Clause's additional lien-subordination requirements "only apply to cattle sold from Waggoner Cattle to Cliff Hanger, *not* to cattle purchased by Cliff Hanger from third parties." *Id.* at 27. Holding that the Transfer Clause applies to *all* cattle "impermissibly renders the definition of 'Cliff Hanger Collateral' meaningless." *Id.* at 29; *see also Italian Cowboy Ps., Ltd. v. Prudential Ins. Co. of Am.*, 341 S.W.3d at 323, 333 (Tex. 2011) ("[W]e must examine and consider the entire writing in an effort to harmonize and give effect to all the provisions of the contract so that none will be rendered meaningless.").

Plaintiff objects to the Bankruptcy Court's interpretation. Plaintiff argues the R&R does not consider whether "payment in full" can refer to something other than the purchase price, such as sums owned to Circle W for feed and care of the Beef Cattle. ECF No. 12 at 4. Plaintiff claims the "payment in full" requirement "simply applies to any cattle for which a payment was due." *Id.* at 6. Thus, the Court "should either rule that Cliff Hanger was required to pay whatever was due on the Beef Cattle for subordination or remand the question to the Bankruptcy Court for further consideration." *Id.*

Defendant offers two arguments in support of the Bankruptcy Court's interpretation of the Transfer Clause. First, Plaintiff's argument that Cliff Hanger may not have paid Circle W in full for the care and feeding of certain Beef Cattle has not been pled in any of its briefings and cannot be asserted upon review of the R&R. ECF No. 16 at 4–5 (citing FED. R. BANKR. P. 9033(d)). Second, whether Cliff Hanger owes money to Circle W for feed payments is irrelevant to whether Plaintiff or Defendant has the senior lien on Beef Cattle. *Id.* at 5–6.

This Court agrees with the Bankruptcy Court and Defendant. Because Plaintiff's objection does not impact lien priority, the Court **OVERRULES** Plaintiff's objection.

C. The Bankruptcy Court Correctly Found Pasture Cattle Were Not Cliff Hanger Collateral

The Bankruptcy Court construed "Cliff Hanger Collateral" to require satisfaction of both the locational and relational conditions. ECF No. 11-1 at 34. Because Pasture Cattle only meet the relational condition — *i.e.*, owned by Cliff Hanger but sold before entering a Cliff Hanger feedyard — Pasture Cattle do not qualify as "Cliff Hanger Collateral." *Id.* The Bankruptcy Court concluded reading out the locational condition "would impermissibly render express language in the ICA meaningless." *Id.* at 26.

Defendant objects to this construction. Defendant argues the ICA — which Defendant claims supplants Article 9 of the Uniform Commercial Code — exclusively governs lien priority, and that under the ICA, all "Collateral" are either "Waggoner Collateral" or "Cliff Hanger Collateral." ECF No. 15-2 at 8. Defendant argues Pasture Cattle do not qualify as "Waggoner Collateral" under the ICA because Pasture Cattle do not satisfy either the relational or locational conditions. *Id.* According to Defendant, Pasture Cattle thus qualify as "Cliff Hanger Collateral." *Id.* at 4–5.

But the ICA does not state (and the Bankruptcy Court did not hold) that all "Collateral" qualifies as either "Waggoner Collateral" or "Cliff Hanger Collateral."[2] Plaintiff retained its first lien on everything not qualifying as "Cliff Hanger Collateral." Because Pasture Cattle do not qualify as Cliff Hanger Collateral, Plaintiff's senior lien against the Pasture Cattle was never subordinated. Whether the Pasture Cattle can independently qualify as "Waggoner Collateral" is irrelevant. Therefore, the Court **OVERRULES** Defendant's objection.

[2] The ICA expressly qualifies the priority of security interests in the collateral as "[n]otwithstanding anything to the contrary contained in any document or hereafter governing, evidencing, securing, guaranteeing, or otherwise relating to or executed in connection with all or any portion of Indebtedness, or the other of filing of any financing statement filed to perfect a security interest or lien granted to secure the Indebtedness . . . ." Adv. Dkt. 159-1 at 2.

D. The Bankruptcy Court Correctly Determined the Statute of Limitations Did Not Bar Plaintiff's Pasture Cattle Conversion Claim

The Bankruptcy Court held Plaintiff's Pasture Cattle conversion claim relates back to the date of the original pleading because the claim "merely amplified the original pleading" and rested on the same "common core of operative facts" as the original complaint. ECF No. 11-1 at 51; *see also* FED. R. CIV. P. 15(c).

Defendant objects to this holding. Defendant avers the statute of limitations bars Plaintiff's Pasture Cattle conversion claim because Plaintiff did not raise this claim until its second amended complaint — after the statute of limitations had run. ECF No. 15-2 at 14. The essence of Defendant's argument is that the words "pasture" and "beef" do not appear anywhere in the original complaint and that there were "significantly different facts" underlying the purchase and management of Beef Cattle. *Id.* at 14–15.

But as the R&R notes, "both complaints allege that [Plaintiff] had a first-in-time lien on all Cliff Hanger cattle, both allege that the ICA allowed for conditional subordination of that lien, and both allege that [Defendant] converted the proceeds of Cliff Hanger cattle upon which [Plaintiff's] lien was not subordinated by the ICA." ECF No. 11-1 at 51. Hence, the original complaint provided "fair notice" to Defendant that its receipt of Cliff Hanger cattle proceeds sparked this litigation. The Court thus **OVERRULES** Defendant's objection.

E. The Bankruptcy Court Correctly Found an Offset of Debt Constitutes a "Payment" under the ICA

The Bankruptcy Court — under the definitions of "payment" and "offset" provided *by Plaintiff* in its own summary judgment brief — determined an offset can constitute a payment. ECF No. 11-1 at 42.[3] But whether such payment constitutes "payment in full," thereby triggering

[3] "Payment" is defined as "[p]erformance of an obligation by the delivery of money or some other valuable thing in partial or full discharge of the obligation." *Payment*, BLACK'S LAW DICTIONARY (11th ed. 2019). "Offset" is defined

subordination of Plaintiff's liens under the ICA, remains at issue. The Bankruptcy Court held that, without a determination of which party held the senior lien against the Offset Cattle, both parties' summary judgment motions on Plaintiff's conversion claim to recover the proceeds of the Offset Cattle should be denied. *Id.* at 43.

Plaintiff disagrees, and argues an offset of debt does not satisfy the ICA's requirement of "receipt of payment in full." ECF No. 12 at 6. Plaintiff alleges there were certain lots of Holstein Cattle transferred from Waggoner Cattle to Cliff Hanger for which Cliff Hanger only provided Plaintiff an offset of debt owed by Waggoner Cattle to Cliff Hanger ("Offset Cattle"). ECF No. 11-1 at 42. Hence, because "payment in full" was never made to Waggoner Cattle for the Offset Cattle, Plaintiff's senior lien on those cattle was never subordinated and it can therefore pursue a conversion action for the proceeds of the Offset Cattle. *Id.*

Plaintiff does not dispute that the offset of debt had value. Nonetheless, Plaintiff argues the offset was not a "payment" because it was not a delivery of money or something else of value to Waggoner. ECF No. 12 at 8. Plaintiff asserts the R&R ignores the contractual requirement that something of value be "received" by Waggoner and the "delivery" requirement in the definition of payment. *Id.*

The Court agrees with the R&R. Plaintiff's "argument that an offset is not a payment is unavailing." ECF No. 11-1 at 43. As Defendant notes, the "economic effect of an offset is the very same as the economic effect" of Cliff Hanger paying Waggoner Cattle for cattle, and Waggoner Cattle then endorsing the check back to Cliff Hanger to pay a debt it owed to Cliff Hanger. ECF No. 16 at 3. The Court **OVERRULES** Plaintiff's objection.

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as "[s]omething (such as an amount or claim) that balances or compensates for something else." *Offset*, BLACK'S LAW DICTIONARY (11th ed. 2019).

F. Defendant Waived Its Argument that the ICA Applies to the T&T Cattle if the Sales Constituted Legitimate Transactions

During its operations, Waggoner Cattle "sold"[4] cattle to Quint Waggoner's sons, Tyler and Tucker ("T&T Cattle"), who then granted a lien on these cattle to Defendant. ECF No. 11-1 at 34. The Bankruptcy Court concluded Plaintiff's first-in-time lien on the cattle sold by Waggoner Cattle to Tyler and Tucker survived the sales. *Id.* at 39. This is because a lien continues after the collateral is sold to another party. TEX. BUS. & COM. CODE § 9.315. Although the Food Security Act ("FSA") preempts Section 9.315 for sales made in the ordinary course of business, the R&R details the irregularity of these sales before concluding that the FSA does not apply. *See* ECF No. 11-1 at 38–42; *see also* 7 U.S.C. § 1631(d). Based on this holding, the R&R holds Plaintiff should be granted judgment in the amount of $2,201,729 related to Defendant's direct receipt of T&T Cattle proceeds. *Id.* at 60.

Defendant argues that even if the Bankruptcy Court's FSA analysis is correct, the predicate question of lien priority remains. ECF No. 15-2 at 20. The reason is that if the T&T Cattle were delivered to a feedyard and were paid for in full, the T&T Cattle and proceeds thereof became "Cliff Hanger Collateral" and Defendant's first-lien collateral. *Id.* at 20–21.

Plaintiff argues Defendant has waived the argument that the ICA applies to the T&T Cattle if the sales to Tucker and Tyler were real. *See* ECF Nos. 20 at 15; 21 at 2; 23 at 2. Plaintiff cites numerous examples where Defendant agrees that priority in the T&T Cattle is not addressed by the ICA in this scenario. ECF No. 20 at 15–16. In response, Defendant points to several instances in which it claims the T&T Cattle fell under the ICA's terms and constituted Cliff Hanger Collateral. ECF No. 22 at 3. But these references only refer to the scenario in which the title to those cattle was not actually transferred to Tucker and Tyler. *See id.* at 3–4; ECF No. 23 at 2; ECF

[4] Plaintiff alleges that these were illegitimate sham transactions to allow Quint Waggoner to double mortgage the cattle but concedes for the sake of summary judgment that the sales were legitimate. *See* Adv. Dkt. 263 at 11.

No. 22 at 4–6. Moreover, Defendant agreed the sales were real. *See, e.g.*, ECF No. 20-1 at 88 ("[Defendant] agrees with [Plaintiff's] statement that Tucker and Tyler owned the Tucker & Tyler Cattle."), 114 (submitting "further evidence that these were legitimate sales transactions not mere 'sham transactions.'"), and 293 ("[Defendant] agrees with [Plaintiff] that lien priority in [T&T Cattle] is not addressed by the ICA. The reason is because those cattle were not owned by either Waggoner or Cliff Hanger when [Defendant] allegedly received the proceeds of such cattle.").

This Court agrees Defendant has waived is argument that the ICA still applies to the T&T Cattle if the sales were legitimate. Accordingly, the Court **OVERRULES** Defendant's objection.

G. The Bankruptcy Court Did Not Err by Granting Summary Judgment in Plaintiff's Favor to Recover $2,201,729 in Direct Proceeds for the T&T Cattle

Defendant argues, even if T&T Cattle proceeds were converted, Plaintiff's conversion damages are inflated and constitute unjust enrichment. ECF No. 15-2 at 21. Defendant reasons Plaintiff was only entitled to receive the value of the calves when Plaintiff sold them to Tucker and Tyler as young calves, rather than when the cattle were sold as fully grown cattle for slaughter. *Id.* ("The usual measure of damages for conversion is the fair market value of the property at the time and place of conversion." (quoting *Wells Fargo Bank Nw., N.A. v. RPK Cap. XVI, LLC*, 360 S.W.3d 691, 706 (Tex. App.—Dallas 2012, no pet.))). Where one lawfully initiates possession, conversion occurs if "the person in possession has unequivocally exercised acts of dominion over the property inconsistent with the claims of the owner or the person entitled to possession." *Wells Fargo*, 360 S.W.3d at 700. Thus — relying on *Wells Fargo* — Defendant argues that the conversion occurred on the date of transfer to Tucker and Tyler, rather than a year or more later. ECF No. 15-2 at 23.

Defendant next argues Plaintiff is not entitled to any judgment at this time with respect to T&T Cattle proceeds because the R&R is not a "judgment" under Federal Rule of Civil Procedure 54(a) and because Defendant's affirmative defenses remain unresolved. *Id.* at 25 (citing *HHH*

Farms, LLC v. Fannin Bank, No. 06-20-00068-CV, 2022 WL 175967, at *31–33 (Tex. App.—Texarkana Jan. 20, 2022, pet. filed); *Schoen v. Underwood*, No. W-11-CA-00016, 2012 WL 13034044, at *2 (W.D. Tex. May 15, 2012)).[5]

Plaintiff first responds by asserting Defendant waived this issue because Defendant never argued conversion occurred upon the sale to Tucker and Tyler. ECF No. 20 at 21. Defendant avers it did not waive this argument because it listed the elements for conversion and argues the date of cause of action accrues is generally a question of law. ECF No. 22 at 7 (citing *Etan Indus. Inc. v. Lehmann*, 359 S.W.3d 620, 623 (Tex. 2011) (per curiam)). Plaintiff argues this misstates the standard for waiver of legal arguments. ECF No. 23 at 2 ("[A] party 'has a duty to put its best foot forward' before the Magistrate Judge — *i.e.*, 'to spell out its arguments squarely and distinctly' — and, accordingly, that a party's entitlement to de novo review before the district court upon filing objections to the Report and Recommendation of the Magistrate Judge does not entitle it to raise issues at that stage that were not adequately presented to the Magistrate Judge." (quoting *Cupit v. Whitley*, 28 F.3d 532, 535 at n.5 (5th Cir. 1994)).

In its briefing, Plaintiff specifically argued the conversion at issue occurred on Defendant's receipt of the proceeds — identifying $2,201,729 in proceeds from T&T Cattle. *See* Adv. Dkt. 263 at 40 ("Upon receipt of the collateral and application to Cliff Hanger's note, [Defendant] completed its conversion because those funds could no longer be returned.") (citing *First State Bank, N.A. v. Morse*, 227 S.W.3d 831, 838 (Tex. App.—Corpus Christi–Edinburg 2007, pet. denied)). Defendant did not argue "squarely and distinctly" that a conversion occurred upon the sale to Tucker and Tyler, but rather argued Plaintiff could not satisfy the elements of conversion. Adv. Dkt. 293 at 59–60. In any case, this Court agrees with Plaintiff that "[h]ad the conversion not

[5] Defendant also argues judgment would be improper given the Bankruptcy Court's recommendation that an offset qualifies as payment under the ICA. ECF No. 15-2 at 25. But this Court has already explained above the Bankruptcy Court did not err in holding that an offset of debt qualifies as a payment under the ICA.

occurred, [Plaintiff] would have received all the proceeds because it had a superior lien." ECF No. 20 at 21. Therefore, the Court disagrees with Defendant that the R&R's finding of conversion damages constitutes unjust enrichment.

Plaintiff agrees a Rule 54 final judgment is inappropriate but correctly points out that a partial summary judgment is *not* a final judgment. ECF No. 20 at 22 (citing FED. R. CIV. P. 56, Notes on Advisory Committee on Rules—1946 Amendment, Subdivision (d)). Plaintiff also asserts that the fact that some of Defendant's affirmative defenses have yet to be resolved does not mean a partial summary judgment is inappropriate. *Id.* This Court agrees. Defendant raised myriad affirmative defenses in its answer to Plaintiff's third amended complaint. *See* Adv. Dkt. 242 at 59–66. The R&R addresses many of Defendant's affirmative defenses — *e.g.*, the ICA, fraud, material breach, the economic loss rule, superior lien, unjust enrichment, no basis for attorney's fees, etc. Other defenses, such as Defendant's argument that an award of damages would violate the Fifth and Fourteenth Amendments of the United States Constitution and the cruel or unusual punishment clause of the Texas Constitution, were not briefed by Defendant for summary judgment. *See generally* Adv. Dkt. 293; *see also Mid-Continent Cas. Co. v. Bay Rock Operating Co.*, 614 F.3d 105, 113 (5th Cir. 2010) ("The fact that Mid–Continent raised this argument in its complaint will not save it from waiver if it failed to present this argument in its summary judgment motions.").

Defendant also improperly relies on *Shoen*. For one, *Shoen* notes Rule 56 does not require the movant to "support its motion with affidavits or other similar materials *negating* the opponent's claim." 2012 WL 1303044, at *2 n.2 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). Furthermore, the seminal case *Shoen* relies on, *Stillman v. Travelers Ins. Co.*, only held the district court erred by entering a *final* judgement, rather than a partial summary judgment because of the unresolved affirmative defenses. *Id.* at 914; *see also* 88 F.3d 911, 913–914 (11th Cir. 1996).

Thus, the Court disagrees that Plaintiff "simply ignored" Defendant's affirmative defenses, as the *Shoen* plaintiff did. ECF No. 15-2 at 25; *see also Williams v. Colonial Bank, N.A.*, 199 F. App'x. 399, 404 n.2 (5th Cir. 2006) ("In [*Stillmore*], the motion for summary judgment that formed the basis for the final judgment that set forth facts that addressed (and rejected) only one affirmative defense.").

As Plaintiff argues, Defendant can still raise affirmative defense in the parties' second summary-judgment motions or at trial. ECF No. 20 at 23. Accordingly, the Court **OVERRULES** Defendant's objection.

H. The Bankruptcy Court Correctly Ruled the Economic-Loss Rule Does Not Bar Plaintiff's Conversion Claims

Defendant alleges the economic-loss rule bars Plaintiff's conversion claims because Plaintiff seeks to recover purely economic losses covered by the ICA's subject matter. The economic-loss rule "prohibits a plaintiff from using a tort cause of action as a vehicle to impose liability for a claim based in contract." *Lincoln Gen. Ins. Co. v. U.S. Auto Ins. Servs., Inc.*, 787 F.3d 716, 725 (5th Cir. 2015). "Courts consider two factors to determine whether a cause of action sounds in contract or tort: (i) the source of the duty giving rise to the injury and (ii) the nature of the injury itself." *Dixie Carpet Installations, Inc. v. Residences at Riverdale, LP*, 599 S.W.3d 618, 635 (Tex. App.—Dallas 2020, no pet.).

The R&R acknowledges Texas courts split in holding whether the economic-loss doctrine bars conversion claims. ECF No. 11-1 at 45–47 ("While Texas courts of appeals have addressed whether the economic loss rule bars conversion claims, they have come to widely differing conclusions on the matter."). But the R&R concludes that — even assuming that the Texas Supreme Court would hold that the doctrine could be sued to bar conversion claims in some circumstances — it could not be used here. *Id.* at 47. This is because the source of duty giving rise

to Plaintiff's conversion claim derives from state law rather than the ICA. *Id.* at 49. And the nature of the injury does not resemble the ICA's contractual damages. *Id.*

Defendant largely bases its objection on its assertion that the priority of the parties' lien rights is solely governed by the ICA. ECF No. 15-2 at 27. But this Court has already rejected this argument for reasons explained above. And as Plaintiff argues, the duty to not take the proceeds of another lender's collateral arises outside the ICA and is not expressly stated in the ICA. ECF No. 20 at 24. Defendant contends that under this analysis, "a conversion claim could never be barred, irrespective of the terms of a contract, because there would always be duty that arose independently of duties imposed by the contract." ECF No. 15-2 at 27. But the R&R does not hold that the terms of a contract are irrelevant. Rather, it merely states *this* contractual agreement does not describe the rights associated with a first-priority lien and does not impose any affirmative obligation on either party, except to provide further assurances upon request and some notices. ECF No. 11-1 at 48.

Because the economic-loss rule does not bar Plaintiff's conversations claim, the Court **OVERRULES** Defendant's objection.

I. The Bankruptcy Court Did Not Err by Determining Attorney's Fees Can Be Recovered in Conversion of Collateral Cases

"In Texas, attorney's fees may be recovered from an opposing party only as authorized by statute or by contract between the parties. Attorney's fees are generally not available for conversion claims." *Wiese v. Pro Am Servs., Inc.*, 317 S.W.3d 857, 861 (Tex. App.—Houston [14th Dist.] 2010, no pet.). Relying on *Permian Petroleum Co. v. Petroleos Mexicanos*, the R&R holds that Plaintiff may be entitled to attorney's fees for its conversion claims. ECF No. 11-1 at 58; 934 F.2d 635 (5th Cir. 1991). In *Permian Petroleum*, the Fifth Circuit — applying Texas law — found an exception to this general rule when a plaintiff sues for conversion of collateral. 934 F.2d at 652. The Fifth Circuit held that a secured creditor seeking to recover converted collateral

"may recover as actual damages either the outstanding principal balance plus the outstanding interest obligation, costs, and attorneys' fees or it may recover the value of the collateral, whichever is less."[6] *Id.* (citing *Hodges v. Leach*, 214 S.W.2d 837, 842 (Tex. App.—Amarillo 1948, no writ); *Metal Window Prods. Co. v. Nored*, 535 S.W.2d 711, 713 (Tex. App.—Beaumont 1976, no writ); *Ochoa v. Evans*, 498 S.W.2d 380, 386 (Tex. App.—El Paso 1973, no writ)). The value of the collateral is calculated on the date of conversion. *Id.*

But *Permian Petroleum* held "a secured party may recover as actual conversion damages the value of the secured interested in the collateral *up to the value of the collateral*." 934 F.2d at 652 (emphasis added). The Bankruptcy Court reasoned it is possible — although not guaranteed — that the value of the converted proceeds will exceed Plaintiff's secured debt plus attorney's fees and costs. ECF No. 11-1 at 59. For this reason, the R&R denies summary judgment to both parties on Plaintiff's claim for attorney's fees and costs. *Id.*

Defendant objects to this holding. Defendant points to two Texas courts of appeals decisions issued after *Permian Petroleum*, where it was determined a plaintiff seeking to recover for conversion of collateral was *not* entitled to attorney's fees. ECF No. 15-2 at 31 (citing *John Deloach Enters., Inc. v. Telhio Credit Union, Inc.*, 582 S.W.3d 590, 601-02 (Tex. App.—San Antonio 2019, no pet.); *Silver Lion, Inc. v. Martinez*, No. 14-05-00746-CV, 2007 WL 665253, at *4 (Tex. App.—Houston [14th Dist.] Mar. 6, 2007, no pet.)). Although the Bankruptcy Court was aware of these cases, it reasoned it was "bound by the state law interpretations of the Fifth Circuit." ECF No. 11-1 (citing *Cornelius*, 2000 WL 233292, at *1).

Defendant argues the Fifth Circuit's interpretation of Texas state law does not bind federal district courts when "a subsequent state decision or statutory amendment . . . render[s] [the Fifth

[6] The Texas Supreme Court has not directly addressed the issue of attorney's fees for claims of conversion of collateral since *Permian Petroleum*.

Circuit's] prior decision clearly wrong." *Id.* at 30 (citing *Cornelius v. Philip Morris Inc.*, No. CIV.A.3:99-CV-2125G, 2000 WL 233292, at *1 (N.D. Tex. Feb. 29, 2000)). But the Fifth Circuit has explained what it means to render a prior decision "clearly wrong":

> [W]hen our *Erie* analysis of controlling state law is conducted for the purpose of deciding whether to follow or depart from prior precedent of this circuit, and neither a clearly contrary subsequent holding of the highest court of the state nor a subsequent statutory authority, squarely on point, is available for guidance, we should not disregard our own prior precedent on the basis of subsequent intermediate state appellate court precedent unless such precedent comprises unanimous or near-unanimous holdings from several—preferably a majority—of the intermediate appellate courts of the state in question.

F.D.I.C. v. Abraham, 137 F.3d 264, 269 (5th Cir. 1998). Thus, it is unlikely that two intermediate decisions could render the Fifth Circuit's decision in *Permian Petroleum* "clearly wrong." But even if they could, neither do so. In *Silver Lion*, "attorney's fees were sought only under the Declaratory Judgement Act." 2007 WL 665253 at *4. And in *John Deloach*, the Texas appellate court only agreed that the cited provisions of the Texas Towing and Booting Act did not provide a statutory basis for an award of attorney's fees. 582 S.W.3d at 601–02. The Court agrees with Plaintiff that these cases do not render the Fifth Circuit's decision in *Permian* "clearly wrong." Therefore, the Court **OVERRULES** Defendant's objection.

J. The Bankruptcy Court Did Not Issue Erroneous Evidentiary Rulings

Defendant objects to various rulings on its summary-judgment evidence. First, Defendant argues Plaintiff's objections to the evidence were untimely: although the exhibits and declarations were filed on November 2, 2021, Plaintiff did not object until December 20, 2021. ECF No. 15-2 at 31. But as Plaintiff points out, there was no court-ordered deadline to object to the evidence and Defendant has not identified any statute or rule making Plaintiff's objections untimely. ECF No. 20 at 26–27.

Second, Defendant objects to the Bankruptcy Court sustaining Plaintiff's objections to paragraphs 25, 26, and 30 of the Declaration of Steve Dawson, an accounting expert. ECF No.

15-2 at 32. The Bankruptcy Court found Dawson's statements unsubstantiated and conclusory, with no underlying facts to support the conclusions. Adv. Dkt. 368 at 5; *see also Galindo v. Precision Am. Corp.*, 754 F.2d 1212, 1216 (5th Cir. 1985) ("[U]nsupported allegations or affidavits setting forth 'ultimate or conclusory facts and conclusions of law' are insufficient to either support or defeat a motion for summary judgment." (quoting C. WRIGHT, A. MILLER & M. KANE, *FEDERAL* PRACTICE AND PROCEDURE: CIVIL *2D* § 2738 (1983))). Defendant avers Dawson's review of the underlying records provided the foundation for him to satisfy Rule 56(e)'s personal knowledge requirement. ECF No. 15-2 at 32. But his review of the underlying records, however thorough they may have been, does not make his statements in paragraphs 25 and 26 that the sale of the T&T Cattle were "sham transactions" any less conclusory. *See* SEALED Adv. Dkt. 295 at 6. Nor does it make his statement in paragraph 30 that the funds Cliff Hanger paid to Circle W for the care and feeding of the T&T Cattle must be counted as "payments" for Waggoner Cattle any less conclusory. *Id.* at 7.

Third, Defendant avers that the Bankruptcy Court erred in sustaining Plaintiff's objections to Roger Becker's Declaration, paragraphs 25 and 31. ECF No. 15-2 at 32. The statements at issue read as follows:

> 25. It is my understanding and belief, based upon representations that were made to me by Quint Waggoner, the owner of the Waggoner Entities, that Beef Cattle and Pasture Cattle were part of Cliff Hanger's business operations and were [Defendant's] first lien collateral.
>
> 31. [Defendant] contends that the categories of cattle defined in [Plaintiff's] MPSJ Memo as either "Beef Cattle" or "Pasture Cattle" were in fact "Cliff Hanger Cattle" because, as represented by Quint Waggoner, these cattle arose out of or related to Cliff Hanger's business operations in the Cliff Hanger Feed yards. In fact, my understanding from Quint Waggoner was that the cattle Lone Star calls "Pasture Cattle" would be fed on pastures for a period of time, but would then be moved to feedyards prior to their sale to third parties.

SEALED Adv. Dkt. 296 at 6–7. The Bankruptcy Court found that these paragraphs constitute hearsay. Adv. Dkt. 368 at 5–6. Without an exception, hearsay is inadmissible. *See* FED. R. EVID.

802. The Bankruptcy Court reasoned these paragraphs contained representations of Quint Waggoner and are therefore hearsay. Adv. Dkt. 368 at 6.

Defendant argues Quint Waggoner's deposition testimony supports these statements and that Becker's statement and were only offered to support Defendant's basis for its position that Beef and Pasture Cattle were Cliff Hanger Collateral. ECF No. 15-2 at 32–33. The Court finds these arguments unavailing and agrees with the R&R. The Court therefore **OVERRULES** Defendant's evidentiary-based objections.

CONCLUSION

Based on the foregoing, the Court overrules Plaintiff's and Defendant's objections and **ADOPTS** the Bankruptcy Court's R&R.

SO ORDERED.

August 24, 2022

MATTHEW J. KACSMARYK
UNITED STATES DISTRICT JUDGE