IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 11-11166

TERRA PARTNERS,
Plaintiff – Appellant Cross-Appellee
v.
RABO AGRIFINANCE, INC. and AG ACCEPTANCE CORPORATION
Defendants – Appellees Cross-Appellants

Appeal from the United States District Court for the
Northern District of Texas, Amarillo
USDC No. 2:08-cv-194-J

RESPONSE BRIEF OF DEFENDANTS-APPELLEES

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to 5TH CIR. R. 28.2.1, and in lieu of FED. R. APP. P. 26.1, the undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Appellant:

Terra Partners, a general partnership comprised of:
Williams & Veigel, Inc.
Burnett & Veigel, Inc.
Kirk & Veigel, Inc.
Massey, Kirk & Veigel, Inc.

Persons and Entities Associated with Appellant:

Steve Veigel
Robert Veigel
Ella Marie Veigel
Bill and Holly Kirk

Counsel for Appellant:

McDole Kennedy & Williams, P.C.
Steven E. Clark

Appellees:

Ag Acceptance Corporation
Rabo Agrifinance, Inc. (successor in interest to Rabo AgServices, Inc. and AgServices of America, Inc.)

Entities Affiliated or Associated with Appellees:

Ag Services, of America, Inc.
Centrale Raiffeisen-Boerenleenbank B.A., Rabobank Nederland; Utrecht, The Netherlands, (a/k/a "Rabobank") and other members of the Rabobank Group including Rabobank International and Utrecht-America Holdings, Inc.

Counsel for Appellees:

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United States District Court Judge:

The Honorable Mary Lou Robinson

/s/ *Barbara Whiten Balliette*
Barbara Whiten Balliette
Attorney for Defendants-Appellees

COUNTER-STATEMENT REGARDING ORAL ARGUMENT

Defendants-Appellees do not believe that oral argument is necessary in this case. This Brief sets out the background of the prior litigation between the parties and this Court's four prior rulings on related cases. The District Court Judge presided over all of the other lawsuits between the parties and/or their affiliates and was quite familiar with all of the underlying facts. Its opinions in this case were legally and factually well-reasoned. Although Appellant Terra Partners presented many issues for appeal, they are not legally complex and do not require oral argument for explanation.

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STATEMENT OF JURISDICTION

Defendants-Appellees agree with Appellants' statement of jurisdiction.

Defendants filed a Notice of Cross-Appeal. Defendants now abandon that cross-appeal as unnecessary and simply file this Response to Appellants' Brief.

COUNTER-STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. The District Court did not err in dismissing all of Terra Partners' conversion claims because:

   - Terra Partners has never produced competent summary judgment evidence to support its damage theories;
   - A conversion does not occur when, as happened here, a plaintiff refuses to identify the property it claims;
   - Terra Partners did not have superior rights to leased equipment;
   - An express provision in the governing security agreements waived all claims for conversion of the leased property; and
   - The doctrine of collateral estoppel applies to bar certain conversion claims.

2. The District Court did not err in issuing declaratory judgments that prevent Terra Partners from using subrogation rights to interfere with Defendants' well-established and judicially-upheld property rights.

3. The District Court did not err in finding that the transfer of subrogation rights to Terra Partners was a fraudulent transfer.

STATEMENT OF THE CASE

In this lawsuit—the fifth case in this Court between the parties and/or their affiliates—Plaintiff-Appellant Terra Partners ("**Terra Partners**") asserted that Defendants-Appellees Rabo Agrifinance, Inc. and Ag Acceptance Corp. (collectively, "**Defendants**")[1] converted Terra Partners' farm equipment when Terra Partners was evicted (by court order) from a farm.

Terra Partners also sought multiple declaratory judgments that would allow it to execute on Defendants' real estate by using a right of subrogation in a judgment lien that was transferred to it by Robert Veigel. Defendants filed counterclaims seeking contrary declaratory judgments.

Through a series of three summary judgment rulings, the District Court dismissed all of Terra Partners' conversion claims and issued declaratory judgments in Defendants' favor. USCA5 2975, "**First Summary Judgment**," USCA5 4563, "**Second Summary Judgment**," USCA5 5216, "**Third Summary Judgment Ruling**."

[1] Unless specifically necessary to distinguish between the two, Rabo Agrifinance and Ag Acceptance Corp. are referred to herein collectively as "Defendants."

STATEMENT OF FACTS

I. HISTORY OF LITIGATION BETWEEN PARTIES AND AFFILIATES

This case is only the most recent in a decade-long saga of litigation arising out the Veigel Entities' unpaid debts. This is the ***fifth case*** between Veigel Entities and Defendants before this Court and Defendants have prevailed in all of the cases. The other cases were:

- "***First Lien Suit***," *Rabo Agrifinance, Inc. v. Terra XXI, Ltd.*, 257 F. App'x 732, 2007 WL 4305378 (5th Cir., Dec. 7, 2007) (upholding a $3.9 million summary judgment against various Veigel Entities based on failure to repay the First Lien Loans);

- "***Deficiency Suit***" or "***Second Lien Suit***,"[2] *Rabo Agrifinance, Inc. v. Veigel Farm Partners,* 328 F. App'x 942, 2009 WL 1362826 (5th Cir., May 15, 2009) (District Court entered judgment for $1.35 million against various Veigel Entities for the deficiency resulting after foreclosure of Second Lien loans. This Court upheld the finding that the debt was specifically preserved in bankruptcy proceedings);

- "***Equipment Suit***," *Rabo Agrifinance, Inc. v. Terra XXI, Ltd.*, 583 F.3d 348 (5th Cir. 2009) (upholding security interests in equipment, permitting foreclosure on that equipment, and finding that Terra Partners' subrogation rights in the equipment could not be exercised until all of the Veigels' debts to Rabo Agrifinance and Ag Acceptance Corp. were satisfied); and

- "***Partition Suit***," *Ag Acceptance Corporation v. Robert Wayne Veigel*, 564 F.3d 695 (5th Cir. 2009) (finding no homestead rights on the 960 Acres, upholding execution on that property, and finding that transfers of leases to Terra Partners were fraudulent).

[2] The parties and the court below have referred to this lawsuit as both the "*Deficiency Suit*" and the "*Second Lien Suit*." To be consistent going forward, Defendants will refer to it as the "*Deficiency Suit*" herein.

There have also been several state court lawsuits between the parties, including:

- "***State Court Wrongful Foreclosure Suit***," *Terra XXI, Ltd. v. Ag Acceptance Corporation*, No. 07-07-0374-CV, 2009 WL 2168741 (Tex. App.—Amarillo, July 21, 2009, pet. denied), *cert. denied*, 131 S.Ct. 436 (2010) (upholding a series of summary judgments against various Veigel Entities, including Terra Partners, and finding that September 2003 foreclosure on the Big Farm was not wrongful)

- "***Eviction Suit***," *Terra XXI, Ltd. v. Ag Acceptance Corporation*, 280 S.W.3d 414 (Tex. App.—Amarillo, 2008, pet. denied) (allowing eviction of Terra Partners and Veigel Entities from the Big Farm to proceed); and

- "***Friemel Suit***," *Friemel v. Ag Acceptance Corp., Rabo Agrifinance, and Terra Partners,* Cause No. CI-07C-24, in the 222nd District Court of Deaf Smith County, Texas. This case began as a suit by the Friemels (who subleased part of the farm) to recover monies they claimed were due from the 2006/2007 wheat crop. The Friemels' claims were settled; thereafter, Terra Partners asserted numerous cross-claims against Ag Acceptance Corp. and Rabo Agrifinance. The case was settled soon after trial started. USCA5 4923, Friemel Settlement Agreement.

Terra Partners was a party to all of these lawsuits except the *First Lien Suit* and the *Deficiency Suit*. The rulings in all of these cases have direct implications on the issues in the present case. Because the case names are similar in traditional citation, these cases will be cited in this Brief by the names defined above.

II. DEFINITIONS

In the *Equipment Suit*, this Court noted the history of the creation and operation of "**Terra Partners**:"

> Terra Partners is the only Veigel entity that does not owe money, either directly or as a guarantor, to the Appellees. … A district court described Terra Partners when analyzing whether certain transfers to it were fraudulent:

> Terra Partners was formed in 2000 to farm the property just as Veigel Farm Partners did before going bankrupt. All but one person with an interest in Veigel Farm Partners also has an interest in Terra Partners. Terra Partners has never been liable to [Rabo Agrifinance and Ag Acceptance]. Terra Partners is comprised of four corporate partners owned by Robert Veigel's family members .... Terra Partners has never filed a tax return.
>
> ... Robert and Steve Veigel are the chief participants in Terra Partners. They have written checks from Terra Partners' bank account and have used Terra Partners' debit card for personal expenses such as meals, lingerie, taxes on a personal residence, camp, a speeding ticket, a television, a trip to Six Flags, a visit to a chiropractor, and a visit to a dentist. Robert Veigel at one point wrote a check from Terra Partners to Amarillo National Bank with the notation for "BV's safe deposit." Between 2004 and 2006, Steve Veigel drafted and cashed many checks made payable to Burnett & Veigel and bearing the notation "advance." Burnett & Veigel has not filed a corporate tax return since 2001. Steve Veigel testified that he has not filed a personal income tax return for "several years." Robert Veigel has not filed an income tax return for at least four years. Steve and Robert Veigel argue that the purchases by check and debit card were loans … Defendants do not have an accounting of the personal expenses that were allegedly borrowed.

583 F.3d at 351 n.4 (quoting the District Court's memorandum opinion from the *Partition Suit*). Terra Partners has never operated as a true business enterprise – it did not even keep financial records until ordered to create such records (after much protest and legal wrangling) during discovery in the present case. *See* USCA5 2815, Order Awarding Costs and Fees (stating that "plaintiff failed to properly keep records concerning its most basic financial information – its income, revenue, profits, and losses.")

Terra Partners is one of several entities owned by members of the Veigel family, Robert/Bob and Ella Marie Veigel, and their children, Steve, Holly, and Vicki. The individuals and the various entities are collectively referred to herein as the "**Veigel Entities**" when it is not necessary to refer to a specific person or entity.

There are two main tracts of land at issue in this case, the "**Big Farm**" and the "**960 Acres**." The Big Farm is approximately 5,600 acres of land in Deaf Smith County, Texas. In partial satisfaction of the Veigel Entities' debts, Defendant Ag Acceptance Corp. foreclosed on the Big Farm in September 2003. The foreclosure was upheld in the *State Court Wrongful Foreclosure Suit* and the *Deficiency Suit*.

The 960 Acres is physically connected to the Big Farm, but has a separate ownership history. That history is fully set out in the *Partition Suit*, 564 F.3d at 697-98. Ag Acceptance Corp. foreclosed on a purchase money lien on a 75% interest in the 960 Acres in August 2003. In the Partition Suit, the Veigel Entities abandoned claims that the foreclosure on the 75% interest was wrongful. *Id.* at 700-01. Defendant Rabo Agrifinance executed on Robert Veigel's 25% interest in the 960 Acres in 2006 and that execution was upheld as proper. *Id*. at 698-700.

III. FACTS RELATED TO THE CONVERSION CLAIMS

A. Events Leading Up to and Including the Eviction[3]

The District Court's First Summary Judgment Opinion succinctly sets out the multi-year and multi-lawsuit history of events leading to the October 2006 eviction:

> Rabo loaned Veigel Farm Partners and Terra XXI approximately $1.8 million between 1997 and 1999 for conducting farming operations in Deaf Smith County, Texas (the Secured Farming Loans).
>
> In August and September of 2000, Veigel Farm Partners and Terra XXI respectively filed for Bankruptcy; their bankruptcy plans were confirmed in December 2001. Under the bankruptcy plans, Rabo's claims were secured by, among other liens, a second lien on all real property owned by Terra XXI …
>
> In 2003, Terra XXI and Veigel Farm Partners defaulted on the now-reduced Secured Farming Loans. On September 2, 2003 Ag Acceptance conducted a non-judicial foreclosure on the Big Farm. Because the property was encumbered by superior liens for more than $3 million, Ag Acceptance purchased the Big Farm for $20,000 at the foreclosure sale, which it credited against the amount owed. The Veigel/Terra entities, however, refused to vacate the property.
>
> In early 2004, Ag Acceptance filed a petition for forcible detainer in Deaf Smith County justice court (the Eviction Suit). Veigel Entities responded by filing a suit in Deaf Smith County District Court, Texas, alleging, among other acts, wrongful foreclosure (the State Court Wrongful Foreclosure Suit). In the Eviction Suit, the justice court awarded Ag Acceptance possession of the property; the Veigel Entities appealed the decision but the appeals were unsuccessful. In

[3] The facts in this section are taken directly from the District Court's First Summary Judgment Opinion. Terra Partners also stated that its "facts" section is taken from the District Court's summary judgment rulings; however, that is simply not true at all. Terra Partners failed to cite to the record, its "facts" are often distortions of the District Court's findings or, more disturbing, nowhere to be found in the District Court's rulings or the record itself. Without direct record citations, the Court should ignore all Terra Partners' alleged "facts" on appeal.

the State Court Wrongful Foreclosure Suit, Deaf Smith County District Court granted summary judgment in favor of Ag Acceptance; the Veigel Entities' appeals were unsuccessful.

The limited return from the foreclosure sale of the Big Farm left a large deficiency on the Secured Farming Loans. Rabo sued to collect the deficiency on September 1, 2005, near the expiration of the two-year statute of limitations (the [Deficiency] Suit).

With the [Deficiency] Suit pending, Rabo filed the Equipment Suit for a temporary restraining order in Texas state court on June 7, 2006, seeking to prohibit "the Veigels, or any of their employees or agents, from injuring, destroying, damaging, or wasting the collateral ... in any manner" and to prohibit "the Veigels, or any of their employees or agents, from removing any of the collateral." The collateral consisted of farming equipment on which Rabo held the first lien pursuant to the Secured Farming Loans and the irrigation system on which Rabo, having bought out Diversified's interest, now also held the first as well as second lien positions. The equipment is equipment which Terra Partners claims Rabo converted in this case.

The Equipment Suit was removed to federal court. Soon after removal, the United States District Court for the Northern District of Texas issued a preliminary injunction against the Veigel Entities as follows:

> Terra XXI, Ltd. Veigel Farm Partners, Veigel Farms, Inc., Grain Central Station Inc., Veigel Grain Company, Robert W. Veigel (a/k/a Bob Veigel), Ella Marie Veigel, and Steve Veigel, and their officers, agents, servants, employees, attorneys, and those in active concert or participation with them who receive actual notice of this Order, by personal service or otherwise, restraining each and every one of them from injuring, destroying, damaging, or wasting the collateral described in the attached Exhibit A in any manner until the final judgment in this action or until further order of this Court, whichever occurs sooner.
>
> IT IS HEREBY FURTHER ORDERED that Terra XXI, Ltd. Veigel Farm Partners, Veigel Farms, Inc., Grain Central Station Inc., Veigel Grain Company, Robert W. Veigel (a/k/a Bob Veigel), Ella Marie Veigel, and Steve Veigel shall not remove any of the collateral described in the attached Exhibit A from Sections, 21, 22, 39, 40, 42, 59, 60, 61 or 62 in Block K4, Deaf

> Smith County, Texas, in any manner until final judgment in this action or until further order of this Court, whichever occurs sooner.
>
> Terra Partners was joined as a defendant in the Equipment Suit on February 9, 2007.
>
> . . .
>
> On October 19, 2006, while the Equipment Suit was pending in Federal Court, a writ of possession was issued in connection with the state court Eviction Suit and was posted at the Big Farm. On October 23, 2006, pursuant to the writ of possession, Ag Acceptance took possession of the Big Farm. Deaf Smith County Deputy Ginter executed the writ.
>
> . . .
>
> Terra Partners did not own the Big Farm and did not owe a debt to Rabo or Ag Acceptance. Terra Partners, however, claimed to have an oral lease on certain of the equipment, including irrigation equipment, and claimed to own other equipment. Terra Partners alleges that it sought to remove all equipment from the Big Farm to the 960 Acres but that it was prevented from doing so because Defendants instructed and convinced Deputy Ginter that the writ of possession together with this Court's temporary injunction prohibited the removal of all non-household personal and leased property. It alleges that Defendants thereby converted all of the equipment including that allegedly leased and that owned by Terra Partners.

USCA5 2977-2981, First Summary Judgment.

B. The Equipment Auction Facts[4]

Terra Partners also asserts conversion claims relating to items of leased and personal equipment that Terra Partners claims was not sold at an April 2008 auction (the "**Auction**"). The Auction was the culmination of three of the federal

[4] The facts in this section are taken from evidence in the record as noted by record citations.

court lawsuits and was conducted under the very close scrutiny of the District Court.

In the Deficiency Suit, the District Court stated that it could not "determine the exact dollar figure that [Rabo Agrifinance] is entitled to until the equipment at issue in [the Equipment Suit] is foreclosed upon and credit is given to the Defendants for the value of the equipment. [Rabo Agrifinance] is entitled to $1,964,355.06, less the credits that will be given for the foreclosed upon equipment. [Rabo Agrifinance] has 60 days from the date of this memorandum opinion to submit competent summary judgment evidence detailing the credits given as a result of the equipment being foreclosed upon." USCA5 4199, Memorandum Opinion in *Deficiency Suit*.

Pursuant to the District Court's instructions, Rabo Agrifinance arranged for the sale of the equipment, which was sold at the April 2, 2008 Auction. After the Auction, Rabo Agrifinance submitted a notice of sale credits to the Court. USCA5 3847-3854.

The Veigels contested the results of the Auction in three different lawsuits claiming that the credit was not high enough because certain equipment was not sold (the exact same allegations they are making in the present suit). USCA5 3855-3915, Filings in Deficiency Suit, Equipment Suit, and Partition Suit. In these three filings, Robert Veigel provided an affidavit complaining of the failure to sell

certain equipment that belonged to Veigel Farm Partners ***and Terra Partners.*** USCA5 3860-3863, 3880-3883, and USCA5 3901-3904.

Defendants filed replies in all three cases and specifically addressed the contention that the equipment was not sold explaining that all of the equipment was, in fact, sold or that it was a fixture. USCA5 3916-3994.[5]

After reviewing all of the evidence, the District Court validated the auction, finding the Veigel Entities' objections "without merit." USCA5 3995-3996, Order on Sale Credits.

IV. SUBROGATION INTEREST FACTS

Separate and apart from the conversion causes of action, in this lawsuit Terra Partners also sought declaratory judgment that would allow it to exercise a right of subrogation in a judgment lien. This Court previously considered related issues concerning the Subrogation Interest in the *Equipment Suit*, 583 F.3d at 353.

The judgment lien was originally obtained in May 2000 by Diversified Financial Services ("**Diversified**," the "**Diversified Lien**" and/or the "**Diversified Judgment**") against other Veigel Entities, including Robert Veigel, after they failed to repay their debts under two installment loans for the purchase of irrigation equipment. *See* USCA5 1070, Diversified Judgment.

[5] USCA5 3916-3994, is the Reply filed in the *Deficiency Suit*. Identical briefs were filed in the *Equipment* and *Partition Suits*.

The Diversified Lien was specifically allowed in the Terra XXI, Ltd. Bankruptcy Plan. USCA5 1073, ("**Terra XXI Plan**"). Defendant Ag Acceptance Corporation purchased the Diversified Lien and attempted to use it to execute on Robert Veigel's 25% interest in the 960 Acres. In order to avoid execution, Robert Veigel paid off the Diversified Judgment. USCA5 1086. Then, Robert Veigel claimed a right of subrogation against the other co-obligors on the Diversified Judgment, i.e., his family and the entities they own and control (the "**Subrogation Interest**"). USCA5 1090. Robert Veigel then assigned the Subrogation Interest to Terra Partners. USCA5 1093, Assignment of Judgment.

SUMMARY OF ARGUMENT

I. SUMMARY OF ARGUMENT REGARDING CONVERSION CLAIMS

The District Court correctly dismissed all conversion claims. Terra Partners asserted claims related to three categories of equipment: Owned Equipment, Leasehold Equipment, and Allegedly Unsold Equipment.[6] Conversion claims for all of these categories fail because Terra Partners never produced competent summary judgment evidence to support its damage theories. Terra Partners' damage calculations have no connection to actual damages suffered and they are based on speculation, improbable inferences, and factually impossible scenarios.

Further, a conversion does not occur when a plaintiff refuses to identify the property it claims. In this case, Terra Partners "steadfastly refused to identify the property which it claimed," therefore, all claims for conversion of Terra Partners' Owned Equipment fail.

Claims for conversion of Leasehold Equipment fail because Terra Partners did not have superior rights to that equipment and because an express provision in the governing security agreements waives all claims for conversion.

Finally, the doctrine of collateral estoppel bars conversion claims related to the Allegedly Unsold Equipment because, in the Equipment Suit, the District Court previously rejected identical arguments relating to that equipment.

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[6] These terms are defined *infra* at page 19.

II. SUMMARY OF ARGUMENT REGARDING DECLARATORY JUDGMENT RULINGS

The District Court's declaratory judgment rulings related to the Subrogation Interest in the Diversified Judgment are correct. First, based on this Court's *Equipment Suit* opinion, the Subrogation Interest cannot be used until all underlying debts to Defendants are repaid. Allowing a right of subrogation in a situation involving only the partial payment of a debt prejudices the rights of a creditor with a secured interest in the collateral.

Second, despite Terra Partners' attempt to twist trial testimony from another lawsuit, the terms of the Terra XXI bankruptcy plan govern lien priority and the Diversified Lien was inferior to Ag Acceptance Corp.'s lien on the Big Farm.

Third, the Diversified Lien did not attach to the 75% interest in the 960 Acres because Terra XXI acquired that property *after* its bankruptcy filing. The pre-petition Diversified Lien cannot attach to property acquired post-petition.

Fourth, by paying off the Diversified Judgment, Robert Veigel extinguished his liability for the judgment, therefore, Terra Partners cannot use the subrogation interest (transferred to it by Robert Veigel) to re-execute on Robert Veigel's former real estate holdings.

III. SUMMARY OF ARGUMENT REGARDING FRAUDULENT TRANSFER CLAIMS

The District Court correctly found that the transfer of the Subrogation Interest from Robert Veigel to Terra Partners was a fraudulent transfer to an insider.

Robert Veigel was insolvent at the time of the transfer because he was not paying his debts as they became due. This fraudulent transfer counter-claim, which was asserted as a defense against Terra Partners' repeated attempts to find a way to use the Subrogation Interest to interfere with Defendants' property rights, is not barred by limitations or *res judicata*.

ARGUMENT AND AUTHORITIES

I. STANDARD OF REVIEW

This Court reviews a district court's grant of summary judgment *de novo,* applying the same legal standards as the district court. *Ballard v. Devon Energy Prod. Co., L.P.*, 10-20497, 2012 WL 1354082, ---F.3d---, (5th Cir. Apr. 19, 2012).

To avoid summary judgment, the non-movant must go beyond the pleadings and come forward with specific facts indicating a genuine issue for trial. *Id.* Mere conclusory allegations are not competent summary judgment evidence, and thus are insufficient to defeat a motion for summary judgment. *Eason v. Thaler,* 73 F.3d 1322, 1325 (5th Cir. 1996). Unsubstantiated assertions, improbable inferences, and unsupported speculation are not competent summary judgment evidence. *See Forsyth v. Barr,* 19 F.3d 1527, 1533 (5th Cir.), *cert. denied,* 513 U.S. 871 (1994). 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 claim. *Ragas v. Tennessee Gas Pipeline Co.,* 136 F.3d 455, 458 (5th Cir. 1998).

This Court is not limited to the district court's reasons for its grant of summary judgment and may affirm the district court's summary judgment on any ground raised below and supported by the record. *Ballard*, 2012 WL 1354082.

II. PRELIMINARY STATEMENT REGARDING ORGANIZATION OF BRIEF

Defendants' Brief addresses all appellate issues regarding related topics in the same section as follows:

- Section III, Conversion Claims
  (Terra Partners' Issues One, Six, Ten, Eleven, Twelve)
- Section IV, Rulings Relating to the Subrogation Interest
  (Terra Partners' Issues Two, Three, Four, and Five)
- Section V, Fraudulent Transfer Issues
  (Terra Partners' Issues Seven, Eight, Nine)

III. THE DISTRICT COURT DID NOT ERR IN DISMISSING TERRA PARTNERS' CONVERSION CLAIMS (TERRA PARTNERS' ISSUES ONE, SIX, TEN, ELEVEN, TWELVE)

The conversion claim facts are undisputed. Defendant Ag Acceptance Corp. foreclosed on the Big Farm in September 2003. The foreclosure was not wrongful. *State Court Wrongful Foreclosure Suit*, 2009 WL 2168741; *Deficiency Suit*, 328 F. App'x 942.

Terra Partners and the Veigels remained on the land for three years after the foreclosure. In October 2006, the Deaf Smith county courts finally issued an eviction order which required Terra Partners and other Veigel Entities to leave the Big Farm. The eviction order was proper. *Eviction Suit*, 280 S.W.3d 414. By the eviction day (three years after the foreclosure), Terra Partners was still on the land and had not moved its personal equipment from the land. At the time of the eviction, the Veigel Entities owed Defendants millions – this debt was secured by

the Big Farm and by the farm equipment. *First Lien Suit*, 257 F. App'x 732, *Deficiency Suit*, 328 F. App'x 942; *Equipment Suit*, 583 F.3d 348.

For the past ten years, Terra Partners and the Veigels have been nothing but obstinate, obstructive, and outrageously litigious. Because of this, Defendants have sought the guidance of courts at every turn, operated under court order in everything they have done, and have prevailed in every lawsuit. Terra Partners' conversion claims are just the latest (expensive and time-consuming) obstacle thrown at Defendants. There is no possible way that Defendants' actions constituted conversion of anything: the conversion claims are frivolous, or very close to it. As the District Court did, this Court should put a stop to Terra Partners' latest barrage of made-up claims.

There are three categories of equipment at issue in the conversion claims: (1) Terra Partners' personal equipment ("**Owned Equipment**") (2) equipment that Terra Partners allegedly leased from other Veigel Entities (the "**Leasehold Equipment**"), which is the vast majority of the allegedly converted equipment; and (3) leased or personal equipment that Terra Partners claims was not sold at the April 2008 auction ("**Allegedly Unsold Equipment**").

Through its three summary judgment rulings, the District Court dismissed all of the conversion claims for all of the categories of equipment. Terra Partners raises five appellate issues relating to the dismissal of the conversion claims:

- Issue Twelve (Insufficient Evidence of Damages) relates to all three categories of equipment;
- Issue One (Refusal to Identify Property) relates to Owned Property only;
- Issues Ten and Eleven (Nature of the Eviction and Waiver of Conversion Claims) relate to the Leasehold Property only; and
- Issue Six (Collateral Estoppel) relates to Allegedly Unsold Property only.

The District Court correctly dismissed all of the conversion claims.

A. The District Court Properly Dismissed All Conversion Claims Because Terra Partners Did Not Provide Competent Summary Judgment Evidence to Support Its Damages Theories (Terra Partners' Issue Twelve)

In its Third Summary Judgment Ruling, the District Court found that all of Terra Partners' conversion claims (relating to all three categories of equipment) fail as a matter of law because Terra Partners was unable to provide competent summary judgment evidence to support its damage claims. USCA5 5225-28.[7] The damages claims fail for three, independent reasons, any one of which is sufficient to support dismissal of all conversion claims: (1) Terra Partners has failed to produce competent summary judgment evidence that proves it suffered the damages it claims; (2) Terra Partners' damages are based on sheer speculation; and

[7] The lack of damages was also raised in court-ordered supplemental briefing on the First Summary Judgment. USCA5 2846, Order for Briefing, USCA5 2854, Defendants' Supplemental Brief on First Motion for Summary Judgment. The District Court did not address the damages issue in its First Summary Judgment ruling.

(3) Terra Partners' damages are based on factual impossibilities. The District Court's ruling was well-reasoned and should be upheld on appeal.

1. Damages are a required element of a conversion claim

A plaintiff must prove damages before it may recover for conversion. *United Mobile Networks, L.P. v. Deaton*, 939 S.W.2d 146, 147 (Tex. 1997); *see also 50-Off Stores, Inc. v. Banques Paribas, S.A.,*150 F.3d 247, 254-55 (5th Cir. 1999) ("a conversion plaintiff must prove that the loss of the converted materials caused the damages claimed").

Damages are limited to the amount necessary to compensate the plaintiff for the actual losses or injuries sustained ***as a natural and proximate result*** of the defendant's conversion. *United Mobile Networks, L.P.*, 939 S.W.2d at 148. A recovery of damages for conversion should not unjustly enrich either party. *United Mobile Networks, L.P.*, 939 S.W.2d at 148. Under the correct view of conversion damages based on loss of use, a conversion plaintiff is "entitled to recover the ***reasonable value of the use of the property for the purpose for which it was being used when converted*** or actually used by the wrongdoer." *3-C Oil Co. v. Modesta P'ship*, 668 S.W.2d 741, 751 (Tex. Civ. App.—Austin 1984, writ ref'd n.r.e.) (emphasis added); *see also* 4A Tex. Jur. Pleading and Practice Forms § 74.14 (2d ed.), Practice Notes (citing *3-C Oil Co.* as black-letter law regarding recovery of loss of use damages in conversion case).

2. Explanation of Terra Partners' damage theory

Terra Partners asserts that it is entitled to damages for the loss of use of equipment from the time of the eviction (October 2006) until the date of the sale of the equipment (April 2008). USCA5 4724 and 4725, Supplemental Complaint ¶¶ 5 and 8, USCA5 5115 and 5118-27. Based on Steve Veigel's concocted calculations, Terra Partners uses the alleged cost to rent similar items of equipment as the measure of its damages for allegedly being deprived of the use of the equipment for that 17-month period. USCA5 5118-27. Shockingly, Steve Veigel has managed to invent a total rental value (for only 17 months) of $1,738,965 for items of equipment that sold for a total of approximately $750,000 at the April 2008 sale. *Compare* USCA5 5118-27 with USCA5 5022-23, *Deficiency Suit* Judgment (finding that gross sales were just over $712,000).[8]

[8] For years, Terra Partners has essentially been a fraudulent shell company used to avoid the other Veigel Entities' creditors, especially Defendants. The Equipment Suit details Terra Partners' history. 583 F.3d at 351 n.4. Terra Partners ***never kept financial records*** until ordered to so by Magistrate Averitte during discovery in this case. *See* USCA5 2815, Order Awarding Costs and Fees.

An examination of Terra Partners' hastily-created financial information that Steve Veigel put together after Magistrate Averitte's orders shows that its profits have never been anywhere near the $1.7 million it claims in damages. *See* USCA5 5036, Terra Partners' 6th Amended Trial P&L Detail Report. It defies credulity for Terra Partners to assert that it suffered more than $1.7 million in damages for an inability to use some items of equipment (on land that it had no longer had any right to access) for a 17-month period when, in reality, Terra Partners' alleged ***total*** profits for the previous ***three years*** was less than $350,000. *Id.* at USCA5 5046.

3. Terra Partners failed to produce evidence that it actually suffered damages

Terra Partners presents a method for calculating damages amounts, but it misses the key point because it did not (and cannot) show that it actually suffered the damages it claims.[9]

(a) Terra Partners has never articulated a factual connection between its proposed measure of damages and actual damages it incurred

In his "expert" report (USCA5 5180-5184), Steve Veigel asserted his opinions about the proper *measure of damages* in a theoretical conversion case (i.e., a made-up rental value), but those opinions have ***no connection to any actual damages*** Terra Partners itself suffered. Indeed, the District Court struck Steve Veigel's expert report on this basis:

> [Steve Veigel] has presented a convoluted argument exploring theories of the measure of damages based on legal conclusions that he is not qualified to render. Further, although he alleges million of dollars in damages, ***he offers no facts to show that Plaintiff incurred any of those losses.*** The Court concludes that his testimony is not based on sufficient facts or data, and his testimony is not the product of reliable principles and methods . . .

USCA5 2841-2842, Order Striking Steve Veigel as expert witness (emphasis added).

[9] Damages are a bandage to repair past injuries, not a sword used to inflict retaliation on the defendant: damages are compensation in money, imposed by law, for loss or injury. *Geters v. Eagle Ins. Co.*, 834 S.W.2d 49, 50 (Tex. 1992). The cardinal principle is that the injured person should receive compensation commensurate with their loss or injury and no more. *Jordan v. Cartwright*, 347 S.W.2d 799, 801 (Tex. Civ. App.—Fort Worth 1961, no writ).

Despite this ruling (unchallenged on appeal), Terra Partners remains undeterred and relies on the *very same unreliable report* the District Court rejected. Terra Partners' Brief, p. 45, n.62. Even if Steve Veigel's testimony is re-characterized as lay witness testimony, it contains the same fatal flaws as the purported expert testimony: it "offers … no facts to show that Plaintiff incurred any of those losses."

For example, if, as claimed, Terra Partners suffered damages because of an inability to use the converted items to farm the 960 Acres, it should explain (and offer competent supporting summary judgment evidence) *which items* it would have used *and how the alleged inability to do so resulted in a real, non-theoretical harm*. But Terra Partners has never made that factual connection.

The leading Texas Supreme Court case on conversion damages controls this case. In *United Mobile Networks,* the conversion plaintiff alleged that the defendant had converted a customer list. 939 S.W.2d at 147. The plaintiff's expert witness testified that the fair market value of the list was in excess of $500,000. There was no dispute that the defendant had taken the list, but the Texas Supreme Court reversed the trial court and rendered judgment that the plaintiff take nothing on the conversion claim ***because the plaintiff failed to provide any evidence that it had actually lost business because of the conversion***. *Id.*

The same is true in this case: Terra Partners has not provided any evidence that it actually lost any business. It presents (fraudulent and grossly-inflated) rental/fair market values for the equipment, but, like the plaintiff in *United Mobile Networks*, ***Terra Partners has never presented any evidence that it lost actual revenues.*** Like the plaintiff in that case, Steve Veigel has simply created a damages number without showing that Terra Partners actually suffered damages. As in the *United Mobile Networks* case, Terra Partners' conversion claims fail as a matter of law fail because it did not show that it actually suffered damages.

(b) On appeal, Terra Partners continues to fail to articulate how its "evidence" supports its claim for damages

In this appeal, Terra Partners continues to fail to articulate the "precise manner" in which its alleged evidence supports its damages claims. *See Ragas*, 136 F.3d at 458 (non-movant must articulate the "precise manner" in which competent evidence supports its claims).[10] Without clarification, Terra Partners simply says that it "presented evidence of damages in accordance with these standards through Steve Veigel. This evidence met the requirement that Terra Partners identify specific evidence and articulate how it supports its claim." Terra Partners' Brief p. 45-46. Despite this self-serving statement, Terra Partners' Brief

[10] *See also Eason,* 73 F.3d at 1325; *Forsyth,* 19 F.3d at 1533.

contains no actual effort to articulate the "precise manner" that the alleged evidence supports its claims for loss of use of the equipment.

Further, Terra Partners wholly ignores the fact that the District Court found significant parts of Steve Veigel's declaration inadmissible because the testimony is "not by itself based on sufficient facts, but offered in support of unsubstantiated assertions, improbable inferences, and unsupported speculation." USCA5 5213 Order Granting Defendant's Motion to Strike Steve Veigel's Declaration. Terra Partners did not appeal this ruling. It cannot avoid the fact that most of the "evidence" it cites on appeal is incompetent, inadmissible evidence.

This case was dismissed on summary judgment, not on a motion to dismiss. At the summary judgment stage, is insufficient to merely state that a plaintiff "could show" damages (as Terra Partners does on appeal and below). Absent the required "precise" articulation of how (the admissible parts of) its alleged evidence support its conversion damages claim, Terra Partners' appeal fails from the start. *See Ragas,* 136 F.3d at 458; *Forsyth,* 19 F.3d at 1537.

4. Conversion claims fail because damages are speculative

As another, independent ground for upholding the District Court's damages rulings, Terra Partners' conversion claims also fail because its damages claims are highly speculative. Under Texas law, neither the fact and amount of damages alleged can be speculative; both must be established with "reasonable certainty." A

plaintiff's failure to show either acts as a bar to recovery. *Roehrs v. Conesys, Inc.,* 332 F. App'x 184, 186 (5th Cir. 2009); *Burkhart Grob Luft Und Raumfahrt GmbH & Co. KG v. E–Sys., Inc.,* 257 F.3d 461, 467 (5th Cir. 2001).

Terra Partners asserts that it "could have" used unspecified items of equipment on the 960 Acres and/or leased unspecified items to some third-party. Terra Partners' Brief, p. 43. But, as the District Court recognized in striking Steve Veigel's declaration, the proposed uses are too speculative to support a damages claim. USCA5 5213.

Terra Partners has never provided any competent evidence showing that, *after the eviction*, any actual lessee would have leased the equipment from Terra Partners (a mere lessee of equipment that was the subject of a pending lawsuit) on land that had been foreclosed and from which Terra Partners had been evicted. Additionally, Terra Partners provides no competent evidence of the price at which the equipment would have been sub-leased, nor any evidence of the length or other terms of the lease. Quite significantly, Terra Partners never inquired in a deposition or other discovery whether Defendants would have allowed the fixture portion of the irrigation equipment to be used in such a sub-lease situation (and it is safe to say that Defendants ***would not*** have allowed a sub-lease that was controlled by Terra Partners, especially since the equipment was the subject of pending litigation in the *Equipment Suit*).

Further, Terra Partners failed to provide any deduction for its cost of doing business and failed to account for the fact that, as the mere lessee of the equipment, it was still obligated to pay rent to the lessors of the equipment.

Terra Partners' damage theory is simply that – a theory. Without competent facts to support the theory, the damages claims are too speculative; therefore, all of the conversion claims fail as a matter of law.

5. Conversion claims fail because damage theories are based on factual impossibilities

Finally, the damages claims fail because they are based on factual impossibilities: Terra Partners claims that it was damaged by its inability to use the three categories of farming equipment on the Big Farm and the 960 Acres (Terra Partners' Brief p. 43), but the undisputed facts show that Terra Partners had no right to use any of that land during the relevant time period.

(a) Could not use the items on the Big Farm

Terra Partners had no right to be on the Big Farm after the eviction, so it could not have used any items there. Although Terra Partners claims that it "could have" leased the equipment to one of Defendants' subsequent tenants (Terra Partners' Brief p. 43), it never attempted to do so, it has no evidence that the lessee would have wanted to lease the equipment, and it has no evidence that Defendants would have allowed the use of the equipment on the land that Defendants owned pursuant to a lease that was controlled by Terra Partners. Made-up scenarios about

what might possibly have happened in some alternate universe are not competent summary judgment evidence. *Forsyth*, 19 F.3d at 1533.

(b) Could not use the items on the 960 Acres

(i) Before February 2007

From October 23, 2006 through February 2007, Robert Veigel still owned a 25% interest in the 960 Acres. At that time, however, the Friemel crop was in place. Pursuant to the Friemel settlement, Terra Partners cannot claim any damages for that time period because it is not entitled "to any additional funds from the 20006/2007 (sic) Wheat Crop." USCA5 4924, Friemel Settlement Agreement.

(ii) After February 2007

After the February 2007 execution on Robert Veigel's 25% interest in the 960 Acres, Defendants owned 100% of the 960 Acres. *See Partition Suit*, 564 F.3d 698-701. Terra Partners had no right to use any equipment of the 960 Acres after that time. Terra Partners falsely claims that it still held "lease rights" to farm the entire 960 Acres, but this Court and the District Court have already confirmed that any lease rights were the result of Terra Partners and the Veigels' fraudulent actions. *Partition Suit*, 564 F.3d at 698 and 700-01. Terra Partners cannot prevail based on its persistent charade that it had legitimate rights to use this land.

6. Summary: Conversion claims fail because Terra Partners has no competent evidence of actual damages suffered

On their face, Terra Partners' damage calculations are preposterous. They are not supported by facts or competent, admissible summary judgment evidence. Because there is no competent summary judgment evidence to support the damage calculations, all conversion claims were properly dismissed on summary judgment.

B. The District Court Properly Dismissed Conversion Claims Related to Owned Equipment Because Terra Partners Refused to Identify It (Terra Partners' Issue One)

The District Court correctly ruled that Defendants did not convert Terra Partners' Owned Equipment because Terra Partners "for whatever reason, steadfastly refused to identify the property which it claimed." USCA5 2982, First Summary Judgment. There is no genuine issue of material fact on this issue and the District Court's finding should be upheld.

A conversion plaintiff must "establish (1) that it owned or had a right to possession of the property; (2) the defendant assumed and exercised dominion and control over the property; and (3) the defendant refused plaintiff's demand for return of the property." *TXNB Internal Case v. GPR Holdings,* 483 F.3d 292 (5th Cir. 2007); *Whitaker v. Bank of El Paso*, 850 S.W.2d 757, 760 (Tex. App.—El Paso 1993, no pet.) (a plaintiff must establish that he demanded return of the property, and that the defendant refused to return it). Although an absolute refusal to transfer possession to one entitled to it constitutes conversion, ***a qualified good faith***

refusal based on a reasonable requirement does not constitute conversion. *Whitaker*, 850 S.W.2d at 760.

A refusal to deliver property on request may be justified in order to investigate the rights of the parties, and no conversion results if such refusal is made in good faith to resolve a doubtful matter. *Id.* *See also* Restatement (Second) of Torts § 240 (1965) ("one in possession of a chattel who is in reasonable doubt as to the right of a claimant to its immediate possession does not become a converter by making a qualified refusal to surrender the chattel to the claimant for the purpose of affording a reasonable opportunity to inquire into such right"); *accord Stein v. Mauricio*, 580 S.W.2d 82, 83 (Tex. Civ. App. 1979) (cited by Terra Partners).

Terra Partners is completely wrong in its assertion that the "Texas Business and Commerce Code § 9.210 places the burden on the *creditor* to identify collateral." Terra Partners' Brief, p. 17. The rule is, in fact, exactly the opposite. Under that section, a secured party is required to "approve or correct" a list of collateral ***provided by the debtor***. Tex. Bus. & Comm. Code § 9.210(a) and (b). The debtors (the Veigel Entities) never provided Defendants such a list.

In this case, Defendants (not Terra Partners or any other Veigel entity) made multiple reasonable efforts to separate equipment that constituted collateral under the Security Agreements from Terra Partners' personally Owned Equipment;

however, (obviously in order to set up this bogus conversion case) Terra Partners adamantly and steadfastly refused to assist in the separation of the equipment.

Before the eviction, Defendants' counsel asked the Veigels to assemble the collateral equipment. USCA5 1030-1049 and USCA5 1050-1052. There was no response. USCA5 1050.

The Eviction Notice was issued on October 19, 2006 and executed on October 23, 2006. USCA5 805. During that time, Terra Partners chose to leave its Owned Equipment on the premises. (Terra Partners actually had three full years before the eviction to move its Owned Equipment since the land was foreclosed on in 2003).

Days after the eviction, Defendants again asked the Veigels to identify the categories of equipment, including specifically its Owned Equipment. USCA5 2868-70, Record Excerpt Tab 4. Terra Partners and the Veigel Entities flatly refused:

> Furthermore, ***my clients do not plan (in the short time provided by your letter), to identify all personal property belonging to Terra Partners*** from that of any other entity. Instead, the burden/risk will be on AAC to identify all personal property in which it claims title to or security interest in, noting that any personal property which it does not allow the Veigels to remove to the [960 Acres], or use in place, will be deemed converted by AAC, et al., and AAC will be held responsible in litigation.

See USCA5 2872, Record Excerpt Tab 5.[11]

Terra Partners followed through with its refusal to specify ownership of the equipment remaining on the farm, continuing its "refusal to identify Terra Partners' property until [the District Court] during the trial of the Equipment Suit, required the Veigel Entities to identify ownership of the property listed on the inventory. ***Then, for the first time, Steve Veigel identified which equipment Terra Partners claimed to own.***" USCA5 2981-82 (emphasis added).

As the District Court held, "Defendants recognized that Plaintiff [Terra Partners] might have ownership of some of the equipment and made a reasonable request that Plaintiff identify that property so that arrangements could be made for the Plaintiff to obtain it. Plaintiff, for whatever reason, steadfastly refused to identify the property which it claimed. Under those circumstances, Defendants did not convert Terra Partners' owned property." USCA5 2982, First Summary Judgment.[12]

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[11] Terra Partners' assertion that it was entitled to move Leasehold Equipment from the Big Farm to the 960 Acres is simply wrong. Under the plain terms of the Security Agreements, the debtor had to "secure prior written permission from the Secured Party before changing the location of the Collateral." *See* USCA5 880 and 885. Of course, Plaintiff did not ever receive permission to change the location of the collateral. Additionally, Terra Partners had no right to use the equipment "in place" because it had been evicted from the Big Farm.

[12] Even after the *Equipment Suit*, Plaintiff continued its strange refusal to take possession of Terra Partners' owned property, threatening that any action taken by Defendants would be at Defendants' "peril." Current counsel stated:

> The Veigels are not interested in moving the property off the farm to be stored at another location. It is our position that Rabo AgriFinance, AAC, and/or their agents and tenants do

C. The District Court Properly Dismissed Conversion Claims Related to the Leasehold Equipment (Terra Partners' Issues Ten and Eleven)

Terra Partners did not own the Leasehold Equipment. At best, it leased it from several other Veigel Entities pursuant to an unrecorded, oral lease.[13] This Court has already confirmed that Defendants held a valid security interest in the Leasehold Equipment and was entitled to foreclose on that equipment despite the existence of Terra Partners' alleged lease. *Equipment Suit*, 583 F.3d 352-55. At the time of the eviction, Terra Partners' lessors (other Veigel Entities) were unquestionably in default on the debts that were secured by the Leasehold Equipment (including the Second Lien Debt which was the basis for the foreclosure that led to the eviction).

1. Conversion claims fail because Defendants have a superior right to the Leasehold Equipment

As a basic prerequisite to a conversion claim, the conversion plaintiff must have a superior right to the allegedly-converted property. *Curtis v. Anderson*, 106 S.W.3d 251, 257 (Tex. App.—Austin 2003, pet. denied) (conversion plaintiff must

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> not have the right to be on the farm or to dispose of the personal property described in your letter dated November 14, 2008. We propose that you leave the items on the farm until the title and possession issues are finally settled, at which time we will make the proper arrangements regarding storage of the property, if necessary. In the meantime, any action taken by your clients or their employees or agents are at your clients' peril.

USCA5 1053, Email correspondence between counsel.

[13] Defendants dispute the validity of the alleged leases; however, for purposes of this Motion, the validity of the lease is irrelevant.

establish ownership or superior right of possession of converted property); *Continental Credit Corp. v. Wolfe City Nat. Bank*, 823 S.W.2d 687, 687 (Tex. App.—Dallas 1991, no writ) (same).

In the face of valid Security Agreements and a massive default on the debts that the equipment secured, Terra Partners ***did not have a superior right to possession of the Leasehold Equipment***. Terra Partners has not cited authority that allows a mere lessee to assert a conversion claim in the face of a secured party's superior rights to the equipment after the lessor's default on the underlying debt. It is Terra Partners' burden to show that it had a superior right to the leased equipment. Because it did not and cannot do so, Defendants were entitled to summary judgment as a matter of law on all conversion claims related to Leasehold Equipment.

2. Terra Partners' lessors waived claims for conversion and Terra Partners is bound by that waiver
(Terra Partners' Issue Ten and Eleven)

Additionally, the governing Security Agreements contain an explicit provision waiving claims for conversion of the equipment subject to the Security Agreements (i.e., the equipment leased to Terra Partners): "Debtor waives all claims for trespass or conversion and damages in any manner caused by Secured Party, its agents and assigns." USCA5 4929, Ex. J, at ¶ 11, line 6. By its Issues Ten and Eleven, however, Terra Partners argues that the judicially-authorized (and

repeatedly-upheld) eviction was really a self-help repossession of collateral with an accompanying breach of peace that voids the waiver provisions of the Security Agreements. This argument fails.

(a) Waivers of conversion claims are permitted

The Texas Business and Commerce Code specifically permits such a waiver of conversion claims. Tex. Bus. & Comm. Code § 9.603. Terra Partners wrongly cites *Zapata v. Ford Motor Credit Co.*, 615 S.W.2d 198, 202 (Tex. 1981) to argue waiver of a conversion claim is against public policy. Terra Partners' Brief, p. 38-39. The issue in *Zapata*, however, was whether certain provisions in a retail installment contract violated the Texas Consumer Code. *Zapata* is wholly inapplicable in this case because the relevant statutory scheme, the Texas Business and Commerce Code, specifically permits waivers of conversion claims.

(b) The eviction was an eviction, not a non-judicial foreclosure

Terra Partners also argues that the waiver provision is not controlling because the eviction was somehow really a non-judicial foreclosure and Defendants breached the peace by taking possession of the equipment at the time of the eviction because sheriffs were present to conduct the eviction. *See* Tex. Bus. & Comm. Code §§ 9.602(6) and 9.609 (precluding waiver of requirement that secured party take possession of collateral without a breach of peace).

First, the eviction process was not a non-judicial foreclosure, therefore, these provisions are simply inapplicable. The statutes regarding breach of peace simply do not and cannot apply to an eviction process where a sheriff's presence is required. Terra Partners' attempts to conflate the two procedures is a transparent attempt to invent non-existent causes of action in order to prolong the decade-long litigation between the parties and cloud title to the real estate in order to prevent its eventual sale.[14]

On the eviction day, Terra Partners and the other Veigel Entities were required to leave. Terra Partners' obstinate refusal to comply with a judicial order of eviction cannot be twisted into a conversion claim. Terra Partners had ample time to prepare to leave before the eviction. It chose not to do so. Its refusal to leave does not turn an eviction conducted by the Deaf Smith County Sheriff's Office into a non-judicial foreclosure accompanied by a "breach of peace" based on the officers' presence.

Second, even if there was a breach of peace, *and* the eviction is regarded as a non-judicial foreclosure, *and* the Business and Commerce Code procedures apply, the only remedy available for breaching peace is "damages in the amount of any loss caused by a failure to comply with [the statutes]." Tex. Bus. & Comm. Code § 9.625. Therefore, if Defendants somehow failed to comply with the statutes and

[14] Terra Partners has filed a lis pendens against the real estate based on this lawsuit in an attempt to cloud the title and prevent its sale.

breached the peace, Terra Partners is limited to damages that were ***caused by*** the breach of peace. Terra Partners has never alleged that it was damaged by a breach of peace; instead, it concocted a theory that it was damaged by an inability to use the equipment on land from which it was evicted. Terra Partners' breach of peace claim fails.

(c) The waiver provisions control

Further, Terra Partners' attempt to avoid the waiver provisions by arguing that it is not bound by them because it did not sign the Security Agreements also fails. It makes no sense to assert that a lessee like Terra Partners has more rights than the lessor owns. Terra Partners' lessors (i.e., the other Veigel Entities) owned the Leasehold Equipment, which was encumbered by a Security Agreement that contained an express waiver of conversion claims. Terra Partners, as the mere lessee, could not lease any greater rights to the Leasehold Equipment than its lessors could give.[15] If anyone is liable to Terra Partners for loss of use of the equipment, it is the lessors (the other Veigel Entities) who failed to pay their just and due debts and put the equipment at risk.

[15] As the mere lessee of the equipment, Terra Partners is bound by the waiver in the Security Agreements. Under Tex. Bus. & Comm. Code Ann. § 9.315, "a security interest or agricultural lien continues in collateral notwithstanding sale, lease, license, exchange, or other disposition thereof unless the secured party authorized the disposition free of the security interest or agricultural lien." Tex. Bus. & Comm. Code Ann. § 9.315.

D. The District Court Properly Dismissed Conversion Claims Related to Allegedly Unsold Equipment on Collateral Estoppel Grounds (Terra Partners' Issue Six)

Terra Partners claims that Defendant converted the Allegedly Unsold Equipment by failing to sell it at the April 2008 Auction. *See* Facts Section III.B, p. 10. In the Second Summary Judgment Ruling, the District Court ruled that these claims were barred on collateral estoppel grounds because the issue of whether the equipment was or should have been sold was already resolved in the debate over auction sale credits in the Deficiency Suit.

> The parties to be bound in these cases are identical parties for the purpose of collateral estoppel and the issue at stake in this case is identical to the issue litigated and critical and necessary to the judgment in the Deficiency Action. Plaintiffs' conversion action is barred by collateral estoppel.

USCA5 4568, Second Summary Judgment Ruling. Terra Partners challenges this ruling on the ground that the parties are not actually identical and the issues were not the same in the two lawsuits.

1. Elements of collateral estoppel

Terra Partners' re-litigation of already-resolved issues has occurred so often that it is not necessary to look outside the body of Fifth Circuit case law established by Terra Partners itself to understand collateral estoppel law:

> . . . [C]ollateral estoppel bars this attack on the validity of the Deficiency Suit judgment. "When a federal court sitting in diversity is considering the collateral estoppel effect of a prior federal judgment, this Circuit applies federal common law." *Reimer v.*

> *Smith,* 663 F.2d 1316, 1325 n. 9 (5th Cir.1981). To establish collateral estoppel under federal law, one must show:
>
> (1) that the issue at stake be identical to the one involved in the prior litigation;
>
> (2) that the issue has been actually litigated in the prior litigation; and
>
> (3) that the determination of the issue in the prior litigation has been a critical and necessary part of the judgment in that earlier action.

Equipment Suit., 583 F.3d at 353.[16]

Terra Partners is simply wrong that exact identity of parties is necessary for collateral estoppel to apply. Indeed, this Court has already ruled in the *Equipment Suit* that the relationship between the various Veigel Entities (including Terra Partners) is sufficiently close for collateral estoppel purposes to bind them all to the rulings in the *Deficiency Suit*:

> The parties to the suits need not be completely identical, so long as the party against whom estoppel applies had the full and fair opportunity to litigate the issue in the previous lawsuit.
>
> . . . [t]he relationship among the Veigel entities is sufficiently close to bind all of them before this court to the judgment in the Deficiency Suit.

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[16] Redetermination of issues is warranted only when there is reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation. *Kremer v. Chemical Const. Corp.,* 456 U.S. 461, 481 (1982); *see also Griffen v. Big Spring Independent School Dist.,* 706 F.2d 645, 654 (5th Cir.1983), *cert. denied,* 464 U.S. 1008 (1984) (same). A "refusal to give the first judgment preclusive effect should not occur without a compelling showing of unfairness." RESTATEMENT (SECOND) OF JUDGMENTS § 28 cmt.j (1982). Collateral estoppel bars 'successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment,' even if the issue recurs in the context of a different claim." *Taylor v. Sturgell,* 553 U.S. 880, 128 S.Ct. 2161, 2171 (2008) (quoting *New Hampshire v. Maine,* 532 U.S. 742, 748 (2001)).

Id.

2. Identical issues

Terra Partners asserts that collateral estoppel does not apply because its current claim of conversion is different than the question of the amount of the sale credits to be applied to reach the judgment amount in the *Deficiency Suit*. Terra Partners' Brief, p. 29. Terra Partners misunderstands collateral estoppel law – the focus is on the particular *issue* that was already decided, not on the type of claim asserted.

The underlying issue in both the Deficiency Action and this conversion case is the same: were Defendants required to sell the items of equipment at issue? In the Deficiency Action, the Veigels pointedly raised that question and argued that Defendants' should have sold the equipment at the Auction, therefore, the sale credit was too low. USCA5 3855-3915. By finding the Veigels' arguments in the Deficiency Action "without merit," the District Court affirmed the auction and validated the sale. USCA5 3995-96. Terra Partners' current conversion claims regarding Allegedly Unsold Equipment simply re-challenge the already-approved sale. The doctrine of collateral estoppel exists precisely to prevent such challenges to already-resolved issues.

Indeed, any finding in this case that Defendants actually *should have* sold the equipment would adversely impact the judgment in the Deficiency Action. If

the Court finds that the equipment should have been sold, then the judgment in the Deficiency Action would need to be changed. This fact alone illustrates that the underlying issue has already been resolved and should not be re-litigated.

3. Actually litigated

The question of the amount of sale credits in the Deficiency Suit (and the necessary sub-question of whether additional equipment should have been sold in order to increase the amount of the credit) was a summary judgment issue in the Deficiency Suit. The District Court ordered Rabo Agrifinance to "submit ***competent summary judgment evidence*** detailing the credits given . . ." USCA5 3509, Memorandum Opinion, *Deficiency Suit* (emphasis added).

An issue determined on summary judgment is considered "actually litigated" for collateral estoppel purposes. *In re Keaty*, 397 F.3d 264, 270-71 (5th Cir. 2005), RESTATEMENT (SECOND) OF JUDGMENTS § 27, cmt.d (1982); 18 James W. Moore et. al., MOORE'S FEDERAL PRACTICE § 132.03. All parties submitted extensive affidavits and other evidence regarding the validity and propriety of the sale. USCA5 3540-3687. There is no legitimate question that the issue of whether the equipment needed to be sold was "actually litigated" on summary judgment in the *Deficiency Suit*.

4. The issue was essential to the judgment in the *Deficiency Suit*

The issue of whether additional equipment should have been sold was essential to the judgment in the Deficiency Suit. The whole purpose of submitting summary judgment evidence on sale credits was for the Court to determine "the exact dollar figure that Plaintiff is entitled to . . ." USCA5 3509. In response to the summary judgment evidence, the Veigels submitted additional evidence and argued that the credit was not high enough because Rabo Agrifinance should have sold additional equipment. USCA5 3548-3552. The Veigels asked the Court not to confirm the sale and not to apply the sale credits as requested. *Id*. Had the Court agreed with the Veigels, the sale would not have been confirmed. It is somewhat speculative to say what would have happened if the sale had not been confirmed, but, presumably, there would have been an additional sale and the equipment at issue would have been sold. The question of whether equipment had to be sold was fundamental to the judgment in the *Deficiency Suit*.

All of the elements of collateral estoppel are satisfied and the District Court's ruling dismissing conversion claims related to the Allegedly Unsold Equipment should be affirmed.

IV. THE DISTRICT COURT DID NOT ERR IN ISSUING DECLARATORY JUDGMENTS THAT PREVENT TERRA PARTNERS FROM USING THE SUBROGATION INTEREST AGAINST DEFENDANTS (TERRA PARTNERS' ISSUES TWO, THREE, FOUR, AND FIVE)

The District Court several multiple declaratory judgment rulings that prevent Terra Partners from using the Subrogation Interest against Defendants' land. USCA5 2990-99, First Summary Judgment. Terra Partners challenges these rulings on appeal, but its challenges fall flat.

A. The District Court Correctly Denied Enforcement of Subrogation Rights Until All Debts to Defendants Are Paid (Terra Partners' Issue Two)

In the *Equipment Suit*, this Court conducted a detailed analysis of the Subrogation Interest, concluding that "because Terra Partners was assigned the surety's rights where only partial payment of the Rabo Agrifinance debts had occurred, Terra Partners' interest could not become subrogated to the first lien until all of the Rabo Agrifinance debts were paid off." *Equipment Suit,* 583 F.3d at 355. Allowing a right of subrogation in a situation involving only the partial payment of a debt prejudices the rights of a creditor with a secured interest in the collateral. "The surety must discharge the entire underlying obligation before achieving subrogation-otherwise the surety would compete with the creditor for recovery, potentially diminishing the creditor's recovery." *Id.* (quoting RESTATEMENT (THIRD) OF SURETYSHIP AND GUARANTY § 27 cmt. b (1996)).

In the present case, the District Court applied this Court's exact analysis and holding from the *Equipment Suit* to limit Terra Partners' ability to exercise its statutory right of subrogation against Defendants' other collateral. USCA5 2989-90, First Summary Judgment. Terra Partners, however, claims that the District Court's reliance on this Court's *Equipment Suit* ruling was erroneous.

Although the only collateral at issue in the Equipment Suit was irrigation equipment, this Court's analysis in that case applies equally to Terra Partners' efforts to execute its right of subrogation against all of Defendants' collateral, including real property. Were Terra Partners able to exercise its right of subrogation and execute against real property prior to full satisfaction of the debts owed, Defendants would be severely "prejudiced by a subrogation that would allow Terra Partners to compete on an equal or superior footing for the secured interest" in the property. *Equipment Suit,* 583 F.3d at 355. Therefore, the District Court's reliance on this Court's *Equipment Suit* opinion to limit Terra Partners' right of subrogation against the real property was proper.

B. The District Court Correctly Refused Terra Partners' Attempts to Change the Priority of Liens (Terra Partners' Issue Three)

Terra Partners concedes that the confirmed Terra XXI Plan "granted AAC a second lien on Terra XXI's real property" and that the Diversified Lien held a third lien on Terra XXI's real property. USCA5 1243, Response to First Motion for

Summary Judgment. Despite this concession, Terra Partners asserts that when Ag Acceptance Corp. foreclosed on the Big Farm in September 2003, it actually foreclosed on some other lien position that was inferior to the Diversified Lien. Terra Partners' Brief p. 22. Therefore, Terra Partners argues, it can use the Subrogation Interest to execute on the Big Farm because the Diversified Lien is superior to Ag Acceptance Corp.'s lien. USCA5 647-48(b),(c). The District Court correctly refused Terra Partners' twisted interpretation. USCA5 2990-93, First Summary Judgment.

Terra Partners comes to its peculiar conclusion by ignoring the express terms of the Terra XXI Plan and distorting excerpts of trial testimony from one of Defendants' representatives, Shawn Smeins, in the State Court Wrongful Foreclosure Suit. Terra Partners argues (without citing any legal authority) that Mr. Smeins somehow judicially admitted Ag Acceptance Corp. into an inferior lien position. Terra Partners' argument has no basis whatsoever in law or fact.

1. <u>The Bankruptcy Plan controls</u>

The Terra XXI Plan granted Diversified a ***third lien*** on real property owned by Terra XXI at the time of the time of the filing of the bankruptcy and granted Ag Acceptance Corporation a ***second lien*** position in the land. USCA5 1081, §3.06, and 1078, §3.05 ¶4d. Thus, under the express terms of the Terra XXI Plan, Ag Acceptance Corp.'s lien on the real estate is superior to the Diversified Lien.

2. Terra Partners misleads the Court about Mr. Smeins' actual testimony

Terra Partners drastically distorts Mr. Smeins' testimony in order to create its novel lien-swap argument. A review of Mr. Smeins' (improperly excerpted) testimony, shows that he was viewing the real estate property and the attached irrigation system as a whole and trying to consider the implications of tax liens that had accrued on the property because of Terra XXI's failure to pay its taxes. USCA5 1820. Terra Partners provides no legal authority for its argument that a party can judicially admit itself into a different lien position: imagine the outcry if Mr. Smeins had tried to "judicially admit" Ag Acceptance Corporation into a first lien position.

The Terra XXI Plan controls. The Ag Acceptance Corp. lien was superior to the Diversified Lien.

C. The Diversified Lien Did Not Attach to Terra XXI's Post-Petition 75% Interest in the 960 Acres (Terra Partners' Issue Four)

Terra Partners asserts that the District Court erred by ruling that the Diversified Lien did not attach to Terra XXI's 75% interest in the 960 Acres and was not superior to Ag Acceptance Corp.'s purchase money lien on that property. USCA5 2995-96, 2999, First Summary Judgment. The District Court's ruling is correct.

The Terra XXI Bankruptcy Plan specifically states that the Diversified Lien only attaches to real estate "***on which Diversified held liens on the date of the filing of bankruptcy.***" USCA5, §3.06, ¶2 (emphasis added). Terra Partners' own pleading admits that Terra XXI did not acquire its interest in the 960 Acres until October 20, 2002 – well after the filing of the bankruptcy and even after the December 2001 confirmation of the Terra XXI Plan. USCA5 668, First Amended Complaint ¶48d. The Diversified Lien could not attach to property acquired after Terra XXI's bankruptcy. *See, e.g.,* 11 U.S.C. § 1141(d) (except as otherwise provided in the plan, confirmation of a plan discharges the debtor from all pre-petition debts). To accept Terra Partners' argument that a pre-petition judgment lien could attach to property acquired after confirmation of the bankruptcy plan turns the entire bankruptcy system on its head.

Further, even if the Terra XXI Plan did not preclude Terra Partners' argument, the claim would still fail as a matter of law because Ag Acceptance Corporation held a purchase money lien on the property. USCA5 1099. Purchase money liens are superior to judgment liens like the Diversified Lien. *Irving Lumber Co. v. Alltex Mortgage*, 468 S.W.2d 341 (Tex. 1971). Thus, Terra Partners' claim fails as a matter of law.[17]

[17] Furthermore, in the *Partition Suit*, the District Court upheld Ag Acceptance Corporation's foreclosure on the 75% interest and that ruling was not challenged on appeal of that case. *Partition Suit*, 564 F.3d at 701 (validity of foreclosure on 75% interest is undisputed on appeal).

D. The District Court Correctly Held that Robert Veigel's Payment of the Diversified Judgment Extinguished His Liability for that Judgment (Terra Partners' Issue Five)

Terra Partners continues its assault on Defendants' long-litigated property rights and argues that, even though Robert Veigel paid off the Diversified Judgment, the Diversified Lien still remains attached to his former 25% interest in the 960 Acres and is superior to Defendants' claims of title. Terra Partners claims that because Robert Veigel assigned his Subrogation Interest in the Diversified Judgment to it, Terra Partners can turn back around and require Robert Veigel to pay the judgment ***again*** by executing on property in which he holds (or held) an interest.

This claim fails because when Robert Veigel paid off the Diversified Judgment, his liability for the debt was extinguished and he is no longer liable on the judgment. The Diversified Lien on Robert Veigel's property is similarly extinguished.

Additionally, if there were any doubt about this extinguishment, the Assignment of Judgment from Robert Veigel to Terra Partners specifically releases him from any and all liability under the judgment and specifically states that Terra Partners released judgment liens on any of his property. USCA5 1093, Assignment of Judgment ("save and except that [Terra Partners] hereby grants Robert W. Veigel

and Ella Marie Veigel a full and complete release of any and all liability under the Judgment and agrees to release any and all Judgment liens held on any and all property of Robert W. Veigel and Ella Marie Veigel").

V. THE DISTRICT COURT DID NOT ERR IN FINDING THAT ROBERT VEIGEL'S TRANSFER OF THE SUBROGATION INTEREST TO TERRA PARTNERS WAS FRAUDULENT (TERRA PARTNERS' ISSUES SEVEN, EIGHT, AND NINE)

Under Texas law, a transfer to an insider when the debtor was insolvent and the insider knew of the insolvency is fraudulent as to an existing creditor:

> A transfer made by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made if the transfer was made to an insider for an antecedent debt, the debtor was insolvent at that time, and the insider had reasonable cause to believe that the debtor was insolvent.

Tex. Bus. & Comm. Code § 24.006(b). In response to Terra Partners' multiple requests for declaratory judgment seeking to interfere with Defendants' property rights through its Subrogation Interest in the Diversified Judgment, Defendants filed a counterclaim seeking a declaration that the transfer of the Subrogation Interest to Terra Partners was fraudulent.[18] Defendants asserted that because Robert Veigel transferred the Subrogation Interest to an insider – Terra Partners – when he was insolvent, the Transfer is fraudulent.

[18] Defendants also asserted fraudulent transfer claims under Texas Business and Commerce Code sections 24.005(a) and (b), 24.006(a), and 24.006(b). Although Defendants believe that they could show as a matter of law that the Transfer was made with intent to hinder, delay, or defraud creditors, Defendants moved for summary judgment only on the claim based on section 24.006(b), which does not require proof of intent to defraud creditors.

The District Court correctly ruled that Robert Veigel's Transfer of subrogation rights in the Diversified Judgment was fraudulent as to Rabo Agrifinance and Ag Acceptance Corp. USCA5 4569, Second Summary Judgment Ruling. Terra Partners challenges this ruling on three grounds (1) the fraudulent transfer counterclaim is barred by a one-year "statute of repose" in Tex. Bus. & Comm. Code § 24.010(a)(3); (2) there is a fact question as to Robert Veigel's insolvency at the time of the transfer; and (3) *res judicata* bars the fraudulent transfer counterclaim.

A. The Texas Revival Statute Applies to Revive the Counterclaim (Terra Partners' Issue Seven)

Terra Partners asserts that a one-year statute of limitations in Tex. Bus. & Comm. Code § 24.010(a)(3) bars the fraudulent transfer counterclaim brought under § 24.006(b) and that the Texas "Revival Statute" (Tex. Civ. Prac. & Rem. Code § 16.069) does not apply. The argument fails: the Revival Statute does apply.

Under the Texas Revival Statute, "[i]f a counterclaim . . . arises out of the same transaction or occurrence that is the basis of an action, a party to the action may file the counterclaim . . . even though as a separate action it would be barred by limitation on the date the party's answer is required." Tex. Civ. Prac. & Rem. Code Ann. § 16.069(a). The revival statute also requires that the counterclaim be

filed "not later than the 30th day after the date on which the party's answer is required." *Id.* § 16.069(b) .[19]

To hold that the counterclaim is time-barred by an alleged statute of repose is an outright denial of Defendants' rights to defend itself against Terra Partners' claims. Defendants' fraudulent transfer argument was asserted as both a counterclaim ***and a defense*** to Terra Partners' declaratory judgment actions. USCA5 541, Defendants' Answer dated January 16, 2009 ("The Defendants assert that Plaintiff's subrogation claims are barred because the transfer to Terra Partners

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[19] In this case, the deadline to file counterclaims was not triggered by the October or December 2008 Complaints, but rather by Terra Partners' First Amended Complaint, which was filed on April 20, 2009. USCA5 652. Among other changes, the First Amended Complaint added new declaratory judgment claims based on the Subrogation Interest that were not made in the original complaint. *Id.* In response to the First Amended Complaint, Defendants filed an amended answer and new counterclaims on April 27, 2009, which was well within the time required by Federal Rule of Civil Procedure 15(a)(3) and within the 30 day time period set out in section 16.069(b) of the Revival Statute. USCA5 671.

"Generally, an amended complaint supersedes and replaces an original complaint, 'unless the amendment specifically refers to or adopts the earlier pleading.'" *Eubanks v. Parker County Com'rs Ct.*, 44 F.3d 1004, 1004 (5th Cir. 1995) (citations omitted). Defendants have not found precedent directly on point for this issue where a counterclaim is filed in response to an amendment of the plaintiff's complaint. One Fifth Circuit case, *MBank Ft. Worth, N.A. v. Trans Meridian, Inc.*, 820 F.2d 716, 719 (5th Cir. 1987), found that an amended counterclaim adding new causes of action could not relate back to the date of the original counterclaim. However, in *MBank*, as opposed to the present case, the counterclaim was not filed in response to an amended complaint; therefore, the situation is inapposite. Further, multiple Texas state courts have criticized *MBank* and rejected its holding. *See, e.g., E.P. Operating Co. v. Sonora Exploration Corp.*, 862 S.W.2d 149, 150 (Tex. App.—Hous. [1st Dist.], 1993) (criticizing and disapproving *MBank* and finding that amended counterclaim could relate back to original counterclaim); *see also Barraza v. Koliba*, 933 S.W.2d 164, 168 (Tex. App.—San Antonio, 1996) (allowing amended counterclaim that related back to same transaction or occurrence as the main lawsuit, but differed from the substance of the original counterclaim) *and Reed v. Kagan*, 2003 WL 22416388 (Tex. Ct. App.—Forth Worth, 2003) (allowing amended counterclaim that related back to the same transaction or occurrence as the main lawsuit despite original answer containing no counterclaims).

was fraudulent and/or acquired in a manner that will prejudice creditors."). The fraudulent transfer counter-claim/defense is a direct response to claims that Terra Partners asserts (and will continue to assert unless it is stopped).

This situation is quite different than *Galbraith Eng. Consultants v. Pochucha*, 290 S.W.2d 863 (Tex. 2009). In that case, the court found that claims against a responsible ***third party*** were barred by the statute of repose and could not be revived. Here, there is no third party – the allegedly-barred claims are asserted directly against the plaintiff itself as a defense to the plaintiff's claims. A finding that the defense and counterclaim is barred is a severe deprivation of a defendants' ability to defend itself against a plaintiff's attacks. In this situation, where the counterclaim is really a defense that arises out of the same transaction or occurrence as the plaintiff's affirmative claims, the Texas Revival Statute must apply.

B. Robert Veigel Was Insolvent at the Time of the Transfer (Terra Partners' Issue Eight)

Even though Robert Veigel owed Defendants millions in long past-due debts at the time of the transfer, Terra Partners tries to argue that there is a fact question as to his solvency. Terra Partners' Brief, p. 33. The District Court correctly ruled against Terra Partners on this point – there is no genuine issue of material fact regarding Robert Veigel's insolvency. USCA5 4570.

"A debtor who is generally not paying the debtor's debts as they become due is presumed to be insolvent." Tex. Bus. & Comm. Code § 24.003(b). As a matter of law, Robert Veigel was insolvent at the time of the transfer because he was not paying his debts as they became due. At the time of the November 2006 transfer, Robert Veigel was liable for both the deficiency amount on the Second Lien Debt, as well as the First Lien Debt.[20] It is indisputable that these debts were long past due by the time of the transfer of the Subrogation Interest; therefore, Robert Veigel is presumed to be insolvent under the statute.[21]

C. *Res Judicata* Does Not Bar the Fraudulent Transfer Claim (Terra Partners' Issue Nine)

Terra Partners claims that Defendant's fraudulent transfer claim should have been brought in prior litigation, therefore, it is barred by the doctrine of *res judicata*. The District Court did not err in overruling this defense. USCA5 4571-73, Second Summary Judgment Opinion.

Defendants raised the fraudulent transfer issue in the Equipment Suit and a

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[20] Because Robert Veigel guaranteed the Second Lien Debt, he was liable to Rabo Agrifinance since at least 2003 for the amount of the deficiency remaining after the foreclosure on the Second Lien Debt. *Deficiency Suit,* 328 F. App'x 942 (confirming Robert Veigel's was liability for the amount of the deficiency after foreclosure). Robert Veigel was also liable to Rabo Agrifinance, Inc. for the First Lien Debt after that note was assigned to Rabo Agrifinance, Inc.'s successor in interest in 2004. *First Lien Suit*, F. App'x 732 (5th Cir. 2007) (confirming Robert Veigel's liability for First Lien debt).

[21] By his own admission, Robert Veigel is "one of the agents of Terra Partners." USCA5 4050, Deposition of Robert Veigel. Given the very close relationship, if not complete identity, between Robert Veigel and Terra Partners, there is no dispute that Terra Partners had reasonable cause to believe that Robert Veigel was insolvent at the time of the Transfer of the Subrogation Interest.

non-suited state court case. *See* Proposed Pretrial Order in Equipment Suit, Docket Entry 55 in Cause 2:06-cv-153, p. 15 (Contested Question of Law: "8. Whether the assignment of Robert Veigel's claimed right of subrogation to Terra Partners constituted a fraudulent transfer.") First, the fact that the fraudulent transfer issue was not resolved in the Equipment and Partition Suits is not dispositive because those were declaratory judgment cases. Res judicata does not bar a party from raising an issue that was not resolved in a previous declaratory judgment case. *Kaspar Wire Works, Inc. v. Leco Engineering & Mach., Inc.*, 575 F.2d 530, 535 (5th Cir. 1978); *Empire Fire and Marine Ins. Co. v. J. Transport, Inc.*, 880 F.2d 1291, 1296-97 (11th Cir. 1989) (allowing insurer to raise defense in second action that court in prior declaratory judgment action declined to reach). In the present case, the District Court did not rule on the fraudulent transfer issue in the Equipment and Partition Suits; therefore, *res judicata* does not prevent Defendants from raising the issue in this case.

Furthermore, the non-suited state court case does not carry any *res judicata* effect. "A dismissal is not *res judicata* unless based on some ground that goes to the merits of the case." *Baker v. Smith,* 407 S.W.2d 4, 6 (Tex. Civ. App.—Ft. Worth 1966, writ ref'd n.r.e.). The state court did not reach the merits of any issue in that case, other than to quash a writ of execution. USCA5 4291. Most specifically, the state court did not reach any conclusion on whether or not Robert

Veigel possessed a valid right of subrogation, as evidenced by the statement that the dismissal was without prejudice to the "alleged" right of subrogation. *Id.* It turns *res judicata* doctrine on its head to hold that Defendants' fraudulent transfer counterclaim was precluded before the issue of whether a subrogation interest actually existed was determined. Thus, Terra Partners' *res judicata* defense fails.

CONCLUSION

For all of the foregoing reasons, Defendants-Appellees respectfully request that the Court affirm the District Court's rulings, uphold the dismissal of all of Terra Partners' claims, grant Defendants their costs, and award all other relief to which Defendants may be entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned counsel certifies that the foregoing Response Brief of Defendants-Appellees was served on May 14, 2012, by this Court's electronic filing system and by First Class Mail to:

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,315 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word in 14 point Times New Roman font.

Dated: May 14, 2012

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