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APPENDIX A

No. 22-20107
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Ramey & Schwaller, L.L.P.,
Plaintiff-Appellant

v.

Zions Bancorporation NA, doing business as Amegy
Bank,
Defendant-Appellee.

(Filed August 1, 2023)

ON PETITION FOR REHEARING EN BANC

Before SMITH, CLEMENT, and WILSON, *Circuit
Judges*.

Per Curiam:

Treating the petition for rehearing en banc as a petition for panel rehearing (5TH CIR. R. 35 I.O. P.), the petition for panel rehearing is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (FED. R. APP. P. 35 and 5TH CIR. R. 35), the petition for rehearing en banc is DENIED.

APPENDIX B

No. 22-20107
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Ramey & Schwaller, L.L.P.,
Plaintiff-Appellant

v.

Zions Bancorporation NA, doing business as Amegy
Bank,
Defendant-Appellee.

(Filed June 16, 2023)

Before SMITH, CLEMENT, and WILSON,
Circuit Judges.
CORY T. WILSON, Circuit Judge:

As the COVID-19 pandemic ground economic activity across the country to a near standstill in March 2020, Congress enacted the Paycheck Protection Program (PPP) to help small businesses keep workers employed during the crisis. See Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No.116-136 § 1102, 134 Stat. 281, 286 (2020) (codified as amended at 15 U.S.C. § 636(a)(36)). PPP loans were made by participating private lenders but guaranteed by the federal government. *Id.* And PPP loans were fully forgivable if borrowers used the funds for certain enumerated purposes. See 15 U.S.C. § 636m.

Congress assigned implementation of the PPP to the Small Business Administration (SBA). SBA issued regulations outlining eligibility criteria. Among other things, potential borrowers must have answered "No" to whether "any individual owning 20% or more of the equity of the Applicant [was] subject to an indictment, criminal information, arraignment, or other means by which formal criminal charges are brought in any jurisdiction, or presently incarcerated, or on probation or parole."

When completing a PPP loan application on behalf of law firm Ramey & Schwaller, L.L.P, owner William Ramey answered "No" to that question. Based in part on that representation, Zions Bancorporation, NA, doing business as Amegy Bank, approved the law firm's application and disbursed a \$249,300 loan. Later, the bank learned that Ramey had actually been subject to a criminal complaint accusing him of attempted sexual assault in Harris County, Texas. So the bank held the law firm in default and froze the firm's accounts as an offset to the loan balance.

The law firm then filed this action against the bank. *Inter alia*, the firm sought a declaratory judgment that Ramey did not answer the application question falsely. The bank alleged a counterclaim for breach of contract. The district court granted summary judgment to the bank and dismissed the law firm's claims. We affirm.

I.

Ramey owned 100% of Ramey & Schwaller, a Houston law firm. On September 25, 2019, a criminal complaint was filed against him in state court in Harris County¹ Texas, accusing him of attempted sexual assault of a female employee. Finding probable cause, a Harris County magistrate judge issued a warrant for Ramey's arrest on September 26. He was arrested the next day.

After arrest, Ramey made his first appearance in court. A state magistrate judge upheld the probable cause finding and ordered that Ramey remain in custody until he posted bail. The magistrate judge also informed Ramey that he stood accused of attempted sexual assault (a third-degree felony) and read him his rights. She set his bail at \$20,000. Ramey posted bail and was released. Though his arraignment was initially scheduled for November 19, 2019, it was rescheduled several times, both at the request of Ramey's counsel and due to COVID-19 restrictions. Eventually, in October 2021 a grand jury failed to return a bill of indictment against Ramey.

In April 2020, while the complaint against Ramey remained pending, Ramey & Schwaller applied for a \$249,300 PPP loan from Amegy Bank. Ramey completed the SBA's PPP Borrower Application Form (the Application) on the law firm's behalf. In conformance with the eligibility criteria for PPP loans, Question 5 on the Application asked:

Is the Applicant (if an individual) or any individual owning 20% or more of the equity of the Applicant subject to an indictment, criminal information, arraignment, or other means by which formal criminal charges are brought in any jurisdiction, or presently incarcerated, or on probation or parole?

If an applicant answered "Yes," it was ineligible to receive a PPP loan under SBA regulations. *See Business Loan Program Temporary Changes; Paycheck Protection Program*, 85 Fed. Reg. 20811, 20812 (Apr. 15) 2020) (to be codified at 13 C.F.R. pt. 120)^{1,1} In response to Question 5, Ramey checked the box for "No." He then signed the Application, certifying that the law firm was "eligible to receive a loan under the rules in effect at the time th[e] application [was] submitted" and that "the information provided in th[e] application ... [was] true and accurate in all material respects."

After approval of the Application, Ramey, on behalf of the law firm, executed two bank-created forms to finalize the firm's PPP loan: a Business Loan Agreement (the Agreement), and a Promissory Note (the Note). The Agreement states that the loan was only issued in "rel[iance] upon Borrower's

¹ On appeal, the parties point to sundry other provisions in later SBA PPP regulations and guidance documents to support their arguments. However, none of those are relevant because they were adopted after the law firm submitted the Application on April 16, 2020. Whether the firm answered Question 5 falsely depends only on the regulations in place at the time it completed the Application.

representations, warranties, and agreements as set forth in this Agreement and any Related Documents[.]" It specifically references "Paycheck Protection Program Application forms" as Related Documents. And it lists "Event[s] of Default," including if "[a]ny warranty, representation, or statement made or furnished to the Lender by Borrower or on Borrower's behalf under th[e] Agreement or the Related Documents is false or misleading in any material respect, either now or at the time made or furnished[.]" In case of default, the bank was allowed to declare "all Indebtedness immediately ... due and payable,, and "setoff all sums owing von the Indebtedness against any and all" of the borrower's accounts held by the bank.

After Ramey signed the Agreement and the Note, the bank disbursed \$249,300 in PPP loan proceeds to the law firm. The firm spent the funds and began pursuing loan forgiveness. See 15 U.S.C. § 636(m).

In the meantime, Ramey had also applied for both personal and business lines of credit from the bank. Reviewing those applications, the bank ran a criminal background check on Ramey, which revealed the Harris County proceedings against him. Based on that disclosure, the bank notified the law firm in July 2020 that it "believe[d] an event of default ha[d] occurred" under the Agreement for the firm's PPP loan because the firm had made a "false statement in the loan application" when answering Question5. The bank declared the loan immediately due and

exercised its right of setoff by freezing \$249,300 held in the law firm's bank accounts.

The bank's actions caused ripple effects. For one, when the law firm applied for another PPP loan from Chase Bank, Chase denied the loan because of a "PPP loan issue with other lender." For another¹ in April 2021, SBA denied the law firm's request for loan forgiveness on the grounds that "the borrower was ineligible based on William Ramey['s] false response to question number 5 on the-loan application." The SBA further explained that "[t]he response was false because William Ramey was subject to formal criminal charges at the time the application was made."

II.

The law firm sued the bank in Texas state court. The bank removed the case to federal court based on diversity jurisdiction. In its operative complaint,² the law firm sought a declaratory judgment that its PPP loan was not in default¹ as well as damages from the bank for breach of fiduciary duties, conversion, estoppel and quasi-estoppel, money had and received, breach of contract, and tortious interference with contract. The bank filed a counterclaim¹ alleging that the law firm breached the loan documents.

² The law firm's operative complaint is the fourth one it filed. But it was mislabeled as the "Second Amended Complaint." The firm's first n Second Amended Complaint" was filed October 2, 2020. Its second "Second Amended Complaint" -the live pleading here-was filed April 2, 2021.

The law firm filed a motion for partial summary judgment on its declaratory judgment claim. It asked the district court to hold that the firm "correctly answered Question No. 5 of the SBA's Borrower Application Form and [was] therefore not in default of the PPP loan[.]". The district court denied the firm's motion.

The bank then filed its own motion for summary judgment. The bank contended that it was entitled to judgment on the law firm's claims because the answer to Question 5 was false as "Mr. Ramey was, at the very least, subject to means by which formal criminal charges are brought at the time he submitted the Loan Application[.]".³

The district court granted the bank's motion. The court concluded that the law firm's answer to Question 5 was false because "William Ramey was 'subject to [a] criminal information' at the time of the PPP loan application[.]". The court therefore held that

³ The bank lodged two alternative arguments in its motion. First, the bank asserted that Ramey also answered Question 5 falsely because he was subject to an arraignment, which had been scheduled by the state court at the time he completed the Application. Second, the bank contended that the law firm had defaulted by failing "affirmatively [to] inform [the bank] of 'all existing or threatened' litigation, claims, and investigations which could materially affect [the law firm]'s financial condition," as required by the Agreement. Because the bank did not brief the first argument on appeal, it is forfeited. *See Rollins v. Home Depot USA*, 8 F.4th 393, 397 (5th Cir. 2021). And because the latter is relegated to a footnote in the bank's appellate brief, it is likewise forfeited for insufficient briefing. *See Arbuckle Mtn. Rancho/Tex., Inc. v. Chesapeake Energy Corp.*, 810 F.3d 335, 339 n.4 (5th Cir. 2016).

the law firm's claims against the bank failed. It further granted summary judgment in favor of the bank on the bank's counterclaim and awarded the bank damages and attorney's fees.

The district court then entered final judgment. The law firm moved for reconsideration. The district court denied that motion. Without vacating its prior determination, the district court concluded that Ramey was subject to other means by which formal criminal charges are brought, a "catch-all phrase" in Question 5 that required "complete candor from the Applicant."

The law firm timely appealed the district court's judgment and the denial of the firm's motion for reconsideration.

III.

This court reviews a summary judgment *de novo*, applying the same legal standards as the district court. *Certain Underwriters at Lloyd's, London v. Axon Pressure Prods. Inc.*, 951 F.3d 248, 255 (5th Cir. 2020). Summary judgment is appropriate when "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 genuine dispute of material fact exists 'if the evidence is sufficient for a reasonable jury to return a verdict for the nonmoving party.'" *Ahders v. SEIPriv. Tr. Go.*, 982 F.3d 312, 315 (5th Cir. 2020) (quoting *Hamilton v. Segue Software Inc.*, 232 F.3d 473, 477 (5th Cir. 2000) (per curiam)). While "[w]e

construe all facts and inferences in the light most favorable to the nonmov[ant]," *Murray v. Earle*, 405 F.3d 278, 284 (5th Cir. 2005), "unsupported allegations or ... testimony setting forth ultimate or conclusory facts and conclusions of law are insufficient to defeat a motion for summary judgment," *Clark v. Am. 's Favorite Chicken Co.*, 110 F.3d 295, 297 (5th Cir. 1997).

IV.

This case hinges on whether Ramey answered the Application's Question 5 falsely. If he did, then Ramey & Schwaller defaulted on its loan, the law firm's claims against Amegy Bank fail, and the bank's counterclaim succeeds.

In granting the bank's summary judgment motion, the district court concluded that Ramey answered Question 5 falsely because he was subject to a "criminal information" when he completed the Application. Specifically, the district court determined that the criminal complaint filed against Ramey constituted an "information" under Texas law, thus bringing it within the purview of Question 5.

On reconsideration, the district court did not retreat from its earlier reasoning⁴ but articulated a different rationale in denying the law firm's motion: It concluded that Ramey's answer to Question 5 was false because at the time Ramey completed the

⁴ The district judge who originally considered this case retired, so the motion for reconsideration was decided by a different district judge.

Application, he was subject to "other means by which formal criminal charges are brought,,, which the court construed as Question S's "catch-all phrase designed to elicit complete candor" from PPP applicants. The district court thus reasoned that the law firm had "forfeited [its] rights" to the PPP loan it received by "fail[ing] to act with complete candor" in answering Question 5.

On appeal, the law firm contends that the district court erred both in granting summary judgment and on reconsideration. As to the initial ruling, the law firm submits that the district court misconstrued Texas law in concluding that the complaint against Ramey was equivalent to a criminal information. As to reconsideration, the law firm urges that the district court erred in its determination that Ramey was subject to "other means by which formal criminal charges are brought" because Question 5's phrasing is less capacious than the district court held it to be.

We need not address the district court's initial basis for granting the bank summary judgment-i.e., that Ramey was subject to a criminal information at the time the law firm applied for its PPP loan-because we conclude that, at the least, Ramey was subject to "other means by which formal criminal charges are brought' when he completed the Application. *See Wantou v. Wal-Mart Stores Tex., L.L.C.*, 23 F.4th 422, 430 (5th Cir. 2022) ("We may affirm the district court's grant of summary judgment on any ground supported by the record and presented to the district court." (quotations and citation omitted)). Ramey

answered Question 5 falsely either way. Plain meaning, the use of the word "charge" in the state court records from Ramey's case, and Texas law all support our conclusion that Ramey's state court proceeding falls within Question 5 's sweep.

First, plain meaning. Considering whether a contract has been breached under Texas law, we must give "terms their ordinary and generally accepted meaning unless the contract directs otherwise." *Great Am. Ins. Co. v. Primo*, 512 S.W.3d 890, 893 (Tex. 2017). In pertinent part, Question 5 asks whether "any individual owning 20% or more of the equity of the Applicant [was] subject to ... means by which formal criminal charges are brought." The term "charge" is not defined in the Application, the Note, or the Agreement. But Black's Law Dictionary defines "charge" as a "formal accusation of an offense as a preliminary step to prosecution." Charge, BLACK'S LAW DICTIONARY (11th ed. 2019). When he completed the Application, Ramey was subject to a formal accusation of attempted sexual assault and preliminary steps were being taken in state court toward prosecuting him. A criminal complaint had been filed against Ramey; a state magistrate judge had found probable cause and issued an arrest warrant; Ramey had been arrested and was released on bail; and his arraignment was scheduled. Therefore, based on the plain meaning of the word "charge," Ramey was subject to "means by which formal criminal charges are brought" when he completed the Application.

The records from Ramey's criminal case confirm this. The criminal complaint against him listed attempted sexual assault as his "felony charge." The state court's docket referred to the complaint as a "charging instrument... Moreover, the arrest warrant described the allegations in the complaint and then ordered a peace officer "to arrest the defendant and bring him before the court ... to answer the above charge... And the bail bond, which Ramey signed, listed "att sexual assault" as Ramey's "charge" and stated that the "condition of this bond is that the defendant has been charge[d] with a felony offense[.]" The bond also required that Ramey appear "for any an[d] all subsequent proceedings that may be had relative to said charge in the course of criminal actions based on said charge[.]"

Texas law likewise validates our reading of Question 5 as encompassing Ramey's state proceeding. The law firm and the bank agree that the complaint in Ramey's case was brought under Article 15.04 of the Texas Criminal Code. That statute states that an "affidavit made before the magistrate or district or county attorney is called a 'complaint' if it charges the commission of an offense." TEXAS CODE OF CRIM. P. art.15.04 (emphasis added).

The law firm's arguments otherwise are unavailing. First, the firm contends that SBA's "regulatory history" shows that "the 'other means' language was not intended to expand the scope of the exclusion to non-indictments, but to make sure that outlier states who call those documents something else were captured." Specifically, the law firm points

to "a pre-PPP form for SBA loans,, from 2013 that "says the reference to an 'information' in the criminal exclusion is meant to be 'a document that is filed in court identifying charges against a defendant, that is commonly used in lieu of an indictment if the subject is intending to plead guilty... But an SBA form from seven years prior explaining the inclusion of "information" in that document's criminal exclusion is not relevant to the meaning of "charge" in the Application for PPP loans, much less sufficiently probative to override the plain language of the Application.

Second, the law firm contends that the canon of *ejusdem generis* counsels in its favor. That canon of construction holds that "[w]here general words follow an enumeration of two or more things, they apply only to ... things of the same general kind or class specifically mentioned."

ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 199 (2012). Based on this canon, the law firm argues that "other means by which formal criminal charges are brought would have to be like an indictment[.]" Therefore, the firm suggests, because "Ramey [was] not 'under an indictment,' Ramey [was] not 'under other means.'"

Not so. *Ejusdem generis* only applies where "the initial terms all belong to an obvious and readily identifiable genus[.]" *Id.* The law firm contends that the specific terms enumerated in Question 5 all belong to the genus of instruments that are "like an

indictment," but the firm does not explain what that means. In any event, the §inn's proposed genus is not at all "obvious and readily identifiable." The canon of *ejusdem generis* therefore is not persuasive for the law firm's position.

V.

Because Ramey was, at least, subject to "means by which formal criminal charges are brought" at the time he completed the Application, he answered Question 5 falsely on behalf of Ramey & Schwaller. Accordingly, the law firm was in default under the PPP loan documents, and the district court correctly entered summary judgment in favor of Amegy Bank.

AFFIRMED.

APPENDIX C

No. 22-20107
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Ramey & Schwaller, L.L.P.,
Plaintiff-Appellant

v.

Zions Bancorporation NA, doing business as Amegy
Bank,
Defendant-Appellee.

(Filed June 16, 2023)

Before SMITH, CLEMENT, and WILSON, *Circuit
Judges*.

JUDGMENT

This cause was considered on the record of
appeal and was argued by counsel.

IT IS ORDERED and ADJUDGED that the
judgment of the District Court is AFFIRMED.

IT IS FURTHER ORDERED that plaintiff-
appellant pay to the defendant-appellee the costs on
appeal to be taxed by the Clerk of this Court.

Attest: [Illegible]
Clerk, U.S. Court of
Appeals, Fifth Circuit

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

RAMEY & SCHWALLER, LLP,
Plaintiff,

v.

CASE NO. 4:20-CV-2890

ZIONS BANCORPORATION, N.A.,
Defendant.

(Filed December 13, 2021)

ORDER

Pending before the Court is Defendant Zions
Bancorporation, N.A.'s Motion for Summary
Judgment. (Instrument No. 48).

I.

A.

This case involves the default and acceleration
of a Paycheck Protection Program loan (hereinafter
the "PPP Loan") by Defendant Zions Bancorporation,
N.A. (hereinafter "Zions") against Plaintiff Ramey &
Schwaller, LLP (hereinafter "Ramey & Schwaller").
(Instrument No. 58 at 4-8).

On April 16, 2020, Ramey & Schwaller applied
for a PPP Loan from Zions, doing business as Amegy

Bank. (Instruments No. 48-9, 58). Question No. 5 on the application for the PPP Loan asked the following:

Is the Applicant (if an individual) or any individual owning 20% or more of the equity of the Applicant subject to an indictment, criminal information, arraignment, or other means by which formal criminal charges are brought in any jurisdiction, or presently incarcerated, or on probation or parole?

(Instrument No. 48-9 at 6). The PPP Loan Application is provided by the Small Business Administration. (Instrument No. 48-9 at 6). The PPP Loan Application was approved based on the representations therein and the parties entered into the Business Loan Agreement to effectuate the PPP Loan on May 11, 2020 for a total of \$249,300. (Instrument No. 49-10). The Business Loan Agreement contains a clause providing that any false or misleading statements made by Ramey & Schwaller under the Business Loan Agreement or its related documents constituted default. *Id.* at 3. The Business Loan Agreement further provided that "all Indebtedness immediately will become due and payable" at the option of Zions upon default. *Id.* at 4. Finally, the Business Loan Agreement provides that Zions "reserves a right of setoff in all Borrower's accounts with Lender (whether checking, savings, or some other account)." *Id.* at 3.

On August 11, 2020, Zions accelerated the entirety of the PPP Loan and required it be repaid by August 26, 2020. (Instrument No. 58 at 6). Zions did

so because it believed Ramey & Schwaller had answered Question No. 5 of its PPP Loan Application falsely. Id. at 6-7. Zions additionally exercised a setoff from Ramey & Schwaller's accounts and froze Ramey & Schwaller's IOLTA account for 3 days, July 27, 2020 to July 29, 2020. Id

Zions determined Ramey & Schwaller had answered Question 5 of the loan application falsely because a criminal complaint had been filed against William Ramey on September 25, 2019 (hereinafter the "Complaint"). (Instrument No. 48-2). William Ramey owned 100% of Ramey & Schwaller. (Instrument No. 48-10 at 2). The Complaint alleges that William Ramey committed Attempted Sexual Assault on or about September 28, 2018. (Instrument No. 48-2). William Ramey was arrested on September 27, 2019, and an emergency protective order was signed that day. (Instruments No. 48-3, 48-4). The arraignment of William Ramey was rescheduled at least 6 times from November 19, 2019 to November 16, 2020. (Instrument No. 48-5, 48-8). On October 28, 2021, a grand jury failed to find a bill of indictment for Attempted Sexual Assault against William Ramey and ordered him discharged. (Instrument No. 85-2).

B.

Ramey & Schwaller filed their "Original Petition and Request for Disclosures" in the in the District Court of Harris County, Texas, 133th Judicial District, on August 14, 2020. (Instrument No. 1-2). Zions filed its Notice of Removal on August 17, 2020. (Instrument No. 1). On April 2, 2021 Ramey & Schwaller filed its "Second Amended Complaint"

which was actually its third amended complaint (hereinafter the "Third Amended Complaint"). (Instruments No. 1-2, 3, 8, 33). In the Third Amended Complaint, Ramey & Schwaller seeks a declaratory judgement that the PPP Loan was not in default and asserts claims for breach of fiduciary duty, conversion, estoppel, quasi-estoppel, money bad and received, breach of contract, and tortious interference with contract. Id On the same day, Zions filed its Answer to the Third Amended Complaint, in which it denied liability. (Instrument No. 34). Zions had previously filed its "First Amended Counterclaims" on January 27, 2021, asserting a breach of contract claim and praying for attorney's fees. (Instrument No. 23).

On June 18, 2021, Zions filed its Motion for Summary Judgment. (Instrument No. 48). On July 13, 2021, Ramey & Schwaller filed its Response to Zions's Motion for Summary Judgment. (Instrument No. 58). On July 16, 2021, Zions filed its Reply to that Response. (Instrument No. 61).

II.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317,322 (1986); *Warfield v. Byron*, 436 F.3d 551, 557 (5th Cir. 2006); see also Fed. R. Civ. P. 56(a).

The "movant bears the burden of identifying those portions of the record it believes demonstrate the absence of a genuine issue of material fact." *Triple Tee Golf, Inc. v. Nike, Inc.*, 485 F.3d 253,261 (5th Cir. 2007) (citing *Celotex*, 477 U.S. at 322-25). "A genuine issue of material fact exists when the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Fisk Elec. Co. v. DQSJ, L.L.C.*, 894 F.3d 645, 650 (5th Cir. 2018) (internal quotations omitted); see also *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

If the burden of proof at trial lies with the nonmoving party, the movant may satisfy its initial burden by "showing -that is, pointing out to the district court -that there is an absence of evidence to support the nonmoving party's case." *Celotex*, 477 U.S. at 325. While the party moving for summary judgment must demonstrate the absence of a genuine issue of material fact, it does not need to negate the elements of the nonmovant's case. *Boudreax v. Swift Transp. Co.*, 402 F.3d 536,540 (5th Cir. 2005) (citation omitted). "If the moving party fails to meet [its] initial burden, the motion [for summary judgment] must be denied, regardless of the nonmovant's response." *United States v. \$92,203.00 in U.S. Currency*, 537 F.3d 504, 507 (5th Cir. 2008) (quoting *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc)).

After the moving party has met its burden, in order to "avoid a summary judgment, the nonmoving party must adduce admissible evidence which creates a fact issue concerning the existence of every essential component of that party's case." *Thomas v.*

Price, 975 F.2d 231, 235 (5th Cir. 1992). The party opposing summary judgment cannot merely rely on the contentions contained in the pleadings. Little, 37 F.3d at 1075. Rather, 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 457, 458 (5th Cir. 1998); see also Baranowski v. Hart, 486 F.3d 112, 119 (5th Cir. 2007). Although the court draws all reasonable inferences in the light most favorable to the nonmoving party, Connors v. Graves, 538 F.3d 373, 376 (5th Cir. 2008), the nonmovant's "burden will not be satisfied by some metaphysical doubt as to the material facts, by conclusory allegations, by unsubstantiated assertions, or by only a scintilla of evidence." Boudreaux, 402 F.3d at 540 (quoting Little, 37 F.3d at 1075). Similarly, "unsupported allegations or affidavit or deposition testimony setting forth ultimate or conclusory facts and conclusions of law are insufficient to defeat a motion for summary judgment." Clark v. Am. 's Favorite Chicken, 110 F.3d 295, 297 (5th Cir. 1997).

In deciding a summary judgment motion, the district court does not make credibility determinations or weigh evidence. E.E.O.C. v. Chevron Phillips Chem. Co., LP, 570 F.3d 606, 612 n.3 (5th Cir. 2009). Nor does the court "sift through the record in search of evidence to support a party's opposition to summary judgment." Jackson v. Cal. Western Packaging Corp., 602 F.3d 374, 379-80 (5th Cir. 2010); Malacara v. Garber, 353 F.3d 393, 405 (5th Cir. 2003); Ragas, 136 F.3d at 458; Nissho-Iwai Am. Corp. v. Kline, 845 F.2d 1300, 1307 (5th

Cir.1988) (it is not necessary "that the entire record in the case ... be searched and found bereft of a genuine issue of material fact before summary judgment may be properly entered"). Therefore, "[w]hen evidence exists in the summary judgment record but the nonmovant fails even to refer to it in the response to the motion for summary judgment, that evidence is not properly before the district court." Malacara, 353 F.3d at 405.

III.

Ramey & Schwaller seeks declaratory judgement that the PPP Loan was not in default and asserts claims for breach of fiduciary duty, conversion, estoppel, quasi-estoppel, money had and received, breach of contract, and tortious interference with contract (Instrument No. 33).

Zions moves for summary judgment on all of those claims and on its own counterclaims for breach of contract and for attorney's fees. (Instrument No. 48).

Because the Court is sitting in diversity and the incident took place in Texas, Texas law governs Plaintiff's claims. See *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

A.

Ramey & Schwaller asserts that Zions breached the PPP Loan Agreement by accelerating the repayment and that Zions breached the Master Services Agreement and Deposit Agreement by offsetting Ramey & Schwaller's other accounts to pay the accelerated debt.

Zions argues summary judgment is warranted because Ramey & Schwaller violated the PPP Loan agreement by providing a false or misleading answer to Question No. 5 of the PPP Loan application, and by failing to disclose pending or threatened litigation. (Instrument No. 48 at 9- 14).

To establish a breach of contract, whether expressed or implied, a plaintiff must prove (1) the existence of a valid contract; (2) performance or tendered performance by the plaintiff; (3) breach of the contract by the defendant; and (4) damages to the plaintiff resulting from that breach. See Abraxas Petroleum Corp. v. Homburg, 20 S.W.3d 741, 758 (Tex. App. 2000); Villarreal v. Wells Fargo Bank, NA., 814 F.3d 763, 767 (5th Cir. 2016). The difference between contracts formed through express promises and those formed through implied promises is the means by which the contracts are formed. Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding, 289 S.W.3d 844, 850 (Tex. 2009). In an implied contract, a contract is formed when there is mutual assent that can be "inferred from the circumstances." *Id* citing Haws & Garrett Gen. Contractors, Inc. v. Gorbett Bros. Welding Co., 480 S.W.2d 607,609 (Tex. 1972).

There is no disagreement concerning whether William Ramey is an individual owning 20% or more of Ramey & Schwaller, as he owns 100% of the partnership, what is contested is whether he was "subject to an indictment, criminal information, arraignment, or other means by which formal criminal charges are brought in any jurisdiction[.]" (Instrument No. 48-9 at 6). Zions asserts that William Ramey was, so Ramey & Schwaller defaulted

by answering Question No. 5 of the application "No." (Instrument No. 48 at 9-14). Ramey & Schwaller asserts he was not, so it answered Question No. 5 truthfully, and Zions breached the Business Loan Agreement and wrongfully appropriated its accounts in violation of their other contracts. Instrument No. 58 at 12- 20).

The parties argue at length over whether William Ramey was "subject to an indictment, ..., arraignment, or other means by which formal criminal charges are brought[.]" Additionally, Ramey & Schwaller flatly asserts that "Ramey [was] likewise not under a criminal information." (Instrument No. 58 at I I). However, the Court finds the question of whether Ramey was subject to an information is central to the breach of contract claim.

An "Information" is defined by the Texas Code of Criminal Procedure as "a written statement filed and presented in behalf of the State by the district or county attorney, charging the defendant with an offense which may by law be so prosecuted." Tex. Code Crim. Proc. art. 21.20. Article 21.21 of the Texas Code of Criminal Procedure has nine requisites for a sufficient information, and these are:

1. It shall commence, "In the name and by authority of the State of Texas";
2. That it appear to have been presented in a court having jurisdiction of the offense set forth;
3. That it appear to have been presented by the proper officer;

4. That it contain the name of the accused, or state that his name is unknown and give a reasonably accurate description of him;

5. It must appear that the place where the offense is charged to have been committed is within the jurisdiction of the court where the information is filed;

6. That the time mentioned be some date anterior to the filing of the information, and that the offense does not appear to be barred by limitation;

7. That the offense be set forth in plain and intelligible words;

8. That it conclude, "Against the peace and dignity of the State"; and

9. It must be signed by the district or county attorney, officially.

Tex. Code Crim. Proc. art. 21.21. The Court is satisfied that the Complaint against William Ramey produced in this case meets the requirements of an information and qualifies as such under the Texas Code of Criminal Procedure. (Instrument No. 48-2). Although the document is labeled a "COMPLAINT," the Texas Court of Criminal Appeals has found that a document labeled "COMPLAINT" also serves as an information so long as it meets the requirements of an information. *State v. Drummond*, 501 S.W.3d 78, 81-83 (Tex. Crim. App. 2016).

While a criminal information is insufficient to then prosecute a felony defendant without a waiver of indictment, the Texas Court of Criminal Appeals has held that a criminal information gives a

competent court jurisdiction over a felony case, and that it instigates the felony case for statute of limitations purposes. *Ex parte Ulloa*, 514 S.W.3d 756, 758-60 (Tex. Crim. App. 2017). Regardless of whether the charges may proceed to trial, it is clear that a criminal information in a felony case is still a valid instrument.

Based on these findings, William Ramey was "subject to [a] criminal information" at the time of the PPP Loan application and Ramey & Schwaller therefore answered Question No. 5 falsely. The Complaint against William Ramey was dated September 25, 2019. (Instrument No. 48-2). The PPP Loan application is dated April 16, 2020. (Instrument No. 48-9). At that point, William Ramey had been arrested, an emergency protective order was issued, and the arraignment of William Ramey was postponed 3 times. (Instruments No. 48-3, 48-4, 48-5). The Court finds that Ramey & Schwaller defaulted under the Business Loan Agreement by making a false statement on its PPP Loan application. (Instruments No. 48-9 at 6, 48-10 at 3-4).

To the degree Ramey & Schwaller argues that Zions cannot lawfully enforce its own contract, those arguments are overruled. (Instrument No. 58 at 22). The Court further finds Zions did not breach the Business Loan Agreement or its other contracts by accelerating the loan or by exercising its right to setoff under the Business Loan Agreement. (Instrument No. 48-10 at 4).

Because the Court finds that the acceleration was lawful, Zions is entitled to summary judgment on Ramey & Schwaller's claims for declaratory

judgment, conversion, tortious interference with contract, money had and received, estoppel, quasi-estoppel, and breach of fiduciary duty.

B.

Zions further moves for summary judgment on its counterclaims. (Instruments No. 23, 48 at 18). Zions asserts claims for breaches of the Business Loan Agreement and the Promissory Note. (Instruments No. 23 at 3-4, 48 at 17-18). Zions further asserted claims for pre-and post-judgment interest and attorney's fees pursuant to the contracts and "Tex. Civ. Prac. & Rem. Code§ 38.001, et seq." Id

The Court has already found that Ramey & Schwaller defaulted on its PPP Loan and that Zions rightfully accelerated that loan. Because the loan was rightfully accelerated and Ramey & Schwaller has failed to fully repay that loan, Ramey & Schwaller is in ongoing breach of its contracts to do so. (Instrument No. 48-10 at 4). Zions seeks payment of \$39,299.30, for the remaining obligation on the loan. (Instrument No. 48 at 10, 48-1). The Court finds Zions is entitled to \$39,299.30 on its breach of contract counterclaim and a further \$2,256.67 in pre-judgment interest. This sum of \$41,555.97 will accrue \$0.24 of post-judgment interest per day.

Zions also prays for attorney's fees pursuant to its contracts with Ramey & Schwaller. (Instruments No. 23 at 4, 48-10 at 7, 48-11 at 2). The Business Loan Agreement provides that "[Ramey & Schwaller] agrees to pay upon demand all of [Zions's] costs and expenses, including [Zions's] reasonable attorneys' fees and [Zions's] legal expenses, incurred in

connection with the enforcement of [the Business Loan Agreement]." (Instrument No. 48-10 at 7). The Court finds that this case arose in connection with the enforcement of the Business Loan Agreement and that Zions is entitled to attorney's fees in the amount of \$132,310.81, with an additional \$5000 if the case is appealed to the Court of Appeals for the Fifth Circuit, an additional \$2500 if Ramey & Schwaller subsequently petitions the Supreme Court, and an additional \$6750 if review is granted by the Supreme Court. (Instruments No. 48 at 18).

IV.

For the foregoing reasons, IT IS HEREBY ORDERED that Defendants' Motion for Summary Judgment is GRANTED (Instrument No. 48). Plaintiffs' claims are therefore DISMISSED.

The Clerk shall enter this Order and provide a copy to all parties. SIGNED on the 10th of December, 2021, at Houston, Texas.

VANESSA D. GILMORE
UNITED STATES DISTRICT JUDGE