UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF WISCONSIN
GREEN BAY DIVISION

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TISSUE TECHNOLOGY LLC, PARTNERS CONCEPTS DEVELOPMENT, INC., OCONTO FALLS TISSUE, INC., and TISSUE PRODUCTS TECHNOLOGY CORP.,

Case No. 14-C-1203

Plaintiffs,

v.

TAK INVESTMENTS, LLC and SHARAD TAK,

Defendants.

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**TAK INVESTMENTS, LLC'S REPLY BRIEF IN SUPPORT OF SECTION 1292(b) MOTION TO CERTIFY THE COURT'S DECISION GRANTING, IN PART, PLAINTIFFS' MOTION FOR LEAVE TO AMEND PLEADINGS**

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For the moment, the sole issue here is Tak Investments, LLC's ("Tak Investments") section 1292(b) request for certification for the controlling questions of law that are ingrained in this case. Will they be addressed by the appellate court now or only after discovery, which has just begun in earnest, and trial? But they will have to be resolved because the Plaintiffs' claims are inherently contradictory. To try to obtain a 27 percent interest in Tak Investments, the Plaintiffs have deemed the Investment Notes cancelled. To try to obtain relief under the notes, the notes must have at least facial validity. These are not alternative theories of relief but alternative universes. Moreover, the statute of limitations bars either claim unless the Amended Complaint relates back to the original Complaint, filed in 2014 seeking only seeking specific performance as a remedy and, at that, not under the notes but under a different agreement

altogether. The application of the relation back doctrine is the crux of the section 1292(b) request.[1]

## STANDARD OF REVIEW

The parties have no disagreement over the appropriate test for interlocutory appeal. *See Ahrenholz v. Board of Trustees*, 219 F.3d 674 (7th Cir. 2000). Indeed, the Plaintiffs' responsive brief quite appropriately quotes Judge Posner's opinion: "if a case turns on a pure question of law, something the court of appeals could decide quickly and cleanly without having to study the record…," the appellate court should not have to "wait until the end of the case." *Id.* at 677. The only "record" to study here consists of the essential pleadings. The Plaintiffs themselves have acknowledged the "pure question of law" at stake, moreover, in the very absence of a district court decision on the relation back doctrine "related to Tak Investments, LLC." (ECF No. 55 at 4.) Unless the note enforcement claim relates back to the original Complaint, and permits Rule 15 amendment, it remains barred by the statute of limitations – just as this Court found the personal liability claim against Sharad Tak barred by the statute of limitations.[2]

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[1] This Court has certified interlocutory appeals, see, e.g., *Kohler Co. v. United States*, No. 01-CV-753, 2003 WL 21693705 (E.D. Wis. June 4, 2003), and where it has denied certification it has cited the absence of a dispositive legal issue, *Manitowoc Marine Group, LLC v. Ameron International Corp.*, No. 03-CV-232, 2006 WL 2519219 (E.D. Wis. Aug. 29, 2006); *DeKeyser v. Thyssenkrupp Waupaca, Inc.*, No. 08-CV-488, 2009 WL 750278 (E.D. Wis. Mar. 20, 2009), and questions of fact, *United States v. NCR Corp.*, No. 10-CV-910, 2016 WL 304805 (E.D. Wis. Jan. 25, 2016). No facts are in dispute—with the Amended Complaint, the case is essentially at the pleading stage—and there is no doubt the legal issues are dispositive. The Plaintiffs themselves concede the statute of limitations and relation back issues are issues "the appellate court may have to deal with upon completion of the entire case." (ECF No. 55 at 5.)

[2] Indeed, the plaintiffs begin their responsive brief by noting that the "Court's decision and order discussed both of these concepts [Rule 15 and the relation back doctrine] but only as they related to Sharad Tak, not Tak Investments LLC." (ECF No. 55 at 1.) And, again, later in their brief, the Plaintiffs state that the statute of limitations issue "may be 'controlling' the future course of the litigation…," but that "the Court has not ruled upon Tak Investments LLC's statute of limitations and relation back issues…." The Plaintiffs then proceed to argue the statute of limitations point which, they say, has not yet been addressed. That is the point.

Tak Investments seeks interlocutory review of the Court's implicit resolution against Tak Investments of the legal question of whether the latest claim for breach of the promissory notes in the Amended Complaint relates back to the original Complaint. Plaintiffs liken this to the review of a summary judgment decision. (ECF No. 55 at 4.) Yet the purely legal issue Tak Investments petitions this Court to certify for interlocutory review requires no scouring of a factual record. It requires only comparing the allegations of the original Complaint and those of the Amended Complaint. The harsh conflict between the two sets of allegations against Tak Investments alone demonstrates that the question presented meets the Seventh Circuit's standard: it is indeed discrete and one of law.

All of the other criteria for interlocutory review are satisfied. The question is controlling, as its resolution in favor of Tak Investments would result in dismissal of all claims against Tak Investments. It is also contestable, and interlocutory review of the issue would finally bring this litigation to an end. The Court should exercise its broad discretion and certify the interlocutory appeal.[3]

## I. The Court Did Not Address Tak Investments' Argument Concerning the Applicability of the Relation Back Doctrine to Plaintiffs' Contract Claim, Providing a Basis for Interlocutory Review.

The Plaintiffs fail to appreciate the reason why Tak Investments seeks interlocutory review of the Court's decision granting the Plaintiffs' motion for leave to amend. Plaintiffs note that the Court in its Decision and Order did not address the applicability of the relation back doctrine and the applicability of the statute of limitations to Tak Investments. (ECF No. 55 at 1.) Yet, that is further reason *for*, not an argument against, the motion to certify the interlocutory

[3] The other defendant, Sharad Tak, has not yet been served. The Amended Complaint's allegations against him also meet the standards for interlocutory review.

appeal. In opposing Plaintiffs' original motion for leave to amend, Tak Investments contended that the relation back doctrine would preclude the assertion of Plaintiffs' new-found claims against it given the running of the statute of limitations. While it was an argument explicitly raised in the initial opposition to the Plaintiffs' motion, it was not addressed in the Decision and Order that permitted the amendment.

Plaintiffs erroneously claim that there was "no reasonable argument made" by Tak Investments regarding the "relation back doctrine and the statute of limitations as to this defendant." (ECF No. 55 at 1.) In fact, Tak Investments contended, in opposing the motion for leave to amend, that the purported amendment permitting a claim for breach of the four Investment Notes (as opposed to a claim for breach of the Final Business Terms Agreement) could not relate back to the original Complaint.

Tak Investments emphasized that the events giving rise to the original claim against it for breach of the Final Business Terms Agreement and the newly-pled claim for breach of the Investment Notes were different in both time and type. (ECF No. 46 at 17.) In support of its relation back argument, Tak Investments cited cases emphasizing that an amendment will only relate back to the filing of the original Complaint where it merely restates the same factual allegations and claims that those facts support an additional theory of recovery. (ECF No. 46 at 14) (citing *Henderson v. Bolanda*, 253 F.3d 928, 931 (7th Cir. 2001). Tak Investments could not have been more explicit in stating that the amendment should not relate back:

> The claim initially asserted by Plaintiffs for specific performance hinged upon the Final Business Terms Agreement and the notice being given to Tak Investments that the Investment Notes were cancelled. According to Plaintiffs, this would have required a transfer of an equity interest in Tak Investments to Plaintiffs if proper notice had been given sometime after three years from the date of the Final Business Terms Agreement. In contrast, the new claim Plaintiffs would assert for breach of the Investment Notes matured by the date the last payment was due in 2010.

(ECF No. 46 at 17.) Tak Investments plainly contended that to permit a relation back under these circumstances would deprive it of fair notice of the claim as required by due process and Rule 8(a). (Id.)

Tak Investments also raised this argument in support of the motion for interlocutory appeal. As Tak Investments stated in its principal brief:

> In granting Plaintiffs leave to amend to assert these two inconsistent theories, the Court applied the analysis required by Rule 15(c) and the relation back doctrine to the putative claims against Mr. Tak, but did not do so with respect to the claim against Tak Investments for breach of the four promissory notes. Had it done so, the Court would have found the claim for breach of the promissory notes barred by the statute of limitations because it does not relate back to the filing of the Complaint in this matter.

(ECF No. 54 at 2.) The issue Tak Investments would have this Court certify for interlocutory review is one it squarely raised in opposing the Plaintiffs' motion for leave to amend. While the Court did not apply the relation back doctrine with respect to Tak Investments, Tak Investments did argue that the new claim should not relate back. That is the point of the section 1292(b) request.

**II. The Plaintiffs Misapply The Statute of Limitations.**

Beyond misunderstanding the reason for Tak Investments' desire for interlocutory review, namely that the Court permitted the amendment without addressing the relation-back doctrine and its applicability to Tak Investments, the Plaintiffs fail to acknowledge that their would-be claims for breach of the promissory notes are time barred. Plaintiffs' argument amounts to a claim that they filed suit on September 30, 2014, after making "demand" in 2014 on notes due in 2010, and therefore, that this action is timely. (ECF No. 55 at 6.) This contention ignores the fact that the lawsuit the Plaintiffs filed in this case in 2014 was *not* a claim for breach of the four promissory notes. Instead, the claim was solely for specific performance

of the Final Business Terms Agreement, premised on Plaintiffs' explicit allegations that the four notes had been cancelled.

Plaintiffs contend that the statute of limitations has not accrued on their claims for breach of the notes, reasoning that a contract claim does not accrue until there is a material breach. (ECF No. 5 at 6.) This argument has no basis. Section 893.43 of the Wisconsin Statutes requires that an action upon any contract be commenced within six years of accrual of the action or the action is barred. *See Hennekens v. Hoerl*, 160 Wis.2d 144, 159 & n.12, 465 N.W.2d 812 (1991) (recognizing claim for breach of promissory note accrues when note is due). Here, the claim for breach of the promissory notes accrued at least by April 16, 2010, meaning any claim to enforce them would be barred after April 16, 2016. A claim for breach of a promissory note accrues on the date of the maturity of the note itself.

Plaintiffs contend that a contract claim matures on the date of the material breach, but this ignores the principle that a claim for breach of a promissory note must be brought within six years from the date of maturity – the latest point in time at which a claim for breach of contract could have accrued would be the day the notes were due and went unpaid. It also is in direct conflict with this Court's prior holding on the issue as it relates to Sharad Tak, where the Court concluded that any claim to enforce the notes would be time barred given the fact such a claim accrued by April 16, 2010, at the latest. (ECF No. 48 at 4.) For these reasons, Plaintiffs' claims against Tak Investments are time barred as well.

That Mr. Van Den Heuvel sent a "demand letter" for payment of the notes does not preserve that claim from the effect of the statute of limitations; only filing suit does.[4] *See* Wis.

[4] Ron Van Den Heuvel's correspondence dated August 15, 2014, bearing the subject line of "Notice of Cancellation of Investment Notes," was not a demand for payment of the notes. Instead, Mr. Van Den Heuvel invoked the Final Business Terms Agreement's provision concerning notice of cancellation and gave notice that the four notes were

*footnote continued on next page…*

Stat. § 893.43(1) ("[A]n action upon any contract … shall be commenced within 6 years after the cause of action accrues or be barred."). And when Plaintiffs actually filed suit, they elected not to file suit to enforce the notes, but to try to enforce a different contract pursuant to which they alleged they had a right of specific performance for the cancelled the notes.[5] The Plaintiffs cannot claim they "initiated their first lawsuit upon these notes and the Final Business Terms Agreement," [ECF No. 55 at 5] as both the prior version of this lawsuit and the current suit were framed exclusively in terms of the contractual obligation Tak Investments allegedly had to the Plaintiffs as a result of the Plaintiffs' own cancellation of the four notes.

Further, the Plaintiffs' responsive brief argues the statute of limitations question but without noting the Court's resolution of one aspect of it. In denying their attempt to enforce the notes personally against Sharad Tak, the Court concluded that the statute of limitations for the notes "accrued at the latest on April 16, 2010" and, as a result, the note claim against him "is therefore untimely." (ECF No. 54 at 4.) The Court said any claim "against Sharad Tak" would not relate back to the original complaint. Left unresolved, except by implication, is whether or not the claim against Tak Investments on the notes, which first appears in the proposed amended complaint, could relate back to a complaint for specific performance under the Final Business Terms Agreement.

Resolution of the relation back question with respect to Tak Investments will certainly control the future course of this litigation. Should the Court conclude that the amendments of

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deemed cancelled. His demand was therefore a transfer of 27 percent of Tak Investments, not payment of the notes. (ECF No. 55-1.)

[5] To be sure, the original Complaint, filed on September 30, 2014, referred to the Investment Notes but only to provide a predicate for the statement that the Plaintiffs had provided notice that "the Investment Notes were deemed cancelled." (Compl. ¶ 17.) That, the Plaintiffs alleged, triggered the 27 percent transfer requirement. There was no allegation that the notes were in default, no request for payment under the notes—in short, nothing to suggest that the notes themselves (having been cancelled) were at issue.

Plaintiffs' claim against Tak Investments do not relate back to the September 30, 2014 Complaint, such claims are indisputably time-barred. With this dispositive issue relating to Tak Investments, the Court should certify this matter for interlocutory review on the narrow issue of the applicability of the relation-back doctrine on Plaintiffs' claims.

**III. Tak Investments Has Not Taken Inconsistent Positions.**

Accusing Tak Investments of taking inconsistent positions, Plaintiffs observe that by correspondence responding to Plaintiffs' demand for a transfer of the 27 percent interest, Tak Investments ignored Plaintiffs' attempt to cancel the four promissory notes. (ECF No. 55 at 9.) There is no inconsistency. Tak Investments responded to correspondence prior to this litigation, stating that it did not recognize the purported cancellations. In response, Plaintiffs could have simply filed suit for breach of the four promissory notes as their primary claim. For whatever reason, they declined to do so.

The federal rules certainly embrace pleading in the alternative. But that is not what Plaintiffs did. They committed wholeheartedly to one theory – the notes were deemed cancelled – and sought relief for an alleged breach not of the notes but of the Final Business Terms Agreement. The claims for breach of the notes were *never* raised in the original Complaint, and Tak Investments had no notice of them. Statutes of limitation play an important role in the system of civil justice in providing repose and requiring claimants to timely assert their claims.

The inconsistency in Plaintiffs' position need not, taken alone, result in a conclusion that the new claims do not relate back to the old. Instead, it is the simple fact that Plaintiffs never hinted at – let alone asserted – the new claim in the original Complaint, and Tak Investments

could not possibly have had notice of the claim given the nature of the original allegations. Indeed, the old claim and the new one are inherently contradictory.

The Court should certify the interlocutory appeal for the controlling legal issue of whether the new claims relate back to the original Complaint.

**IV. Conclusion.**

Tak Investments respectfully maintains that the Court erred when it limited its application of the relation back doctrine to the putative claim against Sharad Tak personally. It did not consider whether the amendment relating to Tak Investments would relate back to the filing of the original complaint. This is the controlling question of law – contestable and likely to result in a termination of the litigation. This is why Tak Investments seeks the Court's permission to appeal its determination on an interlocutory basis. After all, if the district court erred in failing to apply the relation-back doctrine to Tak Investments, and this were found to be the case on appeal after entry of a final judgment, there would be no remaining claim against Tak Investments since the sole remaining claim in this suit is for breach of the four promissory notes.

Accordingly, Tak Investments respectfully requests that the Court grant the motion and certify the interlocutory appeal.

Dated this 7th day of June, 2017.

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