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

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

Plaintiffs,

v.

TAK INVESTMENTS, LLC and SHARAD TAK,

Defendants.

Case No. 14-C-1203

TAK INVESTMENTS, LLC'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Defendant Tak Investments, LLC ("Tak Investments"), by and through its counsel, Godfrey & Kahn, S.C., submits this memorandum in support of its motion for summary judgment. Plaintiffs have twice filed lawsuits seeking to enforce a single contract, the Final Business Terms Agreement ("FBTA"), through which Plaintiffs have sought a 27% interest in Tak Investments and now, belatedly, judgment on the four notes they had deemed cancelled.

The first suit was unsuccessful, dismissed by this Court, because the Plaintiffs had assigned at least one of the four promissory notes (the "Investment Notes") they claim to have cancelled to trigger the transfer obligation. Earlier in this case, the Court concluded that Tak Investments was entitled to partial summary judgment because the specific performance the Plaintiffs sought was not possible. (ECF No. 40 at 4-5.) As a result, the Plaintiffs have now recast their complaint to try to enforce both the FBTA against Sharad Tak personally based on the cancellation of the four Investment Notes and, at the same time and for the first time, to enforce the Investment Notes against Tak Investments.

Summary judgment is appropriate for Tak Investments for two reasons. First, the newly-asserted claim to enforce the Investment Notes is barred by the applicable six-year statute of limitations. The Investment Notes matured on April 16, 2010, yet Plaintiffs did not propose an Amended Complaint asserting any claim for the Investment Notes until January 9, 2017 (ECF No. 43-1), and the pleading was not accepted as filed until April 3, 2017 (ECF No. 49). The new claim on the notes cannot relate back to the suit on an entirely different document.

Second, the undisputed facts demonstrate that the Investment Notes are void for want of consideration. Nothing of value was ever given by the Plaintiffs to or received by Tak Investments in exchange for Tak Investments' making the Investment Notes. Instead, Tak Investments executed the notes to set in place a means by which future credit could be – but never was – extended in the event the parties proceeded with the purchase of a new paper mill. The Investment Notes were empty glasses, never filled.

This matter is scheduled for trial on September 18, 2017. For these issues, there are no facts in dispute to be tried.

SUMMARY JUDGMENT STANDARDS

Summary judgment should be granted "if the movant shows that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). To establish factual disputes, the non-movant's version of events is generally accepted as true at this stage of the proceedings if supported by admissible evidence of record. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). The mere existence of some factual dispute does not defeat a summary judgment motion, however; there must be a *genuine* issue of *material fact* for the case to survive. *Id*. at 247-48.

"Material" means that the factual dispute must be outcome-determinative under governing law, requiring a determination by a judge or jury. *Contreras v. City of Chicago*, 119 F.3d 1286, 1291 (7th Cir. 1997) (citations omitted). A "genuine" issue of material fact requires specific and sufficient evidence – admissible at trial – that, if believed by a jury, would actually support a verdict in the non-movant's favor. *Anderson*, 477 U.S. at 249; *see also* Fed. R. Civ. P. 56(c)(1) and (2). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Matsushita Elec. Indus. Co., v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citation omitted).

ARGUMENT

I. The Claim Against Tak Investments to Enforce the Investment Notes is Barred by the Statute of Limitations.

Wisconsin law, which applies to the Investment Notes, provides that a contract claim must be brought within six years or it will be barred. Wis. Stat. § 893.43(1) (2015-16) ("[A]n action upon any contract … shall be commenced within 6 years after the cause of action accrues or be barred."). Plaintiffs are seeking to enforce promissory notes against Tak Investments, and the inquiry for purposes of the statute of limitations is the date the notes matured. The maturity of a promissory note is the date upon which a claim for breach of the notes "accrues" under the statute. *See Hennekens v. Hoerl*, 160 Wis. 2d 144, 159 & n.12, 465 N.W.2d 812 (1991) (claim for breach of promissory note accrues when note due).

Almost any statute of limitations issue triggered by an amended complaint implicates the "relation back" doctrine. Here, there are two undisputed points in time: the accrual of a potential contract claim and the filing of the amended complaint. Those dates are, again without dispute, more than six years apart. The Plaintiffs did indeed file a complaint before the expiration of that six year period, but it was not a complaint that asserted claims based on any

failure to pay the Investment Notes. The question then presented, whether or not presented before, is whether the original complaint provides a safety net for the Plaintiffs' failure, across the years, to allege a breach of the notes.

The arguments are, perhaps painfully, familiar to the Court. They were raised most recently in Tak Investments' section 1292(b) motion, denied by the Court on June 21, 2017 – noting that the "Defendants have not moved for dismissal of the claims that the court allowed to proceed," including the claim for breach of the Investment Notes. (ECF No. 57 at 3.) In this motion, Tak Investments has now moved for that dismissal based both on the statute of limitations and on the failure of consideration. A resolution on either point will help resolve the "many questions …this court has over the meaning of the bizarre agreement that forms the basis of the lawsuit." (ECF No. 57 at 4.)

Tak Investments adopts by reference the arguments it made in its brief opposing Plaintiffs' motion for leave to amend pleadings (ECF No. 46 at 12-18) on the relation back doctrine and reiterated in its briefs in support of its section 1292(b) motion (ECF Nos. 54, 56). They are succinctly stated. A party cannot deem notes cancelled to obtain specific performance and, simultaneously, pursue a claim on the notes as if they remained not cancelled. Moreover, even were that possible, an amended complaint with these contradictory claims cannot relate back – for statute of limitations purposes – to a complaint based on a FBTA and not on the notes themselves. In summary, an "amended" complaint is not a license to raise new claims not embraced by the original complaint. *See Joseph v. Elan Motorsports Techs. Racing Corp.*, 638 F.3d 555, 558 (7th Cir. 2011) (question of whether an amended pleading relates back to an earlier pleading is a separate question from whether to grant leave to amend).

Here, it is undisputed that, by their own terms, the Investments Notes matured on April 16, 2010. The claim for breach of the notes accrued on that day. Accordingly, the statute of limitations required that the holder of the notes bring any action to enforce the notes by April 16, 2016. That did not happen.

Plaintiffs launched their first lawsuit in 2012 premised on their contention, repeated in pleading after pleading, that they had cancelled the Investment Notes and were therefore entitled to a 27% interest in Tak Investments pursuant to the FBTA. The 2012 case was dismissed after Tak Investments established that at least one of the Investment Notes had been assigned to a third party, precluding the cancellation of all four notes. The Plaintiffs filed this suit in 2014. It was not until after the initial round of summary judgment motions here that the Plaintiffs put forth a proposed Amended Complaint that, for the first time, included a claim against Tak Investments for breach of the Investment Notes. (ECF No. 43-1.)

The Amended Complaint was not proposed by the Plaintiffs until January 9, 2017 (ECF No. 43-1), and not accepted as filed until April 3, 2017 (ECF No. 49); the contract claim against Tak Investments for an alleged breach of the Investment Notes was not asserted before April 16, 2016. Accordingly, the claim is barred by Wis. Stat. § 893.43.

II. The Investment Notes are Void for Lack of Consideration.

Not only is Plaintiffs' claim against Tak Investments under the Investment Notes time-barred, it must fail given the fact that the Investment Notes were not and are not supported by consideration. A contract must be supported by consideration to be valid. *Levin v. Perkins*, 12 Wis. 2d 398, 403, 107 N.W.2d 492 (1961). That is black letter law. Consideration may consist of a detriment to the promisee or a benefit to the promisor. *First Wis. Nat'l Bank v. Oby*, 52 Wis.

2d 1, 6, 188 N.W.2d 454 (1971). Section 403.303 of the Wisconsin Statutes defines "consideration":

> (2) "Consideration" means any consideration sufficient to support a simple contract. The drawer or maker of an instrument has a defense if the instrument is issued without consideration. If an instrument is issued for a promise of performance, the issuer has a defense to the extent that performance of the promise is due and the promise has not been performed.

Wis. Stat. § 403.303(2).

Here, the undisputed facts establish that Tak Investments received nothing by making the Investment Notes. (Tak Investments, LLC's Proposed Findings of Fact in Support of its Motion for Summary Judgment ("PFOF") ¶ 4.) Notes are given in exchange for money lent. The Plaintiffs tendered no money to Tak Investments. The Investment Notes are not evidence of indebtedness from Tak Investments to the note holder because no credit was extended as a result of the notes. Unlike certain subordinated seller notes issued in connection with the 2007 transaction for the sale of the mill in Oconto Falls, the Investment Notes were not issued as a means to finance the sale. In short, though the Investment Notes recite "FOR VALUE RECEIVED," there was, in fact, no such value given to or received by Tak Investments.

For the very definition of a "note," the concept of "value" actually received (tangibly, not as an incantation) is so essential that it is found in sources as basic as Black's Law Dictionary and as famous as Joseph Story. A note is a "written promise by one party (the *maker*) to pay money to another party (the *payee*) or to bearer. A note is a two party negotiable instrument…." *Note,* Black's Law Dictionary 1225 (10th ed. 2014). It is an "unconditional written promise…to pay absolutely and in any event a certain sum of money…." *Promissory note, id.* at 1226. The words "value received" may "raise a positive presumption of a legal consideration sufficient to sustain the promise" but the presumption is always rebuttable. Joseph Story, *Commentaries on*

the Law of Promissory Notes 63 (7th ed. 1878); *see also Wortley v. Kieffer*, 70 Wis. 2d 734, 739, 235 N.W.2d 296 (1975).

The presence or absence of talismanic words is irrelevant. Value must, in fact, have been received in exchange for the note. Joseph Story, *Commentaries on the Law of Promissory Notes* 57 (6th ed. 1868). The Plaintiffs gave none, here, and the Defendants received none.

The Investment Notes were also not made to secure from the Plaintiffs any promise of performance. Nowhere in any of the Investment Notes is there any promise on the part of the payee of the notes to do anything with the ritual exception of a promise to surrender the note upon payment in full of the note. Here, there was nothing to pay. In *Eli Envtl. Contractors, Inc. v. 435 Partners, LLC*, the Court of Appeals found consideration for a promissory note based on the fact the payee had promised to perform certain environmental and demolition work upon request of the maker of the note. 2007 WI App 119, ¶ 13, 300 Wis. 2d 712, 731 N.W.2d 354. No such promises were made in this case. No money changed hands. No services were provided. (PFOF ¶ 4.)

Tissue Products Technology Corp., the original payee on the Investment Notes, made no promises to do anything in connection with Tak Investments' execution of the Investment Notes. Further, unlike certain subordinated seller notes issued in connection with the 2007 sale of the mill in Oconto Falls, the Investment Notes were not issued as a means to finance the sale. (PFOF ¶ 6.)

Instead, the contracts were intended by the parties to provide a conditional vehicle through which financing could be (but never was) obtained for a future project. (PFOF ¶ 5.) This is made plain by the indemnification provisions in the FBTA, where paragraph 2(G) provides that, through the third anniversary of the Investment Notes, OFTI agreed to make any

payments due for interest or principal as required by the notes. None were made because none came due. In the same paragraph of the FBTA, OFTI further agreed to indemnify Tak Investments and hold it harmless against any "damages, losses, deficiencies, actions, demands, judgments, fines, fees, costs and expenses, including, without limitation, attorneys' fees, of or against [Tak] Investments" resulting from OFTI's failure to make such payments.

This Court, in considering the role the Investment Notes played in the dealings between the parties as reflected in the FBTA, observed in the first iteration of this case that the notes played an unconventional but defined role.

> In light of these indemnification provisions, it is evident that the parties to the Final [Business Terms] Agreement did not intend the notes to function as traditional promissory notes. The payee, OFTI, effectively promised that it would never seek to collect the $16,400,000. Instead, it appears that the notes functioned as an incentive for Tak to consummate Phase 2 Financing and enter into an additional contract worth over $315,000,000. Paragraph 2(H) stated that if Tak consummated Phase 2 Financing on or before the tenth anniversary of the notes, the Notes would be deemed cancelled. In addition, ¶ 2(G) provided that if Tak consummated Phase 2 Financing after the notes had been cancelled and the 27% share had been transferred, OFTI would return the 27% share to Tak. Thus, the notes provided Tak an incentive to consummate Phase 2 Financing quickly. If Tak consummated Phase 2 Financing before the third anniversary of the notes, Tak would not be required to transfer a 27% share to OFTI. If OFTI deemed the notes cancelled after the third anniversary, Tak would suffer the 27% loss until it consummated Phase 2 Financing.

Tissue Technology, LLC et al. v. Tak Investments, LLC, Case No. 12-CV-1305, ECF No. 37 at 4. (April 28, 2014).[1]

The parties never intended the Investment Notes to operate as "traditional promissory notes" supported by consideration. Not only is this reflected in the Court's prior decision and in the language of the documents, it is established in the declaration of Mr. Tak. He states that the Investment Notes were not made as a result of credit being extended to any entity affiliated with

[1] A true and correct copy of this Order on Defendant's Motion for Summary Judgment is attached hereto as Exhibit 1.

him but, rather, they were intended by the parties to provide a vehicle through which financing could be – but never was – obtained for a future project. Without any consideration to support the Investment Notes, the contracts are void. The Court should grant Tak Investments' motion for summary judgment on this ground if it doesn't initially find the claim barred by the statute of limitations.

CONCLUSION

The Plaintiffs' claim against Tak Investments is barred because the Plaintiffs never attempted to enforce the Investment Notes within the period of time permitted by the statute of limitations. Additionally, because there was no consideration to support the Investment Notes, they are void.

Accordingly, the Court should grant Tak Investments summary judgment.

Dated this 14th day of July, 2017.

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EXHIBIT 1

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

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

Plaintiffs,

v. Case No. 12-C-1305

TAK INVESTMENTS LLC,

Defendant.

ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Plaintiffs brought this diversity action seeking a specific performance remedy against Defendant Tak Investments, LLC ("Tak"). Plaintiffs allege that pursuant to a contractual agreement, Tak is obligated to transfer to Plaintiffs an undiluted 27% ownership interest of the highest class in Tak. (Pls' Compl. ¶ 15, ECF No. 1.) On October 11, 2013, Tak filed a motion for summary judgment, asserting two discrete grounds for judgment in its favor: (1) Plaintiffs' claim is barred by *res judicata*; and (2) Plaintiffs failed to satisfy a condition precedent, which prevented the ownership transfer provision from being triggered. (ECF No. 21.) For the reasons stated below, Tak's motion will be denied on the ground of claim preclusion but granted for Plaintiffs' failure to satisfy a condition precedent.

I. BACKGROUND

Tissue Technology, LLC ("TTL"), Partners Concepts Development, Inc. ("PCDI"), Tissue Products Technology Corp. ("TPTC"), and Oconto Falls Tissue, Inc. ("OFTI") (collectively,

"OFTI"), are controlled by Ronald Van Den Heuvel and share a principal place of business in De Pere, Wisconsin. Each of the corporate plaintiffs is a Wisconsin corporation with its principal place of business in Wisconsin. (Compl. ¶¶ 2 - 4, ECF No. 1.) TTL has five members, four of whom are residents of Wisconsin and the fifth of whom is a resident of Illinois. (Jurisdictional Statement, ECF No. 27.) Tak is controlled by Sharad Tak and is a Delaware limited liability company with a principal place of business in Gaithersburg, Maryland. It has two members, one a Maryland resident and the other a resident of Florida. (Def's Answer ¶ 5, ECF No. 14.)

On April 16, 2007, Van Den Heuvel and Sharad Tak entered into two agreements. The first agreement was the "Second Amended and Restated Asset Purchase Agreement," which modified a September 19, 2006 asset purchase agreement (the "Asset Purchase Agreements"). (ECF No. 23-1 at 51.) In the April 16, 2007 Asset Purchase Agreement, ST Paper, LLC, an entity controlled by Sharad Tak, agreed to purchase from Van Den Heuvel's business entities substantially all of the assets of a paper mill located in Oconto Falls, Wisconsin, for $86,400,000. (*Id.* at 53.) The second agreement was entitled "Final Business Terms Agreement" (hereinafter the "Final Agreement"). (ECF No. 1-2.) The Final Agreement contemplated a potential, future purchase by Tak (or Sharad Tak) of property owned by Eco Fibre, Inc., another entity controlled by Van Den Heuvel. (Final Agreement ¶ 2(H), ECF No. 1-2.) This potential future purchase was defined as "Phase 2 Financing," in which Tak, or an entity controlled by Sharad Tak, would "construct a linerboard and/or tissue machine at the site presently owned by Eco Fibre, Inc. . . . using Spirit [an entity either controlled by or affiliated with Van Den Heuvel] as general contractor with a minimum construction contract of $315,000,000." (*Id.*)

The Agreement included the issuance of "Investment Notes," which it defined as "the four Notes equaling $16,400,000 executed in favor of TPTC by Investments [Tak] on the date hereof." (Final Agreement at 1, ECF No. 1-2.) On the same day, Tak issued four promissory notes to TPTC in the amounts of $3,000,000, $4,400,000, $4,000,000, and $5,000,000 (totaling $16,400,000). (ECF No. 1-1.) Each of the notes indicated that payment shall be due annually, with the largest payment due at the three-year mark. For example, for the $4,400,000 note, $440,000 was due on April 16, 2008, $440,000 was due on April 16, 2009, and $3,520,000 was due on April 16, 2010. (ECF No. 14-1.) The Final Agreement also included the following provision:

> Through the third anniversary of the date of each Investment Note, the OFTI Group agrees to pay any payments due for interest or principal required per the terms of the Investment Notes. . . . If such Investment Notes are deemed cancelled by the OFTI Group after the third anniversary of the date of the Investment Notes, the OFTI Group shall receive an undiluted 27% ownership interest of the highest class in Investments [Tak].

(Final Agreement ¶ 2(G), ECF No. 1-2.) Paragraph 2(G) provided that through the third anniversary of the notes, OFTI agreed to pay any payments due for interest or principal as required by the notes. OFTI also agreed to indemnify Tak and hold it harmless against any "damages, losses, deficiencies, actions, demands, judgments, fines, fees, costs and expenses, including, without limitation, attorneys' fees, of or against Investments [Tak]" resulting from OFTI's failure make such payments. This indemnification included claims made against Tak by any future holder of the notes. (*Id.*) Paragraph 2(I) provided that OFTI agreed to indemnify Tak against all claims to enforce the notes brought by OFTI or future holders, "other than the enforcement of the pledge described above," presumably referring to the 27% ownership transfer provision. Paragraph 2(I) did not contain a termination date for this indemnification.

In light of these indemnification provisions, it is evident that the parties to the Final Agreement did not intend the notes to function as traditional promissory notes. The payee, OFTI, effectively promised that it would never seek to collect the $16,400,000. Instead, it appears that the notes functioned as an incentive for Tak to consummate Phase 2 Financing and enter into an additional contract worth over $315,000,000. Paragraph 2(H) stated that if Tak consummated Phase 2 Financing on or before the tenth anniversary of the notes, the Notes would be deemed cancelled. In addition, ¶ 2(G) provided that if Tak consummated Phase 2 Financing after the notes had been cancelled and the 27% share had been transferred, OFTI would return the 27% share to Tak. Thus, the notes provided Tak an incentive to consummate Phase 2 Financing quickly. If Tak consummated Phase 2 Financing before the third anniversary of the notes, Tak would not be required to transfer a 27% share to OFTI. If OFTI deemed the notes cancelled after the third anniversary, Tak would suffer the 27% loss until it consummated Phase 2 Financing.

On April 17, 2007, Van Den Heuvel, acting as President of TPTC, assigned the $4,400,000 note to William Bain, stating the following in writing:

> TPTC acknowledges and agrees that certain monetary obligations are owed to William Bain ("Bain"). In partial consideration for such amounts owed by TPTC to Bain, TPTC hereby assigns the Promissory Note ("Note"), between [Tak] and TPTC, and proceeds from such Note dated April 16, 2007. Any payments made under the terms of the Note shall be paid directly to Bain or as designated by Bain.

(ECF No. 14-2.) On March 5, 2008, Tak and TPTC amended and restated the $4,400,000 note, amending the payee from TPTC to TTL. (ECF No. 14-3.) On the same day, Van Den Heuvel and Bain amended the assignment to reflect this change, but otherwise the amended and restated assignment indicated that "the Note shall continue to be assigned to Bain per the terms of the Assignment." (ECF No. 14-4.)

OFTI alleges that on or about April 20, 2010, after the third anniversary of the date of the Investment Notes, it sent notice to Tak that the Investment Notes were deemed cancelled. (Pls' Compl. ¶ 12; April 20, 2010 Letter, ECF No. 1-3.) Tak denies that it ever received OFTI's notice of cancellation, but asserts that even if notice was sent, the assignment to Bain eliminated OFTI's authority to cancel all of the notes. (Def's Answer ¶ 12, ECF No. 14.) Tak contends that because OFTI failed to satisfy this condition precedent, Tak is not obligated to transfer an undiluted 27% ownership interest to OFTI. Further, Tak argues that OFTI's claim is barred by *res judicata*, or claim preclusion, because PCDI already brought (and lost) a contract action in state court against Tak for breach of a separate provision of the Final Agreement. The court now examines whether Tak is entitled to judgment as a matter of law.

II. SUMMARY JUDGMENT STANDARD

Summary judgment is proper if the submitted evidence demonstrates that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). "Material" means that the factual dispute must be outcome-determinative under law. *Contreras v. City of Chicago*, 119 F.3d 1286, 1291 (7th Cir. 1997). A "genuine" issue must have specific and sufficient evidence that, were a jury to believe it, would support a verdict in the non-moving party's favor. Fed. R. Civ. P. 56(e); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). The moving party has the burden of showing there are no facts to support the non-moving party's claim. *Celotex*, 477 U.S. at 322. In determining whether summary judgment is proper, a court must construe the evidence in the light most favorable to the non-moving party. *Ramos v. City of Chicago*, 716 F.3d 1013, 1014 (7th Cir. 2013). There is no genuine issue of

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material fact, and therefore no reason to go to trial, when no reasonable jury could find in the non-moving party's favor. *Smith v. Lafayette Bank & Trust Co.*, 674 F.3d 655, 657 (7th Cir. 2012).

III. ANALYSIS

A. Claim Preclusion

The court first examines whether OFTI's claim is barred by claim preclusion. On September 28, 2010, PCDI filed a complaint in the Brown County Circuit Court against Tak, among other defendants, asserting in part thatTak breached the Final Agreement by failing to transfer to OFTI a 22% ownership interest of the highest class in Tak. (*See Partners Concepts Dev. Inc. v. ST Paper, LLC et al.*, Brown County Cir. Ct. Case No. 10–CV–2714, ECF No. 23-1.) The provision of the Final Agreement relied upon by PCDI provided the following:

> In the event the collateral pledged to Johnson Bank by the OFTI Group in connection with the financial accommodations provided to Investments [Tak] is either drawn upon by Johnson Bank or provided to Investments [Tak], the OFTI Group shall obtain an undiluted 22% of the highest class of ownership interest in Investments [Tak] provided that some or all of such ownership interest may be pledged to Johnson Bank.

(Final Agreement ¶ 2(J), ECF No. 1-2.) PCDI alleged in the complaint that as part of the Asset Purchase Agreements, PCDI "agreed to pledge $11,831,253 in cash collateral to secure for [Tak and its affiliates] financing needed to complete the Asset Purchase Agreements from a commercial lending entity doing business as Johnson Bank." PCDI further alleged that Tak and its affiliates defaulted on the bank loan, prompting Johnson Bank to draw upon PCDI's cash collateral. PCDI therefore alleged that pursuant to ¶ 2(J), Tak was obligated to transfer 22% of its ownership interest to OFTI. (PCDI's Cir. Ct. Compl. ¶¶ 9-13, ECF No. 23-1.)

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On October 18, 2010, Tak denied PCDI's allegations and asserted a counterclaim, alleging that PCDI breached the terms of the Final Agreement by failing to render certain sales and marketing services. (ECF No. 23-2.) Tak filed a motion for summary judgment on September 9, 2011, and PCDI failed to timely file any response to Tak's motion. (ECF Nos. 23-3, 23-4, 23-6.) As a result, the circuit court granted Tak's motion for summary judgment and dismissed PCDI's breach of contract action with prejudice. (ECF No. 23-6.) Tak contends the claim raised by OFTI in the present suit is precluded because the circuit court action was a final adjudication of OFTI's contract claims under the Final Agreement.

The doctrine of claim preclusion provides that a final judgment "is conclusive in all subsequent actions between the same parties as to all matters which were litigated or which might have been litigated in the former proceedings." *DePratt v. West Bend Mut. Ins. Co.,* 113 Wis.2d 306, 310, 334 N.W.2d 883 (1983). In a federal claim premised on diversity of citizenship, the court applies state preclusion law where, as here, the adjudication argued to have preclusive effect was issued by a state tribunal. *Virnich v. Vorwald*, 664 F.3d 206, 215, n.3 (7th Cir. 2011). Under Wisconsin law, the elements of claim preclusion are: "(1) an identity between the parties or their privies in the prior and present suits; (2) an identity between the causes of action in the two suits; and, (3) a final judgment on the merits in a court of competent jurisdiction." *Wickenhauser v. Lehtinen*, 2007 WI 82, ¶ 22, 302 Wis. 2d 41, 57-58, 734 N.W.2d 855, 864 (internal citations omitted). The doctrine of claim preclusion "is premised upon the maxim that litigation must come to an end so as to ensure fairness to the parties and sound judicial administration," and "the doctrine is applied with a broad brush so as to achieve these goals." *A.B.C.G. Enters., Inc. v. First Bank Se., N.A.*, 184 Wis. 2d 465, 472-73, 515 N.W.2d 904, 906–07 (1994) (internal citations omitted).

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OFTI does not contest that the privity and final judgment prongs of the preclusion test are satisfied. This case therefore hinges on whether the second prong of the test is satisfied, that is, whether the causes of action in the circuit court action and this federal action are "identical" for purposes of claim preclusion. To determine whether claims presented in two separate suits are identical, Wisconsin has adopted the transactional approach set forth in RESTATEMENT (SECOND) OF JUDGMENTS § 24 (1982). *Kruckenberg v. Harvey,* 2005 WI 43, ¶ 25, 279 Wis.2d 520, 694 N.W.2d 879. Under this approach, the court examines whether the claims arise from a "common nucleus of operative facts." *Id.* ¶ 26. The transactional approach is a pragmatic approach, and courts consider such factors as "whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage." *Id.* ¶ 25 (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 24 (2) (1982)). The approach also "reflects the expectation that parties who are given the capacity to present their entire controversies shall in fact do so." *Id.* ¶ 27 (internal citations omitted).

Tak contends that OFTI's present claim could have been included in PCDI's circuit court complaint because the claim arises from an alleged breach of the same contract and the alleged injury had accrued by the filing of the circuit court complaint on September 28, 2010. It is true that both claims assert breaches of the Final Agreement. As for the timing, OFTI alleges that it provided notice to Tak that it deemed the Investment Notes cancelled on or about April 20, 2010. (Pl's Compl. ¶ 12.) Therefore, since OFTI apparently believed the condition precedent set forth in ¶ 2(G) of the Agreement had been satisfied months before it filed suit alleging a breach of ¶ 2(J) of the same contract, Tak argues that the claims should have been brought simultaneously. OFTI counters

that the facts underlying each claim are distinct and that the parties understood the Final Agreement to embody several different transactions.

Although the two provisions at issue, ¶ 2(G) and ¶ 2(J), are embodied in the same document, the transactional test is a pragmatic approach, and the Wisconsin courts have rejected bright-line applications. *See, e.g.*, *Menard, Inc. v. Liteway Lighting Products*, 2005 WI 98, ¶¶ 31–33, 282 Wis. 2d 582, 600–01, 698 N.W.2d 738, 747 (rejecting the court of appeals' bright-line rule that shipment and acceptance of goods must be treated as a unit, and reaffirming that the test focuses on whether the two causes of action arise out of the same common set of material facts). "The Wisconsin courts focus on facts, not legal theories, to determine whether an action is precluded." *Wilhelm v. County of Milwaukee*, 325 F.3d 843, 846 (7th Cir. 2003). Consequently, the fact that the two provisions are embodied in the same document is not dispositive. *Accord Cummins, Inc. v. TAS Distrib. Co., Inc.*, 676 F. Supp. 2d 701, 709 (C.D. Ill. 2009) (under Illinois' application of the transactional test, "the fact that two suits between the same parties concern the same contract does not necessarily mean that the second suit is barred."), *aff'd*, 700 F.3d 1329 (Fed. Cir. 2012).

Though based on the same agreement, OFTI's previous state court action was based on different facts than this case. In the Brown County action, OFTI sought an order directing Tak to transfer 22% of the highest class of ownership interest in Tak which it was entitled to receive under ¶ 2(J) of the Agreement when Tak defaulted on its loan and Johnson Bank drew upon the funds that OFTI had posted as collateral. OFTI also sought reimbursement from Tak for the funds taken by the bank less the amount Tak had already pledged to repay in a separate note. (ECF No. 23-1.) This action, in contrast, seeks specific performance of ¶ 2(G) which required Tak to transfer 27% of the highest class of interest in Tak upon OFTI's cancellation of the Investment Notes. Both the

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underlying facts and the relief sought in this action are separate and distinct from those in the Brown County action.

While OFTI could have asserted its claim under ¶ 2(G) in the Brown County action, it was not required to do so. OFTI had the option to deem the notes cancelled after three years and take a 27% share of Tak, but it was merely an option. OFTI could also have waited longer to deem the notes cancelled if it thought that such an approach would encourage Tak to enter Phase 2 Financing. At this stage of the litigation, it is unclear whether Tak received OFTI's notice of cancellation or whether Tak issued any kind of response indicating a refusal to transfer the 27% share. It is also unclear whether the prospect of Phase 2 Financing was alive or effectively dead based on the parties' relationship when OFTI filed suit in September 2010. Ultimately, it does not matter. Given the complex and contingent nature of ¶ 2(G), it would be unfair to require OFTI to have filed suit under ¶ 2(G) in September 2010 solely because it attempted to enforce a separate provision of the contract at that time.

In sum, Tak has failed to demonstrate that OFTI's two claims are identical for purposes of issue preclusion, and practical considerations counsel against the doctrine's application. Summary judgment is therefore denied on the issue of claim preclusion.

B. Condition Precedent

Paragraph 2(G) of the Final Agreement provided that "[i]f such Investment Notes are deemed cancelled by the OFTI Group after the third anniversary of the date of the Investment Notes, the OFTI Group shall receive an undiluted 27% ownership interest of the highest class in Investments [Tak]." (Agreement ¶ 2(G), ECF No. 1-2.) As Tak interprets this provision, ¶ 2(G)

was an “all or nothing” condition: OFTI was required to deem all four notes cancelled after the third anniversary of the Investment Notes to trigger Tak’s obligation to transfer the ownership interest. (Def’s Br. at 10, ECF No. 22.) Tak contends that when OFTI assigned the $4,400,000 note to Bain, OFTI relinquished its right to deem that note cancelled, and thus OFTI no longer had the power to satisfy the condition precedent.

OFTI does not disputeTak’s claim that ¶ 2(G) required OFTI to deem all four Investment Notes cancelled in order to trigger the ownership transfer provision. Instead, OFTI claims that it fully satisfied the condition precedent because even though OFTI assigned one of the Investment Notes to Bain, OFTI and Bain orally agreed that OFTI would retain the authority to cancel the note at any time. OFTI has offered an affidavit from Bain attesting the following:

> Notwithstanding the Assignment and Amended Assignment, I expressly agreed with Van Den Heuvel that TPTC, TTL, and Van Den Heuvel had full power and authority to enforce the Note and Amended Note and to exercise all rights in respect thereto. Pursuant to this agreement, TPTC, TTL, and Van Den Heuvel had the power and authority to cancel the Note and Amended Note.

(Aff. of William Bain ¶ 6, ECF No. 29-2.)

The parties agreed that the Final Agreement and the Investment Notes would be construed in accordance with Wisconsin law. Under Wisconsin law, a condition precedent must be “exactly fulfilled or no liability can arise on the promise which such condition qualifies.” *Woodland Realty, Inc. v. Winzenried*, 82 Wis. 2d 218, 224, 262 N.W.2d 106, 109 (1978) (internal citation omitted). Any material deviation from the condition precedent prevents liability on the contingent promise. *Id.* Here, if the contract required that all four notes be cancelled, and the $4,400,000 note was not cancelled, this would constitute a material deviation from the condition precedent found in ¶ 2(G). Contractual language is construed according to its plain or ordinary meaning, and courts look to

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extrinsic evidence only when a contract provision is ambiguous. *See Tufail v. Midwest Hospitality, LLC*, 2013 WI 62, ¶¶ 27–28, 348 Wis. 2d 631, 643, 833 N.W.2d 586, 592.

Wisconsin law provides that "upon a valid and unqualified assignment, the assignee stands in the shoes of the assignor and assumes the same rights, title and interest possessed by the assignor." *Moutsopoulos v. Am. Mut. Ins. Co. of Boston*, 607 F.2d 1185, 1189 (7th Cir. 1979) (citing *Kornitz v. Commonwealth Land Title Ins. Co.*, 81 Wis.2d 322, 327, 260 N.W.2d 680, 683 (1978)). It is a well-established principle of contract law that a valid assignment of an existing right also extinguishes the right in the assignor. *See* RESTATEMENT (SECOND) OF CONTRACTS § 317 (a)(1), illus. 1 (1981) ("A has a right to $100 against B. A assigns his right to C. A's right is thereby extinguished, and C acquires a right against B to receive $100.") A party may partially assign an interest, provided that the assignment expressly delineates the rights transferred to the assignee from those retained by the assignor. *See Tullgren v. Sch. Dist. No. 1 of Vill. of Whitefish Bay*, 16 Wis. 2d 135, 142, 113 N.W.2d 540, 545 (1962) (observing that unless assignor expressly reserves rights, either on face of assignment or by separate agreement with assignee, assignment is absolute and assignor has no further interest in the subject matter of the assignment); RESTATEMENT (SECOND) OF CONTRACTS § 317 (1) ("An assignment of a right is a manifestation of the assignor's intention to transfer it by virtue of which the assignor's right to performance is extinguished *in whole or in part* and the assignee acquires a right to such performance.") (emphasis added).

Here, Van Den Heuvel assigned the $4,400,000 note to Bain on behalf of his business entities, and the assignment indicated that "any payments made under the terms of the Note shall be paid directly to Bain or as designated by Bain." (ECF No. 14-2.) This language unambiguously assigned the right to collect payment on the note to Bain, and the document did not expressly reserve

any rights to the assignor, Van Den Heuvel. Consequently, this was an absolute rather than a partial assignment, and Van Den Heuvel and his business entities relinquished the right to deem the note cancelled. *See Price v. Ross*, 62 Wis. 2d 335, 343–44, 214 N.W.2d 770, 774 (1974) (holding that according to plain meaning of assignment, the right to collect full payment had been transferred from assignor to assignee and assignor retained no right to modify the monthly payment amount).

Since the language of the assignment is unambiguous, the court may not consider Bain's affidavit as part of its analysis. However, even if the court had found the assignment language to be ambiguous, Bain's affidavit provides no help to OFTI. Bain asserts that notwithstanding the assignment, Van Den Heuvel retained "full power and authority to enforce the Note and Amended Note and to exercise all rights in respect thereto." (Aff. of William Bain ¶ 6, ECF No. 29-2.) Although it is possible for an assignor to assign some rights while reserving others, OFTI essentially argues that Van Den Heuvel assigned to Bain the right to collect payment on the note while reserving to himself the right to cancel the note (and thereby nullify Bain's ability to collect payment). This leads to the absurd result that a party could assign a note for consideration and then cancel the note after realizing his benefit of the bargain, leaving the assignee with nothing. Such an arrangement would be no assignment at all, as no absolute right has actually been transferred. Moreover, the danger of recognizing such an arrangement is highlighted by the facts of this case. On September 7, 2010, Horicon Bank filed an action against Bain in the Brown County Circuit Court alleging that he defaulted on a $240,000 loan. (ECF No. 14-5 at 4-6.) Horicon Bank sought to recover the amount of the loan but also stated a claim for replevin to recover proceeds from the $4,400,000 note, which Bain had used as collateral to secure the loan. (ECF No. 14-5 at 8.) Thus, if Van Den Heuvel had actually retained the authority to cancel the note, then he would have had

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the power to unilaterally deprive Horicon Bank of its security interest. In short, the right to fully enforce the note could not reside in both Van Den Heuvel and Bain at the same time.

Accordingly, the Court concludes that because Van Den Heuvel assigned one of the four Investment Notes to Bain, OFTI lacked authority to deem all four notes cancelled on April 20, 2010. As a result, OFTI could not satisfy the condition precedent required to trigger the ownership transfer outlined in ¶ 2(G) of the Final Agreement at that time. There is also no evidence that Bain properly assigned his interest in the note back to Van Den Heuvel at any subsequent time. OFTI has therefore failed to meet its burden at summary judgment, and Tak is entitled to judgment as a matter of law on OFTI's contract claim.

IV. CONCLUSION

For the foregoing reasons, Tak's motion for summary judgment (ECF No. 21) is granted in part and denied in part. The motion is denied on ground of claim preclusion but granted for OFTI's failure to satisfy a condition precedent. OFTI's claim for breach of contract is hereby dismissed. As for Tak's counterclaim, the parties shall follow the scheduling order and the directives in the text order issued March 20, 2014.

SO ORDERED this 28th day of April, 2014.

s/ William C. Griesbach
William C. Griesbach, Chief Judge
United States District Court