

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.

Case No. 14-CV-1203

Plaintiffs,

v.

TAK INVESTMENTS, LLC and SHARAD
TAK,

Defendants.

DEFENDANTS' PRETRIAL REPORT

Defendants Tak Investments, LLC (“Tak Investments”) and Sharad Tak (“Tak”), by and through their attorneys, Godfrey & Kahn, S.C., submit the following pretrial report pursuant to Civil L.R. 16(c):

I. Short Summary of Facts, Claims and Defenses.

Plaintiffs filed this action on September 30, 2014, seeking specific performance of the Final Business Terms Agreement’s provision requiring a transfer of a 27 percent interest in Tak Investments to the Plaintiffs upon the Plaintiffs’ deeming cancelled four Investment Notes made by Tak Investments, seven years earlier, on April 16, 2007. This action is the second Plaintiffs have filed in this Court seeking this relief. The Court dismissed the prior suit, Case No. 12-C-1305.

With their now Amended Complaint here, Plaintiffs seek relief under two mutually contradictory theories. First, they seek enforcement of the Investment Notes themselves against Tak Investments, asking between \$30 million and \$37 million in damages. That assumes the

notes have not been cancelled. They also again seek specific performance of the Final Business Terms Agreement by Tak, requesting that Tak personally transfer a 27 percent interest in Tak Investments to the Plaintiffs. That assumes the notes have been deemed cancelled. It also assumes Tak owns an interest that can be transferred.

The Defendants assert a series of factual and legal defenses to the Plaintiffs' claims. In its motion for summary judgment, Tak Investments contended that the claims for enforcement of the Investment Notes are barred by the statute of limitations and that the Investment Notes were without consideration. Mr. Tak was only recently made a party to this action. He filed a motion for judgment on the pleadings on the basis of the election of remedies doctrine, as well as a motion for summary judgment on the basis that he has no ownership interest in Tak Investments, precluding him from being able to transfer any interest in Tak Investments.

Beyond these issues, which will be re-presented at trial, discovery has now uncovered that at least two third parties are in possession of the Investment Notes. Specifically, documents produced by Nicolet National Bank indicate that the Investment Note in the amount of \$4,400,000 was assigned to Baylake Bank and remains assigned to Nicolet Bank as a result of the merger of Nicolet Bank and Baylake Bank. In addition, documents produced by Associated Bank demonstrate that the Investment Note in the amount of \$4,000,000 was assigned to Associated Bank. This evidence defeats the Plaintiffs' claims for enforcement of the Investment Notes as well as the equitable claim for enforcement of the Final Business Terms Agreement against Mr. Tak.

II. Prior Decisions/Judicial Analysis.

The Court has entered at least three substantive decisions and orders prior to the trial that begins on Monday: a summary judgment decision dismissing the 2012 Complaint and a

summary judgment decision dismissing, in part, the 2014 Complaint and giving rise to the Amended Complaint that will be the basis of trial. In addition, the Court has denied Tak Investments' section 1292(b) motion for permissive appeal based on the second summary judgment decision. In the course of these decisions, the Court has reached a series of, at the least, informal conclusions about the claims. It is not necessary to engage in a discussion about whether or not they form part of the "law of the case" because their relevance is readily apparent. The defendants replicate them here without advocacy:

On the purpose and effect of the Investment Notes:

In light of these indemnification provisions [binding the Plaintiffs], 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.

Order on Defendant's Motion for Summary Judgment, p. 4, Apr. 28, 2014 (Case No. 12-C-1305, ECF No. 37.).

On the effect of the assignment of one or more of the Notes:

Accordingly, the Court concludes that because [Ron] Van Den Heuvel assigned [even] 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 outline 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 [Ron] 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.

Order on Defendant's Motion for Summary Judgment, p. 14, Apr. 28, 2014 (Case No. 12-C-1305, ECF No. 37.).

On the significance of the indemnity provisions to which the Plaintiffs agreed:

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 [to] 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.

Order on Defendant's Motion for Summary Judgment, p. 3, Apr. 28, 2014 (Case No. 12-C-1305, ECF No. 37.).

On the transfer of ownership interests:

The Plaintiffs protest that LLCs have, under state law, all kinds of rights to convey interests and dispose of property. That, of course, is true. But none of the statutory provisions Plaintiffs cite stands for the principle that an LLC may convey something it does not possess, namely, an ownership interest in *itself*.

Decision and Order, p. 3, Dec. 2, 2016 (ECF No. 40.).

On the status of pending legal issues:

It is possible that Plaintiffs do not have a viable claim against Tak Investments for the breach of the promissory notes, either because the amended claim does not relate back to the original complaint and is thus barred by the statute of limitations or because the claim is incompatible with Plaintiffs' principal claim that the notes were canceled. Plaintiffs' claims largely survived at summary judgment and at the amended pleading stage because the record required further development. I was unable to conclude at summary

judgment that judgment should be entered in the Defendants' favor on the entire case due to an underdeveloped record. (ECF No. 40 at 7.) I allowed Plaintiffs' amended claim against Tak Investments to proceed because I could not conclude at the pleading stage that such a claim would necessarily be futile. (ECF No. 48 at 8.) The upcoming bench trial provides an opportunity to potentially resolve both of Plaintiffs' claims or, at the very least, produce a more developed and clear record for any subsequent litigation. There is no clear and controlling question of law for the Court of Appeals to resolve that would speed up this case. The currently schedule trial will.

Order Denying Motion to Certify an Interlocutory Appeal, p. 4, June 21, 2017 (ECF No. 57.).

III. Statement of the Issues.

- A. Whether the Investment Notes are supported by consideration.
- B. Whether the statute of limitations bars Plaintiffs' attempt to enforce the Investment Notes against Tak Investments.
- C. Whether any of the Investment Notes are assigned to third parties, precluding their enforcement.
- D. Whether Sharad Tak possesses any membership units of Tak Investments.
- E. The extent of any damages resulting from any breach of the Investment Notes.

IV. The Name and Address of Any Witnesses Expected to Testify.

- 1. Sharad Tak
c/o Godfrey & Kahn, S.C.
200 S. Washington St., Ste. 100
Green Bay, WI 54301
- 2. Brad Hutjens
Nicolet National Bank
111 North Washington Street
Green Bay, WI 54301
- 3. Ed Kolasinski
EARTH, LLC
2107 American Blvd.
De Pere, WI 54115

4. Ronald Van Den Heuvel
2303 Lost Dauphin Road
De Pere, WI 54115
5. David Van Den Heuvel
VHC, Inc.
3090 Holmgren Way
Green Bay, WI 54304

The defense reserves the right to call rebuttal witnesses who have not been identified above, as well as any witness identified by Plaintiffs.

V. Background of All Expert Witnesses. Defendants do not anticipate calling any expert witnesses.

VI. Defendants' Listed Exhibits. Defendants will file a separate Exhibit List. While the parties have conferred regarding the exhibits to be offered at trial and will stipulate to the admissibility of exhibits (with exceptions), the Defendants anticipate at least one evidentiary issue with respect to the exhibits. The four Investment Notes are central to the litigation. The Defendants contend that they were given without consideration, that the Plaintiffs suffered no pecuniary damage as a result of their issuance, that they have been deemed cancelled and, finally, that one or more of the notes has been assigned to other parties, depriving the Plaintiffs of the ability to try to enforce them. Accordingly, the Defendants will request that the Plaintiffs produce the original Investment Notes for trial. *See* Fed. R. Evid. 1002.

VII. Deposition Designations. Defendants do not intend to offer any testimony through portions of transcripts or other recordings or depositions to be read into the record or played at trial as substantive evidence.

VIII. Estimated Time Needed to Try the Case. Defendants estimate that the trial in this matter will take no more than two days. This matter is scheduled for a trial to the Court.

IX. Proposed Findings of Fact and Conclusions of Law.

A. Findings of Fact

1. On April 16, 2007, Tak Investments, Tak and Plaintiffs Tissue Technology, LLC, Partners Concepts Development, Inc., Oconto Falls Tissue, Inc., Tissue Products Technology Corp., and Ronald H. Van Den Heuvel entered into a Final Business Terms Agreement.

2. Paragraph 2G of the Final Business Terms Agreement provides that upon the deemed cancellation of the four investment notes by the OFTI Group, “the OFTI Group shall receive an undiluted 27 percent ownership interest of the highest class in investments and such ownership interest shall be above and beyond the ownership interest in Items 2.K of this agreement; provided however, if Phase II, as defined below, occurs after the transfer of ownership interest and prior to the tenth anniversary of the date of the investment notes, the OFTI Group shall return any ownership interest received from the investment notes.”

3. On the same day that the Final Business Terms Agreement was signed, Tak Investments made four notes totaling \$16.4 Million in favor of Tissue Products Technology Corp. These are referred to by the parties as the “Investment Notes” and in the Final Business Terms Agreement.

4. Tak Investments, as maker of the Investment Notes, received nothing in exchange for making the Investment Notes. No money was paid to Tak Investments and no credit was given to Tak Investments as a result of it making the notes.

5. On April 17, 2007, Tissue Products Technology Corp. assigned the Investment Note in the amount of \$4,400,000 to William Bain.

6. On April 24, 2007, Tissue Products Technology Corp. assigned the Investment Note in the amount of \$4,000,000 to Associated Bank, N.A. to secure indebtedness of Partners Concepts Development, Inc.

7. On July 12, 2007, Tissue Products Technology Corp. assigned the Investment Note in the amount of \$5,000,000 to VHC, Inc. for existing debt owed by Tissue Products Technology Corp., Oconto Falls Tissue, Inc. or Partners Concepts Development, Inc. to VHC, Inc.

8. On July 12, 2007, Tissue Products Technology Corp. assigned the Investment Note in the amount of \$3,000,000 to VHC, Inc. for existing debt owed by Tissue Products Technology Corp., Oconto Falls Tissue, Inc. or Partners Concepts Development, Inc. to VHC, Inc.

9. On March 5, 2008, Tissue Products Technology Corp. and Tak Investments signed documents amending the Investment Notes to change the payee to Tissue Technology, LLC.

10. On March 12, 2008, Ronald Van Den Heuvel, through Tissue Technology, LLC, assigned the Investment Note in the amount of \$4,400,000 to Baylake Bank. This assignment was collateral for a \$650,000 loan from Baylake Bank to Ronald Van Den Heuvel as documented in Note No. 490474 dated March 12, 2008. The assignment was accepted by Baylake Bank as collateral to secure all debts and obligations of Tissue Technology, LLC and Ronald Van Den Heuvel.

11. On June 30, 2008, Associated Bank charged off two loans to Partners Concepts Development, Inc., one in the amount of \$517,630.60, and the other in the amount of \$341,746.93. Associated Bank's records indicate that the collateral for these loans was a note from Tak Investments valued at "\$0."

12. On December 28, 2009, Ronald Van Den Heuvel, through Tissue Technology, LLC, assigned the Investment Note in the amount of \$4,400,000 to Baylake Bank. This assignment was collateral for a \$702,485.83 loan from Baylake Bank to Ronald Van Den Heuvel and Nature's Choice Tissue, LLC as documented in Note No. 513406 dated December 24, 2009. The assignment was accepted by Baylake Bank as collateral to secure all debts and obligations of Tissue Technology, LLC and Ronald Van Den Heuvel.

13. Nicolet National Bank, as a result of a merger with Baylake Bank, holds the \$4,400,000 Investment Note.

14. Records kept by the Plaintiffs concerning the Investment Notes reflect the assignment of the Investment Notes to VHC, Inc. and Associated Bank.

15. Plaintiffs, through Ronald Van Den Heuvel and counsel, have repeatedly notified the Defendants of the fact they have deemed the Investment Notes cancelled.

B. Conclusions of Law

1. **The Investment Notes are Void for Lack of Consideration.** For a contract to be valid under Wisconsin law, it must be supported by consideration. This includes the conferral of value in exchange for the note. In making the notes, there was no benefit conferred on Tak Investments. No money was paid to Tak Investments as a result of it making the notes, and no credit extended. Similarly, there was nothing done by Tissue Products Technology Corp. to its detriment as a result of Tak Investments making the notes. As the Investments Notes were not supported by consideration, they are void and unenforceable.

2. **The Statute of Limitations Bars Plaintiffs' Claim to Enforce the Investment Notes.** The Investment Notes matured on April 16, 2010. Plaintiffs' claim for breach of the Investment Notes accrued on that date for purposes of the applicable six-year statute of

limitations, Wis. Stat. § 893.43. Plaintiffs' Amended Complaint asserting claims for breach of the Investment Notes was not filed until April 3, 2017. Since this is beyond the six-year period of the statute of limitations, and these claims do not relate back to the Complaint filed on September 30, 2014, Plaintiffs' claims are barred. That Complaint nowhere sought the enforcement of the Investment Notes, nor did it implicate Sharad Tak personally.

3. **Plaintiffs Lack Standing to Enforce the Investment Notes Assigned to Third Parties.** Since all of the Investment Notes have been, and remain, assigned to third parties, Plaintiffs are without standing to enforce the Investment Notes. The assignment of any one note precludes their enforcement.

4. **The Specific Performance Sought Against Sharad Tak is Impossible.** Because he does not possess any units in Tak Investments, Mr. Tak cannot be compelled to transfer a 27 percent interest in Tak Investments to Plaintiffs.

5. **The Specific Performance Sought Against Sharad Tak Cannot Be Ordered Given the Plaintiffs' Failure to Satisfy a Condition Precedent.** The assignment to third parties of the Investment Notes precludes the Plaintiffs from being capable of deeming the Investment Notes cancelled so as to require Mr. Tak to transfer the 27 percent interest in Tak Investments.

6. **The Election of Remedies Doctrine Precludes the Plaintiffs' Claims.** Plaintiffs cannot proceed with their mutually-inconsistent claims. "A party to a contract cannot both affirm and disaffirm it to suit the party's purposes at different times. Rather, a party must elect to treat it either as void or as valid and then stand by that election." 1 Jay E. Grenig, *Wisconsin Pleading and Practice* § 7.6 (5th ed. 2017). Plaintiffs' claim for enforcement of the Investment Notes is inconsistent with, "and repugnant to, another certain state of facts relied on as the basis

of another remedy,” *Jarosch v. Am. Fam. Mut. Ins.*, 837 F. Supp.2d 980, 1017 (E.D. Wis. 2011) (quoting *Bank of Commerce v. Paine, Webber, Jackson & Curtis*, 39 Wis. 2d 30, 38, 158 N.W.2d 350 (1968)), namely, Plaintiffs’ deeming the Investment Notes cancelled.

Dated this 13th day of September, 2017.

GODFREY & KAHN, S.C.

By: s/ Jonathan T. Smies
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