IN THE 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. Case No. 14CV1203

TAK INVESTMENTS, LLC, and SHARAD TAK,

Defendants.

PLAINTIFFS' POST TRIAL REPLY BRIEF

INTRODUCTION

Tak Investments, LLC takes great pains to attack Ron Van Den Heuvel, of course due to the plaintiffs' attacks to the credibility of Sharad Tak. There is a significant difference between the two approaches. The defendant would have the Court discount all of the testimony of Ronald Van Den Heuvel because as it currently stands, he has pled guilty to one count of bank fraud before this same Court. Of course, none of that conduct is of record in the instant case. Nevertheless, the defendant has failed to describe to this Court any statement of Ronald Van Den Heuvel which is untrue. More importantly, the defense has absolutely failed, in any fashion, to address Sharad Tak's claims that the subject notes were worthless, as he testified, and were only to be used to allow Ronald Van Den Heuvel the opportunity to quell creditors—including the

banks to which some notes were pledged with Sharad Tak's written approval. Perhaps that omission was due to the indefensibility of Mr. Tak's claims—assuredly it was not a negligent omission.

The plaintiffs' attack on Sharad Tak centered on the fact that his testimony was proven to be untrue and was central to the issues before this Court. The defendant calls the plaintiffs' approach irony, yet, it has not identified a single untruth uttered by Ronald Van Den Heuvel.[1] Quite frankly, the irony is that the record shows Sharad Tak to be dishonest in describing the means and manner of the transaction and purpose of the Notes which have been central to the plaintiffs' case since the commencement—and no explanation as to why or how that approach makes any commercial sense.

ARGUMENT

I. The Plaintiffs have standing to enforce the Notes.

The defendant advises the Court, incorrectly, that the plaintiffs must have possession of the investment notes in order to enforce them. In so doing, the defendant picks and chooses from various statutes and cases trying to have those items add up to a conclusion that the plaintiffs do not have "standing" to enforce the Notes, ignoring the import of Wis. Stat. Sec. 403.203. The law is actually quite the contrary to the defendant's assertions.

Wis. Stats. §403.301 provides that there are three classes of persons who are entitled to enforce an instrument, in this case the four Notes: the holder of the instrument, a non-holder in possession of the instrument who has the rights of a holder, or a person not in possession of the instrument who is entitled to enforce the instrument under other sections of the Uniform

[1] It must be noted that Ronald Van Den Heuvel might not be in the midst of his myriad legal and personal financial problems if Sharad Tak and his companies had just honored their commitments. Again, there are two other lawsuits pending in Oconto County Circuit Court related to the Tak companies' failure to pay.

Commercial Code. It is true that possession of the Note can be indicia of ownership of that Note. However, in this case, title to the notes was never transferred to any of the lien holders. The Notes were held as collateral, as is permitted by Wis. Stats. §409.313. David Van Den Heuvel and Brad Hutjens, as well as Ron Van Den Heuvel, testified that the Notes were being held only as collateral. Trial Tr. 9, 70-74, 79-80 September 18, 2017. They acknowledged that Ron Van Den Heuvel's companies still owned the Notes. Trial Tr. 9, 70-74, 79-80 September 18, 2017. Wis. Stats. §409.313 reads as follows:

> **409.313 When possession by or delivery to secured party perfects security interest without filing.**
> **(1)** PERFECTION BY POSSESSION OR DELIVERY. Except as otherwise provided in sub. (2), a secured party may perfect a security interest in tangible negotiable documents, goods, instruments, money, or tangible chattel paper by taking possession of the collateral. A secured party may perfect a security interest in certificated securities by taking delivery of the certificated securities under §408.301.

The statute specifically provides for perfection of a security interest in instruments by taking possession of the collateral. The defendant cites Wis. Stats. §403.301 for the purpose of establishing that an instrument must be in the possession of the holder in order to enforce the instrument. Yet, the law provides a person holding the instrument may only be a secured party where title to the instruments has not been passed.

Dispositive of the issue, however, is Wis. Stat. Sec. 402.203 which specifically provides that an endorsement is required if an instrument is to be transferred. The statute reads:

> **403.203 Transfer of instrument; rights acquired by transfer.**
> **(1)** An instrument is transferred when it is delivered by a person other than its issuer for the purpose of giving to the person receiving delivery the right to enforce the instrument.
> **(2)** Transfer of an instrument, whether or not the transfer is a negotiation, vests in the transferee any right of the transferor to enforce the instrument, including any right as a holder in due course, but the transferee may not acquire rights of a holder in due course by a transfer, directly or indirectly, from a holder in due course if the transferee engaged in fraud or illegality affecting the instrument.

> **(3)** Unless otherwise agreed, if an instrument is transferred for value and the transferee does not become a holder because of lack of endorsement by the transferor, the transferee has a specifically enforceable right to the unqualified endorsement of the transferor, but negotiation of the instrument does not occur until the endorsement is made.
> **(4)** If a transferor purports to transfer less than the entire instrument, negotiation of the instrument does not occur. The transferee obtains no rights under this chapter and has only the rights of a partial assignee.

Obviously, there can be no right to enforce a note absent an endorsement. The testimony in the present case is unanimous and contrary to the defendant's position, i.e., that possession is not the talisman that permits, or deprives, a party of the right to sue.

Wis. Stats. §403.302 describes a holder in due course, who in this case would be the plaintiff companies. Wis. Stats. §403.301 envisions a person who holds the instrument, as well as a non-holder who is in possession of the instrument, having the right to enforce the instrument. When coupled with Wis. Stats. §409.313, it is clear that security interest can be secured by possession of an instrument. The person or company holding that instrument would be a non-holder in possession of the instrument and may have a right to enforce it, as would the holder of the instrument, in this case, the plaintiff companies. The plaintiff companies continue to hold legal title which has never been transferred by endorsement or otherwise.

There is a dearth of law on the issue now before the court under Wisconsin law. However, this issue was discussed by Hon. Lynn Adelman in *United Cent. Bank vs. Maple Court LLC*, 2013 US DIST LEXIS 121842, 2013 WL 4517243(ED Wis.). The court had to first determine a standing issue in the mortgage foreclosure action which is identical to the claims of standing made by the defendant herein. The opinion, dealing with Illinois law as was called for in the applicable instruments and under the UCC provisions identical to those herein, stated:

> The first question is whether UCB had standing to bring this action. Defendants argue that it did not because UCB did not have the right to enforce the Note and foreclose on the Mortgage at the time it filed its complaint. I disagree. The Note is governed by Illinois law. (See Compl. Exh. 1, §23(F) ("This Note shall be governed by the laws of the State of Illinois, provided that such laws are not otherwise preempted by federal laws and regulations."). Under Illinois law, the person in possession of a promissory note who is designated as the payee therein is the "holder" of the note and has the right to enforce payment on it. 810 Ill. Comp. Stat. 5/3-109(b). The holder can give someone else the right to enforce the note by transferring it. 810 Ill. Comp. Stat. 5/3-203(b). A transfer occurs when a note is delivered to a person with the intention of giving the recipient the right to enforce it. Id. 5/3-203(a); see also 810 Ill. Comp. Stat. 5/3-301.

United Cent. Bank vs. Maple Court LLC at 9-10. Here, all of the persons with knowledge testified the notes were being held as collateral and, quite obviously, no rights to enforce were attendant to the possession of the notes.

The same issue was also discussed in *United States Bank Nat'l Ass'n v. Caroll*, 2013 US Dist. LEXIS 974292013 WL 3669320 (N. Dist. Ill.), which dealt with the same UCC provision as Wis. Stat. §403.203 when the District Court had to address the circumstance where the plaintiff possessed an unendorsed note in a mortgage foreclosure action. The Court was asked to consider whether the plaintiff could proceed under the note as a holder even though the Note was not endorsed to the holder/plaintiff. *Inter alia*, the court held, in its analysis of the transaction, that the bearer is not entitled to all of the rights of the holder absent an endorsement or other proof of transaction giving the bearer those rights. *Id*. Possession of the Note itself was insufficient to prove the transaction thereby giving the party with the actual possession of the Note the authority to sue without introducing evidence of the underlying transaction. Here, the defense would have this Court believe that possession is entirely dispositive, contrary to the circumstance in *United States Bank Nat'l Ass'n v. Caroll*, where mere possession was

insufficient. It is necessary, that there be an acquisition of the rights. Here, the defendants suggest the contrary finding is required, to wit: that possession proves that one is a holder of the Note.

Likewise, in *Deutsche Bank Trust Company v. Adolfo*, 2013 U.S. Dist. LEXIS 122805, 213 W.L. 4552407 (N. Dist. Ill.), the Court held that enforcement of the Note can only follow if the plaintiff could show that it had acquired the rights of transfer or if there was language in the instrument itself. In looking at the same Uniform Commercial Code section as Wis. Stats. §403.203, mere possession does not determine enforcement standing, the possessor must show that the rights and the instrument were transferred. In our case, title of the Notes was never transferred to the secured parties. Title in the Notes always remained in the hands of the plaintiffs. David Van Den Heuvel, Brad Hutjens and Ronald Van Dan Heuvel all testified to that effect. Trial Tr. 9, 70-74, 79-80 September 18, 2017.

It is clear that the Notes were held as security as is permitted by Wis. Stats. §409.313. The Defendant's reading of Wis. Stats. §403.301 to require that only those in physical possession of the Note can maintain an action pursuant to the Note would render Wis. Stats. §§403.203 and 409.313 superfluous. Moreover, that reading would further render the language of §403.301 providing "a non-holder in possession of the instrument who has the rights of a holder" superfluous, inasmuch as possession clearly does not mean that one is a holder of the Note. The defendants seek an absurd result, contrary to the law.

In addition, the defendants are critical that the original $4 million Note held by Associated Bank was not produced. A copy of that Note was received without objection, and all of the testimony indicated, without contradiction, that the Associated Bank Note had been paid in

full and that Tissue Products Technology Corporation was entitled to its return. It is not necessary that the original be provided for the Court to ascertain the reliability of the evidence. FRE 902(9) provides:

> Rule 902. Evidence That Is Self-Authenticating
>
> The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted:
>
> ****
>
> (9) *Commercial Paper and Related Documents*. Commercial paper, a signature on it, and related documents, to the extent allowed by general commercial law.

Just before trial, the defendant demanded to have the original notes appear at trial. The Plaintiffs took up that challenge and produced three of the four notes. The Plaintiffs did so to ensure the Court that the Notes were being held as collateral. That was proven and the fourth note is in hand. Copies of all of the notes were admitted into evidence. There is sufficient evidence presented, and nothing to the contrary, that all four notes were held by creditors as collateral.

Clearly, the plaintiffs have every right to enforce the Notes herein and again point to the fact that Sharad Tak promised to pay, through Tak Investments, LLC, and he has again tried to create ways to avoid his obligations. Moreover, if the defendant's position was correct, Wis. Stats. §403.301 would identify that the only person who can enforce an instrument would be the person in physical possession of the instrument. That is not the state of Wisconsin nor federal law, nor has it been accurately stated by the Defendant.

II. Statute of Limitations.

The Defendant again attacks the statute of limitations and suggests somehow that the filing of this lawsuit on September 30, 2014 was outside the statute of limitations because the plaintiffs sought an ownership interest in Tak Investments, LLC. Again, as set forth in prior briefs, the plaintiffs sought a 27% interest in Tak Investments, LLC as a remedy under the terms

of the Final Business Terms Agreement which fully incorporated the Notes. Of course, Wisconsin has a 6-year statute of limitations for breach of contract. Wis. Stats. §893.43. The last payment due under each of the Promissory Notes was 2010 and demand thereon was made and then rejected in 2014. This lawsuit was then timely filed on September 30, 2014, clearly within the 6-year statute of limitations. The statute of limitations does not commence accrual until there is a material breach. *See, CLL Assoc. Ltd. Partnership v. Arrowhead PAC Corp.*, 174 Wis.2d 604, 497 N.W.2d 115 (1993). The Notes were attached to the original complaint and were part and parcel of all of the pleadings from the outset.

III. Consideration.

The issue of whether there was sufficient consideration for the issuance of the Notes is an issue that has been briefed in the past as well. There are several bargained for rights and responsibilities that would satisfy consideration requirements under Wisconsin law. Suffice to say that in Wisconsin, the Court need not assess the nature and extent of the consideration, only that the consideration was given. *In re: Hattens Estate*, 233 Wis. 199 at 216, 288 N.W.2d 278 (1940). In this case, there were several bases that led to adequate consideration. First, Mr. Van Den Heuvel needed to ensure that he could pass "clean title" to the Oconto Falls Tissue Mill to Tak Investments LLC. In that regard, he ensured that the difference in the amounts needed at closing were satisfied by way of certain liens and debts. The evidence shows that both parties knew there would be various debts undertaken by Ron Van Den Heuvel's companies, outside closing. Pl. Ex.8, 9, 10, 11, 16 and 44. Exhibit 9 specifically states "Transaction Outside of Title Company". Exhibit 6 specifically refers to the consideration by which the Investment Notes were created. Sharad Tak's companies received significant value in purchasing the Oconto Falls

Tissue Mill—a deal worth perhaps more than $100 million. The plaintiff companies helped finance the transaction with the Investment Notes, Seller Notes and the Sales and Marketing Agreement.

In addition, there is more than sufficient consideration when one looks at the Final Business Terms Agreement, specifically identifying the Notes, pointed out by the defense, in which the parties contemplated a course of dealings anticipating a deal in excess of $315 million between the Tak and Van Den Heuvel entities for the future construction of paper and tissue processing plants. Trial Exhibit 11. The parties agreed that in the event the anticipated construction was to move forward, the Promissory Notes were to be cancelled because of the significant profit to be generated by the work of Spirit Construction. Of course, there would be no need to cancel the Notes if they were not valid, contemplated never to be paid, and without consideration.

Unfortunately, the Court is presented with less than stellar legal work at the time of the transaction, yielding contracts with many inadequate descriptors in the various documents presented. The parties each claim the other's lawyers were responsible for the drafting. However, it is abundantly clear that the parties negotiated for the Notes in such a way that there was more than sufficient consideration. The course of conduct by Mr. Tak and Mr. Van Den Heuvel clearly contemplates enforceable notes. Sharad Tak received clean title to the Oconto Falls tissue mill and faced the prospect of being able to eliminate the Promissory Notes in the event Spirit Construction was engaged to perform a tremendous amount of construction work. The deal of the parties must be upheld.

Part and parcel of the consideration argument is the defendants' rather odd argument that the plaintiffs have failed to prove damages.[2] Actually, damages in the kind of case now before the Court are simply payment of the principal and interest which was testified to and is of record. The plaintiffs are baffled by this defense argument and have provided the Court with reliable testimony as to the principal and interest due, and have requested an award of attorney's fees..

Weaving in and out of the various arguments before the Court on the issues of the statute of limitations and lack of consideration is the Final Business Terms Agreement. (Trial Ex. 11) The defendant has tried to lash itself to the Final Business Terms Agreement for the purpose of requesting "indemnification" yet insists that the Final Business Terms Agreement should be disregarded for the purposes of the statute of limitations and lack of consideration. Yet, the defendant wants the Court to enforce an indemnification provision from the Final Business Terms Agreement which would, again, yield absurd results. The plaintiffs point to clear, unmistakable Wisconsin law that provides that a contract must be construed in such a way as will make it a rational business instrument that will effectuate what appears to have been the intentions of the parties. *Borchert v.* Wilk, 156 Wis.2d 420 at 427, 456 N.W.2d 653 (Ct. App. 1990); *Bruns v. Rennebohm Drug Stores, Inc.*, 151 Wis.2d 88, 442 N.W.2d 591 (Ct. App. 1989). The defendant advocates a position that would make the contract an irrational business instrument. The Notes and the Final Business Terms Agreement confer certain rights and obligations on both parties to the transaction. Yet, the defense would have the Court read into those contract provisions that the plaintiffs could never sue on either the Final Business Terms Agreement or the Promissory Notes due to a breach because of language that was clearly intended to mean something else. In other words, the interpretation the defense suggests would

[2] The defense states "the Plaintiff provided no evidence of actual damages". Defendant's Post-Trial Brief at pg. 18.

render these contracts entirely unenforceable, despite the parties' clear intentions to the contrary (again, it must be noted that the defense has failed to address and of Mr. Tak's claims in its Post Trial Brief). Again, the course of conduct between the parties evidenced by their emails and subsequent agreements shows both parties deemed the notes enforceable. On the other hand, the interpretation suggested by the plaintiffs, to wit: that plaintiffs had intended throughout to use these Notes as collateral in order to clear title and to set the stage for future business between the parties makes eminent commercial sense. The only rational interpretation of the indemnification provisions are that they would apply, only should third parties sue Sharad Tak and Tak Investments, LLC under the collateralized notes, the plaintiffs would then be obligated to hold Tak Investments, LLC and Sharad Tak harmless and indemnify them. Even absent that reading, the indemnification provision of subsection G was to last only three years—long ago expired and therefore inapplicable. The provisions of subsection I are in contradiction to that of subsection G. Which subsection controls? Frankly, the defendants' suggestion along these lines is ridiculous. Moving back to that which was originally stated both in the plaintiffs' initial post trial brief as well as this reply brief: the position advocated by Sharad Tak in his testimony and now by way of his written submissions to the Court would render the Notes herein as nothing more than a device to mollify creditors, including banks, so Sharad Tak could get his hands on the Oconto Falls tissue mill. The defendant's position makes no commercial sense and renders the parties' course of conduct as meaningless. More than anything, Sharad Tak has not given the Court any explanation of the import of the parties' agreements. Though he wants the Court to enforce this portion of the Final Business Terms Agreement, it would be in stark juxtaposition to Sharad Tak trial testimony:

Q: Paragraph (g), the first sentence; why does it describe there the third anniversary date of each of the investment notes?

A: I – I don't know why Mr. Van Den Heuvel put third anniversary. He could have put fifth or second or first. He was supposed to pay back to himself if there was any – any – any money to be extended.

Q: Sure. He –

A: So, to me it didn't matter really the third or first or fifth.

Q: He was going to pay himself back; is that right?

A: That's what this provision says.

Q: And I think at your deposition you said that makes no sense, correct?

A: I think he tried to convince me that this money would never be due, and that's why he had put that provision in.

Q: The question is whether that makes any sense to you. And I think at your deposition you said to me it made no sense. Is that right?

A: I – I think it -- it makes sense that he's supposed to pay it back to himself, and only sense it makes it – that Tak entities will not be required to pay anything.

(Pause)

Mr. Ganzer: One second please.

(Pause)

By Mr. Ganzer:

Q: Mr. Tak, I'd like to direct your attention to the deposition transcript again, page 90 through 91, and I'd like you to start on page 90, line 20; and I'm going to ask you if I asked these questions, you gave these answers. Twenty:

"Okay. The next area I want to talk about here says if such investment notes are deemed canceled at the third anniversary date of the investment notes, then OFDI" – it says OFDI, but it should be OFTI – "shall receive an undiluted 27-percent ownership interest in the highest class of investments and such ownership interest shall be above and beyond the ownership interest in item 2(k) of this. Understand that one?"

"Answer: I understand the sentence as it reads, but when you read the first sentence, they were supposed to pay it back, so this situation will never arise. I thought this is a kind of an impossibility situation. If you – if someone has paid the notes off in three years' time, then there is nothing to consider."

"Question: Right. Makes no sense, correct?"

"Answer: No sense."

"Question: Yeah?"

"Answer: it does not make sense."

Did I correctly state the questions and answers from your deposition?

A: Yes.

Q: And, so, today you say that it does make sense. Is that correct?

A: I – I did not say – it makes sense partially, because if they were supposed to pay money back to themselves, then – then for me it doesn't matter whether it's after fourth anniversary or fifth anniversary of notes.

Q: All right. So, remaining there with section (g), it talks about the fact that the notes are canceled, then there would be a 27-percent ownership interest given in the highest class of investments, correct?
A: That's correct.
Q: And if you look at (g), it indicates that the notes would be canceled by certain things, as well, but you have testified that if there was then a second phase, then you could borrow money off the notes, correct?
A: That's correct.
Q: But doesn't this agreement say that if there is a second phase the notes would be canceled?
A: That's correct.
Q: So, you say on the one hand that the notes would be canceled if there is a second phase, but that you could borrow off this, what you called a line of credit, for the second phase, right?
A: That's was my understanding.
Q: Makes no sense, does it?
A: The business terms are business terms. The document is here before you.

Trial Tr. 27-30 September 19, 2017. Tak believes that it makes commercial sense that Ron Van Den Heuvel and his companies would pay their own notes. He also states it makes sense that the Van Den Heuvel companies would hold Tak Investments LLC harmless and indemnify them against any claims the Plaintiffs would make upon the Notes which he says the Plaintiffs had to pay themselves. He also claims the Final Business Terms Agreement makes no sense. He offers no rational interpretation of the Agreement or his dealings with Mr. Van Den Heuvel. This Court should not countenance Mr. Tak's obfuscation.

CONCLUSION

Sharad Tak's involvement assigning what he termed "worthless notes" for collateral to a bank cannot be understated as to both its overall untruthfulness and its lack of commercial reasonableness. He was trapped in a bad explanation as to the agreements and in an attempt to dodge his company's duties he lied. His entire testimony should be discounted and the defendants' position should be rejected outright. The defendant has never posited a reasonable, commercial explanation for its execution of the Notes and the attendant Final Business Terms

Agreement. The defendant's lawyers failed to address Mr. Tak's testimony because he took an indefensible position. Tak Investments LLC seeks to toss the relevant notes based on hoked up defenses and has never offered this Court a reasonable explanation for its actions. Justice in this case requires that Tak Investments, LLC be held accountable and that judgment be entered favoring the Plaintiffs in the sum of $34,191,050.00 (as of December 1, 2017) along with an award of actual attorney's fees and costs.

Dated this 19th day of December, 2017.

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