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,

Defendant.

DEFENDANT'S POST-TRIAL BRIEF

INTRODUCTION

The Plaintiffs – Tissue Technology, LLC, Partners Concepts Development, Inc., Oconto Falls Tissue, Inc. and Tissue Products Technology Corp. (collectively, the "OFTI Group") – have now tried to this Court a claim for the enforcement of four notes (the "Investment Notes") from Tak Investments, LLC ("Tak Investments") in 2007. Through that claim, Plaintiffs seek a recovery of more than $34 million in principal and interest. The record developed before and at trial, however, establishes three fundamental flaws in the Plaintiffs' case:

The Plaintiffs are not in possession of the Investment Notes and, therefore, lack standing to enforce them;

The Plaintiffs' claim is barred by the statute of limitations; and,

The Investment Notes were made without consideration.

Accordingly, on any one ground, this matter should be dismissed.

Plaintiffs' post-trial brief offers few facts and little law but, instead, a stream of invective directed at Sharad Tak ("Tak"). The brief lacks any serious discussion of the evidence Plaintiffs

believe entitles them to more than $34 million on notes signed more than ten years ago and even less discussion of the Defendant's responsive arguments. Littered throughout the Plaintiffs' brief are assertions that Tak admitted to "what is loosely termed bank fraud," that Tak was "in jeopardy of having committed bank fraud," and that Tak's testimony was "disingenuous, deceitful and even criminal." (Pls.' Br. at 2, 4, 16, ECF No. 91.) That Plaintiffs would accuse Tak is rich in irony. As the Court knows, Rule 201 of the Federal Rules of Evidence brings to the fore the fact that Plaintiffs' principal and chief witness, Ron Van Den Heuvel, himself has just been adjudged guilty of criminal conspiracy to commit bank fraud. Change of Plea Hearing Minutes, *United States v. Van Den Heuvel*, No. 16-CR-64 (E.D. Wis. Oct. 10, 2017), ECF No. 152.

Beyond their unfounded accusations of inappropriate behavior, Plaintiffs contend that Tak's testimony lacks veracity. (Pls.' Br. at 4, ECF No. 91) ("Sharad Tak is a liar and his testimony should be disregarded in its entirety."). Here, too, irony abounds: Ron Van Den Heuvel's credibility is, to put it mildly, subject to serious question. Early in one of his own criminal proceedings, this Court itself called into question Ron Van Den Heuvel's credibility.[1] Then, here at trial, David Van Den Heuvel, Ron's brother, testified that he had formed an opinion as to Ron's character for truthfulness, but he declined to state that opinion in open court:

> Q Fair enough. Have you had an opportunity through your interactions with him over your whole life to form an opinion as to his character for truthfulness?
>
> A I guess, yes.
>
> Q And what would that opinion be?

[1] In an Order Appointing Counsel pursuant to the Criminal Justice Act, this Court observed that the affidavit Ron Van Den Heuvel submitted attesting to his income and assets was an inaccurate representation of his financial circumstances. *United States v. Van Den Heuvel*, No. 16-CR-64 (E.D. Wis. July 26, 2016).

A That he's a very nice guy.

Q But nothing in relation to truthfulness?

A What do you want me to say about truthfulness?

Q I'm asking for your opinion about whether…what his character for truthfulness is.

A That's a hard one for me to answer because I don't know specifically what you're – what you're asking. I – I did a lot of things with my brother, Ron, through the years and a lot of them were very, very good things. A few didn't work out so well, but most were very good.

Q Separate from, I guess, the various feelings you've had, I just asked if you had an opinion about his character for truthfulness and if so what that was. You indicated you had the opinion, but apparently –

MR. GANZER: Your Honor, I'd object, that's been asked and answered.

THE COURT: Well, I don't think it's been answered.

If you have any other answer – I think you're reluctant to answer, is that a fair statement?

THE WITNESS: That's a fair statement.

(Day 1 Tr. at 19:21-20:20.) The inescapable implication is, of course, that David Van Den Heuvel did not credit his own brother with a truthful character. Further, the fact that Ron Van Den Heuvel is now a felon, convicted of conspiracy to commit bank fraud and awaiting sentencing on January 5, 2018, is also evidence on the issue of Mr. Van Den Heuvel's character for truthfulness. *See* Fed. R. Evid. 609.

Yet the Court need not make credibility determinations in deciding the merits of Plaintiffs' claim. The evidence demonstrates that Plaintiffs' claim should be dismissed for any one of at least three independent reasons.

First, required at trial to produce the original notes Plaintiffs seek to enforce, the evidence instead established that the Plaintiffs were not in possession of any of the notes. On this point, Wisconsin law is clear – a holder of a note must be in actual possession of the note to enforce it. This is so even if the payee of the note has pledged the note as collateral to a creditor – indeed, especially if the payee has pledged the note.

Secondly, the claim for enforcement of the Investment Notes is barred by the statute of limitations. This issue was briefed at length in Tak Investments' prior submissions (incorporated here by reference) [ECF No. 71 at 3-8, ECF No. 61 at 3-5, ECF No. 46 at 12-18], and none of the evidence admitted at trial provides Plaintiffs any relief from the effect of the statute.[2]

Additionally, the evidence established that there was no consideration for the Investment Notes signed on behalf of Tak Investments in 2007, precluding any attempt by Plaintiffs to enforce them. Reflecting that reality, the Plaintiffs' "damages" witness submitted only accounting testimony based on the face of the notes, not any testimony about how much, if at all, any default on the notes damaged Plaintiffs.

Finally, even before the Plaintiffs presented their case, Tak Investments moved the Court pursuant to Rule 15 of the Federal Rules of Civil Procedure to amend the pleadings to conform to the evidence. (Day 1 Tr. at 5:16-6:14.) Specifically, Tak Investments requested permission to assert a counterclaim for indemnification against the Plaintiffs in light of Paragraph 2(I) of the Final Business Terms Agreement. Counsel for the Plaintiffs objected to the motion, and the Court has taken it under advisement. (*Id.*)

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[2] When Defendant's counsel questioned Ron Van Den Heuvel concerning the fact it was not until September 13, 2017 that Plaintiffs committed to prosecuting their claim for enforcement of the Investment Notes, instead of invoking the transfer provision of the Final Business Terms Agreement, the Court observed that testimony was not necessary because the record would reflect the time Plaintiffs first asserted their claim for recovery on the notes. (Day 2 Tr. at 9:22-24; 10:15-11:9.)

In that contractual provision, the parties agreed that in the event of *any* attempt to enforce the notes "by any member of the OFTI Group," the Plaintiffs would indemnify Tak Investments and hold it harmless from any and all damages. (Pls.' Ex. 11.) To the extent the Court concludes that the Plaintiffs have satisfied all of the elements of their claim, including standing, the Court should find, pursuant to an amendment of the pleadings, that the Defendant has complete indemnification. As a result, Tak Investments can have no liability to Plaintiffs, even if there were any validity to Plaintiffs' claim. The only liability in this matter is Plaintiffs' obligation to indemnify Tak Investments for its attorneys' fees and costs associated with defending Plaintiffs' claim to enforce the Investment Notes.

Plaintiffs first sought specific performance of the Final Business Terms Agreement by bringing a lawsuit here in 2012, premised on the cancellation of the Investment Notes. *Tissue Technology, LLC, et al. v. Tak Investments, LLC*, No. 12-C-1305 (E.D. Wis. filed Dec. 21, 2012). After the Court dismissed that case on summary judgment, once it became evident Plaintiffs had assigned one of the notes, Plaintiffs filed this case in 2014. It was not until earlier this year, on the eve of trial, that the Plaintiffs finally decided they would try to enforce the very Investment Notes they had hitherto maintained were cancelled. With the evidence now before the Court, this is the time to finally put this matter to rest.

ARGUMENT

I. Plaintiffs' Failure to Establish Possession of the Original Notes, All Transferred to Plaintiffs' Many Creditors, is Fatal to Their Claim for Enforcement.

In any effort to enforce any promissory note, possession is more than nine-tenths of the law. It is an absolute prerequisite to successful enforcement of a note, with the exception of circumstances that do not apply here, and it is the Plaintiffs' burden to prove possession. This black letter law is codified in Wisconsin's adaptation of the Uniform Commercial Code

("UCC"), chapters 401-411 of the Wisconsin Statutes,[3] as well as cases predating the UCC. For this simple reason alone, the Plaintiffs are not holders of the notes they seek to enforce and, therefore, lack standing to bring this claim.

Further, the UCC provides that the endorsement of an instrument, which is precisely what Tissue Products Technology Corp. and Tissue Technology, LLC did in transferring the Investment Notes to some of their creditors, grants the transferee the sole right to enforce the note as its holder. Wis. Stat. §§ 403.203, 403.204. Thus, the Plaintiffs' endorsement or transfer of the Investment Notes to their creditors, coupled with the undisputed evidence that Plaintiffs do not possess the Investment Notes they would enforce, deprives the Plaintiffs of standing.

A. Plaintiffs Failed to Establish Possession of the Investment Notes Transferred to Third Parties.

Three of the four original Investment Notes were physically brought to court at trial, though none of them by the Plaintiffs. Instead, creditors of the Plaintiffs appeared in court with the original documents and testified that they, *not* the Plaintiffs, were holding them – as collateral for the indebtedness of certain Plaintiffs, Ron Van Den Heuvel, or other entities affiliated with him. At no time during the trial did the fourth Investment Note appear, though the documents admitted in evidence establish that the "missing" note was still held by yet another creditor, Associated Bank. (Pls.' Ex. 14.)

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[3] Section 403.301 (2015-16) of the Wisconsin Statutes provides:

> **Person entitled to enforce instrument.** "Person entitled to enforce" an instrument means the holder of the instrument, a nonholder 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 s. 403.309 or 403.418 (4). A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument.

A "holder" of a negotiable instrument is "[t]he person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession." Wis. Stat. § 401.201(2)(km).

VHC, Inc.'s Possession of the $3,000,000 and $5,000,000 Notes

Two of the Investment Notes (one in the amount of $3 million and the other for $5 million) were produced by David Van Den Heuvel, President of VHC, Inc. ("VHC").[4] (Day 1 Tr. at 8:3-23; 10:11-13.) David Van Den Heuvel, the brother of the Plaintiffs' principal, Ron Van Den Heuvel, testified that he held these two original notes as collateral for money Ron Van Den Heuvel owed VHC. (Day 1 Tr. at 8:7-8; 9:2-5.) David Van Den Heuvel testified:

> Q And the first note that you have there in front of you, what amount is that for?
>
> A Three million dollars.
>
> Q And we can find that on [Plaintiffs'] Exhibit 11. The note is dated April 16th, 2007, is that correct?
>
> A Yes.
>
> Q And why do you hold that note?
>
> A As a payment for my brother, Ron, he owed us a bunch of money.
>
> Q Okay. Is it fair to say that the -- you are holding that as collateral for payment of the money that your brother and his companies own you -- owe to you?
>
> A Yes.

(Day 1 Tr. at 8:18-9:5.)

David Van Den Heuvel stated that his brother owed his company approximately $150 million altogether and that VHC would return the two notes assigned to it only if Ron Van Den Heuvel paid VHC all that he owed the company. (Day 1 Tr. at 16:12-15; 17:9-12.) He also

[4] The debts of Ron Van Den Heuvel and the companies affiliated with him to VHC are also at issue in the proceedings commenced by VHC in the United States Tax Court in which VHC sought bad debt deductions for amounts owed by Ron Van Den Heuvel or his companies. *See VHC, Inc. v. CIR.*, Dkt. Nos. 4756-15, 21583-15. Since the trial of this matter, the Tax Court has ruled that VHC could not avail itself of the deductions. *VHC, Inc. v. CIR*, T.C. Memo. 2017-220 (2017). The "debts," the Tax Court held, were not debts at all.

testified that if there were ever any collection of money purportedly due on the two Tak Investment notes, VHC would have a right to be paid $8 million of that amount.

> Q Do you think that if there were ever any collection under either of these notes[,] you would have the right to be paid first?
>
> A Absolutely.

(Day 1 Tr. at 17:13-18.) Thus, in David Van Den Heuvel's undisputed account, VHC actually held – and holds – the two notes. (Day 1 Tr. at 9:1-5; 18:17-21.)

Like this testimony, the documents admitted at trial also reflect the fact that on July 12, 2007, the Investment Notes in the amount of $3 million and $5 million were pledged by Tissue Products Technology Corp. to VHC. (Def.'s Ex. 1003.) These documents establish the debt owed VHC by certain of the Plaintiffs. Another document maintained by VHC reflected the fact that the notes of $3 million and $5 million were "assigned to" VHC. (Def.'s Ex. 1002.) All of the evidence admitted at trial concerning the $3 million and $5 million Investment Notes leaves no doubt: they were – and are – held by, and in the possession of VHC, not the Plaintiffs.

Nicolet National Bank's Possession of the $4,400,000 Note

Another Investment Note, in the amount of $4,400,000, was produced at trial by Nicolet National Bank as a result of an assignment of the note by Plaintiffs to Baylake Bank prior to the merger between the two banks.[5] Brad Hutjens, an employee of Nicolet National Bank, produced an original of the $4,400,000 note. (Day 1 Tr. at 79:2-14.) Mr. Hutjen's testimony also established that Ron Van Den Heuvel was indebted to Baylake Bank and that the $4,400,000 Investment Note was collateral for that indebtedness. (Day 1 Tr. at 81:3-82:11.) Nicolet

[5] A week before Ron Van Den Heuvel assigned the $4,400,000 note to Baylake Bank on March 12, 2008, he signed an Amended and Restated Assignment of Promissory Note purporting to assign the very same note to William Bain, which was a continuation of the April 17, 2007 assignment to Mr. Bain. (Pls.' Ex. 12.)

National Bank continues to hold the Investment Note as security. (Day 1 Tr. at 82: 9-11.) ("Q: Is it – is this note then still assigned to Baylake Bank as we sit here today. A: Yes, it is."). The undisputed documentary evidence before the Court also establishes that Tissue Technology, LLC originally pledged the $4,400,000 Investment Note to Baylake Bank and that a debt remains. (Pls.' Ex. 15; Def.'s Exs. 1012-1015.)

The only evidence concerning the possession of the $4,400,000 Investment Note admitted at trial demonstrates that it is held by Nicolet National Bank, not the Plaintiffs. That is undisputed.

Plaintiffs Failed to Produce the $4,000,000 Note Held by Associated Bank

Plaintiffs were unable to produce at trial an original of the $4 million Investment Note. The only evidence established that it was in the possession of Associated Bank. Among the documents from Associated Bank admitted at trial was a "Collateral Receipt," reflecting the grant by Tissue Products Technology Corp. of a "Promissory Note executed by Tak Investments, LLC and payable to the order of Tissue Products Technology Corp. in the original amount of $4,000,000 dated April 16, 2007." (Pls.' Ex. 14.) Associated Bank also maintained a "Collateral Pledge and Assignment of Note," executed on April 24, 2007, through which Tissue Products Technology Corp. "irrevocably and unconditionally collaterally assign[ed] and pledge[d] its entire right, title and interest in and to and grant[ed] a security interest in that certain $4,000,000 Promissory Note" made by Tak Investments, LLC. (Pls.' Ex. 14.) Finally, while Ron Van Den Heuvel testified that Associated Bank filed a document purporting to release its security interest in the note on February 28, 2017, more than six years after the note's maturity, the bank did not send him the original. (Day 1 Tr. at 182:6-12.) Thus, the only evidence concerning the

possession of the $4 million note showed it in the possession of Associated Bank, not the Plaintiffs.[6]

B. Without Possession of the Investment Notes, Plaintiffs Lack Standing to Even Try to Enforce Them.

A promissory note is a negotiable instrument. *See* Wis. Stat. § 403.104; *Jax v. Jax*, 73 Wis. 2d 572, 587-88, 243 N.W.2d 831 (1976) ("As a 'negotiable instrument' within the meaning of sec. 403.104, Stats., the note and actions to recover on it are governed by the terms of the Uniform Commercial Code as adopted in this state."). The UCC, as adopted in Wisconsin, limits the parties who may seek to enforce such an instrument.

Section 403.301 defines the term: "'person entitled to enforce' an instrument means 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 s. 403.09 or 403.418(4)." A "holder" is "[t]he person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession." Wis. Stat. § 401.201(2)(km)1. *See also PNC Bank, N.A. v. Spencer*, 763 F.3d 650, 654 (7th Cir. 2014) (under Wisconsin law, holder of note entitled to enforce note) (citation omitted); *PNC Bank, N.A. v. Bierbrauer*, 2013 WI App 11, ¶ 10, 346 Wis. 2d 1, 827 N.W.2d 124 (2012); *PNC Bank, N.A. v. Spencer*, 2016 WI App 50, ¶ 10, 370 Wis. 2d 260, 881 N.W.2d 358 (unpublished) ("Under Wisconsin law, the holder of a note, meaning a person who is in actual possession of the original note, is entitled to enforce it regardless of whether the holder actually

[6] Plaintiffs state in their post-trial brief that Plaintiffs' counsel is now in possession of the original note, which had been held by Associated Bank. (Pls.' Br. at 8 n.1, ECF No. 91). It is not evidence; counsel's statement does not meet their burden of proof. At the time Plaintiffs first asserted the claim to enforce the note in 2017, and at the time of trial, Plaintiffs were not in possession of the original note. This post-trial claim of possession of one of the four Investment Notes further highlights the statute of limitations; they did not possess the instrument they would enforce during the applicable six-year period of limitation, which expired in April of 2016 (six years following the maturity of the Investment Notes).

owns the note."); *In re Lisse*, 567 B.R. 813, 818 (Bankr. W.D. Wis. 2017) (holder of an instrument entitled to enforce the instrument).

There was not a scintilla of evidence before the Court to suggest that Plaintiffs were in possession of any of the Investment Notes they sued upon. In fact, all of the evidence went in the opposite direction, establishing that third parties – to which the Plaintiffs had transferred the Investment Notes as security – held them. Plaintiffs' failure to establish possession is fatal to their claim.[7] It is a common sense, statutory threshold burden they have failed to meet.

Not only do the Plaintiffs lack the ability to enforce the Investment Notes in light of Section 403.301, Section 403.203 is even more explicit, providing that the transfer of the notes "vests in the transferee any right of the transferor to enforce the instrument…." Wis. Stat. § 403.203(2). The comments to the UCC explain:

> An instrument is a reified right to payment. The right is represented by the instrument itself. The right to payment is transferred by delivery of possession of the instrument "by a person other than its issuer for the purpose of giving to the person receiving delivery the right to enforce the instrument."

UCC § 3-203, official cmt. 1 (2002). Because the Plaintiffs transferred all four of the Investment Notes they attempt to enforce, only the transferees have a right to enforce the notes. The Plaintiffs do not.

The transfer of the Investment Notes – made in an attempt to placate the Plaintiffs' creditors – were "endorsements" for purposes of Article 3 of the UCC, resulting in a negotiation of each of the Investment Notes. *See* Wis. Stat. § 403.201 (negotiation occurs with transfer of possession of an instrument to a person who becomes its holder); Wis. Stat. § 403.204 (endorsement is a signature on instrument or paper affixed to it for purpose of negotiating the

[7] "By definition, possession of the paper by the claimant is essential to the claimant having the status of holder. A person who is not in possession of an instrument is not a holder and, except as provided by the Code, does not have the right to enforce the instrument." 11 Am. Jur. 2d, *Bills and Notes* § 210 (2009).

instrument). Section 403.204 states that "[f]or the purpose of determining whether the transferee of an instrument is a holder, an endorsement that transfers a security interest in the instrument is effective as an unqualified endorsement of the instrument." Wis. Stat. § 403.204(3).

The inescapable result of Plaintiffs' endorsement and transfer of the Investment Notes is that the creditors in possession of the Investment Notes, and they alone, are holders of the instruments with the sole right to enforce them. Official Comment 2 of Section 3-204 of the UCC emphasizes that a creditor taking a note as security, and not the original payee of the note, is the only holder capable of enforcing or negotiating the note:

> Assume that Payee endorses a note to Creditor as security for a debt. Under subsection (b) of Section 3-203 Creditor takes Payee's rights to enforce or transfer the instrument subject to the limitations imposed by Article 9. Subsection (c) of Section 3-204 makes clear that Payee's indorsement to Creditor, even though it mentions creation of a security interest, is an unqualified indorsement that gives to Creditor the right to enforce the note as its holder.

UCC § 3-204, official cmt. 2 (2002).

Case law predating Wisconsin's adoption of the UCC also reflects the fact that a person to whom a note has been given as security, as Plaintiffs did in this case, became the holder of a promissory note and, therefore, entitled to sue the maker of the note. In *Peoples Trust & Sav. Bank v. Standard Printing Co.*, the Supreme Court of Wisconsin held that a bank that had accepted a promissory note from the payee of the note as collateral, and possessed the note, was entitled to maintain an action against the maker of the note. 19 Wis. 2d 27, 33-34, 119 N.W.2d 378 (1963).

Other cases, long ago, established that a pledgee who holds a note as security has a right to bring an action upon the note, not a pledgor. "We suppose the law to be perfectly well settled that where a person takes a negotiable promissory note before maturity in the usual course of business, even as collateral security, and makes advances at the time upon the credit of such

note, he is considered by all the authorities as a *bona fide* holder for value, within the rule for the protection of commercial paper." *Curtis v. Mohr*, 18 Wis. 615, 618 (1864). The bona fide holder under such circumstances has "an original and paramount right of action upon" the note. *Id*. at 618-19. One to whom a promissory note is pledged as security has a right to bring an action on the note, regardless of any right of the pledgor to receive proceeds in excess of the amount of the debt secured by the pledge. *See Hilton v. Warring*, 7 Wis. 492, 495 (1858).

Here, upon Tak Investments' challenge at trial that Plaintiffs produce the original Investment Notes, it became evident that Plaintiffs themselves did not have any of the original notes. Instead, under subpoena, third parties produced three of the four original notes. In fact, Plaintiffs' post-trial brief states, succinctly: as Ron Van Den Heuvel testified, "all four [notes] were pledged as collateral." (Pls.' Br., ECF No. 91 at 8 & n.1.) There is no evidence upon which the Court could conclude that the Plaintiffs had the notes. Without possession, Plaintiffs simply are not entitled to enforce the notes pursuant to Section 403.301. Wis. Stat. § 401.201(2)(km)1.

The law is well settled: one cannot enforce a promissory note without proving possession of it. The evidence demonstrated that only third parties held the original notes; none of the Plaintiffs did. While perhaps relevant to any purported obligation of Tak Investments pursuant to the Final Business Terms Agreement's transfer provision, a claim Plaintiffs have abandoned, the semantic distinction Plaintiffs attempt to draw between an assignment and a pledge makes no difference with respect to their claim to enforce the notes.[8]

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[8] While there may be a fine distinction recognized in some cases between an absolute assignment and a pledge, the former passing "the whole interest in the thing assigned," and the latter, "which transfers only possession," *Thurston v. Buxton*, 34 N.E.2d 549, 550 (Ind. 1941), this distinction is of no consequence in this matter. In their own documents, Plaintiffs use the term "assignment" and "pledge" interchangeably, though both plainly refer to a transfer of possession and the grant of a security interest in the Investment Notes. Whatever the distinction between

footnote continued on next page…

One of the few cases cited by the Plaintiffs is a bankruptcy court decision involving a preference action. (Pls.' Br. at 12, ECF No. 91) (citing *In re Voboril*, 568 B.R. 797 (Bankr. E.D. Wis. 2017)). The Court found that the "collateral assignment" of proceeds from the sale of insurance policies, given to support a personal guarantee, was a voidable preference. Putting aside the weight due a single bankruptcy court decision, the decision has nothing to do with the standing to enforce notes transferred by the payee to third parties – whether called collateral, pledge, or assignment.

It is not enough to produce copies of the notes, especially when their provenance and chain of title remain unproven. Nor does it matter, as Plaintiffs contend in their post-trial brief [ECF No. 91 at 8], that Sharad Tak approved the assignment, once, of one note that was subsequently re-assigned again without his permission. All that matters is possession, and it is undisputed that Plaintiffs did not possess the notes. Accordingly, the Court should dismiss Plaintiffs' claims.

II. Plaintiffs' Claim Should be Dismissed as Barred by the Statute of Limitations.

The notes Plaintiffs seek to enforce were made in 2007 and matured by 2010. Since the last payment was due in early 2010, the six-year statute of limitations governing contract actions required that any such claim be brought by 2016. Wis. 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."); *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).

The Plaintiffs did not do this. Instead, Plaintiffs sought specific performance of a different contract, the Final Business Terms Agreement, in this lawsuit and in a previous lawsuit

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an assignment and pledge at common law, the UCC adopted by Wisconsin mandates that Plaintiffs are not entitled to enforce the Investment Notes.

filed in 2012. Their 2012 complaint did not mention an enforcement or breach of contract claim concerning the Investment Notes. Nor did the 2014 complaint. It was not until 2017 that Plaintiffs finally sought leave to amend the complaint to include a claim for enforcement of the notes.

Nothing presented at trial called into question this chronology, nor could it given the chronology established in the record itself. In fact, the evidence at trial – that all four Investment Notes are possessed by third parties, not the Plaintiffs – is itself a sufficient basis to find that the claim is time barred. The Court once suggested that the Plaintiffs' new claim for enforcement of the Investment Notes could, in theory, "relate back" to the original complaint so as to avoid the operation of the statute of limitations. (ECF No. 57 at 3.); *see* Fed. R. Civ. P. 15(c). Yet this can no longer be even theoretically possible given the fact the Plaintiffs did not, at any time, have standing to bring the claim for enforcement of the Investment Notes in the first place.

There is, to be sure, elasticity and forgiveness in applying the rules of pleading. There is, to be sure, elasticity by definition in the "relation back" doctrine. But the Plaintiffs, especially with their litigative history and election of remedies problems, face a bridge too far. They received the notes more than 10 years ago. They have filed serial state and federal lawsuits. The parties and witnesses are known – too well – to each other. Rule 15(c) was never meant to protect a plaintiff who has refused or ignored so many opportunities to try to state valid claims.

For all of the reasons stated in prior submissions, incorporated by reference, on the issue of the statute of limitations and the applicability of the relation back doctrine [ECF No. 71 at 3-8, ECF No. 61 at 3-5, ECF No. 46 at 12-18], the Court should find Plaintiffs' claim time barred,

even if it concludes that the Plaintiffs have standing to enforce the Investment Notes in the first place.

III. The Notes Are Without Consideration and Therefore Invalid and The Plaintiffs Have Failed to Prove Damages From Their Non-Payment.

In multiple pre-trial submissions, Tak Investments has maintained that the Investment Notes are void for want of consideration. (ECF No. 61 at 5-9; ECF No. 71 at 9-12.) The evidence presented at trial confirmed this. The only theory of consideration that emerged from the evidence was Plaintiffs' hollow contention that the Investment Notes were part of a joint effort to convince creditors to release liens on the assets at the Oconto Falls Mill – in other words, that the Plaintiffs somehow convinced creditors to accept unsecured notes in exchange for debt and liens.

Ron Van Den Heuvel was asked whether he contemplated "utilizing the relationships" he had and was "being creative" with the use of the four Investment Notes to convince creditors of Oconto Falls Tissue, Inc. and Tissue Products Technology Corp. to release liens on the mill. He testified that this is what he had in mind. (Day 1 Tr. at 154:1-7.)

On the second day of trial, the Court itself asked Sharad Tak if it was correct that he "also participated in transactions where they [the notes] were pledged or assigned as collateral…in order to remove the liens…." His answer: "No. I did not participate in assignment to remove the liens." He had "no idea," he testified, of what Ron Van Den Heuvel "intended to use the notes for…." (Day 2 Tr. at 59:7-8, 25; 60:1-2.) In response to the Court's direct question about the purchase price for the mill, Tak said the $16.4 million face amount of the notes was not "necessary in order to complete [his] share of the purchase of the company." (Day 2 Tr. at 61:12-17.) And Tak added: "there was no – no role paid – or played by [the] $16.4 million investment notes." (Day 2 Tr. at 62:1-2.)

The Plaintiffs' thesis is that the Defendant executed the notes, knowingly, to give Ron Van Den Heuvel the ability to use the notes to "pay" his debts to third parties holding liens against the paper mill and, thus, to provide "clean title" to the mill to permit closing. That, they say, is the consideration. And that, they must say, is the theory of damages for there is no other damages theory. It is undisputed, after all, that the Defendant received no money in exchange for the note and, after all, one commercial party does not provide a note to another commercial party without receiving money – or, in this case, as Tak testified, a vehicle for future loans.

The Plaintiffs' problem is that they have no evidence for their thesis, save for Ron Van Den Heuvel's tainted testimony. The closing statement does not reflect the $16 million in loans. (Pls.' Ex. 8.) No other closing document refers to them. The Plaintiffs provided no witness to say that he or she had accepted the notes as "payment" for an antecedent debt. Notwithstanding any liens released for or at closing, there is nothing to tie the release of those liens to the acceptance by specific parties of the Tak Investment notes in exchange for specific debt. Before accepting the notes in "payment" of a Van Den Heuvel loan, surely someone would have asked for a Tak Investment financial statement or had a conversation with Sharad Tak. Especially in light of Ron Van Den Heveul's well-known financial difficulties, can anyone imagine a conversation in which a debt and lien holder said, "Sure, I'll take this piece of unsecured paper from something called 'Tak Investments' and release your debt and lien on real property in Wisconsin?" Surely not.

The Court can disregard or disbelieve conflicting testimony. Yet here, the documentary record is unambiguous. The closing documents were devoid of any reference to the notes, and the Plaintiffs produced not one witness or document that even suggested Tak was involved in Ron Van Den Heuvel's discussions and "deals" with his many creditors. None of those

creditors came forward to say that they had asked Tak for a financial statement or any other information in connection with the notes. No one came forward to say that they took the unsecured notes as collateral for the Van Den Heuvel secured loans or that they accepted them as a substitute for debt. No one explained why or how they would swap the notes. What loans? What liens? Which debt? No evidence.

The Plaintiffs begin their brief with the unassailable statement that the notes "identify the principal, interest and dates of payment." (ECF No. 91 at 1.) They do indeed. And the Plaintiff's expert accounting witness, though with his own stake in the outcome of the litigation, provided a formulaic calculation of those amounts. But an accountant's spreadsheet does not provide evidence of actual damages. Putting aside the possession of the notes, putting aside the statute of limitations and relation back issues, putting aside Ron Van Den Hevuel's credibility as a felon, this fact remains: the Plaintiffs provided no evidence of actual damages. If, indeed, Ron Van Den Heuvel used the Investment Notes – with Sharad Tak's knowledge and cooperation – as collateral for debt or substituted the unsecured notes for secured debt, the Plaintiffs have failed to provide evidence of how the non-payment of the notes is tied to specific monetary losses that he suffered.

IV. The Court Should Grant Leave to Amend the Pleadings for Defendant's Counterclaim for Indemnification, Thus Mooting The Plaintiffs' Claims.

Then there is the matter, no small matter, of the protection afforded by the terms of the Final Business Terms Agreement against any claims involving the Investment Notes. As the Plaintiffs put it in their post-trial brief: "It is also clear that the [Plaintiffs] would hold Tak Investments harmless from any claims…" against the notes. (ECF No. 91 at 7.) Precisely.

On the morning of the first day of the trial, by an oral motion, Tak Investments moved the Court to permit an amendment of the pleadings to assert a counterclaim for indemnity against

the Plaintiffs. (Day 1 Tr. 5:16-6:14.) The Court took the motion under advisement. Tak Investments renews it and requests that the amendment be granted, and judgment entered on the counterclaim.

The Plaintiffs' obligation to indemnify Tak Investments arises from Paragraph 2(I) of the Final Business Terms Agreement, the agreement upon which Plaintiffs initially brought this case, which states as follows:

> Each member of the OFTI Group jointly and severally agrees to indemnify [Tak] Investments and to hold it harmless from and against any and all damages, losses, deficiencies, actions, demands, judgments, fines, fees, costs and expenses, including without limitation, attorneys' fees, of or against [Tak] Investments resulting from enforcement of the Investment Notes by any member of the OFTI Group (other than enforcement of the pledge described above), or any enforcement of or other claims made [sic] any other current or future holder of such Investment Notes against [Tak] Investments relating to the Investment Notes.

(Pls.' Ex. 11.) In light of the plain language of this provision, even if the Plaintiffs were to prevail on their claim for enforcement of the Investment Notes, the Plaintiffs have indemnified Tak Investments from any such claim. The net result would be a wash for the Plaintiffs, though, of course, Tak Investments' attorneys' fees, costs and expenses could be awarded to it as well under this provision.

Rule 15(b) of the Federal Rules of Civil Procedure permits amendments to the pleadings even at trial. Amendments may be made to the pleadings in some circumstances "even after judgment has been entered." *United States v. 5443 Suffield Terrace*, 607 F.3d 504, 510 (7th Cir. 2010). Courts have approved of the use of Rule 15(b) to amend the pleadings to include a counterclaim. *See, e.g., In re Meyertech Corp.*, 831 F.2d 410, 421 (3d Cir. 1987).

Here, the evidence before the Court includes the Final Business Terms Agreement, upon which the Plaintiffs have twice brought suit against Tak Investments. (Pls.' Ex. 11.) It was not

until several months before trial (a relatively short period of time given the life of this case and its predecessor filed five years ago) that Plaintiffs even hinted that they might seek to enforce the Investment Notes, the very notes they had previously claimed were cancelled. It was not until the submission of their final pretrial report (ECF No. 81) five days before trial, moreover, that the Plaintiffs committed to pursuing Tak Investments under the Investment Notes, abandoning any claim against Tak individually for specific performance of the Final Business Terms Agreement. And only on the morning of the first day of trial did the Court dismiss the equitable claim against Tak, leaving only the claim for enforcement of the Investment Notes. (Day 1 Tr. at 5:2-15.)

Under these circumstances, the Court should permit Tak Investments' counterclaim for indemnity based on the Final Business Terms Agreement. The OFTI Group – one and the same as the Plaintiffs – promised to indemnify Tak Investments if any of them ever sought to enforce the Investment Notes. They have. While other indemnities in the Final Business Terms Agreement are limited by time, the indemnity provided by Paragraph 2(I) is not.

CONCLUSION

For all of the above reasons, the Court should dismiss Plaintiffs' claim and enter judgment in favor of Tak Investments on its counterclaim for indemnity for its attorneys' fees and costs.

Dated this 4th day of December, 2017.

GODFREY & KAHN, S.C.

By: s/ Jonathan T. Smies
Jonathan T. Smies
State Bar No. 1045422

Attorneys for Defendant Tak Investments, LLC

P.O. ADDRESS:
Godfrey & Kahn, S.C.
200 South Washington Street, Suite 100
Green Bay, WI 54301-4298
Phone: 920-432-9300
Fax: 920-436-7988
Email: jsmies@gklaw.com