

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-C-1203

Plaintiffs,

v.

TAK INVESTMENTS, LLC,

Defendant.

**TAK INVESTMENTS, LLC’S MEMORANDUM OF LAW IN SUPPORT OF ITS
MOTION FOR ATTORNEY’S FEES AND NON-TAXABLE COSTS AND EXPENSES**

Defendant Tak Investments, LLC (“Tak Investments”), by and through its attorneys, Godfrey & Kahn, S.C., request that the Court enter a judgment awarding its attorney’s fees and costs associated with defending the Plaintiffs’ unsuccessful attempt to enforce the Investment Notes at issue in this case in light of the indemnification obligation in the Final Business Terms Agreement (“FBTA”), pursuant to Rule 54(d) and Civil L.R. 54. Tak Investments requests that judgment in favor of Tak Investments be entered in the following amounts:

Attorney’s fees	\$181,695.50
Taxable billable costs	\$2,619.11 ¹
Other costs/expenses	\$6,288.93
TOTAL:	\$190,603.54

¹ With judgment entered in this matter in its favor, Tak Investments is filing a bill of costs in the amount of \$2,619.11. Such costs are awarded as a matter of course to the prevailing party pursuant to Rule 54(d)(1). The costs Tak Investments seeks in this matter are those that: relate to fees for printed or electronically recorded transcripts necessarily obtained for use in this case, \$2,250.11, fees and disbursements for printing, \$35.50, witness fees of \$91.00, and fees for service of subpoenas in that amount of \$242.50. These amounts total \$2,619.11.

I. Summary of Attorney's Fees, Non-Taxable Costs and Expenses Requested.

A. Attorney's Fees – \$181,695.50.

With its motion requesting attorney's fees, non-taxable costs, and expenses, Tak Investments relies on the indemnity provision in the FBTA, which the Court found precluded Plaintiffs from obtaining any recovery on the four Investment Notes they sought to enforce. The applicable paragraph of the FBTA provides 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, for or against Investments resulting from enforcement of the Investment Notes by any member of the OFTI Group (other than the 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 Investments Notes.

(Paragraph 2(I) of the Final Business Terms Agreement, ECF No. 49-1 at 3.)

Tak Investments is *not* seeking attorney's fees incurred through the life of this long series of cases, which began with Plaintiffs filing their first lawsuit under the FBTA in 2012. *Tissue Technology, et al. v. Tak Investments, LLC*, Case No. 12-CV-1305 (E.D. Wis., filed December 21, 2012). That case was ultimately dismissed by the Court on summary judgment. The Plaintiffs then filed this action in 2014.

Nor is Tak Investments seeking any of its attorney's fees for the defense of this case up until the juncture at which Plaintiffs, for the first time, sought to enforce the Investment Notes. This occurred with the Plaintiffs' Motion for Leave to File an Amended Complaint, filed on January 9, 2017. (ECF No. 43.) But Tak Investments does claim its attorney's fees from that point forward, as it spent substantial time and energy defending a new version of the lawsuit and these efforts plainly fall within the scope of indemnity provided by the FBTA. This entailed,

among other things, an unsuccessful motion to the Court for an interlocutory appeal of the decision granting Plaintiffs leave to amend, along with further motion practice, a trial to the Court and post-trial briefing. Tak Investments' attorney's fees and costs resulting from the defense of the enforcement effort are plainly recoverable through the indemnity provision. These amounts are detailed separately in the declaration of counsel and total \$181,695.50.

B. Non-Taxable Costs and Expenses – \$6,288.93.

In addition to attorney's fees and costs, Tak Investments incurred certain other non-taxable expenses, including photocopying expenses, travel and subsistence in connection with depositions and trial, computer-aided legal research charges, and conference call expenses. These amounts total \$6,288.93 and are also recoverable as costs for which Plaintiffs have indemnified Tak Investments.

II. Tak Investments is Entitled to its Attorney's Fees and Non-Taxable Costs and Expenses Resulting from Plaintiffs' Unsuccessful Efforts to Enforce the Investment Notes.

A. The FBTA Entitles Tak Investments to its Attorney's Fees, Costs and Expenses.

Wisconsin law recognizes that parties to a contract may agree to shift responsibility for the payment of attorney's fees and cost in a dispute concerning the contract. *See, e.g., Borchardt v. Wilk*, 156 Wis. 2d 420, 427, 456 N.W.2d 653 (1990). Here, the broad indemnity provided Tak Investments by the Plaintiffs covering any efforts by the Plaintiffs to enforce the Investment Notes is sufficient to include attorney's fees, costs and expenses. The FBTA itself states that the indemnity includes "...fees, costs and expenses, including, without limitation, attorneys' fees..." (ECF No. 49-1 at 3.) Accordingly, Tak Investments is entitled to its attorney's fees, costs and expenses resulting from Plaintiffs' efforts to enforce the Investment Notes.

B. The Attorney's Fees Requested Are Reasonable.

Tak Investments' attorney's fees were incurred as a result of Plaintiffs seeking to enforce the Investment Notes. With this established, the next question is "whether the attorneys' fees were reasonable." *Medcom Holding Co. v. Baxter Travenol Laboratories, Inc.*, 200 F.3d 518, 521 (7th Cir. 1999) ("Under the contract the initial question is whether the outlay is one 'resulting from' Baxter's misrepresentation or breach of the agreement. If the answer is yes, then the next issue is whether the attorneys' fees were reasonable."). The reasonableness of the fees requested under a contractual provision does not require a detailed, hour-by-hour review of invoices, as is often done when fees are claimed pursuant to a statute. *Id.* at 521. Instead, reasonableness is viewed in terms of whether the fees claimed are "fees that commercial parties would have incurred and paid knowing that they had to cover the outlay themselves[]" *Id.*

Here, Tak Investments' fees were based primarily on opposing a motion for leave to amend the pleadings, a motion for an interlocutory appeal, further discovery and motion practice, and the preparation for and two-day trial of this case to the Court. Such fees and expenses were necessarily incurred in the successful defense of the claims against Tak Investments alleged in the Amended Complaint for enforcement of the Investment Notes.

Invoices reflecting fees were calculated multiplying hourly billing rates by hours worked, with the invoices reflecting time reasonably spent to achieve the result. The rates paid by Tak Investments in this matter – ranging from \$360 to \$695 per hour for attorneys – are the prevailing hourly rates charged for the attorneys working on this matter. Such rates are routinely paid by law firm clients and no hourly rate discount was applied in this case by Tak Investments. The Plaintiffs' effort to enforce the Investment Notes, on its face, subjected to Tak Investments to a potential liability exceeding \$37 million. The amount of attorney's fees Tak Investments

seeks pursuant to the contract between the parties is less than half of one percent of this amount. Tak Investments' counsel's billable hourly rates are reasonable in light of counsel's experience, abilities, training, education, and professional standing, as well as the issues raised, Plaintiffs' \$37 million claim at trial, the time and skill required to perform this work, and the result obtained at trial. In short, the amounts claimed by Tak Investments for a portion of this case is commercially reasonable.

For these reasons, Tak Investments requests an award of its fees totaling \$181,650.50.

C. The Non-Taxable Costs and Expenses are Reasonable.

Similar to fees, Tak Investments incurred costs and expenses, all of which should be awarded in light of the FBTA's indemnity provision. These include:

- Photocopying expenses of \$115.95;
- Meals for counsel and Mr. Tak during trial of \$105.01;
- Westlaw and Lexis Research Charges of \$3,060.17;
- Telephone conference charges of \$6.78; and
- Travel expenses for counsel to Florida deposition, and for travel of counsel and paralegal for trial, totaling \$3,001.02.

There is nothing extravagant or inappropriate concerning the amounts Tak Investments seeks for these categories of expenses. Since Tak Investments incurred all of these expenses as a result of Plaintiffs' efforts to enforce the Investment Notes, the same indemnity provision of the FBTA that entitles Tak Investments to its attorney's fees also entitles it to recovery of these amounts, which total \$6,288.93.

III. Conclusion.

The indemnities running in favor of Tak Investments in the FBTA entitle Tak Investments to its reasonable attorney's fees and other non-taxable costs and expenses. Because the amounts sought by Tak Investments are reasonable under the circumstances, the Court should grant Tak Investment's motion.

Dated this 3rd day of April, 2018.

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