No. 18-1835

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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

Plaintiffs-Appellants,

v.

TAK INVESTMENTS, LLC,

Defendant-Appellee.

Appeal From The United States District Court
For the Eastern District of Wisconsin Green Bay Division,
Case No. 2014CV1203
The Honorable William C. Griesbach, Chief Judge

BRIEF AND REQUIRED SHORT APPENDIX OF PLAINTIFFS-APPELLANTS TISSUE TECHNOLOGY, LLC, PARTNERS CONCEPTS DEVELOPMENT, INC. OCONTO FALLS TISSUE, INC. and TISSUE PRODUCTS TECHNOLOGY CORP.

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: No. 18-1835

Short Caption: Tissue Tech LLC, et al vs Tak Investments LLC, et al

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

[ ] **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

Tissue Technology, LLC; Partners Concepts Development., Inc., Oconto Falls Tissue, Inc. and Tissue Products Technology Corp.

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Terschan, Steinle, Hodan & Ganzer, Ltd.; Arnstein & Lehr LLP (now know as Saul Ewing Arnstein & Lehr LLP

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

Partners Concepts Development is parent corp. for Oconto Falls Tissue, Inc. and Tissue Products Tech Corp

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

Attorney's Signature: s/ Michael J. Ganzer Date: July 10, 2018

Attorney's Printed Name: Michael J. Ganzer

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** X **No** ____

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I. JURISDICTIONAL STATEMENT

Plaintiffs-Appellants, Tissue Technology, LLC, Tissue Products Technology Corp., Oconto Falls Tissue, Inc. and Partners Concepts Development, Inc. (collectively referred to as "OFTI GROUP") filed this action in the United States District Court for the Eastern District of Wisconsin on September 30, 2014. The District Court's subject matter jurisdiction was premised on diversity of jurisdiction between the parties pursuant to 28 U.S.C. §1332.

On December 2, 2016, the District Court entered a Decision and Order granting defendant Tak Investments, LLC summary judgment and permitted the plaintiffs to amend pleadings. The plaintiffs so amended and the matter was tried before the District Court on September 18 and September 19, 2017. The Court rendered a decision thereafter and the District Court entered an Order for attorney's fees to be paid from the appellants to the appellee and final judgment was entered thereon on April 18, 2018. The Notice of Appeal was also filed on April 18, 2018 and in a timely fashion.

The Court of Appeals has jurisdiction of this case inasmuch as the appeal is from a Final Decision of the District Court as it required by 28 U.S.C. §1291.

II. ISSUES PRESENTED FOR REVIEW

1. Did the Trial Court err when it ruled that a limited liability company cannot be forced to transfer an interest in itself though it had agreed to do so?
2. Did the Trial Court err when it determined the promissory notes in question were of no value and were therefore unenforceable?

3. Did the Trial Court err when it held that the plaintiffs-appellants were not in possession of the Promissory Notes because the Notes were possessed by creditors as collateral?

III. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

This appeal concerns plaintiffs-appellants' efforts to compel defendant Tak Investments, LLC to honor terms of agreements made through four (4) promissory notes and a Final Business Terms Agreement that all relate to the sale of the Oconto Falls Tissue mill in Oconto Falls, Wisconsin which occurred in April 2007. The essence of the transactions involved agreements between the plaintiff companies controlled by Ronald Van Den Heuvel and the defendant company controlled by Sharad Tak. This lawsuit was filed on September 30, 2014 in the United States District Court for the Eastern District of Wisconsin. Initially, the plaintiffs sought the enforcement of the Final Business Terms Agreement seeking an order of the Court requiring the defendant to turn over an undiluted 27% ownership interest in the highest class of Tak Investments, LLC, as had been agreed between the parties. Following a motion for summary judgment, on December 2, 2016 the District Court granted defendant's motion holding Tak Investments could not issue a membership interest in itself but permitted the plaintiffs to replead.

The plaintiffs filed an amended complaint on April 3, 2017. Cross motions for summary judgment were denied and the matter was set for trial, which in fact occurred on September 18 and 19, 2017. Trial was to the Court.

The District Court rendered its Decision and Order on March 19, 2018 and, subsequent thereto, ordered the imposition of attorney's fees pursuant to contract on April 17, 2018 and judgment was entered on April 18, 2018.

The plaintiffs-appellants filed a Notice of Appeal on April 18, 2018.

B. SUBSTANTIVE HISTORY

The plaintiffs-appellants brought this action to enforce the Final Business Terms Agreement and the notes which they made with defendant-appellee Tak Investments, LLC and Sharad Tak surrounding the sale of the Oconto Falls tissue mill from the various plaintiff companies to companies owned by Sharad Tak. Sharak Tak and Ron Van Den Heuvel had been working on a sale agreement dating back to 2005 and the agreement was finally consummated at closing with the transfer of all assets of the mill on April 16, 2007. Leading up to that time, there were several agreements which anticipated a level of funding so as to satisfy the debts of the plaintiffs-appellants to ensure that the defendant company would receive "clean title". Upon closing, Sharad Tak and his entities provided the Van Den Heuvel companies with three (3) different avenues of income in order to facilitate the transaction and satisfy the obligations that were being undertaken. The parties entered into a Sales and Marketing Agreement which provided a small percentage of gross revenues to Tissue Technology, LLC. Four additional notes were executed at closing called the "Seller Notes" with the combined value of $30,589,000.00. Those notes were payable to Oconto Falls Tissue, Inc. and were subordinated to debt of Goldman Sachs. Those notes are subject to a pending lawsuit in Oconto Falls, Wisconsin Circuit Court. Also executed at the time of closing were the notes that are the subject of this lawsuit which the parties had termed the "Investment Notes".

At the time of the closing, the parties also executed the Final Business Terms Agreement which provided that the investment notes could be satisfied in two ways. First, the Final Business Terms Agreement provided that after three years, if the appellants deemed the notes canceled, they would receive a 27% interest in Tak Investments, LLC. The second avenue was cancellation of the investment notes if Tak Investments, LLC and associated companies would enter into a construction contract with Spirit Construction, Inc., a Van Den Heuvel family company, in the amount of approximately $315,000,000.00. No such contract was ever consummated.

The plaintiffs-appellants took all the necessary steps to attempt to enforce the Final Business Terms Agreement and seek the assignment of the 27% interest in the defendant company by making appropriate demand. Defendant-appellee denied that request which resulted in this lawsuit. The District Court refused to enforce that portion of the Final Business Terms Agreement and the plaintiffs-appellants made demand for payment under the promissory notes. Enforcement of those notes was denied, judgment entered, attorney's fees ordered and this appeal ensued.

I. STANDARD OF REVIEW

The Standard of Review of an appeal of an Order granting summary judgment is *de novo*. *Harris, NA v. Hershey*, 711 F.3d 794, 798 (7th Cir. 2013): the Court must view all facts and draw all reasonable inferences in favor of the non-moving party. *Outlaw v. Newkirk*, 259 F.3d 833, 836 (7th Cir. 2001). The question before this Circuit Court are questions of law which are reviewed *de novo*.

Following trial, the District Court relied entirely on the contracts themselves in reaching the Decision and Order for Dismissal. The 7th Circuit's review of contracts is *de novo, Metavante Corp. v. Emigrant Savings Bank*, 619 F.3d 748, 763 (7th Cir. 2010).

V. SUMMARY OF THE ARGUMENT

A. In order to consummate the sale of the Oconto Falls tissue mill, the defendant-appellee agreed to transfer a 27% interest in Tak Investments, LLC to the plaintiffs-appellants upon cancellation of the subject notes. (R.25-2, 25-3 and 88, Ap.4-006).

The plaintiffs-appellants cancelled the notes and demanded their 27% interest. The defendant-appellee argued impossibility of performance, contrary to its pledge in the contract. Under both Wisconsin law, where these transactions occurred, and Delaware law, where Tak Investments, LLC is domesticated, nothing prohibits a limited liability company from creating an interest in the company for the purpose of securing financing and is specifically authorized to sell, convey, mortgage, pledge and create security interests in its property. Here, the District Court found that the ownership interest could not be conveyed as an LLC does not own itself. Nothing in the laws of either the State of Wisconsin or the State of Delaware preclude the pledge of interest in the limited liability company and the Court's interpretation violates the appellants' freedom to contract.

B. The Trial Court determined the promissory notes in question were of no value and were therefore unenforceable.

The Notes themselves had significant value and are enforceable because they were bargained for, supported by consideration by the terms of the interrelated notes and Final Business Terms Agreement, and had significant value to the parties herein. To render the documents unenforceable, when they are interrelated, belies the claim that the notes are of no value. Moreover, to render the documents as commercially untenable is contrary to

law of the State of Wisconsin which requires that the documents be read to be commercially reasonable. Finally, the interrelated documents must be considered valid since the Court ordered an award of attorney's fees based on those same documents. How can they otherwise be unenforceable?

C. The Trial Court Rules the Plaintiffs-Appellants Were Not in Possession of the Promissory Notes at the Time of Trial.

The plaintiffs-appellants actually held the notes but had transferred the notes for collateral purposes to be held by the creditors to preserve their collateral pending payment. The plaintiffs-appellants still maintained ownership and were the holders of the notes despite having permitted the creditors to physically maintain the notes until such time as payment was complete. The appellants position is consistent with Wisconsin law.

VI. ARGUMENT

A. The Trial Court Erred When It Determined Tak Investments LLC Could Not Be Forced to Transfer Any Interest In Itself Despite Having Contractually Agreed to Do Same.

The parties to this lawsuit entered into several contracts in order to facilitate the sale of the Oconto Falls tissue mill from the appellant companies to several companies owned primarily by Sharad Tak, which included the defendant herein, Tak Investments, LLC. In order to facilitate that purchase, the parties entered into the Final Business Terms Agreement which included a series of prospective business dealings between Sharad Tak and his companies and Ron Van Den Heuvel and his companies. (R. 25-2, 25-3 and 88, Ap. 4 – 006-007) The agreement included the issuance of four (4) investment notes which are the subject of this lawsuit in the principal sum of $16,400,000.00 and which included a variety of terms including interest at the rate of 8% per annum. (R.25-2, 25-3 and 88, Ap.4 – 001-004) The notes were to be deemed canceled provided that Tak

Investments, LLC entered into an additional construction contract for the construction of new paper mills or mill expansion. (R.25-2, 25-3 and 88, Ap. 4 – 006-007) The contract included a Van Den Heuvel family company, Spirit Construction, which contract the parties contemplated to be in excess of $315,000,000.00. (R.25-2, 25-3 and 88, Ap. 4 – 006-007) In the event the additional contracts were consummated and if additional financing took place, the notes were to be deemed canceled. (R.25-2, 25-3 and 88, Ap. 4 – 006-007) However, in the event the investment notes were to be canceled by the OFTI Group, the OFTI Group was to receive 27% ownership in the highest class of investments in Tak Investments, LLC. (R.25-2, 25-3 and 88, Ap. 4 – 006-007) The OFTI Group had the opportunity to cancel those notes after the third anniversary of the contract at which time the 27% share was to be transferred to the OFTI Group. When the future financing did not take place, the appellants sought to cancel the notes and demanded the appellee perform under the terms of the contract. The appellee refused to recognize the cancellation.

The Final Business Terms Agreement provided in relevant part:

> If such investment notes are deemed canceled by the OFTI Group after the third anniversary of the date of the investment notes, the OFTI Group shall receive an undiluted 27% interest of the highest class in investments. (R.25-2 and 25-3, Ap.4 - 006)

As an initial matter of contract law, Wisconsin law provides that contracts are to be enforced as long as those contracts were entered into by and between competent and intelligent parties. *Jezeski v. Jezeski*, 316 Wis.2d 178 at 184, 763 N.W.2d 176 (Ct. App. 2008). A Court can only refuse to enforce a contract where it has no doubt that it violates a statute, a rule of law or public policy. *Id.* at 185. The Courts are to protect each of the parties to a contract by ensuring the parties' promises will be performed. *Merten v.*

Nathan, 108 Wis.2d 205 at 211, 321 N.W.2d 173 at 177 (S. Ct. 1982). In the current case, all of the conditions precedent were met and Tak Investments refused to honor its agreement.

The freedom to contract permits parties to shape their own duties and obligations as long as the contracts are not contrary to public policy. *State ex rel Journal Sentinel, Inc. v. Pleva*, 155 Wis.2d 704 at 711, 456 N.W.2d 359 (S. Ct. 1990), citing *Griffith v. Harris*, 17 Wis.2d 255 at 259, 116 N.W.2d 133 (S. Ct. 1962) and *Continental Ins. Co. v. Daily Express, Inc.*, 68 Wis.2d 581 at 363, 229 N.W.2d 617 (S. Ct. 1975). The Trial Court's decision invades that freedom to contract and fails to recite any public policy concern statute or other enactment prohibiting the parties' agreement. The parties have a right to enter into the contract for transfer of the ownership interest and, absent prohibition, the appellants are entitled to enforcement as a matter of law.

The appellee argued before the District Court that a limited liability company cannot issue membership interest, in itself and, therefore, Tak Investments LLC could not issue the membership interest to OFTI since performance was impossible. Neither the laws of Wisconsin nor the laws of Delaware so restrict limited liability companies. Neither the appellee nor the Trial Court cited any authority that prohibits a limited liability company from issuing shares in itself. Presumably, when Tak Investments, LLC entered into its agreements with the appellants, it did so with the knowledge and agreement of its members. In fact, whether it be in the State of Wisconsin or the State of Delaware, limited liability companies are permitted all of the same powers as corporations. There is

no doubt but that corporations can issue shares in itself as was acknowledged by the Trial Court. (R.1, Ap. 1 - 004) So why not a limited liability company? There is no law prohibiting this transfer.

Wisconsin permits broad latitude to its limited liability company and the way they can operate:

> 183.0106 Nature of business.
>
> (1) A limited liability company may be organized under this chapter for any lawful purpose. A limited liability company engaging in a business that is subject to the provisions of another chapter may organize under this chapter only if not prohibited by, and subject to all limitations of, the other chapter.
>
> (2) Unless otherwise provided in an operating agreement, a limited liability company organized and existing under this chapter has the same powers as an individual to do all things necessary and convenient to carry out its business, including but not limited to all of the following:
>
> (a) Sue and be sued, complain and defend in its name.
>
> (b) Purchase, take, receive, lease or otherwise acquire and own, hold, improve, use and otherwise deal in or with real or personal property, or any legal or equitable interest in real or personal property, wherever situated.
>
> (c) Sell, convey, mortgage pledge, create a security interest in, lease, exchange and otherwise dispose of all or any part of its property.
>
> (d) Lend money, property and services to, and otherwise assist, its members or managers, if any.
>
> (e) Purchase, take, receive, subscribe for other otherwise acquire and own, hold, vote, use, employ, sell, mortgage, lend, pledge or otherwise dispose of and deal in and with shares or other interests in, or obligations of, any other enterprise or entity.
>
> (f) Make contracts and guarantees; incur liabilities; borrow money; issue its notes, bonds and other obligations; and secure any of its obligations by mortgage or pledge of all or any part of its property, franchises and income.

(g) Lend money, invest and reinvest its funds, and receive and hold real or personal property as security for repayment.

(h) Conduct its business, locate offices and exercise the powers granted by this chapter inside or outside this state.

(i) **********

(o) Make payments or donations, or do any other act not prohibited by law, that furthers the business of the limited liability company.

(p) **********

Delaware, the jurisdiction of incorporation of Tak Investments, is similar.

§18-106 Nature of business permitted; powers.

(a) A limited liability company may carry on any lawful business, purpose or activity, whether or not for profit, with the exception of the business of banking as defined in §126 of Title 8.

(b) A limited liability company shall possess and may exercise all the powers and privileges granted by this chapter or by any other law or by its limited liability company agreement, together with any powers incidental thereto, including such powers and privileges as are necessary or convenient to the conduct, promotion or attainment of the business, purposes or activities of the limited liability company.

(c) Notwithstanding any provision of this chapter to the contrary, without limiting the general powers enumerated in subsection (b) of this section, a limited liability company shall, subject to such standards and restrictions, if any, as are set forth in its limited liability company agreement, have the power and authority to make contracts of guaranty and suretyship and enter into interest rate, basis, currency, hedge or other swap agreements or cap, floor, put, call, option, exchange or collar agreements, derivative agreements or other agreements similar to any of the foregoing.

(d) Unless otherwise provided in a limited liability company agreement, a limited liability company has the power and authority to grant, hold or exercise a power of attorney, including an irrevocable power of attorney.

There is no question but that federal courts are imbued with the authority to order specific performance. *See*, *Medcom Holding Company v. Baxter Travinol Lab*, 984 F.3d 223 (7th Cir. 1993); *Roberts v. Sears Roebuck & Co.*, 617 F.3d 460 (7th Cir. 1980) cert. denied, 449 U.S. 975, 66 Led.2d 237, 101 S. Ct. 386 (1980).

In executing its contract with the appellants, Tak Investments, LLC promised to turn over 27% of its company to the appellants if certain conditions were met. Those conditions were met. There is nothing in the law in either Wisconsin, Delaware or the 7th Circuit that prohibits the transaction. It is respectfully requested that this Court enforce the contract by reversing the Trial Court on this issue.

B. The Trial Court erred when it determined the promissory notes in question were of no value and were therefore unenforceable.

The Trial Court determined that the notes were of no value and therefore unenforceable. The Court pointed to some indemnification provisions in the contract and when considered in conjunction with the Final Business Terms Agreement, the Court determined that the investment notes had no value to the appellants. (R.2, Ap. 2 – 012-013) Yet, the interaction of the notes with the Final Business Terms Agreement clearly shows that the parties had reached agreement as to certain values of the investment notes which were to either yield continued business, an assignment of 27% of the interest in Tak Investments, LLC or the value of the notes themselves. The Trial Court's interpretation of the contracts would mean the parties considered a value for their agreement, and how that value was to be parceled if they were to do business in the future or if business were to be terminated. It must be remembered that Mr. Tak's companies hold all right, title and interest in the Oconto Falls tissue mill and Ronald Van Den Heuvel's agreement to accept notes with the prospect of cancellation upon the

commencement of future business, and the other agreements he made, effectively bankrolled the transaction. Yet, Sharad Tak and his company try to avoid their obligations. Contracts require the duty of good faith be displayed by each party to a contract and requires that neither party will do something to injure or destroy the rights of another party to that contract. *Metropolitan Ventures v. GEA Associates*, 2006 Wis. 71, 291 Wis.2d 393, 717 N.W.2d 758. Moreover, the conduct displayed by Mr. Tak's company is perfectly in tune with the observations of Judge Richard Posner of this Court in *Marketstreet Associates Limited Partnership v. Fry*, 941 F.2d 588 at 595 (7th Cir. 1991), citing, *Harbor Insurance Company v. Continental Bank Corp.*, 922 F.2d 357 at 363 (7th Cir. 1990):

> The formation or negotiation stage is precontractual, and here the duty is minimized. It is greater not only at the performance but also at the enforcement stage, which is also post contractual. A party who hokes up a phony defense to the performance of his contractual duties and then, when that defense fails (at some expense to the other party) tries on another defense for size can properly said to be acting in bad faith.

In looking at the possible results of the notes before this Court and the Final Business Terms Agreement, the outcomes are that Mr. Tak's companies and Mr. Van Den Heuvel's companies would continue to work together under a significant construction contract and all of the other contractual duties of Mr. Tak would be discharged in the event that took place. If it didn't take place, and if it didn't happen within three (3) years, Mr. Tak agreed that he would provide Mr. Van Den Heuvel's companies with a 27% interest in Tak Investments, LLC. That did not take place. The next step is to seek enforcement of the notes themselves. The appellants have absolutely nothing to show for the promise to pay under the investments notes or the promise to perform under the Final Business Terms Agreement, all offered in consideration for transfer of the mill.

If the Court agrees with the Trial Court that the 27% interest cannot be transferred, then it is respectfully requested that the Court look to the notes themselves which support the Final Business Terms Agreement and the words contained therein: "FOR VALUE RECEIVED". The maker acknowledges it received sufficient consideration for those notes. They were executed on the same day and as part and parcel of the same transaction when the mill's assets were transferred to ST Paper, LLC, owned by Tak Investments, LLC. In *Hatten's Estate*, 233 Wis. 199 at 216, 288 N.W.2d 278 (1940) the Wisconsin Supreme Court held that any consideration is sufficient to support a simple contract. It is only when there is no consideration that it can be negated. The notes were created so as to ensure that all debts were cleared so the sale of the assets could proceed. The District Court's determination would have both the Final Business Terms Agreement and those four (4) notes to be construed in a way that they are of no value and are not rational business instruments. The concept that they were executed so as to permit Mr. Van Den Heuvel to use them as collateral only, and to use them as collateral when, according to Mr. Tak, the instruments were worthless, renders the instruments irrational. The Final Business Terms Agreement and the four (4) notes must be construed, under the law, in a way that will make them rational business instruments so as to effectuate what happens to have been the intentions of the parties. *Borchardt 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 appellee's position was that the Final Business Terms Agreement and the investment notes are a nullity. However, Wisconsin law requires that the documents be given a rational construction:

> So far as reasonably practicable it (a contract) should be given a construction which will make it a rational business instrument and will effectuate what appears to have been the intentions of the parties. *Bitker & Gerner Company v. Green Investment Company*, 273 Wis.2d 116, 120, 76 N.W.2d 549, at 552 (1956) (quoting *Waldo Bros. Company v. Platt Contracting Company*, 25 N.E.2d 770, 773 (Mass. 1940):

Bruns v. Rennebohm Drug Stores, Inc., 151 Wis.2d 88 at 94, 442 N.W.2d 591 at 593 (Ct. App. 1989).

Contrary to the Trial Court's findings and decision, the documents which were deemed to be unenforceable must be given some rational meaning. Despite some of the awkward contractual language, court's must avoid illogical or unreasonable interpretations of contracts. *Estate of Ermenc v. American Family Mutual Insurance Co.*, 221 Wis.2d 478 at 484, 585 N.W.2d 679 (Ct. App. 1998). *See also*, *Borchardt v. Wilk*, 156 Wis.2d 420 at 427, 456 N.W.2d 653 at 657 (Ct. App. 1990). The absurd result of these agreements being worthless cannot be countenanced. The law requires that this Court so find and reverse this portion of the Trial Court's Decision.

C. The Trial Court Erred When It Held That the Appellant's Were Not In Possession of the Promissory Notes Because the Notes Were Possessed by Creditors as Collateral.

The Trial Court agreed with the appellee that the appellants did not have standing to enforce the notes because they did not have physical possession. In truth, the notes had been transferred to various creditors to be held as collateral. The testimony in that regard was not impeached. The notes were assigned as collateral to two banks and companies that are owned by Ron Van Den Heuvel's brothers. (R.2, Ap. 2 – 015-016) There is no evidence of an outright assignment, only an assignment for the purpose of collateralizing obligations. The law supports this position.

Wis. Stats. §403.301 provides that there are three (3) classes of persons who are entitled to enforce an instrument, in this case, the four (4) 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 Commercial Code. It is true that possession of the note can be indicia of ownership of the note, however, in this case, title to the notes was never transferred to any of the lienholders. The notes were held as collateral, as is permitted by Wis. Stats. §409.313. David Van Den Heuvel and Brad Hutjens testified to the same-as did Ron Van Den Heuvel. David Van Den Heuvel testified that he was holding two notes as collateral and Brad Hutjens, an employee of Nicolet Bank, testified that he was holding a note, essentially in escrow for the bank. Ron Van Den Heuvel testified the fourth note was at Associated Bank and was being held as collateral. All acknowledged Ron Van Den Heuvel's companies, the appellants, still owned the notes.

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 certified securities by taking delivery of certified securities under §408.301.

The statute specifically provides for perfection of a security interest and instruments by taking possession of the collateral. Dispositive of the issue is Wis. Stats. §402.203 which 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.

There can be no right to enforce a note absent an endorsement. Neither Nicolet Bank, Associated Bank, or David Van Den Heuvel's companies could enforce those notes because they did not possess such an endorsement.

There is a dearth of instruction on the issue now before the court in Wisconsin jurisprudence. However, this issue was discussed by Hon. Lynn Adelman in *United Cent. Bank v. 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 v. 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. Stats. §403.2036. 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.

Wis. Stats. §403.302 describes a holder in due course, who in this case would be appellant 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 the 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 the right to enforce it, as would the true holder of the instrument, in this case, the appellants. The appellants continue to hold legal title which has never been transferred by endorsement or otherwise. It is clear that the appellants had every right to enforce these notes despite the fact that the notes were in the possession of others as collateral. There is no testimony to the contrary and under the laws of the State of Wisconsin, it is permitted.

VII. CONCLUSION

The Trial Court erred in each of the three areas that it found as a basis to negate the agreements of the parties. There is no law whatsoever that would prohibit the parties from contracting to transfer of the 27% interest in Tak Investments LLC. Further, the parties had agreed and there is sufficient consideration and the Final Business Terms Agreement and the four (4) notes must be read in conjunction which suggests consideration on many different levels. The Court rendered the agreements of the parties unenforceable in a manner that would make those contracts void of any business sense. Finally, the Trial Court erred when it required that the appellants be in actual physical possession of the notes when the law clearly states that it is not necessary in order to enforce the notes. It is respectfully requested that the Trial Court be reversed, and the case be remanded.

Dated at Milwaukee, Wisconsin this 11th day of July, 2018.

TERSCHAN, STEINLE, HODAN
& GANZER, LTD.
ATTORNEYS FOR PLAINTIFFS-APPELLANTS,

BY: /S/ MICHAEL J. GANZER
MICHAEL J. GANZER
STATE BAR NO. 1005631

P. O. ADDRESS:
309 NORTH WATER STREET
SUITE 215
MILWAUKEE, WI 53202
414-258-1010

CERTIFICATE OF COMPLIANCE WITH FRAP RULE 32(a)(7), FRAP RULE 32(g) and CR 32I

The undersigned, counsel of record for the plaintiffs-appellants, Tissue Technology, LLC, Tissue Products Technology Corp., Oconto Falls Tissue, Inc. and Partners Concepts Development, Inc. furnishes the following in compliance with F.R.A.P. Rule 32(a)(7):

I hereby certify that this brief conforms to the rules contained in F.R.A.P. Rule 32(a)(7) for brief produced with a proportionally spaced font. The length of this brief is 5,483 words.

Dated this 11th day of July, 2018.

TERSCHAN, STEINLE, HODAN
& GANZER, LTD.
ATTORNEYS FOR PLAINTIFFS-APPELLANTS,

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PROOF OF SERVICE

I hereby certify that on July 11, 2018, I electronically filed Appellants' Brief and Short Appendix with the Clerk of the Court of the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system. Additionally, copies will be sent to counsel of record via commercial overnight delivery service, addressed as follows:

Jonathan T. Smies, Esq.
Godfrey & Kahn, S.C.
200 South Washington Street
Suite 100
Green Bay, WI 54301

Dated this 11th day of July, 2018.

TERSCHAN, STEINLE, HODAN
& GANZER, LTD.
ATTORNEYS FOR PLAINTIFFS-APPELLANTS,

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APPENDIX

STATEMENT OF COUNSEL

I, Michael J. Ganzer, counsel for Appellants, Tissue Technology, LLC, Tissue Products Technology Corp., Oconto Falls Tissue, Inc. and Partners Concepts Development, Inc., and a member of the bar of this Court, certify that all of the materials required by the Seventh Circuit Rule 30(a) and (b) are included in Appellants' Appendix.

Dated this 11TH day of July, 2018.

/s/ Michael J. Ganzer
Michael J. Ganzer
State Bar No. 1005631

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

TISSUE TECHNOLOGY LLC., et al.,

Plaintiffs,

v. Case No. 14-C-1203

TAK INVESTMENTS, LLC,

Defendant.

DECISION AND ORDER

Plaintiffs brought the diversity action for breach of contract against Defendant seeking specific performance in the form of an order conveying a 27% interest in Defendant to Plaintiff. The case is before court on cross motions for summary judgment. For the reasons that follow, Plaintiffs' motion will be denied, and Defendant's motion will be granted but only in part.

BACKGROUND

This case is the second iteration of a dispute between the Plaintiffs, a group of entities controlled by Ronald Van den Heuvel, and Tak Investments, LLC, a Delaware company. The dispute arises out of Tak's purchase of an Oconto Falls, Wisconsin, paper mill from the Plaintiffs. In a previous action, Case No. 12-C-1305, the Plaintiffs (also known as the OFTI Group) sought to enforce a provision in the parties' agreement that would require the Defendant to turn over "an undiluted 27% ownership interest of the highest class in [Tak] Investments" because the Plaintiffs had deemed four promissory notes cancelled. Upon motions for summary judgment, this court

found for the Defendant on the ground that one of the four notes had been assigned to another party, thus precluding the ability of the Plaintiffs to deem all four notes cancelled. As such, the Plaintiffs had not fulfilled a condition precedent to enforcing the provision of the contract upon which they relied. However, the court noted that because the assignee "could reassign the fourth note back to OFTI [i.e., the Plaintiffs] there is nothing in the record to suggest that OFTI is permanently foreclosed from cancelling all four notes and thereby fulfilling the condition precedent." (No. 12-C-1305, ECF No. 42 at 5.)

This is exactly what has now happened. The Plaintiffs, having received an assignment of the fourth note, are now payees of all four notes and thus have the ability they lacked in the previous action, which is to "deem" (as the contract puts it) the notes to be cancelled. Accordingly, they believe they are entitled to the remedy of specific performance, that is, an order requiring Defendant Tak Investments, LLC to transfer a 27% interest in itself over to the Plaintiffs. Both sides have moved for summary judgment.

The operative language is contained within an agreement called "Final Business Terms Agreement," dated April 16, 2007. It provides as follows:

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

(ECF No. 25-3 at ¶ 2.G.)

ANALYSIS

1. The LLC Does Not Own Itself.

The Defendant's first argument is very simple: it argues that it does not have the ability to convey any interest in itself to the Plaintiffs, or anyone else for that matter. Only owners can convey interests, and Tak Investments, LLC — the only defendant in this action — does not own itself. Instead, the LLC is owned by Sharad Tak and his wife, and / or Tak Investments, Inc., none of whom are party to this action.

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. For example, the Plaintiffs cite a Maryland statute that provides an LLC may purchase, sell, hold, and pledge "stock or other interests in and obligations of other corporations . . ." Maryland Code §4A-203. But the key word, of course, is "other." The Maryland code does not provide that an LLC may issue shares in itself, which is what the Plaintiffs want. (The Plaintiffs cited Maryland law because they had been unclear whether the LLC was a Delaware or Maryland LLC.) The Plaintiffs also argue that Delaware law allows for assignments of ownership interests as well. But the provision they cite, 6 Del. C. § 18-702, merely provides that LLC interests may be assigned, not that the LLC itself would do the assigning. In fact, the statute suggests that any assignment would be by the member (i.e., the owner), not the LLC itself.[1]

This is not merely an academic problem or an elevation of form over function; it is a

[1]Subsection (e) is the only relevant portion of the Delaware statute. Although that provision acknowledges that LLCs may acquire interests from LLC members, such interest is thereby deemed cancelled at that point.

recognition of the realities of ownership. When part of a company—or anything else, for that matter—transfers to someone, it is also necessarily transferred from someone. The percentage of ownership must always add up to 100%. And so if the company itself purported to transfer 27% of itself to the Plaintiffs, from whom would it be taking that share? And on whose authority? These questions demonstrate the essence of the problem, which may be summarized succinctly: "A corporation does not own itself." Hanley v. Kusper, 61 Ill. 2d 452, 462, 337 N.E.2d 1, 7 (Ill. 1975).

It is true enough that more traditional corporations have the ability to issue shares in themselves, for example, as part of employee stock incentive plans. It is also conceivable that an LLC in some circumstances could transfer part of its ownership. But those abilities would be products of specific contractual arrangements (for example, an ESOP, a convertible bond, or the LLC operating agreement) providing for the company to issue new shares, shares that would dilute the existing owners' interests. If the Plaintiffs here had expected the Defendant to issue new shares in itself, one would expect their agreement to say so. Instead, the contract simply provides, in a single sentence, that the Plaintiffs "shall receive an undiluted 27% ownership interest." (ECF No. 25-3 at ¶ 2.G.) Since LLCs normally do not have "shares" in the same way corporations do—they function more like partnerships—any agreement to issue new ownership interests would have been more specific than the vague "shall receive" language the parties used. This is confirmed by the fact that Sharad Tak, the LLC's owner, signed the agreement on his own behalf. A more reasonable reading of the agreement is that the parties intended that Sharad Tak would be obligated to convey any ownership interest, since he was the only owner of Tak Investments, LLC to sign that agreement. He was the only party with the ability to convey a 27% share of his company. Thus, even if an LLC had a theoretical ability to issue an ownership interest in itself, I do not construe the

parties' agreement as requiring the company to do that under these circumstances.[2] For this reason, Plaintiffs' motion for summary judgment on its claim for specific performance will be denied. But because Plaintiffs seek "such other relief as the court deems just and proper" (ECF No. 1 at ¶ 21), I will address Defendant's remaining argument as well.

2. Conditions Precedent

The Defendant also argues that the Plaintiffs were obligated to pay the principal and interest due under the notes. At this point, some elaboration of the parties' arrangement is warranted. Recall that the notes in question were four promissory notes, totaling $16.4 million, issued by Tak Investments, LLC on April 16, 2007. The notes ranged in amounts ranging from $3 million to $5 million, all of them listing Plaintiff Tissue Products Technology Corporation as the payee. (The parties do not explain why four notes were issued (rather than one) when the maker, the payee, and other terms were the same.) Each note contained a payment schedule. For example, the $4.4 million note required principal payments in the amount of $440,000 each on April 16, 2008 and April 16, 2009, with the remainder of $3.52 million due on April 16, 2010. The other notes followed the same schedule. (ECF No. 1-1 at 1-4.)

The notes themselves do not contain any unusual provisions. However, the Final Business Terms Agreement, also dated April 16, 2007, contains a provision with a debatable meaning: "Through the third anniversary of the date of each Investment Note, the OFTI Group agrees to pay any amounts due for interest or principal required per the terms of the Investment Notes." (ECF No. 25-3 at ¶ 2.G.) In the Defendant's view, this clause required the Plaintiffs (i.e., the OFTI Group)

[2]It is not clear why the Plaintiffs have not sued Sharad Tak personally.

to pay the principal and interest due to themselves during the first three years of the note.[3] Because they failed to do so, they cannot enforce the clause requiring transfer of 27% of Tak Investments, LLC. In fact, under this reading of the clause, the Final Business Terms Agreement would require the Plaintiffs to have extinguished the entirety of the notes, because all of the principal was due within the first three years, and the OFTI Group had agreed to pay "through the third anniversary of the date of each Investment Note," or April 16, 2010.

The Plaintiffs believe this is an odd reading of the agreements; in fact, such an interpretation would actually read the notes out of existence because the payee of the notes would have to pay the entire amount of principal and interest. In their view, the Plaintiffs were not agreeing to pay themselves the entirety of the notes, for the simple reason that it would have made no sense to do so. Instead, they state that they were merely intending to pay any amounts owed in the event one or more of the notes were pledged or assigned to a third party. In that event, the OFTI Group would ensure that demands of principal or interest were not made to Tak Investments, LLC. This is backed up by language indicating that the OFTI Group agreed to indemnify Tak Investments resulting from any failure on OFTI Group's part to make such payments. (Id.) If it had merely been agreeing to pay itself, it would not have made sense to indemnify Tak Investments for any failure to do so, since Tak would presumably not suffer any harm from that failure.[4]

The only thing that's clear is that the clause is unusual and subject to competing

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[3]The payee was Tissue Products Technology Corporation, one of the Plaintiffs, but as a member of the OFTI Group it would essentially be paying itself.

[4]This argument is also unclear. If Tak Investments was to be the maker of the notes, presumably it would have remained the maker even if one of the notes was assigned to a third party. The Plaintiffs do not explain why they would have assumed the role of maker simply by assigning a note to someone else.

interpretations. Presently before me, however, is the more limited argument made by Tak Investments, which is that OFTI Group's failure to make these principal and interest payments forecloses its ability to seek the 27% of Tak Investments. I conclude that, even if OFTI Group was obligated to pay itself the principal and interest due under the four notes, its failure to do so does not excuse Tak and / or Tak Investments, LLC from transferring 27% of the company. Most importantly, the provision in question was not related to the promise that the Plaintiffs would receive 27% of Tak Investments. Even assuming that OFTI Group was supposed to pay its own principal and interest, the Defendant has not explained why such an obligation would prevent the OFTI Group as payee from cancelling the notes or relieve Tak of the obligation that he transfer part of the company. Payment of principal and interest is therefore not properly considered as a "condition precedent" to any other part of the agreement.

CONCLUSION

In sum, I conclude that Plaintiffs' motion for summary judgment on their claim for specific performance should be denied. This does not mean, however, that Plaintiffs are entitled to no relief at all. As noted above, the complaint also seeks "such other relief as the court deems just and proper." (ECF No. 1 at ¶ 21.) The Plaintiffs have sought, in the alternative, damages for nonpayment of the four notes, which in their calculation would amount to some $29 million. The Defendant believes such a claim would be barred by the statute of limitations, and in any event it was not pled in the complaint. It is conceivable, however, that such a claim would relate back to the filing of this action in 2014, see 56 Fed. R. Civ. P. 15(c), assuming it even needed to be pled as

a specific claim in the first place[5]—matters that have not been briefed. Even if collection on the notes is no longer available, some other legal or equitable remedy might be appropriate in light of the unusual facts of the case. Given these circumstances, and the underdeveloped record, I am unable to conclude that judgment should be entered in the Defendant's favor on the entire case at this time.

The Defendant's motion for summary judgment is therefore **GRANTED,** to the extent I conclude that specific performance is not a viable remedy against Tak Investments, LLC. The Plaintiff's motion is **DENIED** for the same reason. The clerk will set the matter on the calendar for a telephone status conference to discuss further proceedings.

SO ORDERED this 2nd day of December, 2016.

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

[5]"A plaintiff is not required to set forth a legal theory to match the facts, so long as some legal theory can be sustained on the facts pleaded in the complaint." O'Grady v. Vill. of Libertyville, 304 F.3d 719, 723 (7th Cir. 2002).

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

TISSUE TECHNOLOGY LLC, *et al.*,

Plaintiffs,

v. Case No. 14-C-1203

TAK INVESTMENTS LLC, *et al.*,

Defendants.

DECISION AND ORDER OF DISMISSAL

Plaintiffs commenced this diversity action for breach of contract and for recovery on four promissory notes having a total face value of $16.4 million. The plaintiffs are four Wisconsin entities—Tissue Technology, LLC, Partners Concepts Development, Inc., Oconto Falls Tissue, Inc., and Tissue Products Technology Corp. (collectively the "OFTI Group")—controlled by Ronald Van Den Heuvel. The three corporate plaintiffs are each incorporated in the State of Wisconsin and have their principal places of business in De Pere, Wisconsin. Tissue Technology, LLC, has three members: Ronald J. and Kelly Van Den Heuvel, who are both citizens of Wisconsin; and Steven C. Peters, who is a citizen of the State of Illinois. Defendant Tak Investments, LLC, has two members: defendant Sharad Tak, a citizen of Florida; and Mahinder Tak, a citizen of Maryland. The court has jurisdiction under 28 U.S.C. § 1332.

Plaintiffs originally sued Tak Investments, LLC ("Tak Investments"), but in an amended complaint added claims against its manager, Sharad Tak ("Tak"). At this stage in the litigation, the Plaintiffs' sole remaining claim seeks recovery on the four promissory notes (the "Investment Notes") executed by Tak Investments in April 2007, which with interest now amount to more than

$34 million. During a bench trial on September 18–19, 2017, the court heard testimony from several witnesses, including Van Den Heuvel and Tak. The parties filed post-trial briefs, and the matter is now ready for decision. For the reasons stated below, I find that at least as to Plaintiffs, recovery on the Notes is barred by the terms of the contract that led to their issuance and because Plaintiffs are not in possession of the Notes. Because the Plaintiffs cannot recover, their claims will be dismissed.

BACKGROUND AND PROCEDURAL HISTORY

This case arises out of a convoluted and bizarre series of business transactions between Van Den Heuvel, Tak, and various entities they each control. Though serious credibility issues were raised as to each party's principal, the case is largely determined by the undisputed facts and written exhibits. In 2005 and continuing throughout 2006, Van Den Heuvel and Tak began discussing prospective business arrangements between their companies, including the sale by Van Den Heuvel and purchase by Tak of an existing tissue mill in Oconto Falls, Wisconsin, as well as the construction of new mills across the country. As relevant here, on April 16, 2007, ST Paper, LLC, a Delaware entity controlled by Tak, closed on an agreement to purchase the assets of Oconto Falls Tissue, Inc., from the OFTI Group for $86.4 million. Ex. 7 at 3; Ex. 8 at 1.

On that same day and separate from the Asset Purchase Agreement, Tak and Tak Investments entered into a Final Business Terms Agreement ("FBTA") with Van Den Heuvel and the OFTI Group. Ex. 11. At the same time and as contemplated by the FBTA, Tak Investments executed the Investment Notes, four promissory notes naming Tissue Products Technology Corp. ("TPTC") as payee. Ex. 11A. The Investment Notes had values of $4.4 million, $3 million,

$4 million, and $5 million, respectively, for a total amount of $16.4 million. The terms of the FBTA and the Notes are interrelated and at the core of this dispute.

The $4.4 million note established the following payment terms:

> FOR VALUE RECEIVED, the undersigned, **TAK INVESTMENTS, LLC** . . . hereby promises to pay to the order of **TISSUE PRODUCTS TECHNOLOGY CORP.** . . . or such other . . . designee as the Payee shall from time to time direct in writing to the Maker the principal sum of Four Million Four Hundred Thousand Dollars ($4,400,000). The unpaid principal balance of this Note shall bear interest at a rate per annum equal to eight percent (8%), per annum. Interest shall accrue from the date hereof and shall be payable on a semi-annual basis commencing on October 16, 2007. Principal hereon shall be due and payable in the amount of $440,000 on April 16, 2008, $440,000 on April 16, 2009 and $3,520,00 on April 16, 2010. Interest will be calculated based on a year consisting of 360 days applied to the actual days on which there exists an unpaid balance hereunder.

Ex. 11A at 1. All four Investment Notes had an identical interest structure consisting of the 8% annual interest rate and semi-annual interest payments. Across all four Notes, the three-year principal repayment schedule was also identical: 10% of the original principal balance was due on the first and second anniversaries of the Notes' execution, and the remaining principal balance was due on the third anniversary. The Notes state that they were made "FOR VALUE RECEIVED," but the parties dispute whether Tak Investments received any consideration for them.

Turning to the FBTA, two consecutive paragraphs pertaining to the Investment Notes are relevant to this litigation. First, paragraph 2(G) addresses payments under the Investment Notes:

> Through the third anniversary of the date of each Investment Note, the OFTI Group agrees to pay any payments due for interest or principal required per the terms of the Investment Notes. 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 the OFTI[] Group's failure to make such payments, which shall include, without limitation, any claims made by any current or future holder of such Investment Notes against [Tak Investments] relating to such interest

> payments. If such Investment Notes are deemed cancelled by the OFTI Group after the third anniversary of the date of the Investment Notes, the OFTI Group shall receive an undiluted 27% ownership interest of the highest class in [Tak Investments] . . . ; provided however, if phase 2, 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 interests received from the Investment Notes.

Ex. 11 at 2. Next, paragraph 2(H) discusses the relationship between the Investment Notes and the "Phase 2" already mentioned in paragraph 2(G):

> Each member of the OFTI Group agrees if the Phase 2 Financing (as defined below) is consummated on or before the tenth (10th) anniversary of the date of each Investment Note, the unpaid principal balance of each Investment Note shall be automatically reduced to zero, [Tak Investments] shall have no obligation to pay any unpaid principal or accrued interest thereunder, and each Investment Note shall be deemed cancelled. For purposes of this Agreement, "Phase 2 Financing" shall mean the consummation by [Tak Investments] (whether individually or in conjunction with an affiliated entity) or Tak (or an entity controlled by Tak) of financing to acquire the existing facility and construct a linerboard and/or tissue machine at the site presently owned by Eco Fibre, Inc. located at 500 Fortune Avenue in De Pere, Wisconsin using [Spirit Construction Services, Inc.] as general contractor with a minimum construction contract of $315,000,000.

Id. at 2–3.

The Phase 2 contemplated by the FBTA never occurred, and no entity controlled by Tak ever entered into a $315 million contract with Spirit Construction, a company owned by Van Den Heuvel's brother, to build one or more tissue mills. After Phase 2 failed to materialize, Plaintiffs sent notice to Tak Investments on September 17, 2009, stating that payments due under the Investment Notes had not been received. Ex. 18. On April 20, 2010, Plaintiffs sent notice "that the Investment Notes have been deemed cancelled." Ex. 19. Observing that the cancellation occurred after the third anniversary of the signing of the Investment Notes, the notice asked Tak Investments to "issue [an] undiluted 27% ownership Interest of the highest class units" in itself under paragraph

2(G) of the FBTA. *Id.* Plaintiffs filed a previous lawsuit against Tak Investments in this court seeking specific performance of that ownership transfer obligation. I granted summary judgment in favor of Tak Investments and dismissed the case because Plaintiffs had assigned at least one of the Notes and thus lacked authority to deem all four Investment Notes cancelled. *Tissue Tech. LLC v. Tak Invs.*, No. 12-C-1305, 2014 WL 12550389, at *6 (E.D. Wis. Apr. 28, 2014).

In response to this court's decision in the first suit, Plaintiffs obtained a reassignment of the Note at issue. In a new notice to Tak Investments on August 15, 2014, Plaintiffs stated that they possessed all four Investment Notes, deemed them cancelled, and therefore sought a 27% interest in Tak Investments under paragraph 2(G) of the FBTA. Ex. 20. When Tak and Tak Investments once again declined to convey an ownership interest in Tak Investments, Plaintiffs filed the current action in this court seeking specific performance directing Tak Investments to transfer a 27% interest in itself. Summary judgment on this claim was granted in a December 2, 2016 decision on the ground that although an owner of a limited liability company could transfer an interest in the company, the company itself could not. Since Plaintiffs had not named Tak in its complaint, even though he was a signatory to the FBTA, I concluded specific performance could not be granted. ECF No. 40 at 3–4. But because the complaint sought "such other relief as the court deems just and proper," and Plaintiffs had alternatively argued for recovery on the notes, I did not dismiss the action at that time. *Id.* at 7–8.

Plaintiffs sought leave to file an amended complaint, which the court generously construed to add claims (1) to enforce the Notes against Tak Investments; (2) to enforce the Notes against Sharad Tak personally; (3) to enforce the terms of the parties' FBTA against Tak personally; and (4) to add a claim for unjust enrichment. ECF No. 48 at 1. Plaintiffs later abandoned the unjust

enrichment claim, and the court concluded that the claim to enforce the Notes against Tak personally was futile, since he had not signed them in his personal capacity. Plaintiffs were allowed to proceed on their claims against Tak for violation of the FBTA and against Tak Investments on the Investment Notes. ECF No. 48. On the eve of trial, Plaintiffs abandoned their claim against Tak personally, and all claims against Tak were dismissed with prejudice. The sole claim remaining is for recovery on the Investment Notes against Tak Investments.

To this claim, Tak Investments offered three defenses: (1) Plaintiffs are not in possession of the Investment Notes and thus lack standing to enforce them; (2) Plaintiffs' claim is barred by the statute of limitations; and (3) the Investment Notes are void for lack of consideration. In addition, on the morning of trial, Tak Investments moved to amend its answer by adding as an affirmative defense and/or counterclaim the fact that Plaintiffs agreed to jointly and severally indemnify and hold harmless Tak Investments from and against "any damages, losses, deficiencies, actions, demands, judgments, fines, fees, costs, and expenses, including, without limitation, attorneys' fees, of or against [Tak] Investments resulting from enforcement of the Investment Notes." ECF No. 89 at 5–6 (citing Ex. 11, ¶ 2(I)). The court took Tak Investments' motion to amend its pleadings under advisement, and the trial proceeded. Having listened to the testimony and considered the arguments of counsel, I now conclude that Tak Investments' motion to amend should be granted.

Motion To Amend

Rule 15 of the Federal Rules of Civil Procedure governs amended and supplemental pleadings. We are well past the time when a party may amend as a matter of course. *See* Fed. R. Civ. P. 15(a)(1). But that does not mean an amendment cannot be allowed. Rule 15(a)(2) provides that after amendment is no longer allowed as a matter of course, "a party may amend its pleading

only with the opposing party's consent or the court's leave." The court is directed to "freely give leave when justice so requires." *Id.* Under Subsection (b) of the Rule, amendments may be allowed during and even after trial. As relevant here, the Rule states:

> When an issue not raised by the pleadings is tried by the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings. A party may move—at any time, even after judgment—to amend the pleadings to conform them to the evidence and to raise an unpleaded issue. But failure to amend does not affect the result of the trial of that issue.

Fed. R. Civ. P. 15(b)(2).

Tak Investments' motion to amend its pleadings to add a claim for indemnification under the FBTA did not add a new element to the case. The FBTA, together with the Investment Notes that were issued pursuant to its terms, has been central to this case since its inception. Indeed, Plaintiffs' orginal complaint sought relief solely under the FBTA. Plaintiffs added their claim for enforcement of the Investment Notes after the court generously allowed them to file an amended complaint following the dismissal of their claim for specific performance of the FBTA. Plaintiffs introduced the FBTA as an exhibit, and most of the testimony from Van Den Heuval and Tak centered on the purpose, meaning, and intent of its provisions in relation to the Investment Notes. Plaintiffs have offered no argument suggesting they would suffer any prejudice if the late amendment were allowed, and the court has been unable to discern any basis on which such an argument could be made. Finally, the indemnification provision of the FBTA speaks directly to the only claims remaining in the case. Under these circumstances, I conclude that Tak Investments' motion to amend should be granted. To complete the record, Tak Investments is instructed to file an amended or supplemental pleading setting forth its affirmative defense and/or claim for indemnification within ten days of this

decision and order. Having fully addressed the issues at trial, however, there is no need to delay further. I therefore proceed to my findings of fact and conclusions of law.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. The Indemnification Provisions

On their face, each of the Investment Notes appears to be a promissory note under which Tak Investments promised to pay Plaintiff TPTC the face amount of the note ($4.4 million, $3 million, $4 million, and $5 million), together with interest, over a three-year period. But under the terms of the FBTA, entered at the same time as the Notes were issued, Plaintiffs agreed "[t]hrough the third anniversary of the date of each Investment Note . . . to pay any payments due for interest or principal required per the terms of the Investment Notes," and to "jointly and severally . . . 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 the OFTI Group's failure to make such payments, which shall include, without limitation, any claims made by any current or future holder of such Investment Notes against [Tak] Investments relating to such interest payments." Ex. 11, ¶ 2(G). It thus appears from the unequivocal terms of the FBTA that Plaintiff TPTC, the payee on the Investment Notes, along with the other OFTI Plaintiffs, agreed that they would indemnify and hold harmless Tak Investments, the payor on the Notes, for all principal and interest payments that came due over the three-year term of the Investments Notes. In other words, Plaintiffs are both the payee and payor on the Investment Notes, despite the fact that the Notes themselves were issued by Tak Investments.

Another provision of the FBTA makes this even more clear. Paragraph 2(I) sets forth additional indemnification terms regarding efforts to enforce the Investment Notes by any member of the OFTI Group or successor in interest:

> 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 the enforcement of the pledge described above), or any enforcement of or other claims made any [sic] other current or future holder of such Investment Notes against [Tak Investments] relating to the Investment Notes.

Ex. 11 at 3.

Considered together with the terms of the FBTA, it appeared that the Investment Notes had no value to the OFTI Group. Van Den Heuvel has continued to claim, however, that they served an important role in the agreement under which ST Paper, a limited liability company controlled by Tak, purchased the assets of Plaintiff Oconto Falls Tissue, Inc. At trial, Van Den Heuvel testified that the need for the Notes arose just weeks before the April 16, 2007 closing on the Asset Purchase Agreement. Van Den Heuvel testified that shortly before the closing, Goldman Sachs, which was to provide the financing for the transaction, reduced its funding from $84 million to $65 million. Ex. 6. The resultant shortfall forced the parties to make arrangements outside of the closing, a necessity that Van Den Heuvel says Tak acknowledged in a March 28, 2007 letter to Goldman Sachs. Ex. 4. Because of the shortfall, there would not be enough money to pay off the liens that Van Den Heuvel's creditors held on the assets. The Investment Notes and the FBTA were devised as a vehicle to allow Van Den Heuvel to convey clean title to the assets to ST Paper. Van Den Heuvel explained that he persuaded several of his secured creditors to release their liens on the

assets of the Oconto Falls tissue mill by offering to pledge the Investment Notes as substitute collateral. From Van Den Heuvel's perspective, Tak Investments therefore received consideration for the Investment Notes in the form of clean title to the assets of the Oconto Falls mill, as delivered to ST Paper, a related Tak business.

With respect to the provision of the FBTA stating that the OFTI Group would pay all interest and principal required under the terms of the Investment Notes and indemnify Tak Investments against any losses resulting from the OFTI Group's failure to do so, Van Den Heuvel testified that this provision simply meant that Plaintiffs were to make the payments that became due on the various bank loans that were secured by the Investment Notes for three years. Van Den Heuvel denied that the OFTI Group was expected to make the principal and interest payments due on the Investment Notes themselves. Instead, he said, the provision was intended to insure that Tak had at least three years before he would have to "put his equity in." ECF No. 89 at 65. "[F]or the first three years," Van Den Heuvel testified, "we could not let the banks that we assigned these to get back to him, and come back after him." *Id.* at 64–65. The Investment Notes, according to Van Den Heuvel, were intended to serve as part of the purchase price for the Oconto Falls tissue mill and thereby increase Tak's or, more precisely, ST Paper's equity. *Id.* at 66–67. After three years, the FBTA provided that the OFTI Group could deem the Investment Notes cancelled and thereupon receive "an undiluted 27% ownership interest of the highest class in [Tak] Investments." Ex. 11, ¶ 2(G). However, if within ten years, Tak or one of his business entities undertook what the agreement referred to as "Phase 2 Financing," the 27% interest would be returned. Phase 2 Financing was described as a commitment by Tak to obtain funds to enter into a $315 million contract with other Van Den Heuvel companies to expand and add machines. ECF No. 89 at 65–66.

Needless to say, Van Den Heuvel's interpretation of the indemnification and hold harmless provisions of the FBTA is not what the agreement says. It does not say that the OFTI Group is to make all payments of principal and interest on bank loans that are secured by the Investment Notes. Instead, the provision states that the OFTI Group is "to pay any payments due for interest or principal required per the terms of the Investment Notes." Ex. 11 at 2.

This is precisely how Tak said he interpreted the FBTA, though he denied knowing the Investment Notes were to replace Van Den Heuvel's collateral for various loans secured by the assets. Tak testified at trial that the Investment Notes were not a prerequisite for closing his company's purchase of the Oconto Falls mill. He noted that it was the seller's obligation to deliver title to the mill free and clear of liens and encumbrances as part of that transaction, so clearing the title was not Tak's responsibility. Instead, Tak testified, Van Den Heuvel presented him with the Investment Notes and the FBTA, which Tak agreed to sign only after Van Den Heuvel explained that the payment and indemnity terms in the FBTA meant that Tak Investments would never have to make any payments under the Investment Notes. Tak also testified that he understood the Investment Notes to function as a line of credit by which Van Den Heuvel could lend his businesses money for the purpose of building other paper mills, if plans for future construction materialized. ECF No. 90 at 20–21. Tak distinguished the Investment Notes from a set of promissory notes referred to as the Seller Notes, approximately $30 million worth of notes that were formally included as a part of the closing on the Oconto Falls mill, and which are currently subject to separate state court litigation in Oconto County.

The dispute between the parties over the meaning of the FBTA raises an issue of contract interpretation. Under Wisconsin law, which controls, "contracts are to be construed as they are

written." *Kennedy v. Nat'l Juvenile Det. Ass'n*, 187 F.3d 690, 694 (7th Cir. 1999), *cert. denied*, 528 U.S. 1159 (2000). "Disputes over the meaning of a written contract are ordinarily resolved by reference to the meaning of the contract as it would be gathered by a reader competent in English (if the contract is in English) and reasonably endowed with common sense." *Airline Pilots Ass'n Intern. v. Midwest Exp. Airlines, Inc.*, 279 F.3d 553, 556 (7th Cir. 2002) (applying Wisconsin law). The plain meaning of the FBTA provisions is that the OFTI Group agreed to pay the principal and interest required per the terms of the Investment Notes as they became due over the three-year term of the Notes, and to indemnify and hold harmless Tak Investments for any losses resulting from its failure to do so. And under Paragraph 2(I) of the FBTA, the OFTI Group agreed to indemnify Tak Investments and hold it harmless "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." Ex. 11 at 3. Moreover, the latter provision contained no three-year time limit. The clear meaning of the FBTA is that notwithstanding Tak Investments' issuance of four Investment Notes promising to pay Plaintiff TPTC $16.4 million over three years, Van Den Heuvel agreed on behalf of himself and the OFTI Group, including TPTC, that the OFTI Group would make all payments that became due on the Notes over the entire three-year term.

It thus follows that Plaintiffs' attempt to collect on the Investment Notes must fail. Having promised to make all payments due under the Notes and to indemnify and hold harmless Tak Investments against any third party attempt to collect on the Notes, Plaintiffs can bring no claim for collection on the Notes against Tak Investments that is not itself a claim against themselves. Contrary to Van Den Heuvel's interpretation, the indemnification and hold harmless provisions of

the FBTA were not limited, or even applicable, to the payments due on loans to Van Den Heuvel and his companies that were secured by the Investment Notes. The indemnification and hold harmless provisions pertained to the principal and interest payments of the Notes themselves. To the extent Tak Investments is liable on the Investment Notes, that liability belongs to Plaintiffs. And having forced Tak Investments to incur attorneys' fees and costs in defending against their claim, Plaintiffs are liable to those amounts as well.

This interpretation of the FBTA is not, as Van Den Heuvel suggests, absurd. Even though this reading of the FBTA rendered the Notes ultimately worthless as to TPTC and the other Plaintiffs, the Investment Notes did serve an important purpose. The Notes were intended, as Van Den Heuvel testified, to provide a way for the OFTI Group to convey clean title to the assets the OFTI Group had agreed to convey to ST Paper pursuant to the Asset Purchase Agreement, and they apparently accomplished this purpose. Van Den Heuvel was able to convince his creditors, including his brother and various banks, to release the liens they held on the assets by pledging the Investment Notes as security instead. Based on the clear and unequivocal language of the Notes, I therefore conclude that Plaintiffs cannot recover on them and their claim must be dismissed. I further conclude that Tak Investments is entitled to its actual attorneys' fees and costs in defending against Plaintiffs efforts to recover on the Notes.

B. Other Defenses

Given my conclusion that Plaintiffs are barred from collecting on the Investment Notes by the provisions of the FBTA, there is no need to continue. For completeness, however, I will briefly address Tak Investments' other defenses to Plaintiffs' action.

1. Lack of consideration

Tak Investments argues that the Investment Notes are void for lack of consideration, noting that it received no payments in exchange for making the Investment Notes. Under the Uniform Commercial Code, the maker of a note has a defense to payment if the instrument is issued without consideration. Wis. Stat. § 403.303(2). The fact that Tak Investments did not receive money, however, does not mean that it did not receive consideration. "Consideration" means "any consideration sufficient to support a simple contract." *Id.* "In Wisconsin, consideration consists of either a detriment to the promisor or a benefit to the promisee." *Tinder v. Pinkerton Security*, 305 F.3d 728, 734 (7th Cir. 2002) (citing *NBZ, Inc. v. Pilarski*, 185 Wis. 2d 827, 520 N.W.2d 93, 96 (1994)). Although use of the phrase "for value received" creates a presumption that consideration exists, that presumption is rebuttable. *See Wortley v. Kieffer*, 70 Wis. 2d 734, 739–40, 235 N.W.2d 296, 299–300 (1975).

Here, it is clear that ST Paper, in which Tak also had a controlling interest, received a benefit in return for the Investment Notes issued by Tak Investments. Under Wisconsin law, a benefit to a third person can constitute sufficient consideration for a contract. *United States v. Bob Chrislaw, Inc.*, 341 F.2d 887, 889 (7th Cir. 1965); *see also* Wis. Stat. § 403.303(1)(e). Van Den Heuvel was able to use the Investment Notes as substitute collateral for old loans or as security for new loans, the proceeds of which he then used to pay off debt that was secured by the Oconto Falls tissue mill. ECF No. 89 at 8–13, 49–53; Ex. 13. Had it not been for the Investment Notes, Van Den Heuvel would not have been able to give ST Paper the clean title to the assets of Oconto Falls Tissue, Inc., and the transaction would not have gone through. Tak, as president of ST Paper, *see* Ex. 7 at 39, clearly benefitted from the Investment Notes he signed as president of Tak Investments. The Investment Notes were therefore not void for lack of consideration.

2. Plaintiffs do not possess the Notes

Tak Investments also argues that Plaintiffs cannot enforce the Notes because they do not possess them. In fact, the testimony at trial established that each of the Notes, except one, is currently held by either Van Den Heuvel's brother or by one of several banks for debt incurred by Van Den Heuvel and/or one of his companies. The fourth was not produced, although Plaintiffs offered evidence that a loan that it at one time secured at Associated Bank had been paid off. In any event, Plaintiffs didn't have possession of any of the Investment Notes.

In order to enforce an instrument such as a promissory note, a person must be "the holder of the instrument, a nonholder in possession of the instrument who has rights of a holder, or a person not in possession of the instrument who is entitled to enforce the instrument under s. 403.309 [relating to lost, destroyed, or stolen instruments] or 403.418(4) [relating to payment by mistake]." Wis. Stat. § 403.301. 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). Because the Notes were transferred to Van Den Heuvel's creditors, TPTC, the payee, is not a holder and has no right to enforce them. Wis. Stat. § 403.301. Nor do any of the other Plaintiffs. Only the creditors to whom the Notes were transferred as security for Van Den Heuvel's debts have standing to enforce them. Wis. Stat. § 403.204(3); *see also Curtis v. Mohr*, 18 Wis. 615, 618–19 (1864) ("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. The indorsement and delivery of the note, under such

circumstances, transfer to the holder the title to the instrument, and give him an original and paramount right of action upon it against the previous parties, so that he is not affected by the equities existing between them.").

Plaintiffs contend that the creditors in possession of the Notes did not have authority to enforce them because Plaintiff TPTC did not endorse them. ECF No. 93 at 3–6. The creditors held the Notes as security, Plaintiffs argue, but title remained with Plaintiffs. But Plaintiffs did not simply transfer possession of the Notes to their creditors; they also gave their creditors written assignments or consents to pledge the Notes as security for their debt. Exs. 12–15, 17. "For 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). Thus, it would appear that while Plaintiffs' creditors who were in possession of the Notes could have enforced them, Plaintiffs could not. Not only because, as noted above, Plaintiffs had promised to indemnify Tak Investments for any payments due on the Notes, but also because Plaintiffs were not in possession of them. For this reason also, Plaintiffs' claims against Tak Investments fail.

3. Statute of limitations

Finally, Tak Investments contends that Plaintiffs' action is barred by the six-year statute of limitations applicable to contracts. *See* Wis. Stat. § 893.43(1); *see also Hennekens v. Hoerl*, 160 Wis. 2d 144, 159 n.12, 465 N.W.2d 812 (1991) (noting "a creditor has six years to commence an action on a promissory note"). By their terms, the Investment Notes were made on April 16, 2007, and were payable in full three years later on April 16, 2010. Thus, Tak Investments contends that the six-year statute of limitations expired on April 16, 2016. Although Plaintiffs commenced the

current action on September 30, 2014, they did not add the claims for enforcement of the promissory notes until they moved for leave to amend their complaint on January 9, 2017, which motion was granted on April 3, 2017. ECF Nos. 44, 48. Because April 3, 2017, is more than six years after April 16, 2016, Tak Investments contends that Plaintiffs' enforcement action is barred.

I conclude that the claims are not barred by the statute of limitations. The record reveals that the $4.4 million Investment Note was amended as part of an assignment on March 5, 2008. Ex. 17 at 7. As amended, that Note was to mature on March 5, 2011. Thus, the statute of limitations would not have expired as to that Note until March 5, 2017. This was two months after Plaintiffs filed their motion for leave to amend, along with a copy of the complaint. Although I did not grant Plaintiffs' motion to amend until April 3, 2017, I am satisfied that for purposes of the statute of limitations, my ruling dates back at least to the day Plaintiffs filed their motion and proposed complaint.

Even as to the other notes, I conclude that the claims are not barred by the statute of limitations. Under Rule 15(c), an amendment of a complaint relates back to the date of the original pleading when "the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading." Fed. R. Civ. P. 15(c)(1)(B). The Investment Notes on which Plaintiffs sought to collect via the claim in their amended complaint, as well as Plaintiffs' attempt to recover for their nonpayment, arose out of the transaction set out in the original pleading. Indeed, they were attached to the original complaint and were central to the entire action. For the reasons set out above, Plaintiffs' claim to enforce the Notes fails, but the claim is not barred by the statute of limitations.

CONCLUSION

For the reasons set forth above, Tak Investments' oral motion for the amendment of pleadings is granted, and Tak Investments is directed to file its amended affirmative defense/counterclaim based on the indemnification provision of the FBTA within ten days of this order. Based on the indemnification and hold harmless provision of the FBTA and because Plaintiffs were not in possession of the Investment Notes, Plaintiffs' claim for enforcement of the Notes is dismissed. The Clerk is directed to enter judgment accordingly. As to Tak Investments' claim for actual attorneys' fees and costs, the parties are directed to Rule 54(d)(2) and the time limits set forth therein. Fed. R. Civ. P. 54(d)(2).

SO ORDERED this 19th day of March, 2018.

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

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

TISSUE TECHNOLOGY LLC, *et al.*,

Plaintiffs,

v. Case No. 14-C-1203

TAK INVESTMENTS LLC,

Defendant.

ORDER FOR AMENDED JUDGMENT

This matter comes before the court on Tak Investments, LLC's motion for a judgment awarding attorneys' fees and non-taxable costs and expenses. ECF No. 98. During a trial to the court on September 18–19, 2017, Tak Investments moved to amend its answer by adding an affirmative defense and/or counterclaim asserting that Plaintiffs agreed to jointly and severally indemnify and hold harmless Tak Investments under the terms of the parties' Final Business Terms Agreement. The court subsequently rendered its decision in a March 19, 2018 Decision and Order of Dismissal, which dismissed the case and directed entry of judgment in favor of Tak Investments. ECF No. 94. However, the court also granted Tak Investments' oral motion to amend, instructed that the amended affirmative defenses and counterclaim be filed within ten days, and authorized Tak Investments to seek its actual attorneys' fees and costs. *Id.* at 18.

Tak Investments timely filed its amended affirmative defenses and counterclaim on March 29, 2018. ECF No. 96. Thereafter, Tak Investments filed its motion to for attorneys' fees and non-taxable costs and expenses. ECF No. 98. Plaintiffs have responded to the counterclaim and motion for attorneys' fees, indicating that, although they object to the underlying decision and order for

dismissal, they do not object to the amount of attorneys' fees sought. ECF No. 102 ¶ 13; *see also* ECF No. 103 (letter stating that Plaintiffs take no position regarding Tak Investments' motion for attorneys' fees). Accordingly, Tak Investments' motion for attorneys' fees and non-taxable costs and expenses (ECF No. 98) will be **GRANTED.** The Clerk is directed to amend the judgment to include an award in Tak Investments' favor of attorneys' fees in the amount of $181,695.50 and other non-taxable costs and expenses in the amount of $6,288.93. The Clerk shall assess taxable costs in the usual manner.

SO ORDERED this 17th day of April, 2018.

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

THIS NOTE HAS NOT BEEN REGISTERED UNDER THE SECURITIES ACT OF 1933, AS AMENDED (THE "ACT"), OR UNDER THE SECURITIES LAWS OF ANY STATE. THIS NOTE MAY NOT BE TRANSFERRED OR RESOLD EXCEPT AS PERMITTED UNDER THE ACT AND THE APPLICABLE STATE SECURITIES LAWS, PURSUANT TO REGISTRATION OR EXEMPTION THEREFROM.

PROMISSORY NOTE

$3,000,000.00

April 16, 2007

FOR VALUE RECEIVED, the undersigned, TAK INVESTMENTS, LLC, a Delaware limited liability company ("Maker"), hereby promises to pay to the order of TISSUE PRODUCTS TECHNOLOGY CORP., a Wisconsin corporation ("Payee"), 1555 Glory Road, Green Bay, Wisconsin 54304, or such other place or designee as the Payee shall from time to time direct in writing to the Maker the principal sum of Three Million Dollars ($3,000,000.00). The unpaid principal balance of this Note shall bear interest at a rate per annum equal to eight percent (8%), per annum. Interest shall accrue from the date hereof and shall be payable on a semi-annual basis commencing on October 16, 2007. Principal hereon shall be due and payable in the amount of $300,000 on April 16, 2008, $300,000 on April 16, 2009 and $2,400,000 on April 16, 2010. Interest shall be calculated based on a year consisting of 360 days applied to the actual days on which there exists an unpaid balance hereunder.

Maker may prepay all or any part of the unpaid balance of this Note at any time, and from time to time, without premium or penalty. No partial prepayment shall relieve Maker of Maker's obligations to make the regularly scheduled payment(s) hereunder until the unpaid balance of this Note is paid in full.

No delay or omission on the part of Payee or any holder of this Note in exercising any right or option given to Payee or such holder shall impair such right or option or be considered as a waiver thereof or acquiescence in any default hereunder. Maker shall be obligated to pay to Payee any costs incurred by Payee in the collection of sums due hereunder by Maker including any attorneys' fees.

Maker hereby waives presentment, demand, notice of dishonor and protest and consents to any and all extensions and renewals hereof without notice. If maker becomes subject to any federal or state bankruptcy or insolvency action, without the requirement of notice or presentment on behalf of Payee to Maker, this outstanding principal and interest, and all other amounts due on and in accordance with this Note, shall become immediately due and payable.

Upon payment in full of this Note, Payee agrees to surrender this Note to Maker for cancellation thereof.

This Note shall be construed in accordance with the internal laws of the State of Wisconsin.

MAKER:

TAK INVESTMENTS, LLC

By: _____

(Title)

mw1233069_1

EXHIBIT

THIS NOTE HAS NOT BEEN REGISTERED UNDER THE SECURITIES ACT OF 1933, AS AMENDED (THE "ACT"), OR UNDER THE SECURITIES LAWS OF ANY STATE. THIS NOTE MAY NOT BE TRANSFERRED OR RESOLD EXCEPT AS PERMITTED UNDER THE ACT AND THE APPLICABLE STATE SECURITIES LAWS, PURSUANT TO REGISTRATION OR EXEMPTION THEREFROM.

PROMISSORY NOTE

$4,000,000.00

April 16, 2007

FOR VALUE RECEIVED, the undersigned, TAK INVESTMENTS, LLC, a Delaware limited liability company ("Maker"), hereby promises to pay to the order of TISSUE PRODUCTS TECHNOLOGY CORP., a Wisconsin corporation ("Payee"), 1555 Glory Road, Green Bay, Wisconsin 54304, or such other place or designee as the Payee shall from time to time direct in writing to the Maker the principal sum of Four Million Dollars ($4,000,000.00). The unpaid principal balance of this Note shall bear interest at a rate per annum equal to eight percent (8%), per annum. Interest shall accrue from the date hereof and shall be payable on a semi-annual basis commencing on October 16, 2007. Principal hereon shall be due and payable in the amount of $400,000 on April 16, 2008, $400,000 on April 16, 2009 and $3,200,000 on April 16, 2010. Interest shall be calculated based on a year consisting of 360 days applied to the actual days on which there exists an unpaid balance hereunder.

Maker may prepay all or any part of the unpaid balance of this Note at any time, and from time to time, without premium or penalty. No partial prepayment shall relieve Maker of Maker's obligations to make the regularly scheduled payment(s) hereunder until the unpaid balance of this Note is paid in full.

No delay or omission on the part of Payee or any holder of this Note in exercising any right or option given to Payee or such holder shall impair such right or option or be considered as a waiver thereof or acquiescence in any default hereunder. Maker shall be obligated to pay to Payee any costs incurred by Payee in the collection of sums due hereunder by Maker including any attorneys' fees.

Maker hereby waives presentment, demand, notice of dishonor and protest and consents to any and all extensions and renewals hereof without notice. If maker becomes subject to any federal or state bankruptcy or insolvency action, without the requirement of notice or presentment on behalf of Payee to Maker, this outstanding principal and interest, and all other amounts due on and in accordance with this [illegible], shall become immediately due and payable.

Upon payment in full of this Note, Payee agrees to surrender this Note to Maker for cancellation thereof.

This Note shall be construed in accordance with the internal laws of the State of Wisconsin.

MAKER:

TAK INVESTMENTS, LLC

By: _____

(Title)

mw1233069_1

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PROMISSORY NOTE

$4,400,000.00

April 16, 2007

FOR VALUE RECEIVED, the undersigned, TAK INVESTMENTS, LLC, a Delaware limited liability company ("Maker"), hereby promises to pay to the order of TISSUE PRODUCTS TECHNOLOGY CORP., a Wisconsin corporation ("Payee"), 1555 Glory Road, Green Bay, Wisconsin 54304, or such other place or designee as the Payee shall from time to time direct in writing to the Maker the principal sum of Four Million Four Hundred Thousand Dollars ($4,400,000.00). The unpaid principal balance of this Note shall bear interest at a rate per annum equal to eight percent (8%), per annum. Interest shall accrue from the date hereof and shall be payable on a semi-annual basis commencing on October 16, 2007. Principal hereon shall be due and payable in the amount of $440,000 on April 16, 2008, $440,000 on April 16, 2009 and $3,520,000 on April 16, 2010. Interest shall be calculated based on a year consisting of 360 days applied to the actual days on which there exists an unpaid balance hereunder.

Maker may prepay all or any part of the unpaid balance of this Note at any time, and from time to time, without premium or penalty. No partial prepayment shall relieve Maker of Maker's obligations to make the regularly scheduled payment(s) hereunder until the unpaid balance of this Note is paid in full.

No delay or omission on the part of Payee or any holder of this Note in exercising any right or option given to Payee or such holder shall impair such right or option or be considered as a waiver thereof or acquiescence in any default hereunder. Maker shall be obligated to pay to Payee any costs incurred by Payee in the collection of sums due hereunder by Maker including any attorneys' fees.

Maker hereby waives presentment, demand, notice of dishonor and protest and consents to any and all extensions and renewals hereof without notice. If maker becomes subject to any federal or state bankruptcy or insolvency action, without the requirement of notice or presentment on behalf of Payee to Maker, this outstanding principal and interest, and all other amounts due on and in accordance with this Note, shall become immediately due and payable.

Upon payment in full of this Note, Payee agrees to surrender this Note to Maker for cancellation thereof.

This Note shall be construed in accordance with the internal laws of the State of Wisconsin.

MAKER:

TAK INVESTMENTS, LLC

By: _____
(Title)

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PROMISSORY NOTE

$5,000,000.00

April 16, 2007

FOR VALUE RECEIVED, the undersigned, **TAK INVESTMENTS, LLC**, a Delaware limited liability company ("Maker"), hereby promises to pay to the order of **TISSUE PRODUCTS TECHNOLOGY CORP.**, a Wisconsin corporation ("Payee"), 1555 Glory Road, Green Bay, Wisconsin 54304, or such other place or designee as the Payee shall from time to time direct in writing to the Maker the principal sum of Five Million Dollars ($5,000,000.00). The unpaid principal balance of this Note shall bear interest at a rate per annum equal to eight percent (8%), per annum. Interest shall accrue from the date hereof and shall be payable on a semi-annual basis commencing on October 16, 2007. Principal hereon shall be due and payable in the amount of $500,000 on April 16, 2008, $500,000 on April 16, 2009 and $4,000,000 on April 16, 2010. Interest shall be calculated based on a year consisting of 360 days applied to the actual days on which there exists an unpaid balance hereunder.

Maker may prepay all or any part of the unpaid balance of this Note at any time, and from time to time, without premium or penalty. No partial prepayment shall relieve Maker of Maker's obligations to make the regularly scheduled payment(s) hereunder until the unpaid balance of this Note is paid in full.

No delay or omission on the part of Payee or any holder of this Note in exercising any right or option given to Payee or such holder shall impair such right or option or be considered as a waiver thereof or acquiescence in any default hereunder. Maker shall be obligated to pay to Payee any costs incurred by Payee in the collection of sums due hereunder by Maker including any attorneys' fees.

Maker hereby waives presentment, demand, notice of dishonor and protest and consents to any and all extensions and renewals hereof without notice. If maker becomes subject to any federal or state bankruptcy or insolvency action, without the requirement of notice or presentment on behalf of Payee to Maker, this outstanding principal and interest, and all other amounts due on and in accordance with this Note, shall become immediately due and payable.

Upon payment in full of this Note, Payee agrees to surrender this Note to Maker for cancellation thereof.

This Note shall be construed in accordance with the internal laws of the State of Wisconsin.

MAKER:

TAK INVESTMENTS, LLC

By: _____

(Title)

mw1233069_1

FINAL BUSINESS TERMS AGREEMENT

April 16, 2007

THIS FINAL BUSINESS TERMS AGREEMENT ("Agreement") is entered into on April 16, 2007, among SHARAD K. TAK ("Tak"), TAK INVESTMENTS, LLC ("Investments"), TISSUE TECHNOLOGY, LLC ("TTL"), PARTNERS CONCEPTS DEVELOPMENT, INC. ("PCDI"), OCONTO FALLS TISSUE, INC. ("OFTI") and TISSUE PRODUCTS TECHNOLOGY CORP. ("TPTC") [TTL, PCDI, OFTI and TPTC are collectively referred to as "OFTI Group"], and RONALD H. VAN DEN HEUVEL ("Van Den Heuvel").

NOW, THEREFORE, for good and valuable consideration the parties hereto agree as follows:

1. Interpretation and Definitions. The following terms used herein shall have the meanings as set forth below:

"Controlled Entity" shall mean any entity or business combination directly or indirectly controlled by Investments or directly or indirectly controlled by any entity or business combination directly or indirectly controlled by Investments.

"Investment Notes" shall mean the four Notes equaling $16,400,000 executed in favor of TPTC by Investments on the date hereof.

2. Covenants.

A. Investments shall not authorize or delegate the authority to any Controlled Entity to terminate the Sales and Marketing Agreement dated as of September 20, 2006 by and between TTL and ST Paper, LLC (an affiliate of Investments), as amended (the "Sales and Marketing Agreement").

B. Investments shall use commercially reasonable efforts to cause its Controlled Entity's to contract with Spirit Construction Services, Inc. ("Spirit") for any construction work within the paper and linerboard industry within the next three years.

C. Investments shall not authorize or delegate the authority to any Controlled Entity to directly or indirectly pay any distributions to their respective owners other than distributions necessary to satisfy the tax obligations of such owners related to income passed-through to such owners as a result of any such Controlled Entity being taxed as a partnership, S corporation or other pass-through entity.

D. If Investments or any Controlled Entity or any other entity controlled by Tak individually, constructs or owns any tissue and/or linerboard facility other than their facility in Oconto Falls, Wisconsin (or as part of any substantial addition to the Oconto Falls, Wisconsin facility), then Investments or Tak, as

EXHIBIT B

the case may be, shall cause such entity to enter into a sales and marketing agreement with a member of the OFTI Group on terms and conditions substantially similar to the Sales and Marketing Agreement.

E. Investments shall deliver the audited financial statements (and if unaudited, prepared in accordance with generally accepted accounting principles, consistently applied) for Investments and any Controlled Entity within one hundred twenty (120) days following the end of each such entity's fiscal year.

F. If there is any payment default, or other event of default that may be cured by the payment of money, by ST Paper, LLC under its credit facility arranged by Goldman Sachs Credit Partners, L.P., then Investments shall permit any member of the OFTI Group to cure any such default if Investments or any other Controlled Entity is not able to cure such default within sixty (60) days of notice thereof from the lenders (such exercise, a "Step-In Event"). Upon the occurrence of any Step-In Event, Investments shall immediately reimburse the contributing member of the OFTI Group for any payment(s) made by such member.

G. Through the third anniversary of the date of each Investment Note, the OFTI Group agrees to pay any payments due for interest or principal required per the terms of the Investment Notes. Each member of the OFTI Group jointly and severally agrees to indemnify 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 Investments resulting from the OFTI's Group's failure to make such payments, which shall include, without limitation, any claims made by any current or future holder of such Investment Notes against Investments relating to such interest payments. If such Investment Notes are deemed cancelled by the OFTI Group after the third anniversary of the date of the Investment Notes, the OFTI Group shall receive an undiluted 27% ownership interest of the highest class in Investments and such ownership interest shall be above and beyond the ownership interest in item 2.K of this agreement; provided however, if phase 2, 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 interests received from the Investment Notes.

H. Each member of the OFTI Group agrees if the Phase 2 Financing (as defined below) is consummated on or before the tenth (10th) anniversary of the date of each Investment Note, the unpaid principal balance of each Investment Note shall be automatically reduced to zero, Investments shall have no obligation to pay any unpaid principal or accrued interest thereunder, and each Investment Note shall be deemed cancelled. For purposes of this Agreement, "Phase 2 Financing" shall mean the consummation by Investments (whether individually or in conjunction with an affiliated entity) or Tak (or an entity controlled by Tak) of financing to acquire the existing facility and construct a

linerboard and/or tissue machine at the site presently owned by Eco Fibre, Inc. located at 500 Fortune Avenue in De Pere, Wisconsin using Spirit as general contractor with a minimum construction contract of $315,000,000.

I. Each member of the OFTI Group jointly and severally agrees to indemnify 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 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 any other current or future holder of such Investment Notes against Investments relating to the Investments Notes.

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

3. Termination: Upon all Investment Notes being paid in full or deemed cancelled through mutual written consent of both parties, covenants C,G ,H and I in Paragraph 2, above, shall terminate.

4. Transfer. For good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, TTL shall, upon Phase 2 Financing, transfer to Tak or his assignee(s) membership units representing a 22% non-voting (other than with respect to the issues identified in Paragraph 5, below) ownership interest in TTL (the "Subject Units"), free and clear of all liens, claims and encumbrances.

5. Limited Liability Company Agreement. The transfer contemplated by Paragraph 4, above, shall be made pursuant to an assignment agreement that shall contain representations, warranties, covenants and indemnities customary for a transfer of membership units in a limited liability company. Tak and his assignee(s) ownership of the Subject Units shall be governed by a Limited Liability Company Agreement that shall contain profit and loss allocations, distribution provisions, management control provisions, transfer restrictions, and other mutually acceptable representations, warranties, and covenants. Notwithstanding the foregoing, the Limited Liability Company Agreement shall reflect the following agreements:

(a) TTL shall not make or incur liability for, and no manager, officer or other representative shall agree to make or incur liability on TTL's behalf for, any disbursement or expenditure of more than $10,000 without the prior written approval of Tak or his designee. Further, TTL shall not make or incur liability for, and no manager, officer or other representative shall agree to make or incur liability on TTL's behalf for, disbursements or expenditures in the aggregate exceeding $1,000,000 during any calendar year without the prior written approval of Tak or his designee. In the event that

TTL makes or incurs liability for such expenditures without the prior written approval of Tak or his designee, the amount of any expenditures made in violation of the preceding sentence shall be deemed to be for the account of Van Den Heuvel and shall reduce his direct or indirect capital account accordingly.

(b) At all times while Van Den Heuvel owns, either directly or indirectly, any ownership interest in TTL or ST Paper (or any entities that own or control TTL or ST Paper), Van Den Heuvel shall faithfully, diligently and competently perform such services as are required of TTL by the Sales and Marketing Agreement and shall devote his full business time and attention to the affairs of TTL, and Van Den Heuvel shall not, directly or indirectly, render services to any other person or entity (other than VHC, Inc. or Spirit Construction Services, Inc.) without the prior written approval of Tak or his designee.

(c) At all times while Van Den Heuvel owns, either directly or indirectly, any ownership interest in TTL or ST Paper (or any entities that own or control TTL or ST Paper), Van Den Heuvel shall not incur liability (whether fixed or contingent) for, nor be personally responsible for the payment of (whether directly, jointly or by guaranty), financial obligations in excess of $5,000,000.

(d) The Subject Units shall continuously represent a 22% ownership interest for all purposes (i.e., profits, losses, distributions, management and control), and shall not be subject to dilution.

6. Publicity. Each party agrees not to make any formal statements regarding this transaction without prior approval by the other party, except as required by law.

7. Taxes. It is agreed that if there are negative tax consequences to either party arising from the structure of the transactions outlined above, that the parties will use their best efforts to minimize the negative tax consequences, without materially changing the terms of this Agreement.

8. Law. This Agreement shall be construed in accordance with Wisconsin law and venue for any disputes shall be a court of competent jurisdiction within the State of Wisconsin.

(REMAINDER OF THIS PAGE LEFT INTENTIONALLY BLANK)

IN WITNESS WHEREOF, the parties have executed this Final Business Terms Agreement as of the day, month and year first above written.

TISSUE TECHNOLOGY, LLC

By: _____
Name: Ronald H. Van Den Heuvel
Title: President

PARTNERS CONCEPTS DEVEOPMENT, INC.

By: _____
Name: Ronald H. Van Den Heuvel
Title: President

OCONTO FALLS TISSUE, INC.

By: _____
Name: Ronald H. Van Den Heuvel
Title: President

TISSUE PRODUCTS TECHNOLOGY CORP.

By: _____
Name: Ronald H. Van Den Heuvel
Title: President

_____
Ronald H. Van Den Heuvel

TAK INVESTMENTS, LLC

By: _____
Name: Sharad Tak
Title: Manager

_____
Sharad K. Tak

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