APPEAL 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
the Honorable William C. Griesbach Presiding,
Case No. 1:14-CV-01203-WCG

BRIEF OF DEFENDANT-APPELLEE TAK INVESTMENTS, LLC

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DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Civil Procedure and Circuit Rule 26.1, Defendant-Appellee Tak Investments, LLC provides the following information:

(1) The full name of every party the attorney represents in this case: Tak Investments, LLC.

(2) If the parties are corporations: (i) the identity of any parent corporation and (ii) any publicly held corporation owning 10% or more of its stock: Not applicable.

(3) The names of all law firms whose partners or associates have appeared for the parties in this case or are expected to appear for the party in this Court: The attorneys from Godfrey & Kahn, S.C. have appeared on behalf of Tak Investments, LLC.

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APPELLEE'S JURISDICTIONAL STATEMENT

Plaintiffs-Appellants' Jurisdictional Statement is not complete and correct. The district court had subject-matter jurisdiction in this contract case premised on diversity of citizenship of the parties pursuant to 28 U.S.C. § 1332.

Plaintiff-Appellant Partners Concepts Development, Inc. is a Wisconsin corporation and has its principal place of business in Wisconsin. Plaintiff-Appellant Oconto Falls Tissue, Inc. is a Wisconsin corporation and has its principal place of business in Wisconsin. Plaintiff-Appellant Tissue Products Technology Corp. is a Wisconsin corporation and has its principal place of business in Wisconsin. Plaintiff-Appellant Tissue Technology, LLC is a Wisconsin limited liability company. At the time of the filing of this lawsuit, the members of Tissue Technology, LLC were Ronald Van Den Heuvel, Kelly Van Den Heuvel, and Daniel Platkowski, all citizens of the State of Wisconsin.

Defendant-Appellee Tak Investments, LLC is a Delaware limited liability company. At the time of the filing of this lawsuit, the members of Tak Investments, LLC were Tak Investments, Inc., a Maryland corporation with a principal place of business in Maryland, and Mahinder Tak, a citizen of the State of Maryland.

In their Complaint, Plaintiffs-Appellants sought to enforce a Final Business Terms Agreement requiring a transfer of a 27% interest in Tak Investments, LLC based on the deemed cancellation of four promissory

notes in the principal amounts of $4,000,000, $3,000,000, $4,400,000 and $5,000,000. The amount in controversy exceeds $75,000.

The Court of Appeals has jurisdiction pursuant to 28 U.S.C. § 1291 as the appeal filed on April 18, 2018 is from the April 18, 2018 judgment of the district court.

STATEMENT OF THE ISSUES

1. Did the district court err in granting summary judgment against the Plaintiffs-Appellants on their claim for specific performance of the Final Business Terms Agreement's transfer provision where Tak Investments, LLC did not own any of its own membership units and, therefore, could not transfer them to anyone?
2. Did the district court err in concluding, after a bench trial on an alternative contract theory, that the indemnity provisions of the Final Business Terms Agreement precluded the Plaintiffs-Appellants from seeking to enforce the Investment Notes?
3. Did the district court err in concluding, after the same trial to the court, that the Plaintiffs-Appellants' failure to establish possession of any of the original Investment Notes precluded them from enforcing the Investment Notes?
4. Could the judgment of the district court be affirmed on the alternative basis that the Plaintiffs-Appellants' claim to enforce the Investment Notes against Tak Investments, LLC was barred by the statute of limitations?

STATEMENT OF THE CASE

This case presents a dispute, one of many, between companies affiliated with Ronald Van Den Heuvel and companies affiliated with Sharad Tak. In 2007, one of Mr. Van Den Heuvel's companies sold the assets of a paper mill in Oconto Fall, Wisconsin, to one of Mr. Tak's companies. Separate from the transaction for the sale of the paper mill, the Plaintiffs-Appellants (also referred to as the "OFTI Group") and Defendant-Appellee Tak Investments, LLC ("Tak Investments") entered into a Final Business Terms Agreement ("FBTA"). On the same day, Tak Investments made four promissory notes (referred to by the parties and here as the "Investment Notes") in the following amounts payable to one Plaintiff-Appellant, Tissue Products Technology Corporation: $4,000,000, $3,000,000, $5,000,000, and $4,400,000 – all due in 2010.

In 2012, the Plaintiffs-Appellants sued Tak Investments under the FBTA in an effort to enforce a single provision of that agreement mandating that Tak Investments transfer 27% of an interest in itself to the Plaintiffs-Appellants after they deemed and declared cancelled the four Investment Notes. *Tissue Technology, LLC, et al. v. Tak Investments, LLC*, No. 12-CV-1305 (E.D. Wis. filed Dec. 21, 2012). That case was dismissed on summary judgment by the district court, concluding that the Appellants had assigned at least one of the four promissory notes to a third party, precluding them from satisfying a condition precedent for any FBTA transfer obligation. After the dismissal of the 2012 lawsuit,

the Plaintiffs-Appellants obtained a document purporting to assign back to one Plaintiff-Appellant the note that had been previously assigned to a third party.

Then, in 2014, the Plaintiffs-Appellants filed this lawsuit, seeking the same relief they sought two years earlier in the prior case. They alleged that the OFTI Group had notified Tak Investments on August 15, 2014 that the four Investment Notes were deemed cancelled and that, pursuant to the FBTA, Tak Investments was required to transfer an undiluted 27% ownership interest to the OFTI Group. (R. 1.)

The parties filed cross motions for summary judgment. (R. 24, 26.) Tak Investments sought judgment alleging that performance of the agreement term requiring the transfer of a 27% stake in itself was not possible. Tak Investments did not own, and never has owned, any shares in itself. The district court found this a sufficient basis to dismiss the Plaintiffs-Appellants' claims for specific performance. (R. 40, A-App. 001-003.) The relief sought was not possible. The district court did, however, provide the Plaintiffs-Appellants an opportunity to amend their pleadings to seek alternative relief.

On January 9, 2017, the Appellants filed a motion for leave to amend with an Amended Complaint that no longer sought the 27% transfer from Tak Investments of its own interest, but instead sought that relief from Sharad Tak, individually. (R. 43.) Beyond this claim against Mr. Tak, the Plaintiffs-Appellants also sought, for the first time,

to enforce the very Investment Notes they previously claimed to have been cancelled to trigger the 27% transfer requirement. (R. 43-1.)

Tak Investments opposed the Plaintiffs-Appellants' motion for leave to amend on various bases, including that the amendment would be futile given the statute of limitations governing the claim for enforcement of the promissory notes. (R. 46.) The district court granted the motion for leave to amend, allowing the Plaintiffs-Appellants to proceed on both the claim for specific performance of the transfer provision against Mr. Tak personally and for enforcement of the promissory notes against Tak Investments. (R. 48.)

Just prior to trial, almost a year ago, the Plaintiffs-Appellants abandoned any claim for enforcement of the FBTA transfer obligation. (R. 81.) At the beginning of the trial, all claims against Mr. Tak were dismissed with prejudice, leaving only Plaintiffs-Appellants' claim for enforcement of the Investment Notes against Tak Investments. (R. 87.)

At trial, the evidence established that the Plaintiffs-Appellants were not in possession of any of the four Investment Notes they sought to enforce. Instead, third-party creditors of the Plaintiffs-Appellants testified concerning their possession of the original promissory notes as a result of various assignments or security interests granted the creditors by the Plaintiffs-Appellants. The documentary evidence admitted at trial

also established the existence of assignments of the negotiable instruments to third parties.[1]

After hearing the evidence and considering post-trial submissions, on March 19, 2018, the district court dismissed the Plaintiffs-Appellants' claims for two different reasons. (R. 94, A-App. 002.) First, the district court found that the Plaintiffs-Appellants had failed to establish they had standing to enforce the promissory notes given the possession of the notes by third party creditors. Additionally, the district court concluded that the FBTA's indemnification provisions precluded the Plaintiffs-Appellants from seeking to enforce the notes against Tak Investments, the beneficiary of those provisions.

As a result, the district court directed that Tak Investments file a formal counterclaim asserting indemnification. After Tak Investments filed that and a motion for its attorney's fees pursuant to Rule 54, the district court granted the request for fees, and it entered an Amended Judgment on April 19, 2018 in Tak Investments' favor in the amount of $181,695.50 in attorneys' fees and $6,288.93 for other non-taxable costs and expenses. (R. 96, 98, 107.)

Throughout this extended litigation, the district court gave the Plaintiffs-Appellants repeated opportunities to make their case. First,

[1] Also on the morning of the first day of the trial, Tak Investments moved for leave to amend its pleadings to assert a counterclaim for indemnification based upon the FBTA. The court granted the motion for leave to amend and allowed Tak Investment to assert that counterclaim. (R. 87.)

after dismissing the initial action, the court suggested that the plaintiffs could refile it. *Tissue Technology, LLC, et al. v. Tak Investments, LLC*, No. 12-CV-1305 (E.D. Wis., Aug. 8, 2014). They did, reasserting an equitable claim to force the transfer of a 27% interest in Tak Investments – a claim that depended on the cancellation of the Investment Notes. Then, having found that claim unsupportable, the district court permitted the amendment of the complaint to allege a breach of the same notes that the Plaintiffs-Appellants themselves had deemed cancelled. In the process, the district court declined to adopt Tak Investments' statute of limitations argument by relying, instead, on the relation back provision of Rule 15(c).

The bench decision, after a two-day trial in which both of the principals testified, ended nearly five years of federal district court litigation. The fault for the outcome lies not with the district court, nor should this Court permit the resurrection of a case that should have ended well before now.

SUMMARY OF ARGUMENT

The Plaintiffs-Appellants' brief suffers from the same inherent conflict that has plagued the case from the outset. They long have maintained that they themselves had deemed the Investment Notes cancelled to trigger the 27% equitable transfer provision of the FBTA. That is the first argument in their brief. They lost on that issue on summary judgment with respect to Tak Investments. Then, having amended the complaint to name Sharad Tak individually, they maintained the equitable argument that they had deemed the Investment Notes cancelled. Only on the eve of trial did they abandon that argument – stipulating to the dismissal with prejudice of Sharad Tak – and seek the notes' enforcement, the position argued in the balance of the brief.

They cannot have it both ways: either the notes have been deemed cancelled, in which case they cannot be enforced, or they are not deemed cancelled, in which case they cannot support the equitable argument. This is not just a matter of pleading alternative remedies. The two positions cannot co-exist.

This case has followed a tortuous path, but one unmarked by reversible error at any stage. First, the district court did not err in granting summary judgment on Plaintiffs-Appellants' claim for specific performance of the FBTA's transfer provision. The undisputed facts established that Tak Investments did not own itself and, therefore, was not capable of the performance sought.

Next, after a bench trial, the district court made factual findings and concluded that the Plaintiffs-Appellants did not possess any of the four Investment Notes. As a result, the Plaintiffs-Appellants lacked standing to enforce them. The district court's factual findings were not clearly erroneous, and it correctly applied Wisconsin law concerning standing to enforce a promissory note.

After the bench trial, the district court also found the indemnity provisions of the FBTA – provisions that required the Plaintiffs-Appellants to indemnify Tak Investments against *any* effort to enforce the Investment Notes – to preclude any recovery. The district court's interpretation of the FBTA's plain language was not erroneous.

Finally, even if this Court were to find a basis to reverse the district court on any of the issues raised by the Plaintiffs-Appellants, the judgment of the district court should be affirmed on the basis of the statute of limitations governing Plaintiffs-Appellants' claim to enforce the Investment Notes. Though the district court declined to decide the matter on this basis, finding that the allegations of the Amended Complaint "related back" to the original complaint. Yet an appropriate reading of the Plaintiffs-Appellants' new allegations for enforcement of the Investment Notes can only lead to the conclusion that the amendment did not qualify for purposes of Rule 15(c), making this claim untimely given the fact the Investment Notes matured in 2010.

STANDARD OF REVIEW

The Court review's a district court's ruling on summary judgment *de novo*. *Avina v. Bohlen*, 882 F.3d 674, 678 (7th Cir. 2018) (citation omitted). Summary judgment is appropriate where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

After a bench trial, the Court reviews "the district court's factual findings for clear error and its conclusions of law *de novo*." *Coexist Found., Inc. v. Fehrenbacher*, 865 F.3d 901, 906 (7th Cir. 2017) (citing Fed. R. Civ. P. 52(a)(6); *Kelley v. Chicago Park Dist.*, 635 F.3d 290, 295-96 (7th Cir. 2011)). In connection with its review of factual findings, the Court gives "due regard to the trial court's opportunity to judge the witnesses' credibility." *Id.* (citing Fed. R. Civ. P. 52(a)(6)).

ARGUMENT

I. The Trial Court's Conclusion as a Matter of Law that Tak Investments, LLC Could Not Transfer an Ownership Interest in Itself Was Not in Error

The district court entertained cross-motions for summary judgment on the OFTI Group's claim for specific performance of the FBTA's provision requiring a transfer by Tak Investments of a 27% interest in itself to the OFTI Group. Tak Investments' motion was premised on the fact that the entity did not own itself and could not therefore provide the relief sought. On the undisputed facts before it, the district court agreed. Since the only owners of the limited liability company were Mahinder Tak and Tak Investments, Inc., none of whom were parties to the action, the relief sought by the OFTI Group was not possible. (R. 40 at 3, A-App. 001-003.) Thus, the district court denied the OFTI Group's motion for summary judgment and granted Tak Investments summary judgment with respect to the claim for specific performance.

The OFTI Group's recitation of the law in its brief concerning limited liability companies in Delaware and Wisconsin does nothing to call into question the district court's conclusion. (Plaintiffs-Appellants' Br. at 9-11.) The district court's holding is based on the simple reality that Tak Investments could not be ordered to transfer an interest it did not possess.

A. The District Court Appropriately Concluded That The LLC Does Not and Cannot Own Itself

Nothing presented on summary judgment called into question the undisputed fact that Tak Investments did not own any of its own membership units. The OFTI Group's own Complaint alleged that Sharad Tak and his wife owned Tak Investments, LLC. (R. 1 at 5.) None of the evidence before the district court on summary judgment established that Tak Investments owned itself or shares in itself in any way.

B. The District Court Properly Dismissed the Claim for Specific Performance Since the Performance Sought was Impossible

The equitable remedy of specific performance is a matter for the trial court's discretion. *Ash Park, LLC v. Alexander & Bishop, Ltd.*, 2010 WI 44, ¶ 32, 324 Wis. 2d 703, 783 N.W.2d 294 (citing *Anderson v. Onsager*, 155 Wis. 2d 504, 513, 455 N.W.2d 885 (1990)). "Further, impossibility of performance is a defense to specific performance: '[W]here it would be impossible for a party to perform the contract, specific performance will not be granted.'" *Id.* ¶ 39 (quoting *Anderson*, 155 Wis. 2d at 512). The district court could not order Tak Investments to transfer the interest the OFTI Group sought for the simple reason it does not have such an interest to transfer. *See Kennedy v. Hazelton*, 128 U.S. 667, 671 (1888) ("A court of chancery cannot decree specific

performance of an agreement to convey property which has no existence, or to which the defendant has no title.").

The OFTI Group, in its brief, notes that various statutes governing limited liability companies in Wisconsin and in Delaware do not preclude a limited liability company from issuing shares in itself. True enough. But such statutes do not compel their creation or permit a court to compel their creation.

In short, state law does not make the relief the OFTI Group sought against Tak Investments possible. No statute authorizes the transfer of membership interests that do not exist. Nor could any statute authorize the transfer of a member's ownership interest in a limited liability company without violating the property rights of the member, especially when they are not parties. Accordingly, because Tak Investments, LLC does not possess any membership units in itself and its members cannot be compelled to transfer their interest, the relief the OFTI Group sought was not possible.

The record on summary judgment established that the sole members of Tak Investments were Mahinder Tak and Tak Investments, Inc. Thus, the OFTI Group could not become members of Tak Investments absent their consent. As the district court observed:

> 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).

(R. 40 at 4, A-App. 001-004.)

Even if it were possible to order any individual or Tak Investments, Inc. to "consent" to the grant of a membership interest to the Plaintiffs-Appellants, any such order would deprive them of their property interests without due process. As Delaware law recognizes, "A limited liability company interest is personal property." 6 Del. Code § 18-701 (2018).

The OFTI Group notes a number of statutes in an effort to illustrate the possibility of adding members to a limited liability company. While it may be *possible* to add members to a limited liability company, it is not possible to do so without diluting the ownership interests of the other members of the limited liability company. The district court's conclusion on summary judgment – that Tak Investments did not own any of its own membership units and that, accordingly, it could not be ordered to specifically perform the FBTA's transfer provision – was not erroneous.

II. The Trial Court's Conclusion That the Final Business Terms Agreement Precluded Plaintiffs' Attempt to Enforce the Notes Was Not in Error

The very agreement under which the OFTI Group has based its claims, the FBTA, also contained indemnity provisions that precluded the OFTI Group from attempting to enforce the four Investment Notes

against Tak Investments. Based upon this plain contractual language, the district court, after a bench trial, found that the recovery sought by the OFTI Group was precluded by the FBTA.

The OFTI Group's obligation to indemnify Tak Investments arises from two separate paragraphs of the agreement, the same agreement upon which the OFTI Group initially brought this case. 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.

(A-App. 004-006.)

Next, paragraph 2(I) sets forth additional indemnification terms regarding any efforts to enforce the Investment Notes by, explicitly, any member of the OFTI Group or any 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 enforcement of the pledge described above), or any enforcement of or other claims made [sic] any other current or future holder of such Investment Notes against [Tak] Investments relating to the Investment Notes.

(A-App. 004-007.)

In light of the plain language, even if the OFTI Group were to prevail on their claim for enforcement of the Investment Notes, the OFTI Group indemnified Tak Investments from any such claim. The net result would be a wash for the Plaintiffs, though, of course, Tak Investments' attorneys' fees, costs and expenses could be (and were) awarded to it as well under this provision. Thus, the district court concluded: "Considered together with the terms of the FBTA, it appeared that the Investment Notes had no value to the OFTI Group." (R. 94 at 9, A-App. 002-009.)

The district court's interpretation of the indemnification and hold harmless provisions of the FBTA was not erroneous. The contractual provisions plainly resulted in an indemnification by the OFTI Group of Tak Investments for any attempt by any party to enforce the Investment Notes. While the OFTI Group surely regrets the inclusion of these provisions in the FBTA, under Wisconsin law "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). "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 Int'l v. Midwest Exp. Airlines, Inc.*, 279 F.3d 553, 556 (7th Cir. 2002) (applying Wisconsin law).

The district court concluded that the plain meaning of the FBTA was that the OFTI Group agreed to make all payments that became due on the Investment Notes for a three-year term and, in addition, to indemnify and hold Tak Investments harmless against any damages resulting from enforcement of the Investment Notes. (R. 94 at 12, A-App. 002-012.)

> 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.

(*Id.*) Ultimately, this meant that "[t]o the extent Tak Investments is liable on the Investment Notes, that liability belongs to Plaintiffs." (*Id.* at 13.) Finally, in light of the indemnity provision, the district court noted that the OFTI Group would be liable for Tak Investments attorneys' fees and costs, which were awarded in the Amended Judgment.

While it may well be, as Plaintiffs-Appellants contend, that the FBTA contained some "awkward contractual language," (Plaintiffs-

Appellants' Br. at 14), this does not permit a court to ignore the plain meaning of the agreement. That includes the explicit indemnities fatal to the belated efforts to enforce the Investment Notes.

III. The Trial Court's Conclusion That the Plaintiffs-Appellants Did Not Hold the Notes and, Therefore, Were Not Entitled to Enforce Them, Was Not in Error.

After the bench trial, the district court found that the Plaintiffs-Appellants' attempt to enforce the four Investment Notes failed because they failed to establish that they held the Investment Notes. Therefore, they lacked standing to enforce them. This conclusion was based on the undisputed evidence that the Plaintiffs-Appellants did not hold any of the four Investment Notes. All had been assigned to third parties.

A. The OFTI Group Failed to Produce the Original Investment Notes at Trial

Three of the four original Investment Notes were physically brought to court at trial, though none of them by the Plaintiffs-Appellants. Instead, creditors of the OFTI Group appeared with the original documents and testified that they, not the OFTI Group, were holding them – as collateral for the indebtedness of certain members of the OFTI Group, Ron Van Den Heuvel, or other entities affiliated with him. At no time during the trial did the fourth Investment Note appear, though the documents admitted in evidence establish that the "missing" note was still held by yet another creditor, Associated Bank. (R. 88-1 Pls.' Ex. 14., Supp. App. 13-22.)

The Plaintiffs-Appellants' position contradicts itself in a single paragraph. They state that they "actually held the notes but had transferred the notes for collateral purposes....[They] were the holders of notes despite having permitted the creditors to physically maintain the notes...." (Plaintiffs-Appellants' Br. at 6.) They cannot hold notes they have transferred.

Two of the Investment Notes (one in the amount of $3 million and the other for $5 million) were produced by David Van Den Heuvel, President of VHC, Inc. ("VHC"). (R. 90, Sept. 18. 2017 Tr. at 8:3-23; 10:11-13, Supp. App. 2, 4.) David, the brother of the Plaintiffs' principal, Ron Van Den Heuvel, testified that he held these two original notes as collateral for money Ron Van Den Heuvel owed VHC. (R. 90, Sept. 18. 2017 Tr. at 8:7-8; 9:2-5, Supp. App. 2, 3.)

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

A Yes.

(R. 90, Sept. 18. 2017 Tr. at 8:18-9:5, Supp. App. 2, 3.)

David Van Den Heuvel also stated that his brother owed his company approximately $150 million altogether and that VHC would return the two notes assigned to it only if Ron Van Den Heuvel paid VHC all that he owed the company. (R. 90, Sept. 18. 2017 Tr. at 16:12-15; 17:9-12 , Supp. App. 5-6.) David also testified that if there were ever any collection of money purportedly due on the two Tak Investment notes, VHC would have a right to be paid $8 million of that amount.

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

A Absolutely.

(R. 90, Sept. 18. 2017 Tr. at 17:13-18, Supp. App. 6.) Thus, in David Van Den Heuvel's undisputed account, VHC actually held – and holds – the two notes. (R. 90, Sept. 18. 2017 Tr. at 9:1-5; 18:17-21, Supp. App. 3, 7.)

Like this testimony, the documents admitted at trial also reflect the fact that on July 12, 2007, the Investment Notes in the amount of $3 and $5 million were pledged by Tissue Products Technology Corp. to VHC. (R. 88-1, Def.'s Ex. 1003 , Supp. App. 29-31.) These documents reflect the debt owed by Plaintiffs-Appellants. Another document maintained by VHC reflected the fact that the notes of $3 and $5 million were "assigned to" VHC. (R. 88-1, Def.'s Ex. 1002, Supp. App. 28.) All of the evidence

admitted at trial concerning the $3 and $5 million Investment Notes leaves no doubt: they were – and are – held by, and in the possession of VHC, not the Plaintiffs-Appellants.

Another Investment Note, for $4,400,000, was produced at trial by Nicolet National Bank as a result of an assignment of the note by Plaintiffs-Appellants to Baylake Bank prior to the merger between the two banks. Brad Hutjens, an employee of Nicolet, produced the original of the $4,400,000 note. (R. 90, Sept. 18. 2017 Tr. at 79:2-14 , Supp. App. 8.) Mr. Hutjen's testimony also established that Ron Van Den Heuvel was indebted to Baylake Bank and that the $4,400,000 Investment Note was collateral for that indebtedness. (R. 90, Sept. 18. 20171 Tr. at 81:3-82:11 , Supp. App. 10-11.) Nicolet National Bank continues to hold the Investment Note as security. (Day 1 Tr. at 82: 9-11.) ("Q: Is it – is this note then still assigned to Baylake Bank as we sit here today. A: Yes, it is."). The undisputed documentary evidence before the Court also established that Tissue Technology, LLC originally pledged the $4,400,000 Investment Note to Baylake Bank and that a debt remains. (R. 88-1, Pls.' Ex. 15 , Supp. App. 23-27; R. 88-1 Def.'s Exs. 1012-1015, Supp. App. 32-57.)

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

The OFTI Group was unable to produce at trial an original of the $4 million Investment Note. The only evidence established that it was in the possession of Associated Bank. Among the documents from Associated Bank was a "Collateral Receipt," reflecting the grant by Tissue Products Technology Corp. of a "Promissory Note executed by Tak Investments, LLC and payable to the order of Tissue Products Technology Corp. in the original amount of $4,000,000 dated April 16, 2007." (R.88-1, Pls.' Ex. 14, Supp. App. 13-22.) Associated Bank also maintained a "Collateral Pledge and Assignment of Note," executed on April 24, 2007, through which Tissue Products Technology Corp. "irrevocably and unconditionally collaterally assign[ed] and pledge[d] its entire right, title and interest in and to and grant[ed] a security interest in that certain $4,000,000 Promissory Note" made by Tak Investments. (R. 88-1, Pls.' Ex. 14, Supp. App. 13-22.)

Finally, while Ron Van Den Heuvel testified that Associated Bank filed a document purporting to release its security interest in the note on February 28, 2017, more than six years after the note's maturity, the bank did not send him the original. He did not have it. (R. 90, Sept. 18. 2017 Tr. at 182:6-12, Supp. App. 12.) Thus, the only evidence concerning the possession of the $4 million note showed it in the possession of Associated Bank, not the Plaintiffs.

B. Without Possession of the Investment Notes, the OFTI Group Lacked Standing to Even Try to Enforce Them.

A promissory note is a negotiable instrument. See Wis. Stat. § 403.104 (2015-16); *Jax v. Jax*, 73 Wis. 2d 572, 587-88, 243 N.W.2d 831 (1976) ("As a 'negotiable instrument' within the meaning of sec. 403.104, Stats., the note and actions to recover on it are governed by the terms of the Uniform Commercial Code as adopted in this state."). The UCC, as adopted in Wisconsin, limits the parties who may seek to enforce such an instrument.

Section 403.301 defines the term: "'person entitled to enforce' an instrument means the holder of the instrument, a nonholder in possession of the instrument who has the rights of a holder, or a person not in possession of the instrument who is entitled to enforce the instrument under s. 403.309 or 403.418(4)." A "holder" is "[t]he person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession." Wis. Stat. § 401.201(2)(km)1. *See also PNC Bank, N.A. v. Spencer*, 763 F.3d 650, 654 (7th Cir. 2014) (under Wisconsin law, holder of note entitled to enforce note) (citation omitted); *PNC Bank, N.A. v. Bierbrauer*, 2013 WI App 11, ¶ 10, 346 Wis. 2d 1, 827 N.W.2d 124; *PNC Bank, N.A. v. Spencer*, 2016 WI App 50, ¶ 10, 370 Wis. 2d 260, 881 N.W.2d 358 (unpublished) ("Under Wisconsin law, the holder of a note, meaning a person who is in actual possession of the original note, is entitled to

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

There was not a scintilla of evidence to suggest that Plaintiffs-Appellants were in possession of any of the Investment Notes they sued upon. In fact, all of the evidence established that third parties – to which the Plaintiffs had transferred the Investment Notes as security – held them. The issue is not whether the banks and individuals holding the notes had or have the right to enforce them, *see* Plaintiffs-Appellants' Br. at 17, but whether the Plaintiffs-Appellants have the right to enforce the notes. Since they do not hold them, they cannot enforce them. Their failure to establish possession was fatal to their claim.[2] It is a common sense, statutory threshold burden they have failed to meet.

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

> An instrument is a reified right to payment. The right is represented by the instrument itself. The right to payment

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

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

UCC § 3-203, official cmt. 1 (Am. Law Inst. & Unif. Law Comm'n 2002). The Plaintiffs-Appellants transferred all four of the Investment Notes they attempt to enforce, and only the transferees have a right to enforce the notes. The Plaintiffs-Appellants do not.

The transfer of the Investment Notes – made in an attempt to placate creditors – were "endorsements" for purposes of Article 3 of the UCC, resulting in a negotiation of each of the Investment Notes. *See* Wis. Stat. § 403.201 (negotiation occurs with transfer of possession of an instrument to a person who becomes its holder); Wis. Stat. § 403.204 (endorsement is a signature on the instrument or paper affixed to it for purpose of negotiating the instrument). Section 403.204 states that "[f]or the purpose of determining whether the transferee of an instrument is a holder, an endorsement that transfers a security interest in the instrument is effective as an unqualified endorsement of the instrument." Wis. Stat. § 403.204(3).

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

payee of the note, is the only holder capable of enforcing or negotiating the note:

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

UCC § 3-204, official cmt. 2.

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

Other cases, long ago, established that a pledgee who holds a note as security has a right to bring an action upon the note, not a pledgor. "We suppose the law to be perfectly well settled that where a person takes a negotiable promissory note before maturity in the usual course of business, even as collateral security, and makes advances at the time upon the credit of such note, he is considered by all the authorities as a *bona fide* holder for value, within the rule for the protection of

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

The law is well settled: one cannot enforce a promissory note without proving possession of it. The evidence demonstrated that only third parties held the original notes; none of the Plaintiffs-Appellants did.

IV. The Judgment of the District Court Can Also Be Affirmed Because Plaintiffs-Appellants' Claim to Enforce the Investment Notes Was Barred by the Statute of Limitations

The Plaintiffs-Appellants begin their brief with a misstatement. They "brought this action," they contend, "to enforce the Final Business Terms Agreement and the notes…." (Plaintiffs-Appellants' Br. at 3.) Nowhere in the pleadings, until the belatedly Amended Complaint, did the Plaintiffs-Appellants ever seek to "enforce…the notes." And they did so only after the statute of limitations had expired.

The Plaintiffs-Appellants picked their remedy early. They "cancelled the notes and demanded their 27% [equitable] interest." (Plaintiffs-Appellants' Br. at 5.) That remained their position until virtually the eve of trial when they, finally and belatedly, sought to

enforce the promissory notes themselves. The first time the Plaintiffs-Appellants ever filed a pleading seeking to enforce the Investment Notes was their motion for leave to amend the complaint, filed on January 9, 2017. (R. 43.) On April 3, 2017, the district court granted the motion for leave to amend, and the Amended Complaint was filed as of that day. (R. 48, 49.)

Whether the newly-asserted claim for enforcement of the Investment Notes is barred by the statute of limitations turns on the question of whether the amendment related back to the original complaint. If it did, as the district court concluded, incorrectly, the claim would not be barred. Tak Investments respectfully submits that the district court erred in deciding this issue. Therefore, should the Court conclude that the judgment should otherwise be reversed, Tak Investments requests that the Court find that the judgment should be affirmed on this basis alone.

Wisconsin law, which applies to the Investment Notes, provides that a contract claim must be brought within six years or it will be barred. Wis. Stat. § 893.43(1) ("[A]n action upon any contract … shall be commenced within 6 years after the cause of action accrues or be barred."). Plaintiffs-Appellants are seeking to enforce promissory notes against Tak Investments, and the determinative date for purposes of the statute of limitations is the date the notes matured. The maturity of a promissory note is the date upon which a claim for breach of the notes

"accrues" under the statute. *See Hennekens v. Hoerl*, 160 Wis. 2d 144, 159 & n.12, 465 N.W.2d 812 (1991) (claim for breach of promissory note accrues when note due).

The Amended Complaint was not proposed by the Plaintiffs until January 9, 2017 (R. 43-1), and not accepted as filed until April 3, 2017 (R. 49). Yet the contract claim against Tak Investments for an alleged breach of the Investment Notes was not asserted before April 16, 2016, six years after the date of accrual, which was April 16, 2010, the date of maturity. Accordingly, the claim is barred by Wis. Stat. § 893.43.

Almost any statute of limitations issue triggered by an amended complaint implicates the "relation back" doctrine and Rule 15(c). Here, there are two undisputed points in time: the accrual of a potential contract claim and the filing of the amended complaint. Those dates are, again without dispute, more than six years apart. The Plaintiffs-Appellants did indeed file a complaint before the expiration of that six-year period, but it was not a complaint that asserted claims based on any failure to pay the Investment Notes. The question then presented is whether the original complaint provides a safety net for the failure, across the years, to allege a breach of the notes.

The new claim asserted after the district court granted leave to amend – to enforce the Investment Notes they had deemed cancelled – is not bound by the same common core of facts and law that gave rise to the Plaintiffs-Appellants' equitable claims pursuant to the FBTA. How

can one equitable claim, premised on the negation of another claim asserted later in time (i.e., the cancellation of the Investment Notes), have the same factual core as the claim to enforce the same Investment Notes? To ask the question illustrates the implausibility of contending that the new claim for breach of the Investment Notes is sufficiently related to relate back to the initial claim for the FBTA transfer claim.

Relation back is appropriate only when an amendment merely restates the same factual allegations of the original complaint and claims that those facts support an additional theory of recovery. *See Henderson v. Bolanda*, 253 F.3d 928, 931 (7th Cir. 2001) ("Generally, an amended complaint in which the plaintiff merely adds legal conclusions or changes the theory of recovery will relate back to the filing of the original complaint if 'the factual situation upon which the action depends remains the same and has been brought to defendant's attention by the original pleading.'") (quoting 6A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1497, at 95 (2d ed. 1990)).[3] Relation back cannot be used as a means to bootstrap time-barred claims onto viable actions where such claims are not based on the same factual allegations. *In re Stavriotis*, 977 F.2d 1202, 1206 (7th Cir. 1992) (holding that since separate tax years imply separate tax claims, "a

[3] S*ee also Bularz v. Prudential Ins. Co. of Am.*, 93 F.3d 372, 379 (7th Cir. 1996) (relation back permitted "where an amended complaint asserts a new claim on the basis of the same core of facts, but involving a different substantive legal theory than that advanced in the original pleading").

claim for 1982 taxes does not relate back to an original claim for 1981 and 1984 taxes").

Whether amendment is permitted requires reference to either Wisconsin's statute of limitations or Rule 15(c)(1)(B). *Hahn v. Walsh*, 762 F.3d 617, 635 n.37 (7th Cir. 2014). The applicable Wisconsin statute provides in pertinent part that relation back is permitted "[i]f the claim asserted in the amended pleading arose out of the transaction, occurrence, or event set forth or attempted to be set forth in the original pleading...." Wis. Stat. § 802.09(3). This statute is "very nearly identical" to Rule 15(c). *Tews v. NHI, LLC*, 2010 WI 137, ¶ 63, 330 Wis. 2d 389, 793 N.W.2d 860. Therefore, for the Court to find that the claims for breach of the Investment Notes relate back to the original Complaint's claim for specific performance, premised on the FBTA, it must conclude that these claims arise from the same conduct, transaction, occurrence or event.

In *Mayle v. Felix*, 545 U.S. 644, 656 (2005), the U.S. Supreme Court addressed the same "conduct, transaction, or occurrence" requirement. The Court in *Mayle* explicitly rejected the expansive reading given those terms by this Court in federal habeas claims, where this Court allowed relation back so long as the new claim stemmed from the petitioner's trial, conviction, or sentence. *Id.* Instead, the Supreme Court held that the proper analysis requires consideration of whether the "claims added by amendment arise from the same core facts as the

timely filed claims" and whether "the new claims depend upon events separate in 'both time and type' from the originally raised episodes." *Id.* at 657 (citation omitted). Thus, Rule 15(c)(1)(B) may relax a state statute of limitations, but it "does not obliterate" it. *Id.* at 659. "[H]ence relation back depends on the existence of a common 'core of operative facts' uniting the original and newly asserted claims." *Id.*

Courts routinely find that an amended pleading does not relate back where the factual allegations for a new claim are missing from the original complaint. *See, e.g., Cunliffe v. Wright*, 51 F. Supp. 3d 721 (N.D. Ill. 2014) (newly-asserted claim of race discrimination by former employee did not relate back to original complaint's allegations concerning retaliation and violation of due process rights); *Illinois Tool Works, Inc. v. Foster Grant Co., Inc.*, 395 F. Supp. 234, 250-51 (N.D. Ill. 1974) (new claim for infringement of different patent on the same product already subject to a patent infringement complaint found not to relate back), *aff'd*, 547 F.2d 1300 (7th Cir. 1976).

In *Cleary v. Philip Morris Inc.*, 656 F.3d 511, 515-16 (7th Cir. 2011), this Court held that allegations against a tobacco manufacturer for deceptive marketing of additional brands of "low tar," "light" and "ultralight" cigarettes did not relate back to the original complaint, which only made allegations concerning one brand of cigarette. This Court affirmed the district court's decision to deny the request to amend

because nothing in the original complaint alerted the company to potential claims regarding its other brands:

> [T]he plaintiffs' original pleading did not mention other brands of cigarette products but only made allegations regarding Marlboro Lights. Expanding the class to include other "light" and "low tar" products would extend the potential liability to new class members (those who purchased or smoked brands other than Marlboro Lights), and it would involve new conduct and transactions (Philip Morris's marketing and sale of brands other than Marlboro Lights). The plaintiffs chose not to make allegations related to other cigarette brands in the original pleading. And based on this pleading, Philip Morris did not have notice that the case might encompass claims against other brands. The district court correctly found that the expanded claim did not arise out of the same transaction or occurrence, and it properly denied the plaintiffs' request to amend their claim.

Id.

Here, there is no common core of operative facts that bind together the equitable claims Plaintiffs-Appellants originally brought with the breach of contract claims they would belatedly bring in their Amended Complaint. The events giving rise to the two claims are different in both time and type. Indeed, they rest on separate documents and on legally and factually incompatible arguments.

The claim initially asserted by Plaintiffs-Appellants for specific performance hinged upon the FBTA and the notice being given to Tak Investments that the Investment Notes were cancelled. According to Plaintiffs-Appellants, this would have required a transfer of an equity interest in Tak Investments to them if proper notice had been given sometime after three years from the date of the FBTA. In contrast, the

new claim for breach of the Investment Notes matured by the date the last payment was due in 2010.

To permit an amendment that includes a claim for breach of the Investment Notes, which the pleadings in this case have consistently alleged to be cancelled, would deprive Tak Investments of the fair notice claim required by due process and Rule 8(a) of the Federal Rules of Civil Procedure. Nothing in the initial complaints provided Tak Investments notice that it could face claims for enforcement of the Investment Notes. To the contrary, the notes were "deemed cancelled." Thus, the district court should have declined the Plaintiffs-Appellants' request to attempt to resurrect these waived and time-barred claims in this litigation. Its failure to do so provides this Court another basis upon which it could affirm the district court should the issues raised on appeal otherwise mandate reversal.

CONCLUSION

For all of the above reasons, the judgment should be affirmed.

Dated this 9th day of August, 2018.

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(g)(1)

I certify that this brief complies with the type volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 7,660 words, according to the Microsoft Word word processing program used to prepare the brief, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) and Circuit Rule 32(b) because this brief has been prepared in a proportionally spaced typeface using Windows 7 in 12-point Bookman Old Style font.

Dated this 9th day of August, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on August 9, 2018, I electronically filed the foregoing with the Clerk of the Court for 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.

Dated this 9th day of August, 2018.

s/ Jonathan T. Smies
Jonathan T. Smies