**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF ILLINOIS**
**EASTERN DIVISION**

| | | |
|---|---|---|
| RNS SERVICING, LLC, an Illinois Limited Liability Company, | § | |
| Plaintiff, | § | |
| v. | § | Case No. 17-CV-108 |
| SPIRIT CONSTRUCTION SERVICES, INC., a Delaware Corporation, STEVEN VAN DEN HEUVEL, a citizen of the State of Wisconsin, and SHARAD TAK, a citizen of the State of Florida, | § | Honorable Edmond E. Chang |
| Defendants. | § | |

**DEFENDANTS' JOINT MEMORANDUM OF LAW**
**IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

Brian C. Spahn, SBN 6290809
Godfrey & Kahn, S.C.
833 East Michigan Street, Suite 1800
Milwaukee, WI 53202-5615
Telephone: (414) 273-3500
Facsimile: (414) 273-5198
bspahn@gklaw.com

Scott A. Nehls, SBN 6290318
Fuchs & Roselli, Ltd.
440 W. Randolph Street, Suite 500
Chicago, IL 60606
Telephone: (312) 651-2400
Facsimile: (312) 651-2499
snehls@frltd.com

*Attorney for Defendant Sharad Tak*

Patrick S. Coffey, SBN 6188134
Robert M. Romashko, SBN 6293659
Husch Blackwell, LLP
120 South Riverside Plaza, Suite 2200
Chicago, IL 60606
Telephone: (312) 655-1500
Facsimile: (312) 655-1501
patrick.coffey@huschblackwell.com
robert.romashko@huschblackwell.com

*Attorneys for Defendants Spirit Construction Services and Steven Van Den Heuvel*

# TABLE OF CONTENTS

# TABLE OF AUTHORITIES

**Page(s)**

Cases

**Statutes**

Defendants Spirit Construction Services, Inc. ("Spirit"), Steven Van Den Heuvel ("Steve VDH") and Sharad Tak ("Tak"), by and through their respective undersigned attorneys, submit this Memorandum of Law in Support of their Joint Motion for Summary Judgment.

## INTRODUCTION

This case is a simple one. Plaintiff claims that its predecessor-in-interest, IFC Credit Corporation ("IFC"), was lied to and damaged by the Defendants: Spirit, Steve VDH, and Tak. But Plaintiff's claims are time barred. They were brought outside the applicable statute of limitations. Plaintiff has thus sought refuge in the discovery rule or the related doctrines of equitable tolling or fraudulent concealment. But Plaintiff's predecessor in interest to these claims sued Spirit in this Court in 2007, and alleged in 2008 filings that it had been lied to by Spirit – the very same lies it now attributes to all Defendants. Even if the discovery rule or any other tolling doctrine applied, Plaintiff's predecessor discovered its claim years before Plaintiff brought this suit, and the statute of limitations has still expired.

RNS Servicing, LLC ("RNS") filed its original complaint against Spirit and Steve VDH on January 6, 2017. (Compl., Dkt. No. 1.) Almost ten months later, on September 25, 2017, RNS Servicing added Tak personally as a defendant. (First Am. Compl., Dkt. No. 31.) Each of Plaintiff's claims against Defendants are based on alleged representations made *more than nine years* before either the Complaint or Amended Complaint were filed. Plaintiff's claims relate to RNS's predecessor-in-interest, IFC's, attempt to resolve a dispute with its lessee, Ron Van Den Heuvel ("Ron VDH"), in a settlement that became effective on March 28, 2007. IFC asserts that it entered into that settlement based, in part, on representations made by Defendants regarding four Engineering Procurement and Construction ("EPC") Contracts that would provide the necessary revenue for Ron VDH, starting in early 2007, to make ten equal and consecutive monthly payments to IFC totaling $3.9 million.

Ron VDH breached that settlement in June 2007, prompting IFC to send a default notice and file a lawsuit on September 6, 2007. In the course of that litigation, IFC was in a position to conduct discovery into its injury, including into Defendants' representations that RNS now alleges were relied upon when entering into the settlement with Ron VDH. Indeed, in an October 2008 court filing, IFC asserted that the fact that the representations regarding the EPC Contracts at issue were not true had become "obvious." Accordingly, the statute of limitations clock on Plaintiff's claims started when IFC *knew* it had been injured – in other words, when Ron VDH breached the March 28, 2007 settlement and put IFC on inquiry notice that its injury may have been wrongfully caused by those who RNS alleges IFC relied upon in entering into the settlement. IFC was legally obligated to investigate what, if any, claims it had against Defendants arising from its injury, and by 2008, it had apparently determined that it had been misled. The statute of limitations has long since expired on each of Plaintiff's claims and, therefore, this case must be dismissed as a matter of law.

## FACTS

### I. THE FORTRESS TRANSACTION

In 2005, IFC, as lessor, entered into two separate Master Lease Agreements with Tissue Products Technology Corp. ("TPTC") and Partners Concepts Development, Inc. ("PCDI"), companies owned and operated by Ron VDH, as co-lessees, for the lease of equipment and attachments used for tissue paper manufacturing. IFC sold, assigned, and transferred to Fortress rights to certain specified lease payments related to one of the Master Lease Agreements pursuant to a "Lease Agreement Rights Purchase Agreement" between IFC and Fortress. Defs.' Rule 56.1(a)(1)(3) Statement of Undisputed Material Facts ¶¶ 10-13 (hereafter "DSF ¶ ___"), Dkt. No. 65. That same year, it became apparent to IFC that Ron VDH's companies would default on both of those leases. DSF ¶ 14.

## II. THE FORTRESS WORKOUT

Ron VDH proposed a solution to IFC and Fortress which involved the pledges of certain revenues Ron VDH represented would be owed to him under various EPC Contracts related to three tissue paper companies. Tak was to be an owner or co-owner of these companies. IFC agreed to this proposal. DSF ¶¶ 15-16. However, just a short time later, Ron VDH and his companies again defaulted. DSF ¶ 17.

## III. IFC LAWSUIT I

On August 25, 2006, IFC filed its first lawsuit against Ron VDH and his companies ("IFC Lawsuit I"). DSF ¶ 18. Settlement discussions began soon thereafter, and IFC Lawsuit I was settled in Spring 2007. DSF ¶ 23. As part of the settlement, IFC agreed again to lease certain paper mill equipment to Ron VDH's companies in exchange for $3.4 million, to be paid back to IFC in installments. DSF ¶¶ 19-22. IFC alleges that it agreed to the lease based, in part, on representations made by Spirit and Tak relating to four EPC Contracts. Ron VDH's lease payments were to come from subcontractor payments Ron VDH's companies were to receive under the four EPC Contracts executed between Spirit and a company run by Tak, ST Paper I. DSF ¶ 22, 24, 26. Steve VDH and Spirit provided to IFC an "Acknowledgment and Consent to Assignment" dated March 28, 2007, which stated Ron VDH's companies "are subcontractors in connection with the [EPC Contracts] and that substantial sums of money in excess of $3,902,220.00 will become owing to them pursuant to said contracts," that Ron VDH's companies were subcontractors under the EPC contracts, and that the contracts were in full force and effect. DSF ¶¶ 26-28.

In addition, IFC alleges that Tak met with Ron VDH and IFC's CEO, Rudolph Trebels, and CFO, Marc Langs, at IFC's offices in Morton Grove, Illinois in late March or early April of 2007 to discuss the EPC Contracts. DSF ¶ 31. At that meeting, Tak is alleged to have made

several representations to IFC about the EPC Contracts, which IFC relied on in entering into the settlement with Ron VDH. DSF ¶ 32. RNS alleges that Tak misrepresented the fact that the four EPC Contracts had been executed; that Tak fully intended to build the four projects contemplated by the contracts; that Ron VDH's companies would be used as subcontractors under the contracts; that the contracts were sufficient to secure financing for the projects contemplated; and that due to confidentiality concerns, IFC could not review the four EPC Contracts. DSF ¶ 32. At his deposition, Tak testified that he may have attended one meeting with IFC in 2006, however, he could not recall the specifics as it was a long time ago. DSF ¶ 51.

## IV. IFC LAWSUIT II

In June 2007, Ron VDH's companies defaulted under the terms of the Continuing Pledge Agreement with IFC by failing to make the first lease payment. DSF ¶ 33. In response, IFC filed a second lawsuit against Ron VDH and his companies, this time also adding Spirit as a defendant ("IFC Lawsuit II"). DSF ¶ 34. IFC's August 2, 2007 lawsuit alleged that Ron VDH's companies had breached the settlement agreement and leases. IFC alleged that work would soon begin under the four EPC Contracts and that Ron's companies and Spirit's obligations under the March 28, 2007 Notice of Assignment would soon be triggered. DSF ¶ 34. On April 8, 2008, as part of discovery in IFC Lawsuit II, counsel for IFC took the deposition of Steve VDH. DSF ¶ 35. At the deposition, counsel for IFC questioned Steve VDH on the terms of the EPC contracts. DSF ¶ 36. Steve VDH testified that while work had been undertaken on one of the four contracts, and Spirit had been paid approximately $9 to $10 million by ST Paper, none of that money was paid (or owed) to any of Ron VDH's companies as a subcontractor. DSF ¶ 36. Steve VDH also testified that not only had Spirit not engaged Ron VDH to perform any work, but also that Spirit did not at that time have any plans to engage Ron VDH to perform any work. DSF ¶ 36.

On June 18, 2008, IFC's CFO, Marc Langs, signed a sworn declaration which stated that IFC would not have agreed to the payment schedule provided to the Ron VDH companies had it known that the EPC Contracts were not going to be funded for many months or that Ron VDH's companies were not going to receive 'substantial payments' under the EPC Contracts. DSF ¶ 37. IFC moved for summary judgment. In its Motion for Summary Judgment, IFC stated, "From the deposition testimony of Spirit Construction's President taken in April 2008, Plaintiff discovered that Spirit Construction misrepresented to Plaintiff at the time the Settlement Agreement was executed the likelihood that Defendants TPTC and PCDI would soon be receiving any substantial sums as subcontractors under those construction contracts." DSF ¶ 38. The motion went on to state, "[a]ccording to Spirit Construction's president, neither TPTC nor PCDI were ever seriously considered by Spirit Construction to be likely subcontractors in connection with the construction contracts." *Id*. IFC's Motion for Summary Judgment argued that the representations to IFC regarding the EPC Contracts were not true or accurate at the time they were made, or at any time since. *Id*.

Further, on October 10, 2008, IFC filed a Motion to Strike in IFC Lawsuit II in which IFC stated in reference to representations made by Spirit during settlement discussions:

> [T]hey evidence the fraud committed by Spirit Construction to induce IFC to enter into the Settlement Agreement. . . . It is clear that, notwithstanding its statement to IFC, Spirit Construction never intended to engage TPTC or PCDI in connection with the EPC Contracts. . . . Similarly, IFC's statement that Spirit Construction's representations were not true is, by now, obvious.

DSF ¶ 39.

IFC Lawsuit II was resolved on March 31, 2009, when a judgment was entered against Ron VDH and the matter was dismissed as to Spirit for lack of standing. DSF ¶ 40. IFC ran into financial problems, and did not further investigate its potential claims against Steve VDH, Spirit, or Tak. DSF ¶¶ 42-46.

## V. IFC BANKRUPTCY FILING, RNS PURCHASE, AND SUBSEQUENT INVESTIGATION

On July 27, 2009, IFC filed for Chapter 7 Bankruptcy and, on August 7, 2014, the bankruptcy court authorized an agreement under which RNS purchased certain of IFC's bankruptcy estate's assets, including IFC's rights under the agreements executed with Ron VDH's companies that were the subject of IFC Lawsuit II. DSF ¶¶ 42-46. During the pendency of the bankruptcy, the bankruptcy trustee did not pursue any litigation or other cause of action against Spirit or Tak. In fact, the bankruptcy trustee concluded (per RNS's description in one of its filings in that matter) that "the remaining collections were too troublesome and speculative to continue to be worthwhile." DSF ¶ 46. This is in spite of the fact that during the course of the bankruptcy, RNS and its members, Steve Csar and Rebecca Elli (both former IFC employees) were hired by the bankruptcy trustee to investigate the collectability of IFC's receivables. DSF ¶ 44.

RNS enlisted the help of IFC's former CFO, Marc Langs (the same individual who had submitted the sworn declaration in IFC Lawsuit II referenced above), to assist it in its investigation leading up to the present lawsuit. On March 21, 2016, nearly a decade after Tak made the alleged misrepresentations about the EPC Contracts to IFC at its offices, Langs emailed Tak inquiring about those contracts. DSF ¶ 49.[1] In response to Langs' email, Tak referred to the EPC Contracts as "frivolous" contracts. *Id*. While RNS added Tak as a defendant in this case, neither Tak nor ST Paper were named as defendants in either of the previous IFC lawsuits.

[1] There is no evidence that from 2008 through March 21, 2016, IFC, the bankruptcy trustee, or RNS took any action to investigate RNS's claims against Tak, Spirit, or even Ron Van Den Heuvel.

## PROCEDURAL BACKGROUND

On January 6, 2017, RNS filed its initial complaint alleging claims for negligent misrepresentation, fraudulent inducement, violation of the Illinois Consumer Fraud and Deceptive Business Practices Act ("ICFA") (*see* 815 ILCS 505/2) and civil conspiracy against Spirit and Steve VDH. (Dkt. No. 1.) Those claims were based, in part, on the allegation that RNS learned that the EPC Contracts at issue were "frivolous" through the March 21, 2016 email exchange between Tak and Langs. (Id. at ¶ 57.) Spirit and Steve VDH moved to dismiss the initial complaint on March 22, 2017. That motion was denied on August 25, 2017. (Dkt. No. 29.) Following the Court's August 21, 2017 Order, RNS, Spirit and Steve VDH sought to depose Tak, who agreed to be deposed on September 21, 2017. Tak testified at his deposition that he may have attended one meeting with IFC in or around 2006 because IFC had lent money to Ron VDH and never got it back. DSF ¶ 51. Tak testified that he did not recall the specifics of the meeting as, "it [was] a long time ago." *Id.* Four days after Tak's deposition, RNS filed an amended complaint bringing claims for negligent misrepresentation, fraudulent inducement, violation of ICFA and civil conspiracy against Tak.[2] Tak moved to dismiss the amended complaint based, in part, on a statute of limitations defense. (Dkt. No. 38-40.) The Court denied Tak's motion. (Dkt. No. 51.) In its Order, the Court stated that resolution of the statute of limitations issue "must wait for another day." (*Id.* at 17.) Following additional discovery in this matter, that day has now come.[3]

[2] On November 6, 2017, RNS voluntarily dismissed ST Paper, LLC as a defendant. (Dkt. No. 36.)

[3] On December 19, 2018, the Court ordered Defendants to file a combined motion for summary judgment on statute of limitations grounds. In the event the Court rules that Plaintiff's claims are not time-barred, Defendants reserve the right to move for summary judgment on other grounds following the conclusion of expert discovery.

## STANDARD

Summary judgment "shall be rendered without delay if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Castello v. Kalis,* 352 Ill. App. 3d 736, 743, 816 N.E.2d 782, 788 (1st Dist. 2004) (citing 735 ILCS 5/2-1005(c)). While the time at which a plaintiff knows or reasonably should have known both of the injury and that it was wrongfully caused will often be a disputed question of fact, where it is clear from the undisputed facts that only one conclusion can be drawn, the question may be resolved as a matter of law. *Id*. at 744 (affirming the trial courts granting of defendant's motion for summary judgment on statute of limitations grounds). Such is the case here.

## ARGUMENT

### I. PLAINTIFF'S CLAIMS ARE TIME-BARRED BY THE APPLICABLE STATUTES OF LIMITATION.

It is well established that statutes of limitations serve important purposes. They protect "defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise." *United States v. Kubrick*, 444 U.S. 111, 117, 100 S. Ct. 352, 62 L. Ed. 2d 259 (1979). Here, all of RNS's claims are based on allegations that Spirit, Steve VDH and Tak made certain misrepresentations to RNS's predecessor-in-interest, IFC, *twelve years ago* regarding anticipated subcontracts Spirit was to award to Ron VDH and his companies. Since those alleged statements were made in 2007, many things have happened: IFC has gone bankrupt and its claims have been sold to RNS; Ron VDH has been convicted of defrauding investors and creditors and is currently serving his sentence in federal prison; documents, including notes, emails and correspondence related to the underlying

transactions have presumably been lost and/or destroyed; and memories have certainly faded. In sum, the facts and circumstances surrounding this case are precisely the reason why statutes of limitation exist. *See In re African-Am. Slave Descendants Litig.*, 304 F. Supp. 2d 1027, 1066 (N.D. Ill. 2004) ("Statutes of limitations … represent expedients, rather than principles. They are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost.")

The statute of limitations on each of Plaintiff's claims begins to run when a reasonable person possesses sufficient information to put them on inquiry notice to determine whether a cause of action exists. *Knox Coll. v. Celotex Corp.*, 88 Ill. 2d 407, 416-17, 430 N.E.2d 976 (1981).

Plaintiff's claims for negligent misrepresentation, fraudulent inducement, and civil conspiracy are subject to a five-year statute of limitations under 735 ILCS 5/13-205. *See McMahan v. Deutsche Bank AG*, 938 F. Supp. 2d 795, 802 (N.D. Ill. 2013) (applying Illinois law). Plaintiff's claims for violations of the ICFA are subject to a three-year statute of limitations. *See Blankenship v. Pushpin Holdings, LLC*, 157 F. Supp. 3d 788, 792 (N.D. Ill. 2016).

Spirit, Steve VDH, and Tak are alleged to have made misrepresentations to IFC in March and April of 2007. Accordingly, the latest statute of limitations referenced above expired, absent some form of tolling, on March 28, 2012, almost five years before this suit was filed. Seeking to evade this rule, Plaintiff has indicated at various points that it intends to rely on the discovery rule, equitable tolling, or another theory to toll the statute of limitations. The burden of showing

that the statute of limitations is tolled rests on the Plaintiff. *Follis v. Watkins*, 367 Ill. App. 3d 548, 558, 855 N.E.2d 579, 587-88 (4th Dist. 2006).

**A. IFC Was On Inquiry Notice Sufficient To Determine Its Causes Of Action As Soon As Ron VDH Breached The March 28, 2007 Agreement.**

"A plaintiff who knows that he has suffered from a 'wrongfully caused' injury has the duty to investigate further concerning the existence of a cause of action." *Cox v. Jed Capital, LLC*, 2016 IL App (1st) 153397-U, 2016 WL 5846681, *6 (Sept. 30, 2016) (citing *Witherell v. Weimer*, 85 Ill. 2d 146, 156, 421 N.E.2d 869 (1981)). Therefore, even though the injured party may not be certain a cause of action exists, they have the burden to investigate further. At this point, the plaintiff has "inquiry notice." *Id.* ("Even though plaintiff might not have knowledge that an actionable wrong was committed, the statute of limitations begins to run when the plaintiff is put on inquiry notice.") (citing *Pruitt v. Schultz*, 235 Ill. App. 3d 934, 936 (4th Dist.1992)).

"Inquiry notice exists 'when a party knows or reasonably should know both that an injury has occurred and that it was wrongfully caused.'" *Id.* (quoting *Nolan v. Johns-Manville Asbestos*, 85 Ill. 2d 161, 171, 421 N.E.2d 864 (1981)). The Illinois Appellate Court explained:

> At that point, "the statute begins to run and the party is under an obligation to inquire further to determine whether an actionable wrong was committed. In that way, an injured person is not held to a standard of knowing the inherently unknowable [citation], yet once it reasonably appears that an injury was wrongfully caused, the party may not slumber on his rights.

*Id.* (quoting *Nolan*, 85 Ill. 2d 161, 171 (1981); citing *Knox Coll.*, 88 Ill. 2d 407, 416 (1981) ("At some point the injured person becomes possessed of sufficient information concerning his injury and its cause to put a reasonable person on inquiry to determine whether actionable conduct is involved.").

Moreover, even if a plaintiff engages in diligent inquiry into his or her possible causes of action, the statute of limitations is *not* tolled. *Janousek v. Katten Muchin Roseman LLP*, 2015 IL App (1st) 142989, ¶ 24, 44 N.E.3d 501 ("Once a plaintiff is aware of his or her wrongful injury, diligent inquiry will not provide a basis for tolling the statute of limitations.") (citing *Mitsias v. I-Flow Corp.*, 2011 IL App (1st) 101126, ¶ 31)). Although discovery is a question of fact, where it is clear from the undisputed facts that only one conclusion can be drawn, the question may be resolved as a matter of law. *Castello*, 352 Ill. App. 3d at 744. This is one such case.

Here, IFC knew that it had been injured when Ron VDH defaulted on his lease with IFC in 2007. DSF ¶¶33-34. IFC filed its second lawsuit against Ron VDH's companies on September 6, 2007 adding Spirit as a defendant. DSF ¶ 34. IFC learned that Spirit had not paid Ron VDH's companies any money and did not intend to use his companies as a subcontractor on the EPC Contracts. DSF ¶¶ 35-36. Moreover, considering how quickly Ron VDH defaulted on his obligations under the Settlement Agreement, a reasonable plaintiff would have been aware its injury was wrongfully caused. Indeed, this Court has previously concluded, "[i]t is reasonable to infer, based on the speed with which the Ron Companies breached the Settlement Master Lease, that the EPC Contracts and the revenue stream that they represented were not genuine." (Mem. Op. and Order (Aug. 25, 2017), Dkt. No. 29.)

Plaintiff's claims against Spirit, Steve VDH, and Tak are all predicated on the alleged representations each made with respect to the EPC Contracts providing an immediate source of revenue for Ron VDH to satisfy his obligations under the Settlement Master Lease. Accordingly, as soon as Ron VDH failed to make those payments, IFC was on inquiry notice that the representations allegedly made by Spirit, Steve VDH, and Tak were false.

Indeed, by 2008, IFC believed its injury had been wrongfully caused. On June 18, 2008, IFC's CFO, Marc Langs, signed a sworn declaration in IFC Lawsuit II which stated in part that IFC would not have agreed to allow Ron VDH's companies the payment schedule it did if it had known that the EPC Contracts were not going to be funded for many months or that Ron VDH's companies were not going to receive "substantial payments" under the EPC Contracts. DSF ¶ 37. IFC then moved for summary judgment and argued that, "From the deposition testimony of Spirit Construction's President taken in April 2008, Plaintiff discovered that Spirit Construction misrepresented to Plaintiff at the time the Settlement Agreement was executed the likelihood that Defendants TPTC and PCDI would soon be receiving any substantial sums as subcontractors under those construction contracts." DSF ¶ 38. IFC also acknowledged that, "[a]ccording to Spirit Construction's president, neither TPTC nor PCDI were ever seriously considered by Spirit Construction to be likely subcontractors in connection with the construction contracts." *Id*.

On October 10, 2008, IFC filed a Motion to Strike in IFC Lawsuit II. IFC stated in reference to representations made by Spirit during settlement negotiations:

> [T]hey evidence the fraud committed by Spirit Construction to induce IFC to enter into the Settlement Agreement. . . . It is clear that, notwithstanding its statement to IFC, Spirit Construction never intended to engage TPTC or PCDI in connection with the EPC Contracts. . . . Similarly, IFC's statement that Spirit Construction's representations were not true is, by now, obvious.

DSF ¶ 39. RNS conceded that IFC made fraud claims related to the EPC Contracts in its 2008 motion to strike. Pl.'s Resp. in Opp'n to Def. Tak's Mot. to Dismiss, at 9-10, Dkt. No. 42. IFC's fraud allegations against Spirit in its 2008 Motion to Strike are the exact same allegations of fraud that RNS now alleges against Spirit, Steve VDH, and Tak, related to the same settlement agreement, over ten years later.

Further, in 2018, Marc Langs testified that the EPC contracts, on their faces, were indicative that there had been a misrepresentation, and that had he seen them in 2006, he would have recommended that IFC not enter into the Settlement Agreement. DSF ¶ 52. However, IFC's counsel, in 2008, when questioning Steve VDH, confronted him with the EPCs. DSF ¶¶ 35-36. Whether Langs personally reviewed the EPCs, IFC had possession of them, and he or other IFC personnel could have done so.

IFC alleged that Spirit and Steve VDH's statements were fraudulent in 2008, and it had possession of documents it claims prove that in that same year. Even if IFC did not *know* that these statements were potentially fraudulent during IFC Lawsuit II, it presumably had a basis for making the allegation in a court filing. Applying the discovery rule, the statute of limitations against Tak must also have accrued by that point. The injured party does not need to *know* all potential causes of their injury in order for the statute of limitations to accrue as to *all* potential defendants. *See Cox*, 2016 WL 5846681, *6 ("It is not necessary for the plaintiff to know the full extent of his injuries before the statute of limitations begins to run.") (citing *Golla v. Gen. Motors Corp.*, 167 Ill. 2d 353, 364, 657 N.E.2d 894 (1995)). IFC was obligated to conduct a diligent inquiry once it suspected it was wrongfully injured. Waiting until 2016 to ask Tak about the EPC Contracts does not excuse IFC's failure to adequately investigate all of its potential claims when it first discovered its injury in 2007. *See Janousek*, 2015 IL App (1st) 142989, ¶ 24 ("Once a plaintiff is aware of his or her wrongful injury, diligent inquiry will not provide a basis for tolling the statute of limitations.") (citing *Mitsias v. I-Flow Corp.*, 2011 IL App (1st) 101126, ¶ 31, 959 N.E.2d 94).

Nor does the fact that Tak and Steve VDH were not named in the prior litigation excuse the failure to investigate potential claims against them. An injured party's failure to discover all

those involved in an injury does not toll the statute of limitations. In *Janousek*, plaintiff filed a lawsuit against his former business partners and others alleging a breach of fiduciary duties. 2015 IL App (1st) 142989, ¶¶ 5, 20–24. Nearly three years later, the plaintiff filed a complaint against his former business partners' attorneys alleging that they aided and abetted them in breaching their fiduciary duties – claims that were subject to a two-year statute of limitations. *Id.* ¶ 6. The court found that the plaintiff knew the defendants served as his former business partners' attorneys well before 2010 and that –

> [he] knew he had been wrongfully injured no later than July 2009, and thus, even though he may not yet have known that defendants' representation was partly responsible and that their conduct gave rise to a cause of action, the statute of limitations began to run because [the plaintiff] did have knowledge of the injury and that his injury was wrongfully caused.

*Id.* ¶¶ 20–21. "In short, [the plaintiff's] claims against his partners for fraud cannot be separated from a claim that defendants failed to protect him from that very same fraud." *Id.* ¶ 21. Therefore, the court held that "[the plaintiff's] knowledge of a wrongful cause of his injury, namely his former associates' breach of their fiduciary duties, initiate[d] the two year statute of limitations." *Id.* ¶ 24. The court reasoned that the plaintiff's "claims against [the attorneys] and [his former business partners] [were] uniquely intertwined and inseparable, as he claims that the former aided and abetted the latter in their breach." *Id; see also LeBlang Motors, Ltd. v. Subaru of Am., Inc.*, 148 F.3d 680, 691 (7th Cir. 1998) (applying Illinois law) ("A thorough investigation mandates that [the plaintiff] consider the potential liability of *all* parties involved in supplying the [misrepresented information], and [the individual defendants] should have been included in this investigation.") (emphasis added).

IFC, in 2008, claimed it had been misled, and even defrauded, by Spirit, so it must have discovered its potential claims by then. Yet it – and its successors in interest – did not file this

suit until 2017. Even if the discovery rule had tolled the applicable statutes of limitations until 2008, this suit was brought far too late after the discovery of any potential claim.

**B. Equitable Tolling Does Not Apply to Plaintiff's Claims.**

Under Illinois law, equitable tolling is only applied when the plaintiff is prevented from asserting its rights in some extraordinary way. *See Goldsmith v. Correct Care Solutions*, No. 12 C 3738, 2014 WL 3377058, *3 (N.D. Ill. July 10, 2014) (applying Illinois law) (holding that when borrowing Illinois' statute of limitations, Federal courts also borrow Illinois' equitable tolling rules). "While equitable tolling is recognized in Illinois, **it is rarely applied**." *Am. Family Mut. Ins. Co. v. Plunkett*, 2014 IL App (1st) 131631, ¶ 33, 14 N.E.3d 676 (emphasis added).[4] "Equitable tolling is a doctrine that allows a plaintiff to avoid the bar of the statute of limitations if he has been unable to obtain vital information bearing on the existence of his claim notwithstanding his diligent inquiry." *Nelson v. Sotheby's, Inc.*, 115 F. Supp. 2d 925, 930 (N.D. Ill. 2000) (applying Illinois law) (citation omitted).

In *Guarantee Trust Life Insurance Co. v. Kribbs*, plaintiff filed a suit against a defendant for unjust enrichment, conversion, constructive fraud, concert of action, and civil conspiracy. 2016 IL App (1st) 160672, ¶ 5, 68 N.E.3d 1046. Nearly six years after filing its initial

[4] In fact, the Illinois Supreme Court has only applied equitable tolling *once* and that was in a case in which the court applied federal law. *See Williams v. Bd. of Review*, 241 Ill. 2d 352, 948 N.E.2d 561 (2011). The court looked at whether the deadline in the federal Trade Act of 1874 for enrollment in an approved training program was subject to equitable tolling. The court recognized that "[a] nonjurisdictional federal statute of limitations is normally subject to a rebuttable presumption in *favor* of equitable tolling." *Id.* at 361 (emphasis in original) (quotation marks and citations omitted). *Williams* is clearly distinguishable from this case. First, there is no federal statute at issue. *See Jones v. Chi. Police Dept.*, 2014 IL App (1st) 123725-U, 2014 WL 3800298, *2 (July 31, 2014) ("The *Williams* decision is distinguishable because it involved whether a provision of a federal statute was subject to equitable tolling under federal law and no federal statute is involved in the present case."). Second, unlike the plaintiff in *Williams*, IFC did not satisfy the necessary due diligence to justify equitable tolling. *See Williams*, 241 Ill. 2d at 373 ("Williams had no reason to know of the 8/16 deadline, much less that it had passed. Her inquiry in December 2006 satisfies the due diligence requirement for application of equitable tolling.").

complaint, while taking discovery depositions in the case, the plaintiff discovered the identity of two of its own employees who it claimed participated in the scheme and sought to name them in the suit. *Id.* ¶ 1. The court found that the plaintiff provided no reason it could not have learned about its employees' involvement in the alleged scheme within the five-year limitations period, and that the plaintiff was "[f]ar from suffering an 'irredeemable lack of information.'" *Id.*, ¶ 48. The court further stated that the "only thing preventing [the plaintiff] from sooner discovering the purportedly revelatory information it learned in those depositions was its own lack of diligence." *Id.* The court affirmed the circuit court's decision that the five-year statute of limitations applicable to the plaintiff's claims against its employees began to run no later than when the plaintiff filed its original complaint against the original defendant and failed to establish that the statute of limitations was tolled by the employees' alleged fraudulent concealment of their participation in the scheme. *Id.* ¶¶ 1, 16–18, 50.

As in *Guarantee Trust*, IFC was on inquiry notice of its alleged injury during IFC Lawsuit II. Accepting, *arguendo*, the notion that IFC did not discover its claim during that suit, the only thing preventing the discovery of the purportedly revelatory information Langs learned from Tak in the March 2016 email exchange sooner was its own lack of diligence. IFC believed it was wrongfully injured as of April 8, 2008. Steve VDH was deposed in IFC Lawsuit II. DSF ¶¶ 35-36. There was nothing preventing IFC from deposing Tak in that same lawsuit. IFC believed that Steve VDH and Spirit Construction misrepresented the EPC Contracts to fraudulently induce IFC into settlement. DSF ¶¶ 37-39. These are the same representations RNS now alleges Tak made to IFC related to the same EPC Contracts so to allegedly induce IFC into entering into a settlement agreement with Ron VDH. DSF ¶¶ 31-32. IFC was clearly on inquiry notice of a possible action against Tak, yet it chose to sit on its rights, failed to depose him, and

failed to file an action against him for a decade. Similarly, IFC had actually discovered its potential claims against Spirit and Steve VDH, but again, sat on its rights.

In its response in opposition to Tak's motion to dismiss the amended complaint, RNS argued that a March 31, 2009 court order granting Spirit's summary judgment motion during IFC Lawsuit II constitutes an "extraordinary occurrence," justifying the tolling of the statutes of limitation. Pl.'s Resp. in Opp'n to Def. Tak's Mot. to Dismiss, Dkt. 42, at 9–10. This is hardly the type of extraordinary barrier contemplated by Illinois courts when applying equitable tolling – in fact, it was no barrier at all. The Court's March 31, 2009 decision stated only that IFC did not have standing to bring a claim against Spirit at that time because IFC's claim, as defined by IFC itself, was for an injunction "only so far as Spirit Construction is or becomes indebted to the other Defendants," and, the court found, it had not yet become indebted to any other Defendant. Nothing about this ruling prevented IFC from investigating (or filing) other claims against Steve VDH, Spirit, or Tak. The fact that IFC lost that motion does not mean the statutes of limitation were tolled.

Nor do the other circumstances giving rise to equitable tolling exist. RNS has not alleged that IFC was prevented from asserting its rights or that it mistakenly asserted its rights in the wrong forum. In fact, the Amended Complaint makes clear that both IFC and RNS waited nearly a decade to communicate with Tak about the EPC Contracts or take any other action to investigate their potential claims.

Therefore, just as with the discovery rule, equitable tolling does not save RNS's claims against Tak. The five-year statute of limitations for RNS's claims for negligent misrepresentation, fraudulent inducement, and civil conspiracy and the three-year statute of

limitations for RNS's claim for violation of the ICFA have long passed. Consequently, all of RNS's claims against Spirit and Tak are time-barred and must be dismissed with prejudice.

**C. Fraudulent Concealment does not toll the statute of limitations.**

Plaintiff has also suggested that fraudulent concealment tolls the statute of limitations with respect to Plaintiff's claims in this matter. Under Illinois law, if a person conceals their liability for an action from the injured party, the statute of limitations is extended five years from the date of discovery. 735 ILCS 5/13-215. However, the applicability of this rule requires specific acts or representations by the defendant "calculated to lull or induce [plaintiff] into delaying filing [its] claim or to prevent [it] from discovering [its] claim." *Barratt v. Goldberg*, 296 Ill. App. 3d 252, 257, 694 N.E.2d 604, 608 (1st Dist. 1998). Where a plaintiff makes inquiries into his cause of action prior to or contemporaneously with lulling representations, and thus his cause of action has been discovered, no tolling is applied. *Voga v. Nash*, No. 2-13-0750, 2014 WL 1323361, at *11–12 (Ill. App. Ct. Apr. 1, 2014).

Plaintiff has alleged no such active steps to conceal in this matter, and, accordingly, may not assert fraudulent concealment. Even if there had been any fraudulent concealment by any Defendant, by 2008, when IFC asserted fraud in IFC Lawsuit II, it had discovered its cause of action. RNS, as IFC's successor to its claims, cannot now claim that its own allegations of fraud and misrepresentation against Spirit and Steve VDH did not demonstrate that it was aware of a cause of action, or that Spirit and Steve VDH's position in litigation – denying they did anything wrong – constituted a lulling action.

## CONCLUSION

Plaintiff's claims are time barred. Plaintiff alleges that the Defendants made false representations to IFC in March and April of 2007, and that these representations induced it to enter into agreements with Ron VDH that Ron VDH immediately breached. In 2008, IFC

alleged that those very same representations by Spirit had in fact been both false and fraudulent. After that case was dismissed on technical grounds, IFC, the subsequent bankruptcy trustee, and RNS sat on their rights to IFC's claim for eight years. They never investigated their further causes of action against Spirit, against its president, Steve VDH, or against Tak until 2016. Regardless of whether the statute of limitations started to run in 2007, when the representations were made, or 2008, by which time IFC discovered the alleged fraud, it has long since expired, and judgment should therefore be entered for the Defendants, dismissing all claims with prejudice.

Dated: March 18, 2019.

Respectfully submitted,

By: */s/Brian C. Spahn*

Brian C. Spahn, SBN 6290809
Godfrey & Kahn, S.C.
833 East Michigan Street, Suite 1800
Milwaukee, WI 53202-5615
Telephone: (414) 273-3500
Facsimile: (414) 273-5198
bspahn@gklaw.com

Scott A. Nehls, SBN 6290318
Fuchs & Roselli, Ltd.
440 W. Randolph Street, Suite 500
Chicago, IL 60606
Telephone: (312) 651-2400
Facsimile: (312) 651-2499
snehls@frltd.com

***Attorneys for Defendant Sharad Tak***

Patrick S. Coffey, SBN 6188134
Robert M. Romashko, SBN 6293659
Husch Blackwell, LLP
120 South Riverside Plaza, Suite 2200
Chicago, IL 60606
Telephone: (312) 655-1500
Facsimile: (312) 655-1501

patrick.coffey@huschblackwell.com
robert.romashko@huschblackwell.com

***Attorneys for Defendants Spirit Construction Services, Inc., and Steven Van Den Heuvel***

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on March 18, 2019, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

*/s/Brian C. Spahn*

20342996.2