

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

RNS SERVICING, LLC, and Illinois Limited
Liability Company,

Plaintiff,

v.

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,

Defendants.

Case No. 17-cv-108

Judge Edmond E. Chang

**PLAINTIFF RNS SERVICING, LLC'S MEMORANDUM IN OPPOSITION TO
TO DEFENDANTS' JOINT SUMMARY JUDGMENT MOTION REGARDING THE
STATUTE OF LIMITATIONS ISSUE**

AND

**PLAINTIFF RNS SERVICING, LLC'S MOTION TO STRIKE DEFENDANTS'
AFFIRMATIVE DEFENSES BASED ON THE STATUTE OF LIMITATIONS**

Joseph R. Marconi
Victor J. Pioli
Brian C. Langs
Johnson & Bell, Ltd.
33 West Monroe Street, Suite 2700
Chicago, Illinois 60603
(312) 372-0770
Fax: (312) 372-9818
E-mail: langsb@jbltd.com

Attorneys for Plaintiff RNS Servicing, LLC

Plaintiff RNS Servicing, LLC (“RNS Servicing”), by and through its undersigned counsel, respectfully submit this Memorandum of Law in Opposition to the Joint Motion for Summary Judgment (the “Response Memorandum”) filed by Defendants Steven Van Den Heuvel (“Steve VDH”), Spirit Construction Services, Inc. (“Spirit”), and Sharad Tak (“Tak”) (collectively, “Defendants”). This Response Memorandum is supported by (1) the Declarations of Marc Langs [ECF 71], Stephen Csar [ECF 72], Rebecca Elli [ECF 73], and Brian Langs [ECF 74]; (2) RNS Servicing’s Response to Defendants’ Rule 56.1 Statement of Facts (the “Response to DSOF”) [ECF 75]; and (3) RNS Servicing’s Rule 56.1 Statement of Additional Material Facts (the “PSAF”) [ECF 75] which are filed contemporaneously with this Response Memorandum.¹

INTRODUCTION

Application of the Illinois fraudulent concealment statute (735 ILCS 5/13-215), the discovery rule, and/or the equitable tolling/equitable estoppel doctrines to the undisputed facts in the record demonstrates that, as a matter of law, RNS Servicing’s claims against any of the three Defendants in this matter are not time-barred. As such, this Court should strike each of the Defendants’ affirmative defenses in this matter which are based on the statute of limitations.

Alternatively, there are disputed questions of fact regarding (1) when the applicable statute of limitations for IFC Credit Corporation (“IFC”)’s claims, the IFC Bankruptcy Estate’s claims, and/or RNS Servicing’s claims here (as successor-in-interest to IFC’s claims) against Defendants Steve VDH and Spirit and/or Tak began to run, if at all, and (2) whether these claims were tolled by the Illinois fraudulent concealment statute (735 ILCS 5/13-215), the discovery rule, and/or the equitable tolling/equitable estoppel doctrines—*i.e.*, whether RNS Servicing’s

¹ Additionally, RNS Servicing will herein refer to Defendants’ Joint Motion for Summary Judgment [ECF 64] as the “Motion”; Defendants’ Joint Rule 56.1(a)(1)(3) Statement of Undisputed Material Facts [ECF 65] as the “DSF”; and Defendants’ Joint Memorandum of Law in Support of Their Motion for Summary Judgment [ECF 67] as the “Memorandum.”

claims in this matter were timely filed. As such, if this Court does not strike Defendants' affirmative defenses in this matter which are based on the statute of limitations, it should still deny Defendants' Joint Motion for Summary Judgment.

ARGUMENT

Pursuant to the fraudulent concealment statute and the discovery rule, the limitation periods RNS Servicing claims in this lawsuit did not accrue until March 21, 2016. "If a person liable to an action fraudulently conceals the cause of such action from the knowledge of the person entitled thereto, the action may be commenced at any time within 5 years after the person entitled to bring the same discovers that he or she has such cause of action, and not afterwards." *See DeLuna v. Burciaga*, 223 Ill. 2d 49, 53-54, 857 N.E.2d 229, 233 (2006) (quoting 735 ILCS 5/13-215). The fraudulent concealment statute applies if a defendant's fraud prevented discovery of the cause of action. *Guarantee Trust Life Insurance Co. v. Kribbs*, 2016 IL App (1st) 160672, ¶ 35, 68 N.E.3d 1046. Further, under Illinois law, a co-conspirator can also be charged with its co-conspirator's fraudulent concealment. *See Polansky v. Anderson*, No. 04 C 3526, 2007 U.S. Dist. LEXIS 85734, at *30-32 (N.D. Ill. Nov. 20, 2007). Moreover, the discovery rule "delays the commencement of the relevant statute of limitations until the plaintiff knows or reasonably should know that he has been injured and that his injury was wrongfully caused." *Hermitage Corp. v. Contractors Adjustment Co.*, 166 Ill. 2d 72, 77 (1995). And "[g]enerally, determining the point at which the running of the limitations period begins under the discovery rule is a question of fact." *Rasgaitis v. Waterstone Financial Group, Inc.*, 2013 IL App (2d) 111112, ¶ 30 (emphasis added).

I. IFC'S LOSS OF THE COLLATERAL IT HAD NEGOTIATED TO SECURE RON VDH, TPTC, AND PCDI'S DEBT UNDER THE MARCH 28, 2007 SETTLEMENT AGREEMENT, MASTER LEASE NO. 801109, AND MASTER AMENDMENT AGREEMENT IS A

**SEPARATE AND DISTINCT INJURY FROM RON VDH, TPTC, AND PCIDI'S
NONPAYMENT ON THAT DEBT**

Defendants claim that IFC knew that it had been injured when Ron VDH,² PCIDI, and TPTC defaulted on the March 28, 2007 Settlement Agreement, Master Lease No. 801109, and Master Amendment Agreement by failing to make the required monthly payments to IFC under those documents. That is obvious. However, RNS Servicing's injury in this case (as successor-in-interest to IFC's rights under the Continuing Pledge Agreement and attached Scheduled A and B) is the loss of the collateral IFC had negotiated to secure that debt—*i.e.*, the loss of PCIDI and TPTC's rights to payment under the CPA EPC Contracts—which is a different injury altogether from Ron VDH, TPTC, and PCIDI's nonpayment on the debt under March 28, 2007 Settlement Agreement, Master Lease No. 801109, and Master Amendment Agreement in the first place. Indeed, the court in the Second IFC Lawsuit held as much on March 31, 2009. *See* PSAF at ¶ 14.

II. WHEN IFC FILED THE SECOND IFC LAWSUIT ON AUGUST 2, 2007, IFC WAS NOT ON INQUIRY NOTICE THAT IT HAD LOST THE COLLATERAL IT HAD NEGOTIATED TO SECURE RON VDH, TPTC, AND PCIDI'S DEBT UNDER THE MARCH 28, 2007 SETTLEMENT AGREEMENT, MASTER LEASE NO. 801109, AND MASTER AMENDMENT AGREEMENT

Defendants claim that because IFC filed a claim for injunctive relief against Spirit on August 2, 2007 in the Second IFC Lawsuit, IFC somehow knew at the time of filing that it had forever lost PCIDI and TPTC's rights to payment under the CPA EPC Contracts—*i.e.*, that on August 2, 2007, IFC was on inquiry notice of the injury RNS Servicing claims in this matter. However, the complaint IFC filed in the Second IFC Lawsuit demonstrates this contention is false. Rather, on August 2, 2007, IFC filed the Complaint in the Second IFC Lawsuit and alleged in Paragraph 52 as follows:

² All capitalized terms in this Response Memorandum shall have the meaning ascribed to them in the First Amended Complaint ("FAC") [ECF 31] unless otherwise noted in this document.

On information and belief, TPTC and PCDI have begun or will soon begin performing, their work pursuant to the [CPA] EPC Contracts. This will, in turn, trigger TPTC's PCDI's and Spirit's respective obligations under the Continuing Pledge Agreement, and IFC's right to receive the payments due to TPTC and PCDI for the work they perform pursuant to the EPC Contracts.

See PSAF at ¶ 13.

III. DURING THE PENDENCY OF THE SECOND IFC LAWSUIT, STEVE VDH AND SPIRIT PREVENTED IFC FROM DISCOVERING THAT IT HAD LOST THE COLLATERAL IT HAD NEGOTIATED TO SECURE RON VDH, TPTC, AND PCDI'S DEBT UNDER THE MARCH 28, 2007 SETTLEMENT AGREEMENT, MASTER LEASE NO. 801109, AND MASTER AMENDMENT AGREEMENT BY FRAUDULENTLY CONCEALING THE FACT THAT STEVE VDH, SPIRIT, AND TAK INTENDED TO MAKE THE COLLATERAL VALUELESS BY RENEGOTIATING THE CPA EPC CONTRACTS SO THAT THE NEW RENEGOTIATED EPC CONTRACTS WERE NO LONGER SUBJECT TO THE CONTINUING PLEDGE AGREEMENT OR SCHEDULES A AND B TO THE CONTINUING PLEDGE AGREEMENT

A. At his April 8, 2008 Deposition in the Second IFC Lawsuit, Spirit's Lawyers Claimed and Steve VDH Testified that Steve VDH Not Shown Any of the CPA EPC Contracts; However, During the Pendency of the Second IFC Lawsuit, IFC Mistakenly Believed that the EPC Contract for the Oconto Falls Tissue Mill Upgrades Project Steve VDH Was Shown at His April 8, 2008 Deposition in the Second IFC Lawsuit Was One of the CPA EPC Contracts

Defendants' claim that during the pendency of the Second IFC Lawsuit IFC, IFC knew that it had forever lost PCDI and TPTC's rights to payment under the CPA EPC Contracts—*i.e.*, that during the pendency of the Second IFC Lawsuit, IFC was on inquiry notice of the injury RNS Servicing claims in this matter. Defendants improperly base this claim on three statements IFC made in filings in the Second IFC Lawsuit, which Defendants describe in Paragraphs 37-39 their Rule 56.1 Statement of Facts. *See* DSF at ¶ 37-39.

Paragraph 37 of DSF. Paragraph 37 of DSF misrepresents the statements in Paragraph 12 of the declaration Marc Langs made in the Second IFC Lawsuit. *See* Pl.'s RDSF at ¶ 37. Paragraph 12 of Mr. Langs's June 18, 2008 declaration states in its entirety as follows:

Furthermore, IFC was told in March of 2007 by Ron Van Den Heuvel that the **EPC Contracts described in the Pledge Agreement and Acknowledgement of and Consent to Assignment would definitely be executed and funded within a matter of weeks.** IFC would not have agreed to allow PCDI and TPTC a ten-month payment schedule if we had known that the EPC Contracts were not going to be funded for many months (to our knowledge; the EPC Contracts are still not funded). Nor would IFC have allowed PCDI or TPTC a ten-month payment schedule if we knew that those companies were not going to receive "substantial payments" under the EPC Contracts.

See Pl.'s RDSF at ¶ 37. Indeed, Paragraph 37 of DSF cherry-picks a quotation from Paragraph 12 of the Langs Declaration in the Second IFC Lawsuit which intentionally leaves out context demonstrating that that the entirety of Paragraph 12 was directed at a misrepresentation by Ron VDH regarding the timing of the when PCDI and TPTC would realize their rights to payment under the CPA EPC Contracts, not the three false statements Steve VDH and Spirit made in Schedule B to the Continuing Pledge Agreement as alleged in Paragraphs 72, 82, and 91 of the FAC in this case ("Steve VDH and Spirit's Misrepresentations") or the five false statements Tak made at the meeting referenced in Paragraphs 100, 110, and 119 of the FAC in this case ("Tak's Misrepresentations") regarding the existence or loss of the collateral IFC had negotiated to secure Ron VDH, TPTC, and PCDI's debt under March 28, 2007 Settlement Agreement, Master Lease No. 801109, and Master Amendment Agreement—*i.e.*, PCDI and TPTC's rights to payment under the CPA EPC Contracts. See Pl.'s RDSF at ¶ 37.

Paragraph 38 of DSF. Defendants claim in Paragraph 38 of DSF that the "construction contracts" referenced in footnote 2 on page 6 of IFC's June 18, 2008 summary judgment motion filed in the Second IFC Lawsuit were referencing the CPA EPC Contracts. However, that claim is demonstrably false for the following reasons:

a. Spirit's and Steve VDH's counsel stated during Steve VDH's April 8, 2008 deposition that Spirit had not produced the CPA EPC Contracts during discovery in the Second IFC Lawsuit;

b. At his April 8, 2008 deposition, Steve VDH corrected his earlier testimony and testified that Exhibit 3 to his April 8, 2008 deposition was **not** one of the four CPA EPC Contracts;

c. Rather, according to Steve VDH, the exhibits marked nos. 3, 4, 5, and 6 at Steve VDH's December 18, 2018 depositions were are the four CPA EPC Contracts

d. The CPA EPC Contracts were produced in this matter as follows: (i) Oconto Falls and DePere, Wisconsin (Upgrades) CPA EPC Contract (Bates No. SCS_00001 – g SCS_000056); DePere New Construction CPA EPC Contract (Bates No. SCS_000237-SCS_000296); St. George, Utah New Construction CPA EPC Contract (Bates No. SCS_000057-SCS_000116); Pennsylvania Site New Construction CPA EPC Contract (Bates No. SCS_000117-SCS_000176);

e. Demonstrably, none of the ten exhibits shown to Steve VDH at his April 8, 2008 deposition were one of the four CPA EPC Contracts;

f. IFC asked both Spirit and Tak to see the four CPA EPC Contracts before IFC entered into (a) the Settlement Agreement; (b) the Master Lease No. 801109, (c) Master Amendment Agreement, and (d) the Continuing Pledge Agreement and Schedules A and B to the Continuing Pledge Agreement, but at that time he was told by Spirit and Tak that he could not review the four CPA EPC Contracts because of their confidential nature; and

g. No one from IFC, IFC's Bankruptcy Estate, or RNS Servicing ever saw any of the four CPA EPC Contracts until March or April 2016, and no one from IFC, IFC's

Bankruptcy Estate, or RNS Servicing ever had any opportunity to review any of the four CPA EPC Contracts in detail until they were produced in this present matter.

See Pl.'s RDSF at ¶¶ 38.

Paragraph 39 of DSF. Paragraph 39 of DSF cherry-picks a quotation from page 3 IFC's October 10, 2008 Motion to Strike. The cherry-picked quotation leaves out IFC's explanation that **"IFC's statement that Spirit Construction's representations [in Schedule B to the Continuing Pledge Agreement] were not true is, by now, obvious. It is based on the record, including the deposition testimony of Spirit Construction's President, Steve Van Den Heuvel."**

See Pl.'s RDSF at ¶¶ 39. However, for the same reasons listed above, IFC's assertion on page 3 IFC's October 10, 2008 Motion to Strike was demonstrably wrong because IFC's basis for that assertion was the false belief at that time that Steve VDH had testified about the CPA EPC Contracts at his April 8, 2008 deposition when, in reality, he had not. See Pl.'s RDSF at ¶¶ 39.

B. After the March 31, 2009 Decision in the Second IFC Lawsuit, IFC Relied on Steve VDH's Fraudulent Testimony and Realized It Had Mistakenly Believed that the EPC Contract for the Oconto Falls Tissue Mill Upgrades Project Steve VDH Was Shown at His April 8, 2008 Deposition in the Second IFC Lawsuit Was One of the CPA EPC Contracts

After the March 31, 2009 ruling in the Second IFC Lawsuit, (a) IFC and its attorneys in the Second IFC Lawsuit discussed the ruling at that time and (b) after rereading Steve VDH's April 8, 2008 deposition transcript, the Continuing Pledge Agreement, and Schedules A and B to the Continuing Pledge Agreement, IFC and its attorneys in the Second IFC Lawsuit came to the following conclusions at that time:

a. During Steve VDH's April 8, 2008 deposition, Spirit's and Steve VDH's counsel stated that Spirit had not produced the CPA EPC Contracts during discovery in the Second IFC Lawsuit;

b. During Steve VDH's April 8, 2008 deposition, Steve VDH had corrected his earlier testimony and by unequivocally testifying that Exhibit 3 to his April 8, 2008 deposition, an EPC contract for upgrades at the Oconto Falls Tissue Mill, was not one of the four CPA EPC Contracts;

c. The CPA EPC Contracts are referenced in the Continuing Pledge Agreement as "four (4) Fixed Price Engineering, Procurement, and Construction Agreements between Spirit Construction Services, Inc. and ST Paper, LLC for 'upgrades' and construction for 'St. George, Utah,' 'De Pere, Wisconsin,' and 'Pennsylvania' facilities"—*i.e.*, that as Steve VDH testified at his April 8, 2008 deposition, the EPC Contract for upgrades to the Oconto Falls Tissue Mill which he was shown at his April 8, 2008 deposition was not actually one of the CPA EPC Contracts;

d. IFC and its attorneys in the Second IFC Lawsuit had been mistaken regarding Steve VDH's testimony at his April 8, 2008 deposition because the EPC Contract for upgrades to the Oconto Falls Tissue Mill which IFC's counsel had shown Steve VDH at his April 8, 2008 deposition (marked as Exhibit 3 at that deposition) was not actually one of the four CPA EPC Contracts;

e. Since Spirit had never produced the CPA EPC Contracts in the Second IFC Lawsuit, as Steve VDH had testified at his April 8, 2008 deposition, none of the EPC Contracts Steve VDH had been shown at his April 8, 2008 deposition was one of the four CPA EPC Contracts;

f. While Ron VDH had told IFC that the CPA EPC Contracts would be "funded in a matter of weeks," IFC had never heard that from Steve VDH, Spirit, or Tak;

g. While IFC knew as of March 31, 2009 that Tak had not yet been able to secure financing for the projects contemplated by the CPA EPC Contracts as quickly as Ron VDH had previously claimed or as quickly as IFC would have obviously preferred, IFC still thought (i) that the CPA EPC Contracts existed, had been executed, and were in full force and effect and (ii) that regulatory concerns required that the CPA EPC Contracts had to be kept confidential while Tak was out trying to secure financing; and

h. The court was correct in its March 31, 2009 ruling that IFC did not have standing to assert any claims against Spirit (for injunctive relief, fraud, or otherwise) because IFC had not been injured by Spirit's conduct and, as a result, at this time, IFC still believed Steve VDH's and Spirit's representations in Schedule B to the Continuing Pledge Agreement, which are at issue in this case, and Tak's representations that he made to IFC at the March 2009 meeting, which are also at issue in this case. This belief was due in large part to their good business reputations and IFC's continued belief at this time that both Tak and Steve VDH had each made large pre-financing investments of significant amounts of money into the projects contemplated by the CPA EPC Contracts (in the form of down payments, engineering costs, zoning permits, and other upfront costs) and that IFC knew that neither Spirit nor Tak were in the business of throwing away money. Therefore, IFC and its lawyers decided that, at that time, (i) IFC could not in good faith appeal the court's order in the Second IFC Lawsuit and (ii) IFC did not have standing for its claim injunctive relief or to make any claim, including fraud, against Spirit (or for that matter against Steve VDH or Tak).

See PSAF at ¶¶ 39.

C. Steve VDH's and Spirits' Fraudulent Concealment at Steve VDH's April 8, 2008 Deposition of the Fact that Steve VDH, Spirit, and Tak Intended to

Make IFC's Collateral Valueless by Renegotiating the CPA EPC Contracts So that the New Renegotiated EPC Contracts Were Not Subject to the Continuing Pledge Agreement or Schedules A and B to the Continuing Pledge Agreement Prevented IFC from Discovering the Injury RNS Servicing Is Claiming in This Matter—i.e., that IFC Had Lost the Collateral It Had Negotiated to Secure Ron VDH, TPTC, and PCDI's Debt

One of the November 14, 2006 CPA EPC Agreements between Spirit and ST Paper was for Spirit to provide construction upgrades to two different paper manufacturing facilities, the Oconto Falls Tissue Mill in Oconto Falls, Wisconsin and another facility in De Pere, Wisconsin. *See* PSAF at ¶ 11. That CPA EPC Contract was produced in this matter as Bates No. SCS_00001 - SCS_000056. At his April 8, 2008 deposition, Steve VDH was shown an EPC Contract for upgrades on only the Oconto Falls Tissue Mill in Oconto Falls, Wisconsin which was not dated November 14, 2006 and which did not provide for upgrades to the facility in De Pere, Wisconsin (Exhibit 3 to that deposition). *See* Pl.'s RDSF at ¶¶ 38-39. After first testifying that this contract was one of the CPA EPC Contracts, Steve VDH retracted this testimony and claimed that it was not. *See* Pl.'s RDSF at ¶¶ 38-39. His lawyers backed up this statement at the April 8, 2008 deposition by claiming that Spirit has not produced any of the CPA EPC Contracts in the Second IFC Lawsuit. *See* Pl.'s RDSF at ¶¶ 38-39.

However, without ever having seen or reviewed the actual CPA EPC Contract for Oconto Falls and DePere, Wisconsin (Upgrades) (Exhibit AA, Bates No. SCS_00001 - SCS_000056), it was impossible for IFC to know in 2008 that Steve VDH had falsely claimed at his April 8, 2008 deposition in the Second IFC Lawsuit that the EPC Contract for upgrades at the Oconto Falls Tissue Mill he was shown was not one of projects contemplated by the four CPA EPC Contracts because neither the Continuing Pledge Agreement nor Schedules A and B attached to the Continuing Pledge Agreement reference upgrades to the Oconto Falls Tissue Mill even though one of the actual CPA EPC Contracts (Exhibit AA, Bates No. SCS_00001 - SCS_000056)

referenced upgrades to both the Oconto Falls Tissue Mill and the DePere, Wisconsin facility. *See* PSAF at ¶ 16.

IV. THE IFC BANKRUPTCY ESTATE WAS NEVER ON INQUIRY NOTICE THAT IFC HAD LOST THE COLLATERAL IT HAD NEGOTIATED TO SECURE RON VDH, TPTC, AND PCDI'S DEBT UNDER THE MARCH 28, 2007 SETTLEMENT AGREEMENT, MASTER LEASE NO. 801109, AND MASTER AMENDMENT AGREEMENT EITHER

Shortly after the March 31, 2009 decision by the court in the Second IFC Lawsuit, IFC was facing an imminent bankruptcy—which was primarily due to nonpayment by Ron VDH and his companies of debts owed to IFC as part of Fortress Transaction and various settlement agreements and judgments against him arising from the nonpayment under the Fortress Transaction and what RNS Servicing now knows to be the misrepresentations of Steve VDH, Spirit, and Tak as alleged in the FAC. *See* PSAF at ¶ 17. Around that time (March 31, 2009), as IFC's bankruptcy was becoming imminent, IFC's Board of Directors began efforts to force Rudy Trebels and Marc Langs to resign as officers of the IFC. Marc Langs submitted his resignation on June 25, 2009 and Rudy Trebels submitted his resignation on June 26, 2009. *See* PSAF at ¶ 18.

On or around July 27, 2009, Rebecca Elli and Steve Csar were hired by the IFC Bankruptcy Trustee as part of his leasing staff (along with other persons) to assist in the liquidation of the IFC Bankruptcy estate. While working on the IFC Bankruptcy Trustee's leasing staff, both of our primary job responsibilities were to assist him, his Counsel, and his Special Counsel with collections on IFC's numerous outstanding equipment lease accounts which existed as of July 27, 2009, the date of IFC's bankruptcy filing. The IFC Bankruptcy Trustee's Counsel and Special Counsel directed both our and the rest of the leasing staff members' priorities in this regard, including which outstanding lease accounts to pursue. Rebecca Elli and Steve Csar continued to be employed by the IFC Bankruptcy estate until the

closing of the sale contemplated by Article 3.1 of the First RNS Asset Purchase Agreement occurred on or about August 27, 2014. After the closing of the sale contemplated by Article 3.1 of the First RNS Asset Purchase Agreement occurred on or about August 27, 2014, Rebecca Elli and Steve Csar continued to provide limited consulting services to the IFC bankruptcy estate until April 15, 2015. *See* PSAF at ¶ 20.

In February 2010, as part of their work for the IFC bankruptcy estate, Rebecca Elli and Steve Csar became aware of August 13, 2008 judgment (the “Ron VDH Judgment”) entered in the Second IFC Lawsuit in favor of IFC and against Ron VDH, TPTC, and PCDI when they received a copy of that judgment. However, while they performed work for the IFC Bankruptcy estate between July 27, 2009 and April 15, 2015, neither Rebecca Elli and Steve Csar ever became aware of or otherwise had reason to investigate whether IFC had existing claims against Steve VDH, Spirit, or Tak—i.e., whether IFC had the claims asserted against those parties in this lawsuit. *See* PSAF at ¶ 21. While the IFC Bankruptcy Trustee investigated possible avenues to enforce the August 13, 2008 Ron VDH judgment, he never became aware of or otherwise had reason to investigate whether IFC had existing claims against Steve VDH, Spirit, or Tak—i.e., whether IFC had the claims asserted against those parties in this lawsuit. *See* PSAF at ¶ 22.

While the IFC Bankruptcy Trustee’s investigation into possible avenues to enforce the August 13, 2008 Ron VDH judgment proved fruitless, on March 29, 2012, the IFC Bankruptcy Trustee successfully negotiated a settlement of the August 13, 2008 Ron VDH Judgment with Ron VDH, TPTC, and PCDI (the “BK/Ron VDH Settlement Agreement”). However, Ron VDH, TPTC, and PCDI defaulted on their payment obligations under the BK/Ron VDH Settlement Agreement. *See* PSAF at ¶ 23. On June 24, 2015, IFC filed a motion to revive the August 13, 2008 Ron VDH Judgment with the court in the Second IFC Lawsuit, and on July 8, 2015, the

court in the Second IFC Lawsuit granted IFC's motion to revive the August 13, 2008 Ron VDH Judgment. *See* PSAF at ¶ 24.

On March 28, 2016, the IFC Bankruptcy Trustee filed the IFC bankruptcy estate's Amended Trustee's Final Report in IFC's bankruptcy proceedings (Case No. 09-27094 in the U.S. Bankruptcy Court in the Northern District of Illinois). Part 1 of 2 of the Amended Trustee's Final Report is a comprehensive 1,238-page report which lists all of the IFC's bankruptcy estate's assets, and the present claims in his lawsuit are not listed. *See* PSAF at ¶ 40.

Tak has never been contacted by the IFC Bankruptcy Trustee or anyone else in relation to the IFC bankruptcy estate. *See* PSAF at ¶ 19.

V. RNS SERVICING WAS NEVER ON INQUIRY NOTICE THAT IT (AS SUCCESSOR-IN-INTEREST TO IFC'S CLAIMS) HAD LOST THE COLLATERAL IFC HAD NEGOTIATED TO SECURE RON VDH, TPTC, AND PCDI'S DEBT UNDER THE MARCH 28, 2007 SETTLEMENT AGREEMENT, MASTER LEASE NO. 801109, AND MASTER AMENDMENT AGREEMENT UNTIL MARCH 21, 2016

On or around January 26, 2016, RNS Servicing hired Marc Langs (IFC's former CFO) as an independent consultant to assist RNS Servicing with enforcing, settling or selling the August 13, 2008 judgment in favor IFC and against Ron VDH, TPTC, and PCDI, which was entered in the Second IFC Lawsuit long before the March 31, 2009 decision granting Spirit's summary judgment motion because IFC had not yet been injured by Spirit and therefore lacked standing for claims against Spirit. *See* PSAF at ¶ 25. RNS Servicing's members, Rebecca Elli and Steve Csar had previously worked with Marc Langs at IFC, but neither of them was involved in the Fortress Transaction or the litigation and settlements that arose from the Fortress Transaction. *See* PSAF at ¶ 26.

At or around January 26, 2016, RNS Servicing provided Marc Langs (with a large amount of material to review which RNS Servicing had bought out of the IFC bankruptcy estate.

See PSAF at ¶ 27. Over the next month or so Marc Langs reviewed the voluminous documentation provided to him by RNS Servicing. After his review, at some time, prior to March 21, 2016, he informed RNS Servicing of the existence of: (a) the Settlement Agreement; (b) Master Lease No. 801109; (c) Master Amendment Agreement; (d) the Continuing Pledge Agreement and attached Schedules A and B; and (e) Tak's meeting with Rudy Trebels and Marc Langs, which is referenced in Paragraphs 60 and 61 of the FAC. *See* PSAF at ¶ 28.

At or around this time, Marc Langs also informed RNS Servicing that he would contact Steve VDH and Tak to inquire whether the projects in the CPA EPC Contracts were ever completed and, if so, inquire whether Steve VDH and Spirit made payments to TPTC and PCIDI instead of the IFC bankruptcy estate. At this time, Marc Langs believed that the projects had to have been built during the administration of IFC's lengthy bankruptcy proceedings. *See* PSAF at ¶ 29. Almost immediately after that conversation with RNS Servicing, Marc Langs contacted Tak by email on March 1, 2016 and called Steve VDH around that same time. When Marc Langs spoke to Steve VDH over the phone, he asked him about the projects contemplated by the CPA EPC Contracts, and Steve VDH informed that they had never been built. Marc Langs also asked Steve VDH if Marc Langs could come up to Green Bay, Wisconsin and meet with Steve VDH face to face about the CPA EPC Contracts, Steve VDH agreed, and a meeting was scheduled. *See* PSAF at ¶ 30.

On March 7, 2016, Tak responded to Marc Langs's initial email and they set up a phone conversation. They spoke on the phone about the CPA EPC Contracts, as well as the work Spirit had apparently completed on the Oconto Falls Tissue Mill, which Tak now owns through ST Paper. *See* PSAF at ¶ 31. On March 8, 2016, RNS Servicing filed a Notice of Assignment of Judgment with the court in the Second IFC Lawsuit. *See* PSAF at ¶ 32. On March 18, 2016,

Marc Langs sent him a follow up email with more specific information about these contracts. Marc Langs was hoping Tak would be able to tell him that some or all of the projects contemplated by the CPA EPC Contracts had actually been completed. However, on March 21, 2016, Tak emailed Marc Langs back and told me that the CPA EPC Contracts were frivolous. *See* PSAF at ¶ 33.

When Marc Langs received the March 21, 2016 email from Tak which is attached as Exhibit L to the FAC, he understood his statement that “[t]hese were frivolous contracts” to be referencing the CPA EPC Contracts at issue in this case, even though at that time, Marc Langs had still never reviewed or even seen the CPA EPC Contracts. *See* PSAF at ¶ 34. After Marc Langs received the March 21, 2016 email from Tak, which is attached as Exhibit L to the FAC, he suspected for the first time:

- a. that Spirit and Tak possibly had not invested significant amounts of money into the projects contemplated by the CPA EPC Contracts in the form of engineering, zoning, and other upfront costs—i.e., before outside financing for the entire projects was secured;
- b. that there was a possibility that the CPA EPC Contracts had never been sufficient to secure financing for the projects contemplated; and/or
- c. that there was a possibility that neither TPTC nor PCDI were subcontractors under the CPA EPC Contracts.

See PSAF at ¶ 35.

On some date right before or soon after the March 21, 2016 email from Tak, Marc Langs met with Steve VDH in Green Bay, Wisconsin. At that meeting, Steve VDH reiterated that the projects contemplated by the CPA EPC Contracts had never been funded and were never completed. However, Steve VDH also told Marc Langs that he still wanted the projects to go

forward and that if the projects went forward in the future, he would make good on the Spirit's promises in Schedule B to the Continuing Pledge Agreement. At this meeting, Steve VDH showed Marc Langs a contract which Steve VDH purported to be one of the CPA EPC Contracts. However, Marc Langs did not review the contract in detail at that time and asked for copies of all of the CPA EPC Contracts. In response, Steve VDH told Marc Langs that he had to check with other people at Spirit regarding this request and that he would get back to Marc Langs if he could give Marc Langs copies of the CPA EPC Contracts. Marc Langs left the meeting shortly thereafter, and Steve VDH never sent Marc Langs the CPA EPC Contracts. *See* PSAF at ¶ 36.

VI. AFTER MARCH 21, 2016, RNS SERVICING RETAINED COUNSEL AND DILIGENTLY WORKED WITH ITS COUNSEL TO GET THIS COMPLEX CASE ON FILE

Shortly after March 21, 2016, RNS Servicing contacted its current counsel, Johnson & Bell, Ltd. RNS Servicing and its current counsel diligently went through the voluminous documentation related to this lawsuit and decided to file a very detailed complaint because of the complex nature of the facts and circumstances occurring over the span of about decade. From that point on, RNS Servicing diligently worked to draft the original complaint in this lawsuit and get it on file. *See* PSAF at ¶ 37. The responses by Spirit, Steve VDH, and Tak to the inquiries by Marc Langs referenced in Paragraphs 29-31 and 33-36 above resulted in RNS Servicing's discovery of the claims made in this lawsuit, and this lawsuit being filed. *See* PSAF at ¶ 39.

VII. EVEN IF RNS SERVICING'S CLAIMS ACCRUED DURING THE PENDENCY OF THE SECOND IFC LAWSUIT THE APPLICABLE LIMITATION PERIODS WERE EQUITABLY TOLLED BETWEEN MARCH 31, 2009 AND MARCH 21, 2016

Because Illinois law provides the statute of limitations for each of RNS Servicing's claims against Steve VDH, Spirit, and Tak, the principles of equitable tolling under Illinois law apply as well. *Villars v. Kubiowski*, 2017 U.S. Dist. LEXIS 157836, at *18-19 (N.D. Ill. Sep.

26, 2017). In Illinois, equitable tolling of a statute of limitations may be appropriate where “the plaintiff has been prevented from asserting his or her rights in some extraordinary way.” *Id*; see also *Theide v. Kapsas*, 386 Ill. App. 3d 396, 403 (3rd Dist. 2008) (“[E]quity calls for us to sometimes look beyond the letter of the law in order to effect a more just result.”)

A plaintiff's standing determines a court's jurisdiction to hear a suit and is an essential component of Article III's case-or-controversy requirement. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). As such, “standing must be present at all stages of the litigation,” and a plaintiff without standing may not proceed with claims. *Parvati Corp. v. City of Oak Forest, Ill.*, 630 F.3d 512, 516 (7th Cir. 2010). Here, the March 31, 2009 order in the Second IFC Lawsuit held that RNS Servicing lacked standing to assert its claim for injunctive relief against Spirit—which was based on Spirit's alleged misrepresentations in this case. See Pl.'s RDSF at ¶ 40; PSAF at ¶ 14. Therefore, even assuming *arguendo* that RNS Servicing's present claims against Tak had accrued during the pendency of the Second IFC Lawsuit, the court's March 31, 2009 holding that IFC's claims related to Spirit's alleged misrepresentations would have been premature was an extraordinary occurrence that prevented IFC from asserting the present claims against Tak at that time. See *Neal v. Keystone Steel & Wire*, No. 06-1289, 2007 U.S. Dist. LEXIS 62539, at *22 (C.D. Ill. Aug. 24, 2007) (holding that when a party is forbidden by a competent court to initiate litigation, “that is the very essence of circumstances calling for equitable relief” under the equitable tolling doctrine). Accordingly, the equitable tolling of RNS Servicing's claims against Steve VDH, Spirit, and Tak began on March 31, 2009—*i.e.* 1 year, 6 months, and 26 days or 5 months and 24 days after IFC's claims accrued (assuming *arguendo* they accrued on October 8, 2008 (the date of Steve VDH's deposition in the Second IFC Lawsuit).

Further, there is no evidence or indication that these claims somehow became ripe between March 31, 2009 and July 7, 2009, the date that IFC filed for Chapter 7 bankruptcy. Indeed, if IFC's claims based on Spirit's alleged misrepresentations were premature on March 31, 2009 because Spirit had not yet breached the Continuing Pledge Agreement at that time and there was no evidence that a breach was likely to occur in the near future, *see* Pl.'s RDSF at ¶ 40; PSAF at ¶ 14, neither IFC nor the IFC Bankruptcy Trustee had any reason to believe IFC or its bankruptcy estate had standing for the claims on July 7, 2009 either. Indeed, the IFC Bankruptcy Trustee must not have discovered the claims because they are not listed on his Final Report. *See* PSAF at ¶ 40; *see also* Section V, *supra*

However, while the Bankruptcy Code requires a trustee to "investigate the financial affairs of the debtor," *see* 11 U.S.C. § 704(a)(4), bankruptcy courts have rejected the proposition that a trustee has a broad obligation to investigate all leads in a case or to reconstruct a debtor's financial affairs. *Lujano v. Town of Cicero*, No. 07 C 4822, 2012 U.S. Dist. LEXIS 141053, at *19-20 (N.D. Ill. Sep. 28, 2012). Thus, the fact that the IFC Bankruptcy Trustee did not have a duty to investigate a case where the debtor had no standing on the date its bankruptcy petition was filed is a second extraordinary occurrence that prevented the filing of RNS Servicing's present claims against Steve VDH, Spirit, and Tak which served to continue the equitable tolling of the applicable limitation periods for those claims until they were sold to RNS Servicing on August 7, 2014.

In turn, RNS Servicing, with whom Marc Langs (IFC's Former CFO) is now employed as a consultant, still had reason to believe that it lacked standing for the claims after they were purchased out of the IFC bankruptcy because Steve had subsequently assured him that EPC

Contacts were still in effect and that Spirit would pay RNS Serving the funds owed when the projects were built. *See* Section V, *supra*; *Thede v. Kapsas*, 386 Ill. App. 3d at 402 (“A defendant may be equitably estopped from asserting a particular defense, such as the statute of limitations, if the defendant made a representation that would preclude exercising that defense and the plaintiff relied on the representation to her detriment.”). However, the equitable tolling period for RNS Servicing’s present claims ended on March 21, 2016 when Tak informed Marc Langs via email that the EPC Contracts were “frivolous” and that Tak had never attempted to secure financing for the contemplated projects. *See* Sections V and VI, *supra*.

Consequently, assuming *arguendo* that RNS Servicing’s claims against Steve VDH, Spirit, and Tak accrued on April 8, 2008, all of the claims are timely because the limitation periods initially ran for only 11 months and 24 days; were equitably tolled from March 31, 2009 through March 21, 2016; and then ran for another 1 year, 6 months, and 5 days before the FAC was filed September 25, 2017.

Dated: May 7, 2019

Respectfully submitted,

JOHNSON & BELL, LTD.,

By: /s/ Brian C. Langs

Brian C. Langs
Johnson & Bell, Ltd.
33 West Monroe Street, Suite 2700
Chicago, Illinois 60603
(312) 372-0770
Fax: (312) 372-9818
E-mail: langsb@jbltd.com

CERTIFICATE OF SERVICE

I hereby certify that on May 6, 2017, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all attorneys of record.

/s/ Brian C. Langs