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 REPLY IN SUPPORT OF ITS CROSS-MOTION FOR SUMMARY JUDGMENT ON DEFENDANTS' AFFIRMATIVE DEFENSES BASED ON THE STATUTE OF LIMITATIONS

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Plaintiff RNS Servicing, LLC ("RNS Servicing"),[1] by and through its undersigned counsel, respectfully submit this reply in support of its cross-motion for summary judgment[2] on Defendants' affirmative defenses based on the statute of limitations.[3]

INTRODUCTION

Under the Continuing Pledge Agreement, the rights of Ron VDH, TPTC, and PCDI (the "Ron VDH Parties") to payments under the CPA EPC Contracts were pledged to IFC as collateral to secure the Ron VDH Parties' indebtedness and lease obligations under the March 28, 2007 Settlement Agreement, Master Lease No. 801109, and the Master Lease No. 801109 Guaranty (collectively, the "Ron VDH Settlement Documents"). The undisputed evidence demonstrates that collateral referenced in the CPA EPC Contracts was valueless neither Spirit nor Tak had invested the significant amounts of pre-contract execution time and money in the projects (in the form of down payments, engineering costs, zoning permits, and other upfront costs) that was necessary to secure outside financing for $200-300 million construction projects like the ones Defendants had fraudulently assured IFC were contemplated by the CPA EPC Contracts contemplated.

Further, from the time that Defendants began making numerous false assurances about valuable nature of the collateral up through IFC's bankruptcy, Defendants fraudulently concealed

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

[2] RNS Servicing initially filed a Motion to Strike Defendants' Affirmative Defenses Based on the Statute of Limitations. *See* 5/7/19 Mot. to Strike [ECF 76]. However, on May 14, 2019, this Court ruled that RNS Servicing's Motion to Strike is essentially a Cross-Motion for Summary Judgment on Defendants' Affirmative Defenses based on the Statute of Limitations. *See* 5/14/2019 Order [ECF 83]. As such, RNS Servicing will herein refer to its Motion to Strike [ECF 76] as its "Cross-Motion."

[3] RNS Servicing will herein refer to RNS Servicing's Rule 56.1 Statement of Additional Material Facts [ECF 75] as the "PSAF"; Defendants' Objections and Responses to Plaintiff's Additional Statement of Facts [ECF 85] as the "Response to the PSAF"; and Defendants' Opposition to Plaintiff's Cross-Motion for Summary Judgment [84] as the "Opposition Brief."

(1) their knowledge that the CPA EPC Contracts were frivolous in the sense that none of the four CPA EPC Contracts were sufficient to obtain financing for the projects and (2) their plan to renegotiate the CPA EPC Contracts

ARGUMENT

I. AS A MATTER OF LAW, RNS SERVICING'S ALLEGED INJURY IN THIS CASE—*I.E.*, IFC'S LOSS OF THE COLLATERAL PROMISED UNDER THE CONTINUING PLEDGE AGREEMENT—IS A SEPARATE AND DISTINCT FROM THE INJURY IFC SUFFERED WHEN THE RON VDH PARTIES' BREACHED THEIR REPAYMENT OBLIGATIONS UNDER THE RON VDH SETTLEMENT DOCUMENTS WHICH THAT COLLATERAL WAS INTENDED TO SECURE

"In order for the plaintiff to show that it has standing, it must show that it has suffered, or will suffer in the future a 'direct injury,' *i.e.,* a wrong which directly results in the violation of a legal right." *South Suburban Safeway Lines, Inc. v. Chicago*, 285 F. Supp. 676, 678 (N.D. Ill. 1968) "This 'legal right' may be a property right, a contractual right, a right protected against tortious invasion, or a right conferred by a statute or constitutional provision." *Id.* Further, under Illinois law, the loss of collateral is a separate and distinct injury from nonpayment of indebtedness which is secured by that collateral. *See, e.g., Hatherley v. Palos Bank & Trust Co.,* 650 F. Supp. 832, 837 (N.D. Ill. 1986) (holding that the loss of additional collateral securing loans and a release of personal liability to repay the loans were two distinct injuries"); *Peick v. Pension Ben. Guaranty Corp*., 724 F.2d 1247, 1276 (7th Cir. 1983) (recognizing the Supreme Court's observation in *United States v. Security Industrial Bank*, 459 U.S. 70, 75 (1982) that "the property right of the creditor in the collateral was quite different in legal contemplation from the contractual right of the same secured creditor to obtain repayment of his debt."); *First Illinois Bank, N.A. v. Servistar Corp*., 1992 U.S. Dist. LEXIS 959, at *18 (N.D. Ill. Jan. 31, 1992) (holding that a contractual right to collect debt and a contractual right to collateral were separate contractual rights that had been violated).

Here, even a cursory review of the FAC demonstrates that RNS Servicing has plainly pleaded that IFC had separate and distinct legal rights under the Ron VDH Settlement Documents, on the one hand, and under the Continuing Pledge Agreement, on the other. First, IFC had the contractual right to receive repayment on the Ron VDH Parties' on indebtedness under the Ron VDH Settlement Documents. *See* FAC [ECF 31] at ¶ 51-54, 56. Second, if the Ron VDH Companies breached their repayment obligations under the Ron VDH Settlement Documents, IFC had a separate and distinct contractual right to receive the subcontractor payments Spirit owed to the Ron VDH Parties under the CPA EPC Contracts. *See* FAC [ECF 31] at ¶¶ 55, 57. Therefore, violations of those separate and distinct legal rights produced two distinct injuries. *See Hatherley,* 650 F. Supp. at 837. However, the only injury Defendants' tortious conduct could have caused IFC is the only injury alleged in the FAC: the loss of the collateral which Defendants assured IFC was valuable. This is especially apparent from the allegations in the FAC that IFC would not have entered into the agreements present in the Ron VDH Settlement Documents without the representations Defendants made to assure IFC that the collateral was valuable. *See* FAC [ECF 31] at ¶¶ 77, 86. 95, 105, 114, 123.

Perhaps most significantly, RNS Servicing's Cross-Motion highlighted Judge Dow's unequivocal March 21, 2009 holding in the Second IFC Lawsuit (Exhibit 9)[4] that RNS Servicing's alleged injury in this case—*i.e.*, the loss of the collateral it had negotiated to secure the payment obligations of Ron VDH, TPTC, and PCDI (collectively, the "Ron VDH Parties") under the March 28, 2007 Settlement Agreement, Master Lease No. 801109, and the Master

[4] All references to numbered Exhibits 1-12 herein are references to exhibits to the Affidavit of Robert M. Romashko in Support of Defendants' Motion for Summary Judgment [ECF 66]. All references to lettered Exhibits A-L herein are references to exhibits to the FAC [ECF 31]. All references to lettered Exhibits M-P1 herein are references to exhibits to the Declaration of Rebecca Elli [ECF 73]. All references to lettered Exhibits Q-U herein are references to exhibits to the Declaration of Steve Csar [ECF 72] All references to lettered Exhibits W-JJ herein are references to exhibits to the Declaration of Brian Langs [ECF 74]..

Lease No. 801109 Guaranty (collectively, the "Settlement Agreement")—is a separate and distinct injury from the injury IFC suffered as a result of Ron VDH Parties' breach of their payment obligation under the Settlement Agreement:

> Spirit is not a party to the prior settlement agreement between IFC and the RVDH Defendants, the No. 801109 lease, or the personal guaranty signed by Ron Van Den Heuvel. … The only claim that IFC has against Spirit is a contingent one, arising out of the continuing pledge agreement. Essentially, if TPTC and PCDI earn money pursuant to potential subcontractor agreements with Spirit, then Spirit would be required to pay that money to IFC (instead of TPTC and PCDI) until TPTC and PCDI fulfill their obligations to IFC. **However, Spirit does not have a duty to pay IFC unless it hires PCDI or TPTC as a subcontractor, and, even then, IFC would not have an injury in fact unless Spirit breached its obligation to pay IFC.** … **None of the prerequisites for payment of funds by Spirit to IFC has occurred yet; thus, whatever potential future injury IFC may have is too speculative.**

See PSAF at 14 (citing Exhibit 9 [ECF 6-99]—*i.e.* the March 31, 2009 Order in the Second IFC Lawsuit) (emphasis added). Defendants do not dispute this holding. *See* Defts.' Resp. to PSAF at ¶ 14.

II. THERE IS NO DISPUTE THAT THE FAC PLAINLY ALLEGES A LOSS OF COLLATERAL INJURY

Defendants' complaint in their Opposition Brief that they do not understand RNS Servicing's alleged injury as a loss of collateral is nonsensical. The entire FAC is centered around the promised collateral in the in the Continuing Pledge Agreement and Defendants' assurances that it was valuable enough to secure the Ron VDH Parties' indebtedness under the Ron VDH Settlement Documents. In Paragraph 55 of the FAC, RNS Servicing alleges in no uncertain terms:

> In addition and as a condition for IFC entering into the Settlement Agreement and new Master Lease No. 801109, TPTC and PCDI also executed a Continuing Pledge Agreement dated March 28, 2007 (the "Continuing Pledge Agreement"). Pursuant to the Continuing Pledge Agreement, **TPTC and PCDI pledged and assigned to IFC their right to receive $3,400,000 in subcontractor payments that the two companies were to receive from Spirit in connection with the**

> **four, fully executed CPA EPC Contracts** … **as collateral for their indebtedness and lease obligations under the Settlement Agreement and new Master Lease No. 801109**.

See FAC [ECF 31] at ¶ 5 (citing Exhibit F) (emphasis added). In Paragraph 47 of the FAC, RNS Servicing alleges that "Spirit, Steve, and Sharad **misrepresented these four CPA EPC Contracts as valuable collateral to induce IFC**, Fortress, and GWS Bank to agree to the Settlement Agreement …" *See* FAC at ¶ 47 [ECF 31] (emphasis added). Paragraph 56 of the FAC alleges "The Master Amendment Agreement made explicit reference to and amended the Continuing Pledge Agreement **by increasing the amount of subcontractor payments pledged to IFC as collateral** from $3,400,000 to $3,902,220." *See* FAC [ECF 31] at ¶ 56 (emphasis added).

Further, "[a] copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes." Fed. Rules Civ. Proc. R 10; *see also Forrest v. Universal Sav. Bank, F.A.*, 507 F.3d 540, 542 (7th Cir. 2007) ("Where an exhibit and the complaint conflict, the exhibit typically controls."). The Continuing Pledge Agreement and the attached Schedules A and B are attached as Exhibit F to the FAC. The Continuing Pledge Agreement contains a section on the first page with a bold heading reading "**SCHEDULE OF COLLATERAL,**" which states that "as and for collateral for the indebtedness and lease obligations owed by [TPTC and PCDI] to IFC," TPTC and PCDI pledge "first and paramount" rights to Spirit's subcontractor payments on the projects contemplated by the CPA EPC Contracts, and in Schedule B, Spirit acknowledges that this collateral exists and is valuable. *See* Exhibit F. Similarly, the FAC pleads that Tak represented to IFC that this same collateral was valuable. *See* FAC [ECF 31] at ¶ 100, 110, 119.

In addition, Defendants' multiple admissions in their Response to RNS Servicing's Statement of Additional Facts not only demonstrate their understanding of RNS Servicing's theory of the case, the admissions directly contradict Defendants' unsupported statement in their Opposition Brief that "RNS's only injury is the nonpayment of the funds that IFC provided to Ron VDH." *Compare* Defts.' Opp. Brief at 2-3 *with* Defts.' Resp. to the PSAF at ¶¶ 4, 25. Indeed, in their Response to RNS Serving's Statement of Additional Facts, Defendants do not dispute Paragraph 4, which states: "Schedule B [to the Continuing Pledge Agreement] was a 'Consent and Acknowledgement' executed by Steve VDH and Spirit which provided IFC assurance **that the collateral described in the Continuing Pledge Agreement was valuable**." *See* Defts.' Resp. to the PSAF at ¶ 4. Moreover, Defendants' admit in their Response to Paragraph 25 of RNS Servicing's Statement of Additional Facts that the CPA EPC Contracts served as underlying collateral for the agreements IFC entered into with Ron VDH and his companies. *See* Defts.' Resp. to the PSAF at ¶ 4, 25.Defendants argue that the Ron VDH Parties' nonpayment under the terms of the Ron VDH Settlement Documents was the only injury pleaded in the FAC. *See* Defts.' Opp. Brief at 2-3. Defendants' "same injury" argument only serve to demonstrate their misunderstanding of the oft-confused legal terms "injury," "damage," and "damages." In *Giammanco v. Giammanco*, the Illinois appellate court explained the nuanced differences in the terms as follows:

> At this point we believe clarification of the pertinent terminology may be helpful. "Damage" (an element of the tort of common-law fraud) is to be distinguished from "damages" (a remedy). It has been noted that, "although the words, 'damage,' 'damages,' and 'injury,' are sometimes treated loosely as synonyms, there is a material distinction between them. Injury is the illegal invasion of a legal right; damage is the loss, hurt, or harm which results from the injury; and damages are the recompense or compensation awarded for the damage suffered." (Ballentine's Law Dictionary 303 (3d ed. 1969); see also Black's Law Dictionary 351 (5th ed. 1979) ("The word [damage] is to be distinguished from its plural, 'damages', which means a compensation in money for a loss or damage").

253 Ill. App. 3d 750, 625 (Ill. App. Ct. 1993); *In re GM Type III Door Latch Litigation*, 2001 U.S. Dist. LEXIS 969, at *7 (N.D. Ill. Jan. 25, 2001) ("Injury is the legal invasion of a legal right; damage is the loss, hurt or harm which results from the injury; and damages are the recompense or compensation awarded for the damage suffered.") (citing *Giammanco*); *Kelly v. Sears Roebuck & Co*., 308 Ill. App. 3d 633, 641 (1st Dist. 1999) (same).

Here, the allegations in the FAC which Defendants highlight on pages 2 and 3 of their Opposition Brief merely measure the value of RNS Servicing's alleged injury (*i.e.*, the loss of the collateral promised to IFC under the Continuing Pledge Agreement) by the amount of unpaid indebtedness which the collateral was intended to secure, which, in the context of the FAC's allegations as a whole, is a natural measurement for the damages RNS Servicing incurred as successor-in-interest to IFC. This is especially true considering (1) that under Rule 8 of Federal Rules of Civil Procedure, a complaint generally need only include "a short and plain statement of the claim showing that the pleader is entitled to relief," *see* Fed. R. Civ. P. 8(a)(2); (2) that this short and plain statement must merely "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests," *Walker v. Dart*, 2019 U.S. Dist. LEXIS 94995, at *3 (N.D. Ill. June 6, 2019) (internal quotation omitted); and (3) that "[t]he Seventh Circuit has explained that this rule 'reflects a liberal notice pleading regime, which is intended to focus litigation on the merits of a claim rather than on technicalities that might keep plaintiffs out of court.'" *Id.* (citing *Brooks v. Ross*, 578 F.3d 574, 580 (7th Cir. 2009)).

III. IFC'S COMPLAINT IN THE SECOND IFC LAWSUIT INDISPUTABLY DEMONSTRATES THAT, AS OF AUGUST 2, 2007, IFC EXPECTED TO START RECEIVING THE COLLATERAL REFERENCED IN THE CONTINUING PLEDGE AGREEMENT

Defendants' Opposition Brief points to this Court's observation in its August 25, 2017 Order [ECF 29] that it was reasonable for IFC to infer from the speed with which the Ron VDH

Parties breached their repayment obligations under the Ron VDH Settlement Documents that CPA EPC Contracts were not valuable. *See* Defts.' Opp. Brief at 4. However, that speculative statement is belied by the fact that, on August 2, 2007, when IFC filed the Complaint in the Second IFC Lawsuit, IFC alleged in Paragraph 7 of the Complaint that "[o]n information and belief, Spirit has not violated its obligation to IFC under the 'Acknowledgement and Consent to Assignment,' [*i.e.*, Schedule B to the Continuing Pledge Agreement] and Spirit is named herein solely in connection with Plaintiffs claim for a Preliminary Injunction based, in part, on the Continuing Pledge Agreement." *See* PSAF at ¶ 3.

The Ron VDH Parties failed to make the required payments under the Ron VDH Settlement Documents from approximately April 19, 2007 through September 6, 2007 and they failed to cure their defaults. *See* FAC [31] at ¶ 63. If it was reasonable to infer that the collateral referenced in the Continuing Pledge Agreement was valueless as early April 2007, why did IFC assert its value in its August 2, 2007 Complaint nearly four months later? Because Defendants had fraudulently concealed the true "frivolous" nature of the CPA EPC Contracts.

IV. DEFENDANTS' FRAUDULENT CONCEALMENT OF THE TRUE "FRIVOLOUS" NATURE OF CPA EPC CONTRACTS PREVENTED IFC'S FROM SUSPECTING OR DISCOVERING THAT THE COLLATERAL REFERENCED IN THE CONTINUING PLEDGE AGREEMENT WAS VALUELESS AT ANY TIME BEFORE IFC'S BANKRUPTCY

It is undisputed that before IFC executed the Ron VDH Settlement Documents and the Continuing Pledge Agreement, Defendants prevented IFC from suspecting or discovering that the collateral referenced in the Continuing Pledge Agreement was valueless by fraudulently concealing the true "frivolous" nature of the CPA EPC Contracts in a number of ways. To wit:

(1) On separate occasions, Steve VDH/Spirit and Tak represented to IFC that three of the four proposed CPA EPC Contracts were for new construction of facilities and that each of these three CPA EPC Contracts included a fixed price for the Tak of $200 million – $400

million. Spirit and Tak each also represented that the fourth CPA EPC Contract was for upgrades to an existing facility for a fixed price of less than $100 million. *See* PSAF at ¶ 6.

(2) IFC asked both Spirit and Tak (on separate occasions) to produce the four CPA EPC Contracts for IFC's review. However, Spirit and Tak informed IFC (on these separate occasions) that they could not produce the CPA EPC Contracts for IFC's review because regulatory concerns required Spirit and Tak to keep them confidential while Tak was seeking financing for the projects. Because of Steve VDH's, Spirit's, and Tak's good business reputations at the time, IFC took them at their word on this point at that time. *See* PSAF at ¶ 7.

(3) However, Steve VDH and Spirit did allow IFC to review another EPC Contract Spirit had executed with another owner (other than Tak), which contemplated a project that had already been financed and was either in the process of construction or had been completed. Steve VDH and Spirit explained to IFC that, in general, once financing was secured for a project and it had become public knowledge that work had begun on the project, regulatory concerns no longer required that the EPC Contract associated with the project remain confidential. Again, because of Steve VDH's and Spirit's good business reputations at the time, IFC took them at their word on this point at that time. *See* PSAF at ¶ 8.

(4) The EPC Contract Steve VDH and Spirit allowed IFC to review was for a fixed price of somewhere between $200 million and $400 million. That EPC Contract demonstrated that Spirit and the owner of that project had each invested significant amounts of money into the project (in the form of down payments, engineering costs, zoning permits, and other upfront costs) before outside financing for the project had been secured. This led IFC to believe that at least three of the four CPA EPC Contracts required the same type of pre-financing investment on the part of Spirit and Tak—*i.e.*, that both Spirit and Tak had already invested a significant

amount of pre-financing money into at least the three new construction projects contemplated by the new construction CPA EPC Contracts—and IFC knew that neither Spirit nor Tak were in the business of throwing away money. As such, IFC thought that Spirit and Tak were supremely confident that Tak would not only be able to secure financing for at least the three new construction CPA EPC Contracts, but that he would make it a priority due to the significant amount of money he had already invested into the three new construction projects. *See* PSAF at ¶ 9.

(5) IFC's review of the EPC Contract Steve VDH and Spirit allowed IFC to see gave IFC knowledge that (a) Spirit and the owner of that project had invested significant upfront costs into that project before financing had been secured; (b) that financing had been secured for that project; and (c) that construction had begun on that project. *See* PSAF at ¶ 9.

Steve VDH's only basis for claiming all of the above facts are in dispute is that conveniently, both Steve and Tak do not recall if they made the fraudulent representations referenced in Paragraphs 6-9 of RNS Servicing's Statement of Additional Facts or not. *See* Defts.' Resp. to PSAF at ¶ 6-9. "A lack of recollection, however, is not sufficient to establish a genuine dispute of material fact." *See Mucha v. Vill. of Oak Brook*, 650 F.3d 1053, 1056 (7th Cir. 2011) (finding testimony inconclusive, and therefore not sufficient to establish a genuine dispute of material fact, where plaintiff testified that he could not recall when or whether an event occurred); *see also Tinder v. Pinkerton Sec*., 305 F.3d 728, 735-36 (7th Cir. 2002) (plaintiff's affidavit asserting that she did not remember seeing or receiving a brochure did not raise a genuine issue that the brochure was distributed to her in light of the uncontroverted affidavits of two other individuals that indicated the brochure was sent and presumably received); *Hudson v.*

C.P. Rail Sys., 24 Fed. Appx. 610, 613 (7th Cir. 2001) (party's "bare assertion" that he "does not recall" making inappropriate comments did not create a genuine issue of material fact).

As such, all of the above representations gave IFC additional assurance that the collateral defined in the Continuing Pledge Agreement was valuable—*i.e.*, it lulled IFC into the false belief that the CPA EPC Contracts existed and that both Spirit and Tak had a significant invested interest in making sure that the projects contemplated by the CPA EPC Contracts were financed and built. However, now that the four CPA EPC Contracts have finally been produced in this litigation, and Steve VDH and Tak have been deposed, the following truths about Defendants' above acts of fraudulent concealment have come to light.

First, review of the CPA EPC Contracts reveals that Defendants could have agreed to allow IFC to review four CPA EPC Contracts. The only pertinent confidentiality provision in the four virtually identical boilerplate CPA EPC Contracts is as follows:

> OWNER agrees not to disclose to third parties (except to a limited and selected number of its employees and subcontractors who need to know) the existence of this .Agreement or its contents. CONTRACTOR shall not, without prior written agreement of OWNER, advertise or publicly announce that it is undertaking work for OWNER. CONTRACTOR shall place the same obligation on its subcontractors. CONTRACTOR will ensure that such employees and subcontractors are aware of and comply with these obligations as to confidentiality.

See Art. 12(D) of Exhibits AA-DD. This provision indicates that Steve VDH could have requested and received written agreement from Tak to show IFC the four CPA EPC Contracts, especially considering that both Steve VDH and Tak had breached this confidentiality provision by even disclosing the existence of the CPA EPC Contracts at all. Further, because this provision should have prevented Steve VDH from disclosing the existence of the EPC Contract he actually allowed IFC to review, Steve VDH's and Tak's excuses that they could only disclose the CPA EPC Contracts after financing had been secured was obviously fabricated.

Second, while Steve VDH admitted at his deposition that between 2005 and 2012, Spirit execute 12 to 14 EPC Contracts including the four CPA EPC Contracts and that Spirit completed

8 to 10 of the projects contemplated by those 12 to 14 EPC Contracts. *See* Exhibit X at 53:7-15. 12 – 8 = 4 and 14 – 10 = 4. In other words, Spirit completed every EPC Contract it executed with an owner from 2005 and 2012 except the four CPA EPC Contracts.

Third, Steve VDH also testified regarding one of these EPC Contracts where Spirit actually completed the work. For that EPC Contract, Spirit required a down payment of $300,000 before even execution of the contract. He also testified that there was no down payment made by Tak on the CPA EPC Contracts. *See* Exhibit X at 143-144.

Fourth, on March 21, 2016, Tak told Marc Langs via email that the CPA EPC Contracts were "frivolous" and that "Ron [VDH] tried to raise money for these [CPA EPC Contracts] but was unsuccessful" even though it is nonsensical that a subcontractor on $300 million construction project would be responsible for obtaining the project owner's financing. *See* Exhibit L.

V. INDISPUTABLE EVIDENCE IN THE RECORD ALSO DEMONSTRATES THAT DEFENDANTS' CONCEALED THE FACT THAT THEY FRAUDULENTLY RENEGOTIATED THE CPA EPC CONTRACT FOR THE DEPERE PLANT AND OCONTO FALLS PLANT UPGRADES (EXHIBIT AA) SO THAT SPIRIT (1) COULD PERFORM UPGRADES ON THE OCONTO FALLS PLANT FOR TAK AND (2) BOTH COULD USE RON VDH PARITES' SUBCONTRACTING EXPERTISE WITHOUT HIRING OR PAYING THE RON VDH PARTIES AS A SUBCONTRACTORS

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* Defts' Resp. to PSAF at ¶ 11. That CPA EPC Contract was produced in this matter as Bates No. SCS_0000l - SCS_000056. *See* Exhibit AA. 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.

This testimony at his April 8, 2008 deposition fraudulently concealed the fact that the Defendants had actually renegotiated the CPA EPC Contract for Upgrades at the DePere Plant and Oconto Falls Tissue Mill to avoid their payment obligations to IFC under Continuing Pledge Agreement once construction on the project began. Indeed, Ron VDH admitted at his April 10, 2008 deposition (1) that TPTC even provided the same services that TPTC and PCDI were to provide on the project according to the CPA EPC Contract for Oconto Falls Upgrades before it was renegotiated and (2) that instead of providing them to Spirit as a "subcontractor," TPTC provided them directly to Tak in exchange for stock, rather than any payments that should have been made to IFC pursuant to the Continuing Pledge Agreement . *See* Exhibit W at 15-26.

However, without ever having seen or reviewed the actual CPA EPC Contract for Oconto Falls and DePere, Wisconsin (Upgrades) (Exhibit AA, Bates No. SCS_0000l - 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_0000l - SCS_000056)

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

As such, it is undisputed that at his first deposition, Steve VDH fraudulently concealed his knowledge that one of the CPA EPC Contracts was renegotiated, executed, financed, and completed, with TPTC providing subcontracting work on the project without calling itself a subcontractor.

VI. AS NONE OF THE FACTS IN RNS SERVICING'S STATEMENT OF ADDITIONAL FACTS IS PROPERLY DISPUTED BY DEFENDANTS, RNS SERVICING STANDS ON ITS REMAINING ARGUMENTS IN SECTIONS III – VII OF ITS CROSS-MOTION

Dated: June 12, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 12, 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